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Utah Supreme Court

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IN THE SUPREME COURT OF THE STATE OF UTAH

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JOHN H. MORGAN, SR., JOHN H. MORGAN, JR., CLARENCE I. JUSTHEIM, JUSTHEIM PETROLEUM COMPANY, and HUSKY OIL COMPANY,

Plaintiffs-Appellants,

- v -

BOARD OF STATE LANDS OF THE STATE OF UTAH, DIVISION OF STATE LANDS, a division of the UTAH STATE DEPARTMENT OF NATURAL RESOURCES, and CHARLES R. HANSEN, as Director of the DIVISION OF STATE LANDS,

Defendants-Respondents.

Case No. 14115

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BRIEF OF THE RESPONDENTS

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IN THE SUPREME COURT OF THE STATE OF UTAH

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JOHN H. MORGAN, SR., JOHN H. MORGAN, JR., CLARENCE I. JUSTHEIM, JUSTHEIM PETROLEUM COMPANY, and HUSKY OIL COMPANY,

Plaintiffs-Appellants,

- v -

BOARD OF STATE LANDS OF THE STATE OF UTAH, DIVISION OF STATE LANDS, a division of the UTAH STATE DEPARTMENT OF NATURAL RESOURCES, and CHARLES R. HANSEN, as Director of the DIVISION OF STATE LANDS,

Defendants-Respondents.

Case No. 14115

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BRIEF OF RESPONDENTS

NATURE OF THE CASE

Plaintiffs-Appellants filed suit to obtain a declaratory judgment that there was an "implied contract" with the Board of State Lands for replacement of 1963 oil shale leases expiring December 31, 1973, with the new form of 20-year leases authorized by the Board in 1965, notwithstanding the lessees failed to pay the six cents per acre conversion fee and filing fees, and also failed to sign and file the required applications to amend the 1963 leases or the amended form of oil shale leases at any time prior to the expiration dates of the 10-year leases.

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DISPOSITION IN THE DISTRICT COURT

Following discovery proceedings, Defendants-Respondents filed a motion for summary judgment supported by uncontroverted affidavits. Plaintiffs-Appellants filed a counter motion for summary judgment, with an affidavit. Counsel for the respective parties stated that if a trial were conducted, no further evidence would be presented. The District Court denied Plaintiffs' motion for summary judgment and granted Defendants' motion for summary judgment on the grounds that the 10-year oil shale leases issued in 1963 expired by their express terms on December 31, 1973, and that the lessees had failed and neglected to pay the required fees or to execute the documents required by the Board of State Lands to effectuate a conversion of the 1963 leases into the 20-year form of oil shale leases.

STATEMENT OF THE FACTS

By reason of omission of nearly all of the admissions contained in the complaint and by Plaintiffs in discovery proceedings and because of incorrect assertions on pages 3 and 4 of Brief of Appellants, Defendants-Respondents do not agree with the Plaintiffs-Appellants' Statement of Facts, except the following portions thereof on pages 2 to 4, which quoted statements only are accepted:

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"1. In 1963, the Board issued the Leases, to expire by their terms on December 31, 1963 [1973], to the Morgans (admitted in pleadings).

"2. In 1964, the Morgans assigned the Leases to Husky, but remained the Lessees of record to whom the Board sent notices and billings (R. 113).

"3. In 1965, the Board adopted a 20 year lease form and passed a resolution that leases under previously issued oil shale leases should have opportunity to convert to the new form (R. 9-11, admitted in the pleadings).

"4. On September 29, 1965, the Director sent to all oil shale lessees a letter (herein called the 'September Letter') in which a procedure for converting to the new 20 year lease form was explained (R. 21). * * * ."

The following statement also would be acceptable to respondents with the word "required" in lieu of "suggested":

"5. The record does not show that either Husky or the Morgans ever followed the conversion procedure suggested by the September Letter. * * * ."

Also, the following statement on page 4 of Brief of Appellants is approved, subject to amplification hereinafter:

"7. Early in 1974, after the Board had cashed Appellants' rental payment check, the Board returned the money to Appellants with the announcement that it considered the Leases to have expired (R. 50-52)."

Respondents present the following additional facts deemed to be relevant and material:

The letter from the Director, dated September 29, 1965, a copy of which (except for his signature) is attached to the

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complaint as Exhibit "C" (R. 21, 190), stated, inter alia:

> " * * * the Utah State Land Board at its meeting held September 9-10, 1965, made the following decisions relative to the proposed amended Oil Shale Lease form and the proposed amended Asphaltic Sands-Bituminous Sands lease form:
>
> "(1) It adopted the attached form of Oil Shale lease subject to approval by the Attorney General's Office. The Board also indicated that the Staff should continue issuing Oil Shale leases on a multiple-use basis.
>
> "These forms were formally approved by the Attorney General by letter of September 20, 1965.
>
> "For your information, enclosed please find copy of the new Oil Shale lease form, copy of the addendum to the Asphaltic Sands-Bituminous Sands lease and copy of a form of application to amend.
>
> "Applications to amend existing Oil Shale leases * * * will be granted upon receipt by this office of a fully executed application and a fully executed amendment of Oil Shale lease * * * . The applicant must also tender a sum equal to 6¢ per acre of the leased land together with a $2.00 filing fee." (R. 21, 190).

By paragraph 6 of the complaint, plaintiffs "acknowledge receipt of said letter" (R. 3). By paragraph 7 of their complaint, it is expressly alleged that "Plaintiffs took no formal action with regard to the leases in response to Exhibit 'C'" (R.3). Attached to the complaint as Exhibit "A" is a photocopy of one of the 1963 oil shale leases (R. 6-8). By paragraph 3 of the complaint, it is stated that the 1963 leases issued to plaintiffs "were to expire, by their terms as originally issued, on December 31, 1973" (R.2-3).

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Exhibit "B", attached to the complaint, consists of quotations from some minutes of the State Land Board meetings in 1965 (R. 9-11). Exhibit "B-1", attached to the complaint, is a photocopy of the form of application to amend the 1963 oil shale leases, signed by a third party (R. 12). It recites that "Lessee hereby requests the Board to grant an amendment of this lease" and also states that "in consideration therefor Lessee tenders to the State a cash consideration of ______________ Dollars ($ ______), being six cents ($.06) per leased acre, for such amendment." Exhibit "B-2", attached to the complaint, is a photocopy of the amended form of Utah State Oil Shale Lease for a term of 20 years (R. 13-20).

In response to defendants' interrogatories of August 21, 1974 (R. 109-111), plaintiffs admitted that "no one of plaintiffs" could "recall having delivered to or otherwise filed at the State Land Office" any application to amend mineral lease relating to any of the oil shale leases referred to in paragraph 3 of the complaint or signing and filing in the State Land Office the form of "Amended State of Utah Oil Shale Lease" (Exhibit "B-2", attached to the complaint). Plaintiffs also admitted that they did not at any time prior to January 1, 1974, pay or tender to the State Land Board the six cents ($.06) per acre conversion fee and the $2.00

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filing fee mentioned in the letter from the Director dated September 29, 1965 (Exhibit "C") (R. 72-73). In response to defendants' requests for admissions of fact (R.63-66), plaintiffs admitted that the 1963 oil shale leases by their own terms would expire December 31, 1973; that no assignment of any of the 1963 leases ever was filed in the State Land Office; that each of the plaintiffs who was a lessee under the 1963 oil shale leases received the letter dated May 11, 1965, a copy of which was attached to the answer of defendants as Exhibit "1"; that each of the said lessees received a copy of the letter dated September 29, 1965, from Max C. Gardner, Director of the State Land Board, in the regular course of the mails; and that each of the plaintiff lessees received with said letter dated September 29, 1965, the form of "Application to Amend Mineral Lease" (Exhibit "B-1") and also the form of "Amended Utah Oil Shale Lease," a copy of which is attached to the complaint as Exhibit "B-2"; and that the Attorney General of the State of Utah, on or about September 20, 1965, approved said form of "Amended State of Utah Oil Shale Lease" (R. 70-71).

