

DAVID A. PROVINSE

IBLA 76-315

Decided November 5, 1976

Appeal from decision of Montana State Office, Bureau of Land Management, canceling oil and gas lease M-31301.

Affirmed.

1. Oil and Gas Leases: Cancellation -- Oil and Gas Leases: Known Geologic Structure

When a noncompetitive oil and gas lease has been issued and includes land within a known geologic structure which was ascertained prior to the issuance of the lease, the lease was erroneously issued and must be cancelled to the extent that it included land within the KGS.

2. Oil and Gas Leases: Known Geologic Structure

In the absence of an express revocation, the determination of an unnamed, undefined known geologic structure is not cancelled when the structure is omitted from a redefinition of a neighboring but separate field, nor is such a determination cancelled by an erroneous certification on a lease that the lands therein are not within a KGS.

APPEARANCES: David A. Provinse, Esq., Billings, Montana, pro se.

OPINION BY ADMINISTRATIVE JUDGE FISHMAN

David A. Provinse has appealed from a decision dated September 30, 1975, rendered by the Montana State Office, Bureau

of Land Management (BLM), which in effect ^{1/} cancelled noncompetitive oil and gas lease M-31301 insofar as it included the NW 1/4 SW 1/4 sec. 20, and the NW 1/4 NW 1/4 sec. 32, T. 9 S., R. 53 E., P.M.M. The decision recited that the Director, Geological Survey, had notified BLM that effective June 9, 1968, the NW 1/4 NW 1/4 sec. 32, T. 9 S., R. 53 E., P.M. Montana, was within an undefined known geologic structure (KGS), and that effective December 5, 1968, the NW 1/4 SW 1/4 sec. 20, in the same township, was also within an undefined KGS. The lease, applied for on March 28, 1975, was issued on April 2, 1975, effective May 1, 1975.

[1] The Mineral Leasing Act, as amended, provides no authority for the issuance of a noncompetitive oil and gas lease for land within a KGS of a producing oil and gas field; such land may only be leased under competitive bidding. 30 U.S.C. § 226(b); 43 CFR 3101.1-1; See Solicitor's Opinion, 74 I.D. 285 (1967). When a noncompetitive lease has been issued and includes land within a KGS which was ascertained prior to the issuance of the lease, the lease was erroneously issued and must be canceled to the extent that it included land within the KGS. William T. Alexander, 21 IBLA 56 (1975); Solicitor's Opinion, 74 I.D. 285 (1967). See Boesche v. Udall, 373 U.S. 472 (1963); cf. Skelly Oil Co. v. Morton, Civil No. 74-411 (D.N.M. July 16, 1975). A person appealing from a determination that land is within a KGS has the burden of making a clear and definite showing that the determination was incorrect. The determination will not be disturbed where such a showing has not been made. William T. Alexander, supra.

[2] Appellant does not attack the determinations themselves, but he contends that Survey cancelled the KGS determinations by redefining the neighboring Bell Creek Field without including the undefined structures. He notes that Survey had all production information for the area and thus was aware of the abandonment of the wells on which the KGS determinations were based. He argues that the omission of the KGS's from the redefinition of the Bell Creek Field was intended as a cancellation of the KGS status of those parcels. However, Survey's response makes clear that it considers the two KGS's as separate from the Bell Creek Field and that the redefinition of the field did not affect these KGS's. Survey provided the following explanation of its policy on canceling or revoking KGS determinations and of the application of that policy to the instant case:

^{1/} The decision is couched in terms of dismissing appellant's protest. On August 26, 1975, BLM issued a decision reciting that the lease had been issued in error in part and afforded appellant 30 days in which to furnish reasons why the lease should not be declared null and void as to the 80 acres in issue. Appellant's response to that show cause order was treated as a protest by the BLM.

Known geologic structures are not usually cancelled or revoked when producing wells are exhausted. By memorandum dated August 27, 1968, Emmett A. Finley, Chief Branch of Mineral Classification states in part:

When a K.G.S. has been established on the basis of evidence of a producing oil or gas well and all acreage presumptively productive within the trap has been included, our present policy that these lands will remain in a K.G.S. until all potentially productive formations are tested remains unchanged.

None of the wells drilled in or near the two unnamed, undefined K.G.S.'s have reached the formations which lie below the Muddy Formation.

Finley's memo also states:

The case that raises serious problems then is in which the well(s) on which the K.G.S. is based fails to sustain the initially established rate of production and declines so rapidly as to result in prompt abandonment following only limited production. In such cases it may be questionable as to whether a producible deposit did indeed exist. If the well history indicates that failure to sustain production over a reasonable period of time is the result of a limited reservoir incapable of being classified as a producing oil and gas field, then there are grounds to consider revocation of the K.G.S. Such determinations involve value judgements which consider all factors involved. We do not feel that definite criteria applicable to all cases can be established as each case requires individual review. Therefore, such revisions should be approached cautiously and carefully evaluated before modification.

