

1948

# Chief Consolidated Mining Company v. State Tax Commission : Reply Brief

Utah Supreme Court

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Cheney, Marr, Wilkins & Cannon; Attorneys for Chief Consolidated Mining Company.

Ray, Rawlins, Jones, & Henderson; C.C. Parsons; WM. M. McCrea; A. D. Moffat; Calvin A. Behle; R. J. Hogan.

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## Recommended Citation

Reply Brief, *Chief Consolidated Mining Company v. State Tax Commission*, No. 19487323.00 (Utah Supreme Court, 1948).  
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UTAH SUPREME COURT

BRIEF

*Calvin A. Behle*  
SOME CASES, BOOKS, ETC. (MAY 1911)

7323, 7334, 7332, 7324, 7293 et al. of Utah

Case No. 7323  
CHIEF CONSOLIDATED MINING COMPANY, Appellant,  
vs.  
STATE TAX COMMISSION, Respondent.

Case No. 7334  
PARK UTAH CONSOLIDATED MINES COMPANY, Appellant,  
vs.  
SUMMIT COUNTY, et al, Respondent.

Case No. 7332  
SILVER KING COALITION MINING COMPANY, Appellant,  
vs.  
STATE TAX COMMISSION, Respondent.

Case No. 7324  
UNITED STATES SMELTING REFINING AND MINING COMPANY, Appellant,  
vs.  
SALT LAKE COUNTY, et al, Respondent.

Case No. 7293  
KENNECOTT COPPER CORPORATION, Appellant,  
vs.  
STATE TAX COMMISSION, Respondent.

**REPLY BRIEF**

CHENEY, MARR, WILKINS & CANNON,  
*Attorneys for Chief Consolidated Mining Company  
and United States Smelting Refining and Mining  
Company.*

RAY, RAWLINS, JONES & HENDERSON,  
*Attorneys for Park Utah Consolidated Mines Com-  
pany.*

R. J. HOGAN,  
*Attorney for Silver King Coalition Mines Company.*

C. C. PARSONS,  
WM. M. McCREA,  
A. D. MOFFAT,  
CALVIN A. BEHLE,  
*Attorneys for Kennecott Copper Corporation.*

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# In the Supreme Court of the State of Utah

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## REPLY BRIEF

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### 1. Judicial Notice.

Respondents criticize appellants for calling to the attention of the Court the report of a Congressional Committee which embodied a report to such Committee by the Governmental Agency charged with the responsibility of making the subsidy payments pursuant to the Act of Congress.

Appellants are not conscious of any impropriety in so doing:

This Honorable Court will take judicial notice of the true signification of all English words and phrases, of the public and private official acts of the legislative, executive, and judicial departments of the United States, and of the political history of the world. In all such cases "the Court may resort for its aid to appropriate books or documents of reference." Section 104-46-1, Utah Code Annotated, 1943.

"The courts may also take notice of the mischief the laws were intended to remedy and of the public demand preceding their passage, and they may, with propriety, recur to the history of the times when the statute was passed to ascertain the reason as well as the meaning of particular provisions therein . . ."

(20 Am. Jur. Evidence, § 41)

Thus in *Outlet Embroidery Co. v. Derwent Mills*, 254 N. Y. 179, 70 A.L.R. 1440, the Court took judicial notice that at the time a contract for the sale of goods to be imported was entered into, Congress was debating a new tariff and that the debate continued for a year.

In earlier cases involving subsidy payments this Honorable Court did take such notice of the actions taken by the government during the course of the last war, including the premium payment plan. (*Combined Metals Reductions Co. v. State Tax Commission*, 176 P. 2d 614.)

