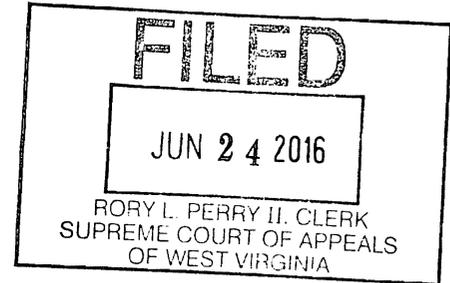


No. 15-0907

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,  
T.G. ROGERS, III, and  
EQT PRODUCTION COMPANY,  
Petitioners,



v.

Docket No. 15-0907

LBR HOLDINGS, LLC,  
Respondent.

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**AMICUS CURIAE BRIEF ON BEHALF 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. IN SUPPORT OF RESPONDENT LBR HOLDINGS, LLC**

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Dated: June 24, 2016

## TABLE OF CONTENTS

I.	Introduction .....	1
II.	Factual And Procedural History.....	3
III.	Issues On Appeal.....	7
IV.	Points And Authorities Relied Upon .....	8
V.	Discussion Of Law .....	10
A.	The Court Should Not Overrule The Reasoned, Flexible Approach To Determining CBM Ownership, Set Forth In The 2003 Case Of <i>Energy Development Corporation v. Moss</i> , 214 W.Va. 577, 591 S.E.2d 135 (2003), In Favor Of The Rigid, One Size Fits All “Gas Is Gas” Approach Advocated By The Petitioners .....	10
1.	Although They Are Both “Gaseous” In Composition, CBM Is Critically Differentiated From So-Called Conventional “Natural Gas” Because Of Its Intimate Connection To The Coal From Whence It Is Derived.....	12
2.	For Well Over A Century, CBM Has Been Considered A Dangerous Byproduct Of Coal Mining, Which Must Necessarily Be Vented And Controlled During The Mining Of The Coal Seam.....	14
3.	It Is Simply Beyond All Argument That CBM Was Not Subject To Wide Commercial Development, Or Even A Known Valuable Resource, In 1938.....	15
B.	The “Gas Is Gas” Approach Advocated By Petitioners, As An Alternative To The <i>Moss</i> Analysis, Flies In The Face Of Long-Standing Applicable Rules Of Contractual Construction, All Of Which Militate In Favor Of The Continued Application Of The Flexible, Case-By-Case Approach Set Forth In <i>Moss, supra.</i> .....	17
1.	Construction Of Latently Ambiguous Contractual Language .....	17
2.	Construction Against Lessor/Grantor.....	19
3.	Business Usages.....	20

C. The *Moss* Court Carefully Considered Decisions From Other Jurisdictions And Found Each To Be Consistent With Its Underlying Reasoning, Which Supports The Findings Of The Circuit Court In The Present Case .....21

VI. Prayer For Relief .....25

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INC. IN SUPPORT OF RESPONDENT LBR HOLDINGS, LLC**

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To the Honorable, the Justices  
Of the Supreme Court of Appeals of West Virginia:

I. Introduction

Your *amicus*, Natural Resource Partners, L.P. ("NRP"), is a limited partnership interested in issues affecting the ownership of mineral interests in real property in West Virginia, including, but not limited to, interests in coal, oil and gas estates. NRP engages principally in the business of owning, operating, managing, and leasing a diversified portfolio of mineral properties in the United States (six hundred eighty thousand (680,000) +/- acres in West Virginia alone), including interests in coal, trona

and soda ash, oil and gas, construction aggregates, frac sand and other natural resources.

Your *amicus*, National Council of Coal Lessors, Inc. (“NCCL”), is an association with 48 members representing hundreds of thousands of acres of coal property owned under lease, which is interested in issues affecting coal lessors. NCCL’s principal purpose has been and will continue to be advancing the interests of coal owners and lessors.

Your *amicus*, Piney Land Company (“Piney”), is a land company with approximately 14,000 acres of land containing coal and gas under lease and is an individual member of *amicus* NCCL.

Your *amicus*, West Virginia Land and Mineral Owners’ Association (“WVLMOA”), is an association with over 80 landowner members, interested in issues affecting the ownership of mineral interests in real property in West Virginia, including, but not limited to, royalty interests in oil and gas estates. WVLMOA’s mission focuses on promoting positive land management practices, lobbying public issues that affect land and mineral ownership, and providing members with valuable educational and networking opportunities that can increase their effectiveness in the natural resource marketplace. The association was established by concerned West Virginians who recognized the need for a collective voice to protect and advance the interests of land and mineral owners within our state.

Your *amicus*, West Virginia Coal Association, Inc. (“WVCA”), is a trade association representing more than 90 percent of the state’s underground and surface coal mine production. The WVCA’s purpose is to have a unified voice representing the

state's coal industry as well as increase emphasis on coal as a reliable energy source to help the nation achieve energy independence.<sup>1</sup>

## II. Factual And Procedural History

This case involves an ownership dispute over the coalbed methane (hereinafter “CBM”) underlying several parcels of property located in McDowell County, West Virginia, between Respondent LBR Holdings, LLC (hereinafter “LBR”), and Petitioners Gregory G. Poulos, Jason G. Poulos, Pamela F. Poulos, Shaun D. Rogers, Derek B. Rogers, Kevin H. Rogers, Derek B. Rogers, T.G. Rogers, III, and EQT Production Company (hereinafter collectively “Petitioners”).

Prior to 1938, three groups of individuals, T.G. and Martha F. Rogers (“the Talmage Rogers Group”), Lloyd and Anne F. Rogers (“the Lloyd Rogers Group”), and Lon B. Rogers (“the Lon Rogers Group”) were affiliated with the Rogers Brothers Coal Company, which had accumulated property and mineral rights throughout Virginia, West Virginia, and Kentucky. (See Joint Stipulation of Facts, Appendix Vol.1, pp. 209-211.) By deed dated May 27, 1938 (hereinafter “the 1938 Deed”), the Talmage Rogers Group and the Lloyd Rogers Group conveyed all of their interests in the subject parcels of property located in McDowell County, West Virginia (hereinafter “the Property”) to the Lon Rogers Group, while expressly excepting from said conveyance and reserving to themselves “an undivided one-half interest in the oil and gas” under the Property. *Id.*

The operative language in the Deed provides:

[T]he parties of the first part [Petitioners’ predecessors],...do hereby grant and convey unto the party of the second part [Respondent’s predecessor],...all of their right, title and interest, in and to all of the hereinafter described property, and being a two-thirds (2/3) undivided

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<sup>1</sup> This brief was written entirely by undersigned counsel on behalf of the *amici*, who have received no monetary compensation from any parties to this action.

