1971

Wasatch Mines Company v. William Hopkinson : Appellant's Brief

IN THE SUPREME COURT

OF THE STATE OF UTAH

WASATCH MINES COMPANY, a corporation,	:	
Plaintiff and Respondent and Cross-Appellant,	:	
vs.	:	CASE NO. 11599
WILLIAM HOPKINSON, an individual,	:	
Defendant and Appellant and Cross-Respondent	:	

APPELLANT'S BRIEF

Appeal from the Judgment of the Third Judicial District Court for Salt Lake County
Honorable Stewart M. Hanson, Judge

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APPELLANT'S BRIEF

STATEMENT OF KIND OF CASE

Plaintiff sued Defendant for payment for 1600 tons of top soil removed from

Plaintiff's land. Defendant counterclaimed for damages for Plaintiff's breach of a written agreement, including amendments, granting him the right to remove top soil from Plaintiff's land for a period of 25 years and for confirmation of said right.

DISPOSITION IN THE LOWER COURT

This case was tried in the District Court for Salt Lake County before the Honorable Stewart M. Hanson sitting without a jury.

As to the Plaintiff's claim, the Court found the facts in Defendant's favor, viz., the terms of the agreement concerning the payment for the 1600 tons of soil were that Defendant was not required to pay for

it until he sold it; he had paid for that which he had sold, and therefore, there was no money due the Plaintiff for the balance of the 1600 tons which had not been sold. The Court further found that Plaintiff's claim was barred by the statute of limitations.

As to the Defendant's claims, the Court ruled as a matter of law that the terms of the grant of the right to remove soil were so vague and uncertain as to render it unenforceable; and further, that the damages claimed were too speculative to determine. The Court did not specifically rule on Defendant's prayer for declaratory relief confirming his right to remove soil, but in holding the terms were too vague and uncertain for enforcement, it denied this right.

RELIEF SOUGHT ON APPEAL

Defendant requests the Supreme

Court of Utah to reverse the decision of the Lower Court as to the counterclaim and hold as a matter of law that the terms of the agreement for the removal of soil are not vague and uncertain and incapable of enforcement, but on the contrary, establish a definite and enforceable right to the soil on the land (known as a profit a prendre); and further, that the damages claimed are not too speculative so as to be incapable of determination.

Also, as respects Plaintiff's cross-appeal, Defendant requests the Court to affirm the Trial Court's Findings and Judgment against the Plaintiff.

STATEMENT OF FACTS

The Plaintiff, Wasatch Mines Company, is the owner in fee of certain patented lode mining claims located in the

vicinity of the Wasatch Drain Tunnel in Little Cottonwood Canyon in Salt Lake County (R. 7, 9), about 78 claims of 20 acres each (R. 159). In September, 1954, the Defendant and the Plaintiff and Alta Wasatch Development Company, the owner of the mineral rights to the area, entered into a written lease agreement granting the Defendant a two-year period in which to take the soil from Plaintiff's land around the drain tunnel at $6.00 per ton for resale as top soil (R. 117, 118). This lease was not introduced at trial because it had been lost (R. 117, 144).

During the period of 1954-56, the term granted in the lease, the Defendant made significant strides in processing and developing the soil for sale as a profitable commodity. He developed a market in Las Vegas, Nevada, and sold a lot of the top soil in

bags of various sizes and prices and gave some away to prove its value (R. 123, 124). Defendant testified (and there was no evidence to the contrary) that the soil was used as an additive and obtained excellent results on trees, bushes, roses, lawns, etc., and that after two years, it had tremendous value (R. 123).

As a result of the success of the first two years, a second document was executed February 9, 1956, entitled "Lease Amendment", which amended the lease of 1954, which was lost (R. 118, 119, 124; Exh. D-3). This amendment increased the boundaries of the first lease by including all of the area (not just around the drain tunnel) of Plaintiff's mining claims (78 claims of 20 acres each, R. 159) that soil was removable without damage to buildings or installations on the property or interference with mine

dumpings. Also, it provided for a 25-year term with option to renew on the same basis. It was non-assignable, but the right to the soil was inheritable in Defendant's sons. Defendant was to pay $6.00 per ton for soil removed, $2.00 to go to Alta Wasatch Company and $4.00 to the Plaintiff. There was also provision for sharing profits in the event minerals were encountered as a result of the soil removal. This document, Exhibit D-3, contains the signatures of the presidents and secretaries and also the seals of the Plaintiff and Alta Wasatch Development Company, the owner of the mineral rights, and was recorded in the Salt Lake County Recorder's office (Exh. D-3).

