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2012 FEB -3 A 11:58

MONTANA FIRST JUDICIAL DISTRICT COURT
LEWIS AND CLARK COUNTY

MUSSELSHELL COUNTY, a political division of the State of Montana, by and through its Board of County Commissioners, Plaintiff, v. YELLOWSTONE COUNTY, a political division of the State of Montana, by and through its Board of County Commissioners; and MONTANA DEPARTMENT OF REVENUE, Defendants.	Cause No. BDV-2010-836 **ORDER ON COMPLAINT FOR DECLARATORY JUDGMENT**

This case involves the Montana Department of Revenue's (MDOR) apportionment of coal gross proceed taxes (CGPT) between Musselshell and Yellowstone Counties from the Bull Mountains Mine (mine). Plaintiff Musselshell County requests a declaratory ruling that MDOR improperly apportioned the CGPT generated by underground coal mining under applicable statutes, or, in the alternative, in a manner that was not just or proper. Musselshell County also seeks a summary

ruling that all impact resulting from the mine occurred in that county. Finally, Musselshell County seeks to disqualify MDOR from making any future determination as to the relative impacts of the mine on the counties. That motion presupposes that the issue of impacts is relevant to the determination of the CGPT.

Defendants MDOR and Yellowstone County seek a ruling that MDOR properly allocated the CGPT between the two counties and, alternatively, requests a summary ruling that impacts of the mine result to both counties. If impacts are relevant to the assessment of the CGPT, then issues of fact clearly exist as to the relative impacts which result to each county from the mine and how those impacts would be applied in calculating the CGPT.

Oral argument was held on December 22, 2012, and the matter is ready for decision.

BACKGROUND

The applicable facts are not at issue. The surface facilities of the Bull Mountains Mine are located on federal land in Musselshell County, while the underground operation of the mine extends into federal land in Yellowstone County. In 2009, coal was taken from underground coal seams located beneath the surface of both counties.[1] The raw coal is crushed into pieces which are six inches or less in diameter, and transported to the surface facilities of the mine.[2] Coal is stockpiled on the surface, where it is further compressed to less than two-inches and transported by

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[1] See Musselshell County's Combined Resp. Br. Opp'n Yellowstone County & MDOR's Mot. Summ. J. & Supp. Pl.'s Mot. Summ. J., at 4, Ex. 1, U.S. Dep't of Interior, Bureau of Land Mgmt., Envtl. Assess. Bull Mtns Mine. No. 1, Musselshell County, Montana, April 2011.

[2] Id. at 2-9, § 2.1.2.

train.[3] Of the raw coal that is removed from each county, approximately 85 percent is marketable, while the remainder is disposed of in Musselshell County.[4] From the portion of the April 2011 environmental assessment which was provided to the Court, it appears the mine will be required to, and is capable of, mitigating subsidence and all other damages caused by the underground mine.[5] Because of subsidence, mitigation measures will eventually take place in both counties.[6]

Under Section 15-23-701, MCA, coal producers are required to submit annual reports to MDOR specifying the gross yield from each mine owned or worked in the preceding year, and an officer of the producing entity must verify the report. The mine operator must file quarterly reports with MDOR as to the tons of coal severed from each county and annual reports as to the price at which the coal is sold. (Def.'s Br. Supp. Mot. Summ. J., Br. Ex. 1, Charlton Dep. at 32-33.)

Prior to tax year 2009, it appears that coal was removed primarily from the mineral estate in Musselshell County. In early 2010, MDOR personnel became aware that coal was being removed from the mineral estate in Yellowstone County. As a result, the mine was required to file amended reports for tax year 2009 that allocated the CGPT between the two counties relative to the amount of coal extracted from the mineral estate of each county. In April 2010, the Bull Mountains Mine operator, Signal Peak Energy, LLC (Signal Peak), filed its sworn amended reports showing the tons of coal sold from each county for the 2009 tax year. (Charlton Dep., attach.) In

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[3] Id. at 2-9, § 2.1.2.1.

[4] Id. at 2-2, § 2.1.1, & 2-10, § 2.1.2.4.

[5] Id. at 2-9, § 2.1.1.3, & 2-14, § 2.1.2.7.

