

Opinion No. 198.**County Commissioners—Tax Deed
Lands—Lands—Royalty and Interest.**

Held: County commissioners have not been given authority to sell oil, gas and mineral reservations retained under the provisions of Chapter 171, Laws of 1941, except as it is produced and saved from the land.

April 8, 1944.

Mr. Robert E. Purcell
County Attorney
Garfield County
Jordan, Montana

Dear Mr. Purcell:

You have submitted for official opinion of this office the following question:

“Have the county commissioners authority to sell the 6¼% royalty

interest in the oil, gas and minerals produced and saved from the land, which they have reserved from tax deed land sold under the provisions of Chapter 171, Laws of 1941?"

The specific portions of said Chapter 171, Laws of 1941, pertaining to this matter are paragraph two of Section 2 and Section 8. Paragraph two of Section 2 provides in part as follows:

" . . . provided that the county may reserve not to exceed six and one-fourth per cent (6¼%) royalty interest in the oil, gas and minerals produced and saved from said land."

Section 8 provides in part as follows:

"That property belonging to the county of the value of less than fifty dollars (\$50.00) and property of the county acquired by means other than by tax deed may be sold as provided by Section 4465.9 of the Revised Codes of Montana of 1935 . . ."

Said Chapter 171, Laws of 1941, pertains to land or property acquired by tax title, and provides the exclusive manner of selling such property. There is some conflict of opinion as to whether this royalty reserved was in reality secured by the tax title or by the act of the commissioners at the time of reservation or exception, but generally it is held that a retention of such rights in a grant are an exception and not a reservation. Therefore, the title would have been received at the time of the taking of tax title. (See Summers Oil and Gas, Vol. 1, Page 354, Section 137.) Therefore, if the title to these royalties were acquired by tax title said Chapter 171, Laws of 1941, is conclusive as to whether the same may be sold.

The only specific mention in said Chapter 171 of such reservation is in the above quoted portion of said Section 2. Said section or the chapter as a whole does not state what is to be done with the royalty nor does it provide in specific terms or by implication for any action on the part of the commissioners for the development of any rights under these reservations. The duties and powers of the county commissioners are fully set forth in our codes and amendment thereto, but nowhere are the commissioners given any authority to enter into the oil or mining business or speculation in oil,

gas or mineral royalties. Section 2 of said chapter does not even give the commissioners authority to enter upon the lands to develop the rights retained and as they have no general powers no such rights can be presumed. The commissioners are merely empowered to **reserve**, to keep a certain royalty interest in the oil, gas and minerals **produced and saved** from said lands. Under the circumstances it is difficult to see how such rights can be merchantable as the development of the same is in the discretion of the purchaser or his successors and the county could not transfer a greater right than it had.

The fact is no expressed authority to sell the reserved royalty is given by Chapter 171, and no further mention of the reservations are made than I have here mentioned. I am of the opinion the legislature intended such reservations should be made without the right to sell; at least after looking at the entire statute it seems to me there certainly is a reasonable doubt of any implied authority. The Montana Court held in *Lewis v. Petroleum County*, 92 Mont. 563, 17 Pac. (2nd) 60, as follows:

"The principle is well established that the board of county commissioners may exercise only such powers as are expressly conferred upon it or which are necessarily implied from those expressed, and that where there is a reasonable doubt as to the existence of a particular power in the board of county commissioners, it must be resolved against the board and the power denied."

Therefore, I agree with your conclusion, and it is my opinion the board of county commissioners have not been given the authority to sell the royalty reserved under paragraph two of Section 2 of Chapter 171, Laws of 1941, under the provisions of Section 8 of Chapter 171, or otherwise, to dispose of such reserved royalty interest except as it is produced and saved from the land.

Sincerely yours,
R. V. BOTTOMLY
Attorney General