

1983

Atlas Corporation v. National Growth Corporation, Et Al. and the Clovis National Bank and the Citizens Bank of Clovis : Brief of The Plaintiff- Respondent

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IN THE SUPREME COURT
OF THE STATE OF UTAH

ATLAS CORPORATION, a Delaware
corporation,

Plaintiff - Respondent,

vs.

NATIONAL GROWTH CORPORATION,
a Colorado corporation,
et al.,

Defendants, and

THE CLOVIS NATIONAL BANK, a
national banking association
and corporation; THE
CITIZENS BANK OF CLOVIS, a
New Mexico corporation,

Defendants - Appellants.

No. 19239

BRIEF OF THE PLAINTIFF - RESPONDENT

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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METHOD OF CITATION TO RECORD

The abbreviations described in the Table of Abbreviations which is attached as Appendix I are used wherever practical in this brief. The Table of Abbreviations gives the location in the Record by volume and page where the entire document is found. Therefore, if an entire document is relied upon, no volume or page numbers are cited in the brief. Where, however, a particular portion of the document is emphasized, citation is made to the particular volume and page(s) in the Record (e.g., v.____, p.____).

STATEMENT OF THE NATURE OF THE CASE

The appeal of the CLOVIS BANKS challenges a determination by Seventh Judicial District Judge Boyd Bunnell that the CLOVIS BANKS have no right to share in ATLAS' net profits from the SUBJECT CLAIMS.

DISPOSITION OF THE CASE IN THE LOWER COURT

This case is a multi-issue, multi-party, quiet title action. It effectively was begun when ATLAS filed its First Amended Complaint on December 11, 1979. The parties included 110 named Defendants; 100 of these, including the CLOVIS BANKS, filed responsive pleadings. A series of settlements, motions, hearings, trials and judgments disposed of all issues, except those between ATLAS and the CLOVIS BANKS.

The CLOVIS BANKS assert as their sole interest in the SUBJECT CLAIMS a right to a fractional share of ATLAS' net profits from the SUBJECT CLAIMS under the SALES AGREEMENT and the OPERATING AGREEMENT.^{1/}

In its GENERAL PRETRIAL ORDER, entered on April 23, 1982, the Trial Court stated that the "issues [to be determined] include the validity of those agreements . . . [and] whether or not any interest in the SUBJECT CLAIMS continues to exist under those agreements . . ."^{2/} In addition, the NET PROFITS PRETRIAL ORDER recites that one of the issues to be decided was whether a perpetual interest in the SUBJECT CLAIMS was reserved in the agreements.^{3/}

The CLOVIS BANKS were the first to move for summary judgment on the issues now involved in this appeal. On December 3, 1982, they filed the CLOVIS BANKS' SUMMARY JUDGMENT MOTION, seeking a declaration that they are the owners of a perpetual real property interest which continues to exist and binds ATLAS.^{4/} Following a hearing on

^{1/} See CLOVIS BANKS' COUNTERCLAIM.

^{2/} GENERAL PRETRIAL ORDER (v.6, p.1021).

^{3/} NET PROFITS PRETRIAL ORDER (v.10, p.1281).

^{4/} See CLOVIS BANKS' MEMORANDUM (v.11, pp.1292-95). See also ATLAS' RESPONSE TO CLOVIS BANKS' SUMMARY JUDGMENT MOTION.

December 14, 1982, District Judge Boyd Bunnell denied the CLOVIS BANKS' SUMMARY JUDGMENT MOTION.^{5/}

ATLAS, on January 25, 1983, moved for a Summary Judgment declaring that the interest claimed by the CLOVIS BANKS no longer exists.^{6/} The CLOVIS BANKS objected and renewed their own motion for summary judgment.^{7/}

Judge Bunnell, at a hearing on February 8, 1983, granted ATLAS' SUMMARY JUDGMENT MOTION and denied CLOVIS BANKS' RENEWAL OF SUMMARY JUDGMENT MOTION.^{8/} ATLAS tendered proposed findings of fact, conclusions of law and judgment and decree, to which the CLOVIS BANKS objected.^{9/} After taking the matter under advisement on March 8, 1983,^{10/} the Trial Court ruled on those objections on March 15, 1983.^{11/} The SUMMARY JUDGMENT (a copy of which is attached to this brief as Appendix III) was entered in favor of ATLAS on April 1, 1983.^{12/}

^{5/} See DECEMBER 14 TRANSCRIPT (v.17, pp.2353-58).

^{6/} See ATLAS' SUMMARY JUDGMENT MOTION.

^{7/} See CLOVIS BANKS' RESPONSE TO ATLAS' SUMMARY JUDGMENT MOTION and ATLAS' REPLY.

^{8/} Judge Bunnell's oral ruling is in the FEBRUARY 8 TRANSCRIPT (v.18, pp.2394-2404), and that portion of the transcript is attached as Appendix II to this brief.

^{9/} See CLOVIS BANKS' OBJECTIONS. See also, ATLAS' RESPONSE TO OBJECTIONS.

^{10/} See MARCH 8 TRANSCRIPT (v.18, p.2429).

^{11/} See RULING ON OBJECTIONS.

^{12/} See SUMMARY JUDGMENT.

The CLOVIS BANKS' MOTION TO AMEND the SUMMARY JUDGMENT was denied by order entered on May 16, 1983.^{13/}

The SUMMARY JUDGMENT provided that the judgment was final under U.R.C.P. 54(b).^{14/} The CLOVIS BANKS filed their NOTICE OF APPEAL from the SUMMARY JUDGMENT on May 24, 1983. The NOTICE OF APPEAL also attempted to perfect an appeal from five interlocutory orders previously entered by the TRIAL COURT which concerned the calculation of the size and value of the interest claimed by the CLOVIS BANKS. However, on July 18, 1983, this Court dismissed the appeal as to those five interlocutory orders. Therefore, the correctness of the SUMMARY JUDGMENT is the sole issue now before this Court.

RELIEF SOUGHT ON APPEAL

ATLAS seeks an affirmance of the SUMMARY JUDGMENT.

STATEMENT OF MATERIAL FACTS

Disagreement with Appellants' Assertions

ATLAS does not agree with the statement of "Facts" set forth in the CLOVIS BANKS' BRIEF, nor does ATLAS agree with the factual allegations, unsupported by the Record, contained in their "Introduction." The statement of "Facts"

^{13/} See ATLAS' RESPONSE TO MOTION TO AMEND; CLOVIS BANKS' REPLY; RULING ON MOTION TO AMEND; and ORDER DENYING MOTION TO AMEND.

^{14/} SUMMARY JUDGMENT (v.15, p.2109).

is misleading,^{15/} indulges in self-serving speculation,^{16/} is erroneous,^{17/} contains facts not in the record^{18/} and

15/ E.g., in describing the sale of the SUBJECT CLAIMS to KERR-McGEE and MERCURY, the CLOVIS BANKS suggest that the primary consideration for the INTEREST OWNERS was the undertakings by KERR-McGEE and MERCURY; the CLOVIS BANKS totally fail to mention that INTEREST OWNERS received \$100,000 in cash and a minimum of \$50,000 in MERCURY stock.

16/ E.g., the CLOVIS BANKS' BRIEF at pp.8-9, asserts that:

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 Southeast of the Bardon Mine were evident at that time [i.e., before 1960].

To support this assertion, the CLOVIS BANKS speculate that information in a document found among the records received by ATLAS from CLIMAX entitled "Outline of Property Examination" dated in 1968 must have been known by KERR-McGEE prior to 1960 because there is no evidence that CLIMAX did any exploration on its own and, therefore, it must have obtained the data from KERR-McGEE. (CLOVIS BANKS' BRIEF at p.9 n.4.) Lack of evidence that CLIMAX did work is not evidence that they did not, in fact, do any work, nor is it evidence to show where CLIMAX obtained the information. More importantly, the "Outline of Property Examination" does nothing to indicate what KERR-McGEE knew about the SUBJECT CLAIMS eight years before the document was prepared.

17/ E.g., CLOVIS BANKS' BRIEF at p.10:

The Velvet Mine has proven to be the richest source of high grade uranium ore in the entire Colorado Plateau region.

The Record is not cited and contains nothing to support this statement. While the VELVET MINE is a good mine, many mines (including some presently operating) on the Colorado Plateau have produced more pounds of uranium concentrate.

18/ E.g., see n. 17/, supra. See also the reference at p.4, n.2 of the CLOVIS BANKS' BRIEF to the 1982 Annual Report of ATLAS which is not in the Record.

... that are not material, 19/ and is replete with argument
... legal conclusions. 20/

Consequently, ATLAS submits the following statement
of material facts, with references to the SUMMARY JUDGMENT and
substantiating references to the Record; these facts are
sufficient to support the SUMMARY JUDGMENT and have not been
controverted with competent evidence.

FACTS

On April 18, 1957, the INTEREST OWNERS (MERRILL,
ABERNATHY and MERSFELDER) owned the SUBJECT CLAIMS, subject to
a 10% royalty previously reserved by Harold Bowen, et al. (the
"BOWEN ROYALTY"), and to certain other payment obligations.
Prior to that date, the INTEREST OWNERS, through their
wholly-owned corporation, N.M.U.C. Mining, Inc., had explored
the SUBJECT CLAIMS for the presence of uranium. 21/ The

19/ E.g., see nn. 16/, 17/, and 18/, supra. Further, even if
someone "predicted" (see CLOVIS BANKS' BRIEF at p.10) the
discovery of the VELVET MINE, that reveals nothing about the
rights and duties of the parties.

20/ E.g., CLOVIS BANKS' BRIEF at p.6:

The parties agreed [in the SALES AGREEMENT]
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.

What the parties "agreed" to and what, if anything, was
"reserved" are the legal issues this Court must decide.

21/ SUMMARY JUDGMENT (v.15, p.2084); McDUGALD DEPOSITION
(v.4, pp.433-37); MERSFELDER DEPOSITION (v.2, pp.229-31);
BOONE DEPOSITION (v.9, pp.1141-43).

exploration gave little encouragement, and MERRILL and ABERNATHY (who had been putting up the money) decided to invest nothing further.^{22/} Before leaving the property, MERSFELDER (who was operating the drilling rig) drilled one last hole (the "NO. 10 HOLE") and encountered promising mineralization.^{23/}

After attempting to negotiate several deals with other parties, on or about April 18, 1957, the INTEREST OWNERS entered into the SALES AGREEMENT (a copy of which is attached to this brief as Appendix IV) with KERR-McGEE and MERCURY.^{24/} Pursuant to the SALES AGREEMENT, the JUNE 7 DEED (a copy of which is attached to this brief as Appendix V) was executed and delivered to KERR-McGEE and MERCURY; the purchasers took title subject to the BOWEN ROYALTY and delivered to the INTEREST OWNERS \$100,000 in cash and 50,000 shares of MERCURY STOCK guaranteed at \$1.00 per share;^{25/} in addition, the

^{22/} ABERNATHY DEPOSITION (v.19, p.2524); MERSFELDER DEPOSITION (v.2, pp.233, 235-36); BOONE DEPOSITION (v.9, pp.1142-43).

^{23/} ABERNATHY DEPOSITION (v.19, p.2524); McDUGALD DEPOSITION (v.4, pp.433-37); MERSFELDER DEPOSITION (v.2, pp.231-35, 244-45); BOONE DEPOSITION (v.9, pp.1142-43).

^{24/} SUMMARY JUDGMENT (v.15, p.2084); BOONE DEPOSITION (v.9, pp.1148-52, 1156-59, 1167-71); MERSFELDER DEPOSITION (v.2, pp.248-53); Finding of Fact No. 5, YUCCA CASE FINDINGS (v.13, pp.1597-98).

^{25/} SUMMARY JUDGMENT (v.15, p.2087); ABERNATHY DEPOSITION (v.19, p.2475); BOONE DEPOSITION (v.9, p.1175); MERSFELDER DEPOSITION (v.2, pp.259-60).

OPERATING AGREEMENT (a copy of which is attached to this brief Appendix VI) was executed.26/

At the time of the negotiation and execution of the AGREEMENTS and the JUNE 7 DEED, all of the parties were experienced and knowledgeable in the uranium mining business and were represented by counsel.27/

On November 5, 1957, MERCURY conveyed all of its interest in the SUBJECT CLAIMS to ANDERSON.28/

KERR-McGEE, as Operator under the OPERATING AGREEMENT, diligently prosecuted exploration to test the SUBJECT CLAIMS for the presence of commercial ore deposits.29/ This work resulted in the discovery of commercial ore which included the NO. 10 HOLE, and KERR-McGEE proceeded to define and develop the only ore body indicated by that discovery.30/

26/ SUMMARY JUDGMENT (v.15, pp.2087-88); MERSFELDER DEPOSITION (v.2, p.259).

27/ SUMMARY JUDGMENT (v.15, p.2086); MERSFELDER DEPOSITION (v.2, pp.212-14, 217-21, 247-48, 300, 307, 318); McDOUGALD DEPOSITION (v.4, pp.432, 436-38, 441-42, 483-84); ABERNATHY DEPOSITION (v.19, pp.2470-74, 2487-91, 2495-96, 2518-22, 2524, 2533-34).

28/ SUMMARY JUDGMENT (v.15, p.2088); MERCURY DEED (v.13, at the second and third unnumbered pages between pp.1637 and 1638).

29/ SUMMARY JUDGMENT (v.15, p.2088); MERSFELDER DEPOSITION (v.2, pp.246, 250-51, 263-64, 266, 271-76); McDOUGALD DEPOSITION (v.4, pp.447-51); Finding of Fact No. 7, YUCCA CASE FINDINGS (v.13, p.1598).

30/ MERSFELDER DEPOSITION (v.2, pp.272-76); McDOUGALD DEPOSITION (v.4, pp.447-51); Finding of Fact Nos. 7 and 11, YUCCA CASE FINDINGS (v.13, pp.1598, 1599); ZITTING-ATLAS AFFIDAVIT at ¶¶ 14-15 (v.13, pp.1590-91).

In the opinion of KERR-McGEE, that ore body was sufficient to justify mining, and KERR-McGEE, in May of 1958 arranged for mining of that ore body by SHATTUCK DENN under the SHATTUCK DENN LEASE.31/

A shaft was sunk, the shaft and mine (called the "BARDON MINE" or the "BARDON SHAFT") were equipped, and production capability of 25 tons of ore per day was achieved in February of 1959.32/ Mining continued until December of 1960.33/

On July 12, 1960, YUCCA initiated the YUCCA CASE seeking a determination of its claimed interest in the SUBJECT CLAIMS.34/

On September 16, 1960, SHATTUCK DENN notified KERR-McGEE of its desire to abandon and on November 14, 1960, quitclaimed the SUBJECT CLAIMS to KERR-McGEE and ANDERSON.35/

31/ SUMMARY JUDGMENT (v.15, p.2088); McDUGALD DEPOSITION (v.4, p.451); SHATTUCK DENN LEASE (v.13, pp.1638-39); Finding of Fact Nos. 6, 7 and 11, YUCCA CASE FINDINGS (v.13, pp.1598-99).

32/ SUMMARY JUDGMENT (v.15, p.2088); Finding of Fact No. 11, YUCCA CASE FINDINGS (v.13, p.1599); HAYES-SPROULS LETTER; ATLAS' RESPONSE TO REQUEST FOR ADMISSION (v.10, p.1256); ZITTING-ATLAS AFFIDAVIT at ¶¶ 14-15 (v.13, pp.1590-91).

33/ Finding of Fact Nos. 6, 7, 9 and 11, YUCCA CASE FINDINGS (v.13, pp.1598-99); HAYES-SPROULS LETTER; ZITTING-ATLAS AFFIDAVIT at ¶¶ 14-15 (v.13, pp.1590-91); DEARTH AFFIDAVIT at ¶¶ 11-12 (v.13, p.1579); SEPTEMBER 16 LETTER; DECEMBER 19 LETTER.

34/ Finding of Fact No. 1, YUCCA CASE FINDINGS (v.13, pp.1596-97).

35/ SUMMARY JUDGMENT (v.15, p.2089); SEPTEMBER 16 LETTER; SHATTUCK DENN DEED.

KERR-McGEE concluded that all ore that could be economically produced from the BARDON MINE had been mined, and gave the INTEREST OWNERS written notice of its desire to abandon the mine on December 19, 1960.^{36/} The INTEREST OWNERS did not exercise their right to acquire the BARDON MINE.^{37/}

On December 29, 1960, ANDERSON conveyed all its interest in the SUBJECT CLAIMS to KERR-McGEE.^{38/}

KERR-McGEE performed additional exploration activity in an unsuccessful attempt to discover another commercial ore body.^{39/} KERR-McGEE abandoned the BARDON MINE, removed the surface facilities and liquidated the assets.^{40/} The mine workings filled with water and could have been of no use in the development or mining of any other ore body.^{41/}

^{36/} DECEMBER 19 LETTER.

^{37/} SUMMARY JUDGMENT (v.15, p.2089); OPERATING AGREEMENT at Section V (v.13, pp.1550-51); DECEMBER 27 LETTER; JANUARY 3 LETTER.

^{38/} ANDERSON DEED; Finding of Fact No. 8, YUCCA CASE FINDINGS (v.13, p.1598).

^{39/} ZITTING-ATLAS AFFIDAVIT at ¶ 15 (v.13, pp.1590-91); ZITTING-CLOVIS BANKS AFFIDAVIT at ¶ 6 (v.14, p.1857).

^{40/} SUMMARY JUDGMENT (v.15, pp.2089-90); Finding of Fact Nos. 9, 11-13, YUCCA CASE FINDINGS (v.13, pp.1598-99); JANUARY 3 LETTER; DEARTH AFFIDAVIT at ¶¶ 11-12, 16 (v.13, pp.1579-80); HAYS-SPROULS LETTER.

^{41/} SUMMARY JUDGMENT (v.15, p.2090); DEARTH AFFIDAVIT at ¶ 16 (v.13, p.1580); DIXON AFFIDAVIT.

KERR-McGEE did no work on the SUBJECT CLAIMS after December 31, 1962.^{42/}

Between November 16, 1960 and May 13, 1964, KERR-McGEE and SHATTUCK DENN made a final accounting to the INTEREST OWNERS disclosing that there were no profits to share.^{43/} The INTEREST OWNERS challenged this accounting on May 12, 1964 by a cross-claim in the YUCCA CASE, alleging that they were entitled to net profits from the BARDON MINE. ^{44/} The INTEREST OWNERS did not, in the YUCCA CASE, claim that KERR-McGEE had any obligation to explore or mine further or to continue any operations on their behalf.^{45/}

The Court in the YUCCA CASE found that SHATTUCK DENN had completed the development and exploration work; that KERR-McGEE and SHATTUCK DENN had made their final accounting to the INTEREST OWNERS; that KERR-McGEE and SHATTUCK DENN had complied with all of the terms and conditions of the OPERATING AGREEMENT; that there were no profits to be shared with the

^{42/} Answer to Interrogatory No. 10, KERR-McGEE INTERROGATORY ANSWERS (v.13, pp.1613-14).

^{43/} SUMMARY JUDGMENT (v.15, p.2090); Finding of Fact Nos. 12 and 13, YUCCA CASE FINDINGS (v.13, p.1599); Answer to Interrogatory Nos. 1-4, KERR-McGEE INTERROGATORY ANSWERS (v.13, pp.1611-12); Answer to Interrogatory Nos. 1-4, SHATTUCK DENN INTERROGATORY ANSWERS (v.13, pp.1616-18).

^{44/} YUCCA CASE CROSSCLAIM (v.13, pp.1625-26); Finding of Fact No. 1, YUCCA CASE FINDINGS (v.13, pp.1596-97).

^{45/} SUMMARY JUDGMENT (v.15, p.2090); YUCCA CASE CROSSCLAIM (v.13, pp.1621-26); STATEMENTS OF ISSUES.

INTEREST OWNERS; and that the INTEREST OWNERS were not entitled to relief against KERR-McGEE, SHATTUCK DENN or MERCURY.46/

On May 25, 1967, and during the pendency of the YUCCA CASE, ABERNATHY conveyed his interest in the SUBJECT CLAIMS and assigned his causes of action in the YUCCA CASE to the CLOVIS BANKS.47/

Also during the pendency of the YUCCA CASE, in 1963, VCA acquired the SUBJECT CLAIMS with other property, subject to an Option to Reacquire held by KERR-McGEE.48/ On December 7, 1970, KERR-McGEE quitclaimed the SUBJECT CLAIMS to FOOTE, the successor of VCA, specifically relinquishing its Option to Reacquire.49/

On June 30, 1973, FOOTE leased the SUBJECT CLAIMS, and other property, to ATLAS;50/ and on January 26, 1977, FOOTE quitclaimed the SUBJECT CLAIMS to ATLAS.51/

46/ SUMMARY JUDGMENT (v.15, pp.2090-91); Finding of Fact Nos. 11-13 and Conclusion of Law Nos. 1 and 2, YUCCA CASE FINDINGS (v.13, p.1599); YUCCA CASE JUDGMENT (v.13, p.1628).

47/ ABERNATHY DEED; ABERNATHY ASSIGNMENT. These instruments were given by ABERNATHY to the CLOVIS BANKS pursuant to an agreement providing that all property of ABERNATHY (with specified exceptions) was to be transferred to the CLOVIS BANKS in satisfaction of a judgment on a debt. ABERNATHY-CLOVIS BANKS AGREEMENT (v.13, pp.1570-72).

48/ SUMMARY JUDGMENT (v.15, p.2091); DAVISON MEMO (v.16, p.2220); KERR-McGEE DEED (v.13, p.1671).

49/ KERR-McGEE DEED; DAVISON MEMO (v.16, p.2220).

50/ FOOTE LEASE.

51/ FOOTE DEED. The CLOVIS BANKS' BRIEF at pp.57-58 asserts that "... ATLAS apparently paid nothing for the Claims ...". (Don't.)

After 1977, ATLAS explored the SUBJECT CLAIMS and discovered a substantial uranium ore body which is served by decline and other workings and facilities (all referred to herein as the "VELVET MINE"), from which there has been continuous production since November of 1979.^{52/}

The VELVET MINE ore body is separate and distinct from the BARDON MINE ore body, and there is no connection between the workings of the two mines.^{53/}

ARGUMENT

THE SUMMARY JUDGMENT SHOULD BE AFFIRMED BECAUSE THERE ARE NO GENUINE ISSUES OF MATERIAL FACT AND BECAUSE ATLAS IS ENTITLED TO JUDGMENT AS A MATTER OF LAW.

I. ATLAS HAS NO OBLIGATION TO SHARE PROFITS WITH THE CLOVIS BANKS BECAUSE FULL PERFORMANCE OF THE AGREEMENTS DISCHARGED THAT OBLIGATION MANY YEARS AGO.

The AGREEMENTS established a mining venture for the purpose of exploring, and, if warranted, developing and mining the SUBJECT CLAIMS. The AGREEMENTS set in motion a chain of events commencing with exploration and concluding with the

without giving any citation to the Record. ATLAS did give good consideration for the lease and conveyance.

^{52/} SUMMARY JUDGMENT (v.15, p.2092); DEARTH AFFIDAVIT at ¶¶ 8, 12, 14-16 (v.13, pp.1579-80); DEARTH DEPOSITION (v.7, pp.1033-35, 1038-39, 1046-49, 1055); LAHUSEN AFFIDAVIT (v.11, p.1582); DIXON AFFIDAVIT (v.12, pp.1454-55).

^{53/} SUMMARY JUDGMENT (v.15, p.2092); DEARTH AFFIDAVIT at ¶¶ 13, 15 and 16 (v.7, pp.1579-80); LAHUSEN AFFIDAVIT at ¶ 5 (v.13, p.1582); DIXON AFFIDAVIT (v.12, pp.1454-55).

ing up of mining operations. Pursuant to the AGREEMENTS, exploration commenced in 1957, and commercial ore was discovered, developed, mined, and exhausted between 1957 and 1961. KERR-McGEE performed all of the obligations of the AGREEMENTS. These AGREEMENTS have no further purpose, and all rights and obligations thereunder have been extinguished and discharged.

A. The CLOVIS BANKS' Predecessor in 1957 Conveyed to KERR-McGEE and MERCURY all of His Right, Title and Interest in the SUBJECT CLAIMS, Subject Only to the Performance of Certain Obligations Provided in the AGREEMENTS.

The CLOVIS BANKS go to great lengths in their brief to suggest that the right to share in net profits was a typical reservation of a mineral or similar real property interest in the SUBJECT CLAIMS; that this net profits interest was the sole, or at least the primary, consideration for the conveyance; and that the interest has well-recognized attributes, including perpetual duration. In fact, these allegations badly distort the transaction.

The SALES AGREEMENT was a contract between KERR-McGEE and MERCURY and the INTEREST OWNERS for the purchase and sale of the SUBJECT CLAIMS.^{54/} The SALES AGREEMENT provided that,

^{54/} See SALES AGREEMENT at 1st full ¶ on p.2:

WHEREAS, Sellers are desirous of selling to Buyers all their said undivided right, title and interest in and to said claims and Buyers are willing to purchase the same

(con't.)

upon delivery of the JUNE 7 DEED, KERR-McGEE and MERCURY would assume the burden of the 10% BOWEN ROYALTY 55/ and would make a very substantial cash payment to the INTEREST OWNERS for their then unproven claims.56/ In addition, following the delivery of the JUNE 7 DEED, as further consideration for the sale and purchase, KERR-McGEE and MERCURY were to perform certain affirmative obligations leading to the development of the SUBJECT CLAIMS.57/ The parties to the SALES AGREEMENT agreed to ". . . execute an agreement with respect to Buyers' operations on said claims. . . ." and provided that such agreement was attached to the SALES AGREEMENT and made a part thereof for all purposes.58/ That agreement was the OPERATING AGREEMENT.59/

subject to the terms, conditions, and provisions herein provided. (v.13, p.1537.)

See also SALES AGREEMENT at Sections 5 and 9 (v.13, pp.1539-40, 1542-43).

55/ See SALES AGREEMENT at Section 4 (v.13, p.1539).

56/ \$50,000 in cash to be paid by KERR-McGEE, \$50,000 in cash to be paid by MERCURY and 50,000 shares of MERCURY common stock, guaranteed at \$1.00 per share, to be delivered by MERCURY. See SALES AGREEMENT at Section 3 (v.13, pp.1538-39).

57/ Judge Bunnell expressed this point in his ruling in the FEBRUARY 8 TRANSCRIPT (v.18, p.2395).

58/ See SALES AGREEMENT at Section 8 (v.13, p.1542).

59/ See Judge Bunnell's explanation in the FEBRUARY 8 TRANSCRIPT (v.18, p.2395).

The INTEREST OWNERS did not reserve or carve out a standing, independent royalty or other perpetual interest when they sold the SUBJECT CLAIMS. Instead, the JUNE 7 DEED contained the following language:

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.^{60/}

The JUNE 7 DEED says nothing about the INTEREST OWNERS' rights to share profits. Moreover, when one peruses the SALES AGREEMENT, to which the JUNE 7 DEED refers, and the OPERATING AGREEMENT, to which the SALES AGREEMENT refers, one cannot find any "reserved" royalty or any other interest. Instead, one finds that the provisions covering profit sharing are inseparable from the rest of the AGREEMENTS.^{61/} The chance to share profits does not stand alone. It is in no way independent of the AGREEMENTS.

