

ESTELLE WOLF ET AL.

IBLA 77-145

Decided October 12, 1978

Appeal from decision of Wyoming State Office, Bureau of Land Management, holding that oil and gas lease W 2687 had expired.

Affirmed.

1. Oil and Gas Leases: Extensions

To qualify for a 2-year extension of an oil and gas lease under the diligent drilling provision of 30 U.S.C. § 226(e), it must be shown that actual drilling operations, that is, penetration of the ground by a drilling bit, were being prosecuted on the lease, or under an approved cooperative or unit plan of development or operation for the benefit of the lease, on the last day of the primary term of the lease. Preliminary work including site preparation and grading of access road is not "actual drilling operations" sufficient to qualify the lease for an extension of 2 years.

APPEARANCES: James D. Voorhees, Esq., Moran, Reidy & Voorhees, Denver, Colorado, for appellants.

OPINION BY ADMINISTRATIVE JUDGE HENRIQUES

Estelle Wolf, Southland Royalty Co. and Amax Petroleum Corp. have appealed from a decision dated January 10, 1977, wherein the Wyoming State Office, Bureau of Land Management (BLM), held that oil and gas lease W 2687 had expired November 30, 1976, because no actual drilling operations were being conducted on or for the benefit of this lease on the last day of the primary term of the lease. 43 CFR 3107.2-3.

The facts in this case are not in dispute. Noncompetitive oil and gas lease W 2687 was issued December 1, 1966, for a primary term of 10 years. Following mesne assignments, title became vested in the appellants: Wolf - 50 percent; Southland - 25 percent and Amax - 25 percent. Effective November 26, 1976, the Geological Survey approved commitment of lease W 2687 to the Stead Canyon East Unit agreement. Southland, as unit operator, contracted with Signal Drilling Co. to drill a well in SW 1/4 NE 1/4 sec. 18, T. 26 N., R. 111 W., 6th principal meridian, within the unit area but not within the area of lease W 2687. Actual drilling of said well was to be commenced before midnight, November 30, 1976. Southland prepared the well site anticipatory of the actual drilling, and Signal then employed Murray Drilling Service to initiate the first drilling operations. A Murray Drilling rig was en route to the well site from Casper, Wyoming, on the morning of November 30, but because of mechanical breakdown, had to return to Casper. After repairs were made, the rig set forth again about 1:30 p.m., and, at 8:30 p.m., went off the road during a blizzard. Notice of this mishap was not given by Murray to Southland until 7:30 a.m., December 1. In the meantime, Southland's representative arrived at the well site just prior to midnight, November 30; he discovered that Murray had not appeared, and so notified Sullivan Drilling of Rock Springs. Sullivan sent a rig which arrived at the well site about 3 a.m., December 1; it rigged up and commenced drilling the surface hole. Subsequently, the well was drilled to its announced depth of 8,700 feet to test the Second Frontier formation, and was completed as a producer.

The crux of appellants' argument is that the Department's interpretation of "actual drilling operations" to include only operations following first penetration of the ground does not comport with Congressional intent to afford extension of leases as a reward for diligent prosecution of drilling operations initiated at the end of the primary term of the lease. They suggest that preparation of the well site, including preparation of the access road, staking and grading the location, construction of necessary reserve pits, bum pits and gas pits, obtaining necessary permits and compliance with NTL 6 before the actual penetration of the ground by the drill bit, are part of "actual drilling operations," especially when the drilling is diligently prosecuted to the completion of a producible well, as occurred in this case. They contend all their operations were conducted with due diligence in a bona fide effort to find oil or gas, and would have included actual penetration of the ground by a drill bit prior to midnight, November 30, 1976, except for the violent adverse weather which caused a casualty to one drilling rig and its crew and can be classifiable only as an operation of force majeure.

Without doubt, the inclement weather brought about the casualties suffered by the putative drilling contractor and the subsequent delay in commencement of actual drilling operations. But such stormy

weather is not uncommon in Wyoming in late November, so that a prudent operator should have allowed more lead time to initiate the drilling activities.

[1] The Department has held that "actual drilling operations" does not include such preparatory work as grading roads and well sites, and moving equipment onto the leased land. Michigan Oil Company, 71 I.D. 263 (1964). Good faith attempts to initiate "actual drilling operations" which are frustrated by inclement weather, personnel shortages and equipment failures so that "actual drilling operations" are not being prosecuted on the lease (or for the benefit of the lease) on the last day of the lease term do not serve to gain the lease an extension. Burton W. Hancock, 31 IBLA 18 (1977), recon. denied, October 21, 1977. Where a lessee has taken only preliminary steps toward drilling but has not actually commenced drilling into the ground before the end of the lease term, the preparatory work is insufficient to permit an extension of the lease. Inexco Oil Company, 20 IBLA 134 (1975). We adhere to the position that "actual drilling operations" as used in 30 U.S.C. § 226(e) (1976), and 43 CFR 3107.2-1(a) do not commence until penetration of the ground by a drilling bit.