## 2. An Argument Exploded.

Respondents avoid rather than meet appellants' arguments by reiterating the premise of the former subsidy tax cases, stating (p. 10):

“\* \* \* Throughout the entire program, both before Rule 13 was amended and afterward, the premium payments were made as a part of the actual total price authorized and pursuant to the premium price plan inaugurated jointly by the Federal Loan Agency, the War Production Board and the Office of Price Administration. In other words, under O.P.A. regulations made in conjunction with the War Production Board the prices permitted to be paid for the metals were the ceiling prices plus the premium price. And the two of them together constituted the selling price of the ores and metals. *The one was never divorced from the other.* \* \* \* ” (Italics ours.)

One might think it strange for counsel to persist in this contention on the basis of the information now before the court in these cases, and the facts admitted to be true by the demurrers below.

And when price controls were discontinued in 1945, while the subsidies continued into 1947, how can respondents argue “The one was never divorced from the other”? Not even a shadow of basis for this argument continued after metal price controls went out of the window.

Respondents just beg the question in baldly asserting (p. 10) that “the prices permitted to be paid for the metals were the ceiling prices plus the premium

price. And the two of them together constituted the selling price of the ores and metals.”

### 3. The Basis For The Subsidies.

Appellants have never advanced the “absurd” straw man that the subsidies—“so-called” by Congress which authorized their payment—were “outright gifts.” (P. 5, 7)

On the contrary, appellants contend that the subsidies paid were increased in direct ratio to the need of each particular mine for more money than could be realized from a sale or conversion into money or its equivalent of that mine’s ores; they were paid, in the words of Congress, “to obtain the maximum necessary production” from the mines of this country.

It follows that since such subsidies are the *opposite* of proceeds from the sale of ores, and no part of the value thereof, the payments may not be considered “in arriving at a proper tax base.”

Respondents at page 7 of their brief momentarily recognize this when they aptly characterize such payments by quoting from a case in which one reason for the allowance of bounties was given as “*production or manufacture to be stimulated.*”

### 4. Respondents’ Consideration of Revised Rule 13. (P. 8)

Original Rule 13 of the quota committee provided with respect to *ores sold* that premium payments would

be “based upon metal paid for under settlement contracts”. (We assume the court will take judicial notice of the fact that in the cases where ores *are* sold, the sales are to buyers under settlement contracts, i.e., contracts specifying the basis of settlement.)

With respect to ores *not so sold* the rule provided that premium payments would be based on stated percentages of the metal content.

In the case of Combined Metals Reduction Co. et al vs. State Tax Commission, this Honorable Court, looking to the first part of the rule—that relating to ores sold—said it was self-evident that metals were not paid for under settlement contracts unless they were sold. Then the court added that since it appears (from the records in those particular cases) that the “premium prices” paid to mining companies were for metals sold by them, it followed that such premium prices were includable as money received on a sale. The majority of the court felt that cases where ores were not so sold were not then before this court.

The decision of the court was accordingly based squarely upon the quoted provision of Original Rule 13, for the court recognized that under our statute the basis for determining the amount of taxes due where there has been a sale of ore under a bona fide contract of sale is the amount of money or its equivalent actually received from the sale.

From the records in these cases *now* before the court involving ore sales it now appears that Original Rule 13 was rescinded, and a new rule adopted under

which subsidy payments were based *on certain stated percentages for the respective metals regardless of the percentages actually recovered or paid for.*

Copies of the original and revised rules are attached as exhibits to the complaints. From these exhibits it appears that under the Revised Rule, even in the case of custom ores, payment of bounties was not "conditioned on a sale";—much less were such bounties "received on a sale".

Respondents would have the court ignore the rescission of old rule 13 and the adoption of a new and different rule.

On page 10 of their brief respondents now recognize that under Original Rule 13 a different method of computing premium payments was provided *where no settlement contracts* existed. Such method is set forth in the instructions of Metals Reserve Company attached as Exhibit D to the complaint of the United States Smelting Refining and Mining Company in Case No. 7324, which exhibit, together with the copies of affidavits attached, show that bonuses were paid on the basis of mine production records and before any sale.

