

## Opinion No. 32-378

February 12, 1932

**BY:** E. K. Neumann, Attorney General

**TO:** Honorable Byron O. Beall, Chief Tax Commissioner, Santa Fe, New Mexico.

{\*140} Your letter of January 29th, 1932, requests an opinion as to whether or not taxes may be assessed and collected upon the interest created by Oil and Gas Leases upon both state and privately owned lands.

The constitutions of many states provide that all property, except such as is exempted by such constitutions or by laws for exemption as provided by such constitution, is subject to taxation, but we find in our constitution no such provision and must consequently look to the statutes to see just what property is subjected to taxation. Section 3 of Article 8 of the Constitution provides that certain classes of property are exempt from taxation, as well as the property of certain classes of persons to certain amounts of valuation, leaving the inference, the constitution standing alone, that all other property within the state is subject to taxation.

Our legislative body by Section 141-101 of the 1929 Codification provides: That "all property, real and personal, in the state shall be subject to taxation, except as in the constitution and existing laws otherwise provided", and by Section 141-201 of the said Codification provides that "all property both real and personal shall be listed, assessed and taxed in the county where it is situated, etc.", by which provisions it is apparent all property, except such as is exempt by the constitution, and other constitutional laws and laws providing for special taxation of certain property and property rights, is to be taxed.

Section 141-502 of the 1929 Codification provides, in parts material to the question at hand:

"At its first regular meeting beginning on the first Monday of March of each year, the commission (State Tax Commission)

(1) Shall determine the actual value.

(c) of mineral property in the state as hereinafter defined:

(2) Shall certify:

(b) To the local assessor in the respective counties in which any of the property included in 1 (c) is situated, the value of such property, found and determined as hereinafter provided;

Thereafter in Section 141-506 of said Code the legislature provided the method of valuing mineral property, as follows, in material parts:

(1) "Mineral property" as used in this act shall mean and include all mineral property in this state, any interest therein, and any products thereof, and all improvements, equipment, materials, supplies, and personal property held or used in connection therewith, and the surface value of all mineral lands for grazing, timber, agricultural or other purposes when held in the same ownership as the mineral rights therein.

(2) Mineral property, or any interest therein, and any products thereof, for the purposes of taxation, shall be divided into the three following classes:

**Class One:** Mineral lands held in fee in private ownership and mineral rights and interests therein.

**Class Two:** The severed mineral products from mineral lands held by possessory title under the laws of the United States.

**Class Three:** The severed mineral products from leasehold and contract mineral rights in lands the fee of which is in the United States or the State of New Mexico.

(3) Mineral properties falling in class: One shall be sub-classified into either productive or nonproductive.

Productive properties shall be such as are mined or operated in good faith for the mineral values <sup>{\*141}</sup> therein, with a reasonable degree of continuity during the year for which the return, hereinafter required, is made, and to an extent in keeping with the market demand and conditions affecting the extraction and disposition of the product.

Non productive properties shall be such as are known to contain minerals in commercially workable quantities, of such character as add present value to the land in addition to its value for other purposes, and are not so operated so as to fall in the class of productive properties as above defined. (Then follows definitions, determination of values, return requirements and the like).

From the foregoing it is apparent that if mineral leasehold and contractual rights in lands owned by the state are property, either personal or real, such are not subject to taxation in any manner except as provided in said Section and Subsection 2, Class Three, which classifies mineral property for the purpose of taxation purposes. In other words, such interests are not subject to taxation as such and cannot be taxed, and only the severed mineral products can be taxed, unless such provision is unconstitutional. As heretofore pointed out, by inference, all property is by the constitution made subject to taxation, except such as is exempted by the constitution and constitutional laws, but, in our opinion, the classification made by the legislature will satisfy the constitutional requirements, if any, for the reason that such property is made subject to taxation under a clearly defined method of computation of value and a clear definition what is

considered mineral property in leasehold and contract rights in lands the fee of which is in the state of New Mexico.

It might be said in passing that the products of oil and gas wells and the value of such producing wells, in any event, cannot be taxed as further provided in said Section 141-505, but must be taxed as provided for in Article 4 of Chapter 97 of the 1929 Code.

Now turning to the matter of assessing for taxation and taxing oil and gas leasehold interests and other mineral interests in lands held in fee in private ownership.

It is generally held that oil and gas leasehold interests are interests and property subject to taxation, where such leasehold interests are more than mere licenses to explore for oil and gas. It is also generally held that oil and gas are minerals within the general meaning of the term.

The courts of most oil producing states hold that leases for the mere prospecting of oil and gas are property subject to taxation without regard as to whether or not such lease conveys a property right to the minerals themselves. Other courts, chiefly the Kansas Courts, hold that where an oil and gas lease is a mere license to prospect and produce same if found, such lease does not convey or create such an interest as is subject to taxation, basing their ruling upon the facts in each particular case. These same courts, however, hold that where there is a specific grant of oil and gas in and under certain lands to the grantee, his heirs and assigns, such grant is a conveyance of such a mineral right as subjects same to taxation as mineral property, and, also, where the grant is for a period of years and "so long as oil and gas, or either of them, is found therein and produced therefrom" the same rule applies.

The New Mexico Supreme Court has held in *Terry vs. Humphreys*, 27 N.M. 564, that "an oil and gas lease for a period of five years, or as long thereafter as oil and gas, or either of them, is produced from said land by the lessee, conveys real property," and consequently, conveying real property, such lease creates an estate or a property right mineral in character. Also, in our opinion, a deed conveying minerals, including oil and gas, creates an estate and a property right apart from and independent from the surface.

We have therefore:

A. An oil and gas lease and a mineral estate created by a mineral deed:

- (1) Oil and gas is a mineral.
- (2) An oil and gas lease is {<sup>\*142</sup>} mineral property and real property.
- (3) A mineral deed conveying oil and gas creates a property right and is real property.

B. A statutes which provides:

(1) All property both real and personal, except exempt property is subject to taxation.

(2) The State Tax Commission shall tax mineral property.

(3) That mineral property for taxation purposes is divided into three classes and one class thereof, relating to privately owned fee lands, is further classified into productive and non productive properties.

Our conclusions therefore, from all the foregoing, is that oil and gas leases on State and Government property cannot be assessed and taxed as such, but that oil and gas leases and separate mineral holdings on privately owned fee lands can be assessed and taxed as is in Section 141-505 of the 1929 Compilation provided. It is to be noted, however, that by Article 4 of Chapter 97 of said Code, production taxes, as therein provided, is in lieu of all other taxes on such oil and gas wells and on their production. In our opinion, however, the leasehold and other mineral interests upon privately owned fee lands may be taxed, even upon a producing lease upon an ad valorem basis where the actual production, producing wells and equipment is taxed as provided by said Article 4 of Chapter 97. Such Article exempting such wells and their production from taxation upon an ad valorem basis.