

1983

Atlas Corporation v. National Growth Corporation, Et Al. and the Clovis National Bank and the Citizens Bank of Clovis : Brief of Appellants

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IN THE SUPREME COURT
OF THE STATE OF UTAH

ATLAS CORPORATION,

Plaintiff - Respondent,

vs.

NATIONAL GROWTH CORPORATION,
et al.,

Defendants, and

THE CLOVIS NATIONAL BANK and
THE CITIZENS BANK OF CLOVIS,

Defendants - Appellants.

No. 19239

BRIEF OF APPELLANTS

Appeal from a Summary Judgment of the Seventh Judicial District
Court in and for San Juan County, Utah
Honorable Boyd Bunnell, Judge

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TABLE OF CONTENTS

	<u>Page No.</u>
NATURE OF THE CASE.....	1
PROCEEDINGS AND DISPOSITION BELOW.....	1
NATURE OF RELIEF REQUESTED ON APPEAL.....	2
INTRODUCTION.....	2
FACTS.....	5
1. Reservation of the Net Profits Interest (1957).....	5
2. The Bardon Shaft Operation (1957-1961)...	7
3. The Yucca Litigation (1961-1968)	8
4. The Velvet Mine (1978)	10
5. The Present Litigation; the Continuing Validity of the Net Profits Interest is Conceded (1979-1982).....	10
6. Atlas Reverses Its Position (September 1982 - Present).....	12
7. Basis of the District Court's Ruling.....	14
ARGUMENT.....	15
I. THE AGREEMENTS AND THE NET PROFITS INTER- EST DID NOT TERMINATE UPON THE COMPLETION OF THE BARDON SHAFT OPERATION	18
A. The Agreements Unambiguously Provide That They Will Remain in Force so Long as the Claims Exist and that the Net Profits Interest Applies to "All Ores" Mined from the Claims.....	18
B. The District Court's Construction of the Agreements is Manifestly Implaus- ible.....	22

1.	There is no basis whatsoever for limiting the duration of the Agreements to a "single mining venture.".....	27
2.	The district court's conclusion that the Agreements were terminated by the abandonment of a carefully-defined portion of property comprising a small fraction of the claims in the precise manner spelled out in the Operating Agreement is demonstrably incorrect.....	28
3.	The district court did not offer an even colorable explanation as to why no weight should be given to the express provisions in the Agreements that apply them to all ores so long as any of the Claims remain in effect.....	30
II.	THE NET PROFITS INTEREST IS AN ESTATE IN LAND WHICH IS LEGALLY BINDING ON ATLAS.....	31
A.	The Phrase "Net Profits Interest" is a Term of Art and by Its Characteristics Describes an Interest in Land Generally Recognized in the Mining Industry.....	33
1.	Net profits interests are recognized as estates in land by their characteristics; indeed, the phrase "net profits interest" has become a term of art.....	33
2.	An analysis of the Net Profits Interest defined in the Agreements shows it to properly be characterized as an estate in land; it should therefore bind successors to the Claims...	37
3.	The parties characterized the Net Profits Interest as a "working interest" which is an interest in land.....	41

B.	The Parties Failure to Use the Term "Royalty" in Drafting the Net Profits Interest is Not Indicative of an Intention to Create a Mere Contract Right.....	43
C.	The Language of the Deed Construed in Light of the Entire Transaction Shows a Clear Intent to Reserve The Net Profits Interest in The Interest Owners.....	45
III.	ALTERNATIVELY, THE NET PROFITS INTEREST IS ENFORCEABLE AGAINST ATLAS AS A COVENANT RUNNING WITH THE LAND BOTH IN LAW AND IN EQUITY....	50
A.	The Net Profits Interest is Enforceable as a Covenant Running with the Land at Law.....	51
1.	The Net Profits Interest touches and concerns the possessory estate in the Claims and the Interest Owners' retained reversionary interest.....	52
2.	The Parties intent that the covenants in the Operating Agreement run with the land is clearly expressed in the Agreements.....	55
B.	The Net Profits Interest is Enforceable in Equity.....	56
IV.	THE COURT ERRED BY CONSIDERING ONLY A PORTION OF THE EVIDENCE BEFORE IT.....	59
A.	The Extrinsic Evidence Decisively Contradicts the District Court's Finding that the Agreements and the Net Profits Interest Terminated in 1961.....	60
B.	At The Least, Atlas' Position Raised Genuine Factual Issues Precluding Summary Judgment.....	66
	CONCLUSION.....	69
	APPENDICES	
1.	A-1
2.	A-2
3.	A-3

CASES CITED

	<u>Page</u>
<u>Arroyo v. Rosenbluth,</u> 454 N.Y.S.2d 610 (1982).....	57
<u>Aspen Acres Association v. Seven Associates, Inc.,</u> 29 Utah 2d, 303, 508 P.2d 1179 (1973).....	46
<u>Bellingham Securities Syndicate, Inc. v. Bellingham</u> <u>Coal Mines, Inc.,</u> 13 Wash. 2d 370, 125 P.2d 668 (1942).....	34
<u>Bentenson v. Call Auto and Equipment Sales, Inc.,</u> 645 P.2d 684 (Utah 1982).....	18
<u>Blackard v. Good,</u> 207 Okla. 175, 248 P.2d 596 (1952).....	56, 57
<u>Blodgett v. Martsch,</u> 590 P.2d 298 (Utah 1978).....	66
<u>Carlock v. National Co-operative Refinery Ass'n,</u> 424 F.2d 148 (10th Cir. 1970).....	34
<u>Cereghino v. Einberg,</u> 4 Utah 514, 11 P. 568 (1886).....	47
<u>Chournos v. D'Agnillo,</u> 642 P.2d 710 (Utah 1982).....	46
<u>City of Westminster v. Skvline Vista Development Co.,</u> 163 Colo. 394, 431 P.2d 26 (1964).....	47
<u>Coltharp v. Coltharp,</u> 48 Utah 389, 160 P. 121 (1916).....	47
<u>Commercial Building Corp. v. Blair,</u> 565 P.2d 776 (Utah 1977).....	60
<u>Dagrosa v. Calabro,</u> 105 N.Y.S.2d 178 (N.Y. Sup. Ct. 1951).....	49
<u>DeBlois v. Crosley Building Corp.,</u> 117 N.H. 626, 376 A.2d 143 (1977).....	56
<u>Durham v. Margetts,</u> 571 P.2d 1332 (Utah 1977).....	66

<u>Extraction Resources, Inc. v. Freeman,</u> 555 S.W.2d 156 (Tex. Cir. App. 1977).....	38
<u>First Western Fidelity v. Gibbons and Reed Co.,</u> 27 Utah 2d 1, 492 P.2d 132 (1971).....	51, 52
<u>Fitzstephens v. Watson,</u> 218 Or. 185, 344 P.2d 221 (1959).....	57
<u>Greenleaf v. S. A. Camp Ginning Co.,</u> 150 Cal. App. 2d 385, 309 P.2d 943 (1957).....	34, 53
<u>Hartman v. Potter,</u> 596 P.2d 653 (Utah 1979).....	38
<u>Hendrickson v. Freericks,</u> 620 P.2d 205 (Alaska 1980).....	49
<u>Holley v. Federal-American Partners,</u> 29 Utah 2d 212, 507 P.2d 381 (1973).....	41
<u>Hudspeth v. Eastern Oregon Land Co.,</u> 247 Or. 372, 430 P.2d 353 (1967).....	53
<u>John Wright, Inc. v. Norskog,</u> 151 Mont. 22, 438 P.2d 550 (1968).....	38
<u>Johnson v. Peck,</u> 90 Utah 544, 63 P.2d 251 (1937).....	46
<u>Kelly v. Haas,</u> 262 S.W.2d 687 (Ky. 1953).....	49
<u>Lundeberg v. Dastrup,</u> 28 Utah 2d 28, 497 P.2d 648 (1972).....	51, 52
<u>Maynard v. Ratliff,</u> 297 Ky. 127, 179 S.W.2d 200 (1944).....	54
<u>Messett v. Cowell,</u> 194 Wash. 646, 79 P.2d 337 (1938).....	57
<u>N.P. Dodge Corp. v. Calderwood,</u> 151 Kan. 978, 101 P.2d 883 (1940).....	57
<u>O'Hara v. Hall,</u> 628 P.2d 1289 (Utah 1981).....	18

<u>Picard v. Richards,</u> 366 P.2d 119 (Wyo. 1961).....	43
<u>Reichert v. Weeden,</u> 618 P.2d 1216 (Mont. 1980).....	56
<u>Richardson v. Callahan,</u> 213 Cal. 683, 3 P.2d 927 (1931).....	57
<u>Rimledge Uranium and Mining Corp. v. Federal Resources Corp.,</u> 13 Utah 2d 239, 374 P.2d 20, 23 (1962).....	41
<u>Russell v. Geyser-Marion Gold Mining Co.,</u> 18 Utah 2d 363, 423 P.2d 487 (1967).....	46
<u>Russell v. Palos Verdes Properties,</u> 218 Cal. App. 2d 754, 32 Cal. Rptr. 488 (1963)....	57
<u>Stephen Hays Estate, Inc.,</u> 85 Utah 137, 38 P.2d 1066 (1934).....	38
<u>Thew v. Thew,</u> 35 Cal. App. 2d 691, 96 P.2d 826 (1939).....	57
<u>Thornack v. Cook,</u> 604 P.2d 934 (Utah 1979).....	66
<u>Weiner v. Wilshire Oil Co.,</u> 192 Kan. 490, 389 P.2d 803 (1964).....	48
<u>Westland Oil Development Corp. v. Gulf Oil Corp.,</u> 637 S.W.2d 903 (Tex. 1982).....	49, 50
<u>Whitinsville Plaza, Inc. v. Kotseas,</u> 378 Mass. 15, 390 N.E.2d 243 (1979).....	56
<u>William v. Borden, Inc.,</u> 637 F.2d 731 (10th Cir. 1980).....	18
<u>Williams v. First Colony Life Insurance Co.,</u> 593 P.2d 534 (Utah 1979).....	60

OTHER AUTHORITIES CITED

3	<u>The American Law of Mining</u> §§15.17, 17.2, 17.3 (Rocky Mtn. Min. L. Fdn. ed. 1982).....	34, 41, 53
1	E. Kuntz, <u>The Law of Oil and Gas</u> , § 15.4 (1962).....	43
3	C. Lindley, <u>Mines</u> §861 (3d Ed. 1914).....	45
5	R. Powell, <u>The Law of Real Property</u> ¶¶ 673[1], [2] (1981).....	51, 54, 56
1A	G. Thompson, <u>Real Property</u> §179 (1980).....	54
1	H. Williams & C. Meyers, <u>Oil and Gas Law</u> , §302-303 (1981).....	43
2	H. Williams & C. Meyers, <u>Oil and Gas Law</u> §424.1....	38, 40
2	H. Williams & C. Meyers, <u>Manual of Oil and Gas Terms</u> 84, 457, 838 (1982).....	35, 40
9	C. Wright & Miller, <u>Federal Practice and Procedure</u> §2575 (1971).....	18
	Burke and Bowhay, <u>Income Taxation of Natural Re- sources</u> §2.06 (Prentice-Hall 1982).....	36
	Gushee, <u>Drafting Practical Royalty Clauses for the Mining Lease</u> , 21 <u>Rocky Mtn. Min. L. Fdn.</u> 625, 634-640 (1974).....	34, 44
	Hecox, <u>Drafting and Negotiating of Net Profits Agree- ments</u> , <u>Mining Agreements Institute II</u> (1982) (Rocky Mtn. Min. L. Fdn.).....	34, 44
	Sherrill, <u>Net Profits--A Current View</u> , 19 <u>Inst. on Oil and Gas Taxation</u> 165 (1968).....	36
23	Am. Jur. 2d <u>Deeds</u> §172 (1965).....	47
	Annot., 23 A.L.R.2d 520 (1952).....	57

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Defendants - Appellants.

No. 19239

NATURE OF THE CASE

This appeal seeks a determination that a net profits interest owned by defendants-appellants continues to exist and to burden certain mining claims located in San Juan County, Utah.

PROCEEDINGS AND DISPOSITION BELOW

The action below was a quiet title action brought by Atlas Corporation ("Atlas") to determine the interests of various parties in certain mining claims (the "Claims"). The Clovis National Bank and The Citizens Bank of Clovis (the "Clovis Banks") own a fractional share of a net profits interest (the "Net Profits Interest") that was created and reserved when the Claims were conveyed to Atlas' predecessor-in-interest in 1957. On February 7, 1983, the district court granted Atlas' motion for summary judgment and subsequently entered findings, conclusions,

and judgment decreeing that the Net Profits Interest had ceased to exist in 1961. This appeal requires review of that summary judgment.

NATURE OF RELIEF REQUESTED ON APPEAL

The Clovis Banks request this Court to reverse the summary judgment and remand this case to the district court with directions to enter judgment on the Clovis Banks' cross-motion for summary judgment, ruling that the controlling instruments unambiguously provide that the Net Profits Interest continues to exist. Alternatively, the Court should rule that genuine issues of fact remain and remand for further discovery and trial.¹

INTRODUCTION

This case presents a story that has been repeated countless times in the development of mineral resources: A prospector stakes claims, discovers ore, and then conveys the claims to a larger operator possessing more adequate resources for developing and mining the claims. Because the value of the claims is necessarily uncertain, the prospector does not receive just a lump sum payment; rather, he retains a right to a percentage of the proceeds of the claims. The legal consequences of

¹On the basis of its ruling that the Clovis Banks have no interest in the Claims, the district court also dismissed the Clovis Banks' cross-claims against certain other defendants; and in the event that the summary judgment is reversed, such cross-claims should be reinstated.

type of transaction are well-established. Absent some agreement or act terminating the retained interest, the interest is perpetual and the owner of the interest is entitled to a percentage of proceeds from the claims whenever such proceeds may be received.

The present case follows this pattern closely. The claim owners, including the Clovis Banks' predecessor-in-interest, acquired the claims when the claims were thought to be of little or no value. Operating on a limited budget, they proceeded to discover a substantial ore body. They then took the claims to an established company, Atlas' predecessor-in-interest, to have the claims developed. An agreement was struck in which the owners agreed to contribute the claims to the venture and the established company agreed to contribute the resources necessary to develop the claims. As compensation for their contribution, the owners reserved the right to retain 40% of the net proceeds from production from the claims and the company was granted the right to receive the remaining 60%. The parties carefully defined the owner's net profits interest and reserved it from the claims when legal title to the claims was transferred to the larger company prior to the commencement of mining operations.

Mining of the claims was subsequently initiated but the owners received no return on their reserved 40% interest. The claims then lay idle for several years before being conveyed to Atlas. At this point, the present case begins to diverge from

the traditional pattern. First, the claims turned out to contain the richest ore body on the Colorado Plateau. This mine has now produced over 3,500,00 pounds of uranium concentrate from ore averaging 0.41% uranium oxide per ton and ultimately may yield as much as 6,000,000 pounds of concentrate. Atlas has, to date, received approximately \$150,000,000 for this concentrate.² Second, contrary to normal industry practice, the original claim owners and their successors, who contributed the claims to the project and who were to receive 40% of the profits from the claims, were not paid one additional penny for their interest. Moreover, under the district court's ruling, the original owners and their successors will not be entitled to any compensation out of further profits from the mine.

There is no indication that the parties intended the retained net profits interest to be less than a perpetual interest in land or to have characteristics different from those normally attributed to such an interest in the industry. Indeed, the instruments creating the interest set forth in tedious detail

²Fiscal 1982 was the most profitable year in Atlas' history. This record performance was attributed by Atlas to the Company's Mineral Division, the main business of which is selling uranium oxide and vanadium pentoxide produced from the Velvet Mine. In that year, the company repaid its long-term bank debt of \$28,233,000, its net worth increased 61%, the return on shareholders' equity was 60% and the company's working capital increased 33%. See Atlas Corp. 1982 Annual Report 1, 2 (June 30, 1982).

clusive, perpetual nature. Moreover, there is no policy in the law prohibiting the creation of a perpetual net profits interest in the mining context. Nevertheless, the district court ruled that a net profits interest is radically different from a royalty or mineral interest notwithstanding the fact that its decision would cut off the original claim owners--who were initially responsible for development of the claims--and their successors from any share of the profits from the mine. The court then concluded that, although the validity of the interest had remained undisputed for over 25 years and through 2 1/2 years of the present trial, the interest had actually terminated in 1961, only four years after its creation.

The court's ruling was detailed and lengthy and included numerous factual determinations. As a result, a review of that ruling requires a detailed rehearsal of the history of the net profits interest and the facts of the case.

FACTS

1. Reservation of the Net Profits Interest (1957).

In early 1957, Hez Abernathy, Lee Merrill, and Bud Mersfelder (the "Interest Owners") owned 38 unpatented mining claims known as the Velvet and Royal Flush claims. On April 18, 1957, these three owners entered into an Agreement (the

"Agreement").³ with Kerr-McGee Industries, Inc. ("Kerr-McGee") and Mercury Uranium and Oil Company ("Mercury"). In the Agreement, the Interest Owners and Kerr-McGee and Mercury set out in detail their respective ownership interests in the Claims. The parties agreed that legal title to the Claims would be transferred to Kerr-McGee and Mercury subject to the reservation of the Net Profits Interest to the Interest Owners. On the same day, the parties also executed an Operating Agreement, see A-2 (which, taken with the Agreement are collectively called the "Agreements") that set forth the various rights and obligations of the parties and governed generally the working relationship of the various interests defined in the Agreement.

In accordance with these Agreements, the Interest Owners conveyed the Claims to Kerr-McGee and Mercury by a deed dated June 7, 1957 (the "Deed"). See A-3. Because of the complexity and length of the accounting procedure used to calculate the interests created in the Agreement, the Interest Owners' reserved rights were not set out in detail in the Deed.

³For the Court's convenience, the Clovis Banks have included an Appendix containing the most pertinent or frequently cited documents from the record. The Agreement is designated as A-1. Documents contained in the Appendix are cited as their Appendix number, e.g., A-1 at 3. Otherwise, citations refer to pages in the Clerk's Record, e.g., Transcript of Hearing at 117, R. 2354. For brevity, citations are in most instances not given for facts which are not in dispute.

their rights were incorporated into and reserved from the Deed by making the Deed on its face expressly "subject to the terms, covenants and conditions contained in that certain Agreement dated the 18th day of April, 1957, by and between the parties hereto." A-3 at 2. In this way, the rights of the Interest Owners were incorporated into the Deed and were afforded the protections of the Utah recording statutes when the Deed was subsequently recorded.

Two different provisions of the Agreements are critical for purposes of this appeal. The first provision is found in the sections in each Agreement which provide, as the Operating Agreement states in the opening recitals, that "said Interest Owners have reserved unto themselves an undivided net profits interest . . . in and to the net profits from all ores mined, saved, removed and sold from said claims" A-2 at 1. The second important provision is contained in Section 1 of the Operating Agreement. This Section defines the duration of the Agreements and the Net Profits Interest: "[T]his Agreement shall be in full force and effect so long as any of the mining claims . . . are in force and effect." A-2 at 2.

