

June 21, 1960
Opinion No. 60-44

REQUESTED BY: OIL and GAS CONSERVATION COMMISSION

OPINION BY: WADE CHURCH, The Attorney General

- QUESTION:
1. Are the rules and regulations comprising Article II, Chapter III, of the General Rules and Regulations Governing the Conservation of Oil and Gas in Arizona, adopted on April 6, 1959, by State Land Commissioner Lassen, valid and properly adopted rules and regulations?
 2. Are these Rules and Regulations Governing the Conservation of Oil and Gas in Arizona, heretofore adopted by State Land Commissioner Lassen on April 6, 1959, binding on the Commissioner's successor, the Oil and Gas Conservation Commission?
 3. Are the Rules and Regulations previously adopted by State Land Commissioner Lane, on October 2, 1951 and re-adopted on December 31, 1952, valid and binding on the Oil and Gas Conservation Commission established in 1959?
 4. May the Oil and Gas Conservation Commission adopt their own rules and regulations?

- CONCLUSIONS:
1. No.
 2. No.
 3. Yes.
 4. Yes

1.

The Laws of 1959, Chapter 112, amending §§ 27-501, 27-502 and 27-514, of the Arizona Revised Statutes, effective July 1, 1959, provide in Section 4 that the powers and duties imposed upon the State Land Commissioner by Title 27, Chapter 4, Article 1, shall be vested in the Oil and Gas Conservation Commission.

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Prior to the new commission's establishment, the State Land Commissioner was specifically and generally authorized and directed to make rules and regulations and amend them as he deemed necessary for the proper administration and enforcement of the production and conservation of oil and gas in Arizona. (A.R.S. §§ 27-514, 27-515 and 27-516A)

A.R.S. § 27-516, entitled "Rules and Regulations", further provides as follows:-

"B. No rule, regulation or order, or change, renewal or extension thereof, except as otherwise provided by this article, shall, in the absence of an emergency, be made by the commissioner under the provisions of this article except after a public hearing of which not less than ten days' notice has been given. Notice shall be given by publication in a newspaper of general circulation in the state. On or before December 1 each year the commissioner shall designate by general order the newspaper in which the publications will be made during the following calendar year. The commissioner in his discretion may give additional notice by personal service made by an officer authorized to serve process or by an agent of the commissioner, in the same manner as provided for service of summons in civil actions in the Superior Court. Proof of service by the person authorized by the commissioner to publish the notice or, in case of personal service, by the agent of the commissioner, shall be by the affidavit of such person or agent, and proof of service by the sheriff shall be as required by law for service of process in civil actions."

A notice of hearing to consider a proposed amendatory set of Statewide Rules and Regulations Governing the Conservation of Oil and Gas in Arizona was advertised in the Arizona Weekly Gazette, a newspaper of general circulation in Maricopa County only, duly authorized as the official newspaper for the publication of notices relating to oil and gas conservation for the year 1958. This notice was published in the aforesaid newspaper on October 21, 1958, more than ten (10) days before the proposed hearing.

In accordance with the notice, a hearing was held at the time, place, and upon the date specified in the notice, as well as on the date fixed for continuance, at which times all interested parties were given an opportunity to present statements or arguments for or against the proposed amendatory set of rules and regulations.

A.R.S. § 41-1002, entitled "Notice of Proposed Adoption of Rule; Contents of Notice; Hearing" reads as follows:-

"A. At least twenty days prior to adoption of any rule, notice of the proposed action shall be filed with the secretary of state. The notice shall include:

1. A statement of the time, place and nature of the proceedings for adoption of the rule.
2. Reference to the authority under which the rule is proposed to be adopted.
3. Either an informative summary of the proposed rule, or the express terms thereof.
4. Such other matters as are prescribed by statute applicable to the specific state agency or to any specific rule, or class of rules.

B. On the date and at the time designated in the notice, the agency shall afford any interested person, his duly authorized representative, or both, the opportunity to present statements, arguments or contentions in writing relating thereto, with or without opportunity to present them orally."

Pursuant to the section of the Administrative Procedure Act quoted immediately above, notice of tentative repeal of Article II, Chapter III, of the Rules of the State Land Department, and the proposed adoption of the new Article II, Chapter III, of said Rules was filed with the Secretary of State on January 8, 1959, more than twenty (20) days prior to the date of a hearing to be held in the office of the

State Land Commissioner, at 10:00 A.M., on January 29, 1959.