Upon the consummation of the purchase and sale of the SUBJECT CLAIMS, the INTEREST OWNERS were entitled to receive \$100,000 in cash, \$50,000 worth of stock and to enforce the performance of all the terms of the OPERATING AGREEMENT so long as it remained in effect. However, once the OPERATING AGREEMENT expired, terminated, or was fully performed, the

^{60/} JUNE 7 DEED (v.13, p.1533).

^{61/} See SALES AGREEMENT at Section 6 (v.13, 1540-41); OPERATING AGREEMENT at Section III (v.13, pp.1548-49).

INTEREST OWNERS had no further rights. Therefore, to determine whether the CLOVIS BANKS now have any right to share in ATLAS' profits one must look, first, to the OPERATING AGREEMENT to ascertain the performance to which the INTEREST OWNERS were entitled and, second, to the undisputed facts to ascertain whether the INTEREST OWNERS received the performance to which they were entitled.^{62/}

B. The AGREEMENTS Were Limited in Duration to the Time for Performance of Obligations Undertaken Therein.

The AGREEMENTS are not perpetual; they are limited in duration. The OPERATING AGREEMENT contains two kinds of limitations which would determine their otherwise indefinite duration. The first limitation is found in Section I of the OPERATING AGREEMENT.^{63/} Had the United States or some rival locator otherwise obtained a determination that the SUBJECT CLAIMS were invalid, the duration of the AGREEMENTS would have been determined. All further rights thereunder would have been extinguished, and all obligations would have been discharged, even though KERR-McGEE might not have commenced exploration or otherwise performed any or all of the obligations under the OPERATING AGREEMENT.

^{62/} Judge Bunnell articulated point well in his oral ruling in the FEBRUARY 8 TRANSCRIPT (v.13, pp.2395-96).

^{63/} See OPERATING AGREEMENT at Section I (v.13, p.1547).

The second limitation is performance. At any time the parties' obligations are fully performed, the AGREEMENTS have no further purpose, and the parties have no further rights or obligations under the AGREEMENTS.^{64/}

1. The purpose of the AGREEMENTS was to create a mining venture, and the duration of the AGREEMENTS, though originally indefinite, becomes definite upon the occurrence or non-occurrence of specified conditions precedent.

The AGREEMENTS themselves provide many limitations on their duration.^{65/} The TRIAL COURT properly reached this conclusion upon a construction of the AGREEMENTS themselves, without reference to any extrinsic evidence.^{66/}

The purpose of the SALES AGREEMENT was to provide for the purchase and sale of the SUBJECT CLAIMS. Because the purpose of the OPERATING AGREEMENT was to govern the performance by KERR-McGEE and MERCURY thereafter,^{67/} it is the performance of the obligations under the OPERATING AGREEMENT that determines the duration.

^{64/} Pacific-Wyoming Oil Co. v. Carter Oil Co., 226 P.2d 193 (Wyo. 1924); 5A A. Corbin, The Law of Contracts § 1230 (1964), Restatement (Second) of Contracts, § 234 (1981).

^{65/} See SUMMARY JUDGMENT ¶ 40 (v.15, pp.2098-99). FEBRUARY 8 TRANSCRIPT (v.18, pp.2396-2400).

^{66/} Id.

^{67/} SALES AGREEMENT at Section 8 (v.13, p.1542); See FEBRUARY 8 TRANSCRIPT (v.18, pp.2394-96).

The duty to perform was generally imposed upon KERR-McGEE, as Operator.^{68/} Section III of the OPERATING AGREEMENT defines the only obligation of KERR-McGEE and MERCURY to share net profits with the INTEREST OWNERS, and SECTION III shows that the obligations of KERR-McGEE were sequential and conditional, not absolute. KERR-McGEE's duty to perform at each step depended on whether the condition immediately preceding the duty had been satisfied.^{69/} If the condition precedent failed, KERR-McGEE's obligations were discharged completely. If the condition precedent was satisfied, KERR-McGEE was obliged to perform further.

Taking the first step was KERR-McGEE's only unconditional obligation. KERR-McGEE agreed unconditionally to explore the SUBJECT CLAIMS sufficiently, in its opinion, to test them adequately for the presence of commercial ore deposits.^{70/} If KERR-McGEE performed its step-one exploration

^{68/} See OPERATING AGREEMENT at p.1, final ¶, and Section II (v.13, pp.1546-47).

^{69/} In Section III of the OPERATING AGREEMENT each obligation is to be performed "in the event of," or "from and after the time" or "after" a specified preceding condition has been satisfied (v.13, pp.1548-49).

^{70/} OPERATING AGREEMENT at Section III (v.13, p.1548):

It is understood and agreed that Kermac (KERR-McGEE), 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

(con't.)

tions, but discovered no commercial ore, KERR-McGEE
have completely performed the OPERATING AGREEMENT. It
could have been discharged, because step two was to be
performed only upon the condition that commercial ore was
discovered.^{71/} There was nothing further required of KERR-
McGEE. However, if the step-one exploration resulted in the
discovery of commercial ore, KERR-McGEE was required to take
step two: to define and develop the ore body indicated by the
discovery.

If the definition and development did not result in a
commercially attractive ore body, KERR-McGEE was not obliged
to proceed further because step three was to be undertaken
only upon the condition that KERR-McGEE satisfied itself that
the ore body was commercially viable.^{72/} However, if the

test the same for the presence of
commercial ore deposits. . . .

^{71/} OPERATING AGREEMENT at Section III (v.13, p.1548):

In the event of the discovery of commercial
ore Operator shall proceed to define and
develop the ore body indicated
thereby. . . .

See Judge Bunnell's explanation in the FEBRUARY 8 TRANSCRIPT
(v.18, pp.2396-97).

^{72/} OPERATING AGREEMENT at Section III (v.13, p.1548):

. . . 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 prepara-
tions for mining and for sinking a shaft and

(con't.)

performance of step two defined a commercial ore body sufficient to justify mining, KERR-McGEE was obliged to sink shaft and equip it, as step three.

If step three did not result in production of at least 25 tons of ore per day, KERR-McGEE was not obliged to proceed to step four, the calculation of net profits. Calculation of net profits depended upon achieving 25 tons per day capability.^{73/} If step three resulted in production capability of 25 tons of ore per day, KERR-McGEE was obliged to determine the net profits, if any, and was permitted to retain any net profits to a specified level.

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.

73/ OPERATING AGREEMENT at Section III (v.13, p.1548):

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. . . .

See Judge Bunnell's explanation in the FEBRUARY 8 TRANSCRIPT (v.18, p.2397).

If the retained net profits did not exceed a total of \$100,000 plus 150% of the costs and expenses incurred prior to a date of 25 tons per day capability, KERR-McGEE was not obliged to share profits, because profit sharing depended on satisfying that preceding condition.^{74/} Only if the performance of step four resulted in the recovery of the specified amounts, was KERR-McGEE obliged to take step five and share the net profits with the INTEREST OWNERS.

Thus the OPERATING AGREEMENT set forth five distinct steps leading to the possible development of a mine. KERR-

^{74/} OPERATING AGREEMENT at Section III (v.13, p.1549):

It is further understood 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, after reimbursement to Kermac 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) percent
Kermac.	Thirty (30) percent
Mercury.	Thirty (30) percent

McGEE's obligation to perform the next step, and the INTEREST OWNERS' right to insist upon performance, were contingent upon satisfaction of the preceding condition. The failure of the condition precedent eliminated the INTEREST OWNERS' chance to share profits.

Other provisions in the OPERATING AGREEMENT would have the same effect of relieving the parties of further rights and obligations. Section V of the OPERATING AGREEMENT required that once a mine was established, KERR-McGEE and MERCURY could not abandon it without the consent of the INTEREST OWNERS or without first offering to sell the mine to them.^{75/} The INTEREST OWNERS could purchase the mine or they could decline to do so. In either case, nothing further would remain to be done^{76/} and the

^{75/} See OPERATING AGREEMENT at Section V (v.13, p.1551).

^{76/} The CLOVIS BANKS' attack on the finding of the Trial Court that the abandonment of the BARDON MINE terminated the OPERATING AGREEMENT seems to misunderstand what Judge Bunnell did. (See CLOVIS BANKS' BRIEF at pp.28-30). All obligations, other than those pertaining to the BARDON MINE, had been satisfied. (See the ZITTING-ATLAS AFFIDAVIT (v.13, pp.1590-91)), which shows that although an attempt was made, no additional ore bodies were found. Those remaining obligations under the OPERATING AGREEMENT were performed when the BARDON MINE was abandoned in accordance with Section V. Judge Bunnell spells this out in Finding of Fact No. 30 in the SUMMARY JUDGMENT (v.15, p.2093):

Upon such abandonment 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.

OPERATING AGREEMENT would be fully performed.^{77/}

Section VI of the OPERATING AGREEMENT required that KERR-McGEE and MERCURY obtain the consent of or offer the SUBJECT CLAIMS to the INTEREST OWNERS before "dropping" them by failing to perform the annual assessment work.^{78/} Once a claim was offered to the INTEREST OWNERS, KERR-McGEE and MERCURY had no further obligation with respect to that claim, whether or not the claim was conveyed to MERRILL, ABERNATHY and/or MERSFELDER or whether or not it was permitted to lapse.

2. The obligations to share profits and all other obligations under the AGREEMENTS were fully performed, and those AGREEMENTS are therefore no longer in effect.

The uncontested evidence presented to the Trial Court establishes that KERR-McGEE and MERCURY did exactly and

^{77/} Because the mine was owned by KERR-McGEE and MERCURY, Section V contemplated a conveyance if the mine was acquired by MERRILL, ABERNATHY and/or MERSFELDER. If the INTEREST OWNERS did not acquire the mine, no conveyance from the INTEREST OWNERS was required because they had no interest which necessitated a conveyance. If MERSFELDER had acquired the BARDON MINE in 1961 it would have belonged to him, and nothing in the OPERATING AGREEMENT would have obligated him in any way to KERR-McGEE, MERCURY, MERRILL and/or ABERNATHY.

^{78/} See OPERATING AGREEMENT at Section VI (v.13, pp.1551-52). The CLOVIS BANKS argue that Section VI amounts to an express method of termination which negates "any implied method of termination." CLOVIS BANKS' BRIEF at p.31. Section VI has nothing to do with termination. If KERR-McGEE had discovered commercial ore, it could not excuse itself from performance by invoking Section VI. The CLOVIS BANKS again seem to confuse the issue. CLOVIS BANKS have no right to share in ATLAS' profits not because of any affirmative act to terminate an existing agreement, but because the AGREEMENTS were fully performed and all rights and duties discharged.

completely what the OPERATING AGREEMENT required them to do. They adequately tested the SUBJECT CLAIMS and discovered a ore body; defined and developed that into a commercial ore body sufficient to justify mining; sunk and equipped the BARDON SHAFT and achieved 25-ton per day capability; mined the SUBJECT CLAIMS, but did not recoup all of the sums to which they were entitled under Section III of the OPERATING AGREEMENT; offered the mine to the INTEREST OWNERS and, when the offer was not accepted, abandoned the mine. They wound up all operations; liquidated the assets of the venture; made a final accounting to the INTEREST OWNERS; and finally they walked away, thereby concluding the mining venture and fully performing and discharging the AGREEMENTS.

Exploration and discovery are established. MERSFELDER described extensive drilling which he did in 1957 and 1958 for KERR-McGEE and SHATTUCK DENN.^{79/} William McDougald, the consulting geologist on the ground, told of the drilling of many holes and of the discovery and development of a commercial ore body.^{80/}

Thereafter, KERR-McGEE sunk a shaft and mined the ore body. Richard T. Zitting, who was manager of Mineral Exploration for KERR-McGEE from 1957 to 1967, stated:

^{79/} MERSFELDER DEPOSITION (v.2, pp.250-51, 272-76, 488-89).

^{80/} McDOUGALD DEPOSITION (v.4, pp.447-51, 487-89).

14. After KERR-McGEE and MERCURY acquired their interest in the SUBJECT CLAIMS, I directed an exploration program in the vicinity of the drilling operations conducted by the INTEREST OWNERS and their predecessors in an attempt to delineate a commercial ore body in that vicinity. Through this exploration activity, KERR-McGEE delineated the ore body which was subsequently mined by . . . SHATTUCK DENN . . . by using the Bardon Shaft.

15. Although I directed additional exploration activity on the SUBJECT CLAIMS in an attempt to discover an additional ore body, KERR-McGEE did not find a commercial ore body on the SUBJECT CLAIMS other than the ore body mined by SHATTUCK DENN through the Bardon Shaft.^{81/}

KERR-McGEE did not recover out of net profits the costs to which it and MERCURY were entitled. KERR-McGEE's accounting demonstrated that there were no profits to share, and the INTEREST OWNERS focused on that matter.^{82/} On May 12, 1964 the INTEREST OWNERS filed a crossclaim against KERR-McGEE in the YUCCA CASE praying for

. . . a complete accounting of the mining operation and construction of the contract of April 18, 1957, for the purpose of determining whether or not these defendants are entitled to any moneys and, if it is determined that they are entitled to money that judgment be entered accordingly . . . ^{83/}

^{81/} ZITTING-ATLAS AFFIDAVIT (v.13, pp.1589-91).

^{82/} See Answer to Interrogatories Nos. 1-2, KERR-McGEE ANSWERS TO INTERROGATORIES (v.13, pp.1611-12); Answer to Interrogatories Nos. 1-2, SHATTUCK DENN ANSWERS TO INTERROGATORIES (v.13, pp.1616-17).

^{83/} YUCCA CASE CROSSCLAIMS (v.13, pp.1625-26).

On August 11, 1967 J. R. Hays, representing KERR-McGEE, and Darwin M. Sprouls, CPA, representing the INTERFERING OWNERS, sent a joint letter to Judge F. W. Keller pursuant to his June 26, 1967 Order in the YUCCA CASE.^{84/} This letter stated that the date the BARDON MINE reached the capability to produce 25 tons of ore per day was February 16, 1959, that the costs incurred prior to that date were \$758,755.33 and the net income from that date to the conclusion of the BARDON MINE operation was \$758,810.27.^{85/}

KERR-McGEE filed Answers to Interrogatories propounded by ABERNATHY and MERRILL in the YUCCA CASE and stated that KERR-McGEE did not then (January 11, 1967) own the SUBJECT CLAIMS; that KERR-McGEE had not mined any ores from the SUBJECT CLAIMS since December 31, 1962; and that

We [i.e., KERR-McGEE] do not know of any persons, firms or corporations who have worked the same since that date.^{86/}

The YUCCA CASE FINDINGS, entered September 30, 1968, included the following Findings of Fact:

6. On May 5, 1958, Kerr-McGee and Anderson Development Corporation, which was then the successor in interest to Mercury . . . , as lessors, and Shattuck

^{84/} The HAYS-SPROULS LETTER was part of the evidence on which the YUCCA CASE FINDINGS were based. YUCCA CASE FINDINGS (v.13, p.1596).

^{85/} HAYS-SPROULS LETTER (v.8, pp.1104-05).

^{86/} Answer to Interrogatory Nos. 5-10, KERR-McGEE INTERROGATORY ANSWERS (v.13, pp.1611-14).

Denn Mining Corporation, as lessee, entered into an instrument entitled "Mining Lease Agreement" under which instrument Shattuck Denn Mining Corporation was granted and assumed the operation of the mining claims.

7. Shattuck Denn Mining Corporation subsequently assigned its interest in the mining lease agreement to Shattuck Denn Company, its wholly-owned subsidiary, which then became the actual operator of the mining claims, completed the exploration and development work on the claims and produced ore which it sold to Kerr-McGee.

8. Kerr-McGee ultimately acquired all of the rights of Anderson Development Company in and to the mining claims and the Operating Agreement of April 18, 1957. . . .

9. On or prior to December 31, 1960 Shattuck Denn and Kerr-McGee ceased operation on the mining claims. . . .

11. Kerr-McGee and Shattuck Denn complied with each and all of the terms and conditions of the operating agreement, including the preparation and submission to Interest Owners of progress reports required by the operating agreement.

12. Kerr-McGee and Shattuck Denn made their books and records available to Interest Owners for their examination and thereby rendered an accounting to them pursuant to court order made herein on May 12, 1966.

13. After payment to Kerr-McGee of all amounts to which it was entitled under the terms of paragraph III of the operating agreement there were no net profits to be divided among the Interest Owners and Kerr-McGee under the terms of the operating agreement. To the contrary, the operation resulted in a loss.

and the following Conclusion of Law:

2. None of the Interest Owners . . . on account of the respective cross claims filed herein by the Interest Owners is entitled to any monetary award or any other or different judgment or relief against Kerr-McGee, Shattuck Denn or Mercury.^{87/}

KERR-McGEE took the necessary steps to abandon the mine. On September 16, 1960, SHATTUCK DENN wrote KERR-McGEE:

Shattuck Denn Company, because of the lack of further known commercial ore near the Bardon Shaft on the Velvet claims, now desires to abandon the premises as set forth in Paragraph 9 of our Agreement with you dated May 5, 1958. The entire area covered by the lease is the area to be abandoned. . . .^{88/}

On December 19, 1960, KERR-McGEE wrote the INTEREST OWNERS and, after making reference to the OPERATING AGREEMENT, said:

Pursuant to Article V of said Operating Agreement, notice is hereby given to you that Kerr-McGee Oil Industries, Inc. and Anderson Development Corporation by mutual agreement now desire to abandon the mine and the workings in connection therewith located on and servicing that part (said part being the area desired to be abandoned) of the lands covered by the above-described claims more particularly described as follows:

[Description omitted.]

Under the provisions of Article V, you, as Interest Owners, have fifteen (15) days to give notice of your desire to acquire Operator's and Non-Operator's interests in the said above-described mine and area to

^{87/} YUCCA CASE FINDINGS (v.13, pp.1598-99).

^{88/} SEPTEMBER 16 LETTER (v.13, p.1601).

be abandoned; however, if you do not wish to acquire said interest, we would appreciate obtaining, as soon as possible, your written consent to abandon the mine, thereby helping to cut the very appreciable overhead costs presently being incurred in keeping the mine open.^{89/}

The only response to the DECEMBER 19 LETTER was that made on December 27, 1960 by MERSFELDER to KERR-McGEE:

I am in a position to take over this property in my personal interest, however, I would like to have information on the exact date you do intend to abandon, and to what extent.^{90/}

On January 3, 1961, KERR-McGEE wrote MERSFELDER that the cost of the mine would be approximately \$50,000, the value of the salvable material and equipment, stated that the DECEMBER 27 LETTER was not responsive to the DECEMBER 19 LETTER, and requested an immediate response if MERSFELDER desired to acquire the BARDON MINE. In addition, KERR-McGEE stated that KERR-McGEE and ANDERSON

desire to abandon immediately the mine property . . ., since we believe that all ore that can be produced from these workings has been mined and since the cost of maintaining the mine in stand-by condition is approximately \$1,500 per month.^{91/}

There was no response to the JANUARY 3 LETTER.

^{88/} DECEMBER 19 LETTER (v.13, pp.1606-07).

^{90/} DECEMBER 27 LETTER (v.13, p.1609).

^{91/} JANUARY 3 LETTER (v.13, p.1609).

Albert E. Dearth, a geologist and President of Atlas Minerals when ATLAS acquired title to the SUBJECT CLAIMS, stated in 1982:

11. That I am familiar with the mining operations conducted on the Velvet Claims in the late 1950's and early 1960's by Kerr-McGee Oil Industry, Inc. and the Shattuck Denn Mining Company, sometimes referred to as the "Bardon Shaft."

12. That I know that the Bardon Shaft ore body was mined out several year before Coates and Lahusen explored for, and discovered the ore body now being mined by Atlas Corporation on the Velvet Claims. . . .

16. . . . (T)he Bardon Shaft surface plant facilities were removed many years ago and the shaft, the drifts and other underground workings for the Bardon Shaft have filled with water. . . . 92/

The AGREEMENTS provide for a mining venture which began with the exploration, development, and mining of an ore body and ended with the winding up of operations. The AGREEMENTS set a standard for full performance of affirmative covenants of the SALES AGREEMENT. Had KERR-McGEE commenced exploration and concluded operations without discovering commercial ore, its affirmative obligation would have been effectively discharged. Having found commercial ore and having developed and mined the ore body, KERR-McGEE performed its obligations. There is nothing in either the SALES AGREEMENT or the OPERATING AGREEMENT that requires the

to resume exploration once the Operator was satisfied that the SUBJECT CLAIMS were sufficiently explored. The sequence of events contemplated by the SALES AGREEMENT and the OPERATING AGREEMENT had clearly defined limits. The language itself provides an end to the sequence. In order to give the CLOVIS BANKS a share of ATLAS' profits the sequence would have to repeat itself, but the AGREEMENTS simply cannot be read to have required KERR-MCGEE in 1957 to embark on a perpetual mining venture with endless obligations to explore, develop, mine, wind up, render accounting, and then explore again, ad infinitum.^{93/}

The INTEREST OWNERS sold the SUBJECT CLAIMS for cash, for MERCURY stock and for the performance of the OPERATING AGREEMENT. They received everything that they bargained for. The AGREEMENTS were fully performed and the mining venture was completed.^{94/} The CLOVIS BANKS acquired their

^{93/} SUMMARY JUDGMENT at ¶ 31 (v.15, pp.2094-95); See FEBRUARY 8 TRANSCRIPT (v.18, pp.2396-97, 2399-2401). Judge Bunnell's findings are amply supported by the Record. See, e.g., SALES AGREEMENT at Sections 5-6 (v.13, pp.1539-41); OPERATING AGREEMENT at Section III (v.13, pp.1548-49); Findings of Fact Nos. 7, 9, 11 and 12, YUCCA CASE FINDINGS (v.13, pp.1598-99); ATLAS-ZITTING AFFIDAVIT at ¶¶ 14-15 (v.13, p.1590-91).

^{94/} Neither the INTEREST OWNERS nor the CLOVIS BANKS claimed in or after the YUCCA CASE that the SUBJECT CLAIMS were not being explored and developed. (See the YUCCA CASE CROSSCLAIMS; STATEMENT OF ISSUES; MERSFELDER DEPOSITION (v.2, p.287).) Their failure to do is strong evidence that they believed there were no further obligations. The CLOVIS BANKS now admit the inactivity from 1961 until ATLAS began exploration in 1975, and belatedly attempt to claim that they (con't.)

claim from ABERNATHY, their financially distressed debtor,⁹⁵ ABERNATHY, at a time when the value of ABERNATHY's claim and share of KERR-McGEE's profits was still in litigation. The CLOVIS BANKS received only what ABERNATHY had to give, and they have no right to share in ATLAS' profits.

C. The CLOVIS BANKS' Contention that their Right to Share Profits Is Perpetual Cannot Be Reconciled with the Terms of the AGREEMENTS.

The CLOVIS BANKS present their claims to a share of ATLAS' profits as if it were a perpetual interest in

are entitled to more than their predecessor bargained for and accepted. They attempt to counter their own failure and the failure of the INTEREST OWNERS to complain:

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. (CLOVIS BANKS' BRIEF at p.64 n.30; emphasis supplied).

The issue is performance, not abandonment. If the AGREEMENTS had not been fully performed, the INTEREST OWNERS would have been entitled to performance of all the provisions of the OPERATING AGREEMENT, including exploration and development which might produce net profits for them to share. True, the INTEREST OWNERS themselves "had no right or obligation to undertake further exploration or mining . . .", but, if the AGREEMENTS had not been fully performed, they did have the right to compel KERR-McGEE to do so.

95/ ABERNATHY-CLOVIS BANKS AGREEMENT (v.13, pp.1570-73).

96/ The CLOVIS BANKS first argue that, despite the duration of the parties' obligations, selected provisions of the AGREEMENTS provide for a perpetual interest.^{97/} Alternatively, and notwithstanding what the provisions of the AGREEMENTS mean when read together as a whole, the CLOVIS BANKS argue that the term "net profits interest," is a term of art so widely recognized that its use alone creates an interest of perpetual duration.^{98/} Neither argument has merit.

1. The AGREEMENTS, read as a whole, clearly and unambiguously do not create a perpetual interest.

The CLOVIS BANKS contend that because the mining claims referred to in Section I of the OPERATING AGREEMENT^{99/} are still valid mining claims, the OPERATING AGREEMENT remains in effect and they are entitled to enforce the profit sharing provisions against ATLAS.^{100/} The CLOVIS BANKS would have the Court adopt their construction of the OPERATING AGREEMENT,

^{96/} CLOVIS BANKS' BRIEF at p.4.

^{97/} Id. at p.18.

^{98/} Id. at p.33.

^{99/} 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. OPERATING AGREEMENT at Section I (v.13, p.1547).

^{100/} CLOVIS BANKS' BRIEF at pp.18-19.

interpreting the first section and the last section,^{101/} while ignoring the terms which lie between. However, the OPERATING AGREEMENT must be construed as a whole.^{102/} Perpetual contracts are not favored, and they will not be enforced except where a perpetual duration is expressed by clear and unequivocal language.^{103/} A construction that the OPERATING AGREEMENT exists in perpetuity cannot be reconciled with the clear and unambiguous language of the OPERATING AGREEMENT, and it belies the purpose of the entire transaction embodied in the AGREEMENTS.

Section III covered the commencement and conduct of activities by KERR-McGEE leading to the sharing of net profits. The only unconditional obligation undertaken by KERR-McGEE, was to commence and diligently prosecute explorations. All other obligations were contingent on the results of the performance of the antecedent obligation. For

^{101/} The last section provides as follows: "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 and assigns." OPERATING AGREEMENT at Section XVIII (v.13, p.1560).

^{102/} Mark Steel Corp. v. Eimco Corp., 548 P.2d 892 (Utah 1976); Thomas J. Peck and Sons, Inc. v. Lee Rock Products, Inc., 515 P.2d 446 (Utah 1973).

^{103/} Holmgren v. Utah-Idaho Sugar Co., 582 P.2d 856 (Utah 1978); See, Portland Section of Council of Jewish Women v. Sisters of Charity of Providence in Oregon, 513 P.2d 1183 (Or. 1973); Zimco Restaurants v. Bartenders and Culinary Workers Union, 331 P.2d 789 (Cal. App. 1958); 17A C.J.S. Contracts § 398 (1963).

... KERR-McGEE had no duty to define and develop an ore body unless its search for commercial ore deposits was successful. Similarly, KERR-McGEE had no duty to sink and pump a shaft until it first had defined and developed an ore body and it had satisfied itself that mining was justified.

The contingent nature of the parties' obligations under the OPERATING AGREEMENT makes untenable the CLOVIS BANKS' contention. If KERR-McGEE had diligently commenced and had diligently prosecuted exploration and other operations sufficient in its opinion to test the SUBJECT CLAIMS for the presence of commercial ore deposits and had failed to find commercial ore, the OPERATING AGREEMENT would be fully performed. The INTEREST OWNERS would have received all the performance to which they were entitled. The continued existence of the OPERATING AGREEMENT would serve no further purpose, because none of the parties would have any further duty of performance. All duties would be discharged and all rights would be extinguished. Even though the SUBJECT CLAIMS might be still in force and effect, the parties could not have intended the OPERATING AGREEMENT to remain in effect under those circumstances.^{104/}

The AGREEMENTS indicate the parties' intent to limit their relationship to a single mining venture.^{105/} Although

^{104/} See SUMMARY JUDGMENT at ¶ 30 (v.15, pp.2092-94).

