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.	)	Docket No. 182 (Group A claims)
THE UNITED STATES OF AMERICA,	)	
Defendant.	)	

Decided: May 10, 1974

FINDINGS OF FACT

1. Identity of Plaintiffs and Capacity to Bring Suit. The Fort Sill Apache Tribe of the State of Oklahoma represents the Chiricahua Apache Tribe, the Warm Springs Apache Band, and the Chiricahua Apache Band, and together they constitute a single identifiable Apache group having the right and capacity to bring and maintain in their own behalf under the Indian Claims Commission Act (60 Stat. 1049) the claims asserted herein against the United States.

2. The Chiricahua Apache Lands. The Indian title lands of the Chiricahua Apaches within the present territorial limits of the United States covered an extensive contiguous area west of the Rio Grande

River, located in the southwestern portion of the present State of New Mexico and extending into the southeastern portion of the present State of Arizona. The Commission has previously determined the boundaries of the Chiricahua Apache aboriginal lands. See Fort Sill Apache Tribe v. United States, Dockets 30 and 48, 22 Ind. Cl. Comm. 527, 542-43 (1970); Dockets 30-A and 48-A, 19 Ind. Cl. Comm. 212, 241-42 (1968). The Commission also determined, after the parties had so stipulated, that the total area of said aboriginal lands consisted of 15,662,051 acres, and that confirmed Spanish-Mexican land grants wholly or partially within the said area consisted of 55,664 acres. The Commission therefore concluded that the Chiricahua Apache lands contained a net of 15,606,387 acres. See Dockets 30-A and 48-A, 25 Ind. Cl. Comm. 361-62, 366 (1971).

3. United States Sovereignty. The Commission has previously determined that the United States acquired sovereignty over most of the aboriginal Chiricahua Apache lands by the Treaty of Guadalupe Hidalgo of February 2, 1848 (9 Stat. 922), following the war between Mexico and the United States, and over the remainder of said lands by the Gadsden Purchase of December 30, 1853 (10 Stat. 1031). See Dockets 30 and 48, 22 Ind. Cl. Comm. at 534; Dockets 30-A and 48-A, 19 Ind. Cl. Comm. at 235. By the Act of February 27, 1851 (9 Stat. 574, 587), the United States extended the Indian Trade and Intercourse Act of June 30, 1834 (4 Stat. 729), over the Indian tribes in the Territory of New Mexico. See Dockets 30-A and 48-A, 19 Ind. Cl. Comm. at 235-36.

By virtue of the aforesaid acts and other acts, the United States acquired sovereignty over the territory which included the Chiricahua Apache lands, and established a system of laws for the territory. The United States also assumed jurisdiction over the Chiricahua Apache Tribe and its affairs, and undertook to respect the Chiricahua Apaches' right to use and occupy lands within the Territories of New Mexico and Arizona in a manner consistent with the policy of the United States in other territories and states. See Dockets 30-A and 48-A, 19 Ind. Cl. Comm. at 236.

4. Extinguishment of Aboriginal Title. The Commission has previously determined that the United States extinguished the aboriginal title of the Chiricahua Apaches to their entire tract of land in Arizona and New Mexico on September 4, 1886. See Dockets 30-A and 48-A, 19 Ind. Cl. Comm. at 243.

5. Intrusions Prior to Extinguishment of Title; United States Encouragement Thereof. By 1886, the Chiricahua Apache aboriginal lands had been the subject of extensive intrusions by non-Indians. A reasonable estimate of the non-Indian population of the tract in 1886 was approximately 26,000 persons. There were numerous settlements within the tract by 1886. The main line of the Southern Pacific Railroad was completed across the tract in 1881. Before 1886, branch lines of the Atchison, Topeka and Santa Fe Railroad had also been constructed within the tract. Telegraph facilities were operating in the tract's

larger towns. The completion of the railroad had brought the tract into prominence as a livestock producing area. It has been estimated that by 1886 there were 425,000 head of cattle grazing on the Chiricahua Apache lands.

By 1886, the mineral wealth of the tract was well established. Although the tract's mineral resources had been known to exist for many years prior to 1886, 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 1886, practically all of the mining districts that were ever worked had been discovered and developed. See Dockets 30-A and 48-A, 25 Ind. Cl. Comm. at 366-67, 369, 372 (1971).

Before the Chiricahua Apaches' aboriginal lands were taken by the United States on September 4, 1886, the policy of the United States was to encourage the intrusion upon and exploitation of the said lands by non-Indian third parties. The United States encouraged the exploitation of these lands by enacting laws aimed at developing the said lands. See e.g., Act of March 8, 1871 (16 Stat. 573); Act of May 10, 1872 (17 Stat. 91). The United States encouraged intrusions upon said lands

thro.gh its policy of protecting said intruders by conducting military campaigns against the Chiricahua Apaches and attempting (albeit unsuccessfully) to confine them to reservations against the wishes of the Chiricahua Apaches. See Dockets 30-A and 48-A, 19 Ind. Cl. Comm. 212, 229, 243-45 (1968).

