

1958

W. P. Rogers and Magna Mining Co. v. United Western Minerals Co. : Brief of Defendant and Appellant

Utah Supreme Court

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Gustin, Richards & Mattson; Attorneys for Defendant and Appellant;

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IN THE SUPREME COURT
of the
STATE OF UTAH

UNIVERSITY UTAH
DEC 19 1958
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W. P. ROGERS and MAGNA MINING
COMPANY, a New Mexico Corporation,

Plaintiffs and Respondents,

—vs—

UNITED WESTERN MINERALS COM-
PANY, a Delaware Corporation,

Defendant and Appellant.

Case No.
8787

BRIEF OF DEFENDANT AND APPELLANT

Appeal from the District Court of the Sixth Judicial
District, in and for the County of Garfield,
State of Utah

HONORABLE JOHN L. SEVY, JR., *Judge*

GUSTIN, RICHARDS & MATTSSON
*Attorneys for Defendant and
Appellant*

INDEX

	<i>Page</i>
STATEMENT OF FACTS.....	1
STATEMENT OF POINTS RELIED UPON.....	4
ARGUMENT	4
1. THE COURT ERRED IN REFUSING TO DISMISS THE AMENDED COMPLAINT OF PLAINTIFFS.	4
2. THE COURT ERRED IN REMOVING AS AN ISSUE IN THE CASE THE QUESTION WHETHER OR NOT MINERALS OR ORES IN COMMERCIAL QUANTITIES COULD BE PRODUCED FROM SAID CLAIMS.	4
3. THE COURT ERRED IN MAKING A FINDING THAT PERFORMANCE OF WORK IN MINING SAID CLAIMS WOULD NOT RELIEVE THE DEFENDANT FROM THE PAYMENT OF \$500.00 PER MONTH.	4
4. THE COURT ERRED IN MAKING FINDINGS, CONCLUSIONS AND JUDGMENT INCONSISTENT WITH THE TERMS OF THE CONTRACT, EXHIBIT "A."	4
5. IN THE EVENT THE COURT DETERMINES THAT DEFENDANT WAS OBLIGATED TO WORK AND MINE THE MINING CLAIMS OR TO PAY \$500.00 MONTHLY REGARDLESS OF WHETHER OR NOT ORE OR MINERALS COULD BE PRODUCED THEREFROM IN COMMERCIAL QUANTITIES, THEN THE PLAINTIFFS ARE BOUND BY THE ELECTION MADE IN THEIR AMENDED COMPLAINT TO RETAKE TITLE TO THE MINING CLAIMS AND THEY HAD NO RIGHT TO MAKE ANY CONTRARY ALTERNATIVE OR INCONSISTENT ELECTION OF REMEDY AT THE TRIAL.....	11
CONCLUSION	12
APPENDIX (following Brief).....	13-20
EXHIBIT "A" Agreement DIAGRAM	

INDEX—(Continued)

Page

TABLE OF CASES

Cook v. Covey-Ballard Motor Co., 69 Utah 161, 253 P. 196.....	11
Gates v. Daines, 3 Utah 2d 95, 279 P. 2d 458.....	5

TEXTS

12 Am. Jur., Page 749.....	9
12 Am. Jur., Contracts, Pages 791-792.....	10
The Essentials of Logic, Revised Edition	
Page 137	6
Page 140	7

IN THE SUPREME COURT of the STATE OF UTAH

W. P. ROGERS and MAGNA MINING
COMPANY, a New Mexico Corporation,

Plaintiffs and Respondents,

—vs—

UNITED WESTERN MINERALS COM-
PANY, a Delaware Corporation,

Defendant and Appellant.

Case No.
8787

BRIEF OF DEFENDANT AND APPELLANT

STATEMENT OF FACTS

Appellant is referred to herein as defendant and respondents as plaintiffs. All italics are ours.

In this action plaintiffs filed an amended complaint and made a part thereof a contract marked Exhibit "A," upon which the entire action is based. The contract, Exhibit "A," is pleaded in full as an appendix to this brief.

It is the contention of plaintiffs that under the terms of said contract the balance of the purchase price of the mining claims listed in the complaint, namely \$125,000.00, which amount is not in dispute, defendant was required to pay at the rate of \$500.00 per month regardless of the presence of ore or mineral in commercial quantities.

