

OIL AND GAS LEASING ON INDIAN LANDS



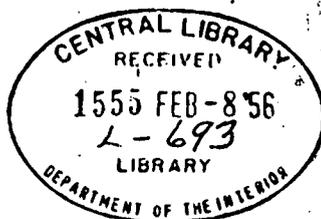
by
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FOREWORD

I am pleased to see this book published and happy to add a brief foreword to it. This book brings together material, documented, with authorities available, relating to the status of Indians and their land, procedures on leasing Indian land, reprints of pertinent statutes and regulations, data on Indian land leases and production, and other material that should be helpful to the student or anyone, even a specialist, interested in or concerned with the oil and gas industry. This book brings together that which is otherwise scattered in many places and in numerous documents and a large part of which is not available to the average reader.

To my knowledge there has never been a book written specifically on the subject of oil and gas leasing of Indian lands. The advantage of having available in one place pertinent material relating to the subject becomes apparent in the light of the complexity of the body of Indian law, resting upon more than 4,000 treaties and statutes and upon thousands of administrative rulings. On the one hand, Indians are citizens with all of the rights and responsibilities of citizenship. On the other hand, Indians may not dispose of or lease their trust or restricted property except in the manner provided in the laws of Congress. While generally an Indian may not lease his land without the approval of the Secretary of the Interior or his authorized representative, the Secretary may not lease the land without the consent of the Indian owner or owners. In this book, as an overall approach to the subject, the writer has included chapters to provide an insight into the laws relating to the status of Indians and their land. This introduction to the complexity of the status of Indians and their land should be helpful to the reader.

In reading this foreword it should not be interpreted that there is any agreement or disagreement, implied or otherwise, with the statements, discussions or interpretations in this book or that the Bureau of Indian Affairs or the Department of the Interior assumes any responsi-

bility for the subject matter. What is important is the fact that for the first time material applicable in general to the oil and gas leasing of Indian lands has been brought together and documented to the extent that it should prove useful as a text and save much research as a reference on questions of leasing procedure and on factors affecting the status of Indian lands.

GLENN L. EMMONS
Commissioner
Bureau of Indian Affairs

Preface

During the last few years the field of oil and gas has become firmly established as a distinct branch of the law. Many law schools have established departments of oil and gas and some now offer specialized degrees in that field. An increasing percentage of attorneys are becoming oil and gas specialists. Numerous treatises have been published on the subject, and so many law review articles have been written that one law review has even published a special compilation of articles on that general subject.¹ Many states have revised and codified their oil and gas laws. Courts are continually grinding out thousands of new decisions each year, many of which clarify or change legal precepts in this field.

Amid this scramble for research, training, legal revision and library expansion, however, there is one general phase of oil and gas law which scholars, authors and courts have usually overlooked or neglected—the development and production of oil and gas on Indian lands. In the legal research for this volume, the author was unable to discover a single treatise, law review article or work of any kind on this specific subject. Several excellent general treatises on Indian land titles in Oklahoma which touch upon oil and gas leasing on Indian lands in that state have been published, but nothing with this sole objective.

Perhaps, you say, this is because the subject is unimportant. Nothing could be further from the truth. Management of Indian lands has always been and still is a mammoth operation. Unfortunately it has been accompanied by an almost complete lack of information and understanding of such operations by the general public. A great many popular misconceptions have arisen and often remained. Too often the general practitioner has failed to assist in eradicating these misconceptions because of lack of inquiry.

A high percentage of attorneys seems unaware of the importance of Indian titles in connection with ac-

¹ OIL AND GAS LAW, 1951, reprinted from various issues of Texas L. Rev.

forms and other authorities. All references to laws and regulations are to those in effect as of the date of printing.

As is customary in a work of this type, the writer has received generous assistance from various sources. The Bureau of Indian Affairs, and especially Mr. H. M. Critchfield, Chief of the Branch of Realty, and Mr. H. F. Larkin, Chief of the Mineral Section, have been most patient and cooperative in furnishing materials and commenting on textual material and authorities. Dr. William H. Gilbert, Analyst of Indian Affairs, Legislative Reference Service, Library of Congress, and Mr. Albert A. Grorud, Special Assistant, Committee on Interior and Insular Affairs, United States Senate, have also kindly furnished materials which have been quite useful. All such assistance was rendered in an individual rather than an official capacity and no governmental agency would be bound by any statement contained herein. All opinions and conclusions stated are those of the author personally.

