

IN THE UNITED STATES BANKRUPTCY COURT  
FOR THE DISTRICT OF COLORADO

<p>In re: SUNNYSIDE COAL COMPANY, a Utah Corporation, #84-1102281,</p> <p style="text-align: center;">Debtor.</p> <p>KENNETH A. RUSHTON, CHAPTER 7 TRUSTEE OF THE ESTATE OF SUNNYSIDE COAL COMPANY, THE DIVISION OF OIL, GAS AND MINING OF THE STATE OF UTAH, AND THE UNITED STATES OF AMERICA, ACTING THROUGH THE OFFICE OF SURFACE MINING RECLAMATION AND ENFORCEMENT OF THE UNITED STATES DEPARTMENT OF THE INTERIOR,</p> <p style="text-align: center;">Plaintiffs &amp; Counterclaim Defendants,</p> <p style="text-align: center;">-vs-</p> <p>CLAY TUCKER, an individual and SHARON TUCKER, as PERSONAL REPRESENTATIVE OF THE ESTATE OF DAN TUCKER,</p> <p style="text-align: center;">Defendants and Counterclaim Plaintiffs.</p>	<p style="text-align: center;"><b>MEMORANDUM BY THE UTAH DIVISION OF OIL, GAS &amp; MINING IN OPPOSITION TO THE TUCKERS' MOTION FOR SUMMARY JUDGMENT</b></p> <p>Bankr. Case 94-12794 CEM</p> <p>Chapter 7</p> <p>MC No. JLS-18</p> <p>Adversary Proceeding No: 95-1293 MSK</p>
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## I. INTRODUCTION

The State of Utah, Department of Natural Resources, Division of Oil, Gas & Mining (the "Division") respectfully submits this memorandum in opposition to the motion for summary judgment served by defendants Clay Tucker and Sharon Tucker, as personal representative of the estate of Dan Tucker (the "Tuckers").

## II. STANDARD OF REVIEW

In Applied Genetics International, Inc., v. First Affiliated Securities, Inc., 912 F.2d 1238 (10th Cir. 1990), the U.S. Court of Appeals for the Tenth Circuit explained the standard of review applicable to Rule 56 motions:

We review the grant or denial of summary judgment de novo. Barnson v. United States, 816 F.2d 549, 552 (10th Cir.), cert. denied, 484 U.S. 896, 108 S.Ct. 229, 98 L.Ed.2d 188 (1987). We apply the same legal standard used by the district court under Fed.R.Civ.P. 56(c) and examine the record to determine if any genuine issue of material fact was in dispute; if not, we determine if the substantive law was correctly applied. Osgood v. State Farm Mut. Auto. Ins. Co., 848 F.2d 141, 143 (10th Cir.1988). When applying this standard, we examine the factual record and reasonable inferences therefrom in the light most favorable to the party opposing summary judgment. Gray v. Phillips Petroleum Co., 858 F.2d 610, 613 (10th Cir.1988). However, the nonmoving party may not rest on its pleadings but must set forth specific facts showing that there is a genuine issue for trial as to those dispositive matters for which it carries the burden of proof. Celotex Corp. v. Catrett, 477 U.S. 317, 324, 106 S.Ct. 2548, 2553, 91 L.Ed.2d 265 (1986).

912 F.2d at 1241. Accord, Considine v. Newspaper Agency Corporation, 43 F.3d 1349 (10th Cir. 1994) ("Summary judgment is appropriate only '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 matter of law.' Fed.R.Civ.P. 56(c).")

## III. DISPUTED MATERIAL FACTS PRECLUDE SUMMARY JUDGMENT

In reviewing the Tuckers' motion for summary judgment, this court must view the evidence in a light most favorable to the non-moving parties. Thus, at this stage of the case, all reasonable inferences must be resolved in favor of the Division, Kenneth A. Rushton, the Chapter 7 Trustee of the Estate of Sunnyside Coal Company (the "Trustee"), and the U.S. Office of Surface Mining ("OSM"). When that is done, the court will find that there are disputed facts bearing on the Tuckers' claims and allegations about the contract.

