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Rimledge Uranium and Mining Corp and Kenneth J. McCormick v. Federal Resources Corporation and Hecla Mining Company : Appellants' Reply Brief

Utah Supreme Court

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Delaney & Balcomb; Brayton, Lowe & Hurley; Attorneys for Plaintiffs-Appellants;

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IN THE SUPREME COURT
of the
STATE OF UTAH

FILED

- 1962

RIMLEDGE URANIUM AND
MINING CORPORATION and
KENNETH J. McCORMICK,
Plaintiffs-Appellants,

vs

FEDERAL RESOURCES
CORPORATION and
HECLA MINING COMPANY,
Defendants-Respondents.

Clerk, Supreme Court, Utah

Case No. 9604

UNIVERSITY UTAH

JUN 1 1962

APPELLANTS' REPLY BRIEF

Appeal from the Judgment of the Third District Court
for Salt Lake County, Hon. A. H. Ellett, Judge

DELANEY & BALCOMB and
BRAYTON, LOWE & HURLEY
1001 Walker Bank Building
Salt Lake City, Utah
Attorneys for Plaintiffs-Appellants

VAN COTT, BAGLEY CORNWALL & McCARTHY
and CHARLES E. HORNING
Suite 300, 65 South Main St. Salt Lake City, Utah
Attorneys for Defendants-Respondents.

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RIMLEDGE URANIUM AND
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Case No. 9604

APPELLANTS' REPLY BRIEF

POINT I.

ALL POINTS RAISED ON APPEAL WERE
RAISED IN THE LOWER COURT.

Respondents, in their brief, make various statements as to what appellants did or did not do in the lower Court, which are not supported by the record, and with which Appellants disagree including:

(a) From 1955 to 1960 "appellants have understood the basis upon which their royalty payments are being computed; they accepted the said payments without objecting or suggesting that the royalty payments were improperly computed (R. 15)." (Respondents' brief 10.)

The reference to R. 15 is to respondents' own answer, the allegations of which as a matter of law are denied (URCP 8(d)).

The deposition of McCormick (D64-65) shows that the basis for payment was not investigated until 1960 and suit was brought in 1961.

(b) "In their brief, appellants contend, although *they raised no such objection before the District Court*, that the meaning of the royalty clause in question is so clear and unambiguous" that the court may not look to parol evidence. (Respondents' brief 11).

This proposition was the very basis of appellants' motion for summary judgment and memorandum in support thereof (Tr. 177).

(c) "Appellants contend that this ruling by the court differentiates their royalty interest with regard to royalties paid and royalties to be paid, . . . The court's *ruling is in accord with the declaratory judgment sought in their complaint.*" (Respondents' brief 25-26)

Appellants' sought an accounting, judgment and declaratory judgment *all* based upon gross proceeds (Tr. 2-3).

(d) "No contention was raised by appellants that they were entitled to royalties on vanadium contained in ore processed."

Many interrogatories and answers thereto are in the record involving this issue (Tr. 163).

The complaint seeks “an accounting of the gross proceeds of the sale of *ore from said claims*.” (Tr. 2) This is not limited, nor was it intended to be limited to uranium. Furthermore the court was advised during the argument that vanadium royalties were claimed.

(e) “No contention was raised by appellants that . . . respondents should not be allowed to deduct development allowances paid by Uranium Reduction Company.” (Respondents’ brief 30.)

The language of the complaint covers “*gross proceeds of the sale*” (Tr. 2) which appellants then and now contend includes fictitious development allowances; and the lower court was so advised, not only by the complaint, but also in the argument.

(f) “No contention was raised by appellants that . . . appellants had not received full payment of royalties based on Circular 5 prices” (Respondents’ brief 30.)

The complaint seeks “*an accounting of the gross proceeds*.” (Tr. 2) How much more explicit should it be?

(g) “A full transcript of the hearing on appellants’ motion, which is not available because of a misunderstanding by counsel as to what aspects of the hearing were being reported, would clearly show that the only point relied on by appellants to establish their right to an accounting was that their royalty payments should be computed” on selling price received. (Respondents’ brief 30.)

There was no “misunderstanding” as to a reporter. It was stipulated the reporter need not take the argument.

If respondents intended to rely upon some supposed concessions or abandonments by appellants during their argument (which appellants deny were made) they should have prepared a statement of the proceedings as a part of the record, in accordance with URCP 75 (m).

(h) “That appellants considered a determination of this single question to be disposition of the case is shown by” their memorandum. (Respondents’ brief 30.)

Appellants’ motion was not directed to whether or not there should be an accounting, but rather what the basis of an accounting should be. Had appellants prevailed, the case would not have been over; the respondents would still have had to account. Thus, just as pointed out in our brief as to respondents’ motion, neither motion if granted should have terminated the case. The issues not before the court were not argued in the memorandum. The questions as to vanadium payments, development allowances and completeness of accounting were intentionally not submitted on a motion for summary judgment, and could not properly have been decided on summary judgment because the record thereon is inadequate. These questions should be decided by the lower court at a trial.