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 excepted 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.**

*(Id.; see also App. Vol. 3, pp.1-2)* (emphasis added).

Respondent is the successor in interest to and owner of all of the Lon Rogers Group's interests in the Property as well as all of the Lloyd Rogers Group's interests in the Property. (See App. Vol. 1, p. 210.) Petitioners are the successors-in-interest to the Talmage Rogers Group, and therefore own a 25% interest in the "oil and gas" estate under the subject parcels. *Id.*

EQT Production Company (hereinafter "EQT") and GeoMet, Inc. and GeoMet Operating Company, Inc. (hereinafter collectively "GeoMet") have drilled and operated CBM wells on the Property and generated royalties therefrom. *Id.* EQT and GeoMet have placed in escrow or otherwise withheld payment of 25% of the CBM royalties based upon an uncertainty as to whether said CBM royalties are properly payable to LBR, as the owner of all of the coal and other mineral interests in the Property, or to Petitioners, as the owners of a 25% interest in the "gas" in the Property. *Id.*

Both Petitioners and Respondent sought declaratory judgment from the Circuit Court of McDowell County, West Virginia, regarding the ownership of the disputed CBM. Cross-motions for summary judgment on ownership of the CBM were filed with and briefed to the Court. By Order dated October 24, 2014, the Circuit Court denied the cross-motions for summary judgment. (See Circuit Court Order Denying Motion for Summary Judgment, App. Vol. 1, pp.187-192.)

Thereafter, on November 12, 2014, the parties entered into a “Joint Stipulation of Facts” in which they stipulated the authenticity of the 1938 Deed and also agreed:

3. LBR is the successor-in-interest to all of the Lon Rogers Group’s and the Lloyd Rogers Group’s interest in the Property, and own a 75% interest in the oil and gas under the Property, 100% of the coal and all other mineral interests in the Property, and certain portions of the surface of the Property.

(See App. Vol. 1, pp. 209-211.) The case then proceeded to Bench Trial on November 12, 2014, which trial continued through November 13, 2014. After considering all of the testimony, exhibits, and arguments of counsel, the Circuit Court entered an Order on August 19, 2015, ruling in favor of LBR. (See Bench Trial Order App. Vol. 1, pp. 305-314.) The touchstone of the Circuit Court’s Order is the analysis set forth in the West Virginia Supreme Court of Appeals’ holding in *Energy Dev. Corp. v. Moss*, 214 W.Va. 577, 591 S.E.2d 135 (2003), in which this Court declined to make a sweeping general holding to the effect ownership of CBM is necessarily part of either the coal or gas estates, but endorsed instead a nuanced, case-by-case approach focusing on the intent of the parties at the time of the conveyance. (See App. Vol. 1, p. 311.)

Applying the *Moss* standard, the Circuit Court determined that the exception language in the 1938 Deed created a latent ambiguity, which, under West Virginia law, must be strictly construed against the grantor (Petitioners) and in favor of the grantee (Respondent). (See App. Vol. 1 at 311-312.) The Circuit Court then found that the weight of the evidence presented at trial showed that the commercial production of CBM was not a common practice in 1938, and that in 1938 CBM was generally regarded as a dangerous nuisance and hazard to be avoided, rather than as a commercial resource. (See App. Vol. 1 at 306-310, 312-313.)

Accordingly, the Circuit Court found that when Petitioners' predecessors entered into the 1938 Deed, they would not have intended to reserve an interest in CBM. (*See* App. Vol. 1 at 312-313.) Petitioners subsequently filed this appeal. By Order dated May 17, 2016, this Court set the case for Rule 19 Argument on October 5, 2016, and invited the filing of *Amicus* briefs.

By their brief, undersigned *amici* will attempt to add insight to the important questions before the Court in this matter regarding the severance and transfer of ownership of CBM, and specifically the natural differential between CBM and conventional "free" natural gas which arises from the intimate relationship that exists between CBM and the coal from which it emanates, and which rightly should prohibit the adoption of a bright-line rule categorizing all CBM as part of the natural "gas" estate under any and all circumstances, as is being advocated by the Petitioners.

*Amici* strongly believe the Court should not overrule its prior precedent set forth in 2003 ruling in *Energy Development Corporation v. Moss*, 214 W.Va. 577, 591 S.E.2d 135 (2003), and the eminently reasonable case-by-case approach adopted therein to determine ownership of the CBM. *Amici* further believe the Trial Court applied the correct analysis in following *Moss's* approach and ultimately determining that the use of the phrase "oil and gas" in the 1938 Deed was latently ambiguous in light of the circumstances which existed at the time of its execution and that ownership of the CBM was not part of the "oil and gas" reservation in the 1938 Deed. Furthermore, the wholesale adoption of the "gas is gas" bright-line rule approach seemingly advocated by the Petitioners, would result in much less clarity and uncertainty in the ownership and transfer of CBM and related property rights, in contrast to the arguments made by Petitioners.

### III. Issues on Appeal

In their Petition for Appeal, Petitioners have made the following assignments of error:

1. The Court erred in finding a latent ambiguity in the 1938 Deed's unlimited and unqualified reservation of gas.
2. The Court erred in denying the Poulos/Rogers Parties' Motion for Summary Judgment.
3. The Court erred in disregarding evidence presented at trial, instead relying on evidentiary findings in *Energy Development Corp. v. Moss*, 214 W.Va. 577, 591 S.E.2d 135 (2003).
4. The Court erred in finding that CBM must have been commercially produced in 1938 in order for it to have been reserved.
5. The Court erred in relying on W.Va. Code §22-21-1.
6. The Court erred in relying on the testimony of Respondents' expert Dr. Nino Ripepi.
7. The Court erred in disregarding the uncontroverted evidence that removed any latent ambiguity the Court may have properly found.
8. The Court erred in holding that there is "a distinct line between CBM and gas."
9. The Court erred in rejecting the undisputed evidence that CBM was a known, valuable resource in 1938.
10. The Court erred in holding that this case is analogous to *Energy Development Corp. v. Moss*, 214 W.Va. 577, 591 S.E.2d 135 (2003).
11. The Court erred in dismissing the case and striking it from the docket.

