

1 Q Plaintiffs' Exhibit C and Plaintiffs'
2 Exhibit D here in evidence refer to the
3 negotiations and relate to the negotiations with
4 that company, is that right?

5 A Yes.

6 MR. PERRY: I think, Mr. Parsons, they were
7 marked for identification. I don't know that they
8 have been offered in evidence.

9 THE WITNESS: Mr. Parsons, we have any number
10 of correspondence and everything with the
11 Mitsubishi people, but this is the final stage,
12 this along with the specifications that they
13 insisted upon.

14 Q BY MR. PARSONS: You are referring now to
15 what is marked what?

16 A This is what I am referring to.

17 Q That is Plaintiffs' Exhibit D for
18 identification?

19 A Yes. This was the final stages of
20 negotiations with Mitsubishi and Mr. Domann, and
21 this takes you up to December, 1961 when I had
22 contacted Mr. Cowden, Fisher Construction Company,
23 about this Mitsubishi order. I would like to
24 say at the same time Mr. Al Stovall of Phoenix,
25 Arizona was very interested and had asked me to
26 return back to him after talking to Mr. Cowden

1 about the Mitsubishi iron market.

2 Q Following your negotiations with
3 Mitsubishi you went to Mr. Cowden, is that right?

4 A Yes, in December of '61.

5 Q Why did you go to see Mr. Cowden?

6 A Art, I felt like I needed Mr. Cowden,
7 not financially, but needed his cooperation. The
8 arbitrators' decision had recommended that we try
9 to get along together, that we try to cooperate
10 with one another. With Mr. Cowden's approval there
11 would be no violation from his part or any action
12 from him and I could have landed this Mitsubishi
13 market.

14 Q Tell me where and when you saw Mr. Cowden
15 with respect to Mitsubishi.

16 A I saw him twice in the latter part of '61
17 about this Mitsubishi thing on two different
18 occasions, the last I know as being December, 1961.

19 Q Where was that?

20 A It's where we are presently sitting with
21 Mr. Clements and Mr. Cowden.

22 Q You mean in the conference room of Snell &
23 Wilmer?

24 A Yes, the conference room of Snell & Wilmer.

25 Q Who was present?

26 A Mr. Clements, Mr. Cowden and myself.

1 Q What was said with respect to the
2 Mitsubishi proposal?

3 A We discussed this out at Mr. Cowden's
4 office prior to coming up here, but on the last
5 occasion that we met here in the conference room
6 I thought we were coming to talk to Mr. Wilmer
7 and Mr. Cowden and Mr. Clements, but when I got
8 up here Mr. Wilmer was not here. But we discussed
9 several things, one being that Mr. Clements asked
10 me what I would take to get out of or return title
11 to Mr. Cowden. I told Mr. Clements and Mr. Cowden,
12 and I think they know this over the past several
13 years that as to this property I had worked a long
14 time on it, that I had faith in it, that I had
15 worked for nothing with Mr. Campbell, that I
16 didn't want to get out and I didn't want to take
17 a few dollars to get out of the property. There
18 was no financial offer made to me.

19 Q What was said with respect to the Mitsubishi
20 proposal?

21 A That Mitsubishi they felt was not a good
22 deal for Mr. Cowden taxwise, that it was just not
23 a good deal to sell that ore for \$5 a ton which,
24 Art, I agreed that it was not, but that I needed
25 the order and I had an order, I had a market, and
26 that I needed production, but I didn't like the

1 idea of selling the Cowden high grade ore for \$5
2 a ton, and I still don't like it, but I needed the
3 order.

4 Q Would that have been a profitable venture
5 at \$5 a ton?

6 A Yes, definitely, at the tonnage that they
7 were buying. Remember that the Mitsubishi people
8 were talking about first 500,000 which we wouldn't
9 even consider, but they wanted 250,000 tons to be
10 delivered over a two-year period, roughly 125,000
11 tons per year. As you will notice from the
12 exhibits we did get some better specifications.
13 We still felt like that the Mitsubishi people were
14 still too high on the specifications in comparison
15 to the competitive ores especially coming in from
16 the Lovelock and the Nevada iron ores. Their
17 specifications are very, very lenient.

18 Q As a result of that conference did you then
19 discontinue your negotiations with Mitsubishi?

20 A Definitely. After talking with Mr. Cowden
21 in December of '61 I had not even written or
22 talked with anyone connected with the Mitsubishi
23 people since my letter to Mr. Domann telling him
24 that I could not deliver the bond. I discontinued
25 at that time even working on the Mitsubishi market
26 and started devoting my time to the fine grind

1 market mostly with Frank Davis of Los Angeles.

2 Q With respect to the bond, Mr. Wright, what
3 sort of a bond was required with the Mitsubishi
4 people?

5 A They wanted a performance bond mainly to
6 guarantee that they would get the ore or the total
7 tonnage delivered. They weren't after anything
8 except assurance that they would receive the ore
9 once they went into this contract. This is quite
10 common with the Japanese. They bond themselves.
11 They pay you on 90 per cent of the total price
12 at stateside and the other 10 per cent is paid
13 from Japan.

14 Q How were you going to manage to put up
15 such a bond?

16 A I couldn't put the bond up which is
17 obvious. That is one reason I went to Mr. Del
18 Fisher, and Mr. Fisher was not present, but I
19 talked to his engineer, discussed the bond
20 situation with his engineer. I discussed the
21 contract.

22 Q Who was the engineer you talked to?

23 A I just can't recall his name. It's
24 Heinkel or very similar to that. I saw Mr. Heinkel,
25 and I have received some correspondence from him.

26 Q You wrote a letter to Mr. Domann I believe

1 informing him that you were not going ahead
2 with this because you could not put up the bond,
3 is that correct?

4 A Right. There was no use of my telling
5 Mr. Domann all of my problems. I just stated that
6 I could not put up the bond, but I talked to Mr.
7 Stovall whom I think will prove that he is
8 financially able to put up the bond. Mr. Stovall
9 asked me to return back to him, that he was very
10 interested in the property, which he has been.
11 He has called me, and I have seen him any number
12 of times about the iron ore property.

13 Q So your thought is that except for Mr.
14 Cowden's disapproval that the bond requirement
15 could have been satisfied?

16 MR. PERRY: We object to the form of the
17 question. It's leading and suggestive and calls
18 for a conclusion.

19 Q BY MR. PARSONS: Go ahead.

20 A I felt this, Art, that without Mr.
21 Cowden's complete cooperation I felt like that
22 this was much too large a venture to even think
23 about going into without his approval, that if I
24 had his approval or some amendment from Mr.
25 Cowden or his cooperation in this matter that yes,
26 I could have gotten the bond, and I think I could

1 have gotten the bond from Mr. Stovall if Fisher
2 Construction wouldn't have gone.

3 Q You stated, I believe, on cross examination
4 by Mr. Perry that there had been an estimate
5 submitted to you or a bid from the Fisher
6 Company with regard to mining on the property?

7 A Yes. The actual mining -- without notes
8 in front of me -- their total bid on a 1,000 ton
9 a day operation was about 70 or 75 cents per long
10 ton. Their stripping as well as I remember was
11 somewhere in the neighborhood of 25 or 30 cents a
12 yard for the stripping of the overburden.

13 Q Those estimates by Fisher were given to
14 you when in point of time?

15 A I don't remember exactly, not this last
16 time, I mean not in December of 1961 because as
17 far as I know maybe they went up on the property,
18 I don't know, but Fisher had been on the property
19 before. Wells Cargo had given me this.

20 MR. PERRY: Just a moment. Would you try to
21 confine yourself to answering the questions,
22 please, sir?

23 Q BY MR. PARSONS: Other than the cost of
24 mining, Mr. Wright, what costs would there have
25 been to deliver the ore to the Seligman rail?

26 A Art, would you repeat that question, please?

1 Q What other costs would have been involved
2 other than the cost of mining in getting the ore
3 to the Seligman railroad?

4 A Of course you have your loading cost at
5 the mine, your loading onto the trucks. You have
6 your 19.6 mile haul.

7 Q Can you tell us what your loading costs
8 would have been?

9 A About 20 or 25 cents per ton over all.
10 That would take in the amortization of your
11 equipment. It depends also whether you were
12 contracting it or not.

13 Q What would the approximate transportation
14 cost be?

15 A We have had bids that have ranged from
16 90 cents per long ton to as high as a dollar and
17 twenty-five cents per long ton.

18 Q That is for a haul from the property to
19 Seligman?

20 A Yes.

21 Q How far is that, did you say?

22 A That is 19.6 miles to the railhead.

23 Q What other costs would there have been?

24 A Then the loading of the iron ore onto the
25 car at Seligman.

26 Q What would that amount to?

1 A Oh, 20 or 25 cents a long ton.

2 Q We are talking now about bulk shipments
3 of large size ore, right?

4 A Yes, we are speaking of certainly minimum
5 of 500 tons a day up to 1500 with probably an
6 average of 1,000 tons per day. We are talking of
7 a price based again upon your total volume of
8 anywhere from two and a half to three and a half
9 per long ton loaded on the car.

10 Q Tell us about your negotiations with
11 Diversa. First of all, who is Diversa?

12 A Diversa Corporation is in the Meadows
13 Building in Dallas, Texas.

14 Q When did you first have some negotiations
15 with them?

16 A With Diversa or with the parties involved
17 in Diversa?

18 Q Well, let's go back again. Who is
19 Diversa?

20 A I have a brochure on Diversa which would
21 explain who they are. They are a large corporation
22 that has several smaller corporations and a few
23 that I know of in Texas and has substantial
24 interest in the Chicago City Bank & Trust Company.

25 Q What kind of business do they engage in?

26 A They are in oil, and they have been in

1 mining. They are in real estate. They are in
2 banking. They have the Big Gus offshore drilling
3 rig. They have the Rich Plan which is a frozen
4 food plan. They have Flasho Gas in West Texas
5 which is butane-propane. They have a large
6 butane business back in the east somewhere and
7 the Middle West.

8 Q Who are the persons with whom you dealt?

9 A With the two people whom I have known for
10 any number of years, five years or so, Gerald C.
11 Mann, Sr. who is president and chairman of the
12 board of Diversa and Gerald C. Mann, Jr. who is
13 a personal friend and one of the officers of
14 Diversa.

15 Q Have they been on the Cowden property?

16 A Yes, they have been on the property
17 several times. The first time was in the days
18 when they were with Murmanell Corporation. They
19 visited the property and looked at the over-all
20 tonnage and the grade of the ore with Mr. Edeling
21 and Mr. Sundness I believe in 1957 or 1958. I
22 don't have my notes.

23 Q It's when they first went to the property?

24 A Yes, it's when they first saw the property
25 with Mr. Edeling, Mr. Sundness, Mr. Campbell and
26 myself and Mr. Hamilton. They looked at the Cowden

1 ore deposit because at that time Murmanell
2 Corporation controlled and owned the Madras
3 process which was a straight iron ore reduction
4 process, and they had a pilot plant of a hundred
5 tons per day capacity located at Longview,
6 Texas.

7 Q What would this Madras process do with
8 regard to the ore on the Cowden property?

9 A The process would take the oxygen out and
10 reduce it down to a sponge iron which would later
11 on be put into an electric furnace and smelted
12 down as pig iron.

13 Q Did you at some point have any negotiations
14 with them for supplying ore?

15 A No, they were extremely interested in the
16 property, but Mr. Mann's opinion from his
17 engineer's reports was that they could not move
18 upon a property that did not have a total tonnage
19 of at least five million tons.

20 Q That was back in 1957 or '58?

21 A Yes. The grade of the ore and everything
22 was satisfactory, but they felt like even if we
23 had two or three million tons of iron ore that
24 they still could not move in and build a plant for
25 their particular process.

26 Q Later on did you have further negotiations

1 with people in Diversa?

2 A Yes, in the following years Gerald Mann,
3 Jr. and myself became quite close friends. We
4 looked at a lot of properties together. We
5 jointly joined Murmanell Corporation --

6 MR. PERRY: How do you join a corporation?

7 THE WITNESS: You didn't wait until I
8 finished. We jointly joined them in some
9 exploration operations, in other words, a 50-50
10 partnership, Mr. Campbell and myself. We looked
11 at any number of properties for and with Mr.
12 Mann.

13 Q BY MR. PARSONS: Did they eventually make
14 a proposal to you with respect to the Cowden
15 Company?

16 A Yes, Jerry Mann, Jr. knew from our
17 friendship that I had done quite a bit of work in
18 the fine grind market of the Cowden iron ore,
19 and Diversa was interested, and they wanted to
20 carry through with it.

21 Q Did they make a proposal to you?

22 A Yes. As to my percentage of the proposal,
23 no. What Diversa wanted to do was check out the
24 information that I had given them, which they
25 did, and then work out something with Mr. Cowden.

26 Q When was that?

1 A The talking and the negotiations started
2 way back in March of 1961. The actual participation
3 of Diversa into the study of the fine grind market
4 started in December, 1961.

5 Q They made an independent study, did they?

6 A Yes, they did, definitely. I do not have
7 their reports. I have never received them, but
8 I know that they did survey and they did check out
9 Frank Davis, they did survey his markets, and they
10 did survey the fine grind material market.

11 Q Did you eventually have a meeting with Mr.
12 Cowden with respect to the Diversa proposal?

13 A Yes.

14 Q When was that?

15 A This was in February, 1962.

16 Q Where did that take place?

17 A This took place in Jerry Mann, Jr.'s and
18 my room at the Adams Hotel here in Phoenix.

19 Q Who was there at that time?

20 A Mr. Verity, an attorney from Tucson,
21 Jerry Mann, Jr., Mr. Clements, Mr. Cowden and
22 myself were there during the entire meeting, and
23 Mr. Gerald Mann, Sr. was there for 30 minutes or
24 an hour.

25 MR. PERRY: That was at the Adams Hotel?

26 THE WITNESS: At the Adams Hotel in February,

1 1962.

2 Q BY MR. PARSONS: What proposal was made to
3 Mr. Cowden at that time if you know?

4 A I believe the proposal that they made,
5 Art -- I don't have a copy of the proposed
6 contract that they handed to Mr. Cowden.

7 Q Wasn't a copy of that identified yesterday?

8 MR. PERRY: No, I showed it to the witness,
9 but I don't believe it was marked. In any event
10 it was that lease that I showed you yesterday that
11 was proposed.

12 MR. PARSONS: Do you have that?

13 MR. PERRY: I am sorry, but I don't. Mr.
14 Cowden took it with him to get the papers that you
15 need for your examination.

16 Q BY MR. PARSONS: That was a lease running
17 between whom and whom?

18 A Diversa and E. Ray and Ruth Reed Cowden.
19 I did not have a copy of the contract because I
20 was not part of the contract. I sat in on the
21 negotiations, and I was there when they presented
22 the proposal to Mr. Cowden, but I do not have a
23 copy.