The Trustee has served a separate memorandum dated September 27, 1996 in opposition to the Tuckers' summary judgment motion. In the Trustee's memorandum, which

the Division hereby adopts and incorporates by reference, the Trustee marshalls the key evidence which shows that several material facts are sharply contested by the parties.<sup>1</sup> The disputed material facts--including those set forth in the Trustee's memorandum and those additional facts set forth in this memorandum--preclude resolution of this dispute under Rule 56 of the Federal Rules of Civil Procedure (as made applicable to this adversary proceeding by Rule 7056 of the Federal Rules of Bankruptcy Procedure).

The Division, the Trustee, and the OSM elected to not file a joint cross-motion for summary judgment precisely because it is obvious this case has material facts in dispute. The documents and the deposition testimony demonstrate that the court must hold a trial to resolve the conflicting evidence about the following core subjects:

- A. The Tuckers claim that there is an alleged oral side-agreement to the effect that the exclusive contract remedy for the Tuckers' breach of the "Amended Letter of Intent"<sup>2</sup> would be liquidated damages in the exact amount of \$50,000 (see Tuckers' memorandum in support at 17-22). However, there is substantial credible evidence which, when viewed in a light most favorable to the non-moving parties, supports the contrary view, held by the non-moving parties, that the court-approved contract does not contain a liquidated damages clause. For example, the Amended Letter of Intent does not contain an express, or even implied, liquidated damages clause on its face. Even though the court in its March 6, 1995 Sales Order did approve certain amendments to the original January 7, 1995 Letter of Intent, the court never approved the amendment now-claimed by the Tuckers.
- B. The Trustee, the Division, and the OSM claim, based on a letter from the Tuckers' counsel to counsel for the Debtor in Possession dated March 1, 1995 (marked as Exhibit 19 to the depositions, and as Exhibit D to the Trustee's memorandum in opposition), that the Tuckers intentionally waived the contractual condition precedent

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<sup>1</sup>The Tuckers have produced a box of documents, 32 of which were marked as exhibits when the parties took depositions of the following witnesses: Clay Tucker (the buyer); James T. Burghardt (transactional/bankruptcy counsel for the Tuckers during the negotiations); Carolyn C. Fuller (counsel for the Unsecured Creditors Committee); Jack L. Smith (transactional/bankruptcy counsel for the Debtor in Possession during the negotiations); Robert Burnham (president of the Debtor in Possession during the negotiations); and Thomas A. Mitchell (counsel for the Division during the negotiations).

<sup>2</sup>As explained more fully in the Trustee's memorandum, the defined term "Amended Letter of Intent" has its genesis in Paragraph 11 on Page 5 of the March 6, 1995 Sales Order. That is, the January 7, 1995 Letter of Intent (Deposition Exhibit 1), as expressly amended by the March 6, 1995 Sales Order (Deposition Exhibit 26) is, by definition, the "Amended Letter of Intent." The Amended Letter of Intent is, in fact and in law, a binding contract.

of East Carbon's water rights.<sup>3</sup> In contrast, the Tuckers now claim that the condition precedent about the City of East Carbon was not satisfied in fact, and thus, the Tuckers allegedly are thereby excused from performance of the contract (see Tuckers' memorandum in support at 23-24). If the aforementioned "waiver letter" of March 1, 1995 is viewed in a light most favorable to the non-moving parties, the court certainly cannot grant summary judgment in favor of the Tuckers.

- C. The Tuckers allege the purpose of the entire contract was frustrated because of certain problems related to the City of East Carbon (see Tuckers' memorandum in support at 24-26). The frustration of purpose argument also begs the factual question raised by the above-mentioned "waiver letter" of March 1, 1995. Moreover, even though the Bankruptcy Court approved the sale of the property to the Tuckers free and clear of all liens, including those of the City of East Carbon, and even though the Tuckers never filed any court papers to secure an adjudication of the City's claims, the Tuckers would have this court rule as a matter of law that the entire contract was in fact frustrated. When the evidence about the East Carbon claims is viewed in a light most favorable to the non-moving parties, the court cannot grant summary judgment for the Tuckers.
- D. The Tuckers allege that they were excused because of an alleged failure of the Debtor in Possession to tender performance (see Tuckers' memorandum in support at 26-27). However, the evidence, viewed in a light most favorable to the non-moving parties, shows that the Debtor in Possession was ready, willing and able to close, and that the only reason the deal did not close is that the Tuckers got cold feet.<sup>4</sup>

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<sup>3</sup>In Soter's Inc. v. Deseert Federal Savings & Loan Ass'n, 857 P.2d 935 (Utah 1993), the Utah Supreme Court held: "On this basis, we hold that there is only one legal standard required to establish waiver under Utah law. We conclude that Phoenix properly stated the requirements for waiver:

A waiver is the intentional relinquishment of a known right. To constitute waiver, there must be an existing right, benefit or advantage, a knowledge of its existence, and an intention to relinquish it.

