

1979

Rio Algom Corporation v. Jimco Ltd et al : Respondent Audrey Defendant's Brief

Utah Supreme Court

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RIO ALGOM CORPORATION,)	
)	
Plaintiff-Appellant,)	
)	
v.)	CASE NO. 16032
)	
JIMCO LTD., HUMECA EXPLORATION)	
COMPANY, JIM L. HUDSON, JUANITA)	
J. MEYER AS EXECUTRIX OF THE)	
ESTATE OF DANIEL H. MEYER,)	
ELDON J. CARD, NORMA HUDSON,)	
JEAN L. CARD, JUANITA J. MEYER,)	
N. J. WHITE, AUDREY WHITE,)	
WILMA WHITE, OTIS DIBLER,)	
DOROTHY MAE DIBLER, GRACE DAVIS,)	
and MARLOWE C. SMITH,)	
)	
Defendants-Respondents.)	

RESPONDENT AUDREY DEFENDANTS BRIEF

Appeal from an Order of the 3rd
District Court for Salt Lake County
Hon. Dean E. Conder, Judge

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FILED

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Clark, Supreme Court, Utah

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IN THE SUPREME COURT OF THE STATE OF UTAH

* * * * *

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)	BRIEF OF RESPONDENT
Plaintiff-Appellant,)	AUDREY DEFENDANTS
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and MARLOWE C. SMITH,)	
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Defendants-Respondents.)	

* * * * *

STATEMENT OF THE CASE

This is an action brought by plaintiff-appellant Rio Algom Corporation (hereinafter "Rio") seeking a declaratory ruling as to the proper basis for computing and disbursing royalties payable by Rio to defendant-respondents pursuant to certain written lease agreements and relating to certain unpatented lode mining claims in San Juan County, Utah (hereinafter sometimes "subject properties").

The Jimco Defendants¹ counterclaimed against Rio and cross-claimed against the Audrey Defendants² alleging inter alia mutual mistake of fact, breach of implied covenant and condition, material misrepresentation (fraud) and negligence, and seeking reformation, rescission and/or damages.

The Audrey Defendants cross-claimed against the Jimco Defendants and counterclaimed against Rio alleging breach of contract and seeking payment of royalties.

DISPOSITION IN LOWER COURT

This appeal is taken by Rio from an Order dated August 29, 1978 (a copy of which is attached hereto as Exhibit "B") by which the Honorable Dean E. Conder, District Judge, Third Judicial District Court (1) granted leave to Rio to file its Amended Complaint; (2) ruled that Rio has no standing under either of the aforementioned leases, or any other theory of law or equity, to challenge or otherwise bar the effectuation and implementation of a Settlement Stipulation dated July 10, 1978

1. Those defendant-respondents comprised of the following named parties: JIMCO LTD., Humeca Exploration Company, Jim L. Hudson, Juanita J. Meyer as the Executrix of the Estate of Daniel H. Meyer, Eldon J. Card, Norma Hudson, Juanita J. Meyer and Jean L. Card.

2. Those defendant-respondents comprised of the following named parties: Audrey White, N.J. White, Wilma White, Otis Dibler, Dorothy Mae Dibler, Grace Davis and Marlowe C. Smith.

(a copy of which is attached hereto as Exhibit "A") between the Audrey Defendants and the Jimco Defendants, and that said Settlement Stipulation is not in violation of any duty owed to Rio by any of the defendants; (3) dismissed with prejudice all claims by Rio against the Audrey Defendants, all claims by the Audrey Defendants against Rio, all claims by the Audrey Defendants against the Jimco Defendants, and all claims by the Jimco Defendants against the Audrey Defendants; and (4) ordered disbursement to the Audrey Defendants, both retroactively and prospectively, of that portion of the royalties to which the Audrey Defendants were and are to become entitled under the terms of the Audrey Lease and the Settlement Stipulation.

RELIEF SOUGHT ON APPEAL

The Audrey Defendants seek to have the Order of Judge Conder upholding the Settlement Stipulation affirmed; whereas Rio seeks to have the Settlement Stipulation and the order upholding it declared null and void.

STATEMENT OF FACTS³

A. Description of the Parties.

1. Plaintiff-Appellant Rio. Rio is a corporation organized pursuant to the laws of the State of

³ Rio's statement of facts contained within its brief is erroneous, incomplete and argumentative in certain respects. Since the factual context in which the appeal must be considered is complex the Audrey Defendants submit that a full factual statement must be made even though it will be somewhat repetitive of Rio's statement.

Delaware, qualified to do business in the State of Utah and engaged in the business of mining and beneficiating uranium ore from the Lisbon Mine located in San Juan County, Utah. Rio is the wholly owned subsidiary of Altas Alloys, Inc., which is in turn is wholly owned by Rio Algom Ltd., a Canadian corporation, engaged internationally in the uranium trade.

2. Respondent Jimco Defendants. JIMCO, LTD. is a limited partnership with more than 100 limited partners which is organized pursuant to the laws of the State of Utah with its principal place of business in Salt Lake City. Humeca Exploration Corporation is a partnership organized pursuant to the laws of the State of Utah. Jim L. Hudson, Juanita J. Meyer and Eldon J. Card are the general partners of JIMCO LTD., and are all partners of Humeca. Norma Hudson and Jean L. Card are the wives of Jim L. Hudson and Eldon J. Card. Juanita J. Meyer is the Executrix of the Estate of Daniel H. Meyer, deceased.

3. Respondent Audrey Defendants. All of the Audrey Defendants are individuals who participated in the original discovery of these uranium properties and who own undivided interests in the subject mineral properties. Three of the group, i.e., Audrey White, Grace Davis and Adrian Smith are elderly widows and substantially dependent upon the income from such properties. Marlowe Smith died after the commencement of this action and is survived by his wife Adrian.

B. Contractual Relationships Between the Parties. By agreement executed on or about July 12, 1968, but back-dated to June 1, 1968 (a copy of which is attached to the Complaint as Exhibit "C" at T.R. pp. 74-125 and is hereafter referred to as the "Audrey Lease") the Audrey Defendants together with Rio leased to the Jimco Defendants certain unpatented lode mining claims in San Juan County, Utah (the subject properties). The Audrey Defendants and Rio are collectively referred to as "Lessors" in the Audrey Lease and share undivided ownership in such properties in a 3 to 1 ratio, i.e., the Audrey Defendants collectively own a 3/4 undivided interest and Rio owns a 1/4 undivided interest. The lease was granted for the stated purpose of "exploration, development, mining and exploitation" of the subject properties. T.R. p. 75.

This Audrey Lease amended and otherwise superseded a prior lease dated February 28, 1964 (denominated herein the "Original" or "Head" Lease) of the same uranium properties between the Audrey Defendants, or their predecessors in interest, and the Jimco Defendants' predecessors in interest. During the interim period between the execution of the Original Lease and the Audrey Lease, Rio acquired its one-fourth (1/4) undivided interest in the ownership of the subject properties.

By agreement dated June 3, 1968 (a copy of which is attached to the Complaint as Exhibit "A" at T.R. pp. 7-72 and hereinafter referred to as the "Jimco Agreement") the Jimco

Defendants granted to Rio an option to acquire the Jimco Defendants' rights and obligations under the Audrey Lease. This option was exercised by Rio on or about June 18, 1968, thereby making Rio the lessee of the subject properties as well as a one-fourth undivided interest owner thereof.

