

Taxation, Lieu Lands Not Subject to. Lieu Lands, not Subject to Taxation.

Indemnity selections or lieu lands made by railroads are not subject to taxation until the selection made by the railroad company has been approved by the United States Land Office.

March 16, 1915.

Hon. G. M. Houtz,
State Tax Commissioner,
Helena, Montana.

Dear Sir:

I am in receipt of your communication under date the 13th instant, in which you ask for an opinion

as to whether or not the lands mentioned in a letter from M. T. Sanders, Tax Commissioner of the Northern Pacific Railroad Company, and said lands being lieu selections for lands relinquished by the company on account of the Mount Rainier National Park Relinquishment, forest reserve withdrawals and adjustment of settler's claims,—are subject to taxation by the State of Montana, before the application for selection by the company is approved by the federal government?

You state that the county assessor claims the right to tax such lands as scrip lands, under an option heretofore rendered by this office.

I assume that you refer to an opinion rendered to you under date June 16th, 1913. As has been laid down by the United States Supreme Court, it is elementary that the state has no power to tax property belonging to the federal government. Consonant with this theory, this office has repeatedly held that so long as the equitable title of land was in the government, it was not taxable, but when everything required by law to be done by the settler on public lands, was completed, in such event the lands are taxable. Under the facts as stated in your letter, I am of the opinion that the lands mentioned are not subject to taxation. The best expression of the principle involved was laid down by the Supreme Court of The United States in a similar case, involving the taxation of certain railroad lands:

"He (the secretary) was required to determine in the first place, whether there were any deficiencies in the land granted to the company which were to be supplied from indemnity lands; and in the second place, whether the particular indemnity lands selected could be properly taken for those deficiencies. In order to reach a proper conclusion on these two questions, he had also to inquire and determine whether any lands in the placé limits had been previously disposed of by the Government, or whether any pre-emption or homestead rights had attached before the line of the road was definitely fixed. There could be no indemnity unless a loss was established. * * * Until the selections were approved there were no selections in fact, only preliminary proceedings taken for that purpose; and the indemnity lands remained unaffected in their title. Until then the lands which might be taken as indemnity were incapable of identification; the proposed selection remained the property of the United States. * * * The approval of the Secretary was essential to the efficacy of the selections, and to give to the company any title to the lands selected. His action in the matter was not ministerial but judicial."

Wisconsin Central Ry. vs. Price Co., 133 U. S. 496, 511.

The case in which the above quotation is made, discusses the question very fully, and collects most of the cases upon the subject. There apparently is some confusion in the mind of the assessor as to the precise extent of the opinion under date of June 16th, 1913. That opinion only went so far as to say that public lands acquired by the use of scrip, and for which government patent had not been issued, *provided such lands have been surveyed, and the survey approved by the federal authorities*, are taxable by the state. It is to be noticed that the proviso limits very materially the power of the state to tax. There is nothing inconsistent in the holding of the opinion of this office with that of the case above cited.

I am, therefore, of the opinion that indemnity selections or lieu selections made by railroads, are not taxable until the selection made by the railroad company has been approved by the United States Land Office.

Yours very truly,

D. M. KELLY,

Attorney General.