**IN THE SUPREME COURT OF MISSISSIPPI**

**NO. 2008-CA-01219**

**AARCO OIL AND GAS COMPANY, ET AL.**
**APPELLANTS**

**V.**

**EOG RESOURCES, INC., ET AL.**
**APPELLEES**

**On Appeal from the Chancery Court of Covington County, Mississippi**

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# BRIEF OF APPELLEE EOG RESOURCES, INC.

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C. Glen Bush ([redacted]
Glenn Gates Taylor ([redacted]
John H. Geary, Jr. ([redacted]
COPELAND, COOK, TAYLOR & BUSH, PA
P.O. Box 6020
Ridgeland, Mississippi 39158
Telephone 601-856-7200
Facsimile 601-856-7626

**ORAL ARGUMENT REQUESTED**

## CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this case. These representations are made in order that the Justices of the Supreme Court and/or the Judges of the Court of Appeals may evaluate possible disqualification or recusal.

1. Belhaven Productions, LLC, Appellant;

2. Little River Drilling, LLC, Appellant;

3. Roy Liddell, Counsel for Appellants Belhaven Productions, LLC, and Little River Drilling, LLC;

4. Fielding L. Cocke, Appellant;

5. Camille Cocke Patton, Appellant;

6. Tamara C. Jenkins, Appellant;

7. John Sanford McDavid, E. Stephen Williams, and Lindsay Green Watts, Counsel for Appellants Fielding L. Cocke, Camille Cocke Patton, and Tamara C. Jenkins;

8. Aarco Oil and Gas Co., Appellant;

9. Harrell Energy Corp., Appellant;

10. Glenn G. Mortimer, III, Appellant;

11. Anne Mortimer Ballantyne, Appellant;

12. Dorchester Royalty, Appellant;

13. Carey R. Varnado, Counsel for Aarco Oil and Gas Co., Harrell Energy Corp., Glenn G. Mortimer, III, Anne Mortimer Ballantyne, and Dorchester Royalty;

14. Wheless Investment Company, Appellant;

15. J.T. Trotter, Executor of the Estates of Joseph Sydney Wheless, Jr., and Executor of the Estate of Ada Nance Wheless, Appellant;

16. Paige Holloway, Successor Trustee of the Paige Holloway Trutter GST Exemption Trust, Appellant;

17. Compass Bank, Trustee of the Barbara Trotter Collins GST Exemption Trust, Appellant;

18. Jefferson D. Stewart, Bernard Hess Both, IV, and Holmes S. Adams, Counsel for Appellants Wheless Investment Company, J.T. Trotter, Paige Holloway, and Compass Bank;

19. John M. Fairchild, Appellee;

20. Michael B. Moore, Appellee;

21. Lynn S. Jones, Appellee;

22. John M. Fairchild; Counsel for Appellees John M. Fairchild, Michael B. Moore, and Lynn S. Jones;

23. William Wallace Allred, Appellee;

24. James L. Quinn, Counsel for Appellee William Wallace Allred;

25. Wiley Fairchild Family Trust, Appellee;

26. Fairchild-Windham Exploration Company, Appellee;

27. Lawrence Gary Gunn, Jr., Counsel for Appellees Wiley Fairchild Family Trust and Fairchild-Windham Exploration Company;

28. Barber Minerals, Inc., Appellee;

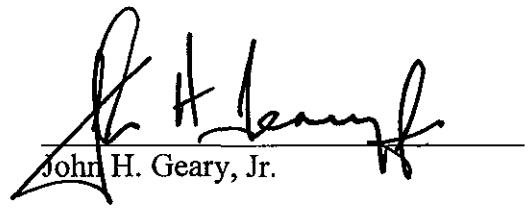
29. Watts C. Ueltschey and J. Anthony Sherman, Jr. Counsel for Appellee Barber Minerals, Inc.;

30. EOG Resources, Inc., Appellee;

31. Glenn Gates Taylor, C. Glen Bush, and John H. Geary, Jr., Counsel for EOG Resources, Inc.; and

32. Thomas T. Crews, Counsel for Sugarberry Oil & Gas Corporation.

Dated: April 23, 2009.



John H. Geary, Jr.

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## STATEMENT REGARDING ORAL ARGUMENT

The central issue in this appeal is the validity of two 1942 tax sales. While it is clear that Covington County authorities followed the applicable law precisely, the statutory scheme of assessment and taxation is detailed. On the basis of the briefs, EOG Resources, Inc. believes that the Appellants do not fully understand that statutory scheme. Oral argument may assist the Court in its consideration of the 1942 tax sales, and EOG respectfully requests oral argument.

## CITATION TO THE RECORD AND STATUTES

Citations to the record on appeal are designated "R." followed by the page number of the record, for example, "R. 100." For the Court's convenience, records excerpts are included, bound separately, and designated "R.E." followed by the tab behind which the excerpt, for example, "R.E. 1." Unless otherwise stated, all references to statutes are to the Mississippi Code of 1930 as amended, and are referenced simply by section number, for example "§ 3161." A copy of the pertinent section of the Mississippi Code is included with the record excerpts.

Pertinent parts of the Covington County land roll and the record of lands sold for taxes are included in the numbered pages in the record; however, because of the large size of the original records, the information on the numbered pages can be difficult to see clearly and difficult to see in context of the whole document. Therefore, for the Court's convenience, EOG has included copies of pertinent parts of the Covington County land roll and the record of lands sold for taxes on large paper, approximating the size and form of the originals. These large copies are included with the record excerpts as Exhibit A.

## STATEMENT OF THE ISSUES

The Chancellor in Covington County ruled that a 1942 tax sale conveyed the subject lands and the mineral interest therein to the tax sale purchaser. The issues on appeal to this Court are summarized as follows:

1. Whether the subject lands, acquired from the State by individuals late in 1940, were properly added to the land assessment roll for the 1941 tax year.

2. Whether tax sales in 1942 for unpaid 1941 taxes due on the subject lands were properly conducted.

3. Whether the 1942 tax sales of the subject lands conveyed to the tax sale purchaser the mineral interests in the subject lands.

4. Whether later United States Supreme Court decisions regarding due process affect the validity of the 1942 tax sales.

## STATEMENT OF THE CASE

This case is about the ownership of certain mineral interests in and under the Subject Lands, two adjoining tracts of land in Covington County, Mississippi, described below. The lands were sold in 1942 for unpaid 1941 taxes. Appellee EOG Resources, Inc. (hereinafter "EOG") claims that the 1942 tax sales were valid to convey the lands, including the minerals therein, and claims title to mineral leasehold interests in the lands through the tax sale purchasers and their successors. [1]

[1] Appellees Fairchild-Windham Exploration Company, Wiley Fairchild Family Trust, Barber Minerals, Inc., and William Wallace Allred claim ownership of the minerals in the Subject Lands through the tax sale purchasers. EOG holds leasehold title to some of this mineral interest. The interests of all Appellees in this case are common.

Appellants[2] contend that the tax sales were invalid, and claim title through owners of record prior to the tax sale. The arguments of the Appellants are summarized in two claims, one based on state law and one on federal due process. First, they contend that Covington County did not follow the Mississippi statutory procedure for assessing, taxing and selling lands for unpaid ad valorem taxes, or that the procedure was inherently flawed. Either conclusion, argue Appellants, renders the 1942 tax sale void. Second, the Appellants contend that the statutory procedure followed in the 1942 tax sales was unconstitutional in light of later United States Supreme Court decisions regarding notice and due process.

Appellants, however, misstate both the taxation procedure of real property under the Mississippi Code of 1930 and the actions of Covington County as set out in the record. Mississippi's statutory procedure for assessment, taxation and sale of land for unpaid taxes in 1941 and 1942 was clear, fair and constitutional. The ad valorem taxes were not paid. In the sale for unpaid taxes, Covington County followed the statutory procedure meticulously. Mineral owners had not only the opportunity, but the duty, to have their minerals assessed separately from the surface estate. Doing so afforded them sufficient safeguards, and they should not be rewarded for their failure to do so.

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[2] Wheless Investment Company; J.T. Trotter, Trustee of the Joseph Sydney Wheless, Jr., 1974 Trust; J.T. Trotter, Executor of the Estate of Ada Nance Wheless; Paige Holloway, Successor Trustee of the Paige Holloway Trotter GST Exemption Trust; and Compass Bank, Trustee of the Barbara Trotter Collins GST Exemption Trust filed a brief on January 30, 2009. These parties are referred to herein as the "Wheless Group," and their brief as "Wheless Br." Belhaven Production, LLC and Little River Drilling, LLC filed a brief dated January 23, 2009. They are referred to herein collectively as "Belhaven," and their brief as "Belhaven Br." Aarco Oil and Gas Company; Harrell Energy Corporation; Glenn C. Mortimer, III; Anne Mortimer Ballantyne; and Dorchester Royalty filed a brief dated January 30, 2009 in which they adopted statement of facts and argument in the other Appellant briefs. Tamara C. Jenkins, Camille Cocke Patton and Fielding L. Cocke filed their joinder on January 30, 2009. The interests of all the above named appellants are common. These appellants are collectively referred to herein as "Appellants."

