Opinion No. 72-16

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*{*19}* **PREFATORY STATEMENT**

Due to the length and complexity of the answers to the questions posed we will depart somewhat from our usual format and present the analyses ahead of our conclusions and pose a new question only after analysis of the preceding. Length also dictates the desirability of using footnotes.

QUESTION ONE

When does a quantity of mineral material become the "output" of an owner or operator of a productive mineral property and is its market value to be determined by the Property Appraisal Department pursuant to subsection 6 of Section 72-6-7, N.M.S.A., 1953 Comp.?

ANALYSIS OF QUESTION ONE

Section 72-6-7 was amended by the New Mexico Legislature at its 1972 Session.[1] The section contemplates four types or categories of taxable property and provides that the same shall be evaluated by the Department *{*20}* for ad valorem tax purposes as follows:

(1) Tangible property, other than minerals, when held or used in connection with minerals, and intangible interests in property, other than the mineral interests, when held in the same ownership as the mineral interests:

Method of Valuation -- the "taxable value" of such property shall be determined" . . . by an appraisal thereof."[2]

(2) The mineral in nonproductive mineral land held in private fee ownership (Class One, nonproductive):

Method of Valuation -- "the department shall determine the taxable value of the mineral in Class One, nonproductive mineral properties by an appraisal thereof."[3]

(3) The severed minerals from mineral lands held by possessory title under the laws of the United States or the fee of which is in the United States or the State of New Mexico (Class Two and Class Three):

Method of valuation -- the "taxable value" shall be determined on the basis of "the annual output value of such mineral property."[4]

(4) The mineral in productive mineral lands held in private fee ownership (Class One, productive):

Method of Valuation --

(i) "the department **may.** . . determine the taxable value of the mineral in all Class One productive mineral properties and their respective allocated reserves, by an appraisal thereof."[5]

or

(ii) the "taxable value of the mineral in all Class One productive mineral properties, and the respective reserves allocated thereto," **may** be determined on the basis of "the annual output value of such mineral property."[6]

It is apparent from the reading of the statute, as well as its predecessor -- the "Output Tax Law of 1915,"[7] that, where it prescribes or permits valuation on the basis of the "annual output value of such mineral property," this value is taken in lieu of the "taxable value" of the minerals or reserves in place in the earth.[8] In other words, the statute equates three times the annual output value of a property for the preceding year, or the average for the preceding five years, with the current taxable value of the mineral reserves in the producing property. It is also apparent that this "in lieu" method of valuation was specified for two reasons: First, because of legal uncertainty as to whether the state or county could properly assess and tax mineral reserves in federally owned lands; second, because of the extreme difficulty and expense, not to mention the somewhat conjectural results, of annually or periodically appraising mineral reserves in place.

Subsection 6 of the statute directs the Department to --

". . . ascertain and determine the average annual output value of such productive mineral property for each of the five years (or so much of such period as the property has been in operation) next preceding the year in which such return is required to be made; said annual output value for each of said years being the market value of the annual output of such productive mineral property, including any bonus or subsidy payments, less the actual costs of producing and bringing the output to the surface and of milling, treating, reducing, transporting and selling the same, for said year; . . ."

Further, subsection 5 of the statute obliges the owner or operator of a productive mineral property to maintain *{*21}* accurate and detailed records showing --

". . . the quantities and kinds of minerals and metals produced, the cost of production, milling, reduction, treatment, transportation and sale thereof, the quantity sold, the amount realized therefrom and the quantities and value of such mineral and metal produced and not disposed of . . ."

and to annually report to the Department --

". . . the total quantities and kinds of ores, metals, coal, coke and other valuable minerals or metals produced and sold during, and on hand at the end of, the next preceding year, . . . and the cost of production, value and amount realized from such output, and such other facts as may be required by the department."

Aside from the decision of the New Mexico Court of Appeals in **"Kaiser Steel Corporation v. Property Appraisal Department,"**[9] issued September 3, 1971, the reported appellate decisions of our Courts are silent as to Section 72-6-7. And, while the statute may have its parallels in other states, it nevertheless appears to be unique in its language. Accordingly, little or no assistance in determining the meaning of the terms of the statute is to be obtained from the case decisions of other jurisdictions. However that may be, the above-quoted language of the statute supplies sufficient illumination as to the meaning of the term "output," as well as its time and condition parameters.

