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# THE MAXIMUM ACREAGE REQUIREMENT OF NONCOMPETITIVE FEDERAL OIL AND GAS LEASE OFFERS ON THE PUBLIC DOMAIN

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According to statistics recently published by the Bureau of Land Management,<sup>1</sup> the Federal Government in 1961 owned more than 767 million acres of land or approximately thirty-four per cent of the entire territory of the United States.<sup>2</sup> All but fifty-seven million acres of this property<sup>3</sup> is classified as the "public domain,"<sup>4</sup> most of which is situated in the so-called "public land states" of "Alabama, Florida and Mississippi and all states north of the Ohio and west of the Mississippi River [sic] except Texas"<sup>5</sup> and Hawaii.<sup>6</sup> About half of this land occupies approximately ninety-nine per cent of Alaska, the largest state in the Union.<sup>7</sup> Most of the balance of this land is situated in the Rocky Mountain states, where the concentration is so great that the percentage figures indicating federal ownership reach as high as eighty-six per cent in Nevada, sixty-seven per cent in Utah, and sixty-four per cent in Idaho.<sup>8</sup>

Of the more than 710 million acres of public land in the United States, sixty-eight per cent, or 484 million acres, is administered by the Bureau of Land Management of the Department of the Interior.<sup>9</sup> A major part of the Bureau's responsibility is the administration of oil and gas leasing on these lands under the Mineral Leasing Act of 1920,<sup>10</sup> as amended to date.<sup>11</sup> In 1962 alone, there were almost 130,000 oil and gas leases outstanding on more than ninety-three

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1. Bureau of Land Management, Public Land Statistics (1962).

2. *Id.* at 11.

3. *Ibid.*

4. All federal land is classified into two categories: (1) *public land* or *public domain land* (used interchangeably), consisting of territory which has never left federal ownership (*id.* at 42); and (2) *acquired land*, composed of property obtained by the Federal Government "through purchase, condemnation or gift" (*id.* at 1, 42).

5. Dunham, *Cases and Materials on Modern Real Estate Transactions* 306 (2d ed. 1958).

6. Bureau of Land Management, *The Public Land Records—Footnotes to American History* (1959), giving a brief outline of the historical reasons for this phenomenon.

7. Bureau of Land Management, Public Land Statistics 11 (1962).

8. *Ibid.*

9. *Id.* at 17.

10. Ch. 85, 41 Stat. 437 (1920).

11. 41 Stat. 437 (1920), as amended, 30 U.S.C. § 181 (1958; Supp. IV, 1963).

million acres of the public domain,<sup>12</sup> from which over \$107 million in revenue was derived.<sup>13</sup> Of this amount, more than forty-five million dollars was returned to the states from which it came for use primarily in their respective educational systems.<sup>14</sup>

Accompanying this growth of federal oil and gas leasing over the past four decades, there has arisen a complex body of law designed to regulate its every phase. It is beyond the scope of this article to treat the law on this subject in its entirety.<sup>15</sup> The present discussion will be concerned with synthesizing only one of the many subtopics comprising this branch of the law—that dealing with the maximum acreage requirement which each noncompetitive federal oil and gas lease offer<sup>16</sup> must meet before it can ripen into a lease.<sup>17</sup>

## I

### THE MAXIMUM ACREAGE REQUIREMENT<sup>18</sup>

Briefly stated the maximum acreage requirement provides that no noncompetitive federal oil and gas lease or offer to lease may cover more than 2560 acres of land.<sup>19</sup> This requirement applies even though the tracts included are not contiguous,<sup>20</sup> and even though the Federal Government owns merely a fractional interest in the mineral deposits thereof.<sup>21</sup>

12. Bureau of Land Management, Public Land Statistics 79 (1962).

13. *Id.* at 172.

14. *Id.* at 177, 179.

15. For comprehensive works in this field see Rocky Mt. Min. L. Foundation, Federal Oil and Gas Leases (1963); 2 American Law of Mining tit. X (1960); Hoffman, Oil and Gas Leasing on Federal Lands (1957).

16. A *noncompetitive lease* is one which may cover only those lands which have not been determined by the U.S. Geological Survey (43 C.F.R. § 192.6(a) (1963)) to be "within any known geological structure of a producing oil or gas field," and may be issued only to that "person first making application" therefor (74 Stat. 782 (1960), 30 U.S.C. § 226(c) (Supp. IV, 1963)), according to the simultaneous filing and public drawing provisions of 43 C.F.R. §§ 192.43(b), 192.43(d) (1963).