Appellants also miss the mark regarding the issue of the constitutionality of the 1941 real property taxation and 1942 tax sale. Mississippi law provided for proper notice for owners of interests in real property who had their interests assessed as required by law, and that notice was, in fact, given. Thus, the 1941 assessment and 1942 sale of the subject lands did not violate due process principles later announced in *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950) or *Mennonite Board of Missions v. Adams*, 462 U.S. 791 (1983). Moreover, Appellants did not properly raise the issue of constitutionality, and the issue should therefore not be before this Court.

## PROCEDURAL HISTORY OF THE CASE

On May 1, 2007, Belhaven Production, LLC and Little River Drilling, LLC filed suit against EOG Resources, Inc. and other defendants, seeking to confirm and quiet title to the Subject Lands. In the months following, additional parties were added, the complaint was amended twice, counterclaims and crossclaims were filed and amended, and discovery was conducted. On April 17, 2008, Fairchild-Windham Exploration Company, LLC and the Trustees of the Wiley Fairchild Family Trust filed a motion for summary judgment. On April 24, 2008, EOG filed its motion for summary judgment. The other Appellees joined. Both motions sought judgment that the 1942 tax sales were properly conducted and conveyed all estates in the Subject Lands to the tax sale purchasers. Belhaven, Little River, the Wheless Group and Aarco opposed the motions for summary judgment. The trial court held a hearing on these summary judgment motions on May 21, 2008. At the conclusion of that hearing, the chancellor told the parties that he was inclined to grant summary judgment, but that in an abundance of caution, he would grant another thirty days to allow the plaintiffs to conduct further discovery, particularly to search records at the State Tax Commission. R. 1884 (R.E. 1)

A second hearing was held June 26, 2008, at which time Belhaven confirmed to the court that it had not discovered any further evidence to support its claims. T. at 85 (R.E. 2). Belhaven also confirmed that in a letter to the court it had raised issues concerning the constitutionality of the Mississippi Code of 1930. T. at 85 (R.E. 2). The court granted the summary judgment motions, finding that the 1942 tax sales were properly conducted under then current law and title to all estates in the Subject Lands passed to the tax sale purchasers. The trial court's order stated that the court considered *Mennonite Board of Missions v. Adams, supra*, and the case did not change the court's opinion as to the validity of the 1940-1941 assessment and subsequent tax sale. R. 1794 (R.E. 3).

EOG and other defendants in the trial below had raised other defenses in addition to the validity of the 1942 tax sales. Particularly, they asserted claims that the defendants' title could be established by possession and that the plaintiffs' claims were barred by statutes of limitation. These claims were not considered at the summary judgment hearings and the chancellor made no findings or rulings regarding possession or any statute of limitation. Rather, these issues were reserved and the summary judgment order was limited to a ruling that the 1942 tax sales were valid under then current law based on the County's records. Because possession and statutes of limitation issues are not before the Court in this appeal, the Appellants' request that the Court render judgment for the Appellants is not well taken. EOG is confident that if these issues were tried in the chancery court, the law and the facts would clearly confirm the Appellees' title to the minerals in the Subject Lands.

## STATEMENT OF THE FACTS

### A. The Lands and Common Source

This case involves a dispute as to the ownership of mineral interests in two contiguous tracts of land in Covington County, Mississippi:

> NW 1/4 SE 1/4, SE 1/4 SE 1/4 and SE 1/4 NE 1/4 of Section 9, Township 7 North, Range 16 West and the SW 1/4 NW 1/4 of Section 10, Township 7 North, Range 16 West ("Tract 1") and the SW 1/4 SE 1/4 of Section 9, Township 7 North, Range 16 West ("Tract 2") (Tract 1 and Tract 2 are together the "Subject Lands").

R.J. Graves acquired a Forfeited Tax Land Patent to Tract 1 dated November 2, 1940. R. 655 (R.E. 4). J.D. Nobles acquired a Forfeited Tax Land Patent to Tract 2 dated November 2, 1940. R. 786 (R.E. 5). Title into Graves and Nobles by those two 1940 tax patents is the common source of title in this dispute.

### B. The Facts Relating to Record Title

Immediately upon acquiring the Subject Lands, Graves and Nobles sold all of the mineral interests. In Tract 1, Graves sold a 1/2 mineral interest to J.S. Wheless, Jr. on October 30, 1940 and a 1/2 mineral interest to Aaron Cohen on November 2, 1940. R. 656-57 (R.E. 6). In Tract 2, Nobles sold a 1/2 mineral interest to Jim Pugh on October 29, 1940 and a 1/2 mineral interest to H. Guinn Lewis on October 29, 1940. R. 787-88 (R.E. 7).[3]

After the lands were granted by the State to the two individuals, the lands were added to the Land Roll as an assessment for 1941 ad valorem taxes. Neither Graves nor Nobles paid the 1941 taxes due and the Subject Lands were sold for unpaid ad valorem taxes in April, 1942. Tract 1 sold on April 6, 1942 to Mrs. R. L. Windham, as recorded in Tax Sale Book 7, Page 140.

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[3] Three of the above mineral deeds actually predate the tax land patents, strongly suggesting that Graves and Nobles acquired the lands only to sell the minerals, with no intention of retaining the lands or paying the taxes.

R. 664-65 (R.E. 8). The tax sale of Tract 1 matured in Mrs. R. L. Windham, and the Chancery Clerk issued a Tax Deed to Mrs. Windham dated May 1, 1944, recorded Book 77, Page 538, and a second tax deed on May 12, 1944, recorded Book 77, Page 555. R. 666-67 (R.E. 9). Tract 2 sold to Independent Trust Fund on April 6, 1942 for unpaid 1941 ad valorem taxes, as recorded in Tax Sale Book 7, Page 159. R. 795-98 (R.E. 10). Tract 2 sold again on April 5, 1943 to Independent Trust Fund for unpaid 1942 ad valorem taxes. See Deraignment of Title, R. 644 (R.E. 11). The tax sale of Tract 2 matured and the Chancery Clerk issued Tax Deeds to Independent Trust Fund on April 6, 1945, recorded in Book 78, Page 480, and on April 7, 1945, recorded in Book 78, Page 487. R. 799-801 (R.E. 12). On April 17, 1945, recorded in Book 78, Page 493, Independent Trust Fund conveyed Tract 2 to R. L. Windham, reserving 1/2 of the minerals. R. 802-03 (R.E. 13).

The lands were sold again in April, 1943 for 1942 ad valorem taxes. Tract 1 was redeemed from the 1943 sale, but not the 1942 sale.

The severed mineral interests in Tracts 1 and 2 were not separately assessed for ad valorem taxes. Under Mississippi law, since the severed mineral interests were not separately assessed, the tax sales of the lands conveyed both the surface and the severed mineral interest. The tax sale of Tract 1 conveyed the entire estate (surface and severed mineral interest) in these lands to Mrs. R. L. Windham, and the tax sale of Tract 2 conveyed the entire estate (surface and severed mineral interest) in these lands to Independent Trust Fund.[4]

Appellees, Fairchild-Windham Exploration Co ("Fairchild-Windham"), the Trustees of the Wiley Fairchild Family Trust ("Fairchild Trust") and W. Wallace Allred ("Allred") are successors in title of Mr. and Mrs. R. L. Windham to a full mineral interest in Tract 1 and a one-

[4] The current surface owners are successors to these tax sale purchasers, but the surface title is not disputed.

half (1/2) mineral interest in Tract 2. EOG is owner of leasehold title from Fairchild-Windham and the Fairchild Trust and a contractual interest from Allred. R. 770-86 (R.E. 14).

Barber Minerals, Inc. is successor in title of Independent Trust Fund to a one-half (1/2) mineral interest in Tract 2, and EOG is owner of leasehold title from Barber Minerals, Inc. R. 806-07 (R.E. 15).

Appellants' claim of title to the mineral interest in Tract 1 and Tract 2 is based on the 1940 mineral conveyances by Graves and Nobles and Appellants' contention that the 1942 tax sales are void. Appellants argue that the lands were not properly assessed in 1941, that there was not proper notice of the 1942 tax sales and that the law and assessment and tax sale process violated due process requirements. However, the law and procedure were proper on all points and Appellants' claim of title fails by virtue of the 1942 tax sales.

### C. The Statutory Taxation Scheme and Covington County Procedures

In order to understand the assessment and taxation of the Subject Lands at issue in this case, it is necessary to understand the statutory scheme established by the Mississippi Code of 1930.[5] Under the 1930 Code, land in Mississippi was assessed for ad valorem taxation every other year. Miss. Code Ann. § 3144 (1930). (All references to statutes hereinafter are to the Mississippi Code of 1930.) Lands were thus assessed in 1940 for the years 1940 and 1941. The assessor was required to complete the assessment of real property and file the roll with the clerk of the board of supervisors on or before the first Monday in July. § 3161. The board of supervisors was to equalize the rolls and by newspaper publication notify the public that the equalized rolls were ready for inspection and examination. § 3162. At a meeting for the equalization of the assessments, with the assessor present, the board was to examine the

[5] The Mississippi Code of 1930 was the law governing assessment and taxation in 1940-1942.

assessments, make necessary corrections, and enter an order approving the assessments. §§ 3161, 3164. The board was then to hold a meeting on the first Monday in August to hear objections to the assessment. *Id.* § 3165. Assessments were to be approved by an order of the board entered on the minutes, but the failure to make and enter such order did not vitiate the assessment if it appeared that the assessment was made according to law. *Id.* § 3172.

