ORAL ARGUMENT – 03/06/02
01-0057 & 01-0058
NATURAL GAS PIPELINE V. POOL

THIS TAPE WAS BAD, VOLUME WAS VERY LOW, HARD TO HEAR TO TRANSCRIBE

PIERCE: These are unusual cases in my experience in which the judgments are troubled on several grounds. However, Texas law provides an answer to each of these problems.

The first problem is a substantive problem in that profitable and productive gas leases because of some short, unexplained interruptions in production decades ago have been terminated with no articulated legal standard for that termination. There are several subsidiary problems that are involved here, but the answer we submit is clear and the answer is found in this court's opinions in Garcia v. King, and Clifton v. Koontz.

The second problem is really an alternative problem. And that is, that in these cases somewhere between 60 and 40 years ago, depending on which case we're looking at, there were periods, in some s 30 days, another I think 90 days, where there were no reported production. If we assume that the oil and gas leases terminated back in 1941 or 1963, the petitioners have been in adverse possession of the mineral estate for that entire period. In one of these cases, the jury found for the petitioners under each of the adverse possession statutes. In the other case, it failed to find for the petitioners under any of the adverse possession statutes. However, because of the length of time, more than 25 years, the petitioners are aided by a presumption under §16.029 of the Civ. Pract & Rem Code. And in fact, the CA virtually agreed that all of the elements of adverse possession had been established with one exception. And that one exception was notice of repudiation. Again, this court has a precedent in the form of a case, Tex-Wis v. Johnson, which answers that completely in my opinion.

The third point is a little different but it's quite an interesting point to me, and it's something that is really of importance to people who are trying these cases throughout the state. And that is whether an equitable defense, in this case laches, is going to be available in this type of case. As I pointed out these events in one case happened as long ago as 60 years before these suits were filed and tried. The other case some 40 years ago.

The court can well imagine and the evidence is conclusive the people who knew the answer, the people who knew the facts are long since dead. These properties have changed hands several times. Despite an effort to find some documents, find some evidence to try to explain why in 1941 or 1955 or 1963 something happened, we could find nothing.

One form of the equitable defense of laches is where the passage of time, the unexcused passage of time in the assertion of claims renders the other party unable or disadvantaged in its efforts _____.

The CA here simply referred to this court's opinion in Ricane Enterprises v. Rogers and said, while this is sort of like a trespass to try title case, therefore, an equitable defense will not apply. I consider that completely wrong for several reasons. In the first place, the two cases before the court today were not pleaded, were not tried _____ to try title cases. No one ever considered this had anything to do with trespass to try title until the CA said, well they are close enough to a trespass to try title case, that we're going to apply Ricane Enterprises v. Rogers.

In the second place, I think common sense would tell us that unlike the traditional trespass to try title action where in its purest form a court is comparing essentially two stacks of deeds and instruments, two abstracts if you will, to determine who has the better paper title. Certainly an equitable defense of laches, I agree, would have no place in that kind of case.

In a case such as these, the turn on human conduct, I submit, that some equitable defenses simply have to be available to allow the parties to present...

HANKINSON: But these claims turn on the lease of what the lease means?

PIERCE: They do turn on the lease...

HANKINSON: And this is a claim in which the plaintiffs say that title reverted to them.

PIERCE: That's correct.

HANKINSON: Can you cite to any instance in which title to real property, someone's claim to it can in fact lapse or be barred as a result of equitable defense such as laches?

PIERCE: I certainly can. I apologize that it's not in the briefs. But frankly, it didn't occur to me at the time we were briefing this. I would refer the court to the case of Humble Oil Co. v. Garrison, 205 S.W.2d 355. That case, I think, clearly shows that this has been done before and that equitable doctrines have been applied by this court in virtually the identical situation. Humble is different. The question there was whether the delay rentals had been properly paid. As the court knows delay rentals under many oil and gas leases are a substitute for physical production. If you don't have production, you may pay delay rentals and perpetuate the lease.

What happened in that case, is the people who were entitled to the royalties had made many complicated transfers among themselves. And it's frankly hard to tell, and it still is to me, what Mr. Harrison should have been entitled to. This court ultimately held that Mr. Harrison should have received 75% of delay rentals. In fact, Humble paid him 50%. Therefore, his delay rentals, his interest was not properly paid and the court pointed out in the normal course of events, the oil and gas lease was terminated as to his interest. The exact same theory as the plaintiffs assert here.

