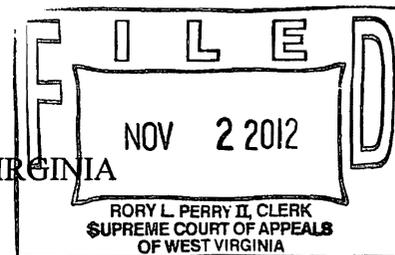


IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA  
No. 12-0767



(Taylor County Circuit Court Civil Action No. 10-P-14)

Judith Collet, Assessor of Taylor County  
and the County Commission of Taylor County,

Appellants

v.

Trio Petroleum Corporation, Waco Oil & Gas, Inc.,  
Mike Ross and I. L. Morris & Mike Ross, Inc.

Appellee

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APPELLEES TRIO PETROLEUM CORPORATION, WACO OIL & GAS, INC., MIKE ROSS  
AND I. L. MORRIS & MIKE ROSS, INC.'S BRIEF

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I. APPELLEE'S STATEMENT OF CASE 12-0767

The Appellees Trio Petroleum Corporation, Waco Oil & Gas, Inc., Mike Ross and I. L. Morris & Mike Ross, Inc. (Hereinafter referred to as Trio to avoid confusion with the other Appellee in this consolidated matter) are the owner of 2 tracts of real property, set forth in 6 property accounts, subject to *ad valorem* property taxation in Taylor County, West Virginia, for tax year 2010 (hereinafter, "the subject property"), to wit:

46-06-9999-0000-1030-0000	3/4 Interest in 640.50 Acres Coal
46-06-9999-0000-0390-0000	1/8 Interest in 3,466.52 Acres Coal
46-06-9999-0000-1010-0000	1/8 Interest in 3,466.52 Acres Coal
46-06-9999-0000-1840-0000	1/8 Interest in 3,466.52 Acres Coal
46-06-9999-0000-2770-0000	1/8 Interest in 3,466.52 Acres Coal
46-06-9999-0000-3130-0000	1/4 Interest in 3,466.52 Acres Coal

This case involves the assessment of Trio's interest in reserve coal properties located in Taylor County, West Virginia for Tax Year 2010.

The State Tax Commissioner determined the appraised value of the subject property:

46-06-9999-0000-1030-0000 3/4 Int. in 640.50 Acres Coal	\$44,260.00
46-06-9999-0000-0390-0000 1/8 Int. in 3,466.52 Acres Coal	\$39,116.00
46-06-9999-0000-1010-0000 1/8 Int. in 3,466.52 Acres Coal	\$39,116.00
46-06-9999-0000-1840-0000 1/8 Int. in 3,466.52 Acres Coal	\$39,116.00
46-06-9999-0000-2770-0000 1/8 Int. in 3,466.52 Acres Coal	\$39,116.00
46-06-9999-0000-3130-0000 1/4 Int. in 3,466.52 Acres Coal	\$78,234.00

The Tax Commissioner forwarded these values to the Assessor of Taylor County on or before January 15, 2010 to be entered onto the tax books of Taylor County.

The Assessor received and accepted the values provided by the State Tax Commissioner.

The Taxpayers were aware of the proposed valuations and accepted the proposed valuations for tax year 2010.

On or about February 12, 2010 the Assessor requested the County Commission to consider new valuations for the subject property to wit:

46-06-9999-0000-1030-0000 3/4 Int. in 640.50 Acres Coal	\$537,486.00
46-06-9999-0000-0390-0000 1/8 Int. in 3,466.52 Acres Coal	\$477,894.00
46-06-9999-0000-1010-0000 1/8 Int. in 3,466.52 Acres Coal	\$477,894.00
46-06-9999-0000-1840-0000 1/8 Int. in 3,466.52 Acres Coal	\$477,894.00
46-06-9999-0000-2770-0000 1/8 Int. in 3,466.52 Acres Coal	\$477,894.00
46-06-9999-0000-3130-0000 1/4 Int. in 3,466.52 Acres Coal	\$955,787.00

On February 13, 2010, the County Commission mailed notice of its intent to consider the new proposed valuations. The notice stated that the hearing would be held on February 22, 2010.

At the conclusion of the hearing, a decision therein was rendered by the County Commission on February 22, 2010, rejecting the valuations and substituting the new proposed valuations.

Trio filed its appeal of that decision with the Circuit Court of Taylor County March 22, 2011. *See Joint Appendix Volume VI items Nos. 44 and 45.*

Both parties fully briefed the matter and on January 12, 2012, the Circuit Court held oral arguments. After due consideration of the entire record and arguments of council the Court by Order Dated January 23, 2012 found:

Therefore, the Assessor's failure to follow the mandatory requirements of W. Va. Code § 11-1C-10(g), but instead appearing before the Board of Equalization and Review to contest the values she had previously accepted, caused the hearing before the Board of Equalization and Review to be held in violation of statutory provisions and made upon unlawful procedures. Therefore, the values initially placed on the property books by the Assessor must be the correct values, and not the altered values arrived at through improper procedures

The Court further directed the Petitioners to submit proposed Orders containing appropriate Findings of Fact and Conclusions of Law in their respective cases.

The Court entered its Final Order on May 10, 2012 where in it made the following conclusions of law:

1. Article 1, Section 10 of the West Virginia Constitution provides that "taxation shall be equal and uniform throughout the State, and all property, both real and personal, shall be taxed in proportion to its value to be ascertained and directed by law."

2. *Killen v. Logan County Commission*, 170 W. Va. 602, 295 S.E.2d (1982), is instructive when considering the above styled appeals. The relevant syllabus points state as follows: 7. the tax commissioner's appraisal should be presumed to be correct and the assessed value should correspond to the appraisal value in the usual case. 10. It is the tax commissioner's duty to ensure that assessment occurs at market value. The tax commissioner must see that county officials are complying with the constitutional and statutory requirements of full value assessment. W. Va. Const. art. 10, § 1; W. Va. Code §§ 11-3-1; 18-9A-11.13. Fifty-five sovereign entities do not exist within the sovereign state of West Virginia. Rather, 55 geographically defined governmental organizations exist to carry out the **purpose of state**

**government. The counties are subdivisions of the state, and county officials and governments are generally subject to supervision by state officials acting for the state government.** (Emphasis added).