2. The Bardon Shaft Operation (1957-1961).

Kerr-McGee commenced exploration of the Claims and, after discovering a commercial ore deposit, began a mining operation. The mine, known as the Bardon Shaft, was operated

until 1960. During this period, Kerr-McGee acquired the interest that had been conveyed to Mercury.

In late 1960, Kerr-McGee announced its intention to abandon the Bardon Shaft. Pursuant to the requirements of Section V of the Operating Agreement, providing for "Abandonment of Mines," see A-2 at 5-6, Kerr-McGee notified each of the Interest Owners of the proposed abandonment, describing in metes and bounds the specific property to be abandoned--which property amounted to only 7.4 acres, an extremely small portion of the almost 700 acres covered by the Claims--and offered the Interest Owners the option of purchasing the Bardon Shaft property. See Letter from Kerr-McGee to Interest Owners (Dec. 19, 1960), R. 1606-07. One of the Interest Owners, Bud Mersfelder, expressed interest, but declined to buy the property after being informed of Kerr-McGee's proposed \$50,000 purchase price. See Letter from Kerr-McGee to P. G. Mersfelder (Jan. 3, 1961), R. 1451.

3. The Yucca Litigation (1961-1968).

After abandoning the Bardon Shaft, Kerr-McGee intended to conduct further exploration and mining. See Letter from R. T. Zitting, Kerr-McGee's Mineral Exploration Manager, to Wm. Dean McDougald (May 9, 1962), R. 1882. There was, in fact, good reason to expect that additional ore would be found on the Claims. Before 1960, Kerr-McGee's drillers, including Bud Mersfelder, who was one of the Interest Owners, had already

... into a part of the ore body which Atlas has subsequently
... See Deposition of William McDougald at 75(4)-77(10),
116(21) -117(19), R. 447-49, 488-89. The evidence further
suggests that both the existence of proven ore reserves and "the
potential for discovery of a major sized ore body" to the south-
east of the Bardon Mine were evident at that time.⁴

Kerr-McGee's planned operations were stalled by the
commencement of litigation seeking an accounting of the proceeds
from the Bardon Shaft operation.⁵ Thus, in mid-1962, Kerr-
McGee stated:

Our present plans for the Velvet Group are to
do some additional exploration drilling as
soon as the [accounting] difficulties can be
resolved. . . . We have such a project
approved by management with only the reserva-
tion that we must straighten out our account-
ing problems before undertaking the work.

⁴The existence of such proven and potential ore is expressly
recognized in a 1968 report prepared by Climax Corporation, a
prospective buyer of the Claims. Letter and Outline of Property
Examination, R. 2124-27. Because the report was not produced by
Atlas until after summary judgment had been granted, the Clovis
Banks had no opportunity to discover the circumstances sur-
rounding the preparation of the report. However, there is no
indication that Climax itself ever performed any exploration on
the Claims. Thus, it is probable that the information reflected
on the report was obtained by Climax from Kerr-McGee or was
common knowledge to those familiar with the history of the
Claims. Moreover, because there is no evidence of any explora-
tion between 1961 and 1968, the Climax report evidently reflects
facts known from the earlier exploration.

⁵Yucca Mining and Petroleum Co. v. Kerr-McGee Oil Indus., Inc.,
Civ. No. 1939 (Seventh Judicial Dist., San Juan Co., Utah).

Letter from R. T. Zitting, Kerr-McGee's Mineral Exploration Manager, to Wm. Dean McDougald (May 9, 1982), R. 1882. The Yucca litigation continued, however, until 1968.

4. The Velvet Mine (1978).

During and following the Yucca litigation, the faces changed: The Clovis Banks acquired Hez Abernathy's portion of the Net Profits Interest in 1967, see Deed of Mining Claims, R. 1352, while ownership of the Claims passed to Foote Mineral Company in 1970 and to Atlas in 1977. Atlas resumed exploration and, as has been previously predicted, a major ore body was discovered to the southeast of the Bardon Mine. See Affidavit of Carl Dixon, R. 1453-55.

Production of ore from Atlas' mine, known as the Velvet Mine, began in 1978. The Velvet Mine has proven to be the richest source of high grade uranium ore in the entire Colorado Plateau region.

5. The Present Litigation; the Continuing Validity of the Net Profits Interest is Conceded (1979-1982).

After acquiring the Claims, Atlas obtained a title opinion from the Denver law firm of Davis, Graham and Stubbs, Atlas' counsel in this case. Title Opinion, R. 1859-64. Following a lengthy and careful analysis, that opinion concluded that "a forty percent net profits interest (or, possibly a 40 percent carried working interest) in the Subject Claims currently exists and would be applicable to any future production from

Claims." Id. at 25, R. 1864 (emphasis supplied). Thus, Atlas filed this lawsuit asking for a determination of the rights of numerous claimants, Atlas did not contend that the Net Profits Interest had terminated or expired. On the contrary, Atlas repeatedly conceded that the Net Profits Interest continued to exist and to burden the Claims.⁶

In fact, the continuing validity of the Agreements and the Net Profits Interest was universally conceded. Kerr-McGee, the original operator of the Claims and a party to this lawsuit, was unequivocal in asserting the continued existence of the Operating Agreement. Kerr-McGee Corp. Memorandum at 4, R. 963. See pp. 62-63, infra. The district court similarly assumed that the Agreements were still effective. For instance, when the Clovis Banks and others sought to enforce a provision of the Operating Agreement requiring monthly reports by the operator,

⁶Atlas' Reply to Clovis Banks' counterclaim stated, for instance: "ATLAS admits that the Subject Claims are subject to the 40% Net Profits Interest." Reply of Atlas at 2 ¶1, R. 102 (emphasis added). The Reply further stated: "ATLAS admits that it is the operator of the Subject Claims under the April 18 Operating Agreement. . . ." Id. at 3 ¶6, R. 103. Indeed, even after the litigation had been in progress for two-and-a-half years, and substantial discovery had been completed, Atlas reiterated its position in a pre-trial statement: "ATLAS admits that the SUBJECT CLAIMS are subject to a net profits interest defined in paragraph I.6.DD above as the 40% NET PROFITS INTEREST. . . ." Statement of Plaintiff Atlas Corp. at 33 ¶39, R. 825. Atlas' other admissions of the existence of the Net Profits Interest are numerous, and it would be redundant to list them.

the court's ruling assumed the continuing effectiveness of that agreement and expressly described Atlas as the operator under such agreement. Decision of the Court at 1-2, R. 971-72.

6. Atlas Reverses Its Position (September 1982 - Present).

In a subsequent pretrial statement, Atlas reversed its position⁷ and contended that the Agreements and the Net Profits Interest had been terminated or abandoned while Kerr-McGee still owned the Claims. Statement of Plaintiff Atlas Corp. at 8-9, R. 1238-39.⁸ Although the district court had earlier issued rulings based upon the unqualified assumption that the Operating Agreement was still in force, at a hearing held less than two months before the scheduled trial date, the court indicated a desire to rethink its position,⁹ and invited Atlas to make a

⁷Even after reversing its positions vis-a-vis the Clovis Banks, Atlas continued to refer, without apparent qualification, to the Net Profits Interest as an existing interest in dealing with other parties. Stipulation and Joint Motion of Atlas and Mersfelders at 1-3, R. 1260-62.

⁸This dramatic reversal was not based on any facts learned through discovery; indeed, although all of the Interest Owners, as well as a number of other persons involved in the earlier transactions had been deposed, those persons were not directly asked whether they had intended or understood the Net Profits Interest to continue after completion of the Bardon Shaft operation. Like the parties to this action, those persons seemed to assume without question that the Net Profits Interest was still in existence.

⁹In the course of a lengthy hearing on December 14, 1982 at which complicated questions were raised involving revenue

presenting the issue. Transcript of December 14, 1982
Hearing at 118-19, R. 2355-56.

Atlas accepted this invitation and, in January 1983,
moved for summary judgment. In response, the Clovis Banks asked
the court to rule that the Net Profits Interest was still in
effect. At the same time, depositions of all the original
Interest Owners and of other persons intimately involved in the
early transactions were scheduled¹⁰ to explore more directly

computation methods, deduction of various claimed charges,
calculation of the parties' respective fractional shares in the
Net Profits Interest, and discovery matters, the court indicated
that it was "trying to resolve in my own mind as to whether or
not [the Agreements and the June 7, 1957 deed] would create an
interest that ran with the land. Because if it did, boy--It's
created all these problems if it did." Transcript of December
14, 1982 Hearing at 117, R. 2354. Further observing that "if I
were to say that it did not, then I'm--the balance of our lawsuit
is probably over and you guys can get on up to the Supreme Court
and see whether I'm right or not." Id. at 118, R. 2355.

¹⁰The importance of these further depositions cannot be over-
emphasized. Although the district court purported to glean the
"intent" of the parties to the agreements from their actions, see
Transcript of February 8, 1983 Hearing at 27, R. 2394, it ignored
such direct statements of intent as that provided by Richard T.
Zitting, one of the key players in all of the transactions
involving the Claims:

I do not believe, and to the best of my know-
ledge the other parties to the 1957 agreements
did not believe, that the 40% Net Profits
Interest was intended to apply only to the ore
body that was mined through the Bardon Shaft.
I did not have any intent or understanding dur-
ing the 1957 negotiations or thereafter that
the 40% Net Profits Interest would be limited
to one ore body or that it would terminate fol-

their understanding of the continuing nature of the interest. See Stipulation and Joint Motion, R. 1739; Notices of Depositions, R. 1751, 1757a, 1764. However, the district court granted summary judgment before those depositions could be taken.

7. Basis of the District Court's Ruling.

The district court construed the Agreements and the Deed as creating a net profits interest that was binding on Kerr-McGee and its successors so long as the Agreements themselves remained in effect.¹¹ However, the court concluded that the parties had intended the Agreements to create a "profit

lowing closing of the Bardon Shaft.

Affidavit of Richard T. Zitting at 2, R. 1773. The entire Affidavit is set out at pages 61 and 62, infra.

¹¹Perhaps the clearest expression of this reasoning was given in Conclusion 45, in which the court rejected the Clovis Banks' understanding of the language of Section VIII of the Operating Agreement providing that "[a]ll sales made by either Kermac or Mercury or their successors in interest shall be subject to the terms, covenants, and conditions of the Agreement. . . ." The court explained:

The Court concludes that the only logical and meaningful way to read Section VIII of the OPERATING AGREEMENT is that all of its terms, conditions and covenants would bind KERR-McGEE or MERCURY or their respective successors, but only so long as mining operations were on-going and only so long as the OPERATING AGREEMENT remains in effect. When the purpose of the OPERATING AGREEMENT was served, it terminated. Section VIII terminated as well, and the SUBJECT CLAIMS were not burdened.

Findings and Conclusions ¶45, R. 2105-06 (emphasis in original).

... arrangement" limited to a "specific mining venture." Findings and Conclusions ¶41, R. 2100. Although it offered no definition of the term "specific mining venture," the court ruled that the "mining venture" had ended upon completion of the Bardon Shaft operation, that the Agreements had therefore terminated at that time, and that the Net Profits Interest had similarly terminated.

ARGUMENT

The district court initially ruled that the net profits interest terminated for two reasons. First, the court determined that the intent of the parties was to limit the interest reserved to the claim owners to a share of ore produced in the initial "mining venture" undertaken by the parties. Transcript of February 8, 1983 Hearing at 27-32, R. 2394-99. Secondly, the court ruled--apparently without particular emphasis--that the interest reserved by the claim owners was not a royalty, working or other real property interest or a covenant binding upon successors of the original developers. Id. at 33-36, R. 2400-03.

The court later adopted more detailed findings and conclusions,¹² the response to which necessitates this lengthy

¹²The district court adopted nearly verbatim the findings and conclusions submitted by Atlas. These included some 36 "findings of fact" and 11 "conclusions of law" covering 28 typewritten pages. The all inclusive nature of these findings and conclusions is exemplified by the fact that at least one of the find-

brief. Because of the complicated nature of the court's ruling and the complicated response made necessary by that ruling, the Clovis Banks would like to introduce their arguments by briefly summarizing them. First, in Part I of the Argument, the Clovis Banks will show that the court's interpretation of the agreements is clearly inconsistent with the plain language of the key instruments in these transactions. Second, in Parts II and II of the Argument, the Clovis Banks will show that the reserved Net Profits Interest is an estate in land or, at the least, a covenant binding upon all successors to the claims who take with notice. Finally, in Part IV of the Argument, it will be shown that the district court erroneously granted summary judgment by selectively reviewing extrinsic evidence and wholly overlooking evidence directly supporting the Clovis Banks' interpretation of the transaction. In addition, the court failed to view the evidence in a manner most favorable to the Clovis Banks as required in the summary judgment context.

The Clovis Banks contend that the judgment must be reversed for two reasons. First, the Agreements were not

ings, i.e., finding 31, that limits application of the agreements to one ore body, was later refuted by Atlas. Compare Findings and Conclusions ¶31, R. 2095, with Atlas' Response to Objections at 7, R. 1945 where Atlas denies having propounded a "one ore body theory".

ated to terminate upon completion of any "single mining
ature." Rather, the Agreements unambiguously provide that they
shall remain in full force so long as any of the Claims continue
to exist. Moreover, the parties to the Agreements have unani-
mously indicated that they did not understand the Agreements or
the Net Profits Interest to terminate upon completion of the
Bardon Shaft operation or at any time thereafter. Second, the
Net Profits Interest was reserved to the Interest Owners and
their successors, and the conveyance to Kerr-McGee, through whom
Atlas' title derives, was expressly made subject to that reser-
vation. Atlas acquired the Claims subject to interests and
encumbrances of record, specifically including the Net Profits
Interest and is therefore bound by the Interest. Either of these
reasons should compel this Court to declare that the Agreements
and the Net Profits Interest continue in force.¹³ At the very
least, the existence of many facts which contradict the district

¹³ It is undisputed that if the Net Profits Interest existed in 1979, then Atlas acquired the Claims subject to that interest. At one point Atlas denied having actual or constructive knowledge of the Agreements and the Net Profits Interest at the time it acquired the Claims; however, Atlas has formally abandoned that position. Atlas' Responses to Clovis Banks' First Set of Interrogatories, Response 9, R. 1733. The fact of such knowledge is therefore established, at least for purposes of this case. Findings and Conclusions ¶45 n.3, R. 2107. In addition, Atlas apparently paid nothing for the Claims, and thus could in no event be considered a bona fide purchaser for value.

court's factual conclusions compel remanding the case for resolution of factual questions regarding the parties' intent.

Finally, although the district court captioned a number of its conclusions as "Findings of Fact," this Court should reach its own conclusions regarding the meaning of the Agreements and the Deed, without giving deference to those of the district court. The district court's conclusions are not factual findings after trial, but are summary judgment rulings that should be reviewed by this Court under the strict standard of Rule 56. See 9 C. Wright & A. Miller, Federal Practice and Procedure §2575 at 698 (1971); see, e.g., Williams v. Borden, Inc., 637 F.2d 731, 739 (10th Cir. 1980). Moreover, because the interpretation of documents is a question of law, "this Court is as capable of determining the issue as the trial court and [is] not bound by its conclusions." Betenson v. Call Auto and Equipment Sales, Inc., 645 P.2d 684, 686 (Utah 1982). See O'Hara v. Hall, 628 P.2d 1289, 1290-91 (Utah 1981).

I. THE AGREEMENTS AND THE NET PROFITS INTEREST DID NOT TERMINATE UPON THE COMPLETION OF THE BARDON SHAFT OPERATION.

- A. The Agreements Unambiguously Provide that they will Remain in Force so Long as the Claims Exist and that the Net Profits Interest Applies to "All Ores" Mined from the Claims.

The Agreements are careful and clear (to the point of redundancy) in defining their own duration, as well as the extent and duration of the Net Profits Interest. The very first section of the Operating Agreement provides:

1. Period of Agreement Concerning Operations.

It is agreed by and between the parties hereto that this Agreement shall be in full force and effect so long as any of the mining claims hereinabove identified and described are in force and effect.

A ? at 2.

Referring to this section, the district court correctly declared that "[t]he mining claims so identified are the SUBJECT CLAIMS, and they remain valid mining claims today." Findings and Conclusions ¶42, R. 2101. Thus, logic compels the conclusion that the Operating Agreement, including Section III which describes the Net Profits Interest, is still in force. The district court's conclusion that the Agreements and the Net Profits Interest were intended to terminate upon completion of the first mining venture, even though the Claims remain in force, blatantly contradicts the express term in Section I.

The duration of the interest is reinforced by the Agreements' clear and repeated descriptions of the scope of the Net Profits Interest itself. Section 6 of the Agreement not only is void of words that would limit the duration of the interest, but expressly provides that the interest applies to "the net profits from all ores mined, produced, and sold from said claims" without limitation. A-1 at 5 (emphasis added). Thus, the duration of the Net Profits Interest is tied to the duration of

the Claims that it burdens.¹⁴ The language of the Agreements flatly contradicts the district court's conclusion that the Net Profits Interest was limited to ores mined in a "specific mining venture."

The continuing nature of the Agreements is further evidenced in Section VIII of the Operating Agreement. After providing for possible sales of the Claims and joint property, this section declares:

All sales made by either Kermac or Mercury or their respective successors in interest, shall be subject to the terms, covenants and conditions of this Agreement, and such terms, covenants and conditions shall be deemed to be covenants running with the land and the mineral estate covered hereby and with such transfer and assignment thereof.

A-2 at 9. In a similar vein, Section XVIII of the Operating Agreement provides that "[t]he terms and conditions of this Agreement shall be binding upon and shall inure to the benefit of the parties hereto, their respective heirs, administrators, executors, successors, and assigns." *Id.* at 15. It is difficult to envision a plainer expression of the parties' intent that the

¹⁴Section III of the Operating Agreement contains an identical provision. See A-2 at 4. In addition, immediately after giving the precise description of all of the claims to be conveyed, the Operating Agreement recites the "said Interest Owners have reserved unto themselves an undivided Net Profits Interest as hereinafter set forth in and to the net profits from all ores mined, saved, removed and sold from said claims ." A-2 at 1 (emphasis added.)

Agreements were not limited to any short-term "specific mining
venture."¹⁵

Moreover, the parties provided for the possibility of termination under very specific circumstances, which have not been met. Section VI of the Operating Agreement spells out in detail a procedure for permitting expiration of the Claims. See A-2 at 6-7. When Section VI is read in conjunction with Section I, which states that the Agreement will remain effective so long as any of the Claims are in force, a mechanism for terminating the Agreements exists that logically precludes any implied method of termination. Read as a whole, the Agreements and the Deed overwhelmingly support the conclusion that their specific provisions unambiguously declare: the Agreements and the Net Profits Interest were intended to remain in effect so long as any of the Claims were in force.