As previously noted, the Audrey Lease was executed subsequent to the exercise of the option by Rio and back-dated to June 1, two days prior to the execution of the Jimco Agreement. This back-dating was acknowledged and explained in paragraph 2.3 of the Audrey Lease:

"The parties hereto recognize and acknowledge that Rio Algom Corporation, in a capacity distinct from its capacity as one of the Lessors herein, on June 18, 1968 held a valid and subsisting option [the Jimco Agreement] to acquire assignment of the leasehold interest of Lessee in the Original Lease [the Jimco Defendants or their predecessors in interest] and the mining claims covered thereby, subject to the terms and conditions of the Option Agreement. Rio Algom Corporation duly exercised the option as of June 18, 1968. This lease has been predated to June 1, 1968, for the explicit purpose of avoiding confusion in the record title. The parties hereto recognize the validity of the exercise of said option by Rio Algom Corporation and affirm the binding nature of this amended lease."

T.R. pp. 78, 79.

While the Audrey Defendants were aware of the Jimco Agreement and its exercise by Rio, the Audrey Defendants were not parties thereto.

Following the execution of both the Audrey Lease and the Jimco Agreement, Rio entered upon the subject properties and commenced the mining and milling of uranium ore. Rio also

contracted with Duke Power Company for the sale to Duke of the beneficiated product U_3O_8 , also referred to as "uranium concentrate" and "yellowcake."

C. Royalty Rights and Obligations of the Parties.

1. Audrey Lease (Audrey Defendants-Rio-Jimco Defendants). Under the terms of paragraph 3.1 of the Audrey Lease, the Lessors (including both the Audrey Defendants and Rio) are to receive "Earned Royalties" dependent upon whether crude ore or mineral concentrate is sold by the Lessee:

"(a) In the event Lessee shall mine or extract ore from the Audrey Group [leased properties] which is sold in its raw or crude form Lessee shall pay Lessors a royalty equal to eight percent (8%) of the "Sales Price"...received by Lessee from the sale of all ores mined, produced and sold in the crude form from the Audrey Group..." (Emphasis added).

T.R. p. 80.

"(b) In the event Lessee shall mine or extract ore from the Audrey Group and recover therefrom for sale or use in commercial quantities any of the minerals contained in such ore, and if the minerals so recovered shall be any uranium compound, Lessee shall pay to Lessors a royalty of four percent (4%) of the "Gross Value" of such compounds..." (Emphasis added).

T.R. pp. 80, 81.

"(c) If Lessee shall recover for sale or use in commercial quantities, any minerals contained in the ores mined and produced from the Audrey Group, and if such minerals so recovered shall be compounds or elements other than uranium compounds, or elements Lessees shall pay to Lessors a royalty of four percent (4%) of the market value thereof..." (Emphasis added).

T.R. p. 83.

Paragraph 3.2 of the Audrey Lease provides an alternative basis for the computation of royalties which allows the Lessors to elect to have royalties computed on the basis of the fair market value of crude ore even though uranium concentrate (U_3O_8) was milled and sold by Lessee:

"3.2 Irrespective of the provisions set forth in paragraph 3.1 above, Lessors shall have the election and option to have royalties due them under the terms of this Lease calculated and paid upon the basis of eight percent (8%) of the fair market value at the mine portal of crude ore mined and produced from the Audrey Group..." (Emphasis added).

T.R. p. 83.

Paragraph 3.2 goes on to state how this election may be exercised and revoked:

"...In order to exercise such election Lessors must unanimously agree and notify Lessee in writing at least ninety (90) days prior to the commencement of any calendar year of their election to require royalties to be calculated and paid in such manner. After having given such notice, the election so made shall remain in force and effect for the next ensuing calendar year, and from year to year thereafter, unless the Lessors should unanimously agree to notify Lessee in writing of their revocation of said election, which notification must be given at least ninety (90) days prior to the commencement of a calendar year and shall become effective at the commencement of, and remain in effect during the ensuing calendar year, and from year to year thereafter, unless another such notification of election is given at the time and in the manner as specified above." (Emphasis added).

T.R. pp. 83, 84.

At this point it should be noted that Rio's acknowledged dual capacity i.e., one-fourth (1/4) undivided interest owner of the subject properties and therefore entitled

to one-fourth of the Earned Royalties under the Audrey Lease, and assignee of Lessee with the obligation to pay all such Earned Royalties, places Rio in a conflict of interest with respect to the computation of royalties and particularly with respect to the election under paragraph 3.2. Stated simply, for every \$4.00 in royalties paid by Rio as Lessee-operator, Rio would get \$1.00 back as co-Lessor with the other \$3.00 going to the co-Lessor Audrey Defendants, thereby resulting in a net negative \$3.00 to Rio. Consequently, under the royalty provisions of the Audrey Lease, the greater the amount of royalties paid by Rio as the Lessee-operator of the properties the more advantageous to the Audrey Defendants and the more costly to Rio.

Recognizing this adversity in position with respect to the election under paragraph 3.2 of the Audrey Lease, the following exclusion was written into paragraph 21.3:

"21.3 Rio Algom Corporation shall by reason of its interest in this Lease as described in Section II hereof [see discussion supra] be excluded from any vote or decision of the Lessors relating to royalties and requiring unanimity of the Lessors, as provided for in Section 3.2 hereof. The unanimous vote or decision of the remaining Lessors other than Rio Algom Corporation shall constitute unanimity for the purpose of the said Section 3.2."
(Emphasis added).

T.R. p. 118.

2. Jimco Agreement -- (Jimco Defendants-Rio).

Under paragraph X of the Jimco Agreement, if uranium concentrate (U_3O_8) is sold Rio as sub-Lessee is to pay

"Earned Royalties" to royalty interest holders (including the Audrey Defendants, Rio and the Jimco Defendants) according to a schedule of from 8% to a maximum of 15% of the average price per pound of U₃O₈. If the product derived and sold by Rio is crude uranium ore, the Earned Royalty rate is fourteen percent (14%). If the product derived and sold by Rio is ore other than uranium ores, wastes or tailings, the Earned Royalty rate is ten percent (10%). T.R. p. 35.

With respect to the division or distribution of Earned Royalties once the dollar amount thereof has been calculated, Rio is to make payments according to the following priorities:

- " (i) first, to satisfy the royalty to the Lessors in the Head Lease [Audrey Lease]...in its entirety...
- (ii) second, if a balance of Earned Royalty...remains after payment of Lessors' royalties...to pay in their entirety the Overriding Royalties...
- (iii) third, if a balance of Earned Royalty...remains after payment of the Lessors' royalties and Overriding Royalties...to pay such balance to JIMCO." (Emphasis added).

T.R. pp. 45, 46.

By paragraph XII of the Jimco Agreement a ceiling or maximum is placed upon the aggregate amount of royalties payable by Rio:

"Notwithstanding anything else herein:

- (a) Rio's maximum aggregate cost or liability from time to time to all persons...shall be:
 - (1) Advance Royalties...
 - (2) Sustaining Royalties...

- (3) the royalties payable to the Lessors pursuant to the Head Lease [Audrey Lease]...
- (5) the balance, if any, of Earned Royalties calculated under Clause X hereof after apportionment and payment therefrom of royalties to the Lessors of the Head Lease...[to the Jimco Defendants]."

(Emphasis added).

T.R. pp. 44, 45.

It should be noted that it is the Audrey Defendants' contention below that the setting of a maximum or ceiling of the sale price of (U_3O_8) upon Rio's Earned Royalty obligation, coupled with the aforestated payment priorities, theoretically at least creates the possibility that the Jimco Defendants can be entirely closed out of the royalty picture. In other words, if the Earned Royalties to which the Audrey Defendants and Rio as Lessors under the Audrey Lease (the obligation for which was delegated to Rio under the Jimco Agreement) equals or exceeds the 15% maximum under the Jimco Agreement the "if any" language would eliminate any additional obligation by Rio to pay the Jimco Defendants. Also, because of this maximum, under certain circumstances the greater the Earned Royalty to the Audrey Defendants, the less the payment to the Jimco Defendants.

