

TEXACO, INC.

IBLA 77-521

Decided March 7, 1978

Appeal from decision of Wyoming State Office, bureau of Land Management, determining that oil and gas lease W 0312471 had expired and was not subject to a 2-year extension by drilling over.

Affirmed.

1. Oil and Gas Leases: Extensions

For a noncompetitive oil and gas lease issued subsequent to September 2, 1960, to be entitled to a 2-year extension for drilling over, actual drilling operations must be commenced on the leasehold, or for the benefit of the leasehold under an approved cooperative or unit plan of development, prior to the end of the primary term of 10 years, and be diligently prosecuted at that time.

2. Oil and Gas Leases: Extensions

Where the term of a noncompetitive oil and gas lease issued subsequent to September 2, 1960, has been extended beyond its 10-year primary term, and actual drilling operations are being conducted on the terminal date, there is no entitlement to a 2-year extension for drilling over unless the drilling operations were commenced prior to the end of the 10-year primary term and had been diligently prosecuted thereafter. It makes no difference whether the extension beyond the 10-year primary term was given because of segregation in accordance with 43 CFR 3107.4-3 (partial commitment of lease to an approved unit agreement), or because of elimination of lease from an approved unit agreement under 43 CFR 3107.5.

APPEARANCES: Peter A. Bjork, Esq., Poulson, Odell & Peterson, Denver, Colorado, for appellant.

OPINION BY ADMINISTRATIVE JUDGE HENRIQUES

Oil and gas lease Wyoming 0312471 issued December 1, 1964, for a primary term of 10 years. Following mesne assignments, the lease, embracing all sec. 10, SW 1/4, NE 1/4 sec. 11, SW 1/4 sec. 12, NW 1/4 sec. 13, T. 44 N., R. 77 W., 6th principal meridian, Johnson County, Wyoming, containing 1,280 acres, was held of record title by Texaco, Inc. On July 29, 1974, within the primary term, the lease was committed to the Holler Draw Unit Agreement, and by virtue of drilling operations within the unit area, lease W 0312471 was extended to November 30, 1976. 43 CFR 3107.2-3. On July 22, 1975, the Holler Draw Unit Agreement was terminated, so that lease W 0312471 was further extended to July 22, 1977. 43 CFR 3107.5. Actual drilling operations were being conducted on the leasehold on the terminal date of July 22, 1977, but the Wyoming State Office, Bureau of Land Management, held that lease W 0312471 expired on that date because there was no production of oil or gas in paying quantities, and the lease was not eligible for a further extension by drilling. This appeal followed.

There is no dispute as to these record facts. The question presented is whether the lease is entitled to a 2-year extension by the actual drilling operations being conducted on the leasehold on the terminal date of the extended term of the lease, it never having been extended by reason of production of oil or gas in paying quantities.

Appellant states that the issue involved in this appeal is identical to that considered by the Court in Robert N. Enfield and Hanagan Petroleum Corp. v. Secretary of the Interior, No. 75-260 M, (D.N.M., March 24, 1976), that a changed regulation is to be given prospective application only so that a drilling-over extension at the end of the primary term should be given under the regulation in effect when the lease was issued. The short answer to this contention is that the opinion of the District Court in that case was reversed. Enfield v. Kleppe, *infra*.

As in Yates Petroleum Corp., 34 IBLA 7 (February 8, 1978), this lease was issued subject to the amendments in Mineral Leasing Act Revision of 1960, P.L. 86-705, 74 Stat. 781, September 2, 1960, and particularly Sec. 2, as set out at 30 U.S.C. § 226(e) (1976):

(e) Competitive leases issued under this section shall be for a primary term of five years and noncompetitive leases for a primary term of ten years. Each such

lease shall continue so long after its primary term as oil or gas is produced in paying quantities. Any lease issued under this section for land on which, or for which under an approved cooperative or unit plan of development or operation, actual drilling operations were commenced prior to the end of its primary term and are being diligently prosecuted at that time shall be extended for two years and so long thereafter as oil or gas is produced in paying quantities.

