

1981

# Nick Kiahtipes, Dino Kiahtipes, and Angelo Kiahtipes v. Marius Henry Mills and Maxine Mills : Brief of Appellants

Utah Supreme Court

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IN THE SUPREME COURT OF THE STATE OF UTAH

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NICK KIAHTIPES, DINO  
KIAHTIPES, and ANGELO  
KIAHTIPES,

Plaintiffs-  
Appellants,

vs.

Case No. 17528

MARIUS HENRY MILLS and  
MAXINE MILLS,

Defendants-  
Respondents.

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BRIEF OF APPELLANTS

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Appeal from the Judgment of the  
Seventh Judicial District Court, Carbon County  
Honorable Don V. Tibbs

-----

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A P P E N D I X

AGREEMENT

THIS AGREEMENT MADE AND ENTERED INTO THIS 10TH DAY OF MAY, 1977, BY AND BETWEEN MARIUS HENRY MILLS, ALSO KNOWN AS M. HENRY MILLS, M. H. MILLS AND HENRY MILLS, AND MAXINE MILLS, HUSBAND AND WIFE OF PRICE, UTAH, SELLERS, AND NICK KIAHTIPES, DINO KIAHTIPES AND ANGELO KIAHTIPES OF PRICE, UTAH, BUYERS,

WITNESSETH:

1. FOR THE SUM OF ONE HUNDRED NINETY TWO THOUSAND TWO HUNDRED TWENTY FIVE DOLLARS (\$192,225.00) TO BE PAID AS HEREAFTER SET FORTH, SELLERS AGREE TO SELL AND BUYERS AGREE TO BUY THE FOLLOWING REAL PROPERTY AND WATER RIGHTS IN CARBON COUNTY, STATE OF UTAH:

(A) WHAT IS COMMONLY KNOWN AS THE "OLD MILLS' FARM" PARTICULARLY DESCRIBED AS FOLLOWS:

TOWNSHIP 15 SOUTH, RANGE 10 EAST, SLM:

SECTION 16:

THE WEST HALF OF THE NORTHWEST QUARTER;  
THE SOUTH HALF OF THE SOUTH EAST QUARTER  
OF THE NORTHWEST QUARTER; THE NORTHWEST  
QUARTER OF THE SOUTHEAST QUARTER; THE SOUTH  
HALF OF THE SOUTHWEST QUARTER OF THE NORTH-  
EAST QUARTER; THE NORTH HALF OF THE NORTHEAST  
QUARTER OF THE SOUTHWEST QUARTER.

ALSO: THAT PART OF THE NORTHWEST QUARTER OF  
THE SOUTHWEST QUARTER WHICH LIES NORTH OF  
MILLER CREEK.

ALSO: BEGINNING AT THE NORTHWEST CORNER  
OF THE SOUTHEAST QUARTER OF THE NORTHWEST  
QUARTER OF SAID SECTION 16 AND RUNNING  
THENCE EAST 244 FEET; THENCE SOUTH 676  
FEET; THENCE WEST 244 FEET; THENCE NORTH 676  
FEET TO THE POINT OF BEGINNING.

ALSO: ALL IMPROVEMENTS THEREON AND AP-  
PURTENANCES THEREUNTO BELONGING AND THE  
WATER AND WATER RIGHTS HEREAFTER PARTI-

CULARLY DESCRIBED.

(B) WHAT IS KNOWN AS THE "ANGELO PEPERAKIS' FARM" PARTICULARLY DESCRIBED AS FOLLOWS:

TOWNSHIP 15 SOUTH, RANGE 10 EAST, SLM:

SECTION 9:

THE SOUTH HALF OF THE SOUTHEAST QUARTER; THE SOUTHEAST QUARTER OF THE SOUTHWEST QUARTER, LESS APPROXIMATELY 40 ACRES THEREOF UPON WHICH IS SITUATED THE FAMILY HOME AND OUT-BUILDINGS OF THE SELLERS LYING SOUTH OF THE CARBON CANAL AND BETWEEN THE FLOOD WASH ON THE WEST AND THE ROAD ON THE EAST THEREOF WHICH PARCEL WILL BE PARTICULARLY SURVEYED AND SET FORTH IN A MEETS AND BOUNDS DESCRIPTION AS A SUPPLEMENTAL TO THIS AGREEMENT.

SECTION 16:

THE NORTHEAST QUARTER OF THE SOUTHEAST QUARTER; THE NORTHEAST QUARTER OF THE NORTHWEST QUARTER; THE NORTH HALF OF THE NORTHEAST QUARTER; THE SOUTHEAST QUARTER OF THE NORTHEAST QUARTER; THE NORTH HALF OF THE SOUTHWEST QUARTER OF THE NORTHEAST QUARTER.