The court said, however, Mr. Harrison because of his dealings with Exxon was aware that Exxon was under Humble(?). It was under the impression that 50% was correct for delay rental. He accepted these delay rentals. He never told Humble that he thought they were

paying delay rentals.

This court applied the doctrine of equitable estoppel based on the silence, based on Harrison's failure to speak up. So certainly it is precedent that...

HANKINSON: And they applied estoppel as opposed to laches?

PIERCE: As opposed to laches.

HANKINSON: Estoppel has not been an issue that's been raised in this case?

PIERCE: It was not raised in this case. My point is simply that an equitable defense based on conduct has been applied in a case involving _____ title.

HANKINSON: Will you now move to the temporary cessation of production issue in connection with the leases that are involved in this case?

PIERCE: I think the fundamental problem that we have in this case is the temporary cessation of production doctrine, which was borne as a doctrine to mitigate against automatic termination, has in effect at least in these opinions and a couple of others that are coming before the court or are before the court, and I consider without question the temporary cessation of production is an affirmative defense to lease termination. The defendant bears the burden of proof. It is a confession, an avoidance defense.

What has happened when you back off and look at these opinions, is that the oil companies, which is typically the defendant, its failure to sustain an affirmative defense becomes ipso facto the termination of the lease. And that ought not be.

I want to talk about how the failure to meet an affirmative defense cannot itself result in termination. The rhetorical question that I have asked in the lower courts, and I think they are ultimately going to have to be confronted here, is when a case comes before a district judge where there is some period of zero production, be it 30 days, be it 60 days, be it a week, whatever it is, how does a court determine that the period was sufficiently long that the oil and gas lease should terminate?

The leases in these cases and judging from the amicus briefs and the audience, and reported in many other cases, don't say. There's no statute that says. There is no administrative rule that says. There is nowhere I submit for any court to look for guidance as to what is a long enough period of time. What is a long enough period of time?

HANKINSON: How can the doctrine _____ context of what caused the temporary cessation as opposed to the duration of this temporary cessation, and that if there is proof in the cause that comes within the law, then we raise issue of whether or not the operator has in fact made reasonable efforts to begin production again. And so there really is a legal standard under the current doctrine.

PIERCE: There is a legal standard under the affirmative defense. There is no question about that. Frankly when you look nationally, we are a little _____ the various _____ side in the application of the doctrine. We impose more requirements _____.

HANKINSON: So is your point then not that we would look at the temporary cessation of the production doctrine, but instead look at the fundamental issue of what is cessation of productions in which to terminate a lease that would give rise to an affirmative defense?

PIERCE: That is exactly correct. And I submit the answer is found in Garcia v. King. What we need to do in my opinion is apply the production in paying quantities doctrine.

HANKINSON: Not to the temporary cessation of production side of it, but to the question of whether there in fact has been a cessation?

PIERCE: That's correct.

HANKINSON: Is this a significant change in Texas law?

PIERCE: I don't think so. This precise issue just hasn't been raised. And in fact it looks to me like there are only two cases where it might have been possible factually for it to have been raised. It's a little hard to tell from some of the opinions. In Midwest Oil v. Winsauer, the facts might have been such that it could have been raised. Unfortunately, Winsauer was decided the same year, but several months before Clifton v. Koontz. But that's one case where it could have been raised. I think it could have been raised in Stewart v. Hunt. And in fact, it was raised in _____ v. Rosenthal, in the Austin CA, where, and this is really remarkable when you're in the position I am in this case, the Austin CA first said, yes, we ought to apply the production paying quantities doctrine. That makes a lot of sense. On rehearing, they changed their mind and said, no, that has never been applied yet, so we're not going to apply it.

HANKINSON: Could then the lessee in fact stop production _____?

PIERCE: If the production in paying quantities doctrine were to apply, arguably so. And I would like to answer that with an example that I think is quite telling.

HANKINSON: Your answer is arguably so?

PIERCE: Yes. And my example, I hope will explain why I say that. Let's contrast two cases. In one case the lessee is careful to make sure that the lease was producing some each month - enough to barely make a profit, so that the lease is not vulnerable under Clifton v. Koontz. But he's producing the minimum. He's holding back.

Now let's contrast that with the situation where the lessee produces all he can except that he's _____ where he decides under the allowable situation everybody will be much better off if we over produce our allowable say in December and January when the market demand is bigger and the price is higher. In the second situation both parties receive more

money. The lessor and the lessee are both economically better off by far but the lessee loses his lease. That is an illogical result particular if one begins in the point where this court has always begun in considering this type of question. The reasons for the lease beautifully articulated in the Wagner Estate v. Seigler case, and also in Garcia v. Koontz, the touchstone in deciding what the rules should be to _____ that the parties entering into these oil and gas leases, which is mutual economic _____.

