

Opinion No. 54-6005

August 25, 1954

BY: RICHARD H. ROBINSON, Attorney General

TO: Honorable E. S. Walker Commissioner of Public Lands Santa Fe, New Mexico.
Attention: Legal Department

{*467} In your letter of August 16, 1954, you ask the opinion of this office {*468} with regard to whether or not you, as the Commissioner of Public Lands, are authorized, under Chapter 87 of the Laws of 1943 (8-113 n, N.M.S.A., 1941) to waive drilling and development requirements of certain leases upon state lands, in view of the fact that an action has been instituted by the United States government to acquire the exclusive use of the lands covered by the said leases for a term commencing July 1, 1954 and ending June 30, 1955, with provision for extending from year to year until June 30, 1959, for military purposes.

The action instituted by the United States government is Civil Action No. 2617 in the United States District Court for the District of New Mexico.

Section 1 of Chapter 87 of the Laws of 1943 provides:

"In all cases where the use of lands embraced in any oil and gas lesse issued by the commissioner of public lands of the state of New Mexico is taken by the United States, by agreement or through condemnation proceedings, for military purposes, or for use in connection with the war effort, under such circumstances as will prevent drilling and development by the oil and gas lessee, the commissioner of public lands may, on application by the lessee, waive compliance with the express or implied drilling and development requirements of any such lease during the period of such use of the lands by the United States and for six (6) months thereafter, but in no event for more than five (5) years from the beginning of such use by the United States. Where the United States takes the use of part only of the lands embraced in any such oil and gas lease, any waiver shall extend only to the lands, the use of which is so taken. On the termination of such use by the United States and of the six (6) months additional period above provided for, the obligation of the lease shall again become effective as fully as if no waiver had been made. If such use by the United States begins during the primary term of any such lease, such primary term shall be extended for a period of time equal to the period of such use and six (6) months thereafter; and if such use by the United States begins during the secondary term of any such lease, such secondary term shall be extended for such period of use and six (6) months thereafter. In all cases, the lessee shall be obligated to continue the payment of the rental provided in said lease, at the rate which is in effect at the time the United States takes possession as aforesaid."

You inquire specifically whether or not the aforesaid action by the Federal government constitutes such a "taking" as would empower you to grant waivers within the meaning of the foregoing statute.

Section 258a of Title 40, U.S.C.A., provides:

"In any proceeding in any court of the United States outside of the District of Columbia which has been or may be instituted by and in the name of and under the authority of the United States for the acquisition of any land or easement or right of way in land for the public use, the petitioner may file in the cause, with the petition or at any time before judgment, a declaration of taking signed by {*469} the authority empowered by law to acquire the lands described in the petition, declaring that said lands are thereby taken for the use of the United States . . .

"Upon the filing said declaration of taking and of the deposit in the court, to the use of the persons entitled thereto, of the amount of the estimated compensation stated in said declaration, title to the said lands in fee simple absolute, or such less estate or interest therein as is specified in said declaration, shall vest in the United States of America, and said lands shall be deemed to be condemned and taken for the use of the United States . . ."

The status of the file in the aforesaid Civil Action, No. 2617, indicates that the Federal government has filed a "declaration of taking" with regard to the state lands in question. That being the case, the condemnation of the said lands, for the interest therein sought to be acquired by the United States government, is complete, See: U.S. v. Carey, C.C.A. Ore. 1944, 143 F.2d 445; U.S. v. Sunset Cemetery Co., C.C.A. Ill.

It is our opinion, therefore, that the United States government has, by its filing of a declaration of taking in its civil action against the said state lands, accomplished the "taking" thereof as contemplated by Chapter 87 of the Laws of 1943, and that you have the power, under the said statute, to waive drilling and development requirements, appurtenant to the leases upon the said lands forthwith.

In your letter, you call our attention to the fact that the United States government, in Civil Action No. 1506 in the United States District Court for the District of New Mexico, acquired the exclusive use of precisely the same lands in question here in 1949 for a term of years extended for yearly periods until June 30, 1954, and that numerous waivers of drilling and development requirements were procured as a result, from the Commissioner of Public Lands. We are of the opinion that that fact in no way precludes your authority at this time to issue such waivers during the current period of the use of the lands by the United States government.

It is true that § 1 of Chapter 87 of the Laws of 1943 provides that waivers may not extend for a period of longer than five years from the inception of the use of lands by the United States government, but the "use" of these state lands which began in 1949 was a different and totally separate use from that which was begun by the Federal

government on July 1, 1954, and with it expired the power of the Commissioner of Public Lands to grant waivers of drilling and development requirements for the period of that use, which period was five years in duration. With the institution of Civil Action No. 2617, and the filing of the said "declaration of taking," a new period of use began, and with that period of use also commenced the power of the Commissioner of Public Lands under Chapter 87 of the Laws of 1943 to grant new waivers of drilling and development requirements for the period of the use by the United States under the rights acquired by it in Civil Action No. 2617, but in no event for more than five years during the particular period of use acquired by the Federal government in that action.

Trusting that the foregoing will answer your question, I am

By: Henry A. Kiker, Jr.

Assist. Attorney General