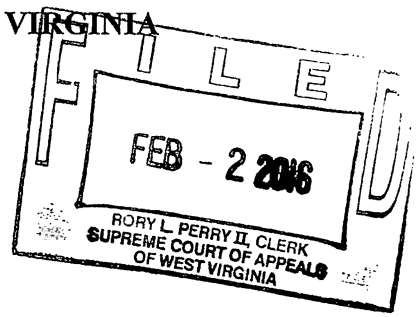
IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA



No. 15-0907

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

Defendants Below, Petitioners,

v.

LBR HOLDINGS, LLC,

Plaintiff Below, Respondent.

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STATEMENT OF THE CASE

This case involves an ownership dispute regarding 25% of the coalbed methane (hereinafter "CBM") in certain property located in McDowell County, West Virginia. 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 (hereinafter collectively "Petitioners"), each sought a favorable declaratory judgment from the Circuit Court of McDowell County, West Virginia regarding the ownership of the disputed CBM.

Much of the factual background of this case is not in dispute, and the parties entered into a joint stipulation of facts. *See* App. Vol. 1, pp. 209-211. 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. Id. By deed dated May 27, 1938 (hereinafter "the 1938 Deed"), the Talmage Rogers Group and the Lloyd Rogers Group conveyed all of their property interests in several parcels of property located in McDowell County, West Virginia (hereinafter "the Property") to the Lon Rogers Group, except for "an undivided one-half interest in the oil and gas" under the Property. Id. More specifically, the 1938 Deed states as follows:

> [T]he parties of the first part [the Talmage Rogers and Lloyd Rogers Groups], . . . do hereby grant and convey unto the party of the second part [Lon B. Rogers], . . . 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 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.

LBR 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. App. Vol. 1, p. 210. As a result, LBR now owns a 75% interest in the oil and gas under the Property, 100% of the coal and all other mineral interests under the Property, and certain portions of the surface of the Property. Id. Petitioners are the successors-in-interest to the Talmage Rogers Group, and now own a 25% interest in the oil and gas under the Property. Id.[1]

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.

Based on the foregoing facts, the parties filed and briefed cross-motions for summary judgment. By Order dated October 24, 2014, the circuit court denied the parties' cross-motions for summary judgment. App. Vol. 1, pp. 187-192. In its Order, the circuit court determined that the 1938 Deed is ambiguous as to whether Petitioners' predecessors' reservation of "oil and gas" includes CBM, and held that this ambiguity creates a genuine issue of fact with respect to the intent

[1] The 1938 Deed was part of a larger transaction for the purpose of settling all property matters among the owners of the Rogers Brothers Coal Company. App. Vol. 2, pp. 22-27. While LBR's predecessor received the property interests conveyed by the 1938 Deed, Petitioners' predecessors received properties in western Kentucky. Id.

of the parties to said deed. Id.

The circuit court held a bench trial on November 12, 2014, which continued through November 13, 2014. After considering all of the testimony, exhibits, and arguments of counsel, the circuit court entered a Bench Trial Order on August 19, 2015, ruling in favor of LBR. App. Vol. 1, pp. 305-314. In doing so, the circuit court properly recognized that in Energy Dev. Corp. v. Moss, 214 W.Va. 577, 591 S.E.2d 135 (2003), this Court declined to make a sweeping pronouncement about the general ownership of CBM, and endorsed a case-by-case approach focusing on what a party, at the time of the conveyance, would have intended to pass or not pass in the conveyance. App. Vol 1., p. 311. The circuit court also recognized that under West Virginia law, ambiguities in deed reservations are strictly construed against the grantor and in favor of the grantee. Id. 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. Id. 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. Id. at 312-313. Petitioners subsequently filed this appeal.

SUMMARY OF ARGUMENT

Petitioners' main argument in this appeal is that CBM is a "gas," and so a conveyance or reservation of "gas" unambiguously and automatically includes CBM in all cases. However, this Court specifically and repeatedly rejected this exact argument in Moss. Indeed, while CBM is primarily methane, it is also intimately bound to coal, which is a more valuable resource and must be disturbed if CBM is to be produced in paying quantities. This was especially true in 1938, when CBM was generally regarded as a dangerous hazard rather than a commercial resource. After

rejecting the argument that Petitioners now make, this Court endorsed a case-by-case approach focusing on what a party, at the time of conveyance, would have intended to pass or not pass.

Petitioners argue that this Court should ignore Moss (the only West Virginia case discussing the transfer of CBM rights) and instead look to Faith United Methodist Church & Cemetery of Terra Alta v. Morgan, 231 W.Va. 423, 745 S.E.2d 461 (2013). However, Faith United does not even mention CBM, does not overrule nor criticize Moss, and is wholly distinguishable. In Faith United, this Court held that the word "surface" was not ambiguous after finding that courts have given it a clear meaning since the 1930s. By contrast, courts and scholars have not uniformly resolved the issue of whether the word "gas" in a lease or deed includes CBM, and, notably, several authorities hold that CBM belongs to the coal owner.

Petitioners also argue that even if a fact-driven analysis consistent with Moss does apply, the circuit court erred in finding (1) that the commercial production of CBM was not a common practice in 1938; (2) that CBM was generally regarded as a deadly hazard rather than as a commercial resource in 1938; and (3) that Petitioners' predecessors would not have intended to reserve an interest in CBM. However, the circuit court's findings were supported by substantial evidence, and are consistent with the findings of other courts regarding the history of CBM. Moreover, it is undisputed that under West Virginia law, an ambiguity in a deed reservation must be strictly construed against the grantor and in favor of the grantee, and in this case Petitioners are the successors to the grantor while LBR is the successor to the grantee.

In summary, because the word "gas" in a 1938 deed reservation does not automatically and unambiguously reserve an ownership interest in CBM, because deed reservations are strictly construed against the grantor and in favor of the grantee, and because the weight of the evidence supports the circuit court's conclusion that Petitioners' predecessors would not have intended to

reserve an interest in CBM in 1938, Petitioners' appeal is without merit.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

LBR believes that no oral argument is necessary under Rule 18(a) of the West Virginia Rules of Appellate Procedure, insofar as the appeal is wholly without merit and the facts and legal arguments are adequately presented in the briefs and record on appeal. However, to the extent oral argument is appropriate, LBR believes that the case is suitable for a Rule 20 argument because the case involves an issue of fundamental public importance.

ARGUMENT

I. STANDARD OF REVIEW

This Court applies a two-pronged deferential standard of review to the findings and conclusions of a circuit court. Phillips v. Fox, 193 W.Va. 657, 661-62, 458 S.E.2d 327, 331-32 (1995). The Court reviews the final order and ultimate disposition under an abuse of discretion standard, and reviews the circuit court's underlying factual findings, including mixed fact/law findings, under a clearly erroneous standard. Id. In this regard, "a reviewing court may not overturn a finding simply because it would have decided the case differently, and it must affirm '[i]f the [circuit] court's account of the evidence is plausible in light of the record viewed in its entirety.'" Id. Questions of law are subject to a de novo review. Id.

II. THE CIRCUIT COURT PROPERLY REJECTED PETITIONERS' "GAS IS GAS" ARGUMENT AND CONDUCTED AN ANALYSIS CONSISTENT WITH THIS COURT'S HOLDING IN MOSS

Petitioners make 11 assignments of error in their opening brief. However, many of these assignments are repetitive and overlapping. For example, assignments of error 1, 2, 4, and 10 all essentially make the argument that a conveyance or reservation of "gas" unambiguously includes CBM in all cases, and that this Court's statements to the contrary in Moss were superseded by this

Court's decision in Faith United. As demonstrated below, the circuit court properly applied West Virginia law, while Petitioners' position is directly contrary to West Virginia law.

A. Petitioners' "gas is gas" argument has been expressly rejected by this Court and is inconsistent with West Virginia law.

Petitioners' primary argument is that CBM is a "gas," and so a conveyance or reservation of "gas" unambiguously includes CBM in all cases. However, this Court specifically and repeatedly rejected this precise argument in Moss. In that case, the appellees were the owners of the surface and all of the minerals under two tracts of land in McDowell County, West Virginia, including the coal, oil, and gas. Moss, 214 W.Va. at 581, 591 S.E.2d at 139. In 1986, the appellees entered into two leases with Energy Development Corporation (hereinafter "EDC") which purported to lease "all of the oil and gas and all of the constituents of either in and under" the subject properties. Id. By virtue of these leases, EDC claimed the right to produce the CBM from the properties. Id. However, as with the 1938 Deed at issue in the case at bar, "[n]owhere in the leases is there a explicit reference to coalbed methane, coalbed gas, or other such specific term." Id. Nonetheless, EDC advanced the same "gas is gas" argument now asserted by Petitioners, and this Court specifically and repeatedly rejected it.

Early in its opinion, the Court declined to "wave a wand and declare coalbed methane to be either 'coal' or 'gas,'" noting that while CBM "is indeed 'methane,'" it is "also intimately bound to the coal, which must be disturbed if coalbed methane is to be produced in paying quantities." Id. at 585, 591 S.E.2d at 143. Later, the Court directly rejected the argument that "coalbed methane is conclusively 'a gas'" and therefore passed under the "all gas" language in the leases at issue in that case. Id. at 591, 591 S.E.2d at 149. The Court noted that while this argument was "seductively simple," its "logic does not persuade us." Id. Instead, the Court endorsed a case-by-case approach

focusing on "what a party, at the time of the conveyance, would have intended to pass, or not pass, in the conveyance." Id. Finally, at the end of its opinion, the Court discussed the West Virginia Coalbed Methane Act, W.Va. Code § 22-21-1 et seq., and stated that the provisions of the Act show that "the Legislature was reluctant, as are we, to make a sweeping pronouncement about the general ownership of all coalbed methane." Id. at 595, 591 S.E.2d at 153.[2] Thus, this Court could not have been more clear that it ***does not*** accept the argument that CBM is automatically and unambiguously included in all conveyances or reservations of "gas."

