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Richard Gerald Dye, aka R. Gerald Dye, and Gas Producing Enterprises, Inc. , A Corporation v. Miller & Viele, A Corporation Lee Charles Miller, Lesley F. Lewis, and Chevron Oil Company, A Corporation v. All Other Persons Unknown Claiming Any Right, Title, Estate, Lien Or Interest In the Real Property Described In the Complaint Adverse To Plaintiffs' Ownership, Or Any Cloud Upon Plaintiffs' Title thereto : Brief of Respondents

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IN THE SUPREME COURT OF THE STATE OF UTAH

RICHARD GERALD DYE, aka R. GERALD DYE, and GAS PRODUCING ENTERPRIS ., INC., a corporation,	)	
Plaintiffs - Respondents,	)	
-vs-	)	Case No. 15475
MILLER & VIELE, a corporation, LEE CHARLES MILLER, LESLEY F. LEWIS, and CHEVRON OIL COMPANY, a corporation,	)	
Defendants - Appellant,	)	
and	)	
All Other Persons Unknown Claiming Any Right, Title, Estate, Lien or Interest in the Real Property Described in the Complaint Adverse to Plaintiffs' Ownership, or any Cloud upon Plaintiffs' Title Thereto.	)	

FILED
MAR 1 1978
Clerk, Supreme Court, Utah

BRIEF OF RESPONDENTS

Appeal From the Summary Judgment of the
Fourth District Court for Duchesne County
Honorable David Sam, Judge

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TABLE OF CONTENTS

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Page

CASES CITED

STATUTES CITED

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Page

TEXTS CITED

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BRIEF OF RESPONDENTS

STATEMENT OF THE NATURE OF THE CASE

This is an action to quiet title to an undivided one-half mineral interest.

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DISPOSITION IN THE LOWER COURT

The district court granted Plaintiffs' Motion for Summary Judgment finding Plaintiff Dye to be the owner of the undivided one-half mineral interest. Defendant Miller & Viele's Motion for Summary Judgment was denied. The court held that Defendant Miller & Viele was barred by the applicable statutes of limitation for tax titles from interposing defenses to Plaintiff Dye's tax title to the disputed one-half mineral interest. The distri court denied that portion of Plaintiffs' Motion pertaining to perfection of Plaintiff Dye's title by adverse possession. Judgment was entered quieting title to the disputed one-half mineral interest in Plaintiff Dye. The court further ordered Defendant Chevron Oil Company (now Chevron USA, Inc.) to disburs to Plaintiffs accrued and future shares of oil and gas production attributable to the disputed one-half mineral interest.

There are no disputed issues of fact. All relevant facts pertaining to the chains of title and lack of possession by Defendant Miller & Viele were either admitted in the pleadin or stipulated and agreed to by the parties. All facts pertaini to possession by Plaintiffs or their predecessors and the Payment of Taxes were submitted upon affidavit and certified abstract. Only issues of law were decided by the Court.

RELIEF SOUGHT ON APPEAL

Plaintiffs seek affirmance of the ruling below.

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IDENTIFICATION OF THE PARTIES AND EXPLANATION OF ABBREVIATIONS

Miller & Viele, a defendant and the appellant, hereinafter will be referred to as Miller & Viele. Defendant Chevron Oil Company hereinafter will be referred to as Chevron or, where appropriate, by its full name. Richard Gerald Dye, a plaintiff and respondent, hereinafter will be referred to as Dye or, where appropriate, by his full name. Plaintiff and respondent Gas Producing Enterprises, Inc., hereinafter will be referred to by its complete name. Richard Gerald Dye and Gas Producing Enterprises, Inc., collectively, hereinafter will be referred to as plaintiffs or, where appropriate, by their names.

"R" refers to a page reference in the record of the case.

STATEMENT OF FACTS

The statement of facts set forth in defendant's brief (pp. 3-7) is accurate so far as it goes. However, defendant omits certain pertinent facts essential to a full and accurate statement, and therefore plaintiffs present this additional statement.

It is true that Richard Gerald Dye is a record owner of the undivided one-half interest in minerals underlying the forty acres legally described as the NW¼NE¼ of Section 29 in Township 1 South, Range 1 West, USM, located in Duchesne County, Utah.

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Dye's title to the undivided one-half interest in minerals underlying the forty acres in dispute stems directly from the Auditor's Tax Deed issued to Duchesne County on May 9, 1932 (R-231, 300). On December 21, 1927, the NW¼NE¼ (including all minerals) had been sold to Duchesne County for delinquent gener property taxes assessed and levied for tax year 1927 (R-230, 29 These lands were not redeemed from tax sale by the "legal owner by any other person or party holding an interest therein during statutory four year period for redemptions of lands from tax sa (R-230, 231). The lands were then "struck-off" (sold) to Duche County at the 1932 May Sale, at which time the Auditor's Tax De issued (R-231). The surface of the NW¼NE¼ and the undivided on interest in minerals here in dispute was ultimately conveyed to Dye in 1954 (R-232, 371).

Dye and his predecessors in interest have been in actual possession and occupancy of the NW¼NE¼ since 1954 and have paid all real property taxes levied and assessed against the property since 1936 (R-232,233). The remaining undivided one-half interest in minerals is owned by one of Dye's predecessors in interest and is not in dispute here (R-232, 345).

It is true that Miller & Viele claims an interest in the disputed undivided one-half interest in minerals. Miller & Viele's claim stems from a 1928 mortgage foreclosure and execution sale in favor of defendant Lee Charles Miller of the NW¼NE¼ which was already subject to the 1927 preliminary tax sale to Duchesne County (R-230, 296). Through a series of Conv

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the interest obtained by defendant Lee Charles Miller pursuant to the foreclosure proceeding devolved upon Miller & Viele in 1930 (R-231, 298), still subject to the 1927 preliminary tax sale to Duchesne County. In 1946 Miller & Viele quitclaimed the NW¼NE¼ to one of Dye's predecessor's in interest, purporting to reserve to itself the undivided one-half interest in minerals now in dispute (R-233, 337).