Notice of this latter hearing was not given by the Commissioner in the Arizona Weekly Gazette, or any other newspaper, required by A.R.S. § 27-516B, nor was an affidavit of publication secured. However, a news item, reporting the filing of the notice with the Secretary of State and announcing the hearing to be held, appeared in the January 13, 1959, issue of the Weekly Gazette under the heading "Regulations Filed with State Secretary" (Section 1, Page 5).

At the hearing held January 29, 1959, no interested parties appeared nor was additional testimony taken; and Article II, Chapter III of the Rules and Regulations, adopted October 2, 1951, and re-adopted December 31, 1952, as amended May 8, 1953, as Rules and Regulations of the State Land Department, were purportedly repealed and the new Article II, Chapter III, purportedly adopted. Certification of the purportedly adopted rules was made and the rules filed with the Secretary of State on April 6, 1959.

It is apparent from the foregoing chronology of the steps taken that the procedural requirements of A.R.S. §27-516(B) were not satisfied in that notices of the hearings held in 1958 and 1959 were not published in a newspaper of general circulation in the state. Two recent cases have held the Arizona Weekly Gazette to fall outside the statutory category as a newspaper of general circulation in the state. Wahl v. Hart, 85 Ariz. 85, 332, P.2d. 195; Hart v. Bayless Trading & Investment Company, 86 Ariz. 379, 346, P.2d 1101.

Furthermore, in Hart v. Bayless, supra, the Supreme Court held that a news item appearing in the Arizona Republic was not sufficient compliance with the statute requiring official notice in the daily newspaper and, hence, the purported adoption of zoning ordinances were void and of no effect.

In light of these decisions, it is the conclusion of the Attorney General that the failure to comply with A.R.S. §27-516, as to the publication of official notice, left State Land Commissioner Lassen without jurisdiction to adopt new rules.

2.

Therefore, the purportedly adopted amendments to Article II, Chapter III, of the Rules and Regulations Governing Conservation of Oil and Gas in Arizona are void and not binding on the Oil and Gas Conservation Commission established by the 1959 Arizona State Legislature.

3.

Question number three was not asked by your Commission, but its importance is apparent because if the rules of April 6, 1959, are invalid and not binding, then, we must know whether the rules adopted October 2, 1951, and re-adopted December 31, 1952, are valid and binding on your Commission.

In accordance with Section 11-1717, A.C.A. 1939, identical with the present A.R.S. §27-516, notice of a hearing to be held October 2, 1951, concerning the adoption of Articles I and II, Chapter III, Statewide Rules and Regulations Governing the Conservation of Oil and Gas in Arizona, was published twice in The Messenger, a newspaper of general circulation in the State. The notice first appeared in the issue of September 15, 1951, and was re-published on September 27, 1951. At the hearing on October 2, 1951, Articles I and II of Chapter III were duly adopted. The statutory prerequisites having been met, these rules became operative immediately, there being no Administrative Procedure Act in existence at the time.

On December 31, 1952, the rules adopted on October 2, 1951, were re-adopted and filed in the Office of the Secretary of State pursuant to the Administrative Procedure Act of 1952.

At a hearing held May 8, 1953, pursuant to notices published in The Messenger on April 18 and April 25, 1953, Article II, Chapter III, Rule 40 was amended and became effective upon its certification and filing in the Office of the Secretary of State.

In view of the conclusions reached in questions 1 and 2, the rules adopted on October 2, 1951, and re-adopted on

December 31, 1952, as amended May 8, 1953, remain in full force and effect and are binding on the new commission, nothing in Title 27, Chapter 4, Article 1, appearing to the contrary.

4.

A.R.S. §27-502, as amended by the Laws 1959, Chapter 112, shifts the responsibility for making and amending the rules and regulations for the administration and enforcement of Title 27, Chapter 4, Article 1, to the Oil and Gas Conservation Commission. Hence, the new Commission may consider any amendments to the existing rules de novo; repeal the old rules of October 2, 1951; or adopt and complete a new set of rules, providing that the statutory procedural requirements found in A.R.S. §27-516 be complied with if a change is contemplated

In the event that no action is taken, then the rules and regulations of October 2, 1951, now in force and effect, are binding on the Oil and Gas Commission.



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