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April 16, 1987

ATTORNEY GENERAL OPINION NO. 87- 70

Keith R. Henley, Chairman
Kansas Corporation Commission
Fourth Floor, Docking State Office Building
Topeka, Kansas 66612-1571

Re: Oil and Gas--Crude Oil or Petroleum; Production and Sale--Assessment of Costs of Administering 55-601 to 55-613, Disposition of Moneys

Synopsis: The statutory and regulatory scheme found in K.S.A. 1986 Supp. 55-609(c), 55-711(c) and K.A.R. 82-3-206 imposes an assessment to pay the conservation division expenses and administrative costs. Under this scheme the first purchaser pays the assessment and deducts it from payment of production to producers and royalty owners. Generally, as a matter of federal constitutional law, the federal government and Indian tribes are exempt from state taxation absent congressional consent. In our judgment there is implicit consent to tax the federal government in 30 U.S.C. §189 which authorizes a tax against a lessee of the federal government. This federal statute has been interpreted by the U.S. Supreme Court to authorize the tax against the lessee "as if the government were not concerned." There is also congressional authorization to tax the mineral interests of Indian tribes if the interests result from a lease issued to a non-Indian lessee pursuant to the 1924 Act found in 25 U.S.C. §398. However, this authorization does not exist in the Indian Mineral Leasing Act of 1938 found in 25 U.S.C. §396a. Therefore Indian mineral interests resulting from a lease issued to a non-Indian lessee pursuant to

> the 1924 Act are not exempt and those pursuant to the 1938 Act are exempt from the statutory and regulatory scheme in question. Cited herein: K.S.A. 1986 Supp. 55-609, 55-711, U.S. Const., Art. IV, §3, cl. 2; 30 U.S.C. §189, 25 U.S.C. §§396a; 398.

* * *

Dear Mr. Henley:

As former Chairman of the Kansas Corporation Commission Mr. Lennen requested our opinion concerning the statutory and regulatory scheme found in K.S.A. 1986 Supp. 55-609(c), 55-711(c) and K.A.R. 82-3-206 that imposes an assessment based on the volume measure of production of oil and gas to pay the conservation division expense and oil and gas conservation administration costs not otherwise provided for. Specifically, he inquired whether mineral interests owned by the federal government or its entities or Indian tribes are exempt from the payment of assessments under this statutory and regulatory scheme.

K.S.A. 1986 Supp. 55-609(c) [oil] and K.S.A. 1986 Supp. 55-711(c) [gas] state:

> "Assessments imposed on the basis of a volume measure of production under the authority of this section shall be reported and remitted in the manner provided in K.S.A. 1986 Supp. 79-4230 [on the mineral severance tax return forms]."

K.A.R. 82-3-206 states:

> "An oil conservation assessment to pay the conservation division expenses, and oil and gas conservation administration costs not otherwise provided for, shall be made as follows: (a) A charge, as established by the commission, on each barrel of crude oil or petroleum marketed or used each month shall be assessed to each producer. The charge and assessment shall only apply to the first purchase of oil from the producer.

> "(b) The first purchaser of the production shall deduct the assessment per barrel of oil marketed or used from the lease each month before paying for production, and shall remit the assessment to the conservation division when the purchasers make their regular oil payments.
>
> "(c) The remittances shall be made each month in a single check. The purchaser shall account for the deductions under this order on the regular payment statements to producers and royalty owners or other interested persons."

Under this statutory and regulatory scheme the first purchaser remits the assessments to the conservation division and then deducts them from the payment to producers and royalty owners. For purposes of your question we will assume that the mineral interests held by the federal government and Indian tribes are royalty interests.

