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1700 West Washington
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October 16 1978
LAW LIBRARY
ARIZONA ATTORNEY GENERAL
Re: I78-239 (R77-253)

Dear Mr. King:

You have requested our opinion on the following question:

Is real property which has been repossessed by the Federal Housing Administration (FHA) or the Veterans Administration (VA) exempt from state property taxation?

To answer your question fully we must examine both state and federal law. This dual examination will accomplish two objectives. First, an examination of federal law will reveal whether Congress has granted authority to the state to tax the real property owned or held by FHA or VA as a result of a repossession. Second, if congressional authority does exist, an examination of state law will reveal whether Arizona may impose any tax on Arizona real property which is owned or held by the FHA or the VA. At this point it should be noted that the FHA is the insurer of VA loans, so any discussion of FHA loans applies equally to VA loans. See 24 CFR § 200.14.

As early as 1819 the United States Supreme Court declared that the states have no inherent power to tax instrumentalities of the federal government, and federal property cannot be taxed without the consent of Congress. McCulloch v. Maryland, 17 U.S. 316, and Congress has the exclusive authority to determine whether and to what extent its instrumentalities shall be subject to state taxation. Maricopa County, Arizona v. Valley National Bank, 318 U.S. 357, (1943).

The National Housing Act of 1934, 48 Stat. 1246, which established the FHA, is divided into thirteen sub-chapters each dealing with a specific area of concern in the housing market. Six of the thirteen contain sections dealing with state taxation of real property acquired and held by the FHA. The language of these sections is substantially identical. See 12 U.S.C. §§ 1706(b); 1714; 1747(j); 1749(kk); 1749(bbb-20); 1750(c).

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Working file for I78-239
can be found in SGO files.
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The first subchapter, entitled "Housing Renovation and Modernization" provides for state taxation at 1706(b). It there states that:

Nothing in this subchapter shall be construed to exempt any real property acquired and held by the Secretary in connection with the payment of insurance heretofore or hereafter granted under this subchapter from taxation by any State or political subdivision thereof, to the same extent, according to its value, as other real property is taxed.

The relevant court decisions uniformly support the proposition that Congress has granted the states the right to tax real property acquired and held by the FHA pursuant to authority granted in the National Housing Act. See, e.g., United States v. County of San Diego, 249 F.Supp. 321 (S.D. Cal. 1966); United States v. Comptroller of the City of New York, 248 F.Supp. 939 (S.D.N.Y. 1965); Dime Savings Bank of Brooklyn v. Beecher, 260 N.Y.S. 2d 500 (Sup. Ct. 1965); Byram Holding Co. v. Bogren, 2 N.J. 361, 63 A.2d 822 (1949); Ferguson v. Donnell, 349 Mo. 975, 163 S.W.2d 940 (1942).

Based on the above authorities, the states have congressional consent to tax property held by the FHA which was acquired pursuant to the following specific authority:

National Housing Act of 1934

Subchapter I "Housing Renovation and Modernization"
12 U.S.C. § 1706(b).

Subchapter II "Mortgage Insurance" 12 U.S.C. § 1714.

Subchapter VII "Insurance for Investment in Rental Housing for Families of Moderate Income." 12 U.S.C. § 1747(j).

Subchapter IX - A "Mortgage Insurance for Land Development and New Communities" 12 U.S.C. & 1749(kk).

Subchapter IX - C "National Insurance Development Program" 12 U.S.C. § 1749(bbb20).

Subchapter X "Defense Housing Insurance" 12 U.S.C. § 1750(c).

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A state may tax property owned by the FHA or VA, but only when such agency has repossessed housing and holds it, or has acquired housing pursuant to authority granted in the six sub-chapters of Title 12 noted above. United States v. General Douglas MacArthur Senior Village, Inc., 470 F.2d 675, 680 (2nd Cir. 1972), cert. denied 412 U.S. 922 (1972).

Arizona's constitution, however, contains language which could be interpreted to be an unequivocal prohibition against taxing federal property. Article 9, Section 2 of the Arizona Constitution states:

"There shall be exempt from taxation
all federal, state, county and municipal property."

This disclaimer of rights to tax federal property has its origins in Arizona's Enabling Act, Act of June 20, 1910, 36 Stat. 557, 568-579, which states in relevant part:

"... no taxes shall be imposed by the
state upon lands or property therein
belonging to or which may hereafter be
acquired by the United States or reserved
for its use. ..."

The Enabling Act is federal legislation which authorized Arizona to adopt a constitution. Arizona's constitution cannot be inconsistent with the paramount Enabling Act. See United States Constitution, Article VI; Arizona Constitution, Article II, § 3; Murphy v. State, 65 Ariz. 338, 181 P.2d 336 (1947). The issue becomes whether the Arizona Enabling Act, which states that no taxes shall be imposed by the State upon lands or property therein belonging to the United States or reserved for its use, prevents Arizona from taxing the FHA pursuant to the waiver granted in the National Housing Act.

