

FILED

IN THE CIRCUIT COURT OF WETZEL COUNTY, WEST VIRGINIA

2020 JAN 21 PM 4: 00

**Richard L. Erlewine,**

*Plaintiff,*

LORI J. McCOY  
CIRCUIT CLERK  
WETZEL COUNTY, WV

v.

**Case No. 20-C-54  
Judge David W. Hummel, Jr.**

**Collingwood Appalachian Minerals III, LLC,  
formerly known as Somerset Minerals LP,  
a Texas limited liability company**

**Oxy USA Inc.,  
a Delaware corporation,**

**Collingwood Appalachian Minerals I, LLC,  
formerly known as BP Mineral Holdings II, LLC,  
a Texas limited liability company**

**Waco Oil & Gas Co., Inc.,  
A West Virginia corporation**

*Defendant.*

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**ORDER**

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On October 15, 2021, Plaintiff, Richard L. Erlewine ("Erlewine" or "Plaintiff"), filed a motion for summary judgment ("Plaintiff's Motion for Summary Judgment"). Also, on October 15, 2021, Defendants, Collingwood Appalachian Minerals III, LLC, Defendant Collingwood Appalachian Minerals I, LLC (Collectively "Collingwood"), Defendant OXY USA Inc. ("OXY"), and Defendant Waco Oil & Gas Co., Inc. ("Waco") (collectively, "Defendants") filed motions for summary judgment (collectively, "Defendants' Motions for Summary Judgment"). The Court held a hearing on all such motions on December 7, 2021. In reaching

its decision, the Court has considered Plaintiff's Motion for Summary Judgment, Defendants' Motions for Summary Judgment, all respective responses and replies, the arguments of counsel, and the entire record in this case. For the reasons that follow, this Court **GRANTS** Plaintiff's Motion for Summary Judgment and **DENIES** Defendants' Motions for Summary Judgment.

### **I. FINDINGS OF FACT**

The Court is of the opinion that genuine issues of material fact **do not exist**. The Court accordingly **FINDS** the following facts are material and undisputed:

1. The Property at issue is an approximately 135-acre tract or parcel situate, lying, and being in Proctor District, Wetzel County, West Virginia ("**Subject Property**"). The Subject Property is further identified by the assessor of Wetzel County by reference to tax map 06, parcel 46.
2. On December 17, 2020, Plaintiff filed a Complaint for Declaratory Judgment To Quiet Title ("**Complaint**") in the Circuit Clerk's Office of Wetzel County.
3. On January 21, 2021, Waco answered the Complaint.
4. On February 5, 2021, Collingwood answered the Complaint.
5. On March 1, 2021, OXY answered the Complaint.
6. Plaintiff's title to the oil and gas underlying his fee estate on the Subject Property was clouded by the existence of two tax deeds that were both based on an unpaid oil and gas assessment entered by the assessor when such oil and gas had not been severed from the fee estate by grant, will, or reservation.
7. By deed dated December 1, 1909, being of record in the Clerk's Office in Deed Book 108, at Page 177, J. E. Huff conveyed the Subject Property to James W. Sivert; reserving, however, "one-half of all the oil and gas royalty." Thereafter, title to the Subject Property was:
  - a. James W. Sivert: 100% surface, and 50% of the oil and gas, and

- b. J.E. Huff: 50% of the oil and gas.
8. By deed dated September 13, 1944 and being of record in the Clerk's Office in Deed Book 162, at Page 578, James W. Sivert conveyed his interest in the Subject Property to Joseph E. Rogers and Myrtle Rogers; reserving, however, a "one-fourth of all the oil and gas royalty." Thereafter, title to the Subject Property was:
- a. Joseph E. Rogers and Myrtle Rogers: 100% surface, and 25% of the oil and gas;
  - b. James W. Sivert: 25% of the oil and gas; and
  - c. J.E. Huff: 50% of the oil and gas.
9. By deed dated September 8, 1945 and being of record in the Clerk's Office in Deed Book 165; at Page 327, Joseph E. Rogers and Myrtle Rogers conveyed their interest in the Subject Property to Osburn Dunham.
10. By deed dated November 1, 1945 and being of record in the Clerk's Office in Deed Book 166, at Page 19, James W. Sivert conveyed his interest in the Subject Property (being 25% of the oil and gas) to Joseph Palmer.
11. By deed dated November 4, 1945, and being of record in the Clerk's Office in Deed Book 166, at Page 225, Joseph Palmer conveyed his interest in the Subject Property (being 25% of the oil and gas) to Osburn Dunham ("**Dunham**").
12. After the execution of the deed on November 4, 1945, title to the Subject Property was:
- a. Osburn Dunham: 100% surface and 50% oil and gas; and
  - b. J.E. Huff – 50% oil and gas.
13. By deed dated April 22, 1968, and being of record in the Clerk's Office in Deed Book 248, at Page 20, Dunham conveyed all his interest in the Subject Property to Russell F. Stiles ("**Stiles**") (the "**Dunham Deed**").

