LETTER OPINION
2002-L-05

January 28, 2002

Ms. Linda Hickman
Williams County State's Attorney
PO Box 2047
Williston, ND 58802-2047

Re: Taxation of Indian Land

Dear Ms. Hickman:

In my August 14, 2001, letter to you I stated that Williams County has authority to tax an Indian's undivided fee interest in land even though other Indian interests in the same tract are nontaxable because they are held in trust by the United States. In light of that conclusion, your September 7, 2001, letter asks me to address a number of procedural issues involved in taxing Indian fee interests. Your specific questions are set forth in your May 1, 2001, letter.

The particular problem that led to your questions concerns tracts of land in which an Indian may own a small, undivided fee interest -- which is taxable -- while the rest of the undivided interests are nontaxable. You gave examples of a 1/144th fee interest and a 1/288th fee interest in 80-acre tracts. Such fractional property interests are common in Indian country and are the source of not only taxation challenges but also difficult management problems. See Conf. of W. Attorneys General, American Indian Law Deskbook 83-86 (2d ed. 1998).

Your first question asks whether the Century Code's tax lien and foreclosure procedures apply to these small, undivided although taxable interests. They do apply. As explained in my August 14 letter, these tracts are subject to taxation. Being subject to taxation implies that Indian title can be lost for failure to pay the taxes. It would make little sense for courts to allow taxation of Indian fee interests and then not allow the tax liability to be enforced.

Indeed, courts have not only ruled that Indian fee land is taxable but also that tax foreclosure proceedings and a consequent loss of Indian title can occur. County of

Yakima v. Confederated Tribes and Bands of Yakima Nation, 502 U.S. 251, 263-64 (1992); Bay Mills Indian Community v. Michigan, 626 N.W.2d 169 (Mich. App. 2001), leave to appeal denied, No. 118795 (Mich. Oct 18, 2001). Nothing in the case law recognizing the right of states to tax Indian fee land suggests that the taxation process governing such land is any different than that governing non-Indian land.

Your next two questions concern notice requirements. If taxes are not paid, the procedures that ultimately can lead to a county's acquisition of title by tax deed impose notice requirements. For example, under N.D.C.C. § 57-20-26 the county must mail "to each owner" a tax delinquency notice. If the taxes remain unpaid and the county proceeds to foreclose the tax lien, additional notice requirements are imposed. In particular, notice must be given to "the owner." N.D.C.C. § 57-28-04(1). Notice must be given to anyone "residing upon the property . . . and upon any tenant or other person entitled to the possession of the property." N.D.C.C. § 57-28-04(3). Notice also must be given to "each mortgagee, lienholder, or other person with an interest in the property . . . " N.D.C.C. § 57-28-04(4).

Identifying residents, mortgagees, and lienholders should not present any unique issues. But determining who is an "owner," who has "an interest," and who is "entitled to . . . possession" of land with concurrent ownership can create problems.

Concurrent ownership of the tracts in question will likely take two forms, either a joint tenancy or a tenancy in common. See N.D.C.C. §§ 47-02-05, 47-02-06, 47-02-08 (defining concurrent ownership, joint tenancy, and tenancy in common). There are significant differences between these two types of property ownership, and those differences create different notice requirements.

In a joint tenancy the "joint tenants hold the property by one joint title and in one right." 48A C.J.S. Joint Tenancy 302 (1981).[1] Tenants in common, on the other hand, "'hold by several and distinct titles . . . '" Stevahn v. Meidinger, 57 N.W.2d 1, 7 (N.D. 1952). The interest of a tenant in common is "a several and distinct estate." 2 Tiffany on Real Property 212 (3rd ed. 1939). Each tenant holds his interest "independently of the other, and none of them can do an act respecting the title which will bind the others . . . " Id.

Ownership in a joint tenancy is truly joint. A property tax is a common burden on all the joint owners and a tax sale would affect the entire estate and title. Thus, notices required for a valid tax foreclosure must be given to all joint tenants. See Blaney v. Inhabitants of Town of Shapleigh, 455 A.2d 1381, 1387 (Me. 1983). But if the interest is a tenancy in common, the notice requirements are less strict.

[1] The right of survivorship is the distinguishing feature of a joint tenancy. Jamestown Terminal Elevator, Inc. v. Knoop, 246 N.W.2d 612, 615 (N.D. 1976).

A statute, such as N.D.C.C. § 57-20-26, requiring notice upon the "owner" only requires notice to the owner of the interest subject to taxation. Other tenants in common do not own or have anything like an ownership interest in their cotenant's title or estate and, therefore, aren't "owners." Since the tax is not a common burden or liability on the cotenants, a tax sale does not affect the common property or the interests of any other cotenants. See Jesberg v. Klinger, 358 P.2d. 770, 776 (Kan. 1961). A tenant in common is not an "owner" entitled to notice.

