Opinion No. 45-4692

April 16, 1945

BY: C. C. McCULLOH, Attorney General

TO: Honorable John E. Miles Commissioner of Public Lands Santa Fe, New Mexico. Attention: George Graham, Attorney

*{*48}* I have had your letter dated March 26, 1945, but have failed to answer the same due to the fact that the recent session of the Legislature prevented checking into the matter.

In your letter you refer to the 20 [cents] per barrel subsidy or premium charges paid by the Federal Government in the Penrose area in Lea County; and you submit an oil statement made by the Humble Oil and Refining Co., received by you on March 26, 1945, in which the following condition appears in the statement:

"Acceptance of the subsidy payment shown on this statement will evidence your agreement that should we be unable within a reasonable time to obtain reimbursement therefor from the United States Government, you will on demand refund to us the amount of such payment and, in the event you do not reimburse us promptly, we are authorized to deduct the amount of such subsidy payment from sums subsequently due or owing to you."

*{*49}* You are wondering whether the State is entitled to royalty on the 20 [cents] per barrel subsidy payment, and also whether the Commissioner is authorized to accept such conditional payments of the royalty, and to comply with the conditions contained therein.

Section 8-1103 of the 1941 Compilation provides the form of oil and gas lease. Subsection 1 thereof is a covenant in which the lessee agrees to pay one-eighth part of the oil produced, or the cash value thereof, such value to be measured by the price prevailing the day the oil is run into a pipeline or storage tank.

Section 8-1132 of the 1941 Compilation authorizes the Commissioner to set up a suspense account on royalty payments made where litigation is involved relative to the right or title of the lessee, or of the right of the State to make such lease. Since no litigation is involved in the present instance, there seems to be no authority for setting up a suspense account to cover the royalty payments on the 20 [cents] per barrel paid to the State.

An interesting and enlightening article on the general subject of the subsidy payments in connection with stripper oil wells appears in the Tax Magazine, entitled "Taxes of November, 1944."

In the Price Administration Bulletin RMPR No. 436, Amendment 2, dated July 10, 1944, as construed in relation to the revised petroleum compensatory adjustment regulation No. 1, section 7001.2, issued by the Defense Supplies Corporation, and as construed by administrators of the Office of Price Administration, it appears that the 20 [cents] per barrel subsidy is not paid to the producer directly by the Government, but this payment is paid to the first purchaser of the oil, provided he has paid the additional sum of 20 [cents] per barrel to the producer. It is an offer upon the part of the Federal Government to reimburse the first purchaser to the extent of 20 [cents] per barrel for the increased price paid by him. It may be a question of fact whether the 20 [cents] per barrel, added to the regular price per barrel, constitutes the prevailing price in the field on a particular day. If only one purchaser accepted the Government offer, and paid the increased price, that would not be sufficient to constitute the prevailing price in the field. However, if a sufficient number of purchasers accept the Government offer, and all pay the increased price, then the same would constitute the prevailing price, as required by the terms of the statutory oil and gas lease, and, in that event, the State is entitled to royalty on the 20 [cents] per barrel additional price paid.

The first purchaser, after making royalty payment to the State of the amount due the State, cannot hold the State responsible for either a refund or a future credit, but he can only look to the Federal Government to carry out the terms of its contract with him for the reimbursement of the 20 [cents] per barrel. Since the Commissioner of Public Lands is not authorized to set up a suspense account, or to make refunds of moneys legally due the State, and since it is his duty, under the law, to collect all amounts due the State as royalty, I do not believe the condition submitted with the payment of royalty on the 20 [cents] per barrel basis is binding upon the Commissioner of Public Lands or the State.

For that reason, I am of the opinion that the entire royalty should be deposited in the State Treasury in the regular course of business, and that no further credits can legally be allowed in the event the Federal Government fails to abide by its agreement to reimburse the purchaser on the basis of 20 [cents] per barrel in the Penrose field or area.