If this work should prove to be helpful to the attorney who is attempting to find his way through the maze of laws, regulations, decisions and forms pertaining to oil and gas leasing on Indian lands even without furnishing all of the desired answers, then the purpose of the author will have been accomplished.

May 21, 1955.

ALFRED E. McLANE

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§ 78. *Expiration of Periods of Trust and Restrictions on Allotted Lands*

Prior to the General Allotment Act periods of trust specified in allotments made pursuant to special treaty provisions were from five to 25 years. Periods of trust under the General Allotment Act and periods of restrictions in other cases of allotted lands was 25 years, but the President was authorized by statute to continue all restrictions on alienation for such period as he might deem best.⁹ Pursuant to this authority the President has by a series of executive orders extended all trust periods and restrictions against alienation, the latest such extension being by executive order on December 13, 1954, extending for one year all such restrictions expiring in 1955.¹⁰

⁹ 34 STAT. 326 (1906), 25 U.S.C. § 391 (1952). Inapplicable to lands in the former Indian territory; however, their restrictions have also been extended.

¹⁰ 18 FED. REG. dated Dec. 17, 1954, p. 8658.

CHAPTER VIII.

OIL AND GAS LEASES—GENERAL AUTHORITY FOR

§ 79. *Indian Leases as Distinguished from Leases on Public Domain*

Many attorneys have failed to distinguish Indian lands (both tribal and allotted) from federal public domain and other lands held or controlled by the federal government with respect to oil and gas leases. Although the Secretary of the Interior, and pursuant to authority from him, the Commissioner of Indian Affairs also, have supervisory authority over oil and gas leases on Indian lands, the lands are privately owned and are held for the sole benefit of the Indians. It should not be expected, therefore, that the laws and regulations pertaining thereto would be the same as those controlling leases on public domain. While there have been statements that regulations applicable to Indian lands follow generally those governing public domain,¹¹ it is submitted that these two general classes of leases are greatly different and the laws and regulations applicable to the two differ in many fundamental respects.

§ 80. *Tribal Leases—Authority to Execute*

Prior to 1891, there was no general statute authorizing tribal leasing. In 1891, a general statute¹² was passed authorizing tribal leasing, which was amended several times commencing in 1924, when it was broadened to authorize leasing at public auction by the Secretary of the Interior with consent of the tribal council. The leases were to be for a period of ten years and thereafter so long as oil and gas should be found in paying quantities.¹³ The act was held to apply not only to lands purchased by Indians but also to exchange lands acquired by Indians in return for a cession or surrender by them of other lands.¹⁴ The reserved oil and

¹¹ *Conservation of Oil and Gas*, published by American Bar Association, Section of Mineral Law, edited by Blake M. Murphy (1948), p. 622.

¹² 26 STAT. 795 (1891), 25 U.S.C. § 397 (1952).

¹³ 43 STAT. 244 (1924), 25 U.S.C. § 398 (1952).

¹⁴ *British-American Oil Producing Company v. Board of Equalization of State of Montana*, 299 U.S. 159 (1936), *rehearing denied*, 299 U.S. 624 (1936).

gas deposits underlying allotted lands in a reservation were held to constitute unallotted lands, owned by the tribe.¹⁵

In 1927 a statutory amendment authorized the leasing of unallotted lands within any reservation or withdrawal created by Executive Order for Indian purposes or for the use or occupancy of any Indians or tribe under the terms and conditions of the 1924 Act.¹⁶

The general procedure for tribal leasing was changed by Congress in 1938 when it expressly authorized the Secretary of the Interior to offer leases at public auction or on sealed bids on tribal lands.¹⁷ Excepted from this statute were the Papago Indian Reservation in Arizona, the Crow Reservation in Montana, the ceded lands of the Shoshone Reservation in Wyoming, and the Osage Reservation in Oklahoma.¹⁸

