

131268

NONDEVELOPMENT AND NONPAYMENT  
OF RENTALS AFFIDAVIT

George R. Wagner, of lawful age, being first duly sworn, upon his oath deposes and says:

That affiant is Manager of Lease Records of SFP Minerals Corporation, an affiliate of Southern Pacific Company and Southern Pacific Land Company, and is personally acquainted with the history of Section 25, Township 36 North, Range 49 East, MDBM, Eureka County, Nevada.

That by Lease of Mining Rights No. SPL-357 dated December 1, 1975, a copy of which is attached hereto as Exhibit A, Southern Pacific Land Company granted to Temple Mountain Industries, Inc., a lease covering the W1/2 of Section 25, Township 36 North, Range 49 East, MDBM for a term from December 1, 1975 to November 30, 1976, subject to annual renewal upon the lessee's written notice being received by the lessor not more than six months nor less than thirty days prior to the expiration of the term or annual period. That the lease also required advance payment of an annual minimum royalty. That neither the lease nor a memorandum of lease was placed of record, but that reference is made to the unrecorded lease in the following instruments appearing of record in Eureka County, Nevada:

BOOK 207 PAGE 404

<u>Instrument</u>	<u>Date</u>	<u>Recording Date</u>	<u>Book/ Page</u>
1. Agreement	01/09/76	03/31/81	93/500
2. Agreement	01/19/76	09/18/81	98/92
3. Agreement	01/09/76	10/23/81	99/84
4. Agreement	01/09/76	10/23/81	99/86
5. Agreement	01/09/76	10/23/81	99/88
6. Agreement	01/09/76	11/02/81	99/173
7. Agreement	03/26/76	02/11/82	101/193

That in his position as Manager of Lease Records, affiant is the recipient of all rental and royalty payments and that he has received no payments on the lease since 1980. That affiant has personally examined the corporate records, that notice by lessee to extend the term of the lease was never timely received, and that by letter dated December 15, 1980, written notice was given to the then lessee, Temple Mountain Industries, Inc., that due to the late payment of an advance minimum royalty, the lease dated December 1, 1975, was considered terminated.

That Temple Mountain Industries, Inc. commenced a lawsuit claiming that the lease dated December 1, 1975, continued in full force and effect, which lawsuit was filed in the United States District Court for the District of Utah, Civil Action No. C-81-0100J, but was transferred to the United States District Court for the District of Nevada, Civil Action No. CV-R-81-183-ECR.

That the United States District Court for the District of Nevada by order, dated November 12, 1982, granted a motion for summary judgment in favor of Defendant Southern Pacific Land Company and against Plaintiff Temple Mountain Industries, Inc. and as such terminated that certain Lease of Mining Rights, SPL-357, dated December 1, 1975. That supporting documentation is attached hereto as Exhibit B.

To the best of affiant's knowledge no oil, gas or other minerals have been produced from any part of the W1/2 Section 25, Township 36 North, Range 49 East, M.D.B.M., for more than ten years.

Further affiant sayeth not.

  
George R. Wagner

State of New Mexico )  
County of Bernalillo ) ss.

Subscribed and sworn to before me this 23rd day of January, 1990.

*Laurie L. Carpenter*  
Notary Public



OFFICIAL SEAL  
LAURIE L. CARPENTER  
NOTARY PUBLIC - STATE OF NEW MEXICO  
Notary Bond Filed With Secretary of State  
My Commission Expires 6-21-93

my commission expires:

June 21, 1993

State of New Mexico )  
County of Bernalillo ) ss.

On January 23, 1990, personally appeared before me, a notary public, George R. Wagner, personally known to be the person whose name is subscribed to the above instrument, who acknowledged that he executed the instrument.

Witness my hand and official seal.

*Laurie L. Carpenter*  
Notary Public



OFFICIAL SEAL  
LAURIE L. CARPENTER  
NOTARY PUBLIC - STATE OF NEW MEXICO  
Notary Bond Filed With Secretary of State  
My Commission Expires 6-21-93

My commission expires:

June 21, 1993

Approved as to Form by General Counsel,  
January 29, 1971

## EXHIBIT A

L-3363-A  
Sheet 1 of 4 Sheets

## LEASE OF MINING RIGHTS

R-25-36-49

Lease No. SPL-357This Lease, made this 1st day of December, 1975, by and between SOUTHERN  
PACIFIC LAND COMPANY,a corporation, hereinafter called "Lessor" and TEMPLE MOUNTAIN INDUSTRIES, INC.

hereinafter called "Lessee":

## WITNESSETH:

1. Lessor, for and in consideration of the observance and faithful performance by Lessee of all the provisions contained in this lease, does hereby lease to Lessee for the term and purposes hereinafter mentioned, all that certain property sometimes hereinafter referred to as "premises" in the County of Eureka, State of Nevada, more particularly described as follows:

W $\frac{1}{2}$  of Section 25, Township 36 North, Range 49 East, MDM.,  
containing 320.00 acres, more or less.

Reserving unto Lessor, its successors and assigns, the right to construct, reconstruct, maintain and use pipelines, wire lines, conduits, ditches, flumes, roads, trails, tracks and appurtenances thereto in, over, upon, along and across said property and the right to use said property for any and all other purposes consistent with Lessee's use of said property for the purposes herein leased.

This lease is made for the sole purpose of examining, searching and testing for, opening and operating of mines, and extracting, reducing, treating, selling and shipping any and all nonferrous metallic minerals hereinafter referred to as "leased mineral", contained therein, subject to the exceptions, reservations, covenants and conditions in this lease. Lessee shall have the exclusive right hereunder only to mine for the mineral hereinabove specified and none other. There is excepted from this lease and reserved unto Lessor, its successors and assigns, all other minerals, including but not limited to oil, petroleum, natural gas and other hydrocarbons, and the exclusive rights thereto; provided, however, that in the event Lessee shall recover and sell any other minerals as a by-product of said leased mineral or as a necessary or unavoidable result thereof, Lessee shall report all such other minerals in the monthly statements hereinafter provided for and pay royalty on such other minerals at the rates hereinafter specified.

This lease is made subject to any and all rights of way and easements and to existing leases and licenses and renewals thereof.

2. The term of this lease shall be from the 1st day of December, 1975, to the 30th day of November, 1976. Lessee agrees to pay annually in advance to Lessor a minimum royalty of \$5.00 per acre per annum; however not less than \$200.00 per year during the term of this lease and each renewal term thereof, to be credited as payment on account of actual royalties to be paid by Lessee to Lessor hereunder. Lessee agrees to pay to Lessor an agreed actual royalty of 5% of the gross value of gold or silver bullion produced in Lessee's mills or by a custom mill in which gold or silver bullion is produced for Lessee's account and/or 75% of the net smelter return on ores and concentrates sold to a smelter.

extracted and removed from said property.

Exhibit "A"

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After all of the minimum royalty credits for each annual period hereunder has been credited to said actual royalties accruing during such period, Lessee shall thereafter, within twenty days after the expiration of each and every calendar month of the term hereof, pay the additional actual royalties at the rates provided by herein, and furnish Lessor full and complete copies of all documents, including settlement sheets, certificates of analyses, and assays, pertaining to or governing settlement for any ore, mineral or metal disposed of and also full and complete reports of any reduction works or mill where the ore may be reduced or treated, and setting forth for the preceding calendar month:

- (a) The number of tons of ore or mineral mined and the gross value thereof.
- (b) The number of tons of ore remaining in stockpiles on said premises.
- (c) The kind, quantity and value of all minerals extracted and sold or otherwise disposed of.
- (d) The disposition made of all ore or minerals mined, together with the dates of shipments, names and addresses of consignees, car numbers, initials and weights.
- (e) That the said premises are being worked independently of and not in connection with any other mine or mineral land.

Such statement and reports to be accompanied by draft payable to the Lessor for the proper amount of the royalty due Lessor as aforesaid. If no work is done a statement in writing to that effect must be furnished. In the event the true value of any shipment of said ore or mineral cannot be determined by Lessee, prior to rendering monthly statement to Lessor, as hereinafter provided, Lessee shall pay to Lessor at the time of rendering such statement, eighty-five per cent of the estimated royalty, based on careful sampling of said ore or mineral at point of shipment, and the true value of such shipment shall, as soon as possible thereafter, be determined and thereupon the balance of royalty thereon shall be paid to Lessor, but such true value shall be determined and the balance of royalty shall be paid to Lessor not later than ninety days from the date of any such shipment. The royalties hereinbefore provided for shall be a lien upon any and all ores or minerals mined upon the said property and upon any improvements erected upon the said property. The advance minimum royalty for each annual period hereunder may be credited only against the actual royalties accruing during such period.

3. Lessee agrees to work said premises in a manner consistent with good, prudent economical mining, so as to take out the greatest amount of ore possible, with due regard to the development and preservation of said premises as a workable mine. Lessee agrees to perform continuously and diligently in good faith, in an active and substantial way, exploration and mining work upon said leased premises directed toward the discovery and production of said lease mineral. Lessee, not later than the twentieth day of each calendar month during the term hereof, and including the calendar month next following the termination hereof, shall furnish to Lessor a statement in writing detailing such exploration and mining work. Lessee shall, upon being requested to do so, make available to Lessor, its agents and employees, copies of assay reports, drill hole logs and any and all other data assembled as an aid in determining the location, quantity and quality of any mineral deposits on said property.

4. The obligations of Lessee under this lease shall be suspended only while Lessee's compliance is prevented by the elements, accidents, strikes, lockouts, riots, delays in transportation, inability to secure materials in the open market, or interference by governmental action, or by any other causes beyond the reasonable control of the Lessee whether similar or dissimilar to the causes specifically mentioned.

5. Lessee shall keep a full set of accounts, records, and maps showing location of working places and shall allow Lessor, or its agents or employees, to examine them from time to time. Lessee shall allow Lessor to enter upon said premises, and into any workings, mills or reduction works thereon, or wherever mineral bearing materials from the leased premises may be worked or reduced, for the purpose of inspection to ascertain whether the terms and conditions of this lease are being properly carried out, and to take samples and to make tests and measurements and to sitis notices.

6. Lessee shall do any and all work necessary to safeguard against accidents and to properly conserve said property and minerals, in a first-class manner, compatible with safe and economical mining, and Lessee shall keep all workings in which ore is exposed clear of all loose rock, earth and rubbish and shall keep all surface openings securely covered or fenced against livestock.

7. In the operation and development of said leased premises, Lessee shall comply with and observe all applicable laws, ordinances, and governmental orders and regulations including, but not limited to, Employers' Liability, Workmen's Compensation and Workmen's Unemployment Insurance. Lessee shall furnish such evidence as Lessor may require showing that Lessee has complied with the requirements and conditions imposed under laws, ordinances and governmental orders and governmental orders and regulations applicable to Lessee's exercise of the rights granted under this lease. Lessee agrees to indemnify and hold harmless Lessor from and against the payment of any and all damages, claims, costs and expenses due to the existence of such enactments, and of any and all claims, costs and expenses in connection therewith under any claim of subrogation provided for by said enactments or otherwise.

8. Lessee shall not mine for any of the minerals excepted from this lease and shall not destroy, cut or remove, nor permit to be destroyed, cut or removed, on or from said land, any timber, trees or firewood, without written permission from Lessor so to do. Lessee shall not divert or obstruct any stream of water on said land, nor divert any water from said property, except that Lessee may, subject to existing rights and statutes and regulations, use any unappropriated water reasonably required for such mining operations. Lessee shall not interfere with, destroy or remove any fences on or enclosing said property nor leave gates open, nor interfere with livestock grazing within such enclosures. Lessee shall not do or suffer to be done in or upon said property any act or thing which is or may be a nuisance and Lessee shall not use or permit others to use said property, or any part thereof, for any unlawful or immoral purposes.

9. Lessee may construct, maintain and use such roads, ditches, buildings, fixtures and machinery on, through and upon said property as may be necessary or convenient in carrying on mining operations.

10. Lessee shall not construct, alter or repair structures or improvements of any character upon said land, except emergency repairs, until after written notice is given to Lessor. Lessee may post and maintain upon the leased premises notices of nonresponsibility as provided by law. Lessee agrees to pay in full all persons who perform labor or services on, furnish materials joined or affixed to, or provide equipment for, said property, or the construction, reconstruction, repair or placement of any structure or improvement on said property, at Lessee's instance or request. Lessee shall not permit or suffer liens of any kind or nature to be enforced against said property for such labor, services, materials or equipment. Lessor may pay such amount as may be required to release any such lien or liens, to defend any action brought thereon, or to satisfy a judgment entered therein. Lessee agrees to reimburse Lessor for all costs, damages, reasonable attorney fees and amounts paid by Lessor

hereby leased said oil and gas to Lessee, its successors and assigns, and all production or severance taxes thereon, excepting however, the production or severance taxes which are assessed and levied upon the production of minerals, and if not so paid by Lessee, Lessee may, at its option, pay such taxes and assessments which are a lien on the real property, or on the minerals and mining rights, and any penalties and interest thereon, and Lessee agrees to reimburse Lessor on demand in the full amount of such payments. Lessee agrees to pay, and be on the same become due and payable, and to save and indemnify Lessor from and against all taxes and assessments which are assessed or levied on said leased premises or portion thereof, on all minerals and ores produced therefrom pursuant to the provisions stated on said property or improvements that may be placed or installed thereon by or under Lessee, during the period this lease shall remain in effect with respect thereto. In the event that this lease is terminated in whole or in part prior to its date, when taxes and assessments on the leased premises become due and payable, Lessee agrees, on such termination, to pay to Lessor a sum equivalent to the taxes levied upon that part of the leased premises so terminated for the fiscal tax year immediately preceding the current fiscal tax year, prorated to the date of such termination. Lessee shall not permit or suffer said leased premises or any part thereof, or any minerals and ores mined therefrom, or any improvements or personal property thereon, to be sold at any time for such taxes. Notwithstanding the above provisions, Lessee shall not be liable for any taxes and assessments levied upon the rights reserved hereunder by Lessor, its successors and assigns.

