12-7-1982

Bakers Park Mining and Milling Co. v. District Court of County of Denver

SUPREME COURT

STATE OF COLORADO

82 SA 494

BAKERS PARK MINING AND MILLING COMPANY, a Colorado corporation, Petitioner, vs. DISTRICT COURT IN AND FOR THE CITY AND COUNTY OF DENVER, THE HONORABLE JOHN BROOKS, JR., one of the Judges thereof, Respondent.	RESPONDENT'S ANSWER TO ORDER TO SHOW CAUSE

PHILIP E. LOWERY, P.C.
Attorneys for Respondent
Philip E. Lowery, #1169
Scot W. Nolte, #10632
110 - 16th Street #1410
Denver, Colorado 80202
(303) 825-8243

SUPREME COURT

STATE OF COLORADO

82 SA 492

BAKERS PARK MINING AND MILLING COMPANY, a Colorado corporation,	)	
Petitioner,	)	
vs.	)	RESPONDENT'S ANSWER TO ORDER TO SHOW CAUSE
DISTRICT COURT IN AND FOR THE CITY AND COUNTY OF DENVER, THE HONORABLE JOHN BROOKS, JR., one of the Judges thereof,	)	
Respondent.	)	

COMES NOW the Respondent District Court represented by the law firm of PHILIP E. LOWERY, P.C. and for its Answer to the Order to Show Cause issued by this Court on November 4, 1982 states as follows:

FACTS

The chronology of events set forth by the Petitioner is essentially correct, save for several important facts existing at the time of the actions alleged to be in excess of Respondent's jurisdiction.

Critical among these is the fact that no sale date had been set with the Office of the Public Trustee of San Juan County at the commencement of the hearing on attorney fees on October 26, 1982. In point of fact the parties had extended into a Stipulation (Exhibit "C") on October 18, 1982 in the companion civil action of **Bakers Park Mining and Milling Company et al. vs. Tusco Incorporated, et al.**, 82 CV 8674 pending in the Denver District Court. This Stipulation called for the reservation of the setting of the sale date through the Public Trustee until the issue of injunctive relief could be heard on December 9, 1982.

Hence, no return upon the Order Authorizing Sale under Rule 120(g) could have been made at the time.

Next, Petitioner ignores the terms of its own agreements with Tusco Incorporated, specifically the Deed of Trust (Exhibit "A) and Promissory Note (Exhibit "B"). A Motion to Dismiss based upon the terms of these documents has previously been presented by the Respondent on November 8, 1982. The terms contained in those documents deserve greater examination.

Neither the Deed of Trust nor the Promissory Note set forth any definite, liquidated sum to be assessed in the event of default proceedings. For example, no set percentage or sum certain is contained within the terms of the Deed of Trust or Note. Further, both documents appear to have been drafted specifically for a transaction involving the purchase of a sizable amount of property in exchange for a promissory note in the amount of $3,600,000.

Based upon all the facts before it, the Respondent contends that there was no abuse of discretion or action in excess of the court's jurisdiction. Rather, when all facts are taken into consideration, the record shows that the procedure followed by the Respondent was correct and proper in view of the circumstances. The position which is advocated by Petitioner would establish a dangerous precedent for the assessment of costs, such as attorney fees, in foreclosure proceedings. This state's public policy in favor of judicial economy and considerations of due process not only justified the Respondent's actions but made those actions mandatory.

ARGUMENT

The Petitioner's argument appears to run in two veins; first, that a hearing under Rule 120 is concluded in <u>all</u> instances when the district court decides whether or not there is reasonable

probability cause to establish a default, and second, that the pendency of a subsequently filed civil action seeking injunctive relief and damages should terminate any actions being taken by another district court involved with the Rule 120 proceeding. Respondent submits that each of these propositions is erroneous.

Specifically, under the circumstances of this case and based upon the language of the Deed of Trust and Promissory Note involved, the Respondent's jurisdiction over the issue of attorney fees did terminate upon the signing of the Order Authorizing Sale. This is especially true in view of the fact that no sale date was set at that time. Petitioner seems to suggest that the issue of attorney fees should have been left to the public trustee of San Juan County to determine rather than a District Court Judge in the State of Colorado. The logic within this proposition would appear to be somewhat strained in view of the statutory power given to the office of public trustee. Further, where as in this case, the question of attorney fees is to be handled as a question of costs the Respondent is not limited to hear and assess costs unless expressly forbidden to do so by statute or rule.