This Brief will address the issues surrounding numbers 1, 3, 4, 5, 7, 8, 9, and 10.

#### IV. Points And Authorities Relied Upon

##### Statutes

W.Va. Code §22-21-1 .....	7, 14, 15, 16
Va. Code §45.1-361.1.....	16

##### Cases

<i>Amoco Production Company v. Southern Ute Indian Tribe</i> , 526 U.S. 865, 119 S.Ct. 1719 (1999).....	12, 13, 14, 16, 22
<i>Boggess v. Milam</i> , 127 W.Va. 654, 34 S.E.2d 267 (1945).....	22
<i>Bowles v. Hopkins County Coal, LLC</i> , 347 S.W.3d 59 (Ky. App. 2011).....	23
<i>Buffalo Mining Company v. Martin</i> , 165 W.Va. 10, 267 S.E.2d 721 (1980) .....	20
<i>Carbon County v. Union Reserve Coal Company, Inc.</i> , 271 Mont. 459, 898 P.2d 680 (1995).....	23
<i>Cimarron Oil Corp. v. Howard Energy Corp.</i> , 909 N.E.2d 1115, 1120 (Ind. App. 2009) .....	13, 23
<i>Continental Resources of Illinois, Inc. v. Illinois Methane, LLC</i> , 897 N.E. 897, 364 Ill. App. 3d 691 (Ill. App. 2006).....	22
<i>Cotiga Development Company v. United Fuel Gas Company</i> , 147 W.Va. 484, 128 S.E.2d, 626, syl. pt. 1 (1962).....	17
<i>Cottrill v. Ranson</i> , 200 W.Va. 691, 490 S.E.2d, 778, Syl. Pt. 5 (1997).....	19
<i>Energy Development Corporation v. Moss</i> , 214 W.Va. 577, 591 S.E.2d 135 (2003).....	5, 6, 7, 10, 11, 12, 14, 15, 17, 18, 19, 20, 21, 22, 23, 24, 25
<i>Faith United Methodist Church v. Morgan</i> , 231 W.Va. 423, 745 S.E.2d 461 (2013).....	24
<i>Harrison-Wyatt, LLC v. Ratliff, et al.</i> , 267 Va. 549, 593 S.E.2d 234 (2004).....	16, 23
<i>Kelley, Gidley, Blair &amp; Wolfe v. City of Parkersburg</i> , 190 W.Va. 406, 438 S.E.2d 586, 589 (1993).....	17
<i>Lowe v. Guyan Eagle Coals, Inc.</i> , 166 W.Va. 265, 273 S.E.2d 91 (1980) .....	20
<i>Maddy v. Maddy</i> , 87 W.Va. 581, 105 S.E. 803, Syl. Pt. 1 (1921).....	24

<i>McDonough Company v. El DuPont DeNemours and Company, Inc.</i> , 167 W.Va. 611, 280 S.E.2d 246 (1981) .....	19
<i>NCNB Texas Nat. Bank, N.A. v. West</i> , 631 So.2d 212 (Ala. 1993).....	11
<i>Newman v. RAG Wyoming Land Company</i> , 53 P.3d 540 (2002) .....	23
<i>Payne v. Weston</i> , 195 W.Va. 502-507, 466 S.E.2d 161 (1995) .....	17, 18
<i>Phillips v. Fox</i> , 193 W.Va. 657, 663, 458 S.E.2d 327 (1995) .....	20
<i>Powers v. Union Drilling, Inc.</i> , 194 W.Va. 782, 787, 461 S.E.2d 844 (1995).....	22
<i>Ramage v. South Penn Oil Company</i> , 94 W.Va. 81, 118 S.E. 62 (1923).....	24
<i>Shamblin v. Nationwide Mutual Insurance Company</i> , 175 W.Va. 337, 332 S.E.2d 639 (1985) .....	18
<i>Tide Water Oil Sales Corp. v. Harper</i> , 113 W.Va. 643, 169 S.E. 454 (1933) .....	18
<i>U.S. Steel v. Hoge</i> , 503 Pa. 140, 468 A.2d 1380 (1983).....	21, 22
<i>West Virginia-Pittsburgh Coal Company v. Strong</i> , 129 W.Va. 832, 42 S.E.2d 46, Syl. Pt. 1 (1947) .....	20

**Regulations**

1891 Territorial Mine Inspection Act, §6, 26 Stat. 1105 .....	16
---	----

**Other**

3 Century Dictionary and Cyclopedia.....	16
App. Vol.1 .....	3, 4, 5, 6
App. Vol. 3 .....	4
D. Van Krevelen, <i>Coal</i> (3d ed.1993) .....	12
D. Yergin, <i>The Prize</i> (1991) .....	14
Gorbaty & Larsen, <i>Coal Structure and Reactivity</i> , in 3 Encyclopedia of Physical Science and Technology 437 (R. Meyers ed. 2d ed.1992) .....	12
Paul N. Bowles, <i>Coalbed Gas: Present Status of Ownership Issue and Other Legal Considerations</i> , 1 E.Min.L.Inst. 7-36 (1980) .....	15

Michelle D. Baldwin, *Ownership of Coalbed Methane Gas: Recent Developments in Case Law*, 100 W.V.L.R 673 (1998) ..... 15, 16

R. Rogers, *Coalbed Methane: Principles and Practice* 148 (1994) ..... 12, 13

*Williston on Contracts*, §32.7, p. 433-435 (4th ed. 1999) ..... 18

**V. Discussion Of Law**

**A. The Court Should Not Overrule The Reasoned, Flexible Approach To Determining CBM Ownership, Set Forth In The 2003 Case Of *Energy Development Corporation v. Moss*, 214 W.Va. 577, 591 S.E.2d 135 (2003), In Favor Of The Rigid, One Size Fits All “Gas Is Gas” Approach Advocated By The Petitioners.**

In *Energy Development Corporation v. Moss*, 214 W.Va. 577, 591 S.E.2d 135 (2003), this Court examined legal issues surrounding the ownership of CBM. *Moss* revolved around two parcels of property situated in McDowell County, West Virginia, which were jointly owned by the Defendant appellee, Nancy Louise Moss, and Hall Mining Company, Inc., as well as several other individuals. In the mid-1980s, the owners had jointly entered into two separate standard oil and natural gas leases with the Plaintiff appellant, Energy Development Corporation, each of which purported to

let lease and demise all of the ‘oil and gas’ and all the constituents of either in and under the land hereinafter described and all possible productive formations therein and thereunder...

