Oil and Gas Leases—State Lands—Leases.

Leases for oil and gas may not be given for a longer period than five years and only after discovery of oil and gas and a determination of the value of the estate. A new lease may be given at the end of the five year period only after a re-appraisement of the value of the estate at that time, the amount of royalty to be based upon the then value of the estate.

I. M. Brandjord, Esq., December 14, 1926.
Register of State Lands,
Helena, Montana.

My dear Mr. Brandjord:

You have requested my opinion whether the board of land commissioners has the authority to renew oil and gas leases heretofore given on state lands under the following provisions contained in the lease, to-wit:

> "1. To entitle the lessee to exercise such privilege and option of renewal of this lease or a renewal hereof, for an additional period, not exceeding five years from the date of its expiration, the lessee, ———————— heirs, personal representative or assigns must within the period of the lease or an extension thereof, under the terms herein provided for, drill a well upon the leased premises, from which is produced oil or gas in commercial quantities. So long as any well or wells drilled upon the leased premises by the lessee or his assigns shall produce oil or gas in commercial quantities, the lessee, ———————— heirs, personal representatives or assigns shall be entitled to renewals of this lease as a matter of right, without further drilling requirement, provided all rents and royalties are paid and the terms, conditions and provisions of the lease and of the laws of the State of Montana have been fully complied with; or:
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> "2. The lessee, ———————— heirs, personal representatives or assigns, shall be entitled to exercise such privilege and option of renewal of the lease upon filing a written application for such renewal or extension, with the Register of State Lands at the State Land Office, Helena, Montana, at least sixty days in advance of the expiration of the lease or extension thereof,

making showing that during the five year period of the lease or the five year period of extension, as the case may be, the lessee has drilled at least three wells to a depth of not less than 1500 feet each, or two wells to a depth of at least 2250 feet each, corroborated by the affidavits of two disinterested witnesses familiar with the facts.

"3. The lessee shall be entitled to a renewal or extension of this lease after its expiration or after the expiration of any renewal hereof, by satisfactory showing of the expenditure of not less than $15,000.00 in exploration, development and improvement of the leased premises in exploration and development for oil and gas during the period of the lease or of each renewal thereof, over and above rents and royalties required to be paid." (Sec. 1, 2 and 3, Art. II.)

As the lessee may claim the right of renewal "for additional five year periods," so long as any well or wells drilled upon leased premises by the lessee or his assigns shall produce oil and gas in commercial quantities, provided the rents and royalties are paid and the terms and conditions of the lease complied with, or, in case oil or gas is not discovered, then by doing the work or making the expenditures therein required the lease becomes a perpetual one should oil or gas be perpetually produced, or its term will be extended for so long as the lessee wishes to lease for exploration purposes.

Where organic law or statute provision limits the term for which land may be leased a lease for the term so fixed by law is valid only as to the original period and is void as to the covenant of renewal. (Hart v. Hart, 22 Barber 606).

We thus approach the consideration of the questions under what conditions and upon what limitation state lands may be leased for oil and gas purposes.

The state board of land commissioners has the control, leasing and sale of the lands granted for school and other purposes under such regulations and restrictions as may be prescribed by law. (Section 4, article XI of the constitution).

Section II of the enabling act, before amendment, provided that the "lands herein granted for educational purposes * * * may, under such regulations as the legislatures shall prescribe, be leased for periods of not more than five years." This same section also imposed a limitation on the manner of sale and the minimum price per acre.

By an act of Congress approved August 11, 1921 (42 Stat. at Large, 158, chapter 61) this part of the enabling act was amended so as to permit the leasing of lands found to be mineral, after title had vested in the state, for a period no longer than twenty years "upon such terms and conditions as the legislature may prescribe."

Section 1882, R. C. M. 1921 provides:

"The State Board of Land Commissioners may lease any

> portion of the land of the state * * *, * * * If stone, coal, coal-oil, gas, or other mineral not mentioned **herein,** be found upon the state land, such land must be leased only for the purpose of obtaining therefrom the stone, coal, coal-oil, gas, or other mineral, for such length of time, and conditional upon the payment to the register of such royalty upon the product as the state board of land commissioners may determine."

The provision "not mentioned **herein,**" no doubt, should read "not mentioned **therein,**" since the reference here made to coal-oil, gas and other minerals "found upon the (particular) state land" is to the lease which the board, by authority of the preceding part of this section, is authorized to make. Also, if the legislature intended to refer to "coal-oil, gas," etc. not mentioned in the statutes it would have used the same general expression "the land of the state" in each instance.

This view finds further support from the clear legislative intent, contained in section 1882, that leases for coal-oil, gas and other minerals shall not be given until after their discovery.

The general power given to the state board of land commissioners to lease any portion of the land of the state was intended only to cover the surface rights, with a right to prospect for minerals, and, if found, then it could lease only for the mineral estate. The view that the mineral estate cannot be leased until after its discovery harmonizes section 1882 with section 1 of article XVII of the state constitution, which provides:

> "None of such land, (public land of the state) nor any estate or interest therein, shall ever be disposed of except in pursuance of general laws providing for such disposition, **nor unless the full market value of the estate or interest disposed of,** to be ascertained in such manner as may be provided by law, be paid or safely secured to the state."