24 Q Mr. Verity you say was there?

25 A Yes.

26 Q That is Vic Verity, a lawyer from Tucson?

1 A Yes, Mr. Verity drew up the contract,
2 drew up the proposed contract, and it was
3 presented to Mr. Cowden for him to look over and
4 to make some recommendations if any, and that they
5 would like to hear from him later after he had a
6 chance to study the proposed contract.

7 Q What was the outcome of that?

8 A To my knowledge if Mr. Cowden did answer,
9 I don't know. It's like I said, I do not have
10 any record of it myself, but I know that Diversa
11 was not interested any more after some two months
12 of waiting.

13 Q Did Diversa make any offer to deal with you
14 directly on your lease from Mr. Cowden?

15 A All Diversa ever told me and told Mr.
16 Cowden was that they would take any outside
17 interest whatever there might be and that they
18 would take me out of the picture. Being friends
19 with Jerry Mann, Jr. we did not have anything in
20 writing. He said, "Elwood, I will take you out
21 of the picture, but I will take care of you."
22 This was told to Mr. Cowden at this meeting.

23 Q Did you at one time enter into some
24 negotiations with Mr. Arthur Lake and Mr.
25 Montgomery?

26 A Verbal negotiations in Texas.

1 Q When was that?

2 A I'm not sure about the first name. It's
3 Arthur Lake or Frank Lake. But it is William
4 Montgomery and Mr. Lake. I did not know Mr. Lake
5 very well. I had known Mr. Montgomery prior to
6 that meeting and after. I went to Midland to see
7 Mr. Lake and Mr. Montgomery pertaining to the iron
8 ore property.

9 Q When was that?

10 A This was after Diversa told me that it
11 looked like they could not make a deal and if I
12 could do myself any good to try to deal with other
13 people. The first contact with Mr. Montgomery was
14 about March or April of 1962, but I don't remember
15 the exact date.

16 Q What did they propose?

17 A They never did make a complete proposal,
18 Mr. Parsons. They wanted the reports which I
19 gave them a complete report, gave them the survey
20 of the markets that I and others had made, the
21 total potential. I discussed the whole problems
22 with them, that I did have trouble or anticipated
23 trouble with Mr. Cowden, that I had not been able
24 to get a mill going but that it had to have a fine
25 grind mill to be a successful operation. I gave
26 them Mr. Davis' name in Los Angeles, and I gave

1 them Mr. Cowden's name, the only two names that
2 I gave them to check out what I had told them,
3 which they did. As a result of the Frank Davis
4 survey they were still willing to go ahead, and
5 after Mr. Lake's conference with Mr. Cowden they
6 were no longer interested. I cannot tell you what
7 went on in the conversation because I have never
8 talked to Mr. Lake since that first meeting, and
9 anything that I know of it is what Mr. Montgomery
10 has told me.

11 Q What did Mr. Montgomery tell you?

12 MR. PERRY: Just a moment. You talked to Mr.
13 Montgomery and Mr. Montgomery told you about Mr.
14 Lake's conference with Mr. Cowden, is that right?

15 THE WITNESS: Mr. Montgomery called me after
16 Mr. Lake got back to Midland, yes, sir.

17 MR. PERRY: So you are about to relate what Mr.
18 Montgomery told you about Mr. Lake's conversation
19 with Mr. Cowden?

20 A I have nothing in writing. All I can tell
21 you is what Mr. Montgomery told me over the
22 telephone.

23 MR. PARSONS: The answer is "yes," Mr. Perry.

24 Q Go ahead, Mr. Wright.

25 A Mr. Montgomery told me that they were no
26 longer interested under the first negotiating that

1 we had done as me being a partner or a part
2 owner in the corporation or in the partnership, that
3 they felt that Mr. Cowden did not want any association
4 with me, the Campbell estate or any previous people
5 that I had brought them, but he was interested in
6 making a deal with someone but he was not
7 interested in making a deal with anyone connected
8 with me.

9 Q That is what Mr. Montgomery related was
10 the position Mr. Cowden had taken?

11 A This is what Mr. Montgomery told me over
12 the phone. Mr. Montgomery further stated that
13 they were interested in the property and what
14 would I take to get completely out of the picture.
15 I told Mr. Montgomery as I had told Mr. Cowden
16 in December of '61 that I did not want to be
17 taken out, that I had faith in the property, that
18 I had worked for nothing and I did not want to get
19 out for a few thousand dollars. I have had
20 further negotiations with Mr. Montgomery pertaining
21 to oil, not to the Cowden lease. We have never
22 discussed it from that telephone conversation.

23 Q Do I understand, Mr. Wright, that in order
24 for you to sell to Mr. Davis you had to have a
25 pulverizing machine in order to make the fine
26 grind, is that right?

1 A Yes. The largest particle size material
2 that he takes is minus 200 mesh which is rather
3 fine within itself.

4 Q At the time of your negotiations with
5 Diversa and Mr. Lake and Mr. Montgomery, Mr.
6 Wright, Mr. Davis represented that he had a market
7 for your product if you could provide it in fine
8 grind size?

9 MR. PERRY: Objection, leading, calls for a
10 conclusion and asks for hearsay.

11 Q BY MR. PARSONS: Do I understand
12 correctly?

13 A That is absolutely correct. Mr. Davis had
14 stated to me that --

15 MR. PERRY: Just a moment, sir. There is no
16 question pending.

17 Q BY MR. PARSONS: Mr. Wright, would you
18 detail the quantities of ore sold from the
19 property at any time from the beginning of the
20 time that you took the lease on the Cowden
21 property?

22 A Could I detail?

23 Q Yes. What sales have been made from the
24 property?

25 A What sales have I made personally?

26 Q All right. Tell us what sales you have made.

1 A I made a 50-ton delivery to C. K. Williams.

2 Q When was that?

3 A That was in 1957 I believe.

4 Q That was a sample?

5 A That was a 50-ton or one carload batch
6 test for C. K. Williams Company.

7 Q For testing purposes?

8 A For testing purposes to make their color
9 strike test and to leave them exposed to weather
10 for a period of not less than six months.

11 Q What was the next ore shipped from the
12 property?

13 A Art, I made a 720-ton delivery to C. K.
14 Williams, but I can't find the date here.

15 Q Can you tell us approximately?

16 A Yes, that was in March of 1961. I made
17 a 181-ton batch test to Phoenix Cement, Clarkdale,
18 Arizona, on 9-14-60 for test purposes.

19 Q That is September 14th?

20 A Yes. I made a 1,000-ton delivery to
21 Ferro-Oxide in I believe October, 1960, stockpiled
22 the ore at Seligman, Arizona. I had a 1,000-ton
23 purchase order from C. K. Williams in August of
24 1961 --

25 MR. PERRY: Just a moment. I wouldn't want the
26 record to be confused. But you didn't sell that.

1 That was not delivered?

2 THE WITNESS: No, that was not delivered. That
3 was canceled.

4 Q BY MR. PARSONS: Are there any other
5 shipments of ore from that property that you are
6 aware of?

7 A Yes. Mr. Cowden made a delivery I believe
8 in 1958 to C. K. Williams. I don't know the exact
9 tonnage, but I think it was around 1400 tons.

10 Q Are you aware of any other shipments of
11 ore?

12 A No volume tonnage, just small tests.

13 Q Do you know what Ferro-Oxide did with the
14 1,000-ton shipment they received?

15 A Yes, they sold it to C. K. Williams this
16 year.

17 Q How do you know that?

18 A The stockpile is gone, and I have been
19 told by Mr. Swartz and by other parties that they
20 sold it to C. K. Williams.

21 MR. PERRY: We are going to ask that the
22 previous answer be stricken on the ground that it
23 obviously constitutes hearsay.

24 Q BY MR. PARSONS: I believe Mr. Cowden
25 also testified to that at the time of the
26 arbitration, is that right?

1 MR. PERRY: Just a moment. The sale to C. K.
2 Williams about which we have just been given is
3 hearsay information which allegedly took place in
4 1962, and the arbitration was in 1960. We object
5 to the comment of counsel and ask that it be
6 stricken.

7 Q BY MR. PARSONS: Have you ever encountered
8 any of this ore anyplace other than in the
9 possession of persons to whom you sold it?

10 A Yes, we definitely did. During January
11 and the early part of February of 1962 in the
12 Diversa survey of the markets of the fine grind
13 material we uncovered a most interesting thing
14 relating to the Cowden iron ore. Diversa found
15 the ore in Dallas, Texas ground down to a minus
16 325 mesh that sold at a retail price of 35 cents
17 a pound. This ore was taken and tested on a
18 strike out of mixing titanium dioxide 10 to 1 to
19 the ore and a linseed oil to get a consistency
20 base and struck out on a rather porous paper to
21 get the strike color of the ore that we had
22 pulverized of the Cowden iron ore, and the ore
23 that was purchased in Dallas, Texas by Diversa
24 gave us the same and almost identical strike out
25 color. It was studied under the microscope as
26 to grain size, as to the strike out of the ore,

1 and it was the conclusion of both Diversa and
2 myself that it was the Cowden iron ore pulverized
3 to a minus 325 mesh.

4 Q On what do you base that conclusion?

5 A The only conclusion that I can give on it
6 is that it's the same iron ore from the Cowden
7 property that was purchased over some period of
8 years by C. K. Williams Company, pulverized to
9 minus 325 mesh and sold because of the same strike
10 out characteristic which is very uncommon in this
11 particular field. The iron ores have a certain
12 characteristic of striking out when they are mixed
13 with a 10 to 1 titanium dioxide.

14 MR. PERRY: It was your conclusion then that
15 this was some of the ore that had been ground
16 down by C. K. Williams?

17 THE WITNESS: Yes, sir, it was my conclusion
18 to the best of my ability and experience that it
19 was, yes, sir.

20 Q BY MR. PARSONS: Do you know who drew the
21 initial 1956 lease between E. P. Campbell and
22 Yavapai Ranch?

23 A I don't know who drew it. We were not
24 represented by counsel in that meeting. It was
25 Mr. Campbell, myself, Mr. Kirshner, Mr. Clements,
26 Mr. Cowden and Mr. Mark Wilmer that was taking the

1 notes, and Mr. Wilmer was the only attorney
2 present, so I assume that he drew up the contract.

3 Q Neither you nor Mr. Campbell nor attorneys
4 for you drew it?

5 A We were not represented by counsel, no,
6 sir.

7 MR. PARSONS: Mr. Perry, would you be kind
8 enough to make some more copies of documents?

9 MR. PERRY: It would be a pleasure.

10 (Thereupon a short recess was taken.)

11 Q BY MR. PARSONS: Mr. Wright, you mentioned
12 sales to C. K. Williams Company, but we haven't
13 gone into your initial contact with C. K. Williams
14 and your dealings with C. K. Williams.

15 A My personal contacts have been directly
16 with C. K. Williams Company employees or vice-
17 president, et cetera.

18 Q Who in particular did you deal with who
19 was part of C. K. Williams & Company?

20 A My only contact or personal contact both
21 in person, correspondence and telephone conversa-
22 tions has always been with Mr. Jim Stewart who
23 is a vice-president of C. K. Williams Company of
24 East St. Louis, Illinois.

25 Q How did you happen to first provide them
26 with the 50-ton test batch?

1 A That first 50-ton batch test back in
2 1957 was acquired by Bradley & Eckstrom through
3 their efforts. I had no dealings in that
4 whatsoever with C. K. Williams. It was through
5 Bradley & Eckstrom acting as our agent.

6 Q When did you first have some dealings with
7 C. K. Williams Company?

8 A I was doing some exploration drilling in
9 1958 with our Mahew 1000 rig with a driller and
10 one helper. Mr. Jim Stewart of C. K. Williams
11 Company came on the Cowden iron ore property, and
12 we had a lengthy discussion about the iron ore
13 and the -- well, just discussion about the iron
14 ore.

15 Q What was C. K. Williams proposed use for
16 the iron ore?

17 A Of course, C. K. Williams has never told
18 me anything. They promised by telephone --

19 MR. PERRY: Just a minute. Will you try to
20 answer the question? We will get done a lot
21 quicker I am sure, and I am sure Mr. Parsons
22 would appreciate it, too. So you listen to his
23 question and try to answer it directly.

24 Q BY MR. PARSONS: Do you know what C. K.
25 Williams used the ore for that they obtained from
26 you?

1 A They used it in any number of fields due
2 to the mesh that they grind it and the purity
3 that they take it to. I would say that their
4 main use of the Cowden iron ore is in the colored
5 cement industry.

6 Q What was your first direct contact with
7 C. K. Williams? You have spoken of Mr. Stewart.
8 You spoke of Mr. Stewart being on the ground?

9 A Yes, that was my first personal contact.
10 Then by correspondence or telephone calls which
11 were prior to the March delivery of the 720 short
12 tons.

13 Q That was pursuant to an order, being
14 Plaintiffs' Exhibit B for identification here, is
15 that correct?

16 A Yes, that is pursuant to that.

17 Q What was your next contact?

18 A After the following months of the shipment
19 of March, 1961 I had several telephone conversa-
20 tions with Mr. Stewart, and they were mainly about
21 setting up an appointment in Phoenix here to
22 discuss their purchasing my contract.

23 Q By that you mean the lease?

24 A The lease, right.

25 Q They wanted to buy your interest out, is
26 that right?

1 A They implied this.

2 (Defendants' Exhibits 2 through 6 inclusive
3 were marked for identification by the
4 reporter.)

5 Q Has what has been marked for identifica-
6 tion as Defendants' Exhibit 6 a letter indicating
7 part of this desire in negotiations?

8 A Correct.

9 Q Then what was your next contact with C. K.
10 Williams?

11 A Mr. Stewart for some reason had to cancel
12 our appointment in Phoenix in August or September
13 of '61, and my next contact was by a purchase
14 order with bills of lading wanting to purchase
15 700 tons.

16 Q That is indicated by Defendants' Exhibit
17 3 for identification, a letter dated August 11,
18 1961?

19 A Yes.

20 Q What subsequently happened to that?

21 A In a few days I received a letter from Mr.
22 Stewart canceling that order and stating that
23 their Emeryville plant was undergoing modifications
24 and enlarging and that they were premature in
25 ordering.

26 Q That is evidenced by Defendants' Exhibit 4,

1 is that correct?

2 A Yes.

3 Q What next happened?

4 A I had several telephone conversations with
5 Mr. Stewart from that cancellation up into March
6 of 1962 still pertaining to the Cowden iron ore.
7 In March, 1962 after a telephone conversation with
8 Mr. Stewart I received a letter confirming that
9 they wanted to purchase the ore that they had
10 previously ordered by purchase order number in
11 August of 1961.

