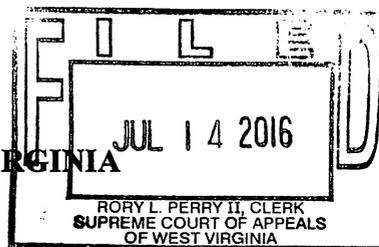


IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA



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

Petitioners,

v.

LBR HOLDINGS, LLC,

Respondent.

Docket No. 15-0907

**PETITIONERS' REPLY TO THE *AMICUS CURIAE* BRIEFS FILED
IN SUPPORT OF LBR HOLDINGS, LLC**

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I. INTRODUCTION

Pursuant to this Court's Order of May 17, 2016, Petitioners respond to the joint *amicus curiae* brief ("Joint Brief") of Natural Resource Partners, L.P., National Council of Coal Lessors, Inc., Piney Land Company, West Virginia Land and Mineral Owners' Association, and West Virginia Coal Association, Inc. (collectively "NRP, *et al.*") and the *amicus curiae* brief ("Brief") of the West Virginia Surface Owners' Rights Organization ("WVSORO") filed in support of Respondent, LBR Holdings, LLC ("LBR").

NRP, *et al.* and WVSORO argue that absent a specific reference to CBM in the severance deed at issue, the grantors did not reserve CBM as part of the gas estate. As is reflected in the record before this Court, although the term "coalbed methane" is a modern term, coined decades after the severance deed at issue was entered in 1938 (the "1938 Deed"), it is not a new creation. Gas has long been known to exist in coal seams. Prior to the creation of the term "CBM," gas in coal seams was referred to simply as "gas."

The submissions of NRP, *et al.* and WVSORO wholly avoid the practical implications of the trial court's ruling. The trial court's ruling that the economics of a resource's production are determinative of its ownership is an impractical and unjust approach not rooted in the law. NRP, *et al.* and WVSORO do not address this reality. Instead, these *amici* fail to address the record *in this case*, and submit superfluous arguments in support of LBR. Because the 1938 Deed contained an unlimited and unambiguous reservation of "the gas" estate and because CBM is "gas" and in 1938 was simply referred to as "gas," the trial court erred in holding that LBR, and not the Petitioners (the "Poulos/Rogers Parties"), owns the CBM and associated royalties at issue.

II. The Court Must Look at the Record and the Facts Of This Case.

Relying on the evidentiary record of *other cases*, NRP, *et al.* state that “[i]t is simply beyond all argument” that CBM was not being commercially produced and was not “even a known valuable resource” at the time of the deed’s execution. Joint Brief at 15. Such assertions are contrary to the undisputed evidentiary record of *this case* which established that gas in coal seams was both being produced and sold in considerable quantities and known to be valuable at the time of the 1938 Deed’s execution. NRP, *et al.*, suggest that this Court is bound by its previous statements and the statements of other courts *in other cases*, such as *Energy Development Corp. v. Moss*, 214 W.Va. 577, 591 S.E.2d 135 (2003), *Harrison-Wyatt v. Ratliff, et al.*, 267 Va. 549, 593 S.E.2d 234 (2004), and others. Joint Brief at 15. It is elementary, however, that the facts and evidentiary record created in *this case* must govern the outcome. The *Moss* Court confirmed this obvious rule and approach when it wrote that the Court was expressing no opinion as to what the outcome may be under a different set of facts. *Moss*, 214 W.Va. at 588.

