

Opinion No. 13.

**State Lands, Leasing of—State Lands,
Grant of—Oil and Gas Leases—
Constitutional Law—En-
abling Act.**

HELD: That those portions of Chapter 122, Session Laws of 1953 which seek to extend the period for which oil and gas leases may be let are in violation of the Constitution and Enabling Act of the State of Montana and as such are ineffective for every purpose and do not change our present statutes upon the form of and manner of granting gas and oil leases.

March 31, 1953.

Mr. W. P. Pilgeram, Commissioner
State Lands and Investments
Capitol Building
Helena, Montana

Dear Mr. Pilgeram:

You have asked the following question:

“I hereby respectfully ask that you give us an opinion ‘as to the terms of oil and gas leases to be granted to successful bidders for oil and gas leases in the light of the action taken by the Thirty-third Legislative Assembly’.”

Chapter 122, Session Laws of 1953, relates to the leasing of state lands and seeks to amend Sections 81-1702, 81-1705 and 81-1708, R. C. M., 1947. The most important change is contained in Section 1 of the Act, amending paragraph 2 of Section 81-1702 to read as follows:

“(2) All leases issued hereunder shall be granted for a primary term or period of ten (10) years, and as long thereafter as oil or gas in paying quantities shall be produced thereunder; provided, however, that all drilling, rental and other obligations are fully kept and performed by the lessee; and provided, further, that nothing herein contained shall be construed as amending or repealing Sections 81-1703 or 81-1706, Revised Codes of Montana, 1947.

"If oil or gas is not being produced from the leased premises at the expiration of the primary term of the lease but the owner of the lease is then engaged in drilling on said premises for oil or gas, then the lease shall continue in force so long as such drilling operations are being diligently prosecuted. If oil or gas shall be recovered from any such well drilled or being drilled at or after the expiration of the primary term of the lease, the lease shall continue in force so long as oil or gas in paying quantities shall be produced from the leased premises."

Another change is Section 3 of the Act seeking to amend Section 81-1708, R. C. M., 1947, to read as follows:

"Amendment of Existing Leases. The owner or owners of any existing state oil and gas lease shall have the right to exchange it for an amended lease containing the same provisions as to the term of said lease as are then provided by law for state oil and gas leases, upon filing a written application therefor, and upon payment of a sum which is the full market value of the exchange, as determined by the state board of land commissioners; but which amended lease shall be subject to all other provisions, including rents and royalties, contained in the original lease; and shall bear the same commencement date as the original lease."

In substance the amendment of Section 81-1702, *supra*, extends the term for which oil and gas leases may be made from the present maximum term of twenty years to a term in perpetuity if oil or gas is discovered on the leased premises during the primary term of ten years. The amendment to Section 81-1708, *supra*, grants the right to any present holder of a Montana state oil and gas lease to exchange his present lease for one embodying the changes dictated by the amendments to Section 81-1702, *supra*.

Practically all of the state lands were granted to the State of Montana as school lands by Section 11 of our Enabling Act, approved by Act of Congress February 22, 1889, 25 Stat. 676

The grant was accepted by Ordinance I, Section VII of the Montana Constitution. The grant of lands to the State of Montana by the Enabling Act, as accepted by the state, constitutes a compact between the state and the United States. See 73 C. J. S., Public Lands, Section 88, p. 727; *State ex rel. Galen vs. District Court*, 42 Mont. 105, 112 Pac. 706; *Texas Pacific Coal and Oil Company vs. State*,Mont., 234 Pac. (2d) 452. An Ordinance to the Constitution has the same force and effect as a constitutional provision. (*Thompson vs. Kenney*, 9 Mont. 223.)

The Enabling Act was amended by Public Law 480 of the 80th Congress, and accepted by our Legislature by Chapter 18 of the Session Laws of 1949. The portion of the Enabling Act dealing with the leasing of public lands, as amended by the above cited Acts, is as follows:

"... Leases for the production of minerals, including leases for exploration for oil, gas, and other hydro-carbons and the extraction thereof, shall be for such term of years and on such conditions as may be from time to time provided by the legislatures of the respective states; . . ."