Webster's Third New International Dictionary (Unabridged) defines "output" as "something that is put out or produced: as (a) mineral, agricultural, or industrial production." The word denotes the end result of a process -- i.e., the process of its production. Under the statute, the end result is any "quantities and kinds of ores, metals, coal, coke and other valuable minerals or metals" produced by an "owner or operator of any productive mineral property" by the **continuous** process of "bringing the output to the surface and of milling, treating (and) reducing" the same. A person who only mills or treats or reduces minerals does not produce taxable "output" in the statutory sense. On the other hand, one who stops short of the entire process described in the statute -- e.g., one who only mines and sells ore to another, does produce taxable "output" in the statutory sense. However, the language of the statute and logic also persuades that one who himself mines but has his ore milled or treated or reduced for his account by another, also produces "output," and that the output, in both cases, is the material in its condition at that point where the described process of production, by or for the account of the owner or holder, ceases. Moreover, the "output" of any owner or operator of mineral property may assume a variety of forms. He may produce a quantity of coal and sell or consume that quantity as it comes from the mine; he may mine another quantity of coal and further treat it by washing and grading the coal before selling or consuming the quantity; finally, he may mine a third quantity of coal and convert the same into coke before selling or consuming the product. Each of these quantities, in its condition at the moment the last processing operation is performed, constitutes an increment of the owner's or operator's "output."

Obviously, it is not intended by the Legislature that every material removed from the earth should be followed into each form it might ultimately assume through all conceivable processes of production. Accordingly, what are the limits of production process? These are supplied by the terms "milling, treating, reducing." Again, resorting to Webster's Third New International Dictionary (Unabridged) we find that a "mill" is a "machine for crushing or comminuting (i.e., pulverizing) some substance"; that to "mill" is "to subject to some operation or process in a mill(;) . . . to grind into . . . powder(;) . . . to crush or grind in a mill." To "reduce" is to "condense, consolidate(;) . . . to diminish in size, amount, extent or number; (to) lessen, shrink . . . to decrease the volume and concentrate(;) . . . to bring to the metallic state by *{*22}* removal of non-metallic elements"; that "iron ores are reduced to metallic iron"; that "metals are reduced from their ore." We are informed by the same authority that the process of reduction may be thermal, chemical or electrochemical. Finally, the cited dictionary defines the term "treat" as "to subject to some action (as of a chemical reagent); (to) act upon with some agent (treating a substance with sulfuric acid)(;) . . . to subject (as a natural or manufactured article) to some process to improve the appearance, taste, usefulness, or some other quality."

Clearly, the expression "treat" appears to embrace a large measure of the manufacturing universe; for example, in its broadest sense, it may be said that mineral ores are treated to produce an automobile. However, the rule of reason must exclude such a possibility,[10] and we are constrained to the belief that the Legislature intended to limit the described process of production to those which change a mineral substance removed from the earth by making it easier to handle and eliminate unwanted fractions by any method, whether manipulative, thermal, chemical or electrolitic. Thus, iron ore can be "output" in the statutory sense, as can be metallic iron reduced from such ore, but steel is not a milled, reduced or treated product of that ore; it is a manufactured product.

Does the statute's concept of mineral production process contain any geographical limitations? Obviously, since "output" is valued, assessed and taxed in lieu of the land from whence it came, and since the State has no taxing power as to the lands beyond its boundaries, the statute does contain this geographical limitation. However, it contains no such limitation as to the place where minerals removed from New Mexico lands may be milled, treated or reduced by or for the account of the owner or operator, and thus become such person's "output." In this connection, it is to be noted that the tax in question is not on the process or activity of mining, milling, reducing or treating minerals; it is a tax upon the land, or the owner's or operator's interest therein, from whence the minerals come, measured by the value of the mineral output from the land.

CONCLUSION

Based upon the foregoing, we conclude that a quantity of mineral material becomes "output" of an owner or operator of mineral lands and that its market value is to be determined by the Department pursuant to subsection 6 of Section 72-6-7, when and during the year the last mining, milling, reducing or treating operation upon it is

performed by or for the account of the owner or operator, irrespective of when the mineral in the material may have been mined or when the material may be sold, exchanged, consumed or further processed by or for the account of the owner or operator.