But if the lands applied for have in fact been determined to fall within such a structure, only a *competitive lease* may be issued thereon, *i.e.*, such lands will be subject to lease only by competitive bidding at a sale by public auction. 74 Stat. 782 (1960), 30 U.S.C. §§ 226(b), 226(e) (Supp. IV, 1963); 43 C.F.R. §§ 192.40, 192.50 (1963).

17. Related requirements, not discussed in this article, include the minimum acreage requirement of 640 acres and the six-mile-square rule of compactness. 43 C.F.R. §§ 192.42(d), (g) (1) (i), (g) (1) (ii) (1963).

18. See generally Hoffman, *op. cit. supra* note 15, at 21; 2 American Law of Mining §§ 10.11c, 10.33 at n. 4 (1963); Landman's Legal Handbook 31 (Continental Oil Co., 1957); Decker, *Land Office Processing of Oil and Gas Lease Offers*, 5 Rocky Mt. Min. L. Inst. 77, 81 (1959); Smith, *Acquisition of Oil and Gas Leases*, 4 Rocky Mt. Min. L. Inst. 135, 170 at nn. 75, 77 (1958).

19. 43 C.F.R. §§ 192.42(d), 192.40(a) (1963).

20. Hoffman, *op. cit. supra* note 15, at 79.

21. Bruce Anderson, 69 Interior Dec. 169 (1962). Though this case involved acquired

If it is impossible to determine with absolute certainty that the total acreage in the offer exceeds 2560 acres because of the indefiniteness of the description of part of the lands sought to be leased, there seems to arise a presumption that it falls within this 2560 acre limit.<sup>22</sup> Thus, where the properly described lands clearly embrace less than 2560 acres and it is unclear how large the misdescribed tract is, the offer will be considered valid as to the former acreage.<sup>23</sup>

## II

### EXCEPTIONS TO THE MAXIMUM ACREAGE REQUIREMENT

The maximum acreage requirement of 2560 acres is subject to two exceptions: (1) the Rule of Approximation, and (2) the Ten Per Cent Excessive Acreage Rule.

#### *A. The Rule of Approximation*

##### 1. Historical Evolution—Homestead Entries

The Rule of Approximation dates back to the nineteenth century when it was first used in connection with Homestead Entries, which were initially permitted by the Homestead Act of 1862.<sup>24</sup> Under the statutory and administrative rules regarding these entries, any citizen of the United States who was the head of a family or a male at least twenty-one years of age was entitled to settle upon any quarter-section (160 acres) of unappropriated public land for the purpose of establishing a "homestead" for his continuous residence and cultivation.<sup>25</sup> However, litigation soon arose regarding attempted entries onto irregular tracts consisting of slightly more than 160 acres. Not wishing to split legal subdivisions while at the same time desiring to avoid the harsh effects of forcing an entryman to eliminate an entire quarter-quarter-section from his homestead merely because to allow him to include it would cause him to exceed the maximum limit by just a few acres, the General Land Office,<sup>26</sup> applying equitable principles, adopted a rule, which came to be known as the Rule of Approximation, to permit him to retain the excessive acreage under certain circumstances. This rule was first enunciated in the official public records of the Gen-

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lands, its construction of 43 C.F.R. § 200.8(d) (2) (1963) would presumably apply to the public domain as well.

22. Duncan Miller, 66 Interior Dec. 370 (1959).

23. *Ibid.*

24. Ch. 75, 12 Stat. 392 (1862).

25. 12 Stat. 392 (1862), as amended, 43 U.S.C. § 161 (1958); 43 C.F.R. §§ 166.2, 166.4, 166.5, 166.15 (1963).

26. Forerunner of the present Bureau of Land Management.

eral Land Office in 1875,<sup>27</sup> and eight years later it was cited approvingly and stated concisely by the Department of the Interior:

It is an established rule of this office that where the excess above 160 acres is less than the deficiency would be should a subdivision be excluded from the entry, the excess may be included, and the contrary when the excess is greater than the deficiency.<sup>28</sup>

Thus, for example, if the entryman claimed a 176.18 acre tract, and if the smallest legal subdivision contained 34.90 acres, the entire acreage was allowed, because the amount in excess of 160 acres (16.18 acres) was 2.54 acres less than the deficiency (18.72 acres, or 34.90 minus 16.18).<sup>29</sup> But if the smallest subdivision in a 175.40 acre tract was 17.50 acres, the entry would be valid only as to 157.90 acres, since the excess of 15.40 acres would be 13.30 acres greater than the 2.10 acre deficiency.<sup>30</sup>

