OFFICE OF THE ATTORNEY GENERAL OF TEXAS
AUSTIN

RALD C. MANN
TORNEY GENERAL

Honorable John E. Taylor, Chief Supervisor
Oil & Gas Division
Railroad Commission of Texas
Austin, Texas

Dear Sir: Opinion No. O-2581
Re: Whether the Railroad Commission of Texas has the authority to grant back allowable to an operator who has been prevented from producing his allowable

We have your letter of July 31, 1940, in which you make a detailed statement of facts, and ask our opinion thereon, as follows:

"On September 24, 1934, the Railroad Commission issued its Rule 37 permit order authorizing Joe Edgar to drill and operate well No. 3 on his Todd-Stinchcomb 3.99 acre tract, Gregg County, Texas, as an exception under the provisions of Rule 37. Suit was filed by Stanolind Oil & Gas Company and Magnolia Petroleum Company against Edgar and the Commission attacking the validity of such permit order. The District Court, upon final hearing, adjudged said permit order to be unreasonable and invalid and enjoined production from said well No. 3. Upon appeal, the District Court judgment was affirmed by the Court of Civil Appeals. (Edgar vs. Stanolind Oil & Gas Company, et al, 90 S. W. (2d) 656). The appellate opinion recited that:

NO COMMUNICATION IS TO BE CONSTRUED AS A DEPARTMENTAL OPINION UNLESS APPROVED BY THE ATTORNEY GENERAL OR FIRST ASSISTANT

"1. The Commission did not have jurisdiction to issue such Rule 37 permit order;

"2. The Edgar lease in question constituted a 'voluntary subdivision in violation of Rule 37';

"3. The Edgar lease already had reasonable development and an equal opportunity with that of adjoining leaseholders to recover the oil beneath such tract.

"On September 11, 1936, after new application, proper notices, and hearings, the Commission again granted Edgar a Rule 37 permit order authorizing production of such well No. 3, the well having previously been drilled under authority of the permit order dated September 24, 1934. An original proceeding was filed by Stanolind and Magnolia in the Court of Civil Appeals seeking writs of prohibition, injunction, and other relief to restrain Edgar from operating said well and to prohibit the Commission from permitting the production of said well and from issuing tenders for any oil produced therefrom. The Court of Civil Appeals denied this relief (Stanolind vs. Edgar, 98 S. W. (2d) 222) upon the ground that an adequate legal remedy existed; but the Court announced that:

"1. Each basis of its prior judgment adjudging the invalidity of the September 24, 1934, permit order was effective and controlling of the last permit order;

"2. The Commission's order and any tenders issued thereunder are void, being in violation of the judgment of such Court in cause No. 8292, consequently any further restraining or prohibitory orders would be supererogatory.

"Edgar applied to the Supreme Court for a writ of error, but the Supreme Court denied the application for lack of jurisdiction on January 6, 1937. Edgar's motion for rehearing was overruled by the Supreme Court. Edgar was thereupon compelled to close in his well and cease production therefrom.

"Meanwhile, Stanolind and Magnolia had filed an original proceeding in the Court of Civil Appeals to enforce the judgments of that Court in causes No. 8292 (90 S. W. (2d) 656) and No. 8580 (98 S. W. (2d) 222), and to prohibit and enjoin Edgar from producing oil from said well No. 3, to plug it, and to hold Edgar in contempt of court for violating such judgments. The Court of Civil Appeals denied all of the relief sought by relators. (Stanolind vs. Edgar, 107 S. W. (2d) 631.) Edgar then again commenced operation of said well under authority of the Commission's permit order dated September 11, 1936.

"Thereafter, Stanolind and Magnolia filed suit against Edgar and the Commission in the District Court of Travis County, attacking said order of September 11, 1936. On May 27, 1939, final judgment was rendered by the District Court sustaining and upholding the validity of said order, the Court in its judgment likewise adjudging that 'all past and future production of oil from said well is in all respects lawful.' No appeal or writ of error from said judgment was perfected.

"By reason of the foregoing facts and proceedings, Edgar was prohibited and prevented from operating said well No. 3 for a period of 103 days from January 22, 1937, to May 6, 1937. During said period the allowable production accorded to said well by the proration schedule and order of the Commission was 25 barrels per day, aggregating a total of 2,575 barrels, for such period which Edgar was, as I understand the facts, ready, willing and able to produce, but

as hereinabove pointed out, was prevented from producing same by virtue of the proceedings hereinabove set forth.

"Edgar now seeks authority from the Commission to produce this oil in such daily quantities and amounts above the current allowable production assigned to said well by the proration schedules of the Commission in any manner that the Commission may authorize.

"Under the facts hereinabove set forth will you please advise whether or not the production of the amount of oil hereinabove mentioned may be permitted by the Commission?"