¹⁵ Almost as persuasive as these affirmative provisions is the conspicuous absence, in both the Agreement and the Operating Agreement, of any language limiting their duration to a "specific mining venture." In view of the repeated provisions suggesting perpetual duration, it would have been imperative clearly to set

B. The District Court's Construction of the Agreements is Manifestly Implausible.

1. There is no basis whatsoever for limiting the duration of the Agreements to a "single mining venture."

The district court's finding that the Agreements and the Net Profits Interest were limited to a "single mining venture"--a term nowhere used in the Agreements--was purportedly based on Section III of the Operating Agreement.¹⁶ Because of the importance attributed by the Court to Section III, it must be quoted in full:

III. Commencement of Activities by Operator and Net Profits Interest.

It is understood and agreed that Kermac, as Operator, at its sole cost and expense, with reasonable diligence will commence and diligently prosecute exploration and other activities and operations upon the lands covered by said claims sufficient in its opinion to adequately test the same for the presence of commercial ore deposits; provided, however, after Kermac shall have incurred in the performance of and in connection with said exploration and activities and operations hereunder a sum equal to Fifty Thousand Dollars (\$50,000), then all drilling, exploration, development, mining

forth any intended limitation or terminating condition.

¹⁶The provisions of Section III are virtually identical to those contained in Sections 5 and 6 of the Agreement; and the court thus gave an identical construction to Sections 5 and 6. This brief focuses on Section III simply because the court found that Section III expressed the limited duration of the Agreements "more directly" than Sections 5 and 6. Findings and Conclusions ¶31, R. 2095.

activities and operations hereunder and all activities and operations in connection therewith by Kermac as Operator shall be borne, shared and paid for by Kermac and Mercury in the proportion hereinabove set forth. In the event of the discovery of commercial ore Operator shall proceed to define and to develop the ore body indicated thereby and in the event the same shall be a commercial ore body in Operator's opinion sufficient to reasonably justify the mining thereof, Operator, upon the completion of defining and developing the ore body, with reasonable diligence shall commence preparations for mining and for sinking a shaft and with reasonable diligence will sink or cause to be sunk at a location to be determined by Operator a shaft, to a depth to mine said ore body, including the necessary equipment to sink and equip said shaft. It is understood and agreed that from and after the time when the initial shaft and/or mine shall have been equipped by Operator to provide a capability for mining and producing twenty-five (25) tons or more of ore per day all other costs and expense incurred for the exploration, drilling, development, mining operation and overhead of said mining claims shall be charged in accordance with the provisions hereof against the proceeds derived from production from said claims and shall be taken into account in determining net profits therefrom for the purpose of ascertaining Interest Owners' participation therein as hereinafter set forth. Operator shall be entitled to a sum equal to ten (10%) percent of all money expended and costs and expenses incurred after said date of capability for mining in connection with the mining and operation of the said mining claims in lieu of an overhead charge as provided and set forth in Exhibit "A", Accounting Procedure, attached hereto and made a part hereof for all purposes.

It is further understood and agreed that after Kermac and Mercury shall have received out of the net profits from all ores mined, produced, saved and sold from said claims a

sum which shall be equal to 100% of One Hundred Fifty Thousand Dollars (\$150,000) and 150% of all costs and expenses incurred by Kermac and Mercury in connection with the exploration, drilling, and development of said claims and the sinking and construction of said initial shaft, and reimbursement to Kermac and Mercury for all costs and expenses of equipping and developing said mine after completion of said shaft and prior to said date when the capability for mining and producing 25 tons of ore per day shall have been established as aforesaid, then Kermac and Mercury and Interest Owners shall share the net profits from all ores mined, produced, saved and sold from said claims after reimbursement to Kermac and Mercury of all costs and expenses of exploration, drilling, development, mining operations and overhead of said claims as follows, to-wit:

Interest Owners . . . Forty (40) percent

KermacThirty (30) percent

MercuryThirty (30) percent

It is also understood and agreed that said Interest Owners' net profits interest is subject to an interest owned by Yucca Mining and Petroleum Co., Inc. of Albuquerque, New Mexico, and an interest owned by Uranic Mining Company, a Colorado corporation of Grand Junction, Colorado; and said Interest Owners shall pay to such Owners of such interest any and all payments on account thereof and hold Kermac and Mercury harmless from and indemnify said parties with respect thereto.

A-2 at 3-4.

Seizing upon the fact that, in setting forth the Operator's duties, the first portion of Section III refers several times in the singular to an "ore body" and describes in general terms a sequential operation involving the discovery and

of such an "ore body," the district court reasoned that the Operator's duty to explore and mine was limited to a single "mining venture," and that upon completion of that "mining venture," there would be no further duty to explore or mine. Findings and Conclusions ¶31, R. 2095. The court then inferred that this limitation on the Operator's duty must also have been intended to limit the applicability of the Net Profits Interest, although no such limitation was expressed and even though Section III explicitly extends the Net Profits Interest to "all ores" produced from "said claims." Id.

This construction violently distorts the plain meaning of Section III. The purpose of references in Section III to an "ore body," and to the operation for discovering and mining such "ore body," is readily apparent; the Operator was given the right to recover 150 percent of certain costs incurred only on "the initial shaft and/or mine" that produced ore, and distinct accounting consequences therefore attached to the first "ore body." However, Section III does not even remotely suggest that the Agreements or the Net Profits Interest would apply to that ore body alone. On the contrary, the Section explicitly requires the Operator to explore for "commercial ore deposits" (in the plural); and it expressly provides, after allowing 150 percent recovery of specified costs relative to the "initial" mine, for 100 percent recovery of "other costs and expense incurred for the exploration, drilling, development, mining, operation and

overhead of said mining claims." (in the plural). A-2 at 3-4 (emphasis added). Had the Agreement been intended to apply only to one ore body or mining venture, it would have been pointless to provide for subsequent exploration and mining or to refer to "the initial shaft and/or mine." Id. at 3. (emphasis added).

Moreover, even assuming that the Operator's duty to explore and mine ended after completion of operations on the first venture or ore body, an Operator might nonetheless choose to undertake additional operations (as in fact happened); and in that event, the Net Profits Interest would apply to any additional production. Even the fragile basis upon which the court placed its finding limiting the Operator's duty to explore and mine, i.e., the singular references to an "ore body," is utterly lacking when the Agreements come to define the extent of the Net Profits Interest. As noted, Section III provides, without any hint of qualification or limitation, that the interest applies to "all ores mined . . . from said claims." (in the plural).¹⁷

¹⁷ A-2 at 4 (emphasis added). That the parties intended no limitation on the Net Profits Interest is, if possible, even clearer in Sections 5 and 6 of the Agreement, where the provisions referring to an "ore body" and allowing 150 percent of recovery of specified costs on the "initial shaft and/or mine" appear in an entirely different section from the provision creating a net profits interest applicable to the "profits from all ores mined, produced and sold from said claims." A-1 at 5 (emphasis added.) It is thus manifest that the references to an "ore body" and "initial shaft and/or mine" were part of a special cost recovery provision; they were not limitations on the

Finally, if the parties had intended to limit the Agreements' duration to a "single mining venture," it is simply inconceivable that they would have chosen to do so in such an obscure, backhanded way. The Agreements contain sections specifically devoted to defining the "Period of Operations" and the procedures for effecting "Expiration of Claims." After making no mention of any limitation in those sections, it is improbable that the parties would have buried a critical limitation in a cost-deduction portion of a section concerned with "Commencement of Activities."

The court's analysis not only tortures the plain language of the Agreements, but collapses in its own internal inconsistencies. Because the only semblance of pretended support in the Agreements for the court's construction consists of the reference to an initial operation on an "ore body," to be logically consistent the court ought to have concluded that the "mining venture" was limited to operations on one ore body. Such a construction, however, defies credulity.¹⁸ The district

Agreements or the Net Profits Interest.

¹⁸ A "one ore body" limitation would raise countless obvious problems. What would happen, for instance, if the initial exploration revealed more than one ore body? Could the operator simply choose to mine the smallest ore body first and thereby terminate the Agreements, thus preserving solely for itself all of the profits on the more lucrative ore bodies? Suppose that more than one ore body were developed and mined simultaneously.

court therefore declined to adopt it, opting instead for a theory limiting the Agreements to a single "mining venture" which might or might not be limited to operations on one ore body. In maneuvering to avoid one implausible construction of the Agreements, however, the court severed any connection between its conclusion and the language of the Agreements, which nowhere in their contents refer to a "mining venture".

2. The district court's conclusion that the Agreements were terminated by the abandonment of a carefully-defined portion of property comprising a small fraction of the claims in the precise manner spelled out in the Operating Agreement is demonstrably incorrect.

The court also appears to advance a separate ground for its ruling, asserting that "[u]nder Section V of the OPERATING AGREEMENT, KERR MCGEE might elect to abandon a mine. Upon such abandonment, if the Non-Operator should decline to take over the operations, the OPERATING AGREEMENT would terminate." Findings and Conclusions ¶30, R. 2093. However, since the Agreements unmistakably contemplate the possibility of more than one mine--indeed, the very section referred to by the court is entitled "Abandonment of Mines" (in the plural)--this inference is

Would the Net Profits Interest apply to ore from all deposits until one ore body was exhausted? Or would it apply to only one ore body? And if so, which one? These obvious possibilities demonstrate the utter implausibility of a construction based on the supposition the parties intended the Net Profits Interest to affect only one ore body.

...entirely unsound. The court thus suggests a qualification: "...if, upon such abandonment [of a mine], the OPERATING AGREEMENT would terminate at the very least with respect to the operations abandoned, and, when the operations abandoned are the only operations undertaken, the OPERATING AGREEMENT terminates in its entirety." Id.

Nothing in Section V, or in the Agreements as a whole, even remotely supports such a construction. Section V provides for abandonment of specific mines but gives no hint that such action would terminate or affect any other right or obligation under the Agreements. Moreover, the district court's reading would place Section V in unalterable conflict with Section I, which clearly provides that the Agreement would remain effective so long as "any of the mining claims" are in force. A-2 at 2 (emphasis added).

This theory would at best make the effect of abandonment contingent on a chronological accident: If another operation had been commenced, then the Agreements would continue in force, but if (as in this case) other operations were planned but not actually commenced, the Agreements and the Net Profits Interest would terminate entirely. In practice, of course, the court's construction of Section V would give the operator power to cut off the interests of others simply by waiting to commence further operations until after an initial (and possibly insubstantial) operation had been abandoned. In the absence of clear

language in the Agreements so stating, such an improbable construction ought to be shunned. In fact, there is no language whatsoever in the Agreements supporting such a construction.

3. The district court did not offer an even colorable explanation as to why no weight should be given to the express provisions in the Agreements that apply them to all ores so long as any of the Claims remain in effect.

Although the district court's lengthy findings and conclusions are devoted in large part to an attempt to explain away provisions that expressly contradict the construction adopted by the court, that attempt is transparently futile. For instance, the court quotes Section I of the Operating Agreement, which provides that "this Agreement shall be in full force and effect so long as any of the mining claims . . . are in force and effect," and then observes that all of the mining claims are still in effect. Findings and Conclusions ¶ 42, R. 2101. The Court quickly adds, in defiance of the obvious syllogism, that although the Claims are still in force "it does not follow . . . that the OPERATING AGREEMENT is still in effect." Id. Acknowledging that the Agreements must be construed as a whole, the court reasoned that, "[t]he duration of [the Agreements] must be reasonably limited by their purpose." Id. However, the only language cited to show a supposed limiting purpose is the language in Section III which refers to an initial operation on an "ore body." The court thus stands the principle favoring construction of a document as a whole on its head. Adopting an

plausible reading of Section III (which in any event never attempts to define the duration of the Agreements), the court then uses that reading to negate entirely the provision of Section I (the express purpose of which is to define the "Period of Agreement").

In summary, the district court's conclusion that the Agreements were intended to terminate upon completion of a "single mining venture" is insupportable and directly contradicts the plain language of the Agreements. Moreover, the abandonment of a carefully-defined small fraction of the claims in no way supports an inference that such action would terminate or affect any other right or obligation under the Agreements. The Agreements provide, without qualification, that they shall remain in full force so long as the Claims continue to exist. The conclusions of the district court must therefore be reversed to enforce the parties' intent in accordance with the plain language of the Agreements.

II. THE NET PROFITS INTEREST IS AN ESTATE IN LAND WHICH IS LEGALLY BINDING ON ATLAS.

The Interest Owners, Kerr-McGee and Mercury took great pains to carefully define in the Agreements their respective interests in the Claims and to incorporate those interests into the Deed when legal title passed to Atlas' predecessors prior to commencing mining operations on the Claims. Indeed, the parties'

clearly stated their intent and understanding of the legal effect of their actions:

.. [S]aid Interest Owners have reserved unto themselves an undivided net profits interest as hereinafter set forth in and to the net profits from all ores mined, saved and removed and sold from said claims"

A-2 at 1 (emphasis supplied). As a result, the Net Profits Interest should survive today as would any other type of royalty, mineral or working interest in the Claims.

Notwithstanding this plain language and the fact that the Agreements do not indicate that the parties intended the Net Profits Interest to have characteristics different from those normally attributed to it by the industry, the district court concluded that the interest was not binding upon Atlas because it was a mere "profit sharing" arrangement.

The district court reached its conclusion on three grounds. First, the it concluded that the Net Profits Interest is radically different from a royalty or mineral interest and that such interests are "generally held to be contract rights, not mineral or royalty interests." Findings and Conclusions ¶44, R. 2103 (emphasis supplied). Second, the court ruled that the parties failure to use the term "royalty" shows that they did not intend to create a perpetual interest. Id. R. 2103-04. Finally, the court held that the parties "did not intend to create a mineral or royalty interest, and that by the use of the words

... to' they did not create such an interest." Id., R.

The district court's conclusions are not supported by the law, an analysis of the characteristics of the Net Profits interest, or industry practice.

- A. The Phrase "Net Profits Interest" is a Term of Art and by its Characteristics Describes an Interest in Land Generally Recognized in the Mining Industry.

The district court's conclusion that net profits interests "are generally held to be contract rights, not mineral or royalty interests" is insupportable. That conclusion fails under a careful analysis of the interest's characteristics, and directly conflicts with industry practice and overwhelming agreement among mining and oil and gas authorities, which uniformly recognize the net profits interest as an estate in land.

1. Net profits interests are recognized as estates in land by their characteristics; indeed, the phrase "net profits interest" has become a term of art.

Net profits interests are relatively new in mineral conveyancing, and therefore, have received relatively little specific consideration in the case law, unlike older and more familiar mineral interests.¹⁹ Nevertheless, net profits

¹⁹ Apparently, the fact that a net profits interest is an

interests, in various forms, are established as a term of art in the mining and oil and gas industry and are accepted as interests in land because of their close affinity to other well accepted interests in land, such as working interests and royalty interests:

Net Profits Interest

A share of gross production from a property, measured by net profits from operation of the property. It is carved out of the working interest.

2 H. Williams & C. Meyers, Manual of Oil and Gas Terms 457 (1982) (emphasis supplied). See, e.g., Gushee, Drafting Practical Royalty Clauses for the Mining Lease, 21 Rocky Mtn. Min. L. Fdn. 625, 634 - 640 (1974); Hecox, Drafting and Negotiating of Net Profits Agreements, Mining Agreements Institute II (1982) (Rocky Mtn. Min. L. Fdn.).²⁰

interest in land is too obvious to result in much litigation. Some cases, however, have held that a net profits interest is enforceable against successors in interest. See, e.g., Carlock v. National Co-operative Refinery Ass'n, 424 F.2d 148 (10th Cir. 1970) (holding a net profits interest enforceable against an assignee of oil and gas lease); Greenleaf v. S. A. Camp Ginning Co., 150 Cal. App.2d 385, 309 P.2d 943 (1957) (holding that a net profits interest ran with the land to which it was appurtenant); Bellingham Securities Syndicate, Inc. v. Bellingham Coal Mines, Inc., 13 Wash. 2d 370, 125 P.2d 668 (1942) (assuming the enforceability of a net profits royalty in a coal lease).

²⁰ Indeed, treatises on the subject simply assume without question that net profits interests are interests in land as are working interests and royalty interests. See, e.g., 3 The American Law of Mining §15.17 (Rocky Mtn. Min. L. Fdn. ed. 1982)

A net profits interest is sometimes used as a term of art to describe the closely related "carried working interest," which is undeniably an estate in land:

Carried Interest

Professor Masterson further noted the close kinship between carried interests and net profits interests. Either type may be employed where one co-owner is to advance the entire costs of drilling. The major difference between the two interests is that it is customary for a carried interest relationship to cease when all costs as to the carried interest are paid

2 H. Williams & C. Meyers, Manual of Oil and Gas Terms 84 (1982) (emphasis supplied). In other cases, "net profits interest" is used to describe an interest with both "royalty-like" and "working interest-like" characteristics:

Net Profits Interest. A net profits interest, is for Federal tax purposes, an interest in minerals in place that is defined as a share of gross production measured by the net profits from operation of the property. Like the overriding royalty, a net profits interest is created out of the working interest and has a similar duration. Unlike the overriding royalty, the income accruing to the net profits interest is reduced by specified development and operating costs, but the interest bears such expenses only to the extent of its share of the income, and is not required to pay out, advance, or become liable for such costs, as is the working interest.

(development provisions should be inserted in agreements where a net profits interest is reserved).

Burke & Bowhay, Income Taxation of Natural Resources §2.06 (Prentice-Hall 1982) (emphasis supplied) (citations omitted).²¹

Finally, Atlas' own counsel in this case have independently used the words "net profits interest" as a term of art and consider it interchangeable with the well recognized interest in land called the "carried working interest":

Although we believe that the Agreement and the Operating Agreement should be construed to create a Net Profits Interest in the Subject Claims, there is a potential uncertainty about whether this interest is a carried working interest or a Net Profits Interest.

* * *

Therefore, a forty percent Net Profits Interest (or, possibly a 40 percent carried working interest) in the Subject Claims currently exists and would be applicable to any future production from those claims.

Title Opinion, R. 1862-1864.

As illustrated by these authorities, the words "net profits interest" have risen to be a term of art in the industry. Because of the characteristics of the interest, mere use of the words defines an estate in land. Failure of this Court to recognize the Net Profits Interest as an interest in land binding

²¹See Sherrill, Net Profits--A Current View, 19 Inst. on Oil and Gas Taxation 165 n.1 (1968) ("A net profits interest has some characteristics which are common to overriding royalty interests and it has other characteristics which are common to working interests . . .").

and all successors to the underlying mineral estate would compromise the security of titles to the many such interests that have been created in reliance on this well-established industry practice. The district court's failure to recognize the Net Profits Interest as a term of art and its conclusion that such interests generally are not considered to be mineral or royalty interests must therefore be reversed.

