

2002

Western United Mines INC., a Utah Corporation,  
Syndicators INC, a Utah Corporation, J.R. Kirk Jr.,  
an individual, and Steven D. Martens, an Individual  
vs. Dan K. Shaw an individual, and Del-Rio  
Resources, INC., a Utah Corporation : Brief of  
Appellant

Utah Court of Appeals

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Dan K. Shaw, Del Rio Resources.

Max D. Wheeler, Rex e. Madsen, etc.

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**IN THE UTAH COURT OF APPEALS**

<b>WESTERN UNITED MINES, INC., a</b>	)	<b>APPEAL NO. 20021064-CA</b>
<b>Utah corporation; SYNDICATORS,</b>	)	
<b>INC., a Utah corporation; J. R. KIRK,</b>	)	
<b>JR., an individual, and STEVEN D.</b>	)	<b>TRIAL COURT NO. 010906368</b>
<b>MARTENS, an individual,</b>	)	
	)	
<b>Plaintiffs/Appellants</b>	)	
	)	
<b>vs.</b>	)	
	)	
<b>DAN K. SHAW, an individual, and</b>	)	
<b>DEL-RIO RESOURCES, INC., a Utah</b>	)	
<b>Corporation,</b>	)	
	)	
<b>Defendants/Appellees.</b>	)	

## APPELLANTS' BRIEF

On Appeal from an Order and Judgment  
of the Third Judicial District Court,  
Salt Lake County, State of Utah  
Honorable Roger A. Livingston Presiding

**Opposing counsel filed notices of withdrawal so the names and addresses of the Appellees only are listed below:**

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MARTENS** Utah Court of Appeals

**FEB 25 2004**

**Paulette Stagg**  
**Clerk of the Court**

**IN THE UTAH COURT OF APPEALS**

<b>WESTERN UNITED MINES, INC., a</b>	)	<b>APPEAL NO. 20021064-CA</b>
<b>Utah corporation; SYNDICATORS,</b>	)	
<b>INC., a Utah corporation; J. R. KIRK,</b>	)	
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<b>MARTENS, an individual,</b>	)	
	)	
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	)	
<b>vs.</b>	)	
	)	
<b>DAN K. SHAW, an individual, and</b>	)	
<b>DEL-RIO RESOURCES, INC., a Utah</b>	)	
<b>Corporation,</b>	)	
	)	
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MARTENS**

## **LIST OF PARTIES**

### **Plaintiffs/Appellants:<sup>1</sup>**

1. Western United Mines, Inc.
2. Syndicators, Inc.
3. J. R. Kirk, Jr.
4. Steven D. Martens

### **Defendants/Appellees:**

1. Dan K. Shaw
2. Del-Rio Resources, Inc.

---

<sup>1</sup> On or about August 28, 2003, Energy Management Services, LLC (“EMS”) acquired all of Plaintiffs/Appellants’ rights and claims in this action. In order to avoid confusion, this brief will continue to refer to the parties as they appeared before the trial court.

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## I. JURISDICTION

This Court has jurisdiction pursuant to Section 78-2a-3(2)(j), *Utah Code Annotated*.

## II. STATEMENT OF ISSUES AND STANDARD OF REVIEW

### A. WHETHER THE TRIAL COURT ERRED IN GRANTING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

#### 1. Standard of Appellate Review:

“Summary judgment is appropriate only when ‘there is no genuine issue as to any material fact and . . . the moving party is entitled to a judgment as a matter of law.’

U.R.C.P. 56(c); see also, e.g., State ex rel. Div. of Forestry, Fire & State Lands v. Tooele County, 2002 UT 8, ¶8, 44 P.3d 680; Tustian v. Schriever, 2001 UT 84, ¶ 13, 34 P.3d

755. The Utah Supreme Court has explained its application of U.R.C.P. 56 as follows:

We will affirm summary judgment only when “there is no genuine issue as to any material fact and . . . the moving party is entitled to a judgment as a matter of law.” We review the trial court’s legal conclusions for correctness, granting no deference. **In reviewing a grant of summary judgment, we view the facts and all reasonable inferences drawn therefrom in the light most favorable to the nonmoving party.**

Alder v. Bayer Corp., 2002 UT 115, ¶ 20, 61 P.3d 1068, 1075-76 (citations and quotation marks omitted, alteration in original). “Summary judgment procedure is generally considered a drastic remedy, requiring strict compliance with the rule authorizing it” Timm v. Dewsnup, 851 P.2d 1178, 1181 (Utah 1993). “‘If the [requirements of the rules] are not fulfilled, both in letter and spirit, the summary judgment procedure may become a vehicle of injustice rather than a salutary medium of reaching a swift but just result on a

pure matter of law, as intended by the framers of the rules.” Id. (quoting Cleveland Trust Co. v. Foster, 93 So.2d 112, 114 (Fla.1957)). The Utah Supreme Court has further cautioned that

inasmuch as the party moved against is being defeated without the privilege of a trial, the court should carefully scrutinize the ‘submissions’ and contentions he makes thereon to see if his contentions and proposals as to proof of material facts, if resolved in his favor, would entitle him to prevail; and if it so appears, the motion for summary judgment should be denied and a trial should be had for the purpose of resolving the disputed issues of fact and determining the rights of the parties . . . .

Rich v. McGovern, 551 P.2d 1266, 1268 (Utah 1976).

It follows that the burden of proof in a motion for summary judgment rests on the moving party. See Jensen v. IHC Hosps., 944 P.2d 327, 339 (Utah 1997) (“On a motion for summary judgment, the moving party bears the burden of proof for its motion, namely, the burden of proving that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.”). In contrast, “[i]t is well settled that a party opposing a motion for summary judgment need not ‘prove’ its theory or theories, but rather it need only ‘establish facts that create a genuine issue of material fact.’” Territorial Savings & Loan Ass’n v. Baird, 781 P.2d 452, 456 n.5 (Utah Ct. App. 1989) (citations omitted) (quoting Amjacs Interwest, Inc. v. Design Assocs., 635 P.2d 53, 55 (Utah 1981)).

Under Rule 56(e), once the proponent of summary judgment establishes a prima facie case, the burden shifts to the opponent to provide some evidence in opposition to the motion and in support of the essential elements of her claim. Campbell,

Maack & Sessions v. Debry, 2001 UT App. 397, ¶ 18, 38 P.3d 984, 990 (citing U.R.C.P. 56(e) & Thayne v. Beneficial Utah, Inc., 874 P.2d 120, 124 (Utah 1994)). Put another way, once the moving party has brought forth evidence either tending to prove a lack of a genuine issue of material fact or challenging the existence of one of the elements of the cause of action, the nonmoving party then bears the burden of providing some evidence in support of the essential elements of his or her claim. Jensen v. IHC Hosps., 944 P.2d 327, 339 (Utah 1997) (quoting Thayne v. Beneficial Utah, Inc., 874 P.2d 120, 124 (Utah 1994)). Although U.R.C.P. 56(e) allows the submission of affidavits by the parties, there is no requirement that all disputes of material fact be set forth in conflicting affidavits:

The rules of civil procedure do not require an answer or affidavits before the allegations of the complaint are deemed controverted. Rather, rule 56(c) clearly states “the judgment sought shall be rendered if the *pleadings*, depositions, *answers to interrogatories*, and *admissions on file*, together with affidavits, *if any*, show that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law.”

Gerbich v. Numed, 1999 UT 37, ¶ 11, 977 P.2d 1205, 1207 (emphasis in original); see also Mountain States Tel. & Tel. Co. v. Atkin, Wright & Miles, Chartered, 681 P.2d 1258, 1261 (Utah 1984) (holding that summary judgment need not be affirmed merely because non-moving party failed to file affidavits to avoid summary judgment against him).

2. Preservation of Issue:

Appellants preserved this issue below by opposing Defendants’ joint motion for summary judgment before the trial court. R. 243-255.

**B. WHETHER THE TRIAL COURT ERRED BY ENTERING SUMMARY JUDGMENT WITHOUT ALLOWING PLAINTIFFS TO CONDUCT REQUESTED DISCOVERY**

1. Standard of Review:

A trial court's grant or denial of a Rule 56(f) motion is reviewed under an abuse of discretion standard. Price Development Co., L.P. v. Orem City, 2000 UT 26, ¶ 30, 995 P.2d 1237, 1248; Crossland Sav. v. Hatch, 877 P.2d 1241, 1243 (Utah 1994). Furthermore, to provide an adequate opportunity for discovery, the trial court should liberally grant Rule 56(f) motions, unless they are dilatory or lacking in merit. Price Development Co., L.P., 2000 UT 26 at ¶ 30. Furthermore, "[R]ule 56(f) motions should be granted liberally to provide adequate opportunity for discovery, because information gained during discovery may create genuine issues of fact sufficient to defeat a motion for summary judgment." Sandy City v. Salt Lake County, 794 P.2d 482, 489 (Utah Ct. App. 1990), rev'd on other grounds, 827 P.2d 212 (Utah 1992) (internal citations omitted) (citing Cox v. Winters, 678 P.2d 311, 313 (Utah 1984); see also Bridge v. Backman, 353 P.2d 909, 910 (Utah 1960) ("unless there is a showing that the disfavored parties cannot produce evidence which would reasonably support a finding in their favor on a material or determinative issue of fact, a summary judgment is erroneous.") (emphasis added)).

2. Preservation of Issue:

Appellants preserved this issue below through the affidavit of their counsel requesting the trial court, pursuant to U.R.C.P. 56(f), to permit discovery, including

deposing Shaw and Nielson regarding statements made in the pleadings and in their affidavits. R. 256-259.

### **III. CONSTITUTIONAL PROVISIONS, STATUTES, ORDINANCES, RULES, AND REGULATIONS**

1. U.R.C.P. 56.<sup>2</sup>

### **IV. STATEMENT OF THE CASE**

#### **A. NATURE OF THE CASE.**

This is an action for declaratory relief in which Plaintiffs below sought a declaration that they are entitled to (1) their undivided share of a 50% beneficial interest in certain oil and gas leases obtained as the result of a settlement of a suit in the United States Claims Court, and (2) their share of \$300,000 in cash proceeds generated by that settlement or, in the alternative, damages.

#### **B. COURSE OF PROCEEDINGS BELOW.**

On July 23, 2001, Plaintiffs<sup>3</sup> filed their Complaint for Declaratory Relief and Money Damages in the Third Judicial District Court, Salt Lake County, against Dan K. Shaw (“Shaw”) and Del-Rio Resources, Inc. (“Del Rio”).<sup>4</sup> R. 1-7. On April 11, 2002, Shaw filed his Answer and Counterclaim. R. 10-69. On April 19, 2002, Del Rio filed its Answer and Counterclaim. R. 70-78. On June 14, 2002, Plaintiffs filed their Reply to

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<sup>2</sup> Referenced provisions are set out verbatim in the Addendum.

<sup>3</sup> Plaintiffs/Appellants are Western United Mines, Inc. (“Western”), Syndicators, Inc. (“Syndicators”), J.R. Kirk, Jr. (“Kirk”), and Steven D. Martens (“Martens”). In this brief, they are referred to collectively as “Plaintiffs.”

<sup>4</sup> Shaw and Del Rio, collectively, are referred to as “Defendants.”

Del Rio's Counterclaim. R. 79-81. On August 2, 2002, Shaw and Del Rio filed their Joint Motion for Summary Judgment, R. 223-226, and Joint Memorandum in Support of Motion for Summary Judgment. R. 82-217. On August 7, 2002, Plaintiffs filed their Reply to Shaw's Counterclaim. R. 227-232. On September 9, 2002, Plaintiffs filed their Memorandum In Opposition to Defendant's Motion for Summary Judgment, R. 243-255, and Affidavit under U.R.C.P. 56(f). R. 256-259. On September 20, 2002, Shaw and Del Rio filed their Reply Memorandum in support of their motion for summary judgment. R. 262-273. On September 23, 2002, the trial court scheduled the motion for summary judgment for hearing on October 28, 2002. R. 277-278. On October 28, 2002, the trial court heard oral argument on the motion. R. 286.

**C. DISPOSITION BELOW.**

On November 14, 2002, the trial court issued its Order and Summary Judgment (the "Judgment") granting Defendants' motion for summary judgment. R. 285-289. The trial court directed the entry of the Judgment as a final judgment pursuant to Rule 54(b) of the Utah Rules of Civil Procedure. R. 289. On December 13, 2002, Plaintiffs filed their notice of appeal. R. 321-322.

**D. STATEMENT OF FACTS.**

The facts underlying this dispute date back to the 1980's when Del Rio, Western, Syndicators, Kirk, and Martens formed a joint venture to develop ten federal oil and gas leases (the "Oil Canyon Leases"), as well as two state of Utah oil and gas leases and two other federal oil and gas leases (the "Flat Rock Leases") covering lands in Uintah County, Utah. R. 31-32, 138-158, and 283. The surface of the lands covered by the Oil

Canyon Leases was owned by the Ute Indian Tribe (the “Tribe”). R. 156. Unfortunately, the Tribe and the United States Bureau of Indian Affairs (“BIA”) denied Del Rio and Plaintiffs access to the lands, thereby preventing them from developing the Oil Canyon Leases. R. 156. Therefore, the Oil Canyon Leases expired over the period of June 1, 1988, through January 29, 1989.<sup>5</sup> Del Rio and Plaintiffs brought suit against the United States in the United States Claims Court (the “Federal Litigation”) alleging that the BIA’s denial of access constituted (1) a breach of the terms of the Oil Canyon Leases, and (2) a taking of property without just compensation. R. 138-158. Del Rio and Plaintiffs did not seek an order reinstating the Oil Canyon Leases in the Federal Litigation.<sup>6</sup> R. 138-158. Instead, Del Rio and Plaintiffs sought damages in the amount of \$17,000,000. R. 157. Del Rio and Plaintiffs later amended their Complaint in the Federal Litigation to add as plaintiffs various other parties who were record title owners of various interests in the Oil Canyon Leases. R. 139-152.<sup>7</sup> However, many of those parties assigned, or agreed to assign, their interests in the Oil Canyon Leases to Del Rio while the Federal Litigation was pending. R. 167-168.

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<sup>5</sup> The dates that the various Oil Canyon Leases expired are set forth approximately in the affidavit of Sandra Decker, Exhibit C to Shaw’s and Del Rio’s motion for summary judgment, R. 165-168, and exactly in Del-Rio Resources, Inc. v. United States, 46 Fed.Cl. 683, 688-9 (U.S. Fed.Cl.Ct. 2000).

<sup>6</sup> Indeed, because the case was brought in the United States Claims Court, this remedy was not available. See 28 U.S.C. § 1491(a)(1); see also Logan Canyon Cattle Assoc. v. U.S., 34 Fed. Cl. 165, 168 (Fed. Cl. Ct. 1995) (“The jurisdiction of the United States Court of Federal Claims encompasses only money claims against the United States.”).

<sup>7</sup> The plaintiffs in the Federal Litigation are collectively referred to as the “Federal Litigation plaintiffs.”



Although the Oil Canyon Leases expired, Del Rio and Plaintiffs were able to gain access to the Flat Rock Leases, and Del Rio and Plaintiffs developed those leases. R. 31. In 1993, Del Rio and Plaintiffs borrowed approximately \$780,000 from Shaw to be used to develop the Flat Rock Leases. R. 31. The loan was secured by all of Del Rio's, Western's, and Syndicators' interest in the Flat Rock Leases. R. 31. Unfortunately, Del Rio and Plaintiffs were not able to repay the monies they had borrowed from Shaw. R. 31. As a result, on May 12, 1995, Shaw, Del Rio, and Plaintiffs entered into an agreement (the "1995 Agreement")<sup>8</sup> that provided, among other things, as follows:

- (a) Del Rio and Plaintiffs assigned to Shaw all of their right, title, and interest in and to the Flat Rock Leases. 1995 Agreement at ¶1(i). R. 32.
- (b) Shaw agreed to appoint Del Rio as operator of the Flat Rock Leases. 1995 Agreement at ¶10. R. 38.
- (c) Kirk and Martens agreed to resign as officers and directors of Del Rio. 1995 Agreement at ¶5. R. 34.
- (d) The parties referred to the pending Federal Litigation and the need for cash to pay expenses being incurred in that litigation. 1995 Agreement at ¶¶4, 4.1 & 4.2. R. 33-34.
- (e) Shaw agreed to use his best efforts to "... enter into an agreement with the plaintiffs of such lawsuit to provide a maximum of thirty thousand dollars (\$30,000) to fund certain future expenses incurred by plaintiffs in such litigation . . . . No expenses shall be paid by Shaw directly to persons who are plaintiffs in the litigation or to affiliates of plaintiffs." 1995 Agreement at ¶4. R. 34.
- (f) The parties further agreed that "Any agreement between the plaintiffs and Shaw shall provide that if, as a result

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<sup>8</sup> A copy of the 1995 Agreement is found in Exhibit C to the joint memorandum in support of the motion for summary judgment and in the Addendum. R. 31-63; Addendum, A-3.

of the litigation, additional leases are awarded, such leases shall be assigned to Shaw (or his affiliates); provided, however, plaintiffs shall be entitled to a fifty percent (50%) beneficial interest in such additional leases . . .” 1995 Agreement at ¶4.1. R. 34.

