ORAL ARGUMENT – 03/06/02
01-0261
ANADARKO V. THOMPSON

GUNN: Sixty-six years ago, the gas lease that is in dispute in this case was executed and the results within 2 or 3 weeks was a well that has been so successful that it has now outlived pieces of the aging pipeline system. Some repairs were done because of old settling torch welds that did not hold up particularly well at the joints over a long period of time. Those repairs were done in 1981 and 1985. Ten years later after brief stoppages of production associated with those repairs, the plaintiffs wrote to us and complained about inactivity on the lease. We spent $250,000 drilling a second well, and it produced and has been producing up until now.

The TC found terminations of the lease in either 1981 or 1985. And the CA affirmed.

PHILLIPS: When was the second well drilled?

GUNN: The second well was drilled in 1995. And that led to the longest period of nonproduction in this case, which has been the court permitted time out while we litigate over title. But if you look at a 66-year period, the entirety of the lease from now back until 1936, the main well has produced, the lease hold has produced, everyone has done quite well. The threshold question is a somewhat a quirky question of lease interpretation about a habendum clause which does not just hold the lease in force when gas is produced, but when gas is or can be produced.

BAKER: Do you say the lease is ambiguous or unambiguous?

GUNN: I'm not sure. The best I can say is they didn't carry their burden to show it is unambiguous. It may well be.

BAKER: Did your client assert anywhere below here that it was ambiguous?

GUNN: We did in our pleadings.

BAKER: So you said it was ambiguous in the TC?

GUNN: Yes.

BAKER: Has that changed your view?

GUNN: No. As I understand the law of ambiguity and construing instruments, it is what it is regardless of pleadings. If I say the cat is black, they say the cat is white, and the court says no, the cat is gray. Then the cat is gray without pleadings and your Coker v. Coker decision, I think,

and White v. Moore from the 1980's establishes that. It may well be ambiguous. If it is, that would lead to a dreadful trial of trying to determine the intent of the parties of a 1936 lease. This case and this lease may not be ambiguous. But you will see cases that have an ambiguous document. And I don't know how you try that ambiguity.

BAKER: Well then under your theory, I guess now of it's not ambiguous, what do you say the habendum clause means?

GUNN: I say it is a primitive form of a shut-in clause, before shut-in clauses really took over. And that the parties probably thought about the nacent(?) development of petroleum in the Panhandle, and the lack of pipeline facilities. And they in fact, if you read later in paragraph 4, they contemplate the problem of hook-up and getting to a pipeline later. So I say it means some sort of mechanical capability of production. Not just geological presence of hydrocarbons in the ground, but that there's a well that can take the hydrocarbons out. Otherwise, the disjunctive is just gone. The "or can be" is gone.

BAKER: Well there's no question that this one is different than the habendum clause in the cases that were just argued.

GUNN: Yes it is. And you will not see many more like this. But the reason I wanted to start with it is first, I think it actually is necessary for you to loop through this issue to get the right disposition of the case. Also, I am told there are a few others, and there's at least one other big is or can be lease with a monstrous amount of production at stake that's behind me in the judicial pipeline.

You know from the CA's opinion that the CA said, We have to destroy the village to save it; we have to take out "or can be" to make this lease work. And that leads to problems, but they said that's just the best we can do. The CA's primary objection as I read it was the infinity problem of a perpetual lease being held for speculation for all time. The answer to that is, not only that it didn't happen, but that there are already tools in the law to stop that from happening. And those tools existed in 1936. Implied covenant to develop would provide the lessors with a damage suit against us, and if we continued to drag our feet and do nothing, not only could they get damages, they could get cancellation for an extreme set of facts. So implied covenant law is going to stop this hypothetical boogeyman that the CA perceived.

We have incentives. We want to produce and we have a good track record of producing. I don't think the perpetual lease objection is very persuasive given the presence of implied covenant law. The only speculation that was going on here was by the CA. Nobody wants to hold on to this lease and just let it sit there.

The second objection that the CA raised was a surplusage objection. Now, I don't see that it makes any sense to say, this part of the lease is surplusage so I'm going to remove that part of the lease. They didn't really cure the surplusage problem. They just shifted and said the

surplusage here is in the habendum clause rather than paragraphs 10 and 11.

