

**BEFORE THE NEBRASKA TAX EQUALIZATION
AND REVIEW COMMISSION**

BEREXCO INC.,)	
)	
Appellant,)	Case No 06M-003
)	
v.)	DECISION AND ORDER
)	DISMISSING FOR WANT
KIMBALL COUNTY BOARD OF)	OF JURISDICTION
EQUALIZATION,)	(Standing)
)	
Appellee.)	

The above-captioned case was called for a hearing on the merits of an appeal by Berexco Inc. ("the Appellant") to the Tax Equalization and Review Commission ("the Commission"). The hearing was held in the Hampton Inn, 200 Platte Oasis Parkway, North Platte, Nebraska, on October 30, 2006, pursuant to an Order for Hearing and Notice of Hearing. Commissioners Wickersham, Warnes, Lore, and Hans were present. Commissioner Wickersham presided at the hearing.

Steven F. Mattoon appeared as legal counsel for the Appellant. Appellant's presence was waived.

David L. Wilson, County Attorney for Kimball County, Nebraska, appeared as legal counsel for the Kimball County Board of Equalization ("the County Board").

The Commission took statutory notice, received exhibits and heard testimony.

The Commission is required by Neb. Rev. Stat. §77-5018 (Cum. Supp. 2006) to state its final decision and order concerning an appeal, with findings of fact and conclusions of law, on the record or in writing. The final decision and order of the Commission in this case is as follows.

**I.
ISSUES**

The Appellant has asserted that the subject property should be exempt from taxation. The issues on this appeal are whether the Appellant has standing and whether the subject property is exempt from taxation.

**II.
FINDINGS OF FACT**

The Commission finds and determines that:

1. The subject property in this appeal is a 12½ per cent (1/8) interest in the oil and gas or other hydrocarbons produced and saved from SW¼SE¼ Section Sixteen (16), Township Thirteen (13) North, Range Fifty-three(53) West, of the sixth (6th) Principal Meridian in Kimball County, Nebraska, except that portion used in connection with development and operations for recovery of oil, gas or other hydrocarbons
2. The Assessor for Kimball County determined that the subject property was subject to taxation.
3. The Appellant protested the Assessor's determination.
4. The Assessor's determination was affirmed by the County Board.
5. The Appellant timely appealed the decision of the County Board to the Commission.
6. An Order for Hearing and Notice of Hearing issued on July 19, 2006, set a hearing of the appeal for October 30, 2006, at 1:00 p.m. CDST.
7. An Affidavit of Service which appears in the records of the Commission establishes that a copy of the Order for Hearing and Notice of Hearing was served on all parties.

**III.
APPLICABLE LAW**

1. Subject matter jurisdiction of the Commission in this appeal is over issues raised during the county board of equalization proceedings. *Arcadian Fertilizer, L.P. v. Sarpy County Bd. of Equalization*, 7 Neb.App. 655, 584 N.W.2d 353, (1998).
2. “The property of the state and its governmental subdivisions shall constitute a separate class of property and shall be exempt from taxation to the extent such property is used by the state or governmental subdivision for public purposes authorized to the state or governmental subdivision by this Constitution or the Legislature. To the extent such property is not used for the authorized public purposes, the Legislature may classify such property, exempt such classes, and impose or authorize some or all of such property to be subject to property taxes or payments in lieu of property taxes as provided by law;” Neb. Const. Art. VIII §2 (1).
3. “(1) The following property shall be exempt from property taxes:(a) Property of the state and its governmental subdivisions to the extent used or being developed for use by the state or governmental subdivision for a public purpose. For purposes of this subdivision, public purpose means use of the property (i) to provide public services with or without cost to the recipient, including the general operation of government, public education, public safety, transportation, public works, civil and criminal justice, public health and welfare, developments by a public housing authority, parks, culture, recreation, community development, and cemetery purposes, or (ii) to carry out the duties and responsibilities conferred by law with or without consideration. Public