In paragraph 7 of their complaint, plaintiffs alleged that they

> " . . . took no formal action with regard to the leases in response to Exhibit 'C', but plaintiffs orally communicated to defendant's director and other

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personnel their desire and intent that the leases be replaced by the new form of oil shale lease adopted * * *." (R. 3).

Plaintiffs did not allege that they ever executed and filed either the "Application to Amend Mineral Lease" or the amended form of Utah Oil Shale Lease, copies of which are attached to the complaint as Exhibits "B-1" and "B-2." In paragraph 7 of their complaint, plaintiffs alleged that "Defendant amended its accounting forms and billing cards to show the replacement of the leases with new form leases" and that the accounting cards were modified by defendant to "reflect the understanding that the leases had been extended." (R. 3).

Plaintiffs also alleged:

"8. On or about December 15, 1973, defendant billed plaintiffs for the 1974 rentals (1974 being the rental year after the leases would have expired unless extended in accordance with the procedures hereinabove set forth) and plaintiffs paid the said 1974 rentals as billed during the calendar year 1973.

"9. Plaintiffs relied on the billings for 1974 rentals as representing an acknowledgment by the defendant of the leases having been replaced, and, except for defendant's actions in transmitting said billings, would have been alerted by their failure to receive billings that some question as to the continued force and effect of the leases had arisen."

By paragraph 10, plaintiffs alleged that some time during January or February 1974, defendants advised plaintiffs that the leases had not been replaced by the new form leases and that replacement could not then be effected, because plaintiffs had

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failed to pay the six cents ($.06) per acre conversion fee, but plaintiffs then tendered payment of the six cents ($.06) per acre. Plaintiffs also alleged that they "protested defendant's termination of the leases, and that the parties' actions as herein set forth have effected the replacement of the leases by new form leases, and defendant may not now deny such replacement." Plaintiffs also alleged that they were afforded opportunity to present their case to defendant at a formal meeting; and after hearing, defendant reasserted that "the leases have been terminated (R. 4).

Plaintiffs prayed for Judgment "declaring that the leases have been replaced by the new form oil shale lease adopted by defendant in September, 1965, and that defendant is under obligation to accept the fees for conversion heretofore tendered by plaintiffs and to effect a formal replacement of the leases with the new form of oil shale leases"(R. 5).

By the FIRST DEFENSE in their answer, defendants alleged that the "complaint fails to state facts constituting a claim for judicial relief" (R. 29).

By their answer, defendants specifically denied that there was ever any "understanding" that any of the 1963 leases "had been extended." Defendants alleged that none of the plaintiffs complied with the terms and conditions of the letter dated

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September 29, 1965. Defendants denied that there was any authorized "amendment of its accounting forms and billing cards to show replacement of any oil shale leases with the new or amended form of oil shale leases, except as to those lessees who complied with the conditions and requirements of Exhibit 'C' by paying the six cents per acre conversion fee, the $2.00 filing fee, and executed the application to amend oil shale lease and also executed the amended form of oil shale lease authorized by the Board (R. 30)." Defendants further alleged that sending "billings" (notices) for 1974 rentals to lessees under 1963 oil shale leases who had not complied with the terms of the letter dated September 29, 1965 (Exhibit "C" attached to complaint), was unauthorized by the Board and was a clerical error (R. 31). Defendants also denied that they "terminated" any of the 1963 oil shale leases and alleged that plaintiffs utterly failed to comply with the offer of the Board for amendment of such 1963 oil shale leases, and that plaintiffs, by their own neglect, had allowed said 1963 leases to expire by noncompliance with the offer contained in said letter dated September 29, 1965 (R. 32).

By affirmative defenses defendants alleged: (a) that if any oral agreement or "understanding" had been made, such as claimed by plaintiffs, the same would have been without statutory authority, contrary to the rules and regulations of the Board,

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without consideration, and null and void, (b) that Section 65-1-18, U.C.A. 1953 as amended, requires applications for mineral leases to be "on such forms as the land board shall prescribe," and the Board, in 1965, prescribed the form of application to amend mineral lease, and also prescribed the amended form of 20-year oil shale lease, and issued notice by letter dated September 29, 1965, together with the forms to be executed and returned to the State Land Office with the required fees (R. 33), (c) that at no time prior to expiration of the 1963 oil shale leases for a term of 10 years did any of plaintiffs comply with any of the terms and conditions specified by the Board for converting the 1963 leases into 20-year oil shale leases, (d) that any oral "agreement" or "understanding" that the 10-year leases were "extended" or "converted" into 20-year oil shale leases, if made, would have been null and void contrary to the Statute of Frauds, Section 25-5-4(1), U.C.A. 1953, and Section 25-5-1, U.C.A. 1953, (e) that Section 65-1-46, U.C.A. 1953, always has provided that "each lease shall contain covenants" specified in the statute, and that none of plaintiffs executed the application nor the form of lease prior to expiration date of the 1963 leases, and that by reason of nonexecution of the required documents each plaintiff was and is estopped to claim a 20-year oil shale lease, (f) that Section 65-1-23, U.C.A. 1953, as amended in 1959, provides that the

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Board shall prescribe the form of application, the form of lease, the annual rental, and the royalty and other details, (g) that excerpts from 1965 minutes of meetings of the Board shown in Exhibit "B," attached to the complaint, show that the Board adopted the form of application and the form of 20-year oil shale lease, and prescribed the fees for converting 10-year leases into 20-year leases, and that each of the plaintiffs failed and neglected to pay the required fees and neglected to execute the required documents, (h) that no statute authorized any waiver or exception to compliance with the offer made by the Board, (i) that Section 65-1-76, U.C.A. 1953, requires:

> "All leases and contracts of every kind entered into by the State Land Board shall before execution by such Board be approved as to form by the Attorney General."

No claimed "oral understanding" was or could be approved by the Attorney General (R. 33-36).

It is undisputed that on December 31, 1973, a letter was received at the State Land Office dated December 27, 1973, from Utah Resources International, Inc., signed by John H. Morgan, Jr., which stated:

> "Enclosed herewith check in the amount of $24,258.50 covering 1974 rentals on the Utah State Oil Shale, Oil, Gas & Hydrocarbon, and Bituminous Sands Leases as follows:

"ML Number	Acres	Rental	
20668	624.60	625.00	Oil Shale * * * ."

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[The list included 25 oil shale leases identified by lease numbers set forth in paragraph 3 of the complaint, issued in 1963, together with 16 oil, gas and hydrocarbon leases and 2 bituminous sands leases identified by lease numbers.]

Accompanying such letter was a check in the name of Utah Resources International, Inc., signed by John H. Morgan, Jr., payable to the Division of State Lands in the total amount of $24,258.50 (R. 46-48, 50-51). Said check was deposited for collection on January 4, 1974. Donald G. Prince, of the Division of State Lands, stated under oath that said check was not returned to sender for the reason that it included amounts becoming due for 1974 rentals on some oil, gas and hyrdrocarbon leases and also on bituminous sands leases not expiring (R. 49-53).

On March 8, 1974, the Board of State Lands directed a refund of a total of $13,834.00 for the "1974 rentals" paid on the 1963 oil shale leases which the Board found had expired on December 31, 1973. Said refund checks were mailed on March 12, 1974 (R. 52, 68-69). Plaintiffs then requested the Board to "acknowledge" said leases as having been "extended," claiming that the opinion of an assistant attorney general to the effect that the 1963 oil shale leases had expired on December 31, 1973, was in error. The Board of State Lands granted plaintiffs a hearing, which was held April 17, 1974 (R. 78).

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Prior to such hearing before the Board, under date of February 26, 1974, Utah Resources International, Inc., by its president, John H. Morgan, Jr., issued to the Division of State Lands a check for $829.78, as the computed six cents ($.06) per acre in each of the 1963 oil shale leases which had been issued to plaintiffs (except Husky). Following the April hearing by the Board of State Lands, the Board advised the applicants in writing that they had failed to prove compliance with the terms and conditions of the letter dated September 29, 1965, and that all of the 1963 oil shale leases issued to them had expired December 31, 1973, and could not be reinstated. The check for $829.78 was also returned (R. 65-69, 70-71).

