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May 1, 1979

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ATTORNEY GENERAL OPINION NO. 79- 72

Fred Warders, Assistant Director
Kansas Fish and Game Commission
Pratt, Kansas 67124

Re: State Boards, Commissions and Authorities--
Fish and Game Commission--Oil, Gas and Mineral
Leases

Synopsis: The Fish and Game Commission has authority pursuant to K.S.A. 74-3315 to enter into non-drilling oil and gas leases of land held by the Commission where such leases are for the purpose of producing oil and gas.

* * *

Dear Mr. Warders:

You inquire regarding the legality of the Fish and Game Commission entering into lease agreements for the production of oil and gas under K.S.A. 74-3315, which agreements do not permit the drilling of wells on the state property so leased. You call our attention to Attorney General Opinion No. 78-116, dated March 15, 1978, and directed to the Honorable Charlie L. Angell, State Senator, regarding proposed legislation in the 1978 Session which would have specifically authorized the Commission to enter into non-drilling oil and gas leases. In that opinion, former Attorney General Schneider concluded that K.S.A. 74-3315 would not be construed to authorize such non-drilling leases in the absence of the additional legislation contemplated during the 1978 Session.

Fred Warders, Assistant Director
Page Two
May 1, 1979

In addition, you relate that the bill which proposed to grant such authority was passed by the House; referred to the Senate, where it was determined by the Senate committee that K.S.A. 74-3315 did contain adequate authorization for the Fish and Game Commission to enter into non-drilling leases without further statutory authority; said bill did not become law.

K.S.A. 74-3315 states:

"The state forestry, fish and game commission is hereby authorized to lease any of the lands under its control, the title of which is vested in the state of Kansas for the production of oil, gas or other minerals which the commission may deem valuable for that purpose. All such leases shall be on terms and conditions as the forestry, fish and game commission may prescribe: Provided, however, That such leases shall not be for a period of more than ten (10) years, and so long as oil, gas or other minerals are produced in paying quantities thereon."

The Fish and Game Commission is thus authorized to consummate leases "for the production of oil and gas or other minerals on such terms and conditions as the . . . commission may prescribe." The Commission's authority to enter into a lease is limited by the terms of the statute to those leases which have as their purpose "the production of oil, gas or other minerals." While it is true that the statute grants a certain degree of discretion to the Commission to prescribe the terms and conditions of leases, such discretion does not warrant the Commission entering into a lease not authorized by the statute, i.e., one which is not "for the production of oil, gas or other minerals."

The term "production" as used in the statute has not been judicially interpreted; however, it is a settled rule of statutory construction that words have the meaning given them in common usage. The word "production" as defined in Webster's Third New International Dictionary (Unabridged, 1968) means "the act or process of producing, bringing forth or making." The types of leases unto which the Commission is authorized to enter under the statute are, therefore, ones whereby the lessee undertakes to engage in the process of producing or bringing forth oil, gas or other minerals, if in fact such minerals are present. However, the agency is not entitled to enter into leases which would foreclose or prohibit the actual production of oil and gas resources.

Fred Warders, Assistant Director
Page Three
May 1, 1979

The obvious intent of the statute was to allow for the recovery and prevent waste of such resources, as well as to protect the correlative rights of the state as a landholder. The statute clearly is designed to encourage oil and gas development. It gives the Commission considerable discretion as to the contractual arrangements employed to accomplish this goal, subject only to the limitation of the term of such leases and the restriction that the state is only permitted to enter into oil and gas leases where the lease would not interfere materially with the purposes for which the lands were granted to the state. K.S.A. 74-3318. As long as the lease agreement is for the purposes outlined in the statute and within the restrictions stated therein, the location of the surface drilling operation appears to be immaterial. Thus, it would appear that the statute does not preclude the leasing of such property for non-drilling purposes, if such "non-drilling lease" provides for the production of oil, gas or other minerals from such property.

