IN THE INTERMEDIATE COURT OF APPEALS OF WEST VIRGINIA

Docket No. 23-ICA-351

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Venable Royalty, LTD,
and V14, LP,

Plaintiffs Below, Petitioners,

v.

EQT Production Company, ET Blue Grass, LLC,
and AMP IV, L.P., *et al*.,

Defendants Below, Respondents.

BRIEF OF RESPONDENT AMP IV, L.P.

Appeal from Circuit Court of Wetzel County, West Virginia
Case No. CC-52-2021-C-19

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RESPONSE TO ASSIGNMENTS OF ERROR

The Brief of Petitioners, Venable Royalty, LTD and V14, LP ("Venable Parties") fails to contain Assignments of Error in accordance with W. Va. R.A.P. 10(c)(3).

STATEMENT OF THE CASE

I. STATEMENT OF FACTS

A. *The McGary NPRI is Created by Deed in 1907*

By deed dated July 6, 1907, William McGary and Charlotte B. McGary, his wife conveyed a 201-acre parent tract ("Subject Tract") to Joseph A. Carpenter.[1] The conveyance was made with the following reservation by William McGary and Charlotte B. McGary: "reserving however from the operation of this deed one sixteenth of all the oil and one half the royalty of gas produced from…the premises."[2] The parties in this case agree that, following this reservation, William McGary was vested with a 50% non-participating royalty interest ("NPRI") in the oil and gas produced from the Subject Tract ("McGary NPRI").[3] The McGary NPRI was assessed on the real property land books of Wetzel County, West Virginia.[4]

By deed dated December 20, 1907, Joseph Carpenter conveyed the 201 acre parent tract to A.E. Riggenbach and J.W. Riggenbach.[5] This deed, which was made subject to the reservation

[1] *Compl*. ¶ 25 (Joint Appendix "JA" 27); *Deed* (JA 57-59).
[2] *Id.*
[3] *Compl.* ¶¶ 67-68 (JA 46), *AMP Cross-cl. and Countercl.* ¶ 113 (JA 113); *Venable's Mem. in Supp. Mot. Sum. J.*, p. 1 (JA 564); *Def. Snodgrass Mem. in Opp'n to Venable's Mot. Sum. J.,* p. 1 (JA 576); *Def. Nuckolls, et. al, Mot. Sum. J.*, ¶ 2 (JA 497).
[4] (JA 235); *see also Tax Deed* (JA 62-76).
[5] *Compl*. ¶ 29 (JA 28); *Deed* (JA 79-80).

by William McGary, vested the Riggenbach brothers with 100% of the surface and oil and gas in place, but only 50% of the royalty from oil and gas produced from the Subject Tract.[6]

B. *The McGary NPRI is Purportedly Sold at a Real Property Tax Sale*

On June 8, 1964, the McGary NPRI was purportedly sold for delinquent taxes by its inclusion in a tax deed dated June 8, 1964 (the "Tax Deed").[7] The Tax Deed from Pearl Frei, Clerk of the County Court of Wetzel County, West Virginia, purported to convey an interest held by William McGary to J.H Riggenbach. The Tax Deed does not describe any NPRI in the Subject Tract, rather, it purported to convey "Oil and Gas – 200 Acres – Limestone Ridge 1/2."[8] Petitioners do not dispute that William McGary owned only a royalty interest at the time of the tax sale.[9]

By various deeds of record, the purported interest in the 1965 Tax Deed was sold to the Venable Parties.[10]

C. *AMP Acquires One-Half (1/2) of the McGary NPRI, Being a One-Fourth (1/4) NPRI*

William McGary died on or about June 30, 1931, survived by Esther L. McGary and Amos D. McGary. Following the death of William McGary, Amos D. McGary was vested with a (1/4) or 25% NPRI in the oil and gas produced from the Subject Tract.[11] Amos D. McGary died on May 17, 1975, survived by Jean M. Bauman.[12] Jean M. Bauman died on April 25, 2012, survived by Bruce K. Bauman.[13] By Deed dated August 23, 2021, Bruce Bauman and Deborah Bauman,

