

United States—Oil Leases—Bonds—Taxes.

Bond given by an oil company to the United States for the performance of a lease wherein it is provided that the lessee would pay all taxes levied by the states upon improvements and the output of the wells was given for the benefit of the United States and not for the state or the counties therein and the bond is not liable at the suit of the county for taxes against the lessee.

Mr. Walter R. Knaack,
County Attorney,
Shelby, Montana.

April 5, 1932.

My dear Mr. Knaack:

I have your request for an opinion. The bond given by the Shoshone Oil Company to the United States in order for it to be available to the county would have to have been made for the express benefit of the county. (Section 7472, R.C.M. 1921.)

In *McDonald vs. American National Bank*, 25 Mont. 456, the court, in construing the above-mentioned section, stated that the contract must be one whereby the promisor undertakes to pay or discharge some debt or duty which the promisee owes to the third person, or, in other words, the third person must sustain such a relation to the contracting parties that a consideration may be deemed to have passed from him to the promisee which raises the implication of a promise from the promisor directly to himself. See also *Tatem vs. Eglanol Mining Company*, 45 Mont. 367.

The fact that the contract may incidentally benefit a third person is insufficient to bring it within the terms of the above mentioned section. (Martin vs. American Surety Co., 74 Mont. 43.)

There was no duty upon the United States to pay any taxes to the state of Montana levied upon the improvements or oil and gas produced from the lands or other rights, property or assets of the lessee. There is, therefore, no consideration for the execution of the bond in so far as the county is concerned which would support a claim that the contract was made expressly for the benefit of the county. The object of inserting the provision in the lease was no doubt to protect the United States itself. One of the reasons for putting the provision in the lease was probably to make clear that the fact that the company was operating on a lease owned by the federal government was not sufficient to excuse the company from the payment of taxes upon the grounds that it was an instrumentality of the federal government.

The provision of section 32 of the leasing act which states that nothing in the act affects the rights of the states to exercise the right to levy and collect taxes upon improvements, output of mines or other rights, property or assets of any lessee of the United States lends color to the belief that the provision in the lease was merely to give contractual effect to this provision of the statute so that the understanding would be clear that the lessee would not assert the claim of it being a federal agency in an effort to avoid state taxes. The purpose of section 32 of the leasing act relating to the taxation of the property of the lessee by the states was apparently to make clear that a lessee could not escape taxation upon the ground that it was an instrumentality of the federal government.

Mid-Northern Oil Co. vs. Walker, 65 Mont. 414, affirmed by
the U. S. Supreme Court.

Furthermore, under the leasing act the United States could elect to take its royalty in kind and in those states where the state taxes the oil it would, if the taxes on it were not paid by the lessee, be subject to the state taxes when delivered to the government and the bond would protect the government if the taxes on the oil had not been paid.

It is my opinion that the bond is not liable at the suit of the county for these taxes.

Very truly yours,

L. A. FOOT,
Attorney General.