61 P.2d at 311-12, quoted in American Savings, 445 P.2d at 3. We further clarify that the intent to relinquish a right must be distinct. [FN6] Under this legal standard, a fact finder need only determine whether the totality of the circumstances "warrants the inference of relinquishment." Harris v. Faultfinders, Inc., 103 Ill.App.3d 785, 431 N.E.2d 1205, 1209 (1981); see Morgan, 704 P.2d at 578; Wassermann, 855 P.2d at 246-247."

<sup>4</sup>Mr. Burnham, the president of the Debtor, testified at his deposition, at page 36:

8 Q All right. Was Sunnyside Coal Company at  
9 all times ready, willing, and able to close consistent with  
10 Judge Matheson's order?

11 A Yes.

E. The Tuckers claim that the Division and OSM were not third party beneficiaries of the contract (see Tuckers' memorandum in support at 27-30). However, the Amended Letter of Intent states: "In general terms, the Agreement would provide that Tucker will obtain a binding commitment from an acceptable bonding company to provide an \$8.6 million reclamation bond to the Division of Oil, Gas & Mining of the State of Utah ("DOGM") to secure the performance of the Reclamation Obligation...." *Id.* As part of the quid pro quo for that new \$8.6 million bond, the Amended Letter of Intent makes clear that the Division and the OSM would have to give up their first lien on about 23,500 acres of land and release the Debtor in Possession, and its officers, directors and employees, from all liability for the Reclamation Obligation. When this line of evidence is viewed in a light most favorable to the non-moving parties, it becomes clear that summary judgment for the Tuckers would be error.

IV. THE TUCKERS' MOTION IS BASED ON INADMISSIBLE PAROL EVIDENCE WHICH ADDS A MATERIAL TERM TO THE DEAL

The Amended Letter of Intent, as a contract to sell thousands of acres of real property, had to be in writing to satisfy the requirements of applicable bankruptcy law and the Statute of Frauds. Under Rule 56(c), F.R.C.P., a motion for summary judgment about that written agreement must be based on "such facts as would be admissible in evidence." *Id.* The Tuckers' motion is, however, hopelessly grounded on an alleged oral, secret side-deal that there is an exclusive remedy of \$50,000 in liquidated damages for an unexcused breach by the Tuckers.

The Tuckers rely not on the contract documents, but rather, on inadmissible parol evidence by Messrs. Burghardt, Smith and Burnham and Ms. Fuller. See, Statement of Facts in the Tuckers memorandum in support, *passim*. That testimony would, if allowed in evidence and believed, add a material term to the Amended Letter of Intent in violation of the parol evidence rule and the Statute of Frauds. Namely, the Tuckers want this court to graft on to the Amended Letter of Intent a new clause that would limit the remedy for the Tuckers' breach of an \$8.6 million deal to only \$50,000 in liquidated damages.

A clause stating the exclusive remedy for breach of a contract is enforceable, but only to the extent such a clause is stated on the face of the agreement so as to reflect the intent of the parties. *Bethers v. Wood*, 10 Utah 2d 313, 352 P.2d 774 (Utah 1960) (permissive remedy clause in a gravel sales contract held to not prevent a contractor from pursuing "any other remedies which the law affords" in a counterclaim action against the subcontractor). *Cf.*, *DCR Inc. v. Peak Alarm Co.*, 663 P.2d 433 (Utah 1983) (express liquidated damages clause applicable to contract claims will not be presumed to extend to tort claims). When viewed in a light most favorable to the non-moving parties, the court would have to find that the Amended Letter of Intent is a complete and final statement of the material terms of the deal; this view is confirmed by Paragraph 5, Page 8 of the March 6, 1995 Sales Order. There is no liquidated damages clause in the Amended Letter of Intent, so the document does not suffer from any ambiguity. Parol evidence about the Tuckers' wishful liquidated damages clause is thus not admissible, and cannot form the basis for any summary

judgment in favor of the Tuckers.