B. Because the term "gas" does not automatically include CBM in all cases, the circuit court properly construed the reservation in the 1938 Deed against Petitioners.

As set forth above, this Court's analysis in Moss makes clear that the term "gas" in a conveyance or reservation does not unambiguously include CBM. Applying "case law concerning contracts, in general, and deeds, in particular," the Moss Court affirmed the lower court's determination that the leases at issue, which contained language purporting to lease and demise "all of the oil and gas" under the covered property, were ambiguous with respect to the inclusion of CBM. 214 W.Va. 582-88, 591 S.E.2d at 140-46. Moreover, the Court's repeated rejection of a "sweeping pronouncement about the general ownership of all coalbed methane," and its endorsement

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[2] As the circuit court properly observed, the very fact that the West Virginia Legislature enacted W.Va. Code § 22-21-1 et seq., a statute dealing specifically with CBM, indicates that the Legislature sees a distinction between CBM and conventional natural gas. App. Vol. 1, p. 309. There would be no reason to have a special statute for CBM if the Legislature did not consider it distinct from other "gas." In their fifth assignment of error, Petitioners argue that the circuit court erred in relying on § 22–21–1 because (a) it was passed in 1994 and therefore could not have affected the parties' intent in 1938, and (b) it speaks only to the production of CBM and not its ownership. This is a red herring. The circuit court did not cite § 22–21–1 as something that affected the intent of the parties in 1938 or that legislatively resolves the issue of CBM ownership. Rather, the circuit court cited § 22–21–1 to show that the Legislature has made a distinction between CBM and conventional natural gas by regulating them separately, and also correctly noted that the fact that the CBM statute was passed in 1994 supports Dr. Nino Ripepi's testimony, discussed *infra*, that the commercial production of CBM did not begin in southern West Virginia until the 1990s. Thus, the circuit court did not err in citing W.Va. Code § 22–21–1 in support of its decision.

of a case-by-case approach focusing on the intent of the parties at the time of conveyance, necessarily imply that a conveyance or reservation of "gas" does not unambiguously include CBM.

Once a document is determined to be ambiguous, West Virginia courts employ canons of construction in their search for the intent of the parties. *See* Id. at 586, 591 S.E.2d at 144. One such canon of construction applied in Moss is that oil and gas leases "will generally be liberally construed in favor of the lessor, and strictly as against the lessee." Id. In the present case, a similar canon of construction applies. As the circuit court properly recognized, under West Virginia law, "deed reservations are strictly construed against a grantor and in favor of a grantee," and "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." App. Vol. 1, p. 311(*citing* Syl. Pt. 2, McDonough Co. v. E.I. DuPont DeNemours & Co., Inc., 167 W.Va. 611, 280 S.E.2d 246 (1981); Syl. Pt. 5, Cottrill v. Ranson, 200 W.Va. 691, 490 S.E.2d 778 (1997)).

Thus, because Petitioners' predecessors were the grantors in the 1938 Deed, their reservation of an interest in "gas" must be strictly construed against Petitioners (the successors to the grantors) and in favor of LBR (the successor to the grantee), and West Virginia law required the circuit court to adopt the construction most favorable to LBR. Accordingly, the circuit court correctly determined that Petitioners' predecessor's reservation in the 1938 Deed does not include an interest in CBM.

C. The circuit court properly conducted an analysis of the intent of the parties at the time the 1938 Deed was executed.

In Moss, this Court rejected the argument that the word "gas" in a conveyance or reservation unambiguously includes CBM, and instead applied an analysis focusing on what a party, at the time of the conveyance, would have intended to pass (or not pass) at the time of the conveyance. *See* 214

W.Va. 585-592, 591 S.E.2d at 143-150. Importantly, the Court observed that when determining the intent of the parties to a document, courts can examine custom and usage at the time of the document's execution. Id. at 587, 591 S.E.2d at 145. The Court further explained that "[i]n 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 usage or custom was one *generally followed at the time and place of the contract's execution.*" Id. (emphasis added). Thus, this Court found it relevant that "the production of coalbed methane was not a common practice in McDowell County at the time the leases were executed." Id.

Consistent with Moss, in this case the circuit court heard extensive evidence regarding the history of CBM production and the intent of the parties in 1938. Based on the totality of the evidence, the circuit court determined that the commercial production of CBM was not a common practice in McDowell County, West Virginia at the time the 1938 Deed was executed, and did not begin until long after 1938. App. Vol. 1, pp. 312-13. Moreover, the circuit court found that as of 1938, CBM was generally regarded as a dangerous hazard to be avoided, rather than as a commercial resource to be exploited for profit. Id. The circuit court then properly concluded that Petitioners' predecessors would not have intended to reserve an interest in a highly-dangerous waste product. Id. Thus, the circuit court's analysis was entirely consistent with Moss and West Virginia law regarding the construction of ambiguous deeds.[3]

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[3] Contrary to Petitioners' assertions, the circuit court did not determine "that the reservation of a natural resource hinges on the quantities of a natural resource that were being produced at the time of a deed's execution and the production methods that were being used to recover that resource." Rather, the circuit court properly determined, consistent with Moss, that whether a reservation of "gas" in a deed includes CBM hinges on the intent of the parties at the time the deed was executed, and then looked to factors unique to CBM and its history to determine that intent. Accordingly, the circuit court's order will not, as Petitioners argue, cause "instability and chaos" to ensue if affirmed, any more than this Court caused chaos and instability when it declined to make a sweeping pronouncement about the general ownership of CBM in Moss.

D. Petitioners' attempts to distinguish Moss and/or read it extremely narrowly are without merit, and the analysis in Moss applies equally in this case.

Because Moss plainly indicates that Petitioners are not the owners of the CBM at issue in this case, they argue that Moss is a narrowly crafted, fact specific opinion intended to have limited precedential value. Similarly, Defendants argue that Moss is factually distinguishable, in that Moss dealt with whether 1986 "gas" leases conveyed to the lessee the right to produce CBM, rather than whether a conveyance and/or reservation of "gas" in a deed includes ownership of CBM. These arguments fail for several reasons.

First, even though Moss dealt with production rights under a lease instead of ownership rights under a deed, the circuit court correctly found it analogous. App. Vol. 1, p. 313. In Syllabus Point 8 of Moss, this Court held that "[i]n 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." Syl. Pt. 8, Moss. 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, it stands to reason that 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. Petitioners have not proffered any reason why different rules should be applied in the context of a deed than are applied in the context of a lease. Moreover, in Moss, this Court affirmed the lower court's finding that the 1986 "gas" leases were ambiguous with respect to the right to produce CBM. Id. at 583-88, 591 S.E.2d at 141-46. It would make no sense to hold that the term "gas" in the 1986 leases at issue in Moss is ambiguous with respect to the inclusion of CBM, but that the term "gas" unambiguously includes CBM when used in a reservation in a deed executed 48 years earlier.

Second, while this Court's ultimate holding in Moss was limited to the facts before it, the Court reached its holding by applying general rules of contract law applicable to both leases *and* deeds. Indeed, the Court noted at the outset that "[a]lthough we are considering a lease in this case, much of our case law concerning contracts, in general, and *deeds, in particular*, offers us guidance." Id. at 585, 591 S.E.2d at 143 (emphasis added). Examples of the general rules of law applied by this Court in Moss include:

- It must be borne in mind in construing this paper [the coal severance deed] that the purpose of all construction is to give effect to the intention of the parties. Id. at 144 (*quoting* Rock House Fork Land Co. v. Raleigh Brick & Tile Co., 83 W.Va. 20, 22, 97 S.E. 684, 685 (1918));

- [A] deed will be interpreted and construed as of the date of its execution. Id. (*quoting* Syl. pt. 2, Oresta v. Romano Bros., 137 W.Va. 633, 73 S.E.2d 622 (1952));

- [T]he general rule as to oil and gas leases is that such contracts will generally be liberally construed in favor of the lessor, and strictly against the lessee. Id. (*quoting* Syl. pt. 1, Martin v. Consolidated Coal & Oil Corp., 101 W.Va. 721, 133 S.E. 626 (1926)); [4]

- Oral testimony of the general usages of the gas business, which must have been in the minds of the parties at the time of entering into the contract, is admissible to explain an ambiguity in a written contract for the purchase of gas, whether the ambiguity be latent or patent. Id. at 587, 591 S.E.2d at 145 (*quoting* Syl. pt. 2, Bell v. Wayne United Gas Co., 116 W.Va. 280, 181 S.E. 609 (1935)).

- 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 usage or custom was one generally followed at the time and place of the contract's execution. Id. (*citing* Syl. pt. 1, West Virginia–Pittsburgh Coal Co. v. Strong, 129 W.Va. 832, 42 S.E.2d 46 (1947); syl. pt. 1, Lowe v. Guyan Eagle Coals, Inc., 166 W.Va. 265, 273 S.E.2d 91 (1980); Phillips, 193 W.Va. at 663, 458 S.E.2d at 333).

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[4] As previously discussed, while this rule is specific to leases, a similar rule applies in the present case and holds that "[d]eed reservations are strictly construed against a grantor and in favor of a grantee." Syl. Pt. 2, McDonough Co., *supra*.

