BEFORE THE INDIAN CLAIMS COMMISSION

THE FORT SILL APACHE TRIBE OF THE STATE OF OKLAHOMA,

THE CHIRICAHUA APACHE TRIBE, ex rel., SAM 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 No. 182
(Group A claims)

Decided: May 10, 1974

Appearances:

I. S. Weissbrodt, Attorney for Plaintiffs; Weissbrodt & Weissbrodt, Abe W. Weissbrodt, Ruth W. Duhl were on the briefs.

Dean K. Dunsmore, with whom was Assistant Attorney General Kent Frizzell, Attorneys for the Defendant.

OPINION OF THE COMMISSION

Kuykendall, Chairman, delivered the opinion of the Commission.

In this case claims have been presented under clause (5) of section 2 (the "fair and honorable dealings" clause) of the Indian Claims Commission Act (60 Stat. 1049, 1050) for damages or compensation for the removal of certain resources from, and for several uses of, the

aboriginal lands of the Chiricahua Apache Tribe prior to the date upon which the tribe's aboriginal title to said lands was extinguished by the United States. These claims were tried before the Commission on May 8, 9 and 10, 1972. By order of the Commission dated September 13, 1972, these claims were denominated "Group A claims," and certain other claims under this docket, which have not yet been tried, were denominated "Group B claims." (See 28 Ind. Cl. Comm. 433, 452-53, appeal dismissed, 202 Ct. Cl. 525, 481 F.2d 1294 (1973).) The Commission now has before it only the Group A claims.

In Dockets 30, 48, 30-A, and 48-A before the Commission, the same plaintiffs presented claims under clause (4) of Section 2 of the Indian Claims Commission Act for the taking of the aboriginal lands of the Chiricahua Apaches without payment of any compensation. Under these dockets, the Commission determined the boundaries of the Chiricahua aboriginal lands and held that the United States extinguished the Chiricahua Apaches' aboriginal title to said lands on September 4, 1886. The Commission also decided the value of said lands, including the remaining resources thereof, as of the date of extinguishment of title and, after deducting offsets in accordance with a stipulation of the parties, entered a final award of $16,489,096 for the plaintiffs. See proceedings under Dockets 30 and 48, Fort Sill Apache Tribe v. United States, 22 Ind. Cl. Comm. 527 (1970); proceedings under Dockets 30-A and 48-A, 19 Ind. Cl. Comm. 212 (1968), 25 Ind. Cl. Comm. 352 (1971), and 26 Ind. Cl. Comm. 193 (1971); and proceedings

under all of the above-enumerated dockets, at 26 Ind. Cl. Comm. 198 (1971), aff'd, 202 Ct. Cl. 134, 480 F.2d 819 (1973).

The Group A claims herein stem from the intrusions by non-Indians upon the lands of the Chiricahua Apaches while they continued to hold aboriginal title to the lands, and the acts of the intruders in removing minerals and timber from the lands and in using the lands for farming, grazing livestock, building settlements, and other purposes without making any payment to the tribe.

In the case of Washoe Tribe v. United States, Docket 288, 21 Ind. Cl. Comm. 447 (1969), this Commission first considered a claim under the "fair and honorable dealings" clause of our Act for the removal of minerals and other valuable resources from Indian title lands. In the Washoe case the plaintiffs sought damages for the uncompensated taking of their aboriginal lands by the United States without treaty or cession, and in addition, sought recovery under section 2, clause (5) of our Act (the "fair and honorable dealings" clause) for the removal of minerals and timber by miners and other intruders from their aboriginal lands prior to the extinguishment of their Indian title. The Commission ruled that there could be recovery under the latter claim, reasoning that the evidence proved that the Government had sanctioned the acts of the intruders, that the law was settled that our Act created new causes of action where they did not previously exist,[1/] that the legislative history of the Act showed that one of the intended purposes of the "fair and honorable dealings" clause was to eliminate

1/ Otoe and Missouria Tribe v. United States, 131 Ct. Cl. 593, cert. denied, 350 U.S. 848 (1955) (aff'g. in part, remanding in part, Docket 11, 2 Ind. Cl. Comm. 335, 2 Ind. Cl. Comm. 500 (1953)).