12 Q You don't have a copy of that letter?

13 A I have got one someplace, Art, but I just
14 don't have that particular letter.

15 Q Then what subsequently happened?

16 A I told Mr. Stewart when he called the
17 second time stating that he had to have this ore
18 immediately -- at that time it was in March --
19 that in Seligman the roads are very bad after the
20 snows, and I told him that it would be at least
21 one week to two weeks before I could start
22 delivery of the purchase order of 700 tons of ore.
23 He said that would be fine.

24 Q Then what happened?

25 A Approximately on March 10, 1962 I called
26 Mr. Stewart at East St. Louis, Illinois and told

1 him that I was starting for Seligman, Arizona the
2 following day and I would start immediately on my
3 arrival to start the delivery of the 700 tons of
4 ore. Mr. Stewart at that time by telephone
5 stated that they were no longer interested in the
6 Cowden iron ore, that they had a deposit of their
7 own and that they had no further use for the
8 Cowden iron ore, to cancel the previous purchase
9 order.

10 Q Was that the end of your dealings with
11 C. K. Williams Company?

12 A No. On March 13th I received at my Post,
13 Texas address a letter from Mr. Stewart dated
14 March 13, 1962 confirming the telephone conversa-
15 tion and canceling the purchase order No. G-3093
16 dated in August, 1961.

17 Q Do you happen to know what happened to the
18 1,000 tons of ore that Ferro-Oxide purchased?

19 MR.PERRY: This is repetitious of what has been
20 covered already before. We have already
21 discovered that his source of his alleged
22 knowledge is Mr. Swartz who learned from somebody
23 else.

24 Q BY MR. PARSONS: Go ahead and answer the
25 question.

26 A Yes, I know it's gone.

1 Q Do you know where it went?

2 A Only by hearsay.

3 Q What is your understanding?

4 A My understanding is that it was sold to
5 C. K. Williams Emeryville, California plant for
6 \$7 a ton loaded on the car at Seligman, that it
7 was definitely sold after the cancellation of my
8 purchase order. Art, may I take a moment to
9 look through the file? I may have something in
10 writing from Ferro-Oxide relating to this shipment
11 to C. K. Williams.

12 Q All right.

13 (Short recess.)

14 Q Mr. Wright, you were present during the
15 arbitration proceedings here in October of 1960,
16 is that right?

17 A Yes, sir, I was.

18 Q Referring to the decision of the
19 arbitrators dated January 15, 1961 on the last
20 page they state the following:

21 "There are some ambiguities in the
22 contract and it is clear that certain
23 parts of the lease are interpreted one
24 way by the Lessor and another way by the
25 Lessee, therefore, it is our recommendation
26 that the Lessor and Lessee meet and iron

1 out these areas of misunderstanding so as
2 to avoid friction and arbitration in the
3 future."

4 Do you agree with that?

5 A Yes, I most certainly do. That is what I
6 have tried to do, Mr. Parsons.

7 Q So your contacts with Mr. Cowden and your
8 meeting and bringing these various respective
9 purchasers to Mr. Cowden was done pursuant to
10 that --

11 A Absolutely.

12 MR. PERRY: Just a moment. Let him finish.

13 MR. PARSONS: Make your objection.

14 MR. PERRY: Objection to it as leading,
15 hearsay, and calls for a conclusion and is
16 irrelevant. Besides, you misread the arbitration
17 agreement or at least according to the copy that
18 I have.

19 MR. PARSONS: Would you like to read that
20 paragraph as you read it?

21 MR. PERRY: Are you reading the last paragraph?

22 MR. PARSONS: The next to the last paragraph.

23 MR. PERRY: All right. Go ahead.

24 MR. PARSONS: That is all. No further
25 questions.

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RECROSS EXAMINATION

BY MR. PERRY:

Q Did you understand that the arbitrators thought that you and Mr. Cowden should meet and attempt to renegotiate your lease to iron out certain ambiguities in it?

A To either amend it or to get along with one another in relationship to the misunderstandings that we had.

Q The lease never was amended, though?

A The lease has never been amended.

Q Who is Mr. Chamberlain or Judge Chamberlain?

A Mr. Chamberlain is an attorney of Dallas, Texas that was a longtime friend of E. P. Campbell and wife and was appointed to handle the Campbell estate upon Mr. Campbell's death.

Q Did you have an occasion to come to Arizona with Mr. Chamberlain and to talk to Mr. Cowden?

A Yes.

Q When was that?

A I don't remember the exact day, but it was in 1961 after Mr. Campbell's death. I don't remember the exact day.

Q Was it within a few months of his death?

1 A Yes, definitely.

2 Q What was the reason for that trip?

3 A It's like I stated yesterday, Mr. Perry,
4 since my employment with Mr. Campbell I have
5 always been closely associated with Mr. and Mrs.
6 Campbell. I have felt --

7 Q Is this necessary to tell me in connection
8 with the purpose of the trip out here?

9 A Well, at this time we were trying to get
10 this fine grind thing started. I would have gone
11 along with Mrs. Campbell and Mr. Chamberlain. We
12 came to see Mr. Cowden to see what we could do.

13 Q In other words, this was a visit by Mr.
14 Chamberlain as a representative of the estate of
15 the deceased Mr. Campbell and of the widow, is
16 that right?

17 A No, sir, it was not. Mr. Chamberlain and
18 myself came to see Mr. Cowden with me as the lease-
19 holder and as any interest that we could work out
20 together.

21 Q What interest did Mr. Chamberlain have in
22 it?

23 A Well, the only interest he had was a
24 personal friend of Mrs. Campbell, and he wanted in
25 on the deal.

26 Q Was he acting as attorney for Mrs.

Campbell in coming here?

1 A I can't answer that. I just don't know.

2 Q Who suggested that he come?

3 A Both of us.

4 Q You suggested it to each other?

5 A I have stated before that we were all very
6 friendly, Mrs. Campbell, Mr. Chamberlain and
7 myself at this time.

8 Q So Mr. Chamberlain was interested as you
9 say in getting in on the deal?

10 A Well, certainly he was interested in that
11 and to see what we could do with Mr. Cowden. He
12 represented me, too.

13 Q Was he interested in getting in on the
14 deal for the Campbell estate?

15 A No, sir.

16 Q Or for Mrs. Campbell?

17 A He feels like my lease is valid.

18 Q Maybe you didn't hear my question. Was
19 he interested in getting in on the deal as a
20 person or as a representative of the estate or
21 of his client Mrs. Campbell?

22 A As a person.

23 Q Then he wasn't representing Mrs. Campbell?

24 A I do not know that. I can't answer that.

25 Q Was he representing himself and Mrs.
26 Campbell?

1 A He could have been along with myself.

2 Q What did he tell you?

3 A Well, I mean he just wanted to see what the
4 deal was.

5 Q As I understand it after you had been on
6 the property for about a year or after the lease
7 had been in existence about a year you found that
8 there was no market for the Cowden iron ore in
9 bulk, that is, the steel market that you had been
10 exploring, is that right?

11 A Not the market that we needed of the
12 lump ore to Kaiser Steel, no, sir.

13 Q So at that time you changed the direction
14 of your search for markets to the fine grind
15 market?

16 A Not at that particular time, no, sir.

17 Q When did you do that?

18 A The interest in the fine grind market was
19 created after the purchase of the 1400 tons by
20 C. K. Williams from Mr. Cowden.

21 Q When was that?

22 A That was in 1958 I believe.

23 Q It was at that time you learned that if
24 you were going to make the property productive
25 that the area to explore was the fine grind market?

26 A It was obvious that we had to work into

1 that phase of it, yes, sir.

2 Q The reason that the ore didn't fit into
3 what you had originally thought was because of the
4 quality of the ore itself?

5 A Yes, sir.

6 Q Its tendency to decrepitate?

7 A Yes, sir.

8 Q Then when you got into the fine grind
9 market, why, the reason you were not able to go
10 into production was because you were unable
11 because of financial reasons to build the necessary
12 mill?

13 A Not at that time, Mr. Perry. We are
14 still speaking of 1958.

15 Q I am speaking over the term of this
16 enterprise.

17 A Over the over-all term then you can speak
18 of that. But at the time that we learned of the
19 interest by C. K. Williams on the fine grind
20 market we had a lot of running around to do to
21 try to find out what was going on, and I defy
22 anyone to find out very much about the fine grind
23 market.

24 Q To get back to the point which I think I
25 was about to make, Mr. Wright, that is that if it
26 hadn't been for lack of financing you would now

1 have a mill in operation and would be in production?

2 A No, sir. During Mr. Campbell's lifetime
3 had I known as much about the fine grind market
4 as I now presently know, we would have been in
5 production then.

6 Q The reason you are not in production today
7 is because during the last year or year and a half
8 you have not had the financing necessary to build
9 a mill?

10 A I have raised the financing any number of
11 times if I could work out something with Mr.
12 Cowden.

13 Q You never built a mill, did you?

14 A No, sir, I did not build a mill. I helped
15 build a flow sheet for a mill.

16 Q I am talking about up at the Cowden
17 property or in Seligman.

18 A No, sir, I have not built a mill, not
19 myself, no, sir.

20 Q And the reason you haven't built it is
21 because you didn't have financing?

22 A No, sir, not altogether.

23 Q Was there a day that you had the financing?

24 A I had the financing available any number
25 of times.

26 Q The lease was never amended?

1 A No, sir.

2 Q You have told us about all of your
3 contacts with Mr. Cowden?

4 A Yes, sir.

5 Q And all of your contacts with potential
6 buyers?

7 A Yes, sir, myself and others that I was
8 associated or affiliated with.

9 Q And the property has never gone into
10 production?

11 A Not steady production, no, sir.

12 Q The only production is what you have told
13 us about?

14 A Production, yes, what I have told you
15 about.

16 MR. PERRY: No further questions.

17

18 REDIRECT EXAMINATION

19 BY MR. PARSONS:

20 Q What do you mean when you say that the
21 knowledge of the fine grind market is highly
22 secret?

23 A Mr. Parsons, the fine grind market of
24 natural red iron oxides and synthetic iron oxides
25 is controlled mainly by the previously stated
26 companies, four or five major ones.

1 Q That would be C. K. Williams and Davis
2 and who else?

3 A Minnesota Mining & Manufacturing, Mapico
4 Division, Columbia Carbon and one or two others
5 that I have never had any contact with along with
6 any number of brokers as listed in the Oil, Paint
7 & Drug Reporter Index, yearly index. It's a very
8 closely guarded market, and absolutely no
9 information can be found about the ferrite
10 industry because they are not required to publish
11 their total production on the natural, not even to
12 the Bureau of Mines, and on the synthetic grade
13 iron oxide markets on other than ferrites they
14 do produce this, and last year 120,000 tons was
15 sold into this market.

16 Q By ferrite market you mean what?

17 A I mean the micron size high purity iron
18 oxides.

19 MR. PARSONS: That is all.
20

21 RE CROSS EXAMINATION

22 BY MR. PERRY:

23 Q What is that you have in your hand?

24 A I have not used these papers today, this
25 particular paper. I used my other notes.

26 Q Mr. Wright, what is that paper you have in

1 your hand?

2 MR. PARSONS: It's all right with me. Let him
3 have the thing and make his copies.

4 Q BY MR. PERRY: What is that paper you have
5 in your hand?

6 A These are some notes that I wrote on May
7 22, 1962 headed "Work performed on iron property
8 since January 1, 1961."

9 Q Were those notes made by you?

10 A Yes, sir.

11 Q Were they made on the date that you told
12 me in May of 1962?

13 A Yes, sir.

14 Q Did you have any source material when you
15 made those notes or did you do it just from
16 memory?

17 A No, sir, I had all my files at home with
18 me. This was written from Post, Texas.

19 Q So you reviewed your files in Post, Texas
20 and as a result of that review of all your files
21 you prepared that synopsis, is that right?

22 A Yes.

23 (Defendants' Exhibit No. 7 was marked for
24 identification by the reporter.)

25 MR. PERRY: That is all. Thank you very much.

26 (Signature waived.)

1 STATE OF ARIZONA,)
2 COUNTY OF MARICOPA.) ss.

3 I hereby certify that I took the foregoing
4 deposition pursuant to stipulation; that I was
5 then and there a notary public in and for the
6 County of Maricopa, State of Arizona, and by
7 virtue thereof authorized to administer an oath;
8 that the witness before testifying was duly sworn
9 by me to testify to the truth, the whole truth,
10 and nothing but the truth; that said deposition
11 was reduced to typewriting under my direction,
12 and that the foregoing 164 typewritten pages
13 constitute a full, true and accurate transcript
14 of the testimony of said witness.

15 Witness my hand and seal of office this 6th
16 day of November, 1962.

17
18
19 _____
Richard H. Ryan
Notary Public

20
21 My commission expires
22 August 25, 1964.
23
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Mr Pennebaker

IN THE SUPERIOR COURT OF THE STATE OF ARIZONA
IN AND FOR THE COUNTY OF YAVAPAI

E. RAY COWDEN AND RUTH REED
COWDEN, his wife,

Plaintiffs,

vs.

ELWOOD WRIGHT, et al,

Defendants.

No. 25571

PLAINTIFFS' REPLY
MEMORANDUM IN SUPPORT
OF INJUNCTIVE RELIEF

Additional court constructions of "mining" and "to mine":

Before specifically engaging in a consideration of defendants' memorandum, the writer thought it might be helpful briefly to bring to the attention of the Court six more cases in which other courts have had occasion to construe the word "mining" or the phrase "to mine."

In adjudging a clay mining lease was not automatically extended but was terminated in its initial term for failure of lessee to operate and mine, the Kentucky Court of Appeals in 1959 (North American Refractories Company v. Jacobs, 324 S.W. 2d 495 at page 497) said:

"At the expiration of the renewed term, on April 28, 1955, while appellant may have been 'operating' on the premises, it was not 'mining' clay. Mining means the excavation or removal of minerals from a natural deposit. Buchanan v. Watson, Ky., 290 S.W. 2d 40; Ozark Chemical Co. v. Jones, 10 Cir., 125 F. 2d 1. See 27 Words and Phrases, 'Mining', and Pocket Part."

* * *

"Since appellant, on April 28, 1955, was not 'mining' clay on the leased premises, the lease was not automatically extended."

In considering whether the owner of coal rights under land (the surface of which was owned by another) owed damages to the surface owner for destruction of timber etc. from strip mining, the Kentucky Court of Appeals in 1956 (in Buchanan v. Watson, 290 S.W. 2d 41 at page 43) said:

"In Rudd v. Hayden, 265 Ky. 495, 97 S.W. 2d 35, it was pointed out that 'mining' is not limited to the sinking of a shaft but may include other methods, including strip, which may be necessary to take possession of and remove the minerals conveyed."