From the facts as stated in your letter, it appears that the final decision of the court was that the well in question was legal, and that the permittee should have been allowed to produce the allowable which was assigned to this well under the proration schedules of the Railroad Commission of Texas for the East Texas field. The question, therefore, resolves itself into a determination of whether the Railroad Commission has the authority to adjust the allowable from this well in the present and future allowable schedules for the East Texas field so as to grant Edgar "back allowable"; in other words, to permit Edgar to increase his production from this well so as to make up for the amount of allowable production which he lost during the time when his well was closed down.

Generally speaking, the authority of the Railroad Commission to promulgate rules relating to the production of oil and gas depends upon the right of the State of Texas and its agencies to prevent the physical waste of oil and gas, either underground or overground, which results either from inefficient methods of production or production in excess of market demand. See Articles 6014, 6023, 6029, 6042 and 6049c, Vernon's Annotated Texas Civil Statutes. The Railroad Commission is specifically given authority to limit the production of oil, where it finds that "waste is taking place, or is reasonably imminent," under the provisions of Section 7 of Article 6049c.

The limitation of the production from an oil field necessarily carries with it the problem of dividing the allowable production among the various producers in the field. The statutes of Texas provide no specific formula for the distribution of the allowable production, but merely provide in general terms that, "the Commission shall distribute, prorate, or otherwise apportion or allocate the allowable production among the various producers on a reasonable basis." Article 6049c, Section 7.

While there have been no reported court decisions on the subject, the question of the authority of the Railroad Commission to permit an operator to produce "back allowable" has been previously passed upon in opinions of this department. In a letter opinion dated May 27, 1935, to Senator Arthur P. Duggan, by Hon. Scott Gaines, First Assistant Attorney General, it was stated that the Railroad Commission does not have authority to permit an operator to produce "back allowable." The same conclusion was reached in an opinion by Assistant Attorney General W. J. (Dick) Holt, addressed to the Railroad Commission of Texas, dated November 20, 1935. Copies of these opinions are attached hereto.

The Railroad Commission has acted upon the construction of its powers by the Attorney General's Department, and has consistently taken the position that it does not have the authority to permit an operator to make up by present production his failure to produce his allowable in the past. It is a matter of general knowledge that at the time the opinions of this department were written in 1935, various persons were asserting the right to produce large quantities of oil as "back allowable," and the consistent departmental construction of the Railroad Commission's authority by this department and by the Railroad Commission has directly affected important property rights.

In the face of this departmental construction, the Legislature has not seen fit to amend the conservation statutes so as to confer on the Railroad Commission

the authority to grant "back allowable." Section 7 of what is now Article 6049c, Vernon's Annotated Civil Statutes, was amended by Chapter 76, Acts 44th Legislature, Regular Session, Section 6, effective April 13, 1935, and then contained the same provisions as to the powers of the Railroad Commission to prorate the production of oil as hereinbefore quoted. Under Section 20 of this act, its provisions terminated September 1, 1937. By Chapter 15, Acts 1937, 45th Legislature, Regular Session, Section 1, the effective term of this act was extended to September 1, 1939, and by House Bill 851, Acts 46th Legislature, Regular Session, Section 1, the effective term of the act was again extended, to September 1, 1941. Both of these extensions were without any amendment to the statutory provisions relating to the proration powers of the Railroad Commission.

Where statutory provisions are general in their terms, the departmental construction placed upon the statute, if reasonable, will be followed by the courts. This is particularly true where the construction directly affects important property rights. In following the departmental construction by the Railroad Commission of the conservation statutes in another connection, the Supreme Court said in the case of Magnolia Petroleum Company vs. New Process Production Co., 129 Tex. 617, 625, 104 S. W. (2d) 1106:

> "An examination of our conservation statutes discloses that they do not in any manner directly deal with such question, but are open to construction in regard thereto. Under such a record we think in this instance we should sustain the departmental ruling. Neubert v. Chicago, etc., Ry. Co., 116 Texas 644, 296 S. W. 1090; Moorman v. Terrell, Comptroller, 109 Texas 173, 202 S. W. 727; Tolleson v. Hogan, Land Commissioner, 96 Texas 424, 73 S. W. 520."

There is additional reason for adopting the departmental construction where, subsequent to the departmental construction, the Legislature has re-enacted or extended the statute without change, the presumption being that the Legislature knew of the departmental construction and was satisfied with it. Federal Crude Oil Co. vs. Yount-Lee Oil Co., 122 Tex. 21, 52 S. W. (2d) 56; Stephens County vs. Hefner, 118 Tex. 397, 16 S. W. (2d) 804; Railroad Commission of Texas vs. T. & N. O. R. Co., 42 S. W. (2d) 1091 (error refused).

We are of the opinion that this department should adhere to the construction heretofore consistently followed by this department and the Railroad Commission, and we therefore are of the opinion that the Railroad Commission does not have authority to permit Edgar to produce the "back allowable" which he was prevented from producing under the facts stated in your letter.

Yours very truly

ATTORNEY GENERAL OF TEXAS

By James P. Hart

James P. Hart
Assistant

JPH:LW

APPROVED OCT 3, 1940

Gerald C. Mann

ATTORNEY GENERAL OF TEXAS

APPROVED
OPINION
COMMITTEE
BY BWB
CHAIRMAN