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Joseph Fazzio, Maxine T. Fazzio And Fuel Exploration, Inc., A Colorado Corporation v. Phillips Petroleum Company, A Delaware Corporation, D & J Oil Company, A Partnership, Roosevelt Unit, Inc., A Nevada Corporation, David H. Monnich, Ballard Ward, First National Bank & Trust of Tulsa, National Banking Association, J.A. Houston, Fern Houston, First Security Bank of Utah, A National Banking Association, Zions First National Bank, A National Banking Association, John Does 1 Through 15 and their Heirs, Successors, Assigns And All Other Persons Unknown Claiming Any Right, Title, Or Estate Or

Interest In Or Lien Upon The Real Property Described In The Pleadings Adverse To The Plaintiffs Ownership Or Clouding Their Title Thereto : Brief of Appellant

IN THE SUPREME COURT OF THE STATE OF UTAH

JOSEPH FAZZIO, MAXINE T. FAZZIO and FUEL EXPLORATION, INC., a Colorado corporation, Plaintiffs-Appellants, v. PHILLIPS PETROLEUM COMPANY, a Delaware corporation, D & J OIL COMPANY, a partnership, ROOSEVELT UNIT, INC., a Nevada corporation, DAVID H. MONNICH, BALLARD WARD, FIRST NATIONAL BANK & TRUST OF TULSA, National Banking Association, J.A. HOUSTON, FERN HOUSTON, FIRST SECURITY BANK OF UTAH, a National Banking Association, ZIONS FIRST NATIONAL BANK, a National Banking Association, JOHN DOES 1 through 15 and their heirs, successors, assigns and all other persons unknown claiming any right, title, or estate or interest in or lien upon the real property described in the pleadings adverse to the Plaintiffs ownership or clouding their title thereto, Defendants-Respondents.	*	Case No. 19161

APPEAL FROM THE JUDGMENT OF THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT, UINTAH COUNTY, STATE OF UTAH

HONORABLE RICHARD C. DAVIDSON, JUDGE

BRIEF OF APPELLANT

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BRIEF OF APPELLANTS

NATURE OF THE CASE

This case is a quiet title action brought by Joseph Fazzio and Maxine Taylor as the owners of mineral interests in certain real property located in Uintah County, Utah and Fuel Exploration, Inc., a lessee of the Fazzio's mineral interest, against Phillips Petroleum Company, its successors and assigns, which purport to claim an interest in the mineral estate of the Fazzios by virtue of oil and gas leases executed by the Fazzios' predecessors in interest in the 1940's and 50's, and against other parties claiming an interest in the subject property adverse to, or constituting a cloud upon, Plaintiffs' interest.

DISPOSITION OF THE CASE IN THE DISTRICT COURT

Defendant Phillips Petroleum Company, joined by Defendant Roosevelt Unit, Inc., responded to the Amended Complaint of the Plaintiffs by filing a Motion to Dismiss, which was granted by the Honorable Richard C. Davidson, Judge of the Seventh Judicial District Court. The district court

subsequently denied Plaintiffs' Motion for Reconsideration and Motion for Leave to Amend the Complaint.

STATEMENT OF FACTS

The Plaintiffs, Joseph and Maxine T. Fazzio, (hereinafter referred to as the "Fazzios" or "Plaintiffs") own mineral interests in the following described real property in Uintah County, Utah:

Township 1 South, Range 1 West, U.S.M.

> Section 24: S1/2 NW1/4.
> Also, beginning at a point 60.0 rods West of the Southeast corner of the SW1/4 of Section 24; and running thence West 60.0 rods; thence North 160.0 rods; thence East 60.0 rods; thence South 160.0 rods to the place of beginning.
> Also, beginning at the Southwest corner of the SW1/4 of Section 24; and running thence North 160.0 rods; thence East 40.0 rods; thence South 160.0 rods; thence West 40.0 rods to the place of beginning. (Containing 180 acres, more or less).

These lands, and the lands involved in a companion case, Taylor, et al, vs. Phillips Petroleum Co., et al., (Case No. 19160) are plotted on Exhibit "A" hereto.

On November 30, 1945 the Plaintiffs' predecessors in interest, the parents and maternal grandparents of Maxine Fazzio, Leslie D. Taylor and his wife Audrey Whitlock, and Alford L. Whitlock and his wife, Nellie, entered into two separate leases with the Defendant Phillips Petroleum Company (hereinafter referred to as "Phillips") covering lands in Sections 23 and 24 of Township 1 South, Range 1 West, U.S.M.,

and Sections 18 and 20 of Township 1 South, Range 1 [illegible], U.S.M. (Paragraph 7 of the Amended Complaint and Exhibits "A" and "B" thereto). These leases, which are hereinafter referred to as the 1945 leases, were on printed forms, the standard Producer Form 88 lease, used extensively throughout the western states. The leases were for primary terms of seven years, and so long thereafter as oil and gas were produced from the property. They provided for a royalty of 1/8th of any oil, gas or other hydrocarbons produced from the premises. Phillips, under these respective leases, was required to begin operations for drilling a well within one year from the date of the lease. If operations did not commence within one year the lease was to terminate unless the lessee paid a "delay rental" in the amount of 25¢ per acre per year to hold the lease from year to year for the primary term of the lease.

At the time the Plaintiffs' predecessors in interest entered into these leases with Phillips, Phillips was not authorized to do business in the State of Utah under §18-8-5 Utah Code Ann. (1943), which statute was then in effect. Phillips became qualified to do business on June 14, 1946 (Paragraph 18 and Exhibit "D" of the Amended Complaint).

A subsequent lease, dated November 12, 1946, was obtained by Phillips from Nellie Whitlock, individually and

administrator for the estate of Wilford L. Whitlock, and from Leslie D. Taylor and Audrey Whitlock Taylor. (Paragraph 8 and Exhibit "C" of the Amended Complaint). This 1946 lease, which is hereinafter referred to as the 1946 lease, differed from the 1945 leases in that it only covered the lands located in Section 24. This readjustment may have been attributable to the death of Wilford Whitlock and the apportionment of his interest among the Plaintiffs' predecessors. The other land contained in the 1945 leases, which was also leased to Phillips by separate leases in 1946, is not involved in the present litigation. There was no actual change in the amount or area leased to Phillips, only a change as to which leases covered which property. (Exhibits "A" and "B" to Defendant's Motion to Dismiss).

The term of the 1946 lease was for six years from November 20, 1946 -- in other words, the expiration of the primary term of the 1945 and 1946 leases was the same time. A clause requiring seismographic work to be performed on the leased property contained in the 1945 leases was omitted from the 1946 lease. The lessors were led to believe that this change was the main reason for the execution of the 1946 lease (Paragraph 20 of the Amended Complaint).

