

15-0907

IN THE CIRCUIT COURT OF MCDOWELL COUNTY, WEST VIRGINIA

LBR HOLDINGS, LLC,

Plaintiff,

v.

Civil Action No. 13-C-213

GREGORY G. POULOS, JASON G.
POULOS, PAMELA F. POULOS, SHAUN
D. ROGERS, KEVIN H. ROGERS, DEREK
B. ROGERS, T.G. ROGERS, III, AND EQT
PRODUCTION COMPANY,

Defendants.

BENCH TRIAL ORDER

On October 15, 2014, the Court conducted summary judgment hearings in the above-referenced matter wherein counsel appeared for the Plaintiff and the Defendants. The Court entered an Order on October 24, 2014, Denying Plaintiff's Motion for Summary Judgment and Denying Poulos/Rogers Defendants' Motion for Summary Judgment. The Court, thereafter set a bench trial on November 12, 2014 which continued on to November 13, 2014. The key issue at the Bench Trial was whether the parties intended to have a 25% interest in the oil and gas on the Property in a 1938 deed to include CBM. Considering the testimony of the parties at the Bench Trial and the Court's own independent research, and based on the totality of the all the related circumstances, the Court hereby rules as follows.

FINDINGS OF FACT

1. Prior to 1938, T.G. and Martha F. Rogers (hereinafter, "Talmage Rogers Group"), Lloyd and Anne F. Rogers (hereinafter, "Lloyd Rogers Group"), and Lon B. Rogers (hereinafter, "Lon Rogers Group") were affiliated with the Rogers Brothers Coal Company, which owned property and mineral rights in Virginia, West Virginia, and Kentucky.¹
2. On May 27, 1938, the Talmage Rogers Group and the Lloyd Rogers Group deeded all of their property interests in several parcels of property located in McDowell County, West Virginia and Buchanan County, Virginia (hereinafter, "the Property") to the Lon Rogers Group, stating:

[T]he parties of the first part . . . do hereby grant and convey unto the party of the second part, . . . all of their right, title and interest, in and to all of the hereinafter described property, and being a two-thirds (2/3) undivided interest (the party of the second part owning the other one-third (1/3) undivided interest), said property being situated in McDowell County, West Virginia . . . including all lands, minerals, rights, interests, easements, rents, issues and profits therefrom But there is expected from the above described property an undivided one-half interest in the oil and gas under said property and the same is reserved to T.G. Rogers and Lloyd Rogers, parties of the first part, their heirs and assigns, together with the usual and necessary rights of ingress and egress and drilling rights to explore, get and remove said oil and gas.²

3. LBR is the successor-in-interest to all of the Lon Rogers Group's and the Lloyd Rogers Group's interests in the Property, and own a 75% interest in the oil and gas under the

¹ See Joint Stipulation of Facts filed November 12, 2014.

² See Joint Stipulation of Facts filed November 12, 2014 and deed of the conveyance also attached to the Joint Stipulation.

Property, 100% of the coal and all other mineral interests in the Property, and certain portions of the surface of the Property.³

4. The Poulos/Rogers Parties are the successors-in-interest to the Talmage Rogers Group and own a 25% interest in the oil and gas under the Property.⁴
5. EQT Production Company (hereinafter, "EQT") and GeoMet, Inc. and GeoMet Operating Company, Inc. (hereinafter, collectively "GeoMet") have drilled and operated Coalbed Methane Gas (hereinafter, "CBM") wells on the Property and generated royalties therefrom.⁵
6. EQT and GeoMet have placed in escrow or otherwise withheld payment of 25% of the CBM royalties attributable to the Property based upon uncertainty as to whether the royalties are owed to the Poulos/Rogers Parties or LBR.⁶
7. The land at issue in the case is approximately 3,800 acres in McDowell County, West Virginia.⁷
8. A Buchanan County, Virginia Court found the 1938 deed language to include CBM for property that was located in Buchanan County, Virginia in an Order entered July 10, 2014; however, Virginia law does not control the outcome of this case.
9. As explained by expert Dr. Nino Ripepi, historically, CBM was regarded as a nuisance and significant hazard associated with underground coal-mining, rather than a commercial resource.⁸

³ See Joint Stipulation of Facts filed November 12, 2014.

⁴ See Joint Stipulation of Facts filed November 12, 2014.

⁵ See Joint Stipulation of Facts filed November 12, 2014.

⁶ See Joint Stipulation of Facts filed November 12, 2014.

⁷ See Bench Trial Transcript Page 21-22.

⁸ See Bench Trial Transcript Page 155, Lines 11-23; Page 201, Lines 5-24; Pages 227-228.

