VOLUME NO. 39 OPINION NO. 69

LIENS - Continuation of liens for penalties and interest on delinquent taxes when property acquired by United States;
LIENS - Priority of lien securing payment of penalties and interest on delinquent taxes;
LIENS - Securing payment of penalties and interest on delinquent property taxes;
TAXATION - Enforcement of liens for penalties and interest on delinquent property taxes;
UNITED STATES - Enforcement of liens for penalties and interest on delinquent property taxes where property subject to SBA mortgage and where title held by United States;
MONTANA CODE ANNOTATED - Title 14, chapter 17; section 15-16-403; Title 15, chapter 17; Title 15, chapter 24, parts 11 and 12; sections 71-1-223, 71-1-224, 71-1-225, 71-1-226, 71-1-227, 71-1-228;
UNITED STATES CODE - 15 U.S.C. § 646, 28 U.S.C. § 2409a, 28 U.S.C. § 2410.

HELD: 1. The tax lien provided by section 15-16-403, MCA, secures both the delinquent tax and any penalties and interest due thereon.

2. The lien for penalties and interest on delinquent taxes under section 15-16-403, MCA, does not enjoy statutory priority over an SBA mortgage.

3. The lien for penalties and interest is not extinguished when, after the lien attaches, the United States takes title to the property without foreclosure.

4. A county may not enforce a lien for penalties and interest under section 15-16-403, MCA, through the tax sale procedures under Title 15, chapter 17, MCA, if there are other prior security interests in the property.

5. A county may foreclose on a tax lien for penalties and interest on property to which the United States holds title by suit under 28 U.S.C. § 2409a.

17 August 1982

Conrad Fredricks, Esq.
Sweet Grass County Attorney
Sweet Grass County Courthouse
Big Timber, Montana 59011

Dear Mr. Fredricks:

You have requested my opinion on the following questions pertaining to a parcel of property subject to a Small Business Administration (hereinafter "SBA") mortgage:

1. Does the tax lien provided by section 15-16-403, MCA, secure payment of penalty and interest due on delinquent taxes as well as payment of the tax itself?

2. Is the tax lien provided by section 15-16-403, MCA, extinguished when title to the property subject to the lien is acquired by the United States after the lien attaches?

3. If not, may the property to which such a lien has attached be sold under Title 15, chapter 17, MCA, to enforce the tax lien?

Your first question was answered in United States v. Christensen, 218 F. Supp. 722, 729 (D. Mont. 1963), a case in which the United States brought suit to

foreclose mortgages held by the SBA. The State of Montana, Yellowstone County, and Musselshell County were made defendants because each had a recorded interest in the property in the form of liens for delinquent taxes plus penalties and interest. The question before the Court was whether the SBA mortgage had priority over the state tax liens. The Court found that under 15 U.S.C. § 646, SBA mortgages were subordinated to state tax liens entitled to priority under state law. However, the Court held that although a tax lien included penalties and interest under Montana law, Congress intended to subordinate SBA mortgages to the state lien for delinquent taxes but not to the accrued interest and penalties. The priority of the lien for penalties and interest was held to be governed by the principle of "first in time, first in right." 218 F. Supp. at 729. Christensen was cited with approval in Salvation Army v. Board of Equalization, 144 Mont. 415, 420, 396 P.2d 463, 465 (1964), and the Montana Supreme Court may therefore be deemed to have approved the federal Court's interpretation of Montana law.

Your second question is whether state tax liens for penalty and interest are extinguished when the United States takes title to the property. As a matter of federal law the answer is clearly no. United States v. Alabama, 313 U.S. 274, 281-82 (1941), explicitly holds that state tax liens are not extinguished when the United States acquires the property subject to the lien. Likewise, nothing in Montana law requires the conclusion that the county's lien was extinguished. This is not a case in which the interests of all lienors are foreclosed, either judicially or through exercise of a power of sale clause which, under Montana law, is the functional equivalent of foreclosure. §§ 71-1-223 to 71-1-228, MCA. Moreover, the county is not seeking to tax property when title is held by the United States. Rather the county merely seeks to enforce penalties and interest validly imposed against the United States' predecessor in interest, a private party not tax exempt. In the former case, a lien which impairs the interest of the United States is obviously constitutionally infirm as Montana law clearly recognizes. See Title 15, ch. 24, pts. 11 and 12, MCA. This constitutional infirmity is absent when the lien attached before the United States took title, under the Supreme Court's holding in Alabama. 313 U.S. at 280. I find nothing in Montana law to suggest that a tax lien of which the United

States had notice when it took title must cease to exist merely to give the United States a more marketable title. See Alabama, 313 U.S. at 282.