12. Lessor shall not be liable, from any cause whatsoever, for any injury to or death of any officer, agent or employee of Lessee, or any other person whatsoever, while upon or in proximity to said premises in connection with the business of Lessee, or for loss or destruction of or damage to any property owned by, or in the custody or control of Lessee or any other person or persons whatsoever, brought, stored or placed upon or in proximity to said premises in connection with the business of Lessee. Lessee hereby releases and discharges and agrees to indemnify and save harmless Lessor from and against any and all claims, liability, demands, causes of action, costs and expenses for injuries to or deaths of any and all persons and loss or destruction of or damage to any and all property, caused by or arising out of the exercise of the rights leased hereunder, irrespective of any negligence on the part of Lessor, or the officers, agents or employees thereof.

13. In case Lessee shall, except by Lessor, be lawfully deprived of the possession of the rights hereby leased, or any part thereof, Lessee shall notify Lessor in writing setting forth in full the circumstances in relation thereto, whereupon Lessor may, at its option, either reinstall Lessee in possession of said rights or terminate this lease and refund to Lessee the pro rata amount of any rental theretofore paid in advance for the unexpired term of this lease, from and after the receipt of such notice, whereupon no claims for damages of whatsoever kind or character incurred by Lessee by reason of such dispossession shall be chargeable against Lessor.

14. Upon breach by Lessee of any of the terms, covenants or conditions of this lease and Lessee's failure to remedy the default within thirty days after written notice from Lessor so to do, then at the option of Lessor, notice of the exercise of which shall be given to Lessee in writing, this lease shall forthwith cease and determine and all rights of Lessee in and to said property shall be at an end, whereupon Lessee shall vacate said premises and surrender possession thereof to Lessor. The waiver by Lessor of any breach of any covenant or condition thereof shall not be deemed a waiver of any other or subsequent breach hereof nor of any other covenant or condition hereof. The acceptance of payments hereunder by Lessor shall not be deemed to be a waiver of any preceding breach by Lessee of any covenant or condition hereof, other than the failure of Lessee to pay such particular payment so accepted, regardless of Lessor's knowledge of such preceding breach at the time of acceptance of such payment.

15. If Lessee is adjudicated a bankrupt, or shall make an assignment for the benefit of creditors, or file a voluntary petition under any law having for its purpose the adjudication of Lessee a bankrupt, or the extension of time of payment, composition, adjustment, modification, settlement or satisfaction of the liabilities of Lessee, or a receiver be appointed for the property of Lessee by reason of the insolvency of Lessee, notwithstanding anything to the contrary elsewhere in the lease, Lessor shall have the immediate right to terminate this lease and to take exclusive possession of the leased premises. The acceptance of royalty or other payments hereunder shall not constitute a waiver of Lessor's right to terminate this lease as above set forth.

16. In case Lessor shall bring suit to compel performance of, or to recover for breach of any covenant or condition herein written, or for declaratory relief, and prevails thereon, Lessee agrees to pay to Lessor reasonable attorney fees in addition to the amount of judgment and costs.

17. Lessee agrees to pay to Lessor interest at the rate of 9 1/2% per annum upon any and all amounts whatsoever due under this lease to Lessor from the due payment of each such amount is due and owing to Lessor or from the date of each breach by Lessee of an obligation hereunder, as the case may be, to the date of receipt by Lessor of each payment of said amounts, unless such payment is tendered or paid to Lessor within 30 days after the date a payment is due and owing hereunder to Lessor or the date of such breach, as the case may be.

18. Any demand, notice or statement herein requested or required to be given by one party to the other shall be in writing. Delivery of such written demand, notice or statement to Lessor shall be conclusively taken as sufficient if and when deposited in the United States Mail, with postage thereon fully prepaid, certified and addressed to Lessor at One Market Street, San Francisco, California 94105, and the payments by Lessee to Lessor hereunder shall be made at the above address. Delivery of such demand, notice or statement to Lessee shall be conclusively taken as sufficient if and when deposited in the United States Mail, with postage thereon fully prepaid, certified and addressed to Lessee at Room 26-27, 39 Exchange Place, Salt Lake City, Utah 84111.

Any party hereto may change by written notice as above provided, the address to which such demands, notices or statements to such party may be sent and Lessor may change the address at which payments shall be made by written notice to Lessee.

19. Lessee may at any time surrender and terminate this lease, in whole or as to any one or more 40 acre subdivisions of said property, upon giving notice in writing to Lessor to that effect and paying all minimum rentals and royalties and any other sums due on the property so surrendered.

20. Upon termination of this lease in any manner, Lessee shall surrender and deliver unto Lessor the quiet and peaceful possession of said leased premises in neat, clean and safe condition and shall quitclaim to Lessor all of the right, title and interest of Lessee in said property. Lessee shall provide with each quitclaim, upon demand by Lessor, a title report issued by a responsible title company covering the property so quitclaimed as of the date of recordation of the quitclaim. If such title report discloses any encumbrances or liens affecting title to said property done, made or suffered by Lessee, or anyone claiming under Lessee, Lessee shall take such steps as may be necessary to extinguish such encumbrances or liens, failing in which Lessor may

at Lessee's cost and expense, including reasonable attorney fees, which cost and expense Lessee agrees to pay to Lessor on demand. At the termination hereof Lessee may remove all machinery, tools, appliances, and buildings and all personal property placed or constructed upon said premises by Lessee, provided no default shall at such time exist in respect of any payments or rentals, or in respect of any covenants, agreements or conditions to be kept and performed by Lessee; and provided further that all timbering and supports within the mine shall be left in good condition whenever the Lessee may terminate the premises, or this lease be terminated, also provided that all machinery, tools, appliances, and buildings and all personal property remaining on said premises sixty days after the termination (by notice or otherwise) of this lease, shall be deemed to have become the property of Lessor and shall not be removed therefrom by Lessee.

from the date of the expiration of the term hereof, subject to the same covenants, terms, covenants, payments and conditions as if the original term of this lease; provided, this lease shall not be terminated prior thereto and Lessee is not then in default in respect to any of Lessee's obligations hereunder, provided, further, that written notice from Lessee of the exercise of such option shall be received by Lessor not more than 90 days after the expiration of the term hereof.

22. Commencing with the lease year immediately following the first lease year in which saleable mineral products are produced from the leased premises for three calendar months or more, and for each succeeding year this lease remains in effect, said advance minimum royalty payments shall be increased or decreased each year in proportion to the amount of the increase or decrease in the "escalation percentage" for the lease year immediately preceding the lease year for which said advance minimum royalty payment is to be made.

The term "escalation percentage" as used herein shall, for any particular lease year, mean the percentage variation, if any, of the "weighted average sales price" received or receivable by Lessee for mineral products produced and sold by Lessee in the leased premises, from the "weighted average sales price" received or receivable by Lessee for similar products during the first calendar or base year in which Lessee produces and sells such products.

For purposes of calculating the "escalation percentage" (or de-escalation percentage) to be applied to the minimum advance royalties, the sum of the "weighted average sales prices" received for mineral products produced and sold shall be divided by the number of such commodities produced and sold during the lease year, and the resulting quotient shall be the "weighted average sales price" used to calculate the percentage variation from the first calendar or base year. This percentage variation shall be the "escalation percentage" or "de-escalation percentage" as the case may be.

The term "lease year" as referred to in this section 22 shall include, in addition to the original term, each and every year this lease is renewed pursuant to the provisions of section 21.

23. If there be more than one person named as Lessee the Lessee's obligations shall be joint and several and the term used wherever used in this lease shall, unless otherwise specified, include the plural as well as the singular.

24. This instrument is intended as, and is, a lease. Lessor shall not be called upon or be required to make any repairs, incur any expense of any kind or nature upon or in connection with said property, for and during the term of this lease, and all such expenses shall be borne by Lessee.

25. Time and specific performance are of the essence of this lease.

26. Lessee shall not assign this lease, or any interest therein, without the written consent of Lessor first had and obtained. The consent to one assignment by Lessor shall not be deemed to be a consent to a subsequent assignment. This lease shall not, nor shall any interest therein, be assignable, as the interest of the Lessee, by operation of law, without the written consent of Lessor. Subject to the above, the provisions contained in this lease shall inure to the benefit of and be binding upon the respective heirs, administrators, executors, personal representatives, successors and assigns of the parties hereto.

Provision 27 on rider attached is made a part hereof.

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

SOUTHERN PACIFIC LAND COMPANY

By [Signature]  
General Manager, Natural Resources

TEMPLE MOUNTAIN INDUSTRIES, INC.

By [Signature]  
President.

Witnessed by [Signature]  
Vice President,  
William J. Mc Nabb.



R I D E R

Rider attached to and made a part of Lease No.  
dated 1st December, 1975 from Southern Pacific Land Company  
to Temple Mountain Industries, Inc.

27. Lessee shall have the option of renewing this lease annually for a period not exceeding four years from the date of expiration of the term hereof and annually from year to year so long thereafter as said land is being operated as provided herein and production royalty is paid, not to exceed, however, a total term of twenty-five years, upon the same reservations, terms, covenants and conditions as herein set forth; provided, this lease shall not have been terminated prior thereto and Lessee is not then in default with respect to any of Lessee's obligations hereunder, and provided further, that written notice from Lessee of the exercise of such option shall be received by Lessor not more than six months, nor less than thirty days, prior to the expiration of said term or each annual period, as the case may be.

*Mined Processed and  
Material sold,  
if not - it forms*

EXHIBIT B

1 ECHEVERRIA AND OSBORNE, CHARTERED  
2 Alfred H. Osborne, Esq.  
3 Nicholas F. Frey, Esq.  
4 555 South Center Street  
5 Reno, Nevada 89501  
6 Telephone: (702) 323-8678  
7 Attorneys for Defendant

FILED

*Nicholas F. Frey*

8 IN THE UNITED STATES DISTRICT COURT  
9 FOR THE DISTRICT OF NEVADA

10 \*\*\*  
11 TEMPLE MOUNTAIN INDUSTRIES,

12 Plaintiff,

Cv. No. 81-0183 ECR

13 vs.

MOTION FOR SUMMARY JUDGMENT

14 SOUTHERN PACIFIC LAND COMPANY,

AND

15 Defendants

PROPOSED FINDINGS OF FACT  
AND CONCLUSIONS OF LAW AND  
JUDGMENT

17  
18 COMES NOW the Defendant, SOUTHERN PACIFIC LAND COMPANY  
19 pursuant to F.R.C.P Rule 56 and hereby respectfully requests the  
20 Court to award summary judgment in its favor in the above-entitled  
21 action.

22 Defendant discusses the grounds for summary judgment  
23 in its memorandum of authorities which is attached hereto and  
24 incorporated by reference. It bases its motion upon that memorandum  
25 the documents attached hereto, and the other pleadings of file.

26 Respectfully submitted this 19th day of January, 1981

27  
28 ECHEVERRIA AND OSBORNE, CHARTERED  
29 Alfred H. Osborne, Esquire  
30 Nicholas F. Frey, Esquire

31 By: *Nicholas F. Frey*  
32 NICHOLAS F. FREY  
555 South Center Street  
Reno, Nevada 89501  
Attorneys for Defendant

ECHEVERRIA AND OSBORNE, CHARTERED  
ALFRED H. OSBORNE, ESQUIRE  
NICHOLAS F. FREY, ESQUIRE  
555 SOUTH CENTER STREET  
RENO, NEVADA 89501  
PHONE 323-8678

28

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT  
OF MOTION FOR SUMMARY JUDGMENT

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In August of 1981, this action was transferred to the District of Nevada. Since that date, the only activity in the case has been Defendant's discovery efforts. On December 7, 1981, Defendant deposited for mailing to the Plaintiff Requests for Admissions (Exhibit 1) and Interrogatories (Exhibit 2). On January 7, 1982, Southern Pacific Land Company noticed the deposition of Robert L. Patrie, President of Plaintiff Temple Mountain Industries, as well as the deposition of those "partners, employees or representatives who will testify at trial" and [a]ny person or person designated by the Plaintiff who "has knowledge of the facts forming the basis of the allegations of the Complaint. (Exhibit 3). To date, the discovery cut-off date having arrived incidentally, Defendant has received no response to its Request for Admission and no answers or objections to its Interrogatories. Indeed, the Plaintiff or its agents failed to appear for the notice deposition and obtained no order prior to the date and time set for those depositions excusing the absence of those noticed individuals

ARGUMENT

Whenever a party requests admissions of the other party pursuant to Rule 36 of the Federal Rules of Civil Procedure, pursuant to that rule those matters are "admitted unless, within 30 days after service of the request... the party to whom the request is directed serves upon the party requesting the admission a written answer or objection addressed to the matter..." The Courts have freely acknowledged and employed this sanction. See, e.g., O'Campo v. Hardistry, 262 F.2d 621 (9th Cir. 1958).

Thus, in the present case, in view of Plaintiff's failure to answer or object to Defendant's Request for Admissions, the matters contained therein are admitted. Those admissions provide alternate grounds upon which SOUTHERN PACIFIC LAND COMPANY

L'VERNA AND  
ONE CHARTERS  
CITIZENSHIP  
CORPORATION  
ATTORNEYS AND  
COUNSELORS AT LAW  
470 CENTER ST.  
RENO, NEVADA 89501  
PHONE 223-8678

1 bases the present motion for summary judgment. No material issue  
2 of fact bars the award of summary judgment, the Court need only  
3 make a determination of law.

4 Thus, the Plaintiff must be deemed to have admitted  
5 that, "during the period from December 1, 1975 to November 30,  
6 1980, or portion of that period, in violation of paragraph 26  
7 of the subject lease [it] assigned the subject lease, or  
8 interest therein, to another person, corporation or other entity."  
9 (Exhibit 1, Request No. 1) It is hornbook law that the parties are  
10 free to fix between themselves the right to assign. See the  
11 cases collected in 49 Am. Jur. 2d Landlord and Tenant 405.  
12 Violation of a covenant against assignment justifies a lessor's  
13 termination of the lease. Therefore, the termination of the  
14 subject lease in the present case and the refusal to renew was  
15 warranted as a matter of law by Plaintiff's unauthorized assign-  
16 ment and, therefore, Plaintiff must fail as a matter of law in  
17 its action against the Defendant.