6. Liability of the United States. The United States assumed responsibility for the intrusions upon and exploitation of the plaintiffs' lands while their aboriginal title remained unextinguished and outstanding by its actions in encouraging, sanctioning and assisting non-Indian intruders, all as recited in finding of fact No. 5, supra. Under such circumstances the United States dealt unfairly and dishonorably with the Chiricahua Apaches in violation of section 2, clause 5 of the Indian Claims Commission Act (60 Stat. 1049, 1050).

MINERALS REMOVED FROM CHIRICAHUA APACHE LANDS BEFORE SEPTEMBER 4, 1886

7. Expert Witnesses and Their Estimates of Value. (a) Plaintiffs. For the plaintiffs Mr. Roy P. Full submitted a report and testified as an expert on the value of the mineral resources removed from the tract before September 4, 1886. Mr. Full first estimated the gross value of the ore output of each district within the tract, considering separately the data applicable to each such district, and then determined a combined total for all districts. Mr. Full's combined estimates for the gross value of ore output were $25,139,911 for the Arizona portion of the tract and $30,058,188 for the New Mexico portion, making a grand

total of $55,198,099 for the gross value of ore output for the entire tract before September 4, 1886.

Having estimated the gross value of minerals produced from each mining district before September 4, 1886, Mr. Full calculated the net profit, district by district, by subtracting operating costs in each separate district from the gross production of the district in the following manner: (1) operating costs in each of 14 districts, accounting for nearly $35,000,000 (two-thirds) of the total $55,198,099 production, were based on all available reports of operating costs in those mining districts; (2) where such cost reports were unavailable, information about the character of the ores and reports of smelter returns and other data served as the basis for estimates of operating costs in 18 districts with about $19,000,000 production; (3) finally, in 4 districts with about $1,000,000 production, in the absence of cost data, costs were estimated on the basis of costs of working comparable deposits. Based upon the foregoing analysis, Mr. Full estimated that the net profit on the $55,198,099 of ore production from the entire tract prior to September 4, 1886, amounted to $20,701,649.

(b) Defendant. For the defendant, Mr. Ernest Oberbillig submitted reports and testified as an expert on the value of the mineral resources removed from the tract before September 4, 1886. For the Arizona portion of the tract Mr. Oberbillig estimated the gross production on a district by district basis using published reports of production. In this manner, he estimated that $25,244,058 was the gross value of ore output in the

Arizona portion of the tract before September 4, 1886.

For the New Mexico portion of the tract, Mr. Oberbillig utilized contemporary reports of the gross value of gold and silver mined in New Mexico through the year 1886. He then subtracted from the total the gold and silver production from those portions of New Mexico located outside the tract. To this figure he added the value of the copper, iron and lead produced within the tract and arrived at a total mineral production of $26,635,712 from the New Mexico portion of the tract. As a check, Mr. Oberbillig also made a district by district analysis of the New Mexico portion, a method which he has asserted to be less exact since it involved making output estimates where production data was lacking. Under this method Mr. Oberbillig arrived at an estimate only $216,235 above his primary estimate. His final estimate of gross value of the ore removed from the entire tract before September 4, 1886, was $51,879,770.

Mr. Oberbillig's opinion was that a royalty rate of 10% of the gross value of ore output was a proper measure of the value of said output to the plaintiffs as owners of the tract. The 10% rate is

> * * * a reasonable rate when considering that often 10% will be paid on considerable ore produced while developing all the mineral prospects, good and bad and a substantial portion of the total production will be made at an operating loss and where no profit could be made. [Def. Ex. M-51, at 45.]

8. Gross Value of Ore Output Before September 4, 1886. Based upon all the evidence in the record herein, the Commission finds that the gross value of the minerals removed before September 4, 1886, from

the Arizona portion of the Chiricahua Apache tract was $25,269,777, and from the New Mexico portion of the said tract was $28,884,525, thus making a total gross value of $54,154,302.