*Moss*, 591 S.E.2d 135, at 139 (emphasis added).

The Court noted that nowhere in either lease was there any explicit reference made to “coalbed methane,” “coalbed gas,” or any other such specific term, and then framed the issue before it:

the specific question asked is whether a standard oil and gas lease executed in 1986 conveyed to the lessee the right to drill into the lessor’s coal seams in order to produce the coalbed methane.

*Moss*, 591 S.E.2d 135, at 138.

In a scholarly, erudite fifteen page opinion issued on January 8, 2004, this Court flatly rejected the argument then advanced by Appellant Energy Development Corporation (and now the same argument advanced by Petitioners in this case) that the “all of the oil and gas”<sup>2</sup> language contained in the habendum clauses of the two 1986 leases also conveyed the ownership of the CBM. *Id.*, 591 at 153.

Significantly, in rejecting the “gas is gas” argument currently advanced by Petitioners, the Court also rejected the corollary argument that the CBM should always be considered part of the coal estate. Instead, the Court opted for a much more nuanced approach, centering on the intent of the parties in the discreet case before it:

There is great temptation in this case, urged on us by both sides, to wave a wand and declare coalbed methane to be either “coal” or “gas.” The logic of either position is facially seductive; “coalbed methane” is indeed “methane” in that both have the same chemical composition; but “coalbed methane” is also intimately bound to the coal, which must be disturbed if coalbed methane is to be produced in paying quantities. If we made such a simplistic finding, it would be short work to decide this appeal and end this opinion. But the precise question we must answer in this opinion is not whether coalbed methane, for all purposes and in all cases, *is* “coal” or *is* “gas.” The specific question we must answer is whether a gas lease executed in 1986, before the widespread commercial production of coalbed methane in West Virginia, signed by a lessor who owned the land, coal, oil and gas, conveyed to the oil and gas lessee the right to develop the coalbed methane, absent any specific language on the issue...with due consideration to the foregoing authority, **we hold that, in the absence of specific language to the contrary or other indicia of the parties' intent, an oil and gas lease does not give the oil and gas lessee the right to drill into the lessor's coal seams to produce coalbed methane gas. 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.**

*Moss*, 591 S.E.2d 135 at 143, 146 (emphasis added).

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<sup>2</sup> The use of the word “all” in the habendum in the *Moss* case suggests that the grants it was considering were significantly broader than those in the present case. See e.g. *NCNB Texas National Bank, N.A. v. West*, 631 So.2d 212, 222-223 (Ala. 1993) (“‘All’ is all. ‘All’ is not ambiguous. ‘All’ is not vague. ‘All’ is not of doubtful meaning.”)

Accordingly, the holding in *Moss* is wholly dispositive of the “gas is gas” argument being advanced by Petitioners in the present case. *Moss*’ flexible, nuanced, “case by case” approach outlined, as applied by the Circuit Court in this case, is highly preferable in determining ownership of CBM to the more rigid, “one-size-fits-all” rule advanced by Petitioners. Indeed, applying the analysis advanced by Petitioners to the myriad instruments which purport to convey interests in coal, oil and gas estates as well as the veritable smorgasbord of potentially relevant circumstances surrounding the same, would undoubtedly result in widespread confusion regarding ownership of CBM, as opposed to more clarity as argued by the Petitioners.

**1. Although They Are Both “Gaseous” In Composition, CBM Is Critically Differentiated From So-Called Conventional “Natural Gas” Because Of Its Intimate Connection To The Coal From Whence It Is Derived.**

The approach adopted by this Court in *Moss* is grounded in both scientific reality and decades of statutory and common law precedent. In *Amoco Production Company v. Southern Ute Indian Tribe*, 526 U.S. 865, 119 S.Ct. 1719 (1999), which is cited extensively by the *Moss* Court in support of its ruling, the United States Supreme Court gave a brief overview of the chemistry and composition of coal and its critical nexus in the creation of CBM.

Coal is a heterogeneous, noncrystalline sedimentary rock composed primarily of carbonaceous materials. See, *e.g.*, Gorbaty & Larsen, *Coal Structure and Reactivity*, in 3 Encyclopedia of Physical Science and Technology 437 (R. Meyers ed. 2d ed.1992)...It is formed over millions of years from decaying plant material that settles on the bottom of swamps and is converted by microbiological processes into peat. D. Van Krevelen, *Coal* 90 (3d ed.1993). Over time, the resulting peat beds are buried by sedimentary deposits. *Id.*, at 91. As the beds sink deeper and deeper into the earth's crust, the peat is transformed by chemical reactions which increase the carbon content of the fossilized plant material. *Ibid*...The process in which peat transforms into coal is referred to as coalification. *Ibid*...The coalification process generates methane and other gases. R.

Rogers, *Coalbed Methane: Principles and Practice* 148 (1994). Because coal is porous, some of that gas is retained in the coal. CBM gas exists in the coal in three basic states: as free gas; as gas dissolved in the water in coal; and as gas "adsorped" on the solid surface of the coal, that is, held to the surface by weak forces called van der Waals forces. *Id.*, at 16-17, 117. These are the same three states or conditions in which gas is stored in other rock formations. Because of the large surface area of coal pores, however, a much higher proportion of the gas is adsorped on the surface of coal than is adsorped in other rock. *Id.*, at 16-17. When pressure on the coalbed is decreased, the gas in the coal formation escapes. As a result, CBM gas is released from coal as the coal is mined and brought to the surface.

*Amoco*, 526 U.S., 872-873.

The chemical composition of CBM is very close to that of conventional natural gas.

Chemically, the gas molecule in "conventional gas" is essentially [the] same as the gas molecule present in coalbed methane. It is hereinafter referred to as the "CH<sub>4</sub> molecule." The molecule of CH<sub>4</sub> is formed as the result of bacterial action on organic matter in the coal or shale formations or some other organic substance present in the surface of the earth. . . . Conventional gas is also formed by the reaction of bacteria on organic matter. However, the formed gas flows through seams, fractures and other voids in the material where it was formed and collects in voids in rocks such as limestone or sandstone.