Plaintiffs then filed suit for declaratory judgment. Following discovery proceedings, defendants filed a motion for summary judgment of "no cause of action," supported by affidavits of Max C. Gardner, former Director of the Board of State Lands, Charles R. Hansen, who has been Director of the Division of State Lands since April 26, 1967, and Donald G. Prince, a member of the staff of the State Land Office since 1954 (R. 81-92, 93-97, 98-104, 105-108). Plaintiffs then filed a counter-motion for summary judgment, together with affidavit of John H. Morgan, Jr., one of plaintiffs, along with copy of agreements between the other plaintiffs and Husky Oil Company (R. 112-129). At the time of

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hearing on the respective motions for summary judgment, it was conceded by counsel for the respective parties that all evidence which the parties could produce, including affidavits covering all testimony which could be presented at a trial, was before the court; and that if a trial were held, no further evidence would be submitted.

In addition to oral arguments, counsel submitted written memoranda. The case was taken under advisement January 21, 1975. On April 18, 1975, the Honorable Jay E. Banks, District Judge, denied plaintiffs' motion for summary judgment and granted defendants' motion for summary judgment (R. 187). Summary judgment of "no cause of action" against plaintiffs and in favor of all of the defendants and judgment of dismissal of the action with prejudice were entered April 29, 1975. From such judgment plaintiffs appealed (R. 188-193, 195).

On May 29, 1975, plaintiffs-appellants filed their "STATEMENT OF POINTS" with their designation of the record, by which they alleged:

> "1. The evidence is insufficient to support the findings of the court that, as a matter of law, there was no implied agreement between the parties for extension of the leases which are the subject of this litigation.
>
> "2. The evidence is insufficient to support the finding and ruling of the court that defendants are not estopped to deny the evidence of the leases which are the subject of this litigation"(R. 198).

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A R G U M E N T

POINT I.

SUMMARY JUDGMENT IN FAVOR OF DEFENDANTS-RESPONDENTS SHOULD BE AFFIRMED BY REASON OF UNAMBIGUOUS WRITTEN INSTRUMENTS AND OTHER MATERIAL FACTS EXPRESSLY ADMITTED BY PLAINTIFFS-APPELLANTS IN THEIR COMPLAINT AND IN DISCOVERY PROCEEDINGS, SHOWING (A) THAT THEIR 1963 OIL SHALE LEASES WOULD EXPIRE DECEMBER 31, 1973, AND (B) BY REASON OF PLAINTIFFS' ADMITTED FAILURE TO TIMELY ACCEPT AND COMPLY WITH THE CONDITIONS OF THE 1965 WRITTEN OFFER OF THE LAND BOARD TO AMEND THE 1963 LEASES INTO 20-YEAR LEASES.

The Brief of Appellants attempts to side-step nearly all of the fatal admissions made by plaintiffs-appellants in their complaint and in discovery proceedings. The applicable Utah statutes relating to mineral leasing of state lands are ignored by appellants. In effect, what plaintiffs-appellants appear to seek by their appeal is judicial legislation for the special benefit of appellants, not only for suspension of the operation of some Utah statutes, but to relieve appellants of the consequences of their failure and neglect to accept timely and to comply with an offer made more than 8 years previously by the Board by letter dated September 29, 1965, to all holders of 10-year 1963 state oil shale leases (expiring December 31, 1973) to amend and convert those leases into the 1965 amended form of oil shale lease with a primary term of 20 years, and also containing some different provisions.

That 1965 offer made by the Board through its authorized Director could be accepted only (a) by payment of six cents ($.06)

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per acre conversion or amendment fee plus a filing fee per lease of $2.00; (b) by filing the required form of written application to amend the 1963 oil shale lease; and (c) by execution and delivery to the State Land Office of the amended form of oil shale lease adopted by the Board in 1965.

There was no provision in the 1963 oil shale lease for any extension of the primary term of 10 years, <u>except by production</u>. There never was any claim of production to preclude expiration of the 1963 oil shale leases on December 31, 1973. The Land Board never made any offer to gratuitously extend the 10-year primary term of the 1963 oil shale leases. Exhibit "A", attached to the complaint, is a photocopy of one of the leases issued to one of the plaintiffs for a primary term of 10 years, which would expire and terminate on December 31, 1973, unless there were production within the leasehold (R. 6-8).

In paragraph 3 of the complaint, it is expressly admitted that the 1963 oil shale leases issued to plaintiffs "were to expire, by their terms as originally issued, on December 31, 1973 (R. 2-3)." Plaintiffs also allege:

> "6. On or about September 29, 1965, defendant's director transmitted to all oil shale lessees by regular mail a letter, a copy of which is hereto attached as Exhibit 'C', and plaintiffs acknowledge receipt of said letter.
>
> "7. Plaintiffs took no formal action with regard to the leases in response to Exhibit 'C', but

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plaintiffs orally communicated to defendant's director and other personnel their desire and intent that the leases be replaced by the new form of oil shale lease adopted as set forth in Exhibit 'B' /"B-2'/" (R. 3).

Max C. Gardner was the Director of the State Land Board from 1961 to 1967. As Director, he signed the letter dated September 29, 1965, Exhibit "C", attached to the complaint, except for his signature). His affidavit, attached to defendants' motion for summary judgment (R. 93-97) never was controverted. Mr. Gardner, in his affidavit, stated, <u>inter alia</u>:

"5. As Director of the State Land Board, I signed the letter dated May 11, 1965, a copy of which is attached to the answer of defendants as Exhibit '1'. As Director I had a copy of such letter mailed to each of the record owners of oil shale leases which had been issued in 1963. As Director I also signed the letter dated September 29, 1965, a copy of which is attached to the complaint as Exhibit 'C' (except for my signature which is not shown on the exhibit attached to the complaint). Enclosed with that letter dated September 29, 1965, mailed to each record owner of State oil shale leases was a copy of the form of application to amend the oil shale lease and also a copy of the new form of oil shale lease, a copy of which new form of oil shale lease is attached to the complaint as Exhibit 'B-2'.

"6. Inasmuch as Donald G. Prince was the man in the State Land Office who had assigned to him the responsibility for processing mineral leases and applications to amend mineral leases, all applications to amend the 1963 oil shale leases and the processing of the amended form of oil shale leases in the State Land Office would have been handled first by said Donald G. Prince. After he processed the documents, we held what we called 'Director's meetings'. We reviewed the documents processed and recommendations and any correspondence.

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In order to complete the amendment to oil shale leases, as Director I had to sign for the State of Utah and for the State Land Board the new form or revised form of oil shale lease, a copy of which is attached to the complaint as Exhibit 'B-2'. That would not have occurred under the established procedures for processing mineral lease applications and any applications for amendments of mineral leases, until there was first received in the Land Office (a) the application to amend mineral lease duly signed by the record owner of the 1963 oil shale lease, (b) the remittance of six cents ($.06) per acre for amendment of the lease plus the filing fee of $2.00 per lease, and (c) the new form of oil shale lease in duplicate signed by the record owner of such 1963 oil shale lease. The record owner of the 1963 oil shale lease had to sign first each of the required documents and then deliver them to the State Land Office for processing, and then if found in order by Donald G. Prince, then at a 'Director's meeting' the documents were examined by me, and if in proper order I then signed the new form of oil shale lease as Director and one completely executed duplicate original of that lease was then sent back to the record lease owner as shown by the records of the State Land Office.

"7. I have read paragraph 7 of the complaint, but to my best recollection none of the lessees named in the oil shale leases designated in paragraph 3 of the complaint ever told me personally or as director that he or they desired to convert or amend their ten year oil shale leases issued in 1963 into 20 year leases. If any of them had told me of any such intent, the procedure I would have followed would have been to state that it would be necessary to comply with the provisions of the letter dated September 29, 1965. It was entirely optional with each record owner of a 1963 oil shale lease whether he or they complied with the terms and conditions specified by the State Land Board in 1965 to amend the then existing oil shale lease or leases over into a 20 year oil shale lease as offered by the letter dated September 29, 1965" (R. 94-96).