We read 10 and 11 not as surplusage, but as safe harbors, and savings clauses that simply allow an easy administrative way to prove nontermination. You can always do it the hard way. And maybe we could go through the factual proof of proving "can be" is satisfied. But why do that if I'm drilling a well. If my first well has gone dry and I start drilling a new well within 60 days, I can just put somebody on the stand and say I'm drilling this new well. I'm clear under paragraph 11. I think that is what is going on. It's just a safe harbor. Ten and 11 do not cause termination.

Paragraph 10, I should point out to you, actually looks elsewhere for whether the lease is maintained or not. It refers in its text, it uses a phrase "while the lease is in force", which tells me it's pointing somewhere else. It contemplates we no whether the lease is or is not enforced by looking at an earlier part of a document.

Paragraph 11, as I say, allows drilling of a second well if the first one runs out. And the plaintiff's reading of 10 and 11 would read as some corky results. For example under para. 11, as I understand their reading, if there's just a one day cessation on my first well they've now triggered the 60 day requirement that I go out and drill another well when I may not need it. This is not an oil and gas lease. It's a gas lease. And it's in the nature of gas production to have temporary stoppages. You can't store the stuff is the problem. It's got to have a hook-up and a pipeline. This succeeded so well, so few of my documents live very long, but these drafters made a legal document that outlived the parties and kept on for a long time and we hope will keep on for a long time in the future. This has produced very well, so well that the steel pipeline just had a breakdown and needed and some help.

The third and final objection that the CA raised to the "is or can be" interpretation we proffer was a pair of out of state cases. The Oklahoma case comes from a different state and different law. They don't interpret habendum clauses the way we do. I have found a Louisiana case that appears to go our way. I will send you a letter with the citation to that. In that case, the TC granted summary judgment on termination. It said the lease was gone. The CA reversed it and said no, there are affidavits saying that gas can be produced.

In short, we think this lease did not terminate. And the summary judgment which found that it did is erroneous and should be reversed. We have briefed, but I don't intend to argue the Clifton argument that you just heard. I have very little to add to that.

The adverse possession and defensive issues I share in common. I would like to develop a little bit because the knife that the plaintiffs bring down on the fee simple has two sides. It has a sharp edge, and if they really have the courage of their conviction and say that the fee simple determinable stops at some moment in time, then I say hold them to that position like the judge in the merchant of venice and say, okay you get what you asked for and the clock started running. The TC found me to be a trespasser. It found that we had been trespassing and exercising dominion over

the minerals since the instant this lease terminated. If that is so, then I say St. Louis Royalty in the 5th circuit had long recognized the clock starts running. That is not the only adverse possession decision. It's well established that the way you possess minerals is by extracting them from the ground. And there's no question that's what we did.

If we step back and look at the policy behind adverse possession, I can think of 2 or 3 policies, all of which are served by applying it here. First, that the obvious policy of repose. Not reposed for its own sake, but reposed to protect people's investments from being destabilized by a stale claim where you don't know what the evidence is.

PHILLIPS: Is your view of the consequences of adverse possession the same as Mr. Pierce's, that is that you have 100% forever and ever?

GUNN: I am not entirely clear. This court hasn't said...

PHILLIPS: Well I know we haven't.

GUNN: The oil and gas theologians get very upset about fine points of doctrine. And the problem with that is, the history of oil and gas litigation is not theologically pure. I think the answer he gave you is the best answer. The statutory hook I would use is the phrase "claim of right" in the adverse possession statute. What is the claim that a producer is making when the lease maybe inadvertently terminates and they continue producing? They are not claiming to own everything and to exclude the royalty owners. They are claiming to go on with their share of the pie, the 7/8. That's exactly what the 5th circuit decreed, and they found that...

BAKER: But don't you think his theory in effect gives the companies more than they ever had to start with?

GUNN: In a way it does.

BAKER: Because it does away with the doctrine of fee simple determination doesn't it, the determinative fee?

GUNN: I think it does away not so much with that because any...

BAKER: Well he only had the right to 7/8 interest, so long as you produced gas or could be produced, and if you don't produce you lose it. The argument that by adverse possession you get 7/8 fee simple period, it sounds to me like you get more than you ever had in the first place.