the unequal treatment arising from technical legal rules of Indians possessing land under Indian title and those holding land under recognized title and, finally, that in the then-recent case of Tlingit and Haida Indians v. United States, 182 Ct. Cl. 130 (1968), the Court of Claims had permitted recovery for exploitation of aboriginal title lands prior to the taking date in a suit under the Tlingit and Haida Claims Act of 1935, 49 Stat. 388, which act is cited in the legislative history of the Indian Claims Commission Act as an example of the type of claim intended to be included under the "fair and honorable dealings" clause of the latter act. The Commission, therefore, held in the Washoe case that the "fair and honorable dealings" clause "* * * permits recovery for the severing and carrying away of minerals and timber from aboriginal title lands to the same extent as such takings would be compensable if committed on lands held under recognized title." 2/ 21 Ind. Cl. Comm. at 456.

The Washoe case was not appealed but the defendant's position has continued to be that the United States can never be liable for the removal of resources from Indian title lands before the date of taking. Most recently the United States took its argument to the Court of Claims in seeking reversal of the Commission's decision in Northern Paiute Nation v. United States, Docket 87-A, 28 Ind. Cl. Comm. 256 (1972), that, following the rule of the Washoe case, the plaintiffs therein

2/ In Williams v. United States, Docket 180-A, 3 Ind. Cl. Comm. 571, 589 (1955), aff'd, 153 Ct. Cl. 697 (1961), the Government was held liable under the "fair and honorable dealings" clause for the removal by miners of gold from lands held under recognized title.

could recover from the defendant for the resources removed from the plaintiffs' aboriginal lands in Nevada prior to the extinguishment of their aboriginal title. The Court of Claims, however, did not reach this issue but reversed on narrower grounds and remanded the case to the Commission. See United States v. Northern Paiute Nation, App. No. 18-72. (Ct. Cl., January 23, 1974).

Given the present posture of this issue, we believe it is appropriate for us in the instant case to set out again why we held in the Washoe and Northern Paiute cases, and why we will again hold here, that the United States is liable for damages to Indian tribes under section 2, clause (5), of the Indian Claims Commission Act (the "fair and honorable dealings" clause) where it is shown that the United States sanctioned, encouraged or assisted third parties in taking and removing resources of the Indians' lands while their aboriginal title thereto was unextinguished and outstanding.

It is settled that in the absence of legislative direction to do so, Federal courts cannot consider claims against the United States relative to Indian title land. Tee-Hit-Ton Indians v. United States, 128 Ct. Cl. 82 (1954), aff'd, 348 U.S. 272 (1955). Thus it has been held that the United States was not a wrongdoer in severing minerals and timber from Indian title lands. Kwash-Ke-Quon Indians v. United States, 137 Ct. Cl. 372 (1957). However, in Otoe and Missouria Tribe v. United States, supra, n.1, the Court of Claims held that section 2, clauses (3) and (5) of the Indian Claims Commission Act created new causes of action against the United

States for claims involving Indian title lands. The court in dicta also stated that under clause (4) of section 2 of the Act there was created a cause of action by which Indian claimants were granted the right to recover the value of Indian title lands which had been taken by the Government without the payment of compensation therefor, whether the Government acquired that land by ratified treaty of cession, or whether the land was taken without the formality of a treaty, even an unratified one. 3/

The Court of Claims reached these conclusions after a detailed analysis of both the language and legislative history of the Indian Claims Commission Act. Interpreting the language of section 2 of the Act, the Court observed that clauses (3) and (5) do not refer to "lands" but that clause (4) does, and that the latter clause characterizes those kinds of property interests intended to be protected as (1) land owned and (2) land occupied. The Court found that the latter phrase encompassed Indian title lands and went on to state:

> If clause (4) permits Indian claimants to recover for the uncompensated taking (deprivation) by treaty or otherwise of a property right which in

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3/ Our Act reads, in pertinent part, as follows:

Sec. 2. The Commission shall hear and determine the following claims against the United States on behalf of any Indian tribe *** (3) claims which would result if the treaties, contracts, and agreements between the claimant and the United States were revised on the ground of fraud, duress, unconscionable consideration, mutual or unilateral mistake, whether of law or fact, or any other ground cognizable by a court of equity; (4) claims arising from the taking by the United States, whether as the result of a treaty of cession or otherwise, of lands owned or occupied by the claimant without the payment for such lands of compensation agreed to by the claimant; and (5) claims based upon fair and honorable dealings that are not recognized by any existing rule of law or equity. [60 Stat. 1049, 1050.]