D. Events Giving Rise to This Lawsuit. Pursuant to the provisions of these agreements Rio took possession of the subject properties and commenced mining uranium ores, beneficiating such ores into uranium concentrate (U_3O_8) and selling the concentrate to Duke Power Company. In August of

1975, the Audrey Defendants (and to the exclusion of Rio) exercised their election under paragraph 3.2 of the Audrey Lease and served notice upon Rio that beginning January 1, 1976 they wished to have the Earned Royalties under the Audrey Lease calculated and paid upon the basis of 8% of the external fair market value of crude ore rather than on the basis of 4% of sale price of U_3O_8 from the subject properties. In reaction to this notification, the Jimco Defendants asserted to Rio that the "fair market value" of crude ore within the meaning of paragraph 3.2 of the Audrey Lease must refer to the internal market value of crude ore which is a function of the price actually being paid to Rio by Duke Power Company for the sale of U_3O_8 from the subject properties.

By reason of this conflict as to the proper basis upon which to calculate Earned Royalties under the election Rio filed this action on April 27, 1976 seeking a declaratory determination of the proper basis for calculation and alleging that it was unable, without judicial clarification, to calculate its royalty obligations under the Audrey Lease and Jimco Agreement. T.R. pp. 1-6. Asserting that the action is in the "nature of an interpleader" (T.R. pp. 801-803, 1392-1398; Plaintiff's Memorandum in Response to the Audrey Defendants Memorandum in Opposition to Plaintiff's Motion for a

Preliminary Injunction"⁴ pp. 1-7), and that it is a "stakeholder" (Id.), Rio commenced tendering the Earned Royalties into Court until the question of computation under the Audrey Lease and distribution under the Jimco Agreement could be determined.

By way of Cross-Claim and Counterclaim the Audrey Defendants alleged failure on the part of both the Jimco Defendants and Rio to pay the Earned Royalties pursuant to the terms of the Audrey Lease, and prayed for payment of the sums due plus interest and a 25% penalty pursuant to paragraph 14.1(b) of the Audrey Lease. T.R. pp. 333-336. By way of Cross-Claim and Counterclaim the Jimco Defendants alleged inter alia mutual mistake of material fact, breach of implied covenant and condition, material misrepresentation (fraud) and negligence and prayed for reformation, rescission and/or damages.

From the date of the commencement of this action until July 10, 1978 (the date of execution of the Settlement Stipulation) the parties carried on extensive discovery both in

4. Pages 1-7 of Plaintiff's Memorandum in Response to the Audrey Defendants Memorandum in Opposition to Plaintiff's Motion for a Preliminary Injunction was properly and timely designated by counsel for Audrey Defendants, see T.R. 2113 item #23, but was not included in the record on appeal. Counsel for Audrey Defendants has requested that the record on appeal be supplemented to include the designated portions of this document.

the U.S. and Canada. Already complex issues became even more complex as allegations of international uranium cartels and conspiracies permeated discussions of the "fair market value" issue.

Deposits into Court during this period (13 in number) totaled some \$1.3 million. T.R. p. 1985.

E. Settlement Stipulation. On July 10, 1978, and following considerable negotiation, the Audrey Defendants and the Jimco Defendants entered into a Settlement Stipulation (T.R. pp. 2241-2244) "[i]n an effort to resolve this dispute, and in furtherance of the public policy to settle litigation when possible." (T.R. pp. 2241, 2242). Without admission or determination of the issues surrounding the "fair market value" question, the Audrey Defendants and the Jimco Defendants agreed as to how the royalties to which they were entitled would be distributed as between themselves. In other words they settled the dispute which had spawned the lawsuit in the first place. Simply stated, the Audrey Defendants agreed to take in full satisfaction of all their royalty claims their 3% of the sale price of U_3O_8 (after reduction by Rio's 1%), together with an assignment of an additional 2.5% of such sale price from the Jimco Defendants royalty share also based upon U_3O_8 sales price. This agreed upon division of royalties was to apply retroactively to those funds on deposit with the Court as well as prospectively for the remainder of the Audrey Lease period.

For the calendar year 1979, and all years thereafter, the Audrey Defendants waived their sole right and discretion to elect under paragraph 3.2 of the Audrey Lease to have royalties based upon 8% of the market value of crude ore. Lastly, the Audrey Defendants dismissed all their claims against the Jimco Defendants and Rio, and the Jimco Defendants dismissed all their claims against the Audrey Defendants.

Because of the knowledge that Rio objected to the settlement, it was expressly made subject to the following condition precedent:

"The foregoing stipulation is subject only to the condition precedent of the Court's ruling, pursuant to the motion made herein, that Rio has no right based upon either the Audrey Lease or the Jimco Agreement, or based upon any other theory of law or equity, to challenge or otherwise bar the effectuation or implementation of this settlement stipulation, that such settlement is not in violation of any duty owed to Rio by any of the defendants, and that the effectuation and implementation of this settlement stipulation effectively and totally dismisses the Audrey Defendants from this litigation, and that those funds presently on deposit with the court equal to 5.5% of the proceeds from the sale of yellowcake by Rio since January 1, 1976, together with accrued interest thereon, less any amounts previously withdrawn by the Audrey Defendants therefrom, be promptly paid to the Audrey Defendants."

The filing of the Settlement Stipulation was accompanied by a motion of similar language seeking the prerequisite court ruling. At the request of Rio the matter was set for oral argument.

The matter was fully briefed and argued orally to the trial Court by all parties with Rio raising precisely the same

points now raised on appeal, i.e., amendment of contract, breach of fiduciary duty and breach of implied covenant.

In addition to resisting the motion Rio sought to amend its complaint to add additional claims relating to and allegedly arising out of the Settlement Stipulation and claiming violation of fiduciary duties, violation of co-tenant fiduciary duties, and interference with contractual and co-tenancy relationship, and seeking imposition of a constructive trust and damages. T.R. pp. 2099-2110.

Following oral argument on August 16, 1978, the Court, per Judge Conder who had been permanently assigned to the case, entered a written order dated August 29, 1978 (T.R. pp. 1982-1985), which granted Rio leave to file the Amended Complaint, but specifically ruled as follows:

"2. The court hereby rules that Rio has no standing under either the Audrey Lease or the Jimco Agreement, or any other theory of law or equity, to challenge or otherwise bar the effectuation and implementation of that certain Settlement Stipulation between the Audrey Defendants and the Jimco Defendants and that such Settlement Stipulation is not in violation of any duty owed to Rio by any of the defendants." T.R. p. 1983.

The order goes on to dismiss as to both the Audrey Defendants and the Jimco Defendants the new allegations of Rio's Amended Complaint together with the original Complaint as to the Audrey Defendants, dismiss all claims by the Audrey Defendants against Rio and the Jimco Defendants, and further dismiss all of claims by the Jimco Defendants against the

Audrey Defendants. The order did not affect the original claims between Rio and the Jimco Defendants. T.R. P. 1983. Lastly, the order authorized the disbursement of that portion of the funds on deposit to which the Audrey Defendants were entitled under the Audrey Lease and the Settlement Stipulation and further ordered that Rio in the future pay the Audrey Defendants their royalties under the Audrey Lease as well as that portion of the Jimco Defendants' royalties which were assigned under the Settlement Stipulation. T.R. pp. 1983, 1984.

