Opinion No. 49-5259

November 28, 1949

BY: JOE L. MARTINEZ, Attorney General

TO: State Corporation Commission Santa Fe, New Mexico. Attention: Dan R. Sedillo, Chairman

*{*102}* I am writing in reply to your recent inquiry as to the right of the Corporation Commission to collect license fees from owners and operators of pipe lines in the state for intra and inter-state transportation of oil and gas. It is my understanding that none of the major pipe lines have paid any license fee since the enactment of this law by the Legislature in 1927.

Section 69-308, New Mexico Statutes Annotated, Laws of 1927, ch. 125, provides as follows:

"The owners or operators of all pipelines laid, built, or maintained for the conveyance of crude oil or gas within the state of New Mexico, shall, within thirty (30) days after the taking effect of this act, and annually thereafter on the first day of July of each year, apply for and procure a license from the state corporation commission to operate such pipelines, and shall on or before the 20th day of each month pay to the state corporation commission a license fee of one-tenth of one cent per *{*103}* barrel of oil or gasoline transported by such pipe-lines, and one-tenth of one cent per ten thousand cubic feet of gas transported by such pipe-lines, for the preceding calendar month. All license fees so collected by the state corporation commission shall be paid into a fund known as the 'Pipe Line Contingency Fund', and shall be expended only for the inspection of, and administration and enforcement of the rules and regulations affecting pipe-lines as provided for in this act."

The right of the state to collect a license fee, excise tax, franchise tax, or property tax on the intra-state operations of any person, partnership or corporation operating in the state is elementary. Humble Pipe Line Company vs. State, 45 N.M. 29; Memphis Natural Gas Co. vs. Beeler, 315 U.S. 649; Ford Motor Company vs. Beauchamp, 308 U.S. 331; Atlantic Refining Company vs. Virginia, 302 U.S. 22; Southern Natural Gas Company vs. Alabama, 301 U.S. 148; Pacific Telephone and Telegraph Co. vs. Tax Commission, 297 U.S. 403. The license fee for all of the companies which have neglected or refused to pay the tax on intrastate operations should be collected back to the effective day of the law in 1927 as will hereinafter be pointed out.

It is my further understanding that no efforts have been made to collect the license fee on so-called inter-state carriers of oil and gas because of two previous opinions issued by former attorneys general. The first opinion, dated August 21, 1929, is merely a flat statement without any substantiation that the law did not apply to inter-state commerce. The second opinion was issued on July 10th, 1945, and again the Attorney General

stated that the license fee could not be collected from those engaged in interstate commerce. This latter decision relied upon the decision of the Supreme Court of New Mexico in the case of Humble Pipe Line Company vs. State, 45 N.M. 29, and upon the Ozard Pipe Line vs. Moner, 266 U.S. 555. It is believed that this latter opinion of the Attorney General is a complete misunderstanding of the law.

The theory that interstate commerce involving the transportation of gas and oil is not subject to a license fee or tax might appear to have merit from the case of Eureka Pipe Line Company vs. Hallaland, 257 U.S. 265; United Pipe Line vs. U.S., 257 U.S. 277. In the Eureka case at page 272, Judge Helmes stated:

"As has been repeated many times, interstate commerce is a practical conception, and, as remarked by the court of first instance, a tax to be valid 'must not in its practical effect and operation burden interstate commerce'. It appears to us as a practical matter that the transmission of this stream of oil was interstate commerce from the beginning of the flow, and that it was none the less so that if different orders had been received by the pipe lines it would have changed the destination upon which the oil was started and at which it in fact arrived. We repeat that the pipe line company not the producer was the master of the destination of any specific oil. Therefore its intent and action determined the character of the movement from its beginning, and neither the intent nor the direction of the movement changed."

It should be noted that in the Eureka case, the tax was two cents on a barrel and Judge Holmes made it quite clear that the tax "must not in its practical effect and operation burden interstate commerce".

*{*104}* To treat the Eureka and United Fuel cases above as a determination that inter-state commerce is free from any reasonable and non-discriminatory tax is erroneous.

Justice Taft, in analyzing the Eureka and United Fuel cases and two other similar cases of the Supreme Court, stated in the case of United Leather Workers vs. Herbert, 265 U.S. 457 that "The effect upon interstate commerce in the four cases just acted on the other hand was directly burdensome and restraining".