It is clear that the land in question were still in the unnamed, undefined known geologic structures on date of lease issuance.

Survey's policy is in accord with Departmental decisions which hold that abandonment of wells and cessation of production by

themselves do not require a redefinition of a structure or revocation of a KGS classification. McClure Oil Company, 4 IBLA 255 (1972); Kermit D. Lacy, 54 I.D. 192 (1933).

In K. S. Albert, 60 I.D. 62, 63 (1947), the Department stated:

It is not the policy of the Department to redefine a geologic structure until all sands or formations therein having prospective value for oil and gas have been exhausted or proved barren. John H. Moss v. A. D. Schendel, A. 6287, March 24, 1924 (unreported); John F. Richardson and Charles F. Consaul, 56 I.D. 354, 358 (1938). The land is within a known geologic structure and is subject to lease only by competitive bidding, as provided in the Mineral Leasing Act of February 25, 1920, as amended (30 U.S.C. sec 226). John H. Moss v. A. D. Schendel, *supra*; John F. Richardson and Charles F. Consaul, *supra*; George C. Vournas, 56 I.D. 390, 394 (1938); W. E. Rennie, A. 24086, July 3, 1945 (unreported).

State of Utah, 71 I.D. 392, 398 (1964), quoted with approval the unreported decision of March 24, 1924, in John H. Moss, v. A. D. Schendel, (A-6287, Buffalo 021031-021033) and stated:

The phrase "known geologic structure of a producing oil and gas field," used in paragraph (2), has been used in connection with oil and gas leasing of public lands since the original Mineral Leasing Act of February 25, 1920, 41 Stat. 437 §§ 13, 17. Its meaning was established soon thereafter as follows:

In its unreported decision of March 24, 1924, in the case of John H. Moss v. A. D. Schendel (A-6287, Buffalo 021031-021033), the Department said:

The applicant Moss has appealed from this decision and alleges that the lands were not, at the time of his application, within a producing field, as all wells in that field which had produced either oil or gas, were not producing, but were exhausted, the wells abandoned and the casing pulled and the wells plugged. * * *

The records disclose that the Torchlight field was a known producing field long before the passage of the leasing act, and was so defined long prior to the filings by appellant or Schendel. The Department is also

aware that large oil companies which have been operating in the field did abandon it in 1923, as alleged, but is not convinced that such abandonment warrants a redefinition of the structure or the revocation of the classification of the area as a producing field at this time. The term "producing oil or gas field" as used in section 13 of the leasing act must be construed to include areas in which there has been production and which are capable of producing more oil, otherwise cessation of production in a given field because of a strike or other external matters would render areas which were clearly oil bearing, subject to prospecting operations and, when oil was brought in, the reward for discovery provided in section 14 of the act would be improperly conferred in a case where such discovery was not essential to the determination, already made, that the land was valuable for oil and gas deposits. Until further showings are made which are persuasive that the area does not still contain valuable deposits of oil, the field will not be redefined. (Kermit D. Lacy, 54 I.D. 192 (1933)).

The Department has repeatedly adhered to this construction of the phrase and still follows it. George C. Vournas, 56 I.D. 390 (1938); K. S. Albert, 60 I.D. 62 (1947); Duncan Miller, A-27644 (September 22, 1958); Duncan Miller, Louise Cuccia, 66 I.D. 388, 390 (1959), and cases cited therein.

In view of the long accepted interpretation of the phrase, which has remained unchanged throughout the many extensive revisions of the Mineral Leasing Act without Congressional criticism, its meaning must be deemed to be established. The fact that Congress used the word "producing" in the next paragraph of the statute to mean "actually producing" does not require a different result. Paragraph (3) applies to all leasable minerals while the phrase used in the preceding section applies only to oil and gas lands and constitutes words of art. Lands in the known geologic structure of an oil and gas field which has produced but may not currently be producing are deemed to be of such value that the lands can be leased by the Secretary only through competitive bidding, Mineral Leasing Act, § 17, as amended, 74 Stat. 781 (1960), 30 U.S.C. § 226(b) (Supp. V, 1964). It seems

clear that Congress intended that oil and gas lands which could be leased only by competitive bidding should be placed in a special category so far as State selections are concerned and that Congress did not intend that only some land subject to competitive leasing, i.e., land in an actually producing field, should be placed in a special category for State selection purposes.