purpose does not include leasing of property to a private party unless the lease of the property is at fair market value for a public purpose. Leases of property by a public housing authority to low-income individuals as a place of residence are for the authority's public purpose; (b) Unleased property of the state or its governmental subdivisions which is not being used or developed for use for a public purpose but upon which a payment in lieu of taxes is paid for public safety, rescue, and emergency services and road or street construction or maintenance services to all governmental units providing such services to the property. Except as provided in Article VIII, section 11, of the Constitution of Nebraska, the payment in lieu of taxes shall be based on the proportionate share of the cost of providing public safety, rescue, or emergency services and road or street construction or maintenance services unless a general policy is adopted by the governing body of the governmental subdivision providing such services which provides for a different method of determining the amount of the payment in lieu of taxes. The governing body may adopt a general policy by ordinance or resolution for determining the amount of payment in lieu of taxes by majority vote after a hearing on the ordinance or resolution. Such ordinance or resolution shall nevertheless result in an equitable contribution for the cost of providing such services to the exempt property; ...". Neb. Rev. Stat §77-202 (Supp. 2005).

4. Leased property held by the state other than property leased for a public purpose is to be taxed or exempted from taxation as if the property was owned by the leaseholder. Neb. Rev. Stat. §77-202.11 (1) (Reissue 2003).

5. Payment of tax assessed on property of the state that is leased for other than a public purpose is the responsibility of the lessee. Neb. Rev. Stat. §77-202.11 (3) (Reissue 2003).
6. Unleased property of the state which is not being used or developed for a public purpose may be subject to taxation. Neb. Rev. Stat. §77-202(1) (b) (Supp. 2005).
7. Taxation of unleased property of the state not being used or developed for a public purpose is excused if a payment in lieu of taxes is made with respect to the property. Neb. Rev. Stat. §77-202(1) (b) (Supp. 2005).
8. Standing is fundamental to jurisdiction and may be raised at any time. *Smith v. City of Papillion*, 270 Neb. 607, 705 N.W.2d 584 (2005).
9. An appellant is required to have a personal stake in the outcome of an appeal that would warrant an exercise of jurisdiction and the commission's remedial powers on behalf of an appellant. *Id.*

IV. DISCUSSION

Nebraska's Constitution allows for the taxation of property held by the state if it is not used for a public purpose. Neb. Const. Art VIII §2. The Legislature has implemented Art VIII §2 of Nebraska's Constitution pertaining to taxation of property owned by the State with enactment of sections 77-202 (1) (a) and (b), 77-202.11 and 77-202.12 of Nebraska Statutes. Those sections distinguish between leased property and unleased property. Neb. Rev. Stat. §77-202(1) (a) and (b) (Supp. 2005).

Property leased to another by the state is subject to taxation if its use by the lessee is for other than a public purpose or the lease is for less than fair market value. Neb. Rev. Stat. §77-202(1) (a) (Supp. 2005). Leased property held by the state other than property leased for a public purpose is to be taxed or exempted from taxation as if the property was owned by the leaseholder. Neb. Rev. Stat. §77-202.11 (1) (Reissue 2003). Payment of tax assessed on the property is the responsibility of the lessee. Neb. Rev. Stat. §77-202.11 (3) (Reissue 2003).

Unleased property of the state which is not being used or developed for a public purpose may be subject to taxation. Neb. Rev. Stat. §77-202(1) (b) (Supp. 2005). Taxation is excused if a payment in lieu of taxes is made with respect to the property. Neb. Rev. Stat. §77-202(1) (b) (Supp. 2005).

The subject property in this appeal is a 12½ per cent (1/8) interest in the oil and gas or other hydrocarbons produced and saved from SW¼SE¼ Section Sixteen (16), Township Thirteen (13) North, Range Fifty-three(53) West, of the sixth (6th) Principal Meridian in Kimball County, Nebraska, except that portion used in connection with development and operations for recovery of oil, gas or other hydrocarbons. (E1, 2, 3, and 9). The subject property was reserved by the State of Nebraska acting by and through the Board of Educational Lands and Funds an instrument captioned as an oil and gas lease. (E9:1 para 3 and 7). A reservation is something taken back out of a grant and creates a new right or something that did not exist prior to the grant. *Elrod v. Heirs, Devisees, Etc.*, 156 Neb. 269, 55 N.W.2d 673 (1952). The reservation of an interest in production in an oil and gas lease is commonly referred to as a royalty interest. See, *Krone v. Lacy*, 168 Neb. 792, 97 N.W.2d 528 (1959). A

royalty interest is only one of the interests in real estate created by the grant of an oil and gas lease. *Id.*

The subject property, a royalty interest reserved in the oil and gas lease received as Exhibit 9, is held by the State of Nebraska acting by and through the Board of Educational Lands and Funds. The Board of Educational Lands and Funds is not a party to the captioned appeals. (Case File). The record before the Commission does not show that the Appellant is the owner or lessee of the royalty interest held by the State of Nebraska through the Board of Educational lands and funds. The Commission is required to determine whether the Appellant has standing.