The Poulos/Rogers Parties presented contemporaneous and historical documents, including official records of the West Virginia Geological and Economic Survey (“WVGES”) and various scientific publications, proving that significant quantities of gas were being produced from coal seams in West Virginia prior to 1938 and that gas in coal seams was known prior to 1938 to have great economic value. *See generally* App. Vol. III at 537-702; *see also, e.g., id.* at 292 and 308-310 (1937 publication of the WVGES stating that the purpose of the report was to investigate “natural gas in West Virginia as an economic resource,” and including a specific section entitled “GAS FROM VARIOUS COAL HORIZONS”); *id.* at 308 (“Several wells near Hundred, Wetzel County, are producing considerable volumes of gas (as much as 380 M.C.F.) from Pittsburgh Coal...”); *id.* at 327 (1904 publication by the West Virginia Geological Survey

discussing the production of gas from coalbed and stating “Several examples are known in West Virginia as well as Pennsylvania, where valuable flows of gas have been obtained from coal beds.”); and *id.* at 390 (1943 publication by State Geologist Paul Price and the Gas Analyst of the West Virginia Geological Survey concluding that “Natural coal gas occurs in the coals of West Virginia in sufficient quantity to meet a large part of the state’s fuel-gas requirements for many years if it can be successfully recovered.”).

The WVSORO argues that “severances of oil and gas took place long before the production [of CBM] by even conventional vertical wells was contemplated, let alone the more recent horizontal, pinnate drilling of CBM wells.” Brief at v. Similarly, NRP, *et al.* argue that at the time the severance deed was executed, “horizontal drilling and fracturing methods used today to invade the coal seam and recover the CBM were completely unknown.” Joint Brief at 22. Once again, the arguments of WVSORO and NRP, *et al.*, ignore the evidentiary record in this case.

As the record reflects, while the use of vertical wells may have become more common as the industry progressed, vertical wells were used long before the 1938 Deed was entered along with the early form of fracking, known as “shooting a well.”¹ Coal formation wells were “shot” (fractured) prior to 1938 as indicated in some of the well histories in App. Vol. III, p. 537-702. *See also* App. Vol. III, p. 398, which refers to the early “shooting” of Pittsburgh coal and Sewickley coal wells in the Big Run and Pine Grove fields. Likewise, while horizontal drilling may be more recent in application, the record shows it was in fact considered a promising technology in the relevant era. For example, in 1943, State Geologist Paul Price and the Gas

¹ “Shooting a well” is a type of “fracturing” which involves “[e]xploding nitroglycerine or other high explosive in a hole, to shatter the rock and increase the flow of oil or gas.” *Williams & Myers Manual of Oil & Gas Terms*, at page 959. (“Shooting a Well”).

Analyst of the WVGES, J.W. Headlee, wrote that gas in coal, as well as gas in other strata, “can be readily recovered by drilling into the fracture system and in such cases horizontal drilling will intercept many fractures as compared with vertical boreholes.” App. Vol. III at 390. These and other contemporaneous records submitted by Petitioners show that in 1938 it was known that gas was found in various strata, including coal seams, that gas was being produced from various strata, including coal seams, that advancements in technology would increase the volumes of gas produced from various strata, specifically coal seams, and that gas in coal seams had significant value once produced. Thus, even if this Court favors the case-by-case approach of *Moss* over the certainty and predictability sought by *Faith United*, the record *in this case* shows that CBM was viewed as a valuable resource, not merely viewed as a resource having no value, a dangerous waste product, and a nuisance, as NRP, *et al.* argue. See Joint Brief at 15, 16; *Faith United Methodist Church and Cemetery of Terra Alta v. Morgan*, 745 S.E.2d 461, 474 (2013) (“[I]n drafting deeds or other instruments of conveyance, courts and practitioners want terms with definite meanings.”).

NRP, *et al.* and the WVSORO argue that in order to have reserved the CBM, the parties to the 1938 Deed must have specifically referenced CBM in the reservation. Importantly, the record establishes that the term “CBM” was not coined until the latter part of the 20th Century, and up until the 1990’s, the official records of the WVGES referred to gas produced from coal seams simply as “gas.” App. Vol. II at 417. It is beyond all reason to suggest that the parties to the 1938 Deed should have referenced CBM by any name other than what it was generally referred to at the time: “gas.”