The affidavit of Max C. Gardner was corroborated by the uncontroverted affidavit of Donald G. Prince, also attached to

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defendants' motion for summary judgment (R. 105-107). Mr. Prince, now Assistant Director of the Division of State Lands, has been an employee of the State of Utah in the Land Office since 1954. Mr. Prince stated, under oath:

> "3. One of my responsibilities was to check on the documents filed in the State Land Office involving any mineral lands and rights in mineral lands, including documents relating to the 1963 oil shale leases, to determine if the oil shale lease owners complied with the terms and conditions of the letter signed by Max C. Gardner, as Director, dated September 29, 1965, a copy of which is attached to the complaint as Exhibit 'C'. Since the letter issued by the Director dated September 29, 1965, (Exhibit 'C') offered to amend the 1963 oil shale leases from 10 year leases to 20 year leases and a new or amended form of oil shale lease was adopted and approved by the Attorney General, before turning over to the Director the documents relating thereto, I ascertained in each case the following facts: (a) Whether the oil shale lease owner of record in the State Land Office had signed the 'Application to Amend Mineral Lease', (b) whether the applicant signed in duplicate the "Amended Form' of oil shale lease; (c) whether the applicant paid the 6 cents per acre fee for the amended form of oil shale lease; and (d) whether the $2.00 fee required to accompany each application was paid. I had to determine whether all of the requirements of the letter dated September 29, 1965, had been met before I delivered them over to the Director with my recommendation for approval. The Director did not sign the amended form of oil shale lease in any case unless the lease owner of the 1963 oil shale lease had first executed such new form in duplicate. If any of those required items had been missing in any case, I would have written to the lease owner to mention the omission and the fact that the Director would not execute the amended form of oil shale lease until and unless all of those requirements had been met.
>
> "4. When all of those requirements had been met, I recommended approval at what we called a 'Director's meeting',

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and after the documents were reviewed by the Director they were submitted to the State Land Board or to its successor Board of State Lands. I signed the defendants' responses to plaintiffs' Requests for Admissions numbered 1 to 5 under date of August 2, 1974. I have attached copies of minutes of the Board of State Lands showing Board approval in those cases wherein the 1963 oil shale lease owners complied with the terms of the letter of the Director dated September 29, 1965. Those minutes show Board approval of compliance by Western Oil Shale Corporation, July 19, 1965; approval of applications of Shamrock Oil and Gas Corporation, and H. Glenn George on October 25, 1965, together with approval of applications of National Farmers Union Exploration Company, and John C. Osmond; approval of applications of Shell Oil Company on November 6, 1965; approval of applications of Pan American Petroleum Corporation December 20, 1965; and on October 30, 1967, approval of additional applications to amend oil shale leases by Western Oil Shale Corporation. There are no minutes of the State Land Board or of the Board of State Lands to approve any applications to amend as to 1963 oil shale leases referred to in paragraph 3 of the complaint, for the reason that I know from my search of the lease case files that there was no compliance with the terms of said letter of September 29, 1965, nor anything in the lease case file to show any effort at compliance at any time prior to December 31, 1973, when those leases would have expired by the terms of those leases.

"5. No one ever contacted me on behalf of any of the record holders of the 1963 oil shale leases described in paragraph 3 of the complaint, down to and including December 31, 1973 * * * ."

By adopting the new form of oil shale lease in 1965 with a primary term of 20 years instead of 10 years, and by the inclusion of some provisions differing from those contained in the 1963 form of oil shale leases, the Land Board could not unilaterally amend any of the existing unexpired 1963 oil shale leases. The letter dated September 29, 1965 (a copy of which is attached as Exhibit "C" to the complaint, except for omission of the signature of the

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Director of the State Land Board), set forth the unequivocal offer in writing made by the Land Board and precisely what the holders of 1963 oil shale leases had to do in order to accept the benefits of that offer:

> "Applications to amend existing Oil Shale leases or Asphaltic Sands-Bituminous Sands leases will be granted upon receipt by this office of a fully executed application and a fully executed amendment of Oil Shale lease or a fully executed addendum of Asphaltic Sands-Bituminous Sands lease whichever the case may be. The applicant must also tender a sum equal to 6¢ per acre of the leased land together with a $2.00 filing fee." (Emphasis added)

The 1963 lease owners, as offerees, had to execute and return to the State Land Office the form of application to amend mineral lease adopted by the Board and the 1965 amended form of oil shale lease approved by the Attorney General on September 20, 1965. In addition, the offerees had to pay, with those executed documents, a sum equal to six cents ($.06) per acre, plus a filing fee of $2.00 with each application. In order for an offeree to accept such offer, it was imperative to comply with each of the four requirements stated in that 1965 offer to amend the 1963 oil shale leases. Although there was no proof, even if plaintiffs had actually communicated orally "their desire and intent that the leases be replaced by the new form of oil shale lease," such oral expression could not legally constitute "acceptance." A tender of less than complete compliance with all four requirements of the offer would not amount to acceptance but a counter offer or

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rejection of that offer.

The general rule is that where an offer in writing does not specify the date by which it must be accepted, the law implies a "reasonable time" for such acceptance. Plaintiffs failed and neglected to comply with the requirements of the September, 1965, offer. Assuming, arguendo, that such written offer could have been construed legally to remain open until the last day of the term of the 1963 leases (which defendants do not concede), the plaintiffs, by their long continued neglect for more than 8 years and 3 months to exercise an option to amend granted in September of 1965, by noncompliance allowed their leases to expire and terminate on December 31, 1973. Following that expiration date, there no longer were any leases remaining in existence which could be amended.

As shown by the uncontroverted affidavit of Donald G. Prince (R. 56-60, 105-107), during the year 1965 many of the lessees under 1963 oil shale leases fully complied with the four requirements of the September 1965 offer to amend their oil shale leases by executing the required documents and by paying the specified fees. The minutes of the Board show that the Board formally approved amendment of the 1963 oil shale leases for those who fully complied with the requirements stated in the offer dated September 29, 1965.

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Summary judgment against plaintiffs was warranted by plaintiffs' own admissions that their 1963 oil shale leases would expire December 31, 1973, and that plaintiffs received copy of the written offer dated September 29, 1965, and did nothing required by the terms of that offer to effectuate an acceptance thereof and amendment of those leases to prevent them from expiring and terminating automatically on December 31, 1973.

Plaintiffs, by paragraph 6 of their complaint, "acknowledge receipt of said letter" dated September 29, 1965, from the Director of the State Land Board. By paragraph 7, it is expressly admitted that "Plaintiffs took no formal action with regard to the leases in response to Exhibit 'C' (R. 3)." That admission, in plain language, means that plaintiffs did absolutely nothing to comply with the requirements of the Board for acceptance of the offer to amend, either by execution and delivery of the documents specified or by payment of any of the required fees. By answers to interrogatories submitted by defendants, plaintiffs in substance admitted (a) that they did not execute and file any application to amend any of the 1963 oil shale leases, (b) that they did not execute and deliver to the State Land Office the amended form of oil shale lease adopted in 1965, approved in form by the Attorney General, (c) that plaintiffs did not pay or tender the six cents ($.06) per acre fee for the amendment of each lease prior to the

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expiration date of the leases, and (d) that plaintiffs never paid the $2.00 filing fee at any time (R. 109-111).

On pages 11 and 12 of the Brief of Appellants, there is an attempt to side-step plaintiffs' unequivocal admissions that they did not do the four things required by the letter dated September 29, 1965, by the untenable argument that

> " . . . the September Letter does not purport to state an exclusive means of conversion, and (2) the September Letter was never sanctified by any Board action reflected by the minutes (i.e., the Director was never instructed or authorized to send it)."

Appellants make no claim that the Board ever made any different or substitute offer to amend the 1963 oil shale leases. The offer in the letter of September 29, 1965, sent by the Director of the State Land Board was the exclusive and only form of offer made, and it was in accordance with the minutes. The lessees had no power to unilaterally amend the leases on their own terms. If the appellants could say correctly that the Director never was authorized to send the letter in question, then appellants infer that there was no valid offer to amend by the letter offer of September 29, 1965. That would mean that the 1963 oil shale leases inevitably would expire on December 31, 1973.