At the time Miller & Viele received its deed to the NW¼NE¼, it was, and now still is a Utah Corporation engaged in the business of real estate investment and mortgage banking (R-230). Neither Miller & Viele, nor any of its predecessors in interest redeemed the NW¼NE¼ from tax sale during the statutory four year period for redemption (R-231). At no time during the forty-seven years since receiving its deed from its predecessor did Miller & Viele go into actual possession or actual occupancy of the NW¼NE¼ (R-233). At no time during the forty-seven years since receiving its deed from its predecessor did Miller & Viele pay the general property taxes levied and assessed against the NW¼NE¼ (R-233).

In summary, the facts of this case developed two independant record chains of title; one in plaintiff Dye stemming from the tax sale proceedings, the other in defendant Miller & Viele through the mortgage foreclosure proceeding. These chains of title are illustrated for convenience on page 1 of the Appendix to this brief. The ultimate question presented is whether Miller & Viele is barred by the applicable statutes of limitation from asserting its chain of title.

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Plaintiffs take no exception to Miller & Viele's Statement of Facts pertaining to creation of the oil and gas leasehold estates, the Communitization Agreement, formation of the 640 acre drilling and spacing unit, and completion and operation of the R. G. Dye 1-29A1 Well in the SW¼NW¼SE¼ of Section 29. Plaintiffs do add, however, that defendant Chevron Oil Company did not physically enter upon the NW¼NE¼ during its exploration drilling and production operation (R-156 to 183).

ARGUMENT

Point I

DEFENDANT MILLER & VIELE IS BARRED BY THE STATUTES OF LIMITATIO FOR TAX TITLES FROM INTERPOSING ANY DEFENSE TO PLAINTIFF RICHAR GERALD DYE'S TAX TITLE TO THE NW¼NE¼ INCLUDING THE UNDIVIDED ON HALF MINERAL INTEREST IN SAID LANDS ON GROUNDS THAT SAID DEFENS IS INTERPOSED MORE THAN FOUR YEARS SUBSEQUENT TO ISSUANCE OF TH TAX TITLE AND DEFENDANT MILLER & VIELE OR ITS AGENTS HAVE NOT ACTUALLY OCCUPIED OR BEEN IN ACTUAL POSSESSION OF THE LANDS WIT FOUR YEARS PRIOR TO INTERPOSITION OF ITS DEFENSE PURSUANT TO UT CODE ANN. §§78-12-5.1 and -.2 (1953).

Although judicial decision appears to entitle Miller & Vie to have the facts viewed in a light most favorable to it inasmuch as this is an appeal from a Summary Judgment, it must be noted that all facts pertaining to the respective chains of tit

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were stipulated to by the parties to this appeal. All facts pertaining to actual possession of the NW¼NE¼ and to payment of taxes by Dye and his predecessors in interest, as well as to exploration and production activities of Chevron Oil Company were submitted by both parties to the appeal upon affidavit and certified abstract and are uncontroverted.

Both plaintiffs and defendant Miller & Viele moved the lower court for summary judgment on grounds that there were no material issues of fact. With the sole exception of the Driscoll affidavit pertaining to the perimeters of the "common source of supply", which the lower court refused to accept, all facts were before the court. There was no new or additional evidence which could have been presented to the court even in a trial setting. The district court considered all the evidence and every inference fairly to be derived therefrom, and ruled in plaintiffs' favor. This case was a particularly appropriate case for summary judgment as there were no disputed facts. The only issues in the district court were issues of law. They are now on appeal.

The issue for determination is whether or not Miller & Viele is barred by the applicable statutes of limitation from interposing its defenses to Dye's tax title. This issue in turn raises the real question to be determined whether Miller & Viele was in actual possession of the disputed mineral interest within four years prior to the interposition of its defense in this lawsuit to Dye's tax title.

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The district court's decision was based upon §§78-12-5.1 an 78-12-5.2, the statutes which prescribe the period of limitation applicable in tax title litigation. Miller & Viele's position o appeal is that it fits the actual possession exception of those statutes and therefore is not barred from asserting its defense to Dye's title.

Specifically, Miller & Viele contends that it was in posses of the undivided one-half mineral interest underlying the NW¼NE¼ by and through its oil and gas lessee, Chevron Oil Company, with the four year period prior to interposition of Miller & Viele's defense to Dye's tax title. The facts upon which Miller & Viele seeks to support its contention are that Chevron is operator of the R. G. Dye 1-29A1 Well which produces oil and gas from a comm source of supply underlying the drilling unit into which the Dye lease was pooled. The well operated by Chevron is located in th SW¼NW¼SE¼ of the Section 29 drilling unit on a lease other than Dye lease. Miller & Viele concludes that production of oil and from the well-head somehow constitutes actual possession of the undivided one-half mineral interest in the NW¼NE¼.

However, the cases relied upon by Miller & Viele to support its position that possession of the lessee inures to the benefit of the lessor are ancient landlord-tenant and mortgagee-mortgago cases from foreign jurisdictions which are not controlling upon this Court. Furthermore, those oil and gas cases cited by Miller Viele in its brief do not stand for the proposition asserted by Miller & Viele; that production of oil and gas from lands pooled

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into a drilling unit consitutes "actual" possession of the mineral estates in those lands. In fact the law of those cases is to the contrary, and is directly supportive of plaintiffs' position.

Plaintiffs contend, that based upon the statutes and compelling oil and gas case law, Chevron was not in actual possession or actual occupancy of the NW¼NE¼, including the underlying mineral estate, required by the applicable statutes of limitation. Therefore, Miller & Viele is barred from challenging Dye's tax title.

The Utah statutes of limitation for tax titles bar all challenges to tax titles which are not brought within four years of the date of issuance of the tax title. Peterson v. Callister, 6 Utah 2d 359, 313 P.2d 814 (1957); Hansen v. Morris, 3 Utah 2d 310, 283 P.2d 884 (1955). There are two exceptions to the barring of untimely defenses, limited (1) to persons challenging the tax title who have actually occupied or who have been in actual possession of the lands affected by the tax title; and (2) to cities or towns who hold a lien which is equal or superior to the claim of the tax title holder.

Miller & Viele relies on the possession exception which reads in context as follows:

> . . . no such action or defense shall be commenced or interposed more than four years after the date of the tax deed . . . unless the person commencing or interposing such action or defense . . . has actually occupied or been in possession of such property within fours prior to the commencement or interposition of such action or defense . . . (emphasis added) §78-12-5.1

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The companion proviso reads as follows:

> . . . this section shall not bar any action or defense by the owner of legal title to such property where he . . . has actually occupied or been in actual possession of such property within four years from the commencement or interposition of such action or defense . . . (emphasis added) §78-12-5.2

Although this exception has been formerly recognized by the Utah Supreme Court in Huntington City v. Peterson, 30 Utah 2d 408, 5[illegible] P.2d 1246 (1974), the court has given no indication that the "ac possession" exception in the statutes was anything other than actual possession.