But respondents’ contention does not follow that appellants, by asserting that they are entitled to a summary judgment on one point, thereby waive all other points on which no such motion is made. URCP 56(a) expressly provides for a summary judgment “upon all or any part” of a case.

(i) The only contention raised by appellants' motion to amend the judgment "was that appellants should be entitled to elect to have their royalty payments" based upon concentrated ore prices less milling costs for all royalty payments, past and future, rather than having different bases for past and future. (Respondents' brief 31.)

It would indeed be a novel rule if appellants waived any point not set out in a motion to amend, as respondents seem to contend.

The court, while making his ruling, was informed by respondents' counsel that their motion was for a "summary judgment rather than for no cause of action" (Tr. 211), to no avail.

The motion to amend was made pursuant to URCP 59 (e), because appellants thought that the judgment was at variance with the court's oral ruling in this one particular only and that it therefore did not reflect the court's intention as reflected by the following record:

"Mr. Lewis: I think it should provide, Your Honor, that that determination for future can only be made with respect to future ores, not past ores.

"The Court: Well, it is identical, isn't it?

"Mr. Lewis: What I mean is they shouldn't be able to elect now to treat ores that were mined and sold months ago — to pay their share of processing.

"The Court: Is there any difference? Isn't it identical, penny for penny, up to now?

"Mr. Benson: Yes.

“Mr. Lewis: Perhaps it is.

“The Court: If he makes his election now on how he takes, that will bind him hereafter. Will you draw findings I can sign?

“Mr. Lewis: Yes, Your Honor.” (Tr. 212)

Appellants agree with the general proposition argued by respondents that issues not tried in the lower court cannot be presented on appeal. The fallacy in respondents' position is that such proposition is inapplicable here because:

1. The issues were presented.
2. The record shows they were presented. ,
3. Respondents having prevailed on their motion for summary judgment “have the burden of establishing the lack of a triable issue of fact *upon a record.*” - 6 *Moore's Federal Practice* 2364.
4. There was no waiver of issues.
5. There is no record of any waiver.

All of the cases, except two cited by respondents to the effect that issues may not be raised for the first time on appeal, are based upon the fact that the *pleadings* did not raise the issues. That is not true here.

One exception is the dicta in *Drummond v. Union Pacific Railroad Company*, 111 Utah 289, 177 P 2d 903, relied on by respondents, that the court would not consider new issues. This was in a case in which Mr. Justice Latimer saw a point not seen by appellate counsel even

on appeal, which the appellate court properly said it would not rule upon.

The other exception is in *River Plate & Brazil Conferences v. Pressed Steel Car Company*, 227 F 2d 60 (2d Cir. 1955) which was a case in which a summary judgment was granted defendant because plaintiff, in order to recover had to show board approval of the contracts in question which plaintiff did not show. The defendant produced the contracts which showed on their face they were not approved. The record showed that plaintiff "came forward with nothing to combat the obvious conclusion that the Board never approved any agreement." On appeal plaintiff asserted there in fact had been an approval. The court rightly held that such assertion came too late. But that is not similar to the case at bar. In that case there was no question as to whether other issues were waived, but rather whether new evidence relating to the very point decided on summary judgment could be considered for the first time on appeal. In the case at bar, appellants are not asserting that the Supreme Court should consider additional evidence on the point as to whether or not defendants' summary judgment should have been granted, but rather appellants are asserting that *on the record* the summary judgment as to the basis of accounting was wrong, and that such a ruling was not dispositive of all the issues in the case. Thus this case is not in point.

POINT II.

THE ROYALTY IS NOT BASED UPON "NET SMELTER OR MILL RETURNS," BUT UPON "GROSS PROCEEDS OF SALE."

As pointed out in appellants' brief (3), any question which existed in the record title as to whether the royalty should be based upon "gross proceeds of sale" as originally reserved, or upon "net smelter or mill returns" as recited in a subsequent assignment was resolved by the adoption of the "gross proceeds of sale" language, and the rejection of the "net smelter or mill returns" language by defendants' attorney when agreeing with plaintiffs' predecessor on the basis of the royalty.

Despite this, defendants still argue that the royalty is a "net smelter or mill return" royalty. (Respondents' brief 12, 19.)

Even if there had been no subsequent agreement between the parties resolving the existing problem in the record, this argument is untenable for two reasons:

The first reason is as follows. The recitation of "net mill or smelter return" is found in the assignment from Pryor and Deniel to U. & I. Uranium Inc. and it provides:

"Whereas, the undersigned owners and locators by contract deed transferred the title thereto to one Melvin D. Rueckhaus, as Trustee (for diverse others owners) but subject to a reserved royalty to the undersigned of 15% of the net mill or smelter returns from any and all ore to be

thereafter shipped or produced from said mining ground, and to be paid the said undersigned owners."