The New Mexico Supreme Court in the Humble Pipe Line case, supra, stated:

"There remains to be decided the question of whether the New Mexico statute, when applied to the appellee's business, which is entirely interstate, violates the commerce clause of the Federal Constitution. Article 1, § 8, cl. 3. That it is not void solely because the effect of the statute is to tax the net income derived from interstate commerce, has been settled by a number of decisions of the Supreme Court of the United States. (citing cases). While we have found no case decided by that court in which the specific question was an issue, yet by illustration that court has stated a number of times that 'a tax may be levied on net income wholly derived from interstate commerce'. McGoldrick v. Berwind-White Coal Min. Co. supra; Atlantic Coast Line R. Co. v. Daughton, supra.

We are unable to see how such tax burdens interstate commerce in a constitutional sense. Like a tax on tangible property within the state, it reduces the profit of the corporation, but it is not a direct burden upon the transportation of oil."

There are three basic tests always made: (1) Whether the tax is so substantial as to be a burden on interstate commerce; (2) Whether such a tax discriminates against inter, as opposed to intra, state commerce, and (3) whether the tax is directed against interstate commerce as distinguished from the incidents of commerce such as the maintenance and supervision of the activities within the state.

The fee charged is "1/10th of one cent per barrel of oil or gasoline transported by such pipe line and 1/10th of 1 cent per 10,000 cubic feet of gas transported by such pipe lines". Such a fee is nominal. The act further provides that the fees "so collected * * * shall be paid into a fund known as the 'Pipe Line Contingency Fund', and shall be expended only for the inspection of, and administration and enforcement of the rules and regulations affecting pipe-lines as provided for in this act."

The fee is nominal and is provided solely for the purpose of administration. As a result of the law, the pipe line carriers are given the right of eminent domain, the right to apply and to receive the supervision of the Corporation Commission in fixing rates and to assure the public in general that the facilities of the pipe lines will be equally available to all. The fee collected can scarcely be looked upon as a burden upon interstate commerce.

The law is not discriminatory as applied to the interstate shippers. The fee is levied on every pipe line, whether a foreign or domestic person or corporation. If the inter-state carriers were exempt from this fee, it would, as a corollary, be discrimination against the inter-state pipe lines. There is no reason why these pipe line carriers should not assume the nominal burden of supervision created by the act. The corner grocer has the obligation of maintaining the state government, but to put upon him the burden of paying the expenses of supervision *{*105}* of a public utility and the cost of administering laws which are primarily beneficial to the utilities, would be discriminatory against the public at large.

In the case of the pipe line carriers, the tax was not conceived or intended to be directed against interstate commerce as such. It simply was a means of providing funds for the purpose of administering the act.

It is recommended that demand be made upon each of these carriers for the fees for which they are liable, back to the effective day of the legislation. The State is not bound by the erroneous decisions of the prior attorneys general, nor of neglect of prior Corporation Commissions. The principle that the doctrine of limitation, laches, or neglect, does not apply to a sovereign power is elementary. As stated by the United States Supreme Court in U.S. vs. State of California, 332 U.S. 19, where the government admitted that for 150 years the federal government had inferentially acknowledged by order, deed, and act the ownership of tide lands:

"And even assuming that government agencies have been negligent in failing to recognize or assert the claims of the Government at an earlier date, the great interests of the Government in this ocean area are not to be forfeited as a result. The Government, which holds its interests here as elsewhere in trust for all the people, is not to be deprived of those interests by the ordinary court rules designed particularly for private disputes over individually owned pieces of property; and officers who have no authority at all to dispose of Government property cannot by their conduct cause the Government to lose the valuable rights by their acquiescence, laches, or failure to act." See also U.S. vs. San Francisco, 310 U.S. 16; (31-32); Utah vs. U.S., 284 U.S. 534, 545 546; Lee Wilson vs. U.S., 245 U.S. 24, 32; Utah Power and Light Company vs. U.S. 389, 409.

The problem of determining the total volume of gas and oil shipped by the respective pipe lines will be a large undertaking. It is believed, however, that the records regarding the shipment of oil should be available through the records of the Corporation Commission, the Oil Conservation Commission, and the Land Office, and particularly through the Interstate Commerce Commission. The records regarding the shipment of natural gas should be available from the Federal Power Commission since 1935 when the Natural Gas Act was passed. The problem of acquiring the exact date is a substantial one, but one we leave to your sound administrative discretion.