The Tuckers would have this court hold that a third party beneficiary cannot invoke the parol evidence rule. However, in *Jackson v. Jackson*, 122 Utah 507, 252 P.2d 214 (1953), an ex-wife sued the estate of her late husband to enforce an alleged oral promise by her late husband that he would leave each of their seven children a sum certain. The couple's comprehensive written property settlement agreement said nothing about the alleged oral promise, so the wife lost, both below and on appeal. In his concurring opinion, Chief Justice Wolfe observed, "The Jackson children, although not parties to the integrated agreement, cannot avoid the effect of the parol evidence rule since it applies to third parties as well, Corbin Sec. 596." *Jackson*, 122 Utah 2d at 517, 252 P.2d at 219. Just as a third party beneficiary to an integrated contract may not avoid the parol evidence rule so as to add a benefit to the contract, neither can a party to that contract avoid the parol evidence rule so as to take a benefit away.

V. THE THIRD PARTY BENEFICIARY ISSUE RAISES A QUESTION OF FACT

One issue not directly addressed in the Trustee's memorandum in opposition concerns the Tuckers' claim that the court can rule at this pretrial stage of the case that the Division and OSM were not intended third party beneficiaries of the court-approved Amended Letter of Intent. In *Wasatch Bank of Pleasant Grove v. Surety Insurance Co. of Calif.*, 703 P.2d 298 (Utah 1985), the Supreme Court of Utah stated that whether a person "is a beneficiary of a contract is determined by the intent of the parties to the contract as evidenced by the contract itself and the surrounding facts and circumstances." *Id.* In this case, it will be necessary for the court to hear the conflicting evidence about "the contract itself and the surrounding facts and circumstances" before the court can rule on the merits of the Tuckers' challenge to the third party beneficiary status of the Division and OSM.

In *Richards Irrigation Co. v. Karren d/b/a Rock Products Co.*, 880 P.2d 6 (Utah Ct. App. 1994), the lower court ruled on a motion to dismiss filed under Rule 12(b)(6) of the Utah Rules of Civil Procedure--which is essentially the same as the Federal Rule 12(b)(6)--that a certain subcontractor was not the third party beneficiary of a contract for an irrigation system project between the general contractor and a state water agency. The Utah Court of Appeals reversed, as follows:

Rock Products claims that it was a third-party beneficiary of the contract between the Division and Richards, and that the Division breached its implied duty of good faith and fair dealing. To determine whether a party is a third-party beneficiary, the trial court must examine the intent of the contracting parties as evidenced by the contract and surrounding facts and circumstances. *Wasatch Bank v. Surety Ins. Co.*, 703 P.2d 298, 300 (Utah 1985). Because the determination of intent is a factual determination, see *Jarman v. Reagan Outdoor Advertising Co.*, 794 P.2d 492, 495 (Utah App.1990), the trial court erred in dismissing this claim

as a matter of law under Rule 12(b)(6).

Id. Similarly, it would be wrong for the court to not receive evidence at trial concerning the intent of the contracting parties to benefit the Division and OSM.

The documents themselves expressly identify the Division and OSM by name, and indeed the parties knew that there could be no deal unless it had the blessing and support of the single largest secured and unsecured creditors of the Estate.

Attorney James Burghardt acted as the Tuckers' counsel in the negotiation. At his deposition, Mr. Burghardt had to admit that the Division and OSM derived a "significant benefit" worth \$8.6 million under the Amended Letter of Intent, though he struggled rather unpersuasively to make a hair-splitting distinction that they were not "beneficiaries" of the contract. Here is what Mr. Burghardt said at his deposition on July 29, 1996:

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....

4 Q (Mr. O'Hara) Did you understand that DOGM was giving up  
5 its lien in approximately 23,500 acres in consideration for  
6 throwing its support behind what you're -- what the Tuckers  
7 were proposing to do with this posting an \$8.6 million  
8 reclamation bond and getting the site reclaimed?

9 A Well, they would give it up if they closed.

10 Q Yes. But the property the Tuckers wanted  
11 was the property that was the -- was DOGM's collateral,  
12 wasn't it?

13 A Yes.

14 Q And that DOGM was critical -- DOGM's support  
15 was critical to the Tuckers achieving their desired  
16 objective of this 363 sale?