(g) The parties further agreed that “Any agreement between plaintiff(s) and Shaw shall provide that, [if] as a result of the litigation, a cash settlement is awarded to plaintiffs, Shaw shall be reimbursed for all expenses of litigation paid by Shaw and the balance of the proceeds shall be delivered free and clear to plaintiffs as damages and for payment of other expenses and costs of the litigation.” 1995 Agreement at ¶4.2. R. 34.

After the 1995 Agreement was signed, Shaw agreed to, and did, provide at least \$20,000 in funds to be used to pay costs in the Federal Litigation.<sup>9</sup> R. 173 (Shaw Affidavit, ¶6).

In 2000, the Federal Litigation settled. R. 159-164. As part of that settlement, a cash payment of \$300,000 was made to the Federal Litigation plaintiffs, and the ten Oil Canyon leases, which previously had expired, were “reinstated and extended” for three years. R. 159. Plaintiffs expected that the Oil Canyon Leases and the \$300,000 cash payment (together, “the Settlement Res”) would be distributed consistent with the 1995 Agreement and the funding agreement Shaw had entered into with the Federal Litigation plaintiffs. Instead, as it turned out, Del Rio and Shaw had other plans and proposed a different distribution of the Settlement Res. R. 343-350. When Del Rio and Shaw refused to recognize Plaintiffs’ interests, Plaintiffs brought the action below.

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<sup>9</sup> Shaw’s affidavit may not accurately reflect the expense reimbursement he actually seeks. Shaw’s affidavit says that he provided approximately \$20,000 in funding, but the proposed distribution of the settlement proceeds contains an entry stating, “Less expenses to Dan Shaw for lawsuit” in the amount of \$47,765.00. R. 345.

## **V. SUMMARY OF ARGUMENTS**

1. The trial court erred by entering summary judgment without explaining the reasons or basis for its decision. If the trial court's decision was based solely on its construction of the 1995 Agreement, it improperly failed to consider the impact of Shaw's performance of his obligation under the 1995 Agreement by providing funding for the Federal Litigation - - as contemplated by the 1995 Agreement. If the trial court based its decision on a finding that Shaw did not in fact reach the funding agreement contemplated by the 1995 Agreement, the trial court improperly resolved a disputed issue of material fact.

The real issues before the trial court were why, and under what terms, Shaw provided the funding for the Federal Litigation that was contemplated by the 1995 Agreement. The trial court's order entering summary judgment did not, and properly could not, resolve these issues. As a result, the Judgment must be reversed.

2. The trial court erred by entering summary judgment without allowing Plaintiffs to conduct certain requested discovery pursuant to U.R.C.P. 56(f). Had Plaintiffs been allowed to conduct the requested discovery, they would have been able to produce additional evidence showing summary judgment was improper.

## **VI. ARGUMENT**

### **A. INTRODUCTION.**

The Judgment is terse, containing few findings of fact and only one conclusion of law. R. 285-289. The single conclusion of law states, in its entirety, as follows:

The 1995 Agreement does not grant Plaintiffs herein any interest in the ten Federal Leases or the \$300,000 cash award in the Federal Action, and Plaintiffs' claims thereunder are denied with prejudice.

(¶ 9.) The trial court does not explain the basis for this conclusion, and the basis is not otherwise apparent from the remainder of the Judgment. Therefore, one can only speculate as to how the trial court reached this conclusion.

When reviewing a grant of summary judgment, this Court reviews the trial court's legal conclusions for correctness, affording those conclusions no deference. Ault v. Holden, 2002 UT 33, ¶ 15, 44 P.3d 781, 787. Furthermore, because summary judgment is granted as a matter of law, the reviewing court may reconsider the trial court's legal conclusions. Id. Therefore, although the Judgment does not contain the trial court's reasoning, as required by U.R.C.P. 52(a),<sup>10</sup> the absence of such reasoning does not prevent review. The focus remains upon whether Shaw and Del Rio were entitled to judgment as a matter of law on the basis of undisputed facts. Careful scrutiny of the Motion for Summary Judgment shows that summary judgment should not have been entered.

**B. THE BASIC CONTENTIONS OF THE PARTIES.**

In the 1995 Agreement, Shaw agreed to use his best efforts to reach a funding agreement with the Federal Litigation plaintiffs to help pay for expenses in connection

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<sup>10</sup> Under U.R.C.P. 52(a), the trial court is required to "issue a brief written statement of the ground for its decision on all motions granted under Rules 12(b), 50(a) and (b), 56, and 59 when the motion is based on more than one ground." Nonetheless, the failure to do so, while potentially justifying an appellate court's remand to the trial court, is not, in and of itself, reversible error. See Neerings v. Utah State Bar, 817 P.2d 320, 323 (Utah 1991).

with that litigation. Under the terms of the 1995 Agreement, any such funding agreement was required to contain the following two provisions:

- (1) Any additional leases awarded as a result of the Federal Litigation were to be assigned to Shaw (or his affiliates); provided that the Federal Litigation plaintiffs were entitled to a 50% beneficial interest in the additional leases; and
- (2) If any cash settlement is awarded to the Federal Litigation plaintiffs, Shaw would be reimbursed for “all expenses of litigation paid by Shaw” and the remaining proceeds would be delivered to the Federal Litigation plaintiffs.

R. 34. Plaintiffs maintain that Shaw performed his obligations under the 1995 Agreement by reaching an agreement to provide and then by actually providing funding for the Federal Litigation. Therefore, Plaintiffs contend that they are entitled to a distribution of the Federal Litigation Settlement Res in accordance with the formula set forth in the 1995 Agreement. Shaw admits that he reached an agreement to provide funding to Del Rio, the lead plaintiff in the Federal Litigation, and that he provided at least \$20,000 in funding to Del Rio and the other Plaintiffs to cover costs in the Federal Litigation. Shaw denies, however, that this funding was provided “pursuant to the provisions of Paragraphs 4, 4.1, or 4.2 of the 1995 Agreement.” R. 173. Del Rio denies altogether that Shaw reached an agreement to provide funding to the Federal Litigation plaintiffs (Del Rio Answer ¶14, R. 72), but this denial is inconsistent with Shaw’s Answer and his affidavit.

Shaw’s admission that he provided funding for the Federal Litigation supports the inference that Shaw reached the funding agreement contemplated by the 1995 Agreement. Therefore, the Federal Litigation Settlement Res should be distributed as required by the 1995 Agreement. At a bare minimum, Shaw’s admission that he provided funding

to Del Rio and the other Federal Litigation plaintiffs raises genuine issues of material fact as to why, and under what terms, Shaw provided such funding. Those issues of fact cannot be resolved by way of summary judgment. Rather, Plaintiffs are entitled to a full and fair opportunity to conduct discovery (including taking the depositions of Shaw and Nielson – the attorney for the Federal Litigation plaintiffs) and to have the factual issues resolved after trial on the merits.

**C. THE TRIAL COURT’S RULING.**

The trial court characterized Plaintiffs’ claims as follows:

Plaintiffs herein sued Defendants asking this Court for a declaration that the 1995 Agreement entitled them to an interest in the ten Oil Canyon Leases as well as an interest in the \$300,000.00 cash award, or in the alternative, damages consistent with the 1995 Agreement.

R. 288 (Order and Summary Judgment, ¶8). In stating that Plaintiffs were asking for a declaration that “the 1995 Agreement” alone entitled them to relief, the trial court took an overly-restrictive view of the Complaint. As to the basis for their claims, Plaintiffs alleged the existence not only of the 1995 Agreement, but also the subsequent actions taken pursuant thereto, including, without limitation, the funding provided by Shaw for the Federal Litigation pursuant to the 1995 Agreement. R. 3 (Complaint, ¶14). The allegations are also based upon the terms of the Federal Litigation settlement agreement. R. 3 (Complaint, ¶¶16, 20, and 23). Based upon all allegations, the Complaint prayed for relief in the form of a declaration of the parties’ beneficial interest in the ten Oil Canyon Leases “consistent with the Agreement” and declaration of the parties’ interests in the \$300,000 cash award “consistent with the Agreement.” R. 5 (Complaint, prayer for re-

lief). Thus, Plaintiffs did not predicate their request for declaratory relief solely upon the 1995 Agreement, but sought relief “consistent with” that Agreement based upon an entire course of conduct, including Shaw’s subsequent funding of the Federal Litigation.

The Utah Declaratory Judgment Act is to be liberally construed and administered in the interest of justice, and courts are to be indulgent in entertaining actions brought to achieve that objective. Salt Lake County v. Salt Lake City, 570 P.2d 119, 121 (Utah 1977). Furthermore, pleadings, and the necessary inferences arising therefrom, should be given a liberal construction. Harman v. Yeager, 110 P.2d 352, 354 (Utah 1941), citing Hancock v. Luke, 46 Utah 26, 148 P. 452, 455 (1915) (“Courts generally do, and always should, require the parties to proceed to the merits, if such a course is permissible, after giving the allegations and necessary inferences arising therefrom, a liberal construction and application.”) Viewed in that light, the trial court incorrectly parsed the Complaint and improperly viewed Plaintiffs’ request for declaratory relief as based solely upon the 1995 Agreement.

After thus characterizing Plaintiffs’ claim, the trial court made its single conclusion of law as follows:

The 1995 Agreement does not grant Plaintiffs herein any interest in the ten Federal Leases or the \$300,000 cash award in the Federal Action, and Plaintiffs’ claims thereunder are denied with prejudice.

R. 288 (Order and Summary Judgment, ¶9). Because the trial court did not explain its reasoning in reaching that conclusion, it is unclear whether the trial court (1) limited its analysis to its construction of the four corners of the 1995 Agreement, and ignored the

factual issue concerning whether Shaw entered into a funding agreement and provided funding, as contemplated by the 1995 Agreement, or (2) reached that factual issue and resolved it on summary judgment by determining that Shaw had not entered into such a funding agreement.<sup>11</sup> Under either scenario, the entry of summary judgment was improper.

To the extent that the trial court may have ignored the factual issue of whether Shaw entered into the funding agreement contemplated by the 1995 Agreement, the trial court focused too narrowly. Plaintiffs do not claim that the 1995 Agreement, in and of itself, grants them interests in the Oil Canyon Leases and the settlement cash proceeds. Rather, Plaintiffs rely on the 1995 Agreement and subsequent conduct in implementation thereof. Therefore, the 1995 Agreement is only the starting point, not the beginning and the end, of a proper analysis of Plaintiffs' claims. In order to determine whether Plaintiffs are entitled to beneficial interests in the Oil Canyon Leases and the cash proceeds, it is necessary to look not only at the provisions of the 1995 Agreement, but also to determine whether Shaw and the Federal Litigation plaintiffs entered into the funding agreement contemplated in paragraph 4 of the 1995 Agreement and, if so, on what terms. In focusing only on the face of the 1995 Agreement, the trial court failed to consider the fundamental issue of whether Shaw subsequently reached and performed the funding

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<sup>11</sup> The trial court granted Plaintiffs leave to amend to assert a claim against Shaw for breach of his best efforts obligation under the 1995 Agreement. R. 288-89. This suggests that the trial court may have concluded that Shaw did not, in fact, enter into the funding agreement contemplated by the 1995 Agreement. For the reasons discussed below, this issue cannot be resolved by summary judgment.



agreement contemplated by the 1995 Agreement. This incomplete analysis constitutes reversible error.

To the extent that the trial court may have reached the factual issue whether Shaw entered into the funding agreement contemplated by the 1995 Agreement, and resolved that issue by way of summary judgment, reversal similarly is required. Shaw admits in his Answer and his affidavit that he did reach an agreement to provide funding for the Federal Litigation, and that he did provide approximately \$20,000.00 to Del-Rio and the other plaintiffs in the Federal Litigation. R. 173 (Shaw Affidavit, ¶6). The facts showing that Shaw reached the funding agreement concerning the Federal Litigation and provided at least \$20,000 in funding to the Federal Litigation plaintiffs, strongly supports the inference that the funding agreement was entered into pursuant to, and contained the terms required by, the 1995 Agreement. Indeed, the 1995 Agreement required such provisions to be included in any funding agreement between Shaw and the Federal Litigation plaintiffs,<sup>12</sup> and there is no reason to believe that Shaw would provide the funding on any other terms.

Of course, in order to determine whether the provisions required by the 1995 Agreement were in fact included in the subsequent funding agreement which Shaw admits entering into and performing under, further factual inquiry is necessary. But, that is what discovery<sup>13</sup> and trial are for, and such factual issues should not have been resolved

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<sup>12</sup> And, by necessary implication, Shaw was required not to enter into a funding agreement if he could not obtain an agreement containing such required terms.

on summary judgment. See Territorial Savings & Loan Ass'n v. Baird, 781 P.2d 452, 456 n.5 (Utah Ct. App. 1989) (citations omitted) (“In granting summary judgment, a trial court must not weigh or resolve disputed evidence. The sole inquiry to be determined by the trial court is whether there is a material issue of fact to be decided.”). Thus, if the trial court’s decision were based on a factual conclusion that Shaw did not reach the funding agreement contemplated in the 1995 Agreement, the Judgment must be reversed.

Finally, after stating the conclusion that the 1995 Agreement does not grant Plaintiffs any interest in the Oil Canyon Leases or the cash proceeds from the settlement, the trial court proceeded to dismiss Plaintiffs’ claim for declaratory relief in its entirety. R. 288 (Order and Summary Judgment, ¶9)(“ . . . Plaintiffs’ claims thereunder are denied with prejudice.”). In so doing, the trial court threw out the baby with the bath water. Even if the trial court were correct that the 1995 Agreement alone did not entitle Plaintiffs to an interest in the Oil Canyon Leases and the cash settlement, this conclusion would not, and could not, resolve the issue of whether Shaw’s performance of his obligations under the 1995 Agreement by entering into the contemplated funding agreement and providing the contemplated funding for the Federal Litigation created rights in the Settlement Res. Under these circumstances the trial court prematurely dismissed Plaintiffs’ declaratory claim in its entirety.

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<sup>13</sup> As discussed in Section VI.E of this brief, Plaintiffs requested an opportunity to conduct discovery, but the trial court granted the motion for summary judgment without ruling on that request and, of course, without the benefit of the requested discovery.

**D. SHAW’S AND DEL RIO’S ARGUMENTS DO NOT SUPPORT THE ENTRY OF SUMMARY JUDGMENT.**

Although the trial court did not expressly address the various arguments made by Shaw and Del Rio in support of their Motion for Summary Judgment (the “Motion”), Plaintiffs recognize that this court is free to consider those arguments. Accordingly, Plaintiffs will discuss each of those arguments below.

Shaw’s and Del-Rio’s Motion raised five arguments: (1) the 1995 Agreement does not grant Plaintiffs any interests in the leases or cash payment; (2) paragraphs 4 and 4.1 of the 1995 Agreement are an unenforceable “agreement to agree”; (3) even if paragraphs 4 and 4.1 of the 1995 Agreement are enforceable, Plaintiffs’ interests are speculative; (4) the 1995 Agreement is too indefinite to be enforceable; and (5) even if the 1995 Agreement is enforceable, the leases awarded in the Federal Litigation are not the “additional leases” referred to in the 1995 Agreement. R. 82-217. For the reasons set forth below, those arguments are legally incorrect and/or require the resolution of disputed issues of material fact. Therefore, summary judgment should not have been granted.

**1. The Language Of The 1995 Agreement Alone Is Not The Entire Basis For Plaintiffs’ Claims.**

The Motion proceeds from the faulty premise that “[t]he claim before this Court for an interest in the federal oil and gas leases is based entirely on paragraphs 4 and 4.1 of the 1995 Agreement.” R. 92 (emphasis added). This premise is simply wrong. As noted above, Plaintiffs’ claims are based upon a combination of the provisions of the pre-existing joint venture, the 1995 Agreement, Shaw’s subsequent actions in funding the Federal Litigation, the settlement of the Federal Litigation, and the proposed distribution

of the Settlement Res. To the extent that Shaw and Del Rio argue that Plaintiffs' claims are based solely upon the face of the 1995 Agreement, they incorrectly limit the analysis. Rather, resolution of Plaintiffs' claims requires a determination of whether Shaw entered into the funding agreement contemplated by the 1995 Agreement and, if so, on what terms. This determination is inherently factual and cannot be resolved on summary judgment.