18 In addition, the subject lease obliged the Plaintiff  
19 to "continuously, diligently, and actively in a substantial way,  
20 explore and mine on the leased premises"; to "furnish to Lessor  
21 [for each calendar month] a statement in writing detailing such  
22 exploration and mining work"; to provide monthly statements of  
23 operation pursuant to paragraph 2 of the lease and to provide  
24 other "statements" and "reports" described under paragraph 2; to  
25 inform the lessor of monthly periods (of which there were) in which  
26 no work was done upon the leased premises. (Exhibit 1, Request  
27 Nos. 5, 6, 7, 9, and 10). Plaintiff failed to comply with any  
28 of these covenants in any material respect, and Plaintiff must  
29 be deemed to have admitted such material breach. (*Id.*).

30 After the fourth year the lease required Plaintiff to  
31 be operating the leased premises as provided in the lease (paragra  
32 27), and yet during the relevant period no "production," as

NEVADA AND  
OREGON CHARTERS  
PROFESSIONAL  
CORPORATIONS  
ATTORNEYS AND  
ENGINEERS AT LAW  
SOLICITORS  
NEVADA 89501  
PHONE 222-8878

1 required in paragraphs 2 and 3 of the lease, of the leased  
2 minerals occurred, Plaintiff mined no leased minerals nor sold  
3 them, and did not "continuously, diligently, and actively and in  
4 a substantial way, explore and mine on the leased premises...."  
5 (Id., Requests 11, 12, and 5). As such, the Plaintiff's own  
6 complaint allegations are contradicted, there occurred material  
7 breaches by the Plaintiff, and the Defendant was fully justified  
8 as a matter of law in refusing to renew the subject lease.

9 Finally, the Plaintiff must be deemed to have admitted  
10 that it did not comply with any notice requirements for renewal  
11 of the lease. Paragraph 27 of the subject lease required for  
12 renewal "written notice from Lessee of the exercise of such option  
13 not more, than six months, nor less than thirty days, prior to  
14 the expiration of said term or each annual period..." Yet,  
15 Plaintiff admits in its complaint that it "failed to give  
16 Defendant at least thirty (30) days written notice of its intention  
17 to renew" during the relevant period. (Complaint ¶6). Plaintiff  
18 contends in its complaint that new notice and renewal require-  
19 ments, arose (Complaint ¶7), yet the Plaintiff must now be  
20 deemed to have admitted that, "even if...new notice requirements  
21 for lease renewal [were established], Plaintiff failed to  
22 reasonably comply in 1980 with even these new requirements," which  
23 are described more specifically in the Request for Admission.  
24 (Requests for Admission, Request Nos. 3 and 4). Therefore, since  
25 Plaintiff did not comply with the provisions regulating renewal  
26 of the lease, it cannot be heard now to complain that SOUTHERN  
27 PACIFIC LAND COMPANY refused to renew.

28 Accordingly, the Defendant, SOUTHERN PACIFIC LAND  
29 COMPANY is entitled to judgment in its favor as a matter of law  
30 upon these various grounds and respectfully requests this Court

31 ///  
32 ///

WENDELL AND  
DORIS CHARLES  
ATTORNEYS AT LAW  
1010 CENTER ST.  
RENO, NEVADA 89501  
TELE 323-9076

1 to award such judgment.

2 Respectfully submitted this ~~17~~ day of January, 1982.

3  
4 ECHEVERRIA AND OSBORNE, CHARTERED  
5 Alfred H. Osborne, Esquire  
6 Nicholas F. Frey, Esquire

7 By: *Nicholas F. Frey*  
8 NICHOLAS F. FREY  
9 555 South Center Street  
10 Reno, Nevada 89501

11 Attorneys for Defendant.

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EVERIA AND  
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CORPORATION  
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6 Telephone: (702) 323-8678  
7  
8 Attorneys for Defendant  
9

10  
11 IN THE UNITED STATES DISTRICT COURT  
12 FOR THE DISTRICT OF NEVADA  
13 \* \* \*

14 TEMPLE MOUNTAIN INDUSTRIES,  
15 Plaintiff,  
16 vs.  
17 SOUTHERN PACIFIC LAND COMPANY,  
18 Defendants.

Cv. No. 81-0183 ECR

PROPOSED FINDINGS OF FACT AND  
CONCLUSIONS OF LAW AND  
JUDGMENT

19 Defendant, SOUTHERN PACIFIC LAND COMPANY, pursuant to  
20 Rule 16 (f) of the Rules of Practice for the United States  
21 District Court for the District of Nevada, submits the following  
22 Proposed Findings of Fact and Conclusions of Law and Judgment:

FINDINGS OF FACT

- 23 1. On December 7, 1982, Defendant, SOUTHERN PACIFIC  
24 LAND COMPANY served upon the Plaintiff by properly mailing Request  
25 for Admission. On the same date SOUTHERN PACIFIC LAND COMPANY  
26 mailed to the Plaintiff's counsel Interrogatories.  
27 2. Plaintiff, TEMPLE MOUNTAIN INDUSTRIES failed  
28 without justification to timely answer or object to said Requests  
29 for Admission.  
30 3. On January 18, 1982, the time for completion of  
31 discovery in the above-entitled action expired without Defendant,  
32 SOUTHERN PACIFIC LAND COMPANY having been served with answers or

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OSBORNE, CHARTERED  
PROFESSIONAL  
CORPORATION  
ALFRED H. OSBORNE,  
NICHOLAS F. FREY,  
ESQUIRES AT LAW  
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1 objections to its Requests for Admissions.

2 4. That said Requests for Admission examined upon the  
3 following matters, namely, whether Plaintiff admits that:

4 (1) During the period from December 1, 1975, to November  
5 30, 1980, or portion of that period, in violation of paragraph 26  
6 of the subject lease it assigned the subject lease, or interest  
7 therein, to another person, corporation or other entity.

8 (2) Western States Minerals Corporation has reimbursed  
9 the plaintiff on various occasions for the annual lease rental  
10 payment, i.e., the "advance minimum royalty" as defined in the  
11 lease or in its complaint.

12 (3) As of November 30, 1980, plaintiff had provided  
13 SOUTHERN PACIFIC with no confirmation that the subject property  
14 was "being operated" under the terms of the agreement.

15 (4) Even if defendant's reminder letter of November 10,  
16 1976, to plaintiff established new notice requirements for lease  
17 renewal, plaintiff failed to reasonably comply in 1980 with even  
18 these new requirements since defendant's November 10, 1976,  
19 letter stated that if renewal was desired by lessee, the advance  
20 minimum royalty had to be "received" before the expiration date  
21 of that term, and since, unlike any prior payment by the plain-  
22 tiff of an advance minimum royalty, plaintiff's 1980 payment was  
23 not mailed or received until after the expiration date of  
24 November 30, 1980.

25 (5) (Separately for each item listed below) that it did  
26 not (as required by paragraph 3 of the lease) continuously, dili-  
27 gently, and actively and in a substantial way, explore and mine  
28 on the leased premises in Nevada.

29 (a) During the term from December 1, 1979, to  
30 November 30, 1980;

31 (b) During the terms from December 1, 1975, to  
32 November 30, 1979.

FEVERIA AND  
WINE, CHARTERS  
PROFESSIONAL  
CORPORATION  
ATTORNEYS AND  
SOLICITORS AT LAW  
SOUTH CENTER ST.  
LAS VEGAS, NEVADA 89101  
PHONE 332-8676



1 (6) It did not comply in all material respects with the  
2 terms of paragraph 3 of the subject lease (excluding the terms  
3 dealt with in the preceding Request for Admission No. 5 and  
4 excluding the last sentence of said paragraph 3).

5 (7) It did not provide the defendant, as provided for in  
6 paragraph 2 of the subject lease in part, every monthly Statement  
7 of Operations within 20 days after the expiration of each and  
8 every calendar month during the following terms (or periods) of  
9 the lease, as required in part by paragraph 2 of the subject  
10 lease:

- 11 (a) During the 1979-1980 lease term;  
12 (b) During the 1975-1979 lease terms.

13 (8) It did not send for each one-year lease term during  
14 the life of the lease any royalty to the defendant other than the  
15 advance minimum royalty.

16 (9) It did not comply with paragraph 2 of the lease  
17 insofar as its requirement that certain specified "statements"  
18 and "reports" be transmitted by the plaintiff to the defendant,  
19 during:

- 20 (a) The 1979-1980 lease term;  
21 (b) The prior lease terms.

22 (10) There were monthly periods in which no work was done  
23 upon the leased premises, and admit further that, despite this  
24 fact, no statement in writing to that effect was, furnished to  
25 the defendant, as required by paragraph 2 in part, of the lease.

26 (11) Its exploration and mining (or that of any assignee)  
27 during the relevant period in 1975 to 1980 caused no "production"  
28 (as the word is used in paragraph 2 and 3 of the lease) of the  
29 leased minerals.

30 (12) It did not mine or sell any leased minerals during  
31 any relevant period covered by the lease.

32

VERITA AND  
ONE, CHARTERED  
NATIONAL  
CORPORATION  
INTE AND  
ELDER AT LAW  
874 CENTER ST.  
RENO, NEVADA 89501  
PHONE 325-8878

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5. Paragraph 27 of the subject lease provides:  
27. Lessee shall have the option of renewing this lease annually for a period not exceeding four years from the date of expiration of the term hereof and annually from year to year so long thereafter as said land is being operated as provided herein and production royalty is paid, not to exceed, however, a total term of twenty-five years, upon the same reservations, terms, covenants and conditions as herein set forth; provided, this lease shall not have been terminated prior thereto and Lessee is not then in default with respect to any of Lessee's obligations hereunder, and provided further, that written notice from Lessee of the exercise of such option shall be received by Lessor not more than six months, nor less than thirty days, prior to the expiration of said term or each annual period, as the case may be.

CONCLUSIONS OF LAW

1. The said Request for Admissions served upon the Plaintiff by the Defendant, SOUTHERN PACIFIC TRANSPORTATION COMPANY are deemed to have been admitted by the Plaintiff.

2. Said admissions contradict the material allegations of Plaintiff's Complaint, and resolve the issues of material fact as a matter of law.

3. The said admissions show the Plaintiff, as a matter of law, to have been in default, without justification, of material provisions of the subject lease sued upon by the Plaintiff.

4. The said admission as well as Paragraph 6 of Plaintiff's Complaint show the Plaintiff, as a matter of law to have failed to comply with any requirements for renewal of the lease, whether found expressly in the terms of the lease or established by the subsequent conduct of the parties.

5. The Defendant is entitled to a summary judgment in its favor.

WHEREFORE, by virtue of the law and reason of the premises aforesaid, IT IS ORDERED, ADJUDGED AND DECREED that the Defendant have judgment against the Plaintiff, and that Plaintiff take nothing or receive no relief by way of its Complaint.

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ONE, CHARLES  
PERSONAL  
CORPORATION  
AGENTS AND  
REGISTRARS AT LAW  
300 CENTER ST.  
RENO, NEVADA 89501  
PHONE 222-6678

1 IT IS ORDERED AND DECREED that the subject lease by and  
2 between the parties expired, and that the Defendant with just cause  
3 refused to renew the said lease at the end of its last one-year  
4 term in November 1980.

5 IT IS FURTHER ORDERED AND DECREED that the Defendant  
6 have and recover, from said Plaintiff, Defendant's costs and  
7 disbursements in this action amounting to the sum of \_\_\_\_\_  
8 and a reasonable attorneys' fee in the amount of \_\_\_\_\_.

9 JUDGMENT RENDERED this \_\_\_\_\_ day of \_\_\_\_\_, 1982.

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SUBMITTED BY: ECHEVERRIA AND OSBORNE, CHARTERED  
Alfred H. Osborne, Esquire  
Nicholas F. Frey, Esquire

By: *Nicholas F. Frey*  
NICHOLAS F. FREY  
555 South Center Street  
Reno, Nevada 89501

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CORPORATE AND  
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5 Telephone: (702) 323-8678

6 Attorneys for Defendant

7  
8 IN THE UNITED STATES DISTRICT COURT  
9 FOR THE DISTRICT OF NEVADA

10  
11 TEMPLE MOUNTAIN INDUSTRIES,

12 Plaintiff,

13 vs.

14 SOUTHERN PACIFIC LAND COMPANY,

15 Defendant.

Cv. No. 81-0183 ECR  
REQUESTS FOR ADMISSION  
TO PLAINTIFF

16 TO: Plaintiff above-named, and to its attorney, Brad L. Swaner,  
17 722 Boston Bldg., Salt Lake City, Utah 84111;

18 Defendant SOUTHERN PACIFIC LAND COMPANY hereby requests  
19 the plaintiff TEMPLE MOUNTAIN INDUSTRIES, a Utah corporation, to  
20 admit the following Requests for Admission in the time and manner  
21 provided by the Federal Rules of Civil Procedure.

22 The following provisions apply to all Requests for  
23 Admission:

24 1. In responding to these Requests for Admissions, you  
25 are required to employ such information as may have been obtained  
26 by, or as is known to or is in the possession of the named plain-  
27 tiff, counsel for said plaintiff, and all agents, servants and  
28 employees, representatives, investigators, or anyone else acting  
29 in plaintiff's behalf.

30 2. The terms "you" or "yours" refer to plaintiff TEMPLE  
31 MOUNTAIN INDUSTRIES.

32 3. SOUTHERN PACIFIC LAND COMPANY will be alternatively

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BOOK 207 PAGE 423

1 referred to herein as "SOUTHERN PACIFIC" or as "defendant".  
2 TEMPLE MOUNTAIN INDUSTRIES is alternatively referred to herein as  
3 "TEMPLE MOUNTAIN INDUSTRIES" and "plaintiff."