In September of 1958, Defendant proposed to the Plaintiff at a meeting of the Board of Directors that he remove about 1600 tons of soil and stockpile it in Midvale,

Utah, so that it would be available for future sales when the weather wouldn't permit one to get up to Little Cottonwood Canyon to get the soil. At this point, there was a dispute of facts at the trial. Defendant's claim was that since he was only going to stockpile it for future sales that the parties had agreed that he would pay for it as he sold it from the stockpile (R. 83, 86, 87, 97). Plaintiff's position was that since Defendant had always paid for it as he removed it from Plaintiff's land, the same arrangement applied as respects the 1600 ton stockpile and therefore, Defendant owed for the soil (R. 105). On this disputed issue of fact, the Trial Court found in Defendant's favor, i.e. that the parties had agreed that as respects the soil in the stockpile, Defendant would pay for it as he sold it(R. 68).

Exhibits D-4 and D-7 constitute further amendments to the grant of the right to remove the soil, upon which the counterclaim is based. They are dated February 11, 1959, and March 1, 1959, and were drafted for the purpose of reducing the $6.00 a ton price by 20 per cent to allow for a moisture content of the soil (R. 124, 125). The proceeds were to be divided $1.60 to the Plaintiff, $1.60 to Alta Wasatch Development Company, and $1.60 to the Defendant (Exh. D-7). Exhibit D-7 was Defendant's copy of the amendment and is signed by the Plaintiff and Alta Wasatch Development Company. The original of Exhibit D-7 was signed by the Defendant also (R. 126).

The above-mentioned documents, viz., the two-year lease agreement of 1954, (the lost document), the 25-year extension of 1956 (Exhibit D-3), and the amendments

of 1959 (Exhs. D-4 and D-7), supported by the course of conduct of the parties under these documents, are the bases of Defendant's counterclaim, claiming the right to the soil upon the land of the Plaintiff. As to the time of Plaintiff's breach of the same, it probably occurred in 1963 or 1964, although there are indications in the record that at least some of the members of the Plaintiff were dissatified with their agreement as far back as September, 1956 (See Exhs. D5 and D6). But essentially, Defendant removed soil from Plaintiff's land pursuant to the above documents up until the fall of 1963 (R. 131). The record shows that Plaintiff was trying to stop Defendant from removing soil in September, 1963 (R. 138), and although soil was removed after that in the same year, Plaintiff refused to allow any further removals after August of 1964 (Exh. D-9;

R. 130). Likewise, Defendant has not sold any more soil from the 1600 ton stockpile because of inability to obtain a large buyer for it without access to more (R. 166, 167). At any rate, Plaintiff admitted in its reply to the counterclaim that it had repudiated Defendant's claimed rights as hereinabove set forth (R. 9).

ARGUMENT

POINT I.

THE TRIAL COURT ERRED IN RULING AS A MATTER OF LAW THAT THE TERMS OF THE AGREEMENT GRANTING THE DEFENDANT THE RIGHT TO THE SOIL ON PLAINTIFF'S LAND WERE TOO VAGUE AND UNCERTAIN FOR ENFORCEMENT.

As stated in the Statement of Facts above, Defendant bases his right to remove the soil from Plaintiff's land upon the written lease agreement of 1954 (lost document), the written extension of 1956 (Exh.D3) and the written amendments of 1959 (Exhs.D4 and D7).

The Lower Court's ruling against him as a matter of law was because the terms were said to be too "vague and uncertain" for enforcement.