The statutory procedure was clear, and as the record shows, the Covington County board of supervisors followed it precisely in conducting the 1940 land assessment for the 1940 and 1941 tax years. Board minutes of July 1, 1940 state that the tax assessor filed real property assessment rolls on or before the first Monday in July in 1940 and that the board ordered that the rolls be equalized and notice be published. R. 1702 (R.E. 16). Board minutes of July 18, 1940 show that the board equalized the real property assessment rolls "*for the years 1940 and 1941*," approved the equalized assessment, and ordered that notice of the equalized assessment be published. R. 1704-05 (emphasis added) (R.E. 17). Minutes of the August 5, 1940 meeting of the board state that notice was timely given to the public. R. 1708 (R.E. 18). Board minutes dated August 8, 1940 state that after meeting to hear objections, with the tax assessor present to render assistance, the board ordered that the real property assessment for years 1940 and 1941 was accepted, approved and made final. R. 1711 (R.E. 19).

Lands owned by the State were to be listed in the land roll along with other lands, but without value. § 3148. Accordingly, Tract 1 and Tract 2 were properly entered on the 1940-1941 Land Assessment Roll as owned by the State, with the assessed value left blank. R. 1675 (R.E. 20, R.E. Ex. A). As set out above, both Tracts were sold to individuals by tax land patents in November of 1940. R. 655, 786 (R.E. 21). As privately owned property, they became subject to taxation in 1941. § 3121. Particularly, "all lands purchased from the state . . . [were to] be

assessed and dealt with as the property of individuals." § 3154. The assessor was required to "carefully examine the records in his county to ascertain what lands have been redeemed or purchased from the state . . . and in assessing land he shall assess all such land as the property of individuals." § 3155.

In compliance with the law, lands that came into private ownership in Covington County in 1940 were added to the 1940-1941 land assessment roll for 1941 taxation. The Land Assessment Roll for 1940-1941, at page 357, has handwritten at the top of the page: "The following assessment is added to Roll by S.O. Herrington, Sheriff & TC to be payed [sic] on for Tax year 1941 and 42." R. 543 (R.E. 22, R.E. Ex. A). On that page is a list of lands identified by tax receipt number, owner, description and assessed value. The list continues for several pages. At the top of page 360 are the handwritten words: "Land Purchased from State and due to be placed on Roll for 41." R. 546 (R.E. 23, R.E. Ex. A). Clearly, the county taxing officials followed the statutory requirement and added lands to the roll as appropriate. Both Tracts were added to the land assessment roll for 1941 assessed at a value of $4 per acre, with Tract 1 assessed to R.J. Graves and Tract 2 assessed to J.D. Nobles. R. 545 (R.E. 24, R.E. Ex. A).[6] It appears that all lands in the Williamsburg school district were entered at an assessed value of $4 per acre. R. 542-47 (R.E. 25, R.E. Ex. A). That is consistent with the statutory procedure, as

[6] The assessment to Graves is at lines 22-23, and the assessment to Nobles is at line 24, Land Roll page 359. R. 545 (R.E. 26, R.E. Ex. A). The dates in the handwritten supplemental entries are in a column labeled "bought." The dates in the "bought" column begin in late June 1941 and run more or less consecutively in reverse chronological order through mid-January 1941. The remaining entries that follow are undated and the Subject Lands purchased in 1940 are among these entries. (Land Roll, p. 359). Belhaven claims that it is unclear whether these entries were made in 1941 or 1942 (see Belhaven Br. at 6, fn 2). However, nothing in the record supports this. According to the record, the Subject Lands were added to the Rolls by June 1941, the date at which the assessor presented the Rolls to the board of supervisors.

lands sold by the State in 1940 were added to the roll for 1941 taxation at an assessment value consistent with the 1940-1941 equalized assessment.

Contrary to the assertion of the Appellants (see Belhaven Br. at 7), both Graves and Nobles received actual notice of the tax sales prior to the end of the redemption period, as documented by county records. The Record of Lands Sold for Taxes shows that notice of the sale of Tract 1 was sent to Graves by registered mail on February 1, 1944, and the return was received by the clerk February 4, 1944. R. 665 (R.E. 27, R.E. Ex. A). Notice of the sale of Tract 2 was sent to Nobles by registered mail, and the return was received by the clerk on January 27, 1944. R. 798 (R.E. 28, R.E. Ex. A). The record is clear and undisputed that both landowners had actual notice that the lands were subject to sale for unpaid taxes, and both had opportunity to pay the tax and redeem the lands within the two-year redemption period. § 3264.

Under then current law, minerals owned separately from the surface of land were required to be separately assessed, and the owners of such minerals were required to report their mineral interests to the assessor for separate assessment. § 3146. The assessor was to enter the assessment of such mineral interests in the next succeeding line after the entry for the land in the assessment roll. *Id.* There is no entry of separate assessment of minerals following the entry of the land assessment for Tract 1 or Tract 2. R. 545 (R.E. 29). Indeed, there is no record that Cohen, Wheless, Lewis or Pugh made any effort to comply with the law and have their mineral interest in the Subject Lands assessed prior to the 1942 tax sale.

## SUMMARY OF THE ARGUMENT

The crux of this case is the validity of two 1942 tax sales. The State sold two tracts of land in 1942 for due and unpaid 1941 taxes. The mineral interests in the lands had not been separately assessed, and the tax sale purchasers thus acquired the surface and the mineral interests. Appellants argue that the 1942 tax sales were invalid for several reasons, which can be summarized as two issues – whether the lands were properly assessed in 1941 and whether proper notice was given of the 1942 tax sales. Appellants further assert that Mississippi law as it governed assessment and tax sales in the early 1940's violated federal constitutional requirements of due process announced in later United States Supreme Court decisions.

The 1942 tax sales were valid. At the time, by statute, land was assessed biennially, and such biennial assessment was constitutional. Land was assessed in 1940 for the 1940 and 1941 tax years. Covington County followed the statutory procedure for assessment exactly. In 1940, the Subject Lands had been entered on the land rolls at no value because they were owned by the State. Those lands were added to the rolls for the 1941 tax year at an assessed value because, in November 1940, they had been sold by the State to individuals. The Subject Lands were added to the rolls at a standard value established by the assessment for 1940-1941.

The owners of the Subject Lands did not pay the 1941 taxes due on the lands. In 1942, the lands were properly sold for unpaid 1941 taxes. Prior to the end of the redemption period, the land owners (surface owners) received notice by registered mail that the taxes were unpaid and that the lands were subject to sale for the unpaid taxes. They did nothing. In 1944, the tax sales matured and the chancery clerk issued deeds to the tax sale purchasers.

The tax patentees severed the mineral interests in the Subject Lands immediately upon acquiring the lands from the State in 1940. The law required owners of minerals owned

separately from the surface of the land to have those minerals assessed. The mineral owners in the Subject Lands did not do so. Had they done so, and then not paid the taxes, they would have received written notice of unpaid taxes and impending tax sale, just as the surface owners received. However, since they failed to have their mineral interests separately assessed, the assessment of the land was an assessment of all the estates in the land. As this Court stated unequivocally in *Stern v. Parker,* 200 Miss. 27, 25 So. 787 (1946), and other cases, the mineral owners could not avoid their duty to have their minerals assessed and then complain that they did not enjoy the benefits of assessment, including notice.

Appellants challenge to the constitutionality of the Covington County actions and the Mississippi law under which the county acted fails on three counts. First, Appellants are barred from raising this issue before this Court because they failed to notify the Attorney General of the State of Mississippi as required by M.R.C.P. 24(d) and M.R.A.P. 44(a). Second, the cases on which Appellants principally rely, *Mullane v. Central Hanover Bank & Trust Co., supra*, and *Mennonite Board of Missions v. Adams, supra*, require actual notice to persons whose names and addresses are reasonably ascertainable, as explained below. Because the names and addresses of owners of unassessed severed minerals were not reasonably ascertainable under the *Mullane* and *Mennonite* standards, publication notice was constitutionally sufficient. Third, this Court should not apply United States Supreme Court decisions retroactively to affect settled property rights.

## THE ARGUMENT

### I. The 1942 tax sales were properly conducted under Mississippi law and valid to convey the lands and minerals.

#### A. The 1940 land assessment was conducted properly under then current Mississippi law and was valid for the 1940 and 1941 tax years.

