

1962

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

Utah Supreme Court

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MAY 2 1962

IN THE SUPREME COURT
of the
STATE OF UTAH

JURY

RIMLEDGE URANIUM AND MINING
CORPORATION and KENNETH J. Mc-
CORMICK,

Plaintiffs-Appellants, Supreme Court, Utah

—vs.—

No. 9604

FEDERAL RESOURCES CORPORA-
TION and HECLA MINING COMPANY,

Defendants-Respondents.

APPELLANTS' BRIEF

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

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and

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IN THE SUPREME COURT of the STATE OF UTAH

RIMLEDGE URANIUM AND MINING
CORPORATION and KENNETH J. Mc-
CORMICK,

Plaintiffs-Appellants,

—vs.—

FEDERAL RESOURCES CORPORA-
TION and HECLA MINING COMPANY,

Defendants-Respondents.

No. 9604

APPELLANTS' BRIEF

STATEMENT OF THE KIND OF CASE

This is an action (a) for an accounting of royalties owing from defendant operators to plaintiffs, the owners of a royalty interest of a "2% of all gross proceeds from the sale of all ore" from certain mining claims, (b) for judgment based upon the difference between the amount actually paid and the amount determined to be due pursuant to the accounting, (c) for a declaratory judgment as to royalties to be paid in the future.

DISPOSITION IN LOWER COURT

Plaintiffs moved for summary judgment. Plaintiffs' motion was that defendants be ordered to render an accounting to plaintiffs based upon 2% of the sales price actually received. The motion was denied.

Defendants moved for summary judgment. Defendants' motion was that if raw ore was not sold, royalties should be based on the value of raw ore, or in the alternative that royalties should be based on the net proceeds of sale of concentrated ore after deducting processing charges. This motion was granted. The Court not only granted defendants' motion for summary judgment, but also decreed that plaintiffs have and recover nothing by their suit.

RELIEF SOUGHT ON APPEAL

Plaintiffs seek reversal of the summary judgment. Plaintiffs also seek judgment in their favor as a matter of law, or, that failing, a trial on the issues of the case.

STATEMENT OF FACTS

There is no extensive record upon which to base a statement of facts since the lower court's judgment was made after an unreported hearing on motions for summary judgment, during which no evidence was introduced and no admissions were made. Judge Ellett stated that his ruling was based "somewhat" upon his personal knowledge of mining and milling practices derived from his employment with Kennecott Copper Company as an accountant, prior to his becoming a Judge. The reported portion of his comment on the subject was "I am drawing somewhat on my experience of seven years dealing with people that shipped ore and checking their contracts" (Tr. 210).

Insofar as error in granting defendants' motion for summary judgment is concerned, this statement of fact

might be based upon what plaintiffs would have proved had they been permitted a trial. This is in accordance with the rule set forth in 6 *Moore's Federal Practice* 2364 that the party moving for summary judgment has the burden of establishing the *lack* of triable issue. However, since plaintiffs also appeal from failure of the court to grant plaintiffs' motion for summary judgment, the facts stated are limited to those established by defendants' admissions and answers to interrogatories in the record.

In 1953 various mining claims containing uranium and vanadium known as the Radon Claims were located. The locators conveyed these claims and reserved a royalty of "15 per cent of all gross proceeds from the sale of ore" (Tr 29). Plaintiffs' predecessors were assigned a 2% royalty (from this 15% royalty) by two successive assignments. The first assignment incorrectly referred to the royalty as "net mill or smelter returns" rather than "gross proceeds of sale" as originally reserved (Tr 31). The next assignment described the royalty as "2% royalty from gross sales of all ore" (Tr 33) which correctly paraphrased the initial reservation. In 1955, to perfect defendants' title to the claims involved, and to clarify and make certain the terms of the reserved royalty, defendants' predecessor obtained a quitclaim deed from plaintiffs' predecessor and gave in return their letter specifying the royalty to be a "gross royalty."

This agreement was drafted by the defendants through their attorney (Tr 96, 121). It is still in force

and governs past and future royalty payments. The exact language thereof is as follows:

“Federal Uranium Corporation hereby acknowledges and confirms to you that you are the owner of a royalty of two percent (2%) of all of the gross proceeds from the sale of all ore from the lode mining claims listed above, the gross proceeds to include any bonuses or premiums upon the ores mined, but shall not include transportation and development allowances paid or granted to the owners of said claims; it is further acknowledged that the aforesaid royalty of two percent (2%) of all gross proceeds, as above specified, shall be paid by the ore depot or purchaser directly to you, or your heirs, executors, administrators, and assigns, care of 200 North Fourth East, Bountiful, Utah, or at such other place or address as you or your successors to this interest may designate in writing to the President of Federal Uranium Corporation.” (Tr 49)

Until 1958 defendants marketed unconcentrated ore by sales to both the AEC and Uranium Reduction Company, a licensed buyer, (Tr 94, 123-162). Royalties during this period were based upon the gross proceeds, such gross proceeds being based upon a price schedule set forth in AEC Circular 5. (Tr 94, 123-162). In 1958, however, despite the fact that AEC Circular 5 was to continue in effect until March 31, 1962 so that any market for unprocessed ore based upon the Circular 5 price schedule continued to be readily available, defendants without consulting plaintiffs, changed their marketing practices. Instead of selling the ore to URC upon delivery, defendants had URC act as a custom mill and re-

tained title to the ore until after it was concentrated. A sale was then made to URC after milling. Defendants entered into two agreements with URC to accomplish this, a custom milling agreement (Tr 70) and a sales agreement (Tr 87).