There is no need here for a lengthy discussion of the terms, as the documents speak for themselves. In order to assist in the determination that there is no vagueness or uncertainty involved, these terms for the removal of soil by the Defendant are summarized as follows:

(a) Duration: Two years granted in 1954; an additional 25 years granted in 1956 with option to renew on same basis;

(b) Area of Grant or Quantity: There is no quantity limit. The grant is for all soil in area of claims owned by Plaintiff, 78 claims of 20 acres each in Little Cottonwood Canyon near the Wasatch Drain Tunnel; formerly, under the 1954

agreement, the boundaries were limited to the area directly around the drain tunnel, but the 1956 extension added the total area.[1]

(c) Parties: The Plaintiff, owner of the land, and Alta Wasatch Development Company, owner of the mineral rights, Grantors, and the Defendant, Grantee. The 1956 amendment added Defendant's sons and they had the exclusive right to the soil.

(d) Inheritable or Assignable: The right to remove the soil was non-assignable, but it was inheritable.

(e) Price and Division of Profits: Originally it was $6.00 per ton, split 2/3 and 1/3 between Plaintiff and Alta Wasatch Development Company respectively; then it

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[1]That grants describing land as "all my property" in a given area and similar descriptions constitute sufficient legal descriptions and that courts construe descriptions liberally to uphold them, see generally 23 Am.Jur.2d, Deeds, sections under topic IX, Descriptions of Property, and cases there cited, particularly sections 222 and 231.

was changed to $4.80 a ton, split equally three ways between the Plaintiff and the Defendant and Alta Wasatch Development Company. Any mineral deposits encountered were to be claimed by Alta Wasatch Development Company with Plaintiff receiving a 15% royalty.

How the terms could be any more definite, clear or certain is difficult to conceive, and the Court erred in failing to confirm Plaintiff's right to continue to remove soil pursuant to those terms. Admittedly, the documents appear to be home drawn and lack legal finesse, but it is a well-established rule of law that courts do not look kindly on the destruction of agreements of litigants on the ground of vagueness or uncertainty of the terms. In American Jurisprudence 2d, we read:

The determination that an agree-

> ment is sufficiently definite is favored. Therefore, the courts will, if possible, so construe the agreement as to carry into effect the reasonable intention of the parties, if that can be ascertained. The law leans against the destruction of contracts for uncertainty, particularly where one of the parties has performed his part of the contract. 17 Am.Jur.2d, Contracts, section 75.

In the present case, not only are the terms clear and definite, as set out above, but the parties operated thereunder for many years prior to Plaintiff's breach.

POINT II.

DEFENDANT'S CLAIMED RIGHT TO REMOVE SOIL IS A PROFIT A' PRENDRE, AND AS SUCH, SHOULD BE DECLARED VALID AND RECOGNIZED IN THE STATE OF UTAH.

A profit a' prendre is the right to remove soil from the land of another,[2] and in counsel's trial brief and closing arguments to the Lower Court, it was argued that

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[2] See generally 34 Words and Phrases, Profit a' Prendre, pp. 441-450; 25 Am.Jur.2d, Easements and Licenses, section 4.

the parties had created such an interest. It is felt that the Lower Court's failure to confirm Defendant's right to remove the soil from Plaintiff's land is because there is very little case law in the State of Utah on the law of profit a' prendre, and the Court was therefore unfamiliar with it.[3] It is submitted that in the instant case, the Trial Court erred in refusing declaratory relief as to Defendant's counterclaim and failing to hold that the documents and facts discussed above created a profit a' prendre.

In a case based on a prayer for declaratory relief, as here, with practically identical facts to those in the present case, viz., an agreement in writing under seal, granting the exclusive right to remove soil

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[3]Only two Utah cases have been located on the subject; though both recognize the doctrine of profit a' prendre, neither define it adequately as has been done in other states. Haynes v. Hunt, 96 Utah 348, 85 P.2d 861 (1939); Deseret Livestock v. Sharp, 123 Utah 353, 259 P.2d 607 (1953).

for a definite term, with an option to renew, a definite price dependent on the quantity removed, a prohibition against assignment, and under which the parties operated for a number of years, the Court in holding that the parties had created a profit a' prendre observed in Moore v. Schultz, 22 N.J. Sup. 24, 91 A.2d 514 (1952):

