

1958

# W. P. Rogers and Magna Mining Co. v. United Western Minerals Co. : Petition for Rehearing by Plaintiffs and Respondents

Utah Supreme Court

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Olsen and Chamberlain; Attorneys for Plaintiffs and Respondents;

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IN THE SUPREME COURT  
OF THE STATE OF UTAH

FILED  
AUG 1 1958

W. P. ROGERS and  
MAGNA MINING COMPANY,  
a New Mexico Corporation,  
*Plaintiffs and Respondents,*  
— vs. —  
UNITED WESTERN MINERALS  
COMPANY,  
a Delaware Corporation,  
*Defendant and Appellant.*

Clerk, Supreme Court, Utah

Case  
No. 8787

Petition For Rehearing  
By Plaintiffs and Respondents

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## I N D E X

	Page
PETITION FOR REHEARING.....	1
STATEMENT OF FACTS.....	3
STATEMENT OF POINTS.....	4
ARGUMENT .....	4
POINT. I. PARAGRAPH 10 OF THE AGREEMENT RE- SOLVES THE AMBIGUITY AND PREVENTS A FORFEITURE TO SELLERS AND UNJUST ENRICHMENT OF BUYER.....	4
POINT. II. THE INTERPRETATION PLACED BY THE BUYER ON THE AMBIGUOUS PROVISIONS OF THE AGREEMENT RESOLVES ALL DOUBT IN FAVOR OF THE SELLERS.....	6
CONCLUSION .....	10

### Authorities Cited

12 Am. Jur., p. 783, Contracts, Sec. 246, para. 2.....	6
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### Cases Cited

Hardinge Company v. Eimco Corp., 1 Utah 2d 320, 266 P. 2d 494.....	9
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## Petition For Rehearing By Plaintiffs and Respondents

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TO THE HONORABLE, THE CHIEF JUSTICE AND THE ASSOCIATE  
JUSTICES OF THE SUPREME COURT OF THE STATE OF UTAH :

The Plaintiffs and Respondents, W. P. Rogers and  
Magna Mining Company, a New Mexico corporation, pre-  
sent this Petition for a rehearing of the above cause and  
in support thereof respectfully show :

1. The appeal taken in this cause by the Defendants  
and Appellants was argued before this Court on June  
10, 1958.

2. On June 30, 1958, this Court rendered its decision remanding the cause to the trial court for further proceedings to determine, by evidence dehors the written contract upon which the action was commenced, the intention of the parties signatory thereto, and reversing the judgment entered by the trial court in favor of your petitioners.

3. The Plaintiffs and Respondents seek a rehearing for the following reasons:

A. The trial court, ruling that the contract was unambiguous, held in favor of the Plaintiffs and Respondents. This Honorable Court reversed that ruling and decision, declaring the contract to be ambiguous.

The Plaintiffs and Respondents, advocating affirmance of the trial court's finding did not, on appeal, argue matters in the written contract itself which are dispositive of the conflict which the Supreme Court has found in those provisions to be irreconcilable.

B. The Plaintiffs and Respondents, in seeking to secure affirmation of the trial court's decision, were justified in omitting arguments which favor a holding of ambiguity in the terms of said contract, and therefore likewise justified in not submitting arguments dispositive of the ambiguity.

WHEREFORE, Petitioners respectfully submit that a rehearing should be had and the decision of this Honorable Court revised to affirm the holding of the trial court

upon another ground or grounds, more fully treated in the Brief in support hereof, the Petitioners respectfully believing that a re-examination of the record will result in a revision of the decision herein and the avoidance of multiple litigation.

## STATEMENT OF FACTS

The Plaintiffs and Respondents wish to advance two reasons why a re-examination of the contract and the total record should cause the prior decision to be revised to affirm the trial court's result.