^{105/} See SUMMARY JUDGMENT at ¶ 31 (v.15, pp.2094-95).

the AGREEMENTS do not rule out exploration, development or mining of more than the single ore body then contemplated. The AGREEMENTS certainly do not contemplate a continuous loop of operations in perpetuity.^{106/}

The CLOVIS BANKS argue that certain language in Section III of the OPERATING AGREEMENT means that their right to share profits is perpetual:

. . . [Agreement] expressly provides, after allowing 150 percent recovery of specified costs relative to the "initial" mine, for 110 percent recovery of "other costs and expense incurred for the exploration, drilling, development, mining, operating and overhead of said mining claims" . . . Had the Agreement been intended to apply only to one 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."^{107/}

The emphasized language does not suggest a perpetual right to share profits. That language is plain recognition

^{106/} The very specificity with which the AGREEMENTS describe the OPERATOR's obligations contradict a perpetual mining venture. For example, the language in Section 6 of the SALES AGREEMENT providing for the sharing of profits is itself specific to the operations carefully described in Section 5. Furthermore, the parties expressly designated a shaft as a means of gaining entry to and mining of the ore body. The AGREEMENTS do not contemplate an ore body that might be mined by a decline, incline, tunnel, open pit or other mining method. The text of Section 6 of the SALES AGREEMENT and Section III of the OPERATING AGREEMENT fixes 25 tons per day as the production level at which cash flow would be available for the recovery of capital costs and eventually the sharing of profits. Such terms presuppose very specific economic parameters pertaining to a deposit of particular grade and characteristics.

^{107/} CLOVIS BANKS' BRIEF at pp.25-26.

... since KERR-McGEE and MERCURY achieved the minimal level of initial production of 25 tons per day, further exploration, and development might be carried out in connection with the ore body contemplated.^{108/} Whether or not one or more ore bodies were discovered, defined and developed, an ore body might be of such a size and nature that more than one shaft or even more than one mine would be necessary to remove the ore.

The CLOVIS BANKS argue that language in the AGREEMENTS means that "... the duration of the Net Profits Interest is tied to the duration of the claims that it burdens."^{109/} They cite the following language:

... Buyers and Sellers shall share the net profits from all ores mined, produced and sold from said claims ...^{110/}

The phrase "all ores mined and produced from said claims" does not refer to duration at all. In the recital found on pages 1 and 2 of the SALES AGREEMENT, the parties used the term "ores"

^{108/} The Court need not decide whether the CLOVIS BANKS might have shared in a second ore body if one had been developed by KERR-McGEE, because there was only one. The Court need only decide whether the the CLOVIS BANKS are entitled to share in all ore bodies discovered and developed long after the parties performed the AGREEMENTS in full and wound up and concluded their mining venture. See SUMMARY JUDGMENT at ¶ 31 (v.15, pp.2094-95); see also OPERATING AGREEMENT at Section III (v.13, pp.1548-49).

^{109/} CLOVIS BANKS' BRIEF at pp.19-20.

^{110/} SALES AGREEMENT at Section 6 (v.13, p.1540).

in association with a list of specific minerals.^{111/} "All ores" means all ores of those minerals, not ores of all minerals and not all ores forever.

The same phrase appears several other places in the AGREEMENTS. For example, Section III of the OPERATING AGREEMENT contains the following:

. . . (A)fter Kermac and Mercury 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 . . . \$150,000 . . . and 150%. . . .^{112/}

It is the receipt of the specified amount, not the "all ores" phrase, that fixes the parties' obligation and hence the duration of the arrangement.

Throughout the AGREEMENTS the words "said claims" are used in conjunction with--even interchangeably with--the terms "mine," "ore body," and "shaft." The words "said claims" do not mean that the AGREEMENTS are perpetual in duration. The use of the words "said claims" suggests nothing more than a recognition that the single ore body contemplated by the parties in Section 5 might occur on more than one mining claim.

^{111/} The interest conveyed covered "the minerals in and to said lands, including uranium, vanadium or ores, including without limiting the generality of the foregoing, uranium, vanadium, thorium, manganese, and other materials associated therewith and all fissionable materials . . ." (v.13, pp.1536-37).

^{112/} OPERATING AGREEMENT at Section III (v.13, pp.1540-41).

2. The use of the term "net profits interest" implies nothing about the nature or duration of the AGREEMENTS.

The CLOVIS BANKS contend that their right to share profits is a "net profits interest" and that such an interest is so like a royalty, mineral interest, carried interest, or an estate in land that their interest should be given the property rights usually attributed to royalty, mineral or carried interests or estates in land, including a perpetual duration.^{113/} The use of the term "net profits interest" does not itself imply a perpetual interest; the duration of their rights to share profits must be determined from the AGREEMENTS

^{113/} CLOVIS BANKS' BRIEF at p.31. The CLOVIS BANKS argue that, because the phrase "net profits interest" appears in a recital to the OPERATING AGREEMENT, their claim to profits is a perpetual estate in land. The CLOVIS BANKS make that argument without regard either to the text of the AGREEMENTS which created the profit sharing arrangement or to the law.

The CLOVIS BANKS' contention muddles two separate issues in this case: first, whether the profit sharing arrangement is perpetual in duration, and, second, whether the nature of the CLOVIS BANKS' claim is such that it may be enforced against ATLAS. The nature of the interest becomes important only if this Court first decides that the CLOVIS BANKS' right to profits is perpetual in duration. The CLOVIS BANKS contend that the use of the term "net profits interest" in the recital to the OPERATING AGREEMENT resolves their way both the duration issue and the nature issue.

The use of the term "net profits interest" implies nothing about the nature or the duration of the interest. The CLOVIS BANKS, of course, have nothing less than the right to enforce the AGREEMENTS, but just as surely they have nothing more. The CLOVIS BANKS' net profits interest is what the AGREEMENTS say it is, and it lasts only so long as the AGREEMENTS say it lasts.

in which it is used.^{114/} This Court need only decide the nature of the INTEREST OWNERS' rights under the particular AGREEMENTS involved here.

^{114/} One of the authorities cited in the CLOVIS BANKS' BRIEF at p.36 n.21, writes as follows:

The nature of a net profits interest is much too indefinite to deserve such independent status [as to be considered a term of art], and our inarticulate use of net profits interest arrangements has led to substantial litigation, usually in connection with the income tax.

We know of no cases in which the "net" has been determined by the court in the absence of some specific agreement by the parties. . . . Thus any consideration of the nature of a net profits interest arrangement, which contains no further specificity beyond the words "net profits interest" per se, is a leap into fantasy, for such words have no independent meaning. (Emphasis supplied.)

J. Sherrill, Jr., Net Profits Interests - A Current View, 19 Inst. On Oil & Gas L. & Tax'n, 165-166 (1968).

Another commentator cited by the CLOVIS BANKS in their brief at p. 43, explains as follows:

[T]here is no body of law clearly defining the net profits interest, its nature and its incidents. The only thing that can be said with any assurance is that a net profits interest may or may not be an interest in land and that the nature of the interest and the rights of its owner must be determined from the provisions of the instrument which created it. (Emphasis supplied.)

5 E. Kuntz, A Treatise on the Law of Oil and Gas § 63.5 (1978).

The authorities cited by the CLOVIS BANKS do not define a net profits interest for all purposes, and the difficulties involved in generalizing the characteristics of net profits interests. While net profits interests may share some characteristics of an overriding royalty interest, a royalty, a working interest, or a carried interest, the profit sharing arrangement in the AGREEMENTS is unlike any of these interests.^{115/} None of the authorities cited by the CLOVIS BANKS^{116/} stands for the proposition that all net profits interests are mineral interests or

^{115/} The dissimilarities between a "usual" royalty interest, a "standard" working interest and the INTEREST OWNERS' rights to net profits under the AGREEMENTS are numerous. A royalty, for example, is not a cost bearing interest at all, and it is calculated without respect to costs or profits. The INTEREST OWNERS here do not even have a freestanding or independent "net profits interest." Instead, they have only the right to share in a common fund of profits, and their share is dependent upon the operations attaining a specific level of profits. A working interest owner has executive rights, the exclusive right to possess, develop and manage the property, and must contribute certain expenses; the INTEREST OWNERS have no such rights nor any obligation to pay expenses.

The CLOVIS BANKS' only source which describes the nature of a net profits interest, rather than what it is "somewhat similar to" or what it is not, limits the use of the classification very specifically to federal income tax situations only. See CLOVIS BANKS' BRIEF at p.35-36, Burke & Bowhay, Income Taxation of Natural Resources, § 2.06 (Prentice-Hall 1982). The rules of contract interpretation will control, however, and may overrule well-settled principles of "terms of art" usage. See Extraction Resources, Inc. v. Freeman, 555 S.W.2d 156 (Tex. Civ. App. 1977).

^{116/} CLOVIS BANKS' BRIEF at pp.34, 38, 41, 43.

estates in land or any other perpetual interest.^{117/} The

117/ Carlock v. National Co-operative Refinery Ass'n, 424 F.2d 148 (10th Cir. 1970), is a contract construction case in which the succeeding lessee specifically agreed to be bound by the terms of an agreement creating an obligation to pay to which his grantor was a party. The appellate court could not reverse unless the trial court was found to be clearly erroneous, which it was not. Greenleaf v. S. A. Camp Ginning Co., 309 P.2d 943 (Cal. Dist. Ct. App. 1957), concerned a term "royalty" interest with no mention anywhere of a net profits interest. Bellingham Sec. Syndicate, Inc. v. Bellingham Coal Mines, Inc., 125 P.2d 668 (Wash. 1942), is a very good case for many of ATLAS' arguments, including the practical construction of contracts, the interpretation of unambiguous contracts, and the nature of a net profits interest. The interest in dispute in Bellingham is a minimum royalty interest which was to be calculated in part on the net profits generated by coal mining operations under a 50-year lease. The Washington Supreme Court held that the contract had to be interpreted as a matter of law in order to determine the nature of the minimum royalty. The primary issue in Bellingham was to decide how to calculate the royalty. The meaning of the interest was ascertained as a matter of law from the language of the agreements and from a lack of evidence that the parties acted in a manner inconsistent with that meaning. There was no contention that such interest was a perpetual mineral right and no testimony was permitted concerning the parties' present intent with respect to the meaning of that interest. The Court stated as follows:

It should be borne in mind that the term "net profits" is the lease term the construction of which is a legal issue; . . . Whether [the lessee] may make the deductions depends upon the construction given by this court to the term "net profits" as used in the lease.

Id. at pp.675-76.

John Wight, Inc. v. Norskog, 438 P.2d 550 (Mont. 1968), and Extraction Resources, Inc. v. Freeman, 555 S.W.2d 156 (Tex. Civ. App. 1977) are both oil and gas cases and neither deals with any interest remotely resembling a net profits interest. Picard v. Richards, 366 P.2d 119 (Wyo. 1961) also deals with interests in oil and gas and discusses the differences between a royalty interest and a mineral interest. Net profits are nowhere discussed. (con't.)

that "net profits interest" is immaterial. What is important is that the AGREEMENTS and the JUNE 7 DEED do not manifest the intent to create a perpetual interest.^{118/}

D. There Is No Genuine Issue as to Any Material Fact Relating to the Construction or Performance of the AGREEMENTS.

When the pleadings, depositions, affidavits and other papers on file in the court show that there is no genuine

Rimledge Uranium and Mining Corp. v. Federal Resources Corp., 374 P.2d 20 (Utah 1962), concerns the method of calculating a landowner's royalty called for under an agreement between the parties; no determination of the nature of the interest was at issue. Holley v. Federal-American Partners, 507 P.2d 381 (Utah 1973), a lease situation, similarly does not involve a decision concerning the nature of the obligation to pay money under a contract.

^{118/} The CLOVIS BANKS contend that the SALES AGREEMENT defined the alleged net profits interest (CLOVIS BANKS' BRIEF at pp.47-48), that the OPERATING AGREEMENT reserved the interest (CLOVIS BANKS' BRIEF at p.48), and that the "... 'subject to' phrase used by the parties states . . . the intention to incorporate the terms, covenants and conditions of the Agreements into the Deed . . ." (CLOVIS BANKS' BRIEF at p.49), and that the incorporation "reserved the interest from the conveyance."

Each step in this argument is wrong. First, the SALES AGREEMENT did not define a net profits interest as contended by the CLOVIS BANKS. Second, the OPERATING AGREEMENT did not reserve such an interest. Third, the words "subject to" do not mean "incorporate by reference." Paragraph 8 of the SALES AGREEMENT shows that the parties knew how to incorporate by reference and they could have done so in the JUNE 7 DEED had they so intended. Fourth, even if there were an incorporation by reference, that is not a "reservation." The parties and their attorneys drafting the AGREEMENTS obviously knew about perpetual interests (e.g., the POWEN ROYALTY which is expressly provided for in Paragraph 4 of the SALES AGREEMENT (v.13, p.1539)) and could have reserved the same had they so intended. (See SUMMARY JUDGMENT at ¶ 32 (v.13, pp.2095-96); FEBRUARY 8 TRANSCRIPT (v.18, pp.2402-03)).

issue as to any material fact and that the moving party is entitled to a judgment as a matter of law, summary judgment proper.^{119/} The central issue in this case is the meaning of the AGREEMENTS. Summary judgment is well-suited to resolve the conflict, because the interpretation of such contracts is a question of law.^{120/}

The CLOVIS BANKS were the first party to move for Summary Judgment interpreting the AGREEMENTS. They then saw no issues as to material facts.^{121/} Moreover, when ATLAS moved for Summary Judgment and presented extensive factual support for its motion,^{122/} the CLOVIS BANKS failed to produce any contradictory evidence.^{123/} Not just any alleged disagreement over facts will bar summary judgment. The disputed facts must be both genuine and material. The CLOVIS BANKS' have established no facts which are "material," those which affect the application of the governing law. Once ATLAS had satisfied its "initial burden of showing there were no issues as to any material fact and that it was entitled to

^{119/} U.R.C.P. 56(c).

^{120/} Morris v. Mountain States Tel. and Tel. Co., 658 P.2d 1199 (Utah 1983); Overson v. United States Fidelity and Guaranty Co., 587 P.2d 149 (Utah 1978).

^{121/} CLOVIS BANKS' SUMMARY JUDGMENT MOTION.

^{122/} ATLAS' SUMMARY JUDGMENT MOTION.

^{123/} CLOVIS BANKS' RESPONSE TO ATLAS' SUMMARY JUDGMENT MOTION and/or RENEWAL OF SUMMARY JUDGMENT MOTION.

... as a matter of law . . ." the burden shifted to the CLOVIS BANKS "to produce competent evidence that a material issue of fact existed."124/ The CLOVIS BANKS failed to produce any such evidence and it is too late for them to attempt to do so now.125/

1. The factual issues the CLOVIS BANKS attempt to raise are not material to construction of the AGREEMENTS.

The CLOVIS BANKS' BRIEF argues that the Trial Court erred in granting summary judgment because there were disputed questions of fact concerning the parties' intention in entering into the AGREEMENTS.126/

There are two reasons why that argument is wrong as a matter of law. First, as the CLOVIS BANKS' BRIEF itself recognizes and urges,127/ the AGREEMENTS are unambiguous and

124/ Brown Wholesale Elec. Co. v. Safeco Ins. Co. of America, 659 P.2d 1299, 1302 (Ariz. Ct. App. 1982); Dupler v. Yates, 10 Utah 2d 251, 351 P.2d 624 (1960). See U.R.C.P. 56(e); United American Life Ins. Co. v. Willey, 21 Utah 2d 279, 444 P.2d 755 (1968). The genuine issue of fact must be material to the resolution of the case, Horgan v. Industrial Design Corp., 657 P.2d 751 (Utah 1982), and the party opposing summary judgment may not " 'build a case on the gossamer thread of whimsey, speculation and conjecture.' " Hahn v. Sargent, 523 F.2d 461, 467 (1st Cir. 1975), cert. denied, 425 U.S. 904 (1976).

125/ Franklin Financial v. New Development Co., 659 P.2d 1040 (Utah 1983); Shayne v. Stanley & Sons, Inc., 605 P.2d 775 (Utah 1980); Villeneuve v. Schamaneck, 639 P.2d 214 (Utah 1981); Collins v. Union Federal Sav. and Loan Ass'n, 662 P.2d 410 (Nev. 1983); DeBardeleben v. Cummings, 453 F.2d 320 (5th Cir. 1972).

126/ See CLOVIS BANKS' BRIEF at pp.59-69.

127/ See CLOVIS BANKS' BRIEF at p.59.

extrinsic evidence of intent should not be considered.^{128/} The AGREEMENTS are not rendered ambiguous merely because of and the CLOVIS BANKS urge different interpretations of the AGREEMENTS.^{129/} The Trial Court, without resorting to extrinsic evidence, found that there was only one way to read the AGREEMENTS as a whole and ruled that the AGREEMENTS clearly and unambiguously were limited in duration.^{130/}

Second, the evaluation of whether the AGREEMENTS are ambiguous or unambiguous is a question of law in Utah;^{131/} therefore, extrinsic evidence of the parties' later recollections of their subjective intent in 1957 has no probative value. What is material is evidence of their conduct, demonstrating how the parties actually acted under the AGREEMENTS and the interpretation which they actually gave those AGREEMENTS.^{132/} The uncontroverted evidence in the

^{128/} Pulsipher v. Tolboe, 13 Utah 2d 190, 370 P.2d 360 (1962); Ephraim Theatre Co. v. Hawk, 7 Utah 2d 163, 321 P.2d 221 (1958).

^{129/} Jones v. Hinkle, 611 P.2d 733 (Utah 1980).

^{130/} SUMMARY JUDGMENT at ¶ 40 (v.15, pp.2098-99).

^{131/} Morris v. Mountain States Tel. and Tel. Co., 658 P.2d 119 (Utah 1983); Jones v. Hinkle, 611 P.2d 733 (1980); Overson v. United States Fidelity and Guaranty Co., 587 P.2d 149 (Utah 1978). See also Bellingham Sec. Syndicate, Inc. v. Bellingham Coal Mines, Inc., 125 P.2d 668 (Wash. 1942).

^{132/} Courts may take extrinsic evidence of subsequent conduct for the purpose of determining whether or not there exists an ambiguity in a written contract. Bullough v. Simms, 16 Utah 2d 304, 400 P.2d 20 (1965); Bullfrog Marina, Inc. v. Lentz, 28 Utah 2d 261, 501 P.2d 266 (1972); Zeese v. Estate of Siegel, (con't.)

and demonstrates that the parties, in the performance of AGREEMENTS, conducted themselves precisely in accordance with the construction made of those AGREEMENTS by Judge Parnell.

The CLOVIS BANKS assert that extrinsic evidence shows that the parties to the AGREEMENTS and the JUNE 7 DEED intended that a perpetual interest in the net profits was created.^{133/} The extrinsic evidence relied upon consists of opinions expressed and positions taken by KERR-McGEE,^{134/} MERRILL and ABERNATHY,^{135/} and ATLAS.^{136/} But that evidence, even if it pertained to a material issue, is not probative; it is not factual evidence of any intent in 1957 to create a perpetual interest at all.

534 P.2d 85 (Utah 1975); Hardinge Co. v. Eimco Corp., 1 Utah 2d 320, 266 P.2d 494 (1954); Motor Terminals, Inc. v. National Car Co., 92 F. Supp. 155 (D.C. Del. 1949); Cook-Reynolds Co. v. Beyer, 79 P.2d 658 (Mont. 1938).

^{133/} See CLOVIS BANKS' BRIEF at p.60.

^{134/} See CLOVIS BANKS' BRIEF at pp.62-63, referring to the KERR-McGEE MEMORANDUM which argues, in response to an earlier motion seeking to impose liability on KERR-McGEE, that ATLAS has the liability (v.6, p.963).

^{135/} CLOVIS BANKS' BRIEF at p.42, refers to the MERRILL DEPOSITION, the ABERNATHY DEPOSITION and the BOONE DEED, in which the INTEREST OWNERS describe their claim as a "working interest."

^{136/} See CLOVIS BANKS' BRIEF at pp.11-12, 63, in which reliance is placed on a title opinion written by counsel for ATLAS in 1978, earlier pleadings in this case and the fact that ATLAS attempted to buy out the INTEREST OWNERS and was ultimately successful in making a compromise settlement with all parties in the case except the CLOVIS BANKS.

The only matter relied upon by the CLOVIS BANKS which relates directly to the intent of the parties in 1957 is the ZITTING-CLOVIS BANKS AFFIDAVIT in which Richard T. Zitting says:

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 Interests would be limited to one ore body or that it would terminate following closing of the Bardon Shaft.^{137/}

However, aside from questions of competence to testify as to the intent of other people, and materiality of that intent, this statement does not controvert the interpretation of the AGREEMENTS adopted by Judge Bunnell. Judge Bunnell did not conclude that the AGREEMENTS applied only to one ore body or to one shaft. The AGREEMENTS, and the mining venture, applied to whatever KERR-McGEE found in its testing, defining and developing of the SUBJECT CLAIMS. As it turned out, only one ore body (the BARDON MINE) was discovered, defined and developed. As it turned out, only one shaft was used. The AGREEMENTS did not terminate because, from the outset, they were limited to a single ore body. They came to a conclusion because they were fully performed and because full performance involved only one ore body.

^{137/} (v.14, p.1857).

2. The factual issues which the CLOVIS BANKS attempt to raise are not material to performance of the AGREEMENTS.

The CLOVIS BANKS' BRIEF^{138/} argues that there is an unanswered "factual question whether the 'mining venture' actually ended in 1961." Perhaps the CLOVIS BANKS are questioning whether KERR-McGEE completely performed the AGREEMENTS.^{139/} However, the CLOVIS BANKS point to no facts material to that assertion.^{140/}

Instead, they rely on statements made prior to the decision to do no further work on the SUBJECT CLAIMS^{141/} that KERR-McGEE, at a relatively early date, still contemplated possible further drilling.^{142/} This statement by KERR-McGEE is completely consistent with the Trial Court's determination that ultimately KERR-McGEE, perhaps after additional drilling,

^{138/} CLOVIS BANKS' BRIEF at p.68.

^{139/} See CLOVIS BANKS' BRIEF at p.64, n.30, see also CLOVIS BANKS' BRIEF at p.9, n.4, where they note that "there is no evidence of any exploration between 1961 and 1968" [by KERR-McGEE or anyone else.]

^{140/} They urge that they should be permitted to proceed with "scheduled discovery" (CLOVIS BANKS' BRIEF at p.69) without indicating what facts they hope to discover which will contradict the overwhelming and undisputed evidence that the AGREEMENTS were fully performed.

^{141/} This decision was made some time near December 31, 1962 because no work was done after that time and in 1963 the property was assigned to VCA.

^{142/} See, e.g., the MAY 9 LETTER in 1962, suggesting that KERR-McGEE's "present plans" were "to do some additional exploration drilling" if and when KERR-McGEE was able to resolve certain problems.

brought the mining venture to an end.143/ So is the suggestion that MERSFELDER, while drilling for KERR-McGEE in 1957 and 1958, may have drilled into the edge of the ore body which became the target of the VELVET MINE many years later.144/

The other "facts" which the CLOVIS BANKS allege have nothing whatsoever to do with whether KERR-McGEE fully performed the AGREEMENTS. What ATLAS' attorneys said about the existence of a paper net profits interest in a title opinion (before the facts of full performance were developed) is totally irrelevant to whether events not contained in recorded documents demonstrate performance. So is speculation, based upon the "Outline of Property Examination" done for CLIMAX in 1968, that someone may have known that there was more ore on the SUBJECT CLAIMS.145/ So are ATLAS' offers to buy out the record claimants of the net profits interest at a minimal sum in order to clear ATLAS' title to the SUBJECT CLAIMS.146/ So are ABERNATHY's practices before the YUCCA CASE was concluded

143/ See ZITTING-ATLAS AFFIDAVIT stating that KERR-McGEE attempted to find an ore body other than the BARDON MINE, but was unsuccessful (v.13, pp.1590-91), and that KERR-McGEE did nothing on the SUBJECT CLAIMS after 1962. See also, KERR-McGEE's INTERROGATORY ANSWERS (v.13, pp.1611-14).

144/ See CLOVIS BANKS' BRIEF at pp.8-9.

145/ See CLOVIS BANKS' BRIEF at p.9 n.4; see also the CLIMAX REPORT (v.15, First page numbered 2127).

146/ See CLOVIS BANKS' BRIEF at p.63.

assigning some value to his position with respect to the
SUBJECT CLAIMS while dealing with the CLOVIS BANKS.^{147/} None
of these matters casts the slightest doubt on the Trial
Court's conclusion that KERR-McGEE performed all of its
obligations under the AGREEMENTS, and that, thereupon, the
CLOVIS BANKS had no further rights to profits which might
accrue from a future mining operation.

3. In any event, it is too late to challenge the
full performance of the AGREEMENTS.

As set forth in Section I.B.2 of this brief, ATLAS
presented to the Trial Court evidence that KERR-McGEE
adequately, in its opinion, tested the SUBJECT CLAIMS for the
presence of commercial ore; made only one discovery; defined
and developed the ore body indicated thereby; sunk a shaft;
commenced mining; achieved 25-ton per day capability; mined
all the ore which could be economically recovered; determined
the net profits, but did not recover \$150,000 and 150% of its
pre-25-ton per day costs; offered the mine to the INTEREST
OWNERS, who did not take it; abandoned the mine; disposed of
the equipment; and made an accounting.

The CLOVIS BANKS, in the CLOVIS BANKS' RESPONSE TO
ATLAS' SUMMARY JUDGMENT MOTION, did not present evidence

^{147/} See CLOVIS BANKS' BRIEF at p.63.

controverting these facts of performance and cannot now do so on appeal.^{148/}

The CLOVIS BANKS did not allege non-performance in their pleadings,^{149/} so ATLAS had no cause to assert affirmative defenses in response. However, it is apparent that if the CLOVIS BANKS ever had any complaint that KERR-McGEE failed to perform and was in breach of its obligations to the INTEREST OWNERS, that claim matured in the early 1960's. That claim was not asserted in the YUCCA CASE and has not been asserted since, at least until this late date. Surely the claim (even if it were tenable - which it is not) is barred now by doctrines such as laches, statute of limitations and res judicata.^{150/}

II. THE OBLIGATION TO SHARE PROFITS WAS A PERSONAL OBLIGATION OF THE PARTIES UNDER THE AGREEMENTS WHICH ATLAS IS NOT BOUND TO PERFORM.

Neither ATLAS nor the CLOVIS BANKS were parties to the AGREEMENTS. As successors in interest to one of the parties,

^{148/} Franklin Financial v. New Empire Dev. Co., 659 P.2d 104 (Utah 1983); Shayne v. Stanley & Sons, Inc. 605 P.2d 775 (Utah 1980); Villeneuve v. Schamanek, 639 P.2d 214 (Utah 1981); Collins v. Union Federal Sav. and Loan Ass'n, 662 P.2d 610 (Nev. 1983); Brown Wholesale Elec. Co. v. Safeco Ins. Co. of America, 659 P.2d 1299 (Ariz. Ct. App. 1982); DeBardleben v. Cummings 453 F.2d 320 (5th Cir. 1972).