In the same complaint it is alleged that such bonuses were paid unconditionally and without any right on the part of the agency of the Federal Government paying the same to receive back the premiums paid in the event the metals recovered from the ores for the production of which such subsidies were paid became lost, destroyed, were retained by the company or otherwise failed to enter the channels of commerce. Yet respondents ask

the court to believe that such bonuses were received "on a sale".

On the same page respondents say there is nothing to indicate that the purpose of making premium payments was changed by Amended Rule 13. We agree: *the purpose of making such payments was specified by Congress, i.e., to obtain the maximum necessary production.*

The *conditions* of payment were, however, within the control of the administrative agency. That agency saw fit to rescind that part of Rule 13 requiring as a condition of payment that certain ores be sold. It prescribed in lieu thereof that the quantities of metals *produced* be determined, as the basis for subsidy payments.

##### 5. The Kennecott and Similar Situations.

Let us assume for this argument that Utah's statutes in question should be construed broadly *against* the taxpayer; and thus that the Legislature had in mind when it used the particular words in these statutes that proceeds or amounts realized from the sale of ores, etc., should include subsidies, bonuses or bounties, *when tied into the purchase price for the sale of these ores.* This apparently was the reasoning of the majority of the court in the Combined Metals and Haynes decisions based upon the records in the first series of cases submitted to this court.

Is this court now willing to press this line of rea-

soning to the point of creating liability in cases such as that of Kennecott, where no sale of the ores, on the increased production of which the subsidies were computed and paid, *ever took place at all?*

In such cases the first part of Rule 13 never did apply, either as originally promulgated and heretofore relied on by this court, or after revision. Further, the records in these cases now before the court, with the material facts pleaded by appellants in cooperation with counsel for respondents and admitted by demurrer, show:

(a) The precise basis on which the subsidies were paid.

(b) That this basis was not the tons of ore *sold*, but the excess-over-quota production of ore.

(c) When the computations for subsidy payments on such basis were made each month, the payments occurred in due course entirely apart from the subsequent treatment and disposition of those excess ores. For example are the familiar Kennecott souvenir beehives, where no sale has ever taken place even of the refined copper.

This indeed is a far cry from the other type of case where the same smelter, buying the ores, paid to the seller both the sales price and on behalf of the Government the subsidy as a premium price, both computed on the same ores as delivered and sold. If one is willing to abrogate the familiar rule of strict construction in favor of the taxpayer, to assume a legislative pre-

science anticipating then unknown conditions, and to look to the particular administrative restrictions and policies in such cases rather than the intent of Congress in its authorization for the payment of production bonuses, then there is something to be said for tax liability in such cases.

But even so—a position which we respectfully submit is in error—in the entirely different situations such as those of the United States Smelting Company and Kennecott, is not the court being asked to legislate judicially under *any* standard, and frankly to rewrite these tax statutes in the interests of a possible need for increased revenue?

In their brief (p. 11) respondents do not and cannot meet this; so they avoid the entire argument by saying (1) these facts are “conclusions of law”; and (2) the affidavit attached to the complaint shows by the selection of one word therein that the subsidy payments were for the sale of the ores.

We can only respectfully request the court to read the concise, simple amended complaint—in effect the entire record—in the Kennecott and similar cases, and then treat respondents’ evasive argument on its merit. It is true that the one word of the particular affidavit attached to the Kennecott complaint as illustrative was not as otherwise throughout, changed from “sold”; but if this court is to pin its decision on that point in view of the picture as otherwise pleaded and as was the fact, Kennecott is willing to let the matter rest on the consciences of those concerned.

## 6. The Inclusion of Subsidy Payments in Determining Net Proceeds Valuation. (P. 13)

Although respondents so entitle the first subdivision of their brief as to purportedly refer to the inclusion of bonuses in determining the *mine occupation tax*, it will be noted that often the argument is directed equally to such inclusion in arriving at net proceeds. We have followed respondents in this, since in large part obviously the same rules are applicable.