It was further alleged that defendant breached the contract because it failed to operate and develop said claims continuously and diligently and made no effort to produce ores and minerals from said claims. The amended complaint prays that plaintiffs be awarded \$500.00 per month, with interest beginning April, 1956 until judgment, and for the return of the claims (R. 8-9).

Defendant moved that the amended complaint be dismissed upon the ground, among other things, that plaintiffs should have pleaded as a condition precedent that ore and minerals could be produced from said mining claims in commercial quantities. The motion was denied (R. 11).

Defendant filed its amended answer and counterclaim to said amended complaint. The counterclaim at the time of the pretrial was withdrawn.

The defendant alleges in its answer to the amended complaint that it was not required to pay the \$125,000.00 remaining due on the purchase of said claims or to mine and operate the mining claims continuously unless ore or minerals could be produced therefrom in commercial quantities and qualities and that the payment of \$500.00 was only to be made in lieu of production in case there was ore or minerals in commercial quantities and qualities and it then failed to mine the same (R. 14). It was stipulated that no payments of \$500.00 per month had been made, nor had there been any payment from the production of ore and there never was any production of ore in commercial quantities from the property (R. 138).

The Court entered its pretrial order holding as follows:

1. That it was not incumbent on plaintiffs to prove the presence or availability of ores in commercial quantities in order to recover \$500.00 per month specified in the contract.

2. That plaintiffs have elected to pursue the remedy of their right to \$500.00 per month in lieu of production and not the return of the mining claims.

3. That the defendant could not be permitted as a defense to offer evidence to show that ore or minerals cannot be produced from the mining claims in commercial quantities, the same being immaterial.

4. Whether the defendant by doing work upon said mining claims regardless of the production of ore or minerals in commercial quantities could avoid the payment of \$500.00 per month (R. 31).

Evidence was offered on behalf of the defendant to show what work had been performed on the claims and the amount of expenditures made therefor (R. 147-164).

A motion was made to strike said evidence. The order to strike was granted upon the ground that it was immaterial to the issues of the case.

Thereafter Findings of Fact, Conclusions of Law and Judgment awarding plaintiffs judgment for \$9500.00, together with interest in the sum of \$475.00, were entered (R. 34-37).

At the trial of said cause plaintiffs admitted that they claimed no ambiguity in the contract (R. 141).

STATEMENT OF POINTS RELIED UPON

POINT 1

THE COURT ERRED IN REFUSING TO DISMISS THE AMENDED COMPLAINT OF PLAINTIFFS.

POINT 2.

THE COURT ERRED IN REMOVING AS AN ISSUE IN THE CASE THE QUESTION WHETHER OR NOT MINERALS OR ORES IN COMMERCIAL QUANTITIES COULD BE PRODUCED FROM SAID CLAIMS.

POINT 3.

THE COURT ERRED IN MAKING A FINDING THAT PERFORMANCE OF WORK IN MINING SAID CLAIMS WOULD NOT RELIEVE THE DEFENDANT FROM THE PAYMENT OF \$500.00 PER MONTH.

POINT 4.

THE COURT ERRED IN MAKING FINDINGS, CONCLUSIONS AND JUDGMENT INCONSISTENT WITH THE TERMS OF THE CONTRACT, EXHIBIT "A."

POINT 5.

IN THE EVENT THE COURT DETERMINES THAT DEFENDANT WAS OBLIGATED TO WORK AND MINE THE MINING CLAIMS OR TO PAY \$500.00 MONTHLY REGARDLESS OF WHETHER OR NOT ORE OR MINERALS COULD BE PRODUCED THEREFROM IN COMMERCIAL QUANTITIES, THEN THE PLAINTIFFS ARE BOUND BY THE ELECTION MADE IN THEIR AMENDED COMPLAINT TO RETAKE TITLE TO THE MINING CLAIMS AND THEY HAD NO RIGHT TO MAKE ANY CONTRARY ALTERNATIVE OR INCONSISTENT ELECTION OF REMEDY AT THE TRIAL.

ARGUMENT ON POINTS 1, 2, 3 and 4

In discussing the points above named, with the exception of Point No. 5, defendant is of the opinion that

each and every one of them falls within the general question as to what is the correct interpretation of the contract, Exhibit "A." If the contract is interpreted as plaintiffs contend, then any question as to burden of proof is of no importance. If, on the other hand, the contract is interpreted as defendant contends, then each of the points raised would be error in itself and the following propositions would be true:

1. That plaintiffs wholly failed to allege or prove the necessary facts or matters to give them a right of recovery.
2. That defendant was denied the right of proving its defense under defendant's interpretation and construction of the contract.