Accordingly, it was proper, unless similar land was offered as base, to reject selections for lands within the known geologic structure of a producing oil and gas field even though there was not actual production within the field so long as there had been production and the geologic structure has not been redefined. [Emphasis supplied.]

The authoritative study, made under the aegis of the Public Land Law Review Commission, captioned "Legal Study of the Federal Competitive and Noncompetitive Oil and Gas Leasing Systems," published April 1969, by the Rocky Mountain General Law Foundation, describes the KGS concept on pages 268 and 564 as follows:

1. Meaning of "Known Geologic Structure of Producing Oil or Gas Field"

While the method and criteria of determining and defining known geologic structures are discussed elsewhere in this report, it should be noted here that the Department construes the term, "known geologic structure" somewhat liberally. In one Bureau decision, it was stated that a known geologic structure does not require that the producing structure be officially defined. All that is required, said the Bureau, is that the land be known to contain oil or gas, and if so, such lands must be leased competitively whether the producing field is formally defined or not. Furthermore, once a "producing oil or gas field" is defined, officially or otherwise, all of the known geologic structures within that field are covered by the statute and must be leased competitively, even though the structure which had been the source of production is exhausted. The definition of "producing field" is not changed merely because production temporarily (or perhaps permanently) ceases, even though the existing wells thereon are capped. If the producing structure is exhausted but other known structures in the field remain completely untested, the Departmental policy is not to redefine

the field until all other formations have been tested and found barren or produced to exhaustion. [Footnotes omitted.]

* * * * *

Once a defined known geologic structure has been established, the designation remains in force until revoked or terminated by administrative action approved by the Director of the Geological Survey. As a rule, the designation will not be revoked or terminated until all sands or formations lying within the field having prospective value for oil and gas have either been exhausted or proven to be barren. [Footnote omitted.]

Similarly, the Law of Federal Oil and Gas Leases, § 15.3, page 414, states:

The mere cessation of production from a field does not remove the land involved from the category of "a producing oil or gas field." Therefore, a noncompetitive offer to lease lands defined to be in a known geologic structure of a producing oil or gas field, but from which production has ceased, will be rejected. The Department's policy is to make no redefinition of a geologic structure until all underlying sands or formations having producing capabilities have been exhausted or proven barren of oil or gas. The lands involved are not deemed available for noncompetitive leasing until they have been excluded from the known geologic structure of a producing oil or gas field by a redefinition thereof, and an application may not be suspended to await action by the Department on the redefinition of the boundaries of the structure. [Footnotes omitted.]

Thus we have a consistent administrative interpretation of KGS since 1920, unchanged despite the many revisions of the Mineral Leasing Act. See Historical Note to 30 U.S.C.A. § 226.

In the absence of an express cancellation of the two KGS determinations, we cannot hold that they were cancelled by the redefinition of the Bell Creek Field. The two structures remain undefined and have been considered as separate from the Bell Creek Field, so there is no basis for asserting that the redefinition of the Bell Creek Field cancelled the KGS determinations of the two unrelated structures.

In addition, appellant contends the KGS determinations were cancelled by Survey's certification of his lease so that none of

the land was within a KGS. Survey's response to appellant's statement of reasons indicates that the certification and lease issuance resulted from an administrative error. We need only note that the issuance through oversight of appellant's lease does not compel the Department to give continuing effect to this erroneous classification. Kermit D. Lacy, supra. Having determined that Survey did not alter the KGS status of the land in issue, we can only conclude that the Department had no authority to issue a noncompetitive lease covering such land and that appellant's lease must be canceled to the extent that it included such land. William T. Alexander, supra.

The dissent is essentially predicated upon a literal and simplistic reading of the expression "known geologic structure of a producing oil and gas field." (Emphasis supplied.)

We are not convinced that a sufficient showing has been made by appellant to warrant a departure from universally accepted practice of some 5 decades. Justice Frankfurter stated in the dissenting opinion in United States v. Monia, 317 U.S. 424, 431-32 (1943), as follows:

This question cannot be answered by closing our eyes to everything except the naked words of the Act * * *. The notion that because the words of a statute are plain, its meaning is also plain, is merely pernicious oversimplification. It is a wooden English doctrine of rather recent vintage (see Plucknett, A Concise History of the Common Law, 2d ed., 294-300; Amos, the Interpretation of Statutes, 5 Camb. L.J. 163; Davies, The Interpretation of Statutes, 35 Col. L. Rev. 519), to which lip service has on occasion been given here, but which since the days of Marshall this Court has rejected, especially in practice. E.g., United States v. Fisher, 2 Cranch 358, 385-86; Boston Sand Co. v. United States, 278 U.S. 41, 48; United States v. American Trucking Assns., 310 U.S. 534, 542-44.