The milling process does not break down the U_3O_8 contained in the ore, but rather eliminates most of the country rock and other impurities. The processes of smelting and refining which would eliminate the oxygen mineralizer from the U_3O_8 , leaving only uranium, are not involved, but occur at a later stage. U_3O_8 is contained in both unmilled and milled ore (Tr 37, Tr 70, reverse side). The U_3O_8 content of the ore has always been the basis for the price paid to defendants for the uranium content of the ore regardless of whether unconcentrated or concentrated ore was sold. (Tr. 37, 88).

By delaying the sale until after milling, instead of selling unconcentrated ore, defendants obtained an income tax advantage, in that dressed ore, being more valuable, is the basis for a greater depletion allowance. Defendants depleted the increased amount (Tr. 43, 92).

When the sales arrangement was changed so that sales occurred after instead of before milling, defendants did not also change the royalty computation to reflect the increased gross proceeds, but continued to compute them as if they had continued to make sales of unprocessed ore based upon AEC Circular 5 guaranteed minimum price schedules (Tr. 43, 92).

Defendants have made royalty payments only after the sales occurred. In fact, defendants have stockpiled in excess of 9000 tons without any payment of royalty thereon (Tr. 43, 92).

Defendants have kept two sets of books, since they started selling dressed ore, one based upon actual sales price of the concentrated ore, and the other, called "Circular 5 Basis Sheets," based upon a computed price that would have been received had unprocessed ore been sold under the price schedule itemized by AEC Circular 5. (Tr. 170). Royalty payments to date have been computed upon the latter. (Tr. 43, 92). Circular 5 expires March 31, 1962 (Tr. 37).

No accounting whatsoever has been made by defendants as sought by plaintiffs' complaint. There has therefore been no accounting for uranium royalties; nor for vanadium royalties, although the ore contains vanadium (Tr. 163, 167); nor for part of the sales price of the ore, which defendants contend is "development allowance" not subject to royalty but which plaintiffs contend is part of the sales price (Tr. 88).

ARGUMENT

POINT I.

THE LOWER COURT SHOULD HAVE GRANTED ~~DE~~
~~FENDANTS~~ MOTION FOR SUMMARY JUDGMENT. *Plaintiff*

(a) *The Supreme Court should not presume the lower court's interpretation of the contract was correct.*

"The rule that the evidence and findings will be reviewed in the light most favorable to the de-

termination of the trial court does not apply to the interpretation of the language or legal effect of documents, nor to the application of principles of law, but only to questions of fact.”

Ellerbeck v. Haws, 1 U. 2d 229, 265 P. 2d 404, 407.

(b) *The royalty provision is expressly based upon proceeds of sale and expressly prohibits deductions.* The royalty language “gross proceeds from the sale of all ore,” has four key words: gross, proceeds, sale and ore.

1. *Gross.*

The pertinent definition by Webster of “gross” is as follows:

“Consisting of an overall total exclusive of deductions (gross earnings, gross production . . .) —opposed to net.”

Webster's Third New International Dictionary (1961)

“Gross” has not needed definition by the courts except as it is incidentally defined in cases arising out of the definition of “net.”

In an old treatise on mining, 2 *Snyder on Mines* 1003, Section 1257, appears the following:

“MEANING OF ‘NET PROCEEDS’ as applied in the western states. — In the western states the practice has become almost universal, as applied to the royalties payable on ores mined and marketed from precious metal mines, to base the payments upon net proceeds, which means generally the price received on the sale of ore less

the smelter charges and railroad freights. Sometimes it includes sampling charges, but never mining charges, and very seldom wagon freight, unless the lease reads 'a certain percentage of the ore or net value of the ore delivered on the dump,' in which case, of course, only mining charges are excluded. In defining the meaning of 'net proceeds' the court of appeals of Colorado very clearly states the position of the parties in the following words: 'We are referred to a number of authorities in which the definition is given of the words 'net proceeds.' We need not specially notice these authorities, because we are in perfect agreement with them. The words 'net proceeds,' as used in a contract, where their signification is not qualified or restricted by other words in the same contract, mean what remains of the gross proceeds after all expense and loss incurred in realizing them are deducted . . . They have confined the deductions to be made from the gross proceeds, in order that the result may be net proceeds, within certain limits. They say that the royalties shall be paid 'on the net proceeds from all smelter and freight charges and mill returns.' These words are not well put together, but every miner and every person familiar with transactions involving leases of mining property knows exactly what they mean. They mean that freight charges and charges for treatment are to come out of the gross mill or smelter values, and what is left is the net proceeds."