QUESTION TWO

Are any of the following costs and expenses of an owner or operator of a productive mineral property deductible under subsection 6 of Section 72-6-7, N.M.S.A., 1953 Comp.?

(1) Royalties paid to --

(a) private persons?

(b) Indian tribes, pueblos or allottees, or to the United States for the account of such persons?

(c) labor unions representing employees of the owner or operator?

(2) Taxes, such as --

(a) severance taxes?

(b) resources excise taxes?

(c) ad valorem or property taxes?

(d) income taxes (federal or state)?

(e) gross receipts taxes on purchased items?

(f) payroll taxes?

(g) unemployment taxes (federal or state)?

*{*23}* (3) Insurance premiums for --

(a) workmen's compensation insurance?

(b) public liability and property damage insurance?

(c) fire (etc.) and extended coverage insurance?

(d) employees health and accident insurance?

(e) life insurance on executives?

(4) Interest on borrowed monies?

(5) Depletion of reserves?

(6) Depreciation on improvements, plant, machinery, equipment, etc.?

(7) Mine and mill development costs?

(8) Mine and mill "start-up" costs?

(9) Exploration costs?

(10) Contract costs?

ANALYSIS OF QUESTION TWO

Subsection 6 of Section 72-6-7 provides in material part that:

". . . said annual output value for each of said years being the market value of the annual output of such productive mineral property, including any bonus or subsidy payments, less the **actual costs of producing and bringing the output to the surface and of milling, treating, reducing, transporting and selling the same,** for said year; . . ." (Emphasis added.)

The key expression in the foregoing quotation for present purposes is "actual cost." In **Kaiser Steel Corporation v. Property Appraisal Department, supra,**[11] the Court observed that the term is not defined by the statute. However, it is defined in Webster's Third New International Dictionary (Unabridged) as "cost based on the most factual allocation of historical cost factors," and the same authority defines the components of the term as follows:

"Actual . . . 2 a: existing in act . . . contrasted with potential and possible b: existing in fact or reality: really acted or acting or carried out -- contrasted with ideal and hypothetical . . . distinguished from apparent and nominal . . .

"Cost . . . 1 a: the amount or equivalent paid or given or charged or engaged to be paid or given for anything bought or taken in barter or for service rendered . . . b: whatever must be given, sacrificed, suffered or foregone to secure a benefit or accomplish a result . . . 3: the expenditure or outlay of money, time, or labor . . . 5: an item of outlay incurred in the operation of a business enterprise (as for the purchase of raw materials, labor, services, supplies) including depreciation and amortization of capital assets . . ."

The meaning of the expression is also revealed by the matters to which it is related in the statute and to those which the statute excludes. It is expressly related to

enumerated activities, operations and processes -- namely, to those of "producing and bringing the output to the surface and of milling, treating, reducing, transporting and selling the same." Expressly excluded from the characterization of "actual cost" are "any amounts paid for --[12]

(1) "Improvements" and

(2) "Purchase of --

(a) "machinery" and

(b) "equipment" and

(c) "appliances" and

(3) "Construction of --

(a) "mills" and

(b) "reduction works" and

(c) "transportation facilities" and

*{*24}* (d) "other buildings or structures" and

(4) "Salaries of any persons not actually engaged in --

(a) "operation of such property" or

(b) "milling (of) such property" or

(c) "treatment (of) such output" or

(d) "reduction (of) such output" or

(e) "transportation (of) such output" or

(f) "selling (of) such output" or

(g) "the immediate management or superintendence of such operations."

Guidance is also furnished by the "Output Tax Law of 1915"[13], which was replaced by Section 72-6-7 in 1921,[14] but which was virtually identical with the present law in all material respects. After expressly excluding from the term "actual cost . . . any amounts expended for machinery, or other improvements, or appliances for such mining operation or for improvements made for the purpose of reducing or refining such

mineral or for the construction of mills or other reduction works, including coke ovens, and washeries, or improvements made for transporting of such minerals,"[15] the "Output Tax Law of 1915" further stated that:[16]

". . . all expenditures made for any and all such improvements, structures, buildings, or other facilities shall be considered as part of the **capital account** of such mining operations and as no part of the **operating expense** thereof." (Emphasis added.)