ALSO: BEGINNING AT THE NORTHEAST CORNER OF THE SOUTHEAST QUARTER OF THE NORTHWEST QUARTER OF SAID SECTION 16 AND RUNNING THENCE WEST 1090 FEET; THENCE SOUTH 676 FEET; THENCE EAST 1090 FEET; THENCE NORTH 676 FEET TO THE POINT OF BEGINNING.

ALSO: ALL IMPROVEMENTS THEREON AND APPURTENANCES THEREUNTO APPERTAINING.

(C)

WATER RIGHTS:

170 SHARES OF THE CAPITAL STOCK OF THE PRICE RIVER WATER USERS ASSOCIATION AND 260 SHARES OF THE CAPITAL STOCK OF CARBON CANAL COMPANY USED FOR THE IRRIGATION OF THE FOREGOING PARCELS OF REAL PROPERTY.

IT IS AGREED THAT OF SAID PROPERTY, THE "OLD MILLS' FARM" CONTAINS APPROXIMATELY 180 ACRES AND THE "ANGELO PEPERAKIS' FARM", LESS THE ACREAGE RETAINED BY MILLS, CONTAINS APPROXIMATELY 335 ACRES. THE CONVEYANCE TO BE MADE BY SELLERS TO THE BUYERS AS HEREINAFTER SET FORTH SHALL BE SUBJECT TO EXISTING EASEMENTS AND RIGHTS OF WAY, IF ANY, INCLUDING DITCH RIGHTS OF WAY, IF ANY, AND TO ALL PATENT RESERVATIONS AND MINERAL RESERVATIONS OF RECORD, IF ANY. \*

2. IT IS AGREED THAT THE BUYERS ARE PURCHASING SAID PROPERTY AS TENANTS IN COMMON WITH NICK KIAHTIPES OWNING AN UNDIVIDED FIFTY PERCENT (50%) OF THIS CONTRACT, DINO KIAHTIPES OWNING AN UNDIVIDED THIRTY FIVE PERCENT (35%) OF THIS CONTRACT AND ANGELO KIAHTIPES OWNING AN UNDIVIDED FIFTEEN PERCENT (15%) OF THIS CONTRACT.

*Sellers shall retain an undivided 40% interest in any present or future mineral interests or royalties, but buyers shall have exclusive right to enter into all future leases on said lands*

3. THE PARTIES ARE AWARE OF AN OUTSTANDING FIRST MORTGAGE ON THE "OLD MILLS' FARM" HELD BY THE FEDERAL LAND BANK OF BERKELEY, NOW KNOWN AS THE FEDERAL LAND BANK OF SACRAMENTO, AS WELL AS A FIRST MORTGAGE TO THE UTAH FARM PRODUCTION CREDIT ASSOCIATION OF SALT LAKE CITY, UTAH ON THE "ANGELO PEPERAKIS' FARM" AND ALL OF THE SAID WATER RIGHTS. THE SELLERS HAVE ORALLY REPORTED THIS SALE TO BOTH OF SAID CORPORATIONS AND HAVE RECEIVED AN ORAL INDICATION THAT IF THIS CONTRACT IS EXECUTED BETWEEN THE SELLERS AND BUYERS, THAT THE SAID FEDERAL LAND BANK WILL THEREUPON RELEASE ITS MORTGAGE AND THAT THE SAID UTAH FARM PRODUCTION CREDIT ASSOCIATION WILL IN WRITING, AGREE THAT WHEN AND IF ALL THE PROCEEDS PAYABLE BY THE BUYERS HEREIN SHALL BE PAID TO AND APPLIED ON THE INDEBTEDNESS OF SELLERS TO SAID ASSOCIATION, THAT IT WILL RELEASE ITS MORTGAGE UPON THE SAID REAL PROPERTY AND WATER RIGHT. IF WITHIN THIRTY (30) DAYS FROM THE EXECUTION OF THIS AGREEMENT THE FEDERAL LAND BANK SHOULD DECLINE TO RELEASE ITS MORTGAGE OR IF THE SAID UTAH FARM PRODUCTION CREDIT ASSOCIATION SHOULD DECLINE TO EXECUTE AN AGREEMENT IN WRITING AGREEING TO RELEASE ITS MORTGAGE UPON THE TERMS AND CONDITIONS ABOVE SET FORTH, THEN THIS SALES AGREEMENT BETWEEN THE SELLERS AND BUYERS SHALL HAVE NO FURTHER FORCE OR EFFECT.