4 4. The terms "subject lease" or "lease" refer to the  
5 lease between the plaintiff and defendant upon the basis of which  
6 plaintiff has brought this action and which is attached to  
7 plaintiff's complaint as an exhibit.

8 REQUESTS FOR ADMISSION

9 Request for Admission:

10 1. Admit that, during the period from December 1,  
11 1975, to November 30, 1980, or portion of that period, in viola-  
12 tion of paragraph 26 of the subject lease you assigned the sub-  
13 ject lease, or interest therein, to another person, corporation  
14 or other entity.

15 2. Admit that, Western States Minerals Corporation has  
16 reimbursed the plaintiff on various occasions for the annual  
17 lease rental payment, i.e., the "advance minimum royalty" as  
18 defined in the lease or in your complaint.

19 3. Admit that, as of November 30, 1980, plaintiff had  
20 provided SOUTHERN PACIFIC with no confirmation that the subject  
21 property was "being operated" under the terms of the agreement.

22 4. Admit that, even if defendant's reminder letter of  
23 November 10, 1976, to plaintiff established new notice require-  
24 ments for lease renewal, plaintiff failed to reasonably comply in  
25 1980 with even these new requirements since defendant's November  
26 10, 1976, letter stated that if renewal was desired by lessee,  
27 the advance minimum royalty had to be "received" before the  
28 expiration date of that term, and since, unlike any prior payment  
29 by the plaintiff of an advance minimum royalty, plaintiff's 1980  
30 payment was not mailed or received until after the expiration  
31 date of November 30, 1980.

32 5. Admit (separately for each item listed below) that

WARRIA AND  
A. CHARLES  
SPECIAL  
CATION  
1975 AND  
LORD AT LAW  
REGISTERED BY  
LAWYER REG. NO.  
1 923-8878

1 you did not (as required by paragraph 3 of the lease) con-  
2 tinuously, diligently, and actively and in a substantial way,  
3 explore and mine on the leased premises in Nevada.

4 (a) During the term from December 1, 1979, to  
5 November 30, 1980;

6 (b) During the terms from December 1, 1975, to  
7 November 30, 1979.

8 6. Admit that you did not comply in all material  
9 respects with the terms of paragraph 3 of the subject lease  
10 (excluding the terms dealt with in the preceding Request for  
11 Admission No. 5 and excluding the last sentence of said paragraph  
12 3).

13 7. Admit that you did not provide the defendant, as  
14 provided for in paragraph 2 of the subject lease in part, every  
15 monthly Statement of Operations within 20 days after the expira-  
16 tion of each and every calendar month during the following terms  
17 (or periods) of the lease, as required in part by paragraph 2 of  
18 the subject leases:

19 (a) During the 1979-1980 lease term;

20 (b) During the 1975-1979 lease terms.

21 8. Admit that you did not send for each one-year lease  
22 term during the life of the lease any royalty to the defendant  
23 other than the advance minimum royalty.

24 9. Admit that you did not comply with paragraph 2 of  
25 the lease insofar as its requirement that certain specified  
26 "statements" and "reports" be transmitted by the plaintiff to the  
27 defendant, during:

28 (a) The 1979-1980 lease term;

29 (b) The prior lease terms.

30 10. Admit that there were monthly periods in which no  
31 work was done upon the leased premises, and admit further that,  
32 despite this fact, no statement in writing to that effect was,

EVERETT AND  
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PROFESSIONAL  
CORPORATION  
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SHEPHERD AT LAW  
FOURTH FLOOR SUITE 400  
NEVADA SPRING  
PHONE 328-6878

1 furnished to the defendant, as required by paragraph 2 in part,  
2 of the lease.

3 11. Admit that your exploration and mining (or that of  
4 any assignee) during the relevant period in 1975 to 1980 caused  
5 no "production" (as the word is used in paragraph 2 and 3 of the  
6 lease) of the leased minerals.

7 12. Admit that you did not mine or sell any leased  
8 minerals during any relevant period covered by the lease.

9 DATED this 14 day of December, 1981.

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ALFRED H. OSBORNE, ESQ.  
NICHOLAS F. FREY, ESQ.  
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By: Nicholas F. Frey  
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8 Attorneys for Defendant

9 IN THE UNITED STATES DISTRICT COURT  
10 FOR THE DISTRICT OF NEVADA

11 TEMPLE MOUNTAIN INDUSTRIES,  
12 Plaintiff,  
13 vs.  
14 SOUTHERN PACIFIC LAND COMPANY.  
15 Defendant. /

Cv. No. 81-0183 ECR  
AFFIDAVIT OF MAILING

16 STATE OF NEVADA )  
17 ) ss.  
18 COUNTY OF WASHOE )

19 I, Terrie Jacqueline Teske being first duly sworn, depo-  
20 ses and says: That affiant is, and was when the herein described  
21 mailing took place, a citizen of the United States, over 21 years  
22 of age, and not a party to, nor interested in, the within action;  
23 that on the 7th day of December, 1981, affiant deposited with the  
24 United States Post Office at Reno, Nevada, a copy of Requests for  
25 Admission to Plaintiff and Interrogatories to Plaintiff enclosed  
26 in a sealed envelope upon which first class postage was fully  
27 prepaid, addressed to:

28 Brad L. Swamer  
29 722 Boston Building  
30 Salt Lake City, Utah 84111

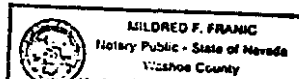
31 and that there is a regular communication by mail between the  
32 place of mailing and the place as addressed

33 Subscribed and sworn to before me this

7<sup>th</sup> day of December, 1981.

*Mildred F. Franic*

ECHEVERRIA AND OSBORNE, CHARTERED  
A PROFESSIONAL CORPORATION  
ATTORNEYS AND COUNSELORS AT LAW  
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3 Telephone: (702) 323-8678  
4 Attorneys for Defendant  
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7

8 IN THE UNITED STATES DISTRICT COURT  
9 FOR THE DISTRICT OF NEVADA

10 TEMPLE MOUNTAIN INDUSTRIES,  
11 Plaintiff,

12 vs.

13 SOUTHERN PACIFIC LAND COMPANY  
14 Defendant.

Cv. No. 81-0183 ECR

INTERROGATORIES TO PLAINTIFF

15  
16 TO: Plaintiff above-named, and to its attorney, Brad L. Swaner,  
17 722 Boston Bldg., Salt Lake City, Utah 84111:

18 Defendant SOUTHERN PACIFIC LAND COMPANY hereby requires  
19 the plaintiff TEMPLE MOUNTAIN INDUSTRIES, a Utah corporation, to  
20 answer the following Interrogatories, under oath in the time and  
21 manner provided by the Federal Rules of Civil Procedure, Rule 33.

22 The following provisions apply to all Interrogatories:

23 1. In answering these Interrogatories, you are required  
24 to furnish such information as may have been obtained by, or as  
25 is known to or is in the possession of the named plaintiff, counsel  
26 for said plaintiff, and all agents, servants and employees, repre-  
27 sentatives, investigators, or anyone else acting in plaintiff's  
28 behalf.

29 2. The term "document" means and includes all physical  
30 material of any nature whatsoever, including, without limitation,  
31 letters, memos, contracts, telegrams, notes, recordings, etc.

32 3. An Interrogatory calling for the identification of a

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(702) 323-8678

EXHIBIT 1



1 complaint, in paragraph 6, that "at all times material ... the  
2 ... premises were being operated," state:

- 3 (a) Precisely what is meant by this allegation;  
4 (b) In detail each fact presently known to you which  
5 forms the basis of this allegation;  
6 (c) Identify each person who has any knowledge of  
7 the facts which form the basis of this allegation and  
8 set forth in detail the facts that each such person  
9 knows;  
10 (d) Identify each document relating to, or referring  
11 to, the matters contained in this allegation or in the  
12 answer to this Interrogatory;  
13 (e) Identify each person who supplied the informa-  
14 tion contained in your answer to the Interrogatory, and  
15 set forth precisely what information was supplied by  
16 each such individual.

17 2. With respect to the allegation contained in your  
18 complaint, in paragraph 8, that "the subject leased property has  
19 continued to be operated as required in paragraph 27 of the sub-  
20 ject lease," state:

- 21 (a) In detail each fact presently known to you which  
22 forms the basis of this allegation;  
23 (b) Identify each person who has any knowledge of  
24 the facts which form the basis of this allegation and  
25 set forth in detail the facts that each such person  
26 knows;  
27 (c) Identify each document relating to, or referring  
28 to, the matters contained in this allegation or in the  
29 answer to this Interrogatory;  
30 (d) Identify each person who supplied the informa-  
31 tion contained in your answer to the Interrogatory, and  
32 set forth precisely what information was supplied by

NEVADA AND  
THE CHARTERED  
PROFESSIONAL  
CORPORATION  
TOPPERS AND  
SHELTON AT LAW  
SOUTH CENTER ST.  
NEVADA 89501  
PHONE 328-8878

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each such individual.

3. With respect to the allegation contained in your complaint, paragraph 8, that "no 'production royalty' is due to defendant from plaintiff," state:

(a) In detail each fact presently known to you which forms the basis of this allegation;

(b) Identify each person who has any knowledge of the facts which form the basis of this allegation and set forth in detail the facts that each such person knows;

(c) Identify each document relating to, or referring to, the matters contained in this allegation or in the answer to this Interrogatory;

(d) Identify each person who supplied the information contained in your answer to the Interrogatory, and set forth precisely what information was supplied by each such individual.

4. With respect to the allegation contained in your complaint, paragraph 5, that "written notice from lessee of the exercise of such option was given to defendant by plaintiff within the time periods prescribed in said paragraph [27] of said lease," state:

(a) In detail each fact presently known to you which forms the basis of this allegation;

(b) Identify each person who has any knowledge of the facts which form the basis of this allegation and set forth in detail the facts that each such person knows;

(c) Identify each document relating to, or referring to, the matters contained in this allegation or in the answer to this Interrogatory;

(d) Identify each person who supplied the informa-

JONES AND  
S. CHARLES  
ATTORNEYS  
AT LAW  
1100 AT LAW  
1100 AT LAW  
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1100 AT LAW  
1100 AT LAW

1 tion contained in your answer to the Interrogatory, and  
 2 set forth precisely what information was supplied by  
 3 each such individual.

4 5. If you have denied, in whole or part, or if you have  
 5 admitted Request for Admission No. 1 set forth in full and complete  
 6 detail all facts and all contentions upon which you base your  
 7 denial or admission as the case may be. Also state:

8 (a) Identify each person who has any kind of know-  
 9 ledge of the facts which form the basis of your denial;

10 (b) Identify each document relating to or referring to  
 11 the matters contained in the answer to this Interrogatory

12 (c) Identify each person who supplied the information  
 13 contained in your answer to this Interrogatory and set  
 14 forth precisely what information was supplied by each  
 15 such individual.

16 6. If you have admitted, in whole or in part, Request  
 17 for Admission No. 2 , set forth in full and complete detail all  
 18 facts and all contentions upon which you base such information.

19 Also state:

20 (a) Identify each person who has any kind of know-  
 21 ledge of the facts which form the basis of your admission

22 (b) Identify each document relating to or referring to  
 23 the matters contained in the answer to this Interrogatory

24 (c) Identify each person who supplied the information  
 25 contained in your answer to this Interrogatory and set  
 26 forth precisely what information was supplied by each  
 27 such individual.

28 7. Set forth in full and complete detail all facts re-  
 29 garding any formal or informal arrangement, agreement, contract, or  
 30 other relationships (legal, such as a corporate tie as between  
 31 parent corporation and subsidiary, or otherwise) between the  
 32 plaintiff and Western State Minerals Corporation with respect to

WESTERN STATE  
 MINERALS CORPORATION  
 7710 WEST 17TH AVENUE  
 DENVER, COLORADO 80202  
 (303) 733-8800

1 or related to the subject lease, or any interest therein, or the  
2 mining or exploration rights discussed in or conveyed by the  
3 subject lease.

4 8. If you have denied in whole or in part, Request for  
5 Admission No. 3, set forth in full and complete detail all facts  
6 and all contentions upon which you base your denial.

7 (a) Identify each person who has any kind of know-  
8 ledge of the facts which form the basis of your denial;

9 (b) Identify each document relating to or referring to  
10 the matters contained in the answer to this Interrogatory;

11 (c) Identify each person who supplied the information  
12 contained in your answer to this Interrogatory and set  
13 forth precisely what information was supplied by each  
14 such individual.

15 9. If you have denied in whole or in part, Request for  
16 Admission No. 4, set forth in full and complete detail all facts  
17 and all contentions upon which you base your denial.

18 (a) Identify each person who has any kind of know-  
19 ledge of the facts which form the basis of your denial;

20 (b) Identify each document relating to or referring to  
21 the matters contained in the answer to this Interrogatory

22 (c) Identify each person who supplied the information  
23 contained in your answer to this Interrogatory and set  
24 forth precisely what information was supplied by each  
25 such individual.

26 10. If you have denied in whole or in part, Request for  
27 Admission No. 5, set forth (separately for each item listed in the  
28 Request for Admission) in full and complete detail all facts and  
29 all contentions upon which you base your denial.

30 (a) Identify each person who has any kind of know-  
31 ledge of the facts which form the basis of your denial;

32 ////

VERBIA AND  
INC. CHARTERED  
CORPORATION  
ATTORNEYS AT LAW  
SUITE 200  
DENVER, COLORADO 80202  
PHONE 333-6678

1 (b) Identify each document relating to or referring to  
2 the matters contained in the answer to this Interrogatory.

3 (c) Identify each person who supplied the information  
4 contained in your answer to this Interrogatory and set  
5 forth precisely what information was supplied by each  
6 such individual.

7 11. If you have denied in whole or in part, Request for  
8 Admission No. 6, set forth in full and complete detail all facts  
9 and all contentions upon which you base your denial.

10 (a) Identify each person who has any kind of know-  
11 ledge of the facts which form the basis of your denial;

12 (b) Identify each document relating to or referring to  
13 the matters contained in the answer to this Interrogatory.