*Cimarron Oil Corp. v Howard Energy Corp.*, 909 N.E.2d 1115, 1120 (Ind. App. 2009).

Accordingly, although they share a very similar chemical composition, CBM is easily differentiated from more conventional natural gas by its physical presence inside the coal seam and its intimate association with coal, while conventional natural gas is found in non-coal bearing strata. As such, it is readily evident that, unlike traditional natural gas, the CBM cannot be properly considered outside the context of its source, an inextricably related co-resource, the coal.

**2. For Well Over A Century, CBM Has Been Considered A Dangerous Byproduct Of Coal Mining, Which Must Necessarily Be Vented And Controlled During The Mining Of The Coal Seam.**

As recognized by the *Amoco* Court, coal has a much older history as a source of fuel than does either natural gas, or certainly, CBM.

In contrast to natural gas, which was not yet an important source of fuel at the turn of the century, coal was the primary energy for the Industrial Revolution.

*Amoco*, 526 U.S. at 875, citing D. Yergin, *The Prize*, 543 (1991). Moreover, careful venting of the CBM is often necessary to allow safe recovery of the coal and often requires physical encroachment into the coal seam. In *Moss*, the Supreme Court of Appeals took note of the macabre history of CBM:

What we today call coalbed methane or CBM has also been called "fire damp," "coal gas," "coal seam methane," or "mine gas," and has long been regarded as one of a coal miner's greatest foes. Coalbed methane may have produced more widows and orphans than any other workplace hazard. In two single West Virginia accidents, coalbed methane killed 440 miners, leaving 362 dead in the Monongah Mine Disaster in 1907, the worst mining disaster in American History, and 78 dead in the Farmington Mine Disaster of November 20, 1968. Literally thousands of miners have been killed by it in America and throughout the world. The danger of coalbed methane, in part, prompted the federal government to [enact the Federal Coal Mine Health and Safety Act of 1969].

*Moss*, 591 S.E.2d at 142.

The *Moss* Court further noted that CBM's significant and known dangers were a driving force behind the enactment of West Virginia's own "Coalbed Methane Wells and Units Act" in W.Va. Code §22-21-1, et seq., in which the Legislature announced policy goals geared toward both abating the danger and exploiting the value of CBM. The statute, which was enacted in 1994, provides, in relevant part:

(b) It is hereby declared to be the public policy of this state and in the public interest to:

(1) Preserve coal seams for future safe mining; facilitate the expeditious, safe evacuation of coalbed methane from the coalbeds of this state, and maintain the ability and absolute right of coal operators at all times to vent coalbed methane from mine areas;

(2) Foster, encourage and promote the commercial development of this state's coalbed methane by establishing procedures for issuing permits and forming drilling units for coalbed methane wells without adversely affecting the safety of mining or the mineability of coal seams;

(3) Safeguard, protect and enforce the correlative rights of coalbed methane well operators and coalbed methane owners in a pool of coalbed methane to the end that each such operator and owner may obtain his or her just and equitable share of production from the coalbed methane recovered and marketed under this article;

(4) Safeguard and protect the mineability of coal during the removal of coalbed methane, as permitted under this article...

W.Va. Code §22-21-1 (1994). Accordingly, until relatively recently, CBM was viewed primarily not as a valuable resource, but a dangerous waste product which needed to be vented to allow recovery of the coal.

**3. It Is Simply Beyond All Argument That CBM Was Not Subject To Wide Commercial Development, Or Even A Known Valuable Resource, In 1938.**

Despite the arguments advanced by Petitioners, and consistent with the finding by the Circuit Court and this Court in *Moss*, there is nothing to suggest that CBM was subject to “widespread commercial development” or even known to be a commercially valuable resource in 1938. *Moss*, 591 S.E.2d 135, at 143.

Indeed, it was not until 1970 that serious development of techniques to remove CBM in advance of actual coal mining began. See *Paul N. Bowles, Coalbed Gas: Present Status of Ownership Issue and Other Legal Considerations*, 1 E.Min.L.Inst. 7-36 (1980). While some commercial drilling did occur before this time, no special techniques apart from those used in other non-coal gas bearing strata were used and CBM was considered mainly a dangerous nuisance to coal mines. *Id.*; Michelle D.

Baldwin, *Ownership of Coalbed Methane Gas: Recent Developments in Case Law*, 100 W.V.L.R. 673 (1998).

This fact is further clearly evidenced by the fact that West Virginia's own CBM statute, W.Va. Code §22-21-1, et seq., which sought to balance the dangers of CBM with its commercial potential, was not enacted until 1994. Similarly, Virginia's analogue, The Virginia Gas and Oil Act, Va. Code §45.1 – 361.1, et seq., was enacted in 1990. *Id.*; See also, *Harrison-Wyatt, LLC v. Ratliff, et al.*, 267 Va. 549, 593 S.E.2d 234, 235 (Va. 2004) (“During the 1970's, however, it became apparent that CBM could be a valuable energy source.”). This finding is further confirmed by the *Amoco* Court in its examination of the language of 1909-1910 era Congressional acts authorizing the issuance of land patents to individuals, to determine whether or not the statutory grants of “coal” would, by necessity, have included the CBM. The Court stated:

We are persuaded that the common conception of coal at the time Congress passed the 1909 and 1910 Acts was the solid rock substance that was the country's primary energy resource...**It is evident that Congress viewed CBM gas not as part of the solid fuel resource it was attempting to conserve and manage but as a dangerous waste product, which escaped from coal as the coal was mined.** Congress was well aware by 1909 that the natural gas found in coal formations was released during coal mining and posed a serious threat to mine safety. Explosions in coal mines sparked by CBM gas occurred with distressing frequency in the late 19th and early 20th centuries. [citations omitted] Congress was also well aware that CBM gas needed to be vented to the greatest extent possible. Almost twenty years prior to the passage of the 1909 and 1910 Acts, Congress had enacted the first federal coal-mine-safety law which, among other provisions, prescribed specific ventilation standards for coal mines of a certain depth “so as to dilute and render harmless...the noxious or poisonous gases.” 1891 Territorial Mine Inspection Act, §6, 26 Stat. 1105. See also 3 Century Dictionary and Cyclopedia, at 2229.