14. In 1969, the assessor charged Stiles a primary assessment for his fee estate in the Subject Property (the "**Stiles Primary Assessment**"). The assessor also charged the land books with two separate and duplicate assessments of the oil and gas underlying the Subject Property. The first being in the name of Stiles and entered as "Huff Ridge 135 1/4 O&G" (the "**Stiles Duplicate Assessment**"). The second being in the name of Dunham and entered as "Huff Ridge 135 1/4 O&G" (the "**Dunham Duplicate Assessment**").
15. In 1988, Stiles failed to pay the taxes for his fee estate charged under the Stiles Primary Assessment, thereby creating a tax lien that was sold by the sheriff of Wetzel County on November 6, 1989 to the Plaintiff. Thereafter, by tax deed dated April 1, 1991, and being of record in the Clerk's Office in Deed Book 335, at Page 15, Mary Riggenschach, Clerk of the County Commission of Wetzel County conveyed the property subject to the Stiles Primary Assessment to the Plaintiff (the "**Erlewine Deed**").
16. After the Erlewine Deed, title to the Subject Property was:
  - a. Richard L. Erlewine: 100% surface and 50% oil and gas; and
  - b. J.E. Huff: 50% oil and gas.
17. Also in 1988, the taxes on the Stiles Duplicate Assessment went unpaid, thereby creating a tax lien that was sold by the sheriff of Wetzel County to Trio Petroleum Corp. and Waco Oil & Gas Co. Inc. ("**Trio and Waco**"). By Quitclaim deed dated April 1, 1991 and recorded in the Clerk's Office in Deed Book 327, at Page 333, Mary Riggenschach, Clerk of the County Commission of Wetzel County West Virginia, as grantor, conveyed "the real estate, hereinafter mentioned and described for the taxes delinquent thereon for the year 1988 . . . which was returned delinquent in the name of Russell F. Stiles . . . [being described as] a ¼ undivided

interest in the oil and gas underlying a 135.00 acre tract of land, situated on Huff Ridge on the waters of Proctor Creek, Proctor District . . .” to Trio and Waco (the “1991 Tax Deed”).

18. In 1992, the taxes on the Osburn Duplicate Assessment went unpaid, thereby creating a tax lien that was sold by the sheriff of Wetzel County to Trio and Waco. By quitclaim deed dated April 1, 1995, and recorded in the Clerk’s Office in Deed Book 350, at Page 1, Mary Riggerbach, Clerk of the County Commission of Wetzel County West Virginia, as grantor, conveyed “the real estate, hereinafter mentioned and described for the taxes delinquent thereon for the year 1992 . . . which was returned delinquent in the name of Dunham, Osburn . . . [being described as] a ¼ undivided interest in the oil and gas underlying a 135.00 acre tract of land, situated on Huff Ridge on the waters of Proctor Creek, Proctor District . . .” to Trio and Waco (the “1995 Tax Deed”).
19. By that document of record in the Clerk’s Office in Corporation Book 13, at Page 165, Trio and Waco merged into the business entity Waco Holding Company. Next, by that document of record in the Clerk’s Office in Corporation Book 13, at Page 165, Waco Holding Company merged into the business entity Waco.
20. By various deeds of record in the Clerk’s Office, the purported interest from the 1991 Tax Deed and 1995 Tax Deed were sold to the Defendants OXY and Collingwood, with Waco reserving some portion of the purported interest from both the 1991 Tax Deed and 1995 Tax Deed.

## II. CONCLUSIONS OF LAW

The Court is of the opinion that Plaintiff is entitled to judgment as a matter of law relative to the declaratory judgment aspect of the instant civil action.