In Ozark Chemical Co. v. Jones, 125 F. 2d 1, the 10th Circuit was considering whether a sodium sulphate deposit in solution beneath the bed of a lake was a mineral deposit for the purposes of a depletion discovery allowance under the Federal income tax law. In a split decision the Court decided it was not a mineral deposit. In the course of the decision both the majority opinion and the dissent considered the definition of "mining." In the majority opinion at page 2, the Court said:

"The word 'mineral' is evidently derived from 'mine', as being that which is usually obtained from a mine, and, accordingly, Webster defines the latter as 'a pit or excavation in the earth from which metallic ores or other mineral substances are taken by digging, distinguished from the pits from which stones only are taken and which are called quarries.' In Atlas Milling Co. v. Jones, 10 Cir., 115 F. 2d 61, 63, we said: 'A "mine" is an excavation in the earth from which ores, coal, or other mineral substances are removed by digging or other mining methods. In its

broader sense it denotes the vein, lode, or deposit of minerals. Mining connotes the removal of minerals from a natural deposit. These definitions express the generally accepted and understood meaning of the words 'mine' and 'mineral.' "

while in the dissent at page 6 the Court said:

"Furthermore, by common usage the word 'mining' has ceased to be confined to the extraction by excavation from the earth of metals and solid minerals. It is now applied to the extraction from the earth of all substances which are classified geologically as minerals."

In 1940 the 10th Circuit also considered whether one who reworked lead and zinc tailings by a flotation process was entitled to a mine depletion allowance within the purview of the Revenue Act of 1932. In deciding against the taxpayer (in Atlas Milling Co. v. Jones, 115 F. 2d 61), the Court at page 63 said:

"A 'mine' is an excavation in the earth from which ores, coal, or other mineral substances are removed by digging or other mining methods. In its broader sense it denotes the vein, lode, or deposit of minerals. Mining connotes the removal of minerals from a natural deposit. It does not embrace the re-working of mineral dumps artificially deposited from the residue remaining after the ore has been milled and concentrates removed therefrom."

Whether reworking a dump was considered mining so as to entitle the owner thereof to a depletion allowance for tax purposes was again considered in Chicago Mines Co. v. Commissioner of Internal Revenue (10 Cir., 1940), 164 F. 2d 785. The Court reaffirmed its ruling in the Atlas case, and, at page 787 said:

"Mining thus connotes the removal of minerals from a natural deposit and does not include the reworking of mineral dumps from the surface of the earth artificially created and resulting from mining operations."

An early (1910) decision of the Louisiana Supreme Court (J. M. Guffey Petroleum Co. v. Muriel, 127 La. 466, 58 So. 705) in deciding that an oil well did not qualify as a mine for the purposes of a constitutional tax exemption, had this to say (at page 711-12):

"The word 'mine' ordinarily conveys to the intelligence the idea of a large opening into the ground into which men descend for the purpose of getting metal, ores, or coal, and large enough to accommodate such operations. This is the ordinary meaning of the word and the sense in which it is employed in the Constitution."

* * *

"Further, in regard to mining, it may be said that the art of mining consists of processes whereby ores or other minerals are obtained from the earth--"

In the opinion on rehearing, the Court, at page 713, said:

"But in its ordinary acceptation the verb 'mine' means to 'dig' in the earth to get ore, metals, coal, or precious stones, and the noun 'mine' means a pit or excavation in the earth, from which metallic ores, precious stones, or other mineral(s) substances are taken by digging;"

Construction of Lease Provisions:

Defendants' memorandum is as interesting for what it does not include as for what it does.

First and foremost, it does not include any answer, any comment or even any reference to pages 4 - 10 of plaintiffs' memorandum dealing with the Construction of Lease Provisions. Dare we assume the defendants agree with us that:

- (a) The language of the lease is controlling as to the contract between the parties;
- (b) To ascertain the meaning of "failure to mine," such must be found within the four corners of the lease and the lease must be read as a whole, and
- (c) That when such is done, the conclusion is inescapable that "mine" in this lease is synonymous with "extract"?

In this connection (on page 10 of plaintiffs' opening memorandum), we said:

"It will be interesting to see if defendants can find even a single use of this verb (mine) or its derivatives in this agreement in which common sense would require a definition broad enough to encompass marketing and financing attempts, or even one day's hauling of ore. The writer could not."

Apparently, neither could the defendants.

Definitions:

Defendants apparently have had a serious change of heart since November 20, 1962 with respect to the meaning of the verb "mine" as used in this lease. Their emphasis has switched from a reliance upon the broad definition thereof (in an effort to encompass their marketing and financing attempts) to a reliance upon the narrow definition, with an extension or twist. That twist or extension is that mine means extract or haul. And the word or is deliberately emphasized for the reason that it is the hauling alone which is here involved (see plaintiffs' opening memorandum, the section entitled "Facts," pages 3 - 4.)

In short, defendants' new theory is that this lease could be kept alive by the simple expedient of taking one Sunday in each six-month period, employing a truck, a loader and two miners for that single day, and filling the truck twenty-five times in order to haul ore from one spot to another on the premises. The writer submits no such construction is authorized by the terms of the lease, dictionary definitions, case law or common sense and justice.

First, without here rearguing the lease provisions, it is clear that the purpose clause (Article II of the lease) held "mine" to be synonymous with "extract." Further, that when referring to attendant operations

(attendant to "extraction") the lease either named the operation (exploration, caving, stripping, removing etc.) or used some general phrase to cover them (all things reasonably necessary, etc.)

Second, all strict definitions of mining (including those cited by defendants) do one of two things:

- (1) Either "mine" is made synonymous with "extract," and nothing further is said, or
- (2) With respect only to underground mining, "mine" is sometimes (infrequently) made synonymous with "extract and haul to the surface."

In no strict definition cited by any of the parties to this action is

- (1) surface mining (in the strict sense) used to include hauling,
- (2) nor is hauling alone defined as mining.

In the sixteen definitions from dictionaries, mining texts, encyclopedias and court cases set forth on pages 10 - 18 of plaintiffs' opening memorandum, only one (from the Encyclopedia Americana - see page 14 of the memorandum) includes within it hauling to the surface. Here, clearly, underground mining is being discussed. And equally important, "mining" in that definition requires two things: "...releasing the mineral from its surroundings

and raising it to the surface..." (Emphasis supplied.)

Again, in this connection the Court's attention is particularly directed to the definitions of stoping, underground transportation and mucking (found on page 12 of plaintiffs' opening memorandum) taken from the United States Bureau of Mines, Metal Mining Practice, wherein stoping is made synonymous with mining and the hauling and transportation features are separated and distinguished.

In one citation, it appears, defendants revert to their reliance upon the broad definition of mining. Defendants (at the bottom of page 3 of their memorandum) include a brief quotation from page 15 of Charles H. Dunning's interesting volume entitled Rocks to Riches (1959). The quotation is to the effect that extractive mining is the final phase of mining. Defendants' intended implication, of course, is that there is more to mining (in the broad sense) than extraction.

In this context Mr. Dunning is obviously using the broad definition of mining. All of the parties to this action clearly admit such a definition does exist. The question, however, is its applicability to the language of the instant lease.

It is important to note that the two paragraphs preceding defendants' selected quotation from Mr. Dunning's book dealt with "Exploration" and "Development" -- two subjects separately referred to in the instant lease. And the paragraph following the selected quotation, entitled

"Ore Chute" deals with methods of removal of ore to transportation equipment for hauling. In other words, Mr. Dunning does not confuse or combine extraction with removal.

On the bottom of page 19 and the top of page 20 of his volume, Mr. Dunning considers open pit mining. Here he makes it clear that in this context he does not even combine development or stripping of overburden with mining. He says:

"At last we come to the open pit mining methods. Here the system of expensive underground preparation for mining is not needed. The development program consists of drilling in a coordinate pattern from the surface to prove the grade and extent of the orebody.

"But open pit mining has certain disadvantages. Usually a large amount of barren overburden must be removed before mining can commence." (emphasis supplied.)

Mr. Parsons, with understandable pride, quotes a definition of mining from page 393 of his father's outstanding volume The Porphyry Coppers (by A. B. Parsons, 1933). The definition appears to include loading and transporting both to the surface and on the surface.

What the younger Mr. Parsons fails to appreciate, however, is that:

- (1) This definition appears on the first page of a chapter (XIX) entitled "Underground Mining." In the area of underground mining, hauling to the

surface, as previously mentioned, is sometimes (though infrequently) included within the narrow definition of mining.

- (2) What the senior Mr. Parsons does not say is that hauling alone constitutes mining.
- (3) In the previous chapter (XVIII) the senior Mr. Parsons discusses open pit mining under the title "Power-Shovel Mining." In this chapter, under the separate subtitle "Haulage of Ore and Waste," Mr. Parsons nicely distinguishes between mining and transportation. Unfortunately, no definition of mining as such is included in this chapter. However, a reading of the chapter as a whole makes the context clear.

Defendants' memorandum (from the bottom of page 4 to the top of page 7 thereof) quotes a definition of mining from T. A. Rickard's Man and Metals. (If the Court enjoyed this lyrical excursion--including Hamlet's quotation--as much as did the writer, the Court should also inspect Mr. Rickard's definition of "civilization" beginning on page 8 of the same volume.) However enjoyable, the quotation does not appear to the writer to support the defendants' summary thereof. Instead, when Mr. Rickard gets down to business, he says:

"Mining, in its industrial sense, to which we now come, is the act, which if done skillfully is an art, of removing rock, hard or soft, loose or compact, from its place in the crust of the earth."

On pages 3 and 4 of their memorandum, defendants, apparently displeased with Peele's definition of mining, seek to "neutralize" it first by quoting, not from the definition of mining in the text, but from the preface with respect to the fields of endeavor of a mining engineer and metallurgist. Then, defendants return to the definition of mining by breaking the quotation concerned into sections. Should the Court choose to refresh its recollection of what Mr. Peele actually had to say on the subject, the quotation is set forth in full on page 11 of plaintiffs' memorandum.

In their reference to the Encyclopedia Britannica article, defendants address themselves to the article's discussion of "mining ventures." The definition of "mining" from that work can be found at the bottom of page 13 and the top of page 14 of plaintiffs' memorandum.

Again in connection with defendants' new theory for the strict definition of "mining" so as to permit it to mean hauling or mucking alone, the Court's attention is directed to A. H. Rickett's definition of "Mining" and "Mining and Milling" (from the volume American Mining Law) set forth at plaintiffs' opening memorandum at page 13. Mr. Rickett's volumes contain no definition of the word "Mucking," but page 31 of Volume I does contain a definition of "Mucker" which reads:

"A 'mucker' is a miner whose duty it is to load ore in the heading on cars after the ore has been extracted by the miners."
(Emphasis supplied.)

Reading first Mr. Rickett's definition of "mining" as synonymous with "extraction" (set forth on page 13 of our opening memorandum), and next his definition of "muckers" as those who perform a process subsequent to extraction, the impact is clear.

Defendants object to our reference to North American Refractories Co. v. Jacobs (included in a quotation from another case at the bottom of page 17 in defendants' opening memorandum, and more fully set forth on page 1 of this memorandum). The stated basis for their objection is that the Kentucky court's definition of mining arose from a fact situation of no mining for ten years under a ten-year lease. Plaintiffs submit the case is very much in point here where in six years less than \$1,000 of royalties have been paid in toto. At 50 cents per ton this means less than 2,000 tons have been sold. And this is in view of the fact that the defendants themselves have made it clear that 2,000 tons would be a reasonable minimal production for only three months -- not six years! (See the second full paragraph on page 22 of plaintiffs' opening memorandum regarding the testimony of Mr. Guy Swartz and defendants' Exhibit "P".)

Defendants also object to our reliance upon Fremont Lumber Company v. Starrell Petroleum on the basis that it is concerned with an oil and gas lease in which activities commenced just prior to the termination of the lease for failure to produce. Plaintiffs submit the parallel is striking.

Defendants wind up the first section of their brief by citing and quoting from an early (1916) decision of the Springfield, Missouri Court of Appeals (Giersa v. Creech, 181 S.W. 588). Plaintiffs are not only curious as to why defendants would cite this case, but strongly encourage this Court to read the decision in toto.

The case revolves around whether the lessee of a coal property is entitled to clean and market coal ore previously mined and piled on the premises by the lessor where one clause of the lease provided for royalty payments on "ores to be extracted from the premises," and another provided for "...digging, mining and carrying away...ores...which may be found in, upon, or under said lands." The Court, in deciding for the lessee:

- (1) Read the contract as a whole (as plaintiffs believe should be done in the case at bar).
- (2) Recognized the literal construction of the word "extract" as not including hauling, but denied its controlling application in the lease contract there at issue.

The case does not stand for a general re-definition of "extract" to include "hauling alone." If the rule of that case were applied to our own (reading the contract as a whole to define "failure to mine"), plaintiffs submit that the conclusion would be inescapable that in our contract the word "mine" does and must mean "extract." That court (at 181 S.W. page 590) quoted with approval

Coal and Iron Co. v. Coal Co., 176 Mo. App. 407, 421

158 S.W. 420, 424, as follows:

"* * * Where the language of a contract is obscure or ambiguous, or where its meaning is doubtful, so that it is fairly susceptible of two constructions, one of which makes it fair, customary, and such as prudent men would * * * make, while the other makes it inequitable, unusual, or such as reasonable men would not be likely to enter into, the interpretation which makes it a rational and probable agreement must be preferred to that which makes it an unusual, unfair, or improbable contract."

Plaintiffs believe it would be unusual, not rational, inequitable, and an agreement not likely to be made by prudent men to construethe lease at bar in such fashion that moving previously mined ore from one place to another on the premises one Sunday every six months would forever prevent forfeiture.

Hearts and Flowers:

The entire second half of defendants' memorandum, under the title "Justification Waiver and Excuse" is devoted to a partial revisitation of facts designed to suggest that if defendants did fail to mine, it was plaintiffs' fault for bedeviling them.

While this Court instructed all counsel that it did not desire the briefing of the facts, plaintiffs believe certain omissions in defendants' excursion therein need reference.

- (1) The period under consideration in the 1960 arbitration is different from

and prior to the period under consideration here.

- (2) Mr. Elwood Wright, under cross-examination at the hearing before this Court, could testify to no sale of ore prevented by Mr. Cowden.
- (3) And he admitted (with respect to negotiations with a Japanese firm) that:
 - (a) He not only agreed with Mr. Cowden that the purchase price offered was too low, but
 - (b) In any event, he could not afford the necessary performance bond required.
- (4) And, with reference to Mr. Cowden's expressed belief that prudent prospective purchasers or those interested in a "new lease" should check with the Campbell estate, it is to be recalled that:
 - (a) Mr. Wright (both in his deposition read into the record and upon cross-examination) stated that his assignment was in the nature of a mortgage;
 - (b) Mr. Cowden received a royalty check from the Campbell estate subsequent to the so-called assignment to Mr. Wright;
 - (c) A geological and geophysical map entered in evidence by the defendants indicated on its face that it was done for the Campbell estate (also subsequent to the so-called assignment from Mr. Campbell to Mr. Wright).

