

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-A

Decided: May 6, 1977

Appearances:

I. S. Weissbrodt, Attorney for Plaintiffs.

Dean K. Dunsmore, with whom was Assistant Attorney General Peter R. Taft, Attorneys for the Defendant.

OPINION OF THE COMMISSION

Kuykendall, Chairman, delivered the opinion of the Commission.

On May 10, 1974, the Commission issued its findings of fact, opinion and order, wherein it found and concluded that: (1) 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 and that, as a result, plaintiffs suffered damages

in that amount; (2) the plaintiffs had 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; and (3) 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.^{1/}

The defendant appealed this decision. On April 14, 1976, the Court of Claims reversed and remanded for further proceedings to reassess pre-1886 "trespass damages".^{2/}

We are concerned here with defendant's motion, filed August 6, 1976, for an order establishing the measure of trespass damages for determining liability in conformance with the remand of the Court of Claims. On August 30, 1976, the plaintiffs filed a response to defendant's said motion in which they agreed that such an order was necessary. The parties disagree on how to conform the measure of trespass damages with the instructions of the Court of Claims.

The defendant urges that the Court of Claims instructed that the Commission establish the measure of trespass damages by:

^{1/} Fort Sill Apache Tribe v. United States, 34 Ind. Cl. Comm. 81, 118-19 (1974).

^{2/} United States v. Fort Sill Apache Tribe, 209 Ct. Cl. 433 (1976). The succinctness of the phrase "trespass damages" has carried the day and will be used herein for convenience. However, there should be no doubt of the concept involved: damages for the diminution in the fee value through acts of the taker or those acting under its authority before the formal valuation date. The concept is an equitable one not depending on finding legal trespasses, trespassers, or common law trespass damages.

. . . . determining the highest and best use of plaintiffs' aboriginal title lands on July 22, 1854, and then valuing said lands as of September 4, 1886, at the highest and best use and in their condition as of July 22, 1854. If this new valuation is higher than that already determined in Dockets 30, 48, 30-A and 48-A, the plaintiffs are entitled to the difference. ^{3/}

The plaintiffs interpret the mandate of the Court of Claims to mean that the Commission should determine the measure of trespass damages by valuing the plaintiffs' lands as of September 4, 1886, without taking into consideration the value of improvements (consisting of railroads, telegraph lines, towns and ranches, resulting from activities on the lands between 1876 and 1886 attributable to the United States or to persons whose activities are imputable to the United States), deducting the value so determined from the award in Dockets 30, et al., and allowing the difference as a deduction against the award previously made by the Commission herein.

Our interpretation of the court's mandate is that the measure of trespass damages is to be established by first determining the worth of all activities of the United States, or imputable thereto, occurring between August 15, 1876 and September 4, 1886, which enhanced the prior valuation of \$16,496,796.00 in Dockets 30, 48, 30-A and 48-A. This determination will not be made by attempting to value the

^{3/} Memorandum in Support of Government's Motion, at 9. In Docket Nos. 30, 48, 30-A and 48-A, the Commission determined that plaintiffs' aboriginal title lands in the present states of New Mexico and Arizona had a fair market value on September 4, 1886, of \$16,496,796. Fort Sill Apache Tribe v. United States, 25 Ind. Cl. Comm. 352, 380-81, 384-85 (1971). Following the valuation decision, offsets were stipulated to by the parties and a final judgment was entered in the amount of \$16,489,096 in favor of the plaintiffs. Fort Sill Apache Tribe v. United States, 26 Ind. Cl. Comm. 193, 198-99 (1971), aff'd, 202 Ct. Cl. 134 (1973).

improvements or value-enhancing activities themselves; rather we will revalue plaintiffs' lands as of September 4, 1886, but in their condition as of August 15, 1876. We will then subtract the amount of the new valuation from the said prior valuation of \$16,496,796.00, the remainder representing the value of all activities of the United States, or imputable thereto, occurring between 1876 and 1886. Next, the value as determined above will be compared to the damages for removal of minerals from plaintiffs' award area prior to the date of taking, previously determined herein to be \$10,830,860.40. If the value of defendant's said activities is less than the liability for trespass damages in the amount of \$10,830,860.40, the plaintiffs will be entitled to the difference, representing the net reduction in the value caused by all activities imputable to the taker. If this difference is more than the previous trespass damages determination, then there was no such net reduction in the value and plaintiffs will not be entitled to any award herein. We believe that this formula for determination of the measure of trespass damages most accurately reflects the intention of the Court of Claims that the award in this docket ". . . should reflect only the net unfavorable impact, if any, upon value, of all activities imputable to the taker."

United States v. Fort Sill Apache Tribe, 209 Ct. Cl. 433.