A non-drilling lease is defined as "[a] lease which grants the lessee the usual rights relative to oil and gas under described premises and which provides that a well shall not be surfaced on the premises. Production from the premises under such circumstances will require that any well drilled be surfaced on other premises." [1963] Oil and Gas Taxes (P-H), ¶2007. "In addition it has been held that a non-drilling lease may be issued on certain acquired lands for oil and gas where surface activities would not be compatible with the purpose for which the land was acquired." Williams and Myers, Oil and Gas Law, Manual of Terms, 370 (4th Ed. 1963).

By virtue of these definitions, each non-drilling lease must be reviewed to determine if it is "a production lease" or "a non-production lease." Leases entered into which have the effect of prohibiting production on state land, and are entered into for the protection of the lessee's interest, as against competing producers, are contrary to the clear meaning and intent of the statute. However, to the extent that the Fish and Game Commission is attempting to enter into agreements to allow unitization for production without drilling on state property or to allow the slant drilling from adjacent property, we believe the Commission is entitled to enter into non-drilling leases pursuant to your authority under K.S.A. 74-3315.

Fred Warders, Assistant Director
Page Four
May 1, 1979

The law has long recognized the utility of unitization.

"Experience has proved that unitization prevents waste, protects correlative rights, increases recovery of oil and gas, prevents the drilling of unnecessary wells, eliminates duplication of producing equipment and lessens operating costs; and in general is an economic boon to both lessee and royalty owners. The increased recoveries of oil and gas, through efficient, centralized management, inure of course to the benefit of lessor and lessee alike." E. BROWN, The Law of Oil and Gas Leases §15.06 (2d ed., 1967).

In fact, in some unique situations where it is impractical for business reasons or reasons of geography to surface drill on a particular parcel of ground, unitization may be the only effective means of protecting the interests of the landowner. Such appears to be the case in a number of the parcels of ground now held by the Fish and Game Commission. In the private sector, the law of unitization recognizes that a parcel of ground under a unitization arrangement is in fact under production to the extent that production is being had on any unit covered by the arrangement. The law of most states, including Kansas, clearly demonstrates that unitization is a recognized form of production. As was stated in the case of Klippel v. Beinar, 222 Kan. 681 (1977):

"(1) The life of the lease is extended as to all included tracts beyond the primary term and for as long as oil, gas and other minerals are produced from any one of the tracts included;

"(2) The commencement of any well on any one of the tracts operates to excuse the payment of delay rentals on all included tracts for the period stated in the respective leases;

"(3) Production from a well in any one of the tracts relieves the obligation to pay delay rentals during production on all included tracts;

"(4) The lessee is relieved of the usual obligation of implied covenant for reasonable development of each tract separately;

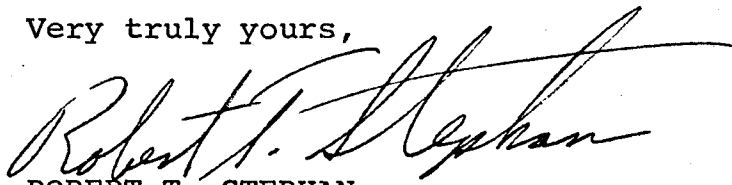
Fred Warders, Assistant Director
Page Five
May 1, 1979

"(5) Wells may be located without reference to property lines; and

"(6) The lessee is relieved of the obligation to drill offset wells on other included tracts to prevent drainage by a well on any included tract. See Hoffman, Voluntary Pooling and Unitization, Pp. 135-136, and South Royalty Co., v. Humble Oil and Refining Co., 151 Texas 324, 249 SW 2d, 914." Id. at 685.

Of course, the rationale of the foregoing is that production on one parcel of the unitized area amounts to production under all parcels of the same area. Thus, in our opinion, a non-drilling lease agreement which contemplates unitization and production on adjacent or unitized parcels of ground, and allows for recovery of royalties inuring to the benefit of the state, would amount to a "production" lease within the purview of the Fish and Game Commission's authority under K.S.A. 74-3315.

Very truly yours,



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Attorney General of Kansas



Bradley J. Smoot
Deputy Attorney General

RTS:BJS:gk