A statute, like other living organisms, derives significance and sustenance from its environment, from which it cannot be severed without being mutilated. Especially is this true where the statute, like the one before us, is part of a legislative process having a history and a purpose. The meaning of such a statute cannot be gained by confining inquiry within its four corners. Only the historic process of which such legislation is an incomplete fragment -- that to which it gave rise as well as that which gave rise to it -- can yield its true meaning. * * *

However, the dissent later manifests willingness to accept the concept that temporary cessation of production would not take land out of the category on being on a KGS but insists that the Departmental standard of not vitiating a KGS until all strata have been tested is erroneous. A bit of pregnancy is still pregnancy. ^{2/} Once one departs from the literal language of the statute, the determination of what constitutes a KGS becomes a matter of judgment. The Department has exercised its judgment and has followed it for some 56 years. There is no compelling reason to depart from that standard now. To the contrary, the trend of the Congress in mineral leasing has been towards all competitive leasing of leasable minerals (e.g., oil, gas, coal, potash, sodium), as manifested by the enactment of P.L. 94-377 of August 4, 1976, mandating competitive leasing of all coal deposits on the public lands.

The dissent asserts that estoppel precludes the cancellation of appellant's lease. One of the basic elements which must be present to involve estoppel is that the party to be estopped must know the facts. Hampton v. Paramount Pictures Corp., 279 F.2d 100, 104 (9th Cir. 1960), cited in United States v. Georgia-Pacific Co., 421 F.2d 92 (9th Cir. 1970). But it is clear in the case at bar that the official issuing the lease did not know the facts, i.e., that the lands are in undefined KGS's.

We note that courts have always exercised the greatest reluctance to find an estoppel against the United States, especially in cases involving the public lands. As the Supreme Court stated in United States v. California, 332 U.S. 10, 40 (1947), "The Government, which holds its interests here as elsewhere in trust for all the people, is not to be deprived of those interests by the ordinary court rules designed particularly for private disputes over individually owned pieces of property; and officers who have no authority at all to dispose of Government property cannot by their conduct cause the Government to lose its valuable rights by their acquiescence, laches, or failure to act." See also, Utah Power & Light Co. v. United States, 243 U.S. 389, 409 (1917); United States v. San Francisco, 310 U.S. 16 (1940); Atlantic-Richfield Corp. v. Hickel, 432 F.2d 587 (10th Cir. 1970). ^{3/}

^{2/} The dissent apparently fails to distinguish conception from parturition.

^{3/} The dissent relies upon United States v. Georgia-Pacific Co., 421 F.2d 92 (9th Cir. 1970), and Brandt v. Hickel, 427 F.2d 53 (9th Cir. 1970), as authority for the proposition that the United States may be estopped. In Georgia-Pacific the Ninth Circuit discussed estoppel at length but rested its decision on the finding that the governmental action at issue there was within the authorized authority of the government officer who performed it. Brandt, on the other hand, was primarily a dispute between two private parties; the court noted that "We would have a much different case if the booby trap set for [the plaintiffs] had somehow hurt the government."

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed.

Frederick Fishman
Administrative Judge

I concur:

Martin Ritvo
Administrative Judge

fn. 2 (continued)

Bad advice cannot ordinarily justify giving away to individuals valuable government assets." 427 F.2d at 57.

Finally, the courts have held that the principle that the United States may not ordinarily be estopped was subject to considerable criticism. However, despite such criticism, the Supreme Court continues to state that the United States may not ordinarily be estopped. See USI & NS v. Hibi, 414 U.S. 5, 8 (1973).

ADMINISTRATIVE JUDGE STUEBING DISSENTING:

The construction of a statute by those charged with its execution should be followed unless there are compelling indications that it is wrong. [Emphasis added.]

Red Lion Broadcasting Co. v. F.C.C., 395 U.S. 367, 381 (1969); see also New York State Department of Social Services v. Dublino, 413 U.S. 405 (1973); United States v. Curtis Nevada Mines, Inc., 415 F. Supp. 1373 (1976).

The construction of the statute applied by the majority is demonstrably wrong. In adhering to earlier administrative interpretations the majority is perpetuating an almost palpable fallacy.

Both the statute and the several regulations implementing the statute refer to a " * * * known geologic structure [KGS] of a producing oil or gas field * * *." 30 U.S.C. §§ 226(b), 226(c), 226-1(b); 43 CFR 3100.7-1, 3101.1-1. "Producing" is a word couched in the present tense and has no connotations referable to the past or future. The words "of a producing oil or gas field" are plain and unambiguous, and may not be simply ignored or construed to mean "of an unproductive oil or gas field."

However, before proceeding with an examination of the law, the facts should be understood.