Plaintiffs attached to their complaint as Exhibit "B" portions of some minutes of 1965 Board meetings: (a) On January 20, 1965, the Board considered the proposed amendments of oil

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shale lease and new lease forms. Frank J. Allen was shown to have been present. The minutes expressly state that "The Land Board also adopted as a definite provision an exchange fee to be charged persons substituting old leases for leases on the new form, of 6¢ per acre," (b) on April 16, 1965, the Board gave final approval to the form of application and the amended oil shale lease form, and (c) in the meetings of September 8, 9, and 10, as shown by minutes as amended October 12, 1965, the amended form of lease was approved by the Board. The Attorney General also approved such amended lease as to form by letter dated September 20, 1965 (R. 9-11). The filing fee of $2.00 for application to lease had been included in the Rules of the Land Board some time previously.

Section 65-1-23, Utah Code Annotated 1953, as amended, for years has expressly provided:

> "Except as otherwise provided by law, the State Land Board shall by rules and regulations prescribe the form of application, the form of lease, the annual rental, the amount of royalty, * * * and such other details as it may deem necessary in the interests of the State."

Not only does such statute require the application for mineral lease and the mineral lease itself to be in writing, but Section 65-1-18 also requires applications for mineral leases, as well as mineral leases, to be in writing, by specifying:

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"* * * All mineral leases issued by the Board shall contain such terms and provisions as the Board deems to be in the best interest of the State. * * * Applications for mineral leases shall be on such forms as the Board shall prescribe."

Section 65-1-76 expressly requires that:

"All leases and contracts of every kind entered into by the State Land Board shall, before execution by such Board, be approved as to form by the Attorney General."

It would be utterly impossible for the Attorney General to approve either an application for a lease or any mineral lease or any other contract, <u>except one in writing</u>. The foregoing statutory requirements preclude any "oral understanding" or any "implied contract."

Furthermore, Section 65-1-45, as amended in 1967, provided, <u>inter alia</u>:

"In all cases where lands become available for leasing by the land board because they are newly acquired, or because an existing mineral lease is canceled, relinquished, surrendered, <u>or for any reason terminates</u>, except where the land board determines it is not in the best interest of the State to offer the land for lease, the land board <u>shall offer</u> the land for subsequent mineral leasing by the following procedure only:

"(a) A notice of the lands having so become available for leasing shall be posted in the State Land Office. The notice shall describe the land, indicate what mineral interest in each tract is available for leasing and state the last date, which shall be fifteen days after the notice is posted, on which bids will be received.

"(b) Except as provided in subsection (c) <u>all applications for the lease of such lands</u> filed before

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the closing date stated in the notice shall be considered to have been filed simultaneously. Such applications shall be submitted in sealed envelopes and shall be opened in the land office at ten o'clock on the morning of the first business day following the last day on which bids are receivable. The land board shall award leases to the highest responsible, qualified bidder in terms of the bonus paid in addition to the first year's rental who regularly submitted a bid in the manner required by this act. In all cases of identical bids of successful bidders, right to lease shall be determined by drawing. Drawings shall be participated in only by those among whom the right to lease is equal, but shall be accomplished publicly at the State land board office.

"(c) At the discretion of the land board, mineral leases may be offered at public auction upon such terms, conditions, and minimum bid as may be prescribed by the board.

"(d) Following the awarding of leases to the successful bidders, all deposits except filing fees made by unsuccessful bidders shall be returned." (Emphasis added)

The above-quoted portions of said amended Section 65-1-45 were in operation and effect when plaintiffs' 1963 oil shale leases automatically expired and terminated on December 31, 1973, at the end of the primary term of 10 years, inasmuch as there was no production within any of the leaseholds to effectuate an extension of the primary term of 10 years. When those leases terminated by expiration, any further mineral leasing became subject to the competitive bidding procedures required by Section 65-1-45, as amended. The Board had no authority to offer "or accept an offer made for any noncompetitive oil shale lease with respect to those lands."

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Plaintiffs had allowed the 1965 offer to amend those 1963 oil shale leases to expire and terminate by operation of law as a result of the admitted failure and neglect of plaintiffs themselves to timely execute and deliver the required amendatory documents and to pay the specified fees stated in the letter of September 29, 1965. Having the option to either accept such offer by complying with its specific terms and conditions, or not to accept it, plaintiffs allowed that offer to expire and permitted their 1963 leases to terminate. The Board did not terminate those leases. The 1963 leases terminated by virtue of their express terms and conditions, because plaintiffs themselves had neglected to accept the offer to amend which had been made more than 8 years and 3 months prior to the automatic termination dates of those 1963 leases. Upon their expiration, said leases ceased to have any legal existence.

In consequence of the fatal admissions made by plaintiffs, there being no material issue of fact nor of law as to termination of those 1963 oil shale leases by reason of their automatic expiration and termination at the end of 1973, the District Court properly granted defendants' motion for summary judgment of "no cause of action" as a matter of law and for dismissal of the action with prejudice. The District Court also properly denied plaintiffs' counter-motion for summary judgment.

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POINT II.

THERE WAS NO JURY QUESTION, BUT EVEN IF PLAINTIFFS HAD REQUESTED A JURY TRIAL, DEFENDANTS WOULD HAVE BEEN ENTITLED TO A DIRECTED VERDICT OF "NO CAUSE OF ACTION" IN VIEW OF PLAINTIFFS' ADMISSIONS.

The headnote under Point I of the Brief of Appellants correctly states that "BY GRANTING SUMMARY JUDGMENT, THE COURT HAS RULED THAT THE EVIDENCE COULD NOT SUPPORT JURY FINDINGS OF IMPLIED CONTRACT OR ESTOPPEL." In consequence of the admissions made by plaintiffs, and the express language of written documents, there was no competent evidence to warrant any findings by a jury or by the court of either "implied contract" or "estoppel." Not only did defendants make a motion for summary judgment supported by uncontroverted affidavits, but plaintiffs themselves made a counter-motion for summary judgment, to which was attached an affidavit of one of the plaintiffs, John H. Morgan, Jr. At the time of oral argument, the court made inquiry as to whether there was any additional evidence which could be presented if a trial were conducted. On page 1 of the Brief of Appellants, it is stated:

> "The parties conceded that their evidence (including affidavits covering all testimony they would adduce at trial) was before the court," and the court "ruled that Appellants had no cause of action as a matter of law."

The cases cited on pages 4 and 5 of the Brief of Appellants clearly hold that summary judgment _is_ warranted when there is _no_

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material issue of fact to be resolved, and there remains only a question of law. In Dupler v. Yates, 10 Utah 2d 251, 351 P.2d 624, it was held that "no genuine issue of material fact was raised and defendant's motion for summary judgment was properly granted." This Court further declared:

> "The purpose of the summary judgment procedure is to pierce the allegations of the pleadings, show that there is no genuine issue of material fact, although an issue may be raised by the pleadings, and that the moving party is entitled to judgment as a matter of law.
>
> "It is apparent here that the defendant has produced evidence that pierces the allegations of the complaint. The plaintiffs have not controverted, explained or destroyed that evidence by counteraffidavit or otherwise * * * ." (10 Utah 2d at page 269).

In the instant case, the plaintiffs-appellants, by their complaint, by responses to requests for admissions and by answers to interrogatories clearly showed that their 1963 oil shale leases would expire and terminate December 31, 1973; that notwithstanding, the Director of the State Land Board, on behalf of the Board, issued a written offer to amend those 1963 leases by letter dated September 29, 1965. Plaintiffs-appellants did not accept said offer to amend, which offer could be accepted only by compliance with all four requirements stated in that letter-offer.

We now examine the affidavit of plaintiff, John H. Morgan, Jr., which was attached to plaintiffs' motion for summary judgment

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(R. 112-115). Morgan did not controvert the affidavits attached to the defendants' motion for summary judgment. He recited that he was the plaintiff to whom correspondence from defendants had been referred; that on or about April 8, 1965, the lessees entered into contract with Husky Oil Company, modified on May 25, 1964; that such contract was known to the Land Board; that affiant caused the leases and assignments of leases to be delivered to plaintiff, Husky Oil Company (but he made no claim that those assignments of leases were ever filed with the State Land Board with a request for approval). At the hearing before the Board on April 17, 1974, on plaintiffs' unique request that the Board "acknowledge that said leases had been extended," it was undisputed that no assignments of the 1963 leases to Husky Oil Company were ever filed with the Board and approved, so that all correspondence was appropriately sent to the original lessees of record, including the letter dated September 29, 1965. It was admitted at such hearing before the Board, on behalf of plaintiffs, that no documents for amendment of the 1963 oil shale leases had ever been executed and delivered to the State Land Office prior to the expiration dates of the 1963 leases; and that said John H. Morgan, Jr., had told an assistant attorney general that the six cents ($.06) per acre had not been paid, and that it probably had been "overlooked" (R. 102-104).