The Utah Supreme Court has defined "actual possession" of real property interests as follows:

> "Actual possession exists where the thing (real property) is in the immediate occupancy of the party;" B.L. Dict p. 349; or as the court in this case instructed the jury, "Actual possession is the subjugation of the premises to the use and dominion of the claimant." [Lillianskyoldt v. Goss, 2 Utah 297 (1877)].

That case involved an action to recover an undivided interest in real property.

The Utah position is in accord with other jurisdictions who have defined the term similarly when construing similar types of statutes. In People ex rel Turner v. Kelsey, 89 NYS 416, 418, 96 App. Div. 148 (1904), the New York Supreme Court, Appellate Division, in construing a real property tax statute which requir a party to be in "actual possession" prerequisite to redeeming delinquent property from tax sale, said:

> "'Actual possession,' is a legal phrase, is put in opposition to the other phrase, 'possession in law,' or 'constructive possession.' Actual

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possession is the same as pedis possessio or pedis positio, and these mean a foothold on the land, an actual entry, a possession in fact, a standing upon it, an occupation of it, as a real, demonstrative act done. It is the contrary of a possession in law, which follows in the wake of title."

The Utah adverse possession statutes countained in §§78-12-9 and §78-12-11 are helpful in defining what types of acts constitute "actual possession" of land. Under those statutes a person is considered to have occupied or possessed lands where the person (1) cultivates or improves the land; or (2) protects the land by a substantial inclosure; or (3) uses the land for fuel, timber, pasturage, or other ordinary use of the land; or (4) expends the value of $5.00 per acre in labor or money to erect or maintain irrigation works. The acts expressly stated in those statutes as constituting actual possession, and those acts to be implied therefrom, are all acts requiring pedis possessio, or actual entry upon and immediate occupation of the land claimed to be possessed. Further, those acts enumerated in the statutes are designed to give the true owner of the property notice that someone else is asserting physical possession of the land.

The requirement for pedis possessio or a foothold upon the estate does not change when this court has dealt with possession of the mineral estate. This court has held that there is no actual possession of the severed mineral estate where there is no actual possession of the beds through mining and extraction. Kanawha and Hocking Coal and Coke Company v. Carbon County, 535 P.2d 1139, 1140 (Utah 1975). In that case this Court rigidly applied the statutes of limitation for tax titles in a mineral dispute

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to bar the plaintiff from challenging defendant Carbon County's tax title to the coal beds. The coal beds, which had been assessed separately from the surface, had been sold to Carbon County for unpaid taxes for the year 1932. The auditor's tax deed issued to Carbon County in 1937. Plaintiff occupied and possessed the surface, but also asserted ownership of the mineral which had been severed from the surface by the tax sale before plaintiff's period of possession commenced. The Court held that the plaintiff was barred by §78-12-5.1 from challenging Carbon County's tax title since the county had received its tax deed more than four years prior to the suit, and since the plaintiff had not been in actual possession of the mineral rights conveyed to the county by the tax deed within the four year period prior to the suit. Interestingly, the issues in Kanawha and Hocking Coal Company were before the lower court on a motion for summary judgment.

The instant case does not deal with a severed mineral estate as did Kanawha. In this case the undivided one-half mineral interest has never been severed from the surface estate obtained by Duchesne County at tax sale. In other words the entire fee simple estate in the NW¼NE¼ remains intact with the title to the surface and the disputed undivided one-half interest in the reposing in the same owner, Richard Gerald Dye, under the tax

Miller & Viele admitted in its Answers to Interrogatories that it was never in actual occupancy or actual possession of NW¼NE¼ which includes the unsevered and undivided one-half mineral interest, and the district court so found. As operator of the

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R. G. Dye 1-29A1 Well, Chevron Oil Company likewise has not been in actual, physical possession of either the NW¼NE¼ of Section 29, or the underlying mineral estate. The R. G. Dye 1-29A1 Well was drilled by and is now operated by Chevron in the SW¼NW¼SE¼ of Section 29. The records of the Utah Division of Oil, Gas and Mining submitted by Miller & Viele clearly reflect that Chevron's drilling and production activities as operator were confirmed solely to the well-site. Chevron has been in actual possession and occupancy of the lands covered by the lease upon which the well is located, but has not drilled or produced from a well on the NW¼NE¼. Since the well is not a directional well, slant drilled from the SW¼NW¼SE¼ into the mineral estate underlying NW¼NE¼, Chevron has not been in actual physical possession of the mineral estate underlying the NW¼NE¼ owned by Dye as holder of the tax title, as Chevron had no foothold upon the mineral estate.

The question then becomes two-pronged. First, did Chevron, as operator of the voluntary pooling unit located on Section 29 to which the Dye lease was committed somehow obtain actual possession of the undivided mineral interest by production of oil and gas from a common source of supply by means of a well located elsewhere in the unit on lands other than those covered by the Dye lease. Second, if it is determined that Chevron was in actual possession of the mineral interest underlying the NW¼NE¼, does that actual possession inure to Miller & Viele.

Miller & Viele states in its brief that other courts ruling on this issue have held that well drilling operations on pooled lands are operations for the extraction of minerals from each of the pooled properties as if by their respective mineral interest leaseholders (Brief of Appellant at 15). Miller & Viele

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then cites Everts v. Phillips Petroleum Co., Dixon v. American Liberty Oil Company, and Smith v. Holt, as well as provisions o the Communitization Agreement and Utah statutes pertaining to forced and voluntary pooling in an effort to support the propo- sition. Unique in this approach is the fact that the Dixon cas is one of the very cases urged by plaintiff below and which the district court found so convincing in ruling in plaintiffs' favor. Through misconstruing the whole thrust and purpose of those cases, the provisions of the Communitization Agreement a the voluntary and forced pooling statute Miller & Viele has inadvertently marched into plaintiffs' camp waving plaintiffs' flag.