3. West Virginia Code 11-1C-7(a) provides that “Except for *property* appraised by the state Tax Commissioner under section ten (W. Va. Code § 11-1C-10) of this article and property appraised and assessed under article six (§§ 11-6-1 et seq.) of this chapter, all assessors shall, within three years of the approval of the county valuation plan required pursuant to this section, appraise all real and personal property in their jurisdiction at fair market value except for special valuation provided for farmland and managed timberland. They shall utilize the procedures and methodologies established by the Property Valuation Training and Procedures Commission and the valuation system established by the Tax Commissioner.” Therefore, according to this section, the appraisal and assessment of natural resources property such as active and reserve coal properties is solely the duty of the State Tax Commissioner.

4. West Virginia Code § 11-1C-10(d) provides: “Within three years of the approval date of the plan required for natural resources property required pursuant to section (e) of this section, the State Tax Commissioner shall determine the fair market value of all natural resources property in the state. The commissioner shall thereafter maintain accurate values for all such property.” West Virginia Code § 11-1C-10(d)(2) then states, in pertinent part, that “The Tax Commissioner shall forward each natural resources property appraisal to the county assessor of the county in which that property is located and the assessor shall multiply each such appraisal by sixty percent and include the resulting assessed value in the land book or the personal property book, as appropriate, for each tax year. The commissioner shall supply support data that the assessor might need to explain or defend the appraisal.” Natural resources property is defined

by West Virginia Code § 11-1C-10(a)(2) as “coal, oil, natural gas, limestone, fireclay, dolomite, sandstone, shale, sand and gravel, salt, lead, zinc, manganese, iron ore, radioactive minerals, oil shale, managed timberland as defined in section two of this article, and other minerals.”

5. West Virginia Code § 11-1C-10(g) provides: “The county assessor may accept the appraisal provided, pursuant to this section, by the State Tax Commissioner: Provided, that if the county assessor fails to accept the appraisal provided by the State Tax Commissioner, the county assessor shall show just cause to the valuation commission for the failure to accept such appraisal and shall further provide to the valuation commission a plan by which a different appraisal will be conducted.”

6. It is well-established that the word “shall”, in the absence of language in the statute showing a contrary intent on the part of the Legislature, should be afforded a mandatory connotation.” Syllabus Point 1 of *Nelson v. West Virginia Public Employees Insurance Board*, 171 W. Va. 445, 300 S.E.2d 86 (1982).

7. The requirements of West Virginia Code § 11-1C-10(g) are mandatory. If an assessor disagrees with the appraisal of natural resource property provided to her by the State Tax Commissioner, she is required to apply to the Valuation Commission to show just cause for failure to accept the Commissioner’s appraisal and to provide the Valuation Commission a plan by which a different appraisal will be conducted. West Virginia Code § 11-1C-3(a) created the Property Valuation Training and Procedures Commission, and states as follows:

“There is hereby created, under the department of tax and revenue, a property valuation training and procedures commission which consists of the state tax commissioner, or a designee, who shall serve as chairperson of the commission, three county assessors, five citizens of the state, one of which shall be a certified appraiser, and two county commissioners. The assessors, five citizen members and two county commissioners shall be appointed by the governor with the advice and consent of the Senate. For each

assessor to be appointed, the West Virginia assessors association shall nominate three assessors, no more than two of whom shall belong to the same political party, and shall submit such list of nominees to the governor. For each of the two county commissioners to be appointed, the county commissioner's association of West Virginia shall nominate three commissioners, no more than two of whom shall belong to the same political party, and shall submit such list of nominees to the governor. Except for the tax commissioner, there may not be more than one member from any one county. No more than seven members of the commission shall belong to the same political party: Provided that any member of the commission who is a direct party to any dispute before the board shall excuse himself or herself from any consideration or vote regarding the dispute. By the first day of November, one thousand nine hundred ninety, the governor shall appoint the fifth citizen member, who shall serve a two-year term.

The assessor failed to apply to the Valuation Commission with a plan for a different appraisal, but instead, her consultant, Jerry Knight, contacted Scott Burgess in January of 2010, immediately prior to the meeting of the Board of Equalization and Review.

8. West Virginia Code § 11-3-24 provides, in part: "At the first meeting [of the Board of Equalization and Review], the assessor shall submit the property books for the current year, which shall be complete in every particular, except that the levies shall not be extended. The assessor and his assistants shall attend and render every assistance possible in connection with the value of property assessed by them."

9. In the 2010 hearings, Jerry Knight, on behalf of the Taylor County Assessor, testified that "and the assessor, in exercising her right just like any other person in the State of West Virginia who has that right, is presenting these issues before this board so that the board can carry out its duty of examining the information and correcting any and all errors that are found in the property books." He later recanted that testimony and stated "I certainly don't intend to indicate, and I don't believe I did indicate, that the assessor was appearing here as a person. The assessor certainly is appearing here in her capacity as an assessor to assist the board

under the provisions of § 11-3-24, as that statute requires in its deliberation concerning these issues.”

The Assessor and the County Commission, sitting as the Board of Equalization and Review, have also argued that the Assessor was fulfilling her mandatory duties pursuant to West Virginia Code § 11-3-24. However, this argument is disingenuous; because the issue would not have been before the Board had the Assessor not challenged the State Tax Commissioner’s appraisals.

Regardless in what capacity the Assessor appeared before the Board, it was a violation of her mandatory statutory duty to fail to present the issue to the Property Valuation Training and Procedures Commission. Upon accepting the value and placing it on the land books, she was foreclosed from attempting to attack the assessment before the Board.

There are many reasons for this determination. First, West Virginia Code § 11-3-2a provides various mechanisms by which notice of an increased assessment is to be provided to a taxpayer prior to the meeting of the Board. The version of § 11-3-2a(a) in effect at the time of the 2010 hearings stated that “If the assessor determines the assessed valuation of any item of real property is more than ten percent greater than the valuation assessed for that item in the last tax year, the increase is one thousand dollars or more and the increase is entered in the property books as provided in section nineteen of this article, the assessor shall give notice of the increase to the person assessed or the person controlling the property as provided in section two of this article. The notice shall be given at least fifteen days prior to the first meeting in February at which the county commission meets as the board of equalization and review for that tax year and advise the person assessed or the person controlling the property of his or her right to appear and seek an adjustment in the assessment.