Finally, in **Kaiser Steel Corporation v. Property Appraisal Department, supra,**[17] the Court of Appeals considered the meaning and applied its interpretation of the term "actual cost." In **Kaiser,** the PAD had disallowed Kaiser's claimed deductions for lease royalties, property taxes, income taxes, depreciation on equipment and depletion of reserves. The Property Tax Appeals Board affirmed the disallowance, and, on appeal, Kaiser asserted that the disallowance was error on two grounds: First, that cost deductions for the indicated items were required under "good accounting principles"; second, on the ground that the deductions should therefore be allowed unless met by a specific statutory prohibition. To both of these contentions and as to all five categories of claimed deductions, the Court of Appeals responded with the observation that:

". . . This argument, and the contention that the deductions should be allowed unless there is a statutory prohibition, is met with the rule of statutory construction in tax matters.

"That rule is that legislative intention to authorize a deduction must be clearly and unambiguously expressed in the statute. Reed v. Jones, 81 N.M. 481, 468 P.2d 882 (Ct. App. 1970). See Field Enterprises Ed. Corp. v. Commissioner of Revenue, 82 N.M. 24, 474 P.2d 510 (Ct. App. 1970). Kaiser seeks deductions from the market value of its production. Since it is neither clear or unambiguous that the claimed deductions are included in the term 'actual cost,' the claimed deductions were properly disallowed."

Further, and with specific respect to the claimed deductions for lease royalties and depreciation, the Court of Appeals also observed in **Kaiser** that:

". . . The market value is to include bonus or subsidy payments and there is evidence that the royalty payments fall into that category. Amounts paid for improvements are not to be included as part of the cost. This seems to indicate that depreciation *{*25}* on such improvements should also not be included. . . ."

An additional reason for excluding lease royalty payments from the term "actual costs," not mentioned in **Kaiser,** can be found in the language of the statute. Subsection 11 of Section 72-6-7 directs the PAD to ". . . deduct from the market value of the annual output (from Class Two and Three mineral properities) any royalties belonging to the State or United States." Class Two and Three properties are either unpatented mining claims, the fee of which belongs to the United States, or they are lands leased by the United States or the State to an operator.[18] But where the mineral lands are "held in fee and private ownership" (i.e., Class One mineral property),[19] subsection 9 of the statute

does not contain a similar direction requiring the PAD to deduct royalties paid to the owner by the operator. Accordingly, since the Legislature expressly provided for deduction of government royalties where the producing mineral property is owned by a government, it must necessarily follow from the Legislature's silence that it did not intend to allow deduction of royalties paid to others where the property is privately owned.

From the foregoing, we distill the following rules of permissible cost deduction, under subsection 6 of Section 72-6-7:

First. Irrespective of what "good accounting principles" may suggest or even require, a cost may not be deducted unless authorization for it is clearly and unambiguously expressed in the statute.

Second. The claimed cost must actually have been experienced by the owner or operator during the year in question in the sense that the obligation to pay it must have been incurred during such year.

Third. The cost must relate to one or more of the prescribed activities, operations or processes -- i.e., to mining or extracting the mineral from the earth, to lifting it to the surface and to milling, treating, reducing, transporting and selling the same, in order to be deductible under the statute; the cost of any other activities, operations or processes of the owner or operator, no matter how indispensable to its affairs, are not deductible.

Fourth. There must be a reasonable direct and immediate relationship between a payroll cost claimed to be deductible and a prescribed activity, operation or process; that is to say, "but for" the manpower time and effort compensated by the payroll item, an increment of "output" would not have been mined, lifted, milled, treated, reduced, transported or sold.

Fifth. Costs of capital items held or used in connection with mining, lifting, milling, treating, reducing, transporting and selling output cannot be deducted either by way of expensing, amortization or depreciation.

CONCLUSION

Based upon the foregoing, our conclusions as to whether the indicated costs are deductible under subsection 72-6-7 are as follows:

(1) Royalties paid to --

(a) Private persons? No.

(Note: So held in **Kaiser Steel Corp. v. Property Appraisal Dept., supra**[20]

(b) Indian Tribes, pueblos or allottees, or to the United States for the account of such persons?

No.