**a. The 1991 Tax Deed was void and did not convey an interest in the oil and gas underlying the Subject Property.**

1. The threshold issue underlying this instant civil action is whether an assessor is permitted to separately assess a sole owner of both the surface estate and the unsevered mineral estate associated with that parcel. Plaintiff argued that the West Virginia code and West Virginia case law does not permit an assessor to make a separate and duplicate assessment. In stark opposition, Defendants argued that, based solely on prior practices, an assessor is permitted to separately assess a sole owner of both the surface estate and the unsevered mineral estate associated with that parcel. For reasons stated below, the Court agrees with Plaintiff's argument and **FINDS** that the West Virginia code and West Virginia case law does not allow a separate assessment of an undivided interest in the unsevered mineral estate.
2. West Virginia Code Section 11, Article 1A through Article 3 generally sets forth the process by which an assessor charges an "owner"<sup>1</sup> in West Virginia an "assessed value"<sup>2</sup> for that owner's property.<sup>3</sup>

<sup>1</sup> West Virginia Code § 11-1C-2(g) "Owner" means the person who is possessed of the freehold, whether in fee or for life. A person seized or entitled in fee subject to a mortgage or deed of trust securing a debt or liability is deemed the owner until the mortgagee or trust takes possession, after which such mortgagee or trustee shall be deemed the owner. A person who has an equitable estate of freehold or is a purchaser of a freehold estate who is in possession before transfer of legal title is also deemed the owner.

<sup>2</sup> West Virginia Code § 11-1A-3(a) "Assessed value" of any item of property is its assessed value after the certification of the first statewide reappraisal and shall be sixty percent of the market value of such item of property regardless of its class or species, except as hereinafter specifically provided in this article . . . .

<sup>3</sup> West Virginia Code § 11-1A-3(h) "Property situate in this state" shall mean:  
(1) Property having legal situs in this state; or



3. West Virginia Code Section 11, Article 4 specifically sets the process by which an assessor charges an "owner"<sup>4</sup> an assessment for that owner's real property.<sup>5</sup>
4. West Virginia Code § 11-4-2 prohibits an assessor from separately assessing the surface of the land and the underlying oil and gas until there has been a severance of that oil and gas by grant, will, or reservation. West Virginia Code § 11-4-2 provides that

The Tax Commissioner shall prescribe a form of landbook and the information and itemization to be entered therein, which shall include separate entries of: (1) All real property . . . . For each entry there shall be shown: (A) The value of land, the value of buildings, and the aggregate value; (B) the character and estate of the owners, the number of acres or lots, and the local description of the tracts or lots;

(2) In the case of persons with a place of business located in this state and authorized to do business in this state and one or more other states of the United States or any foreign country:

- (A) Any tangible property brought into this state from time to time or otherwise deemed to have situs in this state for purposes of ad valorem property taxation, and
- (B) Any intangible property held by such person, wherever evidence thereof is situate. In the case of assessment of such intangible property for ad valorem property taxation after the first statewide reappraisal only such part thereof as may be determined by applicable law or regulation to be subject to such taxation shall be deemed to be situate in this state;

<sup>4</sup> West Virginia Code § 11-4-3(a)(1) "Owner" means the person, as defined in section ten, article two, chapter two of this code, who is possessed of the freehold, whether in fee or for life. A person seized or entitled in fee subject to a mortgage or deed of trust securing a debt or liability is considered the owner until the mortgagee or trustee takes possession, after which the mortgagee or trustee shall be considered the owner. A person who has an equitable estate of freehold, or is a purchaser of a freehold estate who is in possession before transfer of legal title is also considered the owner. Owner shall also include the corporation or other organization possessed of the freehold of a qualified continuing care retirement community.

See also, West Virginia Code § 11-4-9 that provides "'owner or owners' as used in this section shall include any claimant or claimants who now appear as such on the assessment books or are entitled to have the land or interest in land or interest in an estate in land claimed by him or them to be entered and assessed for taxation."

<sup>5</sup> West Virginia Code § 11-1A-3(h) "Property situate in this state" shall mean:

(2) Property having legal situs in this state; or

(2) In the case of persons with a place of business located in this state and authorized to do business in this state and one or more other states of the United States or any foreign country:

(C) Any tangible property brought into this state from time to time or otherwise deemed to have situs in this state for purposes of ad valorem property taxation, and

(B) Any intangible property held by such person, wherever evidence thereof is situate. In the case of assessment of such intangible property for ad valorem property taxation after the first statewide reappraisal only such part thereof as may be determined by applicable law or regulation to be subject to such taxation shall be deemed to be situate in this state;

and (C) the amount of taxes assessed against each tract or lot for all purposes. (emphasis added).<sup>6</sup>

