

No. 435

STATE LANDS, oil and gas lease royalties on mortgage land—
OIL AND GAS, royalties on state mortgage land leases—
“MORTGAGE LANDS”

- Held: 1. “Mortgage lands” which are producing oil or gas or which are recognized as being potentially valuable for the production of oil or gas by the existence of a state oil and gas lease on the lands are not subject to sale.
2. Royalty interests of purchaser and state in “mortgage lands” depend on date of sale, as defined.

June 27, 1942.

Honorable J. W. Walker
Commissioner of State Lands and Investments
State Capitol
Helena, Montana
Attention: Miss B. Fox, Mineral Clerk

Dear Mr. Walker:

We have your request for an opinion of this office with respect to the following questions:

1. Does the Department of State Lands have the right to offer "mortgage lands" for sale which are producing oil or gas or are recognized to carry such a classification by the existence of oil and gas leases on the lands?

2. If so, does the state still receive 12½% of the royalty in addition to the purchasers' 6¼%, or is the purchaser's percentage deducted from that of the state?

3. If the 6¼% royalty granted to the purchaser should not be deductible from the state's royalty, then would 1% be deductible in accordance with Section 1882.1?

Section 1805.2 of the Revised Codes of Montana, 1935, defines the terms used in Section 1805.1 to 1805.121 of the Revised Codes of Montana, 1935, which were originally enacted as Chapter 60, Laws of 1927. The term "lands," within the definition in that section, includes "all lands to which the state has become the owner through a mortgage to the state, either by foreclosure or otherwise . . ." The term "mortgage lands" is also defined in Section 1805.2, Revised Codes of Montana, 1935; but it is obvious mortgage lands are also included within the more general terms "lands" and "state lands" as defined in said section.

In Section 1805.64, Revised Codes of Montana, 1935, it is provided certain lands shall be reserved from sale. It is provided:

"Lands which in the judgment of the board are likely to contain valuable deposits of coal, oil, oil shale, gas, phosphate, metals, sodium and, or other valuable mineral deposits, shall not be subject to sale, either the surface land or any of such deposits therein . . ."

Because the definition of the term "lands" includes "all lands to which the state has become the owner through a mortgage to the state, either by foreclosure or otherwise," it must follow the above quotation from Section 1805.64 of the Revised Codes of Montana, 1935, contemplates exclusion of mortgage lands from sale, if in the board's judgment they are oil bearing.

However, mortgage land may be sold when no indication of presence of oil would cause the board to judge the lands to be oil bearing. The present law (which has been effective since March 14, 1935) requires all mineral rights be reserved in state lands (Section 1805.65, Revised Codes of Montana, 1935), but a mortgage land purchaser shall have a 6¼% royalty. If, subsequent to a sale of mortgage lands, the land turns out to be valuable for oil or gas production, the state may lease the land; but the purchaser will receive a 6¼% royalty, since that royalty—granted when he purchased the mortgage lands—constitutes an interest or estate in the land itself, although incorporeal, (*Santa Rita Oil & Gas Co. v. State Board of Equalization*, 101 Mont. 269, 289, 54 Pac. (2nd) 117) of which he may not be deprived. Accordingly, any lessee from the state for oil and gas is charged with knowledge of the interest of a purchaser who purchased mortgage lands under the present law, and must pay the 6¼% royalty.

Regardless of the 6¼% royalty interest owned by a purchaser of mortgaged lands, Section 1882.4 of the Revised Codes of Montana, 1935, requires there shall be reserved to the state, in addition to rentals, a royalty in all oil and gas produced from land covered by an oil and gas lease from the state which royalty "shall not be less than twelve and one-half per cent (12½%) of the whole thereof." The conveyance of a 6¼% royalty to a purchaser of mortgage lands does not decrease the minimum royalty which the state shall reserve.