A. THE SCOPE OF RULE 120 IS NOT LIMITED AS SUGGESTED BY PETITIONER.

The language of Rule 120(d) is not the language of exclusion as suggested by Petitioner. Rule 120(d) does contemplate the holding of a hearing to inquire into the issues of the existance of a default which would justify the exercise of a power of sale and consideration of the Soldier's and Sailors Civil Relief Act of 1940. But note the language of the Rule, to wit:

> At the time and place set for the hearing or to which the hearing may have been continued, the court shall examine the motion and the expenses, if any, and shall hear such testimony as may be offered. The scope of inquiry at such hearing shall not extend beyond the existence of a default or other circumstances authorizing, under the terms of the instrument described in the Motion, exercise of a power of sale contained therein . . . (emphasis added)

Nothing within the express language of Rule 120 provides for the exclusion of a supplementary proceeding to assess attorney fees as costs where that amount is not provided for in the Deed of Trust and Note. Where the terms of those documents call for the court to determine the issue of a "reasonable attorneys' fee" which "shall be taxed by the Court as part of the costs in such foreclosure proceeding" the Respondent would be abusing its discretion by not deciding that question. (Exhibit A, ¶7).

If the court is not to decide the issue of a reasonable attorney fee then who is vested with that power? Does the Petitioner suggest that the Public Trustee should be the one to determine the legal effect of written documents? Is the Public Trustee to be given discretion in deciding a legal issue and then to render judgment in the form of monetary relief? Clearly, the parties to the Agreements wanted the Court to set the amount of the attorney fee to be charged. The assessment of that fee is solely for the trial court hearing the Rule 120 proceeding.

It is undisputed that the foreclosure proceeding in this case was made "through the Court," (see Exhibit "A", ¶7). The terms of the Deed of Trust allow the beneficiary to elect which procedure will be followed in the event of foreclosure. Foreclosure may be made either by the Court (Rule 120) or the Public Trustee (1973 C.R.S. 38-37-113 and 38-37-114) depending on the property involved. In this case the proceedings which culminated in the Order Authorizing Sale were through the Court. In fact, court supervision of a foreclosure proceeding on <u>real property</u> <u>must</u> be done through the court in accordance with 1973 C.R.S. 38-37-140 which states:

> In all cases of foreclosure of real estate by the public trustee pursuant to a power of sale contained in a deed of trust, the legal holder of the indebtedness secured thereby <u>shall obtain an order</u> authorizing sale <u>from a court property having</u> jurisdiction to issue the same. In no event shall the public trustee sell the subject real esttate prior to the issuance of such an order authorizing the sale. (emphasis added)

Petitioner has argued that the court may only set attorney fees if the foreclosure is through the court and thus, seems to be arguing that this was a public trustee foreclosure. This contention is absurd on its face. In Colorado there can be no foreclosure or real property without invoking the jurisdiction of the district court. Once the issue of the existance of a default has been decided and a sale authorized there is nothing to suggest that the court loses its jurisdiction over the case. In fact Rule 120(g) states that a return must be made to the court showing that a sale has been made.

How, then, may it be argued that the Respondent court was without jurisdiction to hear the issue of attorneys' fees? The statute on foreclosures allows for the utilization of the public trustee in such proceedings when either realty or chattels are secured by an obligation upon which a power of sale is granted in case of a default. However, in cases involving realty the public trustee must, by the terms of the statute, act at the direction of the district court. (1973 C.R.S. 38-37-105). Here, the foreclosure involved real property and as a result the Public Trustee could only issue and post notices to parties in interest, publish the election and demand of the beneficiary and perform the administrative function of conducting the sale and issuing the appropriate deeds. The trustee is not authorized to tax unliquidated attorney fees by the express language of the cited statute.