> itself created no legal right in the owner against the Government, it would seem reasonable to conclude that Congress also intended that the same property right ceded under a ratified treaty of cession for a grossly inadequate consideration would give rise to a cause of action under clause (3); and also that where the Government's dealings with Indians concerning that same property right was less than fair and honorable, the Indians should have a claim under clause (5). [131 Ct. Cl. at 610-11, emphasis added.]

After its review of the legislative history of the Indian Claims Commission Act, the Court concluded that:

> * * * The legislative history of the Act establishes that from the beginning in 1928, certain members of Congress desired the enactment of a bill which would settle extra-legal or moral claims of Indians against the United States, including claims based on their Indian title property right in land which the Government had either taken without the formality of a treaty or which the Government had acquired under ratified treaties procured by fraud, duress, unconscionable consideration, etc., or concerning which the Government had been guilty of dealings less than fair and honorable. This *** became the desire of the majority of Congress and, with the passage of the Act in 1946, became the legislative intent expressed in clauses (3), (4) and (5) of section 2. [Id., at 621, emphasis added.]

While the Otoe and Missouria case involved claims arising out of the actual taking of Indian title lands, we believe that the excerpts quoted above show that the court construed the "fair and honorable dealings" clause to include other Government dealings with the Indians, besides actual takings, related to their Indian title property right. The notorious exploitation of resources on Indian title lands by miners and other intruders acting with the implied, if not overt, sanction and encouragement of the United States surely falls within such a category.

The legislative history of the Indian Claims Commission Act supports such a conclusion. Both the Commission in the Washoe case and the Court of Claims in the Otoe and Missouria case quote from the Statement of the Managers on the Part of the House, Conf. Rep., H. R. 2693, 79th Cong., 2d Sess. 5-6 (July 27, 1946):

> The bill, as passed by the House of Representatives, enumerated six classes of claims cognizable by the Commission. The Senate, in the interest of simplicity, reduced these to three, being careful to state in its report, that the change was not intended to deprive the claimants of the right to invoke the jurisdiction of the Commission in any case which would have been cognizable under the language of the bill as it passed the House. Out of an abundance of caution the conferees reinserted two of the classifications struck by the Senate because they wanted to make sure that if any tribal claimant could prove facts sufficient to make a case under either of these classifications, the Commission would have authority to make an award to such claimant.
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> *** The second of these classifications covers claims arising from the taking by the United States of Indian lands, i.e., lands to which tribal claimants had "Indian title" or the "right of occupancy." Sometimes these lands were taken under the guise of unratified treaties, sometimes without any semblance of a treaty. The reinsertion of this classification makes it plain that where claimant can prove sufficient facts within the language of this classification the Commission has full authority to award proper damages therefor.
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> Both of the classes of claims reinserted by this amendment may fall within the category of "fair and honorable dealings." To set them forth explicitly helps to clarify the contents of that category.

The Otoe and Missouria case, supra, established that clause (5) includes claims arising from the Government's dealings with Indian title property rights, and the above excerpt from the Conference Report on the Act establishes that Congress intended that clause (4) provide the primary basis for recovery for actual takings of aboriginal title lands. It follows, of necessity, that clause (5) was intended to encompass claims relating to aboriginal Indian title rights which included but were not limited solely to actual takings. Thus, we cannot accept the proposition that, as to Indian title lands, clause (5) is merely redundant or superfluous, in that the only claims relating to such Indian title lands that Congress intended to permit under the Act were actual takings and clause (4) covers such actual takings.

