

**Opinion No. 142.****Proprty—Real Estate—Lands—Tax  
Deed Lands—Mineral Lands and  
Reservations.**

**Held:** Undivided interests in real estate are taxable to the separate owners of such interests, and such interests are subject to tax liens and may be sold for taxes. Mineral reservations or grants wherein there is a complete severance are taxable as an interest in property, not on the mineral in place, but on the right to enter and to mine or explore for the same; and as such rights are taxable, they are subject to tax deed proceedings.

April 3, 1946.

Mr. Bert W. Kronmiller  
County Attorney  
Big Horn County  
Hardin, Montana

Dear Mr. Kronmiller:

You have requested an opinion of this office relative to the county's right to take tax title to undivided interests

in real estate, including undivided interests in undeveloped mineral reservations and grants. Your statement of facts is substantially as follows:

John Doe owns an undivided 7/22 interest in and to a section of land located in Big Horn County, Montana. Richard Roe owns the other undivided 15/22 interests. Several years ago John Doe conveyed his 7/22 interest of the mineral rights to his land to Mary Roe. Big Horn County has been making separate assessments of the various interests to the respective owners. The taxes of John Doe, less the mineral rights conveyed, have been kept current, but the taxes of the other parties are delinquent, and their interests are now subject to tax proceedings.

You do not state whether the lands involved were regularly homesteaded or whether they were purchased from the United States in the first place under mineral claims. However, I am presuming the land was taken up under the general homestead provisions.

Section 1997, Revised Codes of Montana, 1935, states as follows:

"All property in this state is subject to taxation, except as provided in the next section."

Section 1998, Revised Codes of Montana, 1935, referred to in the foregoing section does not in any manner mention property here in question, and therefore is not pertinent.

Section 1996, Revised Codes of Montana, 1935, states in part as follows:

"First—The term 'property' includes moneys, credits, bonds, stocks, franchises, and all other matters and things, real, personal, and mixed, capable of private ownership . . .

"Second—The term 'real estate' includes:

"1. The possession of, claim to, ownership of, or right to the possession of land.

"2. All mines, minerals, and quarries in and under the land, subject to the provisions of section 2088 of this code . . ."

Section 2002, Revised Codes of Montana, 1935, states in part as follows:

"The assessor must, between the first Monday of March and the second Monday of July in each year, ascertain the names of all taxable inhabitants, and assess all property in his county subject to taxation . . . and must assess such property to the persons by whom it was owned or claimed, or in whose possession or control it was at twelve o'clock M., of the first Monday of March next preceding . . ."

In the case of Northern Pacific Railway Co. v. Mjelde, 48 Mont. 287, 137 Pac. 386, wherein the court was reviewing the right of the county assessor to assess mineral reservations, the court stated at page 294:

"That neither deed conveys the entire estate to the land described is apparent. That each carves out some interest which the grantor retains is not open to question, and that this interest is an estate in land must be conceded. The coal deposits which underlie section 31 form a part of the real estate within the definition given in section 2501, Revised Codes, and the reservation of those deposits, with the right to mine, constitutes an interest in real estate . . . Section 2501, above, provides that 'the term "real estate" includes: The possession of, claim to, ownership of, or right to, the possession of land.' And this would be the rule independently of statute . . . Each reservation is property, and all property in this state is subject to taxation, except such as is exempt . . . Since these reserved rights do not fall within any of the classes of exempt property, they are subject to assessment for taxation, unless by some provision of the state Constitution they are relieved from the burden . . ."

The Supreme Court of Montana in the case of Rist v. Toole County, (Mont.) 159, Pac. (2d) 340, 342, stated:

"It is well settled that the title to mineral interests in land, including oil and gas interests, may be segregated in whole or in part from the rest of the fee-simple title (citing cases) and that the separate fractional titles should be taxed separately to their several owners."

See further in this respect *Anaconda Copper Mining Company v. Ravalli County, et al.*, 52 Mont. 422, 158 Pac. 682.