10. Through the testimony of Dr. Nino Ripepi, the first commercial CBM well in the Central Appalachian region including West Virginia and Southern Virginia was in Dickenson County, Virginia in 1988 and production of CBM in southern West Virginia began in the 1990s.⁹
11. Through the testimony of Dr. Nino Ripepi, most of the historical and scientific literature regarding four pre-1938 CBM wells in Wetzel County, West Virginia showed that while these wells were together in the same area; this does not make a geographical area commercial and does not make the CBM industry commercial.¹⁰
12. Around twenty producing wells within the boundaries of a field are required to consider a specific field commercial.¹¹
13. Fon Rogers testified that the 1938 Deed marked coal as the dominant, valuable asset of the land, wherein gas in coal was an unwanted hazard and not a commercial resource.
14. Interest and profiting from CBM on the land in question in the above-captioned case did not occur until the late 1980s to the early 1990s.¹²
15. In *Energy Development Corp. v. Moss*, the Supreme Court of Appeals of West Virginia made an observation that the leases in said cases in 1986 were executed “before the widespread commercial production of coalbed methane in West Virginia” and “the production of coalbed methane was not a common practice in McDowell County at the time the leases were executed.”¹³

⁹ See Bench Trial Transcript Page 166, Lines 14-21; Pages 180-183.

¹⁰ See Bench Trial Transcript Page 241, Lines 5-12.

¹¹ See Bench Trial Transcript Pages 281-282.

¹² See Bench Trial Transcript Page 40.

¹³ *Energy Development Corp. v. Moss*, 214 W.Va. 577, 585- 587, 591 S.E.2d 135, 143-145 (2003). *Note:* This Court understands that the subject matter in *Moss* centered around production rights in a lease, while the above-captioned case is about ownership rights under a deed; however, this Court finds this distinction to be irrelevant to the Supreme Court of Appeals of West Virginia’s comments regarding general CBM practices in 1986, decades after the 1938 deed in the above-captioned case.

16. The Virginia Supreme Court also found CBM to be a hazard, and the value of CBM was not established until many decades later after 1938. From about 1887 “and for about a century thereafter, CBM was known as the ‘miner’s curse.’ Indeed, during these years, a great many mine explosions occurred, killing or maiming thousands of miners.”¹⁴ The Virginia Supreme Court observed that CBM became a valuable energy source in the 1970s.¹⁵ and at the time of the 1887 deeds at issue in the case, “the parties could not have contemplated at the time the severance deeds were executed that CBM would become a very valuable energy source.”¹⁶
17. The Defendants’ expert, Dr. J. Donald Rimstidt did not dispute that CBM was not in common practice anywhere in the U.S. and specifically not in West Virginia in 1938, and the general notion in 1938 that CBM was a hazard.
18. Further, Dr. Rimstidt opined that there is no “scientific reason” to distinguish CBM from natural gas but did not use legal, commercial, technological, or other reasons available in distinguishing CBM and natural gas.
19. W.Va. Code §22-21-1 shows a distinction created by the West Virginia Legislature between CBM and natural gas, and the statute was enacted during the time frame Dr. Ripepi testified that commercial CBM began in southern West Virginia, the 1990s. The statute emphasizes that coal is a more valuable resource than CBM, wherein mining coal should be protected from the CBM.
20. Defendants’ expert Mary Behling of the West Virginia Geological and Economic Survey commented that “Coalbed methane was not on our radar until the early 1990s.”¹⁷

¹⁴ *Harrison-Wyatt, LLC v. Ratliff*, 593 S.E.2d 234, 235 (2004).

¹⁵ *Id.*

¹⁶ *Id.* at 238.

¹⁷ See Bench Trial Transcript Page 361, Lines 19-20.

21. Of the 62 well identified in Defendants' Exhibit 1, 15 wells were completed after 1938 and cannot show the intent of the parties with the 1938 deed. Of the 47 remaining wells, 23 wells were drilled in shallow depths in the City of Welch, which joined with Dr. Ripepi's testimony could not produce commercial quantities of CBM and was probably used for home usage.¹⁸

CONCLUSIONS OF LAW

1. Venue and jurisdiction in the McDowell County Circuit Court are both proper in this matter.
2. West Virginia law is applied to the above-captioned case, not previously held Virginia law. The Supreme Court of Appeals of West Virginia found "It is a universal principle of law that real property is subject to the law of the country or state within which it is situated. . . All matters concerning the taxation of realty, title, alienation, and the transfer of realty and the validity, effect, and construction which is accorded agreements intending to convey or otherwise deal with such property are determined by the doctrine of *lex loci rei sitae*, that is, the law of the place where the land is located. . . Every state has plenary jurisdiction and control of the property, real and personal, located within its borders."¹⁹
3. In 1994, the West Virginia Legislature passed a statute regarding CBM, distinguishing the properties of CBM from natural gas and stated: "the value of coal is far greater than the value of coalbed methane and any development of the coalbed methane should be

¹⁸ See Bench Trial Transcript Pages 527-530.