The granting language in said assignment is as follows:

"For and in consideration of One Dollar, and other valuable consideration as hereinbefore referred to, the undersigned hereby assign, set over and transfer to U. & I. Uranium Inc. one-third of the royalty they were to receive under said Rueckhause agreement." (Tr. 31)

There is no question that the royalty which Pryor and Daniel had was a gross and not a net royalty. The instrument creating it is before the Court and it so states. The granting language is broad enough to transfer the royalty interest whether it was gross or net.

In construing documents the granting language takes precedence over language contained in recitals. 16 *Am. Jur. Deeds* 241.

An erroneous recital does not affect the operation of the assignment. *Blackburn v. Pond Creek Coal & Land Co.*, Ky., 287 S.W. 2d 610.

The assignment to U. & I. does not create a situation in which there was granted only a net royalty. As a matter of construction the error in the recital should be disregarded by the court, the true factual situation should be recognized (that the royalty was gross, not net) and the assignment would thus be effective to transfer the gross royalty which existed. 26 *C.J.S. Deeds* 26.

Plaintiffs can therefore rely on the chain of title starting with Pryor and Daniel.

The second reason is as follows: U. & I. Uranium Company merged into defendant Federal Uranium Company. U. & I. Uranium Company assigned to plaintiffs' predecessor, McCormick, a gross royalty. If there was no gross royalty to assign but rather only a net, then plaintiffs' predecessor would have breached its implied warranty that the thing assigned exists.

“An assignor of a right, by assignment under seal or for value, warrants to the assignee, in the absence of circumstances showing a contrary intention . . . (b) that the right, as assigned, actually exists and is subject to no limitations or defenses other than those stated or apparent at the time of the assignment.” 1 American Law Institute Restatement Contracts, 175 (1).

Defendant would be estopped to assert the non existence of that which it warranted existed.

POINT III.

THE PRICE UNDER THE URC PURCHASE AGREEMENT IS NOT ALWAYS EQUAL TO CIRCULAR 5 PRICE PLUS MILLING COSTS.

In their statement of facts, respondents assert that the purchase agreement entered into between them and URC provides for a sale at a price equal to Circular 5 selling price plus milling charges. No citation of the record is given to support such a statement. None can be given. The statement could not be true when processing charges vary at least with the following:

- (a) Average hourly labor cost at the plant (Tr. 76, reverse side).
- (b) Chemical cost index (Tr. 76, reverse side).
- (c) A calcium carbonate penalty which varies with a "new effective plant date" (Tr. 77),

and the sales price varies with the following:

- (a) The "cost of ore fed to process" which varied with a new effective plant date" (Tr. 88, reverse side).

There are no such provisos in Circular 5.

POINT IV.

CIRCULAR 5 PRICES ARE NOT CONTROLLING.

Respondents assert that Circular 5 prices for raw ore control regardless of the royalty provision for "gross proceeds of sale." (Respondents' brief 13.) This assertion is based upon three reasons which we shall discuss.

1. Respondents assert that provisions in the royalty agreement refer to bonuses or premiums, transportation and development allowances, and ore depot or purchaser, which are terms used in Circular 5; and conclude therefrom that Circular 5 prices govern. (Respondents' brief 14.)

This is a non-sequitur. If the parties had intended Circular 5 prices to control, they would have had at least a reference thereto.

2. Respondents argue that since Circular 5 provides “the term ‘ore’ does not include mill tailings or other mill products,” that definition controls. (Respondents’ brief 14.) But it would be more reasonable to argue that the word “ore” was used as a word of art in Circular 5, which, by the definition therein contained, could include or exclude any item; or to argue that, since AEC found it necessary to exclude mill products, “ore” would otherwise have had its usual meaning, which includes mill products.

3. Respondents argue that it is improbable that the parties intended that royalty payments should be based upon the price of concentrated ore since “there were no mills to which ore from the Radon Mining Claims could be sold until 1957, and since it was not until the Atomic Energy Act of 1954 was passed and a mill constructed in 1957” that title could be retained through the milling process. (Respondents’ brief 14.)

Respondents don’t point out how this statement is supported by the record. Uranium ore had been milled for several years. The record, in fact, shows that as early as 1951 AEC Circular 6 in providing for bonus payments, provided “Ores for which payments will be made must have *been delivered to and paid for by either a station or mill*” (Tr. 39) and lists as qualified mills the following on the Colorado plateau and vicinity:

United States Vanadium Company, Uravan, Colo.
United States Vanadium Company, Rifle, Colo.

Climax Uranium Co., Grand Junction, Colo.

Vanadium Corporation of America, Durango, Colo.

Vanadium Corporation of America, Naturita, Colo.

Vanadium Corporation of America, Hite, Utah.

Vitro Chemical Co., 600 West 33rd St., South, Salt
Lake City, Utah

But whether or not there were in fact mills on the Colorado Plateau which were milling ore seems immaterial, since there would certainly be no presumption that the parties assumed that no mill would accept ore for processing merely because no mill had yet done so.

