

Opinion No. 189.

**Lands—Minerals—Surface Rights—
Taxation—County, Tax Title.**

**Held: 1. When a piece of real estate
has been duly severed into sur-
face rights and mineral rights,
or the right of entry to pros-**

pect, explore and mine, and taxed separately, and the county has taken tax deed to each interest separately, the county may, under Chapter 171, Laws of 1941, duly appraise and advertise each of the separate interests, and sell the same separately.

2. When the county has taken title to the surface and subsurface of a piece of real estate as a unit, it must first appraise and offer the entire unit for sale, including surface and mineral rights, and if sold retain the statutory $6\frac{1}{4}\%$ mineral royalty; but if the same cannot be sold, it may, if determined by the board of county commissioners to be for the best interest of the county, then divide the real estate into two estates by dividing it horizontally, and appraise each estate separately and advertise and sell each separately.

3. When the county offers surface rights only for sale, and the purchaser buys only the surface rights, he may not require a reformation of his deed to convey to him all mineral save $6\frac{1}{4}\%$ royalty interest, and if the transaction were irregular and void, his remedy is to request a refund of his purchase price, or the portion thereof paid.

August 7, 1946.

Mr. J. M. Watts
County Attorney
Musselshell County
Roundup, Montana

Dear Mr. Watts:

You have requested an opinion of this office on the following questions:

1. Where a county has taken title to the surface rights of a certain patented mining claim by tax deed in one proceedings and in a separate proceedings has taken title to the same patented mining claim less the surface rights, can the county appraise, advertise and sell the "surface only" separate from the rest of the patented mining claim?

2. Where the county has taken title to a patented mining claim (in-

cluding the surface rights), can it appraise, advertise and sell the "surface only" separate from the rest of the patented mining claim?

3. Where the county has in fact sold the "surface only" of patented mining claims where the title was acquired as above stated, is the purchaser entitled to have the deed reformed to also convey the minerals to him less a $6\frac{1}{4}\%$ royalty interest?

The law in Montana is quite clear in the instance where there is a bona fide severance of the surface rights and the mineral rights. In such cases, our court holds two separate estates in real property are created, each of which is subject to taxation and separate tax deed proceedings. (See in this respect Opinion No. 142, Volume 21, Report and Official Opinions of the Attorney General; *Rist v. Toole County*, 159 Pac. (2d) 340, 346.)

Chapter 171, Laws of 1941, gives the procedure to be followed by the county in disposing of property to which the county has taken tax title. Section 1 of said chapter specifically states it shall be the duty of the board of county commissioners, within six months after taking the tax title, to make an order for sale of such lands at public auction, giving thirty days' notice of such sale, which notice shall describe the lands to be offered and the appraised value of the same, and no sale shall be made for less than the fair market value thereof as determined and fixed by the board of county commissioners.

In Opinion No. 58, Volume 19, Report and Official Opinions of the Attorney General, this office held the board of county commissioners must, under Chapter 171, Laws of 1941, first appraise, advertise and offer for sale real estate acquired by tax deed in the tract or unit in which it was taken in the tax deed. Thus, if the county took a tax title to the surface rights of a certain piece of property in one tax proceeding and in another tax proceeding took the mineral rights or subsurface rights, or the right to enter upon the land to explore, prospect or dig for minerals in and of the same piece of property, the county would have to appraise, advertise and offer each separate interest at public auction sale as a separate unit, and in the deed conveying the right of entry upon such lands to explore, prospect and mine,

the commissioners may provide for their statutory mineral reservations.

Also, Opinion No. 58 held the county commissioners had the power, after the units as originally taken were once offered for sale, and not sold, to divide them or add to them, and then appraise and offer for sale the newly organized units if the board finds that such reorganization of the units would be for the best interest of the county. In this respect, the opinion specifically states:

"After tax deeds have been executed to the county, the board of county commissioners may appraise any tract so acquired or may divide it in any way it may, in its sound discretion, determine will result in a better sale or lease for the county.

"However, each separate tract must first be both appraised and advertised as provided in Section 1 above. This is a mandatory provision and is to give all persons an equal opportunity to purchase and to keep any fraud from entering into the transaction.

"In the event said tract or parts of tracts of land, as appraised and advertised, are not sold at public auction, and in the event the board cannot sell at private sale for at least 90% of the said last appraisal, then the board may again divide or add tracts or parts of tracts as it determines is for the best interests of the county . . ."

In accordance with that opinion, the county must offer the unit of land for sale the first time in the unit as taken; and if it is not sold, the county may divide the unit or add to it and then advertise and sell the newly arranged unit.

The Montana court, in *Northern Pacific Railway Company v. Mjelde*, 48 Mont. 287, 137 Pac. 386, at page 304 of the Montana Report, made the following statement:

"Land may be divided horizontally as well as vertically."

Thus, if the board of county commissioners offers for sale a unit of land as taken by tax deed, and does not sell the same, the board has the authority to divide it into surface and subsurface units, appraise and advertise each of such units, and sell them

separately at public auction. Such procedure would not be a reservation to the county of a royalty right as contemplated by Section 2 of Chapter 171, Laws of 1941, but would be the retaining of a real property right in the county to the mineral rights or the right of entry to explore, prospect and mine, which are recognized by the law of this state as an interest in realty. In other words, it would be a division of the property. The county commissioners' powers in this connection are authorized under their duties to act in the best interests of the county; and such a division of the property might expedite getting the surface land back on the tax rolls.

Section 2 of said Chapter 171 does not state the county must sell all its right, title and interest in all the land as a whole but only all its right, title and interest in the property sold, thus the property sold as result of the offer of sale. If only a portion of the lands is offered, then that portion is all the county sells.

I am in agreement with you on the point a purchaser may only secure back his purchase money in the case of a void sale. (See in this respect the case you cite—*Carpenter v. Okanagon County*, 299 Pac. 400.)

It is therefore my opinion:

1. When a piece of real estate has been duly severed into surface rights and mineral rights, or the right of entry to prospect, explore and mine, and taxed separately, and the county has taken tax deed to each interest separately, the county may, under Chapter 171, Laws of 1941, duly appraise and advertise each of the separate interests, and sell the same separately.

2. When the county has taken title to the surface and subsurface of a piece of real estate as a unit, it must first appraise and offer the entire unit, including surface and mineral rights, for sale, and if sold, retain the statutory 6¼% mineral royalty; but if the same cannot be sold, it may, if determined by the board of county commissioners to be for the best interest of the county, then divide the real estate into two estates by dividing it horizontally, and appraise each estate separately and advertise and sell each separately.

3. When the county offers surface rights only for sale, and the purchaser buys only the surface rights, he may not require reformation of his deed to convey to him all mineral, save $6\frac{1}{4}\%$ royalty interest, and if the transaction were irregular and void, his remedy is to request a refund of his purchase price, or the portion thereof paid.

Sincerely yours,
R. V. BOTTOMLY,
Attorney General