This provision of the Enabling Act requires that oil and gas leases be for "a term of years." Section 81-1702, *supra*, as amended by Chapter 122, Session Laws of 1953, would provide for a lease "for a primary term or period of ten (10) years and as long thereafter as oil or gas in paying quantities shall be produced thereunder . . ." A lease of this type creates in the lessee a determinable fee and not a term for years. See *Thompson on Real Property* Volume 10, Section 5569, p. 605, where it is said:

"The duration of the lease depends upon the terms of the contract. The habendum clause usually provides that the lease shall remain in force for (a) a fixed term of years, or (b) a fixed term of years and an indefinite term thereafter to continue so long as oil and gas is found in paying quantities. The first mentioned form vests in the lessee an estate for years, while the second mentioned form vests in the lessee a determinable fee . . ."

See also *Dabney-Johnson Oil Co. vs. Walden*, 4 Cal. (2d) 637, 52 Pac. (2d) 237; *Dabney-Johnson Oil Co. vs. Edwards*, Cal., 53 Pac. (2d) 962, 103 A. L. R. 822; *Bruner vs. Hicks*, 230 Ill. 536, 82 N. E. 888.

A term of years must have a definite beginning and a definite end. In the case of *Stoltze Land Co. vs. Westberg*, 63 Mont. 38, 206 Pac. 407, it was said:

"On the theory of a tenancy for years, we must observe that one of the cardinal principles in the creation of a tenancy for years is that the term must be certain—there must be a certainty as to the commencement and duration of the term. However, that certainty may be fixed by reference to the happening of some collateral event capable in itself of certainty at the time of the execution of the lease, for that is certain which can be made certain, but that cannot be said of the purported lease here involved. **'So long as you continue to use it for sawmill purposes' leaves the duration of the term in impenetrable obscurity and uncertainty. That is where the parties left it; and that is where we must leave it. Hence it does not create a tenancy for years.** (*Reed v. Lewis*, 74 Ind. 433, 39 Am. Rep. 88; *Reeves v. Thompson*, 14 Ont. Rep. 499; *Gilmore v. Hamilton*, 83 Ind. 196; *Western Transp. Co. v. Lansing*, 49 N. Y. 499; *Melhop v. Meinhart*, 70 Iowa 685, 28 N. W. 545; *Murray v. Cherrington*, 99 Mass. 229; *Idalia Realty Co. v. Norman*, 232 Mo. 663, 34 L. R. A. (n. s.) 1069, 135 S. W. 47; *Underhill on Landlord and Tenant*, 260; *Tiffany on Landlord and Tenant*, 60, 61; 16 R. C. D. 606.)" (Emphasis supplied.)

See also *Francis v. Superior Oil Co.*, 102 Fed. (2d) 732.

Therefore, the provisions of Section 81-1702, *supra*, if amended in the manner provided for in Chapter 122, Session Laws of 1953, would create in the lessee not a term of years but a determinable fee contrary to the provisions of the Enabling Act and our Constitution.

It is therefore my opinion that the amendments to Section 81-1702, Sec-

tion 2, and 81-1708, *supra*, are in contravention of the Enabling Act and our Constitution.

It is the rule in American jurisdictions that an unconstitutional statute has no more effect than if it had never been enacted and it has no effect on a prior valid statute which it seeks to modify or repeal. (*C. M. St. P. & P. R. R. vs. Harmon*, 89 Mont. 1, 295 Pac. 762; *Vennekolt vs. Lutey*, 96 Mont. 72, 28 Pac. (2d) 452.) Under this rule those provisions of Chapter 122, Session Laws of 1953, which seek to extend the period for which state oil and gas leases may be let have no effect upon the present Montana statutes relating to the granting of leases and no change may be made in the form of the Montana lease to conform to these requirements of Chapter 122, Session Laws of 1953.

It is therefore my opinion that those portions of Chapter 122, Session Laws of 1953, which seek to extend the period for which state oil and gas leases may be let are in violation of the Constitution and Enabling Act of the State of Montana and as such are ineffective for every purpose and do not change our present statutes upon the form of and manner of granting gas and oil leases.