^{149/} See CLOVIS BANKS' COUNTERCLAIM.

^{150/} Motor Terminals, Inc. v. National Car Co., 92 F. Supp. 155 (D.C. Del. 1949); Cook-Reynolds Co. v. Bever, 79 P.2d 658 (Mont. 1938).

the CLOVIS BANKS now seek to enforce those contracts against
a successor to other parties. The profit sharing
agreement under the AGREEMENTS is at most a contract
in part.^{151/}

A party should not "be held chargeable with an obligation
under a contract except by his consent."^{152/} ATLAS purchased
the SUBJECT CLAIMS and neither accepted assignments of the
AGREEMENTS nor assumed them.^{153/} ATLAS is not obliged to
share profits with the CLOVIS BANKS under familiar principles
of contract law.

The CLOVIS BANKS nevertheless suggest several theories on
which they seek to hold ATLAS chargeable. Their contention
the "net profits interest" is by its very nature perpetual is
fully answered on pages 34 to 45 in this brief. Next, the
CLOVIS BANKS contend that the profit sharing provisions of the

^{151/} See Le Bus v. Le Bus, 269 S.W.2d 506, 511 (Tex. Civ.
App. 1954), in which the Court held that rights to a portion
of profits generated by mineral development where "one party's
interest [is] only a common interest in the profits, that is,
if he have no title jointly with the other party with the
right to control as owner over the profits, but, with only a
common interest in them because the profits measure what
amount he shall receive," the interest is "only a contractual
right to have his share of the profits paid over to him when
they were earned."

^{152/} Klundt v. Carothers, 537 P.2d 62 (Idaho 1975);
Englestein v. Mintz, 177 N.E. 746 (Ill. 1931); Lingle Water
Users' Ass'n v. Occidental Bldg. & Loan Ass'n, 297 P. 385, 387
(Wyo. 1931).

^{153/} See SUMMARY JUDGMENT at ¶ 45 (v.15, p.2104-08); the
FOOTE LEASE; FOOTE DEED.

AGREEMENTS are binding on ATLAS as covenants running with land.^{154/} The CLOVIS BANKS' alternative theory is that the claimed right to share profits is enforceable against ATLAS as an equitable servitude.^{155/}

A. The CLOVIS BANKS Cannot Enforce the Profit Sharing Arrangement Against ATLAS as a Covenant Running With Land.

The Trial Court properly held that the CLOVIS BANKS' claim is not enforceable against ATLAS as a covenant running with land.^{156/} The courts have held that promises to share profits are personal covenants which do not run with land.^{157/}

As the CLOVIS BANKS point out, the following elements are required to establish real covenants: (1) the covenant must "touch and concern" land; (2) the original parties to the covenant must clearly intend the covenant to run with land; and (3) there must be privity of estate between the present parties.^{158/} None of these elements is satisfied in this case.

^{154/} CLOVIS BANKS' BRIEF at pp.51-56.

^{155/} CLOVIS BANKS' BRIEF at pp.56-59.

^{156/} See SUMMARY JUDGMENT ¶¶ 35, 45 (v.15, pp. 2096-97, 2104-08); see also FEBRUARY 8 TRANSCRIPT v.18, pp.2400-02).

^{157/} Tegarden v. Beers, 265 P.2d 845 (Kan. 1954); McIntosh v. Vail, 28 S.E.2d 607 (W. Va. 1943). See also White v. Hendley, 169 P. 710 (Cal. App. 1917); Womble v. Womble, 113 P. 353 (Cal. App. 1910).

^{158/} CLOVIS BANKS' BRIEF at p.51.

Privity of estate is not present. Privity of estate is an essential element, and the CLOVIS BANKS take the element too lightly.^{159/} Horizontal contractual privity between the original covenanting parties does not establish the required privity of estate between the successors in interest to those original parties. The successors on both sides must have a legal interest, an "estate," in the real property at issue. The INTEREST OWNERS had no estate in the SUBJECT CLAIMS after the sale was consummated; they had only a contractual right to enforce the AGREEMENTS. The CLOVIS BANKS could not have acquired any estate from ABERNATHY, one of the INTEREST OWNERS, because ABERNATHY, having divested himself of the SUBJECT CLAIMS, had no estate to convey.^{160/}

The promises of KERR-McGEE and MERCURY do not "touch and concern" the land. The CLOVIS BANKS assert that the Trial Court erred in concluding that the "touch and concern element is not met because the net profits interest is not related to the physical use of the land."^{161/} But under Utah law the Trial Court is correct, and the CLOVIS BANKS are wrong. This Court has dealt with "touch and concern" in two recent

^{159/} Id.

^{160/} See SUMMARY JUDGMENT MOTION at ¶ 44 (v.15, pp.2103-04).

^{161/} SUMMARY JUDGMENT at ¶ 45 (v.15, pp.2106-07); see CLOVIS BANKS' BRIEF at p. 53.

cases.^{162/} These cases and Hudspeth v. Eastern Oregon Land Co., 430 P.2d 353 (Or. 1967), a case upon which the CLOVIS BANKS rely,^{163/} support ATLAS.

In First Western Fidelity v. Gibbons and Reed Co.,^{164/} this Court, expressly citing Hudspeth, held that the agreement of the Gibbons and Reed Company to leave the land contoured in a specified way did not run, because it did not contain a "clear and definite expression" of the parties' intent that the obligation was to run with land to subsequent transferees. The Court did not decide specifically whether the promise to contour the land met the "touch and concern" requirement, but it did set forth the necessary elements: the covenant must "have some permanent effect of a physical nature upon the land itself affecting its usefulness and/or its value."^{165/}

In Lundeberg v. Dastrup,^{166/} this Court addressed the "touch and concern" question directly and held that an express covenant in a land sales contract to pay attorney's fees to enforce that contract was not a covenant which touches and

^{162/} Lundeberg v. Dastrup, 497 P.2d 648, 650 (Utah 1972); First Western Fidelity v. Gibbons and Reed Co., 492 P.2d 132 (Utah 1971).

^{163/} See CLOVIS BANKS' BRIEF at pp.52-53.

^{164/} 492 P.2d 132, 134 (Utah 1971).

^{165/} Id. at 134.

^{166/} 497 P.2d 648, 650 (Utah 1972).

regards land. The Court, citing First Western Fidelity,
said:

In order for a covenant to run with land it must be of such character that its performance or nonperformance will so affect the use, value, or enjoyment of the land itself that it must be regarded as an integral part of the property. Examples are the covenants of seizin, the right to convey, freedom from encumbrances, and of quiet peaceable possession. Contrasted to these are covenants to perform personal obligations under the contract, which ordinarily do not so run. Under the concept just stated a provision in a purchase contract to pay attorney's fees necessary for enforcement of its terms does not meet the qualification for a covenant which runs with the land.

The Trial Court properly applied the requirements of First Fidelity and Lundeberg in the SUMMARY JUDGMENT when it concluded that the profit-sharing arrangement "does not have a permanent effect of a physical nature upon the land itself," nor does it so affect the use, value or enjoyment of the land itself that it would "by its very nature [become] united with and an integral part of land."^{167/}

The CLOVIS BANKS argue that because "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" and "the covenantee's interest . . . is rendered more valuable by the covenant," the "touch and concern" element is somehow satisfied. The

^{167/} SUMMARY JUDGMENT at ¶ 45 (v.15, p.2107).

infirmity in the argument is obvious. In this case the "covenantee's estate," as the CLOVIS BANKS put it, is not a separate estate rendered more valuable by the sharing of net profits. The alleged "covenantee's estate" is itself the sharing of net profits. In addition, there are several other legal and factual shortcomings to this argument.

In McIntosh v. Vail,^{168/} the Court stated that, "[o]f course, the benefit of a covenant [to divide the mineral production proceeds or profits] . . . would be valuable to anyone, but that factor alone is insufficient to meet the test of a covenant real." The Court went on to state that for a covenant to be considered a covenant real it must become united with the land itself, and a promise to pay net profits from mineral production, which are not considered rents, is not a covenant real which runs with land.^{169/}

^{168/} McIntosh v. Vail, 28 S.E.2d 607, 612 (W.Va. 1943).

^{169/} Of course, a covenantee can never enforce a covenant unless the covenant "touches and concerns" his estate in the land. The INTEREST OWNERS conveyed all their right, title and interest in the SUBJECT CLAIMS when they gave the JUNE 7 DEED. They obviously have no "estate" in the SUBJECT CLAIMS. Undaunted, the CLOVIS BANKS argue that the provision in the OPERATING AGREEMENT allowing the INTEREST OWNERS to purchase abandoned mines and to take over abandoned mining claims give them a reversion which then satisfies the touch and concern element. CLOVIS BANKS' BRIEF at p.54. However, the argument is wrong. Such rights do not amount to a reversion, possibility of reverter, right of reentry upon condition broken, or any other future interest. They do not make the JUNE 7 DEED a lease, the INTEREST OWNERS lessors, or the profit sharing arrangement rent.

Finally, the JUNE 7 DEED and the AGREEMENTS do not express an intention of the parties that the profit-sharing arrangement bind subsequent transferees. The CLOVIS BANKS contend that Section VIII of the OPERATING AGREEMENT expresses the requisite intent. However, Section VIII is a provision dealing only with the duties and rights of KERR-McGEE and MERCURY inter se. Nothing in that Section applies to the INTEREST OWNERS' profit-sharing right.^{170/} Section VIII cannot be construed as "clearly and definitely" expressing either a broad general intention that the OPERATING AGREEMENT run with the property, or a specific intention that the profit-sharing arrangement, contained in Section III of the OPERATING AGREEMENT, run with the land.^{171/}

The CLOVIS BANKS also argue that Section XVIII of the OPERATING AGREEMENT^{172/} is sufficient to establish that the

^{170/} Section VIII of the OPERATING AGREEMENT deals with transfers by KERR-McGEE or MERCURY of their respective interests in the SUBJECT CLAIMS, and with KERR-McGEE's and MERCURY's rights of first refusal in the event of such a transfer, binding KERR-McGEE's and MERCURY's successors to the OPERATING AGREEMENT so long as that Agreement remained in effect. (See v.13, pp.1553-54). See Judge Bunnell's oral discussion of the impossibility of accepting the CLOVIS BANKS' construction of Section VIII. FEBRUARY 8 TRANSCRIPT (v.18, pp.2400-02).

^{171/} First Western Fidelity v. Gibbons and Reed Co., 492 P.2d 132, 134 (Utah 1971).

^{172/} Section XVIII provides as follows (v.13, p.1560):

The terms and provisions of this Agreement shall be binding upon and shall inure to the benefit of the parties hereto, their (con't.)

parties intended the profit-sharing arrangement to run with the SUBJECT CLAIMS. However, the standard "boilerplate" language in Section XVIII merely declares the parties' intention that one who accepts an assignment of the AGREEMENTS can enforce them against those parties to the AGREEMENTS who were not parties to the assignment. The language does not address at all a purchaser of the SUBJECT CLAIMS who does not accept an assignment of the AGREEMENTS. Moreover, that language is hardly specific enough to prove that the parties intended the covenant to share profits to survive performance of the OPERATING AGREEMENT and to run with the land forever.^{173/} As the Trial Court noted,^{174/} many of the "terms, covenants and conditions" could not possibly run with the land. These deal with purely mechanical matters--reporting, sharing expenses, etc.--which could have no meaning once the AGREEMENTS were performed, the venture was completed and the parties went their separate directions.

In any event, even if the OPERATING AGREEMENT could be construed to express the parties' intention that the profit-sharing arrangement run with land, intent alone is not determinative.

respective heirs, administrators,
successors and assigns.

^{173/} City of Glendale v. Arizona Sav. & Loan Ass'n, In Receivership, 409 P.2d 299 (Ariz. Ct. App. 1965).

^{174/} FEBRUARY 8 TRANSCRIPT (v.13, pp.2400-02).

The express covenant of the parties may prohibit a covenant from running with the land, but it cannot make a personal covenant run with the land. Intent alone is not sufficient to make the covenant run. The other legal requirements must be met,^{175/} (Emphasis supplied.)

B. The CLOVIS BANKS Cannot Enforce the Profit-Sharing Arrangement as an Equitable Servitude.

To enforce the profit-sharing arrangement as a negative easement, equitable servitude, or restriction on use, the CLOVIS BANKS must establish, first, the existence of a dominant and servient estate; second, the benefit to the dominant estate and the burden to the servient estate; third, intention by the parties that the instrument creating the servitude, negative easement or use restriction benefit and burden subsequent grantees; and fourth, notice by the party against whom the enforcement is sought. The negative easement, equitable servitude or restriction on use must relate to interests in land.^{176/} An equitable servitude, restriction or easement will not be enforced against land where the benefit is in gross. For land to be so burdened, the encumbrance must benefit land. A negative easement, use

^{175/} Raintree Corp. v. Rowe, 248 S.E.2d 904, 908 (N.C. Ct. App. 1978). In accord, Neponsit Property Owners' Ass'n. v. Inland Industrial Sav. Bank, 15 N.E.2d 793 (N.Y. Ct. App. 1937).

^{176/} Hall v. Risley, 213 P.2d 818 (Or. 1950); Welitoff v. Kohl, 147 A. 390 (N.J. Ct. App. 1929); 2 American Law of Property § 932 (1952).

restriction, or equitable servitude must be appurtenant to the estates affected and must concern dominant and servient estates. The benefit may not be merely personal to the beneficiary.^{177/} This test is not satisfied, because the INTEREST OWNERS had no real property interest in the SUBJECT CLAIMS to which an equitable interest could attach after the conveyance of the property to KERR-McGEE and MERCURY.

To enforce an equitable servitude, easement or restriction against subsequent grantees requires a showing that the original parties intended that the grantees were to be burdened and benefitted by an equitable servitude, easement or restriction. That intent has already been shown not to exist here.^{178/}

The CLOVIS BANKS contend that the profit-sharing arrangement "should be enforced as a covenant running with the land in equity," because ATLAS "took title to the claims with actual knowledge of the Net Profits Interest."^{179/} The CLOVIS BANKS have badly distorted the facts. ATLAS did not acquire the SUBJECT CLAIMS with actual knowledge or notice, and the

^{177/} Wilmurt v. McGrane, 45 N.Y.S. 32 (1897); Orenberg v. Johnston, 168 N.E. 794 (Mass. 1929); Chandler v. Smith, 338 P.2d 522 (Cal. Ct. App. 1959); Craven County v. First-Citizens Bank & Trust Co., 75 S.E.2d 620 (N.C. 1953).

^{178/} See p.61 of this brief.

^{179/} CLOVIS BANKS' BRIEF at pp.56-57.

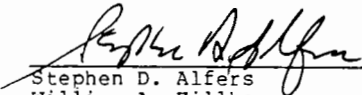
the Court expressly found that no proof was offered to show that ATLAS had actual notice of the AGREEMENTS.^{180/}


CONCLUSION

For the reasons set out in this brief and in the SUMMARY JUDGMENT, the decision of the Trial Court should be affirmed.

Respectfully submitted this 31st day of October, 1983.

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¹⁸⁰ SUMMARY JUDGMENT at ¶ 45 n. 3. (v.15, p.2107). See ATLAS' RESPONSE TO INTERROGATORIES at Response 9 (v.14, p.1732-33). In that Response ATLAS agreed not to pursue its bona fide purchaser defense. Such withdrawal is not an admission of actual notice.

TABLE OF ABBREVIATIONS

Many abbreviations are used in the body of this Brief. The Table of Abbreviations lists the abbreviations in alphabetical order with the full description or name and the volume and page(s) in the record where the document is found.

<u>Abbreviation</u>	<u>Full Description or Name</u>	<u>Record</u>	
		<u>Volume</u>	<u>Page(s)</u>
ABERNATHY	Defendant Hez Abernathy.	N.A.	N.A.
ABERNATHY ASSIGNMENT	Assignment of Hez Abernathy, acknowledged May 25, 1967, from ABERNATHY to the CLOVIS BANKS, filed in the YUCCA CASE on June 27, 1967; attached to ATLAS' SUMMARY JUDGMENT MOTION as Exhibit E.	13	1569
ABERNATHY DEED	Deed of Mining Claims dated May 25, 1967, from ABERNATHY to the CLOVIS BANKS, filed in the YUCCA CASE on June 27, 1967; attached to ATLAS' SUMMARY JUDGMENT MOTION as Exhibit D.	13	1568
ABERNATHY CLOVIS BANKS AGREEMENT	Agreement dated February 10, 1967 between the CLOVIS BANKS and ABERNATHY, et al., which is attached to ATLAS' SUMMARY JUDGMENT MOTION as Exhibit F.	13	1570-73
ABERNATHY DEPOSITION	Transcript of the Oral Deposition of Hez Abernathy; attached as Exhibit B to the STIPULATION DESIGNATING RECORD.	19	2466-2643
AGREEMENTS	The OPERATING AGREEMENT and the SALES AGREEMENT.	13	1536-66
ANDERSON	Anderson Development Corporation.	N.A.	N.A.
ANDERSON DEED	Assignment and Conveyance dated December 29, 1960 from ANDERSON to KERR-McGEE; attached to ATLAS' SUMMARY JUDGMENT MOTION as Exhibit Q.	13	1604-05

<u>Abbreviation</u>	<u>Full Description or Name</u>	<u>Record</u>	
		<u>Volume</u>	<u>Page</u>
ATLAS	Plaintiff and Respondent Atlas Corporation.	N.A.	N.A.
ATLAS-MERSFELDER STIPULATION	Stipulation and Joint Motion of Atlas and Mersfelder, filed October 8, 1982.	10	1260-1
ATLAS' RETRIAL STATEMENT	Statement of Plaintiff Atlas Corporation for the First Pre-trial Conference, September 14, 1982, Relating to the Net Profits Fractional Shares Issues, the Construction Issues and the Net Profits Calculation Issues, filed September 7, 1982.	10	1231-4
ATLAS' REPLY	Reply of Plaintiff Atlas Corporation to the Clovis Banks' Response to Atlas' Motion for Summary Judgment Against the Clovis Banks; Response to the Clovis Banks' Renewal of Motion for Partial Summary Judgment; Answering Statement of Points and Authorities, filed February 8, 1983.	14	1884-1916
ATLAS' RESPONSE TO CLOVIS BANKS' SUMMARY JUDGMENT MOTION	Response to Motion of The Clovis National Bank and The Citizens Bank of Clovis for Partial Summary Judgment with Respect to Construction Issues, filed December 14, 1982.	11	1405-5
ATLAS' RESPONSE TO INTERROGATORIES	Responses of Plaintiff Atlas Corporation to Defendants Clovis Banks' First Set of Interrogatories and Request for Production of Documents Regarding the Net Profits Construction and Calculation Issues Directed to Atlas Corporation, filed January 31, 1983.	14	Second page number: 1716-15

<u>Description</u>	<u>Full Description or Name</u>	<u>Record</u>	
		<u>Volume</u>	<u>Page(s)</u>
ATLAS' RESPONSE TO AMEND	Atlas' Response to the Motion of The Clovis National Bank and The Citizens Bank of Clovis to Amend Findings of Fact or to Make Additional Findings and Motion to Amend Judgment, filed April 18, 1983.	15	Second page numbered 2127-40
ATLAS' RESPONSE TO OBJECTIONS	Atlas' Response to the Objection of the Clovis Banks to Atlas' Proposed Findings of Fact and Conclusions of Law with Respect to Atlas' Motion for Summary Judgment Against the Clovis Banks and to the Proposed Judgment and Decree Quieting Title in Atlas Corporation Against the Clovis Banks; Request for Oral Argument; Notice of Hearing, filed March 7, 1983.	15	1939-2059
ATLAS' RESPONSE TO REQUEST FOR ADMISSION	Plaintiff Atlas Corporation's Response to the First Request for Admission of The Clovis National Bank and The Citizens Bank of Clovis Directed to Plaintiff Atlas Corporation, filed October 4, 1982.	10	1255-59
ATLAS' SUMMARY JUDGMENT MOTION	Motion of Plaintiff Atlas Corporation for Summary Judgment Against the Clovis Banks; Request for Oral Argument; Notice of Hearing; and Statement of Points and Authorities, filed January 28, 1983.	13	1470-One unnumbered page between 1715 and 1716
BARDON MINE OR BARDON SHAFT	Defined on page 9 of this brief.	N.A.	N.A.
BOONE	Defendant R. D. Boone.	N.A.	N.A.
BOONE DEPOSITION	Transcript of the Oral Deposition of R. D. Boone, filed July 20, 1982.	9	1106-1224

<u>Abbreviation</u>	<u>Full Description or Name</u>	<u>Record</u>	
		<u>Volume</u>	<u>Page/s</u>
BOONE DEED	Deed dated October 6, 1958 from MERRILL and ABERNATHY to BOONE and his wife; attached to the CLOVIS BANKS' RESPONSE TO ATLAS' SUMMARY MOTION and/or CLOVIS BANKS' RENEWAL OF SUMMARY JUDGMENT MOTION as Exhibit C.	14	1968
BOWEN ROYALTY	That royalty first reserved to Harold E. Bowen and Neva M. Bowen in a deed dated August 16, 1956, and in a deed dated September 5, 1956.	N.A.	N.A.
CLIMAX	Climax Uranium Corporation.	N.A.	N.A.
CLIMAX REPORT	Document entitled "Outline of Property Examination" dated in 1968, found by ATLAS in files received from CLIMAX and transmitted to counsel for the CLOVIS BANKS by counsel for ATLAS by letter dated March 11, 1983; which document and letter are attached to CLOVIS BANKS' MOTION TO AMEND as Exhibit "A".	15	2124- First page numbers 2127
CLOVIS BANKS	Defendants and Appellants The Citizens Bank of Clovis and The Clovis National Bank.	N.A.	N.A.
CLOVIS BANKS' BRIEF	Brief of Appellants filed on September 29, 1983 by the CLOVIS BANKS in their appeal in this case (No. 19239).	N.A.	N.A.
CLOVIS BANKS' COUNTERCLAIM	Answer, Counterclaims and Cross-Claims of the CLOVIS BANKS, filed March 31, 1981.	1	48-100
CLOVIS BANKS' MEMORANDUM	Memorandum of The Clovis National Bank and The Citizens Bank of Clovis in Support of Motion for Partial Summary Judgment Regarding the 40% Net Profits Interest "Construction Issues" and "Fractional Shares Issues," filed December 3, 1982.	11	1292- 1404

<u>Abbreviation</u>	<u>Full Description or Name</u>	<u>Record</u>	
		<u>Volume</u>	<u>Page(s)</u>
CLOVIS BANKS'	Motion for Partial Summary Judgment Regarding the 40% Net Profits Interest "Construction Issues" and "Fractional Shares Issues," filed December 3, 1982 and supported by the CLOVIS BANKS' MEMORANDUM.	Not in Record	Not in Record
CLOVIS BANKS' MOTION TO AMEND	Motion of The Clovis National Bank and The Citizens Bank of Clovis to Amend Findings of Fact or to Make Additional Findings and Motion to Amend Judgment, filed April 11, 1983.	15	2119-First page numbered 2127
CLOVIS BANKS' OBJECTIONS	Objections of the Clovis Banks to Atlas' Proposed Findings of Fact and Conclusions of Law with Respect to Atlas' Motion for Summary Judgment Against the Clovis Banks and to Atlas' Proposed Judgment and Decree Quietening Title in Atlas Corporation Against the Clovis Banks, filed March 4, 1983.	14	1917-39
CLOVIS BANKS' REPLY	Reply of the Clovis Banks to Atlas' Response to the Motion of The Clovis National Bank and The Citizens Bank of Clovis to Amend Findings of Fact or to Make Additional Findings and Motion to Amend Judgment, filed April 22, 1983.	15	2141-46
CLOVIS BANKS' RESPONSE TO ATLAS' SUMMARY JUDGMENT MOTION and/or CLOVIS BANKS' RENEWAL OF SUMMARY JUDGMENT MOTION	Response of The Clovis National Bank and The Citizens Bank of Clovis to Motion of Plaintiff Atlas Corporation for Summary Judgment Regarding the 40% Net Profits Interest Construction Issues and Renewal of Motion for Partial Summary Judgment of the Clovis Banks, filed February 7, 1983.	14	1774-1883

<u>Abbreviation</u>	<u>Full Description or Name</u>	<u>Record</u>	
		<u>Volume</u>	<u>Page</u>
DAVISON MEMO	Memorandum to File 345-23761 of FOOTE, the successor of WCA, from R. P. Davison, received by ATLAS from FOOTE, and identified as Dixon Deposition Exhibit 34 in the DIXON DEPOSITION.	16	2220
DEARTH AFFIDAVIT	Affidavit of Albert E. Dearth; attached to ATLAS' SUMMARY JUDGMENT MOTION as Exhibit H.	13	1578-81
DEARTH DEPOSITION	Transcript of the deposition of A. E. Dearth taken on December 8, 1981, filed June 1, 1983.	7	1025-44
DECEMBER 19 LETTER	Letter dated December 19, 1960 from KERR-McGEE to ABERNATHY, MERRILL and MERSFELDER; attached to ATLAS' SUMMARY JUDGMENT MOTION as Exhibit R.	13	1606-17
DECEMBER 27 LETTER	Letter dated December 27, 1960 from MERSFELDER to KERR- McGEE; attached to ATLAS' SUMMARYJUDGMENT MOTION as Exhibit S.	13	1608
DECEMBER 14 TRANSCRIPT	Transcript of the hearing in this case on December 14, 1982, filed June 24, 1983, regarding: (1) Atlas' Motion in Limine. (2) Clovis Banks Motion to Compel. (3) Atlas Motion for Protective Order. (4) Clovis Banks Motion Regarding Construction and Fractional Shares Issues. (5) Clovis Banks Motion Regarding Net Profits Interests Deductions. (6) Clovis Banks Motion for Continuance.	17	2238-67

<u>Exposition</u>	<u>Full Description or Name</u>	<u>Record</u>	
		<u>Volume</u>	<u>Page (s)</u>
	(7) Motion of Plaintiff Atlas Corporation for Order Modifying the General Pretrial Order to Vacate Trial Setting and Set Pretrial Conference Concerning the Kerr-McGee Royalty Issues.		
DISCOVERY DECISION	Decision of the Court on the Motion for Declaratory Judgment Involving the April 18 Agreement and Operating Agreement.	6	971-73
DIXON AFFIDAVIT	Affidavit of Carl Dixon and attached map; all attached as Exhibit 3 to Response of Plaintiff Atlas Corporation to The Clovis Banks' Motions Regarding Deductibility of Legal Fees, Interest Expenses, and 150% of Certain Costs, filed December 14, 1982.	12	1453-55
DIXON DEPOSITION	Transcript of the Deposition of Carl Dixon taken on January 18, 1983, filed May 31, 1983.	16	2160- 2231
FEBRUARY 8 TRANSCRIPT	Transcript of the hearing in this case February 8, 1983 regarding the Motion of Plaintiff Atlas Corporation for Summary Judgment Against the Clovis Banks, filed June 27, 1983.	18	2368- First page numbered 2405
FOOTE	Defendant Foote Mineral Company.	N.A.	N.A.
FOOTE DEED	Quit Claim Deed dated January 26, 1976 from FOOTE to ATLAS; attached to ATLAS' SUMMARY JUDGMENT MOTION as Exhibit DD.	13	One unnumbered page between 1715 and 1716

<u>Abbreviation</u>	<u>Full Description or Name</u>	<u>Record</u>	
		<u>Volume</u>	<u>Page</u>
FOOTE LEASE	Mining Lease and Sublease dated June 30, 1973 from FOOTE to ATLAS; attached to ATLAS' SUMMARY JUDGMENT MOTION as Exhibit CC.	13	167-170
GENERAL PRETRIAL ORDER	Pretrial Order Setting Discovery Cutoffs, Pretrial Conferences and Trials with Respect to the Major Issues Which Remain to be Resolved in this Action, entered April 23, 1982.	6	1000-24
HAYS-SPROULS LETTER	Letter dated August 11, 1967 from J. R. Hays, Controller, Minerals Division of KERR-McGEE and Darwin N. Sprouls, CPA, to Seventh Judicial District Judge F. W. Keller, in the YUCCA CASE; a copy of which was attached as Appendix 10 at Exhibit E to Motion for a Partial Summary Judgment Regarding the Yucca Interest, dated July 7, 1982, filed in this case on July 13, 1982.	8	1104-05
INTEREST OWNERS	ABERNATHY, MERRILL and MERSFELDER.	N.A.	N.A.
JANUARY 3 LETTER	Letter dated January 3, 1961 from KERR-McGEE to MERSFELDER; attached to ATLAS' SUMMARY JUDGMENT MOTION as Exhibit T.	13	1609-1
JUNE 7 DEED	Mining Deed dated June 7, 1957 from MERRILL, ABERNATHY and MERSFELDER, and their wives, to KERR-McGEE and MERCURY; a copy of which is attached to ATLAS' SUMMARY JUDGMENT MOTION as Exhibit A.	13	1532-3
KERR-McGEE	Defendant Kerr-McGee Corporation, formerly Kerr-McGee Oil Industries, Inc.	N.A.	N.A.