Previous Colorado cases have allowed the trial court in a foreclosure to decide the issue of a "reasonable attorney fee." In **Denver Lumber & Manufacturing Company vs. Capitol Life Insurance Company**, 96 Colo. 21, 39 P.2d 1036, 1935 one of the issues on appeal was the assessment of a reasonable attorney fee. The language of **Denver Lumber, supra**, is useful in the present controversy, to wit:

> The mortgage provided that in the event of foreclosure the mortgages shall "recover a reasonable attorney's and solicitor's fee," the same to constitute a "further charge and lien upon said premises under this deed, to be paid out of the proceeds of the sale thereof." Plaintiff alleged the requisite facts and prayed for the allowance of an attorney's fee. The evidence was that it had agreed to pay its attorney "as a reasonable fee for handling this case, whatever amount the court may fix as an attorney's fee."

The Supreme Court went on to hold as follows:

> Where either the note or securing instrument in a foreclosure proceeding provides for an attorney's fee, and the mortgagee employs counsel, a sum to that end, reasonably fixed by the court, may be included in the claim to be satisfied by sale.. . .
>
> We are not disposed to the view advanced by counsel for the mortgagor that the contract of mortgagee with its counsel in the matter was inherently weak and vicious. The arrangement conformed to the spirit of our pronouncements that the sum to be allowed for counsel's services must be reasonable. Only the court can determine that issue, and the agreement here was that the court should determine it. (emphasis added)

(See also **Borcherdt vs. Favor** 16 Colo. app. 401, 1901)

The procedure for taxing attorney fees in foreclosures by conducting a hearing after the finding of a default has also been approved by this Court in **Mountain Refining Company vs. Heald**, 112 Colo. 113, 146 P.2d 992, 1944. There, a deed of trust running to the public trustee of Adams County contained the following language:

> "if foreclosure be made by the public trustee an attorney's fee in the sum of five hundred dollars for services in the supervision of said foreclosure proceedings shall be allowed by the public trustee as a part of the cost of foreclosure, and if foreclosure be made through the courts a reasonable attorney's fee shall be allowed by the court as a part of the indebtedness to be paid through such foreclosure proceedings." (emphasis added)

The foreclosure proceeding was through the Court and a "special hearing" was held by the court on the issue of attorney fees.

The Supreme Court discusses the distribution between public trustee foreclosures and court foreclosures. The holding of the special hearing by the trial court is approved and only the amount of the fee is at issue. The reasoning and holding in **Mountain Refining, supra,** is as follows:

> A special hearing was had by the court on the question of attorney's fees and the sum of $1000 was fixed . . .
>
> Had this been a simple public trustee's foreclosure we question the reasonableness of these maximum fees. We realize that counsel's labor involved in this complicated judicial procedure justified a larger fee than should have been allowed had the foreclosure been by the public trustee, notwithstanding which, and taking into consideration the amount of the judgment obtained by Heald (always a proper element for consideration in such cases) this fee should not have exceeded $500.

This Court has also held that where a note calls for attorney fees as a cost of collection, proof of such fees must be presented to the court, (See **Gertner vs. Bank,** 82 Colo. 13, 1927).

Clearly, the Respondent Court acted properly in proceeding to hear the question of attorney fees. This procedure is consonant with prior Colorado case on the subject and particularly in light of the decision in **Princeville Corporation vs. Brooks,** 533 P.2d 916, 1975 where this Court held that:

> A Rule 120 hearing may be used to determine, if the circumstances warrant, whether these are factors in addition to military status which require the court to retain a supervising jurisdiction. No opportunity exists in foreclosure proceedings by the public trustee for defining those possible factors.
> (emphasis added)

What, then, was the prudent and safe course to follow when the issue of attorney fees was brought to the Respondent Court? Should the Respondent have told the applicant to present the question to the public trustee and let that person decide? Should the Respondent have told the applicant to file a separate

lawsuit to determine the amount of the fee, despite the clear terms of the Deed of Trust? Should any court in a Rule 120 hearing automatically throw up its hands and decline to hear any supplementary question that arises after an order authorizing sale is entered? Each of these propositions is implicit in Petitioner's argument and each must be rejected.

The Petitioner complains of an abuse of discretion on an action in excess of jurisdiction and yet would appear to prefer the public trustee to decide how much a defaulting party is to pay for attorney fees. If this reasoning had been followed by the Respondent court who would be acting in excess of its jurisdiction, the court on the public trustee? Petitioner's argument invites abuses of discretion by an administrative office.