Similarly, this Court engaged in a lengthy discussion of several CBM cases from other jurisdictions which involved CBM *ownership* disputes. Id. at 588-592, 591 S.E.2d at 146-150. Notably, the Court determined that each of these cases resolved the *ownership* issues presented by focusing on the intent of the parties at the time of the conveyance, rather than making a sweeping pronouncement that "CBM is gas" and automatically belongs to the gas owner in all cases. Id. Thus, even if this Court's ultimate holding in Moss was limited to the facts before it, the Court's discussion and analysis in reaching that holding were not, and are equally applicable in the case at bar.

Third, this Court's decision in Moss consists of a lengthy discussion of West Virginia contract law, a thorough analysis of numerous cases from other jurisdictions, and a detailed review of the West Virginia Coalbed Methane Act. *See* Id. at 585-595, 591 S.E.2d at 143-153. It would make no sense for this Court to go to such lengths if it intended to disregard all of this discussion and analysis at the next opportunity, and instead simply resolve all future cases by issuing a sweeping proclamation that the word "gas" in all deeds and leases automatically includes CBM.

Fourth, while Petitioners make much out of the fact that the Court limited its holding in Moss to the facts before it, this actually weighs against their "CBM is gas" argument. As discussed above, this Court steadfastly refused to make a sweeping proclamation that CBM "is gas" or "is coal" for all purposes and in all cases, yet that is precisely what Petitioners are asking this Court to do now. In summary, the circuit court properly looked to Moss, this Court's only case addressing the transfer of CBM rights, for the appropriate analysis to be applied in this case at bar.[5]

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[5] To the extent that Petitioners argue that the circuit court relied on the factual findings in Moss, and ignored the evidence presented in the case at bar, this is simply not true. While the circuit court cited the factual findings in Moss in support of its opinion, the circuit court expressly based its decision on "the weight of the evidence presented at trial," and made specific factual findings regarding the evidence presented at trial. App. Vol. 1, pp. 306-310, 312. Moreover, even if the circuit court had simply accepted the factual findings in Moss regarding the general history of CBM production, this would not

E. This Court's decision in Faith United did not supersede Moss, and did not require the circuit court to rule in Petitioners' favor.

Because Moss clearly supports the circuit court's ruling, Petitioners argue that Faith United supersedes Moss, and required the circuit court to accept their "gas is gas" argument. However, Faith United is not a CBM case, and at no point in Faith United did this Court overrule or even criticize Moss. In Faith United, this Court held that the term "surface" has a definite meaning, and overruled Ramage v. South Penn Oil Co., 94 W.Va. 81, 118 S.E. 162 (1923), which previously held that the term "surface" is presumptively ambiguous. In doing so, the Court observed that although courts in the 1920s (when Ramage was decided) were developing different definitions of "surface," by the 1930s this was no longer the case. Faith United, 231 W.Va. at 439-40, 745 S.E.2d at 477-78. In the words of the Court, "[s]ince the 1930s the term 'surface' has largely been regarded as a word of clear meaning[.]" Id. at 440, 745 S.E.2d at 478.

By contrast, Moss was decided in 2003, not 1923, and courts and scholars have not uniformly resolved the issue of whether the term "gas" in a lease or deed includes CBM in the time since Moss has been decided, let alone resolved it in Petitioners' favor. To the contrary, it remains the law in Pennsylvania that "such gas as is present in coal must necessarily belong to the owner of the coal," and that "the coal owner may mine his coal, extract the gas from it, or both." *See* U.S. Steel Corp. v. Hoge, 468 A.2d 1380, 1383-84 (Pa. 1983). Likewise, it remains the law in Alabama that "the reservation of all gas includes the right to coalbed methane gas that migrates into other strata from out of the source coal beds where it formed," but that the reservation "does not include coalbed gas

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have been error. The Moss findings at issue (*i.e.* that the commercial production of CBM was not yet a common practice in McDowell County as of 1986) are not case-specific findings of fact, but rather matters of general history of which a court can take judicial notice. *See* Syl. Pt. 7, Simmons v. Trumbo, 9 W.Va. 358 (1876)("Courts should take judicial notice of such facts as are matters of general history, affecting the whole people...").

contained within its source coal seam" and "the holder of the coal estate has the right to recover *in situ* such gas as may be found within the coal seam." *See* NCNB Texas Nat. Bank, N.A. v. West, 631 So.2d 212, 229 (Ala. 1993) [6]; *see also* Cont'l Res. of Illinois, Inc. v. Illinois Methane, LLC, 847 N.E.2d 897, 902 (Ill. App. 2006)(holding that "the bundle of property rights associated with the coal estate also includes the right to reduce to possession any gas trapped within the coal itself so long as the gas remains within that coal until the time of its capture."); Cimarron Oil Corp. v. Howard Energy Corp., 909 N.E.2d 1115, 1124 (Ind. Ct. App. 2009)(declining to adopt a broad rule regarding general CBM ownership, but finding that "public policy would militate toward considering CBM to be part of the coal bed."); Bowles v. Hopkins Cty. Coal, LLC, 347 S.W.3d 59, 65 (Ky. Ct. App. 2011) (holding that "the owner of the veins and beds of coal possesses the right to capture any CBM within those veins and beds[.]").

Thus, determining the ownership of CBM is not as straightforward an issue as defining the word "surface," and presents different policy considerations. As this Court observed in Moss, CBM is "intimately bound to the coal, which must be disturbed if coalbed methane is to be produced in paying quantities." 214 W.Va. at 585, 591 S.E.2d at 143. Indeed, as Dr. Nino Ripepi testified in this case, CBM is adsorbed[7] into tiny micropores within the coal, and cannot be released in commercial quantities without hydraulically fracturing or horizontally drilling into the coal seam. App. Vol. 2,

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[6] In Moss, this Court discussed both Hoge and West, and neither decision has been overturned since Moss. Petitioners cite Hoffman v. Arcelormittal Pristine Res., Inc., 2011 WL 1791709 (W.D. Pa. 2011), a Pennsylvania federal court case which held that the word "gas" is not ambiguous with respect to the inclusion of *shale gas*, even though it was not commercially exploitable at the time the deed at issue was executed. However, Hoffman did not address CBM rights, and neither disturbed nor questioned the validity of the Pennsylvania Supreme Court's holding in Hoge. Furthermore, Hoffman is distinguishable in that, unlike CBM, shale gas is not intimately bound within a (more) valuable resource, and shale gas has not been historically regarded as a deadly, explosive hazard.

[7] Dr. Ripepi explained that "adsorption" is a chemical attachment whereby the CBM clings to the interior surface of the micropores in the solid matrix of the coal. App. Vol. 2, pp. 94-98.

pp. 94-98, 105, 126, 140. Moreover, the Legislature has recognized that coal is far more valuable than CBM, and has emphasized the importance preserving and protecting coal seams. *See* W.Va. Code 22-21-1. Thus, CBM is intimately bound within a resource that is more valuable than the CBM itself, and cannot be extracted without invading that resource. These considerations were not present in Faith United.[8] As such, Faith United does not supersede this Court's rejection of a "sweeping pronouncement about the general ownership of all coalbed methane" in Moss, nor this Court's preference for a case-by-case approach to CBM rights.

Finally, even if Faith United did implicitly overrule Moss (which it did not), and established a mandatory policy of assigning all words a definite meaning that applies in all cases and contexts, Faith United did not resolve the issue of whether the definite and uniform meaning of the word "gas" should include CBM. In Moss, this Court indicated that CBM is not easily categorized and did not come any closer to holding that CBM is always included in a conveyance or reservation of "gas"

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[8] Petitioners argue that the circuit court's ruling undermines the statement in Faith United that "uniformity and predictability are important in the formulation and application of our rules of property." 231 W.Va. at 437, 745 S.E.2d at 475. While this Court did recognize in Faith United that uniformity and predictability are important in property law, the Court did not hold that these considerations supersede all other considerations in all cases. As discussed *supra*, the issue of CBM ownership presents considerations that were not present in Faith United, and which led this Court in Moss to reject a sweeping pronouncement in favor of a case-by-case approach focusing on the intent of the parties at the time of the conveyance. At no point in Faith United did the Court even mention CBM, and Petitioners have cited no authority holding that this Court's preference for an intent-focused, case-by-case approach to CBM rights must yield to considerations of "uniformity and predictability." Petitioners also point to the statement in Faith United that "[i]t is immaterial what minerals were known to be under the land in 1907, or were not known; the only question is *whether it was the grantor's intention to convey or to reserve* those minerals." 231 W.Va. at 445, 745 S.E.2d at 483 (emphasis added). However, the issue in this case is not whether Petitioners' predecessors knew that CBM was under the Property in 1938. The presence of CBM in coal and the hazard it presented was well known in the early 1900s, when tens if not hundreds of methane explosions occurred in coal mines gaining national attention (including an explosion in Monongah, West Virginia in 1907 that killed over 360 miners). App. Vol. 2, pp. 155, 157. Rather, the issue is whether Petitioners' predecessors would have *intended to reserve* an interest in CBM, given that in 1938 CBM was generally regarded as a dangerous waste product responsible for the deaths of thousands of miners, and that the widespread commercial production of CBM did not begin until long after 1938.

than it did to holding that CBM is always included in a conveyance or reservation of "coal." As discussed above, other jurisdictions have held that CBM located within the coal seam belongs to the coal owner. *See e.g.* Hoge, 468 A.2d at 1383-84; West, 631 So.2d at 229; Illinois Methane, 847 N.E.2d at 902. In addition, two West Virginia Law Review articles cited in Moss conclude that CBM is more properly included in the coal estate. *See* Patrick C. McGinley, *Legal Problems Relating to Ownership of Gas Found in Coal Deposits*, 80 W. Va. L.Rev. 369, 395 (1978)("Courts applying this traditional rule [that the intent of the parties should prevail] should have little problem concluding that the grantee or lessee of coal purchased the right to, as well as the responsibility for, coalbed gas."); Michelle D. Baldwin, *Ownership of Coalbed Methane Gas: Recent Developments in Case Law*, 100 W. Va. L.Rev. 673, 689 (1998)("I would suggest that West Virginia should adopt the position of Alabama and Pennsylvania, and assign ownership of coalbed methane gas to the coal owners so long as the gas remains in the coal seam itself.").