Rio then sought to further tie up the funds and block implementation of the Settlement Stipulation by seeking a stay of the Court's order on appeal and asked the Court to treat the deposited funds as a supersedeas bond or as security for judgment and costs. Under the terms of the Settlement Stipulation this alone would have destroyed its effectuation and implementation as immediate disbursement of funds was an express condition precedent thereto. These motions were denied by the Court by written order dated August 30, 1978, but a stay of one week was granted to allow Rio to seek extraordinary relief from the Supreme Court.

On August 31, 1978 Rio petitioned the Supreme Court for an extraordinary writ in the nature of mandamus to force the trial court to stay its Order regarding the Settlement Stipulation, and also moved the Supreme Court for a stay of the order and for approval of a supersedeas bond. Briefs were

submitted, and following oral argument in which Rio raised all of the points it now raises on appeal, the Supreme Court by orders dated September 5, 1978 denied Rio's petition and motion.

Rio now appeals directly from Judge Conder's Order dated July 29, 1978 approving the Settlement Stipulation, raising its points of objection thereto for the third time.

ARGUMENT

I

INTRODUCTORY STATEMENT

Rio's "STATEMENT OF FACTS" (Rio's Brief pp. 3-17) contains considerable argument as well. Examination of the assumptions contained within this argument reveals several errors which, when taken as a whole, explain to a substantial degree the untenability of the arguments set forth in the "ARGUMENT" section of Rio's brief. Whether stated in terms of contractual amendment, fiduciary duty or implied covenant, Rio's attempts to destroy the settlement by creating duties in the Audrey Defendants and the Jimco Defendants are all premised upon the assumption that because Rio was a party to two different contracts, Rio can bind the two different other parties to obligations which neither contractor on its face could conceivably contemplate. This is because, Rio argues, although neither contract viewed separately can reach such a result, when put together, by the exercise of certain options, the result is adverse to Rio's financial interest.

By the very nature of the contractual relationship which Rio, one of the world's great mining empires, entered into voluntarily, it was theoretically possible that if the fair market price of raw ore suddenly soared, and Rio had contractually bound itself to sell all of its concentrate for a fixed price which did not allow for such an incredible fair market value increase, it could find itself to have made a very bad bargain. This is indeed what happened in the uranium market. Fortunately for the Audrey Defendants, they had reserved the right to compute their royalty on either the actual sales price, or if this did not reflect market value, at the actual fair market value of crude ore, if they so chose.

The Audrey Defendants so chose, thereby causing financial pain to both Rio and the Jimco Defendants. The Jimco Defendants, arguably facing possible extinction of any royalty payment if the fair market value continued to escalate, chose to settle its differences with the Audrey Defendants. Rio, while under the settlement still receiving every penny to which it is contractually entitled, now plays dog in the manger.

Additionally, it should be noted that all of Rio's stated points of objection to the Settlement Stipulation go to the Audrey Defendants waiver therein, for the year 1979 and thereafter, of their right to elect under paragraph 3.2 of the Audrey Lease.

A.

RIO IS EXPRESSLY EXCLUDED FROM ANY RIGHTS
UNDER THE ELECTION PROVISIONS OF
PARAGRAPH 3.2 OF THE AUDREY LEASE

Rio begins its "factual" recitation with the Audrey Lease's Earned Royalty provisions and sets forth the basic royalty formula applicable when U_3O_8 is beneficiated and sold i.e., 4% of the sales price per pound of U_3O_8 . Then Rio goes on to describe the election under paragraph 3.2 as follows:

"In addition, the Audreys and Rio expressly reserved the right in the Amended Audrey Lease to have those royalties based on eight percent of the fair market value of crude ore produced from the claims, in lieu of the four percent royalty just described." (Rio's brief p. 4)

The assertion that the election was reserved by both the Audrey Defendants and Rio is directly contrary to the express language and intent of the parties as Rio is expressly excluded from such election by paragraph 21.3. This fact is admitted by Rio in the two sentences immediately following:

"The decision to elect either the eight percent ore or the four percent yellowcake royalty is vested exclusively in the Audreys under the Amended Audrey Lease, and Rio is not entitled to participate in that decision." (R. 80, 118).

"Rio gave up the right to participate in making the royalty election decision after negotiations between all three parties." (Emphasis added.) (Rio's brief pp. 4, 5).

Rio then refers to the aforementioned conflict of interest as the reason for the exclusion. (Rio's brief p. 5).

Given the express language of paragraph 21.3 ("Rio...shall...be excluded from any vote or decision of the lessors relating to royalties..."), and the admissions by Rio that it "gave up the right to participate in making the royalty election," it is difficult to imagine how Rio could argue that it reserved the election. However, Rio continues by asserting an even more astounding contention, i.e., that it "delegated the election decision to the Audreys." (Emphasis added). (Rio's brief p. 5). A "delegation" is something quite different from an "exclusion," and is certainly not synonymous with the "giving up" of a right. Rio cannot by such characterizations controvert the express provisions of the Audrey Lease, nor can it create legal obligations merely by wish. The simple fact is that Rio did not reserve the election, but rather was expressly excluded therefrom. Given this exclusion, Rio has no rights which can be subject to delegation. Here lies the fatal defect in Rio's first underlying assumption.

B.

RIO CANNOT CREATE OBLIGATIONS IN THE
AUDREY DEFENDANTS FROM THE JIMCO AGREEMENT

Next, Rio proceeds to attempt to create obligations in the Audrey Defendants out of the Jimco Agreement -- a document to which the Audrey Defendants were not parties. This is attempted by setting forth the cumulative impact of both

agreements upon Rio's net cash flow as if all such impact devolved entirely from the Audrey Lease.

In examining this attempt it is important to keep in mind that under the Audrey Lease the interests of the Audrey Defendants and Rio with regard to the payment and receipt of royalties are necessarily adverse. Rio as Lessee pays all of the Earned Royalties and receives back as co-Lessor only one-fourth of the total Lessors royalty. Consequently, under the provisions of the Audrey Lease, it is in Rio's best interest to reduce the royalties, whereas it is in the Audrey Defendant's best interest to increase the royalties. Only after the royalty provisions of the Jimco Agreement are plugged into the overall royalty scheme do the interests of Rio and the Audrey Defendants become compatible since the Jimco Agreement limits the total amount of royalties payable by Rio. An increase in the amount of royalties receivable by the Lessors (including Rio and the Audrey Defendants) under the Audrey Lease does not increase Rio's total obligation to pay royalties under the Jimco Agreement, but merely cuts into the Jimco Defendants' share. Hence, an election by the Audrey Defendants which would increase the amount of their royalty and the amount of the Lessor-Rio's royalty, by reason of the royalty limitations of the Jimco Agreement, would not increase Lessee Rio's obligation to pay royalties. The increase is merely deducted from the residue payable to the Jimco Defendants.

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That is not to say, however, that the Audrey Defendants have any obligations to Rio arising out of the Jimco Agreement. Rio attempts to create such an obligation thus:

"[Rio] certainly expected that the Audreys would make the election from time to time so as to choose the election which would pay them [apparently referring to the Audrey Defendants] the most money. That decision would of course also benefit Rio since it was entitled to one-fourth of the total royalties under either election. As one permissible royalty formula became more lucrative than the other because of changing market conditions for ore or yellowcake, all the parties doubtless anticipated that the Audreys would choose the more profitable of the two elections." (Rio's brief p. 5).

The Audrey Defendants' obligations regarding the election, if any, must come from the Audrey Lease. Said lease expressly relieves the Audrey Defendants of any obligation to Rio by expressly excluding Rio from participating in the election. This is so regardless of any "expectation" on Rio's part arising out of the Jimco Agreement. Here lies the fatal defect in Rio's second underlying assumption.