Snyder, as authority for this proposition, cites two cases, *Maloney v. Love*, 11 Colo. App. 288, 52 P. 1029, 1030, and *Yank v. Bordeaux*, 23 Mont. 205, 58 P. 42, 45.

The Colorado Court says:

“The words ‘net proceeds’, as used in a contract, where there signification is not qualified or restricted by other words in the same contract, mean what remains of the gross proceeds after all expense and loss incurred in realizing them are deducted.”

The Montana Court says:

“The net proceeds of the ore after milling or reduction were to be equally divided. So the contract provides. It is therefore apparent, . . . that the expression ‘net proceeds’ was employed and understood as signifying the avails of the ore, less charges of milling and reduction only.”

It is clear from these citations that the phrase “gross proceeds” means the entire sum received from the sale, while “net proceeds” means gross proceeds less expenses incurred in realizing such returns.

The phrase “the gross proceeds realized” is used in the ad valorem assessment on mines. The value of metalliferous mines for assessment is based on the annual net proceeds thereof, which phrase is defined as the gross proceeds less certain deductions, which deductions include milling costs. (59-5-8 UCA 1953) Under this statute *U. S. Smelting, Refining & Mining Company v. Haynes*, 111 U. 172, 176 P. 2d 622, defined the phrase “the gross proceeds realized” as meaning the total amount of money received from ores extracted from the mining claims.

It will be extensively argued by the defendants, and the lower court evidently concluded, that the parties intended a “net smelter” or “net proceeds” royalty. If the

parties had so intended, they would have said as much.

Summing up the above authorities, gross is the anti-thesis of net and any deduction therefrom changes the gross to net.

With no record at all upon which to base its ruling, the lower court, in effect, rewrote the royalty provision to make it read, "net proceeds from the sale of all ore."

2. *Proceeds.*

The pertinent definition by Webster of "proceeds" is as follows:

"What is produced by or derived from something (as a sale . . .) by way of total revenue: the total amount brought in: yield, returns."

Webster's Third New International Dictionary (1961)

By using "proceeds," the parties provided that the royalty holders had no interest in the ore as such, but only a right to the money derived therefrom. In other words, the royalty holders do not own the ore itself, nor do they have the right to take a percentage of the ore in kind. It is not the type of royalty such as is sometimes found in an oil and gas lease where the royalty holder has the right to take 1/8th of the production in kind.

The right to royalty payments does therefore not arise until there are "proceeds." This is borne out by the practice of the defendants wherein they make royalty payments only after the sale has occurred after stockpiling and after processing.

With no record to support such a ruling, the lower court disregarded the word "proceeds" and instead of basing the royalty upon the amount received, based it upon the amount that would have been received had there been proceeds of sale at an earlier date when the ore was in its raw state.

The court disregarded the word "proceeds" and, in effect substituted therefor the word "value" in ruling that the accounting should be based upon the fair market value of raw ore, despite the clear language of the contract that royalty should be based on the actual amount received, rather than upon someone's opinion as to what the value of the ore was. Had the parties intended "value" they would have said so.

The fact that "value" was not intended is further emphasized by the additional language in the agreement creating a royalty, wherein it is provided that the royalty "shall be paid by the ore depot or purchaser directly to you" (Tr. 49). The purchaser of the ore need not be the one who did the milling, and a buyer other than one doing the milling, would have no information upon which to base any deduction for milling, nor would he have anything upon which to base a payment if the royalty were based upon "value" rather than actual price paid.

The provision in the lower court's summary judgment that defendants pay part of the milling cost also disregards the word "proceeds." The obligation to pay a portion of the milling charges presupposes an ownership interest in the ore being milled, in order that there

be any logic in requiring a contribution toward the milling charge. The royalty holders do not own the ore and a requirement that they pay a processing charge requires the payment by plaintiffs for the processing of defendants' ore.

The decision as to whether or not the ore should be processed, by whom it should be processed, when it should be processed and the cost thereof is entirely within the control of defendants. The royalty holders are not parties to the milling contract nor have they had any say whatsoever relating to it. The language of the royalty provision indicates the parties contemplated that such decisions should be made by defendants who were the operators of the enterprise. The language permits the royalty holders to share in the result but not to dictate the method of arriving at that result. The royalty agreement, if construed as written, nevertheless provides protection to plaintiffs, in that the royalty holders can safely assume that defendants will so operate that the maximum return will be obtained, since that is to the advantage of both the producer and the royalty holder. But when the summary judgment allows deductions to be made from the proceeds, the situation changes completely and such protection is lost. The effect of the lower court's summary judgment is that it takes away from the royalty holders the right to share in the ultimate result while at the same time it leaves the important decisions as to whether or not the ore should be processed, by whom, when and at what cost, entirely within the discretion of the defendants. Had the royalty holders intended that something other

than the proceeds of the sale would determine the amount of royalty payments, they would have been interested in, and would have had provisions controlling the above mentioned factors. No such provisions were made because the parties intended the proceeds to determine the amount of royalty payments.