LBR maintains that the circuit court correctly determined that the reservation in the 1938 deed was ambiguous with respect to the inclusion of CBM, and properly examined extrinsic evidence regarding the intent of the parties at the time of the conveyance, consistent with this Court's opinion in Moss. However, if this Court determines that it must establish a definite and uniform rule with respect to the ownership of CBM, then LBR respectfully requests that this Court hold that CBM belongs to the owner of the coal estate for the reasons set forth in Hoge and the other authorities discussed above, or extend Syllabus Point 8 of Moss to hold that the term "gas" in a lease or deed does not include CBM absent specific language to the contrary or other indicia of intent.[9]

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[9]The Poulos Rogers Parties argue that unless this Court holds that the term "gas" includes all gas of every type, including CBM, then a party wishing to convey or reserve a gas estate will have to list "each and every type of gas it intends to reserve or convey." This is simply not true. This Court's refusal in Moss to declare that "CBM is gas" for the purposes of all conveyances and reservations was

F. The precise language of the 1938 Deed supports the circuit court's finding of an ambiguity, as well as the circuit court's ultimate conclusion.

Even if Faith United required the circuit court to rule that an "unlimited" reservation of gas unambiguously includes CBM (which it did not), the reservation in this case is not unlimited. While Petitioners describe the reservation as "unlimited," the precise language of the reservation includes "an undivided one-half interest in the oil and gas under said property . . . together with *the usual and necessary rights of ingress and egress and drilling rights* to explore, get and remove said oil and gas." App. Vol. 3, pp. 1-2. (emphasis added). Thus, the reservation of "gas" is qualified by "the usual and necessary rights of ingress and egress and drilling rights."

Accordingly, the question of what "the usual and necessary rights of ingress and egress and drilling rights" were in 1938 bears on the intent of the parties. As discussed in greater detail *infra*, the weight of the evidence at trial showed that the commercial production of CBM was not a common practice in McDowell County in 1938, and that the technologies necessary to extract significant quantities of CBM from coal (hydraulic fracturing and horizontal drilling) had not yet been developed. Thus, the "usual and necessary rights of ingress and egress and drilling rights" in 1938 would not have included the right to hydraulically fracture or horizontally drill into a coal seam and produce CBM.

As this Court recognized in Moss, "[w]hen an agreement is ambiguous, a court is loath to adopt a construction that places a large and possibly never-considered burden on one of the parties[.]" 214 W.Va. at 587, 591 S.E.2d at 145. If a court adopted a construction of the 1938 Deed

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based on the fact that CBM is intimately bound to coal, which must be disturbed if CBM is to be produced in paying quantities, and therefore presents unique policy considerations. The same is not true of other types of gas. Thus, at most, a party wishing to convey or reserve a gas estate would only need to specifically list CBM if such party intended to include CBM, and would not need to list "each and every type of gas it intends to reserve or convey."

that allowed Petitioners and/or their predecessors to invade and damage the coal using technologies that had not been developed in 1938 to produce a substance that was not considered a commercial resource in 1938, the court would be placing a large and likely never-considered burden on the coal rights of LBR and/or its predecessors. Moreover, because it is highly unlikely that the grantors would have intended to reserve an interest in something that they could not effectively produce, the language of the deed supports the circuit court's conclusion that the parties thereto did not intend the reservation to include CBM.

III. THE CIRCUIT COURT'S FINDINGS REGARDING THE HISTORY OF CBM PRODUCTION AND INTENT OF THE PARTIES ARE NOT CLEARLY ERRONEOUS

As previously discussed, the circuit court found that the commercial production of CBM was not a common practice in 1938; that the commercialization of CBM in McDowell County, West Virginia occurred decades later in the 1990s; that as of 1938 CBM was generally regarded as a dangerous nuisance and hazard to be avoided, rather than as a commercial resource; and that Petitioners' predecessors "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." App. Vol. 1, p. 312. Petitioners' assignments of error 3, 7, 8, and 9 essentially boil down to the argument that these findings were clearly erroneous. However, as demonstrated below, the record is replete with support for the circuit court's findings.

A. The testimony of Fon Rogers, II.

Fon Rogers, II ("Mr. Rogers") is the manager of LBR, and is also the son of Lon B. Rogers, who was the grantee in the 1938 Deed. App. Vol. 2, pp. 21, 25. At trial, Mr. Rogers testified about a 1947 gas lease in which the parties to the 1938 Deed, including the predecessors in title of both LBR and Petitioners, leased their interests in the gas under the Property to United Producing

Company, Inc. Id. at 27-30. In this lease, the parties to the 1938 Deed specifically recognized that the coal under the Property is the more valuable estate, and that all rights granted must be exercised in such a way as to protect the coal and not interfere with the requirements of any coal operations. Id. at 30-32; App. Vol. 3, pp. 9-12. In a 1957 amendment to that lease, the parties reaffirmed that the dominant estate in the Property is coal. App. Vol. 2, pp. 33-36; App. Vol. 3, p. 17. The fact that the parties to the 1938 Deed specifically recognized that the coal is the dominant, more valuable estate in the Property indicates that they would not have intended the reservation in the 1938 Deed to give the grantor rights that would interfere with the grantee's coal estate. In this regard, the 1947 lease requires that "when any well is drilled through a workable seam of coal it is to be so cased and protected as to prevent gas, oil or water from the well escaping into the coal." App. Vol. 3, pp. 9-10. The fact that the parties to the 1938 Deed required the lessee to seal off any well that is drilled through coal indicates that, as of 1947, they viewed gas in coal as an unwanted hazard, rather than as a commercial resource to be exploited.[10]

Mr. Rogers also testified that no one expressed any interest in developing the CBM under the Property until 1989 or 1990, when Island Creek Coal Company approached him and expressed interest in developing it. App. Vol. 2, p. 40. Mr. Rogers further testified that this was the first time he heard CBM being discussed as a potential resource that could be developed from the Property. Id. Petitioners offered no evidence that any person or entity expressed interest in developing the CBM under the Property prior to 1989, and none of Petitioners testified that they were aware of CBM as a commercially exploitable resource at an earlier point in time. Moreover, no one from

[10] Where a deed or other writing is ambiguous, the parties' "subsequent conduct giving it a practical construction" is admissible to prove the intent of the parties. Kopf v. Lacey, 208 W. Va. 302, 307, 540 S.E.2d 170, 175 (2000).

Petitioners' chain of title ever approached Mr. Rogers about potentially leasing the CBM under the property. Id. at 41. The first CBM lease on the Property was not entered into until 1997, when Mr. Rogers (as Trustee of LBR's predecessor) signed a CBM lease with Equitable Resources Energy Company. App. Vol. 2, pp. 36-40; *see also* App. Vol. 3, p. 23-49.[11] Mr. Rogers' un-rebutted testimony that no one expressed any interest in developing the CBM under the Property until 1989 at the earliest indicates that the commercial production of CBM was not a common practice in 1938. Likewise, the fact that the parties to the 1938 Deed entered into a conventional gas lease in 1947, but no CBM lease was entered into until 50 years later in 1997, indicates that the commercial production of CBM was not a common practice in1938.

Finally, Mr. Rogers testified about an oil and gas evaluation of the Property prepared by Marshall Miller & Associates for Petitioners in 1993. App. Vol. 2, pp. 43-47. According to this evaluation, the CBM potential for the Property was difficult to determine because of a "lack of data associated with lack of projects," and because "[o]nly preliminary research in McDowell County has been conducted." App. Vol. 3, pp. 73-74. The fact that Petitioners' own evaluation in 1993 found that only preliminary research into CBM development in McDowell County had been conducted as of 1993 indicates that the commercial production of CBM was not a common practice in McDowell County in 1993, let alone 1938.

B. The testimony of LBR's expert, Dr. Nino Ripepi.

Dr. Ripepi, whose qualifications are more fully discussed *infra*, is a mining engineer and

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[11] It is notable that Equitable entered into this 1997 CBM lease with LBR's predecessor, which was the owner of the coal estate in the Property, and that none of Petitioners and/or their predecessors are signatories to this lease. *See* Id. It is also notable that while Mr. Rogers' father (who was the grantee in the 1938 Deed) was still alive when Mr. Rogers was negotiating the 1997 CBM lease, he never cautioned or advised Mr. Rogers that LBR might not own all of the CBM under the Property. App. Vol. 2, p. 41.

assistant professor at Virginia Tech who teaches subjects including the historical development of CBM. App. Vol. 3, pp. 117, 145. Dr. Ripepi testified that CBM was not considered a commercial resource (that is, a resource that can be developed for profit) in 1938, nor was it commercially produced in McDowell County as of 1938. App. Vol. 2, pp. 152-154, 226; *see also* App. Vol. 3, pp. 123-138, 495-502. Dr. Ripepi explained that, historically, CBM was regarded as a nuisance and significant hazard associated with underground coal-mining, rather than as a commercial resource. App. Vol. 2, pp. 155, 201, 227, 295. The U.S. Bureau of Mines was established in 1910 in response to a number of catastrophic coal mine disasters caused by methane explosions, such as the explosion that occurred in Monongah, West Virginia in 1907 and killed over 360 miners, and developed ventilation practices to improve miner safety. Id. at 155, 157. CBM was simply vented into the atmosphere until the 1970s, when CBM production began in the United States. Id. at 155, 157-158, 170-171.