Furthermore, even if it be assumed there were no mills, the letter from Federal Uranium setting out the "gross proceeds of sale" royalty provision was written in 1955, after the passage of the 1954 act which respondents construe as authorizing such retention of title.

The following are additional reasons why Circular 5 prices are not controlling:

If they were to control, the parties would have said so.

Circular 5 only provides a guaranteed *minimum* price for the type of ore covered. No maximum is set.

Circular 5 applies specifically to only two types of ore: carnotite and roscoelite (Tr. 37). The ore from the Radon claims is neither.

Circular 5 relates only to deliveries at Monticello, Utah (Tr. 37). Surely the parties would presume there could be a different marketing place in the future.

Circular 1, which became effective in 1948, set a guaranteed minimum price for “domestic refined uranium, high grade uranium bearing ores and mechanical concentrates.” It, and other circulars covering other minimum prices, could have been more within the contemplation of the parties than Circular 5 which covers ore of types not found in the Radon claims.

Circular 5 was amended on various occasions. If it were to control, the agreement of royalty should also change. We doubt respondents would make such a contention.

The royalty language provides the royalty “shall be paid by the ore depot *or purchaser* directly to you” (Tr. 49). This shows that a sale to a government ore buying depot is not the only sale contemplated.

Circular 5 expired on March 31 of this year. If it controlled, there would be no present agreement on royalty. We again doubt respondents would so contend.

The other alternative contention, that expired Circular 5 prices should control, would be ridiculous.

A simple change in the market whereby prices for uranium ore fall below these old Circular 5 prices (as well might occur, particularly after 1966) would quickly change respondents assertion that it would be harsh and

unfair to apply anything but prices set by said regulation.

Circular 5 was not followed by respondents in marketing the ore, and had nothing to do with the proceeds of sale actually received.

Respondents have treated Circular 5 as not controlling, since Circular 5 provided for vanadium payments, yet respondents, except for a brief period, have not even kept records upon which to compute vanadium royalties. The judgment which respondents seek to uphold also ignores this provision for vanadium.

Circular 5 applied only to uranium and vanadium, yet the royalty covers all ores which might occur.

POINT V.

THE "GROSS PROCEEDS" ROYALTY SHOULD NOT BE CONSTRUED AS "VALUE OF RAW ORE."

Respondents assert that they have paid all royalty payments that are due, which they say have been based on raw uranium ore Circular 5 prices. They so assert regardless of the fact that the royalty provision is based upon "gross proceeds."

If their reasoning is that Circular 5 prices control, that is fallacious for the reasons set out above under Point IV.

If respondents' reasoning is that some indefinite "*value of raw ore*" controls, respondents are being inconsistent, because because respondents themselves have not used the "value of raw ore" as a basis for royalty payments. This is evidenced by the following:

Under a “value of raw ore” provision, not only uranium but also vanadium and any other ores would be the basis of royalty payments, whereas respondents have not paid for most vanadium.

Sales have never been made by respondents at the mine, but rather have been made at the mill; and costs incurred *after* the raw ore was produced, such as costs of concentrating by hand sorting, costs of transportation, etc., have neither been deducted nor are they claimed.

No royalty has ever been paid at the time raw ore was produced. Ore has been mined and stockpiled without payment of royalties. Royalty payments have been made only at the time of sale. Respondents thereby recognized that the language “proceeds of sale” controls as to the time the royalty accrues, but illogically urge that somehow it has no control as to the amount of royalty.

POINT VI.

A ROYALTY BASED UPON GROSS PROCEEDS FROM THE SALE OF ORE SHOULD HAVE NO DEDUCTIONS.

The respondents cite many cases (Respondents’ brief 14-23) which they contend support the proposition that processing charges should be deducted in computing royalty payments. What respondents failed to do, was to advise the court as to the nature of the royalty provi-

sions being considered. Obviously, the royalty language is all important. We have no quarrel with the holdings in most of the cases cited by respondents and think most are proper interpretations of the oil and gas leases involved. They are, however, neither controlling nor persuasive in the construction of our royalty provision of "gross proceeds of sale of ore." In fact *none* construes a royalty provision containing the word "gross." Furthermore, they are oil and gas cases as distinguished from hard rock mining cases.

Nearly all of respondents' cases on the point are contained within an annotation on "*Oil and Gas Lease — Compensation*," 73 ALR 2d 1056. The annotation analyzes the cases cited by respondents and others, which analysis we shall not reiterate, but we shall point out the principal reasons why these cases are either not in point or not controlling.

In *Warfield Natural Gas Co. v. Allen*, 261 Ky. 840, 88 S.W. 2d 989:

The royalty language was "proceeds," not "*gross* proceeds."

The decision was partly based upon an accord and satisfaction.

The decision was partly based upon evidence as to custom of the trade. There is no such evidence here.