*Amoco*, 526 U.S. 865, at 874 (emphasis ours). Accordingly, it is simply beyond all argument that in 1938, CBM was not viewed generally as a valuable resource but only a dangerous waste product and certainly not subject to “wide commercial development.”

**B. The “Gas Is Gas” Approach Advocated By Petitioners, As An Alternative To The *Moss* Analysis, Flies In The Face Of Long-Standing Applicable Rules Of Contractual Construction, All Of Which Militate In Favor Of The Continued Application Of The Flexible, Case-By-Case Approach Set Forth In *Moss, supra*.**

Each of the rules of interpretation and construction considered by the *Moss* Court in determining first the existence of the latent ambiguity in the habendum language and then resolving the same in favor of the lessor/grantor militates in support of the lower Court’s decision in the present case.

**1. Construction Of Latently Ambiguous Contractual Language**

Central to the conclusion of this Court in *Moss, supra*, was the finding that the deed in question contained latent ambiguities which had to be construed against the lessor. It has long been held in West Virginia that “a valid, written instrument which expresses the intent of the parties in plain and unambiguous language is not subject to judicial construction or interpretation, but will be applied and enforced according to such intent.” *Cotiga Development Company v. United Fuel Gas Company*, 147 W.Va. 484, 128 S.E.2d, 626, syl. pt. 1 (1962). Accordingly, the intent of the parties as expressed through the written instrument is key; and conversely, where the terms of the written instrument are ambiguous, it falls to the Court to determine the intent of the parties through the process of judicial construction. *Kelly, Gidley, Blair & Wolfe, Inc. v. City of Parkersburg*, 190 W.Va. 406, 438 S.E.2d 586, 589 (1993).

The question as to whether a contract is ambiguous is itself a question of law to be determined by the Court. See *Moss, supra*, 591 S.E.2d 135, 143. An “ambiguity” is defined as language which is “reasonably susceptible of two different meanings, or language of such doubtful meaning that reasonable minds might be uncertain or disagree as to its meaning.” *Payne v. Weston*, 195 W.Va. 502-507, 466 S.E.2d, 161,

166 (1995) (quoting *Shamblin v. Nationwide Mutual Insurance Company*, 175 W.Va. 337, 332 S.E.2d 639 (1985)).

There are two types of ambiguities: patent ambiguities, which appear on the face of the relevant document, and latent ambiguities.

A latent ambiguity which does not appear on the face of the document, however, may be created by intrinsic facts or extraneous evidence...[w]hen evidence discloses a latent ambiguity, such as, for instance, that there are two objects, either of which the terms of the writing apply with equal fitness, then prior and contemporaneous transactions and collocations of the parties are admissible for the purpose of identifying the particular object intended...a latent ambiguity arises when the instrument upon its face appears to be clear and unambiguous, but there is some collateral matter which makes the meaning uncertain.

See *Moss, supra*, 591 S.E.2d 135, at 144.

Accordingly, it logically follows that a Court may only determine the existence of a latent ambiguity arising from clear and unambiguous contractual language by first considering the surrounding circumstances and intrinsic facts surrounding the documents, objects, and execution.<sup>3</sup> Indeed, this is the very same type of ambiguity that was determined to exist by the Court in the *Moss* case.

Specifically, the *Moss* Court determined that the use of the phrase “oil and gas” within the context of a standard natural gas lease executed in 1986 was ambiguous, in light of surrounding circumstances, as to whether the said phrase referred to and included CBM. See *Moss*, 591 S.E.2d at 143-145. The *Moss* Court ultimately

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In theory, the circumstances surrounding the execution of a contract may always be shown and are always relevant to determination of what the parties intended by the words they chose. In construing a contract, a court seeks to ascertain the meaning of the contract at the time and place of its execution. Thus, although the parties may not, because of the parole evidence rule, testify as to agreements they made before or contemporaneously with the execution of the contract, the circumstances surrounding the execution of the contract bear upon the contract’s meaning.

*Williston on Contracts*, §32.7, p. 433-435 (4<sup>th</sup> ed. 1999) (citing *Tide Water Oil Sales Corp. v. Harper*, 113 W.Va. 643, 169 S.E. 454 (1933)).

determined that the phrase “oil and gas,” as used in the context of a 1986 standard natural gas lease, was latently ambiguous in light of the date of its execution, the fact that it had been elicited and drafted by the lessee, and the general usages of the gas business at the time of execution as reflected by oral testimony submitted in the case to the effect that widespread commercial development of CBM did not exist in McDowell County in 1936. *Id.*

It must be noted that the adoption by this Court of the rigid “gas is gas” rule advocated by Petitioners would render the preliminary analysis of whether latent ambiguity exists, such as that undertaken by to the *Moss* Court and the Circuit Court in the present case, superfluous and indeed impossible since the fact that the word “gas” is used in the instrument would be determinative and prevent consideration of any of the nuanced surrounding circumstances.

## **2. Construction Against Lessor/Grantor**

It has long been held in West Virginia law that “deed reservations are strictly construed against a grantor in favor of a grantee, and where there is an ambiguity in a deed or where it admits of two constructions, one will be adopted which is most favorable to the grantee. See *McDonough Company v. El DuPont DeNemours and Company, Inc.*, 167 W.Va. 611, 280 S.E.2d 246, Syl. Pt. 2 (1981); *Cottrill v. Ranson*, 200 W.Va. 691, 490 S.E.2d, 778, Syl. Pt. 5 (1997). This is the deed analogue of *Moss*’s holding that the language in a standard gas lease which was procured and drafted by the lessee should be strictly construed in favor of the lessor. See *Moss*, 591 S.E.2d at 135. Again, since the Petitioners were the grantors in this case, their reservation language regarding oil and gas, which as noted above, does not include the expansive “all” used in *Moss*, *supra*, must be strictly construed against them.