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However, in said affidavit of plaintiff Morgan, it was alleged that affiant:

> " . . . on behalf of the original lessees, has since transmitted all notices except billings and all correspondence from defendants with regard to the Leases (including the letters and enclosures of May 11 and September 29, 1965, referred to in the pleadings herein) to plaintiff Husky Oil Company; that affiant believed, at all times after referral of the aforesaid 1965 correspondence to Husky Oil Company, that the Leases had been converted to the oil shale lease form adopted by defendants in 1965; * * *"(R. 113-114). (Emphasis added)

The admissions contained in the complaint and established on discovery proceedings conclusively show that whatever belief plaintiff John H. Morgan, Jr., entertained for more than 8 years and 3 months was not only contrary to the actual facts, but utterly preposterous and unreasonable. Neither the complaint nor the affidavit of Morgan even alleged that Morgan or any of the other plaintiffs at any time bothered to execute any of the amendatory documents or to pay any of the fees required for acceptance of the 1965 offer of the Board for amendment of the 1963 oil shale leases. An utterly unfounded belief could not possibly dispense with compliance for acceptance of the written offer to amend. Even if plaintiffs had intended to accept the offer to amend and had even executed the required amendatory documents submitted to them and had written out the checks for payment of the required fees but neglected to deliver the executed documents and the

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checks for the required fees to the State Land Office, plaintiffs could not have effectuated an amendment of any of those 1963 leases.

It will be observed that the claim made in the affidavit of plaintiff Morgan, attached to the counter-motion for summary judgment in favor of plaintiffs to the effect that affiant <u>believed</u> that the "leases had been converted to the oil shale lease form adopted by defendants in 1965," was utterly inconsistent with the unique request to the Board in 1974 to "acknowledge that said leases had been extended," when the Board never made any offer to merely <u>extend</u> the primary term of the 1963 leases. Such alleged <u>belief</u> that the 1963 leases "had been converted to the oil shale lease form adopted by defendants in 1965" also was materially at variance with the specious conclusion in a subsequent part of said affidavit to the effect that affiant "relied on the issuance of rental" notices "as a representation and acknowledgment that the Leases had been <u>extended</u>"(R. 114-115). The Board never made any offer for a mere <u>extension</u> of the primary term of the 1963 leases, either gratuitously or on condition of payment of specified fees. The 1965 amended form of oil shale lease involved not only a longer primary term but included provisions differing from the original 1963 form of oil shale leases.

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By his affidavit said plaintiff Morgan further recited that about November 28, 1973, he received from defendant 1974 "rental billings" (rental notices) for each and all of the leases in the same manner as were the "billings" for all other State mineral leases; that shortly after receipt of such "billings" Husky Oil Company instructed affiant to pay the same; that

> " . . . affiant, on December 31, 1973, hand delivered to defendants the check and letter of which copies are attached as 'Exhibit C'; that the time stamp appearing on Exhibit C was affixed on the original and on affiant's copy at the State Land Office by defendants' employee; that affiant and all plaintiffs, in affiant's belief, relied on the issuance of the 1974 rental billings for the Leases as a representation and acknowledgment that the Leases had been extended; that it is affiant's practice each year to check billings received against lease records to verify that all leases considered to be in continuing effect have been the subject of billing so that any questions can be resolved before the end of the lease year; on receipt of the 1974 rental billings for the Leases at $1.00 per acre (whereas the rental rate had been 50c per acre for the first ten years) affiant and his associates in fact checked the billings against plaintiffs' lease records for the Leases and proceeded thereafter on the understanding confirmed by the billings that the Leases had in fact been extended; that, except for his receipt of billings for the Leases, affiant would have been alerted to danger of termination and would have acted to prevent it; that, as soon as defendants informed affiant of defendants' contention the Leases had expired, affiant and all plaintiffs took all reasonable action to correct any possible defect in the procedures for extension they had followed"(R. 114-115).

Plaintiff Morgan used the term "rental billings" in lieu of the correct term "rental notice" in a possible attempt to infer

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that the State had some duty to issue such notice. The State statutes, Title 65, Chapter 1, U.C.A. 1953, as amended, do not require the Board to issue any advance notice of any rental which may become due under the terms of a mineral lease. It is significant that in connection with plaintiffs' counter-motion for summary judgment, they presented a copy of the Rules and Regulations of the Board as amended to June, 1973. "RULE 14 - RENTAL NOTICES", reads as follows:

> "Advance notice of rental due is usually sent to the Lessees by the State Land Board, but failure to receive such notices shall not act to relieve the lessee from the payment of the rental and the lease shall be in default if such payment is not made as provided in the lease"(R. 164).

The rule adopted by the Board for sending notice of "rental due" does not authorize anyone in the State Land Office to send a notice of "rental due" for a year following the expiration of a mineral lease. Inasmuch as the plaintiffs-appellants expressly alleged and proved that their leases automatically expired and terminated December 31, 1973, there could not possibly have been any rental due for 1974. Paragraph 7 of the uncontroverted affidavit of Charles R. Hansen, Director of the Division of State Lands, shows that no one was authorized to send any rental notice for "1974 rentals" on the 1963 oil shale leases <u>except</u> to oil shale lease owners whose leases had been amended and therefore

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continued to exist after December 31, 1973; and that the sending of any rental notice on 1963 oil shale leases described in paragraph 3 of the complaint was a clerical error (R. 100). The uncontroverted affidavit of Donald G. Prince (presently assistant director), who has been a member of the staff of the State Land Office since 1954, also shows that he did not authorize the sending of the so-called "billings for 1974 rentals" to plaintiffs, and that sending such notices was a clerical error (R. 107).

There was no contract right nor statutory right nor any right, under Rule 14, to receive a rental notice (which appellants have described as a "rental billing"). Consequently, the sending of erroneous rental notices for 1974, which was the year beyond the expiration dates of the 1963 oil shale leases, could not impose on the lessees, whose leases were expiring on December 31, 1973, any legal duty to pay any rental for 1974. On December 31, 1973, Utah Resources International, Inc., by its president, John H. Morgan, Jr., left at the State Land Office a check for $24,258.50 for "1974 rentals" (R. 46-48, 50-51). That check was shown by the accompanying letter to be for 1974 rentals actually becoming due for 1974 on certain oil, gas and hydrocarbon leases and bituminous sands leases--leases not expiring December 31, 1973. Included in such check

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for $24,258.50 was an aggregate amount of $13,834.00 for "1974 rentals" on 1963 oil shale leases (which were expiring December 31, 1973). As shown by the affidavit of Donald G. Prince, Assistant Director of the Division of State Lands, said check was deposited for collection about January 4, 1974, for the reason it included sums becoming due for rentals on oil, gas and hydrocarbon leases and bituminous sands leases which would <u>not</u> expire on December 31, 1973 (R. 49-53).

When it was ascertained that the 1963 oil shale leases had not been amended and that they had expired December 31, 1973, the Board, on March 8, 1974, directed refunds in the total amount of $13,834.00, included in the check for $24,258.50 for 1974 rentals, because 1974 rentals were not payable on those oil shale leases expiring December 31, 1973 (R. 46-48, 49-53). Refund checks were issued and mailed March 12, 1974, by the Director of the Division of State Lands (R. 52, 68-69). As stated on page 4 of the Brief of Appellants, "the board returned the money to Appellants, with the announcement that it considered the Leases to have expired" (R. 50-52).