17 A DOGM needed to agree -- we would -- the  
18 Tuckers could have made an offer to buy just the forest  
19 land. That was not going to work. DOGM made it clear that  
20 to do the one, you needed also to provide for reclamation.  
21 Having --

22 Q But you -- I'm sorry.

23 A Having posited that, they had to say, what  
24 kind of reclamation process would be acceptable to them for  
25 the Tuckers to know whether there was anything worthy of

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1 their further attention in this.

2 Q Yes. But it's correct, is it not, that DOGM  
3 was being asked to essentially waive its first position on  
4 23,500 acres of valuable timber property in return for what  
5 the Tuckers were promising to put up in its place ; namely,

6 an \$8.6 million reclamation bond?

7           A    That's accurate. I guess maybe it's hard  
8 for us bankruptcy lawyers not to think of DOGM as anything  
9 other than a creditor, but it really was, was a regulatory  
10 agency, trying to achieve a regulatory goal. And it isn't  
11 just a matter of giving up security for money; they had a  
12 goal of trying to figure out how to reclaim.

13          Q    And so if the contract had been performed,  
14 you would not deny that DOGM would have been a beneficiary  
15 of this contract because they would have achieved their  
16 regulatory objectives?

17          A    Well, I'm a little worried about the word  
18 "beneficiary" as a loaded term. Would DOGM have benefited  
19 from having a bond in place? Yes.

20          Q    All right. And so in that sense, they were  
21 a beneficiary?

22          A    Just like every creditor would benefit from  
23 a deal under which they stood to have the potential right  
24 to recover something on their claims.

25          Q    All right. But specifically as it relates

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1 to DOGM's interests that you've described in reclamation,  
2 the regulatory objective, they would be a beneficiary,  
3 wouldn't they, if such a bond had, in fact, been posted by  
4 your clients?

5          A    Again, I'm not going to play with the word  
6 "beneficiary" because it can mean a lot of different  
7 things. Would they have benefited by it? Certainly.

8          Q    Okay. You'll agree at least to the word  
9 "benefited," and I can leave it at that. That's fine.

10          A    I'm not sure what the term is under the  
11 bond, whether DOGM is called beneficiary or what their  
12 title is under the bond.

13          Q    Fair enough.

14          A    They would have gotten a bond.

Mr. Burghardt testified further about the same subject the next morning, July 30, 1996, as follows:

21                   Mr. O'Hara: Just a few follow-up questions.

22                   Further Examination

23 By Mr. O'Hara:

24           Q    Mr. Burghardt, reading from the Black's Law  
25 Dictionary, 1979 Edition, page 1327, "Third Party

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1 Beneficiary." And it reads: "One for whose benefit a  
2 promise is made in a contract but who is not party to the  
3 contract. "

4 All right. Yesterday, when I asked you  
5 whether DOGM was a beneficiary, you had -- you hung up on  
6 that and you said: I can't say whether they're a  
7 beneficiary, but the contract was for their benefit.

8 Do you recall that testimony?

9 A I didn't say that. I said the contract  
10 would benefit them, like it would all other creditors.

11 Q All right. But, in fact, it would benefit  
12 DOGM more particularly, would it not, because of the fact  
13 that the \$8.6 million reclamation bond would directly  
14 satisfy the regulatory objectives of DOGM and the OSM?

15 A DOGM was willing to accept an \$8.6 million  
16 bond as substitute consideration for what it had before, a  
17 deed of trust and a claim against the debtor.

18 Q Yes. And directing your attention to  
19 Exhibit 1, could you read the first sentence under the  
20 heading A "Summary of Intended Agreement."

21 A Yes, although the document speaks for  
22 itself.

23 Q That's why I want you to read it, so we'll  
24 know what it says.

25 A " In general terms, the Agreement would

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1 provide that Tucker will obtain a binding commitment from  
2 an acceptable bond company to provide an \$8.6 million  
3 reclamation bond to the Division of Oil, Gas, and Mining of  
4 the State of Utah (' DOGM ') to secure performance of the  
5 Reclamation Obligation, and that the Contractor will assume  
6 all responsibility for the Reclamation Obligation. "

7 Q All right. And I suppose, just for the  
8 record, perhaps you can read the next sentence, too.

9 A The next sentence says, " In addition, Tucker  
10 will make a cash payment of \$140,000 to the Debtor's  
11 bankruptcy estate, subject to adjustment as set forth in  
12 this letter. "

13 Q All right. Let's talk about the reclamation  
14 bond. Do you know what a reclamation bond is?

15 A In general terms.

16 Q Can you describe for me what -- who the  
17 parties to the bond are that would be contemplated under  
18 this transaction?