GUNN: It's only more in the sense that it doesn't have that trapdoor. You are correct. But it's not larger in scope.

BAKER: Isn't that what your company bargained for in the first place in the lease?

GUNN: Yes. And I have no objection if the court says no, the best reading is to keep the lease alive. I don't object to that. I think the oil and gas theologians would say, well it's really 7/8.

BAKER: Would you call that a pre-termination status quo?

GUNN: Yes. It's sort of a statutory version of latches or some equitable defense. The 5th circuit said give the royalty owner his 1/8. He's got a right to an accounting. Don't shut him out completely. The claim of right is the way I think you ought to read it. What is the claim of right by the lessee? The claim that we're claiming under is the 7/8.

BAKER: In your lease does the cessation of production clause cause the lease to terminate anytime actual production ceases for more than 60 days?

GUNN: No. It says just the opposite. It just says this is something that will not terminate the lease. It doesn't say as the plaintiff's read it, the opposite: if you fail, if you get to 61 base, then the lease does terminate. It doesn't say that at all. The only thing that terminates the lease, I say is the habendum clause.

The development of the land, development of resources is the social policy that I think is really behind the adverse possession statute. The history of Texas and frontier was characterized by very generous adverse possession statutes. And yes, it does result in a shifting of title. But that's what the legislature wanted.

OWEN: So we are going to have the people that are going to the RR Commission _____ switch over, and instead of going to the lessee they will be going to the lessors saying you need to argue that this lease terminated 60 years ago, so you can now claim...

GUNN: I think it would certainly put an end to the former industry of volunteer title examination. You're right.

HECHT: No, they would just switch over.

GUNN: Well that may be in the nature of adverse possession. And I agree. I would rather find a little more equitable middle ground to go with me on "is or can be" than the guilt is not mine for that development. But I'm afraid that is in the nature of it.

ENOCH: All of the equitable issues that were raised in the earlier argument seems to me pre-supposes that the lessor has some sort of - for the lessor to take advantage of the fee determinable, the reverter there, they have an affirmative obligation to step forward and assert their right. It seems to me to impose some sort of equitable who thinks against them, you have to point to a failure on their part to have asserted their interest under the reverter. Is there any law out there that says when you have fee determinable that it doesn't occur unless the original fee owner steps

forward and stands on a soap box proclaiming I now have title, or goes out on the property and shoos people away or something? Is there any case law that says there's an obligation to do that for the reverter to work?

GUNN: Two cases I will give you. One is in the brief, and one is not. One is the DaBenavides v. Warren case from San Antonio. It's an early 80's nre case that flat out applied latches, determination for the fee simple determinable. It was technically a royalty deed instead of a lease. But that case did it. The way I trace all of these equitable inroads which..

ENOCH: But didn't DaBenavides identify some sort of obligation on the part of the person claiming ___________ title, that they failed to - I mean some sort of threshold they had to do in order to get the title?

GUNN: No. A fee simple determinable is an automatic transmission. It shifts without human conduct. It just shifts.

ENOCH: But without some obligation on the part of the person getting title to do something what is it that you predicate their having failed to have done that for a long period of time now keeps them from doing that. How do you measure the period of time that they have now done something or failed to do if there was never anything they had to do to begin with?

GUNN: The thing that's unique about the fee simple determinable is that somebody has to prove a fact. And I think it fits reasonably well although not perfectly to let equity have a role in saying, If it's proof of a fact that you have to do to establish your title, not to get it in theory, but to actually go establish at the courthouse, that the passage of time can have a bearing on that in the deterioration of records.

ENOCH: It's not an automatic reverter because until that fact is proved there is no reverter of title.

GUNN: I would just separate the substance and the procedures. Substantively there is a theoretically reversion, that is we've got to live in a practical world.

OWEN: Wouldn't we really be saying we don't know what the facts are, we are not going to let anybody prove them up one way or the other?

GUNN: It's something like that. Yes. I think that's right. If it's unfair to change the status quo. If I've got record title and I've been producing for 66 years, and then somebody comes in and says this terminated during WW II, and I can't prove it, and I had check records but the savings and loan crisis has taken down all the banks that had the checks. You know my predecessor in title I can't find the records. There is something ________ demand I think could reach that.