This initial production was done for safety reasons, and it was not until the early 1980s that commercial scale CBM production in the United States commenced in the Black Warrior Basin of Alabama and the San Juan Basin of New Mexico. Id. at 172, 179, 227-230. It was only after the advent and development of hydraulic fracturing and de-watering techniques, and a significant federal tax credit in 1980, that the commercial production of CBM began to grow into a common practice. Id. at 172, 237-240. According to Dr. Ripepi, the first CBM well permit in the United States was issued in Alabama in 1980; the first commercial CBM well in the Central Appalachian region (which includes southern West Virginia and southwestern Virginia) was drilled in Dickenson County, Virginia in 1988; and CBM production in southern West Virginia did not begin until the early to mid

1990s. Id. at 165-167, 180, 232.[12] All of this directly supports the circuit court's findings.

Dr. Ripepi also testified about the differences in the way that CBM and conventional natural gas are contained within and flow through their source rocks. He explained that a piece of coal has two basic parts: the "matrix of the coal," which is the solid part of the coal, and an interconnected system of channels called "cleats." Id. at 93-95; *see also* App. Vol. 3, pp. 148-49. Within the coal matrix are tiny micropores which, unlike the cleats, are not connected together. App. Vol. 2, pp. 95-96, 99-100. While the vast majority of natural gas in conventional gas-producing formations like sandstone exists as a free gas within the cleats or spaces between the minerals, about 98 percent of CBM is adsorbed to the surface of the micropores within the coal matrix itself (rather than existing as a free gas in the cleats). Id. at 96-98, 100, 105-106, 297.

Due to the different ways CBM and conventional natural gas are held in the minerals, producing CBM is much more difficult than producing conventional natural gas and requires different production methods. Id. at 101. While simply drilling a hole into sandstone will produce gas like putting a straw into a balloon, drilling into a coal seam will not produce a significant amount of CBM. Id. at 101,120-126,138-141, 297-298. Water must be pumped out of the coal to reduce pressure and allow the CBM to migrate, and even then migration is slow because the CBM must diffuse through the solid coal matrix to get to the cleat system. Id. at 101-104. Furthermore, due to the low permeability of Central Appalachian coal, it takes significantly longer for CBM to flow through cleats in the coal than it does for natural gas to flow through sandstone. Id. at 107, 113-114.

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[12] Dr. Ripepi testified that even as of the 1990s, when he was working for CONSOL in northern Appalachia, the company was venting CBM into the atmosphere, rather than attempting to capture it, because it was not economic to utilize. App. Vol. 2, pp. 171, 230, 239. He explained that CONSOL spent millions of dollars per year from the 1970s through the 1980s and into the 1990s ventilating and degasifying its coal mines for health and safety reasons with no economic benefit from the CBM as a commercial resource. Id. at 239.

As a result, producers must use one of two techniques in order to produce commercial quantities of CBM: hydraulic fracturing and horizontal drilling. Id. at 126, 140. Hydraulic fracturing involves using high-pressure liquid to create fractures which can extend thousands of feet into the coal seam, thereby significantly increasing the area of drainage for the well and allowing a lot more CBM to be produced. Id. at 126-136. Horizontal drilling (*i.e.* drilling horizontally through the coal seam itself) is more expensive and less common than hydraulic fracturing, and is generally reserved for isolated coal seams that are likely to be mined in the near future. Id. at 126-127, 142-144.[13] Importantly, these technologies were not developed and deployed until long after 1938: the first known hydraulic stimulation of a coalbed did not occur until 1959, while the practice of horizontal drilling did not begin until the late 1980s. Id. at 142, 148, 197-98, 202.[14] In the 1930s, natural gas producers were using open hole and casing perforation wells, which would not typically be capable of producing commercial quantities of CBM. Id. at 118-123, 138-141. The fact that the technology necessary for the commercial production of CBM had not been developed as of 1938 supports the finding that the commercial production of CBM was not a common practice in 1938, and that at that time CBM was generally regarded as a deadly nuisance rather than an exploitable resource.

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[13] According to Dr. Ripepi, of the approximately 6,000 CBM wells in the Central Appalachian region that he has analyzed, about 95% were hydraulically fractured and about 5% were horizontally drilled. App. Vol. 2, pp. 126-127.

[14] While the technique of "shooting" a well, which involved setting off a nitroglycerin explosive inside of a well, did exist prior to 1938, this technique would only create a fracture that extended about 10 feet from the well bore, and thus only had the potential to stimulate gas production in a very small area near the well bore. App. Vol. 2, pp. 124-126. In addition, blasting the coal with nitroglycerin can actually force coal fines into the cleat system, thereby clogging the flow of CBM out of the coal. Id. By contrast, the process of hydraulic fracturing can create fractures upwards of 3000 feet and involves the injection of a sand proppant to keep those fractures open, thus allowing a lot more CBM to be produced. Id. at 127-131.

C. Documents supporting Dr. Ripepi's testimony and the circuit court's findings.

Dr. Ripepi discussed numerous documents in support of his testimony at trial. First, he discussed a pilot study conducted by the Bureau of Mines in the early 1970s to test whether it was feasible to remove CBM from coal seams prior to mining in order to decrease the hazard of methane ignitions and explosions. App. Vol. 2, pp. 159-163. In the 1974 report of that study, the Bureau concluded that the combined procedure of hydraulically fracturing the coal seem and pumping water out of the coal could effectively remove the CBM. Id. at 163-65; App. Vol. 3, p. 161. The 1974 report also demonstrated the feasibility of providing supplemental resources of fuel through the recovery of CBM that would otherwise be wasted into the atmosphere. Id.

Second, Dr. Ripepi discussed a 2010 report by the United States Environmental Protection Agency titled "Coalbed Methane Extraction: Detailed Study Report." This report states that interest in CBM production began in the 1970s, but that little development occurred until the early 1980s. App. Vol. 2, pp. 177-179; App. Vol. 3, p. 206. This report further explains that in 1983, the Gas Research Institute began a field study investigating the potential for producing methane from coalbeds, and that the first areas to be developed were the Black Warrior Basin in Alabama and the San Juan Basin in New Mexico and Colorado in the 1980s. Id.

Third, Dr. Ripepi discussed a chapter out of a 2003 publication titled "Handbook for Methane Control in Mining." It was authored by Pramod C. Thakur, who Dr. Ripepi testified is a pioneer in the field of coal mine degasification. App. Vol. 2, p. 228-29. This publication states that "[b]efore 1950, when coal degasification was generally unknown and ventilation was the only method of methane control, mine explosions in the United States were much more disastrous with a very high number of fatalities." Id. at 227, 231; App. Vol. 3, p. 456.

Dr. Ripepi also discussed various documents previously submitted as exhibits *by Petitioners*

at the summary judgment stage, and demonstrated that none of them contradict, and many of them support, his opinions. The first such document, Plaintiff's Exhibit 14, was a 2002 publication by the United States Geological Survey titled "Coalbed Methane Production in the Appalachian Basin." This publication indicates that commercial production of CBM began in southwestern Virginia in 1988 and in southern West Virginia in 1989. App. Vol. 2, pp. 182-184; App. Vol. 3, p. 281. It also states that, earlier in history, CBM was vented into the atmosphere to degas coalbeds in advance of mining. Id.

The second such document, Plaintiff's Exhibit 15, is a 1937 publication by the West Virginia Geological Survey authored by Paul H. Price and A.J.W. Headlee. This publication states that several wells in Wetzel County, West Virginia were producing considerable volumes of gas from the Pittsburgh coal seam, and then discusses samples from three wells. App. Vol. 2, p. 186; App. Vol. 3, pp. 308-310. As Dr. Ripepi testified, the existence of three or four or even 10 producing wells in Wetzel County would not establish that the production of CBM was a common practice prior to 1938, especially given that over 64,000 conventional natural gas wells had been drilled in West Virginia as of that time. App. Vol. 2, pp. 187, 241.

The third such document, Plaintiff's Exhibit 16, is a 1904 publication by the West Virginia Geological Survey authored by I.C. White. This publication also states that there are several examples in West Virginia where valuable flows of gas have been obtained from coalbeds. Id. at 189; App. Vol. 3, p. 327. Again, the existence of a small number of producing wells does not establish that the production of CBM was a common practice prior to 1938. App. Vol. 2, pp. 187, 190. Furthermore, in the lone example actually discussed in the publication, the drillers were actually targeting the Gordon Sand, rather than the coal. Id. at 190; App. Vol. 3, p. 327.