In this opinion the Court specifically stated that ". . . activities of the United States or imputable to the United States, after expulsion of

the Apaches and up to the taking date" (slip op. at 6) should be considered in making the determination described in the preceding paragraph but the court did not specify when such "expulsion" occurred, thus leaving this question for the Commission to resolve.

Defendant has argued that expulsion occurred as of July 22, 1854, when by the act of that date, 10 Stat. 308, a surveyor general was created for the Territory of New Mexico and the lands of the territory, including plaintiffs' award area, were opened to settlement by non-Indians. Defendant has then argued that because expulsion occurred on July 22, 1854, the United States is not required to pay for any enhancement in value created by third persons after that date.

This latter assertion is directly contrary to what the court said. It is merely a belated attempt to change the date of taking from September 4, 1886, to July 22, 1854. What defendant appears to be attempting is to apply to this case the statement of the Court of Claims in the case of United States v. Northern Paiute Nation, 203 Ct. Cl. 468 (1974), that the United States becomes a taker when (1) its military forces exclude the Indians from mining areas and protect the miners and (2) its mining laws recognize or retroactively validate titles obtained by staking claims. Once a taking occurs, there can, of course, no longer be a trespass nor any liability arising therefrom.

Defendant's argument is inapplicable to this case for two reasons. First, as we stated above, the court in remanding this case, specifically stated that enhancement in value after expulsion and before the taking

date was to be considered in determining the measure of trespass damages. Secondly, the date of taking of plaintiffs' aboriginal lands has previously been determined to be September 4, 1886, and that determination has been affirmed by the Court of Claims. (See United States v. Fort Sill Apache Tribe, 202 Ct. Cl. 134 (1973).) The issue of the taking date is therefore res judicata for purposes of the present litigation between the same parties. The opinion of the Court of Claims remanding this case does not attempt to alter the previous determination with respect to the date of taking.

During the years 1871-1875, reservations were established by the Government for the Chiricahua Apaches within their aboriginal lands. However, in 1876 the Government initiated a program of moving all Chiricahua Apaches from their ancestral homelands and settling them on the San Carlos Reservation located outside their homelands. (See Fort Sill Apache Tribe v. United States, 19 Ind. Cl. Comm. 212, 243-44 (1968).) The Act of August 15, 1876, 19 Stat. 176, 195, applied to the Apaches of Arizona and New Mexico and commanded that the "Commissioner of Indian Affairs shall direct that said Indians shall not be allowed to leave their proper reservation", which was totally outside the aboriginal title area.

In affirming the Commission's determination that September 4, 1886, was the date of taking of plaintiffs' lands in Docket Nos. 30, et al., the Court of Claims stated that "the record could be said to establish that Indian title was extinguished before September 4, 1886, when the

Act of August 15, 1876, 19 Stat. 176, 195, was passed." (See United States v. Fort Sill Apache Tribe, 202 Ct. Cl. at 141.) However, the court found that the Government's conduct of the litigation in the said dockets amounted to waiver of the rights to challenge the September 4, 1886, taking date.

In remanding the present proceeding, the Court of Claims reiterated what it had stated about the taking date in the above-cited opinion.

The court further stated:

With use of 1876 for valuation purposes, it would have been possible to determine a single uncomplicated award for the Indians with no possible unfairness to either side. (United States v. Fort Sill Apache Tribe, (209 Ct. Cl. 433 (slip op. at 2-3))

* * * * *

That the removal of so many tons of ore occurred, tells us only one of many things we need to know, to make a fair and honorable adjustment for any change in value occurring between 1876 and 1886, and imputable to the United States. The record does not tell us the rest. (Id., (slip op. at 7))

Based on the above-cited facts and excerpts from the Court of Claims opinions, the Commission concludes that the date of expulsion of plaintiffs from their aboriginal lands was August 15, 1876.

As stated above the Commission has previously made a liability determination for trespass damages of \$10,830,860.40 in favor of plaintiffs for removal of minerals from their aboriginal title lands prior to September 4, 1886. The said amount represents a 20 percent royalty on the estimated gross value of ore produced on the land before September 4, 1886. Defendant interprets the words "Reversed and Remanded" in the Court of

Claims' opinion to mean the court found the Commission's liability determination for trespass damages to be in error. If the Court had intended to affirm the said determination, the defendant argues, it would have been required to reach the defendant's challenges to the sufficiency of the Commission's findings of fact and the lack of evidentiary support for its conclusions. We do not agree with this argument.