The notice shall be made by first class United States postage mailed to the address of the person assessed or the person controlling the property for payment of tax on the item in the previous year, unless there was a general increase of the entire valuation in any one or more districts in which case the notice shall be by publication of the notice by a Class II-0 legal advertisement in compliance with the provisions of article three, chapter fifty-nine of this code. The area for the publication is the county.” Said Code section was amended, effective June 11, 2010, and now requires that “If the assessor determines the assessed valuation of any item of real property is more than ten percent greater than the valuation assessed for that item in the last tax year, the increase is one thousand dollars or more and the increase is entered in the property books as provided in section nineteen (§ 11-3-19) of this article, the assessor shall give notice of the increase to the person assessed or the person controlling the property as provided in section two of this article. The notice shall be given on or before January 15 of the tax year and advise the person assessed or the person controlling the property of his or her right to appear and seek an adjustment in the assessment: *Provided, That this notification requirement does not apply to industrial or natural resources property appraised by the Tax Commissioner under article six-k of this chapter which is assessed at sixty percent of its true and actual value.* (Emphasis added) The notice shall be made by first-class United States postage mailed to the address of the person assessed or the person controlling the property for payment of tax on the item in the previous year, unless there was a general increase of the entire valuation in one or more of the tax districts in which case the notice shall be by publication of the notice by a Class II-0 legal advertisement in compliance with the provisions of article three, chapter fifty-nine of this code. The area for the publication is the county.

By entering the initial assessment on the land books as being accepted, the Assessor prevented the notice required at that time from being sent to the taxpayer prior to the meeting of the Board.

Second, as expressed by § 11-1C-7a, the assessment of natural resources property is simply not within the jurisdiction of the Assessor. It is exclusively the jurisdiction of the State Tax Commissioner. Further, as provided by § 11-1C-10(d)(2), “The commissioner shall supply support data that the assessor might need to explain or defend the appraisal.” The commissioner has a mandatory duty to provide data to the Assessor to support the Commissioner’s appraisal. It is outside of the Assessor’s duties to hire a separate consultant to review appraisals conducted by the State Tax Commissioner and to question the methods of the State Tax Commissioner when the Assessor has not followed the mandatory statutory duty to present these issues to the Property Valuation Training and Procedures Commission.

Third, while the Court wishes to make clear that it has, for the purposes of the instant order, excluded consideration of the testimony and argument of the State Tax Department in the February 28, 2011 hearings as it relates to any appeal from the 2010 tax year, the Court finds Mr. Burgess’s presence without any type of representation highly suspect. As Mr. Burgess testified “As I recall, and again this is subject to a very bad memory — recent and long term memory — sometime in January, I’m going to say mid to late January, Jerry, on behalf of the county, asked me to look at a number of parcels, some of which we talked about a couple of Fridays ago; some of which we’re here for today. And asked that we review those and he particularly directed us to the environmental because the environmental did increase on those properties from a 20 to a 40. And his question was why they’d be a T-20 if they had no increase.

And I said certainly we'll do that. So I looked at the data; did some of the same screen prints Jerry has provided. I asked Pat White and her people to review that. And after considerable review, it was suggested that this should not be a 40 environmentally; it should be a 20. Particularly given, you know, what's going on in the county."

It appears that at the eleventh hour, Mr. Burgess attempted to make changes to the appraisals without time to submit such appraisals to the Assessor for entry on the land books as is her mandatory duty. Even if Scott Burgess is assumed to be a representative with actual authority from the State Tax Department, such late changes would render parties nearly incapable of addressing the changed appraisals. Further, notice could not have been served as required by the version of West Virginia Code § 11-3-2a in effect at that time.

Regardless of whether Mr. Burgess did or did not have authority from the State Tax Commissioner to be present, the Court finds he had no authority under law to make changes to or override the appraisal of the Tax Commissioner, or to usurp the jurisdiction of the Property Valuation Training and Procedures Commission.

The Court is aware that West Virginia Code § 11-3-25 states that "If there was an appearance by or on behalf of the owner before the county court, or if actual notice, certified by such court, was given to the owner, the appeal, when allowed by the court or judge, in vacation, shall be determined from the evidence so certified. If, however, there was no actual notice to such owner, and no appearance by or on behalf of the owner before the county court, or if a question of classification or taxability is presented, the matter shall be heard de novo by the circuit court." The Court has considered the matters presented only on the record so certified in the above styled cases, but the Court is troubled by the statements of officials from the State Tax Department at the February 28, 2011 hearing. The Court is also aware that West Virginia

Code § 11-3-25(c) now states “If there was an appearance by or on behalf of the taxpayer before either board, or if actual notice, certified by the board, was given to the taxpayer, the appeal, when allowed by the court or judge, in vacation, shall be determined by the court from the record as so certified: *Provided, That in cases where the court determines that the record made before the board is inadequate as a result of the parties having had insufficient time to present evidence at the hearing before the board to make a proper record, as a result of the parties having received insufficient notice of changes in the assessed value of the property and the reason or reasons for the changes to make a proper record at the hearing before the board, as a result of irregularities in the procedures followed at the hearing before the board, or for any other reason not involving the negligence of the party alleging that the record is inadequate, the court may remand the appeal back to the county commission of the county in which the property is located, even after the county commission has adjourned sine die as a board of equalization and review or a board of assessment appeals for the tax year in which the appeal arose, for the purpose of developing an adequate record upon which the appeal can be decided.*”(Emphasis added) Such amendment is only effective on tax years beginning after December 31, 2011, but given the numerous procedural defects and extremely short notice on changes in the appraisals regarding significant and complex issues, this Court would entertain a motion to develop the issues of the actual/apparent agency of Scott Burgess should this matter be reversed on appeal for consideration on the substantive issues, as the Court believes it would be improper to accept that Scott Burgess had actual authority from the State Tax Department when considering the substantive issues set forth below having viewed the allegations against Mr. Burgess in the February 28, 2011 transcript.

10. The Court has declined to delve into the substantive arguments in these matters due to the substantial procedural defects, but it is clear that the model applied by the State Tax Commissioner in valuing active and reserve coal properties can only be applied in an equal and uniform manner by applying the various formulas in the exact same manner in each county in the state. If the Assessor wishes to change how the formula is applied or have factors adjusted, the Assessor must follow her mandatory duty to present the issue to the Property Valuation Training and Procedures Commission. A failure to do so, as in these instant appeals, would result in unequal taxation of properties in Taylor County as compared to similar properties in all the other counties of the state, and would thus violate the Taxpayer's constitutional rights. If the procedure used in this matter was proper, valuation of active and reserve coal properties in the State of West Virginia would devolve into chaos as each county hires its own consultant to fight the State Tax Commissioner's appraisals to increase and alter valuations. The only way that the system can function in a constitutional manner, even with flaws in the calculations, is to apply those flaws uniformly and correct issues year by year on a statewide basis.