The equitable inclinations of the Department of the Interior soon caused various partial exceptions to be carved out of even this latter situation. For despite the fact that the excess may have exceeded the deficiency with respect to a particular entry, the entryman was nevertheless permitted to ignore the smallest legal subdivision in his computations and to use the next smallest one in its place (1) where the elimination of the former parcel would have deprived him of substantial improvements which he had already made thereon and the difference between the excess and the deficiency was but slight,<sup>31</sup> or (2) where such elimination would have broken the contiguity of the tract,<sup>32</sup> or (3) where this smallest subdivision was the site of the entryman's residence.<sup>33</sup>

## 2. Present Application to Federal Oil and Gas Lease Offers

Although research has disclosed few official attempts to define the Rule of Approximation, as applied to federal oil and gas lease offers,<sup>34</sup> in the pertinent

27. Letter from Commissioner to Register and Receiver at Fargo, Dak. Terr., July 1, 1875. Reported as a note following C. G. Shaw (1871) in Copp L.L. 309, 310 (1875).

28. Henry P. Sayles, 2 Interior Dec. 88, 89 (1883). *Accord*, Bladen v. Southern Pac. R.R., 9 Copp L.O. 119, 119-20 (No. 6, 1882).

29. *Dickie v. Kennedy*, 27 Interior Dec. 305 (1898).

30. Henry C. Tingley, 8 Interior Dec. 205 (1889). *Accord*, Henry P. Sayles, 2 Interior Dec. 88, 89 (1883).

31. Vernon B. Matthews, 8 Interior Dec. 79 (1889) (40 acre quarter-quarter-section not eliminated from 180.27 acre tract; excess exceeded deficiency by only .54 acres); *Davis v. Northern Pac. R.R.*, 27 Interior Dec. 78 (1898) (17.30 acre lot with improvements thereon valued at \$100.00 not eliminated from a 169.45 acre entry; excess exceeded deficiency by only 1.60 acres).

32. James Hanna, 12 Interior Dec. 356 (1891).

33. *Dickie v. Kennedy*, 27 Interior Dec. 305 (1898).

34. This is apparently attributable to the scarcity of large federal leases, which, in turn, is due to the fact that active lease trading has so partitioned the public domain as

regulations<sup>35</sup> or administrative decisions,<sup>36</sup> and has disclosed none in the statutes or judicial cases, the Rule has been very clearly explained by Mr. Lewis E. Hoffman, a former official of the Bureau of Land Management, in his extensively used publication on federal oil and gas leasing.<sup>37</sup> From his discussion of the Rule, it seems that its application to federal oil and gas lease offers closely resembles its operation in the homestead entry cases described above. Nevertheless, in the homestead entry situation, by virtue of its lack of codification into written statute or regulation, the Rule was eventually stated to be "a rule merely of administrative expediency and not of right."<sup>38</sup> Whereas in the federal oil and gas lease offer context it is actually a matter of right since its application is made mandatory by codified regulation.<sup>39</sup> Thus, it appears that the Rule had become so widely known and applied throughout the Department of the Interior for so long a time in the homestead cases, that the draftsmen of the pertinent oil and gas leasing regulations undoubtedly deemed it unnecessary to restate it.

Whatever the reason the Rule provides that if an offer is filed for more than 2560 acres, and if the elimination of the smallest legal subdivision covered thereby reduces the total acreage to less than 2560 acres, then if the difference between the resulting acreage and 2560 acres (comprising the deficiency) is *more* than the difference between 2560 acres and the total acreage applied for (comprising the excess), a lease will issue on such total acreage even though it exceeds 2560 acres. Thus, if an offer is made for 2570 acres and the smallest legal subdivision contains thirty-five acres, a lease will issue on the entire 2570 acre tract, since twenty-five (*i.e.*, 2560 minus (2570 minus 35)) is more than ten (*i.e.*, 2570 minus 2560). But if the acreage under the former calculation is *less* than that under the latter, the maximum acreage on which the lease will issue will only be the total acreage applied for less the acreage of this smallest legal subdivision even though it is less than 2560 acres, because the Bureau of Land Management will not split subdivisions. Thus, if an offer is made for 2590 acres and the smallest legal subdivision contains

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to make the opening up of all the tracts comprising a large block of land at the same time fairly uncommon today. See testimony of Mr. H. E. Harrington of Malco Refineries, Inc. at *Hearings on S. 1496 and S. 1497 Before the Subcommittee on Public Lands of the Senate Committee on Interior and Insular Affairs*, 86th Cong., 1st Sess., pt. 1, at 18 (1959).

