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NON-EXCLUSIVE RIGHTS OF LESSEES TO CONDUCT GEOPHYSICAL EXPLORATION--FEDERAL AND WYOMING STATE OIL AND GAS LEASES

In the 1850's, the rush of miners onto the public lands presented a question involving the status of miners in regard to exploration and mining rights upon such lands. Technically and legally, the miners were trespassers since they had not officially been given permission to explore the public lands. In 1866 Congress passed an act which declared that miners were no longer to be considered as trespassers and that the lands were open to exploration for minerals by all citizens.¹

Following the act of February 11, 1897, which authorized patents to placer oil claims on public land, President Taft, in 1909, ordered extensive oil lands to be withdrawn from those lands open to exploration and occupation.² President Taft feared there was a shortage of available oil and the declaration of 1909 was an effort to preserve what was thought to be the little oil remaining.³ Eleven years later, Congress, acting on the same fear sought to preserve the nation's oil reserves by passing the Mineral Leasing Act of 1920.⁴ The Mineral Leasing Act provided for a prospecting permit to be issued, upon application, in order to authorize exploration upon public lands for oil and gas.⁵ Upon discovery of oil, an authorized lease of the explored lands was necessary before extraction of the oil was permitted.⁶ This distinction between "exploration for" and "removal of oil" was maintained for fifteen years until the act of August 21, 1935 eliminated the need for a prospecting permit for exploration.⁷ This act, together with the act of 1946, which doubled the acreage limitation permitted under the oil and gas lease, expressed the liberal attitude maintained by the Government in an effort to encourage the development of potential petroleum reserves on public lands.⁸ The remaining requirement of the

1. Act of July 26, 1866, Ch. 262, 14 Stat. 251 (1866).

2. Miller, *The Historical Development of Oil and Gas Laws of the United States*, 51 CALIF. L. REV. 506, 512 (1963).

3. *Id.* at 521.

4. 30 U.S.C. §§ 181-186 (1964).

5. *Id.*

6. *Id.*

7. Act of August 21, 1935, Ch. 599, 29 Stat. 674.

8. S. REP. NO. 1392, 79th Cong., 2d Sess. (1946).

lease, as outlined by the act of 1935, does not expressly provide for an exclusive right to exploration.

The owners of federal leases, which granted them the exclusive right and privilege to drill for, mine, extract, remove and dispose of all of the oil and gas deposits in the lands leased, contended that their leases included the exclusive right to explore for oil and gas upon the leased lands and that conduct of exploration by other persons upon leased public land was a trespass. This was the situation in *Ready v. Texaco* when the lessee sought damages from the alleged trespasser for conducting geophysical explorations.⁹

Since the narrow issue was limited to the interpretation of the lease held by the lessee, the decision of the Wyoming Supreme Court was also so limited. The court determined that the lessee did not have exclusive exploration rights under the lease and therefore could not prohibit the public from conducting exploration operations upon the leased public lands. As a result, the questions of whether the public was in fact a trespasser or whether they had a right to explore upon leased and non-leased public lands remained unanswered.

In an effort to clarify the status of the exploring citizen upon public lands, the Bureau of Land Management proposed a regulation that became effective, after modification, on June 30, 1967, sixteen months after the *Ready* decision.¹⁰ The exploration regulation provides that upon receipt of a permit to conduct oil and gas exploration (from the local district manager of the Bureau of Land Management) the citizen is legally authorized to conduct geophysical exploration upon leased or non-leased public lands as stated within the permit. The only cost for the permit may be the relinquishment of the required surety bond in case of non-compliance with the regulations as outlined in the permit.

It should be pointed out that history seems to be repeating itself because following the Mineral Act of 1920, a similar distinction was recognized when permits were needed for exploration and leases were needed for removal of oil and gas.

The purpose of the regulation is, "to establish proced-

9. 410 P.2d 983 (Wyo. 1966).

10. 32 Fed. Reg. 8968 (1967).

ures to be followed in conducting exploration of the public land for oil and gas."¹¹ It may also be inferred that the purpose was to answer the fact question left unanswered in the *Ready* case. Whether the primary purpose of the regulation was to protect public lands or to answer the *Ready* case, the principal effect of the regulation is to support the *Ready* decision that the lessee does not have the exclusive exploration rights on public lands. By issuing permits to the public granting them the right to explore upon leased and non-leased public lands the Department of Interior is in effect upholding and supporting the Wyoming Supreme Court in the *Ready* decision. Another effect of the exploration regulations is, of course, that it created a right of exploration in the permit owner and it provided the government with a more efficient means of controlling and of collecting for damages inflicted on the public lands by geophysical exploration. The exploration right created in the permittee is not equal to that owned by the oil and gas lessee since it does not allow core drilling for subsurface geologic information or drilling for oil and gas, but it does allow for drilling operations necessary for seismic exploration.¹²

The regulation fails to mention by way of a penalty clause, what consequences may be possible if exploration is conducted upon the public lands without a permit. So the question may again be asked whether the geophysical explorer, for oil and gas upon public lands without a permit, is a trespasser. He would seem to be, but no general penalty clause could be found to have been issued by the Government to classify him as such or to make him liable in any way.