The Report of the House of Representatives in the bill to create the Indian Claims Commission discusses the "fair and honorable dealings" clause as follows:

> The sixth classification, supra, permits Indian tribes to assert any claim which would arise on a basis of fair and honorable dealings, even though not recognized by any existing rule of law or equity. This extension of jurisdiction is believed to be justified by reason of the fact that we have always treated the Indian Tribes as non sui juris and have set ourselves up as their guardians. In this relationship many claims, not strictly legal, but meritorious in character have developed, which the Congress has recognized in a few special jurisdictional acts (e.g., Tlingit and Haida Claims Act of 1935 (49 Stat. 388), as amended by the acts of June 5, 1942 (56 Stat. 543) and June 4, 1945 (Public Law No. 70, 79th Cong., 1st Sess.)) ***. [H. R. Rep. 1466, 79th Cong., 1st Sess. 12 (1945).]

While the Tlingit and Haida Claims Act of 1935, supra, contained no "fair and honorable dealings" clause it did grant jurisdiction to the

Court of Claims to hear:

> Sec. 2. All claims of whatever nature, legal or equitable, which the said Tlingit and Haida Indians of Alaska may have, or claim to have, against the United States for lands or other tribal or community property rights, taken from them by the United States without compensation therefor, or for the failure or refusal of the United States to compensate them for said lands or other tribal or community property rights, claimed to be owned by said Indians, and which the United States appropriated to its own uses and purposes without the consent of said Indians, or for the failure or refusal of the United States to protect their interests in lands or other tribal or community property in Alaska, and for loss of use of the same, at the time of the purchase of the said Russian America, now Alaska, from Russia, or at any time since that date, and prior to the passage and approval of this Act * * *. [49 Stat. 388.]

In authorizing claims for "*** the failure or refusal of the United States to protect [the Indians'] interests in lands ***" the Tlingit and Haida Claims Act of 1935 was speaking of the right to assert a claim for pre-taking date removal of minerals and other resources. 4/ When Congress referred to this Act in the House report on the Indian Claims Commission Act, it must have intended to include such a claim within the scope of "fair and honorable dealings" because we know that at the time Congress was considering the legislation that became the Indian Claims Commission Act, it was well aware that several Indian tribes were seeking redress for the same type of claim. See Hearings before the House Committee on Indian Affairs on H. R. 1341, June 14, 1945, 79th Cong., 1st Sess., at 170-76.5/

4/ The defendant's argument that such an interpretation was not reasonable when Congress, in the 1940's, was considering the legislation that became the Indian Claims Commission Act because the Tlingit and Haida Claims Act was not judicially so construed until 1968, is fallacious.

5/ See n. 9, infra.

In Gila River Pima-Maricopa Indian Community v. United States, 190 Ct. Cl. 790 (1970), cert. denied, 400 U.S. 819 (1970) (aff'g Dockets 236-K, 236-L, and 236-M, 20 Ind. Cl. Comm. 131 (1968)), the Court of Claims stated:

> *** we must be cognizant of the fact that the jurisdictional section of the Act is a synthesis of those '*** classes of cases *** which have heretofore received congressional consideration in the form of special jurisdictional acts. ***' H. Rep. No. 1466, 79th Cong., 1st Sess., (1945) p. 10.***

Finally, in dicta in the case of Oneida Tribe v. United States, 165 Ct. Cl. 487 (1964), cert. denied, 379 U.S. 946 (aff'g Docket No. 159, 12 Ind. Cl. Comm. 1 (1962)), a claim involving removal of timber from reservation lands, Judge Davis stated as follows, at 492:

> Were one, nevertheless, to accept at face value appellee's assumption that the Oneidas held no more than aboriginal Indian title, we still could not find their claims beyond the scope of the Indian Claims Commission Act. Without that legislation, a justiciable claim might not be stated. See Tee-Hit-Ton Indians v. United States, supra. But the Act has authorized recoveries on the basis of original Indian title (Otoe and Missouria Tribe v. United States, 131 Ct. Cl. 593, 131 F. Supp. 265, cert. denied, 350 U.S. 848 (1955)), and there is no reason why a claim of the sort presented here could not come under the "fair and honorable dealings" provision (section 2(5)) at a minimum. ***

Based upon our review of the authorities cited herein and our interpretation of the legislative history of the Indian Claims Commission Act, we remain convinced that the Act authorizes claims for the removal of minerals and other natural resources from Indian title

lands while such Indian title remained unextinguished.