We are of the opinion that no one would dispute the rule of law that a contract must be read in its entirety in order to obtain its interpretation. *Gates v. Daines*, 3 Utah 2d 95, 279 P. 2d 458.

As the sole question is that of payment, we call the Court's attention to the following language set forth in subparagraph (c) of paragraph 2 of Exhibit "A."

"* * * The balance of the \$125,000.00 purchase price not so paid for in stock *shall be paid for out of 15% of the gross mineral production from said group of claims* *** (italics ours).

The next paragraph that must be considered is paragraph 3. In considering this paragraph and the interpretation of the contract as a whole on the points here involved, we are of the opinion that the vital language is contained in the following:

“* * * Provided, however, that buyer at its option, may pay \$500.00 per month after six months from the date of this agreement in lieu of working and mining said claims so that buyer shall have the obligation of either continuously mining and operating said claims so long as ore or minerals can be produced therefrom in commercial quantities, or if it fails to do so, shall pay sellers the sum of \$500.00 each and every month in lieu of production. The sum of \$500.00 per month so paid shall be credited upon the unpaid balance of the purchase price.”

Although one cannot consider the above as a scholarly statement of the intention or meaning of the parties, we are of the opinion that if the same is analyzed under the well known and established rules of logic and reason which have come down to us from Aristotle, only one conclusion can be reached. The thought or expression as set forth above is what is known as a syllogism. The first portion or premise namely “if ore or minerals can be produced therefrom in commercial quantities” is a hypothetical syllogism. It is stated in the Revised Edition of *The Essentials of Logic* by R. W. Sellers at Page 137 as follows:

“The rule of the hypothetical syllogism — sometimes called the ‘Law of Reason and Consequent’ — is formulated as follows: The truth of the consequent follows from the truth of the antecedent, and the falsehood of the antecedent from the falsehood of the consequent. * * *.”

The disjunctive syllogism “or if it fails to do so shall pay the sellers the sum of \$500.00 per month in lieu

of production” is defined at Page 140 of the text above cited as follows:

“In a disjunctive syllogism, the major premise is disjunctive, while the minor is categorical. Thus, the major premise states possibilities among which the minor makes a selection by affirmation or negation. ***.

“There are two moods, called respectively *modus tollendo ponens* and *modus ponendo tollens*. This means that we can either affirm in the conclusion by denying in the minor premise or deny in the conclusion by affirming in the minor premise. * * *.”

In analyzing the language in the contract the affirmation clause is “in lieu of production.” Therefore, under the rules of logic, if the major premise “so long as ore or minerals can be produced therefrom in commercial quantities” is in the negative, we must deny the minor premise. In other words, if there is no ore or minerals that can be produced in commercial quantities and we are to pay “the sum of \$500.00 each month *in lieu of production*,” it follows that we would have nothing to pay because there would be nothing produced and nothing could come from production. To hold other than as above outlined would be to ignore entirely the statement as we have heretofore outlined.

The only true meaning that can be given the contract is that if minerals or ores in commercial quantities were producible and if for some reason the defendant did not desire to mine the claims continuously, then it was bound to pay to the plaintiffs the sum of \$500.00 in lieu of production. If this is not the true meaning of the

contract, then it should have been drawn to state that regardless of the production of ore or the prescence thereof in commercial quantities, defendant agreed in pay plaintiffs the purchase price at the rate of \$500.00 per month or at a rate of not less than \$500.00 per month.

If paragraph 3, and particularly the second sentence thereof, is analyzed from a grammatical standpoint, one must come to the same conclusion as above stated. In order to assist in the interpretation of this paragraph, we have attached to this brief as an appendix a photostatic copy of a diagram of this paragraph. As shown by the diagram, payment is to be made by buyer monthly under certain circumstances and conditions. The controlling factor is that buyer has the obligation to mine or pay only so long as ore or minerals in commercial quantities can be produced. Payment can be made in lieu of mining, but the entire obligation is modified by the clause "so long as ore or minerals can be produced in commercial quantities." If ore can be produced in commercial quantities, then buyer is only to pay in lieu of production. If, however, ore cannot be produced in commercial quantities, then buyer has no obligation to either mine or pay.