<u>Exposition</u>	<u>Full Description or Name</u>	<u>Record</u>	
		<u>Volume</u>	<u>Page(s)</u>
KERR-McGEE	Quitclaim Deed dated December 7, 1970 from KERR-McGEE to FOOTE; attached to ATLAS' SUMMARY JUDGMENT MOTION as Exhibit BB.	13	1670-72
KERR-McGEE INTERROGATORY ANSWERS	KERR-McGEE's Answers to Interrogatories of ABERNATHY and MERRILL in the YUCCA CASE filed January 11, 1967; attached to ATLAS' SUMMARY JUDGMENT MOTION as Exhibit U.	13	1611-15
KERR-McGEE MEMORANDUM	Kerr-McGee Corporation's Memo-randum in Opposition to Motion for Declaratory Judgment, filed March 15, 1982	6	960-70
LAHUSEN AFFIDAVIT	Affidavit of G. Larry Lahusen; attached to ATLAS' SUMMARY JUDGMENT MOTION as Exhibit I.	13	1581-83
MARCH 8 TRANSCRIPT	Transcript of the hearing in this case on March 8, 1983, filed July 28, 1983.	18	Second page numbered 2405-30
MAY 9 LETTER	Letter dated May 9, 1962 from KERR-McGEE to Wm. Dean McDougald; attached to CLOVIS BANKS' RESPONSE TO ATLAS' SUMMARY JUDGMENT MOTION and/or CLOVIS BANKS' RENEWAL OF SUMMARY JUDGMENT MOTION as Exhibit "H".	14	1882
MCDUGALD DEPOSITION	Transcript of the Deposition of William McDougald taken on February 10, 1981, filed November 9, 1981.	4-5	382- 822
MERCURY	Mercury Uranium and Oil Corporation.	N.A.	N.A.
MERCURY DEED	Mining Deed dated November 5, 1957 from MERCURY to ANDERSON; attached to ATLAS' SUMMARY JUDGMENT MOTION as Exhibit Z.	13	Four unnumbered pages between 1637 and 1638.
MERRILL	Defendant Lee B. Merrill.	N.A.	N.A.

<u>Abbreviation</u>	<u>Full Description or Name</u>	<u>Record</u>	
		<u>Volume</u>	<u>Page</u>
MERSFELDER	Defendant Philip G. Mersfelder, a/k/a Phillip G. Mersfelder.	N.A.	N.A.
MERSFELDER DEPOSITION	Transcript of the oral deposition of Philip G. Mersfelder on December 18, 1980, filed May 28, 1981.	2	206- 340
NET PROFITS PRETRIAL ORDER	First Pretrial Order Regarding the Net Profits Issues, entered November 10, 1982.	10	1277-
NO. 10 HOLE OR NMUC 5	Defined on page 7 of this brief.	N.A.	N.A.
NOTICE OF APPEAL	Notice of Appeal, filed herein on May 24, 1983.	15	2156-
OPERATING AGREEMENT	Operating Agreement dated April 18, 1957 between KERR-McGEE, as Operator, MERCURY, as NonOperator, and MERRILL, ABERNATHY and MERSFELDER as Interest Owners; attached to ATLAS' SUMMARY JUDGMENT MOTION as Exhibit C.	13	1546-
OPTION TO REACQUIRE	Described on page 12 of this brief.	N.A.	N.A.
ORDER DENYING MOTION TO AMEND	Order Denying the Motion of The Clovis National Bank and The Citizens Bank of Clovis to Amend Findings of Fact or to Make Additional Findings and Motion to Amend Judgment, entered May 16, 1983.	15	2151-
RULING ON MOTION TO AMEND	Ruling on Motion of Clovis Banks to Amend Findings of Fact or to Make Additional Findings of Fact and Amend the Judgment, entered April 25, 1983.	15	2147-
RULING ON OBJECTIONS	Ruling on Proposed Findings of Fact, Conclusions of Law, and Judgment on Plaintiff's Summary Judgment Against Clovis Banks entered March 15, 1983.	15	2071-

Title	Full Description or Name	Record	
		Volume	Page(s)
AGREEMENT	Agreement dated April 18, 1957 between MERRILL, ABERNATHY and MERSFELDER, as Sellers, and KERR-McGEE and MERCURY, as Buyers; attached to ATLAS' SUMMARY JUDGMENT MOTION as Exhibit B.	13	1536-45
SEPTEMBER 16 LETTER	Letter dated September 16, 1960 from SHATTUCK DENN to KERR-McGEE; attached to ATLAS' SUMMARY JUDGMENT MOTION as Exhibit O.	13	1601
SHATTUCK DENN	Shattuck Denn Mining Corporation and/or its wholly-owned subsidiary, Shattuck Denn Company.	N.A.	N.A.
SHATTUCK DENN DEED	Quit-Claim Mining Deed dated December 14, 1960 from SHATTUCK DENN to KERR-McGEE and ANDERSON; attached to ATLAS' SUMMARY JUDGMENT MOTION as Exhibit P.	13	1602-03
SHATTUCK DENN INTERROGATORY ANSWERS	Answers to Interrogatories Propounded to Shattuck Denn Corporation by the Defendants Hez Abernathy and Lee B. Merrill in the YUCCA CASE, filed January 26, 1967; attached to ATLAS' SUMMARY JUDGMENT MOTION as Exhibit V.	13	1616-20
SHATTUCK DENN LEASE	Mining Lease Agreement dated May 5, 1958 between KERR-McGEE and ANDERSON, as Lessors, and SHATTUCK DENN, as Lessee; attached to ATLAS' SUMMARY JUDGMENT MOTION as Exhibit AA.	13	1638-69
STATEMENTS OF ISSUES	Plaintiff's and Defendants, Abernathy and Merrill's, Statement of Issues Remaining to be Determined by the Court and Statement of Philip G. Mersfelder of Issues to be Resolved in Trial and Pre-Trial, both filed in the YUCCA CASE on May 12, 1967, and	13	1629-37

Abbreviation	Full Description or Name	Record	
		Volume	Page
	attached to ATLAS' SUMMARY JUDGMENT MOTION as Exhibit Y.		
STIPULATION DESIGNATING RECORD	Stipulation Between Plaintiff- Respondent Atlas Corporation and Defendants-Appellants The Clovis National Bank and The Citizens Bank of Clovis Regarding the Joint Designation of the Record on Appeal; and Order Concerning Confidential Documents for Purposes of the Clovis Banks' Appeal, filed August 17, 1983.	19	2431 2643
SUBJECT CLAIMS	Velvet and Royal Flush unpatented lode mining claims, situated in San Juan County, Utah; more particularly described in Finding of Fact No. 1 in the SUMMARY JUDGMENT.	15	2080, 2111-13
SUMMARY JUDGMENT	Findings of Fact and Conclusions of Law with Respect to Atlas' Motion for Summary Judgment Against the Clovis Banks; and Judgment and Decree Quieting Title in Atlas Corporation Against the Clovis Banks, entered April 1, 1983.	15	2075- 2118
VCA	Vanadium Corporation of America.	N.A.	N.A.
VELVET MINE	Defined on p. 13 of this brief.	N.A.	N.A.
YUCCA	Yucca Mining and Petroleum Co., the plaintiff in the YUCCA CASE.	N.A.	N.A.
YUCCA CASE	Civil Action No. 1939, brought in the Seventh Judicial District Court, San Juan County, Utah, on July 12, 1960 by Yucca Mining and Petroleum Co. against KERR- McGEE, MERRILL, ABERNATHY and MERRILL, <u>et al.</u>	N.A.	N.A.

<u>Designation</u>	<u>Full Description or Name</u>	<u>Record</u>	
		<u>Volume</u>	<u>Page(s)</u>
ATLAS CLAIMS	Answer to Complaint and Cross- Claim of Kerr-McGee Oil Industries, Inc., and Cross- Claim of Hez Abernathy, Lee B. Merrill, and Phillip G. Mersfelder in the YUCCA CASE, filed May 12, 1964; attached to ATLAS' SUMMARY JUDGMENT MOTION as Exhibit W.	13	1621-26
YUCCA CASE FINDINGS	Findings of Fact and Conclusions of Law entered September 30, 1968 in the YUCCA CASE; attached to ATLAS' SUMMARY JUDGMENT MOTION as Exhibit N.	13	1595- 1600
YUCCA CASE JUDGMENT	Judgment and Decree entered in the YUCCA CASE on September 30, 1968; attached to ATLAS' SUMMARY JUDGMENT MOTION as Exhibit X.	13	1627-28
ZITTING- ATLAS AFFIDAVIT	Affidavit of Richard T. Zitting; attached to ATLAS' SUMMARY JUDGMENT MOTION as Exhibit L.	13	1588-91
ZITTING- CLOVIS BANKS AFFIDAVIT	Affidavit of Richard T. Zitting; attached to CLOVIS BANKS' RESPONSE TO ATLAS' SUMMARY JUDGMENT MOTION and/or CLOVIS BANKS' RENEWAL OF SUMMARY JUDGMENT as Exhibit "A".	14	1856-58

IN THE SEVENTH JUDICIAL DISTRICT COURT
OF SAN JUAN COUNTY, STATE OF UTAH

ATLAS CORPORATION,
a Delaware corporation,
Plaintiff,

NATIONAL GROWTH CORPORATION,
a Colorado corporation,
et al.,

Defendants.

and

PHILLIP G. MERSFELDER and
BILLIE Y. MERSFELDER,
his wife,

Interveners.

Motion for Plaintiff Atlas
Corporation for Summary
Judgment Against the
Clovis Banks.

Civil No. 4216

in the Seventh Judicial District Court in
and for San Juan County, Utah

Filed

By

BE IT REMEMBERED that the above entitled Action

came on regularly for hearing before the Honorable Judge
Burt Bunnell, District Judge for the Seventh Judicial District
in and for San Juan County, State of Utah, on February 8th,
1931, in the San Juan County Courthouse, Monticello, Utah,
and was reported by Jean F. Greenleaf, Official District
Court Reporter and Notary Public in and for the State of
Utah.

I, the undersigned, do hereby certify that the foregoing is a true and correct copy of the original

1 extended. And I think that the Court should be aware of
2 that. And I think that the Court should be aware of
3 the fact that the Motion was made and the Motion was
4 was fully performed and carried out. The parties walked
5 from that venture and they walked away from the court.
6 And that's the point in which the 40% Net Profits Inc.
7 evaporated.

8 I think we'll submit it for decision. Your
9 THE COURT: Well, the Court has been, of course
10 wrestling with this idea long before the Motion was
11 made, as I tried to analyze these Agreements as we've
12 through the various phases of this particular case. It
13 has given the Court considerable trouble and concern
14 trying to interpret these documents as to what the intent
15 of the parties was.

16 Both of the parties to this Motion, anyway, I
17 think it is the rule in this that we, for construction
18 instruments in writing and including deeds and contracts
19 so on, the intention of the parties is made apparent
20 words in the agreements, themselves and the surrounding
21 circumstances and the law in general tends to follow
22 the performance of the parties. And I think that the
23 intention of the parties is made apparent by the words
24 and deeds.

25 And I think that the Court should be aware of that.

- 23 -

1 through this and read the various memorandums and listened
2 to your argument today, that the contract of sale was for a
3 buy and sell of those particular Claims; the interest owners
4 being the sellers; the operator and non-operator, being Kerr-
5 McGee and Mercury, were the buyers. And they had entered
6 into a contract of sale and that contract of sale obviously
7 expressed what the consideration was going to be. The
8 consideration being payment in cash of \$150,000, exchange of
9 some stock that went to the interest owner, and there was
10 some obligations created for the receivers of those Claims
11 to go in and see if there was commercially mineable ore on
12 the Claims.

13 The parties said: "We will enter into an agreement
14 to govern the rights, duties, and responsibilities of all
15 three of us now by entering into an Operating Agreement."
16 That was done. The Operating Agreement in accordance with
17 the Sales Agreement was then executed. So we look within
18 those documents. But I view the Operating Agreement as part
19 of the consideration for the transfer, which it obviously
20 was. Because the buy and sell agreement says: "We will do it,"
21 and even outlines specifically a lot of its terms as to what
22 each of these parties will do in carrying out their obliga-
23 tions to develop these particular Claims to see if there is
24 ore there. And the deed was given. The deed provides that
25 this conveyance is made subject to this consideration. The

1 consideration being the execution of the Operating Ag-
2 To the Court that "subject to" means that when you
3 coming in and buying out Kerr-McGee's interest in
4 has to go look to see if this Operating Agreement is in
5 force and effect; and if it is in force and effect, the
6 taking those Claims subject to the Operating Agreement.
7 I cannot reason that it says "subject to" any type of con-
8 or reservation that is contained anywhere else or is in
9 within the Agreements themselves. In other words, to a
10 "subject to" does not necessarily exclude the fact that the
11 Agreement might create the royalty interest, but it does
12 necessarily mean that it does create a royalty interest
13 parties take those Claims, too. It means they're taking
14 subject to that Operating Agreement, but I think within the
15 conditions, if it is still in force and effect; because
16 and I say that, because the Sales Agreement and portion
17 the Operating Agreement within their very terms provide
18 a termination and completion of that Agreement. In other
19 words, it starts out by saying that the grantees of the
20 particular land will go in and they will use their best
21 efforts to try to find some ore. I believe that's in the
22 the last paragraph of the Sales Agreement. And then the
23 Operating Agreement says: "Well, if you find oil, gas,
24 and so on, and it is in force and effect, then you will
25 have the right to shut it down." And so the Operating

1 now ore, the Operating Agreement was finished. It was over.
2 The consideration that they had pledged to give to the
3 grantors, had been given. They had gone in and explored and
4 found nothing. Agreement -- Nobody had any obligation after
5 that time to perform anything, if no more was found. The
6 Claims would remain in existence but nobody had any obligation
7 to anybody else at that point, if it hadn't been found.
8 All right. Then it goes on to say: "But if you do find ore
9 and get production up to a certain limit, then we are entitled
10 to participate in the property: but only then." Assuming
11 they -- Looking at the surrounding circumstances, if they had
12 never -- even though they dug a shaft, but never had been
13 able to produce ore of that quantity or quality to be commer-
14 cially mineable, or the 25 tons per day and so on, the Agree-
15 ment says that Kerr-McGee can keep all of the profits from
16 any time. So at that point they owe the interest holders
17 absolutely nothing and they have performed completely under
18 the "subject's" provisions of the deed: because they've got
19 exactly what their consideration is. So within the Agreement
20 itself, it provides for a termination. Not only that, but
21 the Operating Agreement says that Kerr-McGee can at any time
22 in their own discretion abandon mining. Just walk off and
23 leave it if they want to, in their own discretion: but if they
24 do, then Mercury has a first option to buy them for their
25 interest in the mine and the geological area around the mine.

1 providing they pay them for all of their equipment,
2 site improvements and so on. All detailed in the
3 If Mercury doesn't want to pick up that, then the
4 owners have the right to go in and pick up that mine for
5 them that amount of money. Again, if they do that, the
6 Agreement is terminated. There is no agreement to pay
7 any profits because there isn't any, as far as Kerr-McGee
8 and Mercury is concerned. So again, the Agreement itself
9 by its own terms terminates, if those conditions happen.
10 In this case, those conditions did happen: in that, for
11 at the surrounding circumstances of what the parties did,
12 Kerr-McGee went in and explored. They found commercial
13 They produced. They took back their original retainers,
14 profits, 150% and so on, got their production up, made
15 accounting, paid the interest owners, had a lawsuit with
16 Judge Keller over who owed what to whom, and abandoned
17 mine and quit. And gave notice to the interest owners,
18 "you want the mine." The interest owners in effect, the
19 letter, I believe, from Mr. Mersfelder, says, "Well, I
20 be interested but I want more information on the mine."
21 gave him more information, wrote him another letter in
22 "Now do you want it?" He says -- I don't know whether
23 responded. But at least he didn't purchase any right
24 to claim the mine and so, Kerr-McGee is entitled to
25 the mine and take it into his own interest. He didn't do that.

1 to me that terminates the Agreement. The interest owners
2 have received everything they bargained for in their buy and
3 sell Agreement by way of consideration for the transfer of
4 those Claims. And once they decided that the -- they didn't
5 want to pick up the mine, they didn't want to pay Kerr-McGee
6 anything for their on-site improvements and so on, they were
7 given the opportunity to do, the Agreement by its own terms,
8 terminated, and nobody at that point on had any obligation
9 under the Agreement itself.

10 Now, there's also a provision that says Kerr-McGee
11 and Mercury can actually not only abandon but they can --
12 what's the words used there -- they can let the Claims expire.
13 In other words, they can cease to do the assessment work and
14 let them expire if they want to. But if they do, first Kerr-
15 McGee has to give Mercury the first option to pick them up
16 just by saying: "If you're not going to do them, I want your
17 interest." Kerr-McGee had an automatic obligation under the
18 Agreement to convey their interest in the Claims to Mercury.
19 If Mercury didn't want them then, then the interest owners
20 have the right to get everybody's interest in the Claims and
21 get the title to the Claims back. If that had occurred at
22 any time, again, there's no obligation for anybody to do
23 anything or convey under the Agreement. So the Agreement
24 would terminate. Now, of course, it would terminate prob-
25 ably in another legal theory; but separate and apart from the

1 legal theory, and expression of the parties in their
2 provides that it has a limitation, a duration, an
3 action and a completion -- the way the Court sees it.

4 So the Court in this case feels that the
5 and the way the parties conducted themselves under it
6 that it had a definite limitation, a determination the
7 part of the consideration. The interest owners received
8 that consideration when there was exploration, there
9 abandonment, and they were given the opportunity to
10 over the mine and they didn't exercise it. They received
11 all of the consideration to which they were entitled.

12 Now, the provision that says that the covenants
13 in this Agreement run with the land is contained in the
14 middle of a paragraph that has exclusively to do with the
15 buy and sell Agreement between Kerr-McGee and Mercury
16 has -- it does not even mention the interest owners.
17 In the middle of a paragraph that has to do with the
18 sell Agreement between those two parties. And it says
19 they are bound by the terms of the Agreement otherwise
20 other words, it talks about mergers. If Kerr-McGee
21 merged with some other corporation, that other corporation
22 had to come in under this Agreement. And then it goes
23 on to say that "being bound by all of the terms of the
24 Agreement" and then it's just a general statement.
25 It says that: "The parties, covenants, and conditions"

C-402

1 Agreement shall be a covenant running with the land." in the
2 middle of the paragraph. I take that to mean that they say
3 that all of the terms and conditions run with the land as
4 long as the Agreement is in force and effect. There is only
5 one way you can do it, because to put it otherwise, we have
6 to say that all of the terms run with the -- with these
7 claims. And that's an impossible construction. You can't
8 have accounting procedures, you can't have inspection pro-
9 cedures, and all of the various detail provisions of the
10 Operating Agreement attaching to the land. It would be an
11 impractical construction to say that "all of the terms," and
12 that's what it says, "all the terms are covenants." And
13 there are so many of those that are not covenants and can no
14 way even be interpreted as covenants. And they've either
15 all got to go or none in the opinion of the Court. So when
16 they say: "It's a covenant running with the land," says,
17 "all of the terms and conditions," it's not just referring
18 to the 40% interest and saying "that runs, but nothing else,
19 that nobody else has any obligations that attach but the
20 40% does." We can't give it that construction logically.

21 So the Court is of the opinion that we have to
22 qualify that and say: "The terms and conditions run with the
23 land as long as those terms and conditions are in force and
24 effect, and the terms and conditions at the time that Morris
25 transferred this property, and Operating Agreement had

1 raised in order because the parties did not intend
2 of the agreement and that the parties did not
3 the parties at that time and the parties did not
4 was abandoned. Compactly, the parties were.

5 And not only that, but, these parties were
6 knowledgeable about how to create royalty interests.
7 they provide in their Agreement that there are some
8 interests outstanding. They even provide who's going
9 pay them and out of whose share of profits they're going
10 take care of the various royalty interest. And still
11 made no mention about the 40% becoming specifically a
12 interest, to be paid out no matter who's got the share
13 so on. So there is not a specific provision. And the
14 knew what those were and could have very easily, with
15 matter of the use of four or five words prevented our
16 argument here today. And then, being knowledgeable
17 in the mining business, and they did not do that. So
18 to that is kind of a negative implication that this is
19 intended as just a one-time consideration for the use
20 of those claims to see whether or not there was some
21 use on the premises, to participate in the profits
22 that are of those claims and if they abandoned them,
23 then someone else takes them and the agreement is that
24 the parties did not intend to create a royalty interest
25 in an abandoned claim, but that the parties did not

1 have written on the land. And I just can't find it
2 myself. Obtain the terms of all these Agreements.

3 So, bottom line, the Court is going to grant the
4 Motion for Summary Judgement in behalf of Atlas, deny the
5 Motion as far as Clovis Banks are concerned.

6 The Court will further order that this Judgement
7 will be a final Judgement, so that immediate appeal can be
8 taken to have the matter reviewed by the Supreme Court, if
9 either of the parties desire that.

10 And I think I've pretty well stated -- I originally
11 thought maybe I would put all of it in writing, just so that
12 I wasn't misunderstood as the reasons for it. But I think
13 I'll leave it up to the attorneys for Atlas, at least, to
14 prepare a decision in accordance with what I've just said.
15 And then I'll see if I want to add something to it before
16 I formally sign it -- since I've tried to explain as best
17 I could here orally. There's probably some refinements I
18 want to put on it before I finally sign it: so that everybody
19 will know exactly what direction I'm coming from for the
20 purpose of review.

21 MR. ALFERS: Your Honor, we'll then propose final
22 findings and Judgement, and in those findings and con-
23 clusions I take it we'll be finding a specific order that this
24 Judgement is final and appealable, there being no just reason
25 for delay.

Filed April 1, 1973
San L. Dutton, Clerk

By Charles S. Smith

IN THE SEVENTH JUDICIAL DISTRICT COURT
OF SAN JUAN COUNTY, STATE OF UTAH

ATLAS CORPORATION, a Delaware
corporation,

Plaintiff,

vs.