### 3. Business Usages

The *Moss* Court also placed significant weight on the usages of the “gas business” at the time the 1986 lease was executed, ultimately finding that production of CBM was not a common practice in McDowell County in 1986. The Court relied upon its previous ruling in *Buffalo Mining Company v. Martin*, 165 W.Va. 10, 267 S.E.2d 721 (1980), which held that, in the face of an ambiguity, a Court should be loathe to adopt a construction that places a large and possibly never-considered burden on one of the parties, and should not generally find an implied right to conduct a given activity not explicitly mentioned in the instrument, unless that activity is clearly demonstrated to have been a common practice in the area at the time of the lease’s execution. *Id.*, 267 S.E. 2d, 725. *West Virginia-Pittsburgh Coal Company v. Strong*, 129 W.Va. 832, 42 S.E.2d 46, Syl. Pt. 1 (1947); *Lowe v. Guyan Eagle Coals, Inc.*, 166 W.Va. 265, 273 S.E.2d 91 (1980); *Phillips v. Fox*, 193 W.Va. 657, 663, 458 S.E.2d 327, 333 (1995). This rule is rooted in the corollary concept that language in instruments must be interpreted at the time of its drafting so as to neutralize the effect of advancing technologies, such as the modern horizontal drilling techniques used to invade the coal seam to produce CBM. *Id.*

In the present case, as the Court is analyzing a deed which was executed in 1938, there is simply no question that, at that time, the practice of invading the coal seam via drilling in order to commercially produce CBM, which admittedly had little or no commercial value in 1938, using drilling technologies that were not even developed until the 1970’s, was not, and could not have been, a common practice in McDowell County, West Virginia.

**C. The *Moss* Court Carefully Considered Decisions From Other Jurisdictions And Found Each To Be Consistent With Its Underlying Reasoning, Which Supports The Findings Of The Circuit Court In The Present Case.**

Further evidence of the wisdom and overall preferability of the nuanced case-by-case approach outlined in *Moss, supra*, is found in the *Moss* Court's exhaustive analysis and consideration of the approaches of Courts in other jurisdictions to the issue of CBM ownership, an analysis which ultimately found harmony among the approaches. Specifically, the *Moss* Court found that the greatest common factor among these decisions is the focus on the intent of the parties, given the circumstances which existed at the time of the grant, lease or conveyance. *Moss*, 591 S.E.2d 135, 146.

The *Moss* Court first considered *U.S. Steel v. Hoge*, 503 Pa. 140, 468 A.2d 1380 (1983), in which the Pennsylvania Supreme Court considered a 1920 Deed purporting to convey all the coal of the "Pittsburgh or River Vein," while reserving to the grantor the "rights to drill and operate through said coal for oil and gas without being held liable for any damages," and whether the CBM was necessarily conveyed with the coal, or reserved with the gas. *Moss*, 591 S.E.2d 135, at 146. Although the *Hoge* Court ultimately held the CBM was conveyed with the coal estate, the *Moss* Court noted the significance *Hoge* placed, in divining the intent of the parties, on language in the reservation of gas which reserved only the right to drill "through" said coal for oil gas, stating:

We believe the important fact about *Hoge* is...that the Court found that a limited reservation of a right to drill *through* the coal did not include the right to drill *into* the coal and develop the coalbed methane. Focusing on the intent of the parties, the court stated: The reservation to the grantor of the right to drill through the coal seam deeded away for oil and gas is stated generally. Although the unrestricted term "gas" was used in the reservation clause, in light of the conditions existing at the time of its execution we find it inconceivable that the parties intended a reservation

of all types of gas...We find more logical and reasonable the interpretation offered by the Appellant [coal owner] that the reservation intended only a right to drill through the seam to reach the unconveyed oil and natural gas generally found in strata deeper than the coal.

*Moss*, 591 S.E.2d 135, at 147 (quoting *Hoge*, 468 A.2d, 1384-1385).<sup>4</sup>

It is worth noting that in the present case, the reservation at issue contains a similar general reservation of a “one half interest in the oil and gas,” and a similar limitation, “with the usual and necessary rights on ingress and egress and drilling rights to explore, get and remove said oil and gas.” Given that the present deed was executed in 1938, at a time when the horizontal drilling and fracturing methods used today to invade the coal seam and recover the CBM were completely unknown, the reasoning employed in *Moss* and *Hoge* would indicate the intent of the parties in making the present reservation if the “usual...[gas drilling] rights” did not extend to the right to invade the coal estate to drill for CBM. *Moss, supra*.

The *Moss* Court had a similar interpretation of the U.S. Supreme Court’s ruling in *Amoco, supra*. Rejecting the appellant’s argument that the *Amoco* Court’s holding that stood for the bright-line proposition that CBM is a “gas,” which is not ever conveyed with the coal, the *Moss* Court stated:

While seductively simple, this logic does not persuade us. We believe that what the Court determined was that a *limited* reservation...reserved only that which was specifically and explicitly mentioned. Moreover, the Court in *Amoco* concerned itself primarily with the *intent* of the Congress and

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<sup>4</sup> To the extent the Court were to decide to overrule *Moss* and adopt a “bright line” rule regarding CBM ownership, *amici* would respectfully suggest that the reasoning in *Hoge, supra*, that CBM, at least that physically found in the coal seam, which remains in the coal in place is more naturally part of the coal estate since West Virginia, like Pennsylvania, is an “ownership in place” state, meaning that the owner of the mineral estate actually owns the mineral underground, prior to its production and reduction to possession. See e.g. *Powers v. Union Drilling, Inc.*, 194 W.Va. 782, 787, 461 S.E.2d 844 (1995); *Boggess v. Milam*, 127 W.Va. 654, 34 S.E.2d 267 (1945). Accordingly the conveyance of the coal and the bundle of property rights necessary to recover the same that are ancillary thereto, should properly trump the corollary right to produce “gas” as long as the gas remains physically present in the coal seam. See e.g. *Continental Resources of Illinois, Inc. v. Illinois Methane, LLC*, 897 N.E. 897, 364 Ill. App. 3d 691 (Ill. App. 2006).

what it would have understood about the industry at the time of the enactments. Just as in the instant case, the focus was on what a party, at the time of the conveyance, would have intended to pass, or not pass, in the conveyance. Thus, we conclude that *Amoco* is not at odds with our holding in this case, and does not require a blanket finding by this Court that coalbed methane "is gas."

*Moss*, 591 S.E.2d 135, 149. This is a direct and conclusive rejection of the argument advanced by Petitioners in this case.