HANKINSON: What is to protect the lessor _____ if in fact the actual taking by the lessee is economically beneficial to the lessee _____?

PIERCE: In my second hypothetical it would not be economically and detrimental to the lessor's interest or the lessee's interest. They both make more money.

HANKINSON: But there could be circumstances in which, and my understanding is that the cessation of production rule under Texas law is also _____ to make sure that the lessee is in fact _____ under the lease to protect the interest of the lessor. You've given us an example of where it's mutually beneficial for there to be a cessation of production for economic reasons. What kind of protection would there be under this new rule for a lessor that would protect the lessor if the lessee were making economic decisions that were only beneficial to the lessee.

PIERCE: The lease would be vulnerable to a lawsuit to terminate because of the absence of production in paid quantities. This doesn't give any sort of immunity to the lessee. What this actually does is this judges all oil and gas termination cases by the reasonable Mann standard, which is the best tool we have in our legal toolbox to deal with these cases.

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RESPONDENT

HANKINSON: Does the rule that Mr. Pierce has proposed to us require us to change Texas law, or just develop it further?

HUNT: Yes it does require a change in Texas law.

HANKINSON: Would you please explain?

HUNT: All this court need do is apply the determinable fee doctrine to the lease language. And there's an easy explanation for what happened in this case and the result that should be reached.

The determinable fee doctrine is really a doctrine that is based on produce or lose. That's what the language "so long as" in of the secondary term(?) means. Produce or lose.

HANKINSON: Why is that inconsistent with what Mr. Pierce just said. The example that he gave us, which has us use the standard producing on paying quantities, so that in fact there is

production. Why is that inconsistent with the rule that we have just cited to?

HUNT: Because the determinable fee doctrine is a doctrine based on an agreement of the parties. It has been in force in Texas for nearly 100 years. That doctrine was well expressed by this court in 1943 in Freeman v. Magnolia Oil. And to the same kind of an argument that was made in that case, this court said they could have thus met the condition, which they imposed on themselves by accepting the lease. For their failure to do so they only have themselves to blame.

PHILLIPS: Why after 60 years shouldn't the burden of proof at least shift to _____ _____?

HUNT: Quite the contrary. Let's dispel this idea that we're dealing with 60 years. Less than that. Let's go back to the deposition testimony of Don _____, an NGPL employee who explained that he found records showing that almost every lease in the Panhandle had terminated for lack of production. At a time when those records existed, NGPL had those records and could have done something about it. That's why in 1963 and 1964 when four months went by under one lease, five months went by under another lease, NGPL had the ability to produce records at that time to show why there was a cessation of production.

HECHT: The problem I have is, no one argues that production ought to be every hour of the day. You can quit for an hour, and you have _____ the lease. Quit for a day. I don't hear anyone arguing that a week is the appropriate time. They seem to focus on a month. Why is a month the standard by which you should judge cessation of production? Why not 4 months or ½ year, or a year?

HUNT: There are two reasons. Historically the oil and gas industry has functioned on a month to month basis. But they don't have to. Parties are able to make contracts as they wish. It's interesting to note what the parties agreed to in this case.

HECHT: But they didn't specify the time frame.

HUNT: Oh yes they did. That's the point. Gas companies don't tell you what they agreed to back in 26 and in 35. These leases incorporated a royalty division order. And that royalty division order introduced as plaintiff's 7 in one case, and plaintiff's ex. 1B in the other case, and this division order applies to both leases because it is a consolidated lease, and then the division order applied to both leases spells out that payment shall be mailed on or before the 15th day of each calendar month following the month in which the gas is taken.

The parties agree to operate on a month to month basis. When did they do that? 1935. That's why when it became apparent in 1980, when Don Barson was looking at these records, that there may be a significant problem with every lease in the Panhandle that NGPL had the ability at that point in time to come forward and tell why production was stopped.

ENOCH: I understood Mr. Pierce to say that the issue really here is that was there sufficient production that really the lessor should have at that time brought suit to claim title. Do

you agree that under these leases it's the obligation of the lessor to bring suit to claim title when there's a cessation?