11. The applicable standard of review was set forth by the West Virginia Supreme Court of Appeals in *In re Tax Assessment Against Am. Bituminous Power Partners, L.P.*, 208 W. Va. 250, 254-55, 539 S.E.2d 757, 761-62 (2000):

Upon receiving an adverse determination [concerning property valuation] before the county commission, a taxpayer has a statutory right to judicial review before the circuit court. W. Va. Code § 11-3-25. The statute provides little in the way of guidance as to the scope of judicial review, although it does expressly limit review to the record made before the county commission. Given this limitation, we have previously indicated that review before the circuit court is confined to determining whether the challenged property valuation is supported by

substantial evidence, see *Killen v. Logan County Comm 'n*, 170 W. Va. 602, 295 S.E.2d 689 (1982), or otherwise in contravention of any regulation, statute, or constitutional provision, see *In Re Tax Assessments Against the Southern Land Company*, 143 W. Va. 152, 100 S.E.2d 555 (1957), overruled on other grounds, *In Re Kanawha Valley Bank*, 144 W. Va. 346, 109 S.E.2d 649 (1959). As this Court's previous cases suggest, and as we have recognized in other contexts involving taxation, e.g., *Frymier-Halloran v. Paige*, 193 W. Va. 687, 695, 458 S.E.2d 780, 788 (1995), judicial review of a decision of the board of equalization and review regarding a challenged tax-assessment valuation is limited to roughly the same scope as permitted under the West Virginia Administrative Procedures Act, W. Va. Code Chapter 29A.

West Virginia Code § 29A-5-4(g) provides that the Court "shall reverse, vacate or modify the order or decision of the agency if the substantial rights of the petitioner or petitioners have been prejudiced because the administrative findings, inferences, conclusions, decision or order are: (1) in violation of constitutional or statutory provisions; or (2) in excess of the statutory authority or jurisdiction of the agency; or (3) made upon unlawful procedures; or (4) affected by other error of law; or (5) clearly wrong in view of the reliable, probative and substantial evidence on the whole record; or (6) arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion."

12. As the Board clearly initiated the February 2010 hearings as a result of actions in violation of statutory provisions and made upon unlawful procedures due to the failure of the Assessor to follow mandatory statutory guidelines, the Board's orders entered regarding the property at issue in Case Numbers 10-P-11, 12, 13, and 14 must be REVERSED. The proper values to be assigned to the properties at issue are those initially presented by the State Tax Commissioner and recorded on the land books of Taylor County.

13. As to the property at issue in Case Number 11-P-17, it is clear from the record before the Board that both the Taxpayer and the State Tax Commissioner object to the change in valuation agreed upon by the Board. The values were only reviewed because they differed from the values improperly assigned in 2010. As such, the Court has also concluded that the hearing on February 28, 2011 was in violation of statutory provisions and founded upon unlawful procedures. Therefore, the proper values to be assigned to the properties at issue are

14. Those initially presented by the State Tax Commissioner and recorded on the land books of Taylor County.

15. The Court has also concluded that the procedures in all the above styled cases were in violation of constitutional provisions, as the method applied would result in unequal taxation that is not uniform across the State, as it would treat property in Taylor County vastly differently from similar natural resource property in the other 54 counties in the State.

## II. STATEMENT OF FACTS FOR CASE 12-0767

On or before September 16, 2009 the Taxpayers filed with the West Virginia State Tax Department an annual return for reserve mineral properties for tax year 2010 for all accounts, which are subject to the erroneous assessments.

The State Tax Commissioner developed a computer model to appraise all coal seams in West Virginia that are deemed mineable.

The computer model refined the appraisal method for all mineable coal reserves using a coal bed index factor, or “T-score”.

The computer model assigns numerical figures for six “factors”, adds them together, and divides the sum by three. The tax department then rounds that number to the nearest 20, 40, or 80. See 110 CSR II.4.2.3.17.g.

The six factors, which are added together and divided by three to equal the T-score, are the following:

- a. Market interest factor (also called the transaction factor - the tax department assigns a factor between 20 and 80 based upon a geostatistical analysis of the correlation between transaction density and mining activity) *See* 110 CSR 11.4.2.3.17.a.
- b. Market mineability factor (also called the mine factor - the tax department assigns a factor of 20, 40, or 80 based upon the history of mining within a certain radius around the property) *See* 110 CSR 11.4.2.3.17.b.
- c. Prime coal bed factor (also called the seam factor - if a seam of coal is the “prime coal bed” as defined at 110 CSR 11.3.43, it is given a factor of 20, if not, it is given a factor of 80) *See* 110 CSR 11.3.43, 110 CSR 11.4.2.3.16 and 110 CSR 11.4.2.3.17.c.
- d. Environmental factor (the tax department assigns a factor of 0, 20, 40, or 80 to each coal seam based upon environmental obstacles that may affect mining) *See* 110 CSR 11.4.2.3.17.d.
- e. Use conflict factor (also called the well factor - the tax department assigns a factor of 0, 20, 40, or 80 based upon a geostatistical analysis of the number of oil and gas wells in an area) *See* 110 CSR 11.4.2.3.17.e.
- f. Volatility factor (the tax department assigns a factor of 0 or 80 based upon the volatility content of the coal seam) *See* 110 CSR 11.4.2.3.17.f.

Based upon the said returns and other information that the State Tax Commissioner had compiled from the inception of the model, the model determined the appraised value for the reserve mineral for the subject property were:

46-06-9999-0000-1030-0000 3/4 Int. in 640.50 Acres Coal	\$44,260.00
46-06-9999-0000-0390-0000 1/8 Int. in 3,466.52 Acres Coal	\$39,116.00
46-06-9999-0000-1010-0000 1/8 Int. in 3,466.52 Acres Coal	\$39,116.00
46-06-9999-0000-1840-0000 1/8 Int. in 3,466.52 Acres Coal	\$39,116.00

46-06-9999-0000-2770-0000 1/8 Int. in 3,466.52 Acres Coal	\$39,116.00
46-06-9999-0000-3130-0000 1/4 Int. in 3,466.52 Acres Coal	\$78,234.00

The Tax Commissioner forwarded these values to the Assessor of Taylor County on or before January 15, 2010 to be entered onto the tax books of Taylor County.

The Assessor received and accepted the values provided by the State Tax Commissioner.

The Taxpayers were aware of the proposed valuations and accepted the proposed valuations for tax year 2010.