The dissent seems not to comprehend the plain language of the regulation, 43 CFR 3107.2-1(a), and to suggest that this Board should, in effect, perform rulemaking by saying that the words of the regulation do not mean what the Department has for years interpreted them to mean, that is, that "actual drilling" means real, present drilling. The dissent, despite its argument, concludes that "actual" means "real" and "present" as opposed to "nominal." That is the exact position of the majority. As applied to well drilling, actual drilling means real, present drilling.

The dissent suggests that the majority would effect a forfeiture of the subject lease. We point out that the lease W 2687 had run its normal 10-year period without any development activity, and thereby could be extended further only if actual drilling operations were being prosecuted in the lease (or under an approved unit agreement for the benefit of the lease), at the end of the primary lease term. The lease was committed to an approved unit agreement. The unit operator was fully aware that the requirement for a 2 year extension of lease W 2687 entailed actual drilling across the midnight hour of November 30, 1976. For a number of reasons, such drilling was not in progress, nor had it been initiated, at the critical time. Lease W 2687 was therefore not entitled to the extension. If this is "forfeiture," it was occasioned by negative action of the lessees in commencement of the drilling, not by any overt action of the Government.

The dissent appears to consider Federal oil and gas leases as being strictly under the common law interpretations given to oil and

gas leases granted by private land owners on fee lands. We do not concede that the one case cited by the dissent establishes a general interpretation of the term "actual drilling operations." We suggest, rather, that it is a phrase peculiar to Federal oil and gas leases, at least in the context of this case. Fee leases frequently have such terms as "drilling operations," "commencement of drilling operations," "commencement of a well," and the like, but they do not, as a rule, contain "actual drilling operations" in their terms as the phrase appears in the Federal regulations. The cases indicate that much controversy has arisen over the construction to be given to the variety of words and phrases related to "commencement of operations." We do not recognize any inconsistency in the Departmental interpretation which has been given to its phrase, "actual drilling operations." While leases of public lands may be generally considered similar in character to those affecting privately owned lands, the public land leases contain many provisions not generally found in fee leases, including, *inter alia*, the following:

The Secretary may require a Federal lessee to join a unit agreement;

The Secretary is authorized to establish minimum values for royalty purposes;

The Secretary may waive, suspend, or reduce rental and royalty payments;

The Secretary may impose upon a Federal lessee special stipulations for protection of the surface of the land and the environment beyond the boundaries of the leased lands;

The Secretary may require the posting of a lease bond;

The Secretary may impose nondiscrimination procedures in the hiring of employees by the lessee, not only on the lease but wherever the lessee may have operations of any kind.

Under 30 U.S.C. § 189 (1976), the Secretary of the Interior has authority to prescribe all necessary and proper rules and regulations to accomplish the purpose of the Mineral Leasing Act. It then follows as the night the day that the Secretary may interpret the meaning of the words he has placed in his regulations, and in this case specifically, the meaning of "actual drilling operations" on Federal leases in connection with 30 U.S.C. § 226(e), and to determine that "actual drilling operations" do not include preparation of the site and other incidentals prior to the penetration of the earth by a drilling bit in a drill hole, consonant with his regulation that defines the term "actual drilling operations," without following cases involving fee land leases.

We believe that the Congress intended "actual drilling" as the key part of the phrase "actual drilling operations." As the House Committee on Interior and Insular Affairs reported, H.R. Report No. 1401, 86th Congress, 2d Session, at p. 5, in connection with H.R. 10455: "Similarly, allowance of an added 2-year term for existing and future oil and gas leases, if actual drilling is being diligently prosecuted at the end of the primary term, will provide impetus toward exploration for oil and gas and reward those who do so diligently."

Because of slight differences between H.R. 10455 and S. 2983, a conference was required between the two Houses. Thereafter, the section affecting section 17(e) of the Mineral Leasing Act was amended in the conference to read, in H.R. 10455, which ultimately was enacted as Mineral Leasing Act Revision of 1960, September 2, 1960 (MLAR 1960):

(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 conference report contained this statement of the managers on the part of the House in H.R. Report No. 2135, 86th Congress, 2d Session, at page 12:

The third sentence of section 17(e) of the Mineral Leasing Act, as proposed to be amended in section 2 of the House bill, covered only lands on which actual drilling operations are prosecuted. This was enlarged in the Senate version to cover also lands for which such operations are prosecuted if they are under an approved unit or development plan.

There is nothing in this legislative history that dissuades us from the view point, subsequently adopted by the Department and followed consistently since 1960, that "actual drilling operations" means penetration of the earth's surface by a drilling bit and subsequent actions, and does not include road building, site preparation, obtaining permission of the Geological Survey to drill the well, or any other activity or operation conducted prior to the penetration of the drill bit into the ground.