HUNT: No. And this court has never agreed with that. And that is one of the changes that would have to be made in the Texas law. Because under the Texas cases running from Stevens County v. Mid-Kansas, when we first established the determinable fee doctrine in Texas, this court has said in those early cases time after time that the determinable fee doctrine works without operation of anyone coming forward. It is a termination as a matter of law because in the language of this court in Freeman, that's the bargain that the gas companies make. When the gas companies make the bargain if we don't produce we lose, then they have only themselves to blame. When they don't produce, and in this case, only themselves to blame when they no longer have the records.

HANKINSON: Why don't we look to Clifton? And under Clifton we interpret the leases in Texas to require production in the _____? Why doesn't that same production standard apply to the cessation of production doctrine?

HUNT: It does if there were marginal production. That is, if this were a question of there being three days here, two days that month, and the question of how much was being produced, when it was being produced, that's a perfect way to look to see if that well has dwindled down to the point that there should be some look to see if it's profitable. But, the point here is, that...

HANKINSON: Why would a lessor complain if in fact the lessee is not producing in July and August when prices are lower, and, in fact, gets more money by producing that gas and selling it the other ten months of the year, so at the end of the year the lessor has more money in his pocket?

HUNT: That seems to be such a clarion call. But don't believe it. Because prices are controlled, and that's the point.

HANKINSON: My point is, is that it seems to me clearly by looking at production in terms of paying quantities has added something to this. And in that regard if there were a decision made by a lessee to cease production for a reasonable period of time for the economic benefit of both the lessor and the lessee, why should then the lease terminate under those circumstances?

HUNT: Because it places great power in the hands of the gas company to manipulate what's going on for its own benefit. It changes the agreement of the parties. The parties agreed to produce or lose. It's interesting to note that only last March the Ft. Worth CA had before it a case called Guinn v. Ridge Oil. And there that court correctly noted that the termination of cessation, the temporary cessation of production doctrine doesn't apply where there is an intentional failure to produce. But it only applies where there is some unintentional failure to produce. So if you have a problem with an unintentional failure where there is something that happens at the well, a collapse of a casing, breakdown of the pump, or there is some other problem, in this court's opinion in 1941 in Watson v. Rockmill, the lessee comes in and explains why there's been a problem at the well and then have a reasonable time. It's that same reasonable time, the same standard of Clifton v. Koontz. But what has to trigger that is there is some involuntary cessation of the well.

RODRIGUEZ: And how is an oil company supposed to prove that if there was an automatic termination in 1963? I understand your comment about the Dorsey affidavit, but let's take some hypothetical case. There's a termination in 1963 automatically. Pursuant to your theory how are they going to prove now in 1995 what happened in 1963? How are they supposed to prove that there was a mechanical failure? Are we are going to require permanent retention of documents now by oil companies?

HUNT: No. There ought to be something better than what NGPL did here. There is evidence that there is a document retention if you prefer or document construction policy. Those documents which were known to exist at the time the problem was known to exist are gone.

RODRIGUEZ: Let's _____ the facts of this case. Then in 1994 replacement wells were drilled here. the year. Why isn't there some kind of laches or revivor argument that's compelling here?

HUNT: Two reasons. First of all, laches just simply can't fly to a case in which there is a title for the very reason that you mentioned. If the title automatically reverted as a matter of law _____, then that title can't suddenly be retransferred in contravention of the determinable fee doctrine simply because the suit wasn't brought soon enough. These suits are delayed because the party with the best records who knows whether there was production or knows why there wasn't production were the gas companies. The gas company is in the best position to know what happened, when it happened, and to protect itself against any kind of a fraud.

PHILLIPS: Can't hear question from Phillips.

HUNT: They get the leases back. It's the right of reverter. They own 8/8.

PHILLIPS: Can't hear Phillip's question.

HUNT: That's correct. There still must be production of the gas that's there.

PHILLIPS: Can't hear Phillip's question.

HUNT: When you're dealing with 8/8 instead of 1/8, you certainly have a bigger pie with which to pay for whatever expenses it takes to produce it. That simply is capitalism at work. And those that have the right of reverter and it has worked claiming what is lawfully theirs.

Let me go back to your question of laches. Not only shouldn't it work where there is a title question at issue, make no mistake that's what happened here. The right of reverter when it works on the determinable fee is change of title. And yet the gas companies are coming back and saying, no, this is just a cloud on title. But what the gas companies want is the title back. There's no other way to look at this except that it is a title fight.

ENOCH: Can't hear first part of Enoch's question well enough to transcribe it.