2. The 1995 Agreement Is Not Merely An Unenforceable "Agreement to Agree."

Shaw and Del Rio next argued below that Paragraphs 4 and 4.1 of the 1995 Agreement are nothing more than an unenforceable "agreement to agree". R. 92-93. This contention also is flawed. "[A]n unenforceable agreement to agree occurs when parties to a contract fail to agree on material terms of the contract 'with sufficient definiteness to be enforced.'" Utah Golf Ass'n, Inc. v. City of North Salt Lake, 2003 UT 38, ¶ 13, 79 P.3d 919, 921 (Utah 2003) (quoting Cottonwood Mall Co. v. Sine, 767 P.2d 499, 502 (Utah 1988)). On the other hand, where, as in this case, the parties have concluded their discussions and have reached agreement on all material terms, subject only to a condition precedent — here, Shaw entering into a funding agreement with the Federal Litigation plaintiffs — such an agreement is fully enforceable. See Utah Golf Ass'n, Inc., 2003 UT 38 at ¶¶ 11-14.

Paragraph 4 imposed a "best efforts" obligation on Shaw to negotiate a funding agreement with the Federal Litigation plaintiffs. Although "best efforts" obligations are

enforceable,<sup>14</sup> this clause did not — and obviously could not — mandate that such a funding agreement actually be reached with all of the Federal Litigation plaintiffs. On the other hand, Paragraphs 4 and 4.1, construed as a whole, require that if any agreement is reached, it shall provide that Plaintiffs shall be entitled to a fifty (50%) beneficial interest in any additional leases obtained as a result of the Federal Litigation. As such, Shaw’s subsequent agreement to provide funding for the Federal Litigation satisfied the condition precedent to Plaintiff’s right to a beneficial interest in the Additional Leases. See id. at ¶ 14 (internal quotes omitted).

“Conditions precedent are operative facts ‘on which the existence of some particular legal relation depends.’ Courts have long held that conditions that are indefinite but not illusory can be enforced.” Id. at ¶ 13 (citations omitted). Indeed, in the Utah Supreme Court’s decision in the Utah Golf case, the Court rejected an argument quite similar to that of Shaw and Del Rio in the present matter:

The terms of the Second Addendum created an enforceable condition precedent, not an unenforceable agreement to agree. As a condition precedent, the Second Addendum does not purport to obligate either party to enter into a twenty-year

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<sup>14</sup> First Union Nat. Bank v. Steele Software Systems Corp., 838 A.2d 404, 449 (Md. App. 2003) (“[B]est efforts clauses generally have been held enforceable because the parties intend to be bound, and there is an articulated standard”); Mor-Cor Packaging Prods., Inc. v. Innovative Packaging Corp., 328 F.3d 331, 334 (7th Cir. 2003) (whether best efforts clause is breached is a factual determination); Western Geophysical Co. of Am., Inc. v. Bolt Assocs. Inc., 584 F.2d 1164, 1169-73 (2d Cir. 1978)(construing best efforts clause); Bloor v. Falstaff Brewing Corp., 454 F. Supp. 258, 266 (D.C.N.Y. 1978) (finding breach of best efforts clause); CKB & Assocs., Inc. v. Moore McCormack Petroleum, Inc., 809 S.W.2d 577, 581-82 (Tex. App. 1991)(same); E. Allan Farnsworth, FARNSWORTH ON CONTRACTS § 7.17c, at 381 (2d ed. 1998) (best efforts clauses are no longer considered too indefinite to be enforceable).

lease. Rather, the Second Addendum provides that if the parties agreed to such a lease, the UGA would be entitled to the proceeds from the sale of the UGA Property. Both the City and the UGA are obligated only to act in good faith in negotiating the long-term lease. Under the contract, the UGA does not acquire any rights to the UGA Property in the absence of a long-term lease or bad faith behavior by the City.

Id. at ¶ 14.

In arguing that the 1995 Agreement is merely an “agreement to agree,” Shaw and Del Rio confuse the fact that Shaw would endeavor to agree to pursue discussions concerning the contemplated funding agreement with the Federal Litigation plaintiffs with the fact that Shaw’s discussions with the parties to the 1995 Agreement already were concluded. The parties to the 1995 Agreement were Shaw, Lawrence Caldwell, Jay Kirk, Steven Martens, Del-Rio, Syndicators, and Western. R. 104. In the 1995 Agreement, those parties had concluded their discussions and had memorialized their understanding in a fully-integrated, written, signed document.<sup>15</sup> R. 104-137. That the 1995 Agreement contemplated future discussions between Shaw and the Federal Litigation plaintiffs does not mean that the 1995 Agreement was merely an “agreement to agree.” Rather, it simply shows that the parties to the 1995 Agreement had reached an agreement that defined a subsequent performance required by Shaw.<sup>16</sup>

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<sup>15</sup> The 1995 Agreement contains an integration clause reciting that “This Agreement constitutes the entire agreement between the parties pertaining to the subject matter of this Agreement.” R. 113 (1995 Agreement, ¶13.2).

<sup>16</sup> Del Rio, Syndicators, Western, Kirk and Martens all were plaintiffs in the Federal Litigation. Del Rio, Syndicators and Western between them accounted for the vast majority of the cost-bearing interests in the Oil Canyon Leases. They confirmed their agreement

Shaw concedes that the 1995 Agreement sets forth his obligations, including his obligation to use his best efforts to enter into a funding agreement with the Federal Litigation plaintiffs.<sup>17</sup> R. 173 (Shaw Affidavit, ¶5). Because the 1995 Agreement contains a statement of the parties' intentions and does not leave material terms open for further discussion, it is an agreement in praesenti and is fully enforceable in accordance with its terms. The real issues in this case are whether Shaw, in fact, entered into an agreement as contemplated by the 1995 Agreement and, if so, on what terms. Shaw's admission that he provided at least \$20,000 of the funding contemplated by the 1995 Agreement strongly suggests that he did enter into a funding agreement, and there is no reason to believe that he provided the funding on any terms other than the terms required by the 1995 Agreement. However, Plaintiffs recognize that these are factual issues that cannot be resolved by summary judgment.

3. Whether A Funding Agreement Was Reached Is A Factual Issue.

Shaw and Del Rio next argued below that, although Shaw admittedly provided funding for the Federal Litigation, the funding agreement contemplated by the

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to be bound by the stated terms for the funding agreement by signing the 1995 Agreement. Most of the other plaintiffs in the Federal Litigation were overriding royalty interest owners who might not be willing to contribute to the cost of the Federal Litigation. In recognition of that fact, the 1995 Agreement used the phrase "best efforts" to describe Shaw's obligation also to attempt to reach a funding agreement with them. The 1995 Agreement does not, however, require that Shaw enter into the contemplated funding agreement with all of the Federal Litigation plaintiffs. Rather, it merely required Shaw to use his best efforts to enter into a funding agreement with as many of the Federal Litigation plaintiffs as was possible.

<sup>17</sup> Indeed, the statement of Shaw's obligations is so specific that it includes the material terms to be included in any such agreement.

1995 Agreement never was reached. R. 92. Shaw's admission that he in fact provided the funding for the Federal Litigation, as was contemplated by the 1995 Agreement, shows that he reached a funding agreement of some kind. Thus, the issues become why and under what terms Shaw provided this funding and whether that funding was provided pursuant to the 1995 Agreement. Clearly, resolution of these issues requires a factual inquiry into the pre-existing joint venture, the 1995 Agreement, Shaw's funding of the Federal Litigation expenses, the settlement of the Federal Litigation, and the proposed distribution of the Settlement Res. In part, this will include an examination of the intent of the parties. It is axiomatic that questions of intent are particularly ill-suited for resolution on summary judgment. See Records v. Briggs, 887 P.2d 864, 871 (Utah Ct. App. 1994) ("Generally, when contract interpretation will be determined by extrinsic evidence of intent, it becomes a question of fact. Accordingly, if this extrinsic evidence is disputed, then a material fact is also disputed, and summary judgment cannot be granted.") (citation omitted).

The record contains more than enough evidence demonstrating the existence of genuine issues of material fact on these points. In their Complaint, Plaintiffs alleged, inter alia, that the 1995 Agreement required Shaw to use his best efforts to reach a funding agreement with the Federal Litigation plaintiffs. R. 2-3 (Complaint, ¶11). Plaintiffs also alleged that Shaw in fact funded the Federal Litigation pursuant to such an agreement. R. 3 (Complaint, ¶14). Shaw's Answer denies that he entered into a funding agreement with the Federal Litigation plaintiffs, but admits that he provided funds for that litigation "pursuant to an agreement involving defendant Del-Rio Resources and



Shaw.” R. 12 (Shaw Answer, ¶¶13 and 14) (emphasis added). Del-Rio Resources was the lead plaintiff in the Federal Litigation, R. 343 (first paragraph), and it reasonably may be inferred, particularly for purposes of summary judgment when all inferences must be drawn in favor of the non-moving party, that Shaw’s funding to the lead plaintiff in the Federal Litigation is the funding described in the 1995 Agreement.

Shaw’s affidavit in support of the motion for summary judgment goes even further. There, Shaw states, “I subsequently provided approximately \$20,000.00 to Del-Rio Resources, Inc. and the Plaintiffs in the Del-Rio Federal Litigation to cover costs and expenses therein . . . .” R.173 (Shaw Affidavit, ¶6) (emphasis added).<sup>18</sup> Thus, between his Answer and his affidavit, Shaw admits providing funding not only to Del-Rio but also to the Federal Litigation plaintiffs.

These admissions compel the conclusion that Shaw entered into a funding agreement and provided substantial funding for the Federal Litigation pursuant to the 1995 Agreement.<sup>19</sup> After all, it cannot reasonably be argued that Shaw provided tens of

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<sup>18</sup> Interestingly, Shaw and Del Rio do not have their story straight: Del-Rio’s Answer conflicts with Shaw’s version of events, by denying altogether that Shaw provided funding for the Federal Litigation. R. 72 (Del-Rio Answer, ¶14). This conflict further illustrates the extent to which the factual record required development before summary judgment properly could have been considered.

<sup>19</sup> The argument that Shaw’s funding of Federal Litigation expenses was pursuant to an agreement with Del Rio only, and not all of the Federal Litigation plaintiffs, is a distinction without any meaning. Shaw’s payment of those expenses benefited all of the Federal Litigation plaintiffs. Del Rio was the lead plaintiff, Del Rio engaged Gerald Nielson, and Del Rio was a joint venturer with Plaintiffs. Plaintiffs were all parties to the 1995 Agreement, and Plaintiffs owned the majority interest in the Federal Litigation.

thousands of dollars<sup>20</sup> in funding for Federal Litigation expenses without having reached some kind of agreement with the plaintiffs in that litigation. At a minimum, the admissions create genuine issues of material fact. Under these circumstances, and particularly given the fact that all inferences concerning the terms and conditions of the funding agreement must be drawn in favor of Plaintiffs, summary judgment for Shaw and Del Rio clearly was improper.

Under similar circumstances, involving an alleged agreement that was not yet part of the record and in which defendant criticized plaintiff for not being able to identify with specificity the purported obligations imposed on defendant, the Utah Supreme Court ruled squarely for plaintiffs in reversing summary judgment:

The dissent relies first on the purported contract between the hospital and [Defendant], construing the presumed provisions against any duty on the part of [Defendant] for the mammography suite ventilation. Inconveniently, however, the contract is not part of the record, and we have no certain knowledge of its specific provisions. [Plaintiffs] refer only generally to [Defendant's] contract with the employer, and [Defendant] counters that [Plaintiffs] "cannot cite in the record to any alleged contract and cannot identify with specificity the purported obligations imposed on [Defendant] pursuant to this alleged contract."

The standard of review for summary judgment requires that "we view the facts and all reasonable inferences drawn therefrom in the light most favorable to the nonmoving party." Therefore, we cannot indulge in a default inference that the absent contractual provisions would support defen-

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<sup>20</sup> Shaw's affidavit says that he provided approximately \$20,000.00 of funding for the Federal Litigation. R. 173 (Shaw Affidavit, ¶ 6). When it came time to distribute the settlement cash payment, however, Shaw was to receive reimbursement for approximately \$47,765.00 in expenses. R. 345 (entry for "expenses to Dan Shaw").

dants as the dissent would have us do. Any inference must necessarily be in favor of plaintiffs as the nonmoving party. The law does not permit us to affirm summary judgment and deny plaintiffs their day in court on the basis of guesswork regarding a contract not before us.

Alder v. Bayer Corp., 2002 UT 115, ¶ 7 n.13, 61 P.3d 1068, 1076, 1077 n.13 (citations omitted).

There also is a factual issue concerning the terms under which Shaw provided the funding for the Federal Litigation. Under the 1995 Agreement, any funding agreement for the Federal Litigation was required to include the terms set forth in the 1995 Agreement. Because such provisions were mandatory in any funding agreement entered into by Shaw with respect to the payment of the Federal Litigation expenses, evidence that Shaw reached an agreement to fund the Federal Litigation also supports the inference that the funding agreement included those terms. At a minimum, again, there are factual issues as to the terms and conditions of Shaw's funding agreement with respect to the Federal Litigation expenses, and those factual issues cannot be resolved on summary judgment.

Shaw attempts to avoid this result by denying that he entered into a funding agreement "pursuant to the provisions of Paragraphs 4, 4.1, and 4.2 of the 1995 Agreement." R. 173 (Shaw Affidavit, ¶ 6)(emphasis added) Shaw does not, however, offer any explanation for why he agreed to provide the funding for the Federal Litigation contemplated by paragraph 4 of 1995 Agreement if it was not "pursuant to the provisions of paragraph 4, 4.1 and 4.2 of the 1995 Agreement." Shaw also did not explain the terms under which he provided the funding for the Federal Litigation. Given the fact

that Shaw admits providing the funding contemplated by the 1995 Agreement and the fact that the 1995 Agreement specifies the terms under which this funding would be provided, it is reasonable to infer that the funding was, in fact, provided under the terms set forth in the 1995 Agreement. At a minimum, Shaw's actions in providing the Federal Litigation plaintiffs with at least \$20,000 in funding, as contemplated by the 1995 Agreement, raises a factual issue whether the funding agreement was entered into "pursuant to" paragraphs 4, 4.1, and 4.2 of the 1995 Agreement. Shaw's unsupported statement to the contrary cannot be accepted at face value and is not dispositive for purposes of summary judgment, particularly when inferences must be drawn in favor of the non-moving party.

4. The 1995 Agreement Is Not Too Indefinite to be Enforceable.

Shaw and Del-Rio next argued below that the 1995 Agreement is too indefinite to be enforceable because there are no guidelines for determining what interest any of the Federal Litigation plaintiffs were supposed to receive under the contemplated funding agreement. R. 95-98. This argument ignores the express terms of the 1995 Agreement.

Paragraph 4.1 of the 1995 Agreement states as follows:

4.1 Any agreement between the plaintiffs and Shaw shall provide that if, as a result of the litigation, additional leases are awarded, such leases shall be assigned to Shaw (or his affiliates); provided, however, plaintiffs shall be entitled to a fifty percent (50%) beneficial interest in such additional leases. Shaw shall be the operator of such additional leases and the plaintiffs shall enter into a standard operating agreement with Shaw. If for any reason, the additional leases cannot, under the terms of any court decree or law, be put in the

name of Shaw the parties shall take such action as may be necessary to provide Shaw with a fifty percent (50%) beneficial interest in such additional leases and to enter into an operating agreement with Shaw.

R. 34 (1995 Agreement, ¶4.1). Thus, the 1995 Agreement, on its face, expressly describes the interest which the Federal Litigation plaintiffs are to receive under the funding agreement -- “a fifty percent (50%) beneficial interest in the additional leases.” Therefore, the 1995 Agreement is not indefinite, and cases like Brown’s Shoe Fit v. Olch, 955 P.2d 357 (Utah Ct. App. 1998), where material terms were completely omitted from the contract, are inapposite.