3. *Sale.*

The pertinent definition by Webster of "sale" is as follows:

"A contract transferring the absolute or general ownership of property from one person or corporate body to another for a price."

Webster's Third New International Dictionary (1961)

There is no question that defendants retained title in themselves until after the completion of the ore milling process.

There was no necessity to do so. The raw ore was readily saleable under a price schedule based upon AEC Circular 5 and will be so saleable until March 31, 1962. (Tr. 37).

Defendants have designedly delayed the time of sale until after the ore has been processed so that it will have a higher sales price, resulting in greater "proceeds of sale" or "gross income" upon which a 23% income tax depletion allowance is based. This is under 26 U.S.C.A. 613 which allows percentage depletion of the "gross income from mining." Both the depletion and the royalty

are based upon gross (proceeds or income) yet the defendants are allowed by the summary judgment to intentionally increase the gross and thus profit by increasing the 23% depletion, and at the same time not bear any resulting consequence of increase of royalty as to the 2% royalty.

Defendants even keep two complete sets of books, one based upon sales prices actually received, which books they show to the Internal Revenue, and the other based upon Circular 5 AEC prices which have nothing to do with the sales price received, which set of books they show to the royalty holders (Tr. 170). The lower court says this is entirely proper, despite the fact plaintiffs' royalty agreement provides that payments shall be based upon proceeds of sale.

When Circular 5 expires on March 31st of this year, there will be no guaranteed minimum price for unprocessed ore (Tr. 37). There then may or may not be any market for such ore. If there is a market, it may be at a much lower price than under Circular 5; the price will probably fluctuate, from time to time; and there will probably be different prices depending on such factors as different buyers and sellers, different grades, and types of ores, certainty of availability, costs of mining, size of contracts, etc. Defendants have a contract with Uranium Reduction Company to sell concentrated ore for \$8.00 per pound of U_3O_8 contained therein from April 1, 1962 until December 31, 1966 (Tr. 88 reverse side). The parties would hardly have intended that defendants could

receive proceeds of sale from such contract for a high, certain price, over a long term, and yet be obligated to pay royalties based upon a different market price which may be non-existent, or depressed or fluctuating. On the other hand, they would not have intended that expired Circular 5 prices would control. They intended that actual sales price would control.

The lower court by the summary judgment leaves the royalty holders without the right to claim royalties when the ores are mined, but bases them upon the value at that time. If the royalty is to be rewritten so that it has the effect of a royalty based upon value of raw ore, then plaintiffs should have the right to insist upon a sale just as soon as the ore is mined. The lower court gave them no such right, and in fact expressly provided that defendants "in their absolute judgment and discretion may either sell raw ore in its natural state or process it or cause it to be processed prior to sale."

4. *Ore.*

The complete definition by Webster of "ore" is as follows:

"1a: a natural or native mineral that can usually be profitably mined and treated for the extraction of any of its constituents (iron ore, copper ore) b: a source from which valuable matter is extracted c: an unrefined condition or material 2: Precious Metal."

Webster's Third New International Dictionary
(1961)

Concentrated ore comes within all of these definitions. Definition 1*a* includes treatment. 1*b* does not require that it be in its native state, and smelting and refining extractive processes have not occurred at the milling stage. 1*c* provides that the material is ore until it is refined (refining occurs after the sale). 2 provides that even in the metallic state, which would not occur until after refining, that it would be ore.

When the ore has been concentrated, it is sometimes referred to as “concentrate.” The lower court based its entire judgment on the premise that concentrating the ore changes its form so that it is no longer “ore.”

As shown above, the definitions of “ore” include concentrated ore. Likewise the definitions of “concentrate” show that “concentrate” is included in the term “ore.”

The pertinent definition by Webster of the noun “concentrate” is as follows:

“something obtained by concentration: a concentration or concentrated substance: as a: the remainder of dressed ore that contains the mineral sought.”

The pertinent definition of the verb “concentrate” is:

“to render less dilute or diffuse: . . . (2): to separate dross from (repeated *concentrating* of the ore is necessary) (3): to free from impurities.”

The pertinent definition of “dress” as used in the definition of “concentrate” is: “to free (as grain or ore) of impurities or irregularities.”

Webster's Third New International Dictionary (1961)

These definitions show that a concentrate is a form of ore. The example (a) for the noun shows that it is a constituent of “dressed ore.” Example (2) for the verb shows that neither the first concentrating nor repeated concentratings change the material from “ore.”

Another definition of “ore” is:

“Any material containing valuable metallic constituents for the sake of which it is mined and worked.” *U.S. v. Cherokee Brick & Tile Company*, 218 F. 2d 424, 425.

This definition contemplates the ore will be “worked” or dressed and thus includes both raw and dressed ore.