(5) The only flurries of activity that did occur in the history of this lease occurred when plaintiffs went beyond warning letters and actually instituted proceedings. If plaintiffs have erred, it is that they have been too generous in warnings and not quick enough to act.

In support of their claim that lessors prevented lessees from mining, defendants cite two letters from plaintiffs as far back as August 11, 1960 and January 15, 1961. The only letter barely within the period concerned is defendants' Exhibit "H" dated October 27, 1961. It does not say the lease is terminated. Instead, it warns of defaults in several particulars and states such are not waived. Unfortunately, it neither spurred defendants on to mine nor encouraged them to abandon the property. Instead, they continued the same "mining by telephone" activities they had been conducting since May of 1956. The only activity of plaintiffs that really encouraged mining under anybody's definition was the filing of a lawsuit in May of 1962. Since that time, the ore has been flying!

While plaintiffs are in perfect agreement with the rule of law that a landlord cannot rely on non-performance of which he was the cause, we are at a loss to see its application to the facts of this case. For

this reason we see no reason to further extend this already over-long reply memorandum with a consideration of defendants' citations on this point -- other than to encourage the Court to read these citations if it has the time. The fact situations there involved constitute the best answer to the inapplicability of that rule of law to this case.

Defendants next rely on Taylor v. Kingman Feldspar Co. to support the proposition that adverse market conditions should be considered with respect to an implied covenant of due diligence. Again we have no quarrel with the rule of law. We submit, however:

- (1) The lease in the Taylor case did not contain any six-month (or other) termination clause and, therefore, the implied covenant rule was there applicable. That case itself makes it clear that the rule is not applicable where the condition of forfeiture or termination clause is stated in the lease.
- (2) There is no evidence in the case at bar of adverse market conditions anyway. Instead, the evidence is uncontradicted that the fine grind market has long existed (Mr. Wright testified to a weekly publication of this market with an annual yearbook which has, to his knowledge, been published for more

than ten years) and that defendants were aware of its applicability to this ore even well before the arbiters' decision in January of 1961 in which it is discussed at length (defendants' Exhibit "F"). The problem here has nothing to do with the existence of or the knowledge of markets or their condition. It has to do only with the failure to mine.

Defendants' final effort is on the one hand to avoid an injunction in this action so that mining and stockpiling can continue, while at the same time capture the right to sell all ore stockpiled on the premises. Defendants attempt to support this flabbergasting concept by citing 51 ALR 1121 and Article XVIII of the lease.

First, this is not the import of Article XVIII of the lease. That article permits the lessees' use of the premises during controversies or disagreements, not after termination. Article XVIII reads in full, as follows:

"That the uninterrupted rights of the Lessee to the use of the demised premises and to exercise the rights and privileges herein provided for shall continue unsuspended, notwithstanding any controversy or disagreement between the parties hereto respecting the same, provided that the Lessee shall duly pay all royalty which may accrue on shipments and minimum royalty at the time or times and in the manner stipulated in and by this lease."

Second, the case cited in 51 ALR 1121 (Nally v. Edwards, Ky., 279 S.W. 2d 251, 51 ALR 2d 1118) deals with

ownership of rock which was not only mined or quarried by lessee, but processed or crushed by lessee for sale. The question presented to the court was whether at the end of the lease term (no forfeiture was involved) the tenant had a right, within a reasonable time, to remove and sell the same upon paying the prescribed royalty. The court held he could.

Third, as both the case and the annotation point out, there is both a paucity of law and a split of authority on this subject.

Fourth, in the one case cited in the ALR annotation wherein the lease term was shortened by forfeiture, the opposite result was achieved (Boron v. Smith, 380 Pa. 98, 110 A. 2d 169, 48 ALR 2d 1170).

Fifth, as the ALR annotation points out at pages 1121-22:

"Initially, of course, recourse is to be had to the terms of the lease for the solution of this problem....Where the parties, in drawing the lease, have not anticipated the precise situation considered herein, it is a matter of determining whether and in what manner other provisions in the lease have a bearing."

And Article XV of the lease makes it clear that the parties consider it the lessor's ore until it is removed and a royalty paid thereon.

But finally, plaintiffs submit that no more cogent or impressive argument could possibly be made for the

necessity of an immediate injunction in this case. Defendants have testified that they are mining as rapidly as possible now; that they have been so doing since suit was filed May 18, 1962, and that they will continue until stopped by this Court. If defendants live up to their word, and they be correct with respect to the ownership of mined ore, any decision on the appeal in this case (rendered after the present three-year time lag of our Supreme Court, which will by then have increased due to a nearly 100% increase in cases now pending over those pending three years ago), will indeed be a nullity. More simply stated, if defendants are correct that they own all ore stockpiled, and if an injunction fails to issue now, then defendants will have won this case irrespective of the decision of any court!

Plaintiffs earnestly submit that all of the law supports the fact that this lease has terminated and the injunction must issue if the rights of the parties are to be preserved pending defendants' appeal.

Respectfully submitted

this 7th day of December, 1962.

SNELL & WILMER

By /s/ Roger W. Perry

/s/ Edward Jacobson

Counsel for Plaintiffs
E. Ray Cowden and Ruth Reed
Cowden, his wife.

Two copies of the foregoing delivered to Tognoni, Parsons, Birchett and Gooding, 601 First National Bank Building, Phoenix 4, Arizona, Counsel for Defendants, this 7th day of December, 1962.

/s/ Edward Jacobson

IN THE SUPERIOR COURT OF THE STATE OF ARIZONA

IN AND FOR THE COUNTY OF YAVAPAI

E. RAY COWDEN and RUTH REED
COWDEN, his wife,

Plaintiffs,

vs.

ELWOOD WRIGHT, et al,

Defendants.

NO. 25571

DEFENDANTS' MEMORANDUM
IN OPPOSITION TO INJUC-
TIVE RELIEF

MINING

The plaintiff's memorandum in support of the proposition that the lease under consideration terminated automatically concludes with these reasons:

- "(1) No extraction of ore was accomplished from October 1, 1961, through May 18, 1962, and
- (2) The lease provisions, dictionary definitions and courts all require the verb "mine" in the context to be synonymous with extraction."

In connection with item (1) it is undisputed that approximately 400 tons of ore (D. C. Evans who did the work testified about 375 tons - 25 truck loads) was mucked on March 25, 1962, and a portion of this necessarily came from in place i.e. from the bottom and from the face of the pit on the Iron Chancellor. From the very most strict construction of the verb "to mine", therefore, some ore was "mined" and the plaintiffs failed to make out their case. In addition, however, "mucking" is "mining" and the entire amount of ore stockpiled in March of 1962 be it 375 or 400 tons was "mined". Mr. Cowden testified that "mining" to him included digging and transporting the ore to the railhead for transportation; thus necessarily including the process of mucking. Mr. Cowden's usage

of the word is broader than that quoted by plaintiff's counsel from the Encyclopedia Americana (Vol. 19, page 173, 1958 Edition) as follows:

"Mining, the removal of valuable mineral products from the earth. While in its narrower sense mining includes only the actual operations of releasing the mineral from its surroundings and raising it to the surface..."

but both include the raising of the ore to the surface and "mucking".

The writer is inclined to believe as most accurate the narrow definition used by the American Institute of Mining & Metallurgical Engineering text entitled "The Porphyry Coppers" by A. B. Parsons (to whom the writer believes himself to be related by direct descent) published in 1933. There at page 393 the word "mining" is defined:

"Assuming that preparatory work has gained access to the orebody, mining of whatever kind consists essentially of these operations:

1. Breaking the ore "in place" as nature left it, into pieces small enough for convenient handling.

2. Loading these pieces into some kind of a vehicle on wheels. (in 1933 space vehicles, at least operating underground were unthought of)

3. Transporting the broken ore to some central plant on the surface where the process of extracting the valuable metals can be commenced."

It will be recalled that Mark Gemmill, present lessee of the United Verde, testified that this mucking was in his opinion mining (with- in the meaning of the so-called strict definition). Contrary to expressions in the plaintiffs' memorandum, as did Mr. Cowden, Mr. Elwood Wright ~~considered~~ considered this work "mining" because he did it for the purpose of keeping the lease in effect and this is revealed by his letter to Mr. Cowden of April, 1962, (Exhibit 19) (when his

lease was under attack) wherein he states in the first paragraph:

This letter will have to suffice as I was informed that you were in Mexico this past week. I had planned on spending some time with you if possible while I was in Arizona. I did not intend on stockpiling the ore from the Iron Chancellor claim until we had discussed the overall situation. However I felt that I had better do this, as you were not available. I stockpiled approximately 400 tons of mine run ore on your property alongside the other stockpiles. This was the ore I mined las September. I had 2 miners, a truck, and loader on the property Sunday March 25, 1962. We worked all that day and removed from the Iron Chancellor roadside face to the stockpile, 25 full truckloads."

Thus both parties to this lease and action interpreted the term "mining" as including "mucking" and it is really unnecessary to consider the meaning other persons may attribute to the term. However, and so too, the Encyclopedia Britannica (1962 Edition, Volume 15, page 543) in its article on Mining Metal states:

"Most mining ventures entail an operating cycle which in its usual sequence, is comprised basically of:

- (1) rock breaking (drilling & blasting)
- (2) mucking (loading)
- (3) transporting (hauling & hoisting)"

The author then speaks of related activities (broad view):

"In addition to the basic work cycle of mining, other activities usually must be performed. These generally include the disposing of spoil rock (unprofitable, barren rock sometimes called waste) shaft sinking, distribution of power supply, ventilating, lighting, draining, surveying, making of geologic investigations and the installing and maintaining of mine plants."

Charles H. Dunning in his book on mining in Arizona entitled "Rock to Riches" (1959) speaks of (page 15):

"Extractive Mining: the final phase of mining. The actual removal of usable ore from the mine.:"

The Mining Engineers' Handbook edited by Robert Peele has been referred to by plaintiff's by inference (to which we certainly do not

wholly disagree) as indicating that "mining" is "extraction."

In the preface to the first edition, Peele says (page ix):

"In practice, a well defined boundary exists between the fields of work of the mining engineer and the metallurgist. While under some conditions and in some regions, the mining engineer's functions end with the winning of the ore and its delivery to a custom reduction works (mill or smelter), in other cases the mining company's plant includes a concentrating mill, amalgamating or cyaniding works or even a smelting establishment."

Peele's handbook, as plaintiff's concedes, does not define "mining" but throughout his work he describes the various processes of mining with particularity, and in the article on "Open-cut Mining", for example, loading methods and excavating devices and equipment are described in detail. Thus where he describes what is meant by his four stages of mining:

"Exploitation (mining), or the work of extracting the mineral."

Webster (third edition) defines "exploit" as:

"to turn (a natural resource) to economic account" and "extract" as:

"to separate (an ore or mineral from a deposit; also, to separate (a metal) from an ore"

Perhaps the most learned attempt to fasten down the meaning of "mining" is in "Man & Metals" by T. A. Rickard, published in 1932, being a history of mining in relation to the development of civilization:

"If you want to arrive at intelligible issues-- not to say conclusions--in any discussion, begin by setting the meaning of the terms you are about to use." So said a distinguished Master of Trinity College, Cambridge. It is a true saying, and worthy of acceptance. In this book two words will be used frequently, 'mining' and 'civilization'; it will be well therefore to define them, and in defining them to trace both their derivation and the changes that they have undergone in their significance from the past to the present.

The derivation of 'mining' is uncertain; its

etymologic pedigree has been lost. Our word 'mine' comes from mineor, an Old French verb that in the earliest instance meant to excavate, to make a passage underground, to undermine. Here we have the idea of sapping, of military engineering, which has been implicit until a comparatively recent period. L'Art du Mineur is the name of an eighteenth-century book that, in the Science Library at South Kensington, was placed inadvertently under the heading of 'Mining and Metallurgy', whereas it should have been indexed under 'Military Engineering'. The book discusses the art of the sapper. The Old French word probably came from the medieval Latin mina, which apparently did not signify an excavation from which mineral substances were drawn; the word was not used in an industrial sense; on the contrary, the derivation goes back to the classical Latin mina, a point, something that projects, and therefore threatens. From this we obtain minae, a threat, and later, in medieval Latin, we have minari, to drive by threats, to threaten, a meaning that survives in our English word 'minatory'. Thus 'mine' came to mean an excavation made in warfare; it had a military significance long before it acquired an industrial meaning. During the recent war, the Controller of Mines was the officer in charge of sapping operations on the British front; it happened that in peace-time he was a professional mining engineer. Thus he was a miner in both the old and the new sense of the word. Moreover, the former meaning of 'mine' survives not only in military engineering, but in naval warfare, in which also 'mines' play their deadly part. The Romans, however, did not use the word mina to designate an underground passage; instead they used cuniculus, the primary meaning of which was 'rabbit', because their undermining operations suggested a rabbit warren. The Romans were soldiers long before they were diggers of ore; they dug holes to destroy an enemy's fortification with keener understanding than they exploited an ore deposit. This is evident from the terms employed in early Latin writings, the most interesting literary usage being that of Julius Caesar. In his 'Gallic War' he states that the Bituriges tried to undercut his fortifications by means of mines, cuniculi; he remarks that they did this skilfully because they had large iron-workings, ferrariae, in their own country, so that every kind of mine, cuniculus, was known to them and employed by them in their military operations. Again, he says that the Aquitani advanced their attack with mines, cuniculi, even under his very ramparts, for in this matter of undermining they were expert because in many places in their country they had copper mines, aerariae, and quarries, secturæ. In the same manner other Latin writers use auraria and argentaria to signify a gold mine and a silver mine respectively. These terms, like aeraria and ferraria, are adjectives used substantively, the noun that is understood being fodina, a digging, derived from the verb fodeo, to dig, from which also comes

fossor, digger, or miner.

Mining, in its industrial sense, to which we now come, is the act, which if done skilfully is an art, of removing rock, hard or soft, loose or compact, from its place in the crust of the earth. A clay pit or a stone quarry is an open-air mine, for the term is not restricted to underground excavations. Nor need the product be rocky; an oil well from which a liquid mineral is pumped by machinery, or propelled by its associated natural gas, is a mine; so also is a borehole through which sulphur is drawn after being liquefied by superheated steam. The raising of gold-bearing gravel by means of either a bucket-chain or a suction pump is a mining operation, as is the dissolving of salt underground by means of water for the purpose of pumping it to the surface. The introduction of water into a copper deposit for the purpose of leaching the ore prior to precipitation on scrapiron is a method in which mining and metallurgy are combined. Mining is the exploitation of ore deposits, the word 'ore' meaning rock or mineral that can be exploited to economic advantage; for the idea of gain is implicit. Mining has suffered no break in continuity from the misty dawn when our pithecoïd ancestor detached a nodule of flint in a chalk bank to this later day when a series of machine shovels, actuated by steam or electricity, dig noisily, and effectively, into a mountain of copper-bearing rock. The scale of the operation has been magnified, but the purpose of it is the same: to exploit the mineral resources of nature for the use of man.