NATIONAL GROWTH CORPORATION, a
Colorado corporation, formerly
known as Yucca Mining and
Petroleum Co., Inc., a Colorado
corporation, and also formerly
known as Northwestern Mining
& Petroleum Co., a Colorado
corporation, and as Northwestern
Mining and Petroleum Company, a
Colorado corporation; BERNARD B.
RAIZEN, Successor Receiver for
National Growth Corporation;
BERNARD B. RAIZEN and LIBBY G.
RAIZEN, husband and wife; KERR-
MCGEE CORPORATION, a Delaware
corporation, formerly known as
Kerr-McGee Oil Industries, Inc.;
URANIC MINING COMPANY, also
known as Uranic Mining Co., and
as Uranic, Inc., a Colorado
corporation; HED ABERNATHY, an
unmarried man; LEE B. MERRILL,
also known as L. B. Merrill and
as Lee Merrill, and MILDRED
MERRILL, husband and wife;
MICHAEL LEE MERRILL, an unmarried
man; STEVE FRANCIS MERRILL, also
known as Steven Francis Merrill,
and RHONDA MERRILL, husband and
wife; DAVID PAUL MERRILL and
PAMELA MERRILL, husband and wife;
MARK ALLEN MERRILL and CASSANDRA
MERRILL, husband and wife;
RALPH D. BICONE, also known as

State of Utah
County of San Juan ss
I hereby certify that the document to which this certificate
is attached is a true and correct copy of the original
filed in the
this 1st day of April, 1973
Witness my hand and the seal of
the Court at
San Juan, Utah
Charles S. Smith
Clerk

FINDINGS OF FACT AND
CONCLUSIONS OF LAW WITH
RESPECT TO ATLAS' MOTION
FOR SUMMARY JUDGMENT
AGAINST THE CLOVIS BANKS;
AND JUDGMENT AND DECREE
QUIETING TITLE IN ATLAS
CORPORATION AGAINST THE
CLOVIS BANKS

Civil No. 4216

R. D. Boone, and EILEA BOONE, husband and wife; WILLIAM C. HANCOCK, also known as William Hancock, Personal Representative of the Estate of JOHN T. HANCOCK, also known as Jack Hancock, deceased; WILLIAM C. HANCOCK, in his individual capacity, and MADONNA HANCOCK, husband and wife; CHARLES LEE HANCOCK, an unmarried man; CHARLOTTE "SCOTTIE" HANCOCK, also known as Charlotte Hancock, an unmarried woman; ROSS HANCOCK, an unmarried man; ZONA DOUGHTY, formerly Zona Hancock, also known as Zona Hancock, and also formerly known as Zona Garlick, and JACK LEROY DOUGHTY, wife and husband; THE CLOVIS NATIONAL BANK, a national banking association and corporation; THE CITIZENS BANK OF CLOVIS, a New Mexico banking corporation; THE CLOVIS NATIONAL BANK, a national banking association and corporation, Trustee of the Bettye Diane Boone Trust under the Trust Agreement dated November 15, 1979; SECURITY STATE BANK OF FARWELL, Farwell, Texas, a Texas corporation, Successor Trustee of the Bettye Diane Boone Trust under the Trust Agreement dated November 15, 1979; THE CLOVIS NATIONAL BANK, a national banking association and corporation, Trustee of the Stanley W. Boone Trust under the Trust Agreement dated November 15, 1979; SECURITY STATE BANK OF FARWELL, Farwell, Texas, a Texas corporation, Successor Trustee of the Stanley W. Boone Trust under the Trust Agreement dated November 15, 1979; BLANCH L. FRANKLIN,

known as Blanche L. Epmeler :
 and as Blanche Epmeler, an :
 unmarried woman; HAROLD E. BOWEN, :
 also known as Harold Bowen, :
 and NEVA M. BOWEN, also known as :
 Neva N. Bowen, and as Neva Bowen, :
 husband and wife; BOWEN :
 ENTERPRISES, a limited partner- :
 ship; LESTER MERRILL and ANITA :
 MERRILL, husband and wife; :
 WILLIAM G. BUSH, also known as :
 William C. Bush, and COLLEEN :
 CHRISHOLM BUSH, also known as :
 Colleen Chrisholm Bush, husband :
 and wife; WILLIAM D. McDOUGALD, :
 also known as William Dean :
 McDougald, and VEDA M. McDOUGALD, :
 also known as Veda M. McDougald, :
 husband and wife; MILDRED E. :
 McDOUGALD, an unmarried woman; :
 MORTGAGE COMPANY OF DENVER, a :
 partnership; FIRST SECURITY BANK :
 OF UTAH, N.A., a national banking :
 association and corporation; :
 RICHARD E. WESTWOOD, ARDIS W. :
 GJELSTEEN, and CRAIG B. BENTLEY, :
 Trustees under the Trust Agree- :
 ment of Verlyn W. Bentley dated :
 November 21, 1958; FIRST SECURITY :
 BANK OF UTAH, N.A., a national :
 banking association and corpora- :
 tion; THOR GJELSTEEN and VERLYN :
 W. BENTLEY, Trustees under the :
 Trust Agreement of Ardis W. :
 Gjelsteen dated November 21, :
 1958; MANUFACTURERS HANOVER :
 TRUST COMPANY, a New York :
 banking corporation; WILLIAM G. :
 HARDING and IRENE HARDING, :
 husband and wife; A. N. YATER, :
 also known as Nog Yater and as :
 Ray Yeater, and RUTH YATER, also :
 known as Ruth Yeater, husband :
 and wife; THE HEIRS AT LAW OF :
 WILLIAM J. OWEN, DECEASED; :
 DOROTHY K. GUINAND, formerly :

Dorothy K. Owen, and JEROME B. GUINAND, wife and husband; DEBRA GUINAND, formerly Debra Owen, an unmarried woman; TRACY GUINAND, formerly Tracy Owen, an unmarried woman; JAY COATES and DONNA COATES, husband and wife; LARRY LAHUSEN, also known as G. Larry Lahusen and as G. L. Lahusen, an unmarried man, individually and d/b/a G. L. Lahusen and Associates, MARY LAHUSEN, an unmarried woman, formerly the wife of Larry Lahusen; COATES AND LAHUSEN ENTERPRISES, also known as Coates and Lahusen, as 'Coates - 'Lahusen, and as Coates-Lahusen, a Utah partnership composed of Jay Coates and Larry Lahusen; FUEL SUPPLY SERVICE, INC., a Florida corporation; NELSON L. LEMON and IRENE LEMON, husband and wife; ROBERT L. CARTER and ADA MAE CARTER, husband and wife; WILLIAM K. CARTER, an unmarried man; DONALD RAY CARTER, an unmarried man; CLIFFORD LEE CARTER, an unmarried man; MICHELLE CHANTAY CARTER KIMBER, formerly Michelle Chantay Carter, and GREGORY SCOTT KIMBER, wife and husband; THOMAS BALSLEY, also known as Tom Balsley, and LILY ANN BALSLEY, husband and wife; J. F. COSTANZA, also known as Joseph F. Costanza and as Jim Costanza, and JOYCE L. COSTANZA, husband and wife; LILE FRANCOIS and CLARA FRANCIS, husband and wife; G. S. THOMSON and NORMA THOMSON, husband and wife; DAVID W. ALLEN and MARY ALLEN, husband and wife; BROWN COMPANY, a Delaware corporation, successor in interest of Shattuck Denn Mining Corporation, a Delaware

corporation, FOSTE MINERAL
 COMPANY, a Pennsylvania corpora-
 tion, formerly known as Vanadium
 Corporation of America, a
 Pennsylvania corporation;
 AGUITAINE MINING CORPORATION, a
 Delaware corporation; HUNT OIL
 COMPANY, a Delaware corporation;
 E. W. REINHARDT and EVELYN
 REINHARDT, husband and wife;
 C. E. MARLOW and MARY MARLOW,
 husband and wife; R. W. PATENAUDE
 and MARY E. PATENAUDE, husband
 and wife; D. E. HOFFMAN and
 _____ HOFFMAN, husband and
 wife; F. A. HAGER and _____
 HAGER, husband and wife;
 EDWARD DWYER and EVELYN DWYER,
 also known as E. T. Dwyer,
 husband and wife; ROBERT L. MEHL
 and NANETTE MEHL, husband and
 wife; REID ENTERPRISES, INC., a
 Delaware corporation; JAMES E.
 CAMPBELL and BETTY ANN CAMPBELL,
 husband and wife; NL INDUSTRIES,
 INC., formerly known as National
 Lead Company, a New Jersey corpo-
 ration; CORNUCOPIA GOLD MINES, a
 Washington corporation; JOHN O.
 WILKS, JR., Receiver in Bank-
 ruptcy for Cornucopia Gold Mines;
 A. ALFRED FRANKS, also known as
 A. A. Franks, an unmarried man;
 FIRST DOE; SECOND DOE; THIRD DOE;
 FOURTH DOE; FIFTH DOE; SIXTH DOE;
 SEVENTH DOE; EIGHTH DOE; NINTH
 DOE; TENTH DOE, and also all
 other persons unknown claiming
 any right, title, estate or
 interest in or lien upon the
 patented lode mining claims
 described in the Second Amended
 Complaint of the Plaintiff.
 adverse to Plaintiff's ownership
 in blocking Plaintiff's title
 thereto.

Defendants, :
and :
PHILLIP G. MERSFELDER, also :
known as Philip G. Mersfelder :
and as Bud Mersfelder, and :
BILLIE Y. MERSFELDER, his wife, :
Intervenors. :

FINDINGS OF FACT AND CONCLUSIONS OF LAW
WITH RESPECT TO ATLAS' MOTION FOR SUMMARY
JUDGMENT AGAINST THE CLOVIS BANKS; AND
JUDGMENT AND DECREE QUIETING TITLE IN
ATLAS CORPORATION AGAINST THE CLOVIS BANKS

FINDINGS OF FACT

Based upon the pleadings; the depositions, affidavits and exhibits presented by the parties; the uncontroverted evidence introduced into the record in earlier phases of this case and the Court's familiarity with this case since 1979, the Court finds that there is no genuine issue as to the following facts:

1. Plaintiff Atlas Corporation ("ATLAS") filed this lawsuit on November 26, 1979 seeking, among other things, a judgment and decree quieting its title to certain unpatented lode mining claims situate in San Juan County, Utah, which are more particularly described in Exhibit A attached hereto and incorporated by this reference (the "SUBJECT CLAIMS").

2. ATLAS named as defendants all parties who had possible claims of record to the SUBJECT CLAIMS, including The Citizens Bank of Clovis, a New Mexico banking corporation, and The Clovis National Bank, a national banking association and corporation (collectively the "CLOVIS BANKS") and sought a determination of their interest, if any, in the SUBJECT CLAIMS. The claims of all parties other than the CLOVIS BANKS have now been resolved, either by stipulation or by litigation during the course of this case.

3. In their joint Answer, Counterclaims and Cross-Claims, the CLOVIS BANKS asserted as their sole interest in the SUBJECT CLAIMS a right to a fractional share of ATLAS' net profits from all ores mined and sold from the SUBJECT CLAIMS. The CLOVIS BANKS claim that right under a profit sharing arrangement provided in two Agreements, each dated April 18, 1957, as the successor to defendant Her Abernathy, one of the parties to those Agreements.

4. On April 23, 1982, the Court entered its Pre-trial Order Setting Discovery Cutoffs, Pretrial Conferences and Trials With Respect to the Major Issues Which Remain to be Resolved in this Action. In that pretrial order, the Court segmented this case for trial and scheduled eight trials for the determination of the major issues in this case. Among those major issues set for trial were the following:

a. The determination of the priority and validity of, and ATLAS' possessory title to the SUBJECT CLAIM set for June 15, 1982; and

b. The determination of the claims, if any, the CLOVIS BANKS and others to a fractional share of ATLAS' profits from the SUBJECT CLAIMS under the two Agreements dated April 18, 1957.

5. On June 15, 1982, pursuant to the April 23 Pretrial Order, the Court held a trial to determine ATLAS' title to the SUBJECT CLAIMS. On July 13, 1982, the Court entered its judgment and decree quieting ATLAS' title to the SUBJECT CLAIMS subject to the interests, if any, of the CLOVIS BANKS and others, those interests having been left for further determination pursuant to the April 23 Pretrial Order.

6. On December 2, 1982, the CLOVIS BANKS served their Motion for Partial Summary Judgment seeking a declaration that their claim to a fractional share of ATLAS' profits from the SUBJECT CLAIMS is a perpetual real property interest which continues to exist and which is binding on ATLAS. On December 13, 1982, ATLAS served its Response to Motion of The Clovis National Bank and The Citizens Bank of Clovis for Partial Summary Judgment with respect to Construction Issues. Following a hearing on December 14, 1982, the Court denied the motion of the CLOVIS BANKS.

7. On January 25, 1983, ATLAS served its Motion for Summary Judgment Against the CLOVIS BANKS seeking a declaration that the CLOVIS BANKS have no right, title or interest in the SUBJECT CLAIMS on the grounds, first, that the profit sharing arrangement on which the CLOVIS BANKS base their claim was limited in extent and duration and no longer exists; and second, alternatively, that if the profit sharing arrangement still exists, it is not binding on ATLAS. ATLAS moved further, pursuant to Rule 54(b) of the Utah Rules of Civil Procedure, for a court order that such declaratory judgment be made final on the ground that there is no just reason for delay.

8. The CLOVIS BANKS served their response to ATLAS' summary judgment motion on February 4, 1983, and in their response the CLOVIS BANKS objected to ATLAS' Motion and renewed their own December 2 Motion. ATLAS served its reply on February 7, 1983.

9. A hearing on ATLAS' summary judgment motion and on the CLOVIS BANKS' motion, as renewed, was held on February 8, 1983. At the hearing, ATLAS and the CLOVIS BANKS appeared through their counsel of record. After considering the motions, the responses and replies, the statements of points and authorities and other memoranda, the undisputed documentary evidence submitted by the parties and the argu-

ments of counsel, the Court orally granted ATLAS' motion, and denied the CLOVIS BANKS' motion, as renewed. ATLAS and the CLOVIS BANKS agree that no genuine issue of material fact remains to be determined by the court that is necessary to the disposition of their respective motions for summary judgment.

10. On April 18, 1957, three individuals, defendant Lee B. Merrill ("MERRILL"), defendant Hez Abernathy ("ABERNATHY"), and defendant Phillip G. Mersfelder ("MERSFELDER") owned the SUBJECT CLAIMS subject to a royalty and to certain other rights, all of which have been previously adjudicated in the earlier phases of this case.

11. In late 1956 and early 1957, MERRILL, ABERNATHY and MERSFELDER, through their wholly owned corporation, N.M.U.C. Inc., and their predecessor in interest, had carried out exploration on the SUBJECT CLAIMS, and they had encountered uranium mineralization. On April 18, 1957, MERRILL, ABERNATHY, and MERSFELDER entered into an Agreement under which they agreed to sell the SUBJECT CLAIMS to Kerr-McGee Oil Industries Inc. (now defendant Kerr-McGee Corporation, "KERR-McGEE") and defendant Mercury Uranium and Oil Company ("MERCURY"). That Agreement is referred to hereafter as the "SALES AGREEMENT". They agreed to sell the SUBJECT CLAIMS for cash, MERCURY common stock and for the additional consideration of the specific affirmative under-

taking by KERR-McGEE and MERCURY to explore the SUBJECT CLAIMS with reasonable diligence. /1/ KERR-McGEE and MERCURY agreed further that in the event such exploration discovered commercial ore they would define and develop the ore body indicated thereby, mine the ore body if feasible, and share the net

1 Section 5 of the SALES AGREEMENT provides as follows: .

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 percent (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.

profits as defined in the SALES AGREEMENT, if any, with MERRILL, ABERNATHY, and MERSFELDER. 12

12. KERR-McGEE and MERCURY were mining companies. Through N.M.U.C. Mining, Inc., MERRILL, ABERNATHY, and MERSFELDER had been engaged in the uranium exploration business prior to April 18, 1957. MERRILL, ABERNATHY, MERSFELDER, KERR-McGEE, and MERCURY were all experienced and knowledgeable in the uranium mining business and were represented by their respective counsel in negotiating, drafting, and executing the SALES AGREEMENT and the other instruments related to it.

2 Section 6 of the SALES AGREEMENT provides as follows:

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 overhead of said claims as follows, to-wit:

Sellers	Forty	40 percent
Kerr-McGee	Thirty	30 percent
Mercury	Thirty	30 percent

13. The purchase and sale contemplated by the SALES AGREEMENT was consummated on June 7, 1957 upon the delivery to MERRILL, ABERNATHY, and MERSELDER of \$100,000 cash and 50,000 shares of MERCURY common stock, guaranteed at \$1.00 per share, and the delivery of a deed dated June 7, 1957 (the "JUNE 7 DEED") to KERR-McGEE and MERCURY, conveying all of the right, title and interest of MERRILL, ABERNATHY, and MERSELDER to KERR-McGEE and MERCURY.

14. Because the JUNE 7 DEED left unperformed certain affirmative obligations of KERR-McGEE and MERCURY, the JUNE 7 DEED was made subject to the SALES AGREEMENT. The JUNE 7 DEED contained the following language:

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.

15. As provided in Section 8 of the SALES AGREEMENT and as part of the consideration for the conveyance of the SUBJECT CLAIMS, KERR-McGEE as Operator, MERCURY as Non-Operator and MERRILL, ABERNATHY, and MERSELDER as Interest Owners, entered into an Operating Agreement dated April 18, 1957 (the "OPERATING AGREEMENT") with respect to the rights, duties and responsibilities of the parties on the SUBJECT CLAIMS. The OPERATING AGREEMENT shifted to KERR-McGEE as Operator all of the duties to explore, define, develop and

mine the SUBJECT CLAIMS, undertaken by both KERR-McGEE and MERCURY under the SALES AGREEMENT.

16. By Mining Deed dated November 5, 1957, MERCURY conveyed all of its interest in the SUBJECT CLAIMS to Anderson Development Corporation ("ANDERSON"). This conveyance was made expressly subject to the OPERATING AGREEMENT.

17. KERR-McGEE, as Operator under the OPERATING AGREEMENT, commenced with reasonable diligence and diligently prosecuted exploration and other activities sufficient in the opinion of KERR-McGEE to test the lands covered by the SUBJECT CLAIMS for the presence of commercial ore deposits. In this exploration work, KERR-McGEE discovered commercial ore and proceeded to define the ore body indicated thereby.

18. In the opinion of KERR-McGEE, the ore body so defined and developed was sufficient to justify mining. Therefore, with reasonable diligence and specifically referring to the OPERATING AGREEMENT, KERR-McGEE arranged for the mining of that ore body under a Mining Lease Agreement dated May 5, 1958 with Shattuck Denn Mining Company ("SHATTUCK DENN"). With reasonable diligence, a shaft was sunk, the shaft and the mine were equipped and SHATTUCK DENN achieved production capability at the level of twenty-five (25) tons or more of ore per day.

19. The mine opened by KERR-McGEE and SHATTUCK DENN on the SUBJECT CLAIMS was called the BARDON MINE. KERR-McGEE and SHATTUCK DENN carried out mining operations at the BARDON MINE until they determined that commercial mining was no longer feasible.

20. On September 16, 1960, SHATTUCK DENN notified KERR-McGEE of its desire to abandon the BARDON MINE and its interest in the SUBJECT CLAIMS. On November 14, 1960, SHATTUCK DENN conveyed all of its interest in the SUBJECT CLAIMS to KERR-McGEE and ANDERSON.

21. KERR-McGEE determined to abandon the BARDON MINE and, on December 19, 1960, gave written notice of that intention to MERRILL, ABERNATHY, and MERSFELDER in accordance with Section V of the OPERATING AGREEMENT. Although Section V of the OPERATING AGREEMENT gave MERRILL, ABERNATHY, and MERSFELDER the right to acquire the BARDON MINE, they did not exercise that right.

22. By Assignment and Conveyance dated December 29, 1960 ANDERSON conveyed all of its interest in the SUBJECT CLAIMS to KERR-McGEE. This Assignment and Conveyance makes no reference either to the SALES AGREEMENT or to the OPERATING AGREEMENT.

23. Shortly after January 3, 1961, KERR-McGEE abandoned the BARDON MINE and wound up operations. The

surface facilities of the BARDON MINE were removed; assets used at the BARDON MINE were liquidated; and the mine was filled with water and could have been of no use in the development and mining of any other ore body which might have been discovered.

24. KERR-McGEE then made its final accounting to MERRILL, ABERNATHY, and MERSFELDER disclosing that there were no net profits to share. In Yucca Mining and Petroleum Company v. Kerr-McGee Oil Industries, Inc., et al., Civil No. 1939 (District Court for the Seventh Judicial District, San Juan County, Utah, filed July 12, 1960) (the "YUCCA CASE"), MERRILL, ABERNATHY, and MERSFELDER asserted a cross-claim against KERR-McGEE, alleging that they were entitled to net profits which KERR-McGEE had realized as a result of its operations at the BARDON MINE. MERRILL, ABERNATHY, and MERSFELDER did not assert any other claims in the YUCCA CASE against KERR-McGEE and in particular they did not ask the Court to declare that KERR-McGEE had any obligations to them other than with respect to the BARDON MINE. In its Findings of Fact and Conclusions of Law and Judgment and Decree in the YUCCA CASE, dated September 9, 1968, the Court found that KERR-McGEE had complied with each and all of the terms and conditions of the OPERATING AGREEMENT. That Court held that there were no profits to be shared with MERRILL, ABERNATHY

and MERSFELDER and concluded they were not entitled to any monetary award or any other or different judgment or relief against KERR-McGEE, SHATTUCK DENN or MERCURY.

25. During the pendency of the YUCCA CASE, on May 25, 1967, the CLOVIS BANKS acquired the interest of ABERNATHY in the SUBJECT CLAIMS, and they accepted an assignment of ABERNATHY's causes of action in the YUCCA CASE.

26. On March 29, 1963, without discovering any other ore bodies, KERR-McGEE optioned the SUBJECT CLAIMS to Vanadium Corporation of America, the predecessor of defendant Foote Mineral Company ("FOOTE"), and on December 7, 1970, KERR-McGEE conveyed the SUBJECT CLAIMS to FOOTE by a deed which makes no reference to either the SALES AGREEMENT or the OPERATING AGREEMENT, or to any continuing interest of MERRILL, ABERNATHY, MERSFELDER or the CLOVIS BANKS. FOOTE did not assume any obligation with respect to these two Agreements.

27. On June 30, 1973, FOOTE leased the SUBJECT CLAIMS to ATLAS, and on January 26, 1977, ATLAS accepted a quitclaim deed from FOOTE conveying the SUBJECT CLAIMS to ATLAS. Neither the lease nor the deed refers either to the SALES AGREEMENT or to the OPERATING AGREEMENT, or to any continuing interest of MERRILL, ABERNATHY, MERSFELDER or the CLOVIS BANKS.

28. Since 1977, ATLAS has conducted and caused to be conducted extensive exploration activities on the SUBJECT CLAIMS and has discovered a substantial ore body. ATLAS constructed a decline and the other workings and facilities (the "VELVET MINE") to serve that ore body. Atlas commenced production in November of 1979, and has carried out mining operations since that time.

29. The ore body served by the VELVET MINE is separate and distinct from the ore body served by the BARDON MINE, and there is no connection between the workings of the VELVET MINE and the workings of the BARDON MINE.

30. The OPERATING AGREEMENT provided various points at which the responsibilities of the Operator could be fully discharged and after which MERRILL, ABERNATHY, and MERSFELDER would have no further claim to share in net profits. For example, under Section III of the Operating Agreement, if KERR-McGEE were to explore the SUBJECT CLAIMS with reasonable diligence and then determine that no commercial ore existed, the consideration for which MERRILL, ABERNATHY, and MERSFELDER had bargained would have been fully performed. Similarly, if KERR-McGEE found commercial ore but determined that mining was not feasible, MERRILL, ABERNATHY, and MERSFELDER would have received all that they bargained for. If KERR-McGEE found and developed ore, but for some reason was unable to

achieve a production level of 25 tons per day or, having done so, was unable to recover 150% of its costs, as provided in Section III of the OPERATING AGREEMENT, MERRILL, ABERNATHY, and MERSFELDER would have had no claim to net profits. Yet once again the Agreements would have been fully performed.

Under Section V of the OPERATING AGREEMENT, KERR-McGEE might elect to abandon a mine. Upon such an abandonment, if the Non-Operator should decline to take over the operations, the OPERATING AGREEMENT would terminate. The OPERATING AGREEMENT would terminate, either because MERRILL, ABERNATHY, and MERSFELDER would take over operations themselves to the exclusion of both KERR-McGEE and MERCURY or because they would decline to take over the operations, leaving KERR-McGEE and/or MERCURY in possession of the SUBJECT CLAIMS to the exclusion of MERRILL, ABERNATHY, and MERSFELDER. In either case, the venture would be terminated; KERR-McGEE's obligations would be satisfied; and MERRILL, ABERNATHY, and MERSFELDER would have received their consideration and have no further rights. Upon such abandonment, 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.

Under Section VI of the OPERATING AGREEMENT, KERR-McGEE might elect to drop the SUBJECT CLAIMS. KERR-McGEE might decline to perform assessment work, exposing the SUBJECT CLAIMS to the risk of forfeiture by relocation. But having decided to do so, KERR-McGEE was obliged, first, to notify MERCURY and, then, MERRILL, ABERNATHY, and MERSEFELDER, who in turn might elect to acquire the SUBJECT CLAIMS to the exclusion of KERR-McGEE. Similarly, at that point the venture would be concluded and the Agreements would be terminated.

31. Furthermore, both the SALES AGREEMENT and the OPERATING AGREEMENT contain provisions indicating the parties' intent to limit their relationship to single mining ventures. Section 5 of the SALES AGREEMENT provided for exploration, discovery of commercial ore, development of the ore body so discovered, determination of commercial feasibility, sinking shaft, equipping the shaft and mine workings, achieving a production level of 25 tons per day, further exploration, drilling and development of the deposit, and mining operations. Although Section 5 does not expressly preclude exploration, development, or mining of another ore body, it does not contemplate development of other ore bodies. Section 6 sets up the profit sharing arrangement with respect to the ore body to be developed pursuant to Section 5.

reasonable construction of the language could apply the profit sharing arrangement to all ore bodies in perpetuity.

The OPERATING AGREEMENT makes the point even more directly. It sets in motion a chain of events which begins with the commencement of exploration and ends either with the development, mining, and abandonment of operations of an ore body or with any of the other occurrences which would terminate the Agreements. Section III of the OPERATING AGREEMENT sets a standard for full performance of the affirmative covenants of the SALES AGREEMENT. KERR-MCGEE having undertaken exploration, having found commercial ore, and having developed and mined the ore body, KERR-MCGEE's affirmative obligations were fully performed. Although Section 5 does not expressly preclude exploration, development, or mining of another ore body, it does not contemplate development beyond the specified joint mining venture. Section 6 sets up the profit sharing arrangement with respect to the ore body to be developed pursuant to Section 5. No reasonable construction of the language could apply the profit sharing arrangement to all ore bodies in perpetuity not resulting from the stated and agreed joint mining venture.

22. Although the SALES AGREEMENT and the OPERATING AGREEMENT refer to other interests as "royalties" and the parties clearly appreciated the rights and obligations

associated with a royalty, they do not use that term or any other appropriate term of art describing the profit sharing arrangement as a real property interest. Their failure to express any intention that the profit sharing arrangement was a royalty or mineral interest shows their intention that the profit sharing arrangement be a contract right, not a mineral or royalty interest.

33. Factually, the profit sharing arrangement was a right to share in a common fund of profits, if any, realized from operations by KERR-McGEE and MERCURY as calculated in the Agreements.

34. MERRILL, ABERNATHY, and MERSFELDER retained no estate in the SUBJECT CLAIMS or in any related lands; nor did they agree to use their share of the net profits, if any, in any way that would affect the SUBJECT CLAIMS. The benefit was in gross.

35. Many of the provisions of the OPERATING AGREEMENT are not covenants at all, but procedures--inspection and accounting, for example--which relate only to what is to be done during actual operations. Moreover, there is nothing in the Agreements that suggests that one or another of the terms, covenants, and conditions of the Agreements should be treated any differently from the others. The parties did not intend and could not have intended, that the provisions of the

OPERATING AGREEMENT in general or the profit sharing arrangement in particular would burden the SUBJECT CLAIMS and run with land as real covenants beyond the duration of the OPERATING AGREEMENT.

36. There are no just reasons for delay in making the Court's judgment final and immediately appealable as to all issues between ATLAS and the CLOVIS BANKS under Rule 54(b), U.R.C.P.

CONCLUSION OF LAW

From the foregoing Findings of Fact, the Court states the following Conclusions of Law:

37. There are no genuine issues of material fact and it is appropriate to dispose of the matters presented by the motions of ATLAS and the CLOVIS BANKS on summary judgment.

38. KERR-McGEE and MERCURY acquired the SUBJECT CLAIMS subject to the SALES AGREEMENT. Because Section 8 of the SALES AGREEMENT anticipated the execution of the OPERATING AGREEMENT, KERR-McGEE and MERCURY acquired the SUBJECT CLAIMS also subject to the OPERATING AGREEMENT. The issue before the Court is whether the CLOVIS BANKS' share in ATLAS' profits is, as the CLOVIS BANKS contend, a perpetual mineral or royalty interest binding on ATLAS or, as ATLAS contends, a contract right to share in a common fund of profits limited in extent

and duration to the single mining operation undertaken and concluded between 1957 and 1961. Resolving that issue involves the interpretation of the SALES AGREEMENT, the JOINT DEED, and the OPERATING AGREEMENT, and in interpreting those instruments it is appropriate for the Court to consider those instruments themselves, and the surrounding circumstances and the conduct of the parties which illuminate the meaning of those instruments.

39. The Court concludes that the obligation of KERR-McGEE and MERCURY to share profits with MERRILL, ABERNATHY, and WERSFELDER, and with the CLOVIS BANKS as ABERNATHY's successors, was limited in extent and duration by the Agreements themselves to a single uranium mining venture which was undertaken, carried out and concluded between 1957 and 1961. KERR-McGEE and MERCURY performed those limited obligations in full, and upon the winding up of that mining venture all of the rights of MERRILL, ABERNATHY, and WERSFELDER, and the CLOVIS BANKS, were extinguished and all of the obligations of KERR-McGEE and MERCURY, and of ATLAS as their successor were discharged.