We believe that finding of fact No. 5, infra, together with the detailed findings of fact, cited herein, previously entered in Dockets 30, 30-A, 48, and 48-A, supra, relating to non-Indian intrusions upon the aboriginal lands of the Chiricahua Apaches before September 4, 1886, and actions of the United States and its military forces in connection therewith, establish the requisite nexus of liability against the United States. 6/ These findings show that it was the policy of the United States (evidenced by the actions of the legislative and executive branches) to encourage, sanction and assist non-Indians in making such intrusions and in taking and removing resources from the Chiricahua Apaches' lands before September 4, 1886.

The Commission has previously determined the date upon which the United States took the aboriginal lands of the Chiricahua Apaches. In Fort Sill Apache Tribe v. United States, Dockets 30-A and 48-A, 19 Ind. Cl. Comm. 212, 245 (1968), the Commission found that:

6/ Liability under the "fair and honorable dealings" clause may "*** rest upon the Government's 'true concert, partnership, or control' with, or of, the party dealing with the Indians ***." Lipan Apache Tribe v. United States, 180 Ct. Cl. 487, 502 (1967) (rev'g Docket 22-C, 15 Ind. Cl. Comm. 532 (1965)).

> ***. September 4, 1886, the date of the final surrender of the Chiricahua Apaches under Geronimo and the time of the removal of the members of the tribe from their homelands, marks the date on which the United States took from the Chiricahua Apache tribe its Indian title to its lands in New Mexico and Arizona.

The Commission, at 19 Ind. Cl. Comm. 243-46, entered detailed findings to support its determination that the actual surrender of Geronimo on September 4, 1886, constituted the taking of plaintiffs' title to all their lands in Arizona and New Mexico. The Court of Claims has recently affirmed the Commission's decision. See 202 Ct. Cl. 134, ___ (1973) (App. No. 3-72, June 20, 1973, slip op. at 6). 7/ That the date of taking of plaintiffs' title to all their lands in Arizona and New Mexico was September 4, 1886, is therefore binding upon the parties in this docket.

The recent decision of the Court of Claims in United States v. Northern Paiute Nation, App. No. 18-72, (Ct. Cl., January 23, 1974) (rev'g Docket 87-A, 28 Ind. Cl. Comm. 256 (1972)) is distinguishable. There the court held that the Commission's prior determination of the taking date in a related docket involving the same parties was intended to constitute an "average" or "composite" taking date. In Northern Paiute, the Court of Claims found the record "*** void of any single clearcut extinguishment." The court proceeded to

7/ The court there indicated that it might have agreed with defendant that the September 4, 1886 date was not supported by substantial evidence but held that the Government's conduct in failing to express timely objection to the September 4, 1886 date in proceedings before the Commission "*** amounts to a waiver of the right to challenge the September 4, 1886 taking date." The court pointed out that the date of taking was in issue (slip op. at 8) and that the Government was fully aware that the taking date was in issue (slip op. at 9).

hold that:

> *** such a composite or average date is not res judicata or collateral estoppel that every parcel in the Paviotso tract was taken on the composite or average date. It is so only as to what the composite or average date was. [Slip Op. at 4.]

In the case before us here we do not have such an average or composite taking date. It is clear that the Commission viewed the events of September 4, 1886, as constituting a single clearcut extinguishment of plaintiffs' aboriginal title. That being so, the parties in this docket are bound to the September 4, 1886 taking date for all the plaintiffs' lands in Arizona and New Mexico and may not now relitigate that issue. It follows that the evidence introduced by the defendant in this case showing the issuance of patents before September 4, 1886, by the United States to certain mining properties within the tract is immaterial. All losses suffered by the plaintiffs before September 4, 1886, by virtue of removal of minerals and other resources will, if proven, constitute the measure of damages to which plaintiffs are entitled.

The plaintiffs' claims arising out of the use of their aboriginal lands by third parties before September 4, 1886 for grazing, agricultural, townsite and railroad purposes are simply claims for trespass to Indian title lands cognizable only under clause 5 of section 2 of the Indian Claims Commission Act.[8/]

8/ Valid legal tort claims are cognizable under section 2, clause 2 of the Indian Claims Commission Act, sovereign immunity having been waived, but a claim for trespass for Indian title lands is not a valid legal tort claim. See Kwash-Ke-Quon Indians v. United States, supra.

