OPINION
51-105

June 2, 1951 (OPINION)

MINERALS

RE: Procedure When State Leases

You request an opinion to House Bill 708, as well as the manner in which the state and its political subdivisions lease an interest in oil and gas.

House Bill 708, passed at the thirty-second session of the legislative assembly, with the emergency clause attached, in its first section simply provides for the leasing of lands owned in whole or in part by the state under the terms of the act.

Section 2 of the act provides that the state of North Dakota or any of its departments or agencies shall advertise the land offered in the official newspaper of the county in which such lands are situated, and in some newspaper of general circulation published in the city of Bismarck once each week for at least two weeks, the last publication to be at least ten days before the day of such leasing. Lands located outside of Burleigh County would have to be published in the official newspaper of that county as well as in a publication published in the city of Bismarck.

The purpose of this latter provision appears to be to give notice to interested persons and to provide for one specific paper where all lease interests may be found.

The section also provides that the leasing would be held in the office of the department or agency, and provides that the requirements of notice shall be the legal description of the land, the time and place where the leasing will be held, and any other information deemed by the state to be applicable.

Section 3 of the act provides that the counties must follow the same procedure as is laid down for the state or its departments or agencies.

Section 4 of the act provides as follows:

> Offers for leasing may be made in writing and such bids shall be opened at the time of the leasing and bids may be offered orally at the time of the leasing. Such bids shall be made upon the basis of acceptance of a lease upon the rental basis herein fixed, plus such bonus as the bidder may offer. The leasing agency may reject all bids and no bid shall be accepted unless the bidder shall, at the time of the leasing, tender or pay to the leasing official an amount equal to the first year's rental for such oil and gas rights, plus any bonus offered for such lease."

It should be particularly noted in section 4 that the person desiring

to lease make his offer in writing. There appears to be no restriction as to the acreage which the bidder may apply for, and, under section 2 of the act, at the time fixed in the notice for opening of bids, oral bids may be made with respect to bonus. The purpose of allowing the oral bid is that the state may receive the highest possible price.

Section 5 fixes the rentals at twenty-five cents an acre and the bidding therefore would only be on bonus. Rentals fixed at twenty-five cents per acre are for deferred drilling and the lease should be the standard form of lease calling for one-eighths royalty reservation, and, where the state is an interested party, for a period of not less than five years. The bidder should, in order to fully comply, submit the lease form with his bid.

In reading section 4 together with section 5, it is our opinion that it is the intent of the act that the original application is the initial bid, and that it would appear that the amount of the original offer, the fees for rental, in the application would have to be tendered at that time.

Section 7 gives the state and its departments and agencies the right to make rules and regulations not inconsistent with the act.

Although we do not pass on the question of restricting the number of acres which a bidder might apply for, it is our opinion that it would be within the authority of the state department or its agencies to insist on the leases being drawn to cover a certain number of acres restricting to township or section, and that the applicant make his application in compliance therewith.

you ask for our opinion with respect to the interest held by the state in relation to the interest of the property-owner and the division of rentals.

In answer to that inquiry, we clarify the definition of "land" by stating that oil and gas as they are found in earth are a part of the total physical aggregate which in law is designated as land, (See Rupel v. Ohio Oil Co., 95 N.E. 225), and legal relations respecting them are uniformly held to be real property.

Arrington v. United Royalty Company, 65 S.W. 2d 36, and 90 A.L.E. 765.

Remedies at law and in equity in cases of divided interests have been uniformly held to lie by way of trespass. The cases are too numerous to mention. The general rule and the authorities upon which we rely are:

Depending upon the granting clause immediately upon the execution of the lease the lessee is vested with an interest in the land for the purposes of the lease. The cases found hold that: "what is inchoate until oil or gas is found is the right to produce oil and gas, and the right to the oil and gas itself, which remains inchoate until produced. The right to explore, therefore, is at no time inchoate. It is vested, and will be protected from the time of the execution of the instrument."

The lessee does not have the physical power to reduce the substances of oil and gas to possession as personal property until he finds them. It is that principle that has led this office, as well as a number of courts, to term the right to explore an executory contract.

The reservation held by the state by virtue of Chapter 165 Laws of North Dakota for 1941 technically is not a reservation of the minerals in place but a reservation of the minerals which may be found on or underlying such land. The courts would not be compelled to extend the provisions of the statute, however, to any great extent nor do violence to the language by treating the reservation as a reservation of the minerals instead of a reservation of an interest in production.

In event the act should be construed as a reservation of the minerals it would be necessary for the state or subdivision thereof, to join in the execution of any oil and gas mining lease and unless some provision were contained in the lease to the contrary, the State would be entitled to receive its pro rata portion of the delay rentals and other benefits under the lease.

On the other hand, should the courts treat the reservation in the nature of an overriding royalty, then it would be advisable for the state to join in the lease or ratify the same, but its interest would be restricted to 50 percent of the minerals produced and it would not participate in delay rentals. This construction is not in line with our opinion, but courts in other states have so held. We further hold that the delay rentals are not compensation for the use of the surface.

In the event the stratas of earth are divided and the minerals conveyed by the owner A to the mineral owner B, the grant of the minerals to B would carry the right to use the surface or such parts thereof as may be necessary to an exploitation of the minerals and would be, of course, compensation to the surface owner for any unnecessary or unusual damage to the surface. In the event of such segregation, it would not be necessary for the surface owner to join in the lease and then, not being a part to the lease would not in any manner enjoy the benefits of the lease by way of sharing rentals or the fruits of production. Obviously the delay rentals are paid to the mineral owner for the purpose of deferring commencement of a well on the property and continuing the lease in force during the primary term for the period for which delay rentals are paid.

Authorities from several jurisdictions support the rule that a conveyance or reservation of an interest in the mineral fee conveys or reserves a proportionate interest in delay rentals. See Wright v. Carter Oil Company (Okla. 1923) 223 Pac. 835; Segars v. Goodwin (Ark. 1938) 117 S.W. 2d 43; Way v. Venus (Texas 1931) 35 S.W. 2d 467; 66 Corpus Juris, page 1040.

Each of the above citations hold that where a reservation is made in deed or contract for deed, or a conveyance of minerals has been made that the parties in interest, and they are held to be tenants in common, receive their pro rata share of rental payments.

The cases are uniform in holding that actions in the nature of abandonment and ejectment under the terms of the lease will lie.

It would, therefore, appear, and it is our opinion, that where by operation of law the state has reserved unto itself one-half of the mineral right in the property in question by virtue of the rules governing the law of real property each has the right to enter into and execute separate lease and to receive compensation therefor at the legal rate on the one hand and as per the terms of the contract that each may enter into.

pmf00 Where the lessee may seek to lease from a farmer at a given rate per acre that contract then will be binding to the extent of the interest held by the farmer. The lessor would not have the right to come in at a later time and say that the landowner is entitled to but one-half of the contracted price for the reason that a department of the state is the record-holder of one-half of the mineral interest.

In answer to your inquiry with respect to reservations held by counties, I refer you to an opinion rendered by this office under date of May 18, 1951, and the cases of Adams County v. Dakota Collieries Co., and Northwestern Improvement Co. v. Morton County.

We add in conclusion that when an oil well has been brought in and is producing, and the fugitive nature of the oil and gas reduced to possession, the parties holding interest in those minerals are treated in law as tenants in common.

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