At page 1132, 61 *Corpus Juris*, you will find the following:

"If land is liable to a tax, such land is liable to be sold for nonpayment of the tax . . ."  
Eee also 61 *Corpus Jris* 1115.

The authorities seem quite conclusive on the authority to tax the various undivided interests in realty, including the right to tax in connection with mineral rights if there has been a specific grant or reservation, the same being considered when severed from the surface as an interest in realty. The only question seems to be whether Section 3 of Article XII of our Constitution prohibits the taxation of such interest due to such interest being what might be construed as mineral in place. The case of *Northern Pacific Railway Company v. Mjelde*, supra, in considering what was meant by the term "mines" as used in said Section 3 of Article XII, said at page 301 of the *Montana Reports*:

"The one predominant idea running through the legislation was that consideration was given only to the active, open and working mining property whose development had proceeded past that point which marks the boundary between a mining claim and a mine."

And again at page 304, the following language is used:

"Our conclusion is that neither reservation involved in this controversy constitutes a mine within the meaning of that term as employed in section 3, Article XII, of the Constitution, but each is an interest in real estate. Land may be divided horizontally as well as vertically. That several estates in the same land may be owned by different parties is recognized generally. One may own the surface, another the growing timber, and a third the minerals underground, and each estate be subject to taxation.

"It will not do to say that, because neither of these reservations produces revenue, it is not of any value. From the very act of making the reserva-

tion, the presumption arises that each interest has some appreciable value, or the reservation would not have been made. Taxation is the rule, exemption is the exception; and, if either of these rights in fact is valueless, the burden is upon the party, claiming to come within the exception, to allege and prove the facts necessary to bring his property within the favored class.

"The asserted right to tax these reservations rests entirely upon the fact that each constitutes an interest in real estate, and that neither is a mine or a mining claim within the meaning of section 3, Article XII, of our Constitution.

" . . . Section 2502 declares that 'all taxable property must be assessed at its full cash value.' The duties of the county assessor are prescribed . . . The difficulty which may confront the assessor in determining the full cash value of a property interest of this character cannot operate as a factor in characterizing the interest itself . . ."

The *Montana Supreme Court* has further spoken in later cases involving the taxation of such interests. In the case of *Hinz v. Musselshell County, et al.*, 82 Mont. 502, 512, 267 Pac. 1113, the court said:

"The attempted assessment of the corporeal hereditament, the 'mineral rights,' amounted to an attempted assessment of the coal, or as it may be termed, the mineral deposit. This deposit as such cannot be taxed. The Constitution forbids. The incorporeal hereditament—the right to enter into the lands conveyed, to explore for minerals, and to extract the same where found, with the right to purchase so much of the surface as may be necessary—is subject to taxation; it is an interest in realty. This taxable value to be deducted from the taxable value of the acreage, from the cash value of the land, omitting the deposit—the mineral content—from the estimate . . ."

"In the years 1925, 1926 and 1927 the assessor assessed for taxation the mineral rights and reservations together. This he could not do lawfully. The legal and illegal items are inseparable and this renders the tax void."

(See also *Superior Coal Company v. Musselshell County*, 98 Mont. 501, 41 Pac. (2d) 14.)

You do not state in your request whether these deeds reserved a right of access. However, it is my belief that, if they do not, the same would be implied, and therefore the ruling of the above decisions would be applicable to this case. Therefore, the county could not levy the tax as upon the minerals in place, but may tax the interest valued on the right to entry and exploration, that being a real property interest.

In view of our statutes and the decided cases, my opinion is as follows,

1. Undivided interests in real estate are taxable to the separate owners of such interests, and such interests are subject to tax liens and may be sold for taxes.

2. Mineral reservations or grants wherein there is a complete severance are taxable as an interest in property, not on the mineral in place, but on the right to enter and to mine or explore for the same; and as such rights are taxable, they are subject to tax deed proceedings.

Sincerely yours,  
R. V. BOTTOMLY,  
Attorney General