On November 7, 1950 Phillips entered into the Unit Agreement for the Development and Operation of the Roosevelt Unit. The definition of a "unit" as it applies here is the area included in the joint operations of all or part of an oil or gas bearing formation, without regard to the legal boundaries overlying the formation, so as to maximize the recovery and minimize the waste of the oil and gas and the economic resources from drilling unnecessary wells. All parties which have an interest in the unit share in the total production from the unit, usually in direct proportion to the amount of lands they have committed to the unit. A unit may be formed through agreement, or by order of an agency of the state or federal government, and may be comprised of one or several "participating areas." A participating area is all or a portion of the unit area to which production from wells located on the participating area is allocated and divided in proportion to the interest held by the mineral owners. There may be one or more participating areas to a unit. The history of the formation of the Roosevelt Unit is contained in Phillips Petroleum Co. v. Peterson 218 F.2d 1926 (10th Cir., 1954), a case dealing with Phillips' right to unitize lands under lease.

The Roosevelt Unit appears to have had only one participating area. The participating area was contracted down to its present size effective February 1, 1952 (Exhibit "G" of the Affidavit of Nicholas F. McKean), excluding all but the northernmost 80 acres of the lands leased by Phillips in 1946. Later, effective February 1, 1954, the entire Roosevelt Unit was contracted down to the size of the participating area.

The parties entered into an agreement on March 11, 1952 whereby, notwithstanding the Unit Agreement, Phillips agreed to drill a well for the production of oil and gas on the parcel covered by the 1946 lease excluded from the Roosevelt Unit. (Exhibit "A" to the Supplement to the Response to Defendant's Motion to Dismiss). A well appears to have been drilled in that parcel in 1952, but was abandoned in 1954. (Exhibit "B" to the Supplement).

On October 25, 1954 Phillips entered into an oil and gas lease with the Plaintiffs' predecessors covering only that portion of Section 24 covered by the 1946 lease which had been excluded from of the Roosevelt Unit. (Exhibit "E" of the Amended Complaint). This lease, which is hereinafter referred to as the 1954 lease, was on a standard Producers Form 88 with significant modifications to certain clauses. Stricken from the lease were provisions relating to the primary term and

delay rentals holding the lease. Instead, the lease required commencement of operations for reworking and redrilling a well that had been previously drilled in the SW1/4 of Section 24 within six months, with no right to extend the lease by the payment of delay rentals. This lease was released by Phillips on April 28, 1955. (Exhibit "F" to the Amended Complaint).

No further development has occurred on the lands excluded from the Roosevelt Unit. As indicated by the Affidavit of Joseph Fazzio and the exhibits thereto filed at the request of the district court, the Plaintiffs were in regular contact with Phillips from 1979 concerning the subject land and Phillips' lack of exploration or development thereon. On October 10, 1980 Carl Noel, on behalf of the Plaintiffs, wrote a letter to Phillips demanding release of the land for several reasons including Phillips' unreasonable delay in conducting any developmental operations upon the leasehold. (Paragraphs 49 and 56 of the Amended Complaint and Exhibit "C" of the Motion to Dismiss).

A complaint was filed May 12, 1982 to quiet title against Phillips and its assignees and successors, and also against J.A. and Fern Houston as the grantees named in a stray mineral deed executed by Lorna Hemingway, unrelated to the Phillips leases. On June 10, 1982 an Amended Complaint was

filed correcting certain minor errors in the names of the parties.

Phillips responded to the Amended Complaint on July 26, 1982, by way of a Motion to Dismiss the Complaint which was joined by the Roosevelt Unit, Inc. Other named defendants have filed disclaimers of interest, or in the case of David Monnich, a general denial by way of answer. J.A. Houston and Fern Houston could not be located by the process server and are presumed to be dead.

A hearing was held on the Motion to Dismiss on November 9, 1982, before the Honorable Richard C. Davidson. At the close of the hearing, Judge Davidson took the Motion under advisement and allowed counsel ten (10) days in which to supplement the record. On December 6, 1982 Judge Davidson issued a Minute Entry, and a Judgment was signed and entered December 30, 1982, dismissing the first, second, third, fourth, fifth and portions of the seventh causes of action with prejudice, and the fifth, sixth and portions of the seventh without prejudice.

On January 14, 1983 a Motion to Reconsider the Decision and a Motion for Leave to Amend were filed by the Plaintiffs. These motions were denied by the district court, and this appeal was consequently taken.

ARGUMENT

I. THE STANDARD ON APPEAL REQUIRES THAT THE FACTS ALLEGED IN THE AMENDED COMPLAINT BE ACCEPTED AS TRUE AND INTERPRETED IN THE LIGHT MOST FAVORABLE TO THE PLAINTIFFS.

As noted above, Phillips' response to the Plaintiffs' Amended Complaint was by way of a Motion to Dismiss under Rule 12(b)(6) of the Utah Rules of Civil Procedure. This motion was joined by the Defendant Roosevelt Unit, Inc. The only answer filed was from the Defendant David Monnich, and was basically a general denial. Although the record has been supplemented by both parties through memoranda supporting and opposing the Motion to Dismiss, no discovery has been permitted, and there has been no responsive pleading by Phillips as to any of the factual allegations contained in the Amended Complaint. The district court chose to dismiss four counts of the complaint with prejudice and two counts without prejudice. Leave to amend was denied.

Dismissal of a complaint with prejudice, before trial and before an answer has been filed by the defendant is a drastic measure, particularly in a factually complex case such as the present one. Such a dismissal is neither just nor necessary in the eyes of most legal authorities, and has been looked upon with disfavor by this Court. 2A Moore, Moore's Federal Procedure, Paragraph 12.08 (2d Ed. 1983), on Federal

Rule 12(b)(6), which is almost identical to the Utah version, states as follows:

> A [complaint] may be dismissed on motion if clearly without any merit; and this want of merit may consist in an absence of law to support a claim of the sort made, or of facts sufficient to make a good claim, or in the disclosure of some fact which will necessarily defeat the claim.
>
> But a complaint should not be dismissed for insufficiency unless it appears to a certainty that plaintiff is entitled to no relief under any stated facts which could be proved in support of the claim. Pleadings are to be liberally construed. Mere vagueness or lack of detail is not grounds for a motion to dismiss, but should be attacked by a motion for a more definite statement. (Emphasis in the original, citations omitted).

The standard by which the Utah Supreme Court has measured appeals from motions to dismiss is stated in King Bros., Inc. v. Utah Dry Kiln Co., Inc., 13 Utah 2d 339, 374 P.2d 254, 256, (1962):

> In the face of the motion to dismiss the complaint, the trial court and this court on review, are obliged to survey its allegations in the light most favorable to the plaintiff; and in a similar manner to indulge in its favor all reasonable inferences as to proof that may be adduced thereunder. From the standpoint of the administration of justice it is wise and desirable to adhere to a policy of being reluctant to turn a party out of court without trial. It can justifiably be done only if the party could not in any event establish a right to recover.

See also Holbrook v. Adams, 542 P.2d 191 (Utah 1975); Woolums v. Simonsen, 214 Kan. 722, 522 P.2d 1321 (1974).