(Note: In this connection, subsection 11 of Section 72-6-7 requires deduction of royalties **belonging** to the State or United States. Even though Indian royalties are paid to the United States, they do not "belong" to it; they belong to the Indian Tribe, pueblo or allottee and, thus are not deductible.)

(c) Labor unions representing employees of the owner or operator? Yes.

*{*26}* (Note: If the "royalties" are an actual cost to the owner or operator of mining, milling, treating, reducing or transportation labor.)

(2) Taxes, such as --

(a) Severance taxes? Yes.

(Note: Section 72-18-1.2, N.M.S.A., 1953, imposes these taxes "for the privilege of severing natural resources." Therefore they constitute an "actual cost" for the privilege of mining output.)

(b) Resources excise taxes? Yes.

(Note: Section 72-16A-21, N.M.S.A., 1953, imposes a "resources excise tax . . . on the privilege of severing or processing natural resources within New Mexico." Accordingly, this tax is also an "actual cost" of the prescribed activities, operations and processes.")

(c) Ad valorem or property taxes? No.

(Note: So held in **Kaiser Steel Corp. v. Property Appraisal Dept., supra.**[21]

(d) Income taxes (federal or state)? No.

(Note: So held in **Kaiser Steel Corp. v. Property Appraisal Dept., supra.**[22]

(e) Gross receipts taxes on purchase items? In some cases.

(Note: Yes, if such taxes are paid in connection with services or supplies, the costs of which are deductible under the statute.

No, if such taxes are paid in connection with services or property, the costs of which are not deductible, such as capital items.)

(f) Payroll taxes? Yes.

(Note: These taxes are deductible if the payroll services themselves are direct costs of the prescribed activities, operation and processes.)

(g) Unemployment taxes (federal and state)? Yes.

(Note: such taxes represent a direct cost of labor in connection with mining, milling, etc. and payment to them is statutorily required as is the case with payroll taxes.)

(3) Insurance premiums for --

(a) Workman's compensation insurance? Yes.

(Note: Workman's compensation is a statutory requirement as to employers engaged in the prescribed activities; accordingly, it is an actual cost of labor.)

(b) Public liability and property damage insurance? No.

(Note: Except in the instance where such insurance is required by law as in the instance where the owner's or operator's trucks are using the public highways.)

(c) Fire (etc.) and extended coverage insurance? No.

(Note: These are not regarded as "actual costs" of the prescribed activities, operations and processes; rather they are costs of insuring items of tangible capital property.)

(d) Employees health and accident insurance? Yes.

(Note: If and to the extent that the insurance covers employees of the owner or operator engaged in mining, milling, treating, reducing, transporting or selling the output.)

(e) Life insurance on executives? No.

(Note: Payments on such insurance are not regarded as an actual cost of the prescribed activities, etc.)

*{*27}* (4) Interest on borrowed monies? No.

(Note: It cannot be said that "but for" such a cost, output would not be mined, milled, etc.)

(5) Depletion of reserves? No.

(Note: So held in **Kaiser Steel Corp. v. Property Appraisal Dept., supra.**[23] Also, since it is the value of reserves that subsection 6 of 72-6-7 is theoretically designed to determine, it is not logical to allow a deduction for reserves depleted.)

(6) Depreciation on improvements, plant, machinery, equipment, etc. No.

(Note: So held in **Kaiser Steel Corp. v. Property Appraisal Dept., supra.**[24]

(7) Mine and mill development costs? No.

(Note: See Part IV of this opinion.)

(8) Mine and mill "start-up" costs? No.

(Note: Such expenses are associated with calibration of plant and equipment; moreover, the services and supplies for which they are incurred preceed a mining or milling operation. Accordingly, they are not considered to be "actual costs" of the prescribed activities, operations and processes.)

(9) Exploration costs? No.

(Note: Such costs are not incurred in connection with the prescribed activities, operations and processes.)

(10) Contract costs? In some cases.

(Note: Yes, if such costs are made or payable to independent contractors and incurred in connection with mining, milling treating, reducing, transporting or selling output.

No, if such costs are incurred in connection with any other activity of the owner or operator.)

