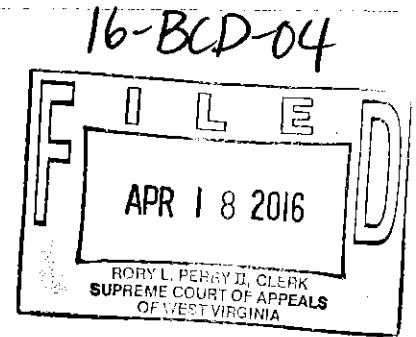


IN THE SUPREME COURT OF APPEALS  
OF WEST VIRGINIA



JOHN MARK HICKMAN,  
CECIL LEE HICKMAN, LAWRENCE  
GRANT HICKMAN, AND CAROL SUE  
CRISWELL, individually, and on behalf  
of a class of similarly-situated persons  
Plaintiffs,

v.

OHIO COUNTY CIRCUIT COURT  
CIVIL ACTION NO. 14-C-133  
JUDGE WILSON

ALLIANCE RESOURCE GP, LLC,  
TUNNEL RIDGE, LLC,  
ROBIN ENERGY INC. and  
JESMAR ENERGY, INC.  
Defendants.

**TO: HONORABLE CHIEF JUSTICE MENIS KETCHUM**

**MOTION TO REFER CASE TO BUSINESS COURT DIVISION**

Pursuant to Rule 29.06 of the West Virginia Trial Court Rules, Defendants Alliance Resource GP, LLC, Tunnel Ridge, LLC, and Robin Energy, Inc., by counsel, P. Nathan Bowles, Esq., and Defendant Jesmar Energy, Inc., by counsel Karen Kahle, Deva Solomon, and Steptoe & Johnson PLLC, respectfully request that this case be referred to the Business Court Division for all further proceedings.

There are no known related actions.

This action involves alleged commercial torts, specifically, alleged trespass by taking coalbed methane.

This matter contains issues significant to business and presents novel and complex commercial and technological issues for which specialized treatment will be helpful, as more fully described below.

### **Procedural and Factual Background**

By their action filed May 14, 2014, Plaintiffs allege that coalbed methane (“CBM”) wells drilled by Defendants drained CBM from lands belonging to Plaintiffs when Defendants had no right to the CBM. Plaintiffs seek certification of a class of all alleged methane gas owners who had their methane extracted from wells designated as Blum 1, Hughes 1, and Hanson Engineering 1.

Defendants filed motions to dismiss, because even if all facts alleged in the complaint are taken as true (that Plaintiffs owned CBM beneath their land in Ohio County, West Virginia, and that the three wells, located in Washington County, Pennsylvania, drained that CBM) there was no cause of action, given the legal doctrine known as “rule of capture.” By Order entered August 13, 2014, the Circuit Court of Ohio County denied the motion, but counsel for the parties did not become aware of entry of the Order until January, 2015.

No further action occurred in the case until Plaintiffs sent discovery requests in October, 2015, to which Defendants have now responded.

Those responses illuminate legal issues of first impression which have critical importance for the coal, oil, and gas industries, and for owners of those natural resources, which are, in many cases, businesses. Technological issues, requiring petroleum engineering expertise, will arise if it becomes necessary to determine patterns of CBM drainage between tracts of land.

## Analysis

- (1) The principal claims in this case involve matters of commercial significance to owners of mineral estates, including businesses, as well as mineral producers.**

An initial legal issue – Who owns the coalbed methane (CBM) beneath a particular tract of land in West Virginia? – must be resolved based on severance deed language. If the court entertains a motion to certify a class, one can anticipate that several forms of severance deeds and oil and gas leases will require interpretation. The interpretation of various severance deeds and oil and gas leases will present complex commercial issues suited to resolution in the Business Court Division.

This case is further complicated by the fact that the Blum 1, Hughes 1 and Hansen Engineering 1 wells are located in Pennsylvania, which has clear legal rules regarding CBM ownership, while Plaintiffs and many putative class members own lands in West Virginia, where there is no bright rule. Under *U.S. Steel v. Hoge*, 503 Pa. 140, 468 A.2d 1380 (1983), CBM in Pennsylvania belongs to the owner of the coal as long as the CBM resides in the coal. In the West Virginia case of *Energy Development Corp. v. Moss*, 214 W.Va. 577, 591 S.E.2d 135 (2003), this Court declined to adopt a bright-line test. This Court limited its decision to whether a gas lease conveyed the right to develop CBM in the absence of specific language in the lease and concluded that the lease did not include that particular right. Thus, the issues in this case are not only complex but novel in West Virginia.