C.

RIO DOES NOT HAVE A RIGHT TO SHARE ON A PRO RATA
BASIS IN AMOUNTS RECEIVED BY THE AUDREY
DEFENDANTS EXCEPT AS TO THOSE ROYALTIES
PAID PURSUANT TO THE AUDREY LEASE

The third basic error by Rio is its insistence that it is always and under any circumstances entitled to one-fourth of whatever amounts the Audrey Defendants receive. This is of course true with regard to royalty payments paid pursuant to the Audrey Lease since Rio is a one-fourth undivided interest

holder with the Audrey Defendants. However, it does not follow that Rio is entitled to one-fourth of whatever the Audrey Defendants may receive from other agreements to which Rio is not a party and for which Rio has given no consideration, i.e., the Settlement Stipulation. Here lies the fatal defect in Rio's third underlying assumption.

Having thus examined the fallacies of the assumptions which Rio treats as absolutes (or at least argues as if they are absolute) and upon which Rio's arguments on appeal are premised, examination of Rio's specific points of argument becomes easier and more clearly reveals their untenability.

II

THE SETTLEMENT STIPULATION DOES NOT AMEND OR OTHERWISE VARY THE TERMS OF EITHER THE AUDREY LEASE OR THE JIMCO AGREEMENT BUT RATHER IS A TOTALLY EXTRANEIOUS AGREEMENT BETWEEN DEFENDANTS.

Rio argues that the Settlement Stipulation constitutes an amendment to the terms of the Audrey Lease and the Jimco Agreement and, therefore, cannot stand without the express concurrence of Rio. However, in so arguing, Rio misperceives both the stated intent and the actual impact of the stipulation. The stipulation leaves intact and operative each and every provision of both agreements except for the election under paragraph 3.2 to which Rio can claim no right. (See discussion supra.) Additionally, the stipulation expressly avoids determination of any issue raised in this litigation

regarding the construction, interpretation or operation of either agreement stating that the defendants agree to settle the dispute as between themselves "without admission or determination of what is or has been the fair market value of crude ore, or whether there is or has been a market value for crude ore, or any other issue in this litigation." T.R. p. 2242.

The Settlement Stipulation quite simply constitutes a determination by the defendants that the relative risks of their respective positions in this litigation justify an amicable adjustment of their respective shares of the total royalty pie. This adjustment is accomplished by the assignment by the Jimco Defendants of a portion of the royalties (2.5% of the sales price of U_3O_8) to which they are unquestionably entitled under the terms of the Jimco Agreement.

The adjustment and assignment are totally extraneous to both the Audrey Lease and the Jimco Agreement and in no way effect either the language of these documents or Rio's rights thereunder. Rio argues, however, that the stipulation modifies the Audrey Lease and the Jimco Agreement in two ways. First, "a permanent waiver of the ore election" under paragraph 3.2. Second, "a permanent reduction in Rio's pro rata share of royalties from the subject claims." (Emphasis added) (Rio's brief p. 18).

As to the first alleged "modification," Rio again argues that it has some vested right in the election even though it is expressly excluded therefrom, and even though Rio admits that it "gave up the right to participate in making the royalty election decision." (See Rio brief p. 5 and discussion supra.) Clearly, the legitimate exercise by the only parties with the sole and exclusive right to elect does not constitute an amendment of the Audrey Lease. Rio cannot contend that the Audrey Defendants do not have the absolute right to elect to have royalties paid on the basis of 4% of the sale price of U₃O₈ in any given year. Such an election would remain, under the express terms of paragraph 3.2, effective for each year thereafter unless and until expressly revoked by the Audrey Defendants. The permanent waiver by the Audrey Defendants of this right to elect and revoke is no different in effect than such an election without subsequent revocation and is no more a modification of the Audrey Lease or an invasion of a duty to Rio than such election would be.

As to the second "modification," Rio can point to no agreement, written or oral, which guarantees to Rio a fixed pro rata percentage of the payments that the Audrey Defendants receive from the subject properties. Rio is guaranteed a 25% share of the Earned Royalties paid under the Audrey Lease. This guarantee is not altered by the Settlement Stipulation. Rio will continue to receive this one-quarter royalty

interest. What Rio wants is 25% of what the Audrey Defendants receive from any other agreement relating to the subject properties as well.

The Audrey Defendants settled its claims in this litigation with the Jimco Defendants in exchange for an assignment of a portion of the Jimco Defendants' royalties. Rio is free to negotiate such a settlement itself if it so chooses. However, Rio is no more entitled to share in the benefits of the Audrey Defendants' settlement than the Audrey Defendants would be entitled to share in any benefits of a Rio settlement bargain.

In short, the Settlement Stipulation does not modify or otherwise amend either the Audrey Lease or the Jimco Agreement. If the Jimco Defendants had elected to assign a portion of its royalties to some other third party, Rio would certainly not contend that such an assignment constituted an amendment of the Audrey Lease or the Jimco Agreement. The fact that the assignee under the Settlement Stipulation happens to be the Audrey Defendants does not and cannot alter this right of assignment.

III

RIO IS NOT AN INTENDED BENEFICIARY OF PARAGRAPH 3.2 OF THE AUDREY LEASE AND THEREFORE CANNOT CLAIM RIGHTS THEREUNDER.

Rio opens its argument on its Point II as follows:

"Rio is not only a party to but an intended beneficiary of the Amended Audrey Lease." (Rio's brief p. 22).

As stated, this point is so obvious that it overtly and overwhelmingly defies argument -- of course it is generally intended that Rio, in its capacity of Lessor, benefit by the Audrey Lease's terms! However, Rio proceeds to attempt to weave the protective shell of this broad statement around the election provisions of paragraph 3.2 of the Audrey Lease -- the benefits of which are expressly withheld from Rio.

An intended beneficiary in terms of the law of third party beneficiaries is a third person not a party to a contract who was intended by the contracting parties to benefit by their bargain. See e.g., Mason v. Tooele City, 26 U.2d 6, 484 P.2d 153 (1971); Kelly v. Richards, 95 Utah 560, 83 P.2d 731 (1938); M.H. Walker Realty Co. v. American Surety Co. of New York, 60 Utah 435, 211 P. 998 (1922); Montgomery v. Spencer, 15 Utah 495, 50 P. 623 (1897). As stated previously, paragraph 3.2 expressly excludes Rio. Consequently, it is impossible to infer that any party to the Audrey Lease intended that Rio benefit from the provisions of paragraph 3.2. Again as previously noted, under the terms of the Audrey Lease the impact upon Rio of any election by the Audrey Defendants is directly converse to the impact upon the Audrey Defendants. Therefore an election which benefits the Audrey Defendants

burdens Rio, and vice versa. Their interests are, by the nature of their relationship, largely hostile and adverse.

Given the express language excluding Rio from the election, together with the adverse practical impact of an election by the Audrey Defendants, it is impossible for Rio to assume the posture of a third party beneficiary of paragraph 3.2.

IV

THE AUDREY DEFENDANTS HAVE NO FIDUCIARY DUTY TO
RIO WITH REGARD TO PARAGRAPH 3.2 AND THEREFORE
COULD NOT HAVE BREACHED SUCH A DUTY.

Rio argues that, based upon the fact that Rio and the Audrey Defendants are co-tenants to the subject property, the Audrey Defendants have a fiduciary duty to exercise the election under paragraph 3.2 in a manner benefiting themselves and Rio.