This statutory and regulatory scheme calls for an "assessment" to be charged. While in legal parlance an "assessment" and a "tax" do not have the same meaning, they have often been employed synonymously. Commercial National Bank v. Board of County Commissioners, 201 Kan. 280 (1968). In determining whether a charge is an assessment or a tax, the name given the charge is not controlling; rather it is the reason for the charge that determines its nature. 70 Am.Jur.2d Special and Local Assessments §1 (1973). General authority defines a tax as an enforced exaction to raise revenue for general governmental purposes. 70 Am.Jur.2d Special and Local Assessments §1 (1973); 41 Words and Phrases, Tax, Taxation 170 (1965). Clearly conservation, as the preservation of natural resources, benefits the general public, and as such is a general governmental purpose. See generally Copper Valley Mach. Works, Inc. v. Andrus, 653 F.2d 595 (1981). These exactions go to paying the costs of the conservation division expenses and are therefore a tax. See generally United States v. State of Maryland, 471 Fed. Supp. 1030, 1036 (D.Md. 1979).

We will first address whether the federal government is exempt from the tax. Unquestionably the federal government has authority to exercise complete dominion and control over all activities on public domain lands, including the regulation of all oil and gas operations conducted thereon. The United States Constitution, at Art IV, §3, cl. 2 states:

> "The Congress shall have the power to dispose of and make all needful rules and regulations respecting the Territory or other property belonging to the United States. . . ."

However, the fact that the United States has authority to regulate and control a particular activity does not prevent a state from regulating the activity, so long as there is Congressional authorization. See, Northern Nat. Gas Co. v. State Corp. Comm., 372 U.S. 84, 83 S.Ct. 646, 9 L.Ed.2d 601 (1963).

In Section 32 of the Mineral Lands Leasing Act of 1920, 41 Stat. 450, codified in 30 U.S.C. §189, Congress provides the necessary authorization to tax the lessee of federal land.

> "Nothing in this chapter shall be construed or held to affect the rights of the States or other local authority to exercise any rights which they may have, including the right to levy and collect taxes upon improvements, output of mines, or other rights, property, or assets of any lessee of the United States."

Construing this section, the U.S. Supreme Court explained:

> "Congress . . . meant by the proviso to say in effect that, although the act deals with the letting of public lands and the relations of the [federal] government to the lessees thereof, nothing in it shall be so construed as to affect the right of the states, in respect of such private persons and corporations, to levy and collect taxes as though the government were not concerned.
>
> . . . .
>
> "We think the proviso plainly discloses the intention of Congress that persons and corporations contracting with the United States under the act, should not,

> for that reason, be exempt from any form of state taxation otherwise lawful." Mid-Northern Oil Co. v. Walker, 268 U.S. 45, 48-50, 45 S.Ct. 440, 441, 69 L.Ed. 841, 843 (1925). (Emphasis in original.)

The Supreme Court again construed section 32 of the Mineral Leasing Act of 1920 (30 U.S.C. §189) and cited the above language in Commonwealth Edison Co. v. Montana, 453 U.S. 609, 101 S. Ct. 2946, 69 L.Ed.2d 884 (1981). The question presented in Commonwealth was whether a severance tax on coal imposed by the State of Montana against producers violated the Commerce and Supremacy Clauses of the United States Constitution. The severance tax on the output of Montana coal miners included coal mined on federal land. In coming to the conclusion that the tax did not violate the Commerce or Supremacy Clause, the Court considered whether the Montana tax was not "otherwise lawful" (language in Walker) because it conflicted with the purpose of the Mineral Leasing Act of 1920. The Court reasoned that the possibility that the Montana tax could result in reducing the royalty payments to the Federal government was not sufficient to make the tax inconsistent with the Mineral Leasing Act.

The Court states:

> "By definition, any state taxation of federal lessees reduces the 'economic rents' accruing to the Federal Government, and appellants' argument would preclude any such taxes despite the explicit grant of taxing authority to the States by §32." Commonwealth Edison Co. v. Montana, 453 U.S. at 632, 101 S.Ct. at 2961, 69 L.Ed.2d at 904.