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[6] *Id.*
[7] *Compl*. ¶ 27 (JA 28); *Tax Deed* (JA 62-76).
[8] *Id*. at (JA 63).
[9] *Compl.* ¶ 26 (JA 28).
[10] *Compl*. ¶¶ 41-47 (JA 33-35).
[11] *Answer, Counterclaim and Cross-Claim on AMP IV, LP* ("AMP Answer"), ¶ 118 (JA 235); *Answer and Affirmative Defenses of Counterclaim Defendants/ Plaintiffs Venable Royalty, Ltd. And V14, LP in Response to Counterclaim Plaintiff/ Defendant AMP IV, LP's Counterclaim* ("*Venable Response to Counterclaim*"), ¶ 6 (JA 304).
[12] *AMP Answer*, ¶ 119 (JA 235); *Venable Response to Counterclaim*, ¶ 6 (JA 304).
[13] *Id.*

husband and wife, conveyed their interest in the McGary NPRI to their children, Daniel C. Bauman and Susanne Jeannine Bauman.[14] By Deed dated September 21, 2021, Daniel C. Bauman and Susanne Jeannine Bauman, conveyed their interest in the McGary NPRI to AMP IV, LP.[15] As a result, AMP IV, LP is vested with a one-fourth (1/4) or 25% NPRI.[16]

D. *Additional Owners of the McGary NPRI*

The following individuals are also vested with an interest in the McGary NPRI as the heirs and successors of Esther L. McGary:

- 1/48 NPRI - Linda W. Nuckolls;
- 1/48 NPRI – Larry W. Wiles;
- 1/72 NPRI – Gail A. Grimm;
- 1/72 – Maureen Plumstead;
- 1/72 – Donna Jean Hansen;
- 1/96 – Douglas Snodgrass;
- 1/96 – Steven Snodgrass;
- 1/96 – Nancy Snodgrass Baker;
- 1/96 – Vicki Snodgrass Starr;
- 1/48 – Sherry D. Compher;
- 1/48 – Bonnie Tressler Hayton.[17]

II. PROCEDURAL HISTORY

The Venable Parties initiated this action by their Petition, which was filed on July 13, 2021 in the Circuit Court of Wetzel County, West Virginia ("Lower Court") AMP responded with its claim to Quiet Title to its NPRI. Following the close of discovery, all parties moved for summary judgment.

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[14] *AMP Answer*, ¶ 119(a)(i); *Deed* (JA 246-249); Venable *Response to Counterclaim*, ¶ 3 (JA 303).
[15] *AMP Answer*, ¶ 119(a)(ii); *Deed* (JA 250-256); *Venable Response to Counterclaim*, ¶ 3 (JA 303).
[16] *Id.*
[17] *Order* (JA 744). The Second Assignment of Error in Petitioner's Notice of Appeal states that the percentage ownership contained in the Court's Order has changed as the result of the death of Paul Snodgrass. AMP's interest in the McGary NPRI remains at 25% and is not impacted by the Second Assignment of Error. Hence, AMP takes no position on the Second Assignment of Error.

On July 20, 2022, the Lower Court held oral arguments on the Motions for Summary Judgment and Cross-Motions for Summary Judgment. On July 5, 2023, the Honorable Circuit Court Judge Ronald E. Wilson, sitting by assignment, entered an Order in favor of AMP and the heirs of the McGary NPRI.[18] The Order held that the value of an "interest in oil and gas in place" is "classified as real property and entered in the land books as such."[19] However, "the value of royalty income received from the production of oil and gas once it is produced" is "entered as personal property."[20] Because the McGary NPRI is a non-participating royalty interest, it "should not have been assessed in the land books in Wetzel County and should not have been sold at tax sale."[21] Accordingly, the Lower Court found that the Tax Deed was void.[22]

This appeal followed.

SUMMARY OF THE ARGUMENT

In 1907, William McGary excepted and reserved an undivided 50% non-participating royalty interest in the Subject Tract's oil and gas. The nature of the interest reserved is not in dispute— all parties in this case agree that the property interest involved is an oil and gas NPRI. The Venable Parties ask this Court to find that the McGary NPRI was properly assessed in the land books, that the assessment was delinquent, and that the McGary NPRI was sold at a real property tax sale in 1965. The Venable Parties request this finding but entirely fail to cite, let alone analyze, the statute governing the taxation of real property interests in West Virginia.