The persuasive rule in oil and gas producing jurisdiction is that removal of oil and gas from under a tract of land by me of a well located on adjacent or nearby tracts, even it include in the same production unit, is insufficient to constitue actua possession of the mineral estate. R. Hemingway, The Law of Oil and Gas 124 (1971)[hereinafter as Hemingway]. Professor Hemin stated the foregoing rule under the subparagraph entitled "(A) of Actual Possession" within a context of his discussion of adv possession of minerals.

Meeting this issue head on in the very case Miller & Viel cites in support of its argument for actual possession, the Louisiana Supreme Court stated:

> [W]here as the drilling and production of oil from a unitized area constitutes an exercise and user of mineral rights throughout the entire unit and operates as a substitute for performance of drilling obligations contained in a mineral lease, these acts

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> are not to be regarded as an eviction of the surface owner's possession of the minerals or of his exclusive right thereto when explorations are not conducted on the land itself. Dixon v. American Liberty Oil Company, 77 So.2d 533, 538, 4 O&GR 21,23 (1954).

In that case two adjacent tracts were unitized by order of the Department of Conservation. A well located on one tract drained the common pool located under both tracts. Although this was an adverse possession case, it did not turn on the hostile, exclusive, continuous, or open elements of adverse possession. It did turn on the actual possession element. The court reasoned that the mineral estate could not be thought of as separate from the surface estate, since both estates were owned by the same party and had not been severed. Consequently, since the minerals were not disturbed in place, that is from actual dominion of the land itself by oil and gas operations extracting directly from the land, the operator exercised no physical dominion over the mineral estate by simply draining the pool.

The reasoning in the Dixon case is consistent with the Utah theory of ownership of oil and gas in place. That theory encapsulates the notion that oil and gas is a corporeal estate in real property to be owned as part of the land, similar to ownership of hard minerals. Chase v. Morgan, 9 Utah 2d 125, 339 P.2d 1019, 1021 (1959). The Utah rule aligns itself with the majority position in the country and is juxtaposed to the non-ownership in place concept which postulates that analogous to wild animals and water, oil and gas as a fugacious substance cannot be thought of as being in the possession of a party until reduced to actual possession at the well-head. Hemingway at 10.

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In Pan American Petroleum Corporation v. Candelaria, 403 F.2d 351, 355 31 O&GR 215 (10th Cir. 1968), on facts strikingly similar to those at issue here, the court affirmed t district holding that the unit operator and developer who clai adverse possession of oil and gas underlying lands covered by a lease committed to a voluntary unit did not effect actual posse where the well was not physically located on the lease, althou the well might have drained the lands covered by the lease. In that case the unit operator, Pan American, was also the lessee of an unnamed co-defendant who was not in physical possession o but asserted rights to oil and gas in lands owned by plaintiffs This case did not turn on the elements of notice or hostility, but rather on lack of actual possession. Although the facts an commentary are scanty in the reported case, they are amply set forth in photocopies of the Findings of Fact (Nos. 10-19) which are attached hereto commencing at page 3 of the Appendix.

Finally, the Tenth Circuit in deciding a case which arose in Utah stated that unitization and pooling agreements were no more than contracts between lessees with respect to allocation of production and computation of royalties, and did not vest in the parties to such agreements property rights, possess or otherwise. Phillips Petroleum Company v. Peterson, 218 F.2d 934 (10th Cir. 1954). For a discussion of this principle and the importance of Phillips Petroleum Company as the leading cas see R. Myers, The Law of Pooling and Unitization, Vol. I, §13.0 at 439 (1967). The Phillips Petroleum Company case involved questions arising from unitizing leases on Duchesne County Land

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to form the Roosevelt Unit. Consequently Miller & Viele's position is not supported by the case law.

Counsel for Miller & Viele also cited Paragraph 8 of the Communitization Agreement and Utah Code Ann. §40-6-6 (f) as putting Chevron in possession of the mineral interest in and underlying the NW¼NE¼ by virtue of its operation of the R. G. Dye 1-29A1 Well. (Brief of Appellants at 18-20). Paragraph 8 of the Communitization Agreement reads as follows:

8.

> The commencement, completion, continued operation or production of a well or wells for communitized substances on the communitized area shall be construed and considered as the commencement, completion, continued operation or production on each and all of the lands within and comprising said communitized area, and operations or production pursuant to this agreement shall be deemed to be operations or production as to each lease committed hereto. (emphasis added)

The Communitization Agreement was executed on October 30, 1973, by defendant Chevron and plaintiff Gas Producing Enterprises, Inc., and by Gulf Oil Corporation and Shell Oil Company who are not parties to this suit.

The pertinent provisions of §40-6-6 (f), read as follows:

> (f) When two or more separately owned tracts are braced within a drilling unit, or when there are separately owned interests in all or a part of the drilling unit, then persons owning such interests may pool their interests for the development and operation of the drilling unit. In the absence of voluntary pooling, the Commission, upon the application of any person with an interest in the proposed pooling, may enter an order pooling all interests in the drilling unit for the development and operation thereof . . . Operations incident to the drilling of a well upon any portion of a unit covered by a pooling order shall be deemed for all purposes to be the conduct of such operations upon each separately owned tract in the unit by the several owners thereof. . . (emphasis added)

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Counsel for Miller & Viele misconstrues Paragraph 8 of th Communitization Agreement and the statute. First, those porti of §40-6-6 (f) urged by counsel and underlined above pertain only to units covered by a compulsory (or forced) pooling order. Such pooling orders are issued by the Commission in th absence of voluntary pooling by the lessees. In this case, th Commission has established 640 acre spacing and drilling units provided by §40-6-6(a-e), but has not issued a pooling order, since all parties voluntarily pooled their leases for producti by execution of the Communitization Agreement. Consequently, the sub-section (f) language urged by Miller & Viele does not apply to the Section 29 drilling unit.

Second, even if §40-6-6 (f) did apply to the unit, the language which states that drilling anywhere on the unit "shal be deemed for all purposes to be" drilling on each lease in th unit is language of construction. The only species of possess in which sub-section (f) or Paragraph 8 of the Communitizatio Agreement could bestow upon a driller not in actual possessio is "constructive operation or constructive possession." Howe the statutes of limitation for tax titles expressly state tha the party challenging a tax title must be in actual possessio or actual occupancy. Constructive operations or constructive possession was not considered by the legislature as qualifyin one to challenge a tax title when these limiting statutes wer enacted.