As set out in detail in the Statement of Facts, the assessment and tax sale at issue in this case were conducted exactly as prescribed by then current law. By statute, land was assessed every two years. § 3144. [7] In years in which land was assessed, the tax assessor was to complete a land assessment roll and present it to the board of supervisors by the first Monday in July. § 3161. The board was to equalize the assessment roll, notify the public by newspaper publication that the roll was ready for examination, hold a meeting in August to hear objections to the assessment, finalize the land assessment roll, and approve it by an order entered on the board minutes. §§ 3162, 3164, 3165, 3172. The Covington County board of supervisors carried out a land assessment in 1940 exactly according to statute and recorded their actions on the minutes. R. 1702, 1704-05, 1708, 1711 (R.E. 30). The land assessment and equalization in 1940 was expressly for the 1940 and 1941 tax years. R. 1704-05 (R.E. 31).

At the time of the 1940-1941 assessment, the Subject Lands were owned by the State and correctly entered on the land roll without value. § 3148, R. 1675 (R.E. 32). In November of 1940, the State sold the Subject Lands to individuals. R. 655, 786 (R.E. 33). County tax officials were required to examine the records each year and determine what lands had been purchased from the state, and see that those lands were then treated as the property of individuals. §§ 3154, 3155. Accordingly, the Subject Lands were added to the 1940-1941 land assessment roll for 1941 taxation. R. 545 (R.E. 34). The Subject Lands were entered at an

[7] As explained above, all references to statutes herein are to the Mississippi Code of 1930, as amended.

assessed value of $4 per acre, the same equalized value as other lands in the Williamsburg school district. R. 542-47 (R.E. 35).

The 1940 assessment was properly conducted and provided a valid land assessment for the two years 1940 and 1941. The Subject Lands, which became the property of individuals in November 1940, were added to the roll for 1941 taxation exactly as prescribed by statutes.

**B. Biennial assessment of land was proper and valid.**

**1. Because land had been assessed in 1940 for the years 1940 and 1941, there was no requirement to publish notice of assessment and equalization in 1941.**

Appellants assert that the 1942 tax sales were based on a 1941 assessment which was not equalized and of which no notice was given. Belhaven Br. 11. Appellants are wrong. That is simply not the statutory assessment procedure. No new land assessment and equalization was required for 1941. The applicable assessment was done in 1940 for the 1940 and 1941 tax years. In 1941, lands that had come into private ownership during 1940 were properly added to the 1940-1941 assessment roll at a value consistent with the equalized and duly approved 1940-1941 assessment.

Appellants contend that § 3162 required the board of supervisors to equalize the real property rolls at the July 1941 board meeting. *Id.* In fact, §3162 did say that the board "shall immediately at the July meeting proceed to equalize such rolls." However, the Appellants' argument ignores § 3164 which sets out what is to be done at such meetings.

> At the meeting for the equalization of assessments, the board of supervisors shall carefully examine the roll or rolls, and shall then and there cause to be assessed any person or thing that may be found to be omitted, and anything found to be undervalued may be correctly valued. And **in the year in which the land assessment is made** the board shall carefully examine the land roll and see that it embraces all the land in the county, and correctly represents it as being the property of individuals or the state . . . and land which is not classed correctly or undervalued shall be properly classified and valued.

§ 3164 (emphasis added). The first sentence of § 3164 refers to examining the assessment of persons and things, i.e. personal property. Personal property was assessed annually. § 3128. The next sentence of § 3164 refers to examining the land rolls **in the year in which the land assessment is made**. § 3162 must be understood together with and in light of § 3164, so that the requirement to equalize "such rolls" at the July meeting means equalizing the rolls for property – personal or real – assessed that year. *Strait v. Pat Harrison Waterway District*, 523 So.2d 36, 40 (Miss. 1988) *citing Aikerson* v. *State,* 274 So.2d 124, 127, n. 2 (Miss. 1973) ("In determining the intent of the legislature, all statutes enacted on the same subject must be construed together so as to indicate the policy of the legislature in the whole subject."); *Gillard* v. *Great Southern Mortgage & Loan Corp.,* 354 So.2d 794 (Miss. 1978). The statutes clearly do not contemplate an assessment and equalization of both personal property and land every year. Rather, the equalization requirement reflects the assessment requirement, i.e., annual equalization of the personal property rolls and biennial equalization of the real property rolls.

Appellants cite three opinions of this Court in support of their argument that, because notice of assessment and equalization of real property was not given in 1941, the 1942 tax sales were invalid. Belhaven Br. 12. However, none of these decisions support the Appellants' argument. Instead, each cited case involved failure to document on the minutes notice of biennial land assessment in the year in which the land assessment was made. In *Mathieu v. Crosby Lumber & Mfg. Co.*, 210 Miss. 484, 49 So.2d 894 (1951), land was sold in 1930 for nonpayment of 1929 taxes. The assessment upon which the taxes were based occurred in 1928. *Id.* The Court found that 1928 board minutes never recorded that notice of the 1928 assessment was given to taxpayers. *Id.* The failure to document notice on the minutes rendered the entire 1928-1929 assessment invalid and the tax sale based on it void. *Id.* In *White v. Merchants &*

*Planters Bank*, 229 Miss. 35, 46, 90 So.2d 11 (1956), the Court said the facts of *White* with regard to the tax sale were the same as those in *Mathieu*, i.e., a tax sale in 1930 for unpaid 1929 taxes based on the 1928-1929 land assessment, which was invalid because the 1928 minutes did record that notice was given. *White*, 229 Miss. at 46. Similarly, in *Berryhill v. Johnston*, 206 Miss. 41, 39 So.2d 530 (1949), the Court found that the board did not enter on its August 1934 minutes that notice of the 1934-1935 land assessment had been given to taxpayers. *Id.* at 54-55.

The common dispositive fact in *Mathieu*, *White* and *Berryhill* was the board's failure to give notice of the two-year land assessment. In our case, there is no dispute as whether notice was properly given of the 1940-1941 land assessment. The precise notice the Court found lacking in *Mathieu*, *White* and *Berryhill* was clearly given by the Covington County board. R. 1708 (R.E. 36). *Mathieu*, *White* and *Berryhill* are not applicable here, and the Appellants' argument regarding notice of assessment in 1941 fails.

**2. Biennial assessment and equalization was proper and constitutional.**

Appellants contend that because the land assessment was not equalized and notice given in 1941, the 1942 tax sale is void. Belhaven Br. 13. That is directly contrary to this Court's prior ruling on the applicable statute. Under the Code of 1930, land was assessed only every other year. § 3144. In *Kuhn v. Hague*, 236 Miss. 74, 109 So.2d 627 (1959), a landowner contended that a 1938 tax sale for unpaid 1937 taxes was void because land had not been assessed in 1937. The Court found that "the proof conclusively shows that a valid assessment was made of the lands of said county in 1936 and the orders of the board of supervisors and the notice to taxpayers showed that it was the land assessment for ad valorem taxes for the years 1936 and 1937. This method of **biennial assessment of land was the proper and only method for assessing lands for ad valorem taxation under Section 3144**, Code of 1930." *Id.* at 76 (emphasis added). *Kuhn* is precisely applicable to the issue now before this Court. There was no

assessment, and thus no equalization, in 1937 in *Kuhn*; there was no assessment, and thus no equalization, in 1941 in our case. In both cases, the lack of equalization in the year between the land assessments had no bearing on the validity of the tax sale.

Again, Appellants try to build an argument on the premise that in order for lands to be added to the land roll for 1941, there had to be a new assessment and equalization. That is directly contrary to the statutory mandate. State owned lands entered with a blank assessment on the equalized assessment roll for 1940-1941 were required to be added to the roll at the equalized, approved assessment when they became taxable for 1941.

Appellants further suggest that if there were no equalization of the assessment roll when lands were added in an "off year,"[8] the tax collector could (and did) assess the property and sell it outside the supervision of the board of supervisors. Belhaven Br. 14. First, the law is clear. Land assessments were examined and equalized by the board every two years. Lands that became taxable for the second year were added to the roll for that second year, and that addition was clearly under the supervision of the board of supervisors. Indeed, the law required that the board of supervisors "pay particular attention" to the assessor's addition of lands that had been purchased from the state. § 3155. Nothing in the law allowed the tax assessor to act independently, assessing, taxing and taking property without board supervision. Second, the record is clear. The July 8, 1941 minutes of the board of supervisors state that the tax assessor "completed and filed the 1941 real and personal assessment rolls" by the first Monday of July 1941. R. 1262 (R.E. 37). Since biennial assessment was in 1940, the completed land roll submitted to the board in July 1941 was the 1940-1941 assessment roll with the necessary additions. "Off year" additions passed under board scrutiny.

[8] "Off year" is Belhaven's term. See Belhaven Br. at 14.