PHILLIPS: So we could have one case where the event happened 50 or 60 years ago, but

it just so happens we have good records on it, or somebody kept a diary.

GUNN: Yes.

PHILLIPS: And another case could be 10 years ago and it would come out the other way.

GUNN: That's correct. And it would be doctrinally pure to say we won't let equity do any of this. But we've crossed that river long ago with the equitable cases, not just Humble and Harrison, but the lay Reynold cases. All of those that...my favorite case is Kothman v. Bailey from 1957. That's the reason we're not producing today. We are standing here still, the longest period of nonproduction was because your decisions say that if there is lessor repudiation and the lessor padlocks you out and says you don't have title anymore, it reverted to me 3 weeks ago, your decision says that is an estoppel, and you can go to the courthouse and litigate. That rule just cannot coexist with the plaintiff's absolute _____ over fee simple determinable. We've already crossed the equitable bridge. There's no reason not to adjust it to fit this pattern.

HANKINSON: You've abandoned the estoppel defense. Is that right? It hasn't been brought up here.

GUNN: It's not equitable estoppel. I think it's quasi estoppel.

HANKINSON: Quasi estoppel I guess is what it was called in the CA opinion.

GUNN: Right. I didn't mean to abandon that. I think it's alive.

HANKINSON: Is the theory that you just talked with us about really the quasi estoppel theory or is it latches? What would you characterize it as a legal theory?

GUNN: Well it's both. Quasi estoppel, I think is coming primarily from their letter where they complain to us: hey, you're not doing anything, give me the lease and we drill. The latches really is the one that goes back before that, and it's just without them taking activity both sides just sitting still and the evidence wasted away.

HANKINSON: Your reference to a theoretical reverter at a point in time there was a cessation of production, is that new or do you know anything in real property law that really talks about the reverter not actually happening until it's been proved up?

GUNN: Are we talking fee simple determinable or fee simple on condition subsequent?

HANKINSON: Fee simple determinable.

GUNN: In a fee simple determinable, it just seems to me it's in the nature of having

the court system. I don't know of a case that says it. But if you have to prove it, the plaintiff comes in and doesn't answer interrogatories and all their witnesses are struck, then they lose title but that in theory they've had it.

HANKINSON: My question is, are you asking to turn real property law on its head by saying that the reverter really doesn't occur until it's been proved, or is that consistent with Horn book real property law?

GUNN: I don't mean to ask you to turn it on its head. I really don't.

HANKINSON: I understand you don't mean to. I'm just trying to get the lay of the land with how your argument fits.

GUNN: I think that is consistent. If you have to prove facts before you can say what they were, is _________ just cat in the box dead or not. We don't know until we look. And it just seems to me that's in the nature of having an adjudicated system.

HANKINSON: If I take title to property by adverse possession, that too is a fact _______ inquiry. Do I not get the title until I go to the courthouse and prove it, or is my title effective when the 10 years runs under the statute? Do I take title from that day, or do I take title from the day I prove it at the courthouse?

GUNN: I think you technically have it when the time runs, but nobody will lend you money and so on. You can't do anything with it until you go prove it.

HECHT: It seems to me the equitable doctrines are of less importance if you buy the theory that the plaintiff must prove more cessation of production and paying quantities in order to establish the reverter in the first place, because that will shift the difficulty of getting information to the plaintiff rather than to the defendant?

GUNN: I think that is true, but it's not clear who has the burden. And I think it could be either side. It's not clear to me who has the burden. If one side comes in and trespass to try title against the other, the plaintiff, whoever got there first I believe has the burden. So I'm not sure it shifts necessarily to the lessor on all cases, but you're correct.

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RESPONDENT

LOVELL: This court and several other courts were struggling with these same issues early in the last century. And the decision was made nearly 100 years ago that the language "so long thereafter as created" a determinable fee estate and the parties had been contracting based upon that construction ever since.

The arguments made by the gas companies in both of the cases you've heard today do turn that on its head; whether it's by applying the production in paying quantities reasonably prudent operator standard, or the other proposals. If a landowner has to prove by the standard of a reasonably prudent operator, that means that landowner never gets title to their reversion back until they go in, file a lawsuit and take action to do it.