Moreover, Shaw and Del Rio cannot, and do not, contend that the term “beneficial interest” is vague. Of course, this is because Shaw himself is entitled to the other 50% beneficial interest. R. 34. Rather, Shaw and Del Rio attempt to attack paragraph 4.1 on a variety of other grounds. First, they contend that paragraphs 4 and 4.1 provide no guidelines to determine “which of the twenty-seven Federal plaintiffs was supposed to enter into the funding agreement with Shaw.”<sup>21</sup> R. 95. This is not true. Paragraph 4 of the 1995 Agreement states that Shaw shall use his best efforts to enter into the funding agreement with “the plaintiffs of such lawsuit.” R. 107. The plaintiffs in the

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<sup>21</sup> Shaw’s and Del Rio’s repeated references to “27” Federal Litigation plaintiffs improperly suggests that there was a large number of active plaintiffs. Del Rio was the lead plaintiff, and most of the other plaintiffs in the Federal Litigation had assigned, or had agreed to assign, their interests to Del Rio. R. 165-168 (Decker Affidavit, ¶9; 343-350 (Proposed Settlement Asset Distribution, fourth paragraph: “In general, the majority of the leases will eventually be returned to Del Rio Drilling Programs.”)).

Federal Litigation are identified in the Complaint in that case. R. 138. Thus, there is no ambiguity with respect to the identity of the parties.<sup>22</sup>

The 1995 Agreement does not require that Shaw enter into a funding agreement with all of the Federal Litigation plaintiffs. Given the different interests claimed by the various Federal Litigation plaintiffs, it is reasonable to assume that the parties to the 1995 Agreement recognized that it might not be possible to reach agreement with all of the Federal Litigation plaintiffs. That would explain why Shaw was required by the 1995 Agreement only to use his “best efforts” to reach the contemplated funding agreement, rather than to make such an agreement with all of the Federal Litigation plaintiffs an absolute condition.

Even if the 1995 Agreement somehow were read as requiring Shaw to enter into a funding agreement with all of the Federal Litigation plaintiffs, this also would not justify the entry of summary judgment. Shaw could satisfy such a requirement by entering into an agreement with Nielson, the attorney for the Federal Litigation plaintiffs, who apparently received the funds advanced by Shaw, or with Del Rio, who was the lead plaintiff in the Federal Litigation. Either way, the funds would be provided to the plaintiffs in the Federal Litigation as contemplated in the 1995 Agreement. Shaw admits both that he entered into a funding agreement with the lead plaintiff in the Federal Litigation and also that he provided funding to Del-Rio and “the Plaintiffs in the Federal Litigation.

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<sup>22</sup> If Shaw and Del Rio are arguing that the term “the plaintiffs” as used in the 1995 Agreement somehow is ambiguous, then extrinsic evidence would be required to establish the intent of the parties. Summary judgment also is improper for that reason.

R. 173 (Shaw Affidavit, ¶6). Thus, it is clear that Shaw did exactly what the parties intended: he entered into a funding agreement with, and provided funding to, “the Plaintiffs in the Federal Litigation.” *Id.* Again, if somehow there is doubt as to what was intended by the 1995 Agreement or what Shaw did in furtherance thereof, that doubt may be resolved only after discovery and a full and fair trial on the merits, not by way of summary judgment on the basis of an incomplete record.

Shaw and Del Rio next argued below that there are no guidelines to determine what type of interest or how much of an interest any of the Federal Litigation plaintiffs were to have received. R. 95. In this respect, Shaw and Del Rio contend that the 1995 Agreement does not specify whether “all twenty-seven Federal plaintiffs were going to receive equal interests or unequal interests.” *Id.* Again, this argument ignores the plain language of the 1995 Agreement which says that if, as a result of the litigation, additional leases are awarded, such leases shall be assigned to Shaw (or his affiliates); provided, however, plaintiffs shall be entitled to a fifty percent (50%) beneficial interest in such additional leases. R. 107 (1995 Agreement, ¶4.1). The interests of the Federal Litigation plaintiffs were specified in the pleadings in the Federal Litigation. Pursuant to the 1995 Agreement, Shaw, Del Rio and Plaintiffs agreed that whatever a party received “as a result of the litigation,” such party would assign 100% to Shaw, and such party would be entitled to fifty percent of such interest. Thus, the 1995 Agreement and the pleadings in the Federal Litigation, taken together, provide guidance on the extent of the interests in the leases and how they will be owned. Paragraph 4.1 does not fail for

indefiniteness, and Plaintiffs are entitled to enforce their interests as tenants in common at a minimum.

Shaw and Del Rio also argued below that the “best efforts” provision of the 1995 Agreement adds another layer of indefiniteness. R. 96. This argument, however, confuses the provisions of Paragraph 4 with the provisions of Paragraph 4.1. Paragraph 4 contains the term “best efforts”; Paragraph 4.1 does not. The term “best efforts” applies only to the effort required of Shaw to obtain a funding agreement. Upon reaching a funding agreement as contemplated by the 1995 Agreement, Shaw has discharged the “best efforts” obligation. Thus, the “best efforts” term has no bearing on how the beneficial interest in the leases will be apportioned. The term cannot be used to support the trial court’s entry of summary judgment in favor of Shaw and Del Rio.

Shaw and Del Rio also argued that the 1995 Agreement is unenforceable because not all of the Federal Litigation plaintiffs were parties to the 1995 Agreement and, therefore, that the parties to the 1995 Agreement had no authority to bind the other Federal Litigation plaintiffs. R. 97. This is a non sequitur, and, again, Shaw and Del Rio miss the point. Plaintiffs do not contend that the 1995 Agreement binds all of the Federal Litigation plaintiffs.<sup>23</sup> The 1995 Agreement merely requires Shaw to use his best efforts

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<sup>23</sup> Plaintiffs maintain that the 1995 Agreement binds at least those Federal Litigation plaintiffs who were parties to the 1995 Agreement, i.e. Del Rio and Plaintiffs, who already had confirmed their assent to the terms thereof by signing the 1995 Agreement. Del Rio, also, was a joint venturer with Syndicators and Western. (R. 31-32, 138-158 and 293). Therefore, any agreement Del Rio entered into with Shaw was on behalf of the joint venture, and Del Rio had fiduciary duties on behalf of the joint venture, including a duty of loyalty not to act in a manner inconsistent with the joint venture’s interests.



to reach a funding agreement with the Federal Litigation plaintiffs. To the extent that Shaw entered into the contemplated funding agreement, the parties to that agreement would be bound. As noted above, the facts establish that Shaw did in fact enter into and performed under the funding agreement contemplated by the 1995 Agreement. The exact terms of, and parties to, the funding agreement are factual issues that cannot be resolved by summary judgment.

Shaw and Del Rio further argued that Plaintiffs concede the unenforceability of the 1995 Agreement in the form of attorney's letters issued during the negotiation of that agreement. Those letters contained certain cautionary statements concerning the enforceability of an "agreement to agree" and a "best efforts" obligation.<sup>24</sup> R. 98. This argument raises another red herring. As demonstrated above, the 1995 Agreement was not an "agreement to agree." Furthermore, Plaintiffs contend that Shaw in fact performed the questioned obligations by reaching an agreement for, and providing funding to, the Federal Litigation. Therefore, the referenced letters are inconsequential.<sup>25</sup>

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<sup>24</sup> The letters in question merely provided conservative legal advice to Plaintiffs from their attorney and do not constitute admissions by Plaintiffs.

<sup>25</sup> Moreover, Plaintiffs do not seek a "better deal" than they bargained for in the 1995 Agreement, but seek only to enforce the interests expressly described therein. It is Shaw and Del Rio who are trying to change the deal: by disclaiming the express terms of the 1995 Agreement now that the Federal Litigation has borne fruit. Indeed, Shaw's and Del Rio's argument here is tantamount to an admission of fraud in the inducement: that they entered into the 1995 Agreement expressly agreeing to performance which they apparently then viewed as unenforceable and did not intend to discharge. Such deceitful behavior should not be rewarded.

5. The Oil Canyon Leases Are “Additional Leases” As That Term Is Used In The 1995 Agreement.

Shaw and Del Rio’s final argument below was that Plaintiffs have no interests in the ten Oil Canyon Leases that were reinstated and extended as a result of the settlement of the Federal Litigation because “as a matter of law, those leases are not the ‘additional leases’ contemplated by paragraph 4.1 of the 1995 Agreement.” R. 100-102. Shaw and Del Rio are incorrect. Again, they would have the court accept argument about the meaning of the 1995 Agreement in lieu of full development and determination of the facts at trial.

The term “additional leases” is not defined in the 1995 Agreement. Therefore, unless the term is clear and unambiguous, the court must resort to evidence of the intention of the parties to determine the meaning of the term. The court cannot resolve that factual issue on summary judgment. See Records, 887 P.2d at 871. Shaw and Del Rio baldly assert that the term “additional leases” can only refer to leases that may have been awarded “*in addition to the leases that the Federal plaintiffs already held . . .*” R. 100. The obvious flaw in this argument is that, at the time the 1995 Agreement was signed, the Federal Litigation plaintiffs did not hold the Oil Canyon Leases. Rather, those leases admittedly had expired. R. 167 (Affidavit of Sandra Becker, ¶8)<sup>26</sup> The Federal Litigation plaintiffs sought only monetary relief in a court of limited jurisdiction -- the United States Claims Court – i.e. damages in excess of \$17,000,000 representing the

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<sup>26</sup> Ironically, the Becker affidavit was offered in support of Shaw and Del Rio’s motion for summary judgment.

value of the lost Oil Canyon Leases, R. 156-157 (Federal Litigation Second Amended Complaint, ¶8), rather than bringing suit elsewhere for injunctive relief or specific performance of active leases. If the Federal Litigation plaintiffs still held valid Oil Canyon Leases, their allegations in the Federal Litigation were without foundation.<sup>27</sup> In other words, Shaw and Del Rio are changing their position here solely to avoid obligations to Plaintiffs.

Significantly, the leases had expired and the Federal Litigation was filed, before the parties executed the 1995 Agreement. The parties to the 1995 Agreement were operating on the understanding that the Oil Canyon Leases had expired, and the terms used in the 1995 Agreement must be read in the context of that understanding. Furthermore, the parties to the 1995 Agreement assigned all of their rights in the existing leases (i.e. the Flat Rock Leases) to Shaw as a result of the 1995 Agreement. As a result, the term “additional leases” in the 1995 Agreement must be viewed as referring to any other leases awarded as a result of the Federal Litigation, including the “reinstated” Oil Canyon Leases.<sup>28</sup>

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<sup>27</sup> Shaw and Del Rio also argue that “of the parties to the 1995 Agreement, only Syndicators Inc. and Del-Rio Resources’ subsidiary Del-Rio Drilling owned interests in the Ten Leases.” R. 101. The argument flies in the face of Shaw’s and Del Rio’s contention that the Oil Canyon Leases were not “additional” leases, as that term is used in the 1995 Agreement. If Syndicators, Inc. were the only party to the 1995 Agreement which allegedly already owned interests in the ten leases, then, such leases, by necessary implication, were “additional leases” to the other parties to the 1995 Agreement.

<sup>28</sup> Plaintiffs’ interpretation of the phrase “additional leases” finds further support in the language used in the proposed distribution of the Federal Litigation Settlement Res. There, Del Rio referred to the leases resulting from the Federal Litigation as “returned”

Even if Shaw and Del Rio dispute this interpretation, the point is that the record reasonably supports more than one interpretation of the term “additional leases” as used in the 1995 Agreement. As such, that term is not clear and unambiguous on its face, and the contract may not be construed as a matter of law as Shaw and Del Rio contend. R. 101. Rather, resort must be had to extrinsic evidence of the intent of the parties, and all inferences must be drawn in favor of the non-moving party. Summary judgment was improperly entered. See Records, 887 P.2d at 871.

Shaw and Del Rio concluded below with the fallacious argument that because Gerald Nielson, the attorney for the plaintiffs in the Federal Litigation, claimed a 25% contingent interest in the “proceeds and results of the Del Rio Federal Litigation,” (R. 171) (Nielson Affidavit, ¶7), the parties to the 1995 Agreement could not have reached an agreement for the leases to be assigned to Shaw, subject to a 50% beneficial interest in favor of the Federal Litigation plaintiffs. This argument does not follow.

First, there is ambiguity as to what interest Nielson actually may have in the “proceeds and results of the Del Rio Federal Litigation.” Although Nielson supplied a conclusory affidavit asserting a purported interest, he did not place a written contingent fee agreement before the trial court.<sup>29</sup> Furthermore, Nielson’s affidavit does not ex-

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leases. R. 343 (fourth paragraph: “The first asset is the value of the returned leases themselves.”). If the Federal Litigation plaintiffs already held the leases, those leases would not have had to be returned. Conversely, if those leases were being returned, then, by necessary implication, they were leases which had been taken away from and were no longer owned by the Federal Litigation plaintiffs. In other words, the returned leases were “additional” leases to the Federal Litigation plaintiffs.

pressly refer to the Oil Canyon Leases or describe any specific interest in such leases. Thus, the true nature and extent of Nielson's claimed interest in the leases is uncertain.

Second, even if Nielson had a claim to some interest in the Oil Canyon Leases resulting from the Federal Litigation, that interest does not preclude an assignment of the Oil Canyon Leases to Shaw. It merely means that the assignment, and the 50% beneficial interest in the Federal Litigation plaintiffs, would be subject to any interest owned by Nielson. In other words, the fact that Nielson may have an interest in the leases does not mean that Plaintiffs do not. At most, it means that Plaintiffs' beneficial interest may be burdened by any proper interest claimed by Nielson.

In sum, the farther one goes into examination of Shaw's and Del Rio's arguments in favor of summary judgment, the clearer it becomes that those arguments depend upon semantics, conjecture, and disputed facts. A motion for summary judgment should be granted only in a clear case and not in the face of uncertainty as to the existence and content of agreements and the intentions of the parties thereto. On this record, there can be no doubt that numerous factual issues exist which must be, but were not, properly resolved before the validity of Plaintiffs' claims may be determined. Accordingly, the trial court erred in disposing of the case on summary judgment.

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<sup>29</sup> Plaintiffs here assume, for purposes of this argument only, the existence of a written contingency fee agreement. If, as appears to be the case, Nielson is relying on an oral contingent fee agreement, there are serious questions concerning the enforceability of that agreement.

**E. THE TRIAL COURT ERRED IN ENTERING SUMMARY JUDGMENT WITHOUT ALLOWING PLAINTIFFS TO DEPOSE SHAW AND MR. NIELSON.**

In support of their Motion for Summary Judgment, Shaw and Del Rio submitted the affidavits of Shaw and Gerald Nielson, the attorney who represented all of the Federal Litigation plaintiffs. R. 169-174. These affidavits raise more questions than they answer. Therefore, Plaintiffs' counsel filed an affidavit pursuant to U.R.C.P. 56(f) requesting an opportunity to depose Shaw and Nielson prior to a ruling on the motion.<sup>30</sup> R. 246. The trial court never responded to that request but, instead, granted the motion for summary judgment without allowing Plaintiffs to conduct the requested discovery. The trial court thus effectively denied Plaintiffs' request, and such denial constitutes an abuse of discretion and reversible error. See Section II.B. supra.

Had Plaintiffs been allowed to conduct the requested depositions, Plaintiffs would have been able to discover additional facts demonstrating that entry of summary judgment would be improper. For example, in his affidavit, Shaw admits that he provided approximately \$20,000 in funding for the Federal Litigation, but he then denies that the funding agreement into which he entered was entered into "pursuant to paragraphs 4, 4.1

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<sup>30</sup> Shaw and Del Rio filed their joint motion for summary judgment on August 2, 2002, R. 223-226, even before Plaintiffs' Reply to Shaw's Counterclaim was filed on August 7, 2002. R. 227-232. The briefing on the motion for summary judgment ensued, and, on September 20, 2002, the same day they filed their Reply on the motion for summary judgment, Shaw and Del Rio filed their Notice to Submit for Decision asserting that the motion for summary judgment was ready for decision. R. 274-276. The trial court immediately set the hearing on the motion for summary judgment. R. 277-278. Thus, the motion for summary judgment moved rapidly to decision, and Plaintiffs did not have an opportunity to conduct discovery before disposition of the motion.

and 4.2 of the 1995 Agreement.” R. 173 (Shaw Affidavit at ¶6). Shaw does not explain why, or under what terms, he provided this funding for the Federal Litigation if it was not pursuant to the 1995 Agreement. Thus, Shaw’s affidavit cannot be viewed as providing the trial court with the entire facts concerning the funding agreement. Had Plaintiffs been allowed to depose Shaw and Mr. Nielson, who apparently received the funding from Shaw,<sup>31</sup> they would have been able to discover, and provide the trial court with, the rest of the story concerning this mysterious funding agreement.