The two undefined structures are unusually small, one only 40 acres, the other only 280 acres. Their respective histories are recounted in a recent memo from the Geological Survey's Area Geologist, as follows:

The lands in dispute are described as the NW1/4SW1/4 section 20, and the NW1/4NW1/4 section 32, T. 9 S., R. 53 E., MPM. The disputed lands in section 20 were determined to be within an unnamed, undefined known geologic structure effective December 5, 1968. This unnamed K.G.S. is described as the SW1/4NE1/4, SE1/4 NW1/4, SW1/4 and NW1/4SE1/4 section 20, T. 9 S., R. 53 E., (see attached plat). This action was based on completion of a well in the NE1/4SW1/4 section 20, for 51 barrels of oil per day and of Cretaceous age, intervals 4,701-03', 4-706-10' and 4,712-14'. The well was abandoned in December, 1970, after having produced 3,116 barrels of oil. Dry holes were subsequently drilled in the NW1/4SW1/4 section 20 and the SW1/4 SE1/4 section 20.

The disputed lands in section 32 were determined to be within an unnamed, undefined known geologic structure effective June 9, 1968. The unnamed, undefined known geologic structure includes only the NW1/4NW1/4 section 32, (see plat) and is based on the completion of a well in the NW1/4NW1/4 section 32, for 16 barrels of oil per day and 4 barrels of water per day from the Muddy interval 4,623-26'. The well was abandoned in December, 1970, after having produced 103 barrels of oil. It offsets a dry hole in the NE1/4NW1/4 section 32.

On March 28, 1975, appellant filed his oil and gas lease offer M-31301, which included the above-described 40 acres in section 20 and 40 acres in section 32. The land office records at that time showed the lands to be open to noncompetitive lease. The BLM routinely submitted the application to the Geological Survey, which reported to BLM that none of the lands applied for were within a known geologic structure. On April 2, 1975, the lease was signed by the Chief of the Minerals Adjudication Section and the lease issued effective May 1, 1975. The face of the original copy of the lease bears the statement:

Lands in lease were not within a known geologic structure on date of lease issuance.

/s/ Jim Hinds
District Geologist
For the Director
U.S. Geological Survey

The error in record keeping and reporting is conceded by both the Bureau of Land Management and the Geological Survey. Quoting again from the Area Geologist's memo:

At the time of processing of lease M-31301 in 1975 before lease issuance, the Bureau of Land Management records were incomplete and did not show that the subject lease was in part within the above mentioned known geologic structures even though the K.G.S.'s were still valid. Further, when the lease was submitted to the U.S.G.S. for clearlisting it was erroneously cleared as not being within a known geologic structure. As asserted by the Appellant, the error was later discovered (August, 1975) while processing another nearby lease.

The Montana State Office then notified Provinse of its error and intention to cancel the lease as to the 80 acres affected.

Provinse protested that action and the Montana State Office subsequently dismissed his protest. From that action he has brought this appeal.

In his appeal, Provinse does not challenge the administrative interpretation of the statute. Instead he asserts that the Government, having issued him a lease under these circumstances, is estopped from canceling it. He points out that the federal agencies were in possession of all of the facts at the time the lease issued, and he states that in reliance on the validity of the lease he expended considerable time and money "putting a prospect together," and then, when the acreage in question was eliminated from the lease by the decision at issue, he was obliged "to obtain substitute acreage."

I am of the opinion that this case may very well present an instance where estoppel against the Government would lie, and I will discuss this issue below. But the complex question of equitable estoppel against the Government would be avoided altogether by a satisfactory resolution of the case on the application of the proper statutory construction, and it is that issue that I will discuss first.

As we have seen, both of these so-called "producing oil or gas fields" produced only meager quantities of oil. After production ceased multiple dry holes were drilled. The wells were plugged and abandoned in 1970, and the leases terminated. There was so little subsequent interest in these "producing" oil fields that although they were apparently available "over the counter" to the first qualified applicant (according to BLM records), no one attempted to lease them until appellant filed his offer.

The majority opinion quotes extensively from a 1968 memo by Emmett A. Finley to the effect that once a KGS is established, subsequent cessation of production and abandonment of the wells will not necessarily result in revocation of the KGS classification. The memo says the classification will remain in effect so long as the acreage is "presumptively productive" and until all "potentially productive formations are tested." This memo is no authority for that proposition. Emmett Finley was a subordinate official of the Conservation Division of the Geological Survey. He was not a lawyer, had no responsibility to make either legal or policy pronouncements for the Department, and his views certainly do not bind us.

The majority opinion cites McClure Oil Company, 4 IBLA 255 (1972). The headnote in that case says:

Oil and Gas Leases: Known Geological Structure

The fact that there has been a cessation of production or abandonment of wells in a given field is not of itself sufficient to warrant a redefinition of the known geological structure or the revocation of the classification of the field in the absence of a proper showing that the area does not in fact contain valuable deposits of oil or gas.