In this appeal the facts alleged in the Amended Complaint must be taken as true. This much is admitted even by the opposing party (Page 4 of the Reporters Transcript of Hearing on Motion Proceedings before the Honorable Richard C. Davidson, November 9, 1982 [referred to hereinafter as "Transcript"]). The inferences to be drawn from the facts alleged in the Amended Complaint are to be viewed from a perspective which is most favorable to the Plaintiffs. In no event should the Plaintiffs be precluded from their right to a trial on the merits at this level, even before discovery has taken place, unless "it appears to a certainty that plaintiff would be entitled to no relief under any state of facts which could be proved in support of the claim." Blackham v. Snelgrove, 3 Utah 2d 157, 280 P.2d 453, 455 (1955). As will be shown below, the Amended Complaint dismissed by the district court clearly does allege facts, which, if taken as true together with inferences deduced therefrom, would entitle Plaintiffs to some relief.

II. THE DISTRICT COURT ERRED BY RESOLVING FACTUAL ISSUES IN ITS DECISION GRANTING PHILLIPS' MOTION TO DISMISS.

A. The court improperly dismissed without prejudice the Plaintiffs fifth and sixth causes of

action when it found, as a matter of fact, that adequate notice of breach of implied covenants had not been given to Phillips.

The Amended Complaint alleged in the fifth and sixth causes of action that Phillips had breached implied covenants of the leases in question to develop the subject property and to further explore for oil and gas.

The lessee's convenants implied in an oil and gas lease for development and further exploration are based upon the requirement of cooperation, integral to any contractual relationship. The lessor to an oil and gas lease gives up the exclusive privilege of exploration, and drilling for and extracting oil and gas from the property. In return, the lessee promises to give the lessor a royalty on production under the lease. The benefit of the lease to the lessor is therefore intimately tied to the diligent operation of the leasehold by the lessee. If the lessee does nothing to develop the premises, lessor's returns on the lease are delayed indefinitely. The requirement of cooperation demands that the lessee conduct its operations in a manner which will accomplish the purpose, i.e., the development of the resources underlying the premises (See, generally, 5 Williams & Meyers, Oil and Gas Law, §801, et seq. and citations therein).

This requirement of cooperation which demands that the lessee act in a manner reasonably designed to promote the interests of the lessor in the lease is heightened when the lease is committed to a unit area, since the possibilities for abuse of the lessor's interest by the lessee are much greater.

Phillips Petroleum Co. v. Peterson, supra, and various exhibits to pleading and memoranda (Exhibits "F" and "G" to the Supplement to Response to Defendant's Motion to Dismiss, Affidavit of Joseph Fazzio and exhibits thereto and Exhibit "H" to the Affidavit of Nicholas F. McKean) indicate that there was great opposition to the formation of the Roosevelt Unit and to the inclusion therein of several leases because of the fear that Phillips would use this as a tactic to hold the leases as long as possible without exploration or development of the natural resources under lease. The Peterson case discusses what should be the mutual benefits to parties to an oil and gas lease which has been joined to a unit and the duties owed by the lessee to the lessor to ensure that the lessor receives these benefits:

> The practice of unitization by a power granted the lessee in advance, if faithfully carried out, will be fair and profitable both to the lessor and lessee, and is vital to the oil and gas industry in the interest of conservation of both natural and material resources. It should be upheld, although the

> ground of power is in general terms, because it is subject to implied terms that will prevent arbitrary and unfair dealing, will require compliance with the implied covenants in the lease for the benefit of the lessor and will oppose a rigid standard of good faith on the part of the lessee. (At 933).

As is obvious from this case, the potential for abuse by the lessee when joining a lease to a unit is enormous. The lessee can commit a very small portion of the lease to a unit so that the lessor will not be fairly compensated for his lease. The court likened the relationship between the lessor and the lessee under a unit agreement to be that between principal and agent. The agent can do nothing adverse to the interests of the principal without the principal's full knowledge and consent. The court stated:

> The agent owes the duty to exercise a high degree of good faith and loyalty for the furtherance and advancement of the interest of his principal.
>
> Where there is also a lessor-lessee relationship the agent-lessee is also obligated to keep and perform the implied covenants of his lease.
>
> A lessee is bound by implied covenants of of the lease to diligently explore and develop the lease, and to do so under a fair unitization plan, if unitization is affected; to market the production if oil and gas is found in paying quantities; to do that which an operator of ordinary prudence, having due regard for both lessor and lessee, would do; and, in the case of unitization to act fairly and in good faith, with due regard for the lessor's interest, and to provide for a fair apportionment of

> the oil produced. The lessee clearly m[illegible] not act arbitrarily or capriciously. (At 934).

The Amended Complaint alleged that notice of Phillips' breach of these implied covenants was given to Phillips, specifically identifying a letter from Carl Noel, representing the interest of the Plaintiffs, to Phillips. The district court ruled in its Minute Entry, which was incorporated by reference into the judgment, as follows:

> These actions appear to be premature in that adequate notice of default and opportunity to correct has not been given to Defendant Phillips. For this reason, Plaintiffs' fifth and sixth causes of action are dismissed without prejudice.

After the ruling Plaintiffs requested leave to amend their complaint to allege that notice had been given generally rather than allege specifically that the letter from Carl Noel constituted notice. The Motion for Leave to Amend was denied, without comment by the district court.

The district court, when ruling on a motion for summary disposition of a case, cannot permit itself to act as the finder of fact. Rather, pleadings must be accepted as true and all inferences to be drawn therefrom should be in favor of the Plaintiff and against the moving party. L & A Drywall, Inc. v. Whitmore Construction Co. Inc., 608 P.2d 626 (Utah 1980); Liquor Control Commission v. Athas, 121 Utah 457, 243

P.2d 441 (1952); Fraunhofer v. Price, 594 P.2d 324 (Mont. 1979).

By its Minute Entry and Judgment, the district court acted as the finder of fact, ruling that no adequate notice had been given of Phillips' breach of covenants implied in the lease.

The adequacy of notice and whether notice was actually given are clearly questions of fact. Phillips, before the district court, argued that "notice" of breach of the implied covenants must be a formal written document specifying the party charged with the breach, identifying the nature of the breach, notifying the breaching party of the breach and demanding that the breach be remedied or cured, or that the contract or agreement be cancelled. Yet in none of those cases cited by Phillips does it appear that effective notice can be given only through such a formal instrument, and that nothing else will suffice.

Phillips ignores the purpose underlying the judicial policy requiring notice to be given to the party breaching an implied covenant of an agreement. The purpose of notice is to make the breaching party aware of its breach and to give that party an opportunity to cure the breach.