In paragraph 7 of his Affidavit, Shaw also states:

No leasehold interests in the ten Federal Leases have been assigned to me or to any entities controlled or owned by me as a result of the settlement of the Del-Rio Federal Litigation or under the terms of the 1995 Agreement.

R. 174. There is substantial reason to doubt the accuracy of this statement. For example, Plaintiffs later discovered that, in conjunction with the execution of the 1995 Agreement, Shaw signed a subscription agreement pursuant to which he agreed to purchase 400,000 shares of Del Rio. Did Shaw own or control Del Rio? Additionally, Plaintiffs have learned that up until they filed their Complaint in this action on July 19, 2001, Shaw was agreeing to contribute the Oil Canyon Leases to a joint venture Shaw was pursuing with Wind River Resources Corporation.<sup>32</sup> Indeed, as late as July 18, 2001, Shaw and Wind

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<sup>31</sup> Notably, Nielson’s affidavit is silent concerning Shaw’s funding agreement with the Federal Litigation plaintiffs. R. 169-171. This is yet another example of the way in which Shaw and Del Rio failed to tell the whole story: Nielson, as attorney for the Federal Litigation plaintiffs, surely has relevant knowledge and information concerning the nature and extent of Shaw’s funding agreement with the Federal Litigation plaintiffs.

River were exchanging documents that called for Shaw, acting through one of his companies, to contribute the Oil Canyon Leases to the joint venture. Important questions need to be answered. How could Shaw agree to contribute the Oil Canyon Leases to this proposed joint venture if neither he nor any of his companies owned any interest in them? Why was it only after Plaintiffs filed this suit that Shaw suddenly claimed no interest in the Oil Canyon Leases? Why would Shaw disclaim an interest in valuable leases except in an attempt to defeat Plaintiffs' interests and thereby enlarge his own? Even after Shaw filed his affidavit in this case, why did Shaw continue to pay PGB to do curative title work regarding the Oil Canyon Leases if neither he nor any of his companies owned any interest in them? These, and other, questions can only be answered by allowing Plaintiffs to depose Shaw, Nielson, and perhaps representatives of Del Rio.

Shaw and Del Rio cannot be allowed to hide the ball by submitting incomplete and ambiguous affidavits. Plaintiffs are entitled to pursue the discovery necessary to determine the whole truth, and it was reversible error for the trial court to enter summary judgment against Plaintiffs without allowing them to conduct the requested discovery.

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<sup>32</sup> Wind River Resources Corporation ("Wind River") was owned and controlled by Thomas Bachtell and other attorneys at Pruitt, Gushee & Bachtell ("PGB"), the law firm that represented Shaw in the trial court. Thus, there is no doubt that Shaw's attorneys knew that Shaw's affidavit, at best, did not contain the whole truth.



## VII. CONCLUSION

For the reasons set forth above, the Judgment should be reversed, and this matter should be returned to the trial court for discovery and trial.

Respectfully submitted this 25<sup>th</sup> day of February, 2004.

SNOW, CHRISTENSEN & MARTINEAU

By: 

Max D. Wheeler

Rex E. Madsen

Keith E. Call

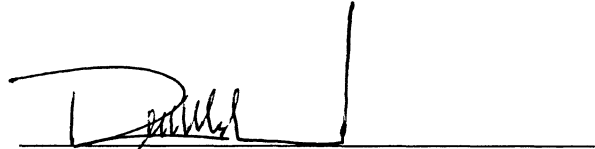
## CERTIFICATE OF MAILING

The undersigned hereby certifies that on the 25 day of February, 2004, a true and correct copy of the foregoing Appellants' Brief was placed in the U.S. mail, postage prepaid, addressed to the following:

Dan K. Shaw  
630 Trade Center Drive  
Las Vegas, Nevada 89119

Del-Rio Resources, Inc.  
c/o Gerald Nielson, Esq.  
3737 Honeycutt Road  
Salt Lake City, Utah 84106

Donald L. Dalton  
Dalton & Kelley  
Post Office Box 58084  
Salt Lake City, Utah 84158

A handwritten signature in black ink, appearing to read "D. Dalton", is written over a horizontal line.

# ADDENDUM

Tab A

trial juror in the trial of a civil action. Such objections must be heard and disposed of by the court in the same manner as a motion.

## PART VII. JUDGMENT

### Rule 54. Judgments; costs.

(a) *Definition; form.* "Judgment" as used in these rules includes a decree and any order from which an appeal lies. A judgment need not contain a recital of pleadings, the report of a master, or the record of prior proceedings.

(b) *Judgment upon multiple claims and/or involving multiple parties.* When more than one claim for relief is presented in an action, whether as a claim, counterclaim, cross-claim, or third-party claim, and/or when multiple parties are involved, the court may direct the entry of a final judgment as to one or more but fewer than all of the claims or parties only upon an express determination by the court that there is no just reason for delay and upon an express direction for the entry of judgment. In the absence of such determination and direction, any order or other form of decision, however designated, which adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties shall not terminate the action as to any of the claims or parties, and the order or other form of decision is subject to revision at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all the parties.

(c) *Demand for judgment.*

(c)(1) *Generally.* Except as to a party against whom a judgment is entered by default, every final judgment shall grant the relief to which the party in whose favor it is rendered is entitled, even if the party has not demanded such relief in his pleadings. It may be given for or against one or more of several claimants; and it may, when the justice of the case requires it, determine the ultimate rights of the parties on each side as between or among themselves.

(c)(2) *Judgment by default.* A judgment by default shall not be different in kind from, or exceed in amount, that specifically prayed for in the demand for judgment.

(d) *Costs.*

(d)(1) *To whom awarded.* Except when express provision therefor is made either in a statute of this state or in these rules, costs shall be allowed as of course to the prevailing party unless the court otherwise directs; provided, however, where an appeal or other proceeding for review is taken, costs of the action, other than costs in connection with such appeal or other proceeding for review, shall abide the final determination of the cause. Costs against the state of Utah, its officers and agencies shall be imposed only to the extent permitted by law.

(d)(2) *How assessed.* The party who claims his costs must within five days after the entry of judgment serve upon the adverse party against whom costs are claimed, a copy of a memorandum of the items of his costs and necessary disbursements in the action, and file with the court a like memorandum thereof duly verified stating that to affiant's knowledge the items are correct, and that the disbursements have been necessarily incurred in the action or proceeding. A party dissatisfied with the costs claimed may, within seven days after service of the memorandum of costs, file a motion to have the bill of costs taxed by the court in which the judgment was rendered.

A memorandum of costs served and filed after the verdict, or at the time of or subsequent to the service and filing of the findings of fact and conclusions of law, but before the entry of judgment, shall nevertheless be considered as served and filed on the date judgment is entered.

(d)(3) [Deleted.]

(d)(4) [Deleted.]

(e) *Interest and costs to be included in the judgment.* The clerk must include in any judgment signed by him any interest on the verdict or decision from the time it was rendered, and the costs, if the same have been taxed or ascertained. The clerk must, within two days after the costs have been taxed or ascertained, in any case where not included in the judgment, insert the amount thereof in a blank left in the judgment for that purpose, and make a similar notation thereof in the register of actions and in the judgment docket.

### Rule 55. Default.

(a) *Entry.* When a party against whom a judgment for affirmative relief is sought has failed to plead or otherwise defend as provided by these rules and that fact is made to appear the clerk shall enter the default of that party.

(b) *Judgment.* Judgment by default may be entered as follows:

(b)(1) *By the clerk.* Upon request of the plaintiff the clerk shall enter judgment for the amount claimed and costs against the defendant if:

(b)(1)(A) the default of the defendant is for failure to appear;

(b)(1)(B) the defendant is not an infant or incompetent person;

(b)(1)(C) the defendant has been personally served pursuant to Rule 4(d)(1); and

(b)(1)(D) the claim against the defendant is for a sum certain or for a sum that can be made certain by computation.

(b)(2) *By the court.* In all other cases the party entitled to a judgment by default shall apply to the court therefor. If, in order to enable the court to enter judgment or to carry it into effect, it is necessary to take an account or to determine the amount of damages or to establish the truth of any averment by evidence or to make an investigation of any other matter, the court may conduct such hearings or order such references as it deems necessary and proper.

(c) *Setting aside default.* For good cause shown the court may set aside an entry of default and, if a judgment by default has been entered, may likewise set it aside in accordance with Rule 60(b).

(d) *Plaintiffs, counterclaimants, cross-claimants.* The provisions of this rule apply whether the party entitled to the judgment by default is a plaintiff, a third-party plaintiff, or a party who has pleaded a cross-claim or counterclaim. In all cases a judgment by default is subject to the limitations of Rule 54(c).

(e) *Judgment against the state or officer or agency thereof.* No judgment by default shall be entered against the state of Utah or against an officer or agency thereof unless the claimant establishes his claim or right to relief by evidence satisfactory to the court.

### Rule 56. Summary judgment.

(a) *For claimant.* A party seeking to recover upon a claim, counterclaim or cross-claim or to obtain a declaratory judgment may, at any time after the expiration of 20 days from the commencement of the action or after service of a motion for summary judgment by the adverse party, move with or without supporting affidavits for a summary judgment in his favor upon all or any part thereof.

(b) *For defending party.* A party against whom a claim, counterclaim, or cross-claim is asserted or a declaratory judgment is sought, may, at any time, move with or without supporting affidavits for a summary judgment in his favor as to all or any part thereof.

(c) *Motion and proceedings thereon.* The motion, memoranda and affidavits shall be filed and served in accordance

with CJA 4-501. The judgment sought shall be rendered if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

(d) *Case not fully adjudicated on motion.* If on motion under this rule judgment is not rendered upon the whole case or for all the relief asked and a trial is necessary, the court at the hearing of the motion, by examining the pleadings and the evidence before it and by interrogating counsel, shall if practicable ascertain what material facts exist without substantial controversy and what material facts are actually and in good faith controverted. It shall thereupon make an order specifying the facts that appear without substantial controversy, including the extent to which the amount of damages or other relief is not in controversy, and directing such further proceedings in the action as are just. Upon the trial of the action the facts so specified shall be deemed established, and the trial shall be conducted accordingly.

(e) *Form of affidavits; further testimony; defense required.* Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits. When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him.

(f) *When affidavits are unavailable.* Should it appear from the affidavits of a party opposing the motion that he cannot for reasons stated present by affidavit facts essential to justify his opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

(g) *Affidavits made in bad faith.* Should it appear to the satisfaction of the court at any time that any of the affidavits presented pursuant to this rule are presented in bad faith or solely for the purpose of delay, the court shall forthwith order the party employing them to pay to the other party the amount of the reasonable expenses which the filing of the affidavits caused him to incur, including reasonable attorney's fees, and any offending party or attorney may be adjudged guilty of contempt.

#### Rule 57. Declaratory judgments.

The procedure for obtaining a declaratory judgment pursuant to Chapter 33 of Title 78, U.C.A. 1953, shall be in accordance with these rules, and the right to trial by jury may be demanded under the circumstances and in the manner provided in Rules 38 and 39. The existence of another adequate remedy does not preclude a judgment for declaratory relief in cases where it is appropriate. The court may order a speedy hearing of an action for a declaratory judgment and may advance it on the calendar.

#### Rule 58A. Entry.

(a) *Judgment upon the verdict of a jury.* Unless the court otherwise directs and subject to the provisions of Rule 54(b),

judgment upon the verdict of a jury shall be forthwith signed by the clerk and filed. If there is a special verdict or a general verdict accompanied by answers to interrogatories returned by a jury pursuant to Rule 49, the court shall direct the appropriate judgment which shall be forthwith signed by the clerk and filed.

(b) *Judgment in other cases.* Except as provided in Subdivision (a) hereof and Subdivision (b)(1) of Rule 55, all judgments shall be signed by the judge and filed with the clerk.

(c) *When judgment entered; notation in register of actions and judgment docket.* A judgment is complete and shall be deemed entered for all purposes, except the creation of a lien on real property, when the same is signed and filed as herein above provided. The clerk shall immediately make a notation of the judgment in the register of actions and the judgment docket.

(d) *Notice of signing or entry of judgment.* A copy of the signed judgment shall be promptly served by the party preparing it in the manner provided in Rule 5. The time for filing a notice of appeal is not affected by the requirement of this provision.

(e) *Judgment after death of a party.* If a party dies after a verdict or decision upon any issue of fact and before judgment, judgment may nevertheless be rendered thereon.

(f) *Judgment by confession.* Whenever a judgment by confession is authorized by statute, the party seeking the same must file with the clerk of the court in which the judgment is to be entered a statement, verified by the defendant, to the following effect:

(f)(1) If the judgment to be confessed is for money due or to become due, it shall concisely state the claim and that the sum confessed therefor is justly due or to become due;

(f)(2) If the judgment to be confessed is for the purpose of securing the plaintiff against a contingent liability, it must state concisely the claim and that the sum confessed therefor does not exceed the same;

(f)(3) It must authorize the entry of judgment for a specified sum.

The clerk shall thereupon endorse upon the statement, and enter in the judgment docket, a judgment of the court for the amount confessed, with costs of entry, if any.

#### Rule 58B. Satisfaction of judgment.

(a) *Satisfaction by owner or attorney.* A judgment may be satisfied, in whole or in part, as to any or all of the judgment debtors, by the owner thereof, or by the attorney of record of the judgment creditor where no assignment of the judgment has been filed and such attorney executes such satisfaction within eight years after the entry of the judgment, in the following manner: (1) by written instrument, duly acknowledged by such owner or attorney; or (2) by acknowledgment of such satisfaction signed by the owner or attorney and entered on the docket of the judgment in the county where first docketed, with the date affixed and witnessed by the clerk. Every satisfaction of a part of the judgment, or as to one or more of the judgment debtors, shall state the amount paid thereon or for the release of such debtors, naming them.

(b) *Satisfaction by order of court.* When a judgment shall have been fully paid and not satisfied of record, or when the satisfaction of judgment shall have been lost, the court in which such judgment was recovered may, upon motion and satisfactory proof, authorize the attorney of the judgment creditor to satisfy the same, or may enter an order declaring the same satisfied and direct satisfaction to be entered upon the docket.

(c) *Entry by clerk.* Upon receipt of a satisfaction of judgment, duly executed and acknowledged, the clerk shall file the same with the papers in the case, and enter it on the register

Tab B

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Lyn

By \_\_\_\_\_  
Deputy Clerk

A. John Davis (#0825)  
Shawn T. Welch (#7113)  
PRUITT, GUSHEE & BACHTELL  
1850 Beneficial Life Tower  
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Salt Lake City, Utah 84101  
Telephone: (801) 534-1700  
Attorneys for Del-Rio Resources, Inc.

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

---

WESTERN UNITED MINES, :  
INC. a Utah corporation, :  
SYNDICATORS, INC., a Utah :  
corporation, J.R. KIRK, JR., an :  
individual, and STEVEN D. :  
MARTENS, an individual, :  
Plaintiffs, :

vs. :

DAN K. SHAW, an individual, :  
and DEL-RIO RESOURCES, :  
INC., a Utah corporation, :  
Defendants. :

:

:

ORDER AND  
SUMMARY JUDGMENT

Case No. 010906368  
Judge Roger A. Livingston



The Court heard oral argument on Defendants Dan K. Shaw's and Del-Rio Resources, Inc.'s Joint Motion for Summary Judgment on October 28, 2002 in Salt Lake City, Utah. Thomas A. Karrenberg appeared on behalf of Defendant Del-Rio Resources, Inc.; A. John Davis and Shawn T. Welch appeared on behalf of Defendant Dan K. Shaw; and Donald L. Dalton appeared on behalf of Plaintiffs Western United Mines, Inc., Syndicators, Inc., J.R. Kirk, Jr., and Steven D. Martens. The Court, having reviewed the Defendants' Joint Memorandum in Support of its Motion for Summary Judgment, Plaintiffs' Memorandum in Opposition and Defendants' Joint Reply Memorandum, and having heard counsel's oral arguments, hereby makes the following findings of fact, conclusions of law and order of partial summary judgment in favor of Defendants Shaw and Del-Rio Resources.

### **ORDER AND SUMMARY JUDGMENT**

1. This action concerns an agreement dated May 12, 1995 (the "1995 Agreement"), wherein defendant Del-Rio Resources, Inc. and Plaintiffs assigned certain oil and gas leases to defendant Shaw in settlement of a debt owed to defendant Shaw.