In the *Ready* decision, which the regulation supports, the lessee was unsuccessful in bringing suit against the public explorer upon his leased public land. But now, if the lessee should bring suit against a non-permittee explorer, the regulation would tend to lend support to the lessee's cause of action. If the non-permittee fails to comply with the regulation and fails to obtain a permit for exploration, there seems to be no reason why the Wyoming Supreme Court should not consider the violation of the regulation in support of the lessee's cause

11. *Id.*

12. *Id.*

of action. The lessee's exploration right upon the public land should not be infringed upon unless a permit has been specifically authorized to permit such exploration.

The Government could just as easily have decided that the exclusive exploration rights should be possessed by the oil and gas lessee since the lessee has made an expenditure of approximately \$.50 per acre per year for the speculative rights of the land.¹³ But this would not have served the Government's purpose. If the exclusive exploration rights were possessed by the lessee, the rate of exploration would by all probability decline drastically. It stands to reason the fewer parties allowed upon the land to explore, the lesser amount of exploration will occur.

The exploration regulation seems to be an indication of the liberal attitude possessed by the Government in an effort to encourage the exploration and development of new petroleum reserves.

The ordinary speculative lessee does not have the financial support to conduct geophysical explorations upon the leased land. His main interest is the speculative value of the land. Therefore, the land may remain unexplored unless a third party would be willing to purchase the exploration rights from the lessee. If the parties cannot come to terms, the exploration and development of any possible petroleum reserves upon the land may be delayed for years.

The Department of Interior, recognizing a potential decline in oil exploration and development if exclusive rights were granted to the lessee, chose to say that the lessee has only an implied exploration right and the remaining exploration rights belong to the Government to do with as it seems best. Notice, the Government carefully omitted the word "exclusive" in the Oil and Gas Exploration Regulation of 1967.

It may be argued that the new regulation allowing open exploration is unequitable from the standpoint of the lessee. After all, the lessee has made an expenditure for the lease under which his authority to explore is derived, yet the permit

13. *Shell Petroleum Corp. v. Puckett*, 29 S.W.2d 809, 810 (Tex. Civ. App. 1930).

holder has made no investment in order to obtain the authority for his exploration rights.

In rebuttal of this argument, it may be pointed out that the lessee has lost very little and may even have gained a great deal. The lessee is still free to make geophysical explorations upon the leased land. The exploration permits have not infringed upon this right since it was declared in *Ready* by the Wyoming Supreme Court that the lessee did not own the exclusive exploration rights on public land in Wyoming.

Compared to the expenditure by the lessee, the permit explorer will have a greater investment than the lessee since geophysical exploration is quite expensive and yet the only return for the investment may be condemnation of the area. If the data obtained by the permittee is indicative of the presence of petroleum reserves, the lessee has the exclusive right to extract the petroleum. Therefore, if the permittee wishes to drill a well and extract the petroleum he must deal with the lessee.

There is nothing in the exploration regulation requiring the permittee to divulge the data to the lessee nor is there anything in the regulation requiring him not to publish the data for all the world. If the information is indicative of the presence of petroleum reserves, the permittee will either sell the use of the data to third parties, retain the data for his own use, or try to deal with the lessee. But if the data is not indicative of petroleum reserves, the permittee may feel economically free to publish the data. If this is done, the speculative value of the lease held by the lessee is probably destroyed. The exploration regulation does not make the permittee liable for damages to the lessee for destruction of the speculative value of the lease. But the lessee may recover damages from the permittee under a slander of title action if the four elements are satisfied as outlined in the Restatement of Torts, Titles 624 and 625.¹⁴ In an action of trespass to the mineral estate, the rule in some jurisdictions is that loss of the speculative value of the lease can be recov-

14. RESTATEMENT OF TORTS, § 624, at 625 (1965). The elements of slander of title are described as consisting of (1) a publication by the defendant; (2) falsity of the publication; (3) malice on the part of the defendant; and (4) resultant damages to the plaintiff.

ered.¹⁵ But this is not an action of trespass since the exploration regulation gives the permittee authority to explore upon the public land leased by the lessee. Moreover, in *Martel v. Hall Oil Co.*,¹⁶ the Wyoming Supreme Court refused to allow more than nominal damages to the lessee when the defendants released information to the public that the land was not favorable for oil and gas.

From the *Martel* decision, it may be inferred that the Wyoming Supreme Court is not in sympathy with the lessee. But the destruction of the speculative value of the lease would also occur if the lessee had conducted the geophysical exploration. The lessee has obtained exactly what he purchased—a chance that the leased land contained oil and gas reserves.

In conclusion, it may be said the most beneficial arrangement of exploration and development rights have been utilized for the betterment of the nation and its citizens. The exploration regulation has answered the fact question in the *Ready* case as to the right of the public to explore and yet many questions still remain to be answered by our courts or future regulations. The lessee may still invest in the speculative value of public lands, yet the development and exploration on the public lands for the nation's leading fuel is not impaired.

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15. *Humble Oil & Ref. Co. v. Kishi*, 276 S.W. 190 (Tex. Comm'n App. 1925); *American Surety Co. v. March*, 146 Okla. 261, 293 P. 1041 (1930).

16. 36 Wyo. 166, 253 P. 862 (1927).