Earlier statutes which have never been expressly repealed authorized leasing of tribal lands on certain named reservations.¹⁹

The tribal constitution, if any, should be consulted for additional evidence of authority to execute oil and gas leases. The Constitution of December 13, 1935, of the Blackfoot Tribe, empowers the Blackfoot Tribal Council to issue tribal oil leases under terms different from those applicable to the other tribes generally; however, it is the position of the Bureau of Indian Affairs that the leasing of Blackfoot tribal lands is nevertheless governed by the provisions of 25 C.F.R. Part 186 which apply to other tribes generally and that any tribal leases which differ materially from the standard form specified in Part 186 would require an exception to the regulations.

¹⁵ *Ibid.*

¹⁶ 44 STAT. 1347 (1927), 25 U.S.C. § 398a (1952).

¹⁷ 52 STAT. 347 (1938), 25 U.S.C. § 396b (1952).

¹⁸ 52 STAT. 347 (1938), 25 U.S.C. § 396f (1952).

¹⁹ 39 STAT. 519 (1916) (ceded Wind River lands); 41 STAT. 751 (1920), as amended, 44 STAT. 658 (1926), 44 STAT. 566 (1926) (Crow Reservation); 47 STAT. 1418 (1933) (addition to the Navajo Reservation); 44 STAT. 300 (1926), 25 U.S.C. § 400a (1952) (Indian Agency and School Lands); 42 STAT. 875 (1922), 25 U.S.C. § 400 (1952) (Reserved lands, Fort Peck and Blackfoot Reservations).

§ 81. *Allotted Land Leases—Authority to Execute*

Although the General Allotment Act of 1887 originally prohibited the leasing of allotted lands, a subsequent series of statutes have authorized leasing subject to the control of the Secretary of the Interior.²⁰ A 1909 statute authorized leasing by an allottee who was not a member of the Five Civilized Tribes or the Osage Nation in Oklahoma, for mining purposes for any term of years as might be deemed advisable by the Secretary of the Interior.²¹ Leasing of allotted lands of members of the Five Civilized Tribes and mineral rights of the Osage Nation have traditionally been authorized by special statutes.²²

§ 82. *Allotted Land Leases—Authority to Execute—Leases by Minors and Incompetents*

A lease made by an Indian must still contain all essential elements of a valid contract. Thus, if a minor Indian executes an oil and gas lease he may disaffirm the lease when he comes of age, regardless of whether or not the Secretary of the Interior has approved the lease.²³ The lease in this case would be voidable, as in the case of any contract executed by a minor. The proper procedure would be to obtain a court order for the leasing of the minor's allotted land.

§ 83. *Indian Lands to which General Statutes and Regulations are Inapplicable*

General statutes and regulations as to oil and gas leases on tribal lands²⁴ apply to all Indian reservations unless specially excepted. Separate sets of regulations pertaining to restricted lands of members of the Five Civilized Tribes in Oklahoma,²⁵ the Osage Reservation,²⁶ ceded lands

²⁰ Conservation of Oil and Gas, *supra* note 11, at p. 614.

²¹ 35 STAT. 781 (1909), 25 U.S.C. § 396 (1952).

²² 35 STAT. 812 (1908) (Five Civilized Tribes Allotted Lands); 34 STAT. 539 (1906); 41 STAT. 1249 (1921); 45 STAT. 1478 (1929); 52 STAT. 1034 (1938); 61 STAT. 459 (1947); 64 STAT. 215 (1950) (Osage Reservation).

²³ *Jennings v. Wood*, 192 Fed. 507 (8th Cir. 1911).

²⁴ 25 CODE FED. REGS. PART 186 (1949).

²⁵ *Id.* at Part 183 (allotted lands).