9. Loss to Plaintiffs from Removal of Minerals Before September 4, 1886. The loss to the plaintiffs as a result of the removal of minerals from their aboriginal lands is the profit they should have received as owners of the land from which the minerals were removed. The incompleteness of documentary data as to costs of production in this case precludes a determination of the actual net profit derived from such production. In such circumstances the most reasonable method for determining the profit which the plaintiffs, as owners of the tract, would have received from the removal of the minerals is a royalty on the gross value of the minerals so removed. The Commission finds, based upon the evidence in the record of the grade of mineral ore produced before September 4, 1886, and the expenses and risks of such production, that a 20 percent royalty on the gross value of the minerals produced from the tract is an appropriate measure of an owner's net profit on the ore mined before September 4, 1886. The Commission therefore finds that the loss to the plaintiffs by the removal from the Chiricahua Apache Tract before September 4, 1886, of minerals having a gross value of $54,154,302 is $10,830,860.40.

CONSUMPTION OF TIMBER CUT FROM WITHIN THE CHIRICAHUA APACHE TRACT BEFORE SEPTEMBER 4, 1886

10. Expert Witnesses and their Estimates of Timber Consumption and Value. (a) Plaintiffs. Mr. Roy P. Full, the plaintiffs' expert

on mineral production, also submitted a report and testified as an expert on the volume of timber utilized in mining operations within the Chiricahua Apache tract before September 4, 1886. Mr. Full made an analysis of conditions in each district within the tract, using reported information of timber consumption where available, and in the many districts where statistical information was not available, making estimates based on similar operations in other areas. Mr. Full gave consideration to the consumption of wood products for the following uses:

Mining:

1. Timber necessary to construct buildings to house surface installations, including hoists, shops, pumps and other service operations.

2. Fuel for steam plants to power the engines for hoists and pumps.

3. Timber utilized in ground support in shafts, drifts and stopes.

Milling:

1. Lumber utilized in the construction of mill buildings.

2. Fuel consumed in steam plants to power engines which drive mill equipment.

3. Fuel consumed in ore roasting operations.

4. Charcoal consumed in smelting operations.

Based upon his analysis, Mr. Full gave his opinion that:

> * * * the amount of timber cut from the Chiricahua Tract for mining purposes prior to September 4, 1886, was 208,490 cords of wood for fuel and charcoal, and 18,485 M board feet of timber and lumber utilized for underground mine support and for surface construction. [Pl. Ex. No. F-23, transmittal letter to Weissbrodt & Weissbrodt.]

Plaintiff also submitted a series of tables prepared by Mr. Frank Kleinman, an appraiser whom the defendant accepted as qualified to testify as an expert on timber consumption from within the tract, and the testimony of Mr. Kleinman concerning his estimates of the volume of timber cut from within the tract prior to September 4, 1886, for various uses, and estimates of the net value thereof after deducting costs of production.

On the basis of census data as to non-Indian population of the tract, the percentages of such population engaged in various occupations and the average number of persons in each household, Mr. Kleinman made estimates of the number of buildings and dwellings in the tract and the board feet required to construct them. He also estimated the cords of wood necessary for domestic fuel purposes. He adopted Mr. Full's figures as to mining-related timber consumption within the tract. Mr. Kleinman estimated that 30 percent of the lumber used within the tract (for both mining and non-mining purposes) was imported from outside the tract. His opinion was that all the timber and firewood consumed within the tract was cut from within the tract. Based on evidence of retail value of cordwood, timber and lumber, and taking into consideration the costs of production, he arrived at a final figure which he estimated to be the value in the tree of the wood that was cut from the Chiricahua Apache tract before September 4, 1886. The following table summarizes Mr. Kleinman's testimony:

	(A) Total Estimated Quantity Consumed	(B) Less Estimated Quantity Imported	(C) Total Estimated Quantity Consumed From Tract	(D) Unit Price
Firewood				
(1) At Mines	208,490 cords	0%	208,490 cords	$ 5.50 per cord
(2) Other	156,000 cords	0%	156,000 cords	5.50 per cord
Timber				
(3) At Mines	12,160,000 bd.ft.	0%	12,160,000 bd.ft.	15.00 per M
Lumber				
(4) At Mines	6,325,000 bd.ft.	30%	4,427,500 bd.ft.	30.00 per M
(5) Other	27,500,000 bd.ft.	30%	19,250,000 bd.ft.	35.00 per M

	(E) Total Price	(F) Less Cost Of Production	(G) Value of Wood In Tree	(H) Equivalent Value in Units
Firewood				
(1) At Mines	$ 1,146,695	82%	$ 208,490	$ 1.00 per cord
(2) Other	858,000	82%	156,000	1.00 per cord
Timber				
(3) At mines	182,400	82%	32,832	2.70 per M
Lumber				
(4) At Mines	132,825	90%	13,282	2.99 per M
(5) Other	673,750	90%	67,375	3.50 per M
			$ 477,979	
			(say)	$478,000

(b) Defendant. The defendant offered no separate testimony or reports as to the amount of timber consumed within or removed from the Chiricahua Apache tract before September 4, 1886. The defendant's mineral expert, Mr. Oberbillig, testified in his report that he believed the royalty lease rate would have included the right to use the surface resources for mining purposes. Mr. Oberbillig's opinion was that:

> * * * the lessees would have the right to free use of the timber * * * for their mining and milling operations and construction of camp buildings and all necessary housing [and] the camp sites which might develop into towns would also be granted free use to the lessees. [Def. Ex. No. 51, at p. 58-59.]