At the May 21, 2008 hearing, the court directed Belhaven to § 3161, which provided that if the assessor failed to file the assessment rolls, the board of supervisors was required to adopt an order showing the failure and certify to the state tax commission a statement showing the failure and the time necessary for the assessor to complete the rolls. R. 1842 (R.E. 38). Upon receipt of such certification, the state tax commission was to enter an order on its minutes stating when the roll will be completed and the date the board of supervisors will meet to equalize the roll and hear objections. § 3161. As the chancellor pointed out, the 1941 board of supervisors' minutes do not mention any failure by the assessor to file an assessment roll. R. 1844 (R.E. 39). In an abundance of caution, the court granted Belhaven thirty days for further examination of county and state records, including expressly the examination of state tax commission records to find an order showing that in 1941 the Covington County tax assessor did not timely file an assessment roll. Belhaven could find no such order. R. 1884 (R.E. 40). As the trial court pointed out, it is highly unlikely that a board of supervisors that so carefully followed the law and so meticulously recorded its actions in all other respects pertaining to assessment should fail to follow the law if the assessor did file a roll. Moreover, if the state tax commission had reason to think that a required assessment or equalization had not taken place in 1941, the commission should have, and presumably would have, taken appropriate action. R. 1845, 1848 (R.E. 41). The absence of any such order on the minutes of the Covington County board of supervisors or the state tax commission is clear evidence that there was no expectation that there would be a new land assessment and equalization in 1941.

Appellants cite *Adams v. Tonella*, 70 Miss. 701, 14 So. 17 (1893), in support of their argument that the tax assessor's actions were unconstitutional under Mississippi law. Belhaven Br. 14. In *Adams*, this Court struck down as unconstitutional a law that empowered a state

revenue agent to audit local assessments, declare property undervalued in the assessment, and levy additional taxes on the property. *Id* at 20. *Adams* is clearly distinguished from the present case. As this Court said:

> The statutes condemned by the Tonella Case . . . undertook to authorize a state officer to go behind assessment rolls which had been finally approved by the board of supervisors and which by their approval had become fixed judgments as between the state and the taxpayer. . . . Any attempt to authorize the revenue agent to ignore the previous judgments of the board of supervisors evidenced by the approved rolls, to that extent, tended to disturb vested rights.

*State v. Wheatley*, 113 Miss. 55, 74 So. 427, 432 (1917). The problem in Adams was the "onerous duties" and "unlimited power" vested in the revenue agent. *Adams* at 18. No such power – going behind board actions, acting contrary to board decisions – was vested in the Covington County tax assessor. Indeed, the *Adams* Court found the whole arrangement unconstitutional. The constitution provided that duly selected county officials, and only such local officials, were authorized to assess property, and the Court ruled that the legislature could not substitute a state agent in that role. *Id.* at 19. The present case does not involve arbitrary, unlimited power exercised by a state agent. To the contrary, the Subject Lands were added to the land assessment roll in 1941 by the duly authorized local county official operating in accordance with statutes under the authority and supervision of the board of supervisors. *Adams* is inapposite.

### C. The 1942 tax sales conveyed all estates in the Subject Lands.

#### 1. The mineral owners did not have their separately owned minerals assessed.

As set out in the Statement of the Facts, Graves and Nobles, tax land patentees in 1940, sold the mineral interests in the Subject Lands to Wheless, Cohen, Lewis and Pugh immediately upon acquiring the lands through tax land patents. R. 656-57, 787-88 (R.E. 42). The law required that separately owned minerals be separately assessed for taxation, and placed upon the

mineral owners the responsibility for seeing that such assessment took place. § 3146. *See Stern v. Parker*, 200 Miss. 27, 38, 25 So. 787 (1946). When the mineral owners identified their minerals for assessment, the tax assessor was to enter the mineral assessment on the next succeeding line in the land assessment roll after the surface description. § 3146. There is no entry of mineral assessment in the lines succeeding the description of Tract 1 or Tract 2 in the land assessment roll. R. 545 (R.E. 43). The record contains no indication that the mineral owners made any attempt to have their minerals assessed separately for 1941 taxation.

**2. Because there was no separate assessment, all estates in the Subject Lands were assessed, taxed and sold together.**

This Court has been direct and clear as to the law on tax sales affecting severed minerals.[9] When land was assessed by a valid surface description, without reservation or exception, the assessment included every estate in the land, including mineral interests below the surface, even if the mineral interests were separately owned. *Stern*, at 41. And, when land was assessed without reservation, not divided into separate estates sold to separate owners, it was "**subject to sale as an entirety.**" *Id.* at 37 (emphasis added). Specifically, if severed minerals were not separately assessed, a tax sale of the land conveyed the minerals as well as the surface. *Clement v. R.L. Burns*, 372 So.2d 790, 794 (Miss. 1979).

**D. Notice of the 1942 tax sales was proper under Mississippi law.**

**1. The landowners received actual notice of the 1942 tax sales.**

Appellants claim that the "only notice given of the 1942 tax sales was publication notice in a local newspaper." Belhaven Br. 9. Quite to the contrary, the record clearly shows that landowners of both Tract 1 and Tract 2 received written notice of the tax sale by registered mail.

[9] The Mineral Documentary Tax provided for exemption of severed minerals after January 1, 1947. See §§ 9701-01 through 9701-09, Mississippi Code of 1942, §§ 27-31-71 through 27-31-87, Mississippi Code of 1972.

The clerk received the return receipt from both landowners and recorded that receipt in the Record of Lands Sold for Taxes. R. 665, 798 (R.E. 44). Actual written notice to the landowners, which meets every constitutional requirement of due process, is indisputable.

### 2. The mineral owners failed to comply with the statutory requirement to have their minerals assessed and protect their interests.

Mississippi law until 1947 provided for separate assessment and taxation of separately owned minerals. If minerals were not separately assessed, the land was assessed as an entirety. A tax sale of such land conveyed all estates in the land.

> Whenever any . . . minerals . . . are owned separately and apart from and independently of the rights and interests owned in the surface of such real estate . . . all such interests shall be assessed and taxed separately from such surface rights and interests in said real estate, and shall be sold for taxes in the same manner and with the same effect as other interests in real estate are sold for taxes.

§ 3146. Mineral owners were responsible to see that their separately owned minerals were separately assessed, with such interests "returned to the tax assessor within the same time and in the same manner as the owners of land are now required by law to list lands for assessment and taxation." *Id.* The assessor was to enter the assessment of such mineral interests upon the assessment roll by entering the mineral interest upon the next succeeding line following the assessment of the surface owner. *Id.* Tract 1 and Tract 2 were added to the land assessment roll for 1941, but there is no entry of mineral interest in the succeeding lines. R. 545 (R.E. 45). Moreover, there is no indication anywhere in the record that Cohen, Wheless, Lewis or Pugh made any effort to have their minerals assessed for the 1941 tax year. These mineral owners either failed or refused to comply with the law.

Settled law in Mississippi at the time was that when a parcel of land had been assessed by a valid surface description, without any reservations or exceptions or limitations either in the particular assessment or elsewhere on the roll, the assessment included "every interest in the land

so described and not only the surface but every estate, horizontal or otherwise, and whether above or below the surface, although separately owned." *Stern*, 200 Miss. at 41. The owner of a severed mineral interest had not only the opportunity, but the duty to see that the mineral estate was assessed and taxed separately. *Id.* at 41. The *Stern* Court said that the mineral owners who failed to have their minerals separately assessed never did "their duty to the taxing powers, themselves, their government or fellow citizens. The land was assessed in its entirety, and that means all of its assessable estates, by this unit assessment. This, they could and should have had corrected then, but did not." *Id.* at 38. Furthermore, the *Stern* Court said that the fact that the tax assessor did not assess the mineral interest was not available to the mineral owners to defeat the claims of the tax sale purchasers, because it was **the mineral owners' "primary duty to protect themselves."** *Id.* at 38 (emphasis added). The mineral owners could not "repair their dereliction in the duty to see to the proper assessment of their separate estate in this land by the argument that the assessor also failed to assess it." *Id.* Placing the burden of the assessment on the tax assessor would require the assessor "to examine thousands of deeds of record in his county to ascertain on precisely what lands and what particular separate rights were owned in the various descriptions in his county and who owned them, a task which would require the prolonged services of persons highly skilled in the law." *Id.* at 44.

We discuss below the burden on the tax assessor as a significant factor in the constitutional due process consideration. At this point, we simply emphasize the finding of this Court in *Stern.* The requirement of separate assessment provided a reasonable, easily available method for a mineral owner to protect a separately owned mineral interest in the event that the land owner failed to pay taxes. It is not reasonable, or fair, to construe the law so that mineral

owners could choose not to have their minerals assessed, and thereby avoid paying tax on their minerals, and then cry foul when the State acted upon the land for unpaid taxes. *See Stern*, 200 Miss. at 40. Furthermore, it is completely unreasonable to expect the county tax assessor to search the land records of the county to find all severed mineral interests.

The law is absolutely clear. Owners of separately owned mineral interests were required to have those interests separately assessed, and failure to do so meant that the assessment on the land assessment roll was an assessment of all the interests in the land. Lands assessed without exception or reservation, not divided into separate estates assessed to separate owners, were subject to sale as an entirety. *Id.* at 37. If severed mineral interests were not separately assessed, a tax sale of the land conveyed the minerals as well as the surface. *Clement*, 372 So.2d at 794.