5. West Virginia Code § 11-4-9 provides that an assessor is authorized to assess separately the surface of land and the minerals thereunder "when any person becomes the owner of the surface, and another or others become the owner of the coal, oil, gas, ore, limestone, fireclay, or other minerals or mineral substances in and under the sale."<sup>7</sup>
6. However, West Virginia Code § 11-4-9 does not permit an assessor to separately assess the surface of the land and the underlying oil and gas until there has been a severance of that oil and gas to a separate and distinct owner by grant, will, or reservation.
7. "The State is not entitled to double taxes on the same land under the same title." Syllabus point 1, *Orville Young, LLC et al. v. Bonacci et al.*, No. 20-0030 (W.Va. Nov. 18, 2021) (citing Syllabus point 1, *State v. Allen*, 65 W. Va. 335, 64 S.E. 140 (1909)).
8. "In the case of two assessments of the same land, under the same claim of title, for any year, one payment of taxes, under either assessment, is all the State can require." Syllabus point 2, *Orville Young, LLC et al. v. Bonacci et al.*, No. 20-0030 (W.Va. Nov. 18, 2021) (citing Syllabus point 2, *State v. Allen*, 65 W. Va. 335, 64 S.E. 140 (1909)). Syllabus point 2, *State v. Allen*, 65 W. Va. 335, 64 S.E. 140 (1909).

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<sup>6</sup> See also the 1966 opinion of C. Donald Robertson, Attorney General of West Virginia, and the letter dated November 7, 1988, Robert A. Hoffinan, Director of the Property Tax Division of the State Tax Department of West Virginia, sent Mr. Ralph E. Phillips, Assessor of Wetzel County, West Virginia, both of which confirm that there can be no separate assessment of unsevered interests in land, including oil and gas. Both were attached to the Plaintiff's Motion for Summary Judgment.

<sup>7</sup> In further support, W. Va. Code § 11-4-7 states: "If the owner of a tract of lot has derived title thereto by several conveyances from the same person, or from different persons, such tract or lot shall be entered and charged with taxes on the land book as a whole, and not in different parcels." (emphasis added).



9. "A deed made pursuant to a tax sale under a void assessment is void." Syllabus point 3, *Orville Young, LLC et al. v. Bonacci et al.*, No. 20-0030 (W.Va. Nov. 18, 2021) (citing Syllabus point 4, *Blair v. Freeburn Coal Corp.*, 163 W. Va. 23, 253 S.E.2d 547 (1979)).
10. "Payment of the taxes by the owner or by any one entitled to make it, is an absolute defeat and termination of any statutory power to sell." *Haynes v. Antero Resources Corp.*, No. 15-1203, 2016 WL 6542734 (W.Va. Oct. 28, 2016) (memorandum decision) (citing *State v. Low*, 46 W. Va. 451, 459 (1899)).
11. "[D]uplicate assessments on a single parcel of property are not permitted. Moreover, when a single landowner owns both the surface and the subjacent mineral estate in a parcel of property and such mineral estate has not been severed from the surface, the property should be assessed as a single, whole unit and not as separate assessments for the surface estate and the mineral estate." *Orville Young, LLC et al. v. Bonacci et al.*, No. 20-0030, 11-12 (W.Va. Nov. 18, 2021).
12. "West Virginia Code Section 11-4-9 employs the mandatory word 'shall' to denote that separate assessments are required only where one person owns the surface estate and another person owns the mineral estate thereunder or timber thereon." *Orville Young, LLC et al. v. Bonacci et al.*, No. 20-0030, 14 (W.Va. Nov. 18, 2021).
13. "[T]here exists a definite legislative intent that a sole owner's undivided interest in the surface estate and the associated, unsevered mineral estate of a single parcel of property is considered to be a single tract of land that is subject to one tax assessment and not separate tax assessments for each constituent component interest." *Orville Young, LLC et al. v. Bonacci et al.*, No. 20-0030, 14-15 (W.Va. Nov. 18, 2021).
14. From 1969 through 1988, along with Stiles receiving a primary assessment for his fee estate interest in the Subject Property, being the Stiles Primary Assessment, the assessor also entered

on the land books a separate and duplicate assessment for his oil and gas interest underlying the Subject Property, being the Stiles Duplicate Assessment.

15. The assessor was only permitted to assess Stiles for the Subject Property once under the Stiles Primary Assessment because his mineral interest was not severed from his surface estate.
16. The Stiles Duplicate Assessment was a duplicate and separate assessment of the oil and gas underlying the Subject Property not authorized by West Virginia statutory or case law and was therefore a void assessment.
17. The 1991 Tax Deed, which was based on the sale of the Stiles Duplicate Assessment, was accordingly void and did not convey a real property interest in the Subject Property.
18. The Court accordingly **FINDS and DECLARES** that the 1991 Tax Deed, which was based on the sale of the Stiles Duplicate Assessment, was void and did not convey a real property interest in the Subject Property.