It was held the parties intended the market at the well to control rather than a distant market, whereas here

the place of sale of both raw and processed ore has been at a distant market, at the mill.

In *Phillips Petroleum Co. v. Ochsner*, 146 F.2d 138, the royalty language the court said it was construing was “market value at the well.” The court refused to consider “proceeds” of sale, because it said there was no sale. The court said: “Lessee did not sell the gas. It simply traded it for an equal quantity of the same kind and of the same market value in another part of the field.” The court said that a market value of gas used for gasoline, and not for light and fuel was established, and under the “market value at the well” royalty provision “where a market value is shown, that controls.”

The *Phillips Petroleum Co. v. Record*, 146 F.2d 485 case shows that there were, in fact, in all three of the Phillips cases two alternative royalty provisions: One was for a royalty for gas used for the manufacture of gasoline, which was based upon “prevailing market rate for gas.” The other was for gas used off the premises which was based upon “gross proceeds.”

The court’s reasoning in *Record* is difficult to follow as to which provision is applicable. The lower court had assumed that the market value provision was applicable and had so instructed the jury, to which counsel took no exception, so that there was no question before the court as to the construction of the “gross proceeds” provision. The court, however, does by way of dicta state that:

“If, however, the district judge was wrong in this, and appellees, though not excepting, could

now question it, this would not advantage them, for the *gas* which defendant got in exchange for, and, therefore, *as proceeds* of, plaintiffs' gas, *was* gotten for and applied to the same use, *to be processed in a gasoline plant*, and its *market value* for that use was no greater than, if as great as, that from plaintiffs' well." (Emphasis added.)

This indicates that the court was reasoning that if the "gross proceeds" provision were at first applicable to the exchange of gas, that the "proceeds" in such an instance were not money, but gas received in exchange; and that since exchange "proceeds" gas was in turn used for the manufacture of gasoline, that then the "prevailing market rate for gas" provision would become applicable.

The court then comes to the conclusion that under a "prevailing market rate for gas" provision, the pertinent market value was the market value of the gas received in exchange, and not the market value of the products manufactured from that gas. With such a conclusion we do not disagree.

The court said that counsel argued that the royalty owner was entitled "to receive not one-eighth of the market value of the gas received in exchange, but one-eighth of the *market value* of the products manufactured from the gas." This shows that not only the court but also counsel were applying the "prevailing market rate for gas" provision, since had they been construing the "gross proceeds" provision they would have said, instead, that they were entitled "to receive not one-eighth

of the market value of the gas received in exchange but one-eighth of the *gross proceeds* of the products manufactured from that gas.”

That this was the rationale is shown by the same Judge’s decision in *Phillips Petroleum Co. v. Williams*, 158 F. 2d 723, in which the court said:

“The gas, for the royalty on which they sue, was used for the manufacture of gasoline, the applicable royalty provision, therefore, is that for the payment of the ‘prevailing market rate for gas’ *and not that for ‘the payment of gross proceeds.’*”

“On careful consideration of a royalty clause identical in language with the clause in question here and of facts as to the use of the gas identical with those shown here, *we so held in Phillips Petroleum Co. v. Record*, 5 Cir., 146 F. 2d 485.”

In *Phillips Petroleum Co. v. Williams*, 158 F. 2d 723, the same royalty provision of “prevailing market rate for gas” was construed. The court said:

“The gas, for the royalty on which they sue, was used for the manufacture of gasoline, the applicable royalty provision, therefore, is that for the payment of the ‘prevailing market rate for gas’ *and not that for ‘the payment of gross proceeds’.*”

It is apparent therefrom that the court decided as it did because the “gross proceeds” provision did *not* apply, the implication being that, had it applied, the actual sales price would have been used as the royalty basis, rather

than market value. These Phillips cases therefore support our position and not respondents.

In *Matzen v. Hugoton Production Co.*, 182 Kan. 456, 321 P. 2d 576, the royalty language was “proceeds from the sale of the gas.” The royalty owner *conceded* that the royalty should be determined at the well head and that the royalty owner should pay reasonable expenses of gathering, processing and marketing the gas produced, where it was transported by the operator in its pipe line off the premises and processed and sold. The *royalty owner* claimed that proceeds of sale meant the same thing as fair value. The operator claimed it meant proceeds of sale and that it could deduct its income tax therefrom. The royalty owner conceded that if it meant proceeds of sale that it meant net proceeds but argued that taxes were not a deductible item. The lower court used the “proceeds less expenses” theory and allowed no income tax deduction. This was affirmed on appeal the court holding that *proceeds of sale control rather than value*. This case construed “proceeds” as “net proceeds” but the important point is that it found that actual proceeds controlled over value. Had the language of the royalty been “gross proceeds,” the result of this case would have been that actual proceeds control over value and no deductions could be allowed. This is the very point we are urging.