> Moreover the agreement was executed under seal, acknowledged and recorded, all of which are the appropriate formalities in the creation of an incorporeal interest. There is often something of implication in the use of language and in the conduct of the contracting parties in the search for their intentions. Quarry rights, mining rights, oil rights, and other similar rights relating to the severance of the physical substances of a servient tenement are normally more commonly interests a' prendre appurtenant or in gross, or easements in gross.
>
> Our study of the agreement, our conception of the exclusive character of the right granted and its distinctive nature, have guided us to the conclusion that the so-called privilege which was invested in Schultz was in the law within the category of a right of profit a' prendre in gross,

sometimes more modernly and liberally designated as an easement in gross. 2 American Law of Property (1952) §8.9, et seq., pp. 235, et seq.; Thompson, Real Property (1939) §§250, 260, 262, and 268; Tiffany, Real Property (1939) §§842, 843; Saratoga State Waters Corp. v. Pratt, 227 N.Y. 429, 125 N.E. 834 (Ct.App. 1920). Cf. Wenger v. Clay Tp. of St. Joseph County, 61 Ind. App. 640, 112 N.E. 402 (Ind. App. Ct. 1916).

Moreover, the label placed on the agreement by the parties[4] or the fact that words of grant are absent, or where the instrument is prepared by a layman, as here, do not invalidate the profit a' prendre, but the language should be construed as a whole to determine the relationship the parties intended to create. In Minnesota Valley Gun Club v. Northline Corporation, 207 Minn. 126, 290 N.W. 222 (1940), the Court observed:

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[4]Note that the exhibits and the record refer to Defendant's right to take the soil variously as "lease", "lease amendment", "agreement", "agency agreement", "soil lease", "contract", etc.

> Although customary words of grant are absent, it must be remembered the draftsman was a layman. The confusing use of "landlord", "license", "indenture", "right' and "privilege" leaves little to rely upon as a basis for decision. In addition, it is a persuasive reason why too much relianc cannot be placed upon the language employed. Reading the instrument as a unit, it satisfactorily conveys the conception that a more substantial relationship was intended than defendant concedes. The particular items mentioned, on the whole, lead to the conclusion that a profit a prendre was granted.

A profit a' prendre is simply "the right to take soil . . . and the like from another's land." Munsey v. Mills & Garrity, 155 Tex. 469, 283 S.W. 754 (1926). Note how closely the definition given in 25 Am. Jur.2d, Easements and Licenses, section 4 at pages 419-20, parallels the facts of the present case:

> A profit a prendre is a right exercised by one person in the soil of another, accompanied with participation in the profits of the soil, or a right to take a part of the soil or produce of the land. It is therefore distinguishable

> from an easement, since one of the features of an easement is the absence of all right to participate in the profits of the soil charged with it. A profit a prendre is similar to an easement, however, in that it is an interest in land. It cannot be created by parol, but is created by grant, and may be either appurtenant to other land or in gross. If enjoyed by reason of holding certain other estate, it is regarded as appurtenant to that estate and may not be severed therefrom. On the other hand, if it belongs to an individual distinct from any ownership of other lands, it takes the character of an estate in the land itself and is assignable or inheritable.

Clearly the Defendant was granted such an interest in land as described above. In this case, it is a profit a' prendre in gross; it is an interest in realty in the nature of a covenant running with the land,[5] and the Defendant has several years remaining in which to take soil from the land pursuant thereto. Even if the Lower Court's opinion that damages

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[5]See Richfield Oil Co. of Cal. v. Hercules Gasoline Co., 112 Cal.App. 431, 297 Pac. 73 (1931).

are speculative were correct, it was error not to grant the declaratory relief prayed for by the Defendant, confirming his right to continue to remove the top soil under the terms, as discussed above.

POINT III.

THE TRIAL COURT ERRED IN RULING THAT DEFENDANT'S DAMAGES ARE SO SPECULATIVE THAT IT WOULD BE UNABLE TO DETERMINE THEM.

In ruling that the Defendant's damages were so speculative that it could not determine them, the Lower Court misapplied the familiar rule of law which requires that damages, to be awarded, must be certain. Therefore, Defendant seeks a reversal as a matter of law.