Ordinarily would these cases arise from the oil company bringing some sort of declaratory judgment action that it has ceased or do the cases ordinarily only arise when the property owner, the lessor, threatens to kick the oil company off? Historically how do these cases get here? Do the oil companies sue or do the landowners sue?

HUNT: While it's true that in some instances there have been suits for declaratory judgments brought by the oil and gas industry. Typically these suits are brought by royalty owners saying, we are now the owners of the 8/8. We are the mineral owners and we are entitled under the determinable fee doctrine to the whole of the mineral estate _____.

PHILLIPS: Are you suing for damages for the 7/8 wrongfully withheld, and do you agree with the CA that that's subject to limitations?

HUNT: Yes.

PHILLIPS: And you've got a 4 year claim?

HUNT: Two years. We've got two years of damages and that's it.

HANKINSON: Should the lessor have to reimburse the lessee for improvements to the lease that it has done during this time period? For example, if they drilled another well.

HUNT: If the court wish to apply some sort of laches standard, the most it could do it's respectfully suggested is to let the company recover the cost of that well. But let me go back...

HANKINSON: My point is that you say that the lessee should be responsible for this because they know they stopped production, but you rely on the division order to tell us that a month is the period of time you're looking at, which means they were getting monthly checks, which means the lessees at the time knew they weren't getting checks in certain months. But they did nothing. And yet we now have the lessee's incurring expenses. For example, let's say they drilled a new well during this interim. And yet the lessor steps up 20 years, 4 years later and says, thank you very much. That's mine. I will take it now. So there's a little bit of tension it seems to me in terms of the period of time when you rely on the division order for monthly payment information. At the same time you're saying this all lies in the hands of the lessee. How are we going to deal with that tension?

HUNT: The best way to deal with the tension is to let the parties have the contract they made. The contract that was made here was produce or lose. There was no production. While it's an easy answer to say, well the mineral owners must have known it because they didn't get a check that month, the mineral owners are not nearly as sophisticated. But that's not the issue. This is a matter of law. Either it reverts or it doesn't. If it reverted back then and the landowners didn't discover the reversion until much later, that legal title still reverted as a matter of law back then.

ENOCH: I understand your argument. If I'm the legal title holder unless there's an adverse possession, I can't lose it just because I don't keep asserting periodically that I own it. How

disastrous would it be for the court to go look at this reverter as a matter of law issue and say there is no reverter as a matter of law unless there is a condition which is the cessation? And if that's the provision that the lessor asserts _____ what would be wrong with the court saying that really the appropriate process should be for the lessor to bring a lawsuit to claim title. Well all of this would simply go away. You wouldn't have a laches problem. You wouldn't have any other problem because the lessor would be required to bring the claim within a reasonable period of time of their claim to cessation _____. How difficult would that be for the parties in these kinds of arrangements to get the relationship correct?

HUNT: This court has the power to make that fundamental change in Texas law. But be sure what the change is. It is a change that was rejected by this court and has been rejected continually throughout the years. It is going to a condition subsequent. It is a destruction of the determinable fee doctrine in Texas. It is a destruction on which the rights of gas companies and mineral owners depend for vested rights that have come down through the years.

PHILLIPS: Will you answer Mr. Pierce's claim that the Johnson case would allow adverse possession under these facts?

HUNT: That's an easily answered decision. Because what that involved is 96 acres along with 56 other acres in East Texas. A mortgagee had a mortgage, a deed of trust mortgage on the 96 acres. In 1921, that mortgagee foreclosed on that property. There are involuntary foreclosure at the courthouse steps. The trustee's deed recorded in the deed records. And so there wasn't any question. But there was a new owner in town at the courthouse. There was someone who was in the position of actively adversely claiming it. New owner, but the new owner never did come in and dispossess. That's the distinction there. There is no change of title here that is recorded at the courthouse that all know.

OWEN: What do we do like with continuous drilling clause? Let's suppose it's been 40 years since the wells were originally drilled and records are lost. But someone who was out there at the time comes and says, well I remember I kept a calender and there was more than a 60 day lapse in-between drilling for wells and the lease should have terminated but the landowner was happy that the well came in and didn't know any better. What do you with do with those kind of cases where people come in way after the fact and say, well I think I remember this? Do we say that the lease terminated under the continuous drilling clause 40 years ago?

HUNT: You may well do that. But you depend instead on the wisdom of juries to recognize a fact issue made and lawyers on each side coming in and making the argument that jury, you should reject this claim. It was so many years go, that is so weakly based on these old memories.