The dissent talks of contemporary interpretations as having much weight. In the Rocky Mountain Mineral Law Institute held in July 1961, Kenneth E. Barnhill, Jr., Esq., an attorney specializing in Federal oil and gas practice, stated as follows:

Pre-September 2, 1960 leases, as well as leases issued since that date, will be extended for two years and so long thereafter as oil or gas is produced in paying quantities if, at the end of the primary term, actual drilling operations are being conducted on the land or on land within an approved unit or cooperative plan of development of which the subject lease is a part.

Inasmuch as the language "actual drilling operations" is used, it is assumed that preparatory surface work – which has been sufficient to maintain fee leases – may not be enough. In answer to a question by the Director of the Bureau of Land Management concerning whether commencement of actual drilling would operate ipso facto to extend the lease, the Solicitor of the Department of the Interior stated that "\* \* \* the act of the lessee in commencing and continuing drilling operations is all that is necessary to cause the extension to become effective. The law makes the grant." [Solicitors Opinion M36601, Sept. 23, 1960.]

Thereafter, the Assistant Solicitor, Land Appeals, in Michigan Oil Company, 71 I.D. 263 (1964), did explicitly and specifically define "actual drilling operations" as used in MLAR 1960 as meaning the actual boring of a well with drilling equipment and not including any preparatory work such as grading roads or well sites or moving in equipment.

Looking at 43 CFR 3107.2-1, we find the definition of "actual drilling operations" to be

(a) Actual drilling operations. As used in this section "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.

It is to be noted that those parts of "actual drilling operations" not part of the physical penetration of a drill bit into the ground are the activities which take place after the well hole has been drilled into a producible formation. The definition of "actual drilling operations" does not include any activities which occur prior to the actual penetration of the drill bit into the ground. It is not reasonable to presume that if the predrilling activities such as road building, site preparation, obtaining necessary permits,

etc., were considered by the Secretary to be part of "actual drilling operations" they would have been included in the regulation 43 CFR 3107.2-1(a), even as the postdrilling activities such as completing and equipping the well are mentioned. Contrary to the position of the dissent, we consider such predrilling activities as being precluded by the regulation.

The dissent cites Morton Oil Company, 63 I.D. 392 (1956), as support for its construction of "actual drilling operations." We point out that the drilling operations in Morton were not the type contemplated in this case. In Morton, under the law then in effect, a lease on which production of oil or gas had been obtained would terminate when production ceased unless there were diligent drilling operations in progress. The question in Morton was "diligence" rather than "actual drilling operations."

We are unable to follow the reasoning in the dissent surrounding Michigan Oil Company.

The dissent, in seeking to change the regulation based on statutory language, ignores the fact that this Board has no such authority. In building his argument the dissenter attempts to denigrate or ignore all the Departmental precedents on which the majority has relied. His arguments are based on fallacious logic, in our opinion, and we are not persuaded to his conclusions.

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.

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Douglas E. Henriques  
Administrative Judge

I concur.

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Joan B. Thompson  
Administrative Judge

## ADMINISTRATIVE JUDGE GOSS DISSENTING:

"[T]he obvious intent of the act of September 2, 1960, [is] to reward those who are spending money, time, and effort in developing reserves, by a further extension of their lease." S. Rep. No. 2165, 87th Cong., 2nd Sess., 1962 U.S. Code Cong. and Ad. News, 3238-39, which report pertains to 1962 amendments. Here the facts adequately show that appellants were expending such money, time, and effort. Appellants have made a most diligent effort to commence "actual drilling" and argue that they did, in fact, commence "actual drilling operations." Appellants allege that these operations included "preparation of access, staking and grading of the location, construction of reserve pits, a burn pit and gas pits, and obtaining necessary permits in compliance with NTL 6 requirements." Statement of Reasons at 2.

On the basis of negotiations commenced approximately November 1, 1976, Signal Drilling Company was to drill the well concerned, it being required that drilling commence by November 30, 1976. On November 24, Signal indicated it would not be able to commence such drilling. Murray Drilling Service was then engaged to commence prior to midnight on November 30. A truck mounted rig and operator, M. J. Murray, and a vehicle with pipe and cement started from Casper, Wyoming, at 9 a.m., November 30, 1976. A mechanical breakdown required return for repairs. The equipment started again at 1:30 p.m. At approximately 8:30 p.m., the truck carrying the pipe went off the road due to snow and blizzard conditions. The driver was severely injured and suffered a broken neck. Murray, the operator of the rig, took the injured driver to the Riverton Hospital for treatment. Murray was shaken by the injury to the employee and forgot to call appellant's agent regarding the accident. While snow and blizzard conditions can of course be anticipated in Wyoming in late November, it is possible that except for the injury to the driver, appellants could have been advised of the difficulty and had a substitute driller working on site by midnight. When appellants did discover that the accident had occurred, it was shortly before midnight on November 30; they still were able to obtain a rig from Sullivan Drilling Company which was at the site by 3 a.m., December 1.