**3. Mineral owners would have received actual notice if they had complied with the law regarding assessment.**

Section 3146 provided that separately owned minerals were to be assessed and taxed separately from the surface rights in land, and "sold for taxes in the same manner and with the same effect as other interests in real estate are sold for taxes." The Covington County authorities meticulously complied with law regarding the tax sale of Subject Lands. Had the mineral owners had their minerals assessed and failed to pay taxes, the taxing authorities would have provided them notice of a tax sale.

**E. The Subject Lands were not "back-assessed."**

Appellants attempt to apply *Long Bell Co. v. McLendon*, 127 Miss. 636, 90 So. 356 (1920), to the present case to argue that land assessed at blank or nothing cannot be back assessed. Belhaven Br. 16. But Appellants' misunderstanding of the law regarding the addition of lands to the assessment roll leads them to a misapplication of case law. In *Long Bell*, the tax assessor entered privately owned lands as vacant and valued at nothing for the years 1913 and

1914. *Id.* at 639. The assessment rolls were approved by the board. *Id.* at 640. In 1915, the tax assessor back assessed the lands for the years 1913 and 1914, though there had been no change in the ownership or condition of the lands. *Id.* at 639. The Court disallowed the back assessment. *Id.* at 640. In our case, there was no back assessment. Lands that were exempt from taxation in 1940, because they were State owned, became taxable for the 1941 tax year because they had been sold to individuals. This was not a "purported reassessment." Belhaven Br. 16. This was the statutorily mandated addition of lands that had come into private ownership. The lands were simply added to the roll as taxable land. No taxes were assessed or due for any time prior to 1941. The facts clearly distinguish *Long Bell* from the present case.

**F. Summary**

Pursuant to statute, a biennial assessment of land was conducted in 1940 for the 1940 and 1941 tax years. The Subject Lands, which had been owned by the State, were sold to individuals in November 1940 and thus became subject to taxation for the 1941 tax year. The Subject Lands were properly added to the tax roll for the 1941 tax year. The 1940 tax patentees did not pay 1941 taxes. Consequently, the lands were sold in 1942 for the unpaid 1941 taxes. The 1942 tax sales were not redeemed, and the tax sales matured in 1944. Notice was provided to the land owners by registered mail prior to the maturation of the tax sales, and prior to the time at which deeds were issued to the 1942 tax sale purchasers. Every statutory requirement for assessment and taxation was followed, and title to the Subject Lands passed to the 1942 tax sale purchasers in 1944.

The 1940 tax patentees sold all the mineral interest in the Subject Lands, in some cases actually signing the mineral deed days prior to obtaining the tax patent. The mineral grantees did not have their separately owned minerals separately assessed, even though the law required them to do so. Because there were no separate assessments, the assessment of the Subject Lands

entered on the Land Roll for the 1941 tax year included all estates in the lands. When the Subject Lands were sold in 1942 for unpaid 1941 taxes, the sale included all estates in the lands. Thus, title to all estates in the Subject Lands, including the minerals, passed to the 1942 tax sale purchasers. Because Belhaven, Wheless and other Appellants claim mineral title through the 1940 mineral grantees, their claims are without merit and fail. Mineral title in the Subject Lands is vested in the successors of the 1942 tax sales – Fairchild-Windham Exploration Co., the Wiley Fairchild Family Trust, W. Wallace Allred, and Barber Minerals – and EOG, who holds leasehold and contractual interests from these mineral owners. The chancellor correctly granted summary judgment to EOG and the other Defendants/Appellees.

## II. There is no constitutional reason to invalidate the 1942 tax sales.

### A. Appellants' constitutional challenge is procedurally barred.

Appellants challenge the statutory taxing procedure as unconstitutional, relying on *Mullane v. Central Hanover Bank & Trust Co., supra*, and *Mennonite Board of Missions v. Adams, supra*. Not only does this challenge fail on substantive grounds, it is procedurally barred. Realizing that their constitutional arguments run afoul of M.R.C.P. 24(d), Appellants try to argue that they are not claiming that the 1942 statutory scheme was unconstitutional. Rather, they claim, "the statutory duties required were not sufficient to fulfill the constitutional due process duties, which are separate and independent of state statutes." Wheless Br. 12.

This is a would-be distinction without a difference. Appellants simultaneously have argued, correctly, that the Mississippi Constitution's guarantees of due process are identical to those guaranteed by the federal Constitution. Wheless Br. 8. They cannot pretend that the statutory scheme which authorized notice by publication was, on their theory, anything other than unconstitutional. Indeed, Belhaven's Statement of the Issues includes the following:

"Whether the notice requirements to assess, seize and sell private property under the 1930 Mississippi Code, as applied in this case, are constitutionally deficient or fail to satisfy the due process requirements of the Fourteenth Amendment to the U.S. Constitution." Belhaven Br. at 1.

The very cases on which they rely, *Mullane* and *Mennonite*, demonstrate their error. In *Mullane*, the Court expressly concluded: "We hold the notice of judicial settlement of accounts required by the New York Banking Law § 100-c(12) is incompatible with the requirements of the Fourteenth Amendment as a basis for adjudication depriving known persons whose whereabouts are also known of substantial property rights." 339 U.S. at 320. A one-word expression for incompatible with constitutional requirements is unconstitutional.

Likewise, in *Mennonite*, the board "contended that it had not received constitutionally adequate notice of the pending tax sale and of the opportunity to redeem the property following the tax sale. The trial court *upheld the Indiana tax sale statute against this constitutional challenge*." 462 U.S. 791, 795 (emphasis added). The Court does not seem to have been under any illusion that the tax sale statute in question was not being "constitutionally challenged." Neither should this Court be under the illusion urged by Appellants.

This Court has recently reminded the bar that "[t]he notice requirement of Rule 24(d) is strenuous." *Oktibbeha County Hosp. v. Miss. State Dep't of Health*, 956 So. 2d 207, 210 (Miss. 2007) (refusing to hear constitutional issue where notice given only to special assistant attorney general). This Court also cited the failure of the hospital to serve its appellate brief upon the Attorney General pursuant to M.R.A.P. 44(a). *Oktibbeha County Hosp.*, 956 So. 2d at 210-11. No such service has been made of Appellants' briefs, as demonstrated by their certificates of service. For this reason as well, this Court should follow its precedents and rule that any constitutional challenge to the statutes in question is procedurally barred in the present case.

### B. Because the addresses of the mineral owners were not reasonably ascertainable, notice by publication was constitutionally sufficient.

#### 1. Constitutional due process requirements are flexible, requiring that actual notice be given to parties whose names and addresses are reasonably ascertainable.

Appellants rely on *Mullane v. Central Hanover Bank & Trust Co.*, *supra*, and *Mennonite Board of Missions v. Adams*, *supra*, to argue that, because the owners of separately owned mineral interests did not receive actual notice of the 1942 tax sales, their constitutionally protected due process rights were violated and the 1942 tax sales were therefore void. However, Appellants miss the mark as to the constitutional requirements for due process and misapply the law to the facts.

The seminal announcement in *Mullane* is well known:

> An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.

*Mullane*, 339 U.S. at 314. Applying its "reasonably calculated" standard, the Court ruled that for those trust beneficiaries whose names and addresses were "at hand," for whom the "trustee has on its books the names and addresses," publication notice was not sufficient, and notice by mail was a reasonable requirement. *Id.* at 318. However, the Court's standard was flexible, not requiring actual notice to all persons whose interest might be affected.

> This Court has not hesitated to approve of resort to publication as a customary substitute in another class of cases where it is not reasonably possible or practicable to give more adequate warning. Thus it has been recognized that, in the case of persons missing or unknown, employment of an indirect and even a probably futile means of notification is all that the situation permits and **creates no constitutional bar to a final decree foreclosing their rights**. Those beneficiaries represented by appellant whose interests or whereabouts could not with due diligence be ascertained come clearly within this category. As to them the statutory notice is sufficient.

*Id.* at 317 (internal citations omitted and emphasis added). Applying the "reasonably calculated" standard, the Court said that publication notice was not unreasonable for beneficiaries who might be discovered by investigation, but "do not **in due course of business** come to the knowledge" of the trustee. *Id.* (emphasis added). Indeed, "we have no doubt that **such impracticable and extended searches are not required in the name of due process.**" *Id.* at 317-18 (emphasis added).

> What is due course and what is an impracticable search depend upon the circumstances.
>
> In the years since *Mullane* the Court has adhered to the principles, balancing the "interest of the State" and "the individual interest sought to be protected by the Fourteenth Amendment." *Mullane* at 314. The focus is on the reasonableness of the balance, and, as *Mullane* itself made clear, whether a particular method of notice is reasonable depends on the particular circumstances.

*Tulsa Professional Collection Services v. Joanne Pope*, 485 U.S. 478, 484, 108 S.Ct. 1340 (1988). Recognizing the difficulties, the Court said, "**These are practical matters in which we should be reluctant to disturb the judgment of the state authorities.**" *Mullane* at 318 (emphasis added).