A. Moss Is Not Comparable or Applicable.

Moss was narrowly crafted based on the record before it. Contrary to NRP, *et al.*’s representations, *Moss* expressly did not set a “precedent.” Joint Brief at 6. *Moss* was limited to

the facts and the parties before it, and the Court could not have been clearer in that regard. *Moss*, 214 W.Va. at 588 (“We express no opinion as to what result may obtain in a different factual scenario, as such a question is not before the Court at this time.”). As the *amicus curiae* brief of the West Virginia Royalty Owners’ Association (“WVROA”) thoroughly discusses, the facts of this case and the record below are significantly different from the facts and record in *Moss*, as are the positions of the parties. WVROA Brief at 7-9.

In expressly limiting its holding to the facts and issues of that case, *Moss* found that the lessee had shown no intent to produce CBM at the time of the lease’s execution, even as, significantly, the lessee had knowledge of the value of the CBM at the time of the lease’s execution, while the lessor did not. *Moss*, 214 W.Va. at 582. Further, the dispute in *Moss* was whether the gas lessee had the right to fracture the coal seam. The *Moss* Court was not faced with the question now before this Court, which is whether an unlimited reservation of “the gas” estate in 1938 only reserved some types of gas as NRP, *et al.* and LBR ask this Court to find. NRP, *et al.* suggest that only those types of gases being commercially produced at the time the severance deed was entered were reserved. *Moss* does not stand for such a proposition.

As amicus party WVROA succinctly explained in its brief, this case shares no similarities with the issues prevalent in *Moss*. *Moss* determined only that the lease at issue did “not give the oil and gas lessee the right to drill into the lessor’s coal seams to produce coalbed methane gas.” WVROA Brief at 9 (citing *Moss*, 214 W.Va. at 588) (emphasis added). Once a coal owner consents to the stimulation of the coal seam (for various and valuable benefits to the coal production), the gas that is then produced is the same gas produced from other strata, and as such, the only logical conclusion which can provide certainty in the law as *Faith United* directs, is that once separated from the coal, CBM belongs to the owner of the gas estate.

B. Surface Use is Not at Issue.

The WVSORO argues that concerns about surface use should guide this Court's determination as to who owns the CBM. The parties to this case have no dispute as to the use of the surface. The Court's determination of who owns the CBM in this case will not affect future CBM production or the rules of law concerning surface use. CBM will continue to be produced, and surface owners will remain protected by the relevant West Virginia statutes, including the due process requirements and surface considerations outlined in W. Va Code § 22-21-1, *et seq.* This case does not implicate the concerns expressed by the WVSORO, and the determination of what party in this matter owns the CBM will have no effect on WVSORO's surface use concerns.

III. Production Volumes and Technologies Do Not Bear on Ownership.

NRP, *et al.* suggest, like LBR, that the law requires a resource to have been produced in certain unspecified "commercial" quantities and by production techniques currently being used in order for a party to have intended to convey or reserve it. This "commercialization" standard proffered by NRP, *et al.* and LBR, simply does not exist in the law. Relying on *Moss's* statement that in order for a usage or custom to affect the meaning of a contract, it must be one that was "generally followed" at the time of its execution, NRP, *et al.* as does LBR, suggest that the law requires a certain threshold of production of a resource to be achieved before it will be found that the parties intended to convey or reserve it. Joint Brief at 15-16. *Moss* imposed no such standard. Nor do NRP, *et al.* cite any other source as the authority for imposition of such a standard. To the contrary, the law is clear that "The knowledge of the parties of the value, or even the existence of the substance at the time the conveyance was executed has been found to be irrelevant to its inclusion or exclusion from a grant of minerals." *Faith United*, 745 S.E.2d at 483, n.124 (quoting *Moser v. U.S. Steel Corp.*, 676 S.W.2d 99, 102 (Tex. 1984) (emphases added)).