¹⁹ *Keesecker v. Bird*, 200 W.Va. 667, 679-680, 490 S.E.2d 754, 766-767 (1997).

undertaken in such a way as to protect and preserve coal for future safe mining and maximum recovery of the coal[.]”²⁰

4. The Supreme Court of Appeals of West Virginia stated in *Moss*, “We express no opinion as to what result may obtain in a different factual scenario.”²¹
5. In terms of ownership rights of CBM the *Moss* Court said, “the Legislature was reluctant, as are we, to make a sweeping pronouncement about the general ownership of all coalbed methane.”²²
6. Therefore, based on *Moss*, a case-by-case approach is necessary to focus “on what a party, at the time of the conveyance, would have intended to pass, or not pass, in the conveyance.”²³
7. Once a document is determined to be ambiguous, the West Virginia Courts use canons of constructions to search for the intent of the parties. Under West Virginia law, “deed reservations are strictly construed against a grantor and in favor of a grantee.”²⁴
8. In terms of ambiguity in a deed, the Supreme Court of Appeals of West Virginia states: “where there is ambiguity in a deed, or where it admits of two constructions, that one will be adopted which is most favorable to the grantee.”²⁵
9. The Supreme Court of Appeals of West Virginia also finds that the intent of parties to a document can be determined by the custom and usage at the time of the document’s execution. “In order for a usage or custom to affect the meaning of a contract in writing because [it was] within the contemplation of the parties thereto, it must be shown that the

²⁰ W.Va. Code § 22-21-1.

²¹ *Moss*, at 146.

²² *Id.*, at 153.

²³ *Id.*, at 149.

²⁴ Syl. Pt. 2, *McDonough Co. v. E.I. DuPont DeNemours & Co., Inc.*, 167 W.Va. 611, 280 S.E.2d 246 (1981).

²⁵ Syl. Pt. 5, *Cottrill v. Ranson*, 200 W.Va. 691, 693, 490 S.E.2d 778, 780 (1997).

usage or custom was one generally followed at the time and place of the contract's execution."²⁶

DISCUSSION

Under West Virginia case law, deed reservations are strictly construed against the grantor and if an ambiguity is present, an interpretation will be adopted most favorable to the grantee. Since the Defendants' predecessors were the grantors in the 1938 Deed, their reservation should be construed against LBR, successors of the grantee. Thus, the Court shall adopt a construction most favorable to LBR. The Court finds that there is an ambiguity in the deed/ potentially two constructions (whether CBM was considered part of the term "gas" within the 1938 deed), a construction will be adopted, most favorable to the grantee, the Plaintiff.

The Court understands that the Defendants argue that there is no ambiguity and the term "gas" in the 1938 deed includes CBM, thus a gas is a gas. However, the great weight of research, historical data, Dr. Ripepi's testimony, the West Virginia Code, and case law including *Moss* have created a distinct line between CBM and gas.

Furthermore, the weight of evidence presented at trial showed that CBM in 1938 was not a common practice. The custom was to consider CBM as a hazard to be avoided rather than a commercial entity. Based on the totality of all the related circumstances, the parties of the deed did not intend reservations in the 1938 deed to include an interest in CBM. The predecessors of the Defendants would not have intended to reserve an interest in a dangerous and even deadly entity like CBM that was considered a nuisance and a hazard. The commercialization of CBM in McDowell County, West Virginia occurred decades later in the 1990s.

²⁶ *Moss*, at 145.

The Defendants also argue that *Moss* is distinguishable from the above-captioned case because *Moss* was regarding production rights under a lease and this case is about ownership rights under a deed. However, the two cases are analogous. If a lease conveying the right to produce “gas” does not include the right to produce CBM absent specific language to the contrary or other indicia of the parties’ intent, then deed language conveying or reserving “gas” does not include ownership of CBM absent specific language to the contrary or other indicia of the parties’ intent. The *Moss* Court showed that “gas” leases were ambiguous with respect to producing CBM. Therefore, it is not logical to find the term “gas” in the 1986 leases in *Moss* as ambiguous with respect to the inclusion of CBM, but the term “gas” unambiguously includes CBM when used in a reservation in a deed.

Based on the totality of all the related circumstances and as discussed above, an analysis of the intent of the parties and the common custom/usage at the time of the 1938 deed indicates that the grantors, the Defendants, would not have intended the reservation to include CBM due to the general opinion that CBM was hazard/nuisance in 1938.

The objection and exception of the Individual Defendants are noted regarding the Court’s ruling. It is so **ORDERED**.

It is further **ORDERED** that all CBM royalties and proceeds from the McDowell County, West Virginia property being held in escrow be released and paid to the Plaintiff with interest at the maximum lawful rate.

For the reasons set forth above, the Court hereby **DISMISSES** the above-captioned case, and it shall be stricken from the docket.

The Clerk is directed to forward a copy of this Order to all counsel of record.

ENTER this 19th day of August, 2015.

Booker T. Stephens
Booker T. Stephens, Judge

A TRUE COPY TESTE
FRANCINE SPENCER, CLERK
BY Angel Kovich