Third, oil and gas leases on private lands are issued fo primary terms, generally of ten years and for so long thereaf as oil and gas is produced from the lease. Customarily, thes

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leases provide for pooling and extension of the leases beyond the primary terms where production is had in the pooling unit but not on the lease. Paragraph 8 of the Communitization Agreement and sub-section (f) of the pooling statute are responsive to the contractual language contained in the leases. The constructive operations or constructive possession language is designed specifically to hold all leases committed to the drilling unit beyond their primary terms by production from the well drilled anywhere on the unit. H. Williams & C. Meyers, VI Oil and Gas Law, §953 at 708.1-716.1 (1977). [hereinafter cited as Williams and Meyers].

In their discussion of the effect of unitization statutes on the extension provisions of oil and gas leases, Professors Williams and Meyers quote the Mississippi forced pooling statute, which is similar in language to Utah's §40-6-6(f). That statute reads as follows:

> The portion of unit production allocated to a separately owned tract within the unit area shall be deemed, for all purposes, to have been actually produced from such tract, and operations with respect to any tract within the unit area shall be deemed for all purposes to be the conduct of operations for the production of oil or gas, or both, from each separately owned tract in the unit area. . . . Miss Code Ann §6132-106 quoted in Williams and Meyers at 708.5-708.6.

Construing the meaning of the foregoing statute and language similar to Paragraph 8 of the Communitization Agreement, the authors conclude:

> Everybody agrees that the standard language appearing in voluntary agreements and in some statutes - the language of the first sentence of Section 106 - should be taken to mean . . . that the lease will be preserved. (emphasis added) Williams and Meyers at 708.1

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Finally, language from the Dixon case quoted by both plaint and defendants demonstrates the preservation aspect of the const tive language of such statutes and voluntary agreements. That language is again set forth as follows:

> [W]here as the drilling and production of oil from a unitized area constitutes an exercise and user of mineral rights throughout the entire unit and operates as a substitute for performance of drilling obligations contained in a mineral lease, these acts are not to be regarded as an eviction of the . . . owner's possession of the mineral or of his exclusive right thereto when explorations are not conducted on the land itself. Dixon, 77 So2d at 538, 4 O&GR at 23.

This language tracks the provisions of Paragraph 8 of the Communitization Agreement and sub-section (f) of the statute. Although the Louisiana Supreme Court correctly concluded that drilling on one lease in the voluntary pooling unit was a substitute for performance of drilling obligations on all other leases, the court determined that such drilling did not put the operator into actual possession of those leases not actually dri upon. This clearly shows that the type of language contained in Paragraph 8 of the Communitization Agreement and §40-6-6(f) is designed as a substitute for performance, and not to create either actual or constructive possession.

In both the Everts v. Phillips Petroleum Company, and Smith v. Holt cases cited respectively at pages 15 and 17 of Miller & Viele's brief, the Louisiana Supreme Court held that drilling on one lease in the unit constituted drilling on other lands within the unit. In Everts, the question was whether or

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not failure to drill an off-set well activated a 1½% royalty provision designed to prevent drainage of the leased lands from oil wells on adjacent lands. The court ruled that compulsory pooling abrogated the 1½% royalty penalty provision as production and drilling on one lease in the unit was effective as though the well were actually drilled on the lease itself. In Smith, plaintiff had taken assignment of an undivided interest in mineral underlying twenty acres, already subject to an existing oil and gas lease which covered the twenty acres and the adjacent twenty. The forty acres were affected by a forty acre spacing order. Plaintiff argued that since the well was not drilled on his twenty acres that the oil and gas lessee could not claim an interest in the minerals. The court held that defendants' lessee was owner under lease of the oil and gas in all forty acres since the lease preceded the assignment to plaintiff. Consequently, in Everts, possession was not an issue and the operator was not construed to have possessory rights in the mineral estate. In Smith neither the facts nor the law apply since both interests in dispute were covered by one lease.

Therefore, the legislative policy of §40-6-6(f), the intention of the parties in drafting Paragraph 8 into the Communitization Agreement, and the clear and obvious meaning ascribed by oil and gas jurisdictions to such language is that the language provides a substitute for drilling obligation under the individual leases in a pool and is designed to hold all leases within the unit beyond their stated primary terms by production on any one of the pooled leases.

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There are also compelling policy considerations why Chevron should not be considered to be in possession of the undivided one-half mineral interest in the NW¼NE¼. First, regardless of how one categorises the nature of Chevron's possession of the oil and gas at the well-head, whether actual or constructive, Chevron Oil Company is in possession of the substances in its capacity as operator of the unit, not as Miller & Viele's lessee. As operator, Chevron is no more the agent of Miller & Viele than it is of Dye and Gas Producing Enterprises, Inc. Chevron's agency as operator under the Communitization Agreement must be thought of as separate and distinct from its agency as Miller & Viele's lessee. Otherwise, possession would inure to Miller & Viele fortuitously, simply because Chevron, who just so happened to be Miller & Viele's lessee, was elected by the other lessees to be the unit operator.

Second, the statutes of limitations for tax titles are statutes of repose. Speaking to this issue in Peterson, supra, this Court stated that §78-12-5.1 is

> . . . a statute of repose, obviously intended to lay to rest claims against tax titles which are asserted more than four years after acquisition of a tax title under statutory proceedings, and where the record owner has not had possession. . . Peterson v. Callister, 6 Utah 2d at 361, 313 P.2d at 815.

To say now that Miller & Viele is in possession pursuant to the statute by the fortuitous fluke of circumstances in which Chevron as Miller & Viele's lessee is also operator of the unit would be to totally frustrate the purpose of the statutes of re Miller & Viele would then be afforded the opportunity to challe

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the validity of the tax title forty six years after creation of the title, when the facts surrounding the statutory proceeding are stale and the persons responsible for complying with the statutory steps are deceased, removed to other jurisdictions, or are dimmed in their memory of the events. All the evidentiary specters which the statutes are designed to dispell will now be mustered to roll. Surely, the legislature could not have intended such dispossessed, delinquent property owners as Miller & Viele to be in possession under such a fluke of circumstances.