The initial question herein concerns the congressional intent of including the word "operations" in the phrase "actual drilling operations were commenced" in 30 U.S.C. § 226(e) (1970). 1/ The usage of

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1/ The basic statute, the Mineral Leasing Act Revision of 1960, provides as follows at 74 Stat. 782:

"(e) Competitive leases issued under this section [17] 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

terms within the oil industry is presumed to have been considered by Congress when it enacted the Mineral Leasing Act Revision of 1960. "Commenced" means the first act of. Cf. Cromwell v. Lewis, 98 Okl. 53, 223 P. 67, (1924). In Humphrys v. Skelly Oil Co., 83 F.2d 989, 992 (1936), the Fifth Circuit construed "drilling operations" in a private lease and cited a long line of precedent and established usage:

The second point labored by appellant, the restricted meaning to be given to the words "drilling operations" used in paragraph 14, is, we think, easily disposed of against his contention. It is quite plain that the principal apparent purpose of the parties which the lease was concerned to express was not the making of a hole in, but the production of oil from, the ground, and it would not be reasonable, in the absence of compelling considerations, to say that the parties deliberately chose terms which were intended to give dominating effect to one stage of the preparatory work over another. Summers on Oil & Gas, pp. 362-363; McCallister v. Texas Co. (Tex.Civ.App.) 223 S.W. 859; Terry v. Texas Co. (Tex.Civ.App.) 228 S.W. 1019; Hudspeth v. Producers' Oil Co., 134 La. 1013, 64 So. 891; Smith v. Gypsy Oil Co., 130 Okl. 135, 265 P. 647; Fast v. Whitney, 26 Wyo. 433, 187 P. 192; Cromwell v. Lewis, 98 Okl. 53, 223 P. 671; Robinson v. Gordon Oil Co., 258 Mich. 643, 242 N.W. 795.

Summers on Oil and Gas, supra, and decisions from all oil and gas producing states, as cited therein, fully support the above interpretation. Summers, as updated in volume 2 of its permanent edition (1959), section 349, Beginning or Commencement of a Well or Drilling Operation, is set forth in part in Appendix A, attached hereto. 2/

To construe section 226(e) as meaning that no drilling "operations" are commenced before a drilling bit penetrates the ground is on its face a contradiction of terms and has the effect of reading the word "operations" entirely out of the statute. That this was not the congressional intent is shown by the reference to "such operations"

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fn. 1 (continued)

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." (Emphasis added.)

2/ Additional decisions, besides those included in Appendix A, are cited in Summers.

and "drilling operations" in Conference Report No. 2135, 86th Cong., 2d Sess., 1960 U.S. Code Cong. and Ad. News 3335 (1946). <sup>3/</sup>

Neither does the word "actual" connote only "actual" drilling by a bit into the ground, to the exclusion of other "actual" physical drilling operations. "Actual" has been construed by the Supreme Court in *Astor v. Merritt*, 111 U.S. 202 (1884): "The word 'actual,' in the lexicon, has a meaning 'real' as opposed to 'nominal,' as well as the meaning of 'present.'"

Apparently the words "actual drilling operations" first appeared in connection with withdrawals in the 1946 amendment to section 17 of the Mineral Leasing Act of 1920, 60 Stat. 951. The 1946 amendment to section 17 read in part:

Any lease issued under this Act upon which there is production during or after the primary term shall not terminate when such production ceases if diligent drilling operations are in progress on the land under lease during such period of nonproduction.

Upon the expiration of the primary term of any noncompetitive lease maintained in accordance with applicable statutory requirements and regulations, the record titleholder thereof shall be entitled to a single extension of the lease, unless then otherwise provided by law, for such lands covered by it as are not on the expiration date of the lease within the known geological structure of a producing oil or gas field or withdrawn from leasing under this section. A withdrawal, however, shall not affect the right to an extension if actual drilling operations on such lands were commenced prior thereto and were being diligently prosecuted on such expiration date. \* \* \* Such extension shall be for a period of five years and so long thereafter as oil or gas is produced in paying quantities and shall be subject to such rules and regulations as are in force at the expiration of the initial five-year term of the lease. No extension shall be granted unless an application therefor is filed by the record titleholder within a period of ninety days prior to such expiration date. Any noncompetitive lease which is not subject to such extension in whole or in part because the lands covered thereby are within the known geologic structure

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<sup>3/</sup> The Conference Committee Report should be construed as correcting the omission of the word "operations" from the phrase "actual drilling" in S. Rep. No. 1549, 86th Cong., 2d Sess., 1960 U.S. Code Cong. and Ad. News 3319, and H.R. Rep. No. 1401 at 5. If the word had been intentionally omitted from the Reports, then a word of no meaning would be presumed to have been deliberately inserted into the statute.

of a producing oil or gas field at the date of expiration of the primary term of the lease, and upon which drilling operations are being diligently prosecuted on such expiration date, shall continue in effect for a period of two years and so long thereafter as oil or gas is produced in paying quantities. [Emphasis added.]