In the first place, most cases have modified the harshness of this doctrine by stating that damages need be proved only with reasonable certainty, thereby removing the notion that an exactness is required of

the party seeking a damage recovery. 22 Am. Jur.2d, Damages, section 22; Dee v. San Pedro L.A.& S.L. R. Co., 50 Utah 167, 167 Pac. 246. In the second place, and perhaps even more important, the requirement that damages be proved to a reasonable certainty refers to the fact of damages, not the amount. Thus, whenever the fact of injury is proved with reasonable certainty, uncertainty as to amount of damages will not prevent the trier of fact from awarding damages. Nor is mere difficulty in the assessment of damages a sufficient reason for refusing them. 22 Am. Jur.2d, Damages, sections 22, 23, 25; Dee v. San Pedro L.A.& S.L. R. Co., supra.

In the present case, there is no question as to the fact of damages for Plaintiff's breach. The only facts presented on the question of damages at the trial were

...se presented by the Defendant, and there was no attempt by the Plaintiff to rebut it or to introduce any contrary evidence upon which the Court could base a finding of no damage. The import of the Court's order denying damages (R. 68) is not that whether Defendant had any damages is speculative, but rather that such damages as he had are speculative, i.e. the amount. It is Defendant's position that in so ruling the Court failed to apply the rules discussed above as to determining the amount of damages when they may be difficult to assess or incapable of exact determination, and thus, it presents a question of law for this Court to decide. The fact that Defendant's damages may have some uncertainty as to the amount (on the question of lost profits) or that they may be difficult to assess, is no ground for denying them.

The damages sustained by the Defendant, which are the natural consequences of Plaintiff's breach, are twofold: (1) damages for loss of profits from 1964 to date for Plaintiff's refusal to allow Defendant to continue to remove soil, and (2) damages for time and money expended in reliance upon the agreement and in preparation for performance.

1. Loss of Profits. While it is true that there can be no recovery for loss of profits where it is uncertain whether any profit at all would have been made, as discussed above, certainty as to amount is not required. In 22 Am.Jur.2d, Damages, section 172, we read:

> But it must be borne in mind that prospective profits are to some extent uncertain and problematical, and so, on that account or on account of the difficulties in the way of proof, a person complaining of breach of contract is not deprived of all remedy; uncer-

> tainty merely as to the amount of profits that would have been made does not prevent a recovery.

In the present case we have a ten year history (from the time of the 1954 lease agreement when Defendant began marketing the soil to Plaintiff's repudiation and refusal to allow further removals of soil after 1963) in which to look for data upon which to compute loss of profits. The evidence is uncontradicted that Defendant was to receive $1.60 net profit for every ton of soil removed and sold (Exh.D7; R. 98, 99). In addition, Defendant was president and stockholder of Mineral Rich Soil, Inc., one of the purchasers of the soil (R. 99), and was therefore a beneficiary of profit made by the corporation. As to the $1.60 per ton, the computation of prospective profits is done simply by multiplying $1.60 by the number

of tons to be sold, e.g., the sale of 260 tons in November, 1963, to Hudson and Stewart (R. 133, 162) would bring a $416.00 net profit to Defendant. The computation of profits for the soil sold variously in 5 lb. bags for 95 cents (R. 124, 160), 100 lb. bags for $5.00 (R. 124, 160), 40 lb. bags (R. 160), etc., some mixed equally with sand (R. 165), would be more difficult as it requires the figuring out of expenses to be deducted, e.g., shipping, mixing, cost of sales, etc. (R. 99), but as pointed out, the difficulty involved should not prevent its being done.

The central problem (if there is a problem) involved on the loss of profits issue is not questions of prices and net profit, as there is ample evidence as to these matters and as to the value of the soil, as discussed above. The real question, and

apparently the one which concerned the Lower Court, is how does one determine how many tons Defendant would have sold from 1964 to date if Plaintiff had not refused to allow him to continue removing soil, i.e., how many 5, 40 and 100 lb. bags would be sold, or how many more two to three hundred ton sales such as the one to Hudson and Stewart would be made, and would Defendant have been successful in locating what he termed a bulk sale buyer for sales of around 5,000 tons (R. 166).