Fourth, it is inconceivable that a sophisticated mortgage banking company such as Miller & Viele would not have paid property taxes on the NW¼NE¼ from 1928 to 1946 or investigated the reasons for not having been assessed if they really thought they owned the property. There swells in the breast a certain indignation at the injustice that Miller & Viele might now be allowed to reap the benefits of the land when it was Dye's predecessors in interest who paid all property taxes levied and assessed upon the land since 1927, and who have actually possessed, improved, and maintained the NW¼NE¼ since 1940.

Finally, Chevron participated in neither the motions for summary judgment, nor the appeal. Surely a lessee who thought it held a title defensible in light of the tax sale or who thought it was in actual possession of the undivided mineral interest in the subject lands so as to prevent application of the statutes of limitation would have aggressively asserted its position.

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The present facts present a particularly appropriate case for application of the statutes of limitations for tax titles. Nearly forty six years have lapsed since creation of the tax title by Auditor's Tax Deed to Duchesne County dated May 9, 193 now held by plaintiff Richard Gerald Dye as to the surface and the undivided mineral interest now in dispute. Miller & Viele admits that it was never in actual possession of the NW¼NE¼, which would include the undivided one-half mineral interest. Moreover, the facts demonstrate and the applicable statutes and case law support the conclusion that Chevron Oil Company, as Miller & Viele's lessee, was not in actual possession of the undivided mineral interest in and underlying the lands.

Further, Miller & Viele never paid the general property ta levied and assessed against the lands. Since Duchesne County received the tax deed more than four years prior to this action, since Miller & Viele has failed to meet the possession requirem of §§78-12-5.1 and .2, Miller & Viele's defense to plaintiff Dy assertion of ownership to any interest stemming from the Audito Tax Deed including the undivided one-half mineral interest is barred, and the title to the undivided one-half mineral interes in dispute should be quieted in plaintiff Dye and its oil and g lessee, Gas Producing Enterprises, Inc.

Plaintiffs remind the court, that as stated in the definit section, §78-12-5.3, the validity of the tax title is not an is in any determination of whether or not a party is barred by the of limitation from attacking or challenging a tax title. Valid

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of the tax title becomes an issue only where the Court determines that Miller & Viele, by and through its lessee, Chevron Oil Company, was in actual possession of the disputed undivided one-half mineral interest in place in the NW¼NE¼. Such is the mandate of the Utah Legislature as codified in those statutes.

POINT II

UNDER THE 1946 QUITCLAIM DEED ARTHUR L. YOUNG ACQUIRED ONLY THE INTERESTS, IF ANY, OF MILLER & VIELE. WHERE MILLER & VIELE HAD NO INTEREST TO CONVEY, THE RESERVATION OF THE UNDIVIDED ONE-HALF MINERAL INTEREST WAS A NULLITY, AND SOLICITATION, DELIVERY AND RECORDATION OF THE QUITCLAIM DEED BY ARTHUR L. YOUNG DID NOT CONSTITUTE ACQUIESCENCE IN THE RESERVATION.

In Point Two of its argument, Miller & Viele appears to assert that in spite of the statutes of limitation for tax titles, Dye's predecessor, Arthur L. Young, acquiesced in Miller & Viele's ownership and right to the undivided one-half mineral interest reserved to Miller & Viele in its quitclaim of the NW¼NE¼ to Arthur L. Young in 1946 (R-233). At the time the deed was executed, Arthur L. Young was record owner of the entire fee in the NW¼NE¼ under the tax title.

The document in which Miller & Viele purported to reserve an undivided one-half mineral interest in the NW¼NE¼ is denominated "QUIT-CLAIM DEED (SPECIAL)" (R-337). The words of grant read as follows:

> That the said party of the first part [Miller & Viele] . . . does hereby Quit-claim unto the said party of the second part [Arthur L. Young] . . . (emphasis added)

The deed, strangely enough, contains words of warranty. It is obvious that a standard form "Warranty Deed (Special)" was used

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from which the words "warranty" were struck from the title of t document and words of grant. The words "Quit-Claim" were inter- linated in both the title and words of grant, demonstrating tha both parties desire that the instrument evidence a quitclaim of the NW¼NE¼.

The law of this state is that a quitclaim does not imply the conveyance of any particular interest in the property, as the grantee can only acquire the interest, if any, of his grant Wallace v. Build Inc., 16 Utah 2d 401, 402 P.2d 699, 701 (1965). Miller & Viele's predecessors in interest had been statatorily disseized by the tax sale, and therefore had no interest to con to Arthur L. Young. Since a reservation retains in the grantor a portion of what is conveyed, Miller & Viele retained or reser nothing, since it had nothing to grant. No cotenancy was or co have been created.

The quitclaim deed, though solicited by Arthur L. Young, was obviously requested to clear the paper title on the records of the Duchesne County Recorder, a customary procedure among la and title men. No more can be read into the solicitation, deli and recording of the quitclaim deed than this. The very fact that Miller & Viele purported to reserve an interest it did not own does not demonstrate acquiescense on the part of Young. Young merely took what curative document Miller & Viele would g realizing that the reservation was meaningless since Miller & V owned no interest in the NW¼NE¼.

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Consequently, there was no acquiescense or agreement between Miller & Viele and Dye's predecessor in interest which is binding on Dye. The district court rejected the argument as having no merit, and rightly so.

CONCLUSION

Defendant Miller & Viele has failed to show actual possession of the NW¼NE¼ or the underlying undivided one-half mineral interest within the four year period prior to interposition of its defense in 1976. The very best arguments defendant offered are (1) that it was in constructive possession of the undivided one-half mineral interest "in place" in the NW¼NE¼ under force of the voluntary Communitization Agreement, or (2) that it actually possessed the detached oil and gas at the well-head in the SE¼. Constructive possession does not qualify Miller & Viele for the actual possession exception of the statutes of limitation to prevent the barring of Miller & Viele's defense. Under the compelling case law, possession of oil and gas at the well-head which has been drained from adjacent unitized lands is not actual possession of the oil and gas or mineral interest in the adjacent lands. Since Miller & Viele does not qualify for the other limited exception and since it did not challenge the tax title within four years of its creation in 1932, Miller & Viele is barred from asserting its claim to the disputed undivided one-half mineral interest at this late date. The decision of the district court

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quieting title to the undivided one-half mineral interest in plaintiffs Richard Gerald Dye and Gas Producing Enterprises, I his lessee, should be affirmed.

As to the acquiescence argument, the issue was fully brie and argued in the district court. That court decided that the argument had no merit. Miller & Viele has had its day in cour on this issue, and it lost.