We do not believe that the scope of section 2, clause (5) of the Act (the "fair and honorable dealings" clause) extends to claims for the mere use of (or trespass upon) Indian title lands unless the lands were damaged as a result thereof. There is a distinction in kind between such a claimed wrong and the severance and removal of irreplaceble natural resources (e.g., minerals and timber). In the former case the mere use did not diminish the value of the Indians' aboriginal title right in the lands and no damages to the lands resulted. If anything, such surface use enhanced the lands' value, as in the case of the Chiricahua Apaches' lands, where the surface uses were reflected in the enhancement of surface valuation in proceedings before the Commission in Dockets 30, 30-A, 48 and 48-A, supra. On the other hand, the removal of natural resources irrevocably diminished the value of the Indians' aboriginal title right, with the result that the Indians were permanently deprived of the value of the resources and suffered measurable damages. The resources so removed were obviously not included in the lands' valuation as of September 4, 1886, in proceedings before the Commission in Dockets 30, 30-A, 48 and 48-A. The plaintiffs have never been compensated for the removal of these resources.

It is the exploitation and irrevocable dimunition of the value of the Chiricahua Apaches' Indian title right, through the removal of natural resources by third parties acting with the encouragement and assistance of the United States, that we have concluded was both unfair and dishonorable within the meaning of section 2, clause (5) of our Act. The pre-taking date surface uses were not analogously exploitive of the

Chiricahua Apaches' Indian title right because such uses have not been shown to have caused damages to the Chiricahuas' aboriginal lands. 9/

In the findings of fact which follow this opinion we have determined that the gross value of mineral production within the Chiricahua Apache tract before September 4, 1886, was $54,154,302. We have based this determination upon an analysis of production statistics in evidence for each district within the tract. We believe that this method of analysis produces the most accurate available estimate of production. Here, there is extensive evidence of district by district production. The first method of Mr. Oberbillig, defendant's expert, (which consisted of estimating total production in the New Mexic portion of the tract by utilizing contemporary compilations of total gross production) is a less reliable method because we cannot examine and evaluate the raw data and methods used to make such compilations. In this case the extensive evidence in the record of production by the mining districts within the tract is the best evidence to arrive at the most reasonably accurate estimate of the gross value of total production within the tract.

9/ In the Tlingit case, supra, a claim based upon use of townsites was rejected by the Commissioner for failure of proof. This claim was apparently based upon the "*** loss of use ***" language in the Tlingit and Haida Claims Act, supra. We believe that the illustrative use by the House of the Tlingit and Haida Claims Act must be construed in conjunction with what was authorized by the other special jurisdictional acts it was used to exemplify, and in conjunction with the types of claims for which other tribes were seeking redress, as shown in the 1945 hearings before the House Committee on Indian Affairs, supra. Using these criteria, we find it unreasonable to impute an intention to incorporate a claim for mere loss of use of Indian title lands under the fair and honorable dealings clause solely on the basis of the illustrative reference to the latter Act in the House report. For these same reasons, we believe reason dictates the inclusion of a claim for removal of resources from Indian title lands under fair and honorable dealings. See n. 5, supra.

The figure of $54,154,302 which we have calculated as the gross value of mineral production within the tract before September 4, 1886, differs somewhat from the corresponding figures, $55,198,099 and $51,879,770, proposed, respectively, by the plaintiffs' and defendant's experts. In a few instances the two experts agreed on a production figure for a single district. Where they disagreed, the plaintiffs' expert proposed an estimate higher than the defendant's expert in approximately 70% of the districts. What we have done is to look at and weigh the evidence of production in each district, evaluating, as part of that process, the experts' estimates of production in each district in terms of how they utilized the evidence in the record. For each district we arrived at a production figure that we found to be the most reasonable estimate on the basis of all the available evidence, including the experts' opinions. In many districts, our figure is the same as was proposed by one (and, in a few instances, both) of the experts because we agreed with that expert's evaluation of the evidence and the conclusion drawn therefrom. In several other districts we found that each of the experts had so evaluated the available evidence of production as to reach a production figure we believed, after our own evaluation of the evidence, to be unreasonably high or low for one reason or another. In such instances, we arrived at a production figure which differed from that proposed by each expert.