40. The SALES AGREEMENT, and particularly the OPERATING AGREEMENT, within their very terms provided for a completion of the mining venture therein contemplated and for the termination of those Agreements. The Court reaches that

conclusion upon the interpretation of the Agreements themselves. Having discovered commercial ore and having commenced and concluded operations, KERR-McGEE and MERCURY fully performed their obligations. MERRILL, ABERNATHY, and MERSFELDER were thus fully satisfied and the obligations of KERR-McGEE and MERCURY were discharged. The Agreements contemplated a specific mining venture. That specificity is inconsistent with a construction that the profit sharing arrangement was intended to be perpetual. Section 5 of the SALES AGREEMENT provided for a specific mining method to be employed in a particular mining operation with specific economic parameters, and Section 6 of the SALES AGREEMENT provided for a profit sharing arrangement with respect to the operations contemplated in Section 5. Neither Section 5 nor Section 6 can be read as creating a right to share profits from all operations on the SUBJECT CLAIMS in perpetuity. The OPERATING AGREEMENT was the agreement contemplated in Section 8 of the SALES AGREEMENT to be entered into with respect to the operations of KERR-McGEE and MERCURY on the SUBJECT CLAIMS. Section III of the OPERATING AGREEMENT restates substantially the obligations of KERR-McGEE and MERCURY found in Sections 5 and 6 of the SALES AGREEMENT. Like the SALES AGREEMENT, Section III of the OPERATING AGREEMENT contains language specific to a single mining operation.

41. The Court reaches the same conclusion as a matter of law based on an interpretation of the Agreements together with the undisputed evidence of the circumstances surrounding the Agreements and the course of performance of the Agreements by the parties which limited the mining venture therein contemplated to the BARDON MINE. Whether or not the parties might have continued their operations on the SUBJECT CLAIMS after the exhaustion of the BARDON MINE, as a matter of undisputed fact, they did not. Instead they abandoned the BARDON MINE, wound up their operations and liquidated the joint assets. The consideration for the purchase and sale of the SUBJECT CLAIMS was fully accomplished and, as a matter of law, the SALES AGREEMENT and the OPERATING AGREEMENT were completely performed. The circumstances surrounding the Agreements and the parties' course of performance reinforces the Court's conclusion that the Agreements unambiguously limited the profit sharing arrangement to the single mining venture therein contemplated. However, if there were any ambiguity in the Agreements on the point, then the Court would adopt the interpretation of the Agreements dictated by the parties' conduct.

42. Section I of the OPERATING AGREEMENT provides as follows:

1. Period of Agreement Concerning Operations.

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

The mining claims so identified are the SUBJECT CLAIMS, and they remain valid mining claims today. However, it does not follow either that the OPERATING AGREEMENT is still in effect or that the profit sharing arrangement found in Sections 5 and 6 of the SALES AGREEMENT and in Section III of the OPERATING AGREEMENT is still in effect. The term of the OPERATING AGREEMENT as set forth in Section I is indefinite, not perpetual. Section I cannot be construed in isolation. To determine the duration of the Agreements, the Court must construe those Agreements as a whole, and in light of the purpose of the Agreements as expressed by the parties in the Agreements themselves. The duration of the OPERATING AGREEMENT and the SALES AGREEMENT must be reasonably limited by their purpose.

The purpose of the SALES AGREEMENT and the OPERATING AGREEMENT was to govern the performance of the obligations of TERRACED and MERCURY under the SALES AGREEMENT left unperformed at the time of the delivery of the JUNE 7 DEED. Those obligations, as expressed in Section 5 and Section 6 of the SALES AGREEMENT and in Section III of the OPERATING AGREEMENT,

were limited to the mining venture undertaken by KERR-McGEE and MERCURY in 1957 and, upon completion of that venture, were fully discharged.

As Operator under the OPERATING AGREEMENT, KERR-McGEE took possession of the SUBJECT CLAIMS and commenced exploration. KERR-McGEE encountered a commercial ore deposit and engaged SHATTUCK DENN to carry out mining operations. KERR-McGEE and SHATTUCK DENN opened the BARDON MINE to serve the deposit encountered. The BARDON MINE was exhausted. SHATTUCK DENN then recommended that the mine be abandoned, and SHATTUCK DENN released its interest in the SUBJECT CLAIMS to KERR-McGEE. Pursuant to the OPERATING AGREEMENT, KERR-McGEE gave notice to MERRILL, ABERNATHY, and MERSEFELDER of its intention to abandon the BARDON MINE; and they declined to exercise their right to purchase KERR-McGEE's interest and take over operations. KERR-McGEE and ANDERSON, MERCURY's successor, then wound up all operations, and ANDERSON conveyed its interest to KERR-McGEE. KERR-McGEE liquidated the assets removed from the BARDON MINE and made its final accounting to MERRILL, ABERNATHY, and MERSEFELDER. After protracted litigation, that accounting was approved by the Court in the YUCCA CASE. KERR-McGEE has thus fully performed its obligations under the SALES AGREEMENT and the OPERATING AGREEMENT. Those Agreements have achieved their purpose and

all rights of MERRILL, ABERNATHY, and MERSFELDER under them were extinguished.

43. The CLOVIS BANKS contend that their claim to a share of profits is, in effect, a mineral or royalty interest, and as such is perpetual. Alternatively, the CLOVIS BANKS argue that their claim to a share of profits is a perpetual covenant running with land or otherwise enforceable against ATLAS in the same manner as a perpetual land use restriction, equitable servitude, or easement. The profit sharing arrangement in the SALES AGREEMENT and the OPERATING AGREEMENT is not an interest in land or a burden on land. Instead, it is a right arising under those Agreements which is enforceable only so long as the Agreements are in force.

44. The claim of the CLOVIS BANKS is to a common fund of profits peculiarly calculated in the manner set forth in the SALES AGREEMENT and the OPERATING AGREEMENT. Such interests are unlike mineral or royalty interests, and they are generally held to be contract rights, not mineral or royalty interests. In any event, it is the parties' intention derived from a reasonable construction of the language of the Agreements that controls. In the SALES AGREEMENT and the OPERATING AGREEMENT the parties did not characterize the profit sharing arrangement as a royalty or mineral interest, despite their familiarity with those concepts. The JUNE "

DEED does not reserve a mineral or royalty interest. The parties were experienced in negotiating and drafting mining agreements. Their decision not to characterize the profit sharing arrangement as a royalty or mineral interest demonstrates their intention that the profit sharing arrangement be a contract right, not a mineral or royalty interest.

Although the JUNE 7 DEED was expressly "subject to" the SALES AGREEMENT, the words "subject to" do not in themselves effect such a reservation; nor do those words in themselves express the intention to reserve such an interest. The Court does not hold that the use of the words "subject to" instead of the words "except and reserve" can never create a mineral or royalty interest where such an intention is otherwise evident. The Court does hold, however, that 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.

45. The CLOVIS BANKS' claim is at most a contract right to share in a common fund of profits as provided in the SALES AGREEMENT and the OPERATING AGREEMENT. ATLAS was not party to those Agreements. The CLOVIS BANKS do not -- and cannot -- contend that ATLAS expressly or impliedly assumed those Agreements, and ATLAS is not bound by those Agreements.

under principles of contract law. The profit sharing arrangement found in the SALES AGREEMENT and the OPERATING AGREEMENT is not binding on ATLAS as a covenant running with land. Those agreements do not express the parties' specific intention that the profit sharing arrangement run with land. Section VIII of the OPERATING AGREEMENT provides in part as follows:

All sales 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.

The SALES AGREEMENT and the OPERATING AGREEMENT contain many terms and conditions which cannot possibly be covenants, let alone covenants running with land, and the Court cannot therefore construe that language as expressing the parties' intention that all terms, covenants, and conditions run with land forever. Nor can that language be read as expressing an intention that one or another, but not all, of the terms, covenants and conditions found in the Agreements run with land. 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-MACBEE or MERCURY or their respective successors, but only

so long as mining operations were on-going and only so long 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.

This construction is even clearer when the phrase ". . . deemed running with the land . . ." is read in the context in which it was used. Section VIII of the OPERATING AGREEMENT deals with limits on conveyances or other transfers by KERR-McGEE or MERCURY or their respective interests in the SUBJECT CLAIMS and with the parties' option or right of first refusal in the event of such a sale. Clearly what the parties intended was to bind KERR-McGEE's and MERCURY'S respective successors to the OPERATING AGREEMENT, so long as that agreement remained in effect. Section VIII cannot be construed as expressing either a general intention that the OPERATING AGREEMENT run with land or a specific intention that the profit sharing arrangement found in Section III run with land.

Moreover, the profit sharing arrangement in the S&M AGREEMENT and the OPERATING AGREEMENT is not a covenant which runs with land, regardless of the parties' intent. The arrangement merely to share net profits where the covenantee own no estate in related land does not have a permanent effect of a physical nature upon land itself. Nor do the benefit-

parties of the obligation own an estate in land benefitted by the covenant.

Because the SALES AGREEMENT and the OPERATING AGREEMENT neither express the intention that the covenant run with land, nor create a covenant which by its very nature becomes united with and an integral part of land, the profit sharing arrangement is a benefit in gross; it cannot be enforced as a covenant running with land.

As a personal covenant, the profit sharing arrangement found in the SALES AGREEMENT and the OPERATING AGREEMENT is not otherwise enforceable against ATLAS as a use restriction, negative easement or equitable servitude. The CLOVIS BANKS contend that ATLAS is bound to the profit sharing arrangement simply because ATLAS has notice of the agreements.¹³ Even assuming ATLAS' notice, there is no evidence that the parties to the Agreements intended the profit sharing arrangement to be a use restriction, negative easement or equitable servitude. The profit sharing arrangement is, at best, a personal covenant conferring a benefit in gross.

The Court does not understand the CLOVIS BANKS to argue that ATLAS had actual notice of either the SALES AGREEMENT or the OPERATING AGREEMENT, and there is no factual basis upon which to conclude that ATLAS had actual notice. Moreover, although the issue of whether ATLAS had constructive or inquiry notice of those Agreements, has not been resolved, the Court assumes such notice for purposes of this ruling only.

Therefore, without the requisite intent and benefit to Atlas, such covenant is not enforceable as a use restriction, negative easement, or equitable servitude.

46. Since the CLOVIS BANKS' only claim to the SUBJECT CLAIMS is to a fractional share of profits arising under the SALES AGREEMENT and the OPERATING AGREEMENT, as ABERNATHY's successor, the CLOVIS BANKS as a matter of law have no right, title or interest in the SUBJECT CLAIMS and judgment shall be entered quieting ATLAS' title against the CLOVIS BANKS.

47. The Court concludes, as a matter of law, that this judgment should be made a final judgment as to all issues between ATLAS and the CLOVIS BANKS under Rule 54(b), Utah Rules of Civil Procedure.

JUDGMENT AND DECREE

NOW, THEREFORE, the Court having made its Findings of Fact and Conclusions of Law and the Court having further concluded that the CLOVIS BANKS are fully subject to the jurisdiction of this Court, that it has jurisdiction of the subject matter of this action under the constitution and laws of the State of Utah, and that the judgment herein is made within the lawful jurisdiction of the Court,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED AS
FOLLOWS:

48. The Motion of Plaintiff Atlas Corporation for Summary Judgment Against the CLOVIS BANKS is granted in its entirety and the Court declares that the CLOVIS BANKS HAVE NO RIGHT, TITLE, ESTATE OR INTEREST IN OR TO OR LIEN UPON THE SUBJECT CLAIMS AND THE LAND COVERED THEREBY, OR ANY PART THEREOF; ALL OF THEIR CLAIMS OR DEMANDS TO ANY RIGHT, TITLE, ESTATE OR INTEREST IN OR TO OR LIEN UPON THE SUBJECT CLAIMS AND THE LAND COVERED THEREBY, OR ANY PART THEREOF, ARE INVALID, GROUNDLESS AND OF NO FORCE AND EFFECT; AND THEY ARE HEREBY FOREVER ENJOINED FROM CLAIMING, ASSERTING OR ENFORCING ANY RIGHT, TITLE, ESTATE OR INTEREST WHATEVER IN OR TO OR LIEN UPON THE SUBJECT CLAIMS AND THE LAND COVERED THEREBY, OR ANY PART THEREOF.

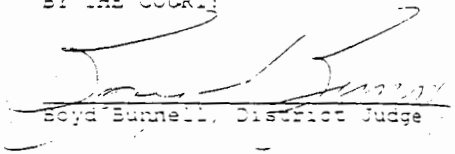
49. This Judgment and Decree is hereby made final as to all issues between ATLAS and the CLOVIS BANKS under Rule 54(b) of the Utah Rules of Civil Procedure, there being no just reason for delay.

50. Additional judgments and decrees in this action have been, and or will be, entered with respect to claims and parties not disposed of by this Judgment and Decree; therefore pursuant to paragraph 5 of the Judgment and Decree relating Title in Atlas Corporation, dated July 13, 1982,

following the ultimate disposition of this action, ATLAS may move for a judgment and decree which will incorporate this judgment and decree and any and all other judgments and decrees previously entered in this action.

Dated this 25th day of March, 1983.

BY THE COURT:



Boyd Bunnell, District Judge

EXHIBIT A
TO
FINDINGS OF FACT AND CONCLUSIONS OF LAW
WITH RESPECT TO ATLAS' MOTION FOR
SUMMARY JUDGMENT AGAINST THE CLOVIS
BANKS; AND JUDGMENT AND DECREE
QUIETING TITLE IN ATLAS CORPORATION
AGAINST THE CLOVIS BANKS

THE SUBJECT CLAIMS

The following unpatented lode mining claims situate in San Juan County, Utah which were described by reference to the copies of the Notices of Location and Amended Notices of Location which appear in the Office of the San Juan County, Utah, Recorder, and further described by metes and bounds in the Judgment and Decree Quieting Title in Atlas Corporation entered by the Court in Civil No. 4216 on July 13, 1982 as follows:

<u>Name of Claim</u>	<u>Notice of Location Recorded</u>			<u>Amended Notice(s) of Location Recorded</u>		
	<u>Book</u>	<u>Page</u>	<u>Date</u>	<u>Book</u>	<u>Page</u>	<u>Date</u>
Royal Flush #1	136	150	08/15/56	610	365	10/01/79
Royal Flush #2	136	150	08/15/56	610	366	10/01/79
Royal Flush #3	136	151	08/15/56	610	367	10/01/79
Royal Flush #4	136	151	08/15/56	610	368	10/01/79
Royal Flush No. 3 Fraction	611	339	10/16/79	612	787	11/29/79
Royal Flush No. 4 Fraction	612	352	11/13/79			
Velvet #1	136	152	08/15/56	138	366	09/04/56
				172	126	05/03/57
				590	931	06/28/78
				611	340	10/16/79
				614	947	02/06/80

<u>Name of Claim</u>	<u>Notice of Location Recorded</u>			<u>Amended Notice of Location Recorded</u>		
	<u>Book</u>	<u>Page</u>	<u>Date</u>	<u>Book</u>	<u>Page</u>	<u>Date</u>
Velvet #2	136	152	08.15/56	138	366	09/04/56
				172	127	06/03/56
				590	932	06/28/56
				611	341	10/16/56
				614	948	02/06/56
Velvet #3	136	153	08/15/56	138	367	09/04/56
				172	128	06/03/56
				590	933	06/28/56
				611	342	10/16/56
				614	949	02/06/56
Velvet #4	136	153	08/15/56	138	367	09/04/56
				172	129	06/03/56
				590	934	06/28/56
				611	343	10/16/56
				614	950	02/06/56
Velvet #5	136	154	08.15/56	138	368	09/04/56
				172	130	06/03/56
				590	935	06/28/56
				611	344	10/16/56
				614	951	02/06/56
Velvet #6	136	154	08.15/56	138	368	09/04/56
				172	131	06/03/56
				590	936	06/28/56
				611	345	10/16/56
				614	952	02/06/56
Velvet #7	136	155	08.15/56	138	369	09/04/56
				172	132	06/03/56
				590	937	06/28/56
				611	346	10/16/56
				614	953	02/06/56
Velvet #8	136	155	08.15/56	138	369	09/04/56
				172	133	06/03/56
				590	938	06/28/56
				611	347	10/16/56
				614	954	02/06/56
Velvet #9	136	156	08.15/56	138	370	09/04/56
				172	134	06/03/56
				590	939	06/28/56
				611	348	10/16/56
				614	955	02/06/56

<u>Name of Claim</u>	<u>Notice of Location Recorded</u>			<u>Amended Notice(s) of Location Recorded</u>		
	<u>Book</u>	<u>Page</u>	<u>Date</u>	<u>Book</u>	<u>Page</u>	<u>Date</u>
Velvet #10	136	156	08/15/56	138	370	09/04/56
				172	135	06/03/57
				590	940	06/28/78
				611	349	10/16/79
				614	956	02/06/80
Velvet #11	136	157	08/15/56	138	371	09/04/56
				172	136	06/03/57
				590	941	06/28/78
				611	350	10/16/79
				614	957	02/06/80
Velvet #12	136	157	08/15/56	138	371	09/04/56
				172	137	06/03/57
				590	942	06/28/78
				611	351	10/16/79
				614	958	02/06/80
Velvet #13	136	158	08/15/56	138	372	09/04/56
				172	138	06/03/57
				590	943	06/28/78
				611	352	10/16/79
				614	959	02/06/80
Velvet #14	136	158	08/15/56	138	372	09/04/56
				172	139	06/03/57
				590	944	06/28/78
				606	326-	08/03/79
					327	
				611	353	10/16/79
				614	960	02/06/80
Velvet #15	136	159	08/15/56	138	373	09/04/56
				172	140	06/03/57
				590	945	06/28/78
				611	354	10/16/79
				614	961	02/06/80
Velvet #16	136	159	08/15/56	138	373	09/04/56
				172	141	06/03/57
				590	946	06/28/78
				611	355	10/16/79
				614	962	02/06/80
Velvet #17	136	160	08/15/56	138	374	09/04/56
				172	142	06/03/57
				590	947	06/28/78
				611	356	10/16/79
				614	963	02/06/80

<u>Name of Claim</u>	<u>Notice of Location Recorded</u>			<u>Amended Notice Location Recd.</u>		
	<u>Book</u>	<u>Page</u>	<u>Date</u>	<u>Book</u>	<u>Page</u>	<u>Date</u>
Velvet #18	136	160	08.15.56	138	374	09.04.56
				172	143	06.03.56
				590	948	06.03.56
				611	357	10.16.56
				614	964	02.06.56
Velvet #19	136	161	08.15.56	138	375	09.04.56
				172	144	06.03.56
				590	949	06.03.56
				611	358	10.16.56
				614	965	02.06.56
Velvet #20	136	161	08.15.56	138	375	09.04.56
				172	145	06.03.56
				590	950	06.03.56
				611	359	10.16.56
				614	966	02.06.56
Velvet #21	136	162	08.15.56	138	376	09.04.56
				172	146	06.03.56
				591	1	06.03.56
				611	360	10.16.56
				614	967	02.06.56
Velvet #22	136	162	08.15.56	138	376	09.04.56
				172	147	06.03.56
				591	2	06.03.56
				611	361	10.16.56
				614	968	02.06.56
Velvet #23	136	163	08.15.56	138	377	09.04.56
				172	148	06.03.56
				591	3	06.03.56
				611	362	10.16.56
				614	969	02.06.56
Velvet #24	136	163	08.15.56	138	377	09.04.56
				172	149	06.03.56
				591	4	06.03.56
				611	363	10.16.56
				614	970	02.06.56
Velvet #25	136	164	09.04.56	138	150	06.03.56
				172	151	06.03.56
				591	5	06.03.56
				611	364	10.16.56
				614	971	02.06.56
Velvet #26	136	164	09.04.56	138	151	06.03.56
				172	152	06.03.56
				591	6	06.03.56
				611	365	10.16.56
				614	972	02.06.56

Thence, N. $89^{\circ}50'15''$ E., 412.80 feet along the Nor-
 side line of Section 3 to a point on the Southeast
 side line of Red Rock No. 2 Claim;
 Thence, N. $67^{\circ}35'23''$ E., 181.97 feet along the
 Southeast side line of Red Rock No. 2 to the S.E.
 Cor. of Red Rock No. 2;
 Thence, N. $21^{\circ}00'36''$ W., 600.00 feet along the
 Northeast end line of Red Rock No. 2 to the N.E. Co-
 of Red Rock No. 2;
 Thence, S. $67^{\circ}35'23''$ W., 138.11 feet along the
 Northwest side line of Red Rock No. 2 to a point on
 the Northeast end line of Red Rock No. 1;
 Thence, N. $21^{\circ}15'36''$ W., 170.07 feet along the
 Northeast end line of Red Rock No. 1 to a point on
 the Northwest side line of Velvet No. 21;
 Thence, N. $14^{\circ}33'39''$ E., 177.94 feet along the
 Northwest side line of Velvet No. 21 to the N.W. Co-
 of Velvet No. 21;
 Thence, S. $73^{\circ}54'08''$ E., 3000 feet along the Northeast
 end lines of Velvet No.'s 21, 22, 23, 24, and 25 to
 the NE Cor. of Velvet No. 25, also the Northwest
 corner of Velvet No. 26;
 Thence, S. $73^{\circ}54'08''$ E., 243.21 feet along the
 Northeast end line of Velvet No. 26 to a point on the
 South side line of Section 34, which bears S.
 $89^{\circ}50'15''$ W., 1934.89 feet from the NE Cor. of
 Section 3, T.31S., R.25E., S1B1M;
 Thence, S. $73^{\circ}54'08''$ E., 356.79 feet along the
 Northeast end line of Velvet No. 26 to the NE Cor. of
 Velvet 26, also the NW Cor. of Velvet No. 27;
 Thence, S. $73^{\circ}54'08''$ E., 1200 feet along the Northeast
 end lines of Velvet No.'s 27 and 28 to the NE Cor. of
 Velvet 28, also the NW Cor. of Velvet 29;
 Thence, S. $73^{\circ}54'08''$ E., 458.23 feet along the
 Northeast end line of Velvet No. 29 to a point on the
 East side line of Section 3, which bears S.
 $0^{\circ}06'52''$ E., 564.21 feet from the NE Cor. of
 Section 3, T.31S., R.25E., S1B1M;
 Thence, S. $0^{\circ}06'52''$ E., 559.40 feet along the East
 side line of Section 3, to a point on the Southeast
 side line of Velvet No. 29, also the Northwest side
 line of Velvet No. 30;
 Thence, S. $0^{\circ}06'52''$ E., 1002.16 feet along the East
 side line of Section 3, to a point on the Southwest
 end line of Velvet No. 30, also a point on the
 Northeast end line of Velvet No. 19;

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Thence, S. $0^{\circ}06'52''$ E., 660.43 feet along the East side line of Section 3 to a Government Brass Cap witness corner for the E. $1/4$ Cor. of Section 3, T.31S., R.25E., SLEB;
 Thence, S. $0^{\circ}00'42''$ E., 124.02 feet along the East side line of Section 3, to a point on the Northeast end line of Nog No. 1;
 Thence, N. $73^{\circ}56'57''$ W., 161.33 feet along the Northeast end line of Nog No. 1 to a point on the Northeast end line of Nog No. 1;
 Thence, S. $14^{\circ}58'27''$ W., 2100.00 feet to a point on the Southwest side line of BO No. 1;
 Thence, S. $73^{\circ}56'57''$ E., 323.94 feet along the Southwest side line of BO No. 1 to a point on the Southwest side line of BO No. 1, also a point on the Northeast end line of BO No. 2, also a point on the Southeast side line of Velvet No. 20;
 Thence, S. $14^{\circ}33'39''$ W., 746.24 feet along the Southeast side line of Velvet No. 20, thence, along the Southeast end line of Velvet No. 34 to the SE Cor. of Velvet No. 34 which bears S. $62^{\circ}40'39''$ W., 646.60 feet from the SE Cor. of Section 3, T.31S., R.25E., SLEB;
 Thence, N. $73^{\circ}54'08''$ W., 1054.36 feet along the Southwest side line of Velvet 34 to a point on the South side line of Section 3, also the North side line of Section 10 which bears S. $89^{\circ}50'23''$ W., 1587.49 feet from the SE Cor. of Section 3, T.31S., R.25E., SLEB;
 Thence, N. $73^{\circ}54'08''$ W., 3835.99 feet along the Southwest side line of Velvet No.'s 34, 33, 32 and 31 to a point on the Southwest side line of Velvet No. 31, also a point on the West side line of Section 3, also a point on the East side line of Section 4;
 Thence, N. $0^{\circ}05'34''$ W., 244.69 feet along the common line between Section 3 and 4 to the NE Cor. of the S. $1/2$ of the SE $1/4$ of Section 4, T.31S., R.25E., SLEB;
 Thence, N. $89^{\circ}53'26''$ W., 2630.84 feet along the North side line of the South $1/2$ of the SE $1/4$ of Section 4, to a point the NW Cor. of the South $1/2$ of the SE $1/4$ of Section 4, T.31S., R.25E., SLEB;
 Thence, S. $89^{\circ}53'26''$ E., 0.00 feet to a point on the North side line of the South $1/2$ of the SE $1/4$ of Section 4, also a point on the Northwest end line of Royal Flush No. 4;

Thence, N. $14^{\circ}33'39''$ E., 1345.22 feet along the Northwest end line of Royal Flush No.'s 4, 3, and 1 to a point on the Northwest end line of Royal Flush No. 2, also a point on the Southeast end line of Snow Cap No. 5;

Thence, N. $75^{\circ}00'23''$ E., 179.88 feet along the Southeast end line of Snow Cap No. 5 to the SE Cor. of Snow Cap No. 5, also the SW Cor. of Snow Cap No. 3;

Thence, N. $57^{\circ}30'24''$ E., 600.00 feet along the Southeast end line of Snow Cap No. 3 to the SE Cor. of Snow Cap No. 3, also the SW Cor. of Snow Cap No. 1;

Thence, N. $41^{\circ}15'24''$ E., 166.54 feet along the Southeast end line of Snow Cap No. 1 to a point on the Northeast side line of Royal Flush No. 1;

Thence, S. $75^{\circ}26'21''$ E., 859.93 feet along the Northwest side line of Royal Flush No. 1 to the NE Cor. of Royal Flush No. 1, also a point on the Northwest side line of Velvet No. 2;

Thence, N. $14^{\circ}33'39''$ E., 458.29 feet along the Northwest side line of Velvet No. 2 to a point on the Southeast end line of Red Rock No. 4;

Thence, N. $70^{\circ}45'15''$ E., 8.38 feet to the SE Cor. of Red Rock No. 4;

Thence, N. $21^{\circ}19'26''$ W., 11.88 feet to a point on the Northwest side line of Velvet No. 2;

Thence, N. $14^{\circ}33'39''$ E., 53.06 feet to the NW Cor. of Velvet No. 2, also the SW Cor. of Velvet No. 1;

Thence, N. $14^{\circ}33'39''$ E., 575.23 feet along the Northwest side line of Velvet No. 1 to a point on the Southeast side line of Red Rock No. 6;

Thence, N. $72^{\circ}03'24''$ E., 409.51 feet along the Southeast side line of Red Rock No. 6 to a point on the common line between Section 3 and 4;

Thence, N. $0^{\circ}03'24''$ W., 1312.01 feet to the point of beginning, the NE Cor. of Sec. 4, also the NW Cor. of Sec. 3, T.31S., R.26E., S1E.M.