11. Evidence of Timber, Lumber and Firewood Production and Consumption Within the Chiricahua Apache Tract before September 4, 1885. The Commission has previously determined that in 1886 there were approximately 1,000,000 forested acres of Ponderosa pine and Douglas fir within the Chiricahua Apache tract. These forests were at elevations of 7000 to 11,000 feet. Most of the timber was inaccessible for commercial timber operations. There was a small demand within the tract for the timber for mining and other local purposes. See Dockets 30-A and 48-A, 25 Ind. Cl. Comm. at 368.

The record herein contains numerous contemporary references to the presence within the tract of commercial grade timber. There are also many references showing that this timber was being used within the tract for both mining and nonmining purposes. The record further shows that there were several sawmills operating within the tract before 1886. In addition there are several references showing that timber was being imported for use within the tract, particularly for underground mining and for fuel purposes. The evidence of record herein, together with the Commission's previous findings in the related dockets 30, 30-A, 48 and 48-A plainly show a substantial need for and use of timber, lumber and firewood within the tract before 1886.

There is very little evidence, however, dealing quantitatively with the volume of timber cut within the tract or with the volume consumed within the tract prior to September 4, 1886. After reviewing all the evidence of record relating to timber production and consumption within the tract prior to September 4, 1886, we find that such evidence does not provide a basis for establishing reasonable quantitative estimates of the volume of timber cut from the tract before September 4, 1886. We find that the expert opinions of volume of timber cut from within the tract are not probative of such a determination because the factual bases for such estimates are not found in the evidence of record. We therefore find that the opinions of these experts are too conjectural and speculative to be accorded weight in our deliberations.

12. Loss to Plaintiffs from Removal of Timber from Tract Before September 4, 1886. On the basis of all the evidence herein, we find that the plaintiffs have failed to prove any loss suffered by virtue of the removal of timber from the subject tract before September 4, 1886.

13. Plaintiffs' Claims for Damages for Use of Tract for Farming, Grazing, Townsites and Railroad Rights-of-Way. Plaintiffs also seek recovery of damages, calculated on the basis of fair rental value, for use of their aboriginal lands before September 4, 1886, for farming grazing and townsites. And they further ask for damages, calculated on the basis of rates of compensation payable to Indian tribes as authorized by Congress in certain contemporary statutes permitting construction of railroads within the Indian Territory, for rights-of-way

of trackage laid across their aboriginal lands before September 4, 1886.

We find, in regard to said claims, that the Chiricahua Apache lands so used were not diminished in value due to said surface uses of the land, as was the case with respect to the removal therefrom of irreplaceble natural resources in the form of minerals and timber. The plaintiffs have, in Dockets 30 and 48, and 30-A and 48-A, recovered for the value of their aboriginal lands, including the lands then being used for grazing, agricultural, townsite and railroad purposes as of September 4, 1886, the date upon which the Commission has determined that the United States took said lands. See 26 Ind. Cl. Comm. 198 (1971). We find that mere use of the Chiricahua Apache lands, without diminution of the value of said lands as a result thereof, does not give rise to measurable damages compensable under section 2, clause (5) (the "fair and honorable dealings" clause) of the Indian Claims Commission Act.

CONCLUSIONS OF LAW

1. The plaintiffs herein are entitled to maintain this suit under the Indian Claims Commission Act, 60 Stat. 1049.

2. The United States acted unfairly and dishonorably toward the plaintiffs incident to the removal by third parties before September 4, 1886, of minerals having a value to the plaintiffs of $10,830,860.40 from the lands then held by the plaintiffs under aboriginal title. Plaintiffs suffered damages in the amount of $10,830,860.40 as a result of said unfair and dishonorable dealings toward them by the United States.

3. The plaintiffs have failed to establish that they suffered any damages as a result of the cutting and removal of timber by third parties before September 4, 1886, from the lands then held by them under aboriginal title.

4. The plaintiffs did not suffer measurable damages compensable under section 2, clause (5) of the Indian Claims Commission Act, 60 Stat. at 1050, resulting from the use by third parties of their aboriginal lands before September 4, 1886, for grazing, agricultural, townsite and railroad purposes.

Jerome K. Kuykendall, Chairman

John T. Vance, Commissioner

Richard W. Yarborough, Commissioner

Margaret H. Pierce, Commissioner

Brantley Blue, Commissioner