In determining the correct interpretation of the contract relative to the alleged duty of defendant to produce and pay out of production or to make minimum monthly payments of \$500.00 each, plaintiffs would have the Court read and consider only the following part of paragraph 3 of the agreement:

*** * * Provided, however, that buyer at its option, may pay \$500.00 per month after six

months from the date of this agreement in lieu of working and mining said claims * * *.”,

but the parties did not stop at that point or with that language. Instead, they went on, without even a comma to break the thought, and used the following language to explain their true intent:

“* * * so that buyer shall have the obligation of either continuously mining and operating said claims *so long as ore or minerals can be produced therefrom in commercial quantities, or if it fails to do so, shall pay sellers the sum of \$500.00 each and every month in lieu of production.* * * *.”

The parties had a definite purpose in mind in adding the explanatory language last quoted. To accept plaintiffs’ construction of the contract would be to ignore completely the language by which the parties explained their intent and would ignore the situation on which they based the duty to pay, namely, the ability to produce ores in commercial quantities. As stated in 12 *Am. Jur.* page 749, “A court is not at liberty to revise an agreement while professing to construe it.” The lower court’s interpretation violates the rule that the court has no right to re-write the agreement of the parties.

Actually, no minimum amount is stated in the event defendants mine and produce and pay out of production “so long as ore or minerals can be produced therefrom in commercial quantities,” since it is clear that if defendant mines and pays out of production, the sum payable is 15% of the gross production, regardless of what that amounts to, but in any event, the duty to pay, whether

out of production or in lieu of production, is clearly based on the presence of ore in commercial quantities.

It is a well established principle of law that agreements must receive a reasonable interpretation according to the intention of the parties at the time of entering into the contractual relationship. 12 *Am. Jur.*, Contracts, pages 791-792:

“Agreements must receive a reasonable interpretation, according to the intention of the parties at the time of executing them, if that intention can be ascertained from their language. In the transactions of business life, sanity of end and aim is at least a presumption, though a rebuttable one. A reasonable interpretation will be preferred to one which is unreasonable. When the evidence of the agreement furnished by the contract itself is not plain and unmistakable, but is open to more than one interpretation, the reasonableness of one meaning as compared with the other and the probability that men in the circumstances of the parties would enter into one agreement or the other are competent for consideration on the question as to what the agreement was which the written contract establishes.”

It is an unreasonable interpretation to assume that the defendant would pay the balance of the purchase price of \$125,000.00 at the rate of \$500.00 per month and the plaintiffs would agree to be paid out of production unless both parties contemplated the presence of a commercial ore body.

The only reasonable interpretation is the one for which the defendant is contending, namely: that the

duty to pay and the right to receive payments were conditioned on the presence of a commercial ore body.

Furthermore, the Court committed error in sustaining the objection to the evidence submitted by defendant to show the work that had actually been done on the claims and in making its finding that such an issue was immaterial.

POINT 5

Plaintiffs prayed in their amended complaint as follows:

- (a) For the sum of \$500.00 per month, together with interest from February, 1956 until judgment.
- (b) For reconveyance by the defendant to plaintiffs of the mining claims in question.
- (c) For general relief.

By praying for the return of the mining claims, plaintiffs exercised an election of remedies inconsistent with a demand for payment of the purchase price of said claims. Bringing the action based upon this remedy, which is alternative and inconsistent with any other remedy provided for in the contract or by law constituted an irrevocable election, and plaintiffs could not thereafter demand payment of the purchase price. This principle is stated in the case of *Cook v. Covey-Ballard Motor Co.*, 69 Utah 161, 253 P. 196 as follows:

“And this court has held, where there is a duty of election as to a particular remedy, the bringing of an action based upon one remedy constitutes an irrevocable election, except in case of

mistake of fact or other legal excuse. Howard v. Paulson Co., 41 Utah, 490, 127 P. 284.”

CONCLUSION

We respectfully submit as follows:

1. Plaintiffs failed in their proof.
2. The contract provides that there be ore or minerals that could be produced in commercial quantities before the defendant would be required to pay or mine.
3. The plaintiffs irrevocably made their election to accept the return of the mining claims as their remedy.

The judgment of the lower Court should be reversed and the Court directed to enter judgment in favor of the defendant.

