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ATTORNEY GENERAL OPINION NO. 2012- 18

Secretary Nick Jordan
Kansas Department of Revenue
915 SW Harrison Street
Topeka, KS 66612

Re: Constitution of the United States—Amendments to the U.S. Constitution—Rights and Immunities of Citizens; Surface and Mineral Rights Taxed Separately

Constitution of the State of Kansas—Finance and Taxation—System of Taxation; Classification; Exemption

Taxation—Listing and Valuation of Real Estate—Surface and Mineral Rights Taxed Separately

Synopsis: The Kansas Legislature may separately classify severed and non-severed mineral interests for taxation purposes without violating equal protection guarantees under the Kansas and United States Constitutions. Cited herein: K.S.A. 79-420; Kan. Const., Art. 11, § 1; U.S. Const., Amend. 14.

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Dear Secretary Jordan:

As Secretary of the Kansas Department of Revenue, you ask our opinion regarding the constitutionality of K.S.A. 79-420. Specifically, you ask whether there is a violation of the equal protection guarantees of the United States and Kansas Constitutions when the same mineral interest is valued at a different rate for taxation purposes based upon ownership of the interest in the surface land.

K.S.A. 79-420 states in relevant part:

> Whenever the fee to the surface of any tract, parcel or lot of land is in any person or persons, natural or artificial, and the right or title to any minerals therein is in another or in others, such mineral interest shall be listed and the market value, if any, determined separately from the fee of such land, in separate entries and descriptions. Such land and such mineral interest shall be separately taxed to the owners thereof respectively.

In plain language, this statute requires a mineral interest to be taxed separately from the land in which the minerals are located when the land and the mineral interest are owned by different persons.

Your question relates to Article 11, § 1 of the Kansas Constitution, which states that the Legislature shall provide for a "uniform and equal basis of valuation and rate of taxation of all property subject to taxation."[1] Article 11, § 1(a) further provides that "[p]roperty shall be classified into the following classes for the purpose of assessment and assessed at the percentage of value prescribed therefor." Real property is classified into four subclasses. The two subclasses relevant to your question are "Land devoted to agricultural use which shall be valued upon the basis of its agricultural income or agricultural productivity . . ."[2] and "[a]ll other urban and rural real property not otherwise specifically subclassified."[3]

As you note in your letter, severed mineral interests are not specifically subclassified in Article 11, § 1(a) and therefore fall into the "all other" classification. You further note that in the vast majority of cases, the land in which minerals are located falls within the "agricultural use" classification. This means that land containing a non-severed mineral interest is usually valued based upon agricultural income or productivity. If the same mineral interest is severed from the fee to the surface land, the mineral interest is valued based upon fair market value. As a result, the same mineral interest may be subject to very different tax assessments depending on whether the interest is severed from the surface fee.

You ask whether disparate treatment of severed versus non-severed mineral interests for taxation purposes violates equal protection. Your question requires an analysis of the Equal Protection Clause of the United States Constitution, which prohibits states from denying "to any person within its jurisdiction the equal protection of the laws."[4] The Kansas Supreme Court has held that Article 11, §1 provides equal protection to Kansas citizens for taxation purposes that is virtually identical to the protection afforded by the Equal Protection Clause of the United States Constitution.[5]

Kansas courts have previously determined that K.S.A. 79-420 does not violate equal protection. In *Cherokee & Pittsburg Coal & Mining Co. v. Crawford County*

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[1] Kan. Const. Art. 11, §1(a).
[2] *Id.* at §1(a)(2).
[3] *Id.* at §1(a)(7).
[4] U.S. Const., Am. 14.
[5] *State ex rel. Tomasic v. City of Kansas City*, 237 Kan. 572, 583 (1985).

