



OFFICE OF THE ATTORNEY GENERAL OF TEXAS

AUSTIN

GERALD C. MANN  
ATTORNEY GENERAL

Honorable Bascom Giles  
Commissioner General Land Office  
Austin, Texas

Dear Mr. Giles:

Opinion No. 0-458

Re: Right of State to participate  
in bonus, rentals and royalties  
under oil and gas lease executed  
by purchaser in accordance with  
the provisions of Chapter 271,  
Acts of 1951.

This is in reply to your letter of May 8, 1959,  
in which you request our opinion as to the right of the  
State to participate in bonus, rentals and royalties pro-  
vided for in lease No. 21518, covering S.F. 15371, exe-  
cuted by Mrs. E. L. Walker to Robert Fields, lessee.

In your letter you enclose copy of an original  
lease dated March 23, 1936, copy of ratification lease  
dated January 13, 1937, and also certain correspondence  
taken from your file on this matter. All of said instru-  
ments are returned herewith.

The oil and gas lease dated March 23, 1936,  
provides for a royalty of 25/128 of oil and gas to be  
paid to the lessor. No express provision is made in such  
lease for the payment of any portion of said royalty to  
the State of Texas.

The lease dated January 13, 1937, in the printed  
portion thereof, provides for the usual 1/8 royalty of oil  
and gas and further contains the following typewritten pro-  
vision on page 2:

"All payments which may fall due under this lease may be made to Otto Staerker, as Agent, one of the above named lessors, in the manner herein stated, to the extent of one-half thereof, and the other one-half thereof, being the remainder, shall be due and payable to the State of Texas.

"As a further consideration for the execution and delivery of this lease, in addition to the royalties as herein above provided, an overriding interest equal to  $1/16$ th of  $7/8$ ths, or  $7/128$ ths of all oil and/or gas from said lease, if, as and when produced, saved and sold, same to be free of all costs for drilling, equipping and operating, to be paid to lessors.

— "Of the total consideration provided herein to be paid to lessors, including the  $1/8$ th royalty or  $16/128$ ths, together with the  $7/128$ ths overriding interest, making an aggregate of  $23/128$ ths, one-half thereof shall be due and payable to the State of Texas, and the other one-half shall be due and payable jointly to the other lessors herein, which said one-half interest, the said Otto Staerker, is hereby authorized and empowered to collect and receive for us in his name, as our Agent and Attorney-in-fact."

A letter from Otto Staerker, Administrator of the estate of E. L. Walker, a copy of which letter you sent to us, states that the reason for the execution of the lease dated January 13, 1937, was:

"Because of pending litigation giving the State participation in overriding royalty, or oil payments, the Attorney for Robert Fields (lessee) insisted that the lease be rewritten and set out the State's interest to be  $1/2$  of the royalty and overriding."

The correspondence which you sent to us further indicates that the landowner is claiming all royalty and overriding royalty provided for under the lease, with the

exception of a 1/16 royalty which he agrees should properly be paid to the State.

You request the opinion of this Department, under the above stated fact situation, as to whether or not the State of Texas "would be entitled to participate in the additional payments and royalties set up (in the foregoing leases), notwithstanding the court's decision in the Wintermann case to the contrary."

The land having been sold under the provisions of Chapter 271, Acts of 1931 (Art. 5421c, Vernon's Annotated Statutes), the rights of the State and of the State's vendee are governed by that Act unless those rights have been effectively changed by the lease in question. In Section 4 of the 1931 Acts, it is provided as follows:

"All land shall be sold without condition of settlement and with a reservation of one-sixteenth (1/16) of all minerals, as a free royalty to the State, which two conditions shall be expressed in the application to purchase and in the notice of award, the minimum price to be fixed by the Commissioner and in no case to be less than One Dollar (\$1.00) an acre. Provided, that one-eighth (1/8) of all sulphur and other mineral substances from which sulphur may be derived or produced shall be reserved as a free royalty to the State."

— The award and patent to the purchaser of the land in question contain the following mineral reservation provision:

"One-eighth of the sulphur and one-sixteenth of all other minerals in the above described land are reserved to the State, as a free royalty."

In Wintermann v. McDonald, 102 S. W. (2d) 167, the Supreme Court had before it for decision the question as to whether the Land Commissioner of Texas should be required to issue an award and patent to a purchaser under Chapter 271, Acts of 1931, providing for a reservation to the State of only 1/16 of all the minerals except

sulphur as a free royalty to the State. The Land Commissioner in such case contended that he was entitled to insert in the award and patent a reservation of all of the minerals to the State, and that the sale of land under Chapter 271 should be governed by the terms and provisions of Articles 5367 and 5368 of the 1925 Revised Civil Statutes, commonly known as the Relinquishment Act. The Supreme Court held that the award and patent should be issued with a reservation of only 1/16 of the oil and gas to the State as a free royalty. The following language was used in the opinions:

"\* \* \*we think that this act, when construed in the light of the policy of this State relating to public lands and minerals as expressed in certain laws, if not directly, impliedly authorizes the landowner to act as the agent of the State in executing mineral leases thereon, and reserving to the State the free royalties described in section 4 thereof."