The authorities cited by Petitioners in its Brief are inapplicable and have no value in the instant controversy. In particular, the case of **Boulder Lumber Company v. Alpine of Nederland**, 626 P.2d 724, 1981 involved foreclosure on a mechanic's lien which conflicted with a public trustee sale. All that was held in **Boulder Lumber** was that the trial court properly enjoined the trustee sale until all conflicting claims could be sorted out and priority status assigned between the claimants.

Other authority cited by Petitioners in the form of **Vaughn vs. District Court**, 559 P.2d, 222, 1977 simply support Respondent's contention that this Court's Writ of Prohibition was improvidently issued.

B. COSTS ARE TAXABLE BY THE TRIAL COURT.

Rule 54(d) of the Colorado Rule of Civil Procedure sets forth the procedure for taxing if costs in civil lawsuits. The parties agreed that attorney fees would be a matter of costs and as such those fees were to be awarded as costs unless presented by statute or other rule. The status of the case before the Respondent court showed that the foreclosure was pending through

the Court and that it had continuing, supervising jurisdiction over that proceeding. The Court this had jurisdiction over the parties and the subject matter and no rule prevents the taxing of costs by the Court in a foreclosure action. In fact, the law would mandate such a procedure under these circumstances. Thus the Respondent property was taxing costs in the form of attorneys' fees under Rule 54(d).

CONCLUSION

The Respondent court is not compelled to consign a Rule 120 proceeding to the dust bin once the Order for Sale has been entered. On the contrary, a court must act prudently and continue to exercise supervising jurisdiction. Here, the beneficiary was entitled to attorney fees due to a default. The parties had agreed to that but had not set the exact amount of those fees as a sum certain. The Respondent, and not the public trustee, was the one to decide the question of a "reasonable attorney fee".

The present Petition is merely a delaying tactic to obstruct the swift and fair administration of justice. The Petitioner would have this Court believe that the amount of fees sought is by itself reason for the extraordinary relief sought under C.A.R. 21. This is not correct and belies the Petitioner's logic. The Petitioner cannot claim the benefit of saying the suggested fee is excessive and then turn around and say the Respondent should not be allowed to decide the controversy. If not the Respondent, then who?

For these reasons the Petition must fail and the Rule to Show Cause be discharged.

Respectfully submitted,

PHILIP E. LOWERY, P.C.

By: _____
Philip E. Lowery
Registration No. 00119

By: _____
Scot W. Nolte
Registration No. 10632
Attorneys for Respondent
110 - 16th Street #1410
Denver, Colorado 80202
(303) 825-8243

CERTIFICATE OF MAILING

I hereby certify that on the 6TH day of December, 1982, I did place in the U.S. Mail, postage prepaid, a true and correct copy of the foregoing Respondent's Answer to Order to Show Cause to:

Edward Nottingham
SHERMAN & HOWARD
Suite 2900
633 17th Street
Denver, Colorado 80202

_____

DEED OF TRUST

THIS INDENTURE, made this 8th day of May 1980 between Timberline Mining and Milling Company, a Colorado corporation, hereinafter called "Grantor," whose address is 1776 Lincoln Street, Suite 510, Denver, Colorado 80203 and the Public Trustee of the County of San Juan, Colorado, hereinafter called "Trustee."

WITNESSETH THAT the Grantor hereby conveys unto the Trustee, IN TRUST FOREVER, the following-described property situate in the County of San Juan, State of Colorado, to wit:

TRACT I:

All of the lands covered and included in that certain patented mining claim, designated by the United States Surveyor General as Lot No. 942, otherwise known, referred to and described as the Howardsville Placer claim, U. S. Survey No. 942, granted and conveyed by the United States Patent covering said claim issued December 15, 1882, and recorded January 24, 1883, in Book A-1 at Page 246 of the records of the county clerk and recorder of said county and state, to which patent and the record thereof reference is here made for a more particular description of said land;

TRACT II
All that part or portion of the "LITTLE NATION" mill-site, Survey No. 169B, described as follows, to-wit:
Beginning at a point whence Corner No. 2, Survey No. 169B "LITTLE NATION" mill-site, bears N. 63°20' E., 355 feet;
Thence S. 61°50' W., 85 feet;
Thence N. 28°10' W., 170 feet;
Thence N. 61°50' E., 85 feet;
Thence S. 28°10' E., 170 feet, containing 0.332 acres of surface ground.