The fourth such document, Plaintiff's Exhibit 17, is a 1994 publication by the United States

Bureau of Mines authored by William P. Diamond. This publication discusses the history and technology of methane drainage for safety purposes, and notes that "ventilation has long been the primary means of controlling methane emissions in underground coal mines." App. Vol. 2, p. 192; App. Vol. 3, p. 336. This publication also discusses, ***in 1994***, the "***potential*** for commercialization of coalbed methane." App. Vol. 2, pp. 193-194; App. Vol. 3, p. 336 (emphasis added). This publication also states that "the first vertical wells in the United States designed specifically to remove gas directly from a coalbed were drilled in 1952 at a mine on the Pennsylvania-West Virginia border." App. Vol. 2, p. 195; App. Vol. 3, p. 338. This publication also states that the first documented attempt to stimulate a CBM drainage well was made in 1952 using nitroglycerin, and that "[t]he first known hydraulic stimulation of a coalbed occurred at this same mine in 1959." App. Vol. 2, p. 196-97; App. Vol. 3, p. 338. Most critically, this publication quotes a 1941 article in which the author "thought it surprising that, in view of the 275 miner deaths in 1940, no thought was given to recovering the gas from coal in advance of mining to enhance mine safety," but "recognized, however, that ***anyone suggesting that this gas be recovered and used would be considered 'visionary or crazy.'***" App. Vol. 2, pp. 200-201, 295; App. Vol. 3, p. 338 (emphasis added). All of this, especially the statement in 1941 that anyone suggesting that CBM be recovered and used would be considered "visionary or crazy," is consistent with Dr. Ripepi's opinion that CBM was viewed in 1938 as a hazard to be vented into the atmosphere rather than a commercial resource to be captured for profit.

The fifth such document, Plaintiff's Exhibit 18, is a 1943 publication titled "Natural Gas in West Virginia" and authored by Paul H. Price and A.J.W. Headlee. Notably, the authors of this publication are the same people who wrote Exhibit 15. App. Vol. 2, p. 205. In Exhibit 18, these authors state that "the term natural coal gas is applied to the gas which occurs naturally in coal to

differentiate it from other natural and artificial gases." Id. at 207; App. Vol. 3, p. 382. Thus, in 1943, the authors of two documents relied upon by Petitioners recognized a differentiation between "natural coal gas," or CBM, and other natural gases. This publication also states that (1) natural coal gas "presents an explosion hazard which demands dilution with ventilating air," but that "[t]he writers believe that the technology developed by the petroleum and gas industry ***could be*** adapted to the economic recovery of this gas"; (2) "[t]he ***first step*** in such a development should be investigation of how the gas is held and released by the coal seams"; (3) "[a] method of horizontal drilling has been suggested which ***may make it possible*** economically to remove this natural coal gas"; (4) "[t]he rate of escape of the methane into the hole is of prime importance and this rate ***will determine the economic feasibility*** of any method of production," but that "[u]nfortunately, there are practically ***no data available*** on the rate of release of gas from virgin coal into boreholes." App. Vol. 2, pp. 207-09; App. Vol. 3, pp. 382, 389-390 (emphasis added). All of this is consistent with Dr. Ripepi's opinion that the commercial production of CBM was not a common practice as of 1938, and that the technology necessary for the commercial production of CBM had not yet been deployed in 1938.

The sixth such document, Plaintiff's Exhibit 19, is a 1991 publication by the West Virginia Geological and Economic Survey authored by Douglas G. Patchen. This 1991 publication notes that CBM is a "potentially important" energy source, that production of CBM in the western and southern United States "has demonstrated the feasibility and profitability of harnessing" CBM, and that coalbeds near the West Virginia-Pennsylvania border "may contain" large amounts of producible gas. App. Vol. 2, pp. 213-14; App. Vol. 3, p. 392. This is consistent with Dr. Ripepi's opinion that commercial CBM production in the United States began in the 1980s in Alabama and New Mexico, and did not occur in southern West Virginia until the 1990s. This publication also discusses the small

number of wells that were drilled into the Pittsburgh coal seam in northern West Virginia prior to 1938. App. Vol. 2, pp. 214-219. Again, the existence of three or four wells in northern West Virginia does not establish that the production of CBM was a common practice in McDowell County, West Virginia (or anywhere) prior to 1938. App. Vol. 2, pp. 187, 218-219.[15]

The seventh such document, Plaintiff's Exhibit 20, is a 1976 report from the National Academy of Sciences authored by James G. Tilton. This publication states, with respect to CBM being produced from degassing projects in advance of mining, that "such production ***is in its infancy*** with respect to commercial use, but those projects which are on stream confirm that commercial recovery is feasible." App. Vol. 2, p. 222; App. Vol. 3, p. 430 (emphasis added). This statement, in 1976, is consistent with Dr. Ripepi's opinion that the commercial production of CBM was not a common practice as of 1938. This publication also discusses some of the same pre-1938 drilling activity in northern West Virginia that was addressed in previous exhibits, and states that as of 1976, "at least 783 wells have been drilled through the Pittsburgh coal, but only 23 have been productive

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[15] As Dr. Ripepi further explained, these wells were most likely producing gas from a sandstone or shale formation either overlying or underlying the Pittsburgh coal formation, rather than from the coal itself. App. Vol. 2, pp. 243-249; App. Vol. 3, p.499. This is because (1) the production volumes for these pre-1938 wells were much higher than what could be produced from a well that was not hydraulically fractured and much higher than what Dr. Ripepi has observed from CBM wells his career; and (2) the gas produced by some of the referenced pre-1938 wells in northern West Virginia had high ethane and propane contents, which is more consistent with shale gas and inconsistent with CBM. App. Vol. 2, pp. 248-49, 292. If in fact the referenced pre-1938 wells in northern West Virginia were actually producing CBM, this was likely possible only because they were drilled on a structural high, in coal with better than average permeability and where there happened to be an absence of water in the coal seams. Id. at 243-44. These are unusual circumstances that were not common to other areas of the same field, and would not likely occur in southern West Virginia where the coals have less permeability and a higher presence of water. Id. This testimony is supported by a 1984 report by the United States Bureau of Mines entitled "Influence of Overlying Strata on Methane Emissions in Northern West Virginia Coal Mine," which discussed abnormally high emissions from a mine near the Pittsburgh coalbed in northern West Virginia and found that a sandstone formation directly above the coalbed was feeding gas into the mine. Id. at 246-48; App. Vol. 3, p. 480.

at that horizon." App. Vol. 2, pp. 223-226, 242-43. This is consistent with Dr. Ripepi's opinion that the commercial production of CBM was not a common practice as of 1938.

Finally, Dr. Ripepi testified about Defendants' Exhibit 6, which is a 1935 report titled "Flow of Gas Through Coal" and authored by S.P. Burke. This report states that "[t]he presence of gas in coal mines necessitates the use of costly ventilation arrangements and the use of expensive mining methods," but that "the gas itself is of considerable intrinsic value, and its separate recovery might conceivably be a profitable undertaking." App. Vol. 2, p. 263; App. Vol. 3, p. 793. The statement, in 1935, that CBM recovery "might conceivably" be a profitable undertaking is consistent with Dr. Ripepi's opinion that the commercial production of CBM was not a common practice in the 1930s. Furthermore, as Dr. Ripepi explained, the recognition that something has intrinsic value does not mean that it is economically recoverable, and if it is not economically recoverable, then it is effectively worthless. App. Vol. 2, pp. 290-291. Indeed, the authors of this report noted that the presence of gas in coal necessitates the use of "costly ventilation arrangements" and "expensive mining methods," and refer to it as "a terrible coal-mining hazard." App. Vol. 3, pp. 793, 805. Furthermore, the report also discusses a variety of samplings from holes drilled in coal seams in West Virginia, and stated that "while generally speaking, 'coal' gas is found associated with coals such as this, of high fixed carbon content, geologists tell us that the occurrence of natural gas in commercial quantity is not to be expected in regions where such coals exist." App. Vol. 2, pp. 300-301; App. Vol. 3, p. 804. All of this is consistent with Dr. Ripepi's opinion, and the circuit court's finding, that CBM was historically viewed as a hazard to be vented into the atmosphere rather than a commercial resource.

D. The testimony of Dr. James Donald Rimstidt.

Notably, Petitioners did not offer any expert witness who contradicted Dr. Ripepi's

testimony. Petitioners' only expert was Dr. James Rimstidt, a geochemist and professor emeritus at Virginia Tech. Dr. Rimstidt agreed with Dr. Ripepi's testimony that CBM is confined in the micropores of the coal matrix, and that water must be pumped out of the coal to allow CBM to migrate. App. Vol. 2, pp. 513-17. He also agreed with Dr. Ripepi's testimony that, unlike CBM, most natural gas in sandstone exists in a free state in the cleats, and so simply drilling into the sandstone is enough to cause the gas to flow up through the well. Id. Most importantly, Dr. Rimstidt never disputed Dr. Ripepi's opinions that the commercial production of CBM was not a common practice in the United States and/or West Virginia as of 1938, and that as of 1938, CBM was generally regarded as a dangerous nuisance rather than as something to be exploited for profit. Instead, he essentially testified that CBM is in fact a "gas" and that he sees no "scientific basis" to distinguish CBM from conventional natural gas. App. Vol. 2, pp. 495, 507-508, 522. As the circuit court correctly recognized, this does not mean that there is no legal, commercial, technological, or public policy basis to distinguish CBM from conventional natural gas. App. Vol. 1, p. 309.

Indeed, the circuit court properly found that "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." App. Vol. 1, p. 312. To summarize, Dr. Ripepi's testimony, along with copious supporting documents, established that (a) unlike conventional natural gas, CBM is adsorbed within a (more) valuable resource which must be significantly disturbed in order to produce commercial quantities of CBM; and (b) unlike conventional natural gas, CBM was historically regarded as a dangerous waste product responsible for the deaths of thousands of miners, rather than as a commercial resource. Moreover, the Legislature passed W.Va. Code § 22–21–1, et seq. which regulates CBM separately from other "gas," and this Court in Moss steadfastly refused to declare that CBM is conclusively "gas" that is automatically included in a conveyance or reservation of an

interest in "gas." Thus, Dr. Rimstidt's testimony does nothing to establish that the circuit court's findings are clearly erroneous.