14 (c) Identify each person who supplied the information  
15 contained in your answer to this Interrogatory and set  
16 forth precisely what information was supplied by each  
17 such individual.

18 12. If you have denied in whole or in part, Request for  
19 Admission No. 7, set forth (separately for each item listed in the  
20 Request for Admission) in full and complete detail all facts and  
21 all contentions upon which you base your denial.

22 (a) Identify each person who has any kind of know-  
23 ledge of the facts which form the basis of your denial;

24 (b) Identify each document relating to or referring to  
25 the matters contained in the answer to this Interrogatory.

26 (c) Identify each person who supplied the information  
27 contained in your answer to this Interrogatory and set  
28 forth precisely what information was supplied by each  
29 such individual.

30 13. If you have denied in whole or in part, Request for  
31 Admission No. 8, set forth in full and complete detail all facts  
32 and all contentions upon which you base your denial.

WERRIA and  
N.E. CHARTERS  
PROFESSIONAL  
WRITERS and  
EDITORS  
FLORIDA AT LAW  
1716 GARDEN ST.  
TALLAHASSEE, FLORIDA 32301  
ONE 323-9978

1 (a) Identify each person who has any kind of know-  
2 ledge of the facts which form the basis of your denial;

3 (b) Identify each document relating to or referring to  
4 the matters contained in the answer to this Interrogatory;

5 (c) Identify each person who supplied the information  
6 contained in your answer to this Interrogatory and set  
7 forth precisely what information was supplied by each  
8 such individual.

9 14. If you have denied in whole or in part, Request for  
10 Admission No. 9, set forth (separately for each item listed in the  
11 Request for Admission) in full and complete detail all facts and  
12 all contentions upon which you base your denial.

13 (a) Identify each person who has any kind of know-  
14 ledge of the facts which form the basis of your denial;

15 (b) Identify each document relating to or referring to  
16 the matters contained in the answer to this Interrogatory;

17 (c) Identify each person who supplied the information  
18 contained in your answer to this Interrogatory and set  
19 forth precisely what information was supplied by each  
20 such individual.

21 15. Regardless of the nature of your response to Request  
22 for Admission No.10, set forth in full and complete detail all facts  
23 and all contentions upon which you base your response. Include the  
24 time periods for which no work was done and also the dates which  
25 you failed to provide defendant as required by paragraph 2 of the  
26 lease with a statement to this effect.

27 (a) Identify each person who has any kind of know-  
28 ledge of the facts which form the basis of your denial;

29 (b) Identify each document relating to or referring to  
30 the matters contained in the answer to this Interrogatory;

31 (c) Identify each person who supplied the information  
32 contained in your answer to this Interrogatory and set

ERRIA AND  
E. CHARLES  
TENNIS  
CORPORATION  
CHRYSE AND  
LAWYER AT LAW  
111 GENTLE ST.  
EVANSTON, ILL.  
TEL 323-8878



1 forth precisely what information was supplied by each  
2 such individual.

3 16. If you have denied in whole or in part, Request for  
4 Admission No.11, set forth in full and complete detail (including,  
5 as should have done for all Interrogatories, all relevant dates)  
6 all facts and all contentions upon which you base your denial.

7 (a) Identify each person who has any kind of know-  
8 ledge of the facts which form the basis of your denial;

9 (b) Identify each document relating to or referring to  
10 the matters contained in the answer to this Interrogatory.

11 (c) Identify each person who supplied the information  
12 contained in your answer to this Interrogatory and set  
13 forth precisely what information was supplied by each  
14 such individual.

15 17. If you have denied in whole or in part, Request for  
16 Admission No.12, set forth in full and complete detail all facts  
17 and all contentions upon which you base your denial.

18 (a) Identify each person who has any kind of know-  
19 ledge of the facts which form the basis of your denial;

20 (b) Identify each document relating to or referring to  
21 the matters contained in the answer to this Interrogatory

22 (c) Identify each person who supplied the information  
23 contained in your answer to this Interrogatory and set  
24 forth precisely what information was supplied by each  
25 such individual.

26 18. Other than is already set forth, in your Answers to  
27 these Interrogatories, please state the name, last known address,  
28 telephone number and relationship if any, to you of each person  
29 known to you having knowledge of any relevant fact concerning any  
30 of the allegations of your complaint, including damages. Unless  
31 privileged, please furnish a general summary of the facts known or  
32 believed to be known by each such person.

TERIA AND  
S. CHARLES  
FEDERAL  
DISTRICT  
COURT  
ROOM 411  
10 CENTER ST.  
ENHAWESBORO  
NJ 08829

1 19. Please list in detail all items of damage, including  
2 the amounts.

3 (a) Identify each person who has any knowledge of the  
4 facts which form the basis of your Answer to this  
5 Interrogatory;

6 (b) Identify each document relating to or referring to  
7 the matters contained in the answer to this Interrogatory;

8 (c) Identify each person who supplied the information  
9 contained in your answer to this Interrogatory and set  
10 forth precisely what information was supplied by each  
11 such individual.

12 20. Please identify each person you expect to call as  
13 an expert witness at trial for any issue, including valuation of  
14 damages.

15 21. As to each such person named in Interrogatory No. 20  
16 state the subject matter on which that person is expected to  
17 testify, as well as the substance of the facts and opinions to  
18 which that person is expected to testify. Please set forth a  
19 summary of the grounds for each such opinion.

20 22. Please identify each person you have retained or  
21 specially employed in anticipation of litigation or preparation for  
22 trial who is not expected to be called as a witness at trial.

23 DATED this 7th day of December, 1981.

24  
25 ALFRED H. OSBORNE, ESQ.  
26 NICHOLAS F. FREY, ESQ.  
27 ECHEVERRIA & OSBORNE, CHARTERED

28 By: Nicholas F. Frey  
29 NICHOLAS F. FREY  
30 Attorneys for the Defendant  
31 555 South Center Street  
32 Reno, Nevada 89501

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1 Nicholas F. Frey, Esquire  
2 ECHEVERRIA & OSBORNE, CHARTERED  
3 555 South Center Street  
4 Reno, Nevada 89501  
5 Telephone: (702) 323-8678  
6  
7 Attorneys for Defendant  
8

9 IN THE UNITED STATES DISTRICT COURT  
10 FOR THE DISTRICT OF NEVADA

11 TEMPLE MOUNTAIN INDUSTRIES,  
12 Plaintiff,

13 vs.

14 SOUTHERN PACIFIC LAND COMPANY,  
15 Defendant.

Cv. No. 81-0183 ECR  
AFFIDAVIT OF MAILING

16 STATE OF NEVADA )  
17 ) ss.  
18 COUNTY OF WASHOE )

19 I, Terrie Jacqueline Teske being first duly sworn, depo-  
20 ses and says: That affiant is, and was when the herein described  
21 mailing took place, a citizen of the United States, over 21 years  
22 of age, and not a party to, nor interested in, the within action;  
23 that on the 7th day of December, 1981, affiant deposited with the  
24 United States Post Office at Reno, Nevada, a copy of Requests for  
25 Admission to Plaintiff and Interrogatories to Plaintiff enclosed  
26 in a sealed envelope upon which first class postage was fully  
27 prepaid, addressed to:

28 Brad L. Swaner  
29 722 Boston Building  
30 Salt Lake City, Utah 84111

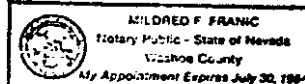
31 and that there is a regular communication by mail between the  
32 place of mailing and the place as addressed

33 Subscribed and sworn to before me this

34 <sup>7th</sup> day of December, 1981.

ECHEVERRIA AND  
OSBORNE, CHARTERED  
PROFESSIONAL  
CORPORATION  
ATTORNEYS AND  
COUNSELORS AT LAW  
555 SOUTH CENTER ST.  
RENO, NEVADA 89501  
PHONE 323-8678

*Mildred F. Franic*



1 ECHEVERRIA AND OSBORNE, CHARTERED  
2 Alfred H. Osborne, Esq.  
3 555 South Center Street  
4 Reno, Nevada 89501  
5 Telephone: (702) 323-8678

6 Attorneys for Defendant

FILED

JAN 8 1982  
CLERK, U. S. DISTRICT COURT  
DISTRICT OF NEVADA  
BY \_\_\_\_\_

7  
8 IN THE UNITED STATES DISTRICT COURT  
9 FOR THE DISTRICT OF NEVADA

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11 TEMPLE MOUNTAIN INDUSTRIES,

12 Plaintiff,

CV. No. 81-0183 ECR

13 vs.

14 SOUTHERN PACIFIC LAND COMPANY,

NOTICE OF DEPOSITION

15 Defendant.

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17 TO: Plaintiff above-named and its attorney of record, BRAD  
18 L. SWANER, 722 Boston Building, Salt Lake City, Utah  
19 84111:

19 YOU, AND EACH OF YOU, WILL PLEASE TAKE NOTICE, that the  
20 deposition of ROBERT L. PATRIE, President of Temple Mountain  
21 Industries, Inc., 505 Newhouse Building, Salt Lake City, Utah, will  
22 be taken by oral examination by and on behalf of the Defendant,  
23 SOUTHERN PACIFIC LAND COMPANY, for the purpose of discovery and  
24 for use as evidence and all other lawful purposes in the above  
25 entitled action, before a Notary Public and Court Reporter of  
26 the State of Nevada, pursuant to all of the applicable provisions  
27 of the Federal Rules of Civil Procedure pertaining to the taking  
28 and use of depositions, on the 15th day of January, 1982, at the  
29 hour of 2:00 p.m., in the offices of Echeverria and Osborne,  
30 Chartered, located at 555 South Center Street, Reno, Nevada, and

31 / / /

32 / / /

ECHEVERRIA AND OSBORNE, CHARTERED  
ALFRED H. OSBORNE, ESQ.  
555 SOUTH CENTER STREET  
RENO, NEVADA 89501  
TELEPHONE 323-8678

*Printed at*

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from day to day thereafter until completed.

DATED this 14 day of January, 1982.

ECHEVERRIA AND OSBORNE, CHARTERED  
Alfred H. Osborne, Esq.  
Nicholas F. Frey, Esq.  
Attorneys for Defendant

BY: Nicholas F. Frey  
NICHOLAS F. FREY  
555 South Center Street  
Reno, Nevada 89501

... as  
completion of ...  
... of the

DATED: \_\_\_\_\_

Signed \_\_\_\_\_

ECHEVERRIA AND OSBORNE, CHARTERED  
PROFESSIONAL CORPORATION  
ATTORNEYS AND COUNSELORS AT LAW  
555 SOUTH CENTER ST.  
RENO, NEVADA 89501  
PHONE 323-6679

1 ECHEVERRIA AND OSBORNE, CHARTERED  
Alfred H. Osborne, Esq.  
2 555 South Center Street  
Reno, Nevada 89501  
3 Telephone: (702) 323-8678  
4 Attorneys for Defendant

FILED

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CLERK, U. S. DISTRICT COURT  
DISTRICT OF NEVADA  
BY \_\_\_\_\_

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8 IN THE UNITED STATES DISTRICT COURT  
9 FOR THE DISTRICT OF NEVADA

10 TEMPLE MOUNTAIN INDUSTRIES,  
11 Plaintiff,

12 vs.

Cv. No. 81-0183 ECR

13 SOUTHERN PACIFIC LAND COMPANY,  
14 Defendant.

NOTICE OF DEPOSITION

15  
16 TO: Plaintiff above-named and its attorney of record, BRAD L.  
SWANER, ESQ., 722 Boston Building, Salt Lake City, Utah  
17 84111;

18 YOU, AND EACH OF YOU, WILL PLEASE TAKE NOTICE, that the  
19 deposition of:

20 1. Your partners, employees, agents or representatives  
21 who will testify at trial in the above-entitled action in the  
22 District of Nevada.

23 2. Any person or persons designated by you who consent  
24 and has knowledge of the facts forming the basis for the allega-  
25 tions of the Complaint.

26 will be taken by oral examination by and on behalf of the Defen-  
27 dant, SOUTHERN PACIFIC LAND COMPANY, for the purpose of discovery  
28 and for use as evidence and all other lawful purposes in the  
29 above-entitled action before a Notary Public of the State of  
30 Nevada, pursuant to all of the applicable provisions of the  
31 Federal Rules of Civil Procedure, Rule 30 (b) (6). Said depositions  
32 will be conducted at the law firm of Echeverria and Osborne,

ECHEVERRIA AND OSBORNE, CHARTERED  
-BORNE CHARTERED  
- PROFESSIONAL  
CORPORATION  
ATTORNEYS AND  
SOLICITORS AT LAW  
555 SOUTH CENTER ST.  
RENO, NEVADA 89501  
TELEPHONE 323-8678

*S. S. S. S.*

BOOK 207 PAGE 441

1 Chartered, 555 South Center Street, Reno, Nevada 89501, and will  
2 commence on January 15, 1982 at 2:30 p.m., and will continue  
3 from day to day thereafter until completed.