Respectfully submitted,

GUSTIN, RICHARDS & MATTSSON

*Attorneys for Defendant
and Appellant*

APPENDIX
EXHIBIT "A"
AGREEMENT

WHEREAS, W. P. ROGERS of Farmington, New Mexico, who is a party to this contract, has acquired certain mining claims hereinafter specifically referred to and described, all of which are located within the State of Utah, said claims being acquired by Rogers as agent for MAGNA MINING CO., a New Mexico corporation, and which company as owner of beneficial interest of said mining claims, joins Rogers in this agreement, and are together designated Sellers; and

WHEREAS, UNITED WESTERN MINERALS CO., a Delaware corporation, having its principal place of business in Santa Fe, New Mexico, desires to purchase two groups of claims designated the Coleman Canyon Group and the Phoebe Group, as hereinafter designated, and which company shall be referred to in this agreement as Buyer;

THE PARTIES agree as follows:

1. Sellers agree to sell and Buyer agrees to buy the group of claims known as the COLEMAN CANYON group, consisting of 67 Federal lode mining claims, and situated in Garfield County, Utah, more particularly shown on Plat marked EXHIBIT I attached to and made a part of this agreement.
2. The consideration for the sale and purchase of said Coleman Canyon group of mining claims is the sum

of One Hundred Fifty-five Thousand Dollars (\$155,000.00), to be paid as follows:

(a) \$3,000.00 to be placed in escrow with a copy of this agreement in the First National Bank of Santa Fe, Santa Fe, New Mexico, to be applied upon the purchase price;

(b) \$12,000.00 to be paid upon furnishing and acceptance of title as hereinafter set forth, and 15,000 shares of common capital stock of buyer corporation at a value of \$1.00 per share;

(c) The balance of \$125,000.00 shall be paid in one of the following ways at the option of the Buyer: At the option of Buyer, to be exercised upon acceptance of title to this group of claims, buyer may pay up to \$62,500.00 of said amount in stock of Buyer's corporation at a value of \$1.00 per share, or any portion less than the \$62,500.00 in such stock. *The balance of the \$125,000.00 purchase price not so paid for in stock shall be paid for out of 15% of the gross mineral production from said group of claims.* The option of payment shall be exercised by Buyer when title is furnished as hereinafter set forth and accepted by the buyer, and the option so exercised may not thereafter be changed but shall be and become a binding obligation upon the buyer pursuant to the other terms of this agreement. A copy of the option as exercised shall be delivered to the escrow agent hereinabove named and the original shall be delivered to the sellers herein named.

3. As to the payment of the purchase price out of production, this payment shall be 15% of the gross mill receipts of all minerals and metals mined and produced from such claims, but there shall be no actual payment due to sellers by buyer for six months after the date of this agreement; however, *the obligation shall accrue during said period as to any minerals produced and marketed* even though the payment is delayed until six months from the date of this agreement. Thereafter, payment shall be made monthly and buyer shall keep accurate books and records and render an accounting monthly to the sellers with the remittance of the 15% of the gross receipts from said claims; provided, however, that buyer at its option, may pay \$500.00 per month after six months from the date of this agreement *in lieu of working and mining said claims so that buyer shall have the obligation of either continuously mining and operating said claims so long as ore or minerals can be produced therefrom in commercial quantities, or if it fails to do so, shall pay sellers the sum of \$500.00 each and every month in lieu of production.* The sum of \$500.00 per month so paid shall be credited upon the unpaid balance of the purchase price.

4. Sellers agree to sell and Buyer agrees to buy a second group of claims known as the PHOEBE GROUP, consisting of 42 Federal lode mining claims situated in Garfield County, Utah, more particularly shown on Plat marked EXHIBIT II attached hereto and made a part of this agreement. The total sale and purchase price of said Phoebe Group is the sum of \$6300.00, to be paid for

upon the furnishing and acceptance of title as hereinafter provided, either in stock of the Buyer company or in cash at that time, at the buyer's election. If paid for in stock, said payment shall be on the basis of \$1.00 per share for such stock.

5. Sellers agree to furnish Buyer, as soon as abstracts can be compiled and furnished, abstracts of the County records pertaining to said mineral claims, such abstracts to be limited to the instruments affecting the minerals in and under said claims, and will also furnish to buyer an opinion of the law firm of Olsen and Chamberlain of Richfield, Utah, pertaining to all of the said claims covered by this agreement as reflected by both the County records and the Bureau of Land Management records in the Federal Land Office within the State of Utah, also covering the State Land records insofar as it affects any state lands included in said claims; and further agree to furnish to buyer any and all conveyances or documents pertaining to the mineral title to said claims as well as maps, geological information, and such other information or documents as sellers may have which will be of assistance to the buyer in accepting title and developing and mining such claims.