Under certain factual situations, a fiduciary relationship exists between tenants in common, see e.g., Webster v. Knop, 6, U.2d 273, 312 P.2d 557 (1957); Heiselt v. Heiselt, 10 U.2d 126, 349 P.2d 175 (1960). By the very facts set forth in those cases it is clear that such a relationship does not exist between the Audrey Defendants and Rio with regard to the election under paragraph 3.2. This is so because under the concept of a fiduciary relationship it is presupposed that the actions of either co-tenant can possibly benefit both co-tenants. Such a possibility does not exist in the

relationship between the Audrey Defendants and Rio with regard to the 3.2 election under the Audrey Lease.

To fully understand the nature of the relationship between the Audrey Defendants and Rio so far as that relationship is pertinent to this point, we again must restrict our examination to the only source of this relationship, i.e., the Audrey Lease. Under the terms of the Audrey Lease it is recognized that Rio has a one-fourth (1/4) undivided interest in the subject properties, together with a one-fourth (1/4) undivided interest in the Earned Royalties paid pursuant to such lease. However, unlike most tenancies in common, the Audrey Lease also recognizes that Rio is to become (in actuality had already become) the Lessee of the subject properties and therefore responsible for the payment of royalties under the terms of the Lease. Consequently, under the terms of the Audrey Lease, for every four dollars paid by Rio in royalties, Rio would receive one dollar back, for a net loss of three dollars. This four to one ratio in royalty cash flow would remain constant regardless of the level of royalty payments.

Turning now to the Audrey Defendants' right to elect under paragraph 3.2, since Rio's interest in such election is directly converse to that of the Audrey Defendants, it is obvious why Rio was precluded from participating in such election. Referring back to the four to one cash flow of

royalty payments outlined in the preceeding paragraph, if it is determined by the Audrey Defendants that royalties based upon 8% of crude ore values would exceed those based upon 4% of yellowcake proceeds, and an election to take based upon crude ore is made, such an election would necessarily benefit the Audrey Defendants to the detriment of Rio. In other words, the net effect to Rio would be an increase in the dollar amount of the net loss. Conversely, if it is determined that royalties based upon proceeds of yellowcake would be greater and the election were revoked, again such revocation would have the effect of a net dollar gain to the Audrey Defendants and a net dollar loss to Rio. Only if the Audrey Defendants make an ill-advised election to their detriment could Rio be benefited. Given this direct conflict in the interests of the Audrey Defendants and Rio with regard to 3.2 it is little wonder that Rio is excluded from participating in the election. Also, because of this conflict of interest regarding the election between co-tenants, the cases cited by Rio, Britton v. Green, 325 F.2d 377 (10th Cir. 1963) and Hendrickson v. California Tale Co., 55 Cal. App.2d 279, 130 P.2d 806 (1943), are inapplicable as both of these cases involved actions of mutual benefit.

THE AUDREY DEFENDANTS ARE UNDER NO IMPLIED COVENANT
TO RIO REGARDING THE ELECTION UNDER PARAGRAPH 3.2
OF THE AUDREY LEASE.

The last of the many legal and/or equitable theories which Rio uses in an attempt to create some duty in the Audrey Defendants regarding the election under paragraph 3.2 is the theory of implied covenant. Rio makes the following assertion:

"In this case, the amended Audrey Lease contains an implied covenant that the Audreys will make the election determination in "furtherance of the interests of" all lessors, including Rio. The Audreys' waiver of their right to exercise the election in exchange for an additional yellowcake proceeds royalty in which Rio does not participate breaches that implied covenant."

(Rio's brief p. 27).

It is the most fundamental of legal propositions that in the interpretation of contracts implied covenants can arise and will prevail only when there is no express provision on the subject matter of the implied covenant, and that an express agreement or covenant excludes the possibility of an implied one of a different or contradictory nature. See, e.g. Hartman Ranch Co. v. Associated Oil Co., 10 Cal.2d 232, 73P.2d 1163(1937); Jones v. Interstate Oil Corp., 115 Cal. App.2d 302, 1P.2d 1051 (1931); Brimmer v. Union Oil Co., 81 F.2d 437 (10th Cir. 1936); 20 Am. Jur. Covenants, Conditions, Etc. §12 (1965). 21 C.J.S. Covenants §32 (1940). The subject matter of the election under paragraph 3.2 of the Audrey Lease, and the

identification of parties having or not having rights thereunder, is expressly dealt with by paragraph 21.3:

"21.3 Rio Algom Corporation shall,...be excluded from any vote or decision of the Lessors relating to royalties and requiring unanimity of the Lessors, as provided for in Section 3.2 hereof. The unanimous vote or decision of the remaining Lessors other than Rio Algom Corporation shall constitute unanimity for the purpose of the said Section 3.2." T.R. p. 118.

Rio is expressly deprived of and excluded from any rights under paragraph 3.2. There can be no implied covenants giving Rio rights thereunder as such an implied right would be directly contradictory to the expressed intent of the parties.

The Audrey Defendants are given the exclusive right of election under paragraph 3.2 and have, by the terms of the Settlement Stipulation, exercised such exclusive right. To give Rio the "implied right" to exercise a veto power over such election is tantamount to giving Rio a vote or voice in the election decision itself. This would be directly contradictory to the above-quoted language of paragraph 21.3. Certainly the court cannot do such violence to the written expression of the intent of the parties!

VI

GIVEN THE COURT'S RULING REGARDING THE SETTLEMENT STIPULATION
DISMISSAL OF RIO'S AMENDED COMPLAINT WAS NOT ONLY
APPROPRIATE BUT MANDATORY.

At the time the Settlement Stipulation was executed the Audrey Defendants and the Jimco Defendants were aware that Rio objected to its terms. Consequently, the stipulation was

expressly made subject to a condition precedent of the Court's ruling that the stipulation did not violate any duty owed to Rio by either signatory. Incorporated into the Settlement Stipulation was the following Motion:

"The Audrey Defendants and the Jimco Defendants hereby move the Court for a ruling that Rio has no standing under either the Audrey Lease or the Jimco Agreement, or any other theory of law or equity, to challenge or otherwise bar the effectuation and implementation of the foregoing settlement stipulation, that such settlement is not in violation of any duty owed to Rio by any of the defendants, that upon effectuation and implementation of said settlement stipulation the Audrey Defendants are effectively and totally dismissed from this litigation, and that those funds presently on deposit with the court equal to 5.5% of the proceeds from the sale of yellowcake by Rio since January 1, 1976, together with accrued interest thereon, less any amounts previously withdrawn by the Audrey Defendants therefrom, be promptly paid to the Audrey Defendants."

(T.R. p. 2246).

In response to this motion, Rio filed a brief objecting to the settlement and raising the same points that it now raises on appeal. (T.R. pp. 2070-2094).

In addition and as a clear attempt to scuttle the settlement, Rio moved for leave to amend its complaint to state new claims against the defendants purportedly arising out of the stipulation itself, i.e., breach of fiduciary duty, breach of implied covenant of good faith, self-dealing and interference with contract. (T.R. pp. 2090-2110).

The collective effect of these motions was to present to the court the issue of whether, under any theory of law or

equity, there is any duty owed to Rio by either the Audrey Defendants or the Jimco Defendants which was breached or otherwise violated by the terms of operation of the Settlement Stipulation. Determination by the Court of this issue would have the dual effect of (1) determining the validity and effectiveness of the Settlement Stipulation since the aforestated issue was a condition precedent to the stipulation, and (2) determining whether the new claims raised by Rio in its Amended Complaint stated a claim for relief upon which relief could be granted.