4 DATED this \_\_\_\_\_ day of January, 1982.

5 ECHEVERRIA AND OSBORNE, CHARTERED  
6 Alfred H. Osborne, Esq.  
7 Nicholas F. Frey, Esq.

8  
9 BY: Nicholas F. Frey  
10 NICHOLAS F. FREY  
11 555 South Center Street  
12 Reno, Nevada 89501  
13 Attorneys for Defendant  
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23 Pursuant to NRS 603.010 I certify that I am an  
24 employee of ECHEVERRIA AND OSBORNE,  
25 CHARTERED, and that on this date I deposited  
26 for and in the amount of \$\_\_\_\_\_ a copy of the  
27 \_\_\_\_\_  
28 \_\_\_\_\_  
29 \_\_\_\_\_  
30 \_\_\_\_\_  
31 \_\_\_\_\_  
32 \_\_\_\_\_

DATED: \_\_\_\_\_  
SIGNED: \_\_\_\_\_

ECHEVERRIA AND OSBORNE, CHARTERED  
PROFESSIONAL CORPORATION  
ATTORNEYS AND COUNSELORS AT LAW  
555 SOUTH CENTER ST.  
RENO, NEVADA 89501  
PHONE 328-8578

1 ECHEVERRIA & OSBORNE, CHARTERED  
Alfred H. Osborne, Esquire  
2 Nicholas F. Frey, Esquire  
3 555 South Center Street  
Reno, Nevada 89501  
Telephone: (702) 323-8678

4  
5 Attorneys for Defendant  
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7

8 IN THE UNITED STATES DISTRICT COURT  
9 FOR THE DISTRICT OF NEVADA

10  
11 TEMPLE MOUNTAIN INDUSTRIES,  
12 Plaintiff,  
13 SOUTHERN PACIFIC LAND COMPANY,  
14 Defendant. /

AFFIDAVIT OF MAILING

15 STATE OF NEVADA )  
16 COUNTY OF WASHOE ) SS.

17 I, Terrie Jacqueline Teske being first duly sworn, depo-  
18 ses and says: That affiant is, and was when the herein described  
19 mailing took place, a citizen of the United States, over 21 years  
20 of age, and not a party to, nor interested in, the within action;  
21 that on the 19th day of January, 1982, affiant deposited with the  
22 United States Post Office at Reno, Nevada, a copy of Motion for  
23 Summary Judgment and Proposed Findings of Fact and Conclusions of  
24 Law and Judgment enclosed in a sealed envelope upon which first  
25 class postage was fully prepaid, addressed to:

26 Brad L. Swaner  
27 722 Boston Building  
Salt Lake City, Utah 84111

28 and that there is regular communication by mail between the place  
29 of mailing and the place as addressed.

30  
31 Subscribed and sworn to before me this 19<sup>th</sup>

32 day of January, 1982.

ECHEVERRIA AND OSBORNE, CHARTERED  
PROFESSIONAL CORPORATION  
555 SOUTH CENTER STREET  
RENO, NEVADA 89501  
PHONE 323-8678

NOTARY PUBLIC  
State of Nevada  
Washoe County  
Notary Expires Nov. 16, 1983



EXHIBIT B

ENTERED  
JUN 29 1982  
U.S. DISTRICT COURT  
DISTRICT OF NEVADA  
CLERK

FILED  
JUN 29 1982  
CLERK, U.S. DISTRICT COURT  
DISTRICT OF NEVADA  
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UNITED STATES DISTRICT COURT  
DISTRICT OF NEVADA

TEMPLE MOUNTAIN INDUSTRIES, INC., )  
Plaintiff, )  
vs. )  
SOUTHERN PACIFIC LAND COMPANY, )  
Defendant. )

CV.-R-81-183-ECR  
MAGISTRATE'S REPORT  
AND RECOMMENDATION

This Report and Recommendation is made to the Honorable Edward C. Reed, Jr., United States District Court Judge. The matter was referred to the undersigned Magistrate pursuant to 28 U.S.C. §636(b)(1)(B), and this Report and Recommendation is made on the basis of the pleadings and motions filed herein. No hearing was requested and none was had.

MATTERS CONSIDERED

This action was brought by the corporate lessee (hereinafter referred to as "Temple Mountain") to contest the termination of a written lease agreement for land located in Eureka County, Nevada with option to renew provisions with Southern Pacific Land Company (hereinafter referred to as "Southern Pacific").

42

1           The action was first filed on February 18, 1981  
2 in the Central Division, District Court of Utah, then trans-  
3 ferred to the District of Nevada, Southern Division, then to  
4 District of Nevada, Northern Division, by order dated August 6,  
5 1981. Defendant's answer was filed August 20, 1981.

6           By Order of this Court filed on August 21, 1981, dis-  
7 covery was to be completed on or before January 18, 1982. All  
8 of the motions to be considered arise directly or indirectly  
9 from defendant Southern Pacific's attempts to conduct dis-  
10 covery.

11           On December 7, 1981, Southern Pacific served by  
12 mailing to Temple Mountain's attorney, written interrogatories  
13 and requests for admissions. On January 8, 1982, Southern  
14 Pacific filed a notice to take the depositions of (1) "partners,  
15 employees, agents or representatives" to testify at trial and  
16 (2) "any person or persons designated by [Plaintiff] who consents  
17 and has knowledge of facts forming basis for the allegations  
18 of the Complaint," to be taken in Reno at 2:30 p.m. January 15,  
19 1982, in the office of defendant's counsel. On the same date,  
20 Southern Pacific filed a second notice to take the deposition  
21 of Robert L. Patrie, President of Temple Mountain, in Reno,  
22 Nevada at 2:00 p.m., January 15, 1982.

23           The motions, replies, and other pleadings under con-  
24 sideration are divided for clarity, as they related to (A)  
25 Southern Pacific's motion to dismiss; (B) Southern Pacific's  
26 motion for summary judgment and (C) the Whites' motions to  
27 intervene. For the Court's convenience, the matters are numbered  
28 according to the Clerk's docket sheet.

1                   A. Matters Relating To Southern Pacific's  
2                   Motions To Dismiss

3                   1. On January 14, 1982, Southern Pacific filed  
4 motion to dismiss or, in the alternative, a motion for other  
5 sanctions for failure of Temple Mountain to comply with dis-  
6 covery, in particular, a failure to serve answers to the interro-  
7 gatories. The motion requested dismissal or other sanctions,  
8 and that Southern Pacific be awarded its costs, including  
9 reasonable attorney's fees. (Docket #25)

10                   2. On February 11, 1982, Southern Pacific filed what  
11 was entitled an ex parte motion, based upon the failure of plain-  
12 tiff to file opposing points and authorities, for an order  
13 granting defendant's previous motion to dismiss. In this motion,  
14 Southern Pacific alleged that (1) Temple Mountain's response  
15 to its prior motion was due by February 1, 1982; (2) that  
16 Southern Pacific had received no answer or response, nor had  
17 any extension of time to file been requested or granted, nor  
18 had the court relieved Temple Mountain of its duty to respond.  
19 The motion requested that its motion to dismiss be granted and  
20 that the court order payment of reasonable expenses, including  
21 attorney's fees. (Docket #31)

22                   3. On March 2, 1982, Temple Mountain filed a motion  
23 with affidavit of plaintiff's counsel, to strike Southern  
24 Pacific's two above stated motions. The grounds for this  
25 request were: (1) That counsel for plaintiff and defendant had  
26 agreed on January 14, 1982, that the answers to Southern  
27 Pacific's interrogatories would be supplied to defendant at  
28 the time of the deposition of Temple Mountain's president.

1 (2) That said deposition had not been taken; and (3) that a  
2 statement had not been filed by Southern Pacific certifying  
3 the inability of its counsel to satisfactorily resolve the  
4 matter of answers to interrogatories, pursuant to Rule 17.4(b),  
5 Rules of Practice, United States District Court for the District  
6 of Nevada. (Docket #35)

7 4. On March 8, 1982, Southern Pacific filed its  
8 memorandum in opposition to Temple Mountain's motion to  
9 strike, with the attached affidavit of one of its attorneys,  
10 Nicholas F. Frey. The memorandum and the affidavit stated:

11 (1) There was no agreement that Temple Mountain need not supply  
12 answers to the interrogatories before the time of the deposition  
13 of its president; (2) that Temple Mountain's declaration to  
14 that effect was untrue; (3) that Temple Mountain's objections  
15 were untimely raised; (4) that even if the parties had entered  
16 into some agreement respecting an extension of time to answer  
17 the interrogatories, that agreement would be without effect  
18 because Local Rule 7(a) requires such stipulations to be  
19 written and signed; (5) that the court has independent grounds  
20 to dismiss the action because Temple Mountain's agents failed  
21 to appear for noticed depositions and obtained no court order  
22 excusing failure to appear; (6) that even if Southern Pacific  
23 had failed to strictly comply with Local Rule 17.4(b), there  
24 were grounds to strike the motion to dismiss because Temple  
25 Mountain waived that argument when it failed to oppose the  
26 motion; (7) that Local Rule 17.4(b) is not applicable to  
27 Southern Pacific's motion to dismiss and defendant's ex parte  
28 motion; and that even if it were applicable, sufficient facts

1 are shown in the affidavits attached to various pleadings,  
2 requirements of Local Rule 17.4(b). (Docket #36)

3 B. Matters Relating To Southern Pacific's  
4 Motion For Summary Judgment

5 1. On January 15, 1982, Temple Mountain filed a  
6 motion for a protective order providing that (1) the depositions  
7 noticed by Southern Pacific to be taken on January 15, 1982 in  
8 Reno, Nevada, not be had or, (2) depositions should be had only  
9 after reasonable notice and after certain of the deponents were  
10 properly described. Plaintiff's grounds were: (1) That the  
11 notices were not received until January 11, 1982 in Salt Lake  
12 City, Utah. (2) That one of the notices did not give plain-  
13 tiff's attorney adequate notice of the persons whom defendant  
14 wished to depose; and (3) that the notices allowed inadequate  
15 and unreasonable time for plaintiff to gather witnesses and  
16 appear in Reno, Nevada for the depositions. (Docket #26 and  
17 #27, being two copies of the same motion)

18 2. On January 19, 1982, Southern Pacific moved,  
19 pursuant to Federal Rules of Civil Procedure 56, for summary  
20 judgment on the grounds: (1) That Temple Mountain had not,  
21 as of that date, responded to Southern Pacific's interrogatories  
22 or requests for admissions and (2) that Temple Mountain had  
23 failed to appear for the noticed depositions and had obtained  
24 no order prior to the date and time set, or at all, for those  
25 depositions excusing the absence of the noticed individuals.  
26 Southern Pacific argued that pursuant to Federal Rules of  
27 Civil Procedure 36, Temple Mountain had admitted the matters  
28 set forth in the request for admissions and that independent

1 grounds existed for the court to award summary judgment.  
2 (Docket #28)

3 3. On February 2, 1982, Southern Pacific filed its  
4 memorandum of points and authorities in opposition to Temple  
5 Mountain's motion for a protective order, to which was attached  
6 a copy of the reporter's affidavit stating that the noticed  
7 individuals had not appeared for depositions. (Docket #29)

8 4. On February 10, 1982, Temple Mountain filed its  
9 memorandum of points and authorities in opposition to Southern  
10 Pacific's motion for summary judgment, arguing: (1) That  
11 Southern Pacific's motion for summary judgment based upon the  
12 request for admissions would have as its basis a breach of the  
13 contract; (2) that Southern Pacific had not raised breach of  
14 contract in its answer to the complaint; and (3) that Southern  
15 Pacific had failed to show that such complained of breaches  
16 were material, all of which facts would fall short of the  
17 requirement necessary under Federal Rules of Civil Procedure 56  
18 for the granting of summary judgment. (Docket #30)

19 5. On February 17, 1982, Southern Pacific filed its  
20 reply to Temple Mountain's memorandum above described.  
21 (Docket #32)

22 C. Matters Relating To The Motions To Intervene

23 1. On February 19, 1982, the court received a letter  
24 from David A. White, as trustee of the Arthur E. White Trust,  
25 requesting the court to await the filing of court papers and  
26 documents relating to the interest of his uncle, Arthur E.  
27 White, and his trust, (the applicants) "as holder of royalty  
28 agreement on the lease." (Docket #33)

1           2. On March 1, 1982, the applicants' filed a motion  
2 to intervene, stating: (1) That their "royalty agreement"  
3 with Temple Mountain to Arthur White would be rendered worth-  
4 less if the lease were not renewed. (2) That the applicants had  
5 only recently learned of the lawsuit. (3) That Southern Pacific  
6 would not be prejudiced by the intervention, and (4) that they  
7 could not adequately protect their interests unless counsel was  
8 retained and discovery reopened and completed within ninety  
9 days. The applicants addressed the issue of summary judgment  
10 and requested that Southern Pacific's motion for summary judg-  
11 ment be denied. (Docket #34)

12           3. On March 9, 1982, Southern Pacific filed its  
13 reply to the applicants' memorandum opposing the intervention,  
14 arguing the merits raised in the memorandum in relation to its  
15 motion for summary judgment and requesting its fees and costs  
16 expended in preparation of the reply. (Docket #37)

17           4. On March 10, 1982, the applicants filed their  
18 motion to intervene as plaintiff, stating: (1) That the  
19 applicants claim an interest relating to the leased property;  
20 and (2) that they are so situated that disposition of the  
21 action may, as a practical matter, impair or impede their  
22 ability to protect that interest. A proposed complaint was  
23 attached. (Docket #38)

24           5. On March 12, 1982, Southern Pacific filed a  
25 memorandum in opposition to the motion to intervene. The  
26 memorandum also addressed the motion of March 10, 1982, oppos-  
27 ing that also. Southern Pacific argued: (1) That the  
28 applicants' request was tardy, coming after the expiration of

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1 the period for discovery; and (2) that it failed to satisfy the  
2 criteria necessary for relief under Federal Rules of Civil  
3 Procedure 24. (Docket #39)

4 6. On March 29, 1982, Southern Pacific filed its  
5 memorandum in opposition to the motion to intervene of March 9,  
6 1982, stating: (1) That the applicants were not parties to  
7 the lease itself but their rights were dependent upon rights  
8 under the lease held by Temple Mountain, and (2) discussing  
9 Southern Pacific's claims that the applicants do not have  
10 sufficient interest to qualify under Federal Rules of Civil  
11 Procedure 24. (Docket #40)

12 DISCUSSION

13 Discussion will be approached according to the  
14 classification set forth in the matters to be considered,  
15 although there will, of necessity, be overlapping of some details  
16 relating to the issues.

17 A. Motions Relating To Dismissal Issue

18 As noted above, Southern Pacific filed a motion to  
19 dismiss for failure to comply with discovery on January 14, 1982  
20 and followed that with an ex parte motion on February 11, 1982,  
21 based on Temple Mountain's failure to respond to the prior  
22 motion with points and authorities, as required by Local Rule  
23 16(c).