From the 'mine' that undercut the enemy's fortification it was a short step to the devising of machines to aid that purpose, such as battering-rams, mangonels, and catapults, these being followed in the sixteenth century by explosives of a destructive character, including the petard. Thus the 'enginry of war' was invented, the 'engine' being a mechanical device to which ingenuity, ingenuity, or skill in contrivance, was applied. Hamlet says to his mother:

For 'tis the sport to have the engineer
Hoist with his own petar; and't shall go hard
But I will delve one yard below their mines,
And blow them at the moon.

So the miner became the "engineer", or engineer, whose ingenuity was brought to bear on operations that previously required mere labor rather than skill. Sir Walter Raleigh, describing the crude gold-washing operations of the natives of Guiana in the sixteenth century, remarked that their mining was opus laboris, non ingenii, the effort of muscle, not of mind. Their method did not involve engineering, which is the application of ingenuity to human handiwork; whereby man liberated himself from his primordial penalty, and, ceasing to toil by the sweat of his brow, substituted the leverage of

machinery for the use of his scarred hands and tired tendons. By aid of mechanical devices, made chiefly from the metal of the mine, he investigated the secrets of Nature and harnessed her forces to his service. Engineering became the genius of our material civilization.

From the foregoing it seems indisputable that whatever is meant by the term "to mine" or "mining" it necessarily includes the making of the cavity by removal of material which leaves the cavity -- i.e. mucking. Such is the interpretation in technical usage and in common usage.

Plaintiff's have quoted at length two cases which it would seem from the portions of the opinion quoted should be commented upon. The first is North American Refractories Company v. Jacobs, 324 S.W., 2nd 495. There a lease had been executed on April 28, 1945 for a period of 5 years with the right of renewal for 5 additional years and at the end of the renewal period the right to continue it in effect "in the event lessee is operating and mining clay at the expiration of the term." The court in declaring the lease terminated states (page 467):

"However, in 10 years appellant had not extracted, for commercial purposes, a single ton of clay."

It appears from the opinion that all that had been done on the property was some stripping of overburden for the purpose of exposing the ore body to be mined. The court holds that while there was some operating there was no "mining." In support of its interpretation of the word it cites Buchanan v. Watson, 290 S.W., 2nd 40, which merely held that mining is not limited to sinking of a shaft but includes the strip type of mining.

The second case, that of Fremont Lumber Company v. Starrall Petroleum Co., 364 P2d 773, involves a lease entered into on August 25, 1954 on 25,000 acres. It was of the oil and gas type

which included a primary term of 5 years and was to continue ".... so long thereafter as oil, gas or other mineral is produced from said lands or lands with which said land is pooled." Another portion of the lease provided an additional 60 days if at the end of the term the lessee was then "....engaged in operations....for mining." The court held that by reason of concession of the parties the prospecting activity which the lessee commenced just 28 days before expiration of the lease was not mining but prospecting only. Reliance also was placed upon the interpretation of oil and gas leases. The use of the word extraction however clearly entailed removal.

The case of *Siersa v. Creech*, 181 S.W. 589, is in point. There the royalty was to be paid the lessor on all ores "...to be extracted from the premises....." and the court holds (page 590):

"The term extract as here used evidently covers the whole work necessary to make marketable ore-- mining, clearing and delivering to market....."

The work of lifting the ore from the ore bed to the surface is shown to be a small part only of what is necessary to market the ore.

JUSTIFICATION WAIVER AND EXCUSE

On August 11, 1960 the Plaintiff's herein wrote to Mr. Wright (Exhibit 13) informing him that he was in default under the lease in various particulars, and, in accordance with the terms of the lease, appointed an arbitrator. Subsequently in October 1960, both parties submitted to arbitration and a decision was rendered on January 15, 1961 (Exhibit 15) by all three arbitrators unanimously holding that the lease was still in effect (the issue of termination under the clause in question was decided). However, following submission to the arbitration and prior to decision the Plaintiff's again attacked the lessors right by letter of November 18, 1960 (Exhibit 14). Again by letter of October 27, 1961 (Exhibit 17) the lessors through their attorney Mark Wilmer declared the lease in default "in numerous particulars". Thus prior to the alleged period of failure to mine from October 1, 1961 to May 18, 1962, during said period, and after, the lessors unjustifiably kept the lessee in a state of uncertainty thus effectively preventing the lessee from entering into contracts to deliver ore or entering into agreements with others to operate the property. These letters declaring the lessee to be in default explain why Mr. Wright believed he must have the approval of Mr. Cowden before entering into such contracts and also explain his repeated attempts to gain such approval.

The question here presented is what effect did these attacks upon lessee's right have upon the duty of the lessee to mine. It is well settled that a covenant of quiet enjoyment is a part of every lease whether expressed in so many words or implied by the relationship itself.

Such a rule is applied in construing oil and gas leases and also leases of other mineral properties. Thus in *Winn v. Collins* 183 S.W., 2d 593 it was contended that failure to mine 1200 tons of bauxite in a given year resulted in a forfeiture but the court held that the bringing of a law suit estopped the Plaintiff's from claiming forfeiture during the period of suit. The Plaintiff's then claimed a lack of due diligence in development of the property. After setting out generally the efforts of the lessees the court adhered to the rule:

"If the appellees by their conduct in instituting lawsuits, or in any other manner, put obstacles in the way of appellants which caused them to fail to perform their covenants, then the appellees would be estopped from setting up abandonment or forfeiture by appellants."

In the 9th circuit court case of *Holla v. Rogers*, 176 Fed. 709, the Plaintiff's lessees, by reason of ejection by the lessors were prevented from mining placer gold gravel during the period of the lease and sought to have the court enjoin the defendants from further interference. The court in granting the injunction based its reasoning on breach of the covenant of quiet enjoyment and upheld the injunction against the lessors until the lessees had uninterrupted mining rights for the lease period even though the lease period had expired. So in the present case the Defendant's are entitled to an extension of their lease during the period it has been under attack. As to the propriety of such alternative decrees -- to require performance by lessee or in lieu thereof forfeiture see *Rocky Mountain Mineral Law Institute Volume 3* at page 709.

In the case of *Taylor v. Kingman Feldsper*, 18 P 2d 649, cited by Plaintiff's for the proposition that in the absence of an express covenant to develop a covenant of due diligence will be

implied, certain facts pertinent to the case at bar should be noticed. The lease was for a term of 99 years. Although advance payments of \$3,800.00 were required to be made the amount was to be deducted from royalties subsequently accruing. During the years from 1924 to 1930 the lessees "mined and shipped" 9,010 tons. In the case at bar it appears something in excess of 10,000 tons has been stockpiled. If these facts are any criterion the mining and stockpiling accomplished by the lessees cannot be ignored. Of further interest in this case is the fact that in declaring the lease not forfeited the court considers the available market for the ore in question and the fact that neither lessor nor lessee owned a mill suitable for grinding (page 652):

"...From this evidence it appears that, due to the freight rates, practically the only place where the feldspar from these claims could be sold was in Southern California, and as a matter of fact that is where it was all sold. Feldspar of this character is used almost entirely in the manufacture of tiling, bathtubs, enamelware, and ceramic products in general. Before it can be used it must be ground into a fine powder, and neither defendants nor their predecessors in interest at any time before this suit was brought were the owners of a mill of the kind necessary to do this situated near enough to the mining claims to be of any use. It was therefore necessary that they sell the crude feldspar to purchasers who owned mills of their own or could make arrangements for having it ground. The largest customer for this particular class of feldspar was the Flynt Silica & Spar Company, of Los Angeles, above referred to, which operated a grinding mill leased by it from another corporation. During 1929 or 1930, this company failed, leaving, as we have stated above, a considerable indebtedness to defendants for feldspar already purchased, and was, of course no longer in the market. It also appears that there was in Southern California a large feldspar deposit near Campo which had thereon a grinding mill of large capacity, and which came into production shortly before defendants took over the lease. It is reasonable to suppose that this feldspar was in close competition with that produced from the Kingman claims, for the year 1928 shows a drop of nearly 30 per cent, in the amount of feldspar shipped from the claims over that of 1927, when apparently the Campo feldspar was available only in its crude form. But the principal reason urged by defendant for the tremendous drop in the amount of feldspar

shipped is the general business depression which commenced in the year 1929 and has continued ever since. This depression is so notorious and widespread that even this court cannot help taking judicial notice thereof, though its extent varies in different localities. As to how this affected the feldspar market we have the statement of plaintiff's chief expert witness, Dr. Malinowski, who testified that the Washington Iron Works, of which he was chief chemist, was using less than 25 per cent of the amount of feldspar at the time of the trial which it was using in the palmy days of 1927 and 1928.

"....It also appears from the testimony of defendant's witnesses that they made every reasonable effort to sell all the feldspar they could, but were unable to secure orders for any more than that actually sold. We think that while the rule above stated requires that the lessee of a mining claim who has agreed to pay royalties on the gross product should use very reasonable effort to produce and sell as much ore as is possible, when there is a temporary depression in the value of the ore produced, such lessee is not required to extract ore at a loss merely so that the lessor may have royalties thereon. O. K. Jellico Coal Co. v. Parks et al., 146 Ky. 674, 143 S. W. 22; Colorado Fuel & Iron Co. v. Pryor, 23 Colo. 540, 47 P. 51. What the rule might be, where it was evident that the lessee could never mine at a profit, need not be considered. There is sufficient evidence from which the trial court could have found, as we must assume it did, that defendant, under the circumstances existing during the period during which a default is claimed, did use due diligence in its operations. Should it appear at a later time, or under different circumstances, that it was not so proceeding, the judgment in this case would, of course, be no bar to a subsequent action to cancel the lease."

In considering the Kingman case it is also worthy of keeping in mind that the lessees here paid \$5,000.00 for the Iron Chancellor claim in which the main deposit exists and also located 16 additional claims all for the benefit of the lessor. Thus this is not a case in which the sole consideration is royalty based upon sales -- though indeed for the lessor to benefit sale of ore is required.

Plaintiff's state the purpose of mentioning implied covenants of diligence is "to get the climate under which a specific termination clause should be read." If this be so the Kingman case is

important. By reason of the characteristics of the iron ore it was most suitable only in the so-called fine grind market. The lessee has now developed a mill it believes suitable for grinding the ore to supply that market. To declare the lease terminated on the basis of a highly technical construction of what is meant by "to mine" would therefore seem inequitable. Diligence in mining, absent sales would accrue nothing to the lessor. As stated in 76 ALR 2d 750:

"The earlier annotation in 60 ALR indicated that some courts have held that the implied obligation of a lessee or grantee to exercise reasonable diligence in the development and operation of the premises for minerals may cease to exist if the market conditions for the minerals to be mined are such that no sale could take place. Later cases dealing with this subject also take this view."

In this connection it should be recalled that Mr. Wright did not in December, 1961 proceed with sales to the Mitsubishi market by reason of Mr. Cowden and his agreement with Mr. Cowden that \$5.00 per ton was too little. Mr. Cowden admitted this was his expression to Mr. Wright and added that a second reason for not making such sales was his, Mr. Cowden's tax position. (See Exhibit 19).

As to propriety of the injunctive relief sought by Plaintiff's it should be pointed out that the ore stockpiled on the premises is owned by the lessee and he has the right to remove it regardless of the date of the lease after May 18, 1962, since it was mined prior to that date. See 51 ALR 2d 1121. Further Article XVIII of the lease provides:

That the uninterrupted rights of the Lessee to the use of the demised premises and to exercise the rights and privileges herein provided for shall continue

unsuspended, notwithstanding any controversy or disagreement between the parties hereto respecting the same, provided that the Lessee shall duly pay all royalty which may accrue on shipments and minimum royalty at the time or times and in the manner stipulated in and by this lease.

Hence it seems injunctive relief prior to a final determination of the rights of the parties is a remedy the lessor has specifically agreed not to seek.

In view of the foregoing, and that forfeitures are abhorred, that the burden of proof is on the lessor, that a lease should be construed most strongly against the drawer, that good faith development must be considered, that the lessees rights were in direct attack from August 11, 1960 until January 15, 1961, and lessor at all times continued unwarrantedly to claim lessee was in default, that the lessor has accepted royalty payments at all times, and the further overriding consideration that "mucking" is "mining" as the parties used the term, injunctive relief should certainly be denied.

Respectfully submitted,

TOGNONI, PARSONS, BIRCHETT & GOODING

By

Arthur B. Parsons, Jr.

Copy of foregoing
received this _____
day of _____,
1962.
Snell & Wilmer
By

IN THE SUPERIOR COURT OF THE STATE OF ARIZONA
IN AND FOR THE COUNTY OF YAVAPAI

E. RAY COWDEN AND RUTH REED
COWDEN, his wife,

Plaintiffs,

vs.

ELWOOD WRIGHT, et al,

Defendants.

No. 25571

PLAINTIFFS' MEMORANDUM
IN SUPPORT OF
INJUNCTIVE RELIEF

Purpose of Memorandum:

In this Court's closing remarks to counsel on Tuesday afternoon, November 20th, 1962, the Court indicated that the ultimate question here involved was whether or not a lease between the Cowdens and the defendants was presently in existence. The Court further indicated this would depend upon the meaning of "mine," "to mine" etc. as used in the lease contract between the parties. And, finally and specifically, on whether the removal of ore (which has been blasted from the mine itself) to a stockpile on the premises constitutes mining within the terms of that contract and the law applicable thereto.

The Court indicated it neither needed nor desired an extended review of the facts.

It is the purpose of this memorandum to comply

strictly with the Court's request, and because of this and of the limitation of time made necessary by the exigencies of the case, corollary matters will be ignored.

Plaintiffs' Theory of the Case:

Briefly stated, plaintiffs' ultimate theory of the case is that the lease has terminated for the failure of defendants to mine the property in question for a period of six successive months (within the purview of Article I of the lease) during the period from October 1, 1961 to May 18, 1962.

This theory is based upon plaintiffs' conviction that both the law and facts support the following conclusions, and no other:

(1) The phrase "...fail to mine...for a period of six (6) successive months..." as used in the termination clause of the lease (Article I) must be construed in such a way as to be consistent with the remainder of the document, so as to give effect to the intentions of the parties.

(2) Giving it such construction, the conclusion is utterly inescapable that this is a production lease, contemplating the payment of royalties as the principal compensation to the landlord.

