Opinion No. 34-720

February 1, 1934

BY: E. K. NEUMANN, Attorney General

TO: Honorable Frank Vesely, Commissioner of Public Lands, Santa Fe, New Mexico.

*{*110}* Your letter of January the 31st, raises the question as to whether or not the Commissioner of Public Lands has the power to enter into agreements which will have the effect of placing in operation the unit plan for development of oil fields in this State, this plan being commonly referred to as unitization.

Sections 97-601 and 97-602 of the 1929 Compilation are as follows:

"Agreements made in the interest of conservation of oil and gas, or the prevention of waste, between and among operators owning separate holdings in the same oil and gas pool, or in an area that appears from geological or other data to be underlaid by a common accumulation of oil or gas, or both, or between and among such operators and royalty owners therein for the purpose of bringing about the *{*111}* development and operation of said pool, or area, or any part thereof, as a unit or establishing and carrying out a plan for the co-operative development and operation thereof, when such agreements are approved by the state geologist, are hereby authorized and shall not be held or construed to violate any of the statutes of this state, relating to monopolies or contracts and combinations in restraint of trade."

"When such agreements as are described in section 1 (97-601) of this act relate to an oil and gas pool wherein are situated lands in which the state owns mineral or royalty interests the commissioner of public lands is hereby authorized to enter into such agreements as a party thereto, on behalf of the state, when in his judgment the best interests of the state will be served thereby."

Under these provisions, it has been held by this office, in Opinion No. 203, that the land commissioner has the power to enter into agreements in the interest of conservation of oil and gas and which agreements pertain to the other matters set forth in these sections and that such agreements, in order to give them force, must carry the approval of the State Geologist.

However, this leads us to give consideration to Section 10 of the Enabling Act, wherein it is provided as follows:

"That it is hereby declared that all lands hereby granted, including those which, having been heretofore granted to the said territory, are hereby expressly transferred and confirmed to the said state, shall be by the said state held in trust, to be disposed of in whole or in part only in manner as herein provided and for the several objects specified in the respective granting and confirmatory provisions, and that the natural products and

money proceeds of any of said lands shall be subject to the same trusts as the lands producing the same.

"Disposition of any of said lands, or of any money or thing of value directly or indirectly derived therefrom, for any object other than that for which such particular lands, or the lands from which such money or thing of value shall have been derived, were granted or confirmed, or in any manner contrary to the provisions of this act, shall be deemed a breach of trust."

Apparently, therefore, under the Enabling Act, the Commissioner of Public Lands would have no right to enter into any agreement which by the terms thereof would have the effect of reducing the proceeds which would otherwise accrue to the State of New Mexico.

We have in mind particularly the question of royalties upon oil and gas produced upon state owned lands. In other words, under the unit plan, if a well should be drilled upon state lands which produces a thousand barrels of oil, such oil is prorated among the other signers of the unitization agreement. It must be made clear that the state cannot waive its right to any royalties upon oil and gas produced upon state owned land.

We see no reason, however, why the commissioner, with the approval of the state geologist, could not enter into such an agreement provided same carries an exception in so far as royalties are concerned, and we would suggest that under this plan it be made clear in the agreement that the royalty upon oil and gas produced on state owned land must be paid in accordance with the actual amounts of production and before division or proration among other signers of the agreement.

To enter into a straight unit plan agreement without taking the question of royalty due the state into consideration would, in our opinion, be repugnant to the above provisions of our Enabling Act.

Trusting the above sufficiently advises you as to your inquiry, I am

By: FRANK H. PATTON,

Asst. Attorney General