Ore was defined by the United States Supreme Court as: “The compound of a metal and some other substance, as oxygen, sulphur or arsenic, called its mineralizer, by which its properties are disguised or lost.” *Marvel v. Merritt*, 116 U.S. 11, 29 L.Ed. 550, see also *Ozark Chemical Company v. Jones*, 125 F.2d 1, 2. Applying this definition, ore was sold by defendants. At the time of sale the ore had been concentrated but neither smelted nor refined. Although later smelting and refining would eliminate the oxygen mineralizer, at the time of the sale by defendants to Uranium Reduction Company the mineralizer was still present. There was still a compound of

uranium metal and oxygen, namely U_3O_8 , plus some remaining substances which had not been eliminated by the concentration process.

In *Yank v. Bordeaux*, 23 Mont. 205, 58 P. 42, 45, the court said the “proceeds of the ore after milling” were the “avails of the ore.” The court was thereby referring to concentrated ore as “ore.”

(c) *Parol evidence should not be considered.*

In the absence of ambiguity or uncertainty, the court must determine the intention of the parties from the instrument itself in accordance with ordinary accepted meaning of the words used.

Oregon Short Line RR Co. v. Idaho Stockyards Co., 12 U. 2d 205, 364 P. 2d 826;

Ephraim Theater Company v. Hawk, 7 U. 2d 163, 321 P. 2d 221.

The intent of parties to a contract should be ascertained from the four corners of the instrument itself if unambiguous. Only if ambiguous are other contemporaneous writings concerning the same subject matter and extrinsic parol evidence of the intentions considered.

Oregon Short Line RR Co. v. Idaho Stockyards Co., 12 U.2d 205, 364 P.2d 826;

Tanner v. Utah Poultry, 11 U.2d 353, 359 P.2d 18;
Davis v. Payne & Day Inc., 10 U.2d 53, 348 P.2d 337;

Moody v. Smith, 9 U.2d 139, 340 P. 2d 83;

Hatch v. Adams, 8 U.2d 82, 329 P.2d 285;

Ephraim Theater Co. v. Hawk, 7 U.2d 163, 321 P. 2d 221;

Continental Bank & Trust Co. v. Bybee, 6 U.2d 98, 306 P. 2d 773;

Starley v. Deseret Foods Corp., 93 U. 577, 74 P.2d 1221.

As shown by the above definitions in I(b), there is no ambiguity in the phrase “gross proceeds from the sale of all ore.” The royalty provision is expressly based upon proceeds of sale and the language expressly prohibits deductions.

(d) *Processed ore can be the basis for royalty payments.*

The fact that the ore has been processed by concentrating does not preclude royalties from being based upon the processed ore price. In *State v. Northwest Magnesite Co.*, 28 Wash. 2d 1, 182 P. 2d 643, 648, the royalty was based upon the price received for processed (dead burned) magnesite where royalty was to be based on sales and the magnesite ore was treated before sale.

(e) *The language clearly supports plaintiffs’ motion.*

Clearly, a “gross” and not a net royalty was created.

Clearly, the royalty is based upon “proceeds from sale” rather than upon any indefinite “value” which might vary according to the opinion of the person setting it.

Clearly, “ore” is a broader term than either the limited terms “raw ore” or “dressed” or “concentrated ore” and therefore includes them. Only when the mineralizer, oxygen, has been eliminated does it cease to be ore.

Because there is no ambiguity, the court cannot consider parol evidence whereby “gross” could be changed to “net” or whereby “proceeds of sale” could be changed to “value of raw ore.”

The unambiguous language of the agreement is conclusive. The court’s decision should have been based thereon and plaintiffs’ motion for summary judgment should have been granted.

POINT II

THE RECORD DOES NOT SUPPORT THE GRANTING OF DEFENDANTS’ MOTION FOR SUMMARY JUDGMENT.

(a) *The burden is upon the defendants to establish a record showing no issue of fact.* The theory underlying a motion for summary judgment is closely akin to that underlying a motion for a directed verdict. The summary judgment procedure is not designed to supplant live trials where there is a genuine issue of material fact to be tried. The lower court, on a motion for summary judgment, should not resolve factual inferences, or otherwise resolve any genuine material issue of fact. The party moving for summary judgment has the burden of clearly establishing the lack of a triable issue of fact upon a record that is adequate to the legal issue presented. 6 *Moore’s Federal Practice* 2364.

(b) *The record should be considered in a light most favorable to plaintiffs.*

For purposes of considering whether summary judgment should have been granted for defendants, the Supreme Court should accept all of plaintiffs' allegations made below as facts.

Watkins v. Simonds, 11 U.2d 46, 354 P.2d 852.

The record should be considered in a light most favorable to plaintiffs.

Gammon v. Federated Milk Producers Association, 11 U.2d 421, 360 P.2d 1018.

(c) *The royalty provision is expressly based upon proceeds of sale and expressly prohibits deductions.*

This is fully covered under Point I.

(d) *There is no record on which to modify the royalty provision.*

There is no record upon which to base any decision that the royalty language "gross proceeds from the sale of all ore" has any meaning other than its usual and ordinary meaning.