The 1946 amendment, and all subsequent statutes, were enacted in the light of the above cited judicial decisions and the discussion in Summers.

In the Department report to the Senate Committee, March 15, 1946, Acting Secretary of the Interior Chapman indicated that the word "operations" was integral to the concept of the lessee's equities:

One exception should be made to the defeat of an extension by a withdrawal existing on the expiration date of the lease. This is where the lessee has commenced actual drilling operations prior to the withdrawal and is diligently prosecuting such operations on the expiration date. Such a lessee has equities in his favor which should entitle him to a lease extension despite the subsequent withdrawal.

\* \* \* However, where the leased lands have been withdrawn at the expiration of the initial term of the lease, the lessee should be entitled to an extension only if he commenced drilling operations prior to the withdrawal. The substitute draft so provides on page 7. [Emphasis added.]

S. Rep. No. 1392, 79th Cong. 2d Sess. 7-8 (1946). While it could be argued that a drilling bit in a hole was intended before a lease could be extended on withdrawn land, but that ordinary drilling operations were sufficient for nonwithdrawn lands, this construction is not applied in the Report of the Senate Committee on Public Lands and Surveys. That Report refers to "diligent operations" as the effort which permits any 2-year extension, regardless of whether a withdrawal is involved and regardless of whether the word "actual" is used. "The leases, with certain exceptions, are subject to one renewal for 5 years, and, if not subject to such renewal, are extended for 2 years if diligent operations are in progress at the lease expiration date." <sup>4/</sup> (Emphasis added.)

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<sup>4/</sup> Senate Committee Report, supra at 2. The Interior Report, supra at 5, abbreviates the phrase to "drilling" in discussing all 2-year extensions.

In his April 6, 1960, letter to the Chairman, Senate Interior and Insular Affairs Committee, the Assistant Secretary discusses the difficulty of interpreting the phrases "actual drilling operations" and "drilling operations," and concludes that the latter involves some unspecified lesser test. 1960 U.S. Code Cong. and Ad. News 3329.

An early departmental interpretation of the word "actual," as used in 30 U.S.C. § 226-1(d) (1970), a companion provision of the 1960 statute here concerned, appears in the Solicitor's Memorandum M-36657 (July 17, 1963). <sup>5/</sup> Therein, the Associate Solicitor for Public Lands sets forth his opinion that the word was used to distinguish "actual" from "nominal":

The legislative history of the Mineral Leasing Act Revision is not explicit on the meaning of this term, but it does reveal a significant fact. The original term employed was simply "drilling operations". Then it was amended to "actual drilling operations". It is obvious that the inclusion of the word "actual" was deemed of great importance by the Committee, and it should, therefore, not be dismissed as mere verbiage. The word "actual" is opposed to the word "nominal", and thus the use of "actual" means that the drilling operations must be more than merely nominal. <sup>6/</sup> The purpose of drilling operations is to produce oil or gas. Therefore, an essential characteristic of actual drilling operations is that they be conducted in such a manner as to be an effort (not necessarily the best effort, but a sincere effort) which a man seriously looking for oil or gas could be expected to make in that particular area, given existing knowledge of geologic and other factors normally considered when drilling for oil and gas. Drilling operations lacking this characteristic cannot be deemed actual drilling operations.

The Associate Solicitor does not state that the word "actual" particularly refers to the drilling holes in the ground, as contrasted with other "actual drilling operations." It will be noted that the above language used in construing the word "actual" was later incorporated into 43 CFR 3107.2-2, quoted infra.

In 1964, however, a new definition of "actual drilling operations," at variance with the Associate Solicitor's more contemporaneous construction, was adopted by the Assistant Solicitor in Michigan Oil Company, 71 I.D. 263. In construing section 226-1(d), the word

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<sup>5/</sup> As the majority opinion points out, in 1961 a private attorney referred to a possible interpretation of the statute and cautioned his colleagues that preparatory surface work "may not be enough."

<sup>6/</sup> Emphasis added.

"operations" was read out of the statute. Therein, two general reasons were given for holding that "actual" referred only to the drilling of the hole and not to other drilling operations.