24 Temple Mountain has never filed a response to  
25 defendant's motion to dismiss. However, apparently, by way  
26 of opposition, it filed a motion on March 2, 1982, to strike the  
27 above two motions based upon an alleged agreement between the  
28 counsel of the parties that provided that the answers to the



1 interrogatories and requests for admissions would be supplied  
2 to Southern Pacific at the time of the deposition of Temple  
3 Mountain's president, which deposition had not taken place.  
4 A further ground was asserted that Southern Pacific had not  
5 filed the certification required by Local Rule 17.4(b). The  
6 claimed agreement of counsel was supported by the affidavit  
7 of Brad Swaner, attorney for Temple Mountain, and stated the  
8 agreement was made by telephone on January 14, 1982, with  
9 Nicholas F. Frey, one of Southern Pacific's attorneys. Southern  
10 Pacific filed its opposition on March 8, 1982, attaching the  
11 affidavit of Nicholas F. Frey, which clearly denied that any  
12 such agreement or understanding had been made.

13 From a review of the file, the following facts appear  
14 uncontested:

15 1. Southern Pacific properly served written  
16 interrogatories and requests for admissions on Temple Mountain's  
17 attorney by mailing same to him on December 7, 1981.

18 2. The responses to the interrogatories and requests  
19 for admissions were due, pursuant to Federal Rules of Civil  
20 Procedure 6(e), 33 and 36, on or about January 11, 1982.

21 3. The file contains no order relieving Temple  
22 Mountain of the duty of responding to the interrogatories or  
23 requests for admissions or extending the time for responding,  
24 nor any motion or request for such order.

25 4. There is no indication in the court's file, as  
26 of this date, that Temple Mountain has answered the interro-  
27 gatories served upon it, has tendered such answers, or has  
28 filed with the court a motion pursuant to Federal Rules of

1 Civil Procedure 6(b)(2) to show that the failure to act was  
2 the result of excusable neglect.

3           Whatever may be said of the claimed agreement, pur-  
4 portedly reached January 14, 1982 by the parties' counsel to  
5 allow Temple Mountain to later answer, such avails Temple  
6 Mountain nothing.

7           First, according to its own affidavit, such agree-  
8 ment would not have been made until January 14, 1982, which was  
9 after the responses should have been made. Under Federal Rules  
10 of Civil Procedure 29, stipulations extending the time provided  
11 in Federal Rules of Civil Procedure 33 and 36, requires approval  
12 of the court. Under Local Rule 8, any time prescribed for  
13 doing of any act specified in either those rules or in the  
14 Federal Rules of Civil Procedure may be enlarged by the court by  
15 order made before the expiration of the time. The court may  
16 only permit the act to be done after expiration of time pursuant  
17 to motion where the failure to act was the result of excusable  
18 neglect. Plaintiff did not file a motion for late response  
19 at all.

20           Secondly, Local Rule 7 requires that stipulations of  
21 counsel relating to the business of the court, except such as  
22 are made in open court, be made in writing and signed. An  
23 oral extrajudicial stipulation could not act so as to extend  
24 the court ordered close-of-discovery on January 18, 1982.

25           Neither do Temple Mountain's claims based on local  
26 Rule 17(a)(4)(b) justify its position. That Rule provides:

27           (a) All motions to compel discovery shall,  
28 in addition to the discovery being sought  
in the motion, set forth in full the text  
of the discovery originally sought and the

BOOK 207 PAGE 453

1 response made thereto, if any.

2 (b) Discovery motions will not be heard  
3 unless a statement or moving counsel is  
4 attached thereto, certifying that after  
5 personal consultation and sincere effort to  
6 do so counsel have been unable to satisfactorily  
7 resolve the matter.

8 The court reads this Local Rule as applying to a  
9 situation in which there has been some attempt to comply with  
10 discovery, not as a "Catch 22" provision whereby a party may  
11 escape the consequences of its total failure to make discovery.  
12 This difference is similar to that between Federal Rules of  
13 Civil Procedure 37(a) and (d).

14 Additionally, Local Rule 16(c) requires that a  
15 responsive memorandum opposing a motion shall be filed in  
16 fifteen days after service of the moving party's points and  
17 authorities. Failure of an opposing party to file a memorandum  
18 of points and authorities in opposition to any motion shall  
19 constitute a consent to the granting of the motion, under Local  
20 Rule 16(e). Therefore, Temple Mountain lost its ability to  
21 protest Southern Pacific's lack of Local Rule 17(b) certifica-  
22 tion, if such a certification were required.

23 Temple Mountain apparently sought to circumvent its  
24 failure to file an opposing memorandum within the fifteen day  
25 time limit, or to request an extension of time to file, with a  
26 March 2, 1982, document entitled a motion to strike Southern  
27 Pacific's motions to dismiss or for sanctions. A motion to  
28 strike is permitted by Federal Rules of Civil Procedure 12(f)  
to remove from any pleading "any insufficient defense or any  
redundant, immaterial, impertinent, or scandalous matter."

1 Temple Mountain does not attempt to show how its motion comes  
2 within the purview of this rule and the document clearly is a  
3 belated memorandum opposing Southern Pacific's motions - filed  
4 forty-two days after Southern Pacific's original motion and  
5 nineteen days after the ex parte motion to dismiss.

6 Under these facts and circumstances, it appears that  
7 the Court must find that Temple Mountain has failed to make or  
8 to cooperate in discovery and that its failure was unjustified.

9 What action the Court may take is set forth in  
10 Federal Rules of Civil Procedure 37(d):

11 If a party or an officer, director, or  
12 managing agent of a party or a person  
13 designated under Rule 30(b)(6) or 31(a)  
14 to testify on behalf of a party fails (1)  
15 to appear before the officer who is to take  
16 his deposition, after being served with proper  
17 notice, or (2) to serve answers or objections  
18 to interrogatories submitted under Rule 33,  
19 after proper service of the interrogatories,  
20 or (3) to serve a written response to a  
21 request for inspection submitted under Rule  
22 34, after proper service of the request, the  
23 court in which the action is pending on motion  
24 may make such orders in regard to the failure  
25 as are just, and among others, it may take any  
26 action authorized under paragraphs (A), (B),  
27 and (C) of subdivision (b)(2) of this rule.  
28 In lieu of any order or in addition thereto,  
the court shall require the party failing to  
act or the attorney advising him or both to  
pay the reasonable expenses, including attorney's  
fees, caused by the failure, unless the court  
finds that the failure was substantially  
justified or that other circumstances make an  
aware of expenses unjust.

The failure to act described in this subdivision  
may not be excused on the ground that the discovery  
sought is objectionable unless the party failing  
to act has applied for a protective order as pro-  
vided by Rule 26(c).

The action authorized under Rule 37 (b)(2), para-  
graphs (A), (B), and (C) includes the court's issuing:

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(a) An order that the matters regarding which the order was made or any other designated facts shall be taken to be established for the purposes of the action in accordance with the claim of the party obtaining the order;

(b) An order refusing to allow the disobedient party to support or oppose designated claims or defenses, or prohibiting him from introducing designated matters in evidence;

(c) An order striking out pleadings or parts thereof, or staying further proceedings until the order is obeyed, or dismissing the action or proceeding or any part thereof, or rendering a judgment by default against the disobedient party.

Southern Pacific's motion to dismiss was based only on Temple Mountain's failure to answer interrogatories and asked the complaint to be dismissed or, in the alternative, that other sanctions be imposed on Temple Mountain, and that Southern Pacific be awarded its costs, including reasonable attorney's fees. However, in determining which sanctions would be effective and just in this situation, other circumstances as shown in the pleadings and papers on file herein should be taken into consideration.

A review of other motions and pleadings shows that the following is uncontested.

1. On January 8, 1982, Southern Pacific filed two notices to take depositions of the president of Temple Mountain, Robert L. Patrie, and of unnamed agents and/or prospective witnesses of Temple Mountain with the requirements of Federal Rules of Civil Procedure 31(a) on January 15, 1982 in Reno, Nevada. Temple Mountain states it received service by mail of these notices on January 11, 1982.

1           2. On January 14, 1982, Temple Mountain made several  
2 telephone calls to Southern Pacific's attorney and did not  
3 obtain an extension of time to take depositions.

4           3. On January 15, 1982, Temple Mountain filed a  
5 motion for a protective order, but it did not file a motion  
6 shortening time or for an expedited decision of the court.

7           4. On January 15, 1982, neither Patrie, nor any  
8 agent or attorney for Temple Mountain appeared at the time  
9 and place set for the depositions.

10           The Ninth Circuit does not allow a party to satisfy  
11 its burden to respond to discovery by merely filing a motion  
12 for a protective order. In Pioche Mines v. Dolman, 333 F.2d  
13 257, (9th Cir., 1964) the court stated:

14           Rule 30(b) places the burden on the proposed  
15 deponent to get an order, not just to make a  
16 motion. And if there is not time to have  
17 his motion heard, the least that he can be  
18 expected to do is to get an order postponing  
19 the time of the deposition until his motion  
20 can be heard.... But unless he has obtained  
21 a court order that postpones or dispenses with  
22 his duty to appear, that duty remains.

23           Hence, some individuals from Temple Mountain, and  
24 at least its president, were under a duty to appear at the  
25 depositions January 15, 1982, and did not appear. As a good  
26 faith effort, its counsel might have appeared but did not.

27           Therefore, it appears that all discovery attempts  
28 by defendant, Southern Pacific, have been frustrated and that  
it has been able to obtain no information beyond the complaint  
from plaintiff, Temple Mountain. It does not appear from the  
record that Temple Mountain has attempted to do any discovery.

          Under these circumstances, the Magistrate recommends

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1 that the court issue its order:

2 1. Granting Southern Pacific's motion to dismiss  
3 the complaint in this action, and that such dismissal be with  
4 prejudice because of the blatant failure to comply with dis-  
5 covery.

6 2. Finding Temple Mountain's "motion to strike  
7 defendant's motions to dismiss" to be a belatedly filed memo-  
8 randum of points and authorities in opposition to defendant's  
9 motion to dismiss, and refusing to consider them.

10 3. In the alternative: (a) Plaintiff has never  
11 filed a response to defendant's motion to dismiss which, there-  
12 fore, constitutes a consent to the granting of the motion,  
13 pursuant to Local Rule 16(e). (b) Denying plaintiff's motion  
14 to strike defendant's motions to dismiss.

15 B. Southern Pacific's Motion For Summary Judgment

16 In light of the Magistrate's previous recommendation,  
17 the motions and responsive pleadings filed in reference to  
18 Southern Pacific's motion for summary judgment would ordinarily  
19 become moot if the court accepts the Magistrate's recommenda-  
20 tion, and would need not be discussed as to their merits.  
21 However, a dismissal of the case should entitle defendant to  
22 a finding by the court that neither plaintiff nor prospective  
23 intervenors have any interest in the property to avoid a quiet  
24 title action at a later time. The most appropriate way to  
25 accomplish this, if justified, is through the summary judgment  
26 process.

27 Plaintiff filed this action to have the court declare  
28 the lease that is the subject of the action to have been renewed

1 for the period December 1, 1980 to November 30, 1981 and for  
2 an order requiring defendant to renew the lease for the period.

3 Southern Pacific Land Company leased mining rights  
4 of some 320 acres to plaintiff, Temple Mountain Industries,  
5 Inc., for one year beginning December 1, 1975 to November 30,  
6 1976. The written lease is attached to plaintiff's complaint  
7 as Exhibit "A". Provision 27 provides for an option to renew the  
8 lease annually for a period not exceeding four years and there-  
9 after, from year to year, provided (1) the lease shall not have  
10 already been terminated; (2) the lessee is not in default in  
11 its obligations; (3) written notice of the exercise of the option  
12 is received by lessor not more than six months nor less than  
13 thirty days prior to the expiration of each annual period.

14 Provision 14 is the standard provision that a waiver  
15 of any breach is not a waiver of any other or subsequent breach  
16 and the acceptance of payments by lessor is not a waiver of any  
17 preceding breach except the failure to pay the payment accepted.

18 Plaintiff alleges in its complaint, which is admitted  
19 by defendant, that it had never given written notice to defen-  
20 dant of its intention to renew during the first four yearly  
21 extensions, but rather tendered its check, which was accepted  
22 and processed. The term ended November 30, 1980. By check  
23 dated December 1, 1980 and received a few days later, Temple  
24 Mountain expected another renewal, although it did not make  
25 a written notification. Southern Pacific declined to renew  
26 and returned the check by letter dated December 8, 1980.  
27 (Exhibit "B" to plaintiff's complaint)

28 Plaintiff alleges in its complaint, in several



1 paragraphs that it was not in default and had complied in  
2 all respects with the agreement except for the written notice.  
3 It claims that defendant had waived the requirement of notice  
4 by its previous acceptance of the checks. Defendant denies  
5 these allegations, which, of course, puts the questions of  
6 breach of contract squarely in issue. (I see no merit in  
7 plaintiff's argument that defendant was also to set out plain-  
8 tiff's breach of contract as a separately stated affirmative  
9 defense under those circumstances.)

10 Defendant served requests for admission to plaintiff  
11 on December 7, 1981, properly and as is allowed by Federal  
12 Rules of Civil Procedure 36. (See Exhibit "1" to defendant's  
13 motion for summary judgment.) It can clearly be seen that if  
14 these twelve requests were admitted, the plaintiff will have  
15 admitted several serious and material breaches of the condi-  
16 tions and covenants of the lease, including the fact that the  
17 prior payments had been mailed and received before expiration  
18 of the term.

19 Here again, plaintiff has completely ignored the  
20 requests for admission and did not answer them, or object to  
21 them or make any effort to get an extension of time through  
22 the court within the thirty days or at all.

23 Federal Rules of Civil Procedure 36(a) provides in  
24 pertinent part:

25 Each matter of which an admission is requested  
26 shall be separately set forth. The matter is  
27 admitted, unless, within 30 days after service  
28 of the request, or within such shorter or  
longer time as the court may allow, the party  
to whom the request is directed serves... a  
written answer or objection...."

1 This sanction has been freely acknowledged and  
2 employed by the courts. See O'Campo v. Hardisty, 262 F.2d  
3 621 (9th Cir., 1958).