OWEN: But we put limitations on just about everything else. Why shouldn't we put some sort of time limit in these cases if you think your lease is terminated to go into court and get that resolved?

HUNT: If you want to do that prospectively you can. The court has that power. But it ought not to destroy the vested rights of property owners in Texas now who have contracted with

respect to leases and lease hold property, who have right of reverters that are at issue. If the reverter happened and you don't find out about it till later, it is still a reverter as a matter of law. Simply because you haven't claimed your property lately doesn't take that property away from you, unless as in Tex-Wis, there is a clear indication of the party in possession that are claiming against that new owner. And that's the distinction. That's why adverse possession will work in most cases where there is a clear repudiation. There was in Tex-Wis. There's not here.

PHILLIPS: Under a case where you claim you're the rightful owner of the property for 40 years, and there have been several new wells drilled since then on the property, does the lessee have any claims to quantum meruit or some other claim for benefits given to your property under a mistaken impression of law?

HUNT: May well have a claim. If a lessee has such a claim, let the lessee assert it. And there's not any reason why as someone who has benefitted another's property in good faith can't recover some of that. But that's not the issue here happily. We don't have to decide that. You certainly have to take it into account as a matter of policy in the decision that you make. But decide this case based on the determinable principles and what the parties agreed to in 1926 and 1935.

HANKINSON: Let me go back to J. Hecht's question earlier, which also bothers me in the question of the no time period. And I know you referred us to the division orders that say that because the royalties were to be paid monthly that that indicates that a month is long enough. But why should it be monthly? Tell me what time period we should be looking at, which seems to be a fundamental problem with the cessation of production doctrine?

HUNT: There are two issues there. First of all, where there is an intentional failure to produce, the temporary cessation production doctrine is not triggered.

HANKINSON: I'm back at cessation of production before we flip over to the lessee saying, I have a legal excuse .

HUNT: I understand the question. What I'm trying to say though is, that you look first to see why it stopped if that is an issue. If there is an intentional cessation, that ought to take place in a month, 2 months, because the industry and the parties operate on a month-to-month basis. And that's what they contracted to do. Produce each month, pay each month.

HANKINSON: But if the economics really require looking at a larger period of time than just a month in terms of making decisions as a prudent operator, then why should we be restricted to a month? If I could produce the well in September and get more for the gas rather than in August, and I'm trying to act as a reasonably prudent operator in the way I run the lease, why should the time period be restricted to a month?

HUNT: Because it places to much economic power in the hands of the gas companies. These leases are unique because they are old and there is no savings clause in any of these. The person most likely to be the number one draft choice in the MBA will likely be a high school student who will have an agent and the best attorneys around. Gas companies surely with all their powerful

attorneys can come forward and draft leases that take care of this problem. But as the leases now stand these terminated and the court should _____.

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REBUTTAL

ENOCH: Before you sat down earlier, you said that it was up to the lessors to sue to claim their title. Now is that the basic premise of your client, that the real reason that they believe they win here is because it's up to the lessor to sue to reclaim their title when there's been a cessation of production?

PIERCE: I think if we apply the cessation in production in paying quantities doctrine, it is incumbent. And that was the question I was trying to answer of J. Hankinson.

ENOCH: So there is not an automatic reverter when there's a cessation of production?

PIERCE: As the law now stands it is that a cessation of production results in the termination of the determinable fee interest in the minerals. The question is what is that cessation? And while the question is not before the court in this case, frankly I don't consider it an argument reductio ad absurdum to suggest that there may be a day in some court in this state where somebody is going to stand up and say, we've got a month period here. This lease is terminated. Or we have a week period, or for that matter a day period where nobody can say why they intentionally turned this well off.

HECHT: And I take it more timely bringing of suit would not resolve that issue. You would still have to resolve that issue.

PIERCE: You would have to resolve that issue. You would have the benefit of some living, breathing witnesses, maybe some documents. And there's really no need for this. Clifton v. Koontz was a _____. This court in Clifton v. Koontz was a _____ to point out there is no arbitrary time period.

OWEN: What about leases that have a 60-day clause?

PIERCE: Those leases will be taken care of by their language with one possible exception. If the 60 day clause is triggered by a cessation of production as was true in Clifton v. Koontz, we could still be in this situation if you applied an automatic ipso facto termination. Would a day be enough?

ENOCH: As I understand it, if there's a cessation of production, the title automatically reverts.