The regulation governing drilling extensions at the time this lease was issued in 1964, was contained in 43 CFR 3127.2, which provided:

Section 3127.2 Continuation of lease as a result of actual drilling operations.

(a) Any lease on which, or for which under an approved cooperative or unit plan of development or operation, actual drilling operations were commenced prior to the end of its primary term and are being diligently prosecuted at that time shall be extended for two years and so long thereafter as oil or gas is produced in paying quantities.

(b) Actual drilling operations must be conducted in such a way as to be an effort which one seriously looking for oil or gas could be expected to make in that particular area, given existing knowledge of geologic and other pertinent facts.

(c) As used in this section (1) "actual drilling operations" shall include not only the physical drilling of a well but the testing, completing or equipping of such well for the production of oil or gas; (2) "primary term" means all periods in the life of the lease prior to its extension by reason of production of oil or gas in paying quantities.

(31 FR 7806, June 2, 1966). This regulation, without change, was redesignated as 43 CFR 3107.2, 35 FR 9502, June 13, 1970.

It is crystal clear that the definition of "primary term" in the regulation does not follow the language of the statute. To eliminate this confused situation, the statutory definition of "primary term" was placed in the regulation, as 43 CFR 3107.2-1(b) by promulgation of March 19, 1975, 40 FR 12507:

Section 3107.2-1 Terms defined.

(b) Primary term. * * *

(2) "Primary term" of all other leases means the initial term as set forth in the lease. For a competitive lease issued under section 17 of the Mineral Leasing Act, as amended (30 U.S.C. § 226(e)), this means five years, and for a noncompetitive lease issued under that section this means ten years.

(35 FR 9686, June 13, 1970, as amended at 40 FR 12507, Mar. 19, 1975).

This appeal is on all fours with the situations presented to this Board in appeals recently decided, Yates Petroleum Corp., supra. That decision involved three leases, each of which had been extended beyond its primary term because of commitment to an approved unit agreement, and on each of which actual drilling operations were in progress at the end of the extended term. Based upon the language in the Mineral Leasing Act Revision of 1960, 74 Stat. 781, September 2, 1960, it was held that extensions of leases by drilling over could be granted only where the drilling over operations were in progress on the last day of the primary term of 10 years, and not on the last day of any extension of that term, for whatever reason the extension was granted. We adhere to that position.

[1] It is abundantly clear that a noncompetitive oil and gas lease issued subsequent to September 2, 1960, 30 U.S.C. § 226(e), has a primary term of 10 years and that if the lessee is to obtain an extension by drilling over, he must be conducting actual drilling operations at the conclusion of the 10-year primary term, notwithstanding that the actual lease term might otherwise have been extended beyond the end of the initial 10-year primary term.

[2] It is likewise clear that the subject lease had been extended beyond its primary term of 10 years by reason of commitment to and elimination from an approved unit agreement, but also that there had not been any drilling operations being conducted on or for the benefit of this lease at the terminal date of the initial 10-year period.

As the Court held in Enfield, et al. v. Kleppe, Secretary of the Interior, No. 76-1737 (10th Cir. December 16, 1977), __ F.2d __, that in a conflict between statute and regulation, the regulation in conflict is void and unenforceable, and that where the regulation is thus ineffective, there is no retroactivity problem; that the length of time a faulty regulation is on the books is of no consequence because an administrative provision contrary to statute must be

overturned, "no matter how well settled and how long standing," and finally that the argument of plaintiff that it had relied to its detriment upon the regulation was without merit because the defective regulation was never valid so there was right to rely on it.

Accordingly, 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.

Douglas E. Henriques
Administrative Judge

We concur:

Martin Ritvo
Administrative Judge

Edward W. Stuebing
Administrative Judge