The court's opinion says only that our method of assessing pre-1886 trespass damages could not be sustained. The Commission finds no indication in the opinion that the majority found error in our determination of \$10,830,860.40 as the value of minerals removed. On the contrary, the majority states that the United States should not be penalized for the "sour" without being given credit for the "sweet". The sour--removal of plaintiffs' ore by defendant--has been determined by the Commission to be \$10,830,860.40; the sweet--value-enhancing activities carried on by the defendant after expulsion of plaintiffs and up to the date of taking-- must now be determined. The following language from the court's opinion prescribes how this is to be done:

In these circumstances, the most that fair and honorable dealings could be held to require now would be that the supplemental award here under consideration should add to the total compensation any net reduction in the compensable [sic] 1886 value caused by activities of the United States, or imputable to the United States, after expulsion of the Apaches and up to the taking date. The "trespass damages" award herein under consideration blatantly fails to do this. It singles out a single activity, the mining, that the Commission considered deleterious, and makes an award for that, without any

offset, leaving the Apaches to enjoy the full benefit of their primary award, without deduction, for activities that enhanced the value.

* * * * *

That the removal of so many tons of ore occurred, tells us only one of many things we need to know, to make a fair and honorable adjustment for any change in value occurring between 1876 and 1886....[Emphasis added]
[Fort Sill Apache Tribe, supra, (slip op. at 6-7)]

In remanding this proceeding to the Commission, the court indicates that fair and honorable dealings now require the Commission to determine the worth of all value-enhancing activities of the United States, or imputable thereto, occurring on plaintiffs' aboriginal lands after expulsion of the Apaches and up to the taking date. If the value so determined is less than the trespass damages of \$10,830,860.40 previously determined herein, the plaintiffs will be entitled to the difference, representing the net reduction in the value caused by all the activities imputable to the taker.

The Commission continues to believe that its findings of fact and conclusions of law on the question of the correctness of the trespass damages are sufficient and fully supported by the evidence in the record.

The last issue to be considered is whether or not discovery of mineral deposits in plaintiffs' award area, as well as mineral development work, are value-enhancing activities for which defendant may be given credit. Plaintiffs contend that the act of discovery of mineral deposits and mineral development work should not be allowed as an element of enhancement for which the United States may be given credit. On the other

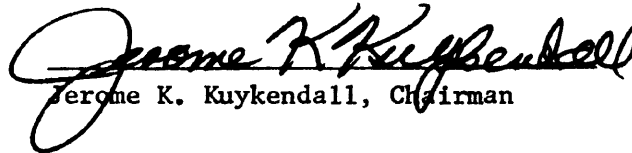
hand, defendant argues that it is clearly entitled to show all of its actions or the actions of others imputed to it, including discovery of minerals and mineral development work, which enhanced the value of plaintiffs' award area on September 4, 1886. The appraisals we ask for below focus on appraising land without enhancements, not enhancements themselves. We do not believe the actual date of discovery or opening of a mine should be the critical date here.

The minerals were in the land before the white man appeared; a fair judgment requires that their value be part of the judgment to the Indian landowner to compensate for the full fee value of his lost property. Our previous determinations show that some \$54 million in minerals were taken out before 1886, and enough then remained to provide some \$6 million in net profits after expenses. Thus a large component of the land value that requires compensation is the mineral value.


Furthermore, mine "improvements" put on the tract by the miners have already been taken out of the two judgments. In reaching the net value of the minerals in 1886 the costs of development are deducted from the mineral income expected to be produced. In valuing the plaintiffs' share of the pre-1886 minerals removed, 80 percent of the minerals' value is set aside for the operator's costs and profit. Mine shafts and other mining improvements cannot be said to "enhance" the land except as related to mining. No such additional deductions as proposed by defendant are proper.


Therefore we conclude that the terms of the remand require the parties to prepare new appraisals of the subject tract as it was in 1876, in near-pristine condition, with no towns, railroads, ranches, or mines. Since

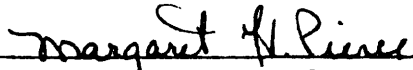
the valuation date of 1886 has been specifically affirmed, market data of that date should be used, and the development of the outside world up to the borders of the tract by 1886 would have to be considered. Thus placing the minerals back into the ground, their prospective profitability can be appraised by the standards of the day (as it appeared in 1876), assuming that the knowledgeable buyer and seller would each engage mining engineers to survey the subject tract and advise on the mineral prospects. With such a value determined by the Commission that eliminates any enhancing effects of development imputable to the defendant, the calculations outlined above can be made, and this judgment adjusted so as to meet the requirements of justice as defined in the remand of the court above.

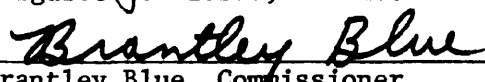

 Jerome K. Kuykendall, Chairman

We concur:


 John T. Vance, Commissioner


 Richard W. Yarborough, Commissioner


 Margaret H. Pierce, Commissioner


 Brantley Blue, Commissioner