On or about February 12, 2010 the Assessor requested the County Commission to consider new valuations for the subject property to wit:

46-06-9999-0000-1030-0000 3/4 Int. in 640.50 Acres Coal	\$537,486.00
46-06-9999-0000-0390-0000 1/8 Int. in 3,466.52 Acres Coal	\$477,894.00
46-06-9999-0000-1010-0000 1/8 Int. in 3,466.52 Acres Coal	\$477,894.00
46-06-9999-0000-1840-0000 1/8 Int. in 3,466.52 Acres Coal	\$477,894.00
46-06-9999-0000-2770-0000 1/8 Int. in 3,466.52 Acres Coal	\$477,894.00
46-06-9999-0000-3130-0000 1/4 Int. in 3,466.52 Acres Coal	\$955,787.00

On February 13, 2010, the County Commission mailed notice of its intent to consider the new proposed valuations.

At the hearing on February 22, 2010, the Assessor put on evidence through Scott Burgess concerning the tax department's model and how the department determined the values of coal seams.

Mr. Burgess appeared ostensibly as a representative of the West Virginia State Tax Commissioner. At the time of the hearing, Mr. Burgess was the Assistant Director of the Property Tax Division.

Prior to the hearing, the environmental factor assigned to the subject properties was a T-40. This was based upon the RCVM modeling used by the State Tax Department to value all reserve coal in the State of West Virginia. The modeling was based upon the returns filed by the Taxpayers and an extensive “database consisting of coal beds and characteristics, property locations, mine locations, sales, transportation, etc., for the entire state”.

At the request of Mr. Jerry Knight, consultant for the Taylor County Assessor, Mr. Burgess reviewed and overrode the environmental factor and assigned a T-20 factor.

Mr. Burgess, testified that he based the recommendation to decrease the environmental factor from 40 to 20 on two things: (1) because an affiliate of ICG was attempting to obtain a permit to mine the Middle Kittanning coal seam in another part of the county approximately six to eight miles away and (2) because the environmental factor for this seam of coal was a 20 in 2009.

The result of these actions the overall T factor for the subject property was changed from a T-40 to a T-20 and resulted in the increased assessments.

### III. SUMMARY OF ARGUMENT

The Circuit Court committed no error in ruling that as a matter of law, under West Virginia Code §11-1C-7a, the State Tax Commissioner has the exclusive jurisdiction to assess natural resources property.

The Circuit Court committed no error in ruling that, as a matter of law, under West Virginia Code §11-1C-10(g), the only way for the Assessor to change the assessed value of

Appellees' property was for the Assessor to apply to the West Virginia Property Valuation Training and Procedures Commission.

The Circuit Court committed no error in ruling that the County Commission disregarded the applicable Legislative Rules and methodologies when they determined that the values assigned by the State Tax Commissioner were erroneous.

#### IV. STATEMENT REGARDING ORAL ARGUMENT AND DECISION

For the all the reasons stated in the Argument below, the Respondent joins the Petitioner in requesting oral argument under Rule 20.

#### V. STANDARD OF REVIEW

This Court reviews the decisions of a circuit court, when the latter was itself sitting as an appellate court, under the same standard by which a circuit court is required to review the decision of the lower tribunal or administrative agency in the first instance. *Martin v. Randolph Cty Bd. Ed.*, 195 W. Va. 297, 465 S.E.2d 399 (1995); *Corliss v. Jefferson Cty. Bd. of Zoning Appeals*, 214 W. Va. 535, 591 S.E.2d 93 (2003); *Webb v. W. Va. Bd. of Med.*, 212 W. Va. 149, 569 S.E.2d 225 (2002) (*per curiam*). Specifically, in the leading case addressing the standard of review in appeals of this nature, this Court has held that, as a result of a long line of earlier rulings, a circuit court is limited to a clearly erroneous and abuse of discretion standard for review of the administrative law judge's findings, unless the incorrect legal standard was applied. See *Frymier-Halloran v. Paige*, 193 W.Va. 687, 458 S.E.2d 780 (1995), syl. pt. 3. Moreover, a circuit court's statutory interpretations are reviewed *de novo*. *Id.* *Burnside v. Burnside*, 194 W. Va. 263, 460 S.E.2d 264, syl. pt. 1 (1995). *See, Belt v. Rutledge*, 175 W. Va. 28, 330 S.E.2d 837 (1985) (“[i]f the question on review is one purely of law, no deference is given and the standard of judicial review by the courts is *de novo*.”) “Although factual findings

are reviewed under the clearly erroneous standard, mixed questions of law and fact that require the consideration of legal concepts and involve the exercise of judgment about the values underlying legal principles are reviewed *de novo*.” *Burnside*, 460 S.E.2d at 265.

## VI. ARGUMENT

### A. THE CIRCUIT COURT COMMITTED NO ERROR IN RULING THAT AS A MATTER OF LAW, UNDER W. VA. CODE §11-1C-7A, THE STATE TAX COMMISSIONER HAS THE EXCLUSIVE JURISDICTION TO ASSESS NATURAL RESOURCES PROPERTY.

Trio concur with the assertion of the appellants that the County Commission sitting as the Board of Equalization and Review has the authority, duty and obligation to review assessments made by the assessor and to correct errors found in such assessments<sup>1</sup>. Specifically, the appellant had the authority, duty and obligation to “cause to be done whatever else may be necessary to make the valuation [of property for ad valorem property tax purposes] comply with the provisions of this chapter [West Virginia Code, Chapter 11]”.<sup>2</sup>

What West Virginia Code § 11-3-24 does not give to the appellant is any authority to exacerbate errors in assessments made by the assessor or to, in any event, attempt to override the authority of the West Virginia Tax Commissioner to value natural resource properties..

West Virginia Code § 11-1C-10 requires that all coal reserves be appraised by the State Tax Department More broadly, this code section explains the various roles of the tax department, the tax commissioner and the county assessors in appraising and assessing coal reserves:

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<sup>1</sup> W.Va. Code § 11-3-24.

<sup>2</sup> Id. Emphasis added.

**§ 11-1C-10. Valuation of Industrial Property and Natural Resources Property by Tax Commissioner; Penalties; Methods; Values Sent to Assessors**

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(2) "Natural resources property" means coal ... and other minerals.

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(d) Within three years of the approval date of the plan required for natural resources property required pursuant to subsection (e) of this section, the state tax commissioner shall determine the fair market value of all natural resources property in the state. The commissioner shall thereafter maintain accurate values for all such property.