It is not the province of the court to write a new agreement for the parties. *Holbrook v. Webster's Inc.* 7 U.2d 148, 320 P.2d 661

Even if a contract is ill advised and burdensome, the court cannot make a new contract for the parties.

Tooele City v. Settlement Canyon Irrigation Co., 4 U. 2d 215, 291 P. 2d 881.

At the very least, before the lower court directed deductions to be made from a gross royalty provision or directed payments to be based upon value of raw ore instead of upon “proceeds of sale” there would have to be a record upon which to base such a ruling. There is no evidence, nor are there any admissions, affidavits or any other bases for the court’s variation from the express terms of the gross royalty provision.

(e) *Rules of construction in the record support plaintiffs’, not defendants’ motion.*

If there were any ambiguity in the royalty language, the contract should be construed strictly against defendants, for not only was the royalty agreement drafted by defendants, it was drafted by defendants’ attorney (Tr. 96, 121).

Tanner v. Utah Poultry, 11 U. 2d 353, 359 P. 2d 18;

Patterson v. Wilcox, 11 U.2d 264, 358 P. 2d 88;

Continental Bank & Trust Co. v. Bybee, 6 U. 2d 98, 306 P. 2d 773.

(f) *Parol Evidence in the record supports plaintiffs’, not defendants’ motion.*

As shown in point I(c), parol evidence should not be considered. But even if there were ambiguity in the royalty language, and it should be considered as to the meaning of “ore,” the parol evidence in the record shows that the sale of “concentrates” is the sale of concentrated ore, and that “concentrates” are a form of ore.

The defendants themselves consider that concentrates are ore. The following are specific instances in the record evidencing this:

Hecla's *sales* records showing the actual sales of concentrated ore to URC on which plaintiffs claim their royalty should be based show "total *ore* value," not "total *concentrate* value" (Tr. 170).

Federal in its fourth annual report showing income of its subsidiaries shows:

"Income Uranium *Concentrate Ore Sales*, \$3,740,025." (Tr. 58(a)).

Federal Resources Corporation in its annual report of April 30, 1960, shows:

"4th. It must be remembered that there is no commercial stockpile of uranium. All of the *ore mined and milled* under government contract *has been purchased* for military use." (Tr. 62).

Radorock Resources Inc. (merged into Federal) in its annual report of April 30, 1959, says:

"Radon Mine . . . A contract has been signed with the Uranium Reduction Company providing for a *market for our ore* through 1966." (Tr. 53)

This reference is to the sales agreement under which plaintiffs claim royalties.

In an affidavit by the president of defendant Federal Resources Corporation, he says:

"Over 90% of the *gross income* of the corporation was for the fiscal year year ending April

30, 1960, realized *from* production of *ores* from mining properties located in San Juan County, State of Utah.” (Tr. 96, 120).

Various provisions in the custom milling agreement between defendants and Uranium Reduction Company show that defendants consider concentrated ore as “ore,” as follows:

“Ownership of ore in process,” (Tr. 77 reverse side) as a heading indicates that it is ore during the processing as does also

“owners recognize that the processes necessary for concentration may require that . . . processor co-mingle owners ore.” (Tr. 77, reverse side).

“All risk of loss, theft or destruction of ore during or . . . after the concentration process . . . shall be on the owners,” (Tr 78)

indicates that it is ore after the processing.

A further indication that the sale was a sale of “ore” in a concentrated form, is the tax depletion treatment allowed the uranium industry, including defendants, which treats milling as a part of mining. As previously stated, this is not a situation in which a finished product has resulted from the processing. Milling is solely for the purpose of concentrating the ores. After the milling process the concentrated ores are smelted and refined until a finished product results. Defendants have treated milling as still part of the process of mining ore in making their tax returns under 26 USCA 613. This act per-

mits the mine operator to take a depletion allowance based upon "the gross income from the property." This is defined as "the gross income from mining." The term "mining" includes not merely the extraction of the ores or minerals from the ground but also the "treatment processes considered as mining," including, in the case of uranium, "crushing, grinding and beneficiation by concentration." The defendants are thus taking inconsistent positions. For tax depletion they assert to the Government that concentration of ore is just part of the mining process whereby ore is obtained, but to the royalty holders they assert that concentration is not a part of mining but is a process which completely changes the ore mined into something else.

(g) *The court erred in granting defendants' motion.*

The court granted defendants' motion for summary judgment and thereby ruled, even without any evidence as to custom of the trade or any other parol evidence, that "ore" as used in the royalty provision *could* not mean processed ore, but as a matter of law meant only raw ore.

This is erroneous for the following reasons:

1. The general term "ore" *does* include both of the more specific terms "raw ore" and "concentrated ore."

2. If that were not true, then at last the general term "ore" *might* include both of the more specific terms "raw ore" and "concentrated ore." In such event there would be two possibilities:

(a) a construction of “raw ore” would be avoided because if the royalty language were construed to mean “gross proceeds from the sale of raw ore,” there would be conflicting provisions because, since 1958, defendants have chosen not to sell any raw ore. There therefore could be no “gross proceeds of sale.” If effect can be given to both of two apparently conflicting provisions of a contract in a reasonable reconciliation, that interpretation should control.