4. THE SAID PURCHASE PRICE OF ONE HUNDRED NINETY TWO THOUSAND TWO HUNDRED TWENTY FIVE DOLLARS (\$192,225.00) SHALL BE PAID AS FOLLOWS: FIFTY THOUSAND DOLLARS (\$50,000.00) THEREOF SHALL BE PAID UPON THE OBTAINING OF THE SAID DOCUMENTS FROM SAID LOANING INSTITUTIONS (WHICH TIME IS HEREIN DESIGNATED AS THE CLOSING DATE)

AND THE BALANCE OF SAID PURCHASE PRICE, NAMELY, ONE HUNDRED FORTY TWO THOUSAND TWO HUNDRED TWENTY FIVE DOLLARS (\$142,225.00) TOGETHER WITH INTEREST ON THE DECREASING PRINCIPAL THEREOF AT THE RATE OF SEVEN AND ONE-HALF PERCENT (7.5%) PER ANNUM RECKONED FROM THE SAID DATE OF CLOSING SHALL BE PAID IN TWELVE (12) EQUAL INSTALLMENTS OF PRINCIPAL IN THE SUM OF ELEVEN THOUSAND EIGHT HUNDRED FIFTY TWO AND EIGHT CENTS (\$11,852.08) PLUS ACCRUED INTEREST ON THE TENTH (10TH) DAY OF MAY OF EACH YEAR COMMENCING WITH THE YEAR 1978. COMMENCING WITH THE YEAR 1981, BUYERS SHALL HAVE THE RIGHT TO PAY ADDITIONAL SUMS OR THE ENTIRE UNPAID PURCHASE PRICE AT THEIR OPTION. POSSESSION SHALL BE GIVEN AT DATE OF CLOSING.

5. SELLERS HAVE ENTERED INTO A LEASE WITH SWISHER COAL COMPANY TO LEASE CERTAIN PRICE RIVER WATER USERS ASSOCIATION STOCK FOR THE YEAR 1977 AND IN CONSIDERATION OF THE EXECUTION OF THIS AGREEMENT, SELLERS HEREBY ASSIGN TO BUYERS ALL OF THEIR RIGHTS UNDER SAID LEASE.

*m.m. 11/11/81*  
5a. Sellers shall retain the B.L.M. privileges based upon said lands & shall transfer them to their other properties

6. ALL PAYMENTS HEREIN PROVIDED SHALL BE MADE AT ZIONS FIRST NATIONAL BANK IN PRICE, UTAH, THE ESCROW HOLDER HEREIN NAMED AND SAID BANK SHALL REMIT ALL PROCEEDS DIRECTLY TO THE UTAH FARM PRODUCTION CREDIT ASSOCIATION, 215 WEST 100 SOUTH, SALT LAKE CITY, UTAH.

7. AT THE TIME OF CLOSING SELLERS AGREE TO MAKE AND EXECUTE TO BUYERS A GOOD AND SUFFICIENT WARRANTY DEED TO SAID REAL PROPERTY AND AN ASSIGNMENT OF SAID WATER STOCK AND TO IRREVOCABLY DELIVER THE SAME IN ESCROW AT THE ZIONS FIRST NATIONAL BANK AT PRICE, UTAH, TO BE HELD BY SAID BANK AND DELIVERED TO BUYERS AT SUCH TIME AS THEY SHALL HAVE FULLY PAID SAID PURCHASE PRICE.

8. SELLERS, AT THEIR OPTION, SHALL FURNISH EITHER TITLE INSURANCE OR AN ABSTRACT OF TITLE ON SAID REAL PROPERTY. IF SELLERS ELECT TO FURNISH AN ABSTRACT OF TITLE, THE LAST CERTIFICATE OF THE SAME SHALL NOT BE EARLIER THAN THE DATE OF THIS AGREEMENT AND THEY



AGREE TO DELIVER THE SAME TO BUYERS FOR EXAMINATION AFTER WHICH SAID ABSTRACT OF TITLE SHALL BE LEFT WITH SAID ESCROW HOLDER AND SHALL BE FINALLY DELIVERED TO BUYERS WHEN THEY SHALL HAVE FULLY PAID SUCH PURCHASE PRICE. IF THERE ARE ANY DEFECTS IN THE TITLE TO SAID REAL PROPERTY WHICH RENDER THE SAME NOT MARKETABLE, SELLERS AGREE TO REMEDY SUCH DEFECTS AT THEIR COST AND EXPENSE AND WITHIN REASONABLE TIME AFTER BEING NOTIFIED THEREOF BY BUYERS.