We cannot accept the plaintiffs' expert's opinion of the profit from the minerals produced in each district because the estimates of

profit too often rest upon unsubstantiated estimates of the costs of producing the minerals. Mr. Full estimated production costs in districts which accounted for over one-third of the total production of the tract because production cost data was not available. For districts where there were statistics of production costs, such statistics were in many instances not available for all years and Mr. Full was required to interpolate estimates of production costs for years where data was not available. We believe that the results obtained from such methods are too speculative and conjectural to be accepted as probative of the profits derived from mineral production.

We believe that in a case like this where a reasonably accurate estimate of gross production can be determined from the evidence and where estimates of profit are conjectural, the surest method of determining the owner's profit is a royalty method. The royalty rate should properly reflect that in the early years of the tract's development, the ore was rich and the costs of extraction were less than in later years when the hazards of extraction from greater depths brought increased production costs. We believe that in the circumstances of this case, a 20% royalty on gross production reasonably reflects the owner's profit from the minerals produced. This is consistent with what the Commission has done in similar cases. See Goshute Tribe v. United States, Docket 326-J, 31 Ind. Cl. Comm. 225, at 246-47 (1973); Western Shoshone Identifiable Group v. United States, Docket 326-K, 29 Ind. Cl. Comm. 5, at 56 (1972).

The plaintiffs have also claimed compensation for the removal of timber from the tract. They have presented expert witnesses who have given their opinions as to the volume of timber cut from the

Chiricahua Apache tract before September 4, 1886, and the value thereof to the Indian owners of the tract. Our findings of fact, infra, contain a description of the plaintiffs' experts' methods and opinions.

We have found that the evidence herein does not support any reasonable determination of the damages which may have been suffered by the plaintiffs by reason of the cutting of timber from within the tract prior to September 4, 1886. The evidence of record here and the Commission's previous findings in Dockets 30, 30-A, 48 and 48-A, supra, established that there was abundant timber growing within the Chiricahua Apache tract but that the timber was located in the relatively inaccessible elevated regions. While meaningful commercial timber operations within the tract were not feasible in the 19th century, the evidence does establish that timber was cut within the tract and was used within the tract in the mining industry, for commercial and residential construction to meet the needs of a substantial non-Indian population and to fuel homes and mining operations. The evidence does support such a generalized conclusion.

However, the difficulty is that there is no evidence in this record which supports any reasonable estimate of the volume of timber which may have been cut from within the tract before September 4, 1886. The testimony of the plaintiffs' experts provide a detailed analysis of estimated timber consumption culminating in exact estimates of timber cut from within the tract and used for specific purposes and the value thereof to the Indians. We find that we are unable to accord weight to the experts' opinions in this matter because we do not believe there

is factual documentary evidence in the record to support their estimates.

Mr. Robert Kleinman, plaintiffs' principal expert witness on timber and its value, arrived at his opinion of the volume of timber cut from within the tract by estimating total consumption within the tract [10/] based upon his estimates of timber necessary to support the known population of the tract, and then subtracting therefrom his estimate of the portion of timber consumed that was imported from areas outside the tract.

The estimates of both experts as to the total timber consumption within the tract may, on their face, represent reasonable estimates, given the known population of the tract and the extent of mining activity, provided the assumptions underlying their estimates are correct. However, the evidence of record does not prove either the truth or the falsity of these assumptions. For most of the mining districts there are no records at all of timber consumption. Therefore, Mr. Full has estimated what he believed was a reasonable volume of timber consumption based upon what he thought were comparable mining operations with available records of timber consumption. Several references in the record indicate that coke was the favored form of fuel in the mining operations, but statistics concerning fuel consumption are rare in the record. Mr. Kleinman's estimates of non-mining related timber consumption are likewise largely unsupported by the evidence. Mr. Kleinman estimated that 85% of residential construction and 80% of commercial construction within the tract was wood frame, but the evidence indicates that stone

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10/ Mr. Kleinman incorporated in his estimates the estimates of timber consumption for mining purposes prepared on behalf of the plaintiffs by Mr. Roy P. Full.

and adobe were the favored construction materials. There are no statistics to support Mr. Kleinman's estimates of the number of buildings within the tract or the volume of wood consumed as fuel.