35. For the only definition found in the regulations see 43 C.F.R. § 200.34(d), at n. 2 (1963), a footnote to a similar regulation which deals with acquired lands and is cited in 2 American Law of Mining § 10.11c, at n. 8 (1963).

36. See J. L. Dougan, SO-1954-43 (Gower Fed. Serv.), A-26724 (1954).

37. Hoffman, *op. cit. supra* note 15, at 21.

38. Ida B. Sprague, 41 Interior Dec. 386, 387 (1912). In *Sprague* it was further asserted that "indeed, the legality of its application is in many cases at least doubtful." *Ibid.*

39. 43 C.F.R. §§ 192.40(a), 192.42(a) (1963). *Cf.* 2 American Law of Mining § 10.11c, at n. 8 (1963).

thirty-five acres, a lease will issue only on a maximum of 2555 acres, since five (*i.e.*, 2560 minus (2590 minus 35)) is less than thirty (*i.e.*, 2590 minus 2560).<sup>40</sup> And if the excess and the deficiency are equal, *e.g.*, where a 2570 acre offer's smallest legal subdivision is twenty acres, such subdivision must be excluded and a lease may be issued only on the balance of the land applied for, or 2550 acres.<sup>41</sup>

In these latter two situations, it is the practice of the Bureau (1) to allow the applicant thirty days from notice to advise the appropriate Land Office the legal subdivision he desires to eliminate from his offer, and (2) to designate in the notice the subdivision the Bureau will consider rejected, should he fail to take advantage of this privilege, which will usually be that subdivision, the elimination of which will leave the remaining acreage most compact.<sup>42</sup> In neither case, however, will the offer be rejected in its entirety. Only one subdivision will be eliminated, and a lease will issue on the remaining acreage.

Although the Rule as applied here is practically identical with its operation in homestead entry cases, the exceptions which have developed in the latter context have failed to materialize with reference to oil and gas lease offers. One can only speculate as to the scope the Department of the Interior will give to these exceptions in the oil and gas area, but it is unlikely that their effect will be very great. In view of the three-year residence right, a requirement which must be complied with before a certificate of entry will be issued to a "homesteader,"<sup>43</sup> as opposed to an oil and gas lease offeror's inability to acquire any interest at all in the land which he applies for until his application ripens into a lease, the exceptions regarding the building of improvements<sup>44</sup> and the maintenance of a residence<sup>45</sup> upon the smallest legal subdivision become virtually inapplicable to mineral leasing. The only exception which could conceivably apply to the oil and gas lease offer would be the one dealing with the break in contiguity of the tract by elimination of this subdivision.<sup>46</sup> But here it is improbable that the Department of the Interior would regard the need for a contiguous tract of an oil and gas lessee, each of whose drilling operations is usually conducted independently from his others, as being equal to the need therefore of a continuously resident entryman who invariably desires to develop his tract as a single, integrated unit.

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40. *Accord*, J. L. Dougan, SO-1954-43 (Gower Fed. Serv.), A-26724 (1954).

41. *Accord*, Utica Oil Co., 51 Interior Dec. 310 (1925), involving an oil and gas permit case; 2 American Law of Mining § 10.11c (1963).

42. Hoffman, *op. cit. supra* note 15, at 21.

43. 37 Stat. 123 (1912), 43 U.S.C. § 164 (1958).

44. *Davis v. Northern Pac. R.R.*, 27 Interior Dec. 78 (1898).

45. *Dickie v. Kennedy*, 27 Interior Dec. 305 (1898).

46. *James Hanna*, 12 Interior Dec. 356 (1891).

### B. The Ten Per Cent Excessive Acreage Rule<sup>47</sup>

The discussion so far has concerned only the situation where the Rule of Approximation is immediately applicable to the acreage designated in the offer, *i.e.*, where the acreage filed on is more than 2560 acres and the elimination of the smallest legal subdivision from the offer reduces the total acreage to less than 2560 acres. The question next arises: to what treatment will the offer be subjected where the Rule of Approximation is *not* directly applicable but where the offer still exceeds 2560 acres? In other words, what action will be taken on an offer which is made either (1) for more than the maximum acreage permissible for the Rule of Approximation to apply (*e.g.*, where irregular lots are involved), or (2) for more than 2560 acres where the Rule of Approximation cannot conceivably apply (*e.g.*, where the total acreage contains no irregular lots)? Stated more simply, the question is: what will happen to a lease offer whose acreage cannot be reduced to less than 2560 acres by eliminating therefrom only one, *i.e.*, the smallest, legal subdivision?