Now when that is what has to be done to get the reversion back, that's not a fee simple determinable. That is a fee simple...

HECHT: I don't understand that, because it looks to me like you could be sitting there in your home thinking you know I didn't get a check last month, so I own it. And then you're sitting there thinking well I own it, and then low and behold the check comes in. It was lost in the mail. And then you say well now I don't own it. Don't you have to wait until the fact is proven one way or the other before you really know whether the reverter triggered or not?

LOVELL: Not to trigger the reverter. Perhaps you do to actually regain possession.

HECHT: But if you just imagine it, you don't own it. If you don't get the check you don't really have the title. You don't really know whether you do or not. Is that right or not?

LOVELL: You don't know whether you do or not, that is correct. And that is the nature of the determinable fee estate is that...

HECHT: But you don't know whether you do or not?

LOVELL: That's right. It doesn't matter.

HECHT: Well when will you know?

LOVELL: That's going to depend on the facts of each case.

OWEN: If they have to be litigated it may turn out either there was a reverter or not. It would have been effective whenever it occurred. But the lawsuit is to determine the facts: Did it happen or not? And to say that we're just not going to let you litigate the facts is not necessarily to undue the doctrine is it? We just simply say we're not going to let you - since neither side has full possession of facts we're going to foreclose anybody from litigating that factual inquiry.

LOVELL: It's not a question of foreclosing people from litigating the factual inquiry. It's a question of the actual operation of that estate and land. And the actual operation is it happens automatically on the limitation that was set forth in the contract.

OWEN: Depending on the facts though, we have to know what the facts were to determine if there was a reverter or not. And we don't have - if both sides aren't in full possession

of all the facts and we say well, because both sides are not, because of the lapse of time, we're not going to let you delve into whether there was a reverter or not when it's a factual inquiry.

LOVELL: Which is a little bit different than the question of whether or not there was a reverter.

OWEN: Reverters turn on facts. You have to know what the facts were to determine if there was a reverter.

LOVELL: To know that, yes.

OWEN: If we simply say we're just not going to let you get into that argument and thrash out what the facts were, that's not derogating the doctrine. We're just simply saying we're not going to let you prove it one way or the other.

LOVELL: I think it goes further than that. Just because of the very nature of the property estate itself. And one of the problems with all of this and the way it's been brought up in my mind anyway is the fact that all of these problems are and have been easily resolved for many years simply through contracting of the parties. We have shut-in clauses. We have cessation clauses like this lease has. And they are common and there is nothing to prevent even NGPL if it goes back actually it was 40 years, but there was nothing to prevent them from picking up the phone and getting an amendment to the lease or a ratification or a new lease. And that case actually that's before you provides the perfect example of why that should not happen. Because they did know at least 20 years ago that the title had reverted and made the conscious decision to keep it a secret. And now, Mr. Pierce stands up here and says, Kings X, we have adversely possessed you secretly and we have more than what we started out with. We have 7/8 and there's no longer a right of reverter. That right of reverter is a valuable property right that those original landowners negotiated for and are entitled to pass on to their heirs.

ENOCH: I'm a little bit troubled about the reverter. If a fact occurs there is a reverter. And the fact here is the cessation of production. That's in dispute. The parties now dispute it. Who has the burden to prove in the course of this dispute that there was a cessation in production?

LOVELL: Initially the landowner does.

ENOCH: The argument about latches, the title's already reverted, what happens with latches? If the landowner has the burden to approve the cessation, then can latches be used against the landowner when - also the landowner over the course of 40 years, the landowner now may e able to come forward and prove the threshold cessation. But the defendant has now lost all the evidence that they would have to have in order to meet that proof. So one party can still bring their case, but the other party because of passage of time has occurred no longer has the evidence. If the plaintiff has the burden to prove the threshold fact that caused the reverter wouldn't it be appropriate for latches to apply if the lessor fails to assert that fact at a time that the defendant would have been able

to meet that proof?