[6] Id.

its amended reports, Signal Peak listed the tons of coal taken from each county, the free on board gross revenue, and six deductions including the black lung tax, federal reclamation tax, resource indemnity trust tax, coal severance tax, CGPT, royalty deductions, and the resulting contract sales price. (Id.)

MDOR administers the three related Montana production taxes including the CGPT, the coal severance tax, and the coal resource indemnity and groundwater assessment tax. (Charlton Dep. at 12-13.) The CGPT is five percent of the contract sales price. (Id. at 26-27.) Based on Signal Peak's reports, in June 2010 MDOR certified the respective portion of the taxable value of the coal gross proceeds to each county treasurer. The contract sales price for coal produced in Musselshell County was $6,572,340, and the resulting CGPT due from the mine was $328,617.02. (Id., see also Compl. ¶ 15). The contract sales price for coal produced in Yellowstone County was $2,538,195.21, with CGPT still due from the mine of $126,909.76. (Compl. ¶ 15.) Charlton explained that when Signal Peak amended the CGPT, they also had to amend the coal severance tax return, as the CGPT is a deduction in the coal severance tax return. (Charlton Dep. at 109.) Charlton further indicated that most coal mines in Montana are above ground, and the Bull Mountain Mine is the only underground coal-mining operation in Montana. (Id., at 137-38.)

No independent appraisal was requested under Section 15-23-102, MCA, and there is no claim of bias in Signal Peak's apportionment.

STANDARD OF REVIEW – STATUTORY CONSTRUCTION

When faced with cross-motions for summary judgment, the Court is not required to simply grant judgment for one side or the other. *Ike v. Jefferson Nat'l Life Ins. Co.*, 267 Mont. 396, 399-400, 884 P.2d 471, 474 (1994); accord *Mont. Bd. of Pharm. v. Kennedy*, 2010 MT 227, ¶ 16, n. 1, 358 Mont. 57, 243 P.3d 415. Instead, the

Court must "evaluate each party's motion on its own merits, taking care in each instance to draw all reasonable inferences against the party whose motion is under consideration." *Id.*, 267 Mont. at 400, 884 P.2d at 474 (quoting *Heublein, Inc. v. United States*, 996 F.2d 1455, 1461 (2nd Cir. 1993)).

Statutory construction presents a question of law to be decided by the district court. Sections 25-7-102 and 26-1-201, MCA. When interpreting statutes, the Court's function is to give effect to the intent of the legislature. Section 1-2-101, MCA; *State v. Boulton*, 2006 MT 170, ¶ 12, 332 Mont. 538, 140 P.3d 482. "If possible, the intent of the Legislature is to be determined from the plain language of the statute. If the intent can be determined from the plain language of a statute, a court may not go further and apply any other means of interpretation." *Id.* (citations omitted). This Court may not insert language which has been omitted, or omit language which has been inserted. Section 1-2-101, MCA; *Stop Over Spending Mont. v. State*, 2006 MT 178, ¶ 62, 333 Mont. 42, 139 P.3d 788. In other words, the Court must reject any construction which leaves part of the language of the statute without effect and must correspondingly give effect to all relevant statutory provisions. Section 1-2-101, MCA; *Spoklie v. Mont. Dep't of Fish, Wildlife &Parks*, 2002 MT 228, ¶ 24, 311 Mont. 427, 56 P.3d 349; *Montco v. Simonich*, 285 Mont. 280, 287, 947 P.2d 1047, 1051 (1997); *Darby Spar, Ltd. v. Dept. of Rev.*, 217 Mont. 376, 379, 705 P.2d 111, 113 (1985).

DISCUSSION

Although the history of mining in Montana is rich, this appears to be a case of first impression. There is no issue as to the fact that coal from the mine is located beneath both counties. The ultimate issue is whether the tax should be apportioned between the two counties based on the tons of coal which are taken from

those counties. Yellowstone County and MDOR assert that the CGPT originates when the coal is severed from the mineral estate. Musselshell County argues that the CGPT is determined after the coal is washed and compressed to less than two inches and placed on the train, free on board in Musselshell County.