19           A    The bond is issued by a bonding company  
20 which is on an approved list for such matters -- approved  
21 list that DOGM and OSM would recognize to secure the  
22 payment of up to \$8.6 million, in this case, for the work  
23 of reclamation.

24           The recipient -- I don't know what the  
25 correct term is -- it's probably beneficiary of the bond is

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1 DOGM/OSM, and the party procuring the bond under the letter  
2 of intent would be the Tuckers.

3           Q    All right. And if, in the ordinary course  
4 of the reclamation -- the Tuckers apparently contemplated  
5 retaining a contractor, correct, to do the reclamation?

6           A    Yes.

7           Q    All right. And they would -- who would pay  
8 the contractor to do the reclamation?

9           A    The Tuckers.

10          Q    And the estimated cost of reclamation, at  
11 least if OSM was correct, would be about \$8.6 million,  
12 correct?

13          A    That was their estimate, yeah.

14          Q    Right. But assuming that they were right,  
15 that the money the Tuckers would have to pay this  
16 contractor would be on the order of magnitude of \$8.6  
17 million, correct?

18          A    Yeah, with that assumption.

.....

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.....

5           Q    Right, but -- all right. I'm sorry. I am  
6 confused. If the Tuckers did not complete -- their  
7 contractor and did not complete the reclamation and the  
8 Tuckers wouldn't go forward, what would happen? The  
9 Tuckers said, "We're not spending another penny. We  
10 thought this would cost a million. We never believed your  
11 8.6 million. Now we found you're right."

12           Wouldn't DOGM, in the ordinary course of  
13 business, be expected to call the bond?

14          A    I suppose so.

15          Q    And in the ordinary course of business, are  
16 you familiar with the concept of indemnity under a bonding  
17 arrangement?

18          A    Yes.

19          Q    And isn't it true that Van-American would  
20 turn around, and if they paid the reclamation concept, 8.6

21 million, Van-American, in turn, would seek indemnity from  
22 the Tuckers?

23 A I assume so.

24 Q All right. So, in fact, the contract that's  
25 described in general terms on the -- well, the second

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1 paragraph of Exhibit 1, it names DOGM by name -- clearly  
2 would provide a genuine benefit to the Division of Oil, Gas  
3 and Mining, would it not?

4 A I don't think I ever disputed that.

5 Q All right. And you don't deny that an \$8.6  
6 million benefit is a significant benefit?

7 A Yes. No, I don't deny it.

8 Q All right. And yet your testimony is that  
9 DOGM was not a third-party beneficiary of this arrangement?

10 A No more than any other creditor was. Other  
11 creditors got benefits under this agreement, too.

12 Q How would the \$8.6 million reclamation bond  
13 help other creditors besides DOGM and OSM?

14 A Well, tremendously. As the debtor pointed  
15 out in its motion, the first and foremost thing was that  
16 this enabled the other creditors to have an opportunity to  
17 participate in a pot of money right away rather than a  
18 potential pot of money over a very extended period of time.

19 Q All right. So you see other people as  
20 benefiting.

Substantial additional consistent deposition testimony by Messrs. Burghardt, Burnham and Mitchell concerning the third party beneficiary issue is set out in Exhibit A to this memorandum. When all the evidence on the third party beneficiary issue is viewed in a light most favorable to the Division and OSM, the Tuckers are not entitled to summary judgment.

## VI. CONCLUSION

The Tuckers' motion for summary judgment should be denied.

DATED this 27<sup>th</sup> day of September, 1996.