2. Paragraphs 4 through 4.2 of the 1995 Agreement reference a lawsuit then pending in the United States Court of Claims involving a claim for money damages relating to certain oil and gas leases. The case was styled *Del-Rio Drilling Programs, Inc., et al. vs. United States*, Case No. 569-86L (hereinafter the "Federal Action").

The Plaintiffs in the Federal Action included the Plaintiffs herein, Defendant Del-Rio Resources and some 22 other individuals and entities (the "Federal Plaintiffs").

3. The oil and gas leases at issue in the Federal Action consisted of ten Federal oil and gas leases identified as follows: U-6610, U-6612, U-6632, U-6634, U-10162, U-10163, U-10164, U-10165, U-1876, and U-27043 ("Federal Leases").

4. Paragraph 4 of the 1995 Agreement references the "various individuals and companies" who were plaintiffs in the Federal Action, and provides:

As additional consideration for Del Rio, Western, Syndicators, Kirk Caldwell and Martens entering into this Agreement, Shaw shall use his best efforts to enter into an agreement with the plaintiffs of such lawsuit to provide a maximum of thirty thousand dollars (\$30,000.00) to fund certain future expenses incurred by plaintiffs in such litigation. . . .

5. Paragraph 4.1 of the 1995 Agreement provides, in relevant part: "Any agreement between the Plaintiffs and Shaw shall provide that if, as a result of the litigation, additional leases are awarded, such leases shall be assigned to Shaw (or his affiliates); provided, however, plaintiffs shall be entitled to a 50% beneficial interest in such additional leases."

6. Paragraph 4.2 of the 1995 Agreement provides, in relevant part:

Any agreement between plaintiff(s) and Shaw shall provide that, as a result of the litigation, a cash settlement is awarded to plaintiffs, Shaw shall be reimbursed for all expenses of litigation paid by Shaw and the balance of the proceeds shall be delivered free and clear of the claims of Shaw, to plaintiffs as damages and for payment of other expenses and costs of the litigation.

7. The Federal Action was resolved by a Settlement Agreement dated March 13, 2001, which stated that the terms of the ten Federal Leases at issue in the Federal Action were deemed “tolled” during the pendency of the Federal Action and were extended for three years from the date of settlement. In addition, the United States Bureau of Land Management agreed to pay the Federal Plaintiffs \$300,000.00 in damages.

8. Plaintiffs herein sued Defendants asking this Court for a declaration that the 1995 Agreement entitled them to an interest in the ten Federal Leases as well as an interest in the \$300,000.00 cash award, or in the alternative, damages consistent with the 1995 Agreement.

9. The 1995 Agreement does not grant Plaintiffs herein any interest in the ten Federal Leases or the \$300,000 cash award in the Federal Action, and Plaintiffs’ claims thereunder are denied with prejudice.

NOW, THEREFORE, IT IS HEREBY ORDERED, ADJUDGED AND DECREED THAT:

1. Defendants Dan K. Shaw and Del-Rio Resources, Inc.’s Joint Motion For Summary Judgment Against Plaintiffs is hereby granted.

2. The Court hereby grants Plaintiffs leave to amend Plaintiffs’ Complaint herein to state a claim for damages against defendant Dan K. Shaw for breach of the “best efforts to enter into an agreement” provision in Paragraph 4 of the 1995

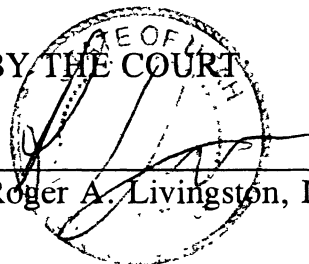
settlement. In granting such right to amend, the Court in no way rules as to the merit of Plaintiffs' claim. Plaintiffs shall file such amendment within ten days of the entry of this Order and Judgment.

3. Each party shall bear its respective costs herein.

**RULE 54(b) CERTIFICATION OF FINAL JUDGMENT**

Consistent with Rule 54(b) of the Utah Rules of Civil Procedure, the Court hereby directs entry of the above order and judgment as final judgment. In directing a final judgment as to same, the Court specifically and expressly finds that there is no just reason for delay and that judgment shall be and is final as to the above-referenced matters.

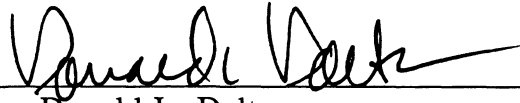
Dated this 14<sup>th</sup> day of November, 2002.

BY THE COURT  



Roger A. Livingston, District Court Judge

Approved as to Form:

DALTON & KELLEY

By:   
Donald L. Dalton  
Attorneys for Plaintiffs

ANDERSON & KARRENBURG

By: 

Tab C

## AGREEMENT

Agreement entered into this 12 day of May, 1995, by and among Dan K. Shaw ("Shaw"), Del Rio Resources, Inc., a Utah corporation ("Del Rio"); Western United Mines, Inc., a Utah corporation ("Western"); Syndicators, Inc., a Utah Corporation ("Syndicators"), Lawrence C. Caldwell, II ("Caldwell"); Jay R. Kirk, Jr. ("Kirk") and Steven D. Martens ("Martens")

### RECITALS:

WHEREAS, Del Rio is the "Lessee" of certain mineral, oil and gas leases (the "Federal Leases" between Del Rio as Lessee and the United States Government as Lessor. A description of the Federal Leases is set forth in Exhibit "A" attached hereto and by this reference made a part hereof; and

WHEREAS, Western and Syndicators previously owned an interest in the Federal Leases; and

WHEREAS, Kirk is the "Lessee" of record of certain mineral, oil and gas leases (the "State Leases") between Kirk as Lessee and the State of Utah as Lessor. A description of the State Leases is set forth in Exhibit "B" attached hereto and by this reference made a part hereof; and

WHEREAS, Kirk is the record holder of the State Leases; and

WHEREAS, pursuant to an Agreement dated November 30, 1993 (the "November 1993 Agreement"), Shaw has provided funding to Del Rio in the amount of \$791,260 to rework the following wells number 30-1 and 29-A located in the Federal leases described in Exhibit "B" attached hereto (the "Wells"); and

WHEREAS, pursuant to his rights under the November 1993 Agreement, Shaw has demanded repayment of the amounts advanced for reworking the Wells, together with interest thereon but none of Del Rio, Western or Syndicators have the financial capability of repaying such advanced funds; and

WHEREAS, under the November 1993 Agreement Del Rio, Western and Syndicators have assigned their interests in the Federal and State Leases to Shaw as collateral security for the advancement of funds used to rework the Wells pursuant to his rights under the November 1993 Agreement; and

WHEREAS, Shaw has agreed to enter a settlement agreement relating to the funds owed to him and other matters in consideration for Del Rio, Syndicators, Western,

Kirk, Caldwell and Martens assigning all of their right title and interest in the Federal and State Leases to him;

NOW THEREFORE, in consideration of the promises contained herein and for other good and valuable consideration, the receipt and sufficiency of which is hereby acknowledged, the parties hereby agree as follows:

1. Assignment of Lease and Other Interests. Del Rio, Western, Syndicators, Caldwell, Martens and Kirk (all of which are hereafter collectively referred to as the "assignors") each hereby assign, transfer and convey to Shaw (or to any assignee of Shaw), any and all of their right, title and interest in and to:

- (i) the Federal Leases and the State Leases;
- (ii) the surface property which is the subject of the Federal and State Leases;
- (iii) the Wells and any other wells drilled under the Federal and State Leases;
- (iv) all reports made to the United States Government Minerals Management Services and all Oil and Gas Reports made to the Utah State Tax Commission relating to the Federal or State Leases from 1989 to the present;
- (v) any reports, logs, agreements, or other records of any type or kind relating to the Federal or State Leases or the Wells; and
- (vi) all personal property and fixtures used at or in the Wells, including, but not limited to, pumps, pipes, casing and other equipment.

For purposes of this Agreement, all of the rights assigned by Assignors to Shaw hereunder are hereafter referred to as the "Lease Rights". The parties hereby agree that the assignment of Lease Rights made hereby, shall be a complete and total assignment to Shaw of any and all rights and interest of each of the Assignors in the Lease Rights. Shaw is hereby authorized by Assignors to take such additional action as is reasonably necessary to effect the assignment of the Lease Rights made herein. Each of the Assignors will execute such additional documents and take such additional action as Shaw deems reasonably necessary to effect the assignment of the Lease Rights and to perfect title of the Lease Rights in Shaw.

2. Cancellation of Debt. In consideration of assignment of the Lease Rights by Assignors to Shaw, Shaw hereby forgives and cancels all debts owed to Shaw by Del Rio, Western and Syndicators which debts include, but are not limited to, the following:

<u>Debtor</u>	<u>Amounts Owed To Shaw</u>
Del Rio	\$6,122.82
Western	\$337.87
Syndicators	\$2,065.89
Del Rio, Western & Syndicator jointly	\$791,600.00

Shaw will take such action as may be necessary to release all security interests securing any of such debt.

2.1 In consideration of Caldwell, Kirk and Martens assigning any and all of their rights in the Lease Rights to Shaw, Shaw hereby indemnifies, holds harmless and releases Caldwell, Kirk and Martens from any debt owed by Caldwell, Kirk or Martens to Shaw and from any debt owed to Shaw by any other person and guaranteed by Caldwell, Kirk and Martens.

3. Resolution of Vernal Investors Matter. Del Rio sold shares of its common stock to certain investors (the "Investors") in a private offering and in connection therewith received offering proceeds of approximately \$132,000. Some of the Investors have expressed dissatisfaction with their investment in Del Rio and have questioned the adequacy of the disclosure given by Del Rio to the Investors in connection with their purchase of Del Rio securities. As additional consideration for the Assignors assigning all of their right, title and interest in the Lease Rights to Shaw, Shaw hereby agrees to use his best efforts to resolve questions or concerns that the Investors may have in connection with their investment in Del Rio. Shaw may, in an attempt to resolve such questions or concerns purchase the shares of Del Rio common stock which the Investors acquired from Del Rio. Shaw hereby agrees to indemnify Del Rio, Caldwell, Kirk and Martens and save them harmless from any and all claims, damages and causes of action made by the Investors.

4. Funding for Existing Litigation. Various individuals and companies are plaintiffs in a lawsuit filed against the United States in the United States Claims Courts involving a claim for oil and gas leases and money damages (Case No. 569-86L).



Plaintiffs require additional money to fund additional on-going litigation expenses. As additional consideration for Del Rio, Western, Syndicators, Kirk Caldwell and Martens entering into this Agreement, Shaw shall use his best efforts to enter into an agreement with the plaintiffs of such lawsuit to provide a maximum of thirty thousand dollars (\$30,000) to fund certain future expenses incurred by plaintiffs in such litigation. The funds to be provided by Shaw shall not be used for legal fees but may be used for other litigation expenses. No expenses shall be paid by Shaw directly to persons who are plaintiffs in the litigation or to affiliates of plaintiffs.

4.1 Any agreement between the plaintiffs and Shaw shall provide that if, as a result of the litigation, additional leases are awarded, such leases shall be assigned to Shaw (or his affiliates); provided, however, plaintiffs shall be entitled to a fifty percent (50%) beneficial interest in such additional leases. Shaw shall be the operator of such additional leases and the plaintiffs shall enter into a standard operating agreement with Shaw. If for any reason, the additional leases cannot, under the terms of any court decree or law, be put in the name of Shaw the parties shall take such action as may be necessary to provide Shaw with a fifty percent (50%) beneficial interest in such additional leases and to enter into an operating agreement with Shaw.

4.2 Any agreement between plaintiff(s) and Shaw shall provide that, as a result of the litigation, a cash settlement is awarded to plaintiffs, Shaw shall be reimbursed for all expenses of litigation paid by Shaw and the balance of the proceeds shall be delivered free and clear of the claims of Shaw, to plaintiffs as damages and for payment of other expenses and costs of the litigation.

5. Resignation of Officers and Directors of Del Rio. Subsequent to the execution of this Agreement and the assignment of the Lease Rights, Kirk and Martens shall resign as officers and directors of Del Rio. Whether prior to or subsequent to such resignation, Kirk and Martens shall use their best efforts to provide Shaw with all documentation and information in their possession or control necessary to effect the assignment of the Lease Rights and to provide Caldwell with all documentation and information in their possession necessary to prepare and file all tax returns of Del Rio, to prepare and have executed all directors minutes for current and previous actions of Del Rio's Board of Directors and to execute any other documents required to bring Del Rio current and in good standing in all of its reports, returns and filings and to effect the agreement of the parties contained herein. Each of Caldwell, Kirk and Martens shall fully cooperate with each other to provide information required by any of them necessary to prepare and file their individual tax returns.

6. Appointment of New Directors and Officers. Within ten days after the resignations required by the preceding paragraph, Caldwell, as the remaining director, shall appoint two individuals to fill the vacancies on the Board of Directors in accordance with the provisions of Utah Code Ann. § 16-10a-810. In the alternative, Caldwell shall schedule a special meeting of the shareholders to be held within twenty days of the date

of this Agreement to elect directors to fill the vacancies. Within ten days after the appointment or election of the new directors, the newly appointed or elected directors shall vote on a resolution authorizing Del Rio to execute and deliver to Kirk a Promissory Note in the form attached hereto as Exhibit "C".

7. Conditions Precedent. The execution of the Promissory Note (Exhibit "C") in accordance with the procedures and within the time periods specified in the preceding paragraph shall constitute a condition precedent to the enforceability of this agreement as to Kirk. Kirk shall not be obligated to perform in accordance with the terms and provisions of this Agreement until said condition precedent has been fulfilled. In the event Del Rio does not execute the Promissory Note (Exhibit "C"), this Agreement shall be null and void.

8. Representations and Warranties of Del Rio, Western and Syndicators. Del Rio, Western, Syndicators, Caldwell, Kirk and Martens represent and warrant that as to itself or himself, the following:

8.1. Corporate Authority. Each of Del Rio, Western and Syndicators represent and warrant as to itself, that it has the full corporate power and authority to execute and deliver this Agreement and to consummate the transactions contemplated hereby. The execution and delivery of this Agreement and the consummation of the transactions contemplated hereby have been duly and validly authorized by the Boards of Directors of Del Rio, Western and Syndicators and no other corporate proceedings on their part are necessary to authorize this Agreement or to consummate the transactions so contemplated. Subject to the laws of bankruptcy, insolvency, general creditor's rights and equitable principles, this Agreement has been duly and validly executed and delivered by Del Rio, Western and Syndicators and constitutes a valid and binding agreement of each of Del Rio, Western and Syndicators, enforceable against each of Del Rio, Western and Syndicators in accordance with its terms.

8.2. Authorization and Approval of Agreement. Each of Caldwell, Kirk and Martens separately represent and warrant as to himself only that he has the full power and authority to execute and deliver this Agreement and to consummate the transactions contemplated hereby. Subject to the laws of bankruptcy, insolvency, general creditors' rights and equitable principles, this Agreement has been duly and validly executed and delivered by each of Caldwell, Kirk and Martens and constitutes a valid and binding agreement enforceable against Caldwell, Kirk and Martens in accordance with its terms.

8.3. Organization. Each of Del Rio, Western and Syndicators each separately represent and warrant as to itself that it is a corporation duly organized, validly existing and in good standing under the laws of the State of Utah and has all requisite licenses, qualifications, corporate power and authority to own, lease and operate its assets and to carry on its business as now being conducted, except where

the failure to be so existing and in good standing or to have such qualifications, licenses, power and authority would not in the aggregate have a material adverse effect on its respective business, operations or financial condition.

8.4. Approvals and Consents; Noncontravention. Each of Del Rio, Western and Syndicators separately represent as to itself.

8.4.1. Except as described in Exhibit "D", no consent or approval or other action by, or notice to or registration or filing with any governmental or administrative agency or authority is required or necessary to be obtained by it Del Rio, Western or Syndicators in connection with the execution, delivery or performance of this Agreement by it or the consummation of the transactions contemplated by this Agreement.

8.4.2. No consent, approval, waiver or other action by any person under any material contract, agreement, instrument or other document, or obligation to which it is a party or by which it or any of its assets are bound, is required or necessary for the execution, delivery and performance of this Agreement or the consummation of the transactions contemplated by this Agreement.

8.4.3. The execution, delivery and performance of this Agreement by and the consummation of the transactions contemplated by this Agreement will not: (i) violate or conflict with its charter documents or Bylaws; (ii) violate or conflict with any law, regulation, order, judgment, award, administrative interpretation, injunction, writ or decree applicable to or by which it or any of its assets are bound, or any agreement or understanding between any administrative or regulatory authority, on the one hand, and it on the other hand; or (iii) violate or conflict with, result in a breach of, result in or permit the acceleration or termination of, or constitute a default under any agreement, instrument or understanding to which it is a party or by which it or any of its assets are bound.