The Court further considered the Montana Supreme Court's decision in *Carbon County v. Union Reserve Coal Company, Inc.*, 271 Mont. 459, 898 P.2d 680 (1995), Wyoming Supreme Court's ruling in *Newman v. RAG Wyoming Land Company*, 53 P.3d 540 (2002), and the then-pending Virginia Supreme Court case, *Harrison-Wyatt, LLC v. Ratliff, et al.*,<sup>5</sup> all of which sought to determine the "intent of the original owners at the time of making a specific and limited conveyance and/or reservation of the coal and gas resources" as the lodestar of their decision, as opposed to a rigid rule making the CBM necessarily a constituent of either the coal or gas estates. *See, Moss*, 591 S.E.2d at 149-150 (citing *Carbon County*, 898 P.2d at 681-689; and *Newman*, 53 P.2d at 549-550). Reported cases decided since *Moss* have also followed this approach. *See, e.g., Harrison-Wyatt, supra*, note 2; *Bowles v. Hopkins County Coal, LLC*, 347 S.W.3d 59 (Ky. App. 2011) ("At the time the coal beds were conveyed, CBM was not being actively pursued as a profitable product . . . we do not believe it was the intent of grantee to retain any ownership interest in the valueless, dangerous, waste product."); *Cimarron Oil Corp; supra*, 909 N.E.2d at 1123 ("the various cases have in common their

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<sup>5</sup> The Supreme Court of Virginia's decision issued on March 5, 2004, is found at 267 Va. 549, 593 S.E.2d 234 (2004). The *Harrison-Wyatt* court considered the effect of an 1887 deed conveying "all the coal in, upon and underlying" the subject tracts on the ownership of the CBM. The court ultimately held that since the surrounding circumstances indicated that the parties could not have contemplated at the time of the conveyance that CBM would become a valuable resources, that they could not have intended to convey the CBM. *Id.*

focus or intent and most refuse to recognize the silent conveyance of a mineral interest . . . in a deed or lease, as of the date of its execution.”).

Moreover, the nuanced analysis supplied by the *Moss* Court is the exact same analysis supplied by this Court in the case of *Faith United Methodist Church v. Morgan*, 231 W.Va. 423, 745 S.E.2d 461 (2013), which forms the supposed cornerstone of the argument advanced by Petitioners in this case. While the *Faith United* Court did ultimately hold that the word “surface” had a definite meaning as used in the 1907 Deed which it was examining, and overruling in the process its prior holding in *Ramage v. South Penn Oil Company*, 94 W.Va. 81, 118 S.E. 62 (1923), the Court arrived at this conclusion by applying the exact same analysis set forth in *Moss*. At the beginning of its analysis, the *Faith United* Court stated:

In construing a deed, will, or other written instrument, it is the duty of the Court to construe it as a whole, taking and considering all parts together, and giving effect to the intention of the parties wherever that is reasonably clear and free from doubt, unless to do so will violate some principle of law inconsistent therewith.

*Faith United*, 745 S.E.2d, 481 (quoting *Maddy v. Maddy*, 87 W.Va. 581, 105 S.E. 803, Syl. Pt. 1 (1921)).

Then, after holding that the word “surface” was not always to be considered ambiguous, as had been held in *Ramage, supra*, it undertook construction of the phrase, as used in the 1907 Deed, placing determinative significance on the use of the word “only” in conjunction with “surface.” The Court stated:

[Grantor] chose the words “surface only” as the subject of the conveyance to mean nothing more than the surface and to retain all the remainder of the property...To hold otherwise – to hold as the Circuit Court did, that the phrase “surface only” included rights to oil and gas – would be to give no significance to the words by the party of the deed.

Again, it must be noted that in the present case the conveying language purports to convey all lands, minerals, rights, interests, easements, rents, issues, and profits therefrom, followed by a very limited reservation of the oil and gas, together with the necessary rights of ingress and egress and drilling rights to explore, get, and remove said oil and gas when considering the time of the conveyance and the limiting language.

Under the analysis set forth in *Moss*, and in harmony with all the other court decisions which have examined this issue, the intent of the parties, as effected in the language they used is that the CBM was not included within the reservation of the “oil and gas,” and the Circuit Court’s findings on this issue were appropriate and should be affirmed.

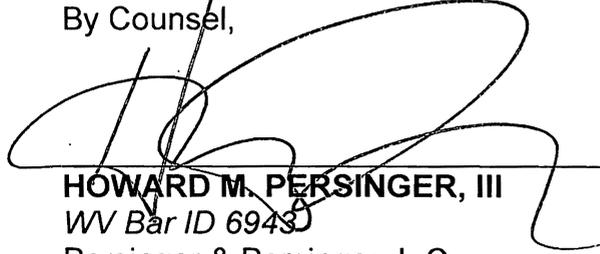
## **VI. Prayer For Relief**

Your *amici*, NRP, NCCL, Piney, WVLMOA, and WVCA respectfully request the Court affirm the ruling of the Circuit Court, and in doing so, that it not overrule the reasoned, nuanced analysis in *Energy Development Corporation v. Moss*, 214 W.Va. 577, 591 S.E.2d 135 (2003) in favor of the rigid, inflexible, “gas is gas” approach advocated by the Petitioners, or any other approach which runs counter to the established rules of contractual interpretation and rules of construction.

Respectfully Submitted,

**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.**

By Counsel,

A handwritten signature in black ink, appearing to read 'Howard M. Persinger, III', is written over a horizontal line. The signature is fluid and cursive, with a large loop at the end.

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Dated: June 24, 2016

**CERTIFICATE OF SERVICE**

I, Howard M. Persinger, III, hereby certify that on the 24th day of June, 2016, the foregoing, "**AMICUS CURIAE BRIEF ON BEHALF 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 IN SUPPORT OF RESPONDENT LBR HOLDINGS, LLC**" was served upon the following counsel to Petitioners and Respondent by email and by depositing a true copy thereof in the United States mail, first class, postage prepaid, and addressed as follows:

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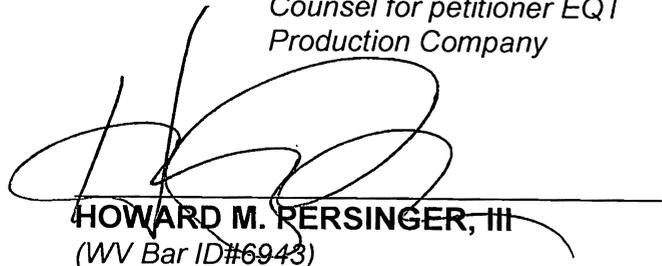
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