Like all mines, a "coal mine" is defined as "all parts of the property of a mining plant under one management that contribute, directly or indirectly, to the mining or handling of coal." Section 50-73-102(3), MCA. Excavations and the "workings" of a mine are defined as "all parts of a mine excavated or being excavated including shafts, slopes, tunnels, entries, rooms, and working places, whether abandoned or in use." Section 50-73-102(2), MCA. The Montana Supreme Court has historically stated that "coal or iron in place may be a mine in a proper sense of that term." *Northern Pac. Ry. Co. v. Musselshell County*, 54 Mont. 96, 112, 169 P. 53, 58 (1917) (citations omitted).

As referenced above, most coal mines are surface mines. There would be no question that MDOR properly apportioned the CGPT if surface mining took place in Yellowstone County, as the mine would clearly be located in both counties and the exact tonnage of coal taken from both counties would be open and obvious. Here, an argument exists simply because mining takes place a few yards below the surface and results in subsidence in both counties. In addition, both counties have filed affidavits indicating financial impacts resulting from the mine and mitigation of subsidence will occur in both counties.

During his deposition, Van Charlton, MDOR's Natural Resource Unit Manager, explained that the coal severance tax benefits the state, while the CGPT benefits counties, and the coal resource indemnity and groundwater assessment tax benefits local government units. (Charlton Dep. at 187-88.) He further testified that

he believed the CGPT should be apportioned between the two counties based on Section 15-23-702, MCA. (Id., at 93-94.) That statute states: "**Entry of gross proceeds in property tax record.** On or before July 1 each year, the department shall enter the valuation of the gross proceeds of coal mines in the property tax record for each county in which the mines are located."

MDOR and Yellowstone County argue that Section 15-23-701, MCA, is the reporting statute; Section 15-23-702, MCA, above-quoted, is an apportionment statute; and Section 15-23-703, MCA, is the five-percent assessment statute which is calculated from the tonnage of coal taken from each county and the contract sales price obtained for the coal which is sold. This Court agrees.

Further, Section 15-23-105, MCA, states in pertinent part:

> **Apportionment among counties**. The department shall apportion the value of property assessed . . . among counties in which such property is located. Apportionment shall be on a mileage basis or on the basis of the original installed cost of the centrally assessed property located in the respective counties. If the property is of such a character that its value cannot reasonably be apportioned on the basis of mileage or on the basis of the original installed cost of the centrally assessed property located in the respective counties, the department may adopt such other method or basis of apportionment as my be just and proper.

The Compiler's Comments to that statute state, "[i]t is the intent of the legislature that apportionments [of centrally assessed property] made under this act shall substantially correspond with the location of such property." In addition, A.R.M. 42.22.122 is cited by the Compiler which requires that the value of centrally assessed property be apportioned among the taxing units where a company's property is located.

Musselshell County argues that a plain reading of Sections 15-23-703 and -105, MCA, require that the CGPT be determined in the county where coal is loaded for transport, free on board. Indeed, at first blush it appears that the CGPT is to

be determined where it is loaded on the train pursuant to the definition of "[c]ontract sales price" found in Section 15-35-102(5), MCA which references "f.o.b." the location of the mine. The definition also contains the word "produced" which is defined in the same statute as when "severed from the earth." Section 15-23-102(8), MCA.

This Court believes, however, that regardless of the definition of contract sales price, the apportionment statute, Section 15-23-105, MCA, is consistent with the Department's interpretation of Sections 15-23-701 through -703, MCA, which require assessment wherever the mine or mines are located. Here, tunnels and coal seams are located in both counties. This Court interprets the statutes as requiring a mine's gross proceeds to be apportioned among the counties where the mineral deposit is located and severed. This is consistent with other statutes as coal is "produced" when it is severed from the earth, Section 15-35-102(8), MCA, and "coal mine" is defined to include all parts thereof including mine tunnels and abandoned property. Section 50-73-102(2), (3), MCA.

Both counties agree that apportionment cannot be performed on a mileage basis or on the basis of the original cost of the centrally assessed property, and the Department has authority to determine apportionment among counties which is just and proper. (See Section 15-23-105, MCA.) This Court believes that Sections 15-23-702 and -105, MCA, contemplate taxation of coal deposits in the county where the ore deposit is located, not where the ore is loaded for transportation. Under Section 15-23-105, MCA, apportionment is based on where the assessed property is located. It is clear that if we were dealing with a strip mine, each county would be granted credit for the coal removed from that county under the applicable statutes. Nothing to the contrary is stated in the statutes, administrative rules, or case law relating to this

subject matter. In fact, A.R.M. 42.22.122(5) requires apportionment of centrally assessed property among county taxing units based on where the property is located.