The concurring opinion even states that counsel should not have conceded that there should be any deduction from the proceeds and had there been no such concession the royalty owner could have recovered gross

proceeds even though the word "gross" was not a part of the royalty provision. The concurring opinion states:

"In view of the contentions of the plaintiffs that their royalty is determined at the wellhead and their concession that they must bear a share of the reasonable costs of gathering, processing and marketing the gas produced, I concur that the judgment must be affirmed. I am in full accord that proceeds from the sale of gas is the measure of plaintiffs' royalty under the terms of the leases. However, I do not wish to be bound by the majority opinion in the event an action would be filed involving a royalty clause as is here presented and the plaintiff alleges, proves and here contends that royalty is determined from proceeds from the sale of gas without deduction of costs of gathering, processing and marketing. Proceeds of a sale, unless there is something in the context showing to the contrary, means total proceeds."

In *Freeland v. Sun Oil Co.*, 185 F. Supp. 754, 277 F. 2d 154, there were again two alternative royalty provisions, one of which would be applicable depending upon the use to which the gas was put. One was based upon "the amount actually received." The other was based upon "market value at the well." Respondents in their brief at page 21 infer that this case construes the "amount realized" provision. The court bases its decision upon the fact that it is the "market value" royalty provision which controls, and *not* the "amount realized" provision. This implies that had the applicable royalty provision been "amount actually received" the result would have been that the royalty owner would have been entitled to the

gross proceeds with no deductions. This again is the precise point we are urging.

In *Coyle v. Louisiana Gas & Fuel Co.*, 175 La. 990, 144 So. 737, the royalty owner claimed a royalty on casing head gas from a gas well, expense free. The lease didn't expressly cover the situation but provided that as to oil one-eighth should be "free of cost," saying nothing as to the cost on gas royalty of "one-eighth royalty for the gas from each well where gas only is found." The upper court held, at first, that no deductions should be allowed, but reversed the ruling on re-hearing and allowed the operator to deduct the cost "to preserve the gas and its gasoline content by making both merchantable." The decision was based upon the fact that the oil royalty provision expressly provided that the royalty should be "free of cost," whereas, the gas provision made no such provision. The court reasoned that having expressly provided that it should be free of cost in one instance, the silence in the other instance implied that there should be a sharing of cost.

In our case there was no necessity to process uranium to make it marketable. There was a ready market for raw ore. Further, the provision for a royalty "free of cost" is the equivalent of "gross." Since the Louisiana court based its decision upon the omission of the phrase "free of cost," the implication is that had such phrase been included, the ruling would have been that no deduction for expenses could be made in paying the royalty. The Louisiana court would, therefore, decide a "gross pro-

ceeds'' royalty as meaning that the operator could not deduct expenses in making royalty payments.

In *Crichton v. Standard Oil Co. of La.*, 178 La. 57, 150 So. 668, the royalty provision was "market value." The operator had gas which was impregnated with gasoline processed by a third party and received therefrom one-third of the product rendered marketable by processing. The court held that the royalty should be based upon the one-third received. This resulted in the court basing the royalty upon the gross proceeds even though it was a market value provision, since one-third of the product was all that the operator received.

In *Wall v. United Gas Public Service Co.*, 178 La. 908, 152 So. 561, the royalty language was "market price." The royalty holder claimed the royalty should be based upon sales price away from the wells. Evidence in the case showed what the market price in the field was. The court held that the market price controlled over sales price at a distant market. The court distinguished two cases on their facts saying,

"Counsel for plaintiffs, in support of their argument that 'market price' means the price at which the gas was sold cite the cases of *Barton, et al v. Oil & Mining Co.*, 27 Okl. 416, 112 P.965, and *Ladd v. Upham* (Tex. Civ. App.) 58 S.W. (2d) 1037, 1038.

"These cases do not support their proposition. The royalty clauses in those cases are not like the one in the case at bar. In neither of the cases was the lessee required to settle at the 'market price'

of the gas. In the Barton case it was agreed that if gas was discovered, the consideration to the lessor should be 'one-tenth portion of each gas well drilled on the premises herein described when utilized and sold off the premises.' The court interpreted that to mean that the lessor was to receive a one-tenth portion of the proceeds of the gas when sold off the premises.

"In the case at bar, the lessor was not to receive a one-eighth 'portion of the proceeds when sold off the premises,' but one-eighth of the market value of the gas.

"In the Ladd case, the contract provided that 'the lessee shall pay lessor as royalty one-eighth of the proceeds from the sale of gas as such'."

The court was distinguishing cases with royalty provisions similar to ours. The implication is that had the court been confronted with our royalty language the actual proceeds would be the basis of the royalty with no deductions.

In *Vedder Petroleum Corp. v. Lambert Lands Co.*, 50 Cal. App. 2d 102, 122 P. 2d 600, the royalty language was based upon the "*value* of all oil produced . . . after making the customary deductions for temperature, water" etc.

This is simply a "value" case with which we do not disagree.