First, the Assistant Solicitor cites Morton Oil Company, 63 I.D. 392, 396 (1956), wherein the Department construed "drilling operations" only as contrasted with "reworking operations." Morton Oil states that the "common usage of the phrase 'drilling operations' within the oil and gas industry is in reference to the actual digging or deepening of a hole \* \* \*." It will be noted that the words being construed in Morton were "drilling operations," rather than the word "actual." No authorities were cited in support of the Morton Oil construction, which construction of "drilling operations" is in fact at variance with the industry interpretation as set forth in Humphrys v. Skelly Oil, supra, and Summers, Oil and Gas, infra. The question of whether "drilling operations" included preparatory work was not an issue in Morton Oil.

Second, the Assistant Solicitor in Michigan Oil concluded that "actual" imparts to "drilling operations" a meaning limited to drilling in the ground. For this proposition, the 1963 Associate Solicitor's Opinion M-36657, supra, was cited, although as quoted above, that opinion reaches a completely contrary conclusion regarding the congressional intent as to the meaning of the term "actual." Further, Michigan Oil at 265 contains the following, which language better supports the 1963 construction of the statute:

Appellant cites 2 Summers, Oil and Gas, § 349 (perm. ed) for the proposition that the general rule in interpreting clauses in leases requiring the commencement or beginning of a well or drilling operations within a stated time is

\* \* \* that actual drilling is unnecessary, but that the location of wells, hauling lumber on the premises, erection of derricks, providing a water supply, moving machinery on the premises and similar acts preliminary to the beginning of the actual work of drilling, when performed with the bona fide intention to proceed thereafter with diligence toward the completion of the well, constitute a commencement or beginning of[\* \* \*] drilling operations \* \* \*

It does not appear from the cases cited in support of this proposition that any of them involved leases containing the term "actual drilling operations." Rather, it is noted that Summers uses the terms "actual drilling" and "actual work of drilling" as denoting the drilling of a hole in the ground as distinguished from such acts as erecting derricks,

moving machinery on the ground, etc., which the courts generally hold to constitute "the \*\*\* commencement \*\*\* of drilling 7/ \*\*\* operations." [Emphasis added.]

Michigan Oil Company thus acknowledges the accepted judicial construction of "drilling operations." The decision does not explain why Congress would have included "operations" in the statute if it were to have no meaning or if it were to have a meaning contrary to industry usage. In 1966 the Department in 43 CFR 3127.2(c) in effect recognized that the "actual drilling operations" definition in Michigan Oil was an incorrect expression of congressional intent, and that the statute should be construed to refer to some actions besides the drilling of a hole in the ground with a drilling rig. Section 3107.2-1, which encompasses former section 3127.2(c), provides in part:

(a) Actual drilling operations. As used in this section "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.

The term "actual drilling operations" in the regulation should, of course, be construed in a manner which does not read "operations" out of the regulation and hence out of the statute. The definition should be presumed to be intended to mean: "As used in this section 'actual drilling operations' shall include not only the physical drilling of a well [operations] but [also] the testing, completing or equipping of such well \*\*\*." The wording of the definition in section 3107.2-1 does not preclude essential pre-bit-in-ground drilling operations as well as post-bit drilling operations, nor is there a statutory basis for such a distinction.

It is difficult to see wherein essential pre-bit drilling operations are any less "actual" than post-bit operations. Rather, it could be argued that the latter, while essential, are less clearly classified as "drilling" operations. Among the magnitude of decisions construing "drilling operations" in private leases, all which have been located concern pre-bit operations rather than post-bit operations. In effect, the majority concludes (1) the Department is not bound by the accepted meaning of "actual" and "drilling operations" as used in the statute and (2) we should assume the Department in section 3107.2-1 intended to impose a definition of "operations" restricted to bit and post-bit operations, a definition exactly opposite to the industry definition – which encompasses pre-bit and bit operations and upon

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7/ Words incorrectly included in the quotation from 2 Summers, Oil and Gas 460, are omitted. See Appendix A hereto.

which definition the statute was based. As submitted above, I do not believe that such a construction is necessary.

As noted above, the language of section 3107.2-2 was used by the Associate Solicitor in 1963 in connection with the word "actual." Section 3107.2-1 must, therefore, be read in conjunction with section 3107.2-2 which further defines "diligent operations" as including an informed and serious effort:

Diligent operations. 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. [Emphasis added.]

The statute and the above regulations should of course be construed in an equitable manner. In City of Chicago v. Federal Power Commission, 385 F.2d 629 (D.C. Cir. 1967), cert. denied, 390 U.S. 945 (1968), the Circuit Court stated at 642-43:

It is argued to us that [the statute] "does not confer equity powers" upon respondent Commission. It may readily be agreed that a commission does not have the same range as an equity court to summon powers to the call of justice. \* \* \* However, when an agency is exercising powers entrusted to it by Congress, it may have recourse to equitable conceptions in striving for the reasonableness that broadly identifies the ambit of sound discretion. Conceptions of equity are not a special province of the courts but may properly be invoked by administrative agencies seeking to achieve \* \* \* the necessities of control in an increasingly complex society without sacrifice of fundamental principles of fairness and justice.

