

Opinion No. 86.

**Tax Deeds—Oil and Gas—Mining—
Royalty.**

Held: A tax deed taken against the owner of the surface rights to land does not extinguish the taxable recorded fractional interest consisting of mineral, oil and gas rights which are separately owned, but that a tax deed taken in accordance with law, extinguished royalty interests which do not constitute an interest in the realty.

October 23, 1945.

Mr. Melvin N. Hoiness
County Attorney
Yellowstone County
Billings, Montana

Dear Mr. Hoiness:

You have requested my opinion concerning the following:

Does one who acquires land under a tax deed purporting to convey the entire fee simple title become the owner of mineral rights reserved to a third person, said third person having been assessed with the value of his right to enter into the land, to explore for and extract minerals; taxes having been paid on the basis of said assessment?

Typical of the situation is the following: A piece of land is sold wherein the grantor reserves all of the oil, gas and mineral rights, together with the right of ingress and egress in connection with the exploration for, or removal of minerals.

The problem presented was considered by the Montana Supreme Court in a recent case, *Rist v. Toole County*, 159 Pac. (2d) 340, which case distinguished between a royalty interest in oil lands and the fee simple title to oil and gas and other minerals.

In the facts you submit, you state that in one example "the grantor reserves, all the oil, gas and mineral rights," which constitute a severance of the surface of the land and the minerals. In *Rist v. Toole County*, supra, the court said:

"It is well settled that the title to mineral interests in land, including oil and gas interests, may be seg-

regated in whole or in part from the rest of the fee simple title . . . and that the separate fractional titles should be taxed separately to their several owners."

The court also considered a royalty interest and adopted the definition of "royalty" from an earlier Montana case as follows:

"The word has a very well understood and definite meaning in mining and oil operations. As thus used, it means a share of the produce or profit paid to the owner of the property. Webster's Dictionary.' The expression 'a share of the produce or profit, paid to the **owner** of the property' is quite different from a share or interest in the property itself. It recognizes that the originator of the royalty is still the owner of the real property to which it relates, and that the assignee's interest is only in the 'produce or profit' therefrom,—namely, in the personal property which the owner is to receive for the granted privilege of producing minerals from his land." (Emphasis mine.)

The court reached the conclusion that a royalty interest as an incident to the owner's fee title was extinguished by the taking of a tax deed. The decision also recognizes that the reservation or conveyance of the mineral rights, which include gas and oil, creates a fractional interest in the land which is taxed separately to the owners of such mineral rights and that a tax deed taken in accordance with the law against the owner of the surface rights does not extinguish or grant to the owner of the tax title the mineral rights previously segregated and separately owned.

A previous opinion of this office, No. 253, Volume 20, page 324, Report and Official Opinions of the Attorney General, held in part:

"Undeveloped oil and gas rights pass under a legally taken tax deed to the surface rights even though the owner of the oil and gas rights and the owner of the surface rights are separate persons . . ."

The opinion failed to distinguish between a royalty interest and the ownership of a fractional interest in land

consisting of the minerals, and said Opinion No. 253, Volume 20, page 324, Report and Official Opinions of the Attorney General, is hereby modified in accordance with this opinion.

It must be remembered that the distinction between a royalty interest and the ownership of the mineral rights is dependent on the words used in the instrument. The example you give is clear on the point in that "the grantor reserves all of the oil, gas and mineral rights," which creates a separate taxable fractional interest.

It is therefore my opinion that a tax deed taken against the owner of the surface rights to land does not extinguish the taxable recorded fractional interest consisting of mineral, oil and gas rights which are separately owned, but that a tax deed taken in accordance with law, extinguished royalty interests which do not constitute an interest in the realty.

Sincerely yours,
R. V. BOTTOMLY,
Attorney General