Respondents argue that the court defined "oil" as meaning "crude oil" and infer that is authority that "ore" in our case means "raw ore." In the Vedder case

the court based its conclusion, that oil meant crude oil, upon thirty-eight references in the lease where it clearly could only mean crude oil. There is not one such reference in our instrument.

Western Gulf Oil Co. v. Title Insurance Co., 206 P.2d 643, is a case similar to the Vedder case.

In *Reed v Hackworth*, 287 S.W. 2d 912, the royalty language was based upon "gas produced". The lease was silent as to the place of market and the price of gas. The gas was piped two miles by the producer and sold by him for 25¢, 10¢ of which was "specifically apportioned . . . as the cost of piping." The court held that the royalty should not include the 10¢ for piping. The court said:

"If a lease is silent on the question, royalty should be based upon the market value of the gas at the well.

"Since the contract (of sale) *explicitly recognizes a price of fifteen cents*, we think the appellee is entitled to a one-eighth royalty based upon that price."

The court bases the royalty, even though a royalty in kind, upon market value, and bases that market value upon sales price, saying that the cost of piping was not part of the sales price. We do not see that the case is at all in point for a "gross proceeds" royalty provision.

In *Danciger Oil & Refineries, Inc. v. Hamill Drilling Co.*, 171 S.W. 2d 321, the royalty was based upon "market price" which the court construed as meaning

market value of gas. The court said that if there was no market then "value" controls. This case is not in point for a "gross proceeds" provision.

In *LeCuno Oil Co. v. Smith*, 306 S.W. 2d 190, the royalty was based upon the price "at the wells." There was no market for gas at the wells. In order to make it marketable, gas was piped to a dehydration plant where it was then sold. All parties and the court *assumed* that the cost of dehydration at a distant dehydration plant was deductible under such royalty provision. The only question involved was whether the cost thereof should be the reasonable cost, or the actual cost of dehydration.

It is thus apparent that none of respondents' cases supports their proposition that expenses should be deducted from a "gross proceeds" royalty, since the cases either construe a "proceeds" royalty as net proceeds, or they construed a market value provision, under either of which, expenses are properly deductible.

In addition to the cases cited by respondents, the reasoning of which supports our position that there should be no deduction from a gross proceeds royalty, the following four cases are of interest:

Phillips Petroleum Co. v. Johnson, (5th Cir.) 155 F.2d 185, 188, 198, holds that a "net proceeds" royalty should not be construed as a "value" royalty. The court said:

"In so far as the gas was 'marketed' we think the stipulation for a share of the 'net proceeds derived' ought to be enforced, effect being given

to the words 'net at the mouth of the well by allowing as expense the cost of transporting, separating, and marketing. *This lessor did not consent to be left to the uncertainties of 'fair value' or even 'market price' as to the gas, but was willing to take one-eighth of what the lessee sold it for, relying on the lessee's interest to secure a good sale.*' (Emphasis added.)

In *Ladd v. Upham* (Tex. Civ. App.) 58 S.W. (2d) 1037, 1038, the royalty was based on "proceeds from the sale of gas." In construing this "proceeds" provision, the civil appeals court said:

"In view of these express terms we feel unwilling to say that the lessee would be compelled to deliver to the lessor at the mouth of the well any part of the gas produced. The lessee under the terms of the lease was given full power and control of the entire production and if, in order to obtain a better price for the gas, he chose to construct pipe lines or otherwise to convey it to a point or points beyond the lease and thus receive greater profit, he could do so, but could not escape the obligation in favor of the lessor imposed by the terms of the lease."

This decision was cited with approval by this court in *U. S. Smelting, Refining & Mining Company v. Haynes*, 111 U. 172, 176 P.2d 622. The Texas Supreme Court affirmed this case, 95 S.W. 2d 365. In doing so, it indicated that the cost of transportation to market might be a deductible item, thus considering proceeds as possibly meaning net proceeds rather than gross. Had the language been "gross proceeds," as in our case, no such

qualification could logically have been made in affirming the decision.

In *Roberts v. Swanson*, 222 S.W. 2d 707 (Tex. Civ. App. 1949), oil was to be delivered “free and clear of all costs and expenses” at the pipe line or other delivery point. It was delivered to a purchaser at a distant refinery rather than at the well. The court held that the cost of transportation was not deductible from the royalty.

“Free and clear of all costs” is the equivalent of our “gross,” and under neither should there be a deduction. If a deduction were allowed for milling costs, there should just as logically be deductions for other costs such as sorting, transportation, etc. Even respondents don’t claim other cost deductions, but illogically single out cost of milling as the only allowable deduction.

Respondents selected the time of sale. They paid no royalty on stockpiled ore. Ore in its raw state was marketable, but for an advantage to themselves, they retained title to the ore through the processing stage. One consequence thereof was an advantage of a higher depletion allowance. Another consequence should be a disadvantage of a higher royalty payment.