8.5. Title and Related Matters. The Federal Leases are in the name of Del Rio or Del Rio, Western and Syndicators as Lessees. The State Leases are in the name of Kirk. All of the Assignors represent and warrant that to the best of their knowledge, except as set forth in Exhibit "E" attached hereto, good and marketable title to the Federal Leases and the State Leases, free and clear of any liens, claims, encumbrances, royalty interests or other restrictions or limitations of any nature whatsoever, will be assigned to Shaw. Assignors each represent and warrant that to the best of their knowledge, the Federal and State Leases are in full force and effect and that there has been no breach of the lease agreement.

8.6. Litigation and Proceedings. Each of the Assignors represents that it or he is not involved in any pending material litigation or governmental

investigation or proceeding relating to the Lease Rights and, to the best of his or its, knowledge no material litigation, claim, assessment or governmental investigation or proceeding is threatened against the Federal or State Leases, any Assignor or their assets, nor, to the best of his or its knowledge of is there any basis for such action.

8.7. Contracts. Exhibit "F" sets forth complete and correct copies of all material contracts, agreements, franchises, licensees, or other commitments related to or effecting the Lease Rights, including, but not limited to, the underlying lease agreements, assignment of lease agreements, working interest agreements, royalty agreements and operating agreements to which any Assignor is a party or by which any of the Lease Rights are bound, subject or effected. To the best of each of their knowledge, no Assignor is a party to any other material agreement, contract, license, franchise or commitment relating to or effecting the Lease Rights. To the best of each of their knowledge and subject to the laws of bankruptcy, insolvency, general creditor's rights, and equitable principles, all contracts, agreements, franchises, licensees, and other commitments to which any Assignor is a party relating to or effecting the Lease Rights, are material to its operations taken as a whole, are valid and enforceable in all material respects.

8.8. Material Contract Defaults. To the best knowledge of each Assignor, such Assignor is not in default in any material respect under the terms of the Federal Lease or the State Lease or any outstanding contract, agreement, license, lease or other commitment which is material to the operation of the Lease Rights and there is no event of default or other event which, with notice or lapse of time or both, would constitute a default in any material respect under any such contract, agreement, lease or other commitment in respect of which such Assignor has not taken adequate steps to prevent such a default from occurring.

8.9 Information. Subject to the limitations noted in this paragraph and in the following paragraph, the information concerning Assignors set forth in this Agreement and in the Exhibits attached hereto, is complete and accurate in all material respects and does not contain any untrue statement of material fact or omit to state a material fact required to make the statements made in light of the circumstances under which they were made not misleading. Shaw expressly acknowledges that his decision to enter into this Agreement and the Del Rio Subscription Agreement is based upon his independent investigation and information supplied solely by Larry Caldwell. Shaw further acknowledges that he has not requested, received or relied upon any information, warranties or representations from Del Rio, Western, Syndicators, Kirk or Martens except as expressly stated in this Agreement as being made by Del Rio, Western, Syndicators, Kirk or Martens.

8.10 Limitation on Warranties and Representations. The warranties and representations of Western and Syndicators are made by the corporate entities only and

shall not be considered or relied upon as a warranty or representation of any officer, director, agent or employee of Western or Syndicators including, but not limited to, the officers, directors, agents or employees who execute this Agreement on behalf of Western and Syndicators. The warranties and representations of Del Rio are made by that corporate entity only and its officer and director, Larry Caldwell, and shall not be considered or relied upon as a warranty or representation of any other officer, director, agent or employee of Del Rio. J. R. Kirk, President of Western, represents only that the representations and warranties of Western stated in this Agreement are accurate to the best of his information, knowledge and belief. Steve Martens, President of Syndicators, represents only that the warranties and representations of Syndicators stated in this Agreement are accurate to the best of his information, knowledge and belief.

9. Representations and Warranties of Purchaser. Shaw represents and warrants to Assignors as follows:

9.1. Authorization and Approval of Agreement. Shaw has the full power and authority to execute and deliver this Agreement and to consummate the transactions contemplated hereby. Subject to the laws of bankruptcy, insolvency, general creditor's rights and equitable principles, this Agreement has been duly and validly executed and delivered by Shaw and constitutes a valid and binding agreement of Shaw, enforceable against Shaw in accordance with its terms.

9.2 Approvals and Consents; Noncontravention. To the best knowledge of Shaw, no consent, approval, waiver or other action by any person under any material contract, agreement, instrument or other document, or obligation to which Shaw is a party or by which it or any of his assets are bound, is required or necessary for the execution, delivery and performance of this Agreement by Shaw or the consummation of the transactions contemplated by this Agreement.

10. Appointment of Del Rio as Operator. Shaw will appoint Del Rio as the operator of oil and gas wells which are drilled or reworked on the Federal Leases and the State Leases. Such appointment shall be made pursuant to the terms of an operator's agreement provided by shaw.

11. Indemnification.

11.1. Subject to the acknowledgments stated in paragraph 8.9 and the limitations stated in paragraph 8.10, assignors hereby agree to indemnify and hold Shaw harmless from, against and in respect of (and shall on demand reimburse Shaw for):

11.1.1. Any and all loss, liability or damage suffered or incurred by Shaw by reason of any untrue representation, breach of warranty or nonfulfillment of any covenant by Assignors contained herein or in any certificate, document or instrument delivered to Shaw pursuant hereto or in connection herewith;

11.1.2. Any and all loss, liability or damage suffered or incurred by Shaw in respect of or in connection with any liabilities of Assignors not expressly assumed by Shaw pursuant to the terms of this Agreement.

11.1.4. Any and all actions, suits, proceedings, claims, demands, assessments, judgments, costs and expenses, including without limitation, legal fees and expenses, incident to any of the foregoing or incurred in investigating or attempting to avoid the same or to oppose the imposition thereof or in enforcing this subsection 11.1.

11.2. Shaw hereby agrees to indemnify and hold Assignors harmless from, against and in respect of (and shall on demand reimburse them for):

11.2.1. Any and all loss, liability or damage resulting from any untrue representation, breach of warranty or non-fulfillment of any covenant or agreement by Shaw contained herein or in any certificate, document or instrument delivered to Assignors hereunder;

11.2.2. Any and all liabilities or obligations of Assignors specifically assumed by Shaw pursuant to this Agreement; and

11.2.3. Any and all actions, suits, proceedings, claims, demands, assessments, judgements, costs and expenses, including without limitation, legal fees and expenses, incident to any of the foregoing or incurred in investigating or attempting to avoid the same or to oppose the imposition thereof or in enforcing this sub Section 11.2.

12. Nature and Survival of Representations. Subject to the acknowledgements stated in Paragraph 8.9 and the limitations stated in Paragraph 8.10, all representations, warranties and covenants made by any party in this Agreement shall survive the Closing hereunder and the consummation of the transactions contemplated hereby. All of the parties hereto are executing and carrying out the provisions of this Agreement in reliance solely on the representations, warranties and covenants and agreements contained in this Agreement or at the Closing of the transactions herein provided for and not upon any representation, warranty, agreement, promise or information, written or oral, made by the other party or any other person other than as specifically set forth herein.

13. Miscellaneous.

13.1 Further Assurances. At any time and from time to time, after the effective date, each party will execute such additional instruments and take such action as may be reasonably requested by the other party to confirm or obtain title to the Lease Rights transferred hereunder or otherwise to carry out the intent and purposes of this Agreement.

13.2 Entire Agreement. This Agreement constitutes the entire agreement between the parties pertaining to the subject matter of this Agreement and supersedes all prior agreements, understandings, negotiations and discussions, whether oral or written, of the parties, and there are no warranties, representations or other agreements between the parties in connection with the subject matter of this Agreement except as specifically set forth in this Agreement.

13.3 Effect; Assignment. This Agreement and all of the provisions of this Agreement will be binding and inure to the benefit of the parties to this Agreement and their respective successors and permitted assigns.

13.4 Amendments; Waivers. No supplement, modification or amendment of this Agreement will be binding unless executed in writing by all parties to this Agreement. No waiver of any of the provisions of this Agreement will be deemed or will constitute a waiver of any other provision of this Agreement (regardless of whether similar), nor will any such waiver constitute a continuing waiver unless otherwise expressly provided.

13.5 Governing Law. The terms of this Agreement will be governed by, and construed in accordance with, the internal laws of the State of Utah.

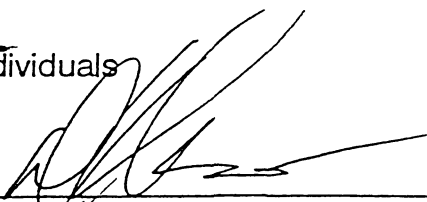
13.6 Headings. The section and subsection headings in this Agreement are inserted for convenience only and shall not affect in any way the meaning or interpretation of this Agreement.

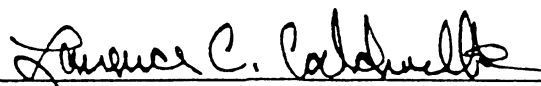
13.7 Counterparts. This Agreement may be executed concurrently in two or more counterparts, each of which shall be deemed an original, but all of which together shall constitute one and the same instrument.

13.8 Severability. If any of this Agreement is deemed to be unenforceable, the balance of the Agreement shall remain in full force and effect.

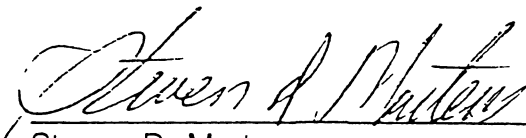
IN WITNESS WHEREOF, the parties have executed this Agreement the day and year first above written.

Individuals

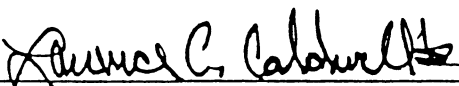
  
\_\_\_\_\_  
Dan K. Shaw

  
\_\_\_\_\_  
Lawrence C. Caldwell, II

  
\_\_\_\_\_  
Jay R. Kirk, Jr.

  
\_\_\_\_\_  
Steven D. Martens

Del Rio Resources, Inc.

By:   
\_\_\_\_\_  
Its President

Syndicators, Inc.

By:   
\_\_\_\_\_  
Its President

Western United Mines, Inc.

By:   
\_\_\_\_\_  
Its President



## EXHIBIT "A"

### Description of Federal Leases

Mineral Lease No. U 10166. Del Rio, Western, Syndicators, Caldwell, Kirk and Martens incorporate by reference Assignment of Record Title interest in a Lease for Oil and Gas Geothermal Resources delivered to Dan K. Shaw on or about May 12, 1995.

Mineral Lease No. U 019837. Del Rio, Western, Syndicators, Caldwell, Kirk and Martens incorporate by reference Assignment of Record Title interest in a Lease for Oil and Gas or Geothermal Resources delivered to Dan K. Shaw on or about May 12, 1995.

## EXHIBIT "B"

### Description of State Leases

Mineral Lease No. 44317. Kirk incorporates by reference the Mineral Lease Assignment Forms for Lease 44317 delivered to Dan K. Shaw on or about May 12, 1995.

Mineral Lease No. 44318. Kirk incorporates by reference the Mineral Lease Assignment Forms for Lease 44318 delivered to Dan K. Shaw on or about May 12, 1995.

EXHIBIT "C"

PROMISSORY NOTE

\$355,849.14

Salt Lake City, Utah  
\_\_\_\_\_, 1995

For value received, Del Rio Resources, Inc., a Utah Corporation (hereinafter "Payor") promises to pay to the Order of Jay R. Kirk, Jr., the sum of Three Hundred and Fifty-five thousand, Eight Hundred and Forty-nine Dollars and Fourteen Cents (\$359,849.14) together with interest at ten percent (10%) per annum from date until paid.

Principal and accrued interest shall be due and payable at such time as payor actually receives any money or other items of value as a result of Settlement, enforcement of judgment or order or otherwise arising out of claims alleged in the case of "Del Rio Drilling Programs, Inc.", a Utah Corporation, et. al. v. Value United States" pending in the United States Claims Court, Case No. 969-86L (hereinafter Case Proceeds). Payment of the obligation herein described shall be first priority payment from the case proceeds.

In the event payor defaults with respect to the obligations herein stated, payor agrees to pay the holder hereof all collection costs, including reasonable attorneys' fees, costs of court and other legal expenses in addition to all other sums due hereunder.

Presentment, demand, protest, notice of dishonor and extension of time without notice are hereby waived.

DEL RIO RESOURCES, INC.

By: \_\_\_\_\_  
Its President

By: \_\_\_\_\_  
Its Secretary

## EXHIBIT "D"

### Actions and Approvals Necessary to Assign Lease Rights

Assignment of State Leases must be approved by Utah Natural Resources, State Lands and Forestry.

Assignment of Federal Leases must be approved by Federal Bureau of Land Management.

See also Exhibits "E" and "F".1

## EXHIBIT "E"

### Encumbrances of Lease Rights

Assignment of Mineral Lease # ML-44317 to Pacific Union Asset Backed Trust dated August 31, 1991 (reassignment in Escrow File).

Assignment of Lease Serial # U-10166 to Pacific Union Asset Backed Trust dated August 31, 1991 (reassignment in Escrow File).

Interests, claims, liens and encumbrances arising out of the contracts described in Exhibit "F".

All rights, title and interest noted in the Assignments delivered to Dan K. Shaw by Larry Caldwell on May 12, 1995.

All rights, title and interest of Plaintiffs named in the Complaint, First Amended Complaint and Second Amended Complaint filed in the United States Court of Claims, Case No. 569-86L.

All rights, title and interest of record noted in the Register Pages on file with the Bureau of Land Management and the State of Utah.

BGS Energy; Kahalia, Kadashia, Profkofski; and, Benjamin G. Sprecher may claim rights, title or interests to the leases and wells by reason of various agreements which are included in the documents heretofore delivered to Dan K. Shaw and more particularly described in Exhibit "G".

Evergreen Aviation has an interest in wells or leases as described in the Complaint and the Amended Complaint filed in the United States Court of Claims Case No. 569-86L. Documents relating to any claims of Evergreen Aviation are included in the documents delivered to Dan Shaw as noted in Exhibit "G".

Cedar Venture Pipeline, Inc., at one time owned or claimed an interest in wells and/or leases. Documents relating to said claim are included in the documents delivered to Dan Shaw as described in Exhibit "G".

Pioneer Oil and Gas Company claims an interest in wells or leases. Documents relating to said claim are included in the documents delivered to Dan K. Shaw described in Exhibit "G".

Pressure Transport, a Texas Corporation, claims an interest in the wells or leases pursuant to a Stipulation and Agreement which is included in the documents delivered to Dan K. Shaw as noted in Exhibit "G".

Interests, claims, liens and encumbrances arising out, relating to or referred to in the documents delivered to Shaw. A description of the documents delivered to Shaw are stated in the Inventory Of Documents Delivered To Shaw attached hereto as Exhibit "G".

## EXHIBIT "F"

### Description of Contracts

ASSET PURCHASE AGREEMENT AND YIELD SUPPLEMENT AGREEMENT dated September 1, 1992, by and between Del Rio Grantor Trust (by and through its Trustee Pacific Union Company), Steven D. Martens and Pacific Union Asset Backed Trust Company (by and through its Trustee Pacific Union Company).

DECLARATION OF TRUST DEL RIO RESOURCES GRANTOR TRUST dated September 1, 1991, by and between Steven D. Martens, Lawrence C. Caldwell II, J. R. Kirk Jr., and Del Rio Resources, Inc.

AGREEMENT dated September 1, 1991, between Del Rio Grantor Trust (by and through its Trustee Pacific Union Company), Steven D. Martens and Pacific Union Asset Backed Trust Company (by and through its Trustee Pacific Union Company).

DECLARATION OF TRUST PACIFIC UNION ASSET BACKED TRUST COMPANY dated September 1, 1991 and executed by Pacific Union Company.

CERTIFICATION OF PREFERENCES, RIGHTS AND LIMITATIONS OF CLASS A PAR VALUE \$1000 TRUST CERTIFICATES OF PACIFIC UNION ASSET BACKED TRUST COMPANY executed by Pacific Union Asset Backed Trust (by and through its Trustee Pacific Union Company) on or about September 1, 1991.

ESCROW AGREEMENT dated September 1, 1991, between Pacific Union Asset Backed Trust, Del Rio Resources Grantor Trust, Del Rio Resources, Inc., Del Rio Drilling Programs, Inc., Syndicators, Inc., Western United Mines, Inc., J. R. Kirk Jr., Lawrence C. Caldwell II, Steven D. Martens and Robert M. McDonald.