(3) As such, the phrase in question relates to extracting ore from its natural environment.

(4) And the facts are undisputed that during the period in question, no ore was extracted.

Facts

The only factual dispute existing in this record is de minimus, if, indeed, it exists at all.

The contention was half-heartedly made during the hearing that in loading the approximately 400 tons or 25 truckloads and hauling it from the mine where it had been previously blasted on the one day of work in question, some small portion thereof, incidentally and unintentionally, might have been actually freed from its natural environment. It is to be noted, however, that this is contrary to Mr. Wright's Deposition at page 65 thereof read into the record at trial; contrary to Mr. Wright's letter to Mr. Cowden of April 3, 1962 which appears as defendants' Exhibit J, and contrary to Mr. Tognoni's letter to Mark Wilmer dated May 28, 1962 which appears as defendants' Exhibit M.

Other than this, it is clear that Mr. Wright's total activities on the premises during the period in question were conducted on that one day late in March and, in his own words, were as follows (Wright Deposition, page 65, read into the record):

"I went up and stockpiled approximately 400 tons or 25 truckloads of iron ore from the pit into the stockpile on the Cowden property."

or, in Mr. Wright's words in his letter to Mr. Cowden dated April 3, 1962 (Exhibit J):

"I did not intend on stockpiling the ore from the Iron Chancellor claim until we had discussed the overall situation."

However, I felt I'd better do this as you were not available. I stockpiled approximately 400 tons of mine run ore on your property alongside the other stockpiles. This was the ore I mined* last September. I had two miners, a truck, and loader on the property Sunday, March 25, 1962. We worked all that day and removed from the Iron Chancellor roadside face to the stockpile, 25 full truckloads." (Emphasis supplied.)

*(The defendant's use of the word "mined" in this context is, at the very least, interesting with respect to his understanding of its meaning.)

or in Mr. Tognoni's words in his letter to Mark Wilmer of May 28, 1962 (defendants' Exhibit M):

"MARCH, 1962

- "1. Cleaned up pits and stockpiled 25 truckloads of ore on property (400 tons).

*(In a previous portion of this letter wherein Mr. Tognoni is relating the activities of his client with respect to the months of August and September, prior to the period in question, there again appears an interesting sentence which reads:

- "2. Mined 400 tons of ore left stockpiled in the pit." (Emphasis supplied.)

Construction of the Lease Provisions:

Even the defendants will not deny, and this Court needs no citation of authority for, the proposition that a particular word or phrase in an agreement, if ambiguous, will be construed to relate sensibly with the remainder of the document so as to give effect to the obvious intention of the parties. With this in mind, we call the following to the attention of the Court:

(1) The last two lines of Article I, page 1, of the Lease and Article V of the Lease, when read together, use the phrase "mining operations" to mean those activities of lessee which are to occur after lessee has had a preliminary exploratory period (60 days were provided -- 18 months were permitted by the landlord). During the preliminary exploratory period, lessee is to drill the area until he is satisfied "...with the nature, grade and extent of the ore body...". Only then, and at lessee's option, does he "...enter upon the performance of this lease and exploration, mining and removing of the ore body..."

In this context the only definition that could be ascribed to mining operations is exploration (other than preliminary), mining and removing. And the only definition that could be ascribed to mining is something other than either exploration or removal, namely: extraction of ore. Neither marketing activities, phone calls or stockpiling would fit.

(2) Article II of the lease, being the purpose clause, makes it clear that

- (a) "mine and remove" is synonymous with "extract and remove" (see the first sentence). Therefore, "mine" is obviously synonymous with "extract," and
- (b) Related activities (activities other than but related to extract or remove) are not included in either of these

words. Instead, related activities are combined in "...all things reasonably necessary... to...extract and remove."

Here again, the purpose clause of the lease would not permit including letters, visits or stockpiling within the synonymous words, "mine" or "extract." This article uses these words so many times and so clearly that plaintiffs' best evidence is the entire provision concerned.

(3) Article III of the Lease says in part:

"Lessee shall have the right to strip and cave the surface of said demised premises and sink shafts and do all such other things as may be reasonably necessary or convenient in its operation." (Emphasis supplied.)

This again underscores that even such activities as are closely related to extraction (stripping and caving) are discussed separately from the mining operation. Later in the same Article, dumping is also separately discussed.

Such restricted and careful use does not permit the broad interpretation contended for by defendants.

(4) The first sentence of Article V makes it clear that lessee's duty to protect unpatented mining claims (as described in Article IV) is not a part of

"mining operations." This is but another example of the restrictive use of the phrase.

(5) Article VI in requiring lessee to act in a workmanlike manner and without undue waste and injury, makes this requirement applicable both to lessees' "mining operations" and to "...all other things and acts done and performed by it pursuant to its performance of this lease agreement...". (Emphasis supplied.)

If "mining operations" had the all-inclusive meaning contended for by defendants, there would be no "...other things and acts..." to be referenced.

(6) Article VII of the lease discusses the event of destruction of a water well "...through mining operations of lessee...". (Emphasis supplied.)

Again, in this context, marketing activities simply would not fit.

(7) Article VIII in discussing royalties refers to "...ores mined and shipped or otherwise removed from the demised premises"; to freight rates with respect to "...ores to be mined and removed..."; to a royalty adjustment in the event of a change in freight rates with respect to "...ore mined and removed by the open pit method of mining"; to no royalty adjustment for freight rate changes with respect to "...underground mining operations as distinguished from open pit mining operations."

Next, Article VIII discusses record keeping with respect to "...ores and other materials removed from the...premises..." (to help the landlord confirm the royalty payments).

And finally, Article VIII discusses still another event occasioning a royalty adjustment being "...if Lessee shall mine and ship from the demised premises ores having a content of natural iron in excess of 51-1/2%...".

In all of these contexts, any but the strict interpretation of the key words would render the provisions senseless.

(8) Article IX and XIII when read together clearly contemplate monthly royalties. To secure a royalty, ore must be "...mined and shipped or otherwise removed..." within the purview of Article VIII.

This provision further reinforces the meaning contended for by plaintiffs of both the purpose clause (Article II) and the termination provision (Article I).

(9) Article XV (mechanics liens, etc.) refers to protecting landlord with respect to the same in regard to "...all iron ore or other ores or the concentrates mined and produced therefrom and not sold and disposed of in due course of business or shipped therefrom..."

The verb "mined" refers to the ores,

and "produced therefrom" refers to the concentrates. It is clear the parties did not even consider the process required to produce concentrates as a part of mining. Article IX referring separately to inspection privileges in "...concentrating plants for the treatment of ores..." is of a like thrust.

(10) Article XXIV (assigning and subletting) uses the phrase "...to work the mine or mines..." synonymously with "...for the purpose of mining..."

The writer apologizes for the rather extended consideration of the language of the lease provisions. However, the best (and at law, the only) way to determine what parties mean in a contract is to see what they say. And, if there is any doubt as to the sense in which they use given words, an inspection of the way in which they use those words or their derivatives elsewhere in the same agreement becomes critical. Tevis v. Ryan, 108 P. 461, 13 Ariz. 120, rehearing den. 114 P. 557, 13 Ariz. 282, affd 34 S. Ct. 481, 233 U.S. 273, 58 L.Ed 597; Hamberlin v. Townsend, 76 Ariz. 191, 261 P.2d 1003; Employer's Liab. Assur. Corp. v. Lunt, 82 Ariz. 320, 313 P.2d 393.

It must be apparent that in the lease agreement in question, the verb "mine" and its variations are not used to include stripping, caving, removal, milling, concentrating, shipping, exploration, assessment work, dumping or any of the other on-site activities related

to ore extraction. Even-the-more so, it is not used to relate to off-site activities such as marketing, financing attempts, or otherwise. The agreement can only make sense if this verb and its variations are used to mean or be synonymous with extraction. And, significantly, in the purpose clause (Article II), "mine" and "extract" are so used.

It will be interesting to see if defendants can find even a single use of this verb or its derivatives in this agreement in which common sense would require a definition broad enough to encompass marketing and financing attempts, or even one day's hauling of ore. The writer could not.

Definitions:

In looking for authoritative definitions, the starting place is, of course, Webster.

"Intransitive: 1. To dig a mine; to get ore, metals, coal, or precious stones, out of the earth; to work in a mine.

XXX

"Transitive

XXX

"3. To get (a natural constituent such as ore, metal or hydrocarbons) from the earth by digging, blasting, etc.

"4. To dig into, for ore or metal"

(Webster's International Dictionary,
Second Edition Unabridged)

The next place to look for definitions is probably in the standard dictionaries of the mining industry.

"Mining includes surface operations, as quarrying in open cuts and the working of placers, as well as underground work. In a given mineral deposit, mining operations may be divided into 4 stages:

"Prospecting, or the search for minerals.

"Exploration, or the work of exploring a mineral deposit when found. It is undertaken to gain knowledge of the size, shape, position, characteristics, and value of the deposit.

"Development, or the driving of openings to and in a proved deposit, for mining and handling the product economically.

"Exploitation (mining), or the work of extracting the mineral.

"These terms are used loosely. It is often difficult to distinguish between prospecting and exploration, or between exploration and development, as the different kinds of work insensibly shade into one another; an arbitrary differentiation between them is usually established at a given property. Confusion also arises when the terms are extended to describe operations on a property containing several orebodies. In such cases, prospecting for new orebodies is a part of exploration. In certain mineral deposits, prospecting and exploration are done in one operation by boring; as in the disseminated lead ores of S E Mo, and in those Mesabi iron ores and gold placers that are mined by open-cut methods." (Emphasis supplied.)

(Mining Engineers' Handbook,
Peele, Third Edition,
page 10-03)

Peele makes it clear that "mining" can be used in the broad sense or the narrow sense. Further, that when used in the narrow sense it means extraction of ore.

In A Glossary of the Mining and Mineral Industry by Albert H. Fay, published by the United States Bureau of Mines (Washington Government Printing Office, Bulletin 95), Webster's first definition (Intransitive) set forth above is adopted as the only definition of "mine" as a

verb (see page 437). "Mining" at page 442 is described as

"Mining. 1. Act or business of making mines or working them (Webster). The processes by which useful minerals are obtained from the earth's crust, including not only underground excavations but also open workings; it also includes both underground and surface deposits (Burdick v. Dillon, 144 Fed. Rept., p. 739)

Here it appears that the United States Bureau of Mines adopts the strict extraction definition for both "mine" and "mining."

In Metal-Mining Practice, United States Bureau of Mines Bulletin 419 (1939), no definition of mine or mining is found. However, at page 3 thereof the definitions of "Stoping," "Underground Transportation" and "Mucking" indicate not only the strict interpretation theory of mining as synonymous with stoping or extraction, but also the separation of the hauling-away function as "mucking."

"Stoping.--The act of excavating ore by means of horizontal, vertical, or inclined workings in veins or large irregular bodies of ore, or by rooms in flat tabular deposits, and also the mining of ore by caving methods. It covers the breaking and removal of ore from underground openings except those driven for exploration and development. In many of the information circulars upon which this bulletin is based the term 'mining' was used synonymously with 'stoping' and is often so used in practice.

"Underground Transportation.--The transporting of ore, rock, men, materials, and supplies through shafts and haulageways, including the loading of ore or rock into cars and carrying it to the surface.

"Mucking.--Hand or mechanical shoveling and power scraping of ore and rock. Because the

term covers both shoveling and power scraping and because it has become thoroughly established in mining parlance through universal use, it is employed freely here in this sense, even though its dictionary meaning is something quite different." (Emphasis supplied.)

In American Mining Law, A. H. Ricketts (1943), no definition of "mine" as a verb is found. But in Volume I at page 27, are the following definitions of "Mining" and "Mining and Milling":

"CVIII. Mining

"The word 'mining' includes placer mines in which the workings are open, and hence the question whether an enterprise is mining or not can not be determined by an inquiry as to whether the workings are open or underground.

"CIX. Mining and Milling

" 'Mining and milling' would seem to be, taken together, one industry, having for its object 'to obtain possession of material products in the state in which they were fashioned by nature.' Mining the process of extracting from the earth the rough ore, would seem to be the first step in the process, milling or reducing the second step, to wit: the further separating of the materials found together, the one from the other, and extracting from the mass the particular product desired." (Emphasis supplied.)

Again, a definition synonymous with extraction is embraced.

Turning this time to standard encyclopedias, we find the first paragraph in the Encyclopedia Britannica's comprehensive article on mining (Vol. 15, 1956 Edition at page 542) reads as follows:

"The winning of metals and their ores from the ground, metals in their pure state and also mechanically and chemically combined with other substances, occur all over the earth's surface. These deposits of metals and metal ores vary in

extent and metal content and in their depth under the surface of the ground, which gives rise to different methods of mining. The broad classification of these methods, which is used by the American Institute of Mining and Metallurgical Engineers, divides metalliferous mining into two main fields; open-cut mining and underground mining." (Emphasis supplied.)

In the beginning of the next paragraph devoted to a description of open-cut mining, the Britannica editors make it clear that even removal of over-burden is not the mining of ore.

"The working of metalliferous deposits which either outcrop at the surface of the ground or are covered by a shallow overburden or capping which must be removed before the ore can be mined." (Emphasis supplied.)

However, the Encyclopedia Americana (Vol. 19, page 173, 1958 Edition) should give a little (but not much) comfort to defendants. In this regard, the Americana editors recognize that a broad definition does exist. Happily, they do not attempt to misapply it.

"Mining, the removal of valuable mineral products from the earth. While in its narrower sense mining includes only the actual operations of releasing the mineral from its surroundings and raising it to the surface, the broad field of mining encompasses all procedures from the search for the deposit through the delineation and exploitation to the treatment of the product, on the surface of the earth, until it is in such physical condition or degree of purity that it may command a suitable market price."

Courts, too, have uniformly used the word "mining" as synonymous with extraction.

In In Re Great Western Petroleum Corporation (D.C. Cal.) 16 F. Supp. 247, 249, Judge Yankwich, in interpreting a

statute requiring the recording of conditional sales contracts of mining equipment and holding it applicable to oil well drilling equipment, says:

"By common usage, the word 'mining' has thus ceased to be confined to the extraction by excavation from the earth of metals and solid minerals. It is now applied to the extraction from the earth of all substances which are classified geologically as minerals."