[18] *Order* (JA 743-745).
[19] *Id.* (JA 744).
[20] *Id.*
[21] *Id.*
[22] *Id.*

The taxation of real property interests is governed by Article 4 of Chapter 11 of the West Virginia Code. Under Article 4, county assessors are prohibited from separately assessing interests in the same real property, except as follows

> 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 same…

W. Va. Code § 11-4-9 (emphasis added).

The owner of an oil and gas *royalty* interest does not own the oil and gas. Because the owners of the McGary NPRI did not own the oil and gas, the McGary NPRI should not have been assessed on the land books. The Lower Court properly found that the McGary NPRI was erroneously entered on the land books as real property, constituting a void assessment which could serve as no valid basis for a tax sale.

On appeal, the Venable Parties argue that all oil and gas NPRIs should be "classified" as "real property" but fail to address how that purported classification would change the meaning of the relevant statute, or would apply retroactively to validate the 1965 tax sale. The Venable Parties seem to assume that if they can convince this Court to classify oil and gas NPRIs as "real property" the interest becomes taxable as real property and can be sold at a real property tax sale. But the only oil and gas interests that are taxed as real property are the "oil" and "gas" in place. There are many other interests in real property that are not taxed under Article 4, including oil and gas leases, rights of way, and structures. The Venable Parties primary bone of contention with West Virginia's well-settled law on this issue is on policy grounds that can only be remedied by the Legislature, and not this Court. The decision of the circuit court should be affirmed.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Oral argument is not necessary under West Virginia Rule of Appellate Procedure 18 because the dispositive issue or issues have been authoritatively decided. Specifically, it has been authoritatively decided that a tax deed resulting from an invalid tax assessment is void.

STANDARD OF REVIEW

A circuit court's entry of summary judgment is reviewed *de novo. State Farm Fire & Cas. Co. v. Nathaniel Realty*, 246 W.Va. 676, 874 S.E.2d 788, 791 (2022), citing syl. pt. 1, *Painter v. Peavy*, 451 S.E.2d 755, 192 W.Va. 189 (1994). Summary Judgment should be granted "when it is clear that there is no genuine issue of fact to be tried and inquiry concerning the facts is not desirable to clarify the application of the law." *Graytel v. Appalachian Energy Partners 2001-D, LLP,* 230 W.Va. 91, 97, 736 S.E.2d 91, 97 (2012), quoting *Aetna Casualty & Surety Co. v. Federal Insurance Co. of New York*, 148 W.Va. 160, 133 S.E.2d 770 (1963).

ARGUMENT

I. THE LOWER COURT CORRECTLY FOUND THAT THE MCGARY NPRI SHOULD NOT HAVE BEEN ASSESSED ON THE LAND BOOKS IN WETZEL COUNTY AND COULD NOT BE SOLD AT A TAX SALE

A. *By Statute, NPRIs Cannot Be Separately Assessed on the Land Books*

Article 4 of Chapter 11 of the West Virginia Code governs tax assessments for real property in West Virginia. The appeal filed by the Venable Parties does not contain a single cite to the relevant statute. Under Article 4, county assessors are statutorily directed to prepare and keep records, commonly known as land books, of the owners of real property within their respective counties. W.Va. Code § § 11-4-1. Each entry on the land books must include "The value of land, the value of buildings, and the aggregate value…". W. Va. Code § 11-4-2.

West Virginia Code § 11-4-9 prohibits an assessor from separately assessing interests in the same real property, except as follows:

> 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 same, or of the timber thereon, the assessor shall assess such respective estates, or any undivided interest therein, to the respective owners thereof, or to groups of same requesting such group assessment, at their true and actual value, according to the rule prescribed in this chapter.

W. Va. Code § 11-4-9 (emphasis added). *See also Hill v. Lone Pine Operating Co.*, 2016 W. Va. LEXIS 903, *7 (W.Va. Nov. 18, 2016) (memorandum decision); *Mcintosh v. Vail*, 126 W.Va. 395, 401, 28 SE 2d 607, 611 (1943) (distinguishing oil and gas *in place* from oil and gas *produced*). Owner is defined as "the person… who is possessed of the freehold, whether in fee or for life." W. Va. Code § 11-4-3(1).