2. An analysis of the Net Profits Interest defined in the Agreements shows it to properly be characterized as an estate in land; it should therefore bind successors to the Claims.

Even if the parties use of the term "net profits interest" were not sufficient to constitute an interest in land on its face, an analysis of the Net Profits Interest shows that its characteristics are those of mineral or royalty interests rather than contract rights. The district court's conclusion that the Net Profit Interest is unlike mineral or royalty interests demonstrates a clear misunderstanding of basic property law concepts and the nature of the Net Profits Interest.²²

²² Perhaps the district court's confused characterization of the Net Profits Interest is attributable to a lack of understanding of terminology used in the mining and oil and gas industry. There has been some confusion in the industry itself as to whether a net profits interest should be characterized as a mineral (working) interest or a royalty interest. However, there is no question that it is an interest in land:

There is some indication in early cases, at

Under Utah law, it is fundamental that the mineral estate may be severed from the underlying fee. See, e.g. Hartman v. Potter, 596 P.2d 653, 656 (Utah 1979); Stephen Hays Estate, Inc., 85 Utah 137, 38 P.2d 1066, 1070 (1934). Moreover, the bundle of rights known as the mineral estate may be subdivided into further interests or hybrids that are no less perpetual in duration. For instance, a working interest owner:

may transfer out of his working interest an Overriding Royal [sic], Oil Payment, Net Profit Interest, or Carried Working Interest leaving himself as owner of the working interest (and therefore entitled to operate on the premises) but as owner of very little production and the recipient of a small fraction of the income from production.

Id. (references omitted) (emphasis added). See, also, John Wright, Inc. v. Norskog, 151 Mont. 22, 438 P.2d 550 (1968) (working interest and overriding royalties in oil and gas); Extraction Resources, Inc. v. Freeman, 555 S.W.2d 156 (Tex. Cir. App. 1977) (bundle of interests in minerals may be divided into

least by way of dictum, that the [net profits interest] is a mere contract interest. We believe, however, that a net profits interest should be treated in much the same manner as an overriding royalty interest and that it should be classified as an interest in land.

2 H. Williams & C. Meyers, Oil and Gas Law §424.1 (emphasis supplied).

interests including royalties, right to bonuses and (b) right to lease, etc.).

As noted above, perhaps the two most important characteristics of the royalty interest are (a) the royalty interest is a share of production and (b) the royalty interest does not have to make cash contributions to the costs of the operations.²³ Similarly, working interests are best recognized by the attributes of (a) being executive rights and (b) being entitled to proceeds on a net, rather than gross basis. The Net Profits Interest, much like the carried working interest described above, is a hybrid of these two interests with characteristics of both.

The Net Profits Interest, like a royalty, is a share of production and is measured by ore "produced, saved and sold" from the mine. See A-1 at 5. The only difference is that the Net Profits Interest is measured by "net" rather than "gross" profits from the operation of the property. 2 H. Williams & C. Meyers, Oil and Gas Law § 424.1 (1981). Like the royalty interest, the Net Profits Interest does not have to make cash contributions to the costs of mining. See A-2 at 2.

²³ This Court is undoubtedly familiar with the many characteristics of royalty interests and working interests, so all of those characteristics will not be set forth in detail here.

In addition to its royalty-like attributes, the Net Profits Interest has characteristics of a working interest. A working interest is defined as "the exclusive right to exploit the minerals on the land." H. Williams & C. Meyers, Oil and Gas Law Manual of Oil and Gas Terms 838 (1982). The fact that Kerr-McGee, Mercury and the Interest Owners executed the Operating Agreement shows that all of the parties understood that the Interest Owners held executive rights that were part of the working interest in the Claims. Second, the Net Profits Interest, like the working interest, receives its return based upon proceeds, net of expenses. See A-1 at 5-6.

In judging the nature of the Net Profits Interest as a interest in land versus a contract right, this Court should give great deference to the characteristics of the interest even if it refuses to acknowledge the words "net profits interest" as a term of art. As owners of the Claims in 1957, the Interest Owners could create, reserve, or convey a virtually unlimited array of interests in land that are binding on all who subsequently acquire the claims with actual or constructive notice. The fact that the Owners chose to create a hybrid interest with characteristics of both royalty and working interests should not be the basis for denying the validity of the Net Profits Interest as an estate in land. As one mining authority has noted:

Royalties on solid minerals are commonly based on a flat percentage of the ore removed, or graduated; it may be based on the

smelter returns, net proceeds of the mining operation or on gross mill value less certain expenses. . . .

: The American Law of Mining § 17.3, at 456 (Rocky Mtn. Min. L. Fdn. ed. 1982) (emphasis added).²⁴ Based upon those characteristics, the only answer is that the Net Profits Interest is an interest in land.

3. The parties characterized the Net Profits Interest as a "working interest" which is an interest in land.

Finally, the parties to the Agreements understood that they had created an interest in land. In depositions taken in 1981,²⁵ and in subsequent instruments executed by them, the

²⁴ The Utah Supreme Court has previously observed that the parties should be allowed to draft royalty provisions that are suited to their own particular needs. In Rimledge Uranium and Mining Corp. v. Federal Resources Corp., 13 Utah 2d 239, 374 P.2d 20 (1962), this court stated:

[T]he parties may obviously provide for any royalty arrangement they wish . . . whether the words employed to designate the royalty basis are "market value," "proceeds," or "gross proceeds." . . .

374 P.2d at 23. See also Holley v. Federal-American Partners, 29 Utah 2d 212, 507 P.2d 381 (1973) (enforcing a mining lease royalty that allowed an election of ten percent of "gross receipts" or fifty percent of "net receipts").

²⁵ These depositions were taken before Atlas raised any allegation regarding the duration of the Net Profits Interest. As noted above, further depositions of key participants in the negotiation and drafting of the Agreements were scheduled but were cut off when the district court ruled summarily in Atlas' favor.

Interest Owners referred to the Net Profits Interest as a share of the working interest. For instance, Lee B. Merrill, one of the Interest Owners, stated that the Interest Owners had a "forty-percent working interest in the [claims]." Response of the Clovis Banks at 33, R. 1810. Later in the same deposition, he construed it as a "forty-percent carried working interest," and a "forty-percent working interest." Id. Hez Abernathy did likewise: "I know at one time [Mercury and Kerr-McGee] give [sic] us forty percent working interest." Id.

Finally, in their conveyance of the Net Profits Interest to R.D. Boone and in other conveyances, the interest was described as:

Twelve and one-half percent (12½%) of a forty percent (40%) working interest in and to the [Velvet and Royal Flush] mining claims . . . Said working interest is defined in Operating Agreement, dated the 18th day of April, 1957
. . . .

See Deed dated October 6, 1958, R. 1865.

Thus, the district court's conclusion that the Net Profits Interest has no characteristics of a mineral or working interest and that the parties did not intend the interest to have such characteristics is in direct contradiction to industry standards and the understanding of the parties. By carefully defining the basis for their share of production and by executing the Agreement and Operating Agreement, the Net Profits Interest was created with attributes of both working and royalty

As such, it is an interest in land that burdens all successors and assigns of the Claims.

B. The Parties' Failure to Use the Term "Royalty" in Drafting the Net Profits Interest is Not Indicative of an Intention to Create a Mere Contract Right.

When used in the oil and gas context, the term "royalty" has a specific meaning as a term of art. See 1 H. Williams & C. Meyers, Oil and Gas Law, § 302-303 (1981); 1 E. Kuntz, The Law of Oil and Gas, § 15.4 (1962); see, e.g., Picard v. Richards, 366 P.2d 119 (Wyo. 1961). The oil and gas royalty owner's rights are defined by use of the shorthand tag "royalty," which is more appropriately described as a "non-participating royalty interest" because the royalty owner does not have executive rights. 1 E. Kuntz, The Law of Oil and Gas, § 15.4 (1962).

The district court concluded that the parties "were experienced in negotiating and drafting mining agreements" and that "[t]heir decision not to characterize the profit sharing arrangement as a royalty or mineral interest demonstrates their intention "to create a contract right rather than a mineral or royalty interest." Findings and Conclusions ¶44, R. 2103-04. Kerr-McGee, the drafting party in the 1957 conveyance, however, was well aware of the results that flow from the "royalty" tag in the oil and gas context and carefully avoided the use of that term in drafting the documents to describe the interest retained by the Interest Owners. Instead Kerr-McGee chose the language

"Net Profits Interest" to reflect more accurately the interest created.

In contrast to the usual oil and gas non-participating royalty interest based on gross proceeds free of costs (with which Kerr-McGee was intimately familiar), the Agreements carefully defined a royalty-type interest based on net proceeds, which is better suited to the nature and risks of the mining industry. See Hecox, Drafting and Negotiating of Net Profits Agreements, Mining Agreements Institute II (1982) (Rocky Mtn. Min. L. Fdn.). Furthermore, because the parties believed that the Net Profits Interest was part of the working interest and shared executive rights, see supra pp. 39-41, they avoided using the term "royalty," which defines an interest that does not have executive rights.

Any reserved share of production is considered a "royalty" not because of its label, but because of its relationship to the land:

The terminology applied to "net value," "net revenue," "proceeds," "market value" and "net smelter returns" has all been the subject of litigation. The courts look to the usual understanding of terms in the industry, but the key, of course, is to carefully define the basis.

Gushee, Drafting Practical Royalty Clauses for the Mining Lease, 21 Rocky Mtn. Min. L. Fdn. 625, 634 (1974) (citations omitted). In this article, Mr. Gushee also notes that "there are all kinds of definitions, as well as different titles affixed to the same

citing a statement by the noted mining scholar, Lindley, as authority: "The important question is what are the respective rights of the parties rather than what is the proper name. 3 C. Lindley, Mines §861 (3d Ed. 1914)." Id. at 635.

Thus, the label used to identify the interest does not necessarily define the rights created. Most importantly, failure to use the word "royalty" in drafting the Net Profits Interest does not indicate any intent to create a mere contractual relationship. To the contrary, use of the words "Net Profits Interest" demonstrates a clear intent to create an interest in land. The district court's conclusion that the parties did not intend to create an interest in land should therefore be reversed.

C. The Language of the Deed Construed in Light of the Entire Transaction Shows a Clear Intent to Reserve The Net Profits Interest in The Interest Owners.

The Net Profits Interest was created by incorporating the terms, covenants and conditions of the Agreements into the Deed, and thereby reserving the interest from the conveyance. The district court's conclusion that the parties did not intend the language in the Deed to reserve a royalty or mineral interest in the Claims is unsupported by any construction of the instruments and ignores the clear intent of the transaction when viewed as a whole. The parties went to great lengths to set out their respective interests in the Claims. Indeed, it is hard to

imagine how the parties could have more clearly defined their interests and incorporated them into the Deed.

The Net Profits Interest, having been carefully defined in the Agreements, was incorporated into the Deed and reserved from the conveyance of the Claims. The June 7, 1957 Deed states:

This conveyance is made subject to the terms, covenants and conditions contained in that certain Agreement dated the 18th day of April, 1957, by and between the parties hereto.

A-3 at 2 (emphasis added). The district court concluded that by the use of this phrase, "the parties here did not intend to create a mineral or royalty interest, and that by the use of the words "subject to," they did not create such an interest." Findings and Conclusions ¶44, R. 2104. In so doing, the district court correctly recognized that deeds should be construed to give effect to the intent of the parties, see Chournos v. D'Agnillo, 642 P.2d 710, 712 (Utah 1982); Russell v. Geyser-Marion Gold Mining Co., 18 Utah 2d 363, 423 P.2d 487 (1967). However, the district court's determination of the parties' intent is unsupported by language of deed alone and fails to consider the entire transaction. More specifically, the court failed to recognize that the parties' intent controls the meaning and effect of a deed phrase which includes the words "subject to." See Aspen Acres Association v. Seven Associates, Inc., 29 Utah 2d 303, 508 P.2d 1179 (1973); Johnson v. Peck, 90 Utah 544, 63 P.2d 251 (1937).

The Utah Supreme Court has long recognized the need to consider all of the surrounding circumstances in determining the intent of the parties to a deed:

The rules of construction applicable to instruments of writing, including deeds, in this jurisdiction is that the intention of the parties, as the same is made apparent from the ordinary and generally accepted meaning of the language used by them . . . in the light of the surrounding circumstances of the parties at the time, controls rather than mere technical words or phrases.

Coltharp v. Coltharp, 48 Utah 389, 160 P. 121 (1916) (emphasis supplied). See also Cereghino v. Einberg, 4 Utah 514, 11 P. 568 (1886). Moreover, contemporaneous instruments, which are part of the same transaction, must be considered as one document:

It is a general rule of construction that in order to ascertain the intention of the parties, separate deeds or instruments executed at the same time and in relation to the same subject matter, between the same parties, or in other words made part of the same transaction, may be taken together and construed as one instrument.

23 Am. Jur. 2d Deeds §172 (1965). See e.g., City of Westminster v. Skyline Vista Development Co., 163 Colo. 394, 431 P.2d 26 (1967).

An analysis of the language used in the Deed, viewed in the context of the entire transaction, shows a clear intent to incorporate the terms of the Agreements into the Deed and reserve the Net Profits Interest from the conveyance of the claims. First, the parties executed the Agreement, which defined the Net

Profits Interest and the terms of the conveyance. On that same day, the parties signed the Operating Agreement, specifically outlining the operator's obligations, reserving the Net Profits Interest to the Interest Owners, and setting forth a detailed accounting procedure. The Operating Agreement was fully incorporated by reference into the Agreement. Less than two months later (the time required to conduct a title search), the Interest Owners conveyed the claims by a Deed expressly made "subject to the terms, covenants and conditions" of the Agreements.

Construing the instruments in this single transaction as a whole makes evident the parties' intent. As demonstrated above, the Agreements unequivocally provide that they will remain in effect so long as the claims are effective and that the Net Profits Interest applies to all ores mined from the claims. See supra pp. 18-20. Additionally, the consideration for the conveyance evidences the intent to reserve an interest in land to the Interest Owners. The Interest Owners were to receive a sum of money initially, but the most important (and by far the most valuable) element of the consideration was the Net Profits Interest. It is absurd to even argue that the parties intended the most important and valuable element of the consideration to be subject to termination by the mere conveyance of the claims by Kerr-McGee and Mercury to someone not a party to the transaction. See Weiner v. Wilshire Oil Co., 192 Kan. 490, 389 P.2d 803 (1964) (reaching this conclusion regarding an overriding royalty).

Moreover, making the Deed subject to the terms, covenants and conditions of the Agreements was not only adequate under the law to effectuate the parties' intent but was the only practical way to reach the desired result. Courts uniformly recognize "subject to" phrases as sufficient to reserve royalty or mineral interests where the parties so intend. See Hendrickson v. Freericks, 620 P.2d 205, 209 (Alaska 1980); see, e.g., Kelly v. Haas, 262 S.W.2d 687 (Ky. 1953); Dagrosa v. Calabro, 105 N.Y.S.2d 178 (N.Y. Sup. Ct. 1951). Furthermore, as a practical matter, the parties had no alternative but to make reference to the Agreements through the "subject to" phrase. No lawyer would set out in a mineral deed the 17 pages of the Operating Agreement and the 4 pages of the Accounting Procedure. Cf. Westland Oil Development Corp. v. Gulf Oil Corp., 637 S.W.2d 903, 908 (Tex. 1982)("It is not unusual for an operating agreement . . . not to be placed of record."). Indeed, there is no customary place in a mineral Deed to insert such a detailed arrangement. Finally, the "subject to" phrase used by the parties states clearly and succinctly the intention to incorporate the terms, covenants and conditions of the Agreements into the Deed. It is unlikely that the parties could have chosen plainer, more concise language to express their intent.

In sum, as owners of the Claims on April 18, 1957, the Interest Owners could create virtually an unlimited array of real property interests ranging from a pure royalty, on one hand, to a

cost-bearing operating interest, on the other. Somewhere within this spectrum lies the Net Profits Interest; an interest carved out of the working interest that is nonoperating, and entitled to a share of proceeds measured by net profits. The net profits "royalty-type" interest is a clearly cognizable estate in land widely recognized in the natural resources industries. By making the Deed expressly subject to the terms, covenants and conditions of the Agreements, the parties incorporated the Agreements into the Deed and reserved the interest from the conveyance. The district court's conclusions fail to consider the transaction as a whole and are directly contrary to the parties' intent as reflected by the instruments. The district court's conclusions must therefore be reversed.

III. ALTERNATIVELY, THE NET PROFITS INTEREST IS ENFORCEABLE AGAINST ATLAS AS A COVENANT RUNNING WITH THE LAND BOTH IN LAW AND IN EQUITY.

The characterization of the Net Profits Interest as an interest in land is not essential for it to be enforceable against Atlas. The requirements of covenants running with the land at law are satisfied in the present case. Moreover, the Net Profits Interest, at the very least, should be enforced in equity by this Court because Atlas acquired the Claims with notice of the interest and failure to enforce the Interest would be unjust.

A. The Net Profits Interest is Enforceable as a Covenant Running with the Land at Law

The elements required for covenants to run with land at law that have been recognized by this court are summarized by Professor Powell in his treatise on real property:

The elements most often said to be required for covenants to run at law are that: (1) the covenant "touch and concern" the land; (2) the original covenanting parties intend the covenant to run; and (3) there be some form of privity of estate.

5 R. Powell, The Law of Real Property ¶ 673[1], at 60-37 (1981). See Lundeberg v. Dastrup, 28 Utah 2d 28, 497 P.2d 648 (1972); First Western Fidelity v. Gibbons and Reed Co., 27 Utah 2d 1, 492 P.2d 132 (1971).

In the present case, there is no dispute that the element of privity is met because Atlas and Clovis Banks are both successors in interest to the original covenanting parties, and there was clear horizontal privity between the original covenanting parties. However, the district court concluded that the covenant to pay net profits did not touch and concern the land and that the parties did not intend the covenant to run. See Findings and Conclusions ¶45, R. 2104-07. These conclusions are contrary to law and the clear intent of the parties expressed in the Agreements.

1. The Net Profits Interest touches and concerns the possessory estate in the Claims and the Interest Owners' reversionary interest.

The trial court concluded that the covenant to pay net profits did not "touch and concern" the land for two reasons. First, because the covenant "does not have a permanent effect of a physical nature upon land itself," Id., R. 2106, and second, because the beneficiaries of the covenant do not own an estate in land. Id. R. 2106-07.