Hardinge Co. v. Eimco Corp., 1 U. 2d 320, 266 P. 2d 494.

A construction of “ore” as including concentrated ore eliminates the apparent conflict and should therefore be adopted, or

(b) if that rule as to conflicting provisions were not followed, then a resort to parol evidence to solve an ambiguity would necessitate a trial, thus precluding a summary judgment.

POINT III.

THE RECORD DOES NOT SUPPORT THE DECREE THAT PLAINTIFFS RECOVER NOTHING BY THEIR SUIT.

Regardless of the correctness of the court’s ruling granting defendants’ motion for summary judgment, the court’s decree dismissing plaintiffs’ complaint was erroneous. The basis upon which this accounting should be made was only one of the issues involved in the suit. Defendants’ motion for summary judgment related solely to the basis of such accounting. The determination by the

lower court as to the basis of the accounting did not therefore, adjudicate all of the issues. Nevertheless, the court, after granting defendants' motion for summary judgment, went beyond the one issue thus adjudicated, and ruled that plaintiffs could recover nothing by their complaint. By this judgment plaintiffs have been deprived of any trial to establish:

1. That uranium royalties even based upon the method of accounting prescribed by the lower court have not been paid;

2. That plaintiffs are entitled to royalties on vanadium which are admittedly contained within the ores produced and for which plaintiffs have not been paid;

3. That part of the proceeds received by defendants in selling the ore was, in fact, a part of the sales price rather than a "development allowance" as contended by defendants, upon which no royalty has been paid.

We consider these points in order:

The first is self explanatory.

The second involving failure to make royalty payments on vanadium is as follows:

Plaintiffs are entitled to an accounting for, and payment of, their royalty based on the best sale price of all ore which defendants by using reasonable efforts might obtain. 2 *Summers Oil & Gas* par. 400.

Where, as here, the royalty is based upon the proceeds of sale, there is an implied obligation to market the production from the property. *Townsend v. Creekmore-Rooney Co.*, Okla., 332 P. 2d 35.

Defendants cannot rightfully give any of the production away, nor sell for a lower price than is reasonably obtainable.

Yet, in the milling agreement with URC, under which defendants are now operating, there is a provision whereby the gross proceeds could be wrongfully reduced. Plaintiffs seek an accounting as to whether or not there has been such a wrongful reduction of gross proceeds, and if there has, plaintiffs seek a judgment for their royalty interest therein. The instance is as follows:

By giving away the Vanadium in exchange for a reduction in processing charge (lime penalty) defendants would have wrongfully reduced the gross price. The Custom Milling Agreement (Tr. 77) provides that defendants shall, until a "new effective plant date," have an election to sell the contained vanadium for 31 cents per pound and pay an increased treatment charge, or give the vanadium away and pay no increased charge if ore contains more than 6% lime. After the "new effective plant date" the vanadium is given away in exchange for no increase in treatment charge regardless of the lime content of the ore. Plaintiffs seeks an accounting as to how much vanadium has been sold at the 31 cents per pound price, since this is clearly a part of "gross proceeds of sale," and plaintiffs are entitled to a judgment for 2%

of the price thereof if not already paid.

On the other hand, if the vanadium was not sold for the 31 cents per pound, plaintiffs are entitled to an accounting as to how much vanadium has been given away, and to a judgment for 2% of the value thereof, since defendants have an implied duty to sell the ore for the best price obtainable.

The third point involving deduction by defendants of a false "development allowance" is as follows:

The government, in buying ore through the AEC, as a matter of public policy, paid to the miner 50 cents per pound of U_3O_8 as a development allowance "in recognition of the expenditures necessary for maintaining and increasing developed reserves of uranium ores," (Tr. 38), which was designed to be used by him to develop other ore bodies. This development allowance was expressly excluded from the gross sales price upon which royalties should be paid in the agreement providing for plaintiffs' royalty (Tr. 49).

The public policy of the AEC to develop more sources of fissionable material is inapplicable where a sale is made to a private buyer such as URC. Any payment made by a private buyer is part of the purchase price, regardless of any subterfuge such as earmarking part thereof as an "allowance." But, instead of showing the true gross sales price, defendants drafted their sales agreement with the private buyer URC to deduct from the total sales price a fictitious "development allowance" on which no royalty was paid (Tr. 88).

Indicative of the fact that there is no separate "policy" on the part of a private buyer to develop more fissionable material is the fact that the sales agreement with URC provides that when the government stops paying a development allowance (upon the expiration of Circular 5 on March 31, 1962) the fictitious allowance from URC ceases and the full payment of \$8.00 per pound is shown as sales price. (Tr. 88 reverse side) If there were any reason for a private buyer to pay a development allowance, it would not be affected by the government's elimination of its allowance. The most that can be said for a development allowance deduction is that if the sale had been made to the government the government would have paid an allowance. That is no reason to make deductions from gross sales price when a sale is made privately. Plaintiffs seek an accounting and judgment for its share of the true gross proceeds without a deduction of any artificial 50 cent per pound development allowance.