TRACT III:
That part or portion of the "LITTLE NATION" mill-site, Survey No. 169B, described as follows, to-wit:
Beginning at corner No. 2, Survey No. 169B, "LITTLE NATION" mill-site,
Thence S. 48° W., 250 feet to a point;
Thence N. 42° W., 217.8 feet to a point;
Thence N. 48° E., 200 feet to a point;
Thence S. 42° E., 217.8 feet to a point. Contains 1.0 acres of surface ground, situate in Animas Mining District, San Juan County, Colorado.

TRACT IV:
A portion of the C.B. COBB LODE MINING CLAIM, U.S. Survey No. 556, Animas Mining District, San Juan County, Colorado, more particularly described as follows:
Beginning at Corner No. 1 of Survey No. 556, C.B. COBB
Thence N. 64° E., 213 feet;
Thence S. 47°12' E., 119.1 feet;
Thence S. 41°35' W., 277 feet;
Thence N. 26° W., 216.7 feet to point of beginning.

(the above-described property being hereinafter referred to as the "Premises"), with all buildings located thereon and all and singular the privileges and appurtenances thereunto belonging, and covenants that the Premises are free of encumbrances except:

"A"

1. Lease effective December 10, 1979 between Tusco Incorporated, as lessor, and Maverick Mining and Milling Company, Inc., as lessee.

2. Liens to secure 1980 taxes due but not payable.

3. Reservations contained in United States Patent dated December 15, 1882, recorded January 24, 1883, in Book A-1, Page 246, San Juan County records affecting Tract I.

4. Reservations contained in United States Patent dated November 30, 1881, recorded October 16, 1902 in Book A-5 Page 154, San Juan County Records affecting Tracts II and III.

5. Reservations contained in United States Patent affecting Tract IV.

TO HAVE AND TO HOLD the same IN TRUST, however, for the purpose of securing:

I. The payment of that certain nonnegotiable promissory note (the holder of which is hereinafter called "Beneficiary") of even date herewith, for the principal sum of $3,600,000, made by the Grantor, and payable to Tusco Incorporated, a Nevada corporation, whose address is 5460 Colorado Boulevard, Commerce City, Colorado 80022, with interest thereon at the rate of zero percent (0%) per annum, payable on the terms and conditions prescribed therein.

II. The payment by the Grantor to the Beneficiary of all sums expended or advanced by the Beneficiary pursuant to the terms hereof.

III. The performance of each covenant and agreement of the Grantor herein contained. (The principal, interest, and advances are hereinafter referred to as the "Indebtedness.")

THE GRANTOR COVENANTS AND AGREES AS FOLLOWS:

1. To pay promptly the principal of and interest on the Indebtedness evidenced by said promissory note in accordance with its terms and to perform each and every agreement and condition in said note and this deed of trust contained.

2. To pay immediately when due and payable all taxes, special assessments, water and sewer rents or assessments, and all other charges imposed by law upon or against the Premises, and to deliver to the Beneficiary upon demand, receipts, or other evidence of such payments.

3. To pay or cause to be paid promptly when due, all debts, if any, secured by prior encumbrances on the Premises; and not to permit any other liens of any kind to accrue and remain on the Premises which might take precedence over the lien of this deed of trust.

4. To neither commit waste nor to suffer waste to be committed on the Premises and to keep all improvements thereon in good condition and repair.

5. To keep the Premises insured for fire and extended coverage in an amount at least equal to the unpaid balance of the Indebtedness.

6. That in the event of default by the Grantor in the payment of the Indebtedness or any part thereof, or in the event default be made in the performance of any covenant or agreement herein contained by the Grantor to be performed, the Beneficiary may