On February 26, 1974, which was nearly two months after the 1963 oil shale leases expired, Utah Resources International, Inc., by John H. Morgan, Jr., its president, issued a check to the Division of State Lands in the amount of $829.78 for the

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computed six cents ($.06) per acre in the 1963 oil shale leases (which had not been amended). Following a hearing before the Board on April 17, 1974, at the request of appellants that the Board "acknowledge that said leases had been extended," the Board denied such application and advised applicants in writing that they had failed to prove compliance with the terms and conditions of the letter dated September 29, 1965, and that all of the 1963 oil shale leases issued to them had expired December 31, 1973, and could not be reinstated nor extended. The check for $829.78, dated February 26, 1974, was then returned (R. 65-69, 70-71). In his hereinabove-mentioned affidavit, plaintiff, John H. Morgan, Jr., by substituting the term "rental billings" sometimes used in lieu of "rental notices," jumped to an incompetent conclusion predicated on his alleged <u>belief</u> in disregard of the facts, which he claimed was shared by other plaintiffs. Without any factual foundation, Morgan resorted to a self-serving, invalid conclusion:

> " . . . that affiant and all plaintiffs, in affiant's belief, relied on the issuance of the 1974 rental billings for the Leases as a representation and acknowledgment that the Leases had been extended . . . ",

but he did not even mention what his belief was as to <u>the period of time</u> those leases were believed to have been extended. Nor

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did said plaintiff give any clue as to how those 1963 leases could have been gratuitously extended for some unstated period of days, months or years, when the Board never made any offer for a mere extension of the 1963 leases, gratuitously or even in consideration of payment of some fees.

Independent of lack of authorization for any of the rental notices in question, they did not contain any language which reasonably could be construed to constitute either a <u>representation</u> or an <u>acknowledgment</u> that any of the 1963 oil shale leases in controversy had been "extended" by the State Land Board. While plaintiff Morgan claimed "reliance" on documents which did not purport to be more than mere rental notices for 1974 rentals, he did not recite any facts which could show any actual representation that there was an "extension," nor any right to rely on those rental notices as an "acknowledgment" by the State that the leases had been "extended," nor any <u>reasonable</u> reliance. On the contrary, he refuted his professions of "reliance" on the unauthorized 1974 rental notices by admissions which would compel a finding that he did not rely on those unsigned rental notices, and that he had no right to rely on such rental notices, by saying:

> "It is affiant's practice each year to check billings received against lease records to verify

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that all leases considered to be in continuing effect have been the subject of billing so that any questions can be resolved before the end of the lease year; on receipt of the 1974 rental billings for the Leases at $1.00 per acre * * * affiant and his associates in fact checked the billings against plaintiffs' lease records for the Leases"(R. 114-115).

Inasmuch as plaintiffs admitted that they "in fact checked the billings against plaintiffs' lease records," they could not possibly have found in those lease records any Amended Oil Shale Lease offered in 1965, because plaintiffs had failed to pay the required fees and had neglected to execute and deliver the required amendatory documents specified in the letter-offer of September 29, 1965. Plaintiffs did not claim, nor could they truthfully claim, that when they checked their lease records against the purported 1974 rental notices, they actually found in those lease records any amended 1965 form of oil shale lease, for it is undisputed that plaintiffs never did any of the things required for acceptance of the 1965 amendatory offer. After attempting to show diligence by checking their lease records, plaintiff Morgan resorted to the absurd conclusionary argument that plaintiffs

> " . . . proceeded thereafter on the understanding confirmed by the billings that the Leases had in fact been extended . . . ",

when common sense would compel a conclusion that the pretended "understanding"was merely a <u>false assumption</u>. An examination

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of the lease records by any intelligent person would alert such person to the fact that there was no executed copy of the 1965 amended form of oil shale lease in the lease records, because plaintiffs had failed and neglected to do the things essential for acceptance of the 1965 offer for amendment of those leases.

Plaintiffs admittedly had done nothing to accept the 1965 offer to amend, made more than 8 years and 3 months prior to the December 31, 1973, lease expiration date. During that entire time, plaintiffs claimed they entertained a <u>belief</u> (which was utterly false), to the effect that the 1963 leases had been "extended," when the Board never had made any offer to gratuitously extend the primary term of the 1963 leases. Nevertheless, affiant Morgan attempted to excuse the inexcusable negligence of plaintiffs to take the required steps for amendment of the leases by the self-serving proclamation that

> "except for his receipt of billings for the Leases, affiant would have been alerted to danger of termination and would have acted to prevent it;"

but affiant failed to disclose just what he possibly could or would have done to prevent expiration of the 1963 leases on December 31, 1973, since there never had been any amendment of those leases in accordance with the terms of the only offer ever made by the Board for their amendment.

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Then affiant Morgan, on behalf of himself and his co-plaintiffs, finally resorted to the specious argument:

> " . . . that as soon as defendants informed affiant of defendants' contention that the Leases had expired, affiant and all plaintiffs took all reasonable action to correct any possible defect in the procedures for extension they had followed." (R. 115).

The fact is that plaintiffs never followed any "procedures for extension." Neither affiant Morgan nor any of the other plaintiffs ever stated just what they claimed they did which could possibly constitute "all reasonable action to correct any possible defect in the procedures for extension they had followed." The representation that plaintiffs followed any "procedures for extension" of the 1963 leases was entirely without factual foundation. The only "defects in procedure" consisted of the neglect of plaintiffs to do any of the things for timely acceptance of the Board's 1965 offer to amend the leases. The plaintiffs had no power to unilaterally "extend" the primary term of those 1963 leases. Consequently, there was no "reasonable action" which plaintiff could have taken on December 31, 1973, to prevent expiration of those leases at the end of that day.

The respondents were entitled to summary judgment of "no cause of action," for appellants presented, by the affidavit

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of John H. Morgan, Jr., all of the "evidence" on which plaintiffs would have relied if there had been a trial. Assuming that there had been a jury trial, defendants-respondents would have been entitled to a directed verdict of "no cause of action," for the following reasons: (a) The testimony (as outlined and set forth in the affidavit of plaintiff, John H. Morgan, Jr.) consisted of declarations of belief contrary to the actual facts. (b) The evidence consisting of unwarranted false assumptions and conclusions was incompetent. (c) There were fatal admissions of fact which conclusively showed that plaintiffs received the written offer to amend the 1963 lease under date of September 29, 1965, but never executed and delivered any of the amendatory documents nor paid any of the required fees for effectuating any amendment. (d) The rental notices for 1974 rentals on the 1963 leases in question never were authorized and sending them was a clerical error. (e) While plaintiffs claimed that they "relied" on such rental notices (which they chose to refer to as "rental billings") "as a representation and acknowledgment that the Leases had been extended," independent of the issuance of such rental notices by clerical error and without authority, there was no language in such rental notices which reasonably could be construed to constitute either a representation or an acknowledgment by an authorized person that any of the 1963 oil shale leases had been

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unilaterally "extended" by the Board. (f) There could not have been any reasonable reliance on such rental notices, since plaintiffs "checked those rental" notices with their lease records. By checking with the lease records, any reasonable person would have been alerted to the fact that those leases had not been amended nor "extended" in consequence of plaintiffs' own neglect. (g) There was nothing plaintiffs could possibly do under the Utah statutes on December 31, 1973, when a check was presented to cover not only "rentals" for 1974 on the leases expiring that day but also for rentals due on mineral leases not then expiring. (h) Refund checks were mailed March 12, 1974, for rentals offered on the expiring 1963 oil shale leases. (i) Contrary to the arguments of appellants, their leases expired and terminated by their own terms. Respondents did not terminate any of those leases.

POINT III.

APPELLANTS' ATTEMPTS TO IMPOSE ON THE STATE LAND BOARD A NEBULOUS "IMPLIED CONTRACT BY ESTOPPEL" FOR EITHER EXTENSION OF THE TERM OF THE 1963 LEASES OR REPLACEMENT OF THOSE LEASES BY THE 1965 AMENDED FORM OF OIL SHALE LEASES, NOTWITHSTANDING APPELLANTS' OWN ADMITTED NEGLECT TO ACCEPT TIMELY THE 1965 OFFER TO AMEND, WOULD VIOLATE THE STATUTE OF FRAUDS, THE PAROLE EVIDENCE RULE, AND REQUIREMENTS OF THE UTAH STATUTES.