PIERCE: In any case, oil and gas lease, grant of real property, any fee simple determinable, there is some condition that is the limitation. When that limitation occurs there is an automatic reversion.

ENOCH: So now we're fighting over the oil company's right to be on the property. Does the oil company have the duty to prove that the condition precedent did not occur, or does the landowner who has his automatic reversion have to establish that the condition precedent occurred.?

PIERCE: As matters now stand, there's no question about that in this case for example there was at least a 30 day cessation of production. That's what the RR commission records show. I have no way to dispute that. The event under present law is established. There is an affirmative defense that is sometimes available, which is the temporary cessation of production doctrine.

ENOCH: So the gas company has the burden to prove that the condition precedent did not occur. If you're going to say the reversion did not occur, then it's up to the oil company to prove those facts to establish that the reverter did not occur.

PIERCE: To prove an affirmative defense, an acceptable reason for cessation of production. Under existing law now if there is no production, the problem is...

ENOCH: If you prove the affirmative defense does that not establish that the reverter did not occur? The condition precedent did not occur.

PIERCE: That's correct. The oil company wins in that instance.

ENOCH: So what the effect of it is, is the oil company has the burden to establish that the condition precedent did not occur under established law. You say the cessation occurred, but that's simply the prima facie showing, but the oil company does have the authority to come in and prove that it as a matter of fact the condition did not occur that resulted in the reverter?

PIERCE: There is a legal excuse for that cessation.

ENOCH: Now over 60 years later, the assertion that title reverted 60 years ago, the oil company claims, well wait a minute, they ought to be estopped equitably from doing that because we cannot now prove our defense to that condition precedent didn't occur.

PIERCE: That's correct. I cannot establish why there was a 30 day cessation of production in 1941 during WW II.

ENOCH: But the prima facie event occurred.

PIERCE: There was a 30 day cessation of production in 1941.

ENOCH: And so the title by prima facie evidence reverted. You are asking that some sort of equitable rule be imposed that then retransfers title, or what does it now do?

PIERCE: I think that the equitable defense of laches and estoppel should be recognized and should be available at least in these kind of facts. What I'm really asking, and if I may make this point, let's talk about our 30 day cessation of production in 1941. Had the gas company gone out

and produced that well for 1 hour, one day that month, a totally different legal test would apply, totally different burden of proof, and in this kind of case almost as a matter of law a different result. I don't think that makes much sense unless we're to say that's how our forefathers did it. It's good enough for us.

HANKINSON: Mr. Hunt says that if we develop the law further as you would have us do with respect to the concept of cessation of production, that in fact, we will be ignoring the intent of the parties to the original lease. Could you respond to that?

PIERCE: I would cite the court to the Wagner Estate v. Seigler(?) case, Garcia v. King. My experience is most legal rules have reasons. There are reasons that these rules developed if you dig back far enough. And in those two opinions this court will find those reasons. These doctrines exist to further the purposes of the parties, which is mutual economic benefit. The landowner says, I will give up the rights to the minerals. I will let you come on my land as long as it's to my economic benefit. That has always been this court's touchstone in deciding what the law ought to be. And that is in no jeopardy if the court does what I'm suggesting.

PHILLIPS: If there was a shut-in royalty clause is that...

PIERCE: There is no shut-in royalty clause in this case.

PHILLIPS: I know there is not, but if there was this problem would never come up or almost never?

PIERCE: I got to get outside the record a little bit. The reason I hesitate is the court may know there are a number of these cases. Sometimes proving the payment of a shut-in royalty is a very difficult issue and it's a little ironic because under existing law that's the lessor's burden to prove that no shut-in royalty was paid.

PHILLIPS: When did those clauses become common?

PIERCE: They apparently became more common in the 40's.

PHILLIPS: Are there a whole lot of existing leases that pre-date the 40's in the Panhandle?

PIERCE: In the Panhandle. And not only in the Panhandle, elsewhere. Frankly, one of my biggest concerns when I was drafting the petition for review might be that the response would be, well this is a very limited problem. It really doesn't have much impact on state-wide jurisprudence. I think that is certainly not true. I could gather more than ½ dozen of these opinions that are working their way up here right now. This is a live issue.

PHILLIPS: Are all the RR commission records - the RR Commission has 100% retention rate of records on what happened from the 30' to the present?