JAN GRAHAM, Esq.  
Utah Attorney General

By Patrick J. O'Hara  
Patrick J. O'Hara, Esq.  
Assistant Attorney General  
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CERTIFICATE OF MAILING

I hereby certify that I caused to be mailed, in the United States Mail, postage prepaid, on this 27<sup>th</sup> day of September, 1996, a true and correct copy of the foregoing **MEMORANDUM BY THE UTAH DIVISION OF OIL, GAS & MINING IN OPPOSITION TO THE TUCKERS' MOTION FOR SUMMARY JUDGMENT**, to the following:

<p>Tom H. Connolly, Esq. Connolly &amp; Halloran, P.C. Attorneys for the Tuckers 1121 Broadway, Suite 202 Boulder, CO 80302</p> <p>Teryl R. Gorrell, Esq. James T. Burghardt, Esq. Jerry N. Jones, Esq. MOYE, GILES, O'KEEFE, VERMEIRE &amp; GORRELL Attorneys for Tuckers 1225 Seventeenth Street, 29th Fl. Denver, CO 80202-5529</p> <p>Dennis J. Bartlett, Esq. Kerr Friederich Brosseau Bartlett, Attorneys for the Division of Oil, Gas and Mining, Department of Natural Resources, State of Utah 1600 Broadway, Suite 1660 Denver, CO 80202</p> <p>Herschel J. Saperstein, Esq. Ray, Quinney &amp; Nebeker Attorneys for the Division of Oil, Gas and Mining, Department of Natural Resources, State of Utah 79 South Main Street, Suite 500 Salt Lake City, UT 84111</p>	<p>Steven J. McCardell, Esq. Penrod W. Keith, Esq. LeBoeuf, Lamb, Greene &amp; McCrae, L.L.P. Attorneys for Chapter 7 Trustee Kenneth A. Rushton 1000 South Main Street Salt Lake City, UT 84101</p> <p>John C. Parks, Esq. Annette W. Jarvis, Esq. Bart B. Burnett, Esq. LeBoeuf, Lamb, Greene &amp; McCrae, L.L.P. Attorneys for Chapter 7 Trustee Kenneth A. Rushton 633 17th Street, #2800 Denver, CO 80202</p> <p>DeAnn L. Owen, Esq. Office of Field Solicitor U. S. Department of the Interior P.O. Box 25007 (D-105) Denver, CO 80225-0007</p> <p>Robert D. Clark, esq. Assistant U.S. Attorney for the District of Colorado Attorney for the U.S. Office of Surface Mining 11961 Stout Street, Suite 1100 Denver, CO 80294</p>
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*Patricia J. O'Keefe*

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Exhibit A

Additional testimony pertaining to the third party beneficiary issue which is not set forth in the body of the memorandum is as follows:

From Mr. Burghardt's Deposition:

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.....  
5 Q Well, let's come back then to -- I'm  
6 obviously interested in the benefits that the DOGM would  
7 obtain under this contract.  
8 You understood, did you not, that in order  
9 for DOGM to assent to this contract, DOGM had to give up a  
10 first position on 23,500 acres of timberland and water  
11 rights?  
12 A I'm not sure what you mean by " assent " to  
13 the contract. They didn't assent to it. They expressly  
14 refused to be a party to it.  
15 Q Wasn't the support of DOGM critical to the  
16 success of the court approval of this contract on March 2?  
17 A Yes.  
18 Q And isn't it a fact that DOGM provided  
19 support to make it possible for the parties to get to that  
20 hearing?  
21 A Yes.  
22 Q And isn't it true that DOGM appeared at that  
23 hearing and supported the contract?  
24 A I think I mentioned yesterday that I don't  
25 recall what DOGM said at that hearing. That they supported

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1 it is without any question.  
2 Q Okay. You are aware that DOGM did hold a  
3 first position on 23,500 acres of land that your clients  
4 were buying?  
5 A Yes, I am.  
6 Q And you're not seriously contending, are  
7 you, Mr. Burghardt, that DOGM gave up that first position  
8 in return for nothing, are you?  
9 A No. I've never said that.

.....  
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.....  
18 Q In your judgment, what would make a

19 third-party beneficiary under a contract? You think it's  
20 irrelevant that they're mentioned on the face of the  
21 agreement?

22 A Yes.

23 Q You think that's irrelevant?

24 A Yes.

25 Q That the fact that the parties are going to

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1 do something for the third party is irrelevant? You  
2 believe that?

3 A The parties are doing what they need in  
4 order to accomplish a goal.

5 Q Yes.

6 A And in order to do that, the parties agree  
7 to do a number of things under this contract, some of which  
8 go to DOGM, some of which go to the cities, some of which  
9 goes to other parties.

10 DOGM is obviously important because of the  
11 regulatory impact of -- on this property and the need to  
12 work with them to come up with an acceptable reclamation  
13 plan.