Thus, where the surface is owned by one person and the "oil" and "gas" are owned by another, the "oil" and "gas" may be separately assessed. However, when the surface and oil and gas are owned in common, "duplicate assessments on a single parcel of property are not permitted." *Orville Young, Ltd. Liab. Co. v. Bonacci,* 246 W.Va 26, 33, 866 S.E.2d 91, 99 (W.Va. 2021) ("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").

The owner of an oil and gas NPRI does not own the oil and gas. *Davis v. Hardman*, 148 W.Va. 82, 90, 133 S.E.2d 77, 81-82 (1963) (distinguishing characteristics of an oil and gas NPRI with ownership of the oil and gas itself); *Gastar Exploration, Inc. v. Contragguerro*, 239 W.Va. 305, 313, 800 S.E.2d 891, 899 (2017) ("NPRI holders have a non-possessory real property interest" whereas "oil and gas in place is real estate"). As explained in *Davis*:

> **The distinguishing characteristics of a non-participating royalty interest are**: (1) Such share of production is not chargeable with any of the costs of discovery and production; (2) the owner has no right to do any act or thing to discover and produce the oil and gas; (3) the owner has no right to grant leases; and (4) the owner has no right to receive bonuses or delay rentals. **Conversely, the distinguishing characteristics of an interest in minerals in place are**: (1) Such interest is not free of costs of discovery and production; (2) the owner has the right to do any and all acts necessary to discover and produce oil and gas; (3) the owner has the right to grant leases, and (4) the owner has the right to receive bonuses and delay rentals.

Davis, 148 W.Va. at 90, 133 S.E.2d at 81-82 (emphasis added).

The Venable Parties concede that an NPRI owner does not own the oil and gas.[23] This should end the inquiry. Unlike mineral owners, under the *Davis* factors, NPRI owners have no right to discover or produce oil and gas, no ability to sign a lease for production, no right to receive bonuses or delay rentals, and no obligation to share in the costs of production. *Davis*, 148 W.Va. at 90, 133 S.E.2d at 82. NPRI owners are completely dependent upon the actions of the owner of the corporeal mineral rights. *Id.* The owner of an oil and gas NPRI has none of the specific corporeal rights of the mineral owner identified in *Davis*— namely, the right to discover and produce oil and gas, and to grant leases. Indeed, "…[t]he concept of royalty *always presupposes development or production* of the mineral to which it relates." *Id*. (emphasis added) (citing *McIntosh v. Vail*, 126 W.Va. 355, 358, 28 S.E.2d 95, 97 (W. Va. 1943)).

Article 4 does not provide for or permit a separate tax assessment for an oil and gas *royalty* interest. This is because the owner of an oil and gas NPRI does not own the oil and gas, which is an express statutory requirement for assessment as real property. W. Va. Code § 11-4-9. To the contrary, it is well-accepted and well-established in West Virginia that the value of the royalty income received from the production of oil and gas is treated as personal property. *McIntosh*, 126 W. Va. at 401

[23] *See* "Venable's Memorandum in Support of Motion for Summary Judgment," p. 7 (JA 432) ("an NPRI is not an in-place interest").

("[w]hen oil and gas is produced and marketed from lands, it loses its character of real property and assumes the quality of personal property."). *See also Warren v. Boggs*, 83 W. Va. 89, 97 S.E. 589 at Syl. Pt. 5 (1918) ("[r]oyalty in oil brought to the surface is personal property.").

B. An Erroneously Assessed Oil and Gas NPRI Cannot be Sold at a Tax Sale

Because only real property is entered on land books,[24] "[p]ersonal property erroneously entered upon the land books as real property constitutes a void assessment and can serve as no valid basis by the sale thereof by the Commissioner of Forfeited and Delinquent Lands." *Blair v. Freeburn Coal Corp.*, 163 W.Va. 23, 253 S.E.2d 547, Syl. Pt. 3 (1979). Where an assessment is invalid, "the tax deeds issuing from the attempt to recoup the invalid assessment… are void." *Bonacci*, 866 S.E. 2d at 98.

The State Of West Virginia's Office of the State Auditor, through an Advisory Memorandum issued on October 4, 2006 ("2006 Advisory Memorandum"), confirmed that a royalty interest is personal property that should not be assessed in the land books and cannot be sold at a tax sale. *See* 2006 Advisory Memorandum (JA 380-384). The 2006 Advisory Memorandum states:

1. Can a mineral interest be offered for sale by the sheriff?

   Yes, provided that it is listed on the real estate land books.