**b. The 1995 Tax Deed was void and did not convey an interest in the oil and gas underlying the Subject Property.**

19. The Court notes that the Defendants argued that a reference in the Dunham Deed to a prior deed in the chain of title constituted a reservation or exception to the benefit of the grantor, Dunham. However, the Court **FINDS** the Dunham Deed was unambiguous and did not except or reserve any oil and gas interest in the Subject Property to Dunham.
20. "When any real property is conveyed or devised to any person, and no words of limitation are used in the conveyance or devise, such conveyance or devise shall be construed to pass the fee simple, or the whole estate or interest, legal or equitable, which the testator or grantor had power to dispose of, in such real property, unless a contrary intention shall appear in the conveyance or will." W.Va. Code § 36-1-11.

21. "In order to create an exception or reservation in a deed which would reduce a grant in a conveyance clause which is clear, correct and conventional, such exception or reservation must be expressed in certain and definite language." Syllabus point 2, *Hall v. Hartley*, 119 S.E.2d 759, 146 W. Va. 328, (1961).
22. "A deed which grants a tract of land, described by metes and bounds, which contains no exception or reservation . . . but which refers, by way of further description, to a prior deed in which the same land is identically described by metes and bounds and in which the coal is expressly excepted and reserved, does not, by such reference, incorporate in such deed the exception and the reservation of the coal contained in the prior deed, and does not except or reserve the coal from its operation but passes the title of the grantor to such coal to the grantee in such deed." *Bennett v. Smith*, 136 W.Va. 903, 69 S.E.2d 42 (1952).
23. Pursuant to W.Va. Code 36-1-11, Dunham's entire interest in the Subject Property, including all of his interest in the oil and gas, was conveyed to Stiles in the Dunham Deed.
24. The assessor was only permitted to assess Stiles for the Subject Property once under the Stiles Primary Assessment because his mineral interest was not severed from his surface estate.
25. The Dunham Duplicate Assessment was a duplicate and separate assessment of the oil and gas underlying the Subject Property not authorized by West Virginia statutory or case law and was therefore a void assessment.
26. The 1995 Tax Deed, which was based on the sale of the Dunham Duplicate Assessment, was accordingly void and did not convey a real property interest in the Subject Property.
27. The Court accordingly **FINDS** and **DECLARES** that the 1995 Tax Deed, which was based on the sale of the Dunham Duplicate Assessment, was void and did not convey a real property interest in the Subject Property.

### **III. ORDER**

For the foregoing reasons, this Court **GRANTS** Plaintiff's Motion for Summary Judgment and **DENIES** Defendants' Motions for Summary Judgment. Accordingly, pursuant to W.Va. Code Section 55-13-1 *et. seq.*, the Court **ORDERS** and **DECLARES** that:

1. The Erlewine Deed granted Richard L. Erlewine 100% interest in the surface and 50% interest in the oil and gas within and underlying the Subject Property on April 1, 1991.
2. The Stiles Duplicate Assessment was a duplicate and separate assessment of oil and gas not authorized by West Virginia statutory or case law.
3. The Stiles Duplicate Assessment was void and assessed no real property interest in the Subject Property.
4. The 1991 Tax Deed, which was based upon the sale of the Stiles Duplicate Assessment, was void and did not convey an interest in the oil and gas underlying the Subject Property.
5. The Osburn Duplicate Assessment was a duplicate and separate assessment of oil and gas not authorized by West Virginia statutory or case law.
6. The Osburn Duplicate Assessment was void and assessed no real property interest in the Subject Property.
7. The 1995 Tax Deed, which was based upon the sale of the Osburn Duplicate Assessment, was void and did not convey an interest in the oil and gas underlying the Subject Property.
8. The Defendants' objections and exceptions to this Order are noted and preserved.

The Clerk of the Court is to remove this case from the docket. The Clerk and shall deliver,  
by first class mail or other means, a certified copy of this Order unto the following:

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ENTER

*JANUARY 21, 2022*  
*David W. Hummel Jr.*

Judge David W. Hummel Jr.



I HEREBY CERTIFY THAT THE ANNEXED INSTRUMENT  
IS A TRUE AND CORRECT COPY OF THE ORIGINAL ON  
FILE IN THIS CASE.  
ATTEST: *[Signature]* CIRCUIT CLERK  
WETZEL CO. WEST VIRGINIA  
BY: \_\_\_\_\_ DEPUTY CLERK