However, the text says, in part, at 4 IBLA 259:

The term "known geologic structure of a producing oil or gas field," as used in 43 CFR § 3125.1(b) (1970), now 43 CFR § 3103.3-2(b) has been defined as a trap, whether structural or stratigraphic, in which an accumulation of oil and gas has taken place and includes all acreage that is presently productive. Columbian Carbon Company, A-28706 (October 10, 1962).

* * * The thing known is the existence of a continuous entrapping structure on some part of which there is production. There is no prediction as to future productivity, or statement as an existing fact that anything is known about the productivity of all the land included in a structure. Columbian Carbon Company, supra.

But the majority also cites Kermit D. Lacy, 54 I.D. 192 (1933), a case which is directly in point and which reaches the same conclusion, i.e., that cessation of production and abandonment of the wells does not require revocation of the KGS classification. In my opinion Lacy is plainly wrong and should be overruled.

The majority opinion quotes from K. S. Albert, 60 I.D. 62 (1947), which says:

It is not the policy of the Department to redefine a geologic structure until all sands or formations therein having prospective value for oil and gas have been exhausted or proved barren. [Emphasis added.]

This indeed appears to be the present rule. The analogy to "Catch 22" is unavoidable. In order to get a noncompetitive lease on a once-productive structure, one must first prove that such a lease would be utterly worthless. The exploratory testing of "sands or formations" which have only "prospective value for oil and gas" is called "wildcatting," and is the very activity that the noncompetitive leasing provisions of the Mineral Leasing Act were intended to encourage.

The statutory provision was construed by the Department in John F. Richardson, 56 I.D. 354 (1938). The headnote states:

STATUTORY CONSTRUCTION-OIL AND GAS LEASES-
"PRODUCING OIL OR GAS FIELD."

An oil or gas field which has produced oil or gas and is capable of further production is a "producing oil or gas field" within the meaning of section 17 of the act of February 25, 1920, as amended, even though production has ceased. [Emphasis added.]

In the case before us there is no allegation, suggestion or hint that these two little fields are believed to be "capable of further production." The text of the decision explains why the Department was unwilling in that case to apply the strict literal meaning of the word "producing":

On January 27, the well was brought into production and continued to produce oil until the end of June. The well then clogged or filled with sand and production has temporarily ceased while the obstruction to the flow of oil is being removed. The company is now constructing another well in the bay, called No. 4, at a distance of 540 feet from the island. Moreover, the Director of the Geological Survey reported to the Commissioner of the General Land Office that the island is within the known geologic structure of the Timbalier Dome oil field.

It is argued that because the two wells of the Gulf Refining Company are not now producing, the area cannot be said to be within "the known geologic structure of a producing oil * * * field." To construe the statute so literally would be absurd. Any temporary cessation in the flow of oil would serve to defeat the obvious purpose of the statute to grant the rewards of a noncompetitive lease to those venturing into "wild cat" areas. The words "producing oil * * * field" were plainly intended to encompass this case. Production has merely been interrupted, the field is capable of production and the applications of the appellants were filed three months after public newspaper announcement of the flow of oil from the well of the Gulf Refining Company.

Id. at 358 (Emphasis added.)

Note the stress on the fact that the cessation of production was temporary and had "merely been interrupted" due to mechanical difficulties which were entirely unrelated to the geologic capability of the field to produce. The decision quoted from the

unreported case of Moss v. Schendel, A-6287 (March 24, 1924), which said, in part:

The term "producing oil or gas field" as used in section 13 of the leasing act must be construed to include areas in which there has been production and which are capable of producing more oil, otherwise cessation of production in a given field because of a strike or other external matters would render areas which were clearly oil bearing, subject to prospecting operations and, when oil was brought in, the reward for discovery provided in section 14 of the act would be improperly conferred in a case where such discovery was not essential to the determination, already made, that the land was valuable for oil and gas deposits.

Clearly it would frustrate the legislative purpose and intent to allow the issuance of noncompetitive leases on the known geologic structure of a producing oil or gas field the moment the field temporarily stopped "producing" because of a mechanical failure, strike, the loss of transportation facilities, a business failure, or other external matters unrelated to the capability of the field to produce. The word "producing" does not have to be read that literally. The administrator is expected to exercise judgment in such matters, and the refusal to lease noncompetitively in such circumstances is clearly within the Secretary's discretion.