The explicit grant of taxing authority provided by Section 32 of the Mineral Leasing Act of 1920 (30 U.S.C. §189) clearly allows the taxing of the lessee under the statutory and regulatory scheme in question. However, while implicit in the language of Section 32, there is no explicit authorization to tax the mineral interests held by the federal government. Since the federal government is not subject to any form of direct taxation without congressional consent, McCulloch v. Maryland, 4 Wheat (U.S.) 316, 4 L.Ed. 579 (1819), we must now determine whether the tax in question is valid against the federal government as an indirect tax.

A nondiscriminatory, indirect tax whose legal incidence does not fall on the federal government is permissible, since the tax does not hinder the federal government's functions or the exercise of sovereign power. United States v. City of Leavenworth, 443 F.Supp. 274 (D. Kan 1977). See United States v. State of Maryland, 471 F.Supp. 1030 (D.Md. 1979). See also Graves v. New York ex rel. O'Keefe, 306 U.S. 466, 59 S.Ct. 595, 83 L.Ed. 927 (1938) and United States v. Boyd, 378 U.S. 39, 84 S.Ct. 1518, 12 L.Ed.2d 713, (1964).

United States v. Leavenworth, 443 F.Supp. 274, involved a franchise fee imposed by a city ordinance upon all utility companies doing business within the city limits of Leavenworth, Kansas. Reviewing all applicable authorities, the Court upheld the constitutionality of the fee as applied to the United States on the ground that the fee's legal incidence did not fall upon the United States. Similarly and in accordance with the reasoning in Leavenworth, the legal incidence of the statutory and regulatory scheme in question does not fall on the federal government because 1) the assessment does not fall directly upon the property of the United States, 2) the legal liability for payment falls on the first purchaser, and 3) the statutory and regulatory scheme do not purport to authorize any penalties for nonpayment such as liens or encumbrances upon government property, and finally 4) there is no requirement that the first purchaser pass all or any of the financial burden on to the United States [the regulation requires that the purchaser "account for the deduction."] See United States v. Maryland, supra, (involves an environmental surcharge upheld as a valid tax against agencies of the federal government.)

In conclusion, it is our judgment that there is implicit consent to the tax (if not express consent) in Section 32 of the Mineral Leasing Act of 1920 and that case law supports the nature of the tax as a nondiscriminatory, indirect exaction. Accordingly, it is our opinion that the mineral interests owned by the federal government are not exempt from the payment of assessments under the statutory and regulatory scheme of K.S.A. 1986 Supp. 55-609(c), 55-711(c) and K.A.R. 82-3-206.

We now turn to the question of whether mineral interests owned by Indian Tribes are exempt. As a matter of federal constitutional law, the question of whether a state may tax or regulate activities on Indian lands where non-Indians are involved is determined by whether, in the specific context, the exercise of state authority would violate federal law. See generally White Mountain Apache Tribe v. Bracher, 448 U.S. 136, 100 S.Ct. 2578, 65 L.Ed.2d 665, (1980) and Israel, 30 Rocky Mt. L. Inst. 3-57 (1984).

Generally, state laws may be applied to tribal Indians on their reservations if Congress has expressly so provided. California, et al. Appellants v. Cabazon Band of Mission Indians et al., _____ U.S. _____, 107 S.Ct. 1083, _____ L.Ed.2d _____, 55 U.S.L.W. 4225 (1987). This very recent U.S. Supreme Court case deals with whether the State has criminal jurisdiction on Indian land. In a lengthy footnote the Court addresses state taxation of Indian tribes, and clearly sets forth the per se rule.

> "In the special area of state taxation of Indian tribes and tribal members, we have adopted a per se rule. In Montana v. Blackfeet Tribe, 471 U.S. 759 (1985), we held that Montana could not tax the Tribe's royalty interests in oil and gas leases issued to non-Indian lessees under the Indian Mineral Leasing Act of 1938. We stated: 'In keeping with its plenary authority over Indian affairs, Congress can authorize the imposition of state taxes on Indian tribes and individual Indians. It has not done so often, and the Court consistently has held that it will find the Indians' exemption from state taxes lifted only when Congress has made its intention to do so unmistakably clear.' Id., at 765. We have repeatedly addressed the issue of state taxation of tribes and tribal members and the state, federal, and tribal interests which it implicates. We have recognized that the federal tradition of Indian immunity from state taxation is very strong and that the state interest in taxation is correspondingly weak. Accordingly, it is unnecessary to rebalance these interests in every case. In Mescalero Apache Tribe v. Jones, 411 U.S. 145, 148 (1973), we distinguished state taxation from other assertions of state jurisdiction. We acknowledged that we had made repeated