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(2) In the case of all other natural resources property [other than managed timberland], the commissioner shall develop an inventory on a county by county basis of all such property and may use any resources, including, but not limited to, geological survey information; exploratory, drilling, mining and other information supplied by natural resources property owners; and maps and other information on file with the state division of environmental protection and office of miners' health, safety and training. Any information supplied by natural resources owners or any proprietary or otherwise privileged information supplied by the state division of environmental protection and office of miner's health, safety and training shall be kept confidential unless needed to defend an appraisal challenged by a natural resources owner. Formulas for natural resources valuation may contain differing variables based upon known geological or other common factors. The tax commissioner shall forward each natural resources property appraisal to the county assessor of the county in which that property is located and the assessor shall multiply each such appraisal by sixty percent and include the resulting assessed value in the land book or the personal property book, as appropriate, for each tax year. The commissioner shall supply support data that the assessor might need to explain or defend the appraisal. The commissioner shall directly defend any challenged appraisal when the assessed value of the property in question exceeds two million dollars or an owner challenging an appraisal holds or controls property situated in the same county with an assessed value exceeding two million dollars. At least every five years, the commissioner shall review current technology for the recovery of

natural resources property to determine if valuation methodologies need to be adjusted to reflect changes in value which result from development of new recovery technologies.

(e) The tax commissioner shall develop a plan for the valuation of industrial property and a plan for the valuation of natural resources property. The plans shall include expected costs and reimbursements, and shall be submitted to the property valuation training and procedures commission on or before the first day of January, one thousand nine hundred ninety-one, for its approval on or before the first day of July of such year. Such plan shall be revised, resubmitted to the commission and approved every three years thereafter.

Pursuant to W. Va. Code § 11-1C-10(e), the tax commissioner developed a model too fairly and equitably value natural resources property. The tax commissioner along with paid consultants developed the reserve coal valuation model (“RCVM”) to appraise coal reserves throughout the state. The RCVM was adapted in to all by legislative regulation 110 CSR II. The legislature in 110 CSR 11.4.2 required all reserve coal to be valued pursuant to the (RCVM).

**B. THE CIRCUIT COURT COMMITTED NO ERROR IN RULING THAT, AS A MATTER OF LAW, UNDER W. VA. CODE §11-1C-10(g), THE ONLY WAY FOR THE ASSESSOR TO CHANGE THE ASSESSED VALUE OF APPELLEES’ PROPERTY WAS FOR THE ASSESSOR TO APPLY TO THE WEST VIRGINIA PROPERTY VALUATION TRAINING AND PROCEDURES COMMISSION.**

When an Assessor challenges the tax commissioner’s valuation of a natural resource property West Virginia Code §11-1C-10, it requires the assessor, to show cause to the Property Valuation Training and Procedures Commission (herein after referred to as the “PVC”) for permission to deviate from that valuation. This ensures that all property tax equal and uniform throughout the state. To allow the Assessor or her agent to request the tax commissioner to apply a different standard to the subject property without oversight from the PVC violates Trio’s constitutional right to equal and uniform taxation.

Under the West Virginia Constitution<sup>3</sup> taxation of property must be “equal and uniform” so that “[n]o one species of property from which a tax may be collected shall be taxed higher than any other species of property of equal value.”<sup>4</sup> The essence of this mandate is that all property in the state be assessed for tax purposes on a uniform basis so that each property so that each property owner pays his fair share of taxes. In practice, assessors in the various counties employ different practices, which result in non-uniform taxation in many cases.

If Assessors throughout the state are allowed to vary from the legislatively mandated method of valuing natural resources properties, the result will be that assessed value will vary greatly from county to county. Under this practice, assessments and the resulting taxes within counties maybe uniform (though in the case at bar only these three tax payers were subject to the Assessor’s review); however, vary greatly from county to county, resulting in disparate taxation for the state as a whole. This practice was declared unconstitutional in *Killen v. Logan County Comm’n*,<sup>5</sup> where the court held that all property must be assessed at 100 percent of market value. The basis for this holding was the constitutional requirement that all property in the state be taxed in an “equal and uniform” manner.<sup>6</sup>

Thus the assessor is prohibited from seeking an increase in the appraisals In West Virginia, an assessor may not ask the Board of Equalization and Review to increase the appraisals entered into the property books without complying with the statutory protocol for challenging the tax department’s appraisal set forth in W. Va. Code § 11-1C-10(g). Subsection

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<sup>3</sup> W. Va. Const art. X, § 1.

<sup>4</sup> *See Re: The Assessment of Shares of Stock of the Kanawha Valley Bank*, 109 S.E.2d 649 (1959).

<sup>5</sup> 295 S.E.2d 689 (W. Va. 1982).

<sup>6</sup> W. Va. Const. art. 10, § 1.

(g) was specifically drafted by the Legislature to provide a mechanism by which the county assessor may challenge the tax department's appraisals. The statute unambiguously states:

... [I]f the county assessor fails to accept the appraisal provided by the state tax commissioner, the county assessor shall show just cause to the valuation commission for the failure to accept such appraisal and shall further provide to the valuation commission a plan by which a different appraisal will be conducted.

W. Va. Code § 11-1C-10(g). The Legislature's use of the word "shall" was purposeful. "Generally, 'shall' commands a mandatory connotation and denotes that the described behavior is directory, rather than discretionary[.]" See *State v. Allen*, 208 W. Va. 144, 153, 539 S.E.2d 87, 96 (1999), and its use negates any discretion. See *State ex rel. Bennett v. Whyte*, 163 W. Va. 522, 524, 258 S.E.2d 123, 125 (1979). The West Virginia Supreme Court of Appeals has stated:

It is presumed that the legislature had a purpose in the use of every word, phrase and clause found in a statute and intended the terms so used to be effective, wherefore an interpretation of a statute which gives a word, phrase or clause thereof no function to perform, or makes it, in effect, a mere repetition of another word, phrase or clause thereof must be rejected as being unsound, if it be possible so to construe the statute as a whole, as to make all of its parts operative and effective.

Syl. Pt. 2, *L.H. Jones Equipment Co. v. Swenson Spreader LLC*, 224 W.Va. 570, 687 S.E.2d 353 (2009) citing Syl. Pt. 7, *Ex Parte Watson*, 82 W.Va. 201, 95 S.E. 648 (1918).