Earlier, the Supreme Court discussed the Secretary's "superintending and supervisory power \* \* \* to do justice" in the face of particular unexpected contingencies:

[W]e hold that the statute requiring approval by the Secretary of the Interior was intended to vest discretion in him by which wrongs like this could be righted, and equitable considerations, so significant and impressive as this, given full force. It is obvious, it is common knowledge, that, in the administration of such large and varied interests are intrusted to the land department, matters not foreseen, equities not anticipated, and which are therefore not provided for by express statute, may sometimes arise, and therefore that the Secretary of the Interior is given that superintending and supervising power which will enable him,

in the face of these unexpected contingencies, to do justice.

Williams v. United States, 138 U.S. 514 (1891).

It would be a waste of judicial, executive and private resources to require that the courts be burdened with all cases requiring an equitable application of a statute. If a court would have the authority to do justice under appropriate circumstances, the above authorities indicate that the Secretary also possesses a degree of that authority and responsibility.

Under the circumstances, the broken neck and the delays resulting therefrom should be considered such an unforeseeable event as to bar what is similar to a forfeiture of the lease. See, e.g., Hyde v. Blaxter, 299 F. 167 (8th Cir. 1924). Appellants state the operations commenced by the Sullivan Drilling Company rig were diligently continued to 8,700 feet as required by the unit agreement, and the well is completed for production. There is no question as to appellant's good faith. The purposes of the statute have been fully satisfied.

While I firmly agree that Departmental precedent should not be lightly reevaluated, no judicial decisions or text authority has been cited in support of the majority position. In 1975, the Supreme Court in NLRB v. J. Weingarten, Inc., 420 U.S. 251, 265-66, discussed the propriety of an agency review of its previous administrative construction in the light of administrative experience:

[T]he Board argues that the case is one where "[t]he nature of the problem, as revealed by unfolding variant situations, inevitably involves an evolutionary process for its rational response, not a quick, definitive formula as a comprehensive answer. And so, it is not surprising that the Board has more or less felt its way . . . and has modified and reformed its standards on the basis of accumulating experience." Electrical Workers v. NLRB, 366 U.S. 667, 674 (1961).

We agree that its earlier precedents do not impair the validity of the Board's construction. That construction in no wise exceeds the reach of § 7, but falls well within the scope of the rights created by that section. The use by an administrative agency of the evolutionary approach is particularly fitting. To hold that the Board's earlier decisions froze the development of this important aspect of the national labor law would misconceive the nature of administrative decisionmaking. "Cumulative experience" begets understanding and insight by which judgments . . . are validated or qualified or invalidated. The constant process of trial and error, on a

wider and fuller scale than a single adversary litigation permits, differentiates perhaps more than anything else the administrative from the judicial process." NLRB v. Seven-Up Co., 344 U.S. 344, 349 (1953).

In Burton W. Hancock, 31 IBLA 18, 19 (1977), a lease was held to have terminated despite a commendable attempt to commence earlier drilling §/ and also despite "concededly heroic efforts" at drilling, which efforts were frustrated by the failure of several pieces of equipment during the coldest period since 1892. Those facts, and the unfortunate facts herein, are examples of inequitable results not intended by Congress. I submit that this accumulating experience requires a reexamination of the Michigan Oil Company interpretation.

Under the approach suggested, the Federal interest would be fully protected by the diligence requirements in section 3107.2-2. I would set aside the decision and remand the case.

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Joseph W. Goss  
Administrative Judge

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§/ See case record.

APPENDIX A

Excerpts from 2 Summers, The Law of Oil & Gas, 459-66

§ 349. Beginning or Commencement of a Well or Drilling Operations

There are several provisions of an oil and gas lease which make it necessary to determine what constitutes the beginning or commencement of a well or of drilling or reworking operations.

The general rule seems to be that actual drilling is unnecessary, but that the location of wells, hauling lumber on the premises, erection of derricks, providing a water supply, moving machinery on the premises and similar acts preliminary to the beginning of the actual work of drilling, when performed with the bona fide intention to proceed thereafter with diligence toward the completion of the well, constitute a commencement or beginning of a well or drilling operations within the meaning of this clause of the lease. 49/

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49/ "Cal.—In Lewis v. Nance, 1937, 66 P.2d 708, 20 Cal.App.2d 71, the court distinguished between "commencement of operations" and "commencement of drilling", holding that the last provision requires actual drilling.

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"Ind.—Illinois Mid-Continent Co. v. Tennis, 1951, 102 N.E.2d 390, 122 Ind.App. 17, acts of lessee were held not to have constituted a good faith commencement of a well. The court quoted this statement of the rule with approval.