For this reason, the focus in similar cases has not been whether such a formal instrument of "notice" has been served upon the breaching party, but, rather, an inquiry into the state of mind of the party charged with the breach of the implied covenant; that is, whether the breaching party knew of its breach of the covenants it had taken upon itself in entering into the lease. An example is Lyons v. Robson, 330 P.2d 593, 596 (Okla. 1958) which was an action seeking cancellation of an oil and gas lease due to the failure of the lessee to develop portions of the land under lease. The defendant attacked the sufficiency of the notice of breach of the implied covenant to develop and the court ruled as follows:

> On the question of notice the rule applied is that what constitutes a reasonable notice is a question of fact to be determined from the circumstances of each case.
>
> In Brown v. Schaffer, Okl. 325 P.2d 743, it was held that no particular form of notice to further develop is required. Written notice is not necessary.
>
> We are convinced that the action of the plaintiffs in the present action made it known to the defendant that it was the desire of the plaintiffs that the defendants either release the property or further develop it.

In the case of Alphin v. Gulf Refining Company, 39 F.Supp. 570 (D.C. Ark. 1941), an oil and gas lease was executed

in April of 1919. No wells were drilled under the lease after 1922 and the lease was assigned to the defendant in 1936. One of the plaintiffs spoke with the vice president of the defendant company concerning lack of development on the land, and was advised that the defendant was "not going to do anything with it unless there was some development in the vicinity that would warrant them drilling it." On March 23, 1938 the plaintiffs addressed a letter to the defendant formally requesting an execution of a release of the lease because they considered the defendant's inactivity on the lease to be an abandonment and forfeiture of the lease.

As stated by the court:

> This testimony is not denied, but counsel ingeniously argue that the action on the part of the plaintiffs was nothing more than a notice, which in itself was an attempt to declare forfeiture and that the mere announcement by the lessee, the defendant company, of an intention not to drill, would not excuse the lessor's failure to give further notice.
>
> It is contended that the action of the plaintiffs did not amount to a demand for compliance with the covenant to develop.

This argument was not accepted by the court. The court, referring to the testimony stated:

> Certainly the defendant company knew from that conversation that the plaintiffs expected the defendant company to comply with the covenants of the lease. A few

> [illegible] the fact that the plaintiffs or their predecessors in title had failed to make a demand for development did not deprive the plaintiffs of the right to take advantage of the forfeiture brought about by the inactivity of the defendant company during an unreasonable length of time. It was not incumbent upon the plaintiffs to do anything and nothing short of an affirmative act which might lead the defendant company to believe that a forfeiture would not be demanded would deprive the plaintiffs of the right to take advantage of such forfeiture, if, in fact, a forfeiture had resulted from the inactivity of the lessee or from the failure of the defendant company to develop. The action of the plaintiffs was sufficient. The delay of the defendant company and its predecessors in title was unreasonable and the defendant company is not in a position to complain of the terms of the notice or when it was given. at 954-955.

See also, Benedum-Trees Oil Company v. Davis, 167 F.2d. 957 (4th Cir., 1948).

The question of whether or not Phillips had notice of its breach of the implied covenants to further develop and to further explore and whether such notice was "clear" are questions of fact which cannot be resolved by a motion to dismiss.

Phillips [illegible]

[illegible] the lands outside the participating area [illegible] since 1954. Phillips most assuredly knew of its responsibility as lessee to produce from the lease or thereby give the lessors the benefit of the lease. The [illegible]'s were not the 25¢ per acre delay rentals, but, rather, royalties on production under the lease. If Phillips was unable or unwilling to meet its responsibility as lessee then it should have released the lease. To hold that Phillips did not have "adequate" notice of its duty to explore and develop the natural resources under lease implied in the lease itself, does violence to the rule that the district court will not find issues of fact on a motion to dismiss. It is also incorrect from the facts pleaded in the Amended Complaint and shown to exist from the various memoranda filed by the parties.

The Utah Supreme Court has consistently ruled that the matter in which notice is given or received is immaterial. What is important is whether or not the breaching party was aware of its breach. As stated in Utah State Building Board v. Walsh Plumbing Company, Inc., Utah 2d 249, 499 P.2d 141, 144 (1965):

> "It should be kept in mind that where the [illegible] shown is this requires the giving of a notice, unless the failure to give it [illegible] puts a party to a disadvantage [illegible] affects his rights, he should [illegible] be permitted to evade his just obligations [illegible] district because of a mere [illegible] failure to give notice.

Also, this Court in Bjork v. April Industries, Inc., 547 P.2d 219, 220 (Utah 1976) appeal after remand, 560 P.2d 315, cert. denied 431 U.S. 930, 97 S.Ct. 7634, 53 L.Ed. 2d. 245 stated, "Demand is not necessary where both parties have equal knowledge of the contract provisions, or where the defaulting party denies the allegation."

It is abundantly clear from the facts alleged in the Amended Complaint, and from inferences derived therefrom, that Phillips has not acted in good faith in discharging its duties under the lease and unit agreement. Production from the unit is low (Paragraphs 44 through 47 of the Amended Complaint). Only a small portion of the lands Phillips claims to hold under lease can participate in the royalties from production from the unit. Phillips has not attempted to develop these lands since 1954. And yet Phillips purports to hold these lands by the payment of 25¢ an acre each year ad infinitum, or so long as there is any production from the Roosevelt Unit. The inequities of this certainly cannot be said to be unknown to Phillips. See, Sander v. Mid-Continent Petroleum Corp. 292 U.S. 272, 291, 54 S.Ct. 671, 674, L.Ed. 1255 (1954); Neff v. Jones, 288 P.2d 712 (Okla. 1955). But Phillips insists it must be given formal written notice of its duties and covenants to

the Plaintiffs and notice of the fact that it has been in breach for all these years.

The record indicates that as early as 1951 the Plaintiffs predecessors in interest were concerned with Phillips' procrastination in developing the property under lease. (Exhibit "F" to Supplemental to Plaintiff's response to Motion to Dismiss). The affidavit filed by Joseph Fazzio and its supporting exhibits indicates that Mr. Fazzio was in contact with employees of Phillips from November 1979. His disgruntlement with the lack of operations upon the leasehold property is quite obvious. For Phillips to claim, and for the district court to rule without even the benefit of weighing the evidence, that these conversations, letters and demands did not give Phillips notice that it was breaching its responsibilities as lessee to the Plaintiffs to develop the leasehold and to further explore for other potentially productive horizons strains the imagination.

B. The district court improperly dismissed Plaintiffs' first cause of action with prejudice on factual grounds.

The First Cause of Action of the Amended Complaint alleged that at the time the 1945 leases were executed,

Phillips did not have authority to conduct business within the State of Utah. As such, under Section 18-8-5 Utah Code Ann. 1943, the leases were void. The Amended Complaint went on to allege that Phillips then induced Plaintiffs' predecessors in interest to execute another lease in 1946 by misleading them as to the validity of the 1945 leases. The Plaintiffs' predecessors relied upon this misrepresentation to their detriment in executing the 1946 lease.