6. Buyer shall have a period of thirty days to examine said abstracts of title after receipt thereof, and if any defects appear, buyer shall notify sellers in writing of such defects within the thirty-day period, and thereafter sellers have a reasonable time and opportunity in which to clear such defects, and if such defects cannot be cleared within six months from the date of notice

of the defects, then buyer may, at its option, terminate and cancel this agreement without any further and other obligation hereunder. In the event any possible defects cover only a small portion of the claims involved and cannot be cured, then the parties shall attempt to prorate the consideration according to the area and value of the claims which have defective title.

7. Sellers shall immediately execute the necessary deeds and assignments conveying said claims to the buyer and place such instruments of conveyance in escrow with the escrow agent hereinabove named, it being understood that the type of conveyance shall be a special warranty deed warranting against any encumbrances by, through, or under the sellers, and that the mineral interests in said claims are free and clear of any liens and encumbrances excepting an existing five per cent overriding royalty on the Phoebe group of claims which is recognized by the parties hereto.

8. Sellers will furnish to buyer a certified copy of the resolution of the Board of Directors of Magna Mining Co. showing approval of this agreement and will also furnish such financial statements and other documents showing that those transactions are not subject to the rights of any creditors of the corporation.

9. The escrow agent hereinabove named is hereby authorized and directed to deliver to the buyer all of the instruments of conveyance held by it, upon payment to the escrow bank of the entire sum of \$30,000.00 with

regard to the Coleman Canyon group of claims and the payment of cash or stock as hereinabove provided for the purchase price of the Phoebe group of claims, and at the time of delivery, to credit to the account of Magna Mining Co. or pay to it all of said purchase price. In the event the purchase price is not paid according to this agreement and upon receipt by the escrow bank of an affidavit from some member of the law firm of Simms and Modrall in Albuquerque, New Mexico, representing the sellers, the escrow agent shall redeliver all instruments of conveyance held by it to the sellers and further pay to sellers the \$3000.00 being held by it in escrow.

10. In the event the buyer fails to make the payments for the balance of the purchase price on the Coleman Canyon group of claims out of the production from said claims or fails to operate and mine said group and does not pay the \$500.00 per month on the purchase price as hereinabove provided, then and in any of such events, the sellers at their option may retake title to all of the Coleman Canyon group of claims, in which event the buyer shall have no further or other obligation relative thereto, or at sellers' option, may pursue any other legal remedy which they may have against the Buyer. It is understood and agreed that the payment out of production on the Coleman Canyon group of claims shall be a lien running with the title to said claims until the full purchase price is paid, and that any assignee or transferee of said claims shall specifically take subject to the obli-

gation of the payment out of production therefrom as provided by this agreement.

DATED on this 4th day of August, 1955.

/s/ W. P. Rogers
MAGNA MINING CO., a New Mexico
Corporation
By /s/ Walter Gibson, President
SELLERS

ATTEST:

/s/ George A. Rutherford
Secretary

(SEAL)

UNITED WESTERN MINERALS
CO., a Delaware corp.
By /s/ Alva A. Simpson Jr., President
BUYER

ATTEST:

/s/ Herbert A. Holt
Secretary

(SEAL)

STATE OF NEW MEXICO }
COUNTY OF BERNALILLO } ss

The foregoing instrument was acknowledged before me this 4th day of August, 1955, by W. P. ROGERS.

(SEAL)

/s/ Arvilla B. Knight
Notary Public

My Commission expires *February 15, 1958*

STATE OF NEW MEXICO }
COUNTY OF SAN JUAN } ss.

The foregoing instrument was acknowledged before me this 5th day of August, 1955, by Walter Gibson, Presi-

dent of MAGNA MINING CO., a New Mexico corporation, on behalf of said corporation.

/s/ James N. Gibson
Notary Public

(SEAL)

My com. expires 3-2-59

STATE OF NEW MEXICO }
COUNTY OF BERNALILLO } ss

The foregoing instrument was acknowledged before me this 24th day of August, 1955, by Alva A. Simpson Jr., President of UNITED WESTERN MINERALS CO., a Delaware corporation, on behalf of said corporation.

/s/ Caroline Harward
Notary Public

(SEAL)

My com. expires: 11-16-58