Respectfully submitted this 1st day of March 1978.

PRUITT & GUSHEE

By _____
Robert G. Pruitt, Jr.

By _____
Phillip Wm. Lear
torneys for Plaintiffs

CERTIFICATE OF SERVICE

I certify that I hand-delivered two true and correct copi of the foregoing Brief to Macoy A. McMurray and Robert T. Dale attorneys for defendant at their offices at 800 Beneficial Lif Tower, Salt Lake City, Utah 84111, this 1st day of March, 197

_____

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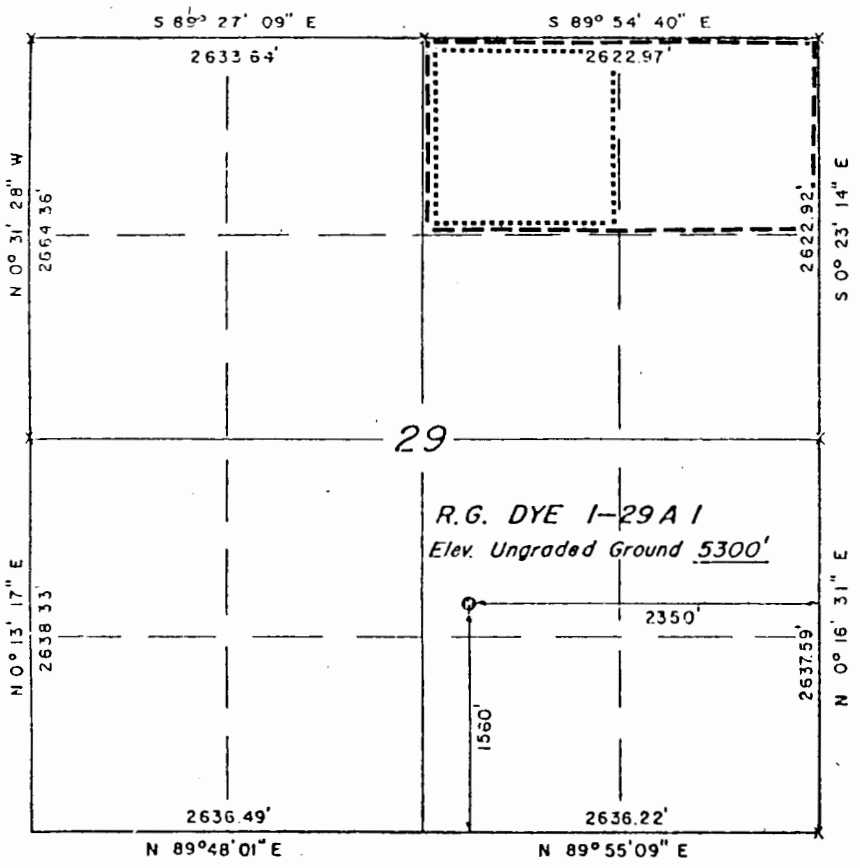

X = Section Corners Located

..... Lands Affected by Tax Title

— — — Lands Covered by Dye Lease

(2)

CERTIFICATE

THIS IS TO CERTIFY THAT THE ABOVE PLAT WAS PREPARED FROM FIELD NOTES OF ACTUAL SURVEYS MADE BY ME OR UNDER MY SUPERVISION AND THAT THE SAME ARE TRUE AND CORRECT TO THE BEST OF MY KNOWLEDGE AND BELIEF

REGISTERED LAND SURVEYOR
REGISTRATION NO 2454
STATE OF UTAH

UINTAH ENGINEERING & LAND SURVEYING
P O. BOX Q — 110 EAST - FIRST SOUTH
VERNAL, UTAH - 84078

SCALE 1" = 1000'	DATE 15 September, 1973
PARTY NJM	REFERENCES
WEATHER Warm	FILE Chevron Oil 1973

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Filed October 28, 1966

104

* * * * *

Findings of Fact and Conclusions of Law of the Court

The Court makes and adopts the following findings of fact and conclusions of law:

Findings of Fact

1. The Court has jurisdiction of the parties hereto and the subject matter hereof.

2. The following described land, the subject of this action, is situated in the County of Rio Arriba, State of New Mexico, to wit:

All of the following described tract of land lying east of the San Juan River in Rio Arriba County, New Mexico, said part containing 116.28 acres, more or less.

Township 30 North, Range 7 West, NMPM, Rio Arriba County, New Mexico described as:

The S/2 SE/4, NW/4 SE/4 of Section 18 and the NE/4 NE/4 of Section 19 according to plat of survey filed with the Surveyor General's Office, Santa Fe, New Mexico, on November 4, 1882;

and described as Tract 45 in Sections 17, 18, 19 and 20 according to plat of independent resurvey filed with the Surveyor General's Office, Santa Fe, New Mexico, on July 19, 1915.

105

3. The lands were originally patented by the United States of America to Juan B. Velasquez on March 3, 1909.

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Subsequent to the issuance of the Patent, the said Juan B. Velasquez joined by his wife, Maria Albina Lucero deVelasquez, conveyed the lands to Bidal A. Candelaria by Warranty Deed dated January 3, 1914. This deed recites the lands to be by the San Juan River in San Juan County and was filed for record in San Juan County on January 12, 1914. Neither the Patent nor Warranty Deed were filed for record in Rio Arriba County until the year 1962.

4. Bidal A. Candelaria acquired title to the above described lands on January 3, 1914, and retained title to these lands until his death.

5. Bidal A. Candelaria died on April 24, 1926, at Carbon Junction, Colorado, and at the time of his death, he resided in Ignacio, Colorado.

6. The District Court of Rio Arriba County, New Mexico has entered an Order determining the heirship of Bidal A. Candelaria, deceased, in Cause No. 295, from which it appears that the estate of Bidal A. Candelaria, deceased, is now owned as follows:

Name	Interest
Manuelita Candelaria	12.5%
Delubina Candelaria Salazar	12.5%
Marie Candelaria Moreno	12.5%
Bennie Candelaria Martinez	12.5%
Genevieve Candelaria	12.5%
Juanita Candelaria Mowbray	12.5%
Aurora Candelaria Marquez	12.5%
Mary O. Candelaria	3.125%
Frank Candelaria	1.875%
Anna Marie Candelaria, also known as Sister Mary Corona	1.875%
Augustina Candelaria Baumer	1.875%
Marie Elena Candelaria Byron	1.875%
Dolores Candelaria Romero	1.875%

Dolores Candelaria Romero is a minor at this time but properly represented herein by her mother and guardian, Mary O. Candelaria.