The district court dismissed the first cause of action with prejudice. As stated in its Minute Entry:

> "The court finds that the Plaintiffs or their predecessors in interest had notice or could have discovered the facts which they now claim to give rise to the allegation of fraud on the part of Phillips Petroleum."

The court went on to cite §78-12-26(3) Utah Code Ann. 1953 as the applicable statute of limitations barring the Plaintiffs' claim against Phillips.

It is obvious from the language of the Minute Entry that the district court invaded the territory of the trier of fact. There is nothing in the record evidencing that the Plaintiffs or their predecessors in interest had actual notice

of the deception of Phillips at any time prior to 1981. The district court, in stating that the Plaintiffs could have discovered the fraud, speculates as to whether the Plaintiffs should have reasonably had notice. This is clearly a factual and not a legal issue, and therefore outside the scope of the district court's discretion on a motion to dismiss.

C. The district court failed to recognize the factual issues contained in the second cause of action of the Amended Complaint in dismissing it with prejudice.

The second cause of action of the Amended Complaint alleged that the 1946 lease was executed by the Plaintiffs' predecessors in interest to correct errors contained in the 1945 leases. It was the intention of the Plaintiffs' predecessors in interest to convey a new interest to Phillips beyond that which they intended to convey in 1945. Since the 1946 lease related back to the 1945 leases, and since it was the intent of the lessors for it to do so, the 1946 lease inherited and suffered from the same defects of the 1945 leases and was void.

The district court in its Minute Entry ruled on the second cause of action as follows:

> The Court having reviewed the 1946 leases (sic) finds that the leases (sic) were given "in correction and in lieu of two

leases."

> This language clearly shows that the 1946 leases (sic) were new leases (sic) which replaced the 1945 leases. In addition, the differing descriptions also show the 1946 leases (sic) to be new. Consequently, the 1946 leases (sic) are valid and the Plaintiffs second cause of action is therefore dismissed.

The court accepted Phillips' argument that the 1946 lease was a new lease replacing the 1945 leases. But the district court failed to see from the facts plead, and the inferences to be drawn therefrom, that it was the intent of the Plaintiffs' predecessors in interest not to make a new lease, but merely to make corrections in the 1945 leases. It should be noted that the 1946 lease was expressly modified so that the end of the primary term would be on the same date as the 1945 leases. The 1946 lease omitted a clause contained in the 1945 leases requiring seismographic work to be done on the property within a year, but this work had been done prior to the execution of the 1946 lease. Finally, there is a difference between the description of the property covered by the 1945 leases and the 1946 lease. As noted in the Statement of Facts, all land omitted from the 1946 lease was leased by Phillips under other leases (Exhibits "A" and "B" to Defendants' Motion to Dismiss).

A lease is a conveyance. Consolidated Uranium Mines v. Tax Commission 4 Utah 2d 236, 291 P.2d 895 (1955). It

should be construed in a manner similar to other conveyances. Scroggins v. Roper, 548 SW. 2d 779 (Tex. Civ. App. 1977). A correction deed relates back to the original conveyance and takes its validity from that conveyance. Kernan Livestock Farm, Inc. v. Multnomah County, 224 Or. 87, 355 P.2d 719 (1960); Fenn v. Boxwell, 312 S.W.2d 536 (Tex. Civ. App. 1958); Mason v. Jarrett, 234 S.W.2d 771 (Ark. 1950). If the original conveyance is void then it is incapable of reformation by an instrument intended to correct it without a showing that it was the express intent of the parties to ratify the void conveyance. Buell Cabinet Company v. Sudduth, 608 F.2d 431 (10th Cir., 1979); Kearns v. Manufacturers Hanover Trust, 272 N.Y.S. 2d 535 (1966); 9 Thompson, Thompson on Real Property, Section 4675.

The case of Bowers v. Cottrell, 15 Idaho 221, 96 P. 936 (1908) provides an illustration of this rule of law. There, a mother executed certain deeds in favor of her daughter which were never delivered nor recorded. The deeds were later recorded by the daughter without the knowledge or consent of the mother. The county recorder later requested that the mother execute a correction deed because there was an error in the description contained in one of the deeds. The daughter had no knowledge of this request by the county recorder. The

court held that the original deeds were void because of a lack of delivery and intent on the part of the mother to convey the property to her daughter. The correction deed executed by the mother at the request of the county recorder was also ineffective to pass title to the daughter. The court explained:

> The former deed being void, and the latter deed being executed to correct an error, and not for the purpose of conveying title, does not amount to a ratification of the same, or pass title thereto. (At 942)

The facts as alleged indicate that there was no intent on the part of the Plaintiffs' predecessors in interest to execute a new lease in 1946 which would breathe new life into the void 1945 leases.

The face of the 1946 lease itself contains ambiguities that would require the court to look further into the facts surrounding its execution. The 1946 lease states that it is "in correction and in lieu of" the 1945 leases. A correction deed is generally used to correct errors in the original deed and not as a substitute for the original deed. The words "in lieu of" do not necessarily imply the second instrument is a substitute for the first. Humble Oil & Refining Co. v. Mullican, 192 S.W.2d 770 (Tex. 1946). Generally, the purpose for the correction or substitute deed

stated on the face of the second instrument. Neblett v. Placid Oil Co., 257 So.2d 167 (La. App. 1972).

The intent of the parties with respect to the interpretation of a written instrument is to be drawn from the four corners of the instrument. Hartman v. Potter, 569 P.2d. 653 (Utah 1979). However if the instrument is ambiguous or susceptible to differing interpretations, the intent cannot be ascertained by looking to the document itself and other facts must be examined to divine the parties' intent. As stated in International Engineering Co. v. Daun Industries, 102 Idaho 303, 630 P.2d 155, 157 (1981):

> Where the language of a written agreement is clear and unambiguous, the trial court will give effect to the language employed according to its ordinary meaning, determination of its meaning and legal effect being a question of law.
>
> But, when the terms of a written contract are ambiguous, its interpretation and meaning become a question of fact and instrinsic evidence may be considered by the trier of fact in an attempt to arrive at the true intent of the contracting parties. In doing so the trier of fact may consider the objective and purpose of the particular provisions and may also scrutinize the circumstances surrounding the formation of contract. If the contract is reasonably subject to conflicting interpretation, it is ambiguous. (Citations ommited).

See also Neblett v. Placid Oil Co., supra; Humble Oil & Refining v. Mullican, supra.

From the facts plead and from the inferences that should be drawn from those facts in favor of the Plaintiffs, it would appear that there was no intent to ratify the void 1945 leases by the Plaintiffs' predecessors in interest by their execution of the 1946 lease. This ambiguity is susceptible to resolution only after evidence relevent to the intent of the parties at the time of the execution of the 1946 lease are examined. It is premature to resolve such a question of fact by a motion to dismiss before Defendant has filed an answer and discovery has been allowed.