The regulation<sup>48</sup> provides that in such a situation, as long as the offer contains no more than ten per cent in excess of the maximum allowable acreage of 2560 acres (*i.e.*, presumably no more than 2816 acres), a lease will issue,

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47. As an aid to distinguish sharply the several possible fact combinations presented in this and the preceding subheadings, the following outline may be useful:

1. 2560 acres or less—Rule of Approximation not applicable; offer valid.

2. More than 2560 acres—Elimination of smallest lot:

a. Brings offer under 2560 acres—Rule applies:

(1) Excess exceeds deficiency—Lot must be eliminated; balance of offer must be approved.

(2) Deficiency exceeds excess—Lot need NOT be eliminated; entire offer must be approved.

b. CANNOT bring offer under 2560 acres:

(1) 2816 acres or less:

(a) Reducible to exactly 2560 acres—Rule does NOT apply; approval of offer discretionary. (?)

(b) NOT reducible to exactly 2560 acres—Rule applies:

(i) Excess exceeds deficiency—Lot must be eliminated; balance of offer must (?) be approved.

(ii) Deficiency exceeds excess—Lot need NOT be eliminated; entire offer must be approved.

(2) More than 2816 acres—Entire offer will be rejected.

48. 43 C.F.R. § 192.42(g)(2)(ii) (1963):

(2) An offer to lease containing any of the following deficiencies will be approved by the signing officer provided all other requirements are met:

\* \* \*

(ii) An offer covering not more than 10 per cent over the maximum allowable acreage of 2,560 acres. The lease will be approved for 2,560 acres in the discretion of the signing officer or so much over that amount as may be included under the rule of approximation.



in case (2), above, for 2560 acres in the discretion of the signing Bureau official, or, in case (1), for the maximum acreage in excess of 2560 acres allowed by the Rule of Approximation. Although it may be a valid inference from the language of this regulation that the signing officer may exercise reasonable discretion in accepting or rejecting either type of offer,<sup>49</sup> the only case<sup>50</sup> found on the point seems to make Bureau approval mandatory. Thus, a Land Office Manager's rejection of an offer for an apparently regular tract of 2740 acres for failure to comply with the maximum acreage requirements was reversed by the Bureau Director. Pursuant to this decision, the Manager issued a lease for 2560 acres upon the offeror's filing an amendment to correct the description.<sup>51</sup>

It is to be noted that the regulation is silent as to whether an offer for more than the maximum acreage allowable by the Rule of Approximation plus the lot or forty acre tract, which was eliminated in the computation made in accordance therewith, is to be accepted where this maximum is less than 2560 acres, and if so, the amount of acreage to be leased. Presumably, a lease would issue for the maximum allowed by the Rule of Approximation, since it is not reasonable to suppose that a person who filed an offer upon which a lease is issuable for less than 2560 acres was intended to be penalized more than a person who filed an application upon which a lease is issuable for acreage in excess of this figure. Besides, in the absence of any statement on this point in subsection (2) (ii) of this regulation,<sup>52</sup> the general language at the beginning of subsection (2) would seem to embrace this situation and the mandatory nature of the phrase "will be approved" as used therein would appear to compel this conclusion.

#### SUMMARY

Summing up, and assuming the interpretations urged above to be correct, it seems that an offer for more than 2816 acres must be rejected in its entirety,<sup>53</sup>

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49. This interpretation would have been much clearer had the regulation read: The lease will be approved *in the discretion of the signing officer* for 2,560 acres or for so much over that amount as may be included under the rule of approximation.

This interpretation would indicate that the signing officer was to have discretion in both situations.

50. Herbert H. Hilscher, BLM-1958-185 (1958).

51. *Ibid.* The opinion in *Hilscher* does not indicate whether the lease was granted, because a corrective amendment was filed. Presumably, in view of the silence of the regulations on this point, a lease still would have been issued, even though no amendment had been filed.

52. 43 C.F.R. § 192.42(g) (2) (ii) (1963). See note 48 *supra*.

53. 43 C.F.R. §§ 192.42(g) (1) (ii), 192.42(g) (2) (ii) (1963).

and an offer for 2560 acres or less will not be rejected as to any part thereof under the maximum acreage requirement.<sup>54</sup> But an offer for acreage between these two limits will be approved only as to that portion, be it more or less than 2560 acres, which the Rule of Approximation allows.<sup>55</sup>

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54. 43 C.F.R. § 192.42(d) (1963).

55. 43 C.F.R. §§ 192.42(g) (1) (ii), 192.42(d) (1963).