In *State v. Hobart Iron Co.*, 143 Minn. 457, 172 N.W. 899, 175 N.W. 100, 176 N.W. 758, the lease provided: “The lessee agrees to pay ‘for all the iron ore mined and removed . . . at the rate of 25c per ton. . . .’” The low grade, unmarketable ore was washed in order to make the ore marketable, and was then sold. The court held

that, under the terms of the lease, the parties intended that royalty should be based upon tonnage as mined rather than lesser tonnage after concentration by washing. At first blush, this case might appear to be against appellants because it bases the royalty on tonnage prior to concentration. However, that determination was made because of the peculiar language of the lease, not present in our case. The importance of this case is that the operator bears the cost of concentration, with no sharing therein by the royalty owner. Furthermore, the court did not base its decision upon any contention that concentrated ore was not ore, but assumed that both ore and concentrates were "ore," and then looked to the language of the lease to determine whether the royalty should be based on tonnage of raw ore or tonnage of concentrated ore.

POINT VII

SALES OF CONCENTRATED ORE ARE SALES OF ORE.

In arguing that concentrates are not ore, respondents cite several cases upon which we comment as follows:

In *Marvel v. Merritt*, 116 U.S. 11, 29 L.Ed. 550, and *Ozark Chemical Company v. Jones*, 125 F.2d 1, 2, the following definition is given:

Ore is a "compound of metal and some other substance, as oxygen, sulphur, or arsenic called its mineralizer by which its properties are distinguished or lost."

Respondents, in their brief, emphasize the phrase "by which its properties are distinguished or lost." How this helps respondents we fail to see, in that, as pointed out in our original brief, the properties of uranium are still distinguished or lost whether the ore is in a raw or concentrated stage, because, in both, the mineralizer oxygen is present, as evidenced by the fact that in sales of both raw and concentrated ore, contained U_3O_8 is sold. The compound does not have the properties of the metal.

In an admiralty case of *American & Cuban S.S. Line, Inc. v. Beer, Sondheimer & Co.* 281 F. 725, a differentiation is made between copper ore and copper concentrate because of the physical differences between them. The question decided was whether or not the terms of a charter had been complied with, where the charter provided for the haulage of ore. A surprised captain, whose ship was equipped to carry an expected solid cargo, was forced to accept a liquid slurry. During the voyage, a storm was encountered and the slopping cargo sank the ship. The decision was based upon expert testimony as to the nature of concentrates, none of which is present here. We do not contend that there is no difference between raw and concentrated ore as to their appearance and physical characteristics. Our contention is that ore includes both raw ore and concentrated ore.

As pointed out in *State v. Hobart Iron Co.* (supra) the court, in construing a royalty based on "iron ore mined and removed" assumed that concentrated ore was "ore" and said that the concentrating "results in mak-

ing the mined ore in a practical sense and in the sense of the lease ‘merchantable shipping iron ore’.”

POINT VIII

WHETHER OR NOT DEPLETION ALLOWANCE CAN BE TAKEN IS NOT AN ISSUE.

Respondents argue that appellants could not take an increased allowance, resulting from an increase in price due to concentration, even if “proceeds of sale” was always applicable rather than just applicable in the future. They cite authority to that effect. The Internal Revenue Code has been amended since the decision cited, and there are contrary authorities. We shall not cite such authorities because it is not an issue in this case. Suffice it to say that appellants think they can take a depletion, and a correct interpretation of the royalty language would give them an opportunity to claim such a depletion. As a matter of fact, there is also a question as to whether or not respondents can properly take such increased depletion, since 26 USCA 613 allows it in the case of “ores or minerals which are not customarily sold in the form of the crude mineral product,” so that respondents would have to establish that uranium is not customarily sold in its raw state, but rather that ore is customarily sold in its concentrated state in order to properly get increased depletion. Such an assertion is the exact opposite of their assertion in this case.

CONCLUSION

Respondents advance no argument in defense of the lower court's ruling that dismissed the case, (when it had before it only motions concerning the basis of accounting) other than that appellants either had not raised issues, or having raised them, had waived them. The record does not support them, but in fact shows that appellants claimed an accounting for the proceeds of sale ore, which would entail an accounting for vanadium, as well as uranium; an accounting for fictitious haulage allowance, if the allowance in fact was a proceeds of sale; and an accounting as to the amount of proceeds regardless of the basis of the royalty.

The respondents' contention that "gross proceeds of sale of ore" does not mean what it says, but that it means there should be *deducted* from the proceeds cost of processing ore; or in the alternative that it means the *value* of raw ore, is not supported by any authority cited by them. To the contrary the very cases cited by respondents, and other cases, differentiate between "proceeds" royalties and "value" royalties, and properly construe them to give meaning to the plain language used by the parties. Deductions are allowed only if "gross" is not used, or if "value" is being determined.

The judgment should be reversed and appellants' motion for summary judgment should be granted.

Respectfully submitted,

DELANEY & BALCOMB and
BRAYTON, LOWE & HURLEY

1001 Walker Bank Building
Salt Lake City, Utah

Attorneys for
Plaintiffs-Appellants