CONTRACTS AND AGREEMENTS ARISING OUT OF, RELATING TO OR REFERRED TO IN THE DOCUMENTS DELIVERED TO SHAW. A description of the documents delivered to Shaw are stated in the Inventory Of Documents Delivered To Shaw attached hereto as Exhibit "G".

Attorney Gerald E. Nielsen is a party to an attorney-client agreement wherein he is granted an interest in the leases and wells as compensation for legal services. A copy of the Agreement may be obtained from Mr. Nielsen.

Clinton Hammond and Larson Caldwell may have an interest in the wells and leases by reason of a Finder's Fee Agreement wherein Hammond and Larson were to find a participant to invest in the Del Rio Project.

Some of the interests described in Exhibit "E" arise out of contracts and agreements. To the extent such interest arise out of contracts, Exhibit "E" is incorporated herein by reference.



**EXHIBIT "G"**  
**INVENTORY OF DOCUMENTS DELIVERED TO DAN SHAW**

**Box 1, Section 1**

Financials for Del Rio Resources, 1979-1982, 1984-1985

Tax Returns for 1983, 1981, 1979 to 1981 and 1982 Tax Returns

Trans American Uranium Offering Circular, shareholders information and correspondence and Tax Returns from 1976 to 1980.

Del Rio Quisp of information;

Del Rio Due Diligence package;

Omega Correspondence, transfer agency correspondence;

Dunn & Bradstreet correspondence;

Thomas Kimball correspondence regarding private placement memorandums;

Interwest Transfer correspondence and general correspondence.

Del Rio Drilling Programs File

Del Rio Corporate Annual Filing information;

Del Rio Resources, Inc. all government reports;

**Box 1, Section 2**

Files for each crude buyer including Western Oil Permian and Husky

Westport Energy and Information regarding Windfall Property Taxes

Petro Source, Inc. file

Husky And additional files on Permian

Box 1, Section 3

All information regarding dealings with Champlin Oil including operating agreement, farm-out contracts, division orders and other data regarding the Champlin Petroleum.

Cotton Petroleum including logs and well histories on HM Bilsby

Bonds on Utah Oil and Gas

BGS Energy File

Various agreements

Well costs and contracts with BGS Energy and Kahalia Kadasha Profsky, Ltd.

Benjamin G. Sprecher file

Agreements relating to Arco Oil and Gas and Mesa Pipeline

Advance Ross information regarding ownership status with the Advance Ross

Agency Draw filed documents

Well information

Mapco Production and Southern Uintah Basin which has information regarding Gusher, Bonanza, Siggard Chemical and Unit requirements and stuff

Cedar Venture Pipeline correspondence and contracts with Cedar Venture Pipeline including various cash flow and documents prepared by Kent Swanson.

Mountain Fuel file regarding Elk Springs Project.

Flatrock No. 2 farm out Agreements and programs regarding drilling bid proposals and reserve a valuations, seismic bids and various authorities for expenditures on the Flatrock field.

Documents regarding Cedar Venture Pipeline and the pipeline right of ways and accounting and various contracts and correspondence regarding Cedar Venture Pipeline.

Box No. 2:

Inventory - starts out with Mariann Houghy production and Analysis and Colorado Well Service completion

Data information - State of Utah completion various well variables and the number of forms that are used in the well and gas business.

All the leases by lease number and by county starting with Garfield County, Box Elder County and lease information primarily to do with Uintah County all broken down by lease number starting with ML22324 21719 going through approximately a large number of lease files. Continuing on with additional forms, application for leases and such affidavits and about forty manilla folders of various other leases ending with some legal documents regarding the Dowell lawsuit.

Box No. 3:

Operating Agreements and exhibits regarding Flatrock and Oil Canyon unit

Miscellaneous correspondence relating to contract agreements, commission agreements, correspondence regarding the 23-1A quarterly limited partnership.

File regarding government, government correspondence

Miscellaneous including resumes of most of the employees over the years

Oil Canyon unit Agreements, Oil Canyon No. 2 Agreement;

Steve Edmundson correspondence

Paradoxy oil and gas correspondence

Farm Out proposal with natural gas corporation from California and Exhibits of such Agreements and Farm Out Agreements and all correspondence with Natural Gas Corporation of California; Mountain Fuel Files, Mono Power correspondence; Mobile Farm Out Agreements and correspondence; Paramount Resources correspondence Drilling bid proposals, Landmark regarding the 29-1A;

File entitled Joe Lonza Primeont, Black Mesa Corporation of Black Giant, various correspondence relating to those three corporations.

Mammoth Agreement file

Jet International file

Kahalia Kadashia file

Haliburton Resources Correspondence

Gus Haisisfutis correspondence

Farm Out Agreements

Option Agreements with Hiko Bell

Oil Canyon One file

Granada, Inc. file

Dean Larson Agreements

Del Rio Resources office information - office in Denver

Empire Capital, Ltd. file

Exxon file

Evergreen Aviation file

Joint Venture with Evergreen Aviation and all correspondence various accounting and summary statements

Chart Well, Janice Jones and Chourney Oil Corporation file

Box No. 4:

Massive file on Charles Pinney Lawsuit

U.S. National Oil & Gas file

Correspondence and Agreements with Pinney and U.S. National

Department of Natural Resources file

Wellco Agreements

TryGon Agreements

Del Rio vs. Utah Gas and Oil file

Agreement with Utah Gas and Oil

Utah Shale Land and Minerals file and Agreements

Tenneco Agreements and correspondence file

Silver Horizons file

Dale Whitloc Agreements

Shane Oil Agreements

TWT Corporation Agreements

U.S. National Oil and Gas Agreements

Olson, Randall Agreements

Jack Olson and Dennis Randall file

PTS and Mono Power file

Lease and Agreements with PTS and Mono Power

Pioneer Oil and Gas file

Joint Venture Agreements

Rulter and Willbanks Agreements

Tennoco Farm Out Proposal and Agreements

Uintah Engineering Agreements

File entitled "Partnerships" regarding various partnerships being formed

Sheridan and McGeary title opinions

Information regarding 29-1A Bureau of Land Management and Applications

Production runs on various wells and information regarding 30-1 well

M & M Specialty Pipelines Supply Company Files

Intermountain Pipeline files

Uintah Engineering Pipeline Agreements

Tight Gas Sands file

Gas Sands Applications and State lands and Forestry correspondence

Farm Out Option Agreements between Western and Del Rio and between Pomco and completion and production information regarding 1-1A Chuck Wagon No. 1 and some various other well data and information and Cultural Resource

Inventory and documents regarding Chuck Wagon No. 1.

Box No. 5:

Fred Dicks and Clinton Hayman Agreements

Title Opinions regarding Flat Rock Oil and Gas Fields

Dowell vs. Del Rio Documents

AFE's Reserve Evaluations for Agency draw

Division Orders for Section 30

Invoices on the 29 - 1A Well

Correspondence regarding Department of Interior and the Oil Canyon Two Unit

Agreement on completion costs of the Oil Canyon 29-1A Well.

Lease files 10166 and State Leases 44317, 44318

Operating Agreements and assignments forms, permits and maps

Current correspondence file

Documents and correspondence with University of Utah relating to research on Tar Sands and the oil quality

Book regarding some H M Billsby Well information, core evaluation

Cat Creek 18-1 file

Some additional information regarding Tar Sands, file entitled "Jim Marshall"

Production tickets for Penzoil

Vincent Supply file

Production Reports from Del Rio Drilling relating to Flatrock and Production Reports

security agreements

Ron Gibb Interwest Mortgage file

King Secu Cumba file

Republic International file. Field Expenses for Caldwell 1989 - 1990

All Limited Partnerships correspondence with the IRS and closing out an ending business with all limited partnerships.

Transamerican Uranium and Del Rio Resources file

Financial Statements Del Rio for 1982 and 1983

1981 Del Rio Resources file

Oklo Inc. file

Corporate papers regarding Trans American Uranium

Correspondence file

Bankruptcy filing for Del Rio Resources and Del Rio Drilling and all the monthly reports through 1985.

Stockholders information regarding Del Rio Resources, Fredman Manger, Lou Perossi

Shareholders News Release files for Del Rio Resources

Company reports for Del Rio Resources

Ken Stroden file

CRC Byco Rental File

Restricted Stock Agreement file

Utah State Securities Commission file

Nasdaq. Information booklet

All of Del Rio Exhibits regarding the bankruptcy and litigation during the bankruptcy, Oklo Agreements and documents involved with the bankruptcy.

Box No. 6:

vendor files and drilling costs - a large box containing mostly accounting for drilling wells and for the various limited partnerships.

Box No. 7:

Vendor invoices and receipts of partnership, accounting and receipts. Bank statements and costs involved in the early eighties.

Box No. 8:

Invoices, check copies in the mid to early eighties and various vendor invoices and check copies.

Box No. 9:

Cancelled checks, copies of Del Rio Resources 1991, 1992 and 1993 accounting receipts and deposit slips for Del Rio corporate checking account.



Box No. 10:

All documents relating to Del Rio Resources Grantor Trust, Pacific Union Asset Backed Trust including accounting, trust certificates, escrow agreement and assignments

Box No. 11:

Logs of various wells, Del Rio Resources 15C211 file - additional exhibits and operating agreements prepared for M & M operating. Dan K. Shaw Agreement. Dave Allen reports regarding various fields and evaluations. Abstract regarding Flatrock. Core lab information regarding tight gas sands application. Over Thrust Tools Supply file and numerous reserve studies from Steve Strong, Hebertson, Kent Swanson, De Forest Smouse. All reserves regarding Flatrock and agency draw. Additional logs and evaluation and miscellaneous correspondence and well data information.

Box No. 12:

Pipeline information and agreements with the' partnerships. Various cost breakdowns and checking account regarding the pipeline Agreements. Oaks Construction and J & H Services file

Agreement whereby stock was paid to Ross Construction in discharge of indebtedness. Southern Flow, J & H, Hebertson, Intermountain Pipe, Western & Company, CRC Byco Rental, all major vendors that had bills due prior to the bankruptcy including Ross Construction. The complete filings of the Chapter 11 bankruptcy and all files and correspondence and Financials relating to that bankruptcy.

Box No. 13:

All files relating to Pressure Transport.

Box No. 14:

Current correspondence relating to Leases and releases from all the farmors. Uintah Engineering correspondence. BIA correspondence. Department of Interior correspondence. Well cost files. David Allen and his correspondence regarding reserve evaluations. Department of Interior file including notices and correspondence regarding Federal lawsuit. US Geological Survey and the Department of Business Regulations correspondence and right-of-way information regarding the Bureau of Land Management. Geological reports

regarding Oil Canyon Unit 2. Correspondence from Kent Swanson. various correspondence files with BIA. Unit procedure requirements regarding Oil Canyon Unit 1 and 2 with Edmondson, Inc. of Denver.

Box No. 15:

All information and exhibits regarding the lawsuit with the Federal Government and the Ute Indian Tribe.

Box No. 16:

Files regarding various transactions with Bay Ridge, Pete Noonon, Darrell Wilder, Keith Howieg, Leo Van Kolmon Jed Van Kampen, Charles Penney. Documentation regarding Penney lawsuit. General correspondence files for the years 1987, 1988 and 1989 for Del Rio Resources. Corporate records for Transamerica Uranium, Insurance information.

Box No. 17:

Check recordation information and invoice information prior to 1983. Various vendor receipts and payments.

Box No. 18:

Invoices and check receipts for various vendors.

Box No. 19:

Complete set of logs for Flat Rock Wells. Information regarding Dowell v. Del Rio lawsuit. Documents regarding Charles Penney vs. Del Rio lawsuit. Coffin, Bessers and Sommers file; Tom Kimball file. Production Report for the thirty 2-A. Gerald Nelson permits and files and miscellaneous reports from regarding oil and gas production in the Uintah Basin and the general area. Hiko Bell file including 10-K's, the State of Utah monthly production reports, correspondence. Hiko check stubs from production 1984 through 1985. The State of Utah production reports 1984 through 1985. The report of operations 1986 and 1987. Mesa Pipeline Production statements.

Box No. 20:

Various accounting files regarding personal loans and expenditures. Windfall profit tax information. Partnership, accounting for oil and gas for the 29-1A. IRS correspondence, oil and gas drilling and report publications, overhead and

production, geological accounting information. Various invoices, payment receipt stubs for Kent Swanson. Drilling costs and completion costs for producing wells. Financial statements 1982 and 1983. Intercompany billings between Western, Syndicators and Del Rio. All correspondence in reference to Cut Energy, Great Western Energy, Bob Pinder, Pete Noonan. Larry Caldwell's field receipts and expenses.

Box No. 21:

This file contains all Well logs.

Box No. 22:

Complete file of George Specials work on the bankruptcy.

Box No. 23:

Check registers and receipts for 1983. All the correspondence and invoices from Southern Flow and Tide Water Compression.

Box No. 24:

Computer generated ledger sheets and statements on pre-1985 accounting.

Box No. 25:

Check registers and cancelled checks from 1976 to approximately 1981 for Del Rio.

Box No. 26:

Financial information accounting records for Del Rio Resources, Del Rio Drilling and partnership tax filings.

Box No. 27:

Exhibits used in the bankruptcy filing and production reports and correspondence regarding 231A, 232A, Agency Draw wells.

Box No. 28:

Limited partnership information regarding taxes and financial information.  
Corporate record book and corporate seals for Del Rio Drilling Programs, Inc.  
and Del Rio Resources, Inc.

Box No. 29:

Invoices and check vouchers from 1985. Vendor receipts. Applications for Ferc  
102 gas price.

File Drawers:

All Well records for Wells in Oil Canyon, Agency Draw Field and other various  
wells that Del Rio participated.

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## ADDENDUM

This Agreement is entered into this 12 day of May, 1995, as an Addendum to the Agreement of the same date between Dan K. Shaw ("Shaw"), Del Rio Resources, Inc., a Utah Corporation ("Del Rio"); Western United Mines, Inc., a Utah Corporation ("Western"); Syndicators Inc., a Utah Corporation ("Syndicators"), Larry C. Caldwell II ("Caldwell"); Jay R. Kirk Jr. ("Kirk") and Steven D. Martens ("Martens") (hereinafter "Primary Agreement").

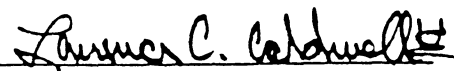
In addition to the terms and provisions of the Primary Agreement, the parties agree as follows: Within 10 days after the resignations required by Paragraph 5 of the Primary Agreement, Caldwell, as remaining director, shall appoint two individuals to fill the vacancies on the Board of Directors in accordance with the provisions of Utah Code Annotated §16-10a-810. In the alternative, Caldwell shall schedule a special meeting of the shareholders to be held within twenty days of the date of this Agreement to elect Directors to fill the vacancies. Within ten days after the appointment or election of the new Directors, the newly appointed or elected Directors shall vote on a resolution authorizing Del Rio to execute and deliver the Release Of All Claims in the form attached hereto as Exhibit "A".

Approval of the resolution authorizing Del Rio to execute and deliver a Release Of All Claims shall constitute a condition precedent to the enforceability of the Primary Agreement as to Western, Syndicators, Kirk and Martens.

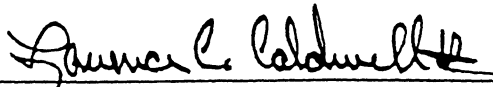
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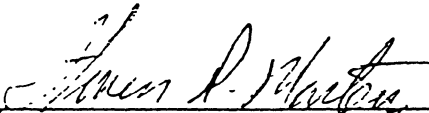
  
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Dan K. Shaw

DEL RIO RESOURCES, INC.

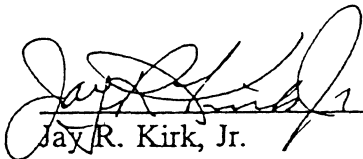
By:   
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Its President

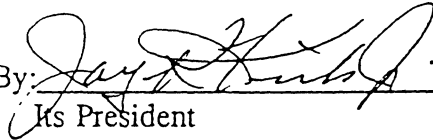
SYNDICATORS, INC.

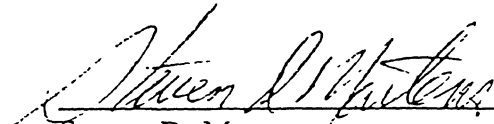
  
Lawrence C. Caldwell, II

By:   
Its President

WESTERN UNITED MINES, INC.

  
Jay R. Kirk, Jr.

By:   
Its President

  
Steven D. Martens

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