> statements 'to the effect that, even on reservations, state laws may be applied unless such application would interfere with reservation self-government or would impair a right granted or reserved by federal law. . . . Even so, in the special area of state taxation, absent cession of jurisdiction or other federal statutes permitting it, there has been no satisfactory authority for taxing Indian reservation lands or Indian income from activities carried on within the boundaries of the reservation, and McClanahan v. Arizona State Tax Comm'n, [411 U.S. 164 (1973)], lays to rest any doubt in this respect by holding that such taxation is not permissible absent congressional consent. Ibid. (Emphasis added.) '" California v. Cabazon Band of Mission Indians, 107 S.Ct. at 1091, 55 U.S.L.W. at 4228. (Emphasis in original.)

In determining whether there is congressional consent, Montana v. Blackfeet Tribe of Indians, 471 U.S. 759, 105 S.Ct. 2399, 85 L.Ed.2d 753 (1985), (cited in the footnote) is particularly relevant. The case involved several Montana taxes, among them Oil and Gas Conservation, Mont. Code Ann. §82-11-101 et seq. (1983), that provided for an assessment to be fixed against each barrel of crude petroleum originally produced in order to defray the expenses of enforcing the oil and gas laws and the operations of the Board of Oil and Gas Conservation. Mont. Code Ann. §82-11-131 (1983). The Supreme Court held that Montana could not tax the royalty interests in oil and gas leases issued to non-Indian lessees pursuant to the Mineral Leasing Act of 1938, ch. 198, 52 Stat. 347, codified at 25 U.S.C. §396a et seq. (1938 Act). The Court considered whether the 1938 Act incorporated the tax authorization of Indian lands by a 1924 statute, Act of May 29, 1924, ch. 210, 43 Stat. 244, codified at 25 U.S.C. §398 (1924 Act) which states:

> "Unalloted land on Indian reservations other than lands of the Five Civilized Tribes and the Osage Reservation . . . may be leased . . . for oil and gas purposes. . . .: Provided, That the production of oil and gas and other

> minerals on such lands may be taxed by the State in which said lands are located in all respects the same as production on unrestricted lands, and the Secretary of the Interior is authorized and directed to cause to be paid the tax so assessed against the royalty interest on said lands."

In addition to finding that the 1938 Act did not incorporate the tax authorization of the 1924 Act, the court assumed for purposes of this case that the 1924 Act's tax authorization remained in effect for leases executed pursuant to the 1924 Act. Montana v. Blackfeet Tribe of Indians, 471 U.S. at 767, 105 S. Ct. at 2404, 85 L.Ed.2d at 760.

Therefore it is our opinion that mineral interests owned by Indian tribes are exempt from the Kansas statutory and regulatory scheme when the interests result from a lease issued to a non-Indian lessee pursuant to the 1938 Act and are not exempt when the interests concern a lease issued pursuant to the 1924 Act.

In conclusion, the statutory and regulatory scheme established by K.S.A. 1986 Supp. 55-609(c), 55-711(c) and K.A.R. 82-3-206 imposes a tax. In our judgment, the mineral interests held by the federal government are not exempt from this tax pursuant to the implicit authority of the Mineral Leasing Act of 1920 found in 30 U.S.C. §189. The mineral interests held by Indian tribes are exempt if they result from a lease issued to a non-Indian lessee pursuant to the Indian Mineral Leasing Act of 1938 found in 25 U.S.C. §396a. But the mineral interests are not exempt if they result from a lease pursuant to the Act of 1924 found in 25 U.S.C. §398 that specifically authorizes the tax.

Very truly yours,

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