9. SELLERS AGREE TO PAY ALL TAXES AND WATER ASSESSMENTS UPON SAID PROPERTY AND WATER RIGHTS TO AND INCLUDING THE YEAR 1976. BUYERS AGREE TO PAY ALL TAXES AND WATER ASSESSMENTS FOR THE YEAR 1977 AND EACH YEAR THEREAFTER BEFORE THE SAME BECOME DELINQUENT.

10. ANY SUM ADVANCED BY SELLERS, THE ADVANCEMENT OF WHICH SHALL BE OPTIONAL, IN ORDER TO AVOID DELINQUENCY IN THE PAYMENT OF TAXES AND WATER ASSESSMENTS, SHALL BEAR INTEREST AT THE RATE OF TEN PERCENT (10%) PER ANNUM AND SHALL BE DUE AND PAYABLE ON DEMAND.

11. IF BUYERS FAIL TO PAY ANY INSTALLMENT OF SAID PURCHASE PRICE PAYABLE HEREUNDER WITHIN THIRTY (30) DAYS FROM THE DATE THE SAME FALLS DUE, SELLERS MAY DECLARE THE FULL AMOUNT OF THE UNPAID PURCHASE PRICE TO BE DUE AND OWING AND MAY PROCEED TO FORECLOSE THIS INSTRUMENT AS A MORTGAGE. IF BUYERS FAIL TO RECTIFY ANY OTHER DEFAULT HEREUNDER WITHIN THIRTY (30) DAYS AFTER BEING NOTIFIED IN WRITING BY SELLERS OF THE EXISTENCE THEREOF, SELLERS MAY LIKEWISE EXERCISE THE REMEDY HEREIN ABOVE SPECIFIED. THE REMEDIES HEREIN SPECIFIED ARE FOR THE BENEFIT OF THE SELLERS AND ARE NOT EXCLUSIVE.

12. THE ACCEPTANCE BY SELLERS OF ANY PAYMENT ON THIS CONTRACT AT A DIFFERENT OR LATER DATE OR IN A LESSER AMOUNT THAN SPECIFIED HEREIN SHALL NOT CONSTITUTE AN ESTOPPEL AGAINST SELLERS TO INSIST ON STRICT PERFORMANCE OF ANY OTHER PAYMENT OR COVENANT THENCEFORTH TO BE PERFORMED BY BUYERS.

13. SELLERS HAVE MADE NO REPRESENTATIONS OR WARRANTIES WITH RESPECT TO SAID PROPERTY OR ITS CONDITION EXCEPT AS SET FORTH IN THIS WRITTEN AGREEMENT.

14. IF EITHER OF THE PARTIES EMPLOYS AN ATTORNEY TO ENFORCE ANY OF THE PROVISIONS OF THIS AGREEMENT OR TO PURSUE ANY

REMEDY ON ACCOUNT OF THE BREACH THEREOF, THE LOSING PARTY AGREES TO PAY ALL COURT COSTS AND A REASONABLE ATTORNEY'S FEE.

15. THE FEES OF THE ESCROW HOLDER SHALL BE PAID ONE-HALF (½) BY EACH OF THE PARTIES. THE PORTION OF THE ESCROW CHARGE PAYABLE BY THE SELLERS SHALL BE WITHHELD BY THE ESCROW HOLDER FROM THE FUNDS PAYABLE THROUGH ESCROW.

IN WITNESS WHEREOF, THE PARTIES HERETO HAVE SET THEIR HANDS TO THIS INSTRUMENT IN TRIPPLICATE AS OF THE DAY AND YEAR FIRST ABOVE WRITTEN - ONE COUNTERPART TO BE RETAINED BY SELLERS, ONE BY BUYERS AND THE THIRD TO BE DELIVERED TO SAID BANK FOR ITS FILE.

SELLERS:

Henry Mills  
Maxine Mills

BUYERS:

Nick Kiatipes  
Dora Kiatipes  
Angelo Kiatipes

STATE OF UTAH    )  
                              : SS.  
COUNTY OF CARBON)

PERSONALLY APPEARED BEFORE ME THIS 10TH DAY OF MAY, 1977, MARIUS HENRY MILLS, ALSO KNOWN AS M. HENRY MILLS, M. H. MILLS AND HENRY MILLS, AND MAXINE MILLS, HUSBAND AND WIFE, NICK KIATIPES,