Opinion No. 51-5353

April 9, 1951

BY: JOE L. MARTINEZ, Attorney General

TO: Honorable Everett M. Grantham United States Attorney District of New Mexico Albuquerque, New Mexico

*{*31}* I have received your letter of March 30 requesting an opinion as to whether or not the severance tax imposed by the State of New Mexico for the removal of oil and gas applies to projects wholly on federal lands.

In order to answer your question this office should be advised as to the types of federal lands involved. In this state, as you well know, we have federal lands which are under the exclusive jurisdiction of the federal government and that the State of New Mexico has renounced all jurisdiction in said lands, reserving only the right to issue civil and criminal process of the courts of this state. Then there are other federal lands in which the State of New Mexico has not relinquished its full jurisdiction but has reserved to itself concurrent jurisdiction over said lands.

However, with the above two propositions in mind I will proceed to answer your question. From the case of McCulloch v. Maryland, 4 Wheat. 316, to now the rule has remained that the states are without power, absent the consent of Congress, to tax the United States, whether with reference to its property or its functions. That rule is the essence of federal supremacy.

In Mayo v. U.S., 319 U.S. 441 and U.S. v. Allegheney Co., 322 U.S. 174, the Supreme Court has reiterated said proposition and has stated that a tax which was laid directly upon the United States violated the immunity of the federal government from taxation and was, therefore, invalid.

There may be some federal lands in the State of New Mexico on which a tax may be considered as laid directly against the United States Government, and in that case any state tax would be invalid or inapplicable to said federal lands, but in the majority of the instances the federal lands in the State of New Mexico would follow in the two categories stated above and I will confine my opinion primarily to those two categories.

In the case of Arledge v. Mabry, *{*32}* 52 N.M. 303, 191 P. 2d 884, the Supreme Court of the State of New Mexico had before it the applicability of a state law in a territory wholly owned by the federal government and over which the State of New Mexico had ceded said land to the federal government, reserving to the State of New Mexico only the right to issue civil and criminal process of the courts of this state. The Supreme Court stated as follows:

"The constitutional provision mentioned in U. S. Const. Art. 1, § 8, cl. 17, giving congress power, among other things: "To exercise exclusive Legislation in all cases whatsoever, over such District (not exceeding ten Miles square) as may, by cession of particular States, and the Acceptance of Congress, become the Seat of the Government of the United States, and to exercise like Authority over all Places purchased by the Consent of the Legislature of the State in which the Same shall be, for the Erection of Forts, Magazines, Arsenals, Dock-Yards, and other needful Building. "The New Mexico statute whereby consent was given to the United States to acquire any land in New Mexico under the clause of the federal constitution quoted above for sites for arsenals and other purposes was enacted in 1912 as L. 1912, c. 47, the portions thereof material to this controversy, reading:

"'The consent of the state of New Mexico is hereby given, in accordance with the seventeenth clause, eighth section, of the first article of the constitution of the United States to the acquisition by the United States, by purchase, condemnation, or otherwise, of any land in this state required for sites for custom-houses, court-houses, post-offices, arsenals, or other public buildings whatever, or for any other purposes of the government.'

"Exclusive jurisdiction in and over any land so acquired by the United States shall be, and the same is hereby, ceded to the United States for all purposes except the service upon such sites of all civil and criminal process of the courts of this state; but the jurisdiction so ceded shall continue no longer than the United States shall own such lands."

Continuing in the above case, the court said:

"Furthermore, the term 'exclusive legislation' employed in said Clause 17 of the federal constitution is held to be synonymous with and to carry the same meaning as if the term 'exclusive jurisdiction' had been employed."

And continuing further in the above case, on page 313, the court stated:

"In Standard Oil Co. v. People of State of California, 291 U.S. 242, 54 S. Ct. 381, 383, 78 L. Ed. 775, the court ruled that gasoline sold on the Presidio Military Reservation was not subject to tax. The court said:

"'A state cannot legislate effectively concerning matters beyond her jurisdiction and within territory subject only to control by the United States.'"

In the case of Collins v. Yosemite Park Co., 304 U.S. 518, the court said as follows:

"Except as to this reserved jurisdiction (the right to serve civil and criminal processes) California put that area beyond the field of operation of her laws." (Ceded to United States.)