This Court cannot insert language to the benefit of one county over the other. Therefore, Yellowstone County is clearly entitled to a portion the CGPT from the mine. Because the statutes require apportionment, this Court finds, as a matter of law, that MDOR's assessment between the two counties was just and proper under Section 15-23-105, MCA.

Further, the statutes are silent on the issue of impacts caused by a coal mine. Therefore, MDOR correctly disregarded impacts in determining the CGPT, as MDOR lacks statutory authority to consider that issue. Further, the Court believes that Yellowstone County provided appropriate answers to discovery requests propounded by Musselshell County stating that the CGPT is not based on impacts.

Unlike the CGPT, the coal severance tax and the resource indemnity and groundwater assessment tax are to be distributed to areas impacted by coal mining. Under 15-35-102(2)(b), MCA, the purpose of the coal severance tax, among other things, is to "stabilize the flow of tax revenue from coal mines to local governments through the property taxation system." Under Section 15-38-102, MCA, the purpose of the resource indemnity tax and groundwater assessment tax is "to indemnify its citizens for the loss of long-term value resulting from the depletion of its mineral resource base and environmental damage caused by mineral development." Section 15-38-102, MCA. The CGPT provides no provision for weighing impact and allocating proceeds to counties based on impact. In addition, Musselshell County admits it has received a two-year grant from the Coal Board to address impacts. (Br. Supp. Mot. Summ. Adjud. Issue Impacts Suffered, at 5.)

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Musselshell County argues that coal gross proceeds are personal property which are taxed in the taxing jurisdiction where it is located on the date of assessment. See Sections 15-8-408 and 15-23-703, MCA. It further argues that while Section 15-23-105 allows apportionment between the counties in which such property is located, no basis exists in this case to allow apportionment. Additionally, because coal is one of the many items that is centrally assessed (the taxpayer's returns are sent to MDOR instead of to the individual counties), the coal is "centrally assessed" in Musselshell County. It also argues that Section 15-23-703, MCA, implies that a mine can only be located in a single county. Finally, Musselshell County argues that because the Hard-Rock Mining Impact Property Tax Base Sharing (Hard Rock Act) specifies the ways in which apportionment takes place among counties, the absence of such specificity relating to coal allows no apportionment. See Section 90-6-401, MCA, et seq. The Hard Rock Act specifically addresses the apportionment of ore from metal mines among counties when the mouth of the mine is in one county but impacts are felt in adjacent counties.

Musselshell County ignores Section 15-23-702, MCA, and misreads the other applicable statutes including the apportionment statute, Section 15-23-105, MCA, and the applicable administrative rules, ARM 42.22.122, and the other statutes that define where a mine is located.

Barring a clear legislative mandate or case law to the contrary, this Court believes the applicable statutes require that coal taken from either the surface or mineral estate under Yellowstone County should be taxed in that county. Therefore, the Court believes Signal Peak/MDOR's apportionment was correct, and Musselshell County's arguments listed above and all other arguments made by Musselshell County miss the mark. MDOR's assessment was required by the applicable statutes and was

therefore "just and proper" and not arbitrary and capricious. MDOR is not required to make an administrative rule clarifying the above, as the statutes and applicable administrative rules are clear.

Finally, Yellowstone County argues that Musselshell County has no statutory authority to bring suit against another county. That issue is moot. All future funds from the CGPT should be allocated between the counties, and Yellowstone County should be paid the amount determined above for tax year 2009.

CONCLUSION

For the foregoing reasons, Musselshell County's motion for summary judgment, request for declaratory ruling, and request for summary ruling are DENIED. Finally, because impacts are not relevant in calculating the CGPT, Musselshell County's motion to disqualify MDOR from determining impacts is moot.

Yellowstone County and MDOR's motion for summary judgment is GRANTED, and its motion relating to impacts is moot.

DATED this 3 day of February 2012.

JEFFREY M. SHERLOCK
District Court Judge

pcs: R. Allan Payne/Marc G. Buyske/Jacqueline R. Papez
Daniel L. Schwarz
Teresa G. Whitney

T/JMS/mussellshell co v yellowstone co ord compl declar j.wpd