Under subdivision 2 of their brief, respondents make three points directed to the inclusion of premium payments in determining gross proceeds and thereby fixing the assessed value of mines. These are as follows:

a. "Under the Utah statutes the base for determining the taxes from mines includes what is annually realized from the product of the mine, over and above the cost of expenses of obtaining such proceeds and includes the value of the ore, etc., produced but not sold during the year."

This statement is obviously unwarranted in fact as a reference to the statute will readily disclose. Only when ores, produced but not sold, *have been converted into the equivalent of money* are they to be included in arriving at net proceeds.

The one case dealing with this is that of Salt Lake County vs. Utah Copper Co., 93 Fed. 2d. 127, in which the question was whether "blister copper", gold and silver bullion produced in the preceding calendar year but remaining unsold, as well as the amount received

from sales in the preceding calendar year of ores produced, should be included in computing gross proceeds.

It was not even contended that ores mined but not processed should so be included. The Court held that such blister copper and gold and silver bullion should be included, saying:

“ ‘Blister copper’ is copper that has passed through the smelting process, metallic copper of a black blistered surface, or final product of converting copper matte, and is about 96-99 per cent pure. The simple meaning of ‘money’ is current coin, but it may mean possessions expressible in money values. ‘Money’ has no technical meaning, but is of ambiguous import, and may be interpreted having regard to all surrounding circumstances under which it is used. ‘Money’ is often and popularly used as equivalent to ‘property’. ‘Money’ means wealth reckoned in terms of money; capital considered as a cash asset; specifically such wealth or capital dealt in as a commodity to be loaned, invested, or the like; wealth considered as a cash asset. ‘Equivalent’ means equal in value, force, measure, power, and effect, or having equal or corresponding import, meaning, or significance; what is virtually the same thing; identical in effect. \* \* \*”

“Blister copper has an established and readily ascertainable market value, and when the taxing authorities were apprised of the number of pounds produced it was a simple matter to appraise its value in money.”

The cases cited by respondents are not in point. The case of Salt Lake County vs. Utah Copper Co., 294 Fed. 199, in which the case of Mercur Mining Co. vs. Juab

County cited by respondents and other cases were reviewed and considered, held, *to the contrary of respondents' contention*, that "the net annual proceeds of a mine are the net proceeds of the sale of its product during the tax year".

In that case it was contended by the County that the statutes did not contemplate that tailings must be converted into cash before the proceeds tax would attach; and the court held against the county. Yet this is the authority cited by respondents.

In the case of Tintic Standard Mining Co. vs. Utah County, cited by respondents, the issue was as to the propriety of certain deductions from gross proceeds taken by the mining company and disallowed by the Board of Equalization. The case did not involve any question of the inclusion in gross proceeds of ores produced but not sold.

b. Respondents next say that notwithstanding the allegations of the amended complaints here before the court, the cases must be considered as though the premium payments were made only after the ores had been converted into the equivalent of money.

Respondents ignore the specific allegations as to how these payments were made. For instance, in the case of United States Smelting Refining and Mining Company, No. 7324, is to be put aside: the exhibits showing the instructions from Metals Reserve Company; the monthly affidavits filed by the smelting company showing that the quantities of metal reported as available

for the payment of premiums were determined by mine production records; the allegations as to the manner in which the ores were treated showing the processing at the plant of the company at Midvale, Utah, the shipment of the resultant product for refining at other plants outside the State of Utah, and the date of payment of premiums with relation to such dates of processing and refining; also the allegations that the premiums were paid before any sale of the ores, were paid unconditionally, and without any right on the part of the federal agency paying the same to recover them or any part thereof in the event the ores were never sold.

Respondents ignore all this to look only to an allegation quoted at page 14 of their brief in which it was succinctly stated that monthly quotas were computed and premiums were paid on a specified percentage of the metal contents of the qualified materials in the ores, and that such metal contents were determined by sampling and assaying before any conversion of the ores and before any processing of the ores other than such crushing is as required to permit of sampling for assaying.