Even if “commercialization” were relevant, the undisputed evidence in the record as to the production of gas from coal seams in and prior to 1938 is that it was being produced and sold, and this alone establishes that CBM was a known economic (commercial) resource in 1938. Indeed, LBR’s expert, Dr. Ripepi, gave no opinion as to what would have been considered “commercial” production in 1938 and only opined that a modern-day energy giant currently considers “commercial production” to be 20 wells or more. App. Vol. 2 at 282.

NRP, *et al.*, and LBR are advocating a “sliding scale” ownership test that will render meaningless the words on the face of a deed, and will create “interminable confusion of land titles.” *Faith United*, 745 S.E.2d at 469. For example, for any given deed, what is the threshold between “commercial” and “non-commercial” production at any given point in time? How many gas wells constitute “commercial” production at any given time? What volumes of gas constitute “commercial” production at any given time? Put simply, when is the production of a resource “commercial enough” to effect a transfer of ownership? The trial court’s holding, which relied on Dr. Ripepi’s testimony, implies that if 19 wells were producing gas from coal seams at a certain point in time, then party A owns the CBM, but if 20 wells were producing gas from coal seams at that same time, then Party B owns the CBM. This cannot be the standard for ownership of natural resources in West Virginia as this is precisely the outcome *Faith United* sought to avoid in “endeavor[ing] to prevent and eradicate uncertainty of such titles.” 745 S.E.2d at 469.

IV. Bright Line Rules Are Favored.

As this Court held in *Faith United*, courts must endeavor to eradicate uncertainty of land titles and avoid inflicting interminable confusion upon the people. 745 S.E.2d at 469. Tellingly, neither NRP, *et al.* nor WVSORO addresses the fact that upholding the trial court’s ruling will upend the state of property law in West Virginia. In direct contradiction of *Faith United*, such an

outcome would impose interminable confusion and uncertainty on ownership of minerals and natural resources in West Virginia.

WVSORO argues that imposing bright line rules may distort the intentions of the parties to instruments of conveyance. Brief at 8. While the *Moss* Court declined to adopt a bright line rule based on the facts before it, instead favoring a case-by-case approach, the evidentiary record in this case shows that in 1938, “gas” meant not some volume of gas or some types of gases, but “all gas.” Seeking to put an end to uncertainty of land titles, such as the very dispute now before this Court, *Faith United* ordered the imposition of clear and certain rules. WVSORO’s concern that such clear and certain rules may distort the intentions of some parties to some documents is not supported by the record in this case.

An affirmation of the trial court’s order in this case will mean that every conveyance or reservation of a resource in West Virginia will forever be subject to challenge as production quantities increase or decrease and technologies evolve. Owners of natural resources in West Virginia will never know what they really own, and title examiners will not know “who owns what,” until they are subjected to lengthy and expensive litigation such as this. And only that determination will suffice until the next conveyance or reservation or the next technological advancement.

Finally, NRP, *et al.* ask that if this Court desires to adopt a bright line rule regarding ownership of CBM, it should find that the rights of the coal estate owner trump the rights of the gas owner to produce gas physically present in the coal seam. Joint Brief at 22, n.4. To the extent NRP, *et al.* intend to suggest that CBM should be found to be the property of the coal estate owner, such an argument is misplaced, as that issue was not litigated below and has no foundation in the record. To the extent NRP, *et al.* intend to suggest that gas owners may not

access the coal seams to produce their CBM, likewise, this issue was not litigated and has no foundation in the record.

V. **CONCLUSION**

For the foregoing reasons, the Poulos/Rogers Parties respectfully request that the Court overturn the ruling of the trial court and find that they, as owners of the gas estate, are the owners of the CBM and associated royalties at issue.

Respectfully submitted,

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The undersigned counsel does hereby certify that she has this day served a true and correct copy of the above and foregoing upon all counsel of record via e-mail and first class mail postage pre-paid:

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