In view of the above decisions of the United States Supreme Court and the Supreme Court of the State of New Mexico, it is my opinion that any state tax is inapplicable to federally owned lands in which the State of New Mexico has ceded to the United States, expressly giving *{*33}* the United States exclusive jurisdiction and withholding within herself no jurisdiction whatsoever, except the service of civil and criminal process of the courts of this state.

However, in federally owned lands in which the state has not expressly given exclusive jurisdiction to the United States, a different rule of law exists. This situation has been expressly decided by the Supreme Court of the United States.

In the case of Wilson v. Cook, 327 U.S. 474, a contractor who had contracted with the United States for the purchase and severance of timber on national forest reserves in the State of Arkansas, sued to enjoin collection of a tax levied by the state on the severance of timber from the soil. The State Chancery Court enjoined the collection of the tax. On appeal, the Supreme Court of Arkansas modified the judgment, holding that the state was without authority to lay a tax on the severance of timber from lands which were public lands of the United States when Arkansas was admitted to statehood; that the authority of the state to lay the tax extended to transactions occurring on the forest reserve acquired by the United States by purchase; and that the tax assessed against the contractor for the severance of timber on forest reserves of the latter class did not lay a constitutional burden on the United States. 208 Ark. 459, 187 S.W. 2d 7. The case was appealed to the Supreme Court of the United States on several issues, but I will confine this opinion to the question before me and that question is whether the lands in the forest reserve, which were purchased for that purpose by the United States, are within the territorial taxing jurisdiction of the state. The court, on page 486, stated as follows:

"The answer turns on the interpretation of the statute of the United States authorizing the acquisition of the lands * * * and of the state statute of Arkansas authorizing the sale. * * * The statute of Arkansas consenting to the purchase of forest lands by the United States, provided that the state should 'retain a concurrent jurisdiction with the United States and not over lands so acquired' * * * to issue and execute 'civil process in all cases, and criminal processes as may issue under authority of the state.' It made no express grant or reservation of legislative power over the areas purchased. Hence the statute cannot be taken as having allowed or intended to surrender to the federal government the state legislative jurisdiction over the area in question, so far as exercise of that jurisdiction is consistent with federal functions."

In examining the federal statute Congress in effect had declined to accept exclusive legislative jurisdiction over forest reserve lands, and expressly provided that the state shall not lose its jurisdiction in this respect nor the inhabitants 'be absolved from their duties as citizens of the state.' Cf. Mason Co. v. Tax Commission, 302 U.S. 186; Atkinson v. Tax Commissioners, 303 U.S. 20; Collins v. Yosemite Park Co., 304 U.S. 518; Stewart and Co. v. Sadrakula, 309 U.S. 94. The Supreme Court, in Wilson v. Cook, supra, on page 487, stated:

"Our conclusion, based on the construction of interrelated state and federal statutes, is that the state has territorial jurisdiction to lay the tax upon activities carried on within the forest reserve purchased by the United States. What we have said of the argument that the tax assessed on plaintiffs, an unconstitutional burden on the government, is applicable to the tax assessed for severance of timber from forest reserve lands which, from the beginning, have been a part of the public domain. That tax is likewise valid if the state has legislative jurisdiction over such lands within its boundaries."

*{*34}* In view of the above decision of the Supreme Court, which is the court's latest pronouncement on this issue, it is my opinion that unless the state has relinquished its legislative jurisdiction over the federal area the severance tax would be applicable.

Your inquiry does not specifically request a ruling as to a state tax on Indian lands and, without going into a long discussion on the question, I refer you to Oklahoma Tax Commission v. Texas Co., 336 U.S. 342, in which the Supreme Court of the United States has expressly overruled the existing law on the subject and has stated in effect that a lessee of mineral rights in allotted and restricted Indian lands in Oklahoma has no immunity under the federal constitution from non-discriminatory gross production taxes and state excise taxes on petroleum produced from such lands. However, this case presents no question concerning the immunity from state taxes of royalty oil, the Indian's share of production. In Carpenter v. Shaw, 280 U.S. 363, the court held that oil royalties received by Indian lessors from nontaxable allotted lands were not subject to a state gross production tax, the tax being regarded as on the lessor's interest rather than on the severed oil; but royalty income is subject to state and federal net income taxes.

In conclusion, if there are any facts which place federal lands in a different category than those stated in this opinion, I would appreciate those additional facts, for it may materially alter the effect of this opinion.