Under Point II, on pages 7 to 12 of the Brief of Appellants, there is a nebulous argument that "the evidence would justify a jury in finding extension of the leases by implied

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contract." Under Point II of this Brief of Respondents, we point out that even if there had been a jury trial, the defendants would have been entitled to a directed verdict of "no cause of action" for lack of any competent evidence to support the claims asserted by plaintiffs. No jury could reasonably believe that plaintiffs-appellants had done what they admitted they never did.

By further argument, on page 6 of Brief of Appellants, claim is made that "the conduct of Respondents in this case implied a promise to renew or extend the Leases," but there was no competent evidence, nor was there any evidence that the State declared a "forfeiture." The 1963 leases all terminated by expiration in accordance with the terms of the leases. On page 8, appellants contend that "a contract may be established by conduct alone without any expression in writing or by parole." They cite Kimball Elevator Co. v. Elevator Supplies Co., 2 Utah 2d 289. In that case, the jury, by instruction, was permitted to speculate and find an "implied agreement" from a "course of dealing" involving a number of unaccepted written offers. In reversing the judgment based on such jury verdict, this Court observed that "the basis upon which Kimball seeks to make out a promise on the part of Elevator Supplies not to submit a competitive bid is nebulous indeed." Furthermore, this Court in

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that case stated what counsel for appellants in this case seems to have overlooked:

> " * * * Nevertheless we fail to see how, taking all of the evidence and every reasonable inference that may fairly be derived therefrom in the light most favorable to the plaintiff, as we are obliged to do, a finding that Elevator Supplies made any such promise in the instant case can be supported. Likewise we find no circumstances here from which it could reasonably be concluded that silence or inaction with respect to such request amounted to an acceptance."

On page 6 of their brief, appellants cite Oil Shale Corporation v. Larson, 20 Utah 2d 369, 438 P.2d 540, but that case does not support any contentions of appellants. That case involved interpretation of a written instrument, which document this Court held to be unenforceable, among other reasons, for lack of any provision as to when the lease would begin or when it would end. Consequently, if a written agreement for a lease must specify a termination date, there certainly could not be any "implied oral agreement" for extension of a lease without a definite understanding as to when the claimed "extension" would end.

On page 9 of their brief, counsel for appellants admit: "We find no Utah case where the promise inferred from conduct was specifically to extend a lease." Counsel for appellants also overlook the fact that the express provisions of Sections 65-1-18 and 23, U.C.A. 1953, require an application for mineral

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lease, as well as a mineral lease to be in writing. Defendants-Respondents not only invoked the parole evidence rule but, by affirmative defenses, pleaded said Utah statutes and also the Statutes of Fraud, Sections 25-5-1 and 4(1); also that all leases and contracts entered into by the State Land Board must be approved as to form by the Attorney General, Section 65-1-76, U.C.A. 1953. All of those statutes would bar any claim of "implied contract" by "estoppel" or otherwise.

Nevertheless, on page 9 of the Brief of Appellants, it is argued that "the board indicated its understanding that the Leases were extended not only by amending its accounting records to show an additional ten-year account period, but also by billing and receiving 1974 rental at a rate which could only apply to a period beyond the initial term of the lease." However, as shown under Point II of this brief, the Board did not authorize the sending of any rental notices (which plaintiffs referred to as "billings"), except on leases not expiring. As shown by the affidavit of the former director of the State Land Board (R. 96), he did not authorize any change in the accounting cards, except as to those 1963 oil shale leases where the lease owners complied with the terms and conditions of the letter-offer to amend, dated September 29, 1965. The affidavit of Charles R. Hansen, present director of the Division of State Lands (R. 99), denies that he

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authorized any changes in the accounting cards, except as to those leases with respect to which there had been full compliance with the requirements of the letter of September 29, 1965. Both of those affiants denied there was any oral "understanding." Furthermore, two of the accounting cards never were changed to include a "new payment schedule"(R. 50-51). Notwithstanding the argument that the accounting records were changed, the affidavit of John H. Morgan, Jr., does not show that he knew anything about the alleged changes until after the 1963 leases expired. He, therefore, could not have relied on those office records for some undefined "understanding." Furthermore, the accounting records were intended for office use, and they could not possibly be construed as a part of an "implied contract." There was no proof of a meeting of the minds.

Contrary to the argument, under Point III of Brief of Appellants, starting on page 13, there was no conduct of the Board which could "estop" the Board "to deny the extension of the leases." We agree with the doctrine announced in Farmers and Merchants Bank v. Universal CIT Corporation, 4 Utah 2d 155, 289 P.2d 1045, that "equitable estoppel" is based on the concept that when one person makes representations to another which warrant the latter in acting in a given way, the one who made the representations will not be permitted to change his position when such change would bring about inequitable consequences.

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There were no "representations" made by the Board to work any "estoppel", equitable or otherwise. The appellants seem to have their concepts of estoppel in reverse, for the Board made no representations to induce plaintiffs not to accept the Board's offer of September 29, 1965. Plaintiffs simply neglected to accept the written offer. As to payment of "1974 rentals," in consequence of the erroneous unauthorized 1974 rental notices, when the Board ascertained that the 1963 leases had expired December 31, 1973, and that no rentals could possibly be due for 1974 rentals, the Board, on March 8, 1974, ordered refunds, and the Director issued and mailed the refund checks on March 12, 1974. Appellants acknowledge the refunds, as shown on page 4: "The Board returned the money to Appellants with the announcement that it considered the Leases to have expired (R. 50-52)."

There is no merit to the suggestion made on page 12 of their brief that appellants should have been given a 30-day "written notice" to "rectify a claimed delinquency" in accordance with Section 65-1-90, U.C.A. 1953, as amended, by reason of appellants' failure to comply with the letter-offer of September 29, 1965. That provision of the statutes relates to violation of a provision of a mineral lease. The Board never claimed any default nor any violation of the terms of the 1963 leases. The Board did not "terminate the lease without notice;" nor any of those leases. Plaintiffs-Appellants, by their own neglect to accept the 1965

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offer to amend, permitted those leases to expire and terminate by their own terms. Appellants' own arguments concerning "implied contract" and "estoppel" illustrate the fallacies of those arguments by trying to make the Board responsible for appellants' own failure to timely accept the 1965 offer to amend the leases.

On page 15 of the Brief of Appellants, it is appropriately stated: "We are not aware of a Utah case where estoppel has been applied directly against the Utah State Land Board," but appellants cite a number of cases which have no possible application to the actual facts of this case. Finally, appellants, on page 16, complain that the Board did not issue some regulations with respect to the conversion of oil shale leases. The 1965 offer to amend was issued to every lease owner of record. If there were any basis to appellants' argument that the letter-offer of September 29, 1965, was unauthorized because there was no "regulation" covering the subject matter, then there was nothing to prevent the expiration of the 1963 oil shale leases on December 31, 1973. That argument also refutes their claims of "estoppel."

On page 16 of their brief, appellants argue, without foundation, that they "relied" on an "amendment of accounting records" and "acceptance" by the Board of "1974 rentals." They could not possibly have relied on unauthorized changes on

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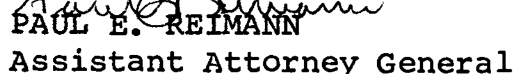
office accounting records which they did not even claim to have seen at any time before their leases terminated by expiration. Appellants have cited a number of cases and some text statements, none of which hold that a party who has allowed his state mineral lease to expire has a right of action to compel the State to suspend the operation of its statutes to grant him either an extension of the primary term of a lease after it has expired or an amended lease which he rejected by nonacceptance of an offer to amend made more than 8 years previously.

C O N C L U S I O N

By way of conclusion, counsel for appellants declares that they "acted in good faith" when they admitted they did absolutely nothing during a period of more than 8 years after they received the Board's offer to amend. Summary judgment of no cause of action" was warranted by plaintiffs' own admissions and affidavit, independent of defendants' affidavits. If there had been a jury trial, respondents would have been entitled to a directed verdict. Consequently, the judgment of the District Court should be affirmed.

Respectfully submitted,

VERNON B. ROMNEY
Attorney General



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