III. THE DISTRICT COURT ERRED IN ITS FINDING THAT THE 1954 LEASE WAS SEPARATE FROM THE 1945 AND 1946 LEASES, DISMISSING THE THIRD CAUSE OF ACTION WITH PREJUDICE.

A. The intent of the parties in entering into the 1954 lease was a question of fact and not susceptible to determination under a motion to dismiss.

The third cause of action of the Amended Complaint recites the fact that the Plaintiffs' predecessors in interest entered into two leases dated November 30, 1945, a subsequent lease in 1946, the Agreement of 1952, and a third lease in October of 1954. The 1954 lease was released in April of 1955. The Amended Complaint alleges that the release of the 1954 lease acted as a release of all the interest Phillips had in that parcel of land.

The district court, in its Minute Entry, ruled on the third cause of action as follows:

> The Court finds the 1954 lease did not include all the lands covered by the 1946 leases (sic) and therefore was a separate and distinct lease. When the 1954 lease was released in 1955, the 1946 leases (sic) were left undisturbed. For that reason, Plaintiffs third cause of action is dismissed.

The district court left unanswered the question of why the parties entered into the 1954 lease in the first place if the 1946 lease was valid. The court makes mention of the fact that the 1954 lease did not include all the lands covered by the 1946 lease. What is inconsistent in the district court's decision is that it held the 1946 lease to be a substitute for the 1945 leases, even though this lease did not cover all lands included in the 1945 leases, and yet ruled that the 1954 lease was a new and separate lease not affecting the 1946 lease.

The Plaintiffs' predecessors joined the Roosevelt Unit Agreement (Exhibit "B" to the Defendants' Motion to Dismiss), but on that same day another agreement was executed by Phillips and the Plaintiffs' predecessors in interest whereby Phillips agreed that:

> Notwithstanding the provisions of the Unit Agreement for development and operation of the Roosevelt Unit (I.Sec. No. 886) to which the above described lease may have been committed by the Lessee or Lessor pursuant to the provisions of Section 12 of said Lease or otherwise, unless Lessee shall on or before November 12, 1952, commence or cause to be

> commenced operations for the drilling of a well for oil and gas at a location of Lessees selection on the above described lands and thereafter drill such well in accordance with provisions of such Unit Agreement and an approved plan for development thereunder, the said (1946) lease shall terminate.

(Exhibit "A" to the Supplement to Plaintiffs' Response to the Motio to Dismiss).

Although a well appears to have been drilled pursuant to this agreement, it was a poor producer, plagued with problems and w abandoned in 1954. (Exhibits "B", "C", "D", "E" & "G" Supplement t Response to Defendants' Motion to Dismiss). The 1954 lease was the executed, requiring Phillips to rework the well within six months o release the lands, with no right to extend the term by the payment delay rentals. This certainly raises a factual question as to the intent of the parties. At the very least it points to the possibility that Phillips and the Plaintiffs' predecessors struck a new deal, modifying Phillips' rights to hold these lands outside th unit participation area without actual production on the lands.

There are several legal theories supporting the Plaintiff contention that the intent shown by these documents indicates that Phillips did not claim its interest in the subject property under t 1946 lease, but rather by the 1954 lease and that when it released the 1954 lease it released all interest it held in the subject pa which was excluded from the participating area of the Roosevelt

unit. These theories are discussed in more detail below. It was an error for the district court to dismiss the third cause of action when to do so required the court to make a factual determination regarding the intent of the parties in the execution of the 1954 lease.

B. The district court improperly ruled, as a finding of fact that the parties did not intend for Phillips' interest in the subject parcel under the 1946 lease to merge into its interest under the 1954 lease.

The third cause of action states that it was the intent of the parties in their execution of the 1954 lease that Phillips' interest under the 1946 lease in the subject parcel would merge into the 1954 lease. A release of that lease would thereby release all interest Phillips claimed in the subject parcel. Before the district court Phillips argued that, under the common law, merger would not have occurred for various technical reasons. However, the common law approach to merger, with its automatic and often unintentional effects, has been almost universally rejected.

The modern doctrine of the merger of two interests in land in a party holding them simultaneously is primarily a question of the intention of the parties, gathered from their express statements or implied from the surrounding circumstances. Bowman v. Cook, 101 [illegible] 366, 419 P.2d 723 (1966); Goldblat v.Cannon, 95 Colo. 419, 37 [illegible] 574 (1934); Dilts v. Brooks, 66 Mont. 346, 213 P. 600 (1923).

Intention is a question of fact. Harris v. Alaska Title Guaranty Company, 510 P.2d 501 (Alaska 1970); Ferguson v. Hilborn, 402 P.2d 914 (Okla. 1965).

It is unknown why the 1954 lease was executed if Phillips really believed it had a leasehold estate on the oil and gas by virtue of the 1946 lease. Taking the facts as alleged and drawing inferences in favor of the Plaintiffs it is likely that Phillips believed it had no rights under the 1946 lease because the 1946 lease was void or had terminated or expired. It is possible that Phillips intended that its interest in the subject parcel, if any, under the 1946 lease, be confirmed and restated in the 1954 lease and merged therewith. The subsequent release of the 1954 lease would, therefore, have operated as a release of any interest held by Phillips under either the 1946 or 1954 lease. The district court, in granting Phillips' Motion to Dismiss, refused to allow the Plaintiffs their right to verify this claim that the parties intended to merge Phillips' interest in the subject parcel in the 1954 lease.

C. Phillips' acceptance of the 1954 lease acted as a surrender of its rights under the 1946 lease to the subject parcel and evidenced its intent to abandon those rights.

In 1954 Phillips entered into an oil and gas lease covering a portion of land it already purported to have in 1946. This parcel, which is the subject of the lawsuit, contained three

lands excluded from participation in the production royalties of the Roosevelt Unit. The 1954 lease is complete in all its particulars. In fact, the 1954 lease is contained on the same printed lease form, a standard Producers Form 88, which Phillips used in 1946. There are significant differences in the habendum clause, which allow Phillips to hold the lease for only six months, within which time Phillips must commence reworking or redrilling a well on the property, with no right to extend the term by payment of delay rentals.

Phillips, by the acceptance of this 1954 lease, surrendered what interest it claimed under the 1946 lease in the parcel of land. As stated in Diamanti v. Aubert, 68 Utah 582, 251 P. 373, 374 (1926):

> The execution of the new lease to one of the original tenants, and its part performance, amounted to a surrender of the old lease by operation of law.

The reason for this termination of a lease by surrender through the acceptance of a new lease is explained by Professor Summers in his treatise on oil and gas law:

> An oil and gas lease will be considered as surrendered by operation of law where acts of the parties are inconsistent with continued existence of the lease. Thus the acceptance of a new and valid lease by the lessee during the existence of the new lease, where the parties intended the new lease to take effect at once, operates as a surrender of the first lease. Abandonment of the premises by the lessee and resumption of possession by the lessor

> may amount to a surrender by law. Whether or not there has been a surrender by operational law is a question of intent to be determined from the facts and circumstances of the particular case.
>
> The general effect of surrender of an oil and gas lease is to terminate the existing legal relations of the lessor and lessee created by the lease.