In the specific context of land development, this court has indicated a view that a covenant must have a permanent effect of a physical nature on land itself in order to meet the touch and concern element. See First Western Fidelity v. Gibbons and Reed Co., 27 Utah 2d 1, 492 P.2d 132 (1971). However, this court recognized in a later case that the physical nature requirement does not apply in all contexts, citing as examples the covenants of title which are commonly held to run with land but clearly do not have a permanent effect of a physical nature. See Lundeberg v. Dastrup, 28 Utah 2d 28, 497 P.2d 648, 650 (1972). The same conclusion was reached by the Oregon Supreme Court:

There is nothing in the nature of things which requires the conclusion that the benefit of a covenant is not capable of running with the land unless the performance of the promise will constitute an advantage in a physical sense to the promise in the use of his land. Both the burden and benefit of promises in leases have been held to run to the successor of the lessee the lessor [sic] in cases where the promise was not related to the physical use of the land. And certain

covenants of title which have no direct relation to the physical use of the land freely run with the land.

Hudspeth v. Eastern Oregon Land Co., 430 P.2d 353, 356 (Or. 1967). The district court's conclusion that the touch and concern element is not met because the Net Profits Interest is not related to the physical use of land is, therefore, in error.

The district court's second reason that the touch and concern requirement is not met--because the beneficiaries of the covenant do not own an estate in land benefitted by the covenant--is likewise erroneous. The Clovis Banks retained a reversionary interest in the claims that is benefitted by the covenant to pay net profits. This type of retained interest is most clearly illustrated by cases concerned with the payment of rent. Indeed, as one mining authority has noted, "mining royalties, i.e., payments made out of production, are much like rent paid by a lessee for the use of land or buildings." 3 The American Law of Mining §17.2 at 434 (Rocky Mtn. Min. L. Fdn. ed. 1982). A covenant by a tenant to pay rent to a landlord is regarded as a covenant running with the land because the burden touches and concerns the tenant's present possessory estate and the benefit touches and concerns the landlord's reversion. Because of the similarities between rents and royalties, authorities agree that covenants to pay royalties whether based on net or gross proceeds, satisfy the "touch and concern" element and run with the land. See e.g., Greenleaf v. S.A. Camp Ginning Co., 150 Cal.

App. 2d 385, 309 P.2d 943 (1957) (net profits interest); Thew, 35 Cal. App. 2d 691, 96 P.2d 826 (1939) (net profits interest); Maynard v. Ratliff, 297 Ky. 127, 179 S.W.2d 200 (1944) (oil and gas royalty); 5 R. Powell, supra, ¶675[2] at 60-92; 1A G. Thompson, Real Property §179 at 144 (1980) ("Covenants to pay royalties run with the land"), cf. Westland Oil Development Corp. v. Gulf Oil Corp., 637 S.W.2d 903 (Tex. 1982) (enforcing a covenant to convey certain interests in oil and gas leases, contained in a mutual interest agreement).

In the present case, the Interest Owners retained important reversionary rights including the right to take over mines and the right to take over claims. See Operating Agreement §§ V, VI. A-2 at 5-7. These are exactly the type of reversionary rights retained by a landlord under a long term (or "so long as") lease commonly used in the mining industry. The covenantor's interest in the Claims in this case is rendered less valuable because of the obligation to pay part of the mineral proceeds to the Interest Owners. The covenantees' interest retained by the Interest Owners, like the landlord's reversion, is rendered more valuable by the covenant. Hence, the covenant in the Operating Agreement to pay net profits touches and concerns interests in land on both the burden and benefit sides.

2. The Parties' intent that the covenants in the Operating Agreement run with the land is clearly expressed in the Agreements.

Section VIII of the Operating Agreement provides in

part:

All sales [of an interest in the Claims] made by either Kermac or Mercury or their respective successors in interest shall be subject to the terms, covenants, and conditions of the Agreement, and such terms, covenants, and conditions shall be deemed to be covenants running with the land and the mineral estate covered hereby and with such transfer or assignment thereof.

A-2 at 9 (emphasis supplied). In Section XVIII, the Operating Agreement further states:

The terms and provisions of this Agreement shall be binding upon and shall inure to the benefit of the parties hereto, their respective heirs, administrators, executors, successors and assigns.

Id. at 15. Despite this clear language expressing the original parties' intent that the covenants run with the land, the trial court concluded that the only "logical and meaningful" way to read the above quoted language is that the covenants would bind successors only so long as mining operations were on-going and only so long as the Operating Agreement remained in effect. See Findings and Conclusions ¶45, R. 2105-06. The trial court further concluded that because the purpose of the Operating Agreement was served, the covenants and terms of the Agreement no longer burden the claims. Id.

The trial court's conclusion is contrary to the express language of the Agreements and ignores established rules of construction. An express statement of the parties as to the running of the covenant is normally decisive. See, e.g., Whitinsville Plaza, Inc. v. Kotseas, 378 Mass. 15, 390 N.E.2d 243 (1979); Reichert v. Weeden, 618 P.2d 1216 (Mont. 1980); DeBlois v. Crosley Building Corp., 117 N.H. 626, 376 A.2d 143 (1977); 5 R. Powell, The Law of Real Property ¶ 673[2] at 60-51, 52 (1981). Moreover, the mere presence of the word "assigns" constitutes strong evidence of devolutive intent. 5 R. Powell, supra ¶ 673[2], at 60-51. Thus, a construction of the Agreements limiting the intended duration of the covenants, including the Net Profits Interest, to a limited term is erroneous.

B. The Net Profits Interest is Enforceable in Equity.

Should this court determine that the elements required for a covenant to run at law are not met in the present case, at the very least, the Net Profits Interest should be enforced as a covenant running with the land in equity.

This Court has not had the occasion to rule on the elements for covenants to run in equity. The modern trend, however, has been to enforce covenants in equity where the successor has acquired its interest in the land with notice of the covenant. As the Oklahoma Supreme Court declared in Blackard v. Good, 207 Okla. 175, 248 P.2d 596, 598 (1952):

There is no question that a personal covenant or agreement affecting lands will be held valid and binding in equity on a purchaser taking the estate with notice, and it is immaterial that the agreement may not be a covenant which runs with the land.

(Emphasis added.)²⁶

In the instant case, Atlas took title to the Claims with actual knowledge of the Net Profits Interest.²⁷ Moreover, Atlas apparently paid nothing for the Claims and commenced mining

²⁶The rule recognized in Blackard has been uniformly recognized by the courts. See, e.g., Fitzstephens v. Watson, 218 Or. 185, 344 P.2d 221, 331 (1959); Arroyo v. Rosenbluth, 454 N.Y.S.2d 610, 612 (1982); Russell v. Palos Verdes Properties, 218 Cal. App. 2d 754, 32 Cal. Rptr. 488, 493 (1963); N.P. Dodge Corp. v. Calderwood, 151 Kan. 978, 101 P.2d 883, 884 (1940); Messett v. Cowell, 194 Wash. 646, 79 P.2d 337, 339 (1938); Annot. 23 A.L.R.2d 520 (1952). The doctrine of enforceability of a covenant in equity is based upon:

the broad ground that the assignee took with knowledge of the covenant and it was of such a nature that, when the intention of the parties, coupled with the result of a failure to enforce it was considered, equity could not in conscience withhold relief.

Richardson v. Callahan, 213 Cal. 683, 3 P.2d 927, 929 (1931). This doctrine was specifically applied to enforce a net profits interest against a successor to the covenantor by the California Court of Appeals in Thew v. Thew, 35 Cal. App. 691, 96 P.2d 826 (1939).

²⁷The trial court assumed that Atlas had actual notice of the Net Profits Interest for purposes of this ruling. See Findings and Conclusions 45 n.3. R. 2107. Further, Atlas has acknowledged, at least for purposes of this litigation, that it acquired the claims with actual or constructive notice. See supra note 13.

operations based on the explicit assumption that the Claims were burdened by a forty percent net profits or working interest.²⁸ Failure to enforce the covenant to pay Net Profits would relieve Atlas from this assumed burden, would deprive successors to the Interest Owners from the most significant and valuable element of the original consideration bargained for in the sale of the Claims, and would result in an unjust windfall to Atlas. It would therefore be inequitable for this court to allow the Net Profits Interest to be cut off by a mere conveyance of the claims to Atlas.

In summary, this court should enforce the Net Profits Interest as a covenant running with the land whether or not it is considered to be an interest in land. The parties to the Agreements intended the Net Profits Interest to run with the land and the interest touches and concerns the possessory interest in the Claims as well as the reversionary interest retained by the Interest Owners. If this court concludes that the requirements for the covenant to run at law are not satisfied, the covenant should at least be enforced in equity. For these additional reasons, the district court's conclusion that the Interest is a

²⁸That was the conclusion of Atlas' attorneys in the Title Opinion previously discussed. See page 36 supra.

profit sharing agreement, unenforceable against successors,
life reversed.

IV. THE COURT ERRED BY CONSIDERING ONLY A PORTION OF
THE EVIDENCE BEFORE IT.

Throughout Parts I, II and III of this Brief, the Clovis Banks have pointed out obvious misinterpretations of the evidence before the trial court or its selective consideration of facts. In part IV, the Clovis Banks will focus upon the most egregious errors in factual interpretations made by the district court through overlooking facts favorable to the Clovis Banks and through refusing to construe facts in a light most favorable to appellant as required in summary judgment proceedings.

The settled law in Utah is that written instruments should be construed as a whole and, where unambiguous, should be enforced according to the plain meaning of the instruments alone. Although purporting to adhere to this settled principle, in actuality the district court merely paid lip-service to the law. See Transcript of February 8, 1983 Hearing at 27, R. 2394. The court went outside of the instruments to interpret their intent, and then chose among the facts before it to bolster its interpretation of the parties' intent.

The Clovis Banks submit that the district courts' factual conclusions are wrong for two reasons. First, the Agreements and the Deed are clear and unambiguous as to the nature and duration of the Net Profits Interest. Second, even if

the district court was permitted to go outside of the instruments to interpret their meaning, the court must look fairly at all of the extrinsic evidence. The overwhelming majority of that evidence supports the Clovis Banks' interpretation of the instruments. At the very least, the evidence in favor of the Clovis Banks' interpretation precludes a summary judgment against the Clovis Banks.²⁹

A. The Extrinsic Evidence Decisively Contradicts the District Court's Finding that the Agreements and the Net Profits Interest Terminated in 1961.

This Court has repeatedly advised that a contract or instrument should be construed according to its language, and that extrinsic evidence should be considered only where such language is ambiguous. Williams v. First Colony Life Insurance Co., 593 P.2d 534, 536 (Utah 1979); Commercial Building Corp. v. Blair, 565 P.2d 776 (Utah 1977). As noted above, the language of the Agreements unambiguously made the Net Profits Interest applicable to "all ores" mined from the Claims that would be valid so long as the Claims remained in force. However, because the district court based its construction in part on extrinsic

²⁹The district court went to some lengths to determine the "intent" of the parties. However, the court chose to accept inference that bolstered its conclusions and did not even attempt to explain away such direct evidences of intent as the Affidavit of Richard Zitting. See *infra* pp. 61-62. This Affidavit alone should be enough for a reversal of the court's ruling.

see, e.g., Transcript of February 8, 1983 Hearing at 2394-99; Findings and Conclusions ¶¶ 17-23, R. 2088-90, it should be pointed out that such evidence emphatically reinforces the clear meaning of the language in the Agreements.

In 1961, when the Bardon Shaft operation was terminated, four parties were affected by the Net Profits Interest: Kerr-McGee and the three Interest Owners. The evidence proves that each of these parties intended and understood that the Net Profits Interest would continue to apply to additional ores that might in the future be mined from the Claims. Because that interest was only a burden, not a benefit, to Kerr-McGee, Kerr-McGee would have had the greatest incentive to believe--or at least hope--that the Agreements would terminate with the closure of the Bardon Shaft.

In fact, however, Kerr-McGee's understanding was precisely to the contrary, as shown by the Affidavit of Richard T. Zitting, a key player for Kerr-McGee in operation of the Claims:

STATE OF NEW MEXICO)
 :ss.
COUNTY OF BERNALILLO)

Richard T. Zitting, being of lawful age and being first duly sworn according to law, upon his oath deposes and says:

1. In 1955, I began working for Kerr-McGee Oil Industries, Inc. as a District Geologist in Grants, New Mexico.

2. In 1957, I became Manager of Mineral Exploration for Kerr-McGee Oil Industries, Inc.

3. In 1967, I became Manager of Mining and Milling for Kerr-McGee Oil Industries, Inc.

4. From that time until 1978, I was employed with Kerr-McGee Oil Industries, Inc. and related entities in various managerial and executive positions.

5. In 1957, I participated in the negotiation of a purchase by Kerr-McGee Oil Industries, Inc. and Mercury Uranium and Oil Company of the Velvet and Royal Flush mining claims from Hez Abernathy, Lee B. Merrill and Philip G. Mersfelder.

6. I was directly involved in the exploration, development and mining of those mining claims between 1957 and 1960 and in additional exploration activity that occurred on the claims by Kerr-McGee Oil Industries, Inc thereafter.

7. I do not believe, and to the best of my knowledge the other parties to the 1957 agreements did not believe, that the 40% Net Profits Interest was intended to apply only to the ore body that was mined through the Bardon Shaft. I did not have any intent or understanding during the 1957 negotiations or thereafter that the 40% Net Profits Interest would be limited to one ore body or that it would terminate following closing of the Bardon Shaft.

/s/Richard T. Zitting
RICHARD T. ZITTING

R. 1771-73 (emphasis supplied).

In the present litigation, Kerr-McGee itself has expressed a similar understanding of the Agreements:

. . . Atlas has on more than one occasion acknowledged that it is bound by the provisions of the April 18 Agreements. This is not surprising in light of the fact that when it acquired the Subject Claims, Atlas had

both actual and constructive notice of the April 18th Agreements, which include an express provision that all sales of the Subject Claims by Kerr-McGee's or its successors in interest "shall be subject to the terms, covenants and conditions of this Agreement, and such terms, covenants and conditions shall be deemed to be covenants running with the land and the mineral estate covered hereby." The parties to the April 18th Agreements could not have been more precise in expressing their intention that Kerr-McGee's successors in interest should assume the obligations imposed by that Agreement.

Kerr-McGee Corp. Memorandum at 4, R. 963 (emphasis added).

The Interest Owners likewise believed that their interest continued in force. Until 1967, when his interest was acquired by the Clovis Banks, Abernathy consistently reported the interest as a valuable asset on financial statements. Statements of Assets and Liabilities, R. 1867-74. Moreover, in 1977, Atlas contacted each of the Interest Owners and offered to buy their respective interests. Merrill and Abernathy refused. Mersfelder sold for \$2,500; but later, upon learning that Atlas had allegedly known of but not disclosed the huge Velvet ore deposit, he sued to rescind the sale, alleging fraud by Atlas. Neither Atlas nor the Interest Owners ever suggested that the Net Profits Interest might have ceased to exist over a decade-and-a-half earlier.

In its findings and conclusions, the district court simply ignored this plain evidence of the parties' intent, but instead focused on two other categories of evidence which are

probative of nothing. First, the court noted that after the Bardon Shaft was abandoned, major operations did not immediately resume. Findings and Conclusions ¶¶23, 24, 26, R. 2089-91. However, a lull in mining operations is hardly uncommon, and may result from any number of factors, including market conditions, budget constraints, or diversion of the operator's efforts to other properties. In this case, of course, the evidence shows that Kerr-McGee intended to resume operations as soon as the Yucca litigation was resolved, but that the litigation dragged on for years. The lull clearly does not demonstrate an intent to terminate or abandon rights, as Kerr-McGee itself has made clear.³⁰

The district court also observed that the Interest Owners did not assert in the Yucca litigation that the Net Profits Interest had not terminated. Findings and Conclusions ¶24, R. 2090. The more significant fact, however, is that no one, including Kerr-McGee, asserted in the Yucca case (or in any

³⁰ Moreover, it was Kerr-McGee, Atlas' predecessor, who failed promptly to resume operations. The Interest Owners had no right or obligation to undertake further exploration or mining; their only right was to receive a portion of any profits that might be generated. Thus, if Kerr-McGee's inactivity signified any abandonment, it would necessarily be an abandonment of Kerr-McGee's rights in the Claims. The district court appears to have reasoned that an operator, by shirking his operator's duties, can thereby terminate the rights of others while keeping his own interest unimpaired. There is no support either in law or logic for this extraordinary conclusion.

... context, until Atlas made the assertion in September 1982) ... the Net Profits Interest had terminated. The Yucca case was concerned with dividing profits from the Bardon Shaft operation, and there was never any dispute about the applicability of the Net Profits Interest to mines that might later be commenced. Thus, the absence of allegations pro or con on that question proves precisely nothing.

Indeed, if the Yucca court is deemed to have ruled on the continuing existence of the net profits, then the conclusion in Yucca squarely contradicts the conclusion of the district court in this case. In 1968 (seven years after the Net Profits Interest had, in Atlas' view, terminated), the Yucca court entered the following finding:

At the time this action was commenced and all times thereafter, the mining claims were owned by Kerr-McGee, subject to . . . [t]he right of the Interest Owners to receive a portion of the net profits under the operating agreement"

Yucca Findings and Conclusions ¶4, R. 1597 (emphasis added).

In sum, the relevant extrinsic evidence emphatically contradicts the district court's finding that the parties intended to terminate the Net Profits Interest and the Agreements in 1961. That the district court could find that there was not even a genuine issue concerning such supposed intent to terminate, in the face of the parties' unanimous disavowal of any such intent, is simply astonishing.

B. At The Least, Atlas' Position Raised Genuine Factual Issues Precluding Summary Judgment.

As demonstrated above, the documents plainly express the parties' intent to reserve a Net Profits Interest that would be binding upon successors and assigns to the Claims. At the very least, the documents are ambiguous. This court has held:

In reviewing the record on any appeal from Summary Judgment, we treat the statements and evidentiary materials of the appellant as if a jury would receive them as the only credible evidence, and we sustain the judgment only if no issues of fact which could affect the outcome can be discerned.

Blodgett v. Martsch, 590 P.2d 298, 300 (Utah 1978) (emphasis added). See also, Thornack v. Cook, 604 P.2d 934, 936 (Utah 1979). Moreover, the extrinsic facts relied upon to determine the meaning of the ambiguous terms must be construed by the reviewing court in the manner most favorable to the appellant resolving doubts in favor of the appellant. See e.g., Durham v. Margetts, 571 P.2d 1332, 1334 (Utah 1977). Thus, if the instruments are considered ambiguous, necessitating reliance by the district court on extrinsic evidence, at least two unresolved issues, both clearly genuine and material, precluded summary judgment in favor of Atlas.

In the first place, if the Agreements were ambiguous, then the court would necessarily have to consider extrinsic evidence of the parties' intent. As noted, the original parties to the Agreement (except Mercury, which sold its interest to

agree at an early date and has not been involved in the present controversy) have unanimously indicated their understanding that the Net Profits Interest did not terminate upon closure of the Bardon Shaft.