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"La.—Hudspeth v. Producers' Oil Co., 1914, 64 So. 891, 134 La. 1013. \* \* \* \* \*

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"Mich.—Robinson v. Gordon Oil Co., 1932, 242 N.W. 795, 258 Mich. 643. \* \* \* \* \*

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"Mont.—Solberg v. Sunburst Oil & Gas Co., 1925, 235 P. 761, 73 Mont. 94, a distinction is made between a lease which requires the commencement of operations and one which requires the commencement of drilling within a certain time and it is held under the latter lease there must be actual drilling to satisfy the terms of the lease.

"Ohio—Duffield v. Russell, 1899, 19 Ohio Cir.Ct.R. 266, 10 O.C.D. 472.

"Okl. — In Smith v. Gypsy Oil Co., 1928, 265 P. 647, 130 Okl. 135, the court said:

"A provision in an oil and gas lease that the lessee "shall commence to drill a well within the terms of this lease" is complied with, where the lessee, or his assign, has, in good faith, made the location for the well, moved the machinery upon the premises, partially completed the erection of a derrick, and connected water, gas,

If the lessee has performed such preliminary acts within the time limited, and has thereafter actually proceeded with the drilling to completion of a well, the intent with which he did the preliminary acts are unquestionable, and the court may rule as a matter of law that the well was commenced within the time specified by the lease 50/. \* \* \*

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fn. 49 (continued)

and tank lines to supply water and fuel for the drilling operations before the date of the expiration of the lease, if it, in good faith, continues to prosecute drilling operations and completes the well with diligence and dispatch, although the actual drilling of the well does not begin until after the date fixed for the expiration of the lease.' [Emphasis added.]

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"Woods v. Bost, Civ.App.1930, 26 S.W.2d 299.

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"W.Va. – Fleming Oil & Gas Co. v. South Penn Oil Co., 1893, 17 S.E. 203, 37 W.Va. 645, 654.

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"In 1 Thornton, The Law of Oil and Gas, 3d Ed., § 147, the following statement is made: "A lease requiring work of development to be commenced within a certain time, by drilling wells, requires actual drilling operations to be commenced within the time specified; and the mere erection of drilling apparatus will not be a compliance with its terms." The only oil and gas case cited to support this statement is Duffield v. Russell, supra. But in that case the court held that staking out the location for the well, making the contract for the lumber for rig, and cutting a portion of the timber, constituted a commencement of operations within the meaning of the lease; the court saying: "We think that there can be no question but that what he did upon that day was a commencement of operations within the meaning of this contract. On general principles we would say this, because the commencement of operations upon land for the development of oil or gas, if done honestly and bona fide, with the intention of developing, may consist of trivial and comparatively insignificant matter, when we take into consideration what is to be done. Any act, the performance of which has a tendency to produce the desired result, is a commencement of operations." This case, as well as Henderson v. Ferrell and Fleming Oil & Gas Co. v. South Penn Oil Co., supra, are squarely contra to the last clause of Thornton's. In Moore v. West, Tex.Civ.App. 1922, 239 S.W. 710, Thornton's statement is quoted without comment"

50/ "Ark.–Vickers V. Peaker, 1957, 300 S.W.2d 29, 227 Ark. 587 (quoting from the text).

"La.–Hudspeth v. Producers' Oil Co., [supra n. 49].

"Mich.–Robinson v. Gordon Oil Co., [supra n. 49].

"Okl.–Aldridge v. Gypsy Oil Co., 1928, 268 P. 1109, 132 Okl. 13.

\* \* \* \* \*

Where the lessee's good faith in the performance of acts preliminary to the commencement of actual drilling is established by uncontroverted evidence of actual completion of the well with due diligence, 51/ the court may rule as a matter of law that these acts were sufficient to constitute a beginning of operations.

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fn. 50 (continued)

"Tex.—\* \* \*.

"Terry v. Texas Co., Civ.App.1921, 228 S.W. 1019.

"W.Va.—Fleming Oil & Gas Co. v. South Penn Oil Co., [supra n. 49]." 51/ Okl.—Cromwell v. Lewis, 1924, 223 P. 671, 98 Okl. 53 (lessee actually completed the well).

"Tex.—In Wheelock v. Battee, Tex.Civ.App., 1949, 225 S.W.2d 591, ref. n. r. e., where the lessee, prior to the anniversary date of the lease, filed notice of intention to drill with the Railroad Commission, made an agreement with a drilling contractor to drill a well, employed a surveyor who made a location and driller actually commenced operations on the last day for the commencement of well but ceased operations a day later when the lessor stated that operations had commenced too late, it was held that the unless lease had not terminated for failure to commence drilling operations in good faith."