3 Summers, Oil & Gas, Sections 524-525, at 451-452.

Upon the failure to drill a producing well after the 1954 lease, Phillips abandoned the property. This intent to abandon is shown by the release of the 1954 lease in 1955, by the abandonment the well as evidenced by the records filed with the USGS, and by Phillips' total failure to do anything with the subject parcel for almost thirty years. Because of the action of the district court granting Phillips' Motion to Dismiss, the Plaintiffs have been precluded from developing evidence which would support their claim that Phillips has either surrendered or abandoned its interest in the 1954 lease.

D. The 1954 lease is a substitute contract for the 1946 lease and is a novation of Phillips' rights under the 1946 lease.

At Page 4 of its Memorandum in Support of its Motion to Dismiss, Phillips postulates a reason for the execution of the 1954 lease:

> The 1945 leases and the 1946 lease contain

> significantly different terms. The difference between these leases indicate that the real reason for the 1946 lease was to enable the parties to strike a different deal, as they apparently wished to do.

If this were the reason for the 1946 lease, then why did Phillips execute the 1954 lease if not to "strike a different deal." Phillips cannot consistently argue that new contractual agreements contained in the 1946 lease superseded and substituted for the 1945 leases, but that the 1954 lease did not have a similar effect on the 1946 lease for the subject parcel. The 1954 lease was clearly a superseding contractual agreement whereby a leasehold on the subject parcel was granted in return for very specific and different contractual obligations on the part of Phillips. The 1954 lease was, in effect, a novation of the 1946 lease as it pertained to the subject parcel.

As stated in Elliot v. Whitney, 215 Kan. 256, 524 P.2d 699 (1979):

> Novation may be broadly defined as a substitution of a new contract or obligation for an old one which is thereby extinguished (66 CJS, Novation, Section 1). It is a new contractual relation which has four requisites: a previous valid obligation, the parties must agree to the new contract, the new contract must be valid and the old obligation must be extinguished by substitution for it of the new one (15 Williston on Contracts, 3rd Edition, Section 1869; 66 CJS, Novation, Section 3).

The 1954 lease was a new contract, valid at the time of execution. It granted Phillips a leasehold interest in the mineral estate, and Phillips took upon itself certain contractual obligati relevant to what should be the mutual goal of the parties, producti of oil and gas from the property. This new valid contract, the 19 lease, extinguished the 1946 lease as modified by the Unit Agreement and the March 11, 1952 Agreement as it pertained to the subject property.

The circumstances surrounding the execution of the 1954 lease clearly indicate the intent of the parties to enter into a substitute contract. Novation is a question of intent. Robison v. Hansen, 594 P.2d 867 (Utah 1979). Since intent is a question of fact, the district court, by dismissing the third cause of action, has denied the Plaintiffs their right to not only a day in court on this issue, but also to a right to an adequate response to this question and an opportunity to pursue it through the judicial system.

IV. THE 1946 LEASE WAS SEGREGATED BY THE CONTRACTION OF THE ROOSEVELT UNIT IN 1954 EXCLUDING THE SUBJECT PARCEL FROM THE UNIT AREA AND PARTICIPATING AREA, THEREBY EXCLUDING IT FROM A PROPORTIONATE SHARE OF PRODUCTION ROYALTIES; AND THE EXCLUDED PARCEL COULD NOT BE HELD BEYOND THE PRIMARY TERM OF THE 1946 LEASE UNDER THE TERMS OF THE UNIT AGREEMENT.

The Roosevelt Unit orginally encompassed 34,713.27 acre (Exhibit "A" to Defendant's Motion to Dismiss). It was approved

effective October 15, 1951. (Exhibit "G" to Affidavit of Nicholas F. McKean). The one and only participating area of the Roosevelt Unit was revised effective February 1952 to include 3,281.50 acres. (Exhibit "G" to Affidavit of Nicholas F. McKean). The Roosevelt Unit itself was contracted in size to the participating area effective December 1, 1954. (Exhibit "C" to Defendants' Motion to Dismiss). Of the lands described in the 1946 lease only the N1/2 of the NW1/4 of Section 24 was included in the participating and unit area of the Roosevelt Unit. The remainder of the lands, which are the subject of this lawsuit, were excluded from the unit and, consequently, from participation in the royalties.

In connection with the formation of the Roosevelt Unit, Phillips was required to go to Court to obtain a determination on the validity of its rights as Lessee to commit the leases it held to the unit. In Phillips Petroleum Company v. Peterson, 218 F.2d 926 (10th Cir., 1954) it was ruled that under Section 12 of the standard form oil and gas leases employed by Phillips in the area, including the 1945 and 1946 leases, Phillips had a right to unitize its leases. The court discussed the reasons for unitization and also the duties the lessee owed to the lessors because of its right to unitize the land. The court stated that unitization was a practical necessity in the oil and gas industry. Rules and regulations governing the drilling and production from wells, coupled with the physical laws

affecting the recovery of oil and gas dictate that production from a pool or producing strata be worked as a whole, without regard to the boundary units overlying the pool itself.

Section 12 of the 1946 lease provided Phillips with the right to unitize, pool or combine any or all parts of the lease in a unit with the terms of the lease to be modified to conform with the terms and provisions of the Unit Agreement. Section 16 (d) of the Unit Agreement (Exhibit "A" to the Defendants' Memorandum in Support of the Motion to Dismiss) states:

> Each lease, sublease or contract relating to the exploration, drilling, development or operation for oil or gas of any land commited to this agreement, which, by its terms might expire prior to the termination of this agreement, is hereby extended beyond such term so provided therein so that it may be continued in full force and effect for and during the term of this agreement, subject to the rental provisions of Section 13 hereof.

Phillips has restricted the unit operations to the upper formations (i.e. the Green River Formation) and exploration or development of the lower formations have been curtailed up to the present, even though these lower formations have shown potential for production, as alleged in the Amended Complaint. The oil companies have ignored requests by land owners and the USGS to develop these formations.

Section 13 of the Unit Agreement, as it relates to those rental provisions, states as follows:

> The parties hereto holding interest in privately owned lands (the term "privately owned land" as used herein shall not be construed to include Indian land) within the unit area consent and agree, to the extent of their respective interests, that each lease thereon which is committed hereto may be continued in effect beyond the primary term of such lease and during the term of this agreement, provided, however, that as to any portion of privately owned land subject to a lease committed to this agreement which lies outside a participating area the lessee shall pay the delay rentals provided in the lease, reduced in the proportion that the mineral or royalty acre interest subject to such lease in the land located in the participating area bears to the total mineral or royalty acre interest in all lands subject to such lease, in the time, manner and amount provided by such lease, subject to the right of surrender provided for in Section 29.

