

## No. 181

**COUNTY TAX DEED LANDS—SALES ON CONTRACT—  
RESERVATION OF OIL, GAS AND MINERALS—STATE  
BOARD OF EQUALIZATION—FORM TO BE USED—  
ROYALTY INTEREST**

**Held:** Boards of county commissioners shall use only the uniform form—prepared by State Board of Equalization—in selling on terms county tax deed lands. Counties may reserve not to exceed 6¼% royalty interest in the oil, gas, and minerals produced and saved from said lands. The reservation clause furnished and provided by the State Board of Equalization is in accordance with the provisions of Chapter 171, Laws of 1941.

July 18, 1941.

Board of County Commissioners  
Fallon County  
Baker, Montana

ATTENTION: Mr. Elmer Wang, Chairman

Gentlemen:

You have submitted the question as to what clause a county should use in its contract of sale of tax deed lands in cases where the county desires to make a reservation of mineral rights in such tax deed lands, under the provisions of Chapter 171 of the Laws of 1941.

That part of Chapter 171 of the Laws of 1941 applicable to your inquiry is found in the first paragraph, on p. 354, in the printed volume of the Laws of the Twenty-seventh Legislative Assembly and reads as follows:

“If a sale is made on terms, the chairman of the board of county commissioners shall execute a contract containing such terms as shall be provided by a uniform contract prescribed by the board of equalization and upon payment of the purchase price in full together with all interest which may become due on any installment or deferred payments, the chairman of the board of county commissioners shall execute a deed attested to by the county clerk to the purchaser, or his assigns, or such other instruments as shall be sufficient to convey all of the title of the county in and to the property so sold, 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." (Emphasis mine.)

It will be noted the above quoted paragraph of the law is mandatory in requiring the chairman of the board of county commissioners to execute a contract containing such terms as shall be provided by a uniform contract prescribed by the Board of Equalization.

The said quoted law further provides, ". . . 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."

The county commissioners—in selling such tax deed lands—are not required to reserve any of the mineral rights, or they may reserve any per cent not to exceed six and one-fourth per cent (6¼%) royalty interest in the oil, gas and minerals produced and saved from said land.

Our Supreme Court has said,

"The word "royalty" has a definite and well-understood meaning in oil operations. It means a share of the product or profit paid to the owner of the property."

Homestake Exploration Corp. v. Schoregge, 81 Mont. 604, 264 Pac. 388.

Hinerman v. Baldwin, 67 Mont. 417, 215 Pac. 1103.

"It is an interest in the land (Summers on Oil & Gas, p. 169), although incorporeal."

Willard v. Federal Surety Co., 91 Mont. 465, 8 Pac. (2nd) 633.

Such an interest may be excepted or reserved from conveyance.

Krutzfeld v. Stevenson, 86 Mont. 463, 284 P. 553.

In passing on this question the Supreme Court of Oklahoma, in McCully, et al. v. McCully, et al., stated: "Royalty arising under an ordinary oil and gas mining lease is profit issuing out of the land. Accrued royalty is personal property, unaccrued royalty or royalty to accrue is a part of the estate remaining in the lessor and is real property."

McCully, et al. v. McCully, et al., 86 Pac. (2nd) 786, 788; 184 Okl. 264.

Where the grantor of real estate reserves a per cent of the oil and gas and other minerals, the grantor and the other owners of any of the mineral rights in the same land become tenants in common of the said minerals.

The general rule of law is a co-tenant in exclusive possession of mining or oil property who extracts and sells the mineral or oil may charge against its proceeds the reasonable and necessary expense of exploration, extraction and marketing. (See *Marias River Syndicate v. Big West Oil Co.*, 98 Mont. 254, 38 Pac. (2nd) 599.)

It will be observed, from the foregoing decisions, there is a great deal of difference between reserving an interest in the minerals in the land and reserving a royalty interest in the minerals produced and saved from the land."

"A county is merely a subdivision of the state for governmental purposes and as such is subject to legislative regulation and control; the legislature may within constitutional limitations circumscribe or extend the powers to be exercised by a county, and legislative authority to regulate or control the disposition of county property not having been limited by the constitution, it could properly declare . . . that such property may be sold only under the restrictions and in the manner therein indicated."

Syllabus, *Franzke v. Fergus County*, 76 Mont. 150, 245 Pac. 962.

"The fact that the contemplated action may be in the best interests of the county is not an admissible argument. The doctrine of expediency does not enter into the construction of statutes."

Franzke v. Fergus County, 76 Mont. 150, 245 Pac. 962.

The State Board of Equalization has informed me that it has provided each county clerk with its prescribed uniform contract, applicable provision thereof being as follows:

"There is hereby reserved unto the grantor, its successors and assigns, a royalty interest of .....percent (.....%) of all oil, gas and minerals recovered and saved from the lands above described, which, in the case of oil or gas, shall be delivered, free of cost, to the credit of this grantor, its successors or assigns, into the pipe line to which the operator or producer shall connect his wells, or, at the option of the operator, this grantor, its successors or assigns, shall be paid the .....percent (.....%) of the market value of all such oil or gas produced and saved from said land, at the time of production and in the field where produced, without deduction of operating or other costs whatsoever."

The State Board of Equalization has also requested the same reservation clause be inserted in the final deed of conveyance of such land.

It will be observed the clause prescribed by the State Board of Equalization reserves to the county its per cent of the royalty interest in all oil, gas and minerals recovered and saved from the lands, and in the case of oil or gas, the share shall be delivered free of cost in the pipe line, or the market value of the same.

It is therefore my opinion the uniform contract and the reservation clause hereinabove mentioned are the only permissible form under Chapter 171, Laws of 1941, which county commissioners may use in selling such lands, and the mineral reservation clause prescribed by the State Board of Equalization fully complies with the provisions of Chapter 171, Laws of 1941.

Sincerely yours,

JOHN W. BONNER  
Attorney General