Your final question involves the enforcement of the lien for penalties and interest. You inquire whether the county may institute a summary tax sale proceeding under Title 15, chapter 17, MCA, while the United States holds title. In my opinion it may not. Christensen holds that a lien for penalties and interest does not enjoy statutory priority over an SBA mortgage under 15 U.S.C. § 646. 218 F. Supp. at 729. The tax sale provisions of Title 15, chapter 17, are designed to enforce liens entitled to statutory priority over all other claims, and they therefore make no provision for satisfaction of prior liens out of the proceeds of the sale. Assuming arguendo that the SBA mortgage has priority, a statutory tax sale could not satisfy SBA's interest.

The question arises, however, whether the county could bring an action against the United States to force foreclosure of its security interest. In 1941, when Alabama was decided, such an action was barred by the doctrine of sovereign immunity. 313 U.S. at 281-82. Since that time, Congress has waived the sovereign immunity of the United States in cases involving property in which the United States owns an interest. 28 U.S.C. § 2410 allows a suit against the United States raising issues regarding "real or personal property on which the United States has or claims a mortgage or lien." This section would authorize a foreclosure action by the county here but for the fact that the United States now owns fee title to the property. See Bank of Hemet v. United States, 643 F.2d 661, 664-65 and n.1 (9th Cir. 1981); Bertie's Apple Valley Farms v. United States, 476 F.2d 291, 292 (9th Cir. 1973); see also United States v. Bedford Associates, 657 F.2d 1300, 1317 (2d Cir. 1981), cert. denied, 50 U.S.L.W. 3802 (1982). However, 28 U.S.C. § 2409a has been construed to authorize an action to foreclose a mortgage against property in which the United States has a leasehold interest. Bedford Associates, 657 F.2d at 1314-17. The case involved an action by a bank to foreclose a mortgage on property owned by Bedford but leased to the United States. 28 U.S.C. § 2409a authorizes suit against the United States "to adjudicate a disputed title to real property in which the United States claims an interest, other than a security interest or water

rights." The Second Circuit Court of Appeals reasoned that a mortgage foreclosure was a "title dispute" under this statute, and that the United States claimed an interest in the property under its status as lessee. The Court held that the statute authorized the foreclosure action. Under the reasoning, the county could bring an action to foreclose its lien under 28 U.S.C. § 2409a. In such an action, the interest of the United States would be satisfied first, assuming its priority in time, with any remainder applied to satisfy the county's lien. See, e.g., H. B. Agsten & Sons v. Huntington Trust & Savings Bank, 388 F.2d 156 (4th Cir.), cert. denied, 390 U.S. 1025 (1967).

A second option is available to the county to enforce its lien. Alabama clearly held that when the United States took title a state tax lien was not extinguished, but merely unenforceable against the United States because of sovereign immunity. 313 U.S. at 281. Under this rationale, the lien would follow the property into the hands of persons buying from the United States. Id. at 282. If those persons are not entitled to sovereign immunity and the prior lien of the United States is released, the county could apply the provisions of Title 15, chapter 17, MCA, to compel the purchaser to either satisfy the lien or see the property sold. While the lien clouds the United States' title and impedes its marketability, Alabama states that this fact alone does not render the lien unlawful or void. 313 U.S. at 281-82.

THEREFORE, IT IS MY OPINION:

1. The tax lien provided by section 15-16-403, MCA, secures both the delinquent tax and any penalties and interest due thereon.

2. The lien for penalties and interest on delinquent taxes under section 15-16-403, MCA, does not enjoy statutory priority over an SBA mortgage.

3. The lien for penalties and interest is not extinguished when, after the lien attaches, the United States takes title to the property without foreclosure.

4. A county may not enforce a lien for penalties and interest under section 15-16-403, MCA, through the tax sale procedures under Title 15, chapter 17, MCA, if there are other prior security interests in the property.

5. A county may foreclose on a tax lien for penalties and interest on property to which the United States holds title by suit under 28 U.S.C. § 2409a.

Very truly yours,

MIKE GREELY
Attorney General