Section 16 states:

> The terms, conditions and provisions of all leases, subleases and other contracts relating to exploration, drilling, development or operation of oil or gas of lands committed to this agreement are hereby expressly modified and amended to the extent necessary to make the same conform to the provisions hereof, but otherwise to remain in full force and effect, ...

From the language contained in the Unit Agreement, if there are lands of the lease excluded from the participating area, the Unit Agreement treats them differently than those within the participating area. They are not given production royalties in proportion to their

size with the participating area, but delay rentals are paid in conformity with the underlying lease. The Unit Agreement also sta that the terms of the leases are modified to the extent necessary t conform with the Unit Agreement, but the leases otherwise are to remain in full force and effect.

From this it would appear that delay rentals were intende to hold that portion of the 1946 lease lying outside the participating area. Delay rentals will be paid in accordance with the lease, but the lease provides that delay rentals can only hold the lands for the primary term, and no longer. The Unit Agreement does not require holding lands outside the unit beyond the primary term of the leases covering such lands. The Unit Agreement is not concerned with lands outside the unit area. Therefore, it is entirely consistent that the clause in the Unit Agreement providing for the holding of lands by the payment of delay rentals is limited to the primary term, and that unless separate wells are drilled, an production is obtained, on those lands outside the unit, those lands will be released from the lease.

The provision in the Unit Agreement requiring the payment of delay rentals is unusual in unit agreements of this type coverin lands in this area (Transcript at 41). This interpretation is entirely consistent with the March 11, 1952 Agreement which requi Phillips to commence the drilling of a well on the lands exclude

from the Roosevelt Unit before the expiration of the primary term of the 1946 lease.

It is evident from the actions of the parties that this interpretation of the Unit Agreement was adopted by the parties. In a letter to the USGS, the unit operator spoke of the necessity to drill a well on the 1946 lease before the expiration of the primary term. (Exhibit "C" to the Supplement to the Response to Defendants' Motion to Dismiss). After the expiration of the primary term Phillips obtained a new lease from the Plaintiffs' predecessors in interest requiring it to redrill a well on the lands excluded from the participating area of the Roosevelt Unit. At that time Phillips acted as if it had no lease on, or interest in, the subject parcel excluded from the participating area.

Phillips cannot now, almost thirty years later, claim it has an interest in the subject parcel. The subject parcel was separated and treated differently from the other lands covered by the 1946 lease by its exclusion from production of the Roosevelt Unit, and, consequently, it cannot now be held by Phillips solely by virtue of production from the Roosevelt Unit. By treating the subject lands as being held by production from the Roosevelt Unit, the district court was in error, and its Judgment dismissing the fourth cause of action of the Amended Complaint must be reversed.

CONCLUSION

As can be seen by the discussion herein, this is a c[illegible] case, dealing with complicated, and often seemingly contradictor[illegible] transactions occuring over thirty years ago. To dismiss such a ca[illegible] at the pleading stage, without allowing the parties an opportunit[illegible] distill the facts through discovery, and without the district cour[illegible] having the benefit of hearing and weighing what would undoubtedly voluminous and contradictory evidence, is clearly erroneous.

The interpretation and legal effect of many of the transactions sued upon must be determined according to the intent the participants at the time. For example, what was the intent of the parties in executing the 1946 oil and gas lease? Was the 194[illegible] lease intended to relate back to the 1945 leases, which were void Why did the parties execute an oil and gas lease in 1954 covering lands it now claims it held by virtue of the 1946 lease? These ar[illegible] just a few of the important questions which must be answered thro[illegible] discovery and trial, and which cannot, and should not, be decided the district court on a motion to dismiss.

For the foregoing reasons the Plaintiffs-Appellants respectfully submit that the decision of the district court grant[illegible] Defendants' Motion to Dismiss should be reversed and this case remanded.

DATED this 23rd day of June, 1983.

Respectfully submitted,

HUGH C. GARNER & ASSOCIATES, P.C.

By: _____
Hugh C. Garner

By: _____
Nicholas F. McKean

By: _____
Randy K. Johnson

Attorneys for Plaintiffs-Appellants

CERTIFICATE OF MAILING

I hereby certify that on the 15th day of June, 1983, a tr
and correct copy of the foregoing Brief of Appellant was mailed,
postage prepaid, by United States Mail, to the following:

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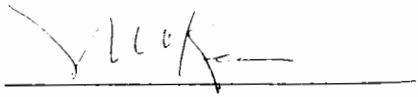

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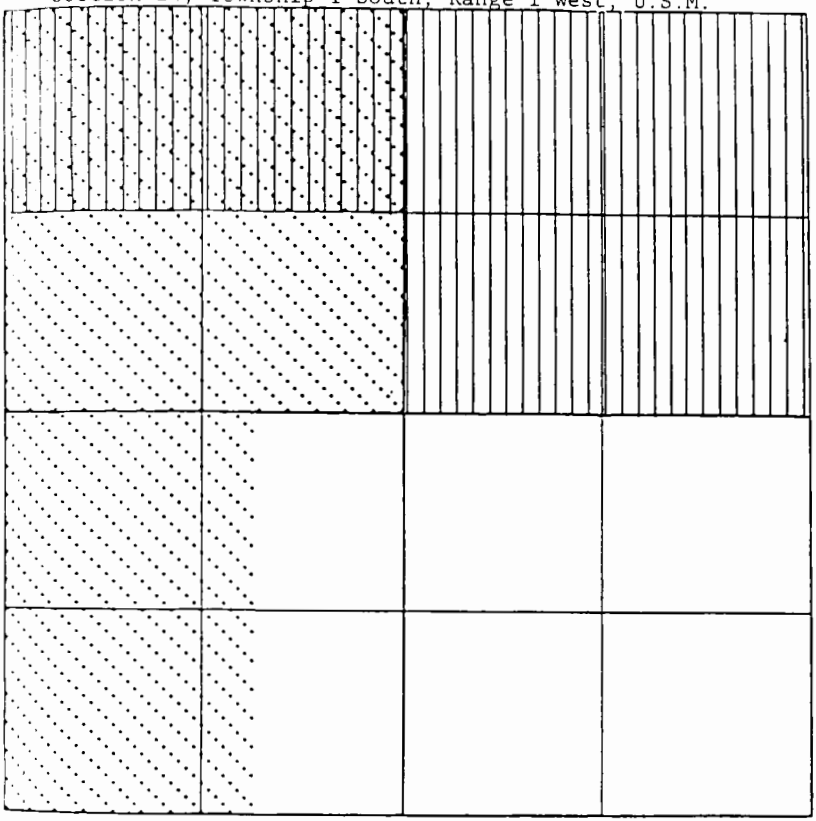

1945/1946 leases

Roosevelt Unit

1954 lease

Taylor, et al. v. Phillips Petroleum Co., et al.
Case No. 19160

Fazzio, et al. v. Phillips Petroleum Co., et al.
Case No. 19161

EXHIBIT "A"