The majority opinion finds inconsistency in my willingness to concede that such a temporary cessation of production would not alter the classification of the land as producing, saying, "A bit of pregnancy is still pregnancy." Carrying the analogy a bit further, the majority apparently take the position that once a female was found to be pregnant she would thereafter be considered officially pregnant for all time, even after the babies were delivered or the pregnancy was otherwise terminated, and she could only be reclassified as non-pregnant after it was proven medically that she could never again conceive.

It is a quantum leap to say that since we do not always need to read the word "producing" in its strictest literal present tense meaning, we are obliged to hold that it means "not producing" in a situation such as the one presented by this case.

First, nothing in this case suggests that the cessation of production was due to any external factor. Everything in the record before us indicates that the two wells produced all that they could, which was precious little, and then quit producing because they could produce no more. Several dry holes were drilled on adjacent lands, the wells were then plugged and abandoned, and the leases surrendered.

Second, the production began in 1968 in each field and, based upon the total amount produced and the reported rate of production, I assume that it ended the same year, although the wells were not abandoned until 1970. Thus there has been no production from either field for nearly 8 years - hardly a temporary condition.

Where there was once only scant production, where there has been no production for a number of years, where subsequent dry holes have been drilled, where the wells have been plugged and abandoned and the leases terminated, and where there is no known capability of the fields to produce oil or gas, and no facilities for such production are in place, I submit that it requires a distortion of the English language to construe this non-production as meeting the statutory qualification of "a producing oil or gas field." To say that a field which is not producing oil or gas is a producing oil or gas field, is an exercise in Orwellian "Newspeak." ^{1/}

Were this case merely an appeal from the rejection of a lease offer because the record showed that the land was KGS, I would have no trouble agreeing that the offer should be rejected on the theory that the record is controlling, regardless of the propriety of the classification. See, e.g., James A. Wallender, 26 IBLA 317 (1976), where the noncompetitive lease offer was rejected because the land was shown on the records to be KGS, notwithstanding that the nearest present production was 17 miles away.

However, the present appeal involves the cancellation of an existing lease which was issued in accordance with what was reflected by the record. The rights of a lessee differ vastly from those of a mere offeror. In Barbara C. Lisco (Supp. On Court Remand), 26 IBLA 340, 344 (1976), this Board said:

The Department has recognized that upon signature of a lease by both parties, it becomes a binding instrument and cannot be vitiated by unilateral action, all else being regular. Charles D. Edmondson, et al., 61 I.D. 355, 363 (1954). See Stephen P. Dillon, et al.,

^{1/} George Orwell's Nineteen Eighty-Four (Harcourt 1949) described life in the fictional totalitarian state of Oceania. Newspeak was the official language of Oceania, and it was administered and interpreted by the Ministry of Truth. Characteristic of the language was the kind of distortion epitomized by the three slogans of the Party, viz., "War is Peace, Freedom is Slavery, Ignorance is Strength."

66 I.D. 148, 150 (1959); R. S. Prows, 66 I.D. 19, 21 (1959). 3/

Thus a signature is sufficient to establish the contract, create the lease, and take the case outside of the regulation, 43 CFR 3110.1-8, requiring rejection of offers to lease. 4/ On this record there was no legal impediment to leasing at the time of lease issuance.

3/ "The Government's rights and obligations as lessor of public lands are no different from those of any other lessor. United States v. General Petroleum Corp., 73 F. Supp. 225, 234 (S.D. Cal. 1946), aff'd Continental Oil Co. v. United States, 184 F.2d 802 (9th Cir. 1950). The rules of construction applicable to Government contracts are the same rules applied to contracts between private parties. * * *" Standard Oil Co. of California v. Hickel, 317 F. Supp. 1192, 1197 (D. Alaska 1970), aff'd per curiam, 450 F.2d 493 (9th Cir. 1971).

4/ [Omitted.]

It is noteworthy that this Board has been rigid and strict in construing the meaning of "production" and "well capable of producing" in other contexts of the Mineral Leasing Act and the regulations thereunder. We have consistently held that in those contexts the requirement is that the production capability must be present, actual and substantial. See e.g., The Polumbus Corporation, 22 IBLA 270 (1975); Arlyne Lansdale, 16 IBLA 42 (1974); R. E. Hibbert, 8 IBLA 379 (1972).

The fact that there is long-standing precedent for the present rule (with presumed tacit Congressional approval) is no bar to our rectifying the error, as illustrated by the fact that another erroneous Departmental position held since 1921 with respect to the same statutory provision was corrected by a Solicitor's Opinion in 1967 at 74 I.D. 285. Some excerpts:

Long standing administrative practice never serves to excuse a departure from the strict letter of the law.

Id. at 288 (Emphasis added).

* * * * *

Consequently, there was no logical basis for Secretary Fall's action in 1921, and there is none for adhering to his interpretation today.