E. The testimony of Mary Behling and the WVGES records.

Ms. Behling is an employee of West Virginia Geological and Economic Survey (hereinafter "WVGES"), and she mainly testified regarding Defendants' Exhibit 1, which is a collection of printouts from the WVGES online oil and gas database for various wells in West Virginia, together with copies of scanned records that were used as the basis for the information in the printouts. App. Vol. 2, p. 323.[16] Ms. Behling testified that the information on the printouts in Defendants' Exhibit 1 represents a WVGES employee's best understanding of what the scanned records behind each printout reveals, and that there is no other source of information for the printouts beyond the records attached thereto. App. Vol. 2, p. 427. Furthermore, the database was not created until 1966, many years after the original records for pre-1938 wells were created. Id. at 365-366, 417.

As could be expected from a database created so long after 1938, the evidence at trial showed that there were numerous errors on the WVGES printouts regarding pre-1938 wells, and there were many instances in which the information on a given printout was not supported by any scanned

[16] The first two pages of Defendants' Exhibit 1 are not from the WVGES database. Rather, these two pages are a purported summary prepared by counsel for Petitioners, and not by an employee of the WVGES. Furthermore, this chart does not accurately reflect the contents of Exhibit 1. For example, the cover page lists three wells which do not actually appear in Exhibit 1 (including Permit 4 in Ohio County, Permit 5A/845 in Wetzel County, and a 1902 well in McDowell County with no well/permit number listed). Furthermore, the "Target/Production Formation" field in counsels' summary is not a field contained in the WVGES printouts and draws conclusions unsupported by the data in the exhibit. For example, for the Boone County wells with Permit Nos. 9, 11, and 22, the cover page lists the "Target/Production Formation" as "Penn. Sys.- unidentified coal," but the WVGES printouts and supporting records do not indicate that the drillers either targeted or produced gas from coal. The WVGES printouts and records indicate only that the wells were drilled into the Pennsylvanian System, without any indication that the drillers were targeting coal as opposed to some other formation in the Pennsylvanian System. For a more accurate chart of all the wells identified in Exhibit 1, see App. Vol. 1, pp.286-290.

historical document.[17] Thus, there is a substantial question as to the reliability of the WVGES database printouts. In any event, not a single printout or record in Defendants' Exhibit 1 demonstrates that commercial quantities of CBM were produced from any well in or before 1938. There is no production data in Defendants' Exhibit 1 for this time period. Even for those wells with records showing a methane "pay," Ms. Behling testified that the notation of "pay" does not necessarily mean that commercially producible quantities of gas were found. App. Vol. 2, pp. 355-356, 369.[18]

Moreover, of the 62 wells identified in Defendants' Exhibit 1, 15 were completed after 1938, and thus could not have had any bearing on the intent of the parties to the 1938 Deed. Of the remaining 47 wells, 23 were drilled to shallow depths within the City of Welch and could not have been commercial CBM wells. Critically, with one exception (Permit 20), the printouts for all of these Welch wells state merely that they were drilled into the "Pennsylvanian System" without specifying any formation within that system. *See* App. Vol. 3, pp. 650-676, 695-97. As Ms. Behling testified, the "Pennsylvanian System" contains not only coals but shales, sandstones, and limestones. App. Vol. 2, pp. 336-337, 429-30. Thus, with the exception of Permit 20, there is no evidence that any of these Welch wells ever even *encountered* coal (the records for Permit 20 indicate that it encountered coal but was shot in a formation identified as "rock"). *See* App. Vol. 3,

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[17] Due to page limitations, LBR does not have enough space in this brief to discuss the flaws and shortcomings of each of the 62 WVGES printouts contained in Defendants' Exhibit 1. However, a detailed discussion of the problems with each printout is contained in the proposed order that LBR submitted to the circuit court. *See* App. Vol. 1, pp.239-250, 253-58; *see also* the summary chart at App. Vol. 1, pp. 286-290.

[18] Ms. Behling explained that a gas "pay" means more than 25,000 cubic feet per day, whereas a smaller amount of gas would be referred to as a gas "show." Id. at 355-356. However, she acknowledged that when the WVGES records indicated a "pay," that is just a static representation of data measured on the date the well was completed, and the WVGES just "assumed" it would continue to produce like amounts moving forward. Id. at 342-43, 461-63.

pp. 650-676, 695-97. However, even if these wells *did* encounter coal, Dr. Ripepi testified that CBM wells in this area of the country must be drilled to a depth of at least 700 feet in order to produce commercial quantities of CBM. App. Vol. 2, pp. 149-150, 526-532. The deepest of the referenced McDowell County wells was only 550 feet, the next deepest was only 160 feet, and the majority were less than 100 feet. *See* App. Vol. 3, pp. 650-676, 695-97.[19] While no depth was given for six of these 23 wells, that fact that they were all located within a space consisting of a few hundred feet in the City of Welch indicates that all 23 of these wells were shallow wells used for house gas. App. Vol. 2, pp. 527-28. Regardless, there are no records indicating that *any* of these 23 Welch wells actually *produced any gas from coal.*

Of the remaining 24 wells in Defendants' Exhibit 1, only 13 purportedly encountered enough gas from coal to be considered a "pay," according to the WVGES printouts. *See* App. Vol. 1, pp. 286-290.[20] The scanned well records for two of these 13 wells (Marshall County Permits 52 and 84) contradict the WVGES printouts and demonstrate that there was in fact no "pay" of gas from coal from these two wells. App. Vol. 2, pp. 474, 536-38. Of the remaining 11 wells, the scanned records for another three wells (Wetzel County Permits 61, 63, and 65) do not contain any support for the finding of a "pay" of gas from coal beyond the mere facts that each well was perforated in a coal formation and is generally referred to as a "gas well." *See* Id. at 467-471; App. Vol. 3, pp. 591-600.

As such, Defendants' Exhibit 1 establishes, at best, that eight pre-1938 wells encountered

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[19] The WVGES printout for the McDowell County well designated as Permit 26 incorrectly lists the total vertical depth as 1600 feet. The attached well records state that the depth was only 160 feet and that the well was only used to supply gas to a house and a garage. App. Vol. 2, pp. 458-459, 532; App. Vol. 3, p. 697.

[20] The 13 pre-1938 wells which, according to the WVGES printouts, encountered a "pay" of gas from coal are Wetzel 30248, Marshall 84, Mason 30009, Mason 30010, Wetzel 30968, Wetzel 30219, Wetzel 61, Wetzel 63, Wetzel 65, Marshall 52, Wetzel 136, Wetzel 148, and Mason 25.

enough gas from coal to be considered a "pay," and again, Ms. Behling could not say that a "pay" meant that commercial quantities were produced from the well after it was completed. Even if all eight of these wells did produce commercial quantities of CBM, Dr. Ripepi's unrebutted testimony established that eight producing wells (or 13 producing wells, for that matter) would not even make a single field commercial, let alone an entire industry. Dr. Ripepi testified that at least 20 producing wells within the boundaries of a field are necessary before that field is considered commercial. App. Vol. 2, pp. 281-282.[21] Thus, even if the printouts from the WVGES database are correct (and there is a substantial question in that regard), Defendants' Exhibit 1 does not establish that the commercial production of CBM was a common practice in or before 1938.[22] Likewise, even if some operators were attempting to produce CBM from these wells before 1938, such limited and sporadic efforts do not prove that the circuit court's findings that CBM was generally regarded as a dangerous

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[21] Petitioners take issue with Dr. Ripepi's definition of the number of wells that it takes to make a field commercial. However, it can hardly be argued that a mere eight producing wells make an industry commercial or change the general perception of CBM as a deadly hazard. This is especially true given that over 64,000 conventional natural gas wells had been drilled in West Virginia as of 1938. App. Vol. 2, p. 187. Citing a well record for Permit 70001 in Monongalia County, Petitioners assert that in 1865 it was believed that just one well could produce enough CBM to heat an entire town, which they argue was undoubtedly "commercial" production. However, while this well record indicates that a significant volume of gas was encountered, it does not specify the depth or formation where the gas was encountered, and *does not* state that the gas was found in and/or produced from coal. *See* App. Vol.3, p. 520. The well record does generally list several coal formations, but Dr. Ripepi explained that this does not make it safe to assume that the gas was produced from coal. App. Vol. 2, pp. 553-554. As Ms. Behling testified, these types of records list the depths at which coals are encountered because coals are very good marker beds for determining stratigraphic units. Id. at 348-349. Thus, there is no basis to conclude that the record for this well is talking about CBM as opposed to gas from a conventional formation.

[22] Petitioners also argue that CBM production need not be "commercial" in 1938 order to bear on the intent of the parties. However, given the general perception of CBM as a deadly hazard, it stands to reason that production would need to be commercial (*i.e.* lucrative) in order to cause a person to intend to reserve an interest in it. Moreover, Petitioners have failed to show that any production of CBM, commercial or otherwise, was a common practice as of 1938. They have shown, at best, limited and sporadic production of CBM, while the weight of the evidence is clear that the common practice was to treat CBM as a dangerous waste product and vent it into the atmosphere to protect miners.

nuisance in 1938, and that commercial CBM production was not a common practice at that time, were clearly erroneous. [23]

Indeed, Ms. Behling testified that the WVGES only started paying attention to gas produced from coal in the 1990s, in conjunction with a study conducted by Douglas G. Patchen. App. Vol. 2, pp. 361, 416-417. In Ms. Behling's words, "[c]oalbed methane was not on our radar until the early 1990s." App. Vol. 2, pp. 361, 417. If CBM was not "on the radar" of the WVGES until the 1990s, it strains credulity to believe that private parties making a reservation in a deed in 1938 would have viewed CBM as anything other than a hazard to be vented into the atmosphere.[24]

F. The findings of other courts.

Dr. Ripepi's testimony and the circuit court's findings are consistent with the findings of various appellate courts. For example, in construing leases that were executed *in 1986*, this Court observed that said leases were executed "before the widespread commercial production of coalbed methane in West Virginia" and that "the production of coalbed methane was not a common practice in McDowell County at the time the leases were executed." Moss, 214 W.Va. at 585-87, 591 S.E.2d

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[23] It should also be noted that the seams in which Defendants' Exhibit 1 indicates show or pay amounts of gas were encountered are the Freeport Coal, Pittsburgh Coal, and the Sewickley/Mapleton, which are not present in McDowell County, West Virginia. *See* App. Vol. 2, pp. 532-533.