Even were we to accept as reasonable the experts' estimates of timber consumption within the tract, it is impossible to verify from the record Mr. Kleinman's estimates that none of the firewood and timber and 30% of the lumber consumed within the tract were imported from areas outside the tract. To the extent there is any evidence in the record on this matter of importation of timber, it contradicts Mr. Kleinman's assumptions. For instance, there are references in the record indicating that much of the timber used in the Arizona mines came from Oregon and California, that most of the lumber used in New Mexico was shipped from Chicago, and that a great deal of the firewood consumed in Tombstone and Bisbee was imported from outside the tract.

In order for us to accord weight to expert opinion, we must be satisfied that such opinion is based upon fact and not upon assumption or hypothesis. We have carefully reviewed this record to test the validity of the premises underlying the expert opinion concerning the volume of timber cut from within the tract before September 4, 1886. We find that the evidence is utterly inconclusive at best and, in those instances described above, even contradicts the experts' assumptions. Under these circumstances these expert opinions are too speculative and conjectural to be of value to us in this proceeding. The evidence herein fails to establish the quantum of any loss that plaintiffs may have

suffered by virtue of the removal of timber from the tract before September 4, 1886. We will therefore award no damages for the removal of timber.

The defendant has raised two procedural points which merit our comments. The Government has very strongly objected to the presiding Commissioner's ruling at the trial, permitting the plaintiffs to reopen their case-in-chief and to call defendant's retained surface appraiser, Mr. Mervin J. Christensen, as a witness for the plaintiffs, after defendant had rested its case without calling Mr. Christensen. Although this objection is mooted by our decision that the plaintiffs will recover only for minerals removed, we believe that this ruling was well within the Commission's discretion in view of its mandate that claims before it "*** be settled finally on the most complete records available." Our cases are not "***ordinary adversary litigation." Otoe and Missouria Tribe v. United States, supra, at 625-26.

Defendant has asserted that the date of taking under this docket remains "open" because "*** its Motion for Rehearing and Reconsideration of Date of Taking filed June 4, 1970, is still pending in this case." (Def. Brief, April 18, 1973, at 95.) The defendant claims that its motion was addressed to Docket Nos. 30, 48, 30-A, 48-A, 49 and 182 and that rehearing was denied only as to Dockets 30-A and 48-A by the Commission's order at 23 Ind. Cl. Comm. 417 (1970).

What was sought in defendant's motion was "*** a rehearing on the matter of the date of taking designated and found in [the Commission's]

decision of June 28, 1968, 19 Ind. Cl. Comm. 212 ***." In the same motion the defendant referred to the taking date as follows:

> The Commission's date of taking, now applicable to Docket Nos. 30 and 48, 30-A and 48-A, and having a bearing and effect on Docket Nos. 49 and 182, is September 4, 1886.

Even a cursory glance at the Commission's decision of June 28, 1968, 19 Ind. Cl. Comm. 212, reveals that it involved only Dockets 30-A and 48-A. For this reason its order denying defendant's motion to rehear and reconsider involved only these same dockets. If the defendant in 1970 considered that its motion applied to Docket 182, the defendant was clearly mistaken because there never had been an initial decision under Docket No. 182 for the Commission to rehear and reconsider. There is simply no merit to the defendant's argument that its 1970 motion is still pending in Docket 182. It never was pending under Docket 182.

Our order entered herein today concludes that, on the basis of this opinion, and the findings of fact and conclusions of law which follow this opinion, the plaintiffs suffered damages to the extent of $10,830,860.40 due to the removal of minerals from their aboriginal lands and for which the defendant is liable under section 2, clause (5) of our Act. This represents the damages recoverable by the plaintiffs under their Group A claims. The order further provides that this docket will now proceed to the adjudication of the plaintiffs' Group

B claims and, thereafter, to the determination of any claimed gratuitous offsets to which the defendant may be entitled hereunder.

Concurring:

Jerome K. Kuykendall, Chairman

John T. Vance, Commissioner

Richard W. Yarborough, Commissioner

Margaret H. Pierce, Commissioner

Brantley Blue, Commissioner