QUESTION THREE

Where annual output is to be determined on an average basis, is the Department bound by its earlier determinations as to market values and actual costs of output for the first four years of the five-year period if such determinations served as a basis of certification of assessed value pursuant to Section 72-6-4A(2)(b), N.M.S.A., 1953?

ANALYSIS OF QUESTION THREE

Referring to a certification of mineral property assessed value by the PAD to a county assessor under the last cited statute, Section 72-6-4B, N.M.S.A., 1953, provides in material part that:

"The assessed values so determined, when certified by the Property Appraisal Department, shall be final and binding upon all tax officials of the state . . ."

The question, of course, is whether this statutory provision precludes a redetermination of values made in prior years for purposes of calculating a current, average, annual

output value. Apparently, the question has not been answered by any New Mexico case decision.

A number of factual possibilities may give rise to the foregoing question. For example, in the course of a prior year's determination of output market value, the same may have been predicted on the value of output **sold** rather than the market value of output **produced.** Or, it may develop that an unsold increment of output actually had a higher unit market value during the year in question than was previously determined for it. Or, it may develop that a cost deduction for a prior year exceeded the "actual cost of producing and bringing the output to the surface and of milling, treating, reducing, transporting and selling the same, for said year," in that *{*28}* the owner or operator was permitted to deduct depreciation or other nondeductible costs. Similarly, such mistakes and errors may arise for several reasons -- that is, because Section 72-6-7 was misconstrued or misapplied or because the taxpayer's return misinformed the PAD and was not audited by it.

The question posed does not ask whether the PAD can retroactively correct an output assessment of a mineral property for a prior year theretofore certified by the PAD to a County Assessor, and accordingly, this opinion is not addressed to that question. Rather, the question is whether the PAD, in **currently** assessing average annual output, can use market values, quantities of output and actual costs of producing the same which are different from those which served as the basis of prior output assessments.

Looking to the language of Section 72-6-4B, N.M.S.A., 1953, quoted above, we note that it is the "assessed value . . . when certified," and not the value, quantity or cost figures from which such value determination was made, that becomes "final and binding upon all tax officials of the state." Moreover, the statute does not specify that a certified assessment of value for a prior year is final and binding upon tax officials in any subsequent year. In doing what it asks if it can do in the third question, the PAD is not seeking or trying to reassess as to a prior year.

CONCLUSION

Based upon the foregoing, we conclude that, where annual mineral output is to be determined on an average basis, the Department is not bound by an earlier determination as to market values or quantities or actual costs of output for the first four years of the five-year period even though such determination served as the basis of certifications of assessed value pursuant to Section 72-6-4A(2) (b) N.M.S.A., 1953.

QUESTION FOUR

Do subsections 13 and 14 of Section 72-6-7, N.M.S.A., 1953, require the Department to determine and certify to the several county assessors the assessed value of subsurface mineral property improvements, such as mine shafts and the like?

ANALYSIS OF QUESTION FOUR

Subsections 13 and 14 of Section 72-6-7, N.M.S.A., 1953, specify in material part that:

"The taxable value of all improvements . . . held or used in connection with all mineral property . . . shall be determined by the department by an appraisal thereof in addition to . . . (the output value)."

The problem, of course, is what is an "improvement . . . held or used in connection with . . . (a) . . . mineral property"? Does this characterization include any work performed by or on behalf of an owner or operator beneath the surface of the earth apart from that performed in actually extracting mineral and lifting it to the surface? For example, is a mine shaft an improvement in the statutory sense?

Express mention of mineral property in an ad valorem tax act was first made in 1882.[25] Section 2 of this 1882 Act defined the terms used and provided as follows:

"Section 2. The terms mentioned in this section are employed throughout this chapter in the sense herein defined:

"1. The term 'real estate' includes all lands within the territory, to which title or right to title has been acquired; **all mines, minerals and quarries, in and under the land, and all rights and privileges appertaining thereto, and improvements.** (Empahsis added.)

"2. The term 'improvements' includes all buildings, structures, fixtures and fences erected upon or affixed to land, whether title has been acquired to said land or not."