The district court, while attempting to bolster its result by selective reference to some extrinsic evidence, purported to avoid this problem by declaring that the Agreements "unambiguously" limited their duration to a single mining venture. Findings and Conclusions ¶41, R. 2100. However, in addition to noting the various provisions in the Agreements that squarely contradict this construction, it must be remembered that Atlas' own counsel had earlier issued a lengthy and careful title opinion that reached precisely the opposite conclusion, that Atlas had repeatedly admitted that the Agreements and Net Profits Interest were still in force, and that the court itself had issued rulings holding, or at least adopting as an essential assumption, that the Agreements were still in force. The Agreements have been the focus of intense scrutiny throughout this litigation; yet despite the painstaking attention of Atlas lawyers who from the beginning had every motive to limit or negate the effect of the Agreements, even the possibility of a construction limiting the Agreements to a "specific mining venture" does not appear to have occurred to anyone until more than two years after this action was commenced. In view of these

facts, the court's ruling that the Agreements were "unambiguous in providing for their earlier termination is incredible.

Moreover, even if it is assumed that the Agreements were intended to be limited to a "specific mining venture," this construction leaves unanswered the factual question whether the "mining venture" actually ended in 1961. Under the court's view of the Agreements, the fact that one ore body was exhausted would not necessarily terminate the "mining venture."³¹ Nor is there any evidence to prove that the parties believed any "mining

³¹ Atlas has conceded as much. Atlas explained its proposed Conclusions Nos. 39-42 (which the district court adopted without modification) as follows:

The PROPOSED RULING does not find and conclude that the April 18 Agreements precluded the development of two or more ore bodies in the course of the mining venture undertaken in 1957. Conclusions Nos. 39, 40, 41 and 42 determine that the Sales Agreement and the Operating Agreement were limited to the activities undertaken and concluded by the parties to those Agreements, and their successors, from 1957-1961, and that the parties themselves, as it turned out, limited those activities to the one ore body served by the Bardon Mine.
(Emphasis added.)

Atlas Response at 7 R. 1945 (emphasis added). This explanation merely underscores the fact that even under the construction given the Agreements by the district court, the court's ruling nonetheless required a factual finding that the parties, "as it turned out," intended to terminate the venture and the Agreements after completion of the Bardon Shaft operation. In the context of summary judgment, and given the fact that none of the parties has every expressed such an intent (all the parties, rather, have explicitly or by their conduct disavowed having any such intent), the district court's finding in this regard is indefensible.

venture" had ended in 1961. On the contrary, the evidence shows that McGee fully intended that the mining venture would continue. See p. 9, supra. And while it was in fact Atlas, not McGee, that resumed operations, the provisions binding "successors and assigns" preclude any interpretation that would limit the "mining venture" to the original parties.³²

At the very least, the Agreements were ambiguous; and the extrinsic evidence is similarly disputed. Thus, if the Clovis Banks were not entitled to summary judgment, then the district court should have permitted the parties to conduct the scheduled discovery, and should then have gone forward with the scheduled trial to resolve such controversies.

CONCLUSION

The Agreements and the Deed, taken together and read as a whole, clearly create an interest that is to survive "so long as any of the mining claims . . . are in force and effect." The district court erred in determining that the Net Profits Interest that was reserved to the Interest Owners in the June 7, 1957 deed terminated in 1961.

³² In order to rule summarily that a "mining venture" had terminated, it would seem that the district court should at least have offered a definition of what a "mining venture" is. In fact, however, neither the district court nor the Agreements give any definition or guidance as to what constitutes a "specific mining venture." Because this concept is critical to the court's ruling, the court's failure to explain or define the concept seems inexcusable.

Neither the Agreements nor the Deed made provision for termination of the Net Profits Interest at the conclusion of an initial "mining venture" and were unambiguous in setting out the duration of the interest. Moreover, by reserving the Net Profits Interest from the conveyance of the Claims to Atlas' predecessors, the Interest Owners created an interest in real property that binds successors and assigns of the initial owners of the Claims and cannot be cut off unilaterally. Finally, even if the Net Profits Interest, as defined in the Agreements or as carved out of the Deed, is a terminable interest, the extrinsic evidence considered by the district court does not support the conclusion that an intent to terminate the interest exists. The evidence overwhelmingly supports the conclusion that the interest continues to exist. At the very least, under the tests established by this Court, summary judgment in favor of Atlas is clearly improper.

For the foregoing reasons, this Court should reverse the summary judgment and remand to the district court to enter judgment in favor of the Clovis Banks on their cross-motion for summary judgment. Alternatively, the case should be remanded for further discovery and trial.

Respectfully submitted this 29th day of September, 1983.

ROOKER, LARSEN, KIMBALL & PARR

By 

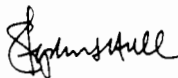
Dale A. Kimball, Esq.

Stephen J. Hull, Esq.

Attorneys for The Clovis National
Bank and The Citizens Bank of
Clovis

CERTIFICATE OF SERVICE

I certify that two true and correct copies of Brief of Appellants was hand-delivered to L. Robert Anderson for Anderson and Anderson and for Davis, Graham & Stubbs, at the offices of Rooker, Larsen, Kimball & Parr, 185 South State Street, Suite 1300, Salt Lake City, Utah this 29th day of September, 1983.



AGREEMENT

THIS AGREEMENT, Made and entered into this 18th day of April, 1957, by and between LEE B. HERRILL of Clovis, New Mexico, HAZ ABERNATHY, of Clovis, New Mexico, and PHILIP C. HERSFELDER of Moab, Utah (said individuals sometimes collectively being hereinafter referred to as "Sellers"), and KERR-MCGEE OIL INDUSTRIES, INC., a Delaware corporation (hereinafter sometimes being referred to as "Kerr-McGee"), and MERCURY URANIUM AND OIL COMPANY, a New Mexico corporation (hereinafter sometimes referred to as "Mercury"), and Kerr-McGee and Mercury sometimes jointly being referred to as "Buyers".

W I T N E S S E T H:

WHEREAS, Sellers are the owners of all the undivided right, title and interest (except as hereinafter set forth) in and to those certain mining claims identified and described as follows, to-wit:

Velvet Claims 1-34, inclusive

Royal Flush Claims 1, 2, 3 and 4
(a portion of the lands covered
by Velvet Claims 1, 2, 3, 21, 22
and 23, and Royal Flush Claims
1, 2, 3 and 4 is not owned by
Sellers as the result of a
boundary line settlement).

said claims covering lands situated in Section 3 and
Section 4, Township 31 South, Range 25 East, and
Section 34, Township 30 South, Range 25 East, Salt
Lake Meridian, San Juan County, Utah, comprising
approximately 640 acres, more or less;
and Sellers represent that said claims cover the minerals in
and to said lands, including uranium, vanadium or other, etc.

cluding without limiting the generality of the foregoing, uranium, vanadium, thorium, manganese, and other materials associated therewith and all fissionable materials in, on, or under said lands; and

WHEREAS, Sellers are desirous of selling to Buyers all their said undivided right, title and interest in and to the claims and Buyers are willing to purchase the same subject to the terms, conditions, and provisions herein contained,

NOW, THEREFORE, in consideration of the premises and the mutual promises herein contained, it is mutually agreed as follows, to-wit:

1. Sellers agree to furnish, within thirty (30) days from the date hereof, to Buyers, or to Buyers' attorneys designated in writing to Sellers, an Abstract of Title to the above described mining claims and a Certificate duly acknowledged by a qualified person that examination of the pertinent records in the office of the United States Bureau of Land Management, Salt Lake City, Utah, reflects that the lands covered by said mining claims were open to mineral entry for the above mentioned minerals at the time of the location of said claims; said Abstract and Certificate shall be current to a recent date not earlier than March 6, 1957, and shall show good possessory title in and to said claims to be valid in the Sellers as against every person (and entity) except the United States of America and as otherwise set forth here.

Upon receipt of such Abstract and Certificate from Sellers, Buyers shall have thirty (30) days thereafter to accept or reject title as aforesaid, and to notify the Sellers, in writing, of any title defects or requirements to be made, or corrective work to be done. Sellers shall not

have thirty (30) days in which to correct or cure said title defects or requirements, provided, however, said title defects cannot be cured within said thirty (30) day period, and in the opinion of Buyers' Attorneys a quiet title action should be instituted for the purpose of curing said defects, then Sellers shall have five (5) months from the end of said thirty (30) day period in which to quiet title to such claims. In the event Sellers shall be unable to tender Buyers good possessory title, as aforesaid, to said mining claims, or to meet the requirements as hereinabove provided within said thirty (30) day period and said five (5) months period, this agreement, at Buyers' election, shall become null and void.

2. In the event, however, Sellers shall deliver to Buyers good possessory title as against every person (and entity) except the United States of America and as otherwise set forth herein as aforesaid, or should Seller be unable to do so and Buyers elect to waive such title defects or requirements and accept Sellers' title, then and in such event, upon written notice of such acceptance, or waiver, Sellers shall prepare, execute and deliver a mining deed in quit claim form conveying the above described mining claims and all of Sellers' right, title and interest therein unto Buyers subject to this agreement; such Deed shall contain a special Warranty of Title in the following form:

"The Grantors, for themselves, their legal representatives, successors or assigns, represent that they have not encumbered or alienated any of the above property, and Grantors do hereby warrant their title to said property as against, but only against, any person or persons lawfully claiming the whole or any part of such property through or under grantors."

3. Upon delivery of such instrument or instruments and acceptance thereof by Buyers, Buyers shall pay Sellers One Hundred Fifty Thousand Dollars (\$150,000.00) in accordance with the following, to-wit:

- (a) Fifty Thousand Dollars (\$50,000.00) cash paid by Kerr-McGee.
- (b) Fifty Thousand Dollars (\$50,000.00) cash to be paid by Mercury.
- (c) Delivery by Mercury of 50,000 common shares of capital stock of Mercury Uranium and Oil Company to Sellers, or to Sellers' respective nominees, if any.

4. Notwithstanding anything to the contrary herein contained, it is understood and agreed (and Sellers so to that Sellers said right, title and interest in and to said claims, is subject to the following, to-wit:

- (a) Royalty of Ten Per Cent (10%) of the gross receipts from all ores mined, produced and sold, including in part of said gross receipts all premiums and bonuses paid to Buyers by the Atomic Energy Commission or the government authorized purchaser, less all allowances for haulage and development.
- (b) Some right or interest owned by Yucca Mining and Petroleum Co. Inc., a Colorado corporation, of Albuquerque, New Mexico.
- (c) Some right or interest owned by Uranic Mining Company, a Colorado Corporation of Grand Junction, Colorado, in care of Walter Lyntager.
- (d) It is understood and agreed that said interests of Yucca and the said interest of Uranic shall be payable only out of Sellers' net profits (interest hereinafter set forth in Paragraph 6 below) and Buyers' interest so acquired hereunder shall in no way be subject to said interests of Yucca and Uranic, and Sellers hereby agree to hold Buyers harmless from and indemnify Buyers with respect thereto.

5. It is understood and agreed that in the event of the consummation of the sale and purchase of said claims in accordance with this Agreement, Buyers agree to explore said claims with reasonable diligence, and in the event of the discovery of commercial ore, to proceed to define and to develop the ore body indicated thereby, and in the event the same shall be a commercial ore body in Buyers' opinion sufficient to reasonably justify the mining thereof, to sink at a location of Buyers' choosing a shaft to a

depth to mine said ore body, including the necessary equipment to sink and equip said shaft, all at the cost of the Buyers. From and after the time when the initial shaft and/or mine shall have been equipped by Buyers to provide a capability for mining and producing 25 tons or more of ore per day, all other costs and expenses incurred for the exploration, drilling, development and mining of said mining claims shall be charged against the proceeds derived from production from said claims and shall be taken into account in determining net profits therefrom. It is also agreed that Buyers shall be entitled to a sum equal to ten per cent (10%) of all expenditures made or incurred after said date of capability for mining in connection with the mining and operation of the said mining claims in lieu of an overhead charge.

6. After Buyers shall have received out of the net profits from all ores mined, produced and sold from said claims, a sum which shall be equal to 100% of \$150,000.00 and 150% of all costs and expenses incurred by Buyers in connection with the exploration, drilling and development of said claims and the sinking and construction of said initial shaft and reimbursement to Buyers for all costs and expenses of equipping and developing said mine after completion of said initial shaft and prior to said date when the capability for mining and producing 25 tons of ore per day shall have been established as aforesaid, then Buyers and Sellers shall share the net profits from all ores mined, produced and sold from said claims after reimbursement to Buyers of all costs and expenses of exploration, drilling, development, mining, operation and

and overhead of said claims, as follows, to-wit:

Sellers	Forty (40) per cent
Kerr-McGee	Thirty (30) per cent
Mercury	Thirty (30) per cent

7. It is contemplated that Kerr-McGee will have a call on all ores mined, produced, saved and sold from said claims. For all such ore with respect to which Kerr-McGee exercises its said call, it is understood and agreed that prior to March 31, 1962, Kerr-McGee shall pay for the uranium content contained in all marketable ore mined, saved and removed from said claims and purchased by Kerr-McGee and/or processed by Kerr-McGee through its mill at Shiprock, New Mexico, the price established for uranium content of amenable ore of like grade and kind in the A.E.C. Domestic Uranium Program, Circular 100, effective March 31, 1951, as now revised and as the same may from time to time be revised, plus bonuses and development allowances and haulage allowances allowed Kerr-McGee by the Atomic Energy Commission less the actual cost of transporting such ores to Kerr-McGee's mill at Shiprock, New Mexico, or other point of sale; and that subsequent to March 31, 1962, in the event there is no such price established by the Atomic Energy Commission for such ores in its Domestic Uranium Program, the price payable by Kerr-McGee for the uranium content of said ore shall be equal to the average price being paid by Kerr-McGee for the uranium content of said ores of like grade, quality and amenability to mill process delivered to said Kerr-McGee mill by other suppliers of ore thereto, provided, that at no time shall the price for uranium content be less than the average price being paid for like ores by other similar producing mills located within a 100 mile radius of said mining

claims. It is understood and agreed that in the event the ores shall contain valuable minerals other than uranium for which a bona fide purchaser, other than Kerr-McGee, shall be in a position to purchase for a minimum period of six (6) months the entire estimated production of ores produced from said claims and is ready, willing and able to do so and to pay more therefor than Kerr-McGee is willing to pay, then Kerr-McGee shall release the ore for sale to such other purchaser until such time as Kerr-McGee is willing to pay the price being paid by such other purchaser or the then highest price for like ores being paid in the area by purchasers other than said other purchaser.

8. Upon the delivery by Sellers of said instruments conveying said right, title and interest to Buyers and payment by Buyers of said sums and issuance and delivery of said shares of stock to Sellers, as aforesaid, by Warranty the parties hereto agree to execute an agreement with respect to Buyers operations on said claims, which agreement shall be in the form of and contain the provisions set forth in the Agreement attached hereto as "Exhibit A" and made a part hereof for all purposes.

9. It is understood and agreed that in the event this sale and purchase is consummated Sellers will appoint by appropriate and proper written instrument one of their number who shall be authorized to act as attorney-in-fact for and to represent all of said Sellers with Kerr-McGee and Warranty in all respects in connection with Sellers' respective interests in and to the said claims and the joint property and all payments, accounts, reports, correspondence, and notices shall be made to and

conducted with such representative, except Seller shall have the right to appoint a bank to which payments to which Seller is entitled hereunder shall be paid.

10. In the event of the discovery of a commercial ore body as hereinabove provided Buyers agree to mine, remove, and sell such ore from said claims with reasonable diligence and reasonable continuity and in a good workmanlike manner, in accordance with modern techniques and practices as generally used in the industry; provided, however, if the United States Government or its duly authorized buyer or representative shall suspend for a period of time, or cease the buying of uranium, or any other fissionable material, or there is no satisfactory market, the buyers shall not be required to continue mining said claims during any such period of time, it being understood and agreed, however, in the event of such suspension or cessation of buying by the United States Government of said minerals, Buyers shall use reasonable effort to find a satisfactory market.

11. All payments to which Sellers may be entitled hereunder with respect to said net profits shall be paid by Buyers, or whichever of Buyers shall be operator of the properties, within thirty (30) days following receipt of payment for all ores sold by Buyers from said claims, and such payments shall be accompanied by settlement sheet therefor.

IN WITNESS WHEREOF, the parties hereto have executed this Agreement as of the day and year first above set forth.

SELLERS:

W. C. G. Russell
Secretary
W. C. G. Russell
President
W. C. G. Russell
Secretary
W. C. G. Russell
Secretary

ATTEST:

BUYERS:

ATTEST:

W. C. G. Russell
Secretary
W. C. G. Russell
Secretary

W. C. G. Russell
Secretary
W. C. G. Russell
Secretary
W. C. G. Russell
Secretary
W. C. G. Russell
Secretary

STATE OF California)
COUNTY OF San Bernardino) ss

On the 15th day of June, A. D. 1957,
personally appeared before me John C. Vane,
who, being by me duly sworn, did say that he is Vice
President of KIRK-MCGEE OIL INDUSTRIES, INC., and that
said instrument was signed in behalf of said Corporation
by authority of its By-Laws (or by resolution of its Board
of Directors) and said John C. Vane
acknowledged to me that said Corporation executed the same.

John C. Vane
Notary Public

In and for the San Bernardino County
State of California

My Commission Expires:

March 17, 1961

Residence:

California State Capital

STATE OF New Mexico)
COUNTY OF Bernalillo) ss

On the 18th day of June, A.D. 1957,
personally appeared before me John C. Vane,
who, being by me duly sworn, did say that he is
President of MERCURY URANIUM AND OIL COMPANY, and that said
instrument was signed in behalf of said Corporation by
authority of its By-Laws (or by resolution of its Board of
Directors) and said John C. Vane
acknowledged to me that said Corporation executed the same.

John C. Vane
Notary Public

In and for Bernalillo County
State of New Mexico

My Commission Expires:

June 8, 1960

Residence:

Albuquerque, N. M.

STATE OF New Mexico } ss
COUNTY OF Bernalillo }

On the 18th day of April, A. D. 1957,
personally appeared before me Mr. B. K. K. K. K. and
signer(s) of the above instrument, who
acknowledged to me that he (they) executed the same.

Leota K. K. K.
Notary Public

In and for Bernalillo County
State of New Mexico

My Commission Expires:
June 3, 1960

Residence:

Albuquerque, N. M.

STATE OF New Mexico } ss
COUNTY OF Bernalillo }

On the 18th day of April, A. D. 1957,
personally appeared before me Mr. B. K. K. K. and
signer(s) of the above instrument, who
acknowledged to me that he (they) executed the same.

Leota K. K. K.
Notary Public

In and for Bernalillo County
State of New Mexico

My Commission Expires:
June 3, 1960

Residence:

Albuquerque, N. M.

STATE OF New Mexico } ss
COUNTY OF Bernalillo }

On the 18th day of April, A. D. 1957,
personally appeared before me Mr. B. K. K. K. and
signer(s) of the above instrument,
who duly acknowledged to me that he (they) executed the same.

Leota K. K. K.
Notary Public
In and for Bernalillo County
State of New Mexico

My commission Expires:
June 3, 1960

Residence: Albuquerque, N. M.