A central legal issue in this action is whether the rule of capture applies to CBM seams. Both West Virginia and Pennsylvania have long recognized the rule of capture, which holds that because oil and gas (CBM is a gas) can migrate beneath the surface, those substances belong to whoever “captures” them through a wellbore, regardless of where they originated. Businesses

are free to drill their own wells. See, Powers v. Union Drilling Co., Inc., 197 W.Va. 782, 461 S.E. 883 (1995); Gain v. South Penn Oil Co., 76 W.Va. 769, 86 S.E. 883 (1915); Barnard v. Monongahela Natural Gas Co., 216 Pa. 362, 65 A. 807 (1907). West Virginia allows CBM owners (which, again, include businesses and not just individuals) to ameliorate the rule of capture by seeking forced pooling in production units. See W. Va. Code Ch. 22 Article 21.

In resisting the Defendants' motions to dismiss, Plaintiffs argued that the voids left underneath their land from the act of coal mining constituted artificial stimulation of CBM production, and so the rule of capture should not apply. Defendants entirely disagree. The ruling on this issue will have great implications for commercial oil and gas development.

Another important legal issue in this case is the application of the statute of limitations, which is two years for trespass on a mineral estate in both West Virginia and Pennsylvania. Production of CBM from the three wells ceased in April, 2012. Plaintiffs filed suit in May, 2014. The resolution of the parties' positions for and against the application of the statute of limitations will involve the legal application of the mineral trespass statute of limitations to the alleged wrongful extraction activities and, as discussed further below, complex technological issues concerning oil and gas extraction.

- (2) Specialized treatment is likely to improve the likelihood of a fair and reasonable resolution of this dispute, which presents not only legal issues important to commercial mineral development, but technical issues regarding liberation and capture of coal bed methane.**

In addition to the legal issues discussed above, CBM production involves highly technical factual issues. CBM exists in coal in pores, is dissolved in water contained in coal, and can be "adsorped" on the surface of coal. CBM can create fatally dangerous mining conditions.

Producing CBM can be commercially profitable and useful in degasification of coal mines. The extraction of CBM, however, is technologically complex.

Unlike a traditional gas well in which gas comes to the surface because of underground pressures, the CBM from the wells in this case had to be pumped out by creating a vacuum at the wellhead on the surface. As the atmospheric pressure in the strata decreases, the rate of adsorption increases. In discovery, Defendant Robin Energy, Inc. produced two technical reports regarding projected future production of CBM. Understanding these reports and determining their relevance to this case will require specialized knowledge. Furthermore, if the trial court concludes that the rule of capture does not apply in this case and allows claims for drainage, then the trial court will have to evaluate evidence that involves highly technical matters of petroleum engineering, such as direct and inverse proportional ratios of gas pressures, distances, and volumes.

**(3) The principal claims do not involve consumer litigation.**

Although the plaintiffs are individuals, they do not appear in this litigation as consumers, but rather as landowners who assert ownership of coalbed methane as a commercial product. Moreover, they seek to certify a class of “[t]hose methane gas owners, after coal interests were previously severed, who held the right to explore for and produce methane gas in the mined out works where coal was mined out and who had their methane gas extracted and produced [through the Blum 1, Hughes 1 and/or Hanson Engineering 1 wells].” *Complaint*, paragraph 19, attached here. Upon information and belief, some of the putative class members are businesses. Thus, just because Plaintiffs are individuals, this dispute is over commercial rights, not transactions in the consumer marketplace.

**Other Matters**

In further support of this motion, please find attached copies of the complaint, the answers, the docket sheet, the Circuit Court Order denying Defendants' Motion to Dismiss and Notice of [June 2] Scheduling Conference.

**WHEREFORE**, the undersigned hereby **MOVE**, pursuant to W.Va. Trial Court Rule 29, the Chief Justice of the West Virginia Supreme Court of Appeals to refer this case to the Business Court Division.

Respectfully submitted this 15<sup>th</sup> day of April, 2016.

ROBIN ENERGY, INC.,  
ALLIANCE RESOURCE GP, LLC,  
TUNNEL RIDGE, LLC,  
By Counsel,

JESMAR ENERGY, INC.,  
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CERTIFICATE OF SERVICE

I, Karen Kahle, do hereby certify that on this 15<sup>th</sup> day of April, 2016, I have served the foregoing ***"Motion to Refer Case to Business Court Division,"*** with attachments by first class mail to all counsel of record at the addresses provided below:

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Circuit Court of Ohio County  
c/o Circuit Court of Hancock County  
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New Cumberland, WV 26047

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