LOVELL: It depends. Actually you could have the same problem in an adverse possession case. But that doesn't change title. Now one of the reasons that latches should not, I mean it doesn't, but one of the reasons it should not in this context is because who has control over the facts that tell what happened. Well it's going to be the producer. And if we grant to them the opportunity to say, Okay we're going to place the burden of proof on this party who has a right of reverter to prove what you operator did or did not do when, then that creates the incentive to act just like NGPL acted, and that is start destroying records that implicate themselves. And then you've left the landowner without any means of showing that their property right has reverted to them.

They've made it sound today like such an erroneous burden to prove what happened with the well. But the facts in the cases before you contradict that argument. These companies have well files that are contained within the record that they show checks, delay rental checks, from the turn of the century. Yet they destroy other files that they say well they show what we were doing and why we were doing it. Yet we have lease files that contain documents going back forever. They keep in their record retention policy those documents which are important to show the state of their title.

HANKINSON: Would you explain why the CA did not read out of the habendum clause the "or can be produced" language?

LOVELL: They didn't read it out. When applicable lease construction principles are applied, you can't just read three words. You have to read the 4 corners of the document.

HANKINSON: If you do that it says, as long thereafter as gas is or can be produced. Mr. Gunn has addressed that argument to say we must give meaning to all of those words, which gives meaning to the entirety of the lease. What's your response?

LOVELL: The document itself. In the first place, how that is to be construed is the courts are to construe searching for the intent of the parties. And in this document the intent of the parties is given to us in para. 1 where it says the purpose of this lease is for producing gas, not discovering and holding gas, but for producing gas. Then we have the para. 2 of the habendum clause "is or can be" produced. Then it goes on though. There is a commencement clause that requires in spite of the one-year primary term that drilling be commenced in a very short period of time. And that is 14 days that they have to commence. And then it goes on. This continuation of para. 4. And it says, upon completion of said well is a well producing natural gas in paying quantities lessee shall within 60 days cause that well to be connected to a pipeline and commence producing and marketing.

Then we have the para. 10 and 11, these savings provisions. Which again belie the claim that "is or can be" produced means to the operator whenever we get around to it. Para. 10 interestingly says, not withstanding anything in this lease contained to the contrary. It is

expressly agreed that if lessee shall commence drilling operations at anytime while this lease is in force, which occurred, this lease shall remain in force and its terms shall continue so long as such operations are prosecuted, and if production results therefrom, then as long as production continues. And that's precisely what happened.

HANKINSON: And Mr. Gunn's response to that is is that the additional language in the habendum clause operates as a shut-in clause, which would be consistent with everything you just talked about.

LOVELL: The additional language in the habendum clause is not a shut-in clause. If there is a shut-in clause...

HANKINSON: I'm just telling you his response is that he can read it consistently by giving it that kind of meaning. All of the clauses that you've talked about.

LOVELL: How does construing that as a shut-in clause fit within the intent of the parties to encourage production, and fit within the language of the numerous cases out of this and other courts saying that courts will construe leases to require production? It doesn't fit. And it is not a reasonable interpretation. This case is controlled ultimately by para. 11, which says if this production on the lease premises shall cease from any cause this lease shall not terminate provided. And then it gives 60 days to regain production. And in this case there were two periods in excess of 60 days.

By the way, I do need to correct a misstatement of the facts that you heard. There was no evidence of any activities or any pipeline problems or anything else with respect to the 1985 cessation, which was at least 91 days.

Further, no party has claimed that this lease is ambiguous. Not here. Not in the CA. Not in the TC. So when you look at the 4-corners of the doctrine this one is pretty clear, that "can be" does not mean a shut-in clause. Now there are cases that this court has construed that language - "is or can be" produced. And one of them is one of the leading oil and gas cases, Texas Co. v. Davis. That had a "can be" produced habendum clause. And this court determined that that required production. So it's easily construed to deal with that.