This allegation respondents say is a mere "conclusion of law". The allegation is one of fact as to the time when certain things were done; it would be as much a conclusion of law to say that one had breakfast before having lunch.

But respondents say that the very question to be determined here is whether or not there was a conversion of ores into money or the equivalent of money.

That is not the ultimate question to be determined:

the question before this court is whether or not the bonuses paid were any part of the gross proceeds realized from the sale or conversion into money or its equivalent of ores produced by appellants. We submit that under the admitted facts pleaded in these cases now before the court, it cannot seriously be contended that the subsidies were any part of such gross proceeds.

c. Finally, respondents argue that it is immaterial whether the ores were converted or sold; and "When the ores were taken out of the mine and were sent to the smelter or mill, such ores immediately had a value in addition to their ceiling price, namely, the amount which was payable for such ores as premium payments". (p. 17)

Here again respondents simply beg the question as to whether the subsidies were some part of the *payment* made for the ores; or on the contrary were, as the Emergency Price Control Act of 1942 authorized, as every rule issued (except one rescinded portion of original Rule 13), and as every act done evidences, bonuses paid by Government to ensure maximum production of certain strategic materials, paid because the amounts realizable from the particular operations of a particular mine were not sufficient to cover costs and ensure continued maximum production.

#### 7. The Constitutional Question. (P. 19)

Respondents state that they are content to rest the question of the constitutionality of the inclusion of premium payments in computing the net proceeds tax

valuation upon the decision of this court in "the Haynes case".

It is true that in the Haynes case this Honorable Court did consider *on the facts there presented* the constitutionality of the inclusion of such premium payments.

It will be remembered that in the Haynes case this Honorable Court said that there either the premiums were received only on a sale of the ores or were received only after the ores had been converted into the equivalent of money; and therefore the subsidies were properly treated as part of the proceeds from the mine.

In the Haynes case no question of subsidies other than premiums payable under the initial quotas established was presented. The court did not then have, as it now has, the full story of the basis on which subsidies were paid; the determination and revision of quotas, the reports required from each individual mining company showing its own costs of operation and planned development; the elaborate calculations by the federal agencies required to estimate the subsidies needed to be made to each mining company in order to make up the deficits over and above the amounts receivable from mine operations and permit of continued operations; the times and conditions of payment, as for instance, retroactive payments to make up for increased labor costs; and the reduction in quotas and consequently in subsidies paid when either through increased production or reduced costs a mine more nearly carried itself.

Upon the records here presented, it is submitted

that premium payments, so-called, made under the authority of the Emergency Price Control Act of 1942, authorizing the making of *subsidy* payments when necessary to obtain maximum necessary production of any commodity, are clearly no part of the amount received on either a sale of ores, or on the conversion of ores into the equivalent of money. On the contrary, the subsidies were what had to be added to all such receipts to permit of continued mine operation.

We submit that the question of the constitutionality of the inclusion of such subsidy payments in the measure of value should be reviewed and considered by this Honorable Court. Now that the true nature of the subsidies is disclosed to this court, it would well appear that they were no more a part of the *value* of each mining property than a \$5.00 bounty for killing the animal would remake the coyote's \$1.00 pelt into a \$6.00 value. True, the owner-killer might realize \$6.00 by collecting the bounty and selling the pelt to the furrier; but the proceeds from the sale of the pelt would remain the same, be the bounty what it may.

Respectfully submitted,

CHENEY, MARR, WILKINS & CANNON,  
*Attorneys for Chief Consolidated Mining  
Company and United States Smelting  
Refining and Mining Company*

RAY, RAWLINS, JONES & HENDERSON,  
*Attorneys for Park Utah Consolidated  
Mines Company*

R. J. HOGAN,  
*Attorney for Silver King Coalition Mines  
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C. C. PARSONS,  
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