PIERCE: They have apparently a pretty good record that goes back at least - frankly I

don't know how far back it goes. The retention problem - why did these cases get here? Why do we have these cases? What's happened, and this is in the record and in the briefs, is that there are people who go out and go through these RR commission records. They find months of zero production. They contact the heirs of the original lessors and say, you've got quite a lawsuit here, assign me 1/3 of it, I'll get a lawyer and we'll pursue them.

PHILLIPS: But the existence of RR commission records, at least the existence at the time and for sometime thereafter is critical to your laches and adverse possession argument is it not?

PIERCE: It is.

RODRIGUEZ: Is this a national problem as well? How do they define cessation and what's the majority rule if there is _____?

PIERCE: 100 A.L.R.2d 885, 1963 annotation. It is in my opinion a little deficient on analysis though it does collect the cases. The substantive law of various states is different. Oklahoma for example, the interest is not a determinable fee, but a profit of _____. So there are some differences that make it hard to do a headcount like we might with the question of say whether contributory negligence is a defense to some claim. Generally speaking, the temporary cessation doctrine is applied, but it is applied with a little more - _____ by a little more equity if you will. It is more a, was this reasonable? Did the party act reasonably? Was there a reason they did what they did? Did they get production restored? And it kind of suggest was anybody really hurt, like in this case, or my second hypothetical where the lessor ends up better off.

HECHT: With respect to your theory of focusing on paying production. The idea that a lessee would say, look, let's wait till December and produce more then because it will be mutually beneficial to both of us, is a compelling one. But what's to keep the lessee from saying let's wait till 2005 because gas prices right now are low Winter and Summer, and we should just wait and bide our time?

PIERCE: The longer the period is stretched the more vulnerable the lease will be under Clifton v. Koontz. Clifton v. Koontz, again this court made it very clear there is no arbitrary absolute period to look at. You submit that to the jury. If, for example, someone knew that 13 months from now a gas plant, processing plant is going to be completed in the next county and we can get twice as much for this gas, I submit it might be determined to be reasonable to wait until that plants available.

PHILLIPS: Wouldn't it be better for everybody in the industry to know in advance what the consequences of their actions are going to be...

PIERCE: It would certainly be simpler. But in the production and paying quantities we don't have a hard and fast rule. It is submitted to the jury under the reasonably prudent operator standard, and the operator essentially gets to come in and explain why it did or didn't do what occurred.

JEFFERSON: Under Watson, didn't we hold that unfavorable market conditions wouldn't justify a nonproduction?

PIERCE: Watson was a two-year, 7 month, I believe, period where there was no production at all because the gas market had gotten so bad and the oil was of such low quality. I think any doctrine, and again, depending on the facts, there is always a point where a court is entitled to say, and sometimes must say, as a matter of law you've gone past the limit. I think Watson was correctly decided. On different facts, I don't know what the result would be.

PHILLIPS: Mr. Hunt, at least alluded to the fact that some of these leases have long term fix price contracts.

PIERCE: No. The leases do not.

PHILLIPS: So there's really a seasonable variation?

PIERCE: That's right. Natural Gas Pipeline Co was an interstate pipeline whose prices were regulated by the federal power commission back at this period. And that's why I haven't made the argument that somehow that motivated this conduct. I'm talking about this court writing for the industry and considering hypothetically what could happen. And that's a very real possibility today.

HANKINSON: Under your adverse possession theory, what title does the lessee get? Could it be title outright? Does the determinable fee continue?

PIERCE: It is title to a 7/8 mineral interest. It owns the minerals outright to the extent of 7/8. The reason for that is, no one but the petitioners ever considered that they owned the 1/8 royalty interest.

HANKINSON: You're using the adverse possession doctrine in order to defend against the claim that title reverted.

PIERCE: It's the only defensive doctrine.

HANKINSON: Is the title obtained by adverse possession of the same nature as the title the lessee originally received under the lease, or is it of a different nature?

PIERCE: It is a complete and whole fee simple title to a 7/8 mineral interest.

OWEN: And that's because they never claimed the 1/8?

PIERCE: They never claimed the royalty interest.

OWEN: They are no longer bound by the lease terms. They own it outright?

PIERCE: That's correct. And in fact this precise point is made at the very end of the St.

Louis Royalty case, old 5th circuit, adverse possession case that's cited in the briefs.

HANKINSON: It sounds like we've swung the pendulum then entirely the other direction under the adverse possession theory. Because the lessor comes out on the other end with a whole lot less of what rights they would have under the lease for the 7/8.

PIERCE: The consequences of not timely asserting their claim that's correct