Standing is fundamental to jurisdiction and may be raised at any time. *Smith v. City of Papillion*, 270 Neb. 607, 705 N.W.2d 584 (2005). An appellant is required to have a personal stake in the outcome of an appeal that would warrant an exercise of jurisdiction and the commission's remedial powers on behalf of an appellant. *Id.* In this appeal the applicable statutes do not require the Appellant to pay any tax that might be imposed on the subject property because it is not leased to the Appellant. The Appellant is required to deliver the subject property to the State of Nebraska (Lessor), free of cost. (E9:1 para 3.). There is no evidence before the Commission that the term "cost" includes an ad valorem tax levied on the interest of the State of Nebraska as holder of a reserved royalty interest. Nor has the Commission found any authority that the term cost should be understood to include ad valorem taxes which might be levied on a royalty interest.

Rules and regulations promulgated by the Property Tax Administrator require a unit operator to collect ad valorem taxes due on the interest of each owner in a unit. 350 Neb.

Admin. Code, Ch 13, §004.02 (5/7/05). The unit operator is allowed to deduct the estimated amount of the ad valorem tax from any payment otherwise due to an owner. 350 Neb. Admin. Code, Ch 13, §004.03 (5/7/05). An ad valorem tax may also be collected from the owner. 350 Neb. Admin. Code, Ch 13, §004.05 (5/7/05). While the Property Tax Administrator's rules and regulations require collection of an ad valorem tax by a unit operator from a royalty owner, no penalty is prescribed for a failure to comply, and a default collection procedure is provided. The noted rules and regulations, when read together, do nothing more than impose an obligation to collect a tax if funds are available and to pay out any tax that is collected. The rules and regulations of the Property Tax Administrator do not provide a sufficient stake in the outcome for the Commission to determine that the Appellant has standing in this appeal.

The Appellant has no interest in the subject property except to deliver it to the State of Nebraska acting by and through the Board of Educational Lands and Funds after recovery and is not responsible for payment of any property tax that might be assessed against it. The Appellant does not have standing and the Commission does not have jurisdiction. The appeal must be dismissed.

V.
CONCLUSIONS OF LAW

1. The Commission has jurisdiction over the parties to this appeal.
2. The Appellant does not have standing to maintain this appeal.

**VI.
ORDER**

IT IS THEREFORE ORDERED THAT:

1. This appeal is dismissed for reasons stated.
2. The decision of the County Board determining that the subject property is taxable as of the assessment date January 1, 2006, is affirmed.
3. This decision, if no appeal is timely filed, shall be certified to the Kimball County Treasurer, and the Kimball County Assessor, pursuant to Neb. Rev. Stat. §77-5018 (Supp. 2005).
4. Any request for relief, by any party, which is not specifically provided for by this order is denied.
5. Each party is to bear its own costs in this proceeding.
6. This decision shall only be applicable to tax year 2006.
7. This order is effective for purposes of appeal January 18, 2007.

Signed and Sealed. January 18, 2007.

Wm. R. Wickersham, Commissioner

SEAL

Susan S. Lore, Commissioner

William C. Warnes, Commissioner

Robert L. Hans, Commissioner

ANY PARTY SEEKING REVIEW OF THIS ORDER MAY DO SO BY FILING A PETITION WITH THE APPROPRIATE DOCKET FEES IN THE NEBRASKA COURT OF APPEALS. THE PETITION MUST BE FILED WITHIN THIRTY DAYS AFTER THE DATE OF THIS ORDER AND MUST SATISFY THE REQUIREMENTS OF STATE LAW CONTAINED IN NEB. REV. STAT. §77-5019 (CUM. SUPP. 2006). IF A PETITION IS NOT TIMELY FILED, THIS ORDER BECOMES FINAL AND CANNOT BE CHANGED.