²⁶ *Id.* at Part 180 (allotted lands with minerals reserved by the tribe).

except Osage from 1925 to 1933 was construed. These were minimum payments required to be made until such time as royalties on production should exceed the advance royalty payments, and were similar to the present delay rentals provided for in Indian leases. It was held that these advance royalties were in addition to the prescribed rental for a shut-in gas well. Such advance royalties have also been held to be deductible by the lessee as delay rentals for federal income tax purposes.⁴⁶

§ 150. *How Rental and Royalty Payments are Made*

All rental and royalty payments under Crow leases are made by check or draft on a solvent bank payable to the order of the Superintendent of the Crow agency. Payments under Blackfeet leases are by check, draft or money order payable to the order of the Treasurer of the Blackfeet Tribe but submitted through the office of the Oil and Gas Supervisor for that agency. Payments under Osage leases are made to the Superintendent of that agency by check or bank draft on a solvent bank payable to the order of the Treasurer of the United States. As to other tribes not organized under the Indian Reorganization Act of 1934 and not within the requirements of the regulations, it is the practice for the lessee to pay the first year's rental direct to the Superintendent of the particular agency. Subsequent rentals are also made to the Superintendent but are transmitted through the Oil and Gas Supervisor. Payment is by check or bank draft payable to the order of the Treasurer of the United States. As to tribes organized under the Indian Reorganization Act of 1934 the practice varies and the successful bidder should consult the terms of the advertisement and lease to ascertain the method of payment. Rental and royalty payments on allotted lands are all made to the Superintendent of the particular Indian agency, except that under amendments to 25 Code of Federal Regulations, Part 183, approved September 5, 1951, payments may be made direct to the Five Civilized Tribes as lessors in certain cases.

⁴⁶ *Merrillat v. Commissioner of Internal Revenue*, 9 B.T.A. 813 (1927).

§ 151. *Confusion of Terminology*

In preparing instruments pertaining to oil and gas leases, it is quite important that technical terms such as "royalty" and "delay rentals" be used in their correct technical sense. The courts will generally assume that this has been done; however, courts will occasionally find that such terms have been clearly intended to mean something different. In one Osage case, the term "royalty" as used in a statute was held to include "bonuses."⁴⁷ In a non-Indian Oklahoma case, the term "royalty" was held to mean "mineral rights."⁴⁸

§ 152. *Rentals and Royalties not Subject to Change*

The rentals and royalties specified by the particular lease, and the regulations applicable thereto are not subject to change by the Secretary of the Interior even though the lease may provide that it is subject to all rules, regulations and orders of the Secretary, and even though the Secretary attempt to amend his regulations. Thus it was held that the Secretary could not increase the royalty to the Indians by passing a regulation requiring certain minimum royalty each year.⁴⁹ All forms of lease now in current use prohibit a change in rate of royalty or annual rental without the written consent of the parties to the lease.

§ 153. *Miscellaneous Provisions*

The remaining provisions of the ordinary Indian lease deal with various operational matters which are discussed in the next chapter. Often, special stipulations will be attached to a lease. For example, there is sometimes imposed a requirement that upon request of the Superintendent the lessee will condition any dry hole drilled which is capable of producing water in such a manner as to make the water available to the lessors. Often, the lessee is required to hire Indian labor where available. Special stipulations may also protect farming and grazing rights and national forests.

⁴⁷ *Payne v. United States ex rel. Mosler*, 269 Fed. 871 (D.C. Cir. 1921).
⁴⁸ *Mabee Oil and Gas Company v. Hudson*, 156 F. 2d 450 (10th Cir. 1946).
⁴⁹ *United States v. Missouri Kansas Texas Railroad Company*, 66 F. 2d 919 (10th Cir. 1933) (coal lease); *accord*, *United States v. Murray*, 181 Fed. 723 (8th Cir. 1910).

APPENDIX II.

**REGULATIONS OF THE SECRETARY OF THE
INTERIOR PERTAINING TO OIL AND GAS
LEASING AND OPERATIONS**

(Citations are to the Code of Federal Regulations)

§ 186.7 Lessees to furnish additional information. The superintendent may, either before or after approval of a lease, call for any additional information desired to carry out the regulations in this part. If a lessee shall fail to furnish the papers necessary to put his lease and bond in proper form for consideration, the superintendent shall forward such lease for disapproval.