14 Q But they're also important because of the  
15 lien, are they not?

16 A Sure.

17 Q And without the release of that lien, your  
18 clients never would have done the deal, would they?

19 A Of course not.

20 Q All right. Well, we'll let the Court  
21 decide, I suppose, the ultimate legal question. I just  
22 wanted to explore that issue with you in some detail.

The president of the Debtor in Possession at the time the Tucker deal was negotiated was Mr. Robert Burnham. Mr. Burham was deposed July 30, 1996, and he, too, was asked about the benefits under the Amended Letter of Intent that would run in favor of the Division and the OSM. Like Mr. Burghardt, Mr. Burnham had to admit those significant benefits, as follows:

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.....

5 Q Now, throughout your negotiations with the  
6 Tuckers, did you have as one of your objectives the

7 ultimate satisfaction of the reclamation obligation on the  
8 property?

9 A We were -- yes. We were trying to assure  
10 that the reclamation was completed.

11 Q And specifically you wanted DOGM to release  
12 Sunnyside and its officers and directors and shareholders  
13 from any further liability they might have under SMCRA so  
14 that the reclamation would get done under the Tucker deal?

15 A Yes.

16 Q So there was no doubt in your mind that  
17 there was an intention to make DOGM benefit from the deal  
18 that you were doing with the Tuckers?

19 A I don't know that I was specifically  
20 thinking of benefiting DOGM. I was specifically thinking  
21 of how do we accomplish the reclamation and satisfy the  
22 largest single secured claim against -- against Sunnyside,  
23 and also the potential of resolving or satisfying the  
24 largest -- what we believed to be the largest unsecured  
25 claim.

Page 25

1 Q And that's DOGM?

2 A Yes.

3 Q All right. So, in that sense, you're  
4 benefiting DOGM?

5 A Right.

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5 Q Now, you were -- participated in the  
6 negotiations of the letter of intent, right?

7 A Yes, I did.

8 Q And is it fair to say, in that  
9 participation, you acted on behalf of Sunnyside Coal?

10 A Yes.

11 Q And tried to obtain the best possible  
12 agreement for Sunnyside Coal?

13 A Yes.

14 Q Did you let your personal liability --  
15 possibility of your personal liability interfere with your  
16 efforts to act on behalf of Sunnyside Coal?

17 A I don't believe I did.

18 Q All right. Did you negotiate attempting --  
19 out of your -- out of some desire to do an extra benefit  
20 for DOGM, try to negotiate something for DOGM they weren't  
21 entitled to?

22           A    I was trying to negotiate something that  
23 would take care primarily of my largest secured creditor  
24 and provide additional funds for other -- other obligations  
25 under bankruptcy.

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1           Q    The bankruptcy estate for whom you were the  
2 representative --

3           A    Yes, yes.

4           Q    -- was your intended beneficiary of your  
5 work?

6           A    Yes.

                  During the negotiations leading up to the approval of the Amended Letter of Intent, Thomas A. Mitchell, an Assistant Attorney General for the State of Utah, represented the Division. At his deposition on July 30, 1996, he testified as follows:

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.....

8           Q    When in that process did you first conclude  
9 that DOGM was or might be a third-party beneficiary of the  
10 Tucker transaction?

11          A    I received a document dated January 7  
12 entitled "Letter of Intent," which had been signed by all  
13 the parties to that agreement, which provided a substantial  
14 benefit to the State of Utah, increasing its secured  
15 position substantially.

16          Q    All right.

17          A    And I would say at that point in time, I  
18 believed that if the letter of intent became operable, that  
19 the State of Utah would be a third-party beneficiary. And  
20 I -- as of the entry by the Court of the order approving  
21 the sale and the letter of intent, at that time I believed  
22 that the State was, in fact, a third-party beneficiary.

.....

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.....

13          Q    Go ahead. Any other provision in here?

14          A    Oh, I'm sorry. OSM does appear in this  
15 document --

16          Q    Yes.

17          A    -- towards the bottom of paragraph 3,  
18 page 2.

19                    The -- I think those are all essentially

20 part and parcel of the totality of what's going to be done  
21 which will benefit the State of Utah. They will replace a  
22 bankrupt company with an \$8.6 million bond and a  
23 contractor --

24 Q We just want to go paragraph by paragraph.

25 A I'm talking about paragraph 3.

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1 Q Okay. Paragraph 3, and you've identified  
2 the language.