file notice with the Trustee declaring such default and his election and demand in writing, as provided by law, that the Premises be advertised for sale and sold in accordance with the laws of the State of Colorado in such cases made and provided; and thereupon it shall and may be lawful for the Trustee to foreclose this deed of trust and thereupon, the Trustee shall sell and dispose of the Premises (en masse or in separate parcels as the Trustee may think best), and all right, title, and interest of the Grantor therein at public auction at the front door of the Courthouse in the County of San Juan, State of Colorado, or on the Premises, four weeks' notice having been previously given of the time and place of such sale, by advertisement weekly in some newspaper of general circulation at the time published in said San Juan County and/or such other notice as may be then required by law and shall issue, execute, and deliver a certificate of purchase, trustee's deed, or certificate of redemption in the manner provided by law to the party entitled thereto. The trustee's deed may be in the ordinary form of conveyance. The Trustee shall, out of the proceeds or avails of such sale, after first paying and retaining all fees, charges, and costs of making said sale, including an attorney's fee in the amount hereinafter provided, pay to the Beneficiary the amount then owed on the Indebtedness secured hereby, rendering the surplus, if any, unto the Grantor or the successors or assigns of the Grantor.

7. That in the event foreclosure is made by the Trustee, attorneys' fees for services in the supervision of said foreclosure proceedings in a reasonable amount shall be allowed by the Trustee as part of the cost of foreclosure. In the event foreclosure is made through the Court, attorneys' fees in the amount determined by the Court to be reasonable shall be taxed by the Court as part of the costs in such foreclosure proceedings.

8. That if the Indebtedness secured hereby is now or hereafter further secured by chattel mortgages, deeds of trust, pledges, contracts of guarantee, or other additional securities, Beneficiary may, at his option, exhaust any one or more of said securities as well as the securities hereunder, either concurrently or independently and in such order as Beneficiary may determine and may apply the proceeds received therefrom upon the Indebtedness without waiving or affecting the status of any breach or default or any right or power whether contained herein or whether contained in any other security agreement.

9. That each right, power, and remedy herein conferred upon the Beneficiary or Trustee is cumulative of every other right or remedy of the Beneficiary or Trustee whether conferred herein or by law and may be enforced concurrently; and no waiver by the Beneficiary of the performance of any covenant or agreement herein contained shall thereafter in any manner affect the right of the Beneficiary to require or enforce performance of such covenant or agreement.

10. That each covenant, agreement, and provision herein contained shall apply to, inure to the benefit of, and be binding upon the Grantor, the Trustee, the Beneficiary, their respective heirs, personal representatives, successors, and assigns. The term "Beneficiary" as used herein shall include any lawful owner, holder, or pledgee of the Indebtedness secured hereby as well as the holder of a certificate of purchase which may be issued under the foreclosure hereof. Whenever used in this deed of trust, the singular number shall include the plural, the plural the singular, and use of any gender shall be applicable to all genders.

PROVIDED, HOWEVER, that upon payment of the Indebtedness hereby secured, or if the purposes of this deed of trust shall otherwise be satisfied, the Beneficiary shall concurrently therewith execute and deliver to the Grantor a request for the release of this deed of trust directed to the Trustee. The Trustee may release

portions of the Premises from the lien of this deed of trust upon request by the Beneficiary without impairing any rights or priority the Beneficiary may have in the remainder of the Premises or against the original maker, his heirs, or personal representatives. It is agreed that the Grantor will pay all expenses in connection with any release.

EXECUTED AND DELIVERED the day and year first above written.

TIMBERLINE MINING AND MILLING COMPANY

By: Mark K. Shipman
President

Attest:

Secretary

STATE OF COLORADO)
) SS.
CITY AND COUNTY OF DENVER)

The foregoing instrument was acknowledged before me this 8th day of May A.D. 1980, by Mark K. Shipman, as President, and Caswell Silver, as Secretary, of Timberline Mining and Milling Company, a Colorado corporation.

WITNESS my hand and official seal.

My commission expires: My Commission Expires Sept. 11, 1983

Sheila K. McCall
Notary Public

[SEAL]