§ 186.8 Lands to be in compact body. The area covered by a lease shall be in a reasonably compact body and shall conform to the system of public-land surveys, except that leases covering lode ground may consist of one or more adjoining parallelograms 1,500 feet in length by 600 feet in width, as provided by the United States mining laws. No lease under the regulations in this part shall convey any extralateral rights, and no coal lease shall have a length exceeding 1 mile along the outcrop.

§ 186.9 Acreage limitation. (a) No individual, corporation, partnership, company, or association shall hold under leases for mining purposes Indian tribal lands and restricted allotted Indian lands in any one State in excess of the following areas, exclusive of holdings in the Five Civilized Tribes and the Osage Nation:

(1) On deposits of the nature of lodes or veins, containing ores of gold, silver, copper, lead, zinc, or other useful metals, not more than 640 acres.

(2) For beds of placer gold, gypsum, asphaltum, phosphate, iron ores, or other useful minerals except coal, oil, and gas, not more than 960 acres unless otherwise authorized by the Commissioner of Indian Affairs.

Codification: In § 186.9 (a) subparagraph (2) was amended to read as set forth above and subparagraph (4) was revoked, 16 F. R. 7277, July 25, 1951.

§ 186.10 Term of leases. Mining leases may be made for a specified term not to exceed ten years from the date of approval by the Secretary of the Interior, or his authorized representative, and as much longer as the substances specified in the lease are produced in paying quantities.

(18 F. R. 4291, July 23, 1953)

§ 186.11 Government reserves right to buy minerals produced. In time of war or other public emergency all of the executive departments of the United States Government shall have the option to purchase at the posted market price on the date of sale all or any part of the substance or substances produced under any lease.

Rents and Royalties

§ 186.12 Manner of payments. (a) Except where otherwise provided by the terms of leases where the tribes are

organized under the act of June 18, 1934 (48 Stat. 984; 25 U.S.C. 461-479), all rents and other payments due under leases which have been or may be approved by the Secretary of the Interior shall be paid to the superintendent or to such other person as may be designated by the Secretary of the Interior, for the benefit of the lessors. Except advance payments for the first year which shall be sent direct to the superintendent at the time of filing leases, payments of rental and royalty under leases shall be transmitted through the supervisor, shall be accompanied by a statement by the lessee, in triplicate, showing the specific items of rental or royalty that the remittance is intended to cover, and shall be made at such time or times as the lease provides.

(b) In the event of the discovery of minerals in paying quantities all advance payments shall be allowed as credit on stipulated royalties for the year for which such advance payments have been made. No refund will be made under oil, gas, or other mining leases, in the event that royalty from production is not sufficient to equal the advance payment, nor will any part of the moneys so paid be refunded to the lessee because of any subsequent surrender or cancellation of the lease, nor shall the lessee be relieved from the obligation to pay said advance rental annually when it becomes due, by reason of any subsequent surrender or cancellation of the lease.

§ 186.13 Rates of rentals and royalties under oil and gas leases. (a) The lessee shall pay, beginning with the date of approval of oil and gas leases by the Secretary of the Interior, a rental of \$1.25 per acre per annum in advance during the continuance thereof, together with a royalty of 12½ percent of the value or amount of all oil, gas, and/or natural gasoline, and/or all other hydrocarbon substances produced and saved from the land leased, save and except oil, and/or gas used by the lessee for development and operation purposes on the lease, which oil or gas shall be royalty free. During the period of supervision, "value" for the purposes of the lease may, in the discretion of the Secretary of the Interior, be calculated on the basis of the highest price paid or offered (whether calculated on the basis of short or actual volume) at the time of production for the major portion of the oil of the same gravity, and gas, and/or natural gasoline, and/or all other hydrocarbon substances produced and sold from the field where the leased lands are situated, and the actual volume of the marketable product less the content of foreign substances as determined by the supervisor. The actual amount realized by the lessee from the sale of said products may, in the discretion of the Secretary of the Interior, be deemed mere evidence of or conclusive evidence of such value. When paid in value, such royalties shall be due and payable monthly on the last day of the calendar month following the calendar month in which pro-