2. Can a royalty interest or a building on leased acreage be offered for sale?

   No, the West Virginia Supreme Court stated in Morrie Blair, et al. v. Freeburn Coal Corporation, etc., et al, that under §36-1-1 of the West Virginia Code, real property can be conveyed only by deed or will. Further, under §2-2-10 of the West Virginia Code, the word "land" or "lands" and the words "real estate" or "real property" include tenements and hereditaments, and all rights thereto and interests therein except chattel interests…" ***Personal property erroneously entered upon the land books as real property constitutes a void assessment and can serve as no valid basis for the sale thereof by the Commissioner of Delinquent and Nonentered Land or Sheriff.***

[24] *State v. South Penn Oil Co.*, 42 W. Va. 80, 98, 24 S.E. 688 (W.Va. 1896).

3. Can a person receive a deed to a royalty interest as a result of a land sale?

A deed made pursuant to a delinquent land sale under a void assessment is void.

See 2006 Advisory Memorandum, (JA 383) (emphasis added).

This directive from the State Auditor that a purported tax sale of a royalty interest is void relies on the *Blair* decision by the West Virginia Supreme Court. *Blair*, 163 W.Va at 23 (1979). In that decision, the Court held that a tax sale of invalidly assessed personal property was void. In relying on the *Blair* holding, the State Auditor clarified— to the extent that it was still in doubt— that a royalty interest "erroneously entered upon the land books as real property constitutes a void assessment and can serve as no valid basis for the sale thereof…" (JA 383).

C. The McGary NPRI Was Improperly Assessed on the Land Books and the Resulting Tax Deed is Void

The Venable Parties concede that an NPRI is "not an in-place interest."[25] They also concede that "West Virginia precedent has established that an oil or gas NPRI becomes a personal property interest once the mineral is brought to the surface (i.e., an accrued royalty interest")).[26] Accordingly, there should be no dispute. In light of the clear statutory language, which only allows separate assessments for the oil and gas in place, the McGary NPRI should not have been assessed on the land books in Wetzel County. *See* W. Va. Code § 11-4-9. *See also* 2006 Advisory Memorandum [JA 383].

Indeed, there could not be a separate assessment in the Subject Tract under W. Va. Code § 11-4-9 because the 1907 reservation by William McGary and Charlotte B. McGary did not sever

[25] *Plaintiffs' Proposed Findings of Fact, Conclusions of Law and Order Granting Plaintiffs' Motion for Summary Judgment ("Plaintiffs' Proposed Findings*"), ¶ 66 (JA 733) ("an NPRI is not an in-place interest").
[26] *Id.*, ¶ 67 (JA 733).

the surface estate from the oil and gas, it simply severed a royalty interest. The assessment on the land books of the McGary NPRI was an improper duplicate assessment, and the tax sale deed the Venable Parties rely upon affords them no relief.

In *Bonacci*, the assessor for Marshall County created a separate assessment for an oil and gas leasehold interest, identified on the land books as "202 Royalty Wells #629-630 Nat Gas Co W. Va.". *Bonacci*, 246 W. Va at 30. The taxes on the oil and gas leasehold interests were later declared to be delinquent and the oil and gas interests were offered for sale at a sheriff's tax sale. *Id.* The court invalidated the tax deed, holding that assessment of the oil and gas leasehold interest "was erroneous because the assessment did not relate to a separate interest in real property in which the subject taxes could be assessed." *Id.* at 35. In so finding, the Court relied on the express language of Section 11-4-9 which "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…" *Id.* at 34. The court noted that "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."

Similarly, in *Lone Pine*, the West Virginia Supreme Court affirmed a circuit court decision invalidating the tax sale of several oil and gas lease assessments which were erroneously entered on the land books. *Lone Pine*, 2016 W. Va. LEXIS 903, *6 (affirming circuit court holding that "the duplicative 'Leased' assessments, purchased by [p]etitioners do not, and have never, represented the ownership of any interest in property, minerals or oil and gas").