4 Plaintiff has done nothing here but file a lawsuit  
5 and then has completely and blatantly ignored its obligations  
6 for discovery under the Federal Rules of Civil Procedure.  
7 Furthermore, it has filed motions asking for certain relief for  
8 itself while totally ignoring its responsibilities provided  
9 by the rules of this Court and Federal Rules of Civil Procedure  
10 in responding to defendant's legitimate motions. Since the  
11 plaintiff does not appear to be interested in pursuing its law-  
12 suit by the rules of procedure and of court, the defendant  
13 should not be required to spend its time defending it.

14 Therefore, it is recommended that the requests for  
15 admission be considered admissions, pursuant to Federal Rules  
16 of Civil Procedure 36(a), which leaves no issue of material fact  
17 to be decided. Summary judgment should be granted to defendant  
18 with the order and decree of the court that the subject lease  
19 has expired and that plaintiff has no interest in the property,  
20 in the County of Eureka, State of Nevada, which is described  
21 as follows:

22 The West 1/2 of Section 25, Township 36  
23 North, Range 49 East, MDM., containing  
320.00 acres, more or less.

24 C. Applicants' Motion To Intervene

25 The first communication from the applicants to  
26 intervene was received February 19, 1982 by the court in the form  
27 of a letter. They filed their first motion to intervene on  
28 March 1, 1982. Both of these dates were over a month after the

1 close of discovery. The motion of March 1, 1982 asks that the  
2 court allow them to intervene, to deny Southern Pacific's  
3 motion for summary judgment, and to reopen discovery for an  
4 additional ninety days. On March 10, 1982, the applicants  
5 filed a second motion, requesting the court to allow them to  
6 intervene as plaintiff, and they attached a proposed complaint.

7 The applicants allege the existence of a royalty  
8 agreement between Temple Mountain and Arthur E. White, signed  
9 on March 26, 1976. (The attached copy of the document shows  
10 that it was recorded February 11, 1982, at Book 101, Page 193,  
11 by the Recorder of Eureka County, Nevada.) The document pro-  
12 vides that Arthur E. White is to receive nine percent of any  
13 net profit that might be derived from the mining operation to  
14 be developed by Temple Mountain. The agreement sets forth  
15 Temple Mountain's interest in the leased property in question  
16 (represented to be 320 acres) and in a group of unpatented  
17 mining claims (said to be approximately 620 acres). Temple  
18 Mountain agreed:

19 ....on a best effort basis and at its own  
20 risk and expense and without further contri-  
21 bution or liability to the party hereinafter  
22 identified to proceed as soon as possible  
23 with exploration upon the subject lands,  
24 looking forward to the creation of a profit-  
25 able mining operation, subject, of course to  
26 the well understood 'miners risk.'

27 Mr. White, referred to in the agreement as a  
28 "sophisticated investor," appears to have paid \$700.00 for  
the nine percent of the net profits. In an affidavit attached  
to the March 1, 1982 motion to intervene, David A. White,  
identified as nephew of Arthur E. White and trustee of the

1 Arthur E. White Trust, states that in February, 1981, Arthur E.  
2 White assigned and transferred approximately seventy-eight per-  
3 cent of his interest in the "royalty agreement" to the Trust.

4 The applicants allege that the "royalty agreement"  
5 will be rendered worthless if the lease between Temple Mountain  
6 and Southern Pacific is not renewed; that they claim an interest  
7 relating to the property which is the subject of the action (by  
8 virtue of the agreement); and that they are so situated that  
9 disposition of the action may as a practical matter impair or  
10 impede their ability to protect that interest. However, nowhere  
11 does it appear from the agreement that any interest in the lease  
12 was ever assigned by Temple Mountain to White. Therefore, their  
13 contract is merely one for money and does not involve a real  
14 property interest, applicants' allegations and agreement not-  
15 withstanding.

16 Applicants' proposed complaint attached to their  
17 motion of March 10, 1982 is an action by applicants, as plain-  
18 tiffs against Temple Mountain and Southern Pacific, as defen-  
19 dants. It appears to set forth generally the same matters as  
20 were alleged in the original complaint, adding that they were  
21 damaged by any failure of Temple Mountain to comply with the  
22 lease but not praying for any damages against Temple Mountain.

23 Applicants' motions to intervene attempt to respond  
24 only to Southern Pacific's motions for summary judgment and  
25 do not mention or defend against Southern Pacific's motions  
26 to dismiss.

27 Rule 24 of the Federal Rules of Civil Procedure  
28 govern intervention. The relevant parts of Federal Rules of

1 Civil Procedure 24 provide:

2 (a) Intervention of Right. Upon timely  
3 application anyone shall be permitted to inter-  
4 vene in an action... (2) when the applicant  
5 claims an interest relating to the property  
6 or transaction which is the subject of the  
7 action and he is so situated that the disposition  
8 of the action may as a practical matter impair  
9 or impede his ability to protect that interest,  
10 unless the applicant's interest is adequately  
11 represented by existing parties.

12 (b) Permissive Intervention. Upon timely  
13 application anyone may be permitted to inter-  
14 vene in action:... (2) when an applicant's  
15 claim or defense and the main action have a  
16 question of law or fact in common....

17 (c) A person desiring to intervene shall serve  
18 a motion to intervene upon the parties as pro-  
19 vided in Rule 5. The motion shall state the  
20 grounds therefor and shall be accompanied by a  
21 pleading setting forth the claim or defense for  
22 which intervention is sought....

23 A principal issue as to whether applicants may inter-  
24 vene as a matter of right is whether they fulfill the "interest"  
25 requirement. No clear definition of this "interest" has been  
26 established by the Supreme Court or the lower courts. Blake  
27 v. Pallan, 554 F.2d 947 (9th Cir., 1977) 952. [For a discussion  
28 of the difficulties in arriving at a consistent and clear  
29 definition of required "interest," see, Rosebud Coal Sales Co.  
30 v. Andrus, 644 F.2d 849 (10th Cir., 1981) and In Re Penn Central  
31 Commercial Paper Litigation, 62 F.R.D. 341 (S.D. N.Y., 1974).

32 Various courts have commented on the "interest"  
33 requirement:

34 Several courts, including this one, have,  
35 implicitly, at least, rejected the notion  
36 that Rule 24(a)(2) requires "a specific  
37 legal or equitable interest." Blake, supra.

38 To meet this requirement, an applicant for

1 intervention need not show that he has a  
2 legal or equitable interest in jeopardy....  
3 An applicant must show that he has a "protect-  
4 able interest" in the outcome of the litigation  
5 of sufficient magnitude to warrant inclusion  
6 in the action.... Smith v. Puginan, 651  
7 F.2d 1320 (9th Cir., 1980) 1324.

8 [I]t is clear that such an interest must be  
9 direct, substantial and significantly  
10 protectable.... An interest which is remote  
11 or contingent is insufficient.... U. S. v.  
12 Carrols Development Corp., 454 F.Supp. 1215  
13 (N.D., N.Y. 1978).

14 [A]n interest, to satisfy the requirements of  
15 Rule 24(a)(2) must be significant, must be  
16 direct rather than contingent, and must be  
17 based on a right which belongs to the proposed  
18 intervenor rather than to an existing party to  
19 the suit. In Re Penn Central Commercial Paper  
20 Litigation, 62 F.R.D. 441 (S.D., N.Y. 1974)  
21 346.

22 The interest that applicants allege is an agreement  
23 with plaintiff to be paid a percentage of the net profits of  
24 a minerals exploration and mining project to be conducted on  
25 itemized land, including the land leased from defendant.  
26 Applicants are not party to the lease under litigation nor  
27 was it drawn for their benefit. Their position could be  
28 summarized as follows: If plaintiff cannot get the lease  
reinstated, applicants will not be able to be paid by plain-  
tiff from any profits that might come from mining the land,  
subject to the lease. Courts generally seem to have found  
somewhat similar interests insufficient for intervention pur-  
suant to Federal Rules of Civil Procedure 24(a)(2). See,  
Rosebud Coal Sales Co. v. Andrus, 644 F.2d 849 (10th Cir., 1981)  
U.S. v. Carrols Development Corporation, 454 F.Supp. 1215  
(N.D.N.Y., 1978); Warheit v. Osten, 57 F.R.D. 629 (E.D. Mich.,  
1973)

1           Additionally, this proceeding will not foreclose  
2 applicants' cause, if any, against plaintiff, with whom they  
3 have their agreement.

4           Therefore, the applicants have not shown that they  
5 have a protectable interest in the proceeding to entitle them  
6 to intervene pursuant to Federal Rules of Civil Procedure  
7 24(a)(2).

8           If the court finds they may not intervene by  
9 right, applicants have petitioned the court to allow them  
10 permissive intervention.

11           Applicants, apparently, hope that the court will  
12 allow them, in effect, to take the position of Temple Mountain  
13 in this case (even though they have designated Temple Mountain  
14 as a defendant in their proposed complaint) and reopen discovery  
15 for ninety days, in an attempt to show that defendant was  
16 required to allow Temple Mountain to renew the lease.

17           Aside from the fact that applicants would be liti-  
18 gating a cause in which they would not be a real party in  
19 interest as defined in Federal Rules of Civil Procedure 17,  
20 and who are not parties to the lease which this case concerns,  
21 if the court accepts the recommendation on Southern Pacific's  
22 motions to dismiss filed on January 14, 1982 and on February 11,  
23 1982, there will be no cause to litigate.

24           The courts have not allowed intervenors to revive  
25 a moribund lawsuit. In Cook v. Bates, 92 F.R.D. 120 (S.D.  
26 N.Y. 1981), after a sua sponte dismissal of the complaint for  
27 failure to state a claim upon which relief could be granted,  
28 the court refused to allow intervention:

1 There must be an existing litigation into  
2 which to intervene, Hobbs, v. Police Jury  
3 of Morehouse Parish, 49 F.R.D. 176, 178-9  
4 (W.D. La., 1976), because intervention  
5 may not be utilized to revive a moribund  
6 lawsuit. McClune v. Shamah, 593 F.2d 482,  
7 486 (3rd Cir., 1979)

8 Therefore, it is recommended that the court not  
9 exercise its discretion to allow applicants permissive inter-  
10 vention and that the two motions to intervene in this proceed-  
11 ing be denied.

12 SUMMARY

13 The Magistrate, in summary, recommends that the  
14 Court issue its order disposing of the referred matters as  
15 follows:

16 1. That the motion of defendant, Southern Pacific,  
17 to dismiss the complaint in this action for failure to comply  
18 with discovery be granted, in that the cause should be dismissed  
19 with prejudice; each party to bear its own costs and attorneys'  
20 fees.

21 2. That the motion of plaintiff, Southern Pacific,  
22 to strike defendant's motion to dismiss be found to be a  
23 belatedly filed response to defendant's motions to dismiss and  
24 should itself be stricken or, in the alternative, be denied.

25 3. That the motion of plaintiff, Temple Mountain,  
26 for a protective order be found to be moot.

27 4. That the motion for summary judgment of defendant,  
28 Southern Pacific, be granted.

5. That the motion of Arthur E. White and David E.

///



1 White, Trustee, to intervene and their motion to intervene  
2 as plaintiff be denied.  
3

4 DATED this 29<sup>th</sup> day of June, 1982.  
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9 UNITED STATES MAGISTRATE  
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BOOK 207 PAGE 468

EXHIBIT B

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ENTERED

NOV 16 1982

CLERK OF DISTRICT COURT  
DISTRICT OF NEVADA  
BY: [Signature]

FILED

NOV 12 1982

CLERK, U. S. DISTRICT COURT  
DISTRICT OF NEVADA  
BY: [Signature]

UNITED STATES DISTRICT COURT  
DISTRICT OF NEVADA

TEMPLE MOUNTAIN INDUSTRIES, INC..

Plaintiff,

CIV-R-81-163-ECR

vs.

ORDER

SOUTHERN PACIFIC LAND COMPANY,

Defendant.

The Court hereby adopts the findings and recommenda-  
tion of the Magistrate filed on June 29, 1982, only as to  
defendant's Motion for Summary Judgment filed on January 19,  
1982, and the Motion to Intervene filed on March 1, 1982. The  
other pending motions are rendered moot by this order.

IT IS HEREBY ORDERED that defendant's Motion for  
Summary Judgment filed on January 19, 1982, is GRANTED. The  
Clerk of Court shall forthwith enter judgment in favor of  
defendant and against plaintiff.

IT IS FURTHER ORDERED that the Motion to Intervene  
filed on March 1, 1982, is DENIED.

DATED: November 12, 1982.

[Signature]  
UNITED STATES DISTRICT JUDGE

47

EXHIBIT B

FILED

JUDGMENT ON DECISION BY THE COURT

RECORDED

United States District Court

FOR THE

CLERK, U.S. DISTRICT COURT  
DISTRICT OF NEVADA

NOV 15 1982

U.S. DISTRICT COURT  
DISTRICT OF NEVADA

CIVIL ACTION FILE NO. CV-R-81-183-BCR

DEPUTY

TEMPLE MOUNTAIN INDUSTRIES, INC.,

vs.

Plaintiff,

JUDGMENT

SOUTHERN PACIFIC LAND COMPANY,

Defendant.

to be considered by  
This action came before the Court, Honorable EDWARD C. REED, JR., considered  
United States District Judge, presiding, and the issues having been duly  
and a decision having been duly rendered.

It is Ordered and Adjudged that defendant's Motion for Summary Judgment filed on  
January 19, 1982, is GRANTED in favor of defendant and against plaintiff.

OFFICIAL RECORDS  
RECORDED AT THE REQUEST OF  
BOOK 207 PAGE 404  
Frontier Bell Co.  
30 JAN 29 1984

ELUREKA COUNTY, NEVADA  
PLN. RECORDED RECORDER  
FILE NO. FEE \$ 71.00  
131268

Dated at Reno, Nevada  
of November, 1982

this 16th day

CAROL C. FITZGERALD, CLERK  
Clerk of Court

By: *Colleen Larsen*  
COLLEEN LARSEN  
Deputy

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