We acknowledge our own omission to argue these points either forcefully or at all — but seek avoidance of the rule that a neglectful failure of that sort might preclude a rehearing by asserting in justification of that default that all arguments before and the judgment of the trial court was that the contract was not ambiguous. We do not seek by this rehearing to contradict or argue with this Honorable Court's finding that the principal provisions of the contract argued and examined before it were conflicting. However, for those two reasons which are the argumentative points of this brief, we shall attempt to demonstrate that the ambiguity which the Court has found is dispelled and the irreconcilability resolved in favor of the same result as that reached by the trial court.

It appears to us that more simplicity and clarity may be achieved by referring to the Plaintiffs and Respondents, the petitioners herein, as the Sellers, and the Defendant and Appellant as the Buyer.

## STATEMENT OF POINTS

### POINT I.

PARAGRAPH 10 OF THE AGREEMENT RESOLVES THE AMBIGUITY AND PREVENTS A FORFEITURE TO SELLERS AND UNJUST ENRICHMENT OF BUYER.

### POINT II.

THE INTERPRETATION PLACED BY THE BUYER ON THE AMBIGUOUS PROVISIONS OF THE AGREEMENT RESOLVES ALL DOUBT IN FAVOR OF THE SELLERS.

## ARGUMENT

### POINT I.

PARAGRAPH 10 OF THE AGREEMENT RESOLVES THE AMBIGUITY AND PREVENTS A FORFEITURE TO SELLERS AND UNJUST ENRICHMENT OF BUYER.

The Buyer, if unavailability of commercial ore is established by further proceedings in the lower court and is at the same time held to constitute a defense to suit for the purchase price, has unjustly benefited and the Sellers have lost all title to their mining claims without remedy. That such was not intended, notwithstanding even diametrically conflicting language in paragraph 3, is manifested without any obscurity, doubt, or qualification in paragraph 10 of the agreement which reads:

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 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 have against the Buyer.

This section of the contract makes no reference to commercially available ore. It states only that if the Buyer "*fails to operate and mine said group and does not pay the \$500.00 per month on the purchase price*" the Sellers may retake title or sue for the purchase price. The record is uncontradicted in that both of those conditions are unfulfilled: Buyer has not operated and mined the Coleman group, and has not paid the \$500.00 per month. If the Buyer should argue that the phrase "as hereinabove provided" in any way conditions the obligation to mine and produce and pay Sellers 15% of the proceeds thereof or respond in monthly installments the complete answer is that the reverse is true, viz.: those irreconcilable provisions in paragraph 3 are controlled by this clearly enunciated option of remedies reserved to the Sellers.

Then occurs the most significant stipulation, providing 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*. (emphasis supplied)

which is entirely vitiated by any contention that commercially available ore is a condition precedent to recovery of



either (the Sellers having the option to elect) the claims or the purchase price since at the time of the conveyance to Buyer either monthly or production payments were all that remained.

Paragraph 10, we submit, must control those conflicting expressions in paragraph 3, to resolve their ambiguity in favor of the result of the trial court for the fundamental rule that conflicting provisions in an agreement are to be resolved by reference to unambiguous recitals bearing thereupon. 12 Am. Jur., page 783, Contracts, Section 246, paragraph 2.

Without giving expression to paragraph 10 which is the Sellers' remedy, the contract would operate to exact a forfeiture against Sellers and confer an unjust benefit upon Buyer.

## POINT II.

### THE INTERPRETATION PLACED BY THE BUYER ON THE AMBIGUOUS PROVISIONS OF THE AGREEMENT RESOLVES ALL DOUBT IN FAVOR OF THE SELLERS.

Although reference was made in the original brief of these petitioners to the practical construction placed on the agreement by the Buyer, its significance assumes much greater proportion now that this Court has held certain portions of the contract to contain irreconcilable terms.

As pointed out in our original appeal brief, a letter agreement modified the original contract by granting, at the request of Buyer, an extension of time for the com-

mencement of these disputed installments. We argued that this request was an acknowledgement of the contemplation by the Buyer that it was obligated to pay and so interpreted the contract. We argued, however, that the original agreement was unambiguous without reference to the amendatory supplement. The Court's holding now demands, we submit, a closer analysis of exactly what was the nature of the obligation the Buyer wished to defer temporarily.