An early Oregon case, Escott v. Crescent Coal & Navigation Co., 56 Ore. 190, 106 P. 452, 453, construing a miner's labor lien statute, states:

"The form of coal obtained from the strata of the earth is a carbonaceous mineral substance, commonly known as mineral coal, and the procurement thereof, by digging in the earth, is termed 'mining'. 27 Cyc. 532"

In 1932, in considering the application of certain taxes to a gravel pit operation, the North Carolina Supreme Court had this to say (Lillington Stone Co. v. Maxwell, 203 N. C. 151, 165 S. E. 351-2):

"True, the term 'mining' has accommodated itself to a variety of situations. Annotation, 17 A.U.R. 156. Originally it conveyed the idea of extracting minerals from beneath the surface of the earth by means of tunneling and shafting. Rock House Fork Land Co. v. Raleigh Brick & Tile Co., 83 W. Va. 20, 97 S. E. 684, 17 A.L.R. 144. But in later times it has assumed a broader signification, and is not now confined in its meaning to the method of excavation. Nephi Plaster & Mfg. Co. v. Juab County, 53 Utah 114, 93 P. 53, 14 L.R.A. (N.S.) 1043; note, Ann. Cas. 1912 A, 1302.

"It is limited in its meaning, however, to the extraction of minerals from the earth..." (emphasis supplied).

In determining the application of bankruptcy laws to a gold and silver operation (In re Rollins Gold & Silver Min. Co., 102 F. 982, 985), the Court said:

"Mining and milling would seem to be taken together, one industry, having for its object 'to obtain possession of material products in the state in which they were fashioned by nature'. Mining, the process of extracting from the earth the rough ore, would seem to be the first step in the process, milling or reducing the second step..." (Emphasis supplied.)

In determining who was to bear the burden of a net proceeds tax, the Montana Supreme Court in Rice Oil Co. v. Toole County, 86 Mont. 427, 284 P. 145, said:

"Oil is a mineral and the process of extracting it from the rocks is mining."

The newest case the writer has been able to find, and one with a fact situation not unlike our own, is Fremont Lumber Company v. Starrell Petroleum Co., (Sept. 6, 1961), Ore., 364 P. 2d 773. The Oregon Supreme Court affirmed the quiet title judgment given by the lower court to a landlord who claimed his tenant had failed to mine. The particular question involved was whether a lease which had no specific termination provision, terminated by action of law for the failure of the tenant's activities to qualify as "operations for...mining." And absent a specific clause, the first several pages of the case are devoted to the legal import of various types of habendum clauses. In spite of a lease provision requiring notice

in the event of default (and no notice was given), the Court at page 778 said:

"The declared object of the lease, as stated in paragraph 1, was for '* * * the purpose of investigating, exploring, prospecting, drilling and mining for and producing oil, gas, sulphur and all other minerals, * * *' Starrell contends that under this broad statement of purpose the lease might be kept alive indefinitely by merely exploring, investigating and prospecting. With this we cannot agree."

And, at pages 779-780, the following is set forth:

"(5) The phrase 'operations for * * * mining' found in paragraph 6, supra, does not embrace prospecting activities. Prospecting, exploring and investigating are not 'mining'. This is made manifest by judicial and lay definition and the testimony of mining experts who were witnesses at the trial.

"In its primary sense the term 'mine' or 'mining' is defined to mean extraction of minerals from beneath the surface of the earth by means of tunneling and shafting. 58 C.J.S. Mines and Minerals § 1, pages 14, 15, 36 Am. Jur. 281, Mines and Minerals § 2.

"In *J. M. Guffey Petroleum Co. v. Murrell*, 1910, 127 La. 466, 53 So. 705, at page 711, the court considered the meaning of the terms 'mine' and 'mining operation,' and said that:

"* * * When the term mine is used, it is generally understood that the excavation so named is in actual course of exploitation * * *. No occurrence of ore is designated as a mine unless something has been done to develop it by actual mining operations. * * *"

"More recently the Kentucky Court of Appeals has had occasion to consider the same subject. In *North American Refractories Co. v. Jacobs*, Ky. 1959, 324 S.W. 2d 495 at page 497 the Supreme Court of that state said:

"At the expiration of the renewed term, on April 28, 1955, while appellant may have been 'operating' on the premises, it was not 'mining' clay. Mining means the excavation or removal of minerals from a natural deposit. * * *"

See, also, Atlas Milling Co. v. Jones, 10 Cir., 1940, 115 F. 2d 61, 63; 1 Lindley, Mines (3d ed.), 135 § 86.

"To succeed Starrell must show whether the nature of its activity falls within the meaning of the clause in paragraph 6, reading: '* * * but lessee is then (at the end of the primary term) engaged in operations for * * * mining * * * thereon, this lease shall remain in force * * *.'"

"The evidence reveals very little done in the way of excavation."

The balance of the opinion deals at length with the implied covenants of diligence and good faith, cites a wealth of authority therefor, discusses the fact that searching for financing or "speculating" is not mining and quotes with approval from Monroe v. Armstrong, 96 Pa. 307, 311 as follows:

"* * * Perhaps in no other business is prompt performance of contracts so essential to the rights of the parties, or delay by one party likely to prove so injurious to the other"

A concluding or summary paragraph to this section of this memorandum seems unnecessary. We believe it apparent that courts and dictionaries alike have determined that mining in the usual sense means extraction of minerals from their natural environment.

Duties of Lessee at Law under a Royalty Lease
(Implied Covenants)

As the Court indicated, there is a wealth of case law on the general subject here involved. Significantly, most if not all of it deals with agreements which contain no termination clause for "failure to mine." However, even in such circumstance the law steps forward to protect the owner from the tenant's lack of diligence.

The general rule is set forth as follows in 58 C.J.S. Mines and Minerals at page 389:

"Implied covenant. In the absence of a provision to the contrary, the law implies a covenant on the part of the lessee to begin operations within a reasonable time and continue to develop and work the mine in a proper manner and with reasonable diligence, so that the lessor may receive the compensation or income contemplated when the lease was made, where under the terms of the lease the right to mine is granted in consideration of the reservation of a certain proportion of the product to the lessor, or the rent reserved is a certain fixed proportion of the price of the product which the lessee might get and sell, or a royalty on the amount of mineral mined."

The greatest portion of the case law developing this proposition is collected in three comprehensive A.L.R. annotations (60 A.L.R. 904-913, 922-928; 76 A.L.R. 2d 723-732, 735-6, 738-748; 77 A.L.R. 2d 1058-1060). The appropriate summaries in these annotations speak for themselves.

The implied covenant of due diligence, logically, becomes particularly strong with respect to royalty leases which contain neither minimum tonnages nor minimum

rents (such as the lease here in question).

In Volume 3, American Law of Mining (edited by the Rocky Mountain Mineral Law Foundation--University of Colorado, 1960), section 16.51, page 335, after generally discussing the existence of an implied covenant of diligence, has this to say:

"The second factor previously mentioned, the effect of a minimum tonnage (royalty) clause, has not received thorough analysis by the courts. Of course, where no minimum is specified there is a strong reason for the implication of a covenant to mine diligently and continuously. Otherwise the object and purpose of the lesser would be defeated where the only substantial consideration to be received by him is the royalty." (emphasis supplied.)

In Mendota Coal and Coke Co. v. Eastern Ry. & Lumber Co. (1931), 53 F. 2d 77, the Ninth Circuit Court affirmed the cancellation without notice of a 99-year mining lease (which contained no minimum royalty provision and no termination clause) because of such an implied covenant -- and in spite of poor marketing conditions -- for failure of diligence in the first five years. The Court, at page 80, said:

"Where, as here, a lease is entered into with no provision for minimum royalties required, there must necessarily be a strong implied obligation for the lessee to develop and mine the coal diligently and continuously."

See also: Rains Coal Corporation v. Southern Coal Co., Inc. (Ark.), 155 S.W. 2d 345; Freeport Sulphur Co. v. American Sulphur R. Co., (Tex.), 6 S.W. 2d 1039, 60 A.L.R. 890; George v. Jones, 168 Neb. 149, 95 N.W. 2d 609, 76 A.L.R. 2d 710; Darr v. Eldridge, 66 N.M. 260, 346 P. 2d 1041, 77 A.L.R. 2d 1052.

This rule was adopted by the Arizona Supreme Court in 1933 in Taylor v. Kingman Feldspar, 41 Ariz. 376, 18 P. 2d 649. Though under the facts there in question our Court found "due diligence" did exist, still in 18 P. 2d at pages 651-2, Justice Lockwood stated:

"We consider then the second proposition above stated. Again we think plaintiffs have correctly stated the general rule of law. While it is true that a large number, if not the majority of the cases upholding this principle have arisen where the lease was for oil or gas lands, we are nevertheless impressed that the same rule in reason should apply to mineral land of any character. When mining claims are leased on a royalty basis, the only way in which the lessor can get anything for his property is through the lessees working it. It is obvious that no sane man would execute such a lease unless he believed the lessee would at least make a reasonable effort to develop the premises, and we think that a lease which provides the sole or the main consideration moving to the lessor is to be a royalty from the proceeds of the mine implies a covenant for diligent operation and imposes on the lessee the duty of proceeding in that manner, and his failure or refusal so to do constitutes a breach of contract which warrants the lessor in canceling the lease. Sledge v. Stolz 41 Cal. App. 209, 182 P. 340; McIntosh v. Robb, 4 Cal. App. 484, 88 P. 517; Downing v. Rademacher et al., 133 Cal. 220, 65 P. 885, 83 Am. St. Rep. 160; Pritchard v. McLeod et al. (C.C.A.) 205 F. 24; Sharp v. Behr (C.C.) 117 F. 864; 60 A.L.R. 901, and note.

The value of the "implied covenant" cases, it would seem, is to underscore the importance which the courts have placed upon the duties of a lessee in royalty or production leases, and particularly upon those leases in which no minimums are set. These cases help (if help is, indeed, needed) to set the "climate" under which a specific termination clause should be read.

Were there no termination clause whatever in this lease, and even if this lease contained no pre-lease exploratory period, it is submitted that the law of implied covenants would require its cancellation.

From Mr. Guy Swartz' testimony at the Court hearing, 600 tons per month of mining is reasonable at this mine. Paragraph 4 of defendants' Exhibit P (being the contract between Mr. and Mrs. Wright and Mr. and Mrs. Swartz) in effect sets such a schedule. Mining at better than this rate is now going on!

Conclusion:

It is respectfully submitted that under the lease in question, defendants have failed to mine for a period in excess of six months for the reasons that:

- (1) No extraction of ore was accomplished from October 1, 1961 through May 18, 1962, and
- (2) The lease provisions, dictionary definitions and courts all require the verb "mine" in this context to be synonymous with extraction.

Any other conclusion, we believe, is inconsistent with the words of the lease, common sense and the law.

The lease having thus terminated, it is imperative that an injunction issue to preserve plaintiffs' property during the pendency of defendants' appeal.

Respectfully submitted

this 26th day of November, 1962.

SNELL & WILMER

By /s/ Roger W. Perry

/s/ Edward Jacobson

Counsel for Plaintiffs
E. Ray Cowden and Ruth Reed
Cowden, his wife.

Two copies of the foregoing
delivered to Tognoni, Parsons,
Birchett and Gooding, 601 First
National Bank Building, Phoenix 4,
Arizona, Counsel for Defendants,
this 26th day of November, 1962.

/s/ Edward Jacobson

DEFINITIONS

"Mining" (in the restricted sense).

1. Fay - pg 437, Subsection 5

"To dig a mine; to get ore, metal, coal or precious stones out of the earth; to dig in the earth for minerals; to work in a mine".

from "A Glossary of the Mining and Mineral Industry"
by A. H. Fay. U. S. Bureau of Mines Bulletin 95 (1920).

Also:

2. Fay - pg 442, Subsection 1, second sentence:

"The processes by which useful minerals are obtained from the earth's crust, including not only underground excavations but also open workings; it also includes both underground and surface deposits".

3. Encyclopaedia Britannica - 11th Ed. (1929), pg 544.

....."the winning of metals and their ores from the ground".

4. U.S. Bureau of Mines Bulletin 419 (1939) entitled "Metal Mining Practice".

pg 3

"In many of the (U.S.B.M.) information circulars upon which this bulletin is based the term "mining" was used synonymously with "stoping" and is often so used in practice".

5. American Mining Law, by A. H. Ricketts (1943)

pg 27

"Mining, the process of extracting from the earth the rough ore....."

"Mining" (in the comprehensive sense).

Peele: Mining Engineers' Handbook (1941):

pg 10-03

1. "In a given mineral deposit, mining operations may be divided into 4 stages:

Prospecting, or the search for minerals.

Exploration, or the work of exploring a mineral deposit when found. It is undertaken to gain knowledge of the size, shape, position, characteristics, and value of the deposit.

Development, or the driving of openings to and in a proved deposit, for mining and handling the product economically.

Exploitation, (mining) or the work of extracting the mineral.

1a. Ricketts - pg 27, Footnote 182:

"The process of mining is, therefore, not completed until the ore has been milled or smelted." (Great Western Corp. 16 Fed. Supp. 252.)

Therefore "mining" (in the extended sense) includes the milling and smelting of ores, but I find no mention of market research and the contacting of possible ore buyers to be an integral part of mining. Such can only be arrived at by indirect, viz:

Ricketts - pg 27, Footnote 181:

"The process of mining is a business", and

Fay - pg 442, Subsection 1, first sentence:

(Mining is the) "act or business of making mines or working them", (quoted by Fay from Webster)

and a business must have a profitable outlet for its product.

Name: E. N. Pennebaker. Age 60.

Profession: Mining Geologist.

Residence: Scottsdale, Arizona

Education:

B.S. from College of Mining, University of California,
1924. Graduate studies in geology, 1925 and 1927.

Registration:

State of Arizona
Registered Geologist, No. 1105.

State of Nevada
Professional Engineer, No. 190.

Professional Experience

35 years' practice in the field of mining geology both as a staff member of several mining companies and as a consultant to many major mining companies. Work has been in North and South America, the Caribbean Region, Africa, and Australia.

In Arizona have conducted investigations for Phelps Dodge Corporation, Miami Copper Company and associated companies, Pima Mining Company, Arizona Public Service Company, Union Gypsum Company, The American Metal Company, Homestake Mining Company, National Lead Company, Olin Mathieson Chemical Corp., and Westinghouse Electric Corp.

Member of the following professional societies:

Mining and Metallurgical Society of America
Society of Economic Geologists
Amer. Inst. of Mining, Metallurgical & Petroleum Engineers
Canadian Institute of Mining & Metallurgy
American Association of Petroleum Geologists
Geological Society of South Africa
Geochemical Society

Investigation of Iron Ore Deposits

- 1944 - Examination and estimation of ore reserves of the Sanford Lake ilmenite-magnetite deposit in northern New York for National Lead Company.
- 1952 - Conducted exploration by test pits for lateritic iron ore in eastern Cuba, near Manati in Oriente Province. Visited Nicaro deposits.

1960 - Carried out a field study of the iron deposits of south-central New Mexico.

1961 - Examined iron-copper deposits northeast of Parker, Arizona.

1961 - Study of detrial magnetite deposits south of Florence, Arizona.