In *Mennonite*, the Court held that a mortgagee was entitled to actual notice that property was to be sold for the mortgagor's failure to pay taxes. The Court expressly followed the analysis of *Mullane*, requiring actual notice when the interested party was reasonably identifiable. *Mennonite*, 462 U.S. at 798. Specifically, the Court said that "constructive notice must be supplemented by notice mailed to the mortgagee's *last known available address*, or by personal service." *Id.* (emphasis added). "[U]nless the mortgagee is not reasonably identifiable, constructive notice alone does not satisfy the mandate of *Mullane*." *Id.* Again,

> Notice by mail or other means as certain to ensure actual notice is a minimum constitutional precondition to a proceeding which will adversely affect the liberty or property interests of any party, whether unlettered or well versed in commercial practice, **if its name and address are reasonably ascertainable.**

*Mennonite* at 800 (emphasis added). By implication, constructive notice does satisfy due process when the party's name and address are *not* reasonably ascertainable. Clearly, the *Mennonite* court continued to affirm the flexible standard set out in *Mullane*.[10]

**2. Because the mineral owners did not identify their minerals to the tax assessor for assessment, statutory notice to such mineral owners was constitutionally sufficient.**

As set out above, persons who owned minerals separately from the surface of land in 1941 had a statutory duty to identify their separately owned minerals to the tax assessor for separate assessment. It is fundamental that if such mineral owners do not do so, their identities are not reasonably ascertainable by the county tax assessor. Absent separate assessment, the only way the tax assessor could know that mineral interests had been severed from the surface of assessed land would be to conduct a thorough search of the county land records. Since he would have to conduct such a search for every assessed tract of land in the county subject to sale for taxes, such a requirement would effectively make the tax assessor a full time title abstractor. That is wholly unreasonable. Instead, that would be "impracticable and extended searches . . . not required in the name of due process." See *Mullane* at 317. This Court recognized precisely that in *Stern v. Parker, supra*, noting that asking the assessor "to examine thousands of deeds of record in his county to ascertain on precisely what lands and what particular separate rights were owned in the various descriptions in his county and who owned them, a task which would require the prolonged services of persons highly skilled in the law." 200 Miss. at 44. Perhaps with enough time, effort and staff, the tax assessor might track down some mineral owners.

[10] Often quoted is the statement in *Mennonite* that the Court has "adhered unwaveringly to the principle announced in *Mullane*." *Mennonite* at 797. As examples of that adherence, *Mennonite* cites *Walker v. City of Hutchinson*, 352 U.S. 112 (1956), in which the landowner "was known to the city and on the official records," and *Schroeder v. New York City*, 371 U.S. 208 (1962), in which the "name and address were readily ascertainable from both deed records and tax rolls." *Mennonite* affirms flexibility and reasonableness.

However, such mineral owners do not come to the notice of the assessor *in the due course of his business* and are therefore not reasonably ascertainable. Clearly, statutory published notice for such mineral owners satisfies constitutional due process. *See Mullane* at 317.

Other courts have agreed. The Fifth Circuit concluded that "a search of the conveyance records to identify parties with mineral interests would be unduly burdensome and 'is a task beyond the routine examination of land records that was involved in *Mennonite*.'" *Davis Oil Company v. Mills*, 873 F.2d 774 (5th Cir. 1989) *citing Bender v. City of Rochester, NY*, 765 F.2d 7 (2nd Cir. 1985). The Fifth Circuit stated expressly that *Mennonite* does not require actual notice to every party who has a publicly recorded interest. *Davis*, 873 F.2d at 790. As the *Bender* court noted that even if a search identified record owners, it would not identify successors in interest, would therefore be inconclusive and would therefore be an unreasonable burden on the notice giver. *Bender*, 765 F.2d at 11. Likewise, in rejecting a challenge of a tax sale by tenants of a building whose owner failed to pay taxes, a Maryland court distinguished *Mennonite*, finding that the name and address of the mortgagee in *Mennonite* was "*readily ascertainable from a cursory examination* of the land records. *Marshall v. Tax Sale Investors, Inc.*, 998 F.Supp. 612, 618 (D.Md. 1998) (emphasis added).

Moreover, courts have found that the ability of property owners to protect themselves is a significant factor in determining whether such owners are reasonably ascertainable. This Court's decision in *Stern v. Parker* anticipated post-*Mennonite* analysis by other courts. Mineral owners have a primary duty to protect themselves. *Stern, supra*, 200 Miss. at 39. Mineral owners who do not see that their minerals are assessed and taxed are at fault, not the State. *Id.* at 37. The protection of notice requires "certain performance of mandatory duties and obligations from owners of various estates in land." *Id.* at 40.

The Fifth Circuit has ruled that the same reasoning applies post-*Mennonite*. *Davis Oil Company v. Mills, supra*, involved a mineral lessee's challenge of a foreclosure on the grounds that, since his lease was a protected property interest, he should have received actual notice of the foreclosure. A Louisiana statute provided that a person could obtain notice by mail of the seizure of immovable property by paying a ten-dollar fee and placing his/her name and address on file in the mortgage records of the parish where the property is located. *Davis*, 873 F.2d at 779. The Fifth Circuit held that under the circumstances, including the availability of the request notice statutory protection, constructive notice to the mineral lessee of the seizure and sale of the property was sufficient to meet the requirements of due process. *Id.* at 791.

> We are aware, as was the Second Circuit, that *Mennonite* states explicitly that 'a party's ability to take steps to safeguard its interests does not relieve the State of its constitutional obligation. We agree with the Second Circuit, however, that 'the initial determination of what obligation due process imposes must take into account what the interested party, or someone obligated to act in its behalf, is likely to do. Specifically, **we do not construe *Mennonite* as requiring actual notice to every party who has a publicly recorded interest in the subject property. Given the complexity of land records in some jurisdictions, the 'reasonableness' constraint of *Mullane* must limit the broad language of *Mennonite.***

*Davis*, 873 F.2d at 790 (emphasis added).

The Louisiana court has similarly rejected Appellants' due process argument. A Louisiana law passed in the wake of *Mennonite* provided that the tax collector shall send written notice "to each person holding a properly recorded mortgage on immovable property for which taxes are delinquent, *if such mortgage holder has notified the tax collector of such recorded mortgage*." *Hodges Ward Purrington Properties v. Lee*, 601 So.2d 358, 359 (La. Ct. App. 1992) (emphasis added). The Louisiana court held that because the mortgagee made no claim that it notified the tax collector of its mortgage as required by statute, it did not meet the burden of

proof that the sale was invalid for failure to afford proper notice to the mortgage holder. *Id.* at 360.

The availability of separate assessment for separately owned minerals (indeed, the obligation of such assessment) makes all the more unreasonable a requirement that the tax assessor search records to ascertain separately owned mineral interests. In light of the standards announced in *Mullane* and *Mennonite*, minerals owners who did not have their separately owned minerals assessed were not reasonably ascertainable, and constructive notice of the tax sale to such mineral owners was constitutionally sufficient. Under the rationale of *Stern*, *Davis Oil* and *Hodges Ward*, Appellants constitutional challenge fails.

### 3. Because the addresses of the mineral owners in the Subject Lands were not reasonably ascertainable, statutory notice was constitutionally sufficient.

As set out above, the 1940 forfeited tax land patentees conveyed the minerals under the lands to four grantees – Wheless, Cohen, Lewis and Pugh. The mineral deed from Graves to Cohen identifies the grantee only as "Aaron Cohen" – no address, no state of residence, no further identification at all. R. 656 (R.E. 46). Similarly, the mineral deed from Graves to Wheless identifies the grantee only as "J.S. Wheless, Jr." – no address, no state, no further identification. R. 657 (R.E. 47). Nothing in this deed provides any information upon which the tax assessor could even begin a search for these mineral owners.[11] Under any standard articulated by the Supreme Court, these mineral owners were not reasonably ascertainable. Statutory notice by publication was the only reasonable requirement of notice for these mineral owners who had not had their minerals separately assessed.

[11] Belhaven's Brief informs us that Wheless and Cohen were living in Texas at the time. Belhaven BR. 7.

The mineral deed from Nobles to Pugh identifies the grantee as "Jim Pugh, a single man, of Hinds County, Mississippi." R. 787 (R.E. 48). Similarly, the mineral deed from Nobles to Lewis identifies the grantee as "H. Guinn Lewis of Hinds County, Mississippi." R. 788 (R.E. 49). Even if the tax assessor had chanced upon these deeds, there was no address. It is not reasonable to expect the tax assessor to search records for populous counties to find the addresses of every possible owner of minerals of lands in his county subject to tax sale. Such a requirement would flood the assessor with hundreds of searches of far flung jurisdictions. Such investigation is not required, as emphasized by the Third Circuit, commenting on *Mullane* in the context of a bankruptcy proceeding:

> Reasonable diligence does not require 'impracticable and extended searches ... in the name of due process.' Precedent demonstrates that what is required is not a vast, open-ended investigation. The requisite search instead focuses on **the debtor's own books and records**. Efforts beyond a careful examination of these documents are generally not required.