The Arizona Supreme Court has not had an opportunity to address this particular issue. However, there are opinions on point from the Washington and Wisconsin Supreme Courts.

The Washington Supreme Court addressed the issue in Boeing Aircraft Company v. Reconstruction Finance Corporation, 171 P.2d 838 (1946), cert. denied 330 U.S. 803 (1946). This case dealt with the validity of a county tax on real property leased to Boeing by the Defense Corporation, a subsidiary of the Reconstruction Finance Corporation. Real property owned by the Reconstruction Finance Corporation was specifically made taxable by the provisions of 15 U.S.C. § 610, providing in part:

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"... except that any real property of the corporation shall be subject to state, territorial, county, municipal or local taxation to the same extent according to its value as other real property is taxed. ..."

Washington's Enabling Act (Act of February 22, 1889, 25 Stat. 676) stated in language virtually identical to that of the Arizona Enabling Act that no taxes shall be imposed on lands or property therein belonging to or which may be hereafter purchased by the United States. Article 26 of the Washington constitution echoed the language of their Enabling Act. Finally, the 14th Amendment to the Washington Constitution repeated the exemption of property of the United States.

The Washington Supreme Court looked to the intent of the framers of their constitution and to the intent of Congress to determine the reason for inserting the tax disclaimer in their enabling act. The court noted, 171 P.2d at 843, that:

It has been that usual practice in admitting new states into the Union that a provision be inserted in the enabling acts or the state constitutions, that Federal property be exempt from taxation. Such exemptions are merely declaratory of what the law is regardless of the provisions, and are unnecessary to establish the exemption of national property from state taxation.

It was further stated that:

The principle that property belonging to the United States is not taxable by the States in which it is situated did not receive final judicial affirmation until 1885 in *Van Brocklin v. State of Tennessee*, 117 U.S. 151, 6 S.Ct. 670, 29 L.Ed. 845. Prior to this decision it had quite generally been taken for granted that Federal property was thus exempt from State taxation, but in a number of cases Congress would seem to have implied that it was not confident upon this point since it incorporated into enabling acts for the admission of territories into the Union as States,

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the requirement that after admission the property of the United States should be exempt from State taxation. The effect of the decision in *Van Brocklin v. State of Tennessee* was, of course, to hold that these provisions were declaratory merely, and, therefore, superfluous. Id. at 843-844.

The obvious import of this language is that the United States Congress required these tax disclaimers to insure that there was no doubt as to the existence of a tax exemption on federal property; that they were not necessary to the existence of the exemption and are therefore superfluous. In light of this reasoning the Washington Supreme Court held that:

... our constitutional provisions relative to taxes upon Federal property are not compelling, in that they do not bind this state to exempt from taxation property owned by the United States, and that in all cases Federal property shall be taxed by this state when consent is given by the Congress of the United States. Id. at 845.

The same line of reasoning was followed by the Wisconsin Supreme Court in *State v. Slander*, 27 N.W.2d 447 (1947). The Court held:

... (1) that the enabling acts are merely declaratory of a rule that a state may not without federal consent tax lands owned by the United States; (2) that these acts were founded in caution and meant to do no more than secure by compact what the law required in any event; ... Id. at 452.

The decisions by the Washington and Wisconsin Supreme Courts are persuasive authority that Article 9, Section 2 of the Arizona constitution does not prevent the State of Arizona from taxing federal property when the United States Congress has consented to taxation. Therefore we conclude that Arizona's Constitution does not prevent state taxation of real property owned by the FHA where the United States Congress has consented to such a tax.

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The principal that the State may levy a tax upon property acquired by the Federal Government is also clearly approved with respect to property acquired by the Farmers Home Administration (FmHA). Real estate taxes which became due or payable after January 1, 1977, on Federal Government-owned rural housing property will be paid by the Federal Government. 43 Fed. Reg. 1290 (1978), amending 7. C.F.R. § 1955.63, provides in pertinent part:

* * *

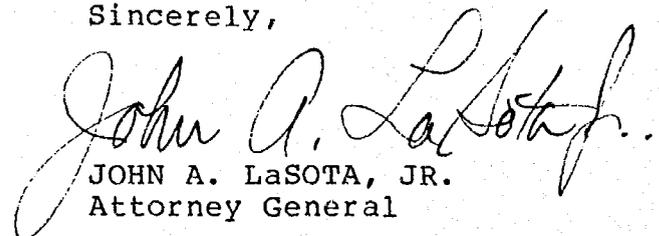
(f) Taxes. (1) Property acquired by FmHA is subject to taxation by State, Commonwealth, territory, district, and local political sub-divisions in the same manner and to the same extent as other property, unless State law specifically exempts taxation of real estate owned by the Federal Government.

* * *

Accordingly, where property is held by the FHA, VA or FmHA as the result of a repossession pursuant to the authority and provisions of the National Housing Act of 1934, Subchapters I, II, VII, IX(c) and X or 7 C.F.R. § 1955.63, it is subject to state property taxation.

Please advise if you require further information.

Sincerely,


JOHN A. LaSOTA, JR.
Attorney General