But not only have defendants created the fiction of a "development allowance" in sales to a private buyer, the development allowance was actually raised even higher than that paid by the government. The government paid 50 cents (Tr. 38) but defendants and URC made it 54 cents, and thus arrive at a \$7.46 "sales price" instead of a true \$8.00 per pound (Tr. 88) This adds insult to injury. If defendants can increase the allowance 4 cents, why couldn't it be increased 6 cents, 10 cents or any larger portion of the \$8.00?

Plaintiffs are entitled to an accounting and judgment

for not only the 50 cents but also the extra 4 cents per pound.

POINT IV.

THE COURT ERRED IN GIVING THE ROYALTY PROVISION A DIFFERENT EFFECT FOR PAST AND FUTURE ROYALTIES.

The Court held that, if plaintiffs did not like the royalties based on raw ore value, *in the future only* plaintiffs might elect to have the royalty based upon the net proceeds of sale actually received, after deducting milling costs. If, despite the royalty provision language of "gross," not "net" royalty, plaintiffs have to choose between these two alternatives, it is better from a tax depletion standpoint to have the accounting based upon net proceeds rather than raw ore values, inasmuch as plaintiffs could get a portion of the benefit of a greater depletion allowance. To date, defendants have had the benefit of all of the increased depletion allowance. Defendants have not just depleted the "working interest" portion of the proceeds, but have depleted that portion of the increase in sales price of the ore attributable to plaintiffs' 2% royalty, since it has depleted 100% of the gross proceeds of sale, less "raw ore value" royalty payments (Tr. 43, 92). The court, with no basis for differentiation between past and future royalties, (the royalty agreement does not change) held that the duty of the defendants to account on the net actual sales price basis, which is by far the better of the two poor alternatives given plaintiffs, applies only to future sales. The least the court could have done, in order to be con-

sistent, is to hold the royalty provision means one thing or the other from its inception, rather than changing its construction only for future production.

CONCLUSION

Technical rules of construction need not be applied in this case. The plain, clear language of the royalty provision is "gross proceeds from the sale of all ore." Because the language is unambiguous, parol evidence must not be considered. The language expressly bases royalties upon proceeds of sale, and expressly prohibits deductions. Plaintiffs' motion that the royalties should be so based should therefore have been granted.

The court rejected the language of the royalty provision, and instead gave plaintiffs two alternatives: Plaintiffs could either, 1—take the *value* of raw ore, or 2—take the *net* proceeds of sale. Both alternatives violate the clear provisions set forth in the royalty agreement. The first disregards the words "proceeds of sale"; the second disregards the word "gross" and gives it an exactly opposite meaning of "net." There was no record whatsoever in support of such a construction, even if the court had been justified in looking beyond the language of the agreement. Even the parol evidence in the record supports plaintiffs' motion rather than defendants'.

It is not the province of the court to write a new agreement for the parties. Defendant Federal Resources Corporation is hardly an unsophisticated miner who

might not have known the precise meaning of words used in creating a royalty interest. When some confusion existed in the chain of title as to whether there was a "net mill or smelter return" or a "gross proceeds of sale" royalty, defendants' corporate counsel wrote an agreement expressly stating that the royalty should be based on gross proceeds. A lawyer would intend the words to mean precisely what they said; that a gross royalty should be created. If he had intended a net royalty to be created whereby milling or other costs should be deducted from the gross, he would have said so and would have specified what deductions should be made.

The court based the judgment on his own observations of copper mining rather than upon any record. Its ruling was based entirely on the court's concept that "concentrates" are not ore. This ignores the dictionary definitions and defendants' own use of the words indicating otherwise. After so construing the word "ore" the court then completely ignored all of the other words, "gross proceeds of sale." A correct construction would have reconciled all the provisions.

The summary judgment also differentiates between past and future royalties, creating a situation in which defendants are entitled to all of the increase in depletion allowance in the past and permitting plaintiffs to take its pro-rata share of the increased depletion allowance only in the future. Such differentiation has no basis, in that the same royalty provision controls both past and future royalties.

Not only did the court err in the construction of the royalty provision, it went beyond the scope of the motion for summary judgment. The motion merely sought determination of the basis upon which an accounting should be made, but the court adjudicated that plaintiffs were not entitled to any accounting whatsoever. The court thereby deprived plaintiffs of their day in court to ascertain whether or not they had all the uranium royalties to which they were entitled, (even upon defendants' construction of the royalty provision) and to ascertain the amount of vanadium royalties to which they were entitled, and to ascertain whether or not that which defendants contend is development allowance, not subject to a royalty, was in fact a part of the purchase price to which plaintiffs' royalty would apply.

We submit that error was committed and that the judgment should be reversed and an accounting be ordered based upon the language of the royalty provision.

Respectfully submitted,

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