

State Lands—Oil and Gas Lease—Rentals—Forfeiture.

Where an oil and gas lease provides for certain drilling each year, and in event of failure of lessee so to drill, in the option of the first party the lease to become forfeited, unless the lessee pays the sum of \$1 per acre in addition to the rents and royalties, the first party must take some active steps to compel the payment of the penalty upon failure to drill and cannot do so by merely remaining idle.

H. V. Bailey, Esq.,
Register State Lands,
Helena, Montana.

My dear Mr. Bailey:

You have submitted to this office the question of what payments should be made under an oil and gas lease executed March 28, 1922, and the second year's rental was due March 28, 1923.

This lease is on the regular form of oil and gas lease which the department uses. Paragraph 3 of Article I of this form requires the installation of machinery and the drilling of at least one well to a depth of 1500 feet within a period of eighteen months from the date of the lease, and during the next succeeding twelve months the well is required to be drilled to an additional depth of 1000 feet, or to drill another well to a depth of at least 1500 feet, unless oil or gas are encountered in commercial quantities at a less depth.

This paragraph also contains the following provision:

"In the event the party of the second part shall fail to drill in accordance with these requirements and conditions, this lease shall become forfeited and of no further force or effect, at the option of the first party, unless the second party shall pay unto the first party, in addition to the rents and royalties herein provided for, the sum of \$1.00 per acre per annum, in lieu of drilling and development work as above prescribed."

No drilling was done under this lease. The Board did not attempt to exercise its right to declare the lease forfeited; had it done so, the second party would then have had the right to acquiesce in its action, or to hold the lease for another year by paying the \$1.00 per acre. The Board cannot sit by and waive the non-performance of work and compel the party to pay \$1.00 per acre. In other words, the Board cannot elect to compel the payment of \$1.00 per acre by sitting quiet. They can only do this by compelling the party to elect to make payment in order to retain the lease.

It is, therefore, my opinion that the penalty of \$1.00 per acre cannot be collected, except in cases where the party has agreed to pay in order to save his lease, and that only the rental for the period occupied can be collected.

Very truly yours,

WELLINGTON D. RANKIN,
Attorney General.