Further support for this conclusion is found in the statute providing the right to reacquire land lost for unpaid taxes, N.D.C.C. § 57-28-19. The repurchase right is confined to the "former owner" and the former owner's immediate family. Id. "Former owner" means "the owner or owners whose title was terminated by the expiration of the period of redemption . . . " Tesoro v. LaDue, 133 N.W.2d 566, 569 (N.D. 1965). Tenants in common, therefore, don't have a repurchase right. This makes it less likely that the notice requirements discussed above should be interpreted to included tenants in common.

A provision requiring notice upon "each mortgagee, lienholder, and other person with an interest in the property," N.D.C.C. § 57-28-04(4), is broader than a provision requiring notice only to the "owner." But other tenants in common are not, merely by being tenants in common, mortgagees or lienholders. Nor do they have "an interest in the property." As noted, tenants in common hold entirely distinct and separate titles and one tenant in common can do what he wishes with his interest without the consent of his cotenants. He has a right by his actions to "inject a stranger into the cotenancy." 7 Powell of Real Property § 50.06[4] (2000). The statutory reference to persons with "an interest in the property" does not include other tenants in common.

Another statutory provision requires service of notice upon persons "actually residing upon the property . . . and upon any tenant or other person entitled to the possession of the property." N.D.C.C. § 57-28-04(3). A tenant in common could be residing on the property and, if so, his status as a resident, not his status as a cotenant, entitles him to notice.

The statutory duty to notify persons "entitled to the possession" of the property could impose an onerous requirement if all tenants in common are deemed to possess the land. The term "possession," however, is ambiguous. It is a "chameleon-hued word" making a search for its "proper" meaning likely fruitless. Bryan A. Garner, A Dictionary of Modern Legal Usage 673 (2d ed. 1995). It is the "'most vague of all vague terms,'" State v. Strutt, 236 A.2d 357, 359 (Conn. Cir. Ct. 1967), and has "many shades of meaning." Boyd v. Travelers Fire Ins. Co., 22 N.W.2d 700, 702 (Neb. 1946).

The duty to notify persons "entitled to . . . possession" was enacted in 1999. 1999 Sess. Laws ch. 503, § 24 (codified at N.D.C.C. § 57-28-04(3)). The legislative history says nothing about the word's meaning.

It is unlikely that the legislature intended "possession" to mean something other than an actual physical presence on the land. The statute requires notice to "any tenant or other person entitled to the possession of the property . . ." Coupling the phrase in question with "tenant" is some indication that the legislature had in mind a category of interests separate from owners. Indeed, subsection (1) of the statute deals with notice to the "owner," making it unlikely that notice to owners is also the subject of subsection (3). Finally, a foreclosure proceeding affects title to only the taxable cotenancy. It has no affect on any other cotenant's interest and does not involve the land's common title. Given the distinctive and separate nature of the interests held by tenants in common, it is unlikely the legislature intended the notice protections to extend to cotenants who "possess" the land only through bare legal title and whose legal interest is unaffected by the foreclosure.

A useful case on notice is In re Foreclosure of Liens, 922 P.2d 73 (Wash. 1996), a case that involved facts much like those you describe. James Cleland owned a 1/36th undivided interest in a parcel of land which he had acquired from his wife's estate. Id. at 75. Although Cleland's wife was an Indian, he was not. Id. Therefore, his interest was taxable. Id. Janice Folk was Cleland's stepdaughter and she too acquired a 1/36th interest from her mother's estate. Id. at 76. Her interest was nontaxable because she was an Indian and did not hold fee title. Id.

Cleland did not pay the taxes on his 1/36th interest, so the county acquired his interest at a foreclosure sale. Id. Folk later tendered payment of the delinquent taxes, penalties, and interest, which the county refused to accept. Id. Folk sued, arguing that as a tenant in common she should have been notified about the tax foreclosure because Washington law requires notice to the "owner" and to "'any person having a recorded interest in or lien of record upon the property.'" Id. at 77.

The court rejected Folk's argument, noting that the county did not proceed against the entirety of the parcel, "but only against Mr. Cleland's undivided interests upon which the taxes were delinquent, and purported to sell only those undivided interests." Id. The tax foreclosure did not involve the parcel's "'common title,'" but only Cleland's "individual undivided interest." Id. at 81. Because Folk did not own the estate sold, she was not an "owner" entitled to notice. Id. at 77.

