Opinion No. 209.

Counties—Tax Deed Lands—Irrigation District Assessment — Conflict of Laws, Federal and State.

HELD: 1. Lands lawfully acquired through tax deed proceedings are acquired free from irrigation district incumbrances, and no longer subject to irrigation district assessments. Title so acquired creates new title as independent grant from sovereign.

2. Federal Courts will give independent interpretation of State statutes in reference to sale of irrigation bonds if at any time of sale of bonds no state decision is in existence, even though there is a decision in existence at time of rendition of Federal decision.

December 13, 1937.

Mr. Thomas Dignan
County Attorney
Glasgow, Montana

Dear Sir:

You have submitted for our opinion the following facts:

It appears that Valley County has acquired a large acreage of irrigated lands in the Milk River Irrigation District through tax deeds; that Valley County has sold some of said lands so acquired, but at the present time owns about 6,000 acres of irrigated lands in said irrigation district; that the irrigation taxes levied against the county from 1932 to 1934 inclusive were stricken from the records and no irrigation taxes have been levied against the county lands until the present time. The question involved is whether or not tax deed lands lawfully acquired through tax deed procedure are subject to these irrigation district assessments.

The facts you submitted are quite general. You have not advised us as to when this irrigation district was created, nor when the bonds were sold. Neither have you advised us as to the specific dates when these tax deed lands were acquired. A specific statement of the facts may require a slightly different application of the law than as herein concluded.

It appears to this office that there is a square conflict in the decisions of the federal courts and those of the Montana Supreme Court upon the question involved. In the cases of Cosman v. Chestnut Valley Irrigation District, 74 Mont. 111; Clark v. Demers, 78 Mont. 287; and Drake v. Schoregge, 85 Mont. 94, it was held that the bonds of the irrigation district were general obligations of the district. The case of Mallot v. Board, 89 Mont. 37, overruled these cases and held that the bonds of the irrigation district were not general obligations, but were a lien against the lands within the district, and that when each tract of land had paid its pro rata share of the bonded indebtedness, that particular tract of land was released from the bond obligation; and that when the county acquired these tax lands by lawful tax deed, such irrigation district bonded indebtedness and lien was de-destroyed; and that the purchaser received a clear title, free from the encumbrances of the irrigation district lien. In arriving at such conclusion, our state court proceeded upon the theory that general county and state taxes were superior and paramount to irrigation district liens, which district liens were special assessments only. The further theory and reasoning being that the holder of an irrigation district bond must protect his rights and his lien by paying the general county and state taxes, just as a mortgagee must pay such general taxes if he intends to protect his mortgage. To give an irrigation bondholder a

priority over general taxes would result in destroying the sovereignty of the government to tax.

The Circuit Court of Appeals, in the case of Judith Basin Irrigation District v. Mallott, 73 Fed. Rep. 2nd S., 142, arrived at a contrary conclusion to that reached by our supreme court in the case of Mallot v. Board, 89 Mont. 37. In the Circuit Court decision, supra, at the time said bonds were sold, they were sold pursuant to the law as ennunciated in the Cosman case. At that time, or the time at which the bonds were sold, no decision existed in Montana contrary to the Cosman case. The court said:

> "* * * Ordinarily, it is the duty of the federal court to follow the decisions of the state court with reference to state legislation. But one of the exceptions to this rule is that when there is no decision of the state court interpreting a statute, and that statute has been the basis for the issuance of obligations, the statute becomes a part of the contract between the purchaser of the bond and the political corporation issuing the same, and the federal courts will exercise their independent judgment in determining the proper construction of the state statute regardless of subsequent decisions of the Supreme Court of the state upon the question, leaning strongly, however, to the adoption of such interpreation if reasonably possible. * * *"

In accordance with such language of the Circuit Court, if the bonds of the Milk River Irrigation District had been sold after the decision reached by our supreme court in the Mallott case, then, of course, the Circuit Court of Appeals would have arrived at a different conclusion and the bondholder would have been subject to the interpretation given to the law by our supreme court. You have not given us the date when the Milk River bonds were sold, but with that knowledge accessible to you, you will be able to give proper application to our interpretation.

At the time of the Circuit Court decision, there was no decision by the Supreme Court of Montana as to whether or not after a tax deed had been issued to the county, subsequent irrigation charges should be levied from year to year pending the sale by the county of the lands thus acquired. The Circuit Court held that in the absence of such decision, there was a duty to assess said taxes and an annual levy made for the same. In conformity to the Circuit Court decision, the Supreme Court of the United States, in the case of Roberts v. Richland Irrigation District, 289 U. S. Rep. 71, has held that irrigation bonds were general obligations.

Since the Circuit Court decision, our supreme court has again affirmed their former opinion as found in the Mallott case.

In the case of Rosebud Land and Improvement Co. vs. Carterville Irrigation District, 102 Mont. 465, the court said:

> "* * * There is considerable merit in certain of the contentions of counsel for the defendants, based upon provisions of the Irrigation District Law, but after a careful reconsideration of the questions raised in the Mallott case, 89 Mont. 37, 296 Pac. 1, 13, and here, we are not inclined to recede from the position taken in that case. The bonds constitute 'an encumbrance' against the lands within the district, extinguished by the issuance of a tax deed, which 'is not derivative, but creates a new title in the nature of an independent grant from the sovereignty, extinguishing all former titles and liens not expressly exempted from its operation.' (Citing State ex rel. City of Great Falls v. Jeffries, 83 Mont. 111, 270 Pac. 638.)
>
> Judgment affirmed."

It must be noted herein that the decision arrived at by the Circuit Court of Appeals is that of an intermediate court, and its decision did not reach the Supreme Court of the United States; that if a bondholder was able to bring himself within the jurisdiction of the federal courts under the Circuit Court decision reached, a different conclusion would result than if said action were brought within the state court. Of course, there is always a possibility that such a possible litigant could not submit himself to federal jurisdiction, and of course it must be borne in mind that the Circuit Court is not the final court of federal jurisprudence. However, while we have called your atten-

tion to the conflict that exists, yet we believe that it is our duty in interpreting the law to adhere to the decision of the highest court of our state, as that court has definitely passed upon the question.

Therefore, it is our opinion that the tax deeds acquired by your county on lands within the irrigation district, if lawfully acquired, are free and clear from the irrigation tax lien of the irrigation district, and that your county should not levy an irrigation assessment upon said lands so acquired to meet the irrigation district assessment upon said lands, and that purchasers taking the said lands from the county take the same free and clear from irrigation tax liens. In conclusion, we may further state that in the event the county should quiet title to any of these tax deed lands, if possible, the bondholder should be made a party defendant.