C. THE CIRCUIT COURT COMMITTED NO ERROR IN RULING THAT THE COUNTY COMMISSION DISREGARDED THE APPLICABLE LEGISLATIVE RULES AND METHODOLOGIES WHEN THEY DETERMINED THAT THE VALUES ASSIGNED BY THE STATE TAX COMMISSIONER WERE ERRONEOUS.

### **Reserve Coal Valuation Model**

The West Virginia Legislature has the constitutional authority to determine what species of property is to be tax and how the value of that property is to be determined. The legislature created the mode of valuation for the purpose of taxation of the reserve minerals

through the creation of the Reserve Coal Valuation Model which set forth the method upon which the value of reserve coal should be determined. Prior to the creation of the RCVM coal was valued using subjective methods that resulted in a hodgepodge of values that were not fair and equal throughout the state. The Assessor and Mr. Burgess have inserted a subjective change that is not supported by the legislative framework or the objective facts.

As mandated by the WV Legislature in Title 110, Series 1I, the RCVM was first used for the 2000-tax year. The RCVM also involves using a GIS that includes many data sets:

- 1) Coal bed maps: areal extent, thickness for selected previously mined coal beds.
- 2) Quality maps: sulfur, BTU, washability, volatility.
- 3) Mine maps: location and other pertinent data of reported coal mines current and closed.
- 4) Coal prices: sales information with source location (coal mine), destination (buyer), transportation, and FOB-source price of coal sold from mine in WV.
- 5) Transactions: terms and locations of leases and sales of coal properties prospect and permit application etc.
- 6) Royalties: location and terms of coal royalty agreements.
- 7) Environmental: general location of potential problems which could impede permitting for mining.
- 8) Property location: location of each individual.
- 9) property for which coal rights are owned.

- 10) Coal Production: data reflecting coal produced annually by mine and by coal bed.
- 11) Capitalization rate: market data necessary to develop an estimate capitalization rate.
- 12) Current mine data: active mine data from the Natural Resources Appraisal System.

The RCVM ultimately determines the value placed upon each cubic foot of coal reserves throughout different areas of West Virginia. The RCVM is used to determine the coal bed index factor, or T-score, for each seam of coal on a property. To determine the T-score for a given tax account, the model assigns numerical figures for six “factors,” adds them together, and divides the sum by three. The tax department then rounds that number to the nearest 20, 40, or 80. *See* 110 CSR 11.4.2.3.17.g. The RCVM was designed to predict when the coal reserves might be mined: T-20 represents mining in the next 10 to 30 year; T-40 represents mining in the next 30 to 60 years; and T-80 represents mining beyond the next 60 years.

The six factors, which are added together and divided by three to equal the T-score, are the following:

1. Market interest factor (also called the transaction factor - the tax department assigns a factor between 20 and 80 based upon a geostatistical analysis of the correlation between transaction density and mining activity) *See* 110 CSR 11.4.2.3.17.a.
2. Market mineability factor (also called the mine factor - the tax department assigns a factor of 20, 40, or 80 based upon the history of mining within a certain radius around the property) *See* 110 CSR 11.4.2.3.17.b.
4. Prime coal bed factor (also called the seam factor - if a seam of coal is the “prime coal bed” as defined at 110 CSR 11.3.43, it is given a factor of 20, if not, it is given a factor

of 80) *See* 110 CSR 11.3.43, 110 CSR 11.4.2.3.16 and 110 CSR 11.4.2.3.17.c.

5. Environmental factor (the tax department assigns a factor of 0, 20, 40, or 80 to each coal seam based upon environmental obstacles that may affect or impede mining) *See* 110 CSR 11.4.2.3.17.d.
6. Use conflict factor (also called the well factor - the tax department assigns a factor of 0, 20, 40, or 80 based upon a geostatistical analysis of the number of oil and gas wells in an area) *See* 110 CSR 11.4.2.3.17.e.
7. Volatility factor (the tax department assigns a factor of 0 or 80 based upon the volatility content of the coal seam) *See* 110 CSR 11.4.2.3.17.f.

Assuming for arguments sake the Mr. Burgess was acting under the authority of the Tax Commissioner. Mr. Burgess failed to follow the required model. The Assessor and her consultant decided that the subject property was undervalued because the t-factor assigned to the property was a t-40. Mr. Knight contacted Mr. Burgess and at his behest, Mr. Burgess reviewed the computer-generated factors and determined that if the environmental factor was changed the t factor would change to a t-20.

Mr. Burgess took to subjectively change the environmental factor.

MR. SAYRE: Mr. Burgess you said that one of the factors dealing with your change---or your subjective change in the environmental factor was the permitting that is in the area. And we know that at least one of the permits or maybe the only permitting in the area is roughly six and a half miles away---or...

Isn't permitting a portion of the other factors in the formula?

MR. BURGESS: Not directly. It's looking at mineability. It's looking at transactions. So in that regard permitting would come into play.

And I've noticed on one of these we've looked at---and I get confused after a while---but one of the transaction factors went from a 40 to a 20 which means that another transaction occurred in

the area which could very well have been the ICG permitting process going on.

So indirectly it does. Directly it doesn't.

MR. SAYRE: So---so permitting has a change on the--- the market interest factor and the market mineability factor?

MR. BURGESS: Transaction factor.

MR. SAYRE: Transaction factor. And these tracts already have the lowest of the values for the transaction factors?

MR. BURGESS: I'd have to review them. They do have low. They would have to have low for this to be a T-20 with this adjustment.

*See Trans. at 100-102.*

Mr. Burgess is clearly wrong when he stated that permitting is not accounted for in other factors.

a. Market interest factor (also called the transaction factor - the tax department assigns a factor between 20 and 80 based upon a geostatistical analysis of the correlation between transaction density and mining activity) *See* 110 CSR 11.4.2.3.17.a.

b. Market mineability factor (also called the mine factor - the tax department assigns a factor of 20, 40, or 80 based upon the history of mining within a certain radius around the property) *See* 110 CSR 11.4.2.3.17.b.

At the hearing, the Assessor's evidence failed to establish that the true and actual values of the subject properties, as of July 1, 2009, were greater than the values set by the Tax Commissioner.

Mr. Burgess failed to consult any of the required sources of information to make a deviation from the environmental factor assigned by the model. The model relies upon data files obtained and generated by:

- West Virginia Division of Environmental Protection;
- West Virginia Division of Natural Resources;

- West Virginia Geological and Economic Survey;
- United States Department of the Interior; and
- Any other sources that may come to the attention of the Tax Commission.