This decision expresses the proposition that statutory protections in tax foreclosure actions should apply only to those who have something to lose. Other courts also recognize this proposition. In a New Jersey case an owner of an easement on land

subject to foreclosure asserted the right to redeem. Lipman v. Shriver, 144 A.2d 37 (N.J. Sup. Law Div. 1958). The redemption statute seemed to give him a right to do so. It allowed not only the owner, mortgagee, and occupant to redeem but also gave this right to any "'other person having an interest in land.'" Id. at 38. An easement is an interest in land. Nonetheless, the "spirit and policy" of the statute required that it be interpreted to apply only to an interest that would be cut off by the tax foreclosure. Id. Since the easement would be unaffected, the easement holder had "no right, nor indeed no necessity, to have the right to redeem to protect that interest." Id. See also Malone v. Midlantic Bank, N.A., 758 A.2d 158, 164 (N.J. Super. Ct. Ch. Div. 1999)(an interest that could not be cut off by the tax sale was not an interest entitled to redemption rights); Notch Mountain Corp. v. Elliott, 898 P.2d 550, 559 (Colo. 1995)(same).

In sum, if the taxable interest is held in joint tenancy then all the joint owners are entitled to notice. But if the taxable interest is held as a tenant in common, cotenants are not entitled to notice. A tenant in common's "individual title interest may be transferred . . . [by a tax sale] without the consent or knowledge of the other cotenants." In re Foreclosure of Liens, 922 P.2d 73, 78 (Wash. 1996).

Your fourth question asks whether the county can "proceed to obtain a tax deed/foreclosure on an undivided partial interest in real estate." Based upon the foregoing analysis as well as that in my August 14 letter, the answer to this question is yes.

Your fifth question asks whether the county, after acquiring an interest through a tax foreclosure, can sell that interest. After acquiring the interest of a tenant in common, the county becomes a cotenant with all the other tenants in common. Applying the principles discussed above, the county would have all the rights of a tenant in common and could therefore sell, pledge, or lease its interest without its cotenants' consent.[2] A cotenant "'can deal with strangers as he will in so far as his own undivided moiety is concerned. He can sell, lease, mortgage, or pledge it as he can any other property he may own.'" Stevahn v. Meidinger, 57 N.W.2d at 7. See also, In re Foreclosure of Liens, 922 P.2d at 80-81.

Your sixth question asks whether the county is required to partition the property. I am unaware of any authority requiring the county to do so. In fact, the authority cited above

[2] Of course, whatever the county does with its property interests it must act consistently with all relevant statutory authority. See 85 C.J.S. § 1231 Taxation (2001)("to the extent that authority is conferred by statute, a county or municipality may sell or otherwise dispose of property held by it under a tax deed"). (A number of statutes address transfers of land held by a county under a tax deed. E.g., N.D.C.C. §§ 11-27-08; 57-28-10, 57-28-13, 57-28-15, 57-28-17, 57-28-22, 57-28-27.)

supports the proposition that the county, as a tenant in common may manage its property as it sees fit, subject, of course, to any general statutory restrictions or mandates.

Your seventh question notes that Williams County already owns some small undivided interests and you ask whether the county can relieve itself of undivided interests by quit-claiming the property back to the original owner or their heirs or successors. If not, you ask if there is another way of divesting the County's interests.

Assuming these property interests were properly acquired, the county may not simply give them away, as the question seems to imply. The constitution prohibits a county from giving away its property. N.D. Const. art. X, § 18. County property can only be conveyed if the transaction is supported by legal, equitable, or moral consideration. Petters & Co. v. Nelson County, 281 N.W. 61, 64-65 (N.D. 1938).

Your September 7 letter poses an additional question. You ask whether the county may properly forego its foreclosure rights when the amount of the taxes is so small that foreclosure costs exceed the value of what can be gained through foreclosure. This is a difficult issue. Failure to fully enforce taxation authority on all persons subject to taxation implicates questions of uniformity, fairness, and equality. See N.D. Const. art. X, §§ 4, 5.

There is authority for the commonsense proposition that foreclosure should not be mandated when costs of doing so outweigh the potential gain, as was the situation in School Dist. of City of Lansing v. City of Lansing, 249 N.W. 848 (Mich. 1933). The case concerned a dispute between a school district and city. The school district asserted that the city was not collecting all taxes due and the city defended on the grounds that tax collection costs would exceed the taxes. The city prevailed. "The treasurer is not bound to seize property which will not produce some taxes above costs." Id. at 850. Williams County could exercise similar discretion.

I hope that this discussion of the issues you raise is helpful.

Sincerely,

Wayne Stenehjem
Attorney General

cmc/vkk