[24] Petitioners attempt to explain away Ms. Behling's statement that CBM was "not on our radar until the early 1990s" by asserting that she only meant that usage of the term "coalbed methane gas" is a recent development. However, Ms. Behling clearly testified that the WVGES started paying attention to gas produced from coal in the 1990s, in conjunction with a study conducted by Douglas G. Patchen. App. Vol. 2, pp. 361, 416-417. That study did not coin the term "coalbed methane." Rather, that study found that CBM is a "potentially important" energy source and that production of CBM in the western and southern United States "has demonstrated the feasibility and profitability of harnessing" CBM. *See* Id. at 213-14; App. Vol. 3, p. 392. Thus, when Ms. Behling said that CBM was "not on our radar until the early 1990s," it is clear she meant that the WVGES did not recognize CBM as a commercially viable industry prior to that time.

at 143-45.[25] Furthermore, in Moss, this Court conducted an "Overview of Coalbed Methane," indicating that CBM has historically been regarded as a dangerous hazard responsible for the deaths of thousands of miners, and that its status as a valuable resource is a much more recent development. Id. at 584-85, 591 S.E.2d at 142-143.

Likewise, in Hoge, the Supreme Court of Pennsylvania observed with respect to the 1920 deed at issue that "[i]n the year 1920, coalbed gas was primarily regarded as a lethal substance to be removed from mines and wasted into the atmosphere." 468 A.2d at1389. The Court also observed that although there has been some CBM production dating back to the year 1900, "[c]ommercial exploitation of coalbed gas, however, has remained very limited and sporadic *until recently*." Id. at 1383 (emphasis added). In light of these facts, the court then found it "inconceivable" that the grantors intended in 1920 to reserve an interest in CBM, which at that time was generally known as "only a waste product with well-known dangerous propensities[.]" Id. at 1385.

The circuit court's findings are even consistent with the findings of the Supreme Court of Virginia in Harrison-Wyatt, LLC v. Ratliff, 593 S.E.2d 234 (Va. 2004), which Petitioners relied upon extensively in the parallel Buchanan County Circuit Court action.[26] In Harrison-Wyatt, the

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[25] Petitioners have argued that this language in Moss merely reflects findings of fact by the trial court. Even if this is true, the fact remains that, after conducting its own "Overview of Coalbed Methane," this Court never disagreed with those findings.

[26] Petitioners note that they prevailed in Virginia as to the ownership of CBM under the Virginia properties covered by the 1938 Deed. However, the Buchanan County Circuit Court, which was affirmed without opinion by the Virginia Supreme Court, merely ruled that the word "gas" automatically includes CBM under Virginia law without examining the intent of the parties at the time the 1938 Deed was executed. This is directly contrary to West Virginia law as set forth in Moss, and as the McDowell County Circuit Court correctly concluded, West Virginia law, not Virginia law, controls the outcome of this case. App. Vol. 1, p. 310. Indeed, as this Court has recognized: "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.

Supreme Court of Virginia recognized that in 1887 and "for about a century thereafter, CBM was known as the 'miner's curse,'" and was responsible for "killing or maiming thousands of miners." 593 S.E.2d at 235. The Court further recognized that CBM's value as an energy source did not become apparent until the 1970s, and that the parties to the 1887 deeds at issue "could not have contemplated at the time the severance deeds were executed that CBM would become a very valuable energy source." Id. at 235, 238[27]; *see also* Illinois Methane, 847 N.E.2d at 900 (finding that "[h]istorically, coalbed methane gas was considered a 'dangerous waste product of coal mining,'" and that "[t]echnological developments in the 1980s and changes in federal law made the commercial development of coalbed methane gas possible."); Cimarron, 909 N.E.2d at 1122 ("The parties have agreed that neither contemplated in 1976 that technological advances would permit production of CBM for commercial gain."); Bowles, 347 S.W.3d at 62 (finding that "only in recent years has [CBM] become profitable to produce," while "[t]he only previous interest in CBM was how to best eliminate it from the coal and get rid of it by ventilating into the atmosphere or even burning it off."). Thus, by arguing that the circuit court's findings are clearly erroneous, Petitioners would have this Court believe that the findings of *all* of the above-referenced courts were also clearly erroneous.

IV. THE TRIAL COURT PROPERLY ADMITTED DR. RIPEPI'S TESTIMONY.

In their sixth assignment of error, Petitioners argue that while LBR's expert, Dr. Nino Ripepi, may be qualified to testify about current CBM extraction methods, he is not qualified to testify as

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Every state has plenary jurisdiction and control of the property, real and personal, located within its borders." Keesecker v. Bird, 200 W.Va. 667, 679-680, 490 S.E.2d 754, 766-67 (1997)(citations omitted).

[27] It should be noted that, unlike Harrison-Wyatt, the instant case does not involve a coal severance deed. LBR is not simply the owner of the coal alone, but is the owner of *all* of the mineral interests in the Property subject only to a narrow reservations of a 25% interest in oil and gas (which, as previously discussed, must be strictly construed against the grantor).

to the history of CBM production nor to his allegedly "speculative conclusion" that the commercial production of CBM was not a common practice in 1938. This argument completely ignores the fact that Dr. Ripepi is an assistant professor in the Department of Mining and Minerals Engineering at Virginia Tech *who teaches a graduate level class about the history of CBM production in the United States*. App. Vol. 2, pp. 54, 75-82. More specifically, Dr. Ripepi teaches a class called "Coalbed Methane Reservoir Engineering," and the syllabus for this class, under the heading "Goals," states that "[h]aving successfully completed this course, the student will be able to: Demonstrate knowledge of the historical development of coalbed methane fields in the United States." Id.; *see also* App. Vol. 3, p. 145. In addition, Dr. Ripepi has both a B.S. and a Ph.D. in Mining and Minerals Engineering from Virginia Tech. App. Vol. 2, pp. 54-65; App. Vol. 3, p. 117. He also formerly worked for CONSOL Energy, Inc., where he was involved in the planning and testing of the company's CBM degasification wells. App. Vol. 2, pp. 58-61. He also worked as a research scientist for the Virginia Center for Coal and Energy Research, where he collected and analyzed production data for 50 percent of *all* CBM wells in the Central Appalachian Basin, which includes western Virginia and southern West Virginia, in order to study enhanced CBM production. Id. at 65-73. As such, it is difficult to imagine an expert witness who is *more* qualified to testify about the history of CBM production.

Moreover, as discussed in greater detail *supra*, the record in this case is replete with publications, witness testimony, court opinions, and other evidence that support Dr. Ripepi's conclusions. As such, Petitioners' characterization of his conclusions as "unsupported speculation" is patently false. As the circuit court correctly observed, "the weight of the evidence at trial showed that CBM in 1938 was not a common practice," and that "[t]he custom was to consider CBM as a hazard to be avoided rather than a commercial entity." App. Vol.1, p.312. Thus, it cannot be said

that the admission of Dr. Ripepi's testimony was an abuse of discretion.

V. PETITIONERS HAVE NO GROUNDS TO OBJECT TO THE CIRCUIT COURT'S DISMISSAL OF THE CASE

As to Petitioners' 11th assignment of error, Petitioners are correct that the issues of ownership and accounting were bifurcated, with the accounting claims to be resolved following the resolution of the ownership issue. However, as Petitioners acknowledge in their brief, only the party prevailing on the ownership claim is entitled to an accounting. As set forth above, the circuit court correctly ruled in favor of LBR on the ownership issue, and determined that the disputed CBM royalties belong to LBR. Accordingly, Petitioners are not entitled to an accounting and have no basis to object to the circuit court's failure to resolve their accounting claims. LBR respectfully requests that it be given the opportunity to raise its accounting claims before the circuit court at the conclusion of this appeal.

CONCLUSION

For all of the reasons set forth above, LBR respectfully requests that this Court affirm the judgment of the circuit court, and hold that LBR is the owner of the CBM and associated royalties at issue.

Respectfully submitted,

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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

No. 15-0907

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

Defendants Below, Petitioners,

v.

LBR HOLDINGS, LLC,

Plaintiff Below, Respondent.

CERTIFICATE OF SERVICE

I, Michael W. Carey, do hereby certify that on the 2nd day of February, 2016, I have served the foregoing **"Respondent's Brief"** upon the parties to this action, via United States Mail, postage pre-paid, addressed as follows:

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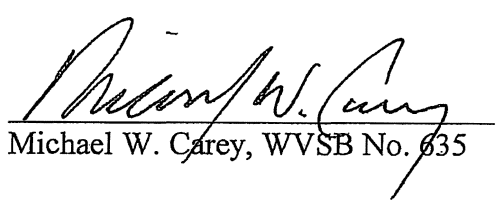

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