Admittedly, the foregoing definition of "improvements" does not clearly *{*29}* suggest that a hole in the ground is included. However, it is to be noted that the definition of "real estate" includes (1) minerals in and under the ground, (2) mines in and under the ground, (3) quarries in and under the ground, (4) as well as improvements, which can be "buildings" or "structures"; accordingly, that the Act distinguished between and included as taxable property both that which is to be extracted from the earth and that which facilitates such extraction. Moreover, our Supreme Court has held that an oil well is a "structure" (**Albuquerque Foundry Works v. Stone,** 34 N.M. 540, 286 P. 157 (1930), as is a water well (**Dysart v. Youngblood,** 44 N.M. 351, 102 P.2d 664 (1940), and we also note that Section 3 of the 1882 Act expressly recognized that a mine was a subsurface improvement in exempting the following from taxation:

". . . Mines and mining claims bearing gold, silver and other precious or useful metal (but not the gross product and **surface improvements** thereof), for a period of ten years from the date of record of location thereof; ditches, canals and flumes used exclusively for irrigating lands and industrial pursuits; . . ."

And in 1899, the Territorial Legislature clarified the provisions of the 1882 Act, as the same related to unpatented mining claims and as to what constituted a mining "improvement." In this regard, it provided:[26]

"No tax shall be assessed, levied or collected upon any mining claim in this state, located under the mining laws of the United States, nor upon any **shaft or workings therein,** until after patent shall have been duly issued therefore by the United States; and for one year thereafter but nothing herein contained shall be held or construed to exempt from taxation, as provided by law, **the improvements upon any such mining claim, other than the shaft and other works as aforesaid,** nor the net product of any such mining claim." (Emphasis added.)

This exemption provision was expressly repealed by the Legislature in 1921,[27] when Section 72-6-7, N.M.S.A., 1953, was enacted.[28]

Finally, we note that a few weeks before Section 72-6-7, N.M.S.A., 1953, was enacted, the New Mexico Supreme Court addressed itself to and issued an opinion on the subject of what is a "mining improvement." In **Golden Giant Mining Co. v. Hill,** 27 N.M. 124, 198 P. 276 (1921), the Court was concerned with what constituted "labor" or "improvements" under a federal statute relating to unpatented mining claims. Quoting from the opinion in **Fredricks vs. Klauser,** 52 Ore. 110, 96 P. 679, 682, the Supreme Court gave the following definition of the term "improvement" (27 N.M. at 131):

"The word 'improvement' as thus used, evidently means such an artificial change of the physical conditions of the earth in, upon, or so reasonably near a mining claim as to evidence the design to discover mineral therein or to facilitate its extraction, and in all cases the alteration must reasonably be permanent in character."

CONCLUSION

Based upon the foregoing, we conclude that the term "improvements," as used in subsections 13 and 14 of Section 72-6-7, N.M.S.A., 1953, means any reasonably permanent, artificial change in the physical conditions on or beneath the surface of the earth or any structure erected on or beneath said surface, or reasonably close thereto, effected to discover minerals therein or to facilitate its extraction or transportation. Accordingly, the cited provisions of the statute do require the Department to determine the value of and assess the subsurface improvements of an owner or operator of mineral property in New Mexico.

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n1 L. 1972, Ch. 57, Sec. 2

n2 Id., Subsections 13 and 14

n3 Id., Subsection 10

n4 Id., Subsection 11

n5 Id., Subsection 8

n6 Id., Subsection 9

n7 L. 1915, Ch. 55

n8 See discussion in State v. State Tax Commission, 40 N.M. 299, 58 P.2d 1204 (1936)

n9 Cause No. 582; Vol. 10, No. 19, State Bar of New Mexico Bulletin, at page 226.

n10 See New Mexico Attorney General's Opinion No. 68-5; January 11, 1968

n11 See Footnote 9

n12 Sec. 72-6-7(6), N.M.S.A., 1953

n13 L. 1915, Ch. 55, Sec. 3

n14 L. 1921, Ch. 133, Sec. 505

n15 L. 1921, Ch. 55, Sec. 3

n16 Ibid.

n17 See Footnote 9

n18 Sec. 72-6-7(2), N.M.S.A., 1953

n19 Ibid.

n20 See Footnote 9

n21 Ibid.

n22 Ibid.

n23 Ibid.

n24 Ibid.

n25 L. 1882, Ch. 62

n26 L. 1899, Ch. 60, Sec. 1

n27 L. 1921, Ch. 133, Sec. 109

n28 Id., Sec. 505.