

## **N.D.A.G. Letter to Duppler (July 7, 1987)**

July 7, 1987

Mr. Alan Duppler  
Mercer County State's Attorney  
Mercer County Courthouse  
Stanton, ND 58571

Dear Mr. Duppler:

Thank you for your May 21, 1987, letter in which you asked whether local ad valorem property taxes may be levied upon properties located in Mercer County which are held either directly by the Department of Energy or held indirectly in trust by the First Trust Company of North Dakota. In my opinion, all of these properties are held by DOE as an instrumentality of the United States and are therefore immune from ad valorem taxation.

In 1979, the North Dakota Supreme Court determined that Federal Land Bank royalty interests were exempt from the gross production tax because the Federal Land Bank is an instrumentality of the United States. Federal Land Bank of St. Paul v. State, 274 N.W.2d 580 (N.D. 1979). The court in Federal Land Bank cited N.D. Const. art. X, § 5, which provides that "the property of the United States . . . shall be exempt from taxation." It is my opinion that any real property held by DOE, a federal agency which is clearly an instrumentality of the United States, is likewise exempt by virtue of N.D. Const. art. X, § 5.

Federal immunity from state taxation is also found in the United States Constitution. U.S. Const. art. 6, cl. 2, provides that:

This Constitution, and the laws of the United States which shall be made in pursuance thereof, and all treaties made or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the Constitution or laws of any state to the contrary notwithstanding.

This supremacy clause gives to the United States and its instrumentalities immunity from taxes imposed by any state. McCullock v. Maryland, 4 U.S. (4 Wheat.) 415 (1819); United States v. Allegheny County, Pa., 322 U.S. 174 (1944), relating to instrumentalities of the United States; United States v. New Mexico, 455 U.S. 720, 733-735 (1982); and The Boeing Company v. Omdahl, 169 N.W.2d 696, 701 (N.D. 1969).

This federal immunity from state taxation is implied and can be waived only by express provision made by the United States Congress. See Kern-Limerick, Inc. v. Scurlock, 347 U.S. 110, 122 (1954).

There is no provision in the law which establishes the United States Department of Energy, or in any other act of Congress, which purports in any way to waive the immunity of the DOE or its agents from any state tax imposed on or in reference to the activities of that department or its agents. In addition, Congress expressly authorized DOE to "operate, lease, or dispose of any [property] . . . without regard to any [state] law." 42 U.S.C. § 5919(g) (1983). This clear congressional directive supports the state and federal constitutional provisions cited earlier which indicate that property owned by DOE is immune from state taxation.

Property held by the First Trust Company of North Dakota and controlled by the DOE should be considered property held directly by DOE and immune from state taxation. The trust arrangement was created January 19, 1982, through the Housing Program Land Trust Agreement between GPGA and the First Trust Company of North Dakota as a means by which to transfer property in accordance with the terms of the operating agreement. Under the terms of the agreement, the Secretary of Energy as guarantor of the Great Plains Coal Gasification Project's loan was granted "a security interest or lien in all of the property acquired by it in connection with the Project as collateral to secure the Settlor's obligation. . . ." Housing Program Land Trust Agreement, at 2. The Marshall's Deed which later effected the foreclosure sale on July 16, 1986, specifically referred to DOE's security interest in the land trust:

Marshal..... grants, bargains, sells and conveys forever to the United States of America on behalf of the Department of Energy and its assigns, all of the property subject to the lien of the Mortgage, consisting of both legal and equitable interests therein, including all personal property, equipment, fixtures and assets of a coal gasification plant constituting Marshal the Great Plains Coal Gasification Project, and the intangible property, consisting of contracts and the beneficial interest in a land trust.

Marshal's Deed, Document No. 13575, recorded July 17, 1986, in Mercer County, Book 92-357, at 3. (Emphasis supplied.)

It is my opinion that property held by the First Trust of North Dakota was included in the transfer of the GPCGP to DOE at the time the Marshalls Deed was effected. The property in question is therefore immune from state taxation from the date of that transfer.

Please let me know if I can be of further assistance in this matter.

Sincerely,

Nicholas J. Spaeth