"\* \* \*We think that the Legislature intended that the purchasers of land subject to sale under this act shall acquire such land and the minerals therein, but that there shall be reserved to the State one-sixteenth of all minerals as a free royalty to the State, except as to sulphur and other mineral substances from which sulphur may be derived or produced, and as to these a one-eighth thereof shall be reserved as a free royalty to the State."

"The royalties reserved by the State under the provisions of this law constitute a fee in the minerals in place, and will follow the land. For a very able and exhaustive discussion of this question we refer to the opinion of Justice Greenwood in the case of Sheffield v. Hogg, 124 Tex. 290, 77 S. W. (2d) 1021, 80 S. W. (2d) 741. The term 'free royalty' introduced into this act must mean that the interest reserved to the State in the minerals produced on school land sold under the terms of the act must not bear any part of the expense of the production, sale, or delivery thereof."

In the Wintermann case, supra, the Supreme Court has definitely settled the question of the mineral interest which the State is entitled to reserve in land sold under Chapter 271, Acts of 1931. That interest is a free royalty of 1/16 of the oil and gas and 1/8 of all sulphur and other mineral substances from which sulphur may be derived and produced. In the Wintermann case it was further directly held that the Land Commissioner could not legally insist upon inserting in an award and patent under the 1931 Act a greater reservation of oil and gas than the 1/16 free royalty reservation specified by the statute.

The question is now presented as to whether or not the State can legally enforce the payment to it of a greater royalty than 1/16 of the oil and gas when an oil and gas lease executed by the State's vendee provides for the payment of a larger royalty than 1/16 to the State. Or, in the event the above quoted provision contained in the oil and gas lease dated January 13, 1937, is considered as an additional bonus payment rather than as a royalty, can the State enforce the payment to it of a full one-half of such additional bonus or overriding royalty?

In Schlittler v. Smith, 101 S. W. (2d) 543, opinion by the Commission of Appeals and adopted by the Supreme Court, the question involved was whether or not the grantor of land who in his grant had reserved to himself an "undivided 1/2 interest in and to the royalty rights and all of the oil and gas and other minerals in, on or under" the land granted was entitled to receive 1/2 of the bonus and rentals received from an oil and gas lease executed by his grantee.

In holding that the grantor, notwithstanding his reservation of 1/2 of the royalty rights, was not entitled to any of the bonus and rentals received by the grantee from a subsequent lease, the court said:

"A reservation of 'royalty' on all oil, gas and minerals which may be produced necessarily implies that the grantor contemplated the leasing of the land for production. He reserved no right of leasing to himself and consequently the grantee possesses such right."

"\* \* \* It is well settled that a grantor may reserve minerals or mineral rights and he

may also reserve royalties, bonuses, and rentals, either one, more or all. Here we have a reservation of only 'royalty rights.' It is obvious, it seems to us, that this does not include a reservation of bonuses or rentals, but only of an interest in oil, gas, or minerals paid, received, or realized as 'royalty' under any lease existing on the land at the time of the reservation, or thereafter executed by the grantee, his heirs or assigns."

The above cited cases, in our opinion, have announced and settled the rule that the State of Texas is entitled to no more than a 1/16 free royalty interest upon oil and gas in land sold under the provisions of the 1931 Act. The consideration and royalty which the State is entitled to demand is fixed and limited by the 1931 statute and also by the award and patent in question to 1/16 of the oil and gas as a free royalty. No authority is found in the statute to justify or make enforceable a claim by the State for a royalty interest greater than a 1/16 free royalty. Nor is there any consideration paid by the State which will make enforceable, against an unwilling landowner, a claim by the State of a right to participate in royalty, bonus or rentals to a greater extent than a 1/16 free royalty, or for any portion of the bonus paid for the lease.

The conclusion we have reached in this opinion is in accord with a previous opinion of this Department, dated September 2, 1937, addressed to Wm. H. McDonald, then Land Commissioner. We quote from that opinion as follows:

"\* \* \* it is our opinion that under the case of Wintermann v. McDonald, 102 S. W. (2d) 167, (motion for rehearing, 104 S. W. (2d) 4, where land is sold under Chapter 271 of the Acts of the Regular Session of the 42nd Legislature (Vernon's Statutes, Article 5421c) the reservation of 1/16 of the minerals as a free royalty, except 1/8 of sulphur, the State is not entitled to receive:

Honorable Bascom Giles, Page 7

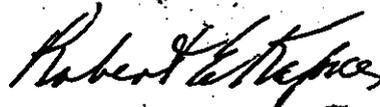
any part of the bonus or rentals received by the lessor. It was our contention in the Wintermann case that the State was authorized to reserve all the minerals and that leases on the land were made under the Relinquishment Act, so as to entitle the State to receive 1/2 of the bonus and rentals as well as the 1/16 royalty. This contention was overruled by the Supreme Court."

You are, therefore, advised that, in our opinion, the State of Texas has no legally enforceable right to participate in the bonus, rentals and royalties provided for by the lease in question, other than to the extent of a 1/16 free royalty.

Yours very truly

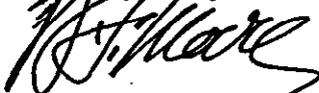
ATTORNEY GENERAL OF TEXAS

By



Robert E. Kepke  
Assistant

APPROVED JUL 28, 1939



FIRST ASSISTANT  
ATTORNEY GENERAL