As in *Bonnaci* and *Lone Pine*, the McGary NPRI was illegally and invalidly assessed as real property, making the assessment void. As a result, the tax deed purporting to convey the McGary

NPRI for delinquent taxes is also void. There is no statute of limitations on a void deed – "once void, always void." *MZRP, LLC v. Huntington Realty Corp.,* 2011 W.Va. LEXIS 240, at *13 (W.Va. March 10, 2011) (memorandum decision) ("void tax sale deeds do not have a statute of limitations…"). The void Tax Deed cannot be rehabilitated— it is simply void and of no effect as a matter of law. Based on the foregoing, the Lower Court correctly held that the Tax Deed was ineffective to divest the heirs of William G. McGary of their interest in the McGary NPRI, including the 25% NPRI held by Respondent AMP.

II. CONTRARY TO THE ASSERTION OF PETITIONERS, AN INTEREST IN REAL ESTATE IS NOT THE SAME AS TAXABLE REAL PROPERTY

A. Article 4 Governs the Taxation of Interests in Real Property and the Mere Classification of an Interest as "Real Property" is Irrelevant

On appeal, the Venable Parties argue that all oil and gas NPRIs should be "classified" as "real property." The Venable Parties fail to address how that classification would retroactively apply to the tax sale in this case, having already acknowledged that oil and gas NPRIs are not interests in the oil and gas in place. The Venable Parties completely ignore that there is a statute governing the taxation of real property interests, and that statute refers only to separate assessments for the "owner of the surface" and the "owner of the coal, **oil, gas,** ore, limestone, fireclay, or other minerals or mineral substances in and under the same." W. Va. Code § 11-4-9 (emphasis added).

Without so much as acknowledging that statute, the Venable Parties seem to assume that if they can convince this Court to classify oil and gas NPRIs as "real property," the interest becomes taxable as real property and can be sold at a real property tax sale. But there are many interests in real estate that are not taxed as real property, including oil and gas leases, rights to mine, and structures. *See, e.g., Drainer v. Travis,* 116 W. Va. 390, 392, 180 S.E. 435, (1935) ("An oil and gas leasehold, limited to a term of years and so long thereafter as oil or gas shall be produced from the

premises, even after production, is, in West Virginia, a chattel real, and as such, is regarded for the purposes of taxation, not as real estate, but as personal property*")*; *Blair,* 163 W. Va. at 26 (real estate structure taxed as personal property); *Harvey Coal & Coke Co. v. Dillon*, 59 W.Va. 605, 614, 53 S.E. 928, 933 (1905) (right to mine from real property is taxed as personal property).

Article 5 of the West Virginia Code dealing with assessments of *personal* property, expressly applies to a myriad of interests in real property. "Personal Property" is defined to include "all fixtures attached to land" and "all chattels real and personal…" W. Va. Code § 11-5-3. "[C]hattel interests in real property" are "defined to be interests in tangible personal property and are to be assessed and taxed as such…." *Id.* § 11-3-7a.

Because the Venable Parties fail to address the West Virginia taxation statutes at all, it naturally follows that they fail to explain how the assessment of an oil and gas NPRI on the land books, rather than personal property, would work or could be implemented statewide. This is particularly true because, while oil and gas in place is taxed on a per acre basis, the tax assessment of a royalty interest is determined by a calculation using information shown in producers' reports provided to the State Tax Department by oil and gas producers. W.Va. Code § 11-1C-10(3). Thus, in order to determine the taxes to be charged, the royalty interest must be in production, which is consistent with the taxation of a royalty interest as personal property. *McIntosh*, 126 W. Va. at 401 ("When oil and gas is produced and marketed from lands, it loses its character of real property and assumes the quality of personal property"); see also *Warren v. Boggs*, 83 W. Va. 89, 90, 97 S.E. 589, 592 (1918) ("[r]oyalty in oil brought to the surface is personal property."). But this is largely beside the point because regardless of whether an oil and gas NPRI is broadly an interest in real property (as the Venable Parties contend) the interest is not taxable as real property under Article 4.