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7. All of the lands were rendered for taxes in San Juan County for the years 1913, 1914 and 1919 through 1939. Taxes were assessed against B. A. Candelaria in San Juan County for the year 1913, sold by Tax Sale Certificate No. 426 and redeemed by B. A. Candelaria on January 2, 1915. By Tax Deed dated March 30, 1937, the lands were conveyed by the San Juan County Treasurer to the State of New Mexico, and on December 4, 1944, the lands were thereafter conveyed by the New Mexico State Tax Commission to Saul A. Yager. These two deeds recite the lands to be in San Juan County and were timely filed for record in San Juan County. Saul A. Yager rendered the lands for taxes, and paid taxes, in San Juan County for the years 1945 through 1959, at which time the surface was condemned by the Federal Government. After 1959, no taxes were assessed by San Juan County. No part of the lands were rendered for taxes in Rio Arriba County until the year 1962.

8. In 1947 Saul A. Yager filed a quiet title suit in the District Court of San Juan County in Cause No. 02439 describing the lands involved herein as being located in San Juan County. B. A. Candelaria had been deceased since 1926 and was named as a living person in said quiet title suit. The record in Cause No. 02439 shows that Bidal A. Candelaria was not personally served with process, and none of the plaintiffs in this action was personally served with process. Notice of lis pendens in said Cause No. 02439 was not filed in Rio Arriba County.

107

9. In 1948 Saul A. Yager exeucted two oil and gas leases to Wayne Moore purporting to lease the minerals underlying the lands involved herein and describing the lands as being located in San Juan County. The defendants are successors in interest to Wayne Moore.

10. The defendants included the lands involved herein in the Unit Agreement and Unit Operating Agreement for the development and operation of the Northeast Blanco Unit Area.

11. In 1953 Blackwood & Nichols Company, operator of the Northeast Blanco Unit, obtained a compulsory pooling order from the New Mexico Oil Conservation Commission pooling the

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properties in the E/2 of Section 18, E/2 of Section 19, W/2 Section 17 and W/2 of Section 20 into four separate drilling and proration units.

12. Wells were commenced and completed by the defendants on the dates and for the costs hereinafter set forth:

Well	Dates of Well Commencement and Completion	Cost
12-18	8/29/53 - 10/16/53	$90,681.35 (Mesa Verde Formation) $114,785.86 (Dakota Formation)
13-20	8/31/53 - 12/17/53	$165,569.20 (Mesa Verde Formation)
35-19	7/14/57- 7/25/57	$87,865.75 (Mesa Verde Formation)
24-17	5/1/55 - 5/22/55	$64,502.00 (Mesa Verde Formation)

The Dakota Formation in the 12-18 Well was dry.

13. Acreage was dedicated to the wells by the defendants for the purpose of receiving an allowable as hereinafter set forth:

108

Well	Acreage Dedicated
12-18	E/2 Section 18
13-20	W/2 Section 20
35-19	E/2 Section 19
24-17	S/2 Section 17

14. A portion of the lands involved herein was dedicated to each of the four wells and the total acreage dedicated to the four wells included all of the lands involved herein. None of the wells were physically located on the land involved in this action.

15. The defendants have received an allowable from

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the New Mexico Oil Conservation Commission for each of the four wells based upon the acreage dedicated to each well. The defendants' allowable has been proportionately increased by their dedication to each well of the plaintiffs' acreage. If they had not been able to dedicate the plaintiffs' acreage to each well their allowable would have been proportionately reduced.

16. The four wells drilled by the defendants have drained gas and other minerals from the lands involved herein.

17. The plaintiffs were not aware of the wells here involved, or that they owned the lands involved or of any of the proceedings relative to the quiet title suit, oil and gas leases, unitization or actions before the New Mexico Oil Conservation Commission. The plaintiffs did not discover that they could assert any of the claims asserted herein until they were joined as parties defendant in Civil Action No. 3934 in the United States District Court for the District of New Mexico by the United States Government for condemnation of the surface of the lands involved herein.

109

18. The defendants acted in good faith in drilling the wells in question and in their unitization efforts and efforts before the Oil Conservation Commission. Their action in using the plaintiffs' lands to obtain an increased allowable and increased production was in good faith and in the belief that they had the right to do so.

19. The defendants have been unjustly enriched and the plaintiffs have been damaged by the defendants in the amount of the full value of all production attributable to the lands involved herein, based upon the percentage of the plaintiffs' acreage dedicated to each of the four wells. The defendants are entitled to deductions for the plaintiffs' proportionate share of expenditures made in development and operation of the wells.

Conclusions of Law

1. The Court has jurisdiction over the parties and

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the subject matter of this cause.

2. The plaintiffs are the owners of the minerals underlying the lands involved herein and are entitled to a decree quieting their title against the adverse claims of the defendants.

3. The defendants have been unjustly enriched to detriment of the plaintiffs. The defendants should, there account to the plaintiffs for the plaintiffs' share of all production from the four wells to be determined by the amo of plaintiffs' acreage dedicated to each well, plus intere on said production from the date of production at the rate 6 percent per annum. In accounting to the plaintiffs the defendants should be allowed to deduct from the

amount due the plaintiffs the plaintiffs' share of the cos development and operating costs to be determined by the am of plaintiffs' acreage dedicated to each well, plus intere on said sums from the date of expenditure at the rate of 6 percent per annum, but should not be allowed to deduct the cost of drilling the 12-18 well to the Dakota formation.

4. The defendants have converted the plaintiffs' minerals to the defendants' use.

5. The plaintiff's right to recovery in this acti is not barred by the doctrine of laches, the applicable Ne Mexico statute of limitations, or the doctrine of res judicata.

6. The quiet title decree on which the defendant rely is void as to these lands and as against these defen ants.

7. The plaintiffs should have judgment against t defendants for the costs of this action.

All Requested Findings and Conclusions not incorp ated in the above are refused.

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Dated at Albuquerque, New Mexico, on this the 28th day of October, 1966.

Howard Bratton
United States District Judge

Filed October 28, 1966

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