A G R E E M E N T

THIS AGREEMENT, Made and entered into this 18th day of April, 1957, by and between LEE B. MERRILL of Clovis, New Mexico, HED AZENWATHY, of Clovis, New Mexico, and PHILIP G. MERSFELDER 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:

Valvet Claims 1-34, inclusive
 Royal Flush Claims 1, 2, 3 and 4
 (a portion of the lands covered by Valvet 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 24, Township 30 South, Range 25 East, Salt Lake Meridian, San Juan County, Utah, comprising approximately 8-0 acres, more or less;

and Sellers represent that said claims cover the minerals in and to said lands, including uranium, vanadium or ores, in-

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

WHEREAS, Sellers are desirous of selling to Buyers, their said undivided right, title and interest in and to, 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' attorney designated in writing to Sellers, an Abstract of Title on 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 dated to a recent date not earlier than March 1, 1957 and shall show good possessory title in and to said claims to and for the Sellers as against every person (and entity) except the United States of America and as otherwise set forth.

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 Sellers, in writing, of any title defects or requirements to be made, or corrective work to be done. Sellers shall

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 to be paid by Kerr-McGee.
- (b) Fifty Thousand Dollars (\$50,000.00) cash to be paid by Mercury.
- (c) Delivery by Mercury of 80,000 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 warrant) 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 sale from all ores mined, produced and sold, including a part of said gross receipts all premiums and bonuses paid to Buyers by the Atomic Energy Commission or its government authorized purchaser, less all allowances for haulage and development.

(b) Some right or interest owned by Yucca Mining & Petroleum Co., Inc., a Colorado corporation, of Alamosa, New Mexico.

(c) Some right or interest owned by Uranic Mining Company, a Colorado Corporation of Grand Junction, Colorado, in care of Walter Lybarger.

(d) It is understood and agreed that said interests of Yucca and the said interest of Uranic shall be paid only out of Sellers' net profits interest hereinafter set forth in Paragraph 5 below and Buyers' interest so acquired hereunder shall in no way be subject to said interests of Yucca and Uranic, and Sellers do agree to hold Buyers harmless from and indemnify Buyers with respect thereto.

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

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 share 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, effective March 31, 1961, 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 interests, 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 operating mills located within a 100 mile radius of said Shiprock.

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 Mercury 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 thereof 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 Mercury in all respects in connection with Sellers' respective interests in and to the said claims and the joint property and all payments, account 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 he is entitled hereunder shall be paid.

10. In the event of the discovery of a commodity body as hereinabove provided Buyer agree to mine, remove and sell such ore from said claims with reasonable diligence 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, Buyers shall not be required to continue mining said claim during any such period of time, it being understood and agreed that in the event of such suspension or cessation of buying by the United States Government of said minerals, Buyers shall make reasonable effort to find a satisfactory market.

11. All payments to which Sellers may be entitled under this respect to said net profits shall be paid by Buyer or whichever of Buyers shall be operator of the properties within thirty (30) days following receipt of payment from the sales sold by Buyers from said claims, and such payments shall be accompanied by settlement sheet hereafter.

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

SELLERS:

[Signature]
[Name]
[Address]
[City, State, Zip]

BUYERS:

[Signature]
[Name]
[Address]
[City, State, Zip]

[Signature]
[Name]
[Address]
[City, State, Zip]

STATE OF California } ss
COUNTY OF San Diego }

On the 22nd day of May, A. D. 1937,
personally appeared before me John C. Vickrey,
who, being by me duly sworn, did say that he is Vice
President of WATER-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. Vickrey
acknowledged to me that said Corporation executed the same.

John C. Vickrey
Notary Public
in and for the San Diego County
State of California

My Commission Expires:

January 17, 1940

Residence:

San Diego, California

STATE OF New Mexico } ss
COUNTY OF Bernillo }

On the 18th day of April, A.D. 1937,
personally appeared before me Carl O. Anderson,
who, being by me duly sworn, did say that he is
President of Lincoln Station 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 Carl O. Anderson
acknowledged to me that said Corporation executed the same.

Carl O. Anderson
Notary Public
in and for Bernillo County
State of New Mexico

My Commission Expires:

June 1, 1940

Residence:

Albuquerque, N. M.

STATE OF New Mexico

ss

COUNTY OF Bernalillo

On the 18th day of April, A. D. 1960,
personally appeared before me Notary Public and
signer(s) of the above instrument,
acknowledged to me that he (they) executed the same.

Loetta Keshman
Notary Public

In and for Bernalillo Coun
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. 1960,
personally appeared before me Notary Public and
signer(s) of the above instrument,
acknowledged to me that he (they) executed the same.

Loetta Keshman
Notary Public

In and for Bernalillo Coun
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. 1960,
personally appeared before me Notary Public and
signer(s) of the above instrument,
acknowledged to me that he (they) executed the same.

Loetta Keshman
Notary Public

In and for Bernalillo Coun
State of New Mexico

My Commission Expires:
June 3, 1960

Residence:

Albuquerque, N. M.

R-5214

THIS INDENTURE, made this 7th day of June, 1957, between
LEE D. MERRILL and MILDRED MERRILL, his wife, HEZ
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 Y. MERSFELDER, his wife, of the
County of Grand in the State of Utah, Parties of the First Part; and
KERR-McGEE OIL INDUSTRIES, INC., a Delaware corporation,
and MERCURY URANIUM AND 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 to them
in hand paid by the Parties of the Second Part, the receipt whereof is
hereby acknowledged, have granted, bargained, sold, remised,
released and forever quitclaimed and by these presents do grant,
bargain, sell, remise, release and forever quitclaim unto the 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 situate, lying and being in Big Indian (unorganized)
Mining District, in the County of San Juan, State of Utah, to-wit:

Velvet Claims 1 to 34 inclusive -
recorded in Book 136, pages 152
through 163 and Book 139, pages
261 through 277, San Juan County,
Utah

Royal Flush Claims 1, 2, 3 and 4 -
recorded in Book 136, pages 150 and 151,
San Juan County, Utah (except only insofar
as said claims cover lands situate in the
S/2 of the S/2 of Sec. 4, T13S, R25E)

covering lands situated in Section 3 and
Section 4, Township 31 South, Range 25
East, and Section 14, Township 30 South,
Range 25 East, Salt Lake Meridian,
San Juan County, Utah,

Handwritten notes and signatures at the bottom right of the page, including "J. A.", "B. M.", and "T. H." with various initials and dates.

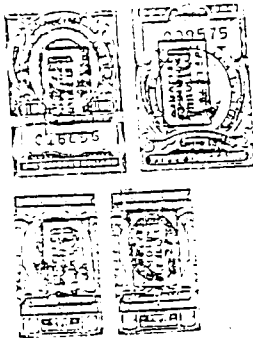
SUBJECT to that certain Boundary Agreement dated February 7, 1937, by and between N.M.M.C. Mining Corporation, Harold E. Bowen and Vera Bowen, his wife, and John Hancock and Cora Hancock, his wife, as First Parties, and Lyle Francis and Clara Francis, his wife, and H. C. Thomson and Cora Thomson, his wife, as Second Parties, recorded February 17, 1937, in Book 142 at page 912 in the records of San Juan County.

This conveyance is made subject to the terms, covenants and conditions contained in that certain Agreement dated the 16th day of April, 1937, 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 encumbered or alienated any of the above property, and First Parties 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 First Parties.

TOGETHER with all the dips, spurs, and angles, and all the metals, ores, gold and silver-bearing quartz, rock and earth therein, and all the rights, privileges and franchises thereto incident, appurtenant and appurtenant, or thereunto usually used and enjoyed; and all and singular the tenements, hereditaments and appurtenances thereto belonging or in anywise appertaining, 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 and parcel thereof, with the appurtenances.

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

IN WITNESS WHEREOF, the said Parties of the First Part have hereunto set their hands and seals the day and year first above written.



Leo H. Merrill
Leo H. Merrill
Leo H. Merrill
Leo H. Merrill
Leo H. Merrill
Leo H. Merrill

State of New Mexico } ss.
 County of Bernalillo }

On this 7th day of June, A.D., 1907,
 personally appeared before me Leo H. Merrill and Miriam
Merrill, his wife, the signers of the above instrument, who duly acknowledged to me that they executed the same.

Leo H. Merrill
 Notary Public

My Commission Expires:

June 3, 1910

Residence:

Albuquerque, New Mexico

State of New Mexico

County of Bernalillo

38.

On the 7th day of June, A.D., 1957,
personally appeared before me Max Abernathy and Joyce
Gernally, his wife, the signers of the above instrument, who duly
acknowledged to me that they executed the same.

Walter K. Korman
Notary Public

My Commission Expires:

June 3, 1960

Residence:

Albuquerque, New Mexico

State of New Mexico

County of Bernalillo

39.

On the 7th day of June, A.D., 1957, personally
appeared before me Philip G. Hersafolier and Billie Y.
Hersafolier, the signers of the above instrument, who duly acknowledged
to me that they executed the same.

Walter K. Korman
Notary Public

My Commission Expires:

June 3, 1960

Residence:

Albuquerque, New Mexico

FILED	61300	31	24	480
JUN 11 1957		ARVILLA E. WARREN		
CLERK		SANTA FE COUNTY CLERK		

UP-6 2

OPERATING AGREEMENT

THIS AGREEMENT, made and entered into this 18th day of April, 1957, by and between KERR-MACOE OIL INDUSTRIES, INC., a Delaware corporation (hereinafter sometimes referred to as "Kerrmac" 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 LEO B. WESSILL of Clovis, New Mexico, THE ASSOCIATES, of Clovis, New Mexico, and FRED C. WESSINGER, of Moab, Utah (said named individuals being collectively referred to as "Interest Owners").

WITNESSETH:

WHEREAS, Kerrmac 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 31 South, Range 35 East, and Section 34, Township 30
South, Range 35 East, Salt Lake Meridian, San Juan County,
Utah, comprising approximately 240 acres, more or less; and

WHEREAS, 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

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

1546

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

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.

II. Operator and Proportionate Liability.

Kernac 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 mine (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 or borne by the parties named as follows, to-wit:

Kernac 50%

Mercury 50%

Kernac 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 Mercury (and/or said Interest Owners, respectively) for inadvertent mistakes, errors or omissions.

If Kernac should desire to resign as Operator, it shall notify Mercury or its successors, in writing, to that effect and within thirty (30) days after the giving of such notice, Mercury, at its election, shall have the right to become Operator hereunder; provided, however, that in the event Mercury shall not so elect to become Operator, Kernac and Mercury, within thirty (30) days from the date that Mercury so notifies Kernac 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 Proceeds 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 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%) 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 Hermac 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 Hermac and Mercury in connection with the exploration, drilling, and development of said claims and the siting and construction of said initial shaft, and reimbursement to Hermac and Mercury for all costs and expenses incurred in equipping and developing said mine after completion of said shaft and prior to said date when the capability for mining and producing 500 tons of ore per day shall have been established as aforesaid, then Hermac and Mercury and Interest Owners shall share the net profits from all ores mined, produced, saved and sold from said claims after reimbursement to Hermac 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
Hermac.....	Thirty (30) per cent
Mercury.....	Thirty (30) per cent

It is also understood and agreed that said Interest Owners produce interest as subject to an interest owned by Vance Mining and Mill Co., Inc. of Albuquerque, New Mexico, and an interest owned by Uranium Company, a Colorado corporation of Grand Junction, Colorado; and said Interest Owners shall pay to such Owners of such interest any and all payments in account thereof and hold Hermac and Mercury harmless from and indemnify the parties with respect thereto.

IV. Accounting Procedure.

A. Operator shall, subject to the provisions of this section (B), of said Paragraph IV, advance and pay all costs and expenses into the Joint Account and shall charge, upon monthly settling, Non-Operator its proportionate part thereof. Operator will furnish Non-Operator all said Interest Owner for their information monthly cost statements. All Non-Operator agrees to pay each monthly settling on or before the 15th of

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 Procedure).

(b) Operator, at its election, may require Non-Operator to advance its respective portion of the anticipated costs and expenses of operation and development hereunder in accordance with an estimate by Operator to be made no less 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 account of Non-Operator adjusted accordingly.

(c) Operator shall undertake no single operation or activity (except normal production operations) reasonably expected to involve expenditure in excess of Five Thousand Dollars (\$5,000) without first obtaining written consent of Non-Operator; provided, however, that consent or approval to the opening of a primary shaft and its auxiliary accessways shall constitute approval of all costs and expenditures incident thereto. Operator may, if so desired, employ its own personnel and equipment in its operations hereunder charging therefor in accordance with the provisions of Exhibit "A" hereof.

7. Abandonment of Mine.

No mine jointly owned hereunder shall be abandoned without the mutual consent of Kermac and Mercury. If either Kermac or Mercury 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, defining 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 notified 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 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 the party desiring to 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 included 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 notifying 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 full for the value of Operator's and Non-Operator's respective interests in the solvable 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 served 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 Bunker and Marbury. 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 let such claims lapse or expire shall have thirty (30) days thereafter within which to elect whether to agree to let the designated claims or the

lapse or expire or to acquire the interest of the other party in the mining claims which the other party is willing to let lapse or expire. 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 such lapse or expiration.

If the notified party elects to acquire the interest of the other party desiring to let said claims lapse or expire and notifies such other party to that effect, such other party shall forthwith assign and convey by good valid instrument, without warranty of title, all of its right, title and interest in the mining claims which such party is willing to let lapse or expire. Such assignment however shall not affect any salvable material or equipment on the mining claims so assigned.

Notwithstanding the foregoing, no claim covered hereby shall be permitted by Operator and Non-Operator to lapse or expire 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 let any such claim lapse or expire or consents (or is deemed to have consented) to such lapse or expiration, then the notifying 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 claim and so notify Operator and Non-Operator within the said fifteen (15) day period, Operator and Non-Operator shall forthwith assign and convey by good, valid instrument, without warranty of title, all of their respective right, title and interest in the mining claims which such parties are willing to let lapse or expire. Such assignment, however, shall not affect any salvable material or equipment on the mining claims so assigned.

VIII. Operation and Management of Production.

Hamm and Mercury each shall own and at its own option, 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 handling Non-Operator's ore to market, for which Operator is not compensated by reason of the Atomic Energy Commission privilege allowance.

IX. Option to Purchase and Sales.

(a) Except as provided in Paragraphs 7 and 12 above, no assignment, conveyance, mortgage or other transfer affecting the Joint Property covered hereby, shall be made by Hamm or Mercury unless the same shall cover the entire undivided interests of the assignor, conveyer, 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 obtaining the consent thereto of the other of said parties in writing. It is the intention of this provision to maintain and preserve the unit character, development and operation of said jointly owned property.

(b) Subject to the provisions of this subsection (b) of this Paragraph IX, in the event that either Hamm or Mercury receives a bona fide offer which it is willing to accept for the purchase of all 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 (2) 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 Deed or Warranty 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 Deed or Warranty 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.

III. 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 Kermac 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) Kermac and Mercury each agree and does hereby elect to be excluded from the application of the provisions of Sub-chapter I, Chapter 1 of Subtitle A of the Internal Revenue Code of 1954 or such provisions 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 containing 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.

IV. Operating Materials

Supplies material and equipment from the joint property fund, 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 "A."

XI. Royalties Obligations and Failure of Title.

All royalties under said claims 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 Kemco and Mercury in the proportion of ownership in the property as hereinabove set forth.

XII. 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.

XIII. Access to Facilities 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.

17. 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 according to Non-Operator's interest up to the amount owing by Non-Operator and each purchaser (including Remme) 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.

18. Law and Regulations and Force Majeure.

This Agreement shall be subject to all State and Federal laws 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, wars, acts of Federal or State agencies, inability to secure materials, services, equipment, or other factors 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.

III. Notices and Miscellaneous.

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

Martinez Petroleum and Oil Company
-600 Gold Street, Southwest
Albuquerque, New Mexico

Oil Field No. 1

Max Barnum
2501 Sheldon Street
Oklahoma City, New Mexico

Lee B. Barnum
1400 Sheldon Street
Oklahoma City, New Mexico

Philip C. Mersfelder
Box 110
Muskogee, Oklahoma

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.

DATE: 2019-08-20

Notwithstanding anything to the contrary contained in the License, the Licensee 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 encumbers its said mill, 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 5, effective March 31, 1951, as now revised and as the same may from time to time be revised, plus bonuses and development allowances and heritage 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 suitability to mill process delivered to said Kerr-McGee mill by other suppliers of ore thereto, purchased, however, so as 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 under a long title purchaser, other than Kerr-McGee, shall be in a position to purchase for a 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

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.

WHERE. 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.

KERR-MCGEE OIL INDUSTRIES, INC.

By [Signature]
Vice-President

MINERALS TRADING AND OIL COMPANY

By [Signature]
President

[Signature]
As Secretary

[Signature]
As S. Secretary

[Signature]
Philip S. [unclear]

STATE OF California }
COUNTY OF San Diego } ss

On the 13th day of April, A.D., 1957, personally appeared before me John J. [illegible], Notary Public, being by me known, did say that he is President of [illegible] and [illegible] 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 [illegible] acknowledged to me that said Corporation executed the same.



[illegible]
Notary Public
in and for San Diego County
State of California

My Commission Expires:

Residence:

STATE OF New Mexico }
COUNTY OF Albuquerque } ss

On the 13th day of April, A.D., 1957, personally appeared before me [illegible], Notary Public, being by me known, did say that he is President of [illegible] and [illegible] 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 [illegible] acknowledged to me that said Corporation executed the same.



[illegible]
Notary Public
in and for Albuquerque County
State of New Mexico

My Commission Expires:

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 Paul G. [unclear] and
signer(s) of the above instrument, who duly acknowledged to me that he
(they) executed the same.

Laith [unclear]
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 Paul G. [unclear] and
signer(s) of the above instrument, who duly acknowledged to me that he (they)
executed the same.

Laith [unclear]
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 Paul G. [unclear] and
signer(s) of the above instrument, who duly acknowledged to me that he (they)
executed the same.

Laith [unclear]
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
January 1, 1957, by and between Berry-McGee Oil
Industries, Inc., Marquary Oilman and Oil Company, Lee Dr.
Marshall, Ben Abernathy and Philip G. Harrell

ACCOUNTING PROCEDURE (UNIT AND JOINT LEASE OPERATIONS)

I. GENERAL PROVISIONS

1. Definitions

- "Joint property" is herein used and shall be construed to mean the subject area covered by the agreement in which this "Accounting Procedure" is used.
- "Operator" is herein used and shall be construed to mean the party designated to conduct the development and operation of the subject area and account of the parties thereto.
- "Non-Operator" is herein used 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 15th day of each month for its proportionate share of costs and expenditures during the preceding month. Such bill shall be accompanied by statements reflecting the debits and credits as set forth under Subparagraph A.
- A. Statement of debits to all charges and credits to the joint account.
- B. Statement of all charges and credits to the joint account summarized by appropriate classifications indicative of the nature thereof.

- C. Statement of all charges and credits to the joint account summarized by appropriate classifications indicative of the nature thereof.
- D. Statement of all charges and credits to the joint account summarized by appropriate classifications indicative of the nature thereof.

3. Payments by Non-Operator

- Each party shall pay to the Operator on or before the 15th day of each month the cash value of the bill for the preceding month. Payment of cash shall be made by check or cash.

4. Adjustments

- Payments of cash shall be made by the party designated to conduct the development and operation of the subject area and account of the parties thereto. Subject to the provisions of this section, all statements reflecting the debits and credits to the joint account shall be subject to audit by the parties thereto. The parties shall have the right to examine and audit the books and records of the Operator and the Non-Operator. The parties shall have the right to examine and audit the books and records of the Operator and the Non-Operator. The parties shall have the right to examine and audit the books and records of the Operator and the Non-Operator.

5. Audits

- A Non-Operator, upon notice in writing to the Operator and to other Non-Operators, shall have the right to audit the Operator's accounts and records relating to the accounting procedure for any calendar year within the calendar year 24 months following the end of such calendar year. However, the Non-Operator shall not have the right to audit the Operator's accounts and records for any calendar year 24 months following the end of such calendar year. The parties shall have the right to examine and audit the books and records of the Operator and the Non-Operator.

II. DEVELOPMENT AND OPERATING CHARGES

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

1. Rentals and Royalties

- Operator shall charge the joint account with the rental and royalty charges for the subject area and for the operations conducted thereon.

2. Labor

- A. Labor shall be charged to the joint account for the services rendered by the Operator and the Non-Operator in the development and operation of the subject area. The parties shall have the right to examine and audit the books and records of the Operator and the Non-Operator.
- B. The parties shall have the right to examine and audit the books and records of the Operator and the Non-Operator.
- C. The parties shall have the right to examine and audit the books and records of the Operator and the Non-Operator.

3. Employee Benefits

- Operator shall charge the joint account with the employee benefits for the subject area and for the operations conducted thereon.

4. Material

- Operator shall charge the joint account with the material charges for the subject area and for the operations conducted thereon.

5. Transportation

- Operator shall charge the joint account with the transportation charges for the subject area and for the operations conducted thereon.

3. If material is moved to Operator's warehouse or other storage point, no charge shall be made to the joint account for a distance greater than 100 yards from the nearest road. Any cost of moving material shall be subject to special agreement with Non-Operator. No charge shall be made to the joint account for moving material to other properties belonging to Operator, except by special agreement with Non-Operator.
4. Service
- A. Service Services
- The cost of services rendered and materials procured from outside sources.
- B. Cost of Operator's Equipment and Facilities
- Cost of the use of Operator's exclusively owned equipment and facilities is provided in Paragraph 1 of Section III entitled "Operator's Equipment & Facilities."

5. Damages and Losses to Joint Property and Equipment

All costs of replacement necessary to replace or repair damage to items incurred by fire, flood, storm, theft, accident, or any other cause not attributable to Operator through the exercise of reasonable diligence. Operator shall furnish Non-Operator written notice of damage or loss as soon as it is practicable after report of the same has been received by Operator.

6. Litigation Expense

All costs and expenses of litigation, of legal services otherwise necessary or reasonable for the protection of the joint interests, including attorneys' fees and expenses as hereinafter provided, together with all expenses incurred against the parties or any of them on account of the joint operations under this agreement and actual expenses incurred by any party or parties hereto in securing redress for the purpose of defending against any action or claim commenced or threatened against the joint account or the subject matter of this agreement.

A. If a majority of the interests hereunder shall so agree, actions of claims affecting the joint interests hereunder may be handled by the legal staff of one or more of the parties hereto, and a charge commensurate with cost of providing and furnishing such services rendered may be made against the joint account, but no such charge shall be made until approved by the legal departments or of attorneys for the respective parties hereto.

B. Fees and expenses of outside attorneys shall not be charged to the joint account unless authorized by the parties hereto.

7. Taxes
- All taxes on property and the nature thereof as stated herein or in connection with the properties which are the subject of this agreement, the production therefrom or the operation thereof, and which shall have been paid by the Operator for the benefit of the parties hereto.

8. Insurance and Claims

A. The cost of insurance required to be carried by the parties to the joint account, together with all expenditures incurred and paid in settlement of any and all other claims, damages, judgments and other expenses, including legal services, not required from insurance carriers.

B. If a majority is required, a charge commensurate with cost of providing and furnishing such services rendered may be made against the joint account, but no such charge shall be made until approved by the legal departments or of attorneys for the respective parties hereto.

9. Drilling and Camp Expense, Field Supervision and Camp Expense

A. The cost of all expenses of Operator's production superintendent and other employees working the joint property and other properties of the Operator in the same area or areas, which shall be paid out of the joint account, and the cost of all other expenses of the Operator in the same area or areas, which shall be paid out of the joint account.

B. The cost of all expenses of the Operator's production superintendent and other employees working the joint property and other properties of the Operator in the same area or areas, which shall be paid out of the joint account, and the cost of all other expenses of the Operator in the same area or areas, which shall be paid out of the joint account.

10. Operations

Operator may charge to the Joint Account each month as its indirect and overhead expense a sum which shall be equal to ten (10%) per cent of the total amount of all income generated and the costs and expenses incurred during that month with respect to all operations and activities conducted by Operator under and in accordance with the provisions of this Agreement.

11. Accounting and Auditing

The Operator shall maintain accurate records of all operations and activities conducted by Operator under and in accordance with the provisions of this Agreement. The Operator shall also maintain accurate records of all income generated and the costs and expenses incurred during that month with respect to all operations and activities conducted by Operator under and in accordance with the provisions of this Agreement.

WELL BASIS Rate Per Well Per Month

DEVELOPING WELL

PRODUCING WELL RATE
Not Commission 2.00%

Lease Fee

Lease Fee

Lease Fee

Lease Fee

- a. When permanent shut-down due to either stopping joint operations or other causes is proposed, same to be entered within 30 days of effective. When such wells are plugged overhead wells are charged to the producing well rate during the same period of operation.
- b. Wells being plugged back, being jammed or converted to a source of output will shall be included in the overhead schedule during the well.
- c. Temporary shut-down well longer than 30 days by governmental regulatory agency which are not proposed to be used again for a period of 60 days shall not be included in the overhead schedule however wells that have governmental regulatory shall be in the overhead schedule only in the event the allowable production is transferred to other wells on the same property in the same direction, it will be capable of producing will be counted in determining the overhead charges.
- d. Wells completed in less than 60 days shall be considered as two wells in the producing overhead schedule.
- e. Wells that were plugged wells shall not be included in the overhead schedule unless such wells are used in a secondary recovery system on the same property.
- f. The above overhead schedule for producing wells may be applied to the total percentage of wells operated under the Operating Agreement, and the operating procedure is assigned, operation of individual wells.
- g. In operations production of the above overhead shall apply only to drilling and producing operations and are not intended to be construction of operations or additional facilities such as, but not limited to, producing plants, compressor plants, separating devices, etc. additional similar installations. If at any time any of all of them become necessary to the operations, separate agreements shall be entered into an overhead charge and allocation of surface income.
- h. A above specific overhead rates may be amended from time to time by agreement between Operator and Non-Operator. If a change is made to be inequitable or excessive.

12. Operator's Fully Owned Warehouse Operating and Maintenance Expense

Operator shall follow the general procedure to be followed by the Operator.

None

13. Other Expenditures

Any expenditure not of that expenditure shall be charged and allocated to the respective provisions of the Section 12, created by the Operator, and the same procedure to be followed by the Operator.

III. BASIS OF CHARGES TO JOINT ACCOUNT

1. Purchases

Operator shall follow the general procedure to be followed by the Operator.

2. Material Furnished by Operator

Operator shall follow the general procedure to be followed by the Operator.

3. New Material Construction

Operator shall follow the general procedure to be followed by the Operator.

4. Construction of Wells and Pits

Operator shall follow the general procedure to be followed by the Operator.

5. Construction of Wells and Pits

Operator shall follow the general procedure to be followed by the Operator.

Operator shall follow the general procedure to be followed by the Operator.

Operator shall follow the general procedure to be followed by the Operator.

6. Premium Drills

Operator shall follow the general procedure to be followed by the Operator.

7. Material of Material Furnished by Operator

Operator shall follow the general procedure to be followed by the Operator.

8. Operator's Fully Owned Facilities

Operator shall follow the general procedure to be followed by the Operator.