A lease is a disposition of the land or estate leased for the purpose and during the term of the lease, and a lease containing a covenant giving a perpetual right of renewal at the end of each five-year period on the same terms and conditions as is contained in the original lease, is a permanent disposition of the estate leased (Lerch vs. Missoula Brick & Tile Co., 45 Mont. 315) before the **full market value of the estate,** or any value, has or could be determined, and clearly violates this provision of the constitution. The fixing of a royalty on the product in advance does not comply with the mandatory provisions of the constitution, for the amount of royalty that should be required from the lessee cannot be determined until the value and extent of the mineral estate is known, or, at least, is known to the extent that discovery has revealed it.

If a 1000 barrel oil well is discovered on state land the royalty demanded should be much more than if a well producing only 100 barrels is discovered. But discovery is absolutely necessary before any basis exists for any sort of compliance with the constitutional requirement.

That the language contained in section 1882 has always received

administrative construction, limiting the term to five years, is evidenced by the renewal covenant contained in the lease. If the limitations of five years on leases of state land, contained in either section 1883 or section 1887, are not to be read into section 1882, then why mention renewals at the end of each five-year period at all? Why was a lease not given on a royalty basis that could not thereafter be changed by the state for so long a time as the lessee desired it?

Section 1883 provides for leasing lands, both agricultural and grazing, and limits a lease to a period of not more than five years, while section 1887 provides that "no state land shall be leased to any person for a longer period than five years." This latter section provides for leasing lots within a town or city for five-year periods, with covenants for renewals for nine more five-year periods at such rental as may be fixed at the end of each period. Here provision is made for renewals as to length of term, not exceeding a total of fifty years, but the rental is fixed at the end of each five-year period upon a redetermination of the value of the premises at such times.

From the limitation of five years on leases of state land, contained in both sections 1883 and 1887, as well as in section II of the enabling act, before amendment, it is apparent that what the legislature intended in section 1882 was that state land could be leased for coal-oil, gas, or other minerals "for such length of time," not exceeding five years, as the board may determine.

It is a well known rule of statutory construction that all statutory provisions upon the same subject must be harmonized and each given effect, if possible.

36 Cyc. 1128;

County of Hill v. County of Liberty, 62 Mont. 15;

State v. Cudahy Packing Co., 33 Mont. 179.

Applying these well known rules, we must give effect to the provisions "No state land shall be leased to any person for a longer period than five years," (section 1887), and "no land shall be leased for a longer period than five years," (section 1883), both sections a part of the same act (chapter 147, laws of 1909) as in section 1882, for it contains no intimation that it is not to be limited by other parts of the same act. "Land" includes everything under it or over it, and therefore includes the gas and oil estates. (Gas Products Co. vs. Rankin, 63 Mont. 372).

Five-year Limitation on Leases not Affected by Amendment of the Enabling Act.

It may be contended that the amendment to section II of the enabling act, extending the five-year limitation on leases of certain lands granted the state by congress not to exceed twenty years, extended the term of leases already given, or those thereafter given, by the board without additional legislation by the state.

If the only limitation on leases of state land was that found in the

enabling act, or, if it conclusively appeared from all statutory limitations that they were intended solely to meet the limitation imposed by congress in the enabling act, then it might be contended that the amendment had some such effect.

Clearly, whatever limitations or restrictions congress desired to place on the disposition of lands granted the state were accepted by the state in accepting the grant, and were forever thereafter (until congress released them) binding upon the state. This did not prevent the state from imposing the same restrictions on the same lands covered by the congressional restriction, or from adding other restrictions, or from including in its restrictions lands not covered by the congressional restriction.

The restriction of leases to five years imposed by the enabling act applied only to "lands granted for educational purposes." It applied to none of the grants made by congress for other purposes, though grants of land were made to the state for other than educational purposes.

The restriction imposed by the state is not so limited; it includes all lands granted by congress, or however acquired, and furnishes us proof that the state restriction is not to be attributed to the congressional restriction. Hence, whatever of the congressional restriction congress may see fit to remove does not remove or affect in any way those restrictions imposed by the state; they still stand and are binding on the officers and agents of the state until changed. They bind not only the officers of the state but all persons dealing with them are bound by them and are equally bound to know and take notice of them. Statutory restrictions on the powers of officers must be read into every contract made by them.

Throop's Public Officers, 551;

Lebcher v. Board County Commissioners, 9 Mont. 315;

Stange v. Esval, 67 Mont. 301; 215 Pac. 807.

It is therefore, my opinion that the state board of land commissioners has no power to renew a lease prior to thirty days before the expiration of the lease previously given, and then only upon condition that the register and lessee agree upon the value of the land as the basis of the royalty required for the renewal of the leases; second, that the board is without power to insert in leases for oil, gas, and other minerals the provisions set forth in the lease designated as sections 1, 2 and 3 of article II; third, that the board is without power to grant leases for oil, gas and other minerals until after discovery of these minerals, and until after there has been an opportunity for determining their full market value.

Very truly yours,

L. A. FOOT,
Attorney General.