If the question was decided in the affirmative, i.e., a duty was owed and violated, the stipulation would dissolve under its own terms, and therefore, the new claims by Rio would be baseless. If the question was decided in the negative, i.e., no duty owed or violated, the stipulation would stand and the new claims would fail to state a claim upon which relief could be granted. In either case the new claims of the Amended Complaint would be dismissed.

After having read the briefs submitted by all parties (Rio submitted two such briefs), and having heard oral argument, the lower Court entered the following ruling:

"The court hereby rules that Rio has no standing under either the Audrey Lease or the Jimco Agreement, or any other theory of law or equity, to challenge or otherwise bar the effectuation and implementation of that certain Settlement Stipulation between the Audrey Defendants and the Jimco Defendants and that such Settlement Stipulation is not in violation of any duty owed to Rio by any of the defendants." (T.R. p. 1983).

Having thus ruled, as a matter of law, the new claims raised by Rio's Amended Complaint, which were premised upon the existence of one or more such duties, failed to state a claim upon which relief could be granted and, therefore, necessarily must have been dismissed.

Of course, it is from this ruling of the lower court that Rio now appears raising the same assertions raised below. Again, if this Court finds that there is a duty owed them the Settlement Stipulation is void and the parties are again enmeshed in litigation, and the new claims will, therefore, be baseless. However, if this Court upholds the ruling of the trial court, thereby allowing the defendants to settle their differences, the new claims would fail to state a claim and the trial courts' dismissal of the new claims would have to be affirmed. Under no circumstances could the new claims of the Amended Complaint be allowed to stand.

CONCLUSION



The issue presented to the Court is very simple. Rio brought this lawsuit in the nature of an interpleader as stakeholder of certain royalties over which the Audrey Defendants and the Jimco Defendants had a legitimate dispute. In furtherance of the general judicial policy in favor of settlement of litigation and, at least as to the Audrey Defendants, in order to receive the funds upon which their

livelihoods depend, the defendants have agreed as to how their shares of the royalties will be divided as between themselves. This has been accomplished without violation of any right of or duty to Rio. Rio is left completely free to negotiate or litigate with the Jimco Defendants the royalty value of its one-quarter Lessors interest. But certainly Rio should not be allowed, and indeed does not have the right, to act as a dog in the manger to block a legitimate settlement of the very dispute which Rio asked the lower court to resolve in the first place!

Respectfully submitted this 4th day of April, 1979.

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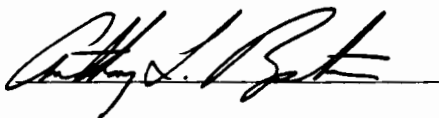
CERTIFICATE OF HAND DELIVERY

I hereby certify that on the 24 day of April, 1979,
I personally delivered a copy of the foregoing document to the
following:

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A handwritten signature in dark ink, appearing to read "Clifford L. Ashton", is written over a horizontal line.

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Salt Lake County, Utah

AUG 16 1978

W. Sterling Evans, Clerk 3rd Dist. Court
By *Kay E. Sullivan*
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IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT,
IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

RIO ALGOM CORPORATION,

Plaintiff,

v.

SETTLEMENT STIPULATION AND MOTION

JIMCO LTD., HUMECA EXPLORATION
COMPANY, JIM L. HUDSON,
JUANITA J. MEYER AS EXECUTRIX
OF THE ESTATE OF DANIEL H.
MEYER, ELDON J. CARD, NORMA
HUDSON, JEAN L. CARD, JUANITA
J. MEYER, N. J. WHITE, AUDREY
WHITE, WILMA WHITE, OTIS
DIBLER, DOROTHY MAE DIBLER,
GRACE DAVIS, and MARLOWE C.
SMITH,

Defendants.

Civil No. 234808

The defendants, by and through their counsel of record,
submit to the Court the following stipulation and motion in an
attempt to settle this dispute, at least as between themselves:

STIPULATION

In an effort to resolve this dispute, and in furtherance
of the public policy to settle litigation when possible, and

without admission or determination of what is or has been the fair market value of crude ore, or whether there is or has been a market value for crude ore, or any other issue in this litigation, defendants Audrey White, N. J. White, Wilma White, Otis Dibler, Dorothy Mae Dibler, Grace Davis, Marlowe C. Smith and Adrian Smith (hereinafter "Audrey Defendants") and defendants Jimco, Ltd., Humeca Exploration Company, Jim L. Hudson, Daniel H. Meyer, Eldon J. Card, Norma Hudson, Juanita J. Meyer and Jean L. Card (hereinafter "Jimco Defendants") hereby stipulate to the following settlement of the pending dispute as between themselves, subject only to the condition precedent hereinafter set forth:

1. The Audrey Defendants agree to take in full satisfaction of all royalty obligations owed to them by both the Jimco Defendants and Rio Algom Corporation (hereinafter "Rio") under both the Audrey Lease and the Jimco Agreement, 5.5% of the total proceeds from the sale of yellowcake by Rio to Duke Power Company or any other purchaser.

a. With regard to the funds deposited into Court by Rio, the Audrey Defendants are entitled to, and there should be immediately released by the court, an amount equal to 5.5% of the proceeds of the sale of yellowcake by Rio since January 1, 1976, together with earned interest thereon, less any amounts previously withdrawn from such funds. The Audrey Defendants shall also be entitled to 5.5% of any retroactive increases in the per pound price of yellowcake negotiated or received by Rio from Duke Power Company or any other purchaser and applicable to yellowcake sold since January 1, 1976.

b. If, in the future, Rio deposits into Court any

funds to which, under the provisions of this stipulation, the Audrey Defendants are entitled, the Jimco Defendants agree to join the Audrey Defendants in moving the court for the release of such funds.

c. For the balance of 1978, and thereafter, the Jimco Defendants agree to assign and transfer to the Audrey Defendants and to direct Rio to calculate and pay to the Audrey Defendants, that amount which, when added to that amount which the Audrey Defendants would otherwise receive directly from Rio, equals 5.5% of the proceeds received by Rio from Duke Power Company, or any other purchaser, for the sale of yellowcake.

2. For the calendar year 1979, and all years thereafter, the Audrey Defendants hereby waive their right to the election of royalty payments based upon market value of crude ore as provided in paragraph 3.2 of the Audrey Lease, and agree to timely revoke their previous election under paragraph 3.2. Timely notice of the revocation of said election will be provided by the Audrey Defendants to Rio.

3. The Jimco Defendants agree to execute any assignments determined by the Audrey Defendants to be necessary to effectuate payment of royalties to the Audrey Defendants as set forth herein.

4. The Audrey Defendants agree upon effectuation of the foregoing to dismiss any and all pending cross-claims against the Jimco Defendants, and any and all pending counterclaims against Rio.

5. The Jimco Defendants agree upon effectuation of the foregoing to dismiss any and all pending cross-claims as against the Audrey Defendants, and only as against them. The Jimco

Defendants expressly reserve their claims as against Rio. .

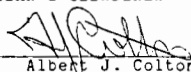
The foregoing stipulation is subject only to the condition precedent of the Court's ruling, pursuant to the motion made herein, that Rio has no right based upon either the Audrey Lease or the Jimco Agreement, or based upon any other theory of law or equity, to challenge or otherwise bar the effectuation or implementation of this settlement stipulation, that such settlement is not in violation of any duty owed to Rio by any of the defendants, and that the effectuation and implementation of this settlement stipulation effectively and totally dismisses the Audrey Defendants from this litigation, and that those funds presently on deposit with the court equal to 5.5% of the proceeds from the sale of yellowcake by Rio since January 1, 1976, together with accrued interest thereon, less any amounts previously withdrawn by the Audrey Defendants therefrom, be promptly paid to the Audrey Defendants.