Here we must state that it is immaterial what language or what description the Buyer employed in its letter to the Sellers to identify the obligation it sought to defer. It is essential, we submit, to determine exactly what the Buyer had agreed to do which it desired delayed. The letter amendment drawn and submitted by the Buyer states, in the next-to-last paragraph:

The date for beginning of payments out of gross mineral production, provided for in clause 3 of the Agreement of August 4, 1955, will be postponed until April 4, 1956.

The clause 3 referred to states:

\* \* \* 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 payment is delayed until six months from the date of this agreement. Thereafter, payment shall be made monthly \* \* \*

This six-month moratorium on all obligations of the Buyer was the one it sought to extend for an additional

two months. If the contract is given the meaning contended for it by the Buyer in this appeal, *their request for this extension can have no sense, meaning, or purpose whatsoever*, and this is a very fine but equally momentous point: First, consider that for purposes of this argument, at least, the only unknown factor is the presence or absence of commercial ore. If there is ore commercially available on the claims, then the Buyer, like any purchaser of a business property, would like the property to pay for itself. The Buyer here, knowing that it had obligated itself to pay a balance of \$125,000, wanted to delay the payments thereon until the business property could begin liquidating its own encumbrance and requested that they be given an additional two months, enabling them to prepare for mining more sufficiently as well as benefit by later weather, for commencing these payments, either out of production or on a minimum basis. If ore could be mined, then the Buyer only had to pay to Sellers 15% of the gross value of production, even if that amounted to substantially *less* than \$500.00 per month. Thus commencement of actual mining — meaning actual production of minerals — would satisfy the obligation of the Buyer (R., page 4, para. 3 of the Contract and R., page 104 and page 9 of Appellant's original brief).

*On the other hand*, if the contract is interpreted the way the Buyer *now* contends, assume *either one* of the two possibilities, i. e., presence of ore or absence of ore, and no useful consequence can be attached to the amendment proposed by the Buyer. First, if there is commercial ore present they are going to be, even under their theory,

obliged to pay the full purchase price, so the time or manner of payment would be immaterial. If ore were not available in commercial quantities, and if as they have urged it is a condition precedent to recovery, *then they could have waited five years or even more to make a determination of that, and still have absolutely no liability.* If their view were adopted and it ever is determined conclusively that ores cannot be developed commercially at the properties in question, the finding would relate back to April 4, 1956, and not only would the Buyer be excused from liability for the purchase price, but also the Sellers could not recover their property. That is the defense Buyer has asserted. Thus, under either circumstance, that is either with the *presence* of ore, or with the *absence* of ore, the Buyer could have had absolutely no purpose or objective in requesting and obtaining an extension of the moratorium on monthly payments of the balance unless the Buyer had been confident that it had an unqualified obligation to pay something each month under either condition, either \$500.00 per month or 15% of an actual mining operation.

This is the contemporaneous and practical construction placed upon the agreement by the Buyer which should resolve any ambiguity found in the principal terms of the contract. *Hardinge Company v. Eimco Corp.*, 1 Utah 2d 320, 266 P. 2d 494.

Stated succinctly, the Buyer viewed the contract precisely as we are now urging it to be construed by this Court: If the obligation to mine or pay monthly install-

ments was unqualified, they could benefit by deferring those payments an additional two months. This benefit they sought and obtained (R. 29). If they had believed the contract to mean what they now contend it does, the extension could be of no benefit because if commercial ore were a condition upon recovery of the purchase price, they would have had no obligation at any time; that fact would have had relation back to execution of the contract and excused further performance.

That the first time the Buyer has contended that commercial ore is a condition precedent to its obligation was in this lawsuit is clearly illustrated by their action in requesting and obtaining an extension of the first due date for a monthly installment.

## CONCLUSION

We respectfully petition this Court for a rehearing and re-examination upon the record and the contract, believing that the Court might have some questions, answers to which counsel may assist the Court in reaching.

Respectfully submitted,

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