COPY

NONNEGOTIABLE PROMISSORY NOTE

$3,600,000 May 8, 1980
Denver, Colorado

FOR VALUE RECEIVED, TIMBERLINE MINING AND MILLING COMPANY, a Colorado corporation ("Borrower"), 1776 Lincoln Street, Denver, Colorado 80203, hereby promises to pay to TUSCO INCORPORATED, a Nevada corporation ("Lender"), at its office located at 5460 Colorado Boulevard, Commerce City, Colorado 80022, the principal sum of Three Million Six Hundred Thousand Dollars ($3,600,000), with interest at the rate of zero percent (0%) on unpaid principal from the date of this Note until paid. Installments of principal shall be payable monthly on the 25th day of each month, commencing June 25, 1980. Each monthly installment shall be in an amount which equals the product of $5.00 multiplied by the number of tons processed at the mineral ore mill referred to in the Purchase and Sale Agreement (the "Purchase Agreement") dated as of March 20, 1980, among Borrower, Lender, J. W. LaFollette and J. P. LaFollette, during the full calendar month preceding the due date of each installment. For purposes of this Note, the tonnage processed at the Mill shall not include ore processed at the Mill by Maverick Mining Company, Inc., under its lease of a portion of the Mill, or any ore processed at the Mill on account of milling commitments of Maverick Mining Company, Inc., which are assumed by Borrower. Concurrently with the payment of each installment on this Note, Borrower shall deliver to Lender documents evidencing the tonnage upon which the computation described in the foregoing sentence is based. Additionally, if the total of the monthly installments computed as described above for the six-month period ended June 30, 1981, and each six-month period thereafter shall be less than $60,000, Borrower shall pay to Lender additional principal in an amount which equals the difference between the total of the monthly installments for the six-month period in question and $60,000, such semiannual payments, if any, to be made on January 25 and July 25 of each year, commencing July 25, 1981.

The principal of this Note may be prepaid at any time and from time to time after September 15, 1980, in full or in part, without penalty or premium; no prepayment shall be made prior to September 15, 1980.

"B"

Borrower waives presentment for payment, protest, notice of non-payment and protest and agrees to any extention of time of payment and partial payments, before, at or after maturity, and if this Note is not paid when due, or suit is brought, Borrower agrees to pay all reasonable costs of collection, including reasonable attorneys' fees.

This Note is the promissory note referred to as the "Timberline Note" in the Purchase Agreement. This Note is subject to the terms applicable to it under the Purchase Agreement, which are incorporated in this Note to the same extent as if set forth at length herein. This Note is secured by a Deed of Trust of even date to the Public Trustee of San Juan County, Colorado, for the benefit of Lender and by a security interest in personal property, all as described in the Purchase Agreement.

This Note shall be governed by and construed in all respects according to the laws of the State of Colorado.

TIMBERLINE MINING AND MILLING COMPANY

By Mark K. Shipman
President

Attest:

Secretary

DISTRICT COURT, CITY AND COUNTY OF DENVER, COLORADO

Civil Action No. 82CV0[illegible]374

STIPULATION

BAKERS PARK MINING AND MILLING COMPANY, a Colorado corporation, and SUNDANCE OIL COMPANY, a Utah corporation,

Plaintiffs,

v.

TUSCO INCORPORATED, a Nevada corporation, and CATHERINE E. MARTINEZ, Public Trustee of the County of San Juan, Colorado,

Defendants.

Plaintiffs Bakers Park Mining and Milling Company and Sundance Oil Company and Defendant Tusco Incorporated ("Tusco") hereby stipulate and agree as follows:

1. Plaintiffs agree, at the request of Tusco, to file this action in the District Court for the City and County of Denver, rather than in the District Court for the County of San Juan. Neither plaintiffs nor Tusco will raise further venue objections in these proceedings.

2. Plaintiffs and Tusco agree that the foreclosure sale by the Public Trustee of San Juan County, Colorado, in Trustee No. 4-82, currently set for 10:00 o'clock a.m. on Thursday, October 21, 1982, will be vacated and will be re-set only in accordance with the provisions of paragraph 3 of this Stipulation. Plaintiffs and Tusco will further so notify the Public Trustee of San Juan County.

3. Tusco, its agents, servants, employees, attorneys, and all persons acting under, in concert with, or for it will refrain from taking any action to set or schedule the foreclosure sale by the public trustee until after a final judicial ruling on plaintiffs' motion for a preliminary injunction and declaratory judgment.

EXHIBIT "C"

Dated at Denver, Colorado, this 18 day of October, 1982.

SHERMAN & HOWARD

By _____
Edward W. Nottingham 4498
Charles Y. Tanabe 7575
2900 First of Denver Plaza
633 Seventeenth Street
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(303) 893-2900

Attorneys for Plaintiffs

PHILIP E. LOWERY, P.C.

By _____
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Attorneys for Defendants