DATED this 10th day of July, 1978.

WILLIAM G. WALDECK

_____

FABIAN & CLENDENIN

By _____
Albert J. Colton

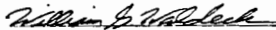
Attorneys for Audrey Defendants
800 Continental Bank Building
Salt Lake City, Utah 84101

MOTION

The Audrey Defendants and the Jimco Defendants hereby move the Court for a ruling that Rio has no standing under either the Audrey Lease or the Jimco Agreement, or any other theory of law or equity, to challenge or otherwise bar the effectuation and implementation of the foregoing settlement stipulation, that such settlement is not in violation of any duty owed to Rio by any of the defendants, that upon effectuation and implementation of said settlement stipulation the Audrey Defendants are effectively and totally dismissed from this litigation, and that those funds presently on deposit with the court equal to 5.5% of the proceeds from the sale of yellowcake by Rio since January 1, 1976, together with accrued interest thereon, less any amounts previously withdrawn by the Audrey Defendants therefrom, be promptly paid to the Audrey Defendants.

DATED this 10th day of July, 1978.

WILLIAM G. WALDECK



FABIAN & CLENDENIN

By



Albert J. Colton

Attorneys for Audrey Defendants

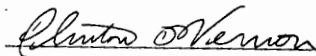
VAN COTT, BAGLEY, CORNWALL &
McCARTHY

By



E. Scott Savage
Attorneys for Jimco Defendants
141 East First South
Salt Lake City, Utah 84101

CLINTON D. VERNON



FILED

CLERK OF DISTRICT COURT
SALT LAKE COUNTY, UTAH

AUG 29 10 35 AM '78

W. STERNBERG, CLERK
BY *[Signature]* DEPUTY CLERK

IN THE THIRD JUDICIAL DISTRICT COURT OF SALT LAKE COUNTY,
STATE OF UTAH

RIO ALGOM CORPORATION,
Plaintiff,

v.

JIMCO LTD., HUMECA EXPLORATION
COMPANY, JIM L. HUDSON, JUANITA
J. MEYER AS EXECUTRIX OF THE
ESTATE OF DANIEL H. MEYER,
ELDON J. CARD, NORMA HUDSON,
JEAN L. CARD, JUANITA J. MEYER,
N. J. WHITE, AUDREY WHITE,
WILMA WHITE, OTIS DIBLER,
DOROTHY MAE DIBLER, GRACE
DAVIS, and MARLOW C. SMITH.

Defendants.

ORDER REGARDING SETTLEMENT
STIPULATION, DISMISSING CLAIMS
AND AUTHORIZING DISBURSEMENT
OF FUNDS

Civil No. 234808

This matter came on for hearing before the above entitled court on the 16th day of August, 1978 pursuant to the motion of defendants Audrey White, N. J. White, Wilma White, Otis Dibler, Dorothy Mae Dibler, Grace Davis, Marlowe C. Smith and Adrian Smith (hereinafter "Audrey Defendants") and defendants Jimco, Ltd., Humecca Exploration Company, Jim L. Hudson, Daniel H. Meyer, Eldon J. Card, Norma Hudson, Juanita J. Meyer and Jean L. Card (hereinafter "Jimco Defendants") regarding the settlement stipulation between them which was filed with the court on the 10th day of July, 1978, and pursuant to plaintiff Rio Algom Corporation's (hereinafter "Rio") motion to amend complaint. Rio was represented by James B. Lee, Gordon L. Roberts and Kent W. Winterholler of Parsons, Behle & Latimer; the Jimco Defendants were represented by Clifford E. Ashton and E. Scott Savage of VanCott, Bagley, Cornwall & McCarthy and Clinton D. Vernon; and the Audrey Defendants were represented by Albert J. Colton and Anthony L. Rampton of Fabian & Clendenin.

The court, having read the briefs submitted by counsel, having heard oral arguments by counsel, and being fully advised in the premises,

1992

HEREBY ORDERS, ADJUDGES AND DECREES as follows:

1. That Rio is granted leave to file its Amended Complaint.
2. The court hereby rules that Rio has no standing under either the Audrey Lease or the Jimco Agreement, or any other theory of law or equity, to challenge or otherwise bar the effectuation and implementation of that certain Settlement Stipulation between the Audrey Defendants and the Jimco Defendants and that such Settlement Stipulation is not in violation of any duty owed to Rio by any of the defendants.
3. That, pursuant to the foregoing ruling and in accordance therewith, the First Cause of Action as against the Audrey Defendants and the Second, Third and Fourth Causes of Action as against all defendants, of Rio's Amended Complaint are hereby dismissed with prejudice; furthermore, pursuant to the Settlement Stipulation any and all pending cross-claims by the Audrey Defendants against the Jimco Defendants and by the Jimco Defendants against the Audrey Defendants are hereby dismissed with prejudice; and further pursuant to such Settlement Stipulation any and all pending counterclaims by the Audrey Defendants against Rio are hereby dismissed with prejudice.
4. That the clerk of the court is hereby ordered to immediately disburse and pay over to the Audrey Defendants through their attorneys, Fabian & Clendenin, from the funds presently on deposit with the court the amount of \$921,691.00 (which represents 5.5% of the proceeds from the sale of yellowcake by Rio since January 1, 1976, less any amounts previously withdrawn by the Audrey Defendants, as computed on Schedule A attached hereto), together with accrued interest thereon.
5. That, from the date of this order and as long as Rio receives proceeds from the sale of yellowcake from the subject properties, Rio is hereby ordered to pay when due under the terms of the Audrey Lease to the Audrey Defendants at the Moab National Bank in Moab, Utah, an amount equal to 5.5% of the proceeds from the sale by Rio of such yellowcake including any retroactive increases in the

per pound price of yellowcake negotiated or received by Rio from
Duke Power Company or any other purchaser.

DATED this 29 day of Aug, 1978.

BY THE COURT:

ATTEST

W. STERLING EVANS
CLERK

BY

W. Sterling Evans
Deputy Clerk

Dean E. Conder
District Judge

SCHEDULE A

Computation of 5.5% of yellowcake proceeds dervied from
supporting information supplied to the court by plaintiff:

<u>Tender #</u> <u>Dated</u>	Sale price per pound multiplied by amount (lbs) <u>Sold</u>	<u>Total</u> <u>Sales</u> <u>Price</u>	<u>5.5% of</u> <u>Sales Price</u>
Tender #5 5/2/77	166,615 lbs. x 13.78/lb.	\$2,295,954.70	\$126,277.60
Tender #6 for 6/24/77 recapitulates total sales for the year 1976 as:			
	639,666 lbs. x 13.48/lb. (final price)	8,622,697.68	474,248.37
Tender #7 7/29/77	145,475 lbs. x 13.89/lb.	2,020,647.75	111,135.62
Tender #8 9/23/77	47,303 lbs. x 14.04/lb.	664,134.12	36,527.37
Tender #9 10/28/77	174,847 lbs. x 14.14/lb.	2,472,336.58	135,978.50
Tender #10 12/21/77	Not applicable; this is payment of 1976 holdback; holdback is not applicable to Audrey defendants.		
Tender #11 1/30/78	162,432 lbs. x 14.43/lb.	2,343,893.76	128,914.15
Tender #12 3/1/78	179,888 lbs. x 14.61/lb.	2,628,163.68	144,548.99
Tender #13 7/24/78	170,720 lbs. x 14.81/lb.	2,528,363.20	<u>139,059.97</u>
			\$1,296,691.00
	Less amount paid 2/1/78		<u>375,000.00</u>
			\$ 921,691.00