The respondent failed to rebut or address the uncontroverted evidence of the process upon which

Scott Burgess testified that permitting is factored into the Transaction (Mine Interest) Factor and further stated that the Transaction (Mine Interest) Factors assigned to these properties were the lowest possible factors.

During the 2011 hearings, some very disturbing facts became known. During the testimony of Mr. Knight, certain information was proffered by the tax commissioner's council:

MR. KNIGHT: ... By the Tax Department assigning an environmental factor of 40 to these properties rather than a 0, as they did last year, these properties are treated - -

MR. MARLOW: I'll raise another objection. I'm sick of this. Every time this comes, they want to jump up and jump in our face about not going back to last year.

As long as they're going to try to use the values from last year, we have the right to argue what we're going to argue about the rogue employee.

Will you stipulate that all of the values used last year were T-40 on the environmental factor on these seams until Scott Burgess came up and changed them?

MR. KNIGHT: I don't know about all these properties. I would have to go back and look at last year's information.

MR. MUDRINICH: Just put the whole transcript in from last year instead of one of these pages, and then it will become evident on -

MR. MARLOW: Abundantly clear.

MR. SLUSS: I don't know what the issue is. I mean the Tax Commissioner last year said that this was - -

MR. MUDRINICH: We've been down this road before.

MR. SLUSS: I know we have.

MR. MUDRINICH: Rogue employee came up.

MR. SLUSS: A rogue employee is what you're characterizing him. He was a representative of the State Tax Commissioner.

MR. MUDRINICH: No, he wasn't.

MR. SLUSS: Yes, he was.

MR. MUDRINICH: I answered that.

MR. MARLOW: The State Tax Commissioner didn't consider him an official representative, I can tell you that.

*See Transcript, at 105-07.*

As evidenced by the following, the State Tax Department does not agree with the environmental factors assigned by Scott Burgess to Trio's tax accounts in 2010:

MR. MUDRINICH: ... Mr. Burgess was up here without an attorney. He was not authorized to come up here and make a change - - recommend a change to the environmental factor or that valuation.

I believe we're trying to make that clear in the Circuit Court I don't know. We're not a party to that, but that was not the Tax Department's position last year. He was up here unauthorized.

*See Transcript, at 8.*

MR. MARLOW: And I'm going to raise that again. It was a rogue employee no longer employed by the Tax Department, who has no official authorization by the Tax Commissioner.

He was up here on his own, not as an official representative of the Tax Department. He may have claimed to be, but he was not.

Let's make that clear for the record.

*See Transcript, at 89.*

MR. MUDRINICH: And I want it on the record that I come up here or delegate an attorney to come up here just about every year

since ICG has started, and if you would have noticed, last year there was no attorney because we were never notified of that hearing where that increase was done. Always come up here always.

*See Transcript, at 92.*

MR. MARLOW: Does anybody not find it strange that every other year we had members of the Legal Division here; we had members of either the consulting firm or somebody from tax Department's coal division here until last year when Scott was here by himself? We didn't even know he was here.

Does anybody not find it strange that every other year, we've fully covered these hearings; last year, we didn't?

*See Transcript, at 148-49.*

The Tax Department's consultant, Jeffrey Kern, also shed light on the 2010 environmental factor

MR. KERN: I have the answer to that question. I was on a train on my way to New York City and I received a phone call from one of my employees who informed me that Mr. Scott Burgess was busy overriding numbers as quick as he could, which was illegal.

I testified to - - I testified - - I told the Director of the Department that I would not substantiate those numbers nor would I testify to their authenticity if they're going to be played with by someone in the Department. That's not consistent. That's not meant to be what the department is supposed to do.

You cannot go in there and inconsistently apply one number against one company because you don't like them, and don't apply a number against another company because you do like them.

MR. SLUSS: I'm going to object, he's characterizing - -

MR. KERN: Those numbers were overridden by someone at the Tax Department that no one else in the Tax Department agreed with, and the consultant to the Tax Department specifically called and wrote a memo saying that we would not stand behind those numbers.

MR. MARLOW: Mr. Kern, there are a number of properties here that we're discussing right now regarding some environmental factors.

To the best of your knowledge and belief, when the appraised values were provided to the Assessor last year, previous to any Board of Equalization and Review hearings occurring, would the properties in question here have had environmental factors of 40 on them?

MR. KERN: Yes.

MR. MARLOW: And those all got changed subsequent to a Board of Equalization and Review hearing; is that correct?

MR. KERN: That's correct.

MR. MARLOW: Why were you not here for that hearing?

MR. KERN: I was specifically told by the assistant department director that none of my personnel or myself were to be at this hearing. We normally come. One of my --

MR. SLUSS: I'm going to object to hearsay.

MR. MARLOW: There's no jury present. You can give it whatever weight you wish to consider.

MR. KERN: Usually, the northern counties are counties that my staff comes to because our office is in Pennsylvania. When the State Department staff is short, they will go to the southern counties and my staff will go to the northern counties.

We were planning on my calendars to have someone at Taylor County last year. We were specifically told not to come to Taylor County last year. I received that phone call.

MR. MARLOW: And, thus, you were not here?

MR. KERN: I was not here to discuss where those property figures came from or where those factors came from.

*See Transcript, at 119-20.*

The actions of Mr. Burgess where clearly ultra vires and void and did not bind the tax commissioner. *Totten v. Nighbert*, 41 W.Va. 800, pt. 3 syl., 24 S.E. 627, *Samsell v.*

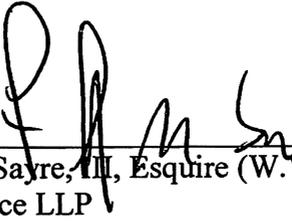
*State Line Development Corp.*, 154 W.Va. 48, 174 S.E. 2d 318 (1970),. It would be a gross injustice to allow these illegal actions of Mr. Burgess to be used to create an economic harm upon Trio.

## VII. CONCLUSION

Based on the evidence in the record of this matter, and on the foregoing points and authorities, it is respectfully submitted that the Circuit Court committed no error and its Final Order should be affirmed.

TRIO PETROLEUM CORPORATION, WACO  
OIL & GAS, INC., MIKE ROSS AND I.L.  
MORRIS & MIKE ROSS, INC.,

Appellees  
By Counsel



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**CERTIFICATE OF SERVICE**

I, Floyd M. Sayre, III, Esquire, do hereby certify that a true and exact copy of the foregoing Appellees' Brief has been served, by United States mail, postage prepaid, upon the following:

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this 2nd day of November 2012.

  
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Floyd M. Sayre, III, Esquire