Does this problem make the fact of damages too speculative? Admittedly, because of the nature of the product and the market (i.e., need for large buyers and need to cultivate one's own market), it would be difficult to be exact on one's estimate of the probable sales, but in order to uphold the ruling of the Trial Court, under the

law discussed above, it would have to be said that there was no showing to a reasonable certainty that Defendant would have sold any soil at all. Consider the following: Here is a man who in 1954 obtains a 2-year soil lease and commences to develop it, sell it, give it away to prove its value and create a market, etc. (R. 123, 124). Bog analyses (R. 158) and core drillings were obtained showing the soil was salable to a depth of 35 feet (R. 160). Later, a stockpile was set up for times when it would be difficult to get soil up the canyon (R. 168). His plans were long range, having in 1956 obtained a 25-year extension with option to renew (Exh. D-3). Although the record contains no statement as to the total tonnage removed from 1954 to 1964, or the total sales or profits, there is ample evidence of the creation of a

market, that the soil is valuable, and was extracted by Defendant during that period for resale. There is in the record an accurate list of sales in Las Vegas, Nevada, during 1959, primarily in the first half of th year. Exhibit D-15 (three separate items) shows these sales. The exhibit speaks for itself, but if counsel's addition is correct, the total sales of soil on the three parts of the exhibit are in the neighborhood of $3,300.00. It is true that Defendant had a little trouble after that with his sales-man in Las Vegas becoming ill (R. 161), but then he located Hudson and Stewart of Texas, as buyers (R. 130). After that, Defendant was prohibited from removing any more soil. Can we now say as a matter of law that there is no showing to a reasonable certainty that there would have been any more sales, or

that there is nothing in the record to indicate what kind of program Defendant was conducting so as to afford a reasonable basis for an estimate of the amount? Is Defendant to be denied recovery of lost profits because the nature of the business makes it a little difficult to determine?

It is respectfully submitted that Defendant was engaged in a long-term venture; that he showed the value of the soil at the trial and that he was making sales and profits at various times (R. 92, 97, 100, 105, 123, 124, 128, 129, 131, 133, 158, 160, 161, 162, 164, 166, 168; Exhs. D-8, D-15), and that he is entitled to have the loss of profits since 1963 determined and be awarded the same.

2. Expenses in Reliance. Defendant may recover not only for the net gains which were prevented by the breach, but also

for expenses incurred in reliance on the Plaintiff's performance of its end of the bargain. It should be borne in mind that the agreement between the parties for the removal of soil was for the profit of both parties and that Defendant incurred expenditures and went to considerable effort to accomplish that end. Consider his early efforts in creating a market, the bog analyses, the core drillings, the obtaining of buyers, the marketing methods, advertising in newspapers (letter attached to Exh. D-8), and even the stockpiling of the 1600 tons in Midvale - all of these were for Plaintiff's benefit as well as Defendant's. He paid out $2,500.00 in cash just to haul the soil to the stockpile (Exh. D-1), which expenditure was in vain because Plaintiff's refusal to allow Defendant to take more soil greatly diminished his chances of selling the soil in

the stockpile (R. 167, 168). These expenditures of time and money incurred by the Defendant were certainly within the contemplation of the parties, being for the benefit of both, and such are known as preparation or part-performance damages and are recoverable Hackersmith v. Hanley, 29 Ore. 27, 44 Pac. 497 (1896); Murphey v. Northeastern Construction Co., 31 Ga. App. 715, 121 S.E. 848 (1924); 17 A.L.R.2d 1300; 22 Am.Jur.2d, Damages, sections 47, 159-61.

CONCLUSION

Defendant is entitled to judgment as a matter of law confirming his right to a profit a' prendre in the soil on Plaintiff's land. This is true regardless of the disposition of the damages issues. The terms of the profit a' prendre are neither vague nor uncertain, and any irregularities as may exist

because of the home drawn documents should be resolved in favor of the obvious intent of the parties as shown by the language of the documents as a whole and by the conduct of the parties thereunder.

On the damages questions, it would appear the Court should apply the widely accepted rule that the amount of damages need not be proved to a reasonable certainty where the fact of damages is so proved. A little conjecture as to the amount is okay when not abused; which is worse, that or allowing the Plaintiff to breach after 10 years without payment for loss of profits just because the nature of Defendant's business does not easily lend itself to an exact determination of future profits. Even if the Court rules against the Defendant as to loss of profits, the reliance damages should be awarded as there is no speculation as to the amounts,

e.g., $2,500.00 cost to set up the stock-pile.

Respectfully submitted,

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