OPERATING AGREEMENT

THIS AGREEMENT, made and entered into this 18th day of April, 1957, by and between KEMMAC OIL INDUSTRIES, INC., a Delaware corporation (hereinafter sometimes referred to as "Kemmac" and as "Operator") and MERCURY URANIUM AND OIL COMPANY, a New Mexico corporation (hereinafter sometimes being referred to as "Mercury" and as "Non-Operator"), and LEE B. MERRILL of Clovis, New Mexico, REZ ALKHAULTY, of Clovis, New Mexico, and PHILIP C. MERRIFIELD, of Moab, Utah (said named individuals being collectively referred to as "Interest Owners").

WITNESSETH:

WITNESSES, Kemmac and Mercury have acquired from said Interest Owners those certain valid and subsisting mining claims identified and described as follows, to-wit:

- Velvet Claims 1-34 inclusive
- Royal Flush Claims 1, 2, 3 and 4 (a portion of the lands covered by Velvet Claims 1, 2, 3, 21, 22 and 23, and Royal Flush Claims 1, 2, 3 and 4 is not owned by Sellers as the result of a boundary line settlement).

Said claims covering lands situated in Section 3 and Section 4, Township 11 South, Range 25 East, and Section 34, Township 30 South, Range 25 East, Salt Lake Meridian, San Juan County, Utah, comprising approximately 640 acres, more or less; and

WITNESSES, said Interest Owners have reserved unto themselves an undivided net profits interest as hereinafter set forth in and to the net profits from all ores mined, saved, removed and sold from said claims and said Interest Owners are interested in the development of said claims; and

WITNESSES, it is the desire of Mercury that Kemmac be in charge of all development and mining operations and all other operations and activities in connection therewith on said lands covered by said mining claims in accordance with the agreements and provisions hereinafter contained and Kemmac is willing to be Operator hereunder;

NOW, WHEREFORE, in consideration of the premises and the mutual covenants and agreements herein contained, it is mutually agreed as follows to-wit:

I. Period of Agreement Covering Operations.

It is agreed by and between the parties hereto that this Agreement shall be in full force and effect so long as any of the mining claims hereinabove identified and described are in force and effect.

II. Operator and Proportionate Liability.

Kernas shall be the Operator of the above-described mining claims hereinafter sometimes referred to as the "Joint Property" and shall, in accordance with all of the provisions of this Agreement have full, complete and exclusive control, charge and supervision of all development and mining operations on the Joint Property. All operations shall be for the joint account of the Operator and Non-Operator.

It is understood and agreed that, subject to the net profits interest, hereinafter set forth, of said "Interest Owners," all ore mined (after payment of royalties other than those payable by said Interest Owners out of said net profits interest), benefits, costs, expenses, liabilities, operations and risks accruing to or resulting from the operations of the Joint Property and the Joint Account shall be determined, shared and borne by the parties named as follows, to-wit:

Kernas 50%

Marcury 50%

Kernas agrees that it will perform its duties as Operator to the best of its ability and in accordance with good mining practices; provided, however, it is understood and agreed that Operator shall not be liable to Marcury (and/or said Interest Owners, respectively) for inadvertent mistakes, errors or omissions.

If Kernas should desire to resign as Operator, it shall notify Marcury or its successors, in writing, to that effect and within thirty (30) days after the giving of such notice, Marcury, at its election, shall have the right to become Operator hereunder; provided, however, that in the event Marcury shall not so elect to become Operator, Kernas and Marcury, within thirty (30) days from the date that Marcury so notifies Kernas shall select another Operator or petition a court of competent jurisdiction to make division or partition of the Joint Property.

III. Commencement of Activities by Operator and
Net Profits Required.

It is understood and agreed that Kennecott, as Operator, at its sole cost and expense, with reasonable diligence will commence and diligently prosecute exploration and other activities and operations upon the lands covered by said claims sufficient in its opinion to adequately test the same for the presence of commercial ore deposits; provided, however, after Kennecott shall have incurred in the performance of and in connection with said exploration and activities and operations hereunder a sum equal to Fifty Thousand Dollars (\$50,000), then all drilling, exploration, development, mining activities and operations hereunder and all activities and operations in connection therewith by Kennecott as Operator shall be borne, shared and paid for by Kennecott and Mercury in the proportion hereinabove set forth. In the event of the discovery of commercial ore Operator shall proceed to define and to develop the ore body indicated thereby and in the event the same shall be a commercial ore body in Operator's opinion sufficient to reasonably justify the mining thereof, Operator, upon the completion of defining and developing the ore body, with reasonable diligence shall commence preparations for mining and for sinking a shaft and with reasonable diligence will sink or cause to be sunk at a location to be determined by Operator a shaft, to a depth to mine said ore body, including the necessary equipment to sink and equip said shaft. It is understood and agreed that from and after the time when the initial shaft and/or mine shall have been equipped by Operator to provide a capability for mining and producing twenty-five (25) tons or more of ore per day all other costs and expense incurred for the exploration, drilling, development, mining, operation and overhead of said mining claims shall be charged in accordance with the provisions hereof against the proceeds derived from production from said claims and shall be taken into account in determining net profits therefrom for the purpose of ascertaining Interest Owners' participation therein as hereinafter set forth. Operator shall be entitled to a sum equal to ten (10%) per cent of all money expended and costs and expenses incurred after said date of capability for mining in connection with the mining and operation of the said mining claims in lieu of an overhead charge.

as provided and set forth in Exhibit "A", Accounting Procedure, attached hereto and made a part hereof for all purposes.

It is further understood and agreed that after Kennac and Mercury shall have received out of the net profits from all ores mined, produced, saved and sold from said claims a sum which shall be equal to 100% of One Hundred Fifty Thousand Dollars (\$150,000) and 150% of all costs and expenses incurred by Kennac and Mercury in connection with the exploration, drilling, and development of said claims and the sinking and constructing said initial shaft, and reimbursement to Kennac and Mercury for all costs and ~~expenses~~ equipping and developing said mine after completion of said shaft and prior to said date when the capability for mining and producing 25 tons of ore per day shall have been established as aforesaid, then Kennac and Mercury and Interest Owners shall share the net profits from all ores mined, produced, saved and sold from said claims after reimbursement to Kennac and Mercury of all costs and expenses of exploration, drilling, development, mining, operation and overhead of said claims as follows, to-wit:

Interest Owners.....	Forty (40) per cent
Kennac.....	Thirty (30) per cent
Mercury.....	Thirty (30) per cent

It is also understood and agreed that said Interest Owners' net profits interest is subject to an interest owned by Tucson Mining and Milling Co., Inc. of Albuquerque, New Mexico, and an interest owned by United States Company, a Colorado corporation of Grand Junction, Colorado; and said Interest Owners shall pay to such Owners of such interest any and all payments or account thereof and hold Kennac and Mercury harmless from and indemnify all parties with respect thereto.

IV. Accounting Procedure.

(a) Operator shall (subject to the provisions of subsection (b) of this Paragraph IV) advance and pay all costs and expenses of the Joint Account and shall charge, upon monthly billing, Non-Operator its proportionate part thereof. Operator will furnish Non-Operator (and said Interest Owner for their information) monthly cost statements, and Non-Operator agrees to pay such monthly billing on or before the 15th day

the month succeeding the month for which billing is made. All such costs and expenses, credits and related matters and the method of handling and accounting with respect thereto shall be, insofar as they do not conflict with other provisions of this Agreement, in accordance with the provisions set forth in the said Exhibit "A" (Accounting Procedures).

(b) Operator, at its direction, may require Non-Operator to advance its indemnitory portion of the anticipated costs and expenses of operation and development hereunder in accordance with an estimate by Operator to be made no later than twenty (20) days in advance of the month in which the costs and expenses are to be incurred. Adjustment between estimated and actual costs shall be made by Operator at the close of each calendar month and the amounts of Non-Operator adjusted accordingly.

(c) Operator shall undertake to engage operation or activity (except normal production operations) reasonably expected to involve expenditures in excess of Five Thousand Dollars (\$5,000) without first obtaining written consent of Non-Operator; provided, however, that consent or approval to the spending of a primary share and its subsidiary equipment shall constitute approval of all costs and expenditures incident thereto. Operator may, if so desired, employ its own personnel and equipment in the operations hereunder or sharing thereafter in accordance with the provisions of Exhibit "B" hereof.

V. ABANDONMENT OF MINES.

No mine jointly owned hereunder shall be abandoned without the mutual consent of Laramie and Bannock. If either Laramie or Bannock desires to abandon a mine and the other party does not agree thereto, the party desiring to abandon shall notify the other party in writing, describing the boundaries of the area to be abandoned and the latter party shall have thirty (30) days thereafter within which to elect whether to agree to the abandonment of the mine or to acquire the interest of the other party therein. Failure to elect within the said period of time and to notify the other party of such election in writing shall be conclusively deemed to be consent to abandonment.

If the interested party elects to acquire the interest of the party desiring to abandon, such party shall pay the abandoning party in cash for the value of its interest in the valuable minerals and equipment

in said mine, such value to be determined in accordance with the provisions of said Exhibit "A." Upon receipt of payment the party desiring to abandon shall assign and convey to the acquiring party without warranty of title all of its right, title and interest in and to said mine and the area serviced by the mine and defined in the notice of intent to abandon.

Notwithstanding the foregoing, no mine shall be abandoned by Operator and Non-Operator hereunder without the consent of said Interest Owners and in the event the notified party shall fail to elect to acquire the interest of the party desiring to abandon such mine or consents (or is deemed to have consented) to such abandonment, then the notifying party shall, by registered mail, notify said Interest Owners of such consent or failure to elect and said Interest Owners shall have fifteen (15) days thereafter within which to notify Operator and Non-Operator of their desire to acquire the interests of Operator and Non-Operator therein. If said Interest Owners, either jointly or severally, elect to acquire Operator's and Non-Operator's interest in such mine, said Interest Owners (or such Interest Owner) shall pay Operator and Non-Operator, respectively, in cash for the value of Operator's and Non-Operator's respective interests in the salvable material and equipment in said mine, such value to be determined in accordance with the provisions of said Exhibit "A." Upon receipt of payment Operator and Non-Operator, respectively, shall assign and convey to the acquiring party or parties, without warranty of title, all of their respective right, title and interest in and to said mine and the area serviced by the mine and defined in the notice of intent to abandon.

VI. Lapse or Expiration of Mining Claims.

No mining claim covering any part of the Joint Property shall be permitted to lapse or expire without the mutual consent of both Kennecott and Mercury. If either of said parties desires to let all or any of the mining claims covered hereby lapse or expire and the other party does not agree thereto the party desiring to let such claims lapse or expire shall notify the other party, in writing, and such other party not desiring to so let such claims lapse or expire shall have thirty (30) days thereafter within which to elect whether to agree to let the designated claim or claims

Japans or explore or to acquire the interest of the other party in the mining claims which the other party is willing to let Japans or explore. Failure to elect within the said period of time and to supply the other party of such interests, in writing, shall be conclusively deemed to be consent to such Japans or exploration.

If the interested party elects to acquire the interest of the other party according to let said claims Japans or explore and provisions such other party to that effect, such other party shall forthwith execute and convey by good valid instrument, without warranty of title, all of the right, title and interest in the mining claims which such party is willing to let Japans or explore. Such assignment however shall not affect any valuable material or equipment on the mining claims so assigned.

Notwithstanding the foregoing, no claim covered hereby shall be purchased by Operator and Non-Operator to Japans or explore without the consent of said Interest Owners and in the event the interested party shall fail to elect to acquire the interest of the party desiring to let any such claims Japans or explore or otherwise (or is deemed to have consented) to such Japans or exploration, then the participating party shall notify said Interest Owners by registered mail of such consent or failure to elect and said Interest Owners shall have fifteen (15) days thereafter within which to notify Operator and Non-Operator of their desire to acquire the interests of Operator and Non-Operator therein. If said Interest Owners, either jointly or severally, elect to acquire Operator's and Non-Operator's interests in such claims and so notify Operator and Non-Operator within the said fifteen (15) day period, Operator and Non-Operator shall forthwith execute and convey by good, valid instrument, without warranty of title, all of their respective rights, title and interest in the mining claims which such parties are willing to let Japans or explore. Such assignment, however, shall not affect any valuable material or equipment on the mining claims so assigned.

VII. Operation and Disposal of Production.

Kamco and Mercury each shall own and at its own expense, if it so desires, take in kind or separately dispose of its proportionate part of the commercial ore produced from the Joint Property. However, at such time or times as Non-Operator shall fail or refuse to take in kind or separately dispose of its proportionate part of such production, Operator shall have the authority, revocable at will by Non-Operator at any time it wishes to resume the taking in kind or separate disposition of its ore, to sell all or any part of Non-Operator's share of production to others at the same price that Operator receives for its own proportionate part of production. It is understood and agreed that Operator will not be responsible for, and may bill Non-Operator for, all costs of transporting and hauling Non-Operator's ore to market, for which Operator is not compensated by reason of the Atomic Energy Commission haulage allowance.

VIII. Option to Purchase and Sales.

(a) Except as provided in Paragraphs V and VI above, no assignment, conveyance, mortgage or other transfer affecting the Joint Property covered hereby, shall be made by Kamco or Mercury unless the same shall cover the entire undivided interests of the assignor, conveyor, mortgagor or transferor in all of the Joint Property covered hereby; provided, however, that an assignment, conveyance, mortgage or transfer of a lesser interest than the seller's entire undivided interest may be made upon securing the consent thereto of the other of said parties in writing. It is the intention of this provision to maintain and preserve the unit ownership, development and operation of said jointly owned property.

(b) Subject to the provisions of this subsection (a) of this Paragraph VIII, in the event that either Kamco or Mercury receives a bona fide offer which it is willing to accept for the purchase of its interest in any or all of its interest in the Joint Property covered hereby from a person, firm or corporation, ready, willing and able to purchase such interest in said Joint Property, or interest therein, the party

receiving such offer shall immediately give written notice thereof to the other of said parties, including in said notice the name and address of such offeror, the price offered and all other pertinent terms and conditions of the offer. The other of said parties, for a period of thirty (30) days following the giving of said notice, shall have the prior right and option to purchase such interest in said Joint Property covered by said offer, at the price and according to the terms and conditions specified in said offer. If, however, such other of said parties should fail to exercise said right and option by giving written notice of its acceptance within thirty (30) days after the giving of the above mentioned notice, and if the written consent required in subsection (a) of this Paragraph VIII is obtained, the party which receives said offer may accept said offer and complete said sale to the offeror in accordance with said offer within sixty (60) days after the expiration of the said thirty (30) day period; provided, however, that if the party which receives said offer fails to accept said offer or to complete said sale within said period of sixty (60) days, the preferred right and option of said parties hereunder shall be considered as revived and the party which receives said offer shall not complete said sale to said offeror unless and until said offer again has been presented to the other of said parties, as hereinabove provided, and said other of said parties again has failed to elect to purchase on the terms and conditions of said offer.

The provisions hereof shall not apply to a transfer by Kansas or Mercury made in connection with a merger, consolidation or reorganization involving said party, or to a corporation or partnership in which said party may own the majority of the stock or the controlling interest.

All sales made by either Kansas or Mercury or their respective successors in interest, shall be subject to the terms, covenants and conditions of this Agreement, and such terms, covenants and conditions shall be deemed to be covenants running with the land and the mineral estate covered hereby and with such transfer or assignment thereof.

II. Relation of the Parties.

(a) In the performance of its work hereunder Operator shall be an independent contractor, free of control or supervision of Non-Operator as to the means, manner or method of performing such work, Non-Operator being interested only in the results.

The number of employees, the selection of such employees, the hours of labor and the compensation of services to be paid any and all such employees shall be determined by Operator. Such employees shall be the employees of Operator.

(b) The rights of the parties hereunder shall be several and individual and not joint or collective. Each party shall be responsible for only its several and individual obligations as set out herein, and, as between Kansas and Mercury each of said parties shall be responsible for only its proportionate share of the risks, liabilities, obligations, costs and expenses of developing and operating the Joint Property.

(c) Kansas and Mercury each agrees and does hereby elect to be excluded from the application of the provisions of Sub-chapter L, Chapter 1 of Subtitle A of the Internal Revenue Code of 1954, or such part thereof as may be permitted or authorized by the Secretary of the Treasury or his delegate. Each of said parties also agrees to and does hereby so elect with respect to any applicable state income tax law now or in the future contains similar provisions. Non-Operator hereby authorizes and directs Operator to execute such election or elections in its behalf and to file the same with the proper administrative office or agency.

L. Surplus Materials.

Surplus material and equipment from the joint property when, in the judgment of Operator, the same are not necessary for the development and operation of the joint property may with the approval of the Non-Operator be sold to others for the benefit of the Joint Account and proper charges

and credits shall be made by Operator as provided in the Accounting Procedure attached hereto as Exhibit C.

II. Royalty Obligations and Failure of Title.

All royalties under said claim shall be paid by Operator and charged to the Joint Account as part of the expenses and operations.

If the title to any portion of said Joint Property should fail in whole or in part, the loss shall be borne by Lessee and Minors in the proportion of ownership in the property as hereinabove set forth.

III. Insurance.

Operator shall carry with responsible insurance carriers, Workmen's Compensation and Employer's Liability Insurance, Automotive Public Liability and Property Damage Insurance and General Public Liability and Property Damage Insurance covering the activities on and with respect to the Joint Property, and protecting all of the parties hereto in or for such amounts as are customarily carried by it with respect to operations of the nature and extent covered hereby. Operator and Non-Operator agree to hold said Interest Owners harmless from and with respect to all losses of and damage to property and injury to and death of any person arising out of the operation hereunder of said Joint Property except such loss or damage or injury or death resulting from or occasioned by the negligence of said Interest Owners.

IV. Access to Premises and Records.

Operator shall afford to Non-Operator and to Interest Owners, their respective agents and representatives reasonable access to the Joint Property and reasonable access during reasonable business hours to all books and records of Operator which relate to the Joint Property and the Joint Account. Operator shall in addition furnish to Non-Operator and Interest Owners and/or designated representative reports of the progress of all operations conducted by Operator under this Agreement.

XIV. Operator's Lien.

Operator is hereby given a first, prior and preferred lien on the interest of Non-Operator in and to said Joint Property, said mining claims and Non-Operator's interest in and to the ore produced and proceeds thereof and Non-Operator's interest in the material and equipment owned by the Joint Account to secure the payment of all sums due from or payable by Non-Operator pursuant to the provisions hereof.

In the event Non-Operator fails to pay any amount owing by it to Operator as its costs and expenses or as an advanced estimate within the time limited for the payment thereof Operator, without prejudice to other existing rights and remedies is authorized at its election to collect from the purchaser or purchasers (or withhold payment if Operator shall be purchaser) the proceeds accruing to Non-Operator's interest up to the amount owing by Non-Operator and each purchaser (including Lessee) is authorized to rely upon Operator's statement as to the amount owing by Non-Operator. Should Non-Operator fail or neglect to pay any such amount owing by it to Operator, the same shall bear interest at six (6%) per cent per annum until paid.