*Chemetron Corp. v. Jones*, 72 F.3d 341, 347 (3rd Cir. 1995) (citations omitted and emphasis added). In fact, the principle announced in *Mullane* required notice to "known person whose whereabouts are also known." 339 U.S. at 320. Appellants' constitutional argument is without merit.

### C. Court decisions affecting property rights should not be applied retroactively.

Although Appellants cite general propositions of law regarding the retroactive effect of appellate decisions, they do not acknowledge that courts have expressly refused to apply *Mennonite* retroactively to invalidate tax sales of decades past. The West Virginia Supreme Court addressed this precise issue in *Geibel v. Clark*, 408 S.E.2d 84 (W. Va. 1991), and its thoughtful discussion of the issues governing retroactive application bears quotation at length:

> In determining whether to extend full retroactivity, the following factors are to be considered: First, the nature of the substantive issue overruled must be determined. If the issue involves a *traditionally settled area of law, such as*

> contracts or *property* as distinguished from torts, and the new rule was not clearly foreshadowed, then *retroactivity is less justified.* Second, where the overruled decision deals with procedural law rather than substantive, retroactivity ordinarily will be more readily accorded. Third, common law decisions, when overruled, may result in the overruling decision being given retroactive effect, since the substantive issue usually has narrower impact and is likely to involve fewer parties. Fourth, where, on the other hand, substantial public issues are involved, arising from *statutory or constitutional interpretations* that represent a clear departure from prior precedent, *prospective application will ordinarily be favored.* Fifth, the more radically the new decision departs from previous substantive law, the greater the need for limiting retroactivity. Finally, this Court will also look to the precedent of other courts which have determined the retroactive/prospective question in the same area of the law in their overruling decisions.

*Geibel*, 408 S.E.2d at 89 (quoting *Bradley v. Appalachian Power Co.*, 256 S.E.2d 879, 889 (W. Va. 1979) (italics in *Geibel*)). The *Geibel* court went on to recognize that "[w]hen interests in property are involved, courts usually give only prospective effect to a new court-made rule because property law is a traditionally settled area of the law, requiring, for example, finality of transactions to promote the marketability of real estate titles." *Id.* The same court found that the other factors tended to support prospective, not retroactive, application, particularly given that *Mennonite* was, in that court's view, a "radical departure" from previous precedent. *Id.* at 90. Much more so was *Mullane*, the 1950 case which effectively abolished the *in personam/in rem* distinction that had existed at common law for generations previously.[12]

As the *Geibel* court also noted, courts in Wyoming and New York had come to the same decision with regard to *Mennonite*. *Id.* The New York high court cited the "broad, unsettling effect on the marketability of otherwise settled titles to property" in refusing to apply *Mennonite Board* retrospectively. *McCann v. Scaduto*, 519 N.E.2d 309, 404 (N.Y. 1987).

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[12]In this regard, compare the decision of a Pennsylvania intermediate court that *Mennonite Board* should be applied retroactively (to a tax sale in 1983), on the grounds that the ruling was foreshadowed by *Mullane*. *Gay v. Cooper*, 1988 WL 156870, at **4 (Pa. Ct. Com. Pleas 1988). Regardless of the merits or demerits of this decision, the rationale will not apply in the present case, where *Mullane* was decided years after the tax sales in question.

A comparable issue arose after the United States Supreme Court struck down the replevin statutes of Pennsylvania and Florida, holding that their provision for repossession of goods after default was inconsistent with due process. *See Fuentes v. Shevin*, 407 U.S. 67 (1972). The Third Circuit held that *Fuentes* should be applied retroactively only with caution and only in limited circumstances.

> There is ample precedent for a refusal to apply *Fuentes* retrospectively to invalidate replevin proceedings begun before the date of the decision. Giving *Fuentes* a retroactive effect is not only harsh and impractical, but . . . would work **an injustice and a hardship upon (parties) who have lawfully acquired vested rights** in the form of their state judgments.
>
> As a consequence, a number of courts have not only refused to apply *Fuentes* retroactively but have let stand attachments and other results of unconstitutional state procedures obtained after *Fuentes* had cast doubt on those procedures but before a judicial decision invalidating the particular state statutory scheme in question. **Parties are thereby permitted to rely on state statutory procedures even after a United States Supreme Court decision has rendered them highly suspect.**

*Kacher v. Pittsburgh Nat'l Bank*, 545 F.2d 842, 846 (3d Cir. 1976) (citations omitted and emphasis added).

The rule applied in *Geibel* and *McCann* and in *Kacher* is a rule that this Court has recognized and applied. The rule against retroactive application "has full application in cases where the obligation of contracts entered into in reliance upon the earlier decision would be impaired and in cases where vested rights acquired in reliance upon such decision would be injuriously affected." *Bailey v. Fed. Land Bank of New Orleans*, 40 So. 2d 173, 176 (Miss. 1949). Unless this Court wishes to invalidate innumerable tax sales prior to 1947 and bring into question otherwise settled titles to property, it should deny retroactive application of *Mennonite* and *Mullane*.

## CONCLUSION

For all the complicated arguments and detailed facts in this case, the central issue is straightforward: Were the 1942 tax sales valid to convey the Subject Lands, including the minerals, to the tax sale purchasers? Appellants incorrectly argue that the County did not comply with some aspect of the statutory taxation scheme, and the County's failure renders the 1942 tax sale void. However, the law – statutory law and case law – is clear that under the Code of 1930, land was to be assessed every other year, and lands that became taxable in the second year of the two-year assessment were to be added to the land roll for taxation in that second year. The record shows that Covington County followed the statutory requirements completely and precisely. There is no merit to the Appellants' claim that the 1942 tax sales and the assessments upon which they were predicated, were not properly conducted under then current Mississippi law. The Chancellor correctly ruled that the 1942 tax sales were valid, and there is no reason, on the basis of the law or the record, for this Court to reverse the Chancellor.

Appellants challenge the constitutionality of the 1942 tax sales. As a threshold consideration, the Appellants did not notify the Attorney General of the constitutional challenge as required by M.R.C.P. 24(d) or M.R.A.P. 44(a) and thus should be barred from raising the issue here. Even without the procedural bar, though, the constitutional issue fails. The cases the Appellants rely upon hold that constitutional due process requires that property owners whose names and addresses are reasonably ascertainable must be given actual notice prior to an action that affects their property rights. However, under the analysis of those cases, the names and addresses of owners of severed mineral interests who did not have those mineral interests separately assessed were not reasonably ascertainable. Publication notice for such mineral owners was constitutionally sufficient.

## CERTIFICATE OF SERVICE

I , John H. Geary, Jr, certify that on April 23, 2009, I have caused to be hand delivered the original and three copies of the Brief of Appellee EOG Resources, Inc. and an electronic disk of the brief for filing to:

Ms. Betty Sephton, Clerk
Mississippi Supreme Court
Mississippi Supreme Court Building
450 High Street
Jackson, Mississippi 39201

I have caused to be mailed by United States mail, postage prepaid, a copy of the Brief of Appellee EOG Resources, Inc. to the to following:

Honorable Joe Dale Walker
Covington County Chancery Judge
P.O. Box 909
Monticello, Mississippi 39654-0909

Roy H. Liddell
WELLS, MARBLE & HURST, PLLC
P.O. Box 1588
Jackson, Mississippi 39206

Jefferson D. Stewart
Holmes S. Adams
ADAMS AND REESE LLP
P.O. Box 24297
Jackson, Mississippi 39225-4297

Carey R. Varnado
MONTAGUE, PITTMAN & VARNADO
P.O. Drawer 1975
Hattiesburg, Mississippi 39403

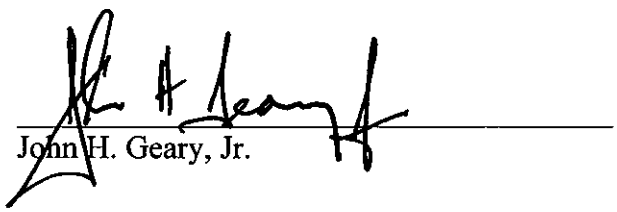
E. Stephen Williams
John Sanford McDavid
Lindsey Green Watts
YOUNG WILLIAMS PA
P.O. Box 23059
Jackson, Mississippi 39225

Thomas R. Crews
WATKINS & EAGER PLLC
P.O. Box 650
Jackson, Mississippi 39205

Lawrence C. Gunn, Jr.
GUNN , HICKS AND BENNETT PLLC
P.O. Box 18350
Hattiesburg, Mississippi 39404-8350

Watts C. Ueltschey
J. Anthony Sherman, Jr.
BRUNINI, GRANTHAM, GROWER & HEWES, PLLC
P.O. Drawer 119
Jackson, Mississippi 39205

James L. Quinn
P.O. Box 271
Hattiesburg, Mississippi 39403-0271



John H. Geary, Jr.