Commissioners, the Kansas Supreme Court considered Laws 1897, c. 244, the statutory predecessor to K.S.A. 79-420.[6] In that case, a coal company owning mineral rights in real estate, but not the fee to the surface land, challenged the statute on the ground that it provides for "unequal and inequitable valuation and assessment" of mineral interests in violation of Article 11, § 1 of the Kansas Constitution.[7] The Court held that the statute did not violate the Kansas Constitution, and further noted that "[m]inerals in the earth are real estate, and, when the owner of them has not the fee to the surface of such land, they should be separately assessed and taxed."[8] The Court has reaffirmed its 1905 holding in *Cherokee*.[9]

Generally, lawmakers are afforded broad discretion in creating taxation schemes, even if such schemes result in unequal taxation. "[I]n taxation, even more than in other fields, legislatures possess the greatest freedom in classification."[10] A tax classification that does not involve a fundamental right or suspect classification need meet only the rational basis level of scrutiny to satisfy equal protection.[11]

In this case, owners of mineral interests are classified according to whether the mineral interest is severed from the fee to the surface land. Such classification does not involve a fundamental right (*e.g.* freedom of speech or the right to vote) or a suspect classification (*e.g.* race or religion). Therefore, the tax classification of severed versus non-severed mineral interests need meet only the rational basis level of scrutiny to satisfy equal protection.

The rational basis test examines whether a statutory classification bears some reasonable relationship to a valid legislative purpose.[12] A tax classification is constitutionally valid on equal protection grounds "if there is any reasonably conceivable state of facts that could provide a rational basis for the classification."[13] "[I]t is entirely irrelevant for constitutional purposes whether the conceived reason for the challenged distinction actually motivated the legislature."[14]

The statute requiring severed mineral interests to be valued separately from the surface land was originally enacted in 1897,[15] and later codified at K.S.A. 79-420. There is no legislative history available to explain the actual reason for enactment of the statute. However, Kansas courts have noted that the purpose of K.S.A. 79-420 is to ensure that

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[6] 71 Kan. 276 (1905).
[7] *Id.*
[8] *Id.* at Syl. 2.
[9] *See, e.g., Hitch Land & Cattle Co. v. Board of County Comm'rs of Seward County*, 179 Kan 357, 361 (1956); *Catlett v. Roemer*, 174 Kan. 309, 313 (1953); *Hushaw v. Kansas Farmers' Union Royalty Co.*, 149 Kan. 64 (1939).
[10] *Peden v. Kansas Dept. of Revenue*, 261 Kan. 239, 253 (1996) (quoting *Madden v. Kentucky*, 309 U.S. 83 [1940]).
[11] *Armour v. City of Indianapolis*, __ U.S. __, 132 S. Ct. 2073, 2076 (2012); *In re CIG Field Services Co.*, 279 Kan. 857, 878 (2005).
[12] 279 Kan. at 878.
[13] *See, e.g., F.C.C. v. Beach Communications, Inc.*, 508 U.S. 307, 313 (1993).
[14] *Id.* at 315.
[15] Laws 1897, c. 244.

property is properly listed for taxation. The *Cherokee* court described of the purpose of the statute as follows:

> The act under consideration was passed to meet a newly developed class of property or division of ownership of real estate in Kansas, by which lands came to be divided horizontally, as it were. But for this provision, it would be possible for a very large and highly valuable class of real estate to escape taxation.[16]

In *Hushaw v. Kansas Farmers' Union Royalty Co.*, the court stated:

> It is a matter of common knowledge that Kansas contains vast reservoirs of oil and gas. The value of these mineral deposits baffle computation. The purpose of the statute is to place these properties on the tax roll. The method selected by the legislature was to compel disclosure of the true ownership of such minerals as they are from time to time transferred.[17]

Thus, K.S.A. 79-420 serves to place severed mineral interests on the tax rolls. In our opinion, this is a valid legislative purpose, and K.S.A. 79-420 bears a reasonable relationship to such purpose. As previously noted, a tax classification distinguishing owners of severed versus non-severed mineral interests does not involve a fundamental right or a suspect class. Therefore, we conclude that K.S.A. 79-420 meets the rational basis level of scrutiny under an equal protection challenge.

Accordingly, we opine that the state may separately classify severed and non-severed mineral interests for taxation purposes without violating the equal protection guarantees of the Kansas and United States Constitutions.

Sincerely,

Derek Schmidt
Kansas Attorney General

Sarah Fertig
Assistant Attorney General

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[16] 71 Kan. at 278.
[17] 149 Kan. at 74.