An examination of the history of the statute which is now Section 1805.65 of the Revised Codes of Montana, 1935, is necessary, in order to determine the rights of the state and the rights of various purchasers of mortgage lands to royalty under oil and gas leases. This section was enacted as Section 65 of Chapter 60, Laws of 1927. At the same session

of the legislature, Section 1 of Chapter 108, Laws of 1927, was passed. This section is now Section 1882.1 of the Revised Codes of Montana, 1935. Both of these sections, as enacted in 1927, provided the purchaser of mortgage lands should receive a royalty of one per centum (1%) of all oil or gas produced from such mortgage lands, such royalty to be paid directly to him by the lessee either in gas or oil or in cash, as the purchaser may desire and determine. Section 1882.1, Revised Codes of Montana, 1935, which has never been amended since its enactment, provided the one per centum (1%) royalty reserved to the purchaser of mortgaged lands should be deducted from the royalty reserved to the state. It is clear that, on oil and gas leases entered into while Section 65 of Chapter 60, Laws of 1927, was in effect as originally enacted the royalty reserved by the state in any oil and gas lease on mortgaged lands is decreased by one per centum (1%), which is to be paid by the lessee directly to the purchaser of mortgage lands. The situation exists with respect to all oil and gas leases covering mortgage lands which were sold on and after July 1, 1927, the effective date of Chapter 60, Laws of 1927, and until February 26, 1929, on which date Chapter 28, Laws of 1929, was approved.

By Chapter 28 of the Laws of 1929, Section 65 of the Laws of 1927 was amended to provide a purchaser of lands from the state shall acquire no right, title or interest in or to any mineral deposits, but further provided as follows:

“These mineral reservations shall not apply to lands that the state has acquired through the foreclosure of mortgages or otherwise acquired in connection with mortgages given to it. In cases of this kind all rights shall go with the land that passed with the land from the mortgagor to the state.”

This statute remained in force and effect from February 26, 1929, the date of its approval, until March 14, 1935, when it was last amended by Chapter 183, Laws of 1935. During this period the state reserved no interest whatsoever in any mortgage lands which may have been sold to any purchaser. Chapter 28, Laws of 1929, included the familiar provision “all acts and parts of acts in conflict herewith are hereby repealed.” By virtue of the enactment of said Chapter 28, Laws of 1929, the provision of Section 1 of Chapter 108, Laws of 1927—relating to the 1% royalty conveyed to the mortgage land purchaser—was repealed and ipso facto became inoperative.

When Chapter 183, Laws of 1935, was approved on March 14, 1935, it required that—in all sales of mortgage lands thereafter made—the mineral rights should be reserved to the state and the purchaser should receive a 6¼% royalty. There is no intimation the 6¼% royalty conveyed to the mortgage land purchaser should be deducted from the state's royalty; and certainly the enactment of Chapter 183, Laws of 1935, did not revive—with a change in the amount of royalty from 1% to 6¼%—the portion of Section 1 of Chapter 108, Laws of 1927 (Section 1882.1 of the Revised Codes of Montana, 1935) which was repealed by Chapter 28 of the Laws of 1929 and which related to the deduction of the mortgage land purchaser's 1% royalty from the state's royalty. Since the enactment of Chapter 183, Laws of 1935 (Section 1805.65 of the Revised Codes of Montana, 1935, as it now exists) the state reserves all mineral rights, except a 6¼% royalty of oil or gas produced, which goes to the mortgage land purchaser but which does not affect the royalty which must be reserved to the state under Section 1882.2, Revised Codes of Montana, 1935.

It is my opinion:

1. “Mortgage lands” which are producing oil or gas or which are recognized as being potentially valuable for the production of oil or gas by the existence of a state oil and gas lease on the lands are not subject to sale unless the board, in its judgment, concludes such land is not likely to contain valuable mineral deposits—which would obvi-

ously be an absurd conclusion, since—in nearly every case—the very existence of an oil and gas lease, whether producing or non-producing, would seem necessarily to impel the board to the judgment such mortgage land is likely to contain valuable mineral deposits.

2. "Mortgage lands," which may have been sold without knowledge of the likelihood of their containing valuable mineral deposits, convey to the purchaser the following interests in oil and gas produced:

(a) If the mortgage land was sold on or subsequent to July 1, 1927, and prior to February 26, 1929, the purchaser receives a royalty of 1% of all oil or gas produced from such lands, which royalty shall be paid directly to the purchaser by the lessee and which amount shall be deducted from the royalty reserved to the state.

(b) If the mortgage land was sold on or subsequent to February 26, 1929, and prior to March 14, 1935, the purchaser receives all the interest in the land and no mineral rights are reserved to the state.

(c) If the mortgage land was sold on or subsequent to March 14, 1935, the purchaser receives a royalty of $6\frac{1}{4}\%$ of all oil or gas produced from such lands, which royalty shall be paid directly to the purchaser by the lessee, but which cannot affect the royalty reserved to the state which must be not less than $12\frac{1}{2}\%$.

Sincerely yours,

HOWARD M. GULLICKSON
Attorney General