IV

Because the Department's present practice is contrary to the statute, it must be immediately changed. We have enclosed a proposed amendment to the regulations which embodies the proper interpretation, and we request that you approve it. Since this interpretation is required by law, it would be improper to publish it as proposed rulemaking, and we have, therefore, prepared the amendment to be effective immediately upon publication. While we recommend that the new interpretation be made immediately effective as far as pending offers are concerned, we do not propose to act against leases issued in the past in accordance with the mistaken policy. Precedent for taking no action against such leases is found in Franco Western Oil Co. (Supp.), 65 I.D. 427 (1958).

Frank J. Barry,
Solicitor.

Id. at 290. (Emphasis added.)

Finally, we must consider the issue raised by the appellant, *i.e.*, the contention that the Government should be estopped by its actions from canceling the lease. As I indicated earlier, a consideration of this issue would be obviated if the word "producing" were simply construed to mean what it says, rather than its diametric opposite, "not producing." However, assuming that the majority is correct in its application and interpretation of the statute, it seems to me that this may present a case in which equitable estoppel would protect the appellant.

Despite generalized statements in various texts as to the unavailability of estoppel against the Government in matters relating to public lands, United States Supreme Court cases make it quite clear that this is true only when the Government agent making the representations acts beyond the scope of his authority. Utah v. United States, 284 U.S. 534, 545 (1932); Cramer v. United States, 261 U.S. 219, 234 (1923).

A definitive analysis of the operation of estoppel against the Government is contained in United States v. Wharton, 514 F.2d 406 (9th Cir. 1975), and in the two judicial opinions delivered in the case of United States v. Lazy F C Ranch, 324 F. Supp. 698 (1971), aff'd, 481 F.2d 985 (9th Cir. 1973). The Court of Appeals held that the estoppel doctrine is applicable to the United States where justice and fair play require it, citing Moser v. United States, 341 U.S. 41, 71 (1951); Schuster v. C.I.R., 312 F.2d 311 (9th Cir. 1962), and Brandt v. Hickel, 427 F.2d 92 (9th Cir. 1970).

The Court held that estoppel will lie in a proper case even if the Government is acting in a sovereign capacity (as distinguished from proprietary), referring to United States v. Georgia-Pacific Co., 421 F.2d 92 (9th Cir. 1970), and Pitner v. Federal Crop Insurance Corp., 491 P.2d 1268 (Ida. 1971).

The opinion in the case of United States v. Georgia-Pacific Co., *supra*, also contains a definitive treatment of the application of estoppel against the United States, together with an extensive collection of authorities. It reiterates the test applied in Hampton v. Paramount Pictures Corp., 279 F.2d 100, 104 (9th Cir. 1960), which must be satisfied in order to invoke equitable estoppel:

Four elements must be present to establish the defense of estoppel: (1) The party to be estopped must know the facts; (2) he must intend that his conduct shall be acted on or must so act that the party asserting the estoppel has a right to believe it is so intended; (3) the latter must be ignorant of the true facts; and (4) he must rely on the former's conduct to his injury. California State Board of Equalization v. Coast Radio Products, 9 Cir., 228 F.2d 520, 525.

United States v. Georgia-Pacific Co., *supra* at 96. Moreover, the Court held that, "Equitable estoppel is a rule of justice which, in its proper field, prevails over all other rules." (Citations omitted). *Id.*

In the appeal here at issue each element of the foregoing test appears to have been met. Certainly, the District Geologist had authority to report, as he did, on behalf of the Director of the Geological Survey, that these lands were not "KGS." There is no doubt that the Chief of the Minerals Adjudication Section, BLM, was fully authorized to execute this oil and gas lease on behalf of the United States. These were affirmative actions on the part of authorized federal offices, as distinguished from the passive failure to act which characterized Santiago v. Immigration & Naturalization Service, 526 F.2d 488 (9th Cir. 1975); Utah Power and Light Co. v. United States, 243 U.S. 389 (1917), and The Polumbus Corporation, *supra*, where no estoppel was found. Next, the Government was admittedly in possession of all the facts concerning the history of these two fields at the time it issued the noncompetitive lease to appellant. Further, in entering into a lease agreement in response to appellant's offer, the adjudicator must have intended that the lessee would act in reliance thereon, with a clear right to believe that the Government intended that he should do so. Moreover, there is no showing that appellant was not ignorant of the true facts; indeed it

seems to be admitted by both the GS and BLM that he could not have known. Finally, appellant alleges that he relied on his issued lease to his injury, in that he lost labor, time and money in promoting development in the belief that his lease was valid in every particular.

I would reverse the decision of the Montana State Office.

Edward W. Stuebing,
Administrative Judge