I would like to touch on adverse possession. In the first place, I do want to remind the court that in this case ultimately adverse possession, that defense, turns on the facts. Here the TC found against Anadarko on its claims of adverse possession. It found it had not met its burden of proof. But the elements that are raised here are the elements of intent and notice of repudiation. Now notice of repudiation is really the critical thing and particularly in light of the argument we heard in the last case. That is exactly why there has to be notice of repudiation, so is that people have notice that somebody is claiming title by possession. And the cases go back well over 100 years that require that in a circumstance such as we have here where possession commences permissively before that possession can start triggering a limitations title, there has to be notice of

repudiation of the previously permissive tenancy. And that's also set forth in the definition of adverse possession itself, which requires an actual and visible appropriation of real property commenced and continued under a claim of right that is inconsistent with and hostile to the claim of the owner.

JEFFERSON: Can that notice be in a form of a failure to pay royalties that would otherwise be due during _____?

LOVELL: No, not necessarily. Under certain facts, I guess it could be. Then if they start up royalties again, that's conduct that's consistent with the lease hold estate. Just like actually being out there and producing, putting signs at the well signs. Those are all activities that are consistent with the previously permissive character.

PHILLIPS: If their possession claim was only to 7/8, would that necessarily be inconsistent so long as they paid royalties on 1/8 and just paid it whether or not they had had a cessation longer than 60 days?

LOVELL: If I understand your question, yes. That is still inconsistent because even though they may be claiming only 7/8, they are claiming 7/8 fee simple title. And taking away any right of reverter.

HECHT: Why is it notice that they are at least claiming what they had before with the right of reverter?

LOVELL: They are claiming it through the lease, which is the permissive possession.

HECHT: But you claim that has gone away.

LOVELL: That's right.

HECHT: So what are they doing on your property? That's the part I am having trouble with.

LOVELL: They are producing the well.

HECHT: Under what claim of right?

LOVELL: It depends on what claim of right they make.

HECHT: I mean if somebody came on my property and started drilling a well and carrying off all of the goodies, I would be upset and I would want to know why you are out there.

LOVELL: Sure. But if they were out there to begin with because you gave them a piece

of paper that gave them permission to be out there, then you have no way of knowing that they are now claiming title to your property because they are out there.

PHILLIPS: But if you gave them the paper and everything goes along hunky-dory for 20 years and they pay you 1/8, and then all of a sudden there is 3 months they don't pay you, which is notice to you that it is now your property under your reading of the lease, and then they start paying you that 1/8 again isn't that open and notorious occupation of the land or whatever the statute is applicable _________ statute?

LOVELL: No. Because once again that is consistent with the previous possession, and...

PHILLIPS: But you say the previous possession is now in the past, that they don't have any current position.

LOVELL: No. That they don't have current title. They still have possession. They don't have title. And that's the difference.

PHILLIPS: Then they should be sending you more profit. They should only be keeping their cost of operation.

LOVELL: That's right. We get down to the question of notice. What is notice and what is not notice and what is consistent and what's not consistent and how they started out. And if they start out permissibly - just for example, well they miss a few months payment so automatically everybody knows that the lease terminated. Everybody doesn't know that the lease terminates. Everybody doesn't necessarily know that they missed several months payments. And you can see that in the record that you have in this case. These landowners own not just the royalties on one well, there were several wells, and they got one check for all these wells.

PHILLIPS: Isn't there a ______________ bottom that tells you how it was calculated?

LOVELL: No. Look at it. I encourage the court to look at it. We had testimony from accountants who couldn't even figure out what all those numbers mean. Sometimes they didn't ever refer to wells. They would refer to division order numbers that were internal to Anadarko.

PHILLIPS: So your notice if any would come from taking a trip to Austin and looking through RRC files?

LOVELL: It could yes. That's right. If you do that you can find production history on a given well. That's correct. But the point is that a missing check is not necessarily notice. An adverse claim. Now in this case it's even easier to resolve because here Anadarko's own representative admitted that they weren't claiming possessively. Only claiming under the lease. In fact they moved off the property. They took off the compressor. They shut down the well. They chained it up and left when the suit was filed, which is clear evidence that they didn't consider

themselves to have limitation title.

And its' for these reasons we ask the court to affirm.

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REBUTTAL

GUNN: J. Baker to answer your question. Ambiguity you will find on p. 173 of the clerk's record. Our possession was not permissive. We've used the word lease. We are not a tenant. We own fee simple determinable. We're either the owner, not there by permission, but by our right, or we're a trespasser, which is what finding No. 12 found us to be.

I think the court understands the issues.