XV. Laws and Regulations and Force Majeure.

This Agreement shall be subject to all State and Federal law and the rules and regulations of public bodies exercising jurisdiction over the Joint Property or the development or operation thereof, and in the event this Agreement, or any provision hereof is or the operations contemplated hereby are found to be inconsistent with or contrary to any such law or rule or regulation, the latter shall be deemed to control and this Agreement shall be regarded as modified accordingly and as so modified shall continue in full force and effect. Obligations under this Agreement shall be suspended while the parties hereto are prevented from complying therewith by acts of God, riots, acts of Federal or State agencies, inability to secure materials, strikes, lockouts, or other matters beyond their reasonable control, provided that the settlement of

strikes or lockouts shall be entirely within the discretion of the party having the difficulty; and provided further that the party so prevented from complying with its obligations hereunder shall notify the other party thereof and exercise diligence in an effort to overcome or remove such cause.

XVI. Notices and Communications.

Except as otherwise provided herein, all notices, elections, payments, reports or correspondence required or permitted hereunder shall be deemed to have been properly given or delivered when made in writing and delivered personally, or when sent by mail or telegraph with all necessary postage or charges fully prepaid and addressed to the parties hereto, respectively as follows:

Kerr-McGee Oil Industries, Inc.
Kerr-McGee Building
Oklahoma City, Oklahoma

Mercury Uranium and Oil Company
4600 Gold Street, Southwest
Albuquerque, New Mexico

Est. Abernethy
2624 Sheldon Street
Clovis, New Mexico

Lee B. Merrill
1200 Sheldon Street
Clovis, New Mexico

Philip C. Marafalder
Box 1166
Moab, Utah

provided, however, in the event Interest Owners designate one of their number as their representative with respect to said Joint Property then all such notices, payments, reports, and correspondence shall be given to such representative.

All notices shall be deemed given when deposited in the United States mail, or with Western Union Telegraph Company, and the time given the party receiving such notice shall run from the date the notice is deposited as aforesaid.

XVII. Call on Production.

Notwithstanding anything to the contrary contained here,

Kerr-McGee shall have and is hereby given and granted for the period any of said mining claims are in force and effect the continuing right and option to purchase from time to time or at all times any part of or all of the ore produced and saved from said Joint Property. For all such ore with respect to which Kerr-McGee exercises its said call, it is understood and agreed that prior to March 31, 1962, Kerr-McGee shall pay for the uranium content contained in all marketable ore mined, saved and removed from said claims and purchased by Kerr-McGee and/or processed by Kerr-McGee through its mill at Shiprock, New Mexico, the price established for uranium content of marketable ore of like grade and kind in the A.E.C. Domestic Uranium Program, Circular 3, effective March 31, 1951, as now revised and as the same may from time to time be revised, plus bonuses and development allowances and handling allowances allowed Kerr-McGee by the Atomic Energy Commission less the actual cost of transporting such ores to Kerr-McGee's mill at Shiprock, New Mexico, or other point of sale; and that subsequent to March 31, 1962, or in the event there is no such price established by the Atomic Energy Commission for such ores in its Domestic Uranium Program, the price payable by Kerr-McGee for the uranium content of said ore shall be equal to the average price being paid by Kerr-McGee for the uranium content of said ores of like grade, quality and ~~marketability~~ to mill process delivered to said Kerr-McGee mill by other suppliers of ore thereto, provided, however, at no time shall the price for uranium content be less than the average price being paid for like ores by other similar processing mills located within a 100-mile radius of said mining claims. It is understood and agreed that in the event the ores shall contain valuable minerals other than uranium which a bona fide purchaser, other than Kerr-McGee, shall be in a position to purchase for a ^{1. month} minimum period of one-year the entire estimated production of ores produced from said claims and is ready, willing and able to do so and to pay more therefor than Kerr-McGee

to selling to pay, then said title shall release the ore for sale to such other purchaser until such time as Kerr-McGee is willing to pay the price being paid by such other purchaser or the then highest price for like ores being paid in the area by purchasers other than said other purchaser.

XVIII. The terms and provisions of this Agreement shall be binding upon and shall inure to the benefit of the parties hereto, their respective heirs, administrators, executors, successors and assigns.

IN WITNESS WHEREOF, the parties hereto have executed this Agreement as of the day and year first above written.



APPROVED:
Ray Kermegay
Secretary

KERR-MCGEE OIL INDUSTRIES, INC.

Clifford Seely
Vice-President

KENTUCKY URANIUM AND OIL COMPANY

By Charles L. Anderson
President

Ray Thurst
Vice President

Lee B. Merrill
Lee B. Merrill

Philip G. Marshall
Philip G. Marshall

STATE OF California }
COUNTY OF San Bernardino }

On the 18th day of April, A.D., 1957, personally appeared before me Carl C. Anderson, who, being by me duly sworn, did say that he is President of KERN-METZ OIL COMPANY, INC. and that said instrument was signed in behalf of said Corporation by authority of its By-Laws (or by resolution of its Board of Directors) and said Carl C. Anderson acknowledged to me that said Corporation executed the same.



W. C. V. C. V. C.
Notary Public

in and for San Bernardino County
State of California

My Commission Expires:

December 17, 1957

Residence:

California - San Bernardino

STATE OF New Mexico }
COUNTY OF McBernalillo }

On the 18th day of April, A.D., 1957, personally appeared before me Carl C. Anderson, who, being by me duly sworn, did say that he is President of KERN-METZ OIL COMPANY, INC. and that said instrument was signed in behalf of said Corporation by authority of its By-Laws (or by resolution of its Board of Directors) and said Carl C. Anderson acknowledged to me that said Corporation executed the same.



John Kambou
Notary Public

in and for Bernalillo County
State of New Mexico

My Commission Expires:

June 8, 1960

Residence:

Albuquerque, N. M.

STATE OF New Mexico }
COUNTY OF Bernalillo } ss

On the 18th day of April, A.D., 1957, personally
appeared before me LEE S. KIRKMAN and
signer(s) of the above instrument, who duly acknowledged to me that he
(they) executed the same.

NOTARY
PUBLIC
1957

Lee S. Kirkman
Notary Public

in and for Bernalillo County
State of New Mexico

My Commission Expires:

June 8, 1960

Residence:

Albuquerque, N. M.

STATE OF New Mexico }
COUNTY OF Bernalillo } ss

On the 18th day of April, A.D., 1957, personally
appeared before me LEE KIRKMAN and
signer(s) of the above instrument, who duly acknowledged to me that he (they)
executed the same.

NOTARY
PUBLIC
1957

Lee S. Kirkman
Notary Public

in and for Bernalillo County
State of New Mexico

My Commission Expires:

June 8, 1960

Residence:

Albuquerque, N. M.

STATE OF New Mexico }
COUNTY OF Bernalillo } ss

On the 18th day of April, A.D., 1957, personally
appeared before me PHILIP G. MENDENHALL and
signer(s) of the above instrument, who duly acknowledged to me that he (they)
executed the same.

Philip G. Mendenhall
Notary Public

in and for Bernalillo County
State of New Mexico

My Commission Expires:

June 8, 1960

Residence:

Albuquerque, N. M.

EXHIBIT - A -

Attached to and made a part of: that certain Operating Agreement dated
1951, by and between Kerr-McGee Oil
Industries, Inc., Mercury Drilling and Oil Company, Ltd.,
Merrill, Son, Abernathy and Philip G. MacCallister

ACCOUNTING PROCEDURE

(UNIT AND JOINT LEASE OPERATIONS)

I. GENERAL PROVISIONS

1. Definitions

"Joint property" is lands and shall be construed to mean the subject was covered by the agreement to which this "Accounting Procedure" is attached.

"Operator" is lands and shall be construed to mean the party designated to conduct the development and operation of the subject as to its joint interest in the joint lease.

"Non-Operator" is lands and shall be construed to mean any one or more of the non-operating parties.

2. Statements and Billings

Operator shall bill Non-Operator on or before the last day of each month for its proportionate share of taxes and expenditures during the preceding month. Such bills will be accompanied by statements, showing the total costs and charges to be levied under Subparagraph A.

A. Statement to detail of all charges and credits to the joint account.

B. Statement of all charges and credits to the joint account, summarized by appropriate classification indicative of the nature thereof.

C. Statement of all charges and credits to the joint account, summarized by appropriate classification indicative of the nature thereof.

(1) ~~Statement of all charges and credits to the joint account, summarized by appropriate classification indicative of the nature thereof.~~

(2) ~~Statement of all charges and credits to the joint account, summarized by appropriate classification indicative of the nature thereof.~~

(3) ~~Statement of all charges and credits to the joint account, summarized by appropriate classification indicative of the nature thereof.~~

3. Payments by Non-Operator

Each party shall pay to Operator on or before the last day of each month (11) days after receipt thereof. If payment is not made within said time, responsibility shall lie with the party in default.

4. Adjustments

Provision of any such bill shall not deprive the right of Non-Operator to protest or question the correctness thereof. Subject to the provisions of Paragraph 1 of this Section I, all statements rendered to Non-Operator by Operator during any calendar year shall constitute a final and conclusive statement of the joint account for that year. No statement rendered to Non-Operator by Operator during any calendar year shall constitute a final and conclusive statement of the joint account for that year. No statement rendered to Non-Operator by Operator during any calendar year shall constitute a final and conclusive statement of the joint account for that year. No statement rendered to Non-Operator by Operator during any calendar year shall constitute a final and conclusive statement of the joint account for that year.

5. Audits

A Non-Operator, upon notice in writing to Operator and all other Non-Operators, shall have the right to audit Operator's accounts and its relation to the accounting hereunder for any calendar year within the twenty-four (24) month period following the end of such calendar year. However, such Non-Operator must also submit evidence to and make claim upon the Operator for all discrepancies claimed in its audit within the twenty-four (24) month period. Where there are no or more Non-Operators, the Non-Operators shall make every reasonable effort to conduct joint or simultaneous audits at a season which will result in a minimum of inconvenience to the Operator.

II. DEVELOPMENT AND OPERATING CHARGES

Subject to limitations hereinafter prescribed, Operator shall charge the joint account with the following:

1. Rentals and Royalties

Delay or other costs, when such costs are paid by Operator for the joint account; royalties, when not paid directly to royalty owner by purchaser.

2. Labor

A. Salaries and wages of Operator's employees directly engaged on the joint property in the exploration and operation and including salaries or wages paid to geologists and other employees who are temporarily assigned to and directly employed on a drilling rig.

B. Operator's cost of liability, workers' compensation and disability benefits, and other necessary allowances applicable to the salaries and wages paid under Subparagraph 2 A and Paragraph 11 of this Section II. Costs under the Subparagraph 2 B may be changed to a "cost plus" or by "percentage maximum" on the basis of salaries and wages chargeable under Subparagraph 2 A and Paragraph 11 of this Section II. If percentage maximum is used, the rate shall be based on the Operator's cost expenses.

C. Costs of expenditures or contributions made pursuant to agreements imposed by governmental authority which are applicable to Operator's cost of salaries and wages as provided under Subparagraphs 2 A, 2 B, and Paragraph 11 of this Section II.

3. Employee Benefits

Operator's current cost of established plans for employees' group life insurance, hospitalization, pension, retirement, stock purchase, disability and other benefit plans of a like nature, applicable to Operator's labor cost, provided that the cost of such charges shall not exceed 15% of Operator's labor cost as provided in Subparagraphs A and B of Paragraph 2 of this Section II and in Paragraph 11 of this Section II.

4. Materials

Material, equipment, and supplies purchased or furnished by Operator for use on the joint property. So far as it is reasonably practical to do so, such material shall be purchased for or procured on the joint property in order to insure the most economical use and the maintenance of supplies shall be insured.

5. Transportation

Transportation of employees, equipment, material, and supplies necessary for the development, maintenance, and operation of the joint property subject to the following limitations:

A. If material is moved to the joint property from vendor, or from the Operator's warehouse or other property, no charge shall be made for a return trip for a distance greater than the distance from the nearest suitable supply base or railway receiving point where available, except by special agreement with Non-Operator.

C. 100-10000

DEED OF MINING CLAIMS

SEE ABERNATHY, Grantee, of Clovis, Curry County, New Mexico,
hereby conveys to The Clovis National Bank, Clovis, New Mexico, a National
banking association and corporation, and The Citizens Bank of Clovis, Clovis,
New Mexico, a banking corporation, for the sum of Ten Dollars and other good
and valuable considerations, the receipt whereof is hereby acknowledged,
their successors and assigns forever, absolutely and in fee simple, all of said
Grantee's right, interest, claim and demand whatsoever, in law or equity, of
in, all certain mining ground, claim, or land situate, lying, and being in the
Juni County, State of Utah, more particularly described as follows:

.. VELVET, Nos. 1 to 34, both inclusive
.. ROYAL FLUSH, Nos. 1 to 4, both inclusive,
located in Sections 3 and 4, Township 34
South, Range 13 East, Salt Lake Meridian.

together with all dips, angles, grades and variations of said mining ground claim
or lands and all and singular the hereditaments and appurtenances therewith
belonging.

TO HAVE AND TO HOLD the premises with their appurtenances to
the Grantees, their successors and assigns forever.

IN WITNESS WHEREOF, I have hereunto set my hand this 25th
day of May, 1917.

H. C. Abernathy
SEE ABERNATHY

STATE OF NEW MEXICO)
COUNTY OF CURRY) ss.

The foregoing instrument was acknowledged before me this 25th
day of May, 1917, by See Abernathy

(SEAL)
My commission expires:
Sept 26, 1921

John B. Bingham
Notary Public

RECORDED
INDEXED
FILED
C. 100-10000

In the County of Curry, New Mexico
I am the Notary Public for the County of Curry
and the State of New Mexico.
Witness my hand and seal this
25th day of May, 1917.
John B. Bingham

14404

2021

MIDWAY DEED

THIS INDENTURE, made, this 7th day of June, 1957, between
 LEE B. MERRILL and MILDRED MERRILL, his wife, KEK
 ABERNATHY and JOYCE ABERNATHY, his wife, all of said parties
 being of the County of Curry in the State of New Mexico, and PHILIP
 G. MERSFELDER and BILLIE V. MERSFELDER, his wife, of the
 County of Grant in the State of Utah, Parties of the First Part; and
 KERR-MCCLELLAN OIL INDUSTRIES, INC., a Delaware corporation,
 and MERCURY TRAMMONT OIL COMPANY, a New Mexico
 corporation, Parties of the Second Part:

WITNESSETH:

That the Parties of the First Part, for and in consideration of
 the sum of Ten Dollars (\$10) and other valuable consideration, a sum
 in hand paid by the Parties of the Second Part, the receipt of which is
 hereby acknowledged, have, granted, bargained, sold, conveyed,
 transferred and forever quieted and by these presents do grant,
 bargain, sell, convey, transfer and forever quiet to said Parties
 of the Second Part their respective successors and assigns, in the
 proportion of an undivided one-half interest to each, the following,
 described property situated, lying and being in San Juan County,
 New Mexico, to-wit: in the County of San Juan, State of Utah, to-wit:

Various Claims 1 to 14 inclusive -
 recorded in Book 138, pages 182
 through 183 and Book 140, pages
 101 through 177, San Juan County,
 Utah

Also, Union Claims 1, 2, 3 and 4 -
 recorded in Book 141, pages 150 and 151,
 San Juan County, Utah (except only so much
 as said claims cover lands situated in the
 S/2 of the S/2 of Sec. 4, T11N, R21E)

covering lands situated in Section 1 and
 Section 4, Township 11 South, Range 21
 East, and Section 4, Township 11 South,
 Range 20 East, Salt Lake Meridian,
 San Juan County, Utah.

WITNESSES to their several boundary agreements dated February 7, 1977, by and between British Mining Corporation, Harold L. Brown and Rose Brown, his wife, and John Johnson and Don Johnson, his wife, as First Parties, and Lyle Thomas and Clara Thomas, his wife, and G. A. Johnson and Thora Johnson, his wife, as Second Parties, recorded February 19, 1977, in Book 118 on page 112 in the records of San Juan County.

This conveyance is made subject to the terms, covenants and conditions contained in said certified agreement dated the 14th day of April, 1977, by and between the parties hereto. The parties of the First Part, for themselves, their legal representatives, successors or assigns, represent that they have not constructed or alienated any of the above property, and that Parties hereto warrant their title to said property as against, not only against, any person or persons lawfully claiming the whole or any part of said property through or under First Parties.

TO HAVE AND TO HOLD, all the dips, spurs, and angles, and all the roads, dikes, jacks and all other mining claims, rock and earth covering, and all the rights, privileges and franchises therein incident, appurtenant and appurtenances, or to have to himself, his and assigns: and all and singular the tenements, improvements and appurtenances therein belonging or in anywise appurtenant, and the rents, issues and profits thereof; and all the estate, right, title, interest, claim and demand whatsoever, as well in law as in equity, of the said Parties of the First Part, of, in or to the said premises, and every part the parcel thereof, with the appurtenances.

TO HAVE AND TO HOLD, all and singular, the said premises, together with the appurtenances and privileges therein incident, unto the said Parties of the Second Part, their heirs and assigns forever.

IN ALL-TIME RECORD, the said Parties of the First Part have
 heretofore and shall henceforth and until the day and year above
 written.



John B. McNeill
 J. B. McNeill
John B. McNeill
 J. B. McNeill
John B. McNeill
 J. B. McNeill
John B. McNeill
 J. B. McNeill

State of New Mexico)
 County of Bernalillo) ss.

On the 10th day of June, 1970,
 personally appeared John B. McNeill
John B. McNeill, the signer of the above instrument, who duly
 acknowledged to me that he executed the same.

John B. McNeill
 J. B. McNeill

My Commission Expires:

June 4, 1960

Notarized:

A. J. McNeill, Notary Public

State of New Mexico } ss.
County of Bernalillo

On the 7th day of June, A.D., 1971,
personally appeared before me the undersigned and Jo Jo
personally, his wife, the signers of the above instrument, who duly
acknowledged to me that they executed the same.

John F. [Signature]
Notary Public

My Commission Expires:
June 8, 1980

Subscribed:
Albuquerque, New Mexico

State of New Mexico } ss.
County of Bernalillo

On the 7th day of June, A.D., 1971, personally
appeared before me John F. [Signature] and Billie T
personally, the signers of the above instrument, who duly acknowledged
to me that they executed the same.

John F. [Signature]
Notary Public

My Commission Expires:
June 8, 1980

Subscribed:
Albuquerque, New Mexico

by 9-3-57 8-8-71 480
1070
11500
[Stamp: ARVILLA & COMPANY, 1000 1ST ST. N.E., ALBUQUERQUE, N.M. 87101]