B. *Petitioners Misstate the Facts in Collingwood, Which Involved Assessment of Oil and Gas In Place Not a Royalty Interest*

Although the Venable Parties cite to a myriad of irrelevant cases for the proposition that oil and gas NPRIs broadly fall under the common-law definition of "real property," they cite to just one case for the case-determinative proposition that an oil and gas royalty interest may be *assessed and taxed* as real property in West Virginia — *Collingwood Appalachian Minerals II, LLC v. Erlewine*, 889 S.E. 2d 697 (W.Va. 2023). The Venable Parties represent to this Court that *Collingwood* "confirmed that an oil and gas royalty interest may be taxed as real estate and that a subsequent tax deed is valid." Petitioners' Brief, p. 12.

Collingwood did not involve an oil and gas royalty interest, but rather an interest in the oil and gas in place.[27] *Collingwood* does not even remotely stand for the proposition that oil and gas royalty interests may be assessed and taxed as real property. The Venable Parties should correct this misstatement of the case in their Reply Brief, or risk running afoul of their duty of candor to this Court.

The Court in *Collingwood* undeniably treated the relevant reservation as a reservation of the oil and gas *in place* because the parties in the circuit court agreed to that interpretation:

> The parties maintain, and the circuit court found, that all of the interests at stake in this appeal are total of a fifty percent interest in the oil and gas. But, as noted in the facts below, the deeds in the record prior to the 1991 and 1995 tax deeds refer to these interests as interests in the "oil and gas royalty." To avoid confusion, we will refer to these interests as the parties did, rather than as the deeds provided.
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> ****
>
> As noted above, the parties and the circuit court refer to these royalty interests as ownership of a percentage of the oil and gas. And for purposes of our analysis, we refer to these interests using the parties' and circuit court's terminology.

Collingwood, 889 S.E.2d at 699 fn. 1 & 700 fn. 6.

[27] The Petitioner in *Collingwood* was represented by the same law firm as the Venable Parties here.

It is difficult to understand how the Venable Parties could repeatedly represent to this Court that *Collingwood* involved "royalty interests" that "were entered for ad valorem property taxes as real estate" when this is simply not true. The *Collingwood* court repeatedly and consistently refers to the interest as an interest in the "oil and gas estate". *Id.* at 704 ("Petitioners purchased a valid tax deed to the oil and gas estate…") and ("the former landowner subjected the mineral estate to tax sale when he paid no taxes on the 135-acre property or the separately assessed oil and gas estate.").

Although the Venable Parties claim that the *Collingwood* reservation is "virtually identical" to the reservation in this case, that simply is not the case. The reservation in Collingwood "reserved 'one-half of all the oil and gas royalty,'" whereas the reservation in the case-at-bar reserved "one sixteenth of all the oil and one half the royalty of gas produced from…the premises." Under well-settled case law, the reservation in *Collingwood* is interpreted as a reservation of the oil and gas in place. *See e.g., Davis*, 148 W.Va at 90-91. Whereas under that same case law, and as the parties in the present appeal all agree, the reservation in this case is an NPRI. *See id.* The Court in *Collingwood* accepted that the reservation language reserved the oil and gas in place, whereas all parties in this case agree that the relevant reservation is an NPRI. Being that *Collingwood* did not involve an interest in an oil and gas royalty, it naturally follows that the Court did not decide that oil and gas NPRIs may be taxed as real estate and a subsequent tax deed is valid, as the Venable Parties claim. Simply put, *Collingwood* does not support the Venable Parties' position at all.

CONCLUSION

The decision of the Circuit Court of Wetzel County, West Virginia should be affirmed. The Tax Deed was based on a void assessment and, therefore, was ineffective to divest the heirs and successors of William G. McGary of their interest in the McGary NPRI, including the Respondent herein AMP IV, LP.

Respectfully submitted,

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IN THE INTERMEDIATE COURT OF APPEALS OF WEST VIRGINIA

Docket No. 23-ICA-351

Venable Royalty, LTD,
and V14, LP,

Plaintiffs Below, Petitioners,

v.

EQT Production Company, ET Blue Grass, LLC,
and AMP IV, L.P., et al.,

Defendants Below, Respondents.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this 21st day of December 2023, the foregoing BRIEF OF RESPONDENT AMP IV, L.P. was served using the electronic File & ServeXpress system, which will send copies of such filings to counsel of record.

By: */s/ Kerri C. Sturm*
Kerri C. Sturm, Esq. (WV Bar No. 14413)