INTERMEDIATE COURT OF APPEALS OF WEST VIRGINIA

No. 22-ICA-207

EARL J. NICHOLSON, and
JOYCE A. NICHOLSON,

Petitioners,

vs.

Appeal from the Circuit Court of
Doddridge County, West Virginia
(Case No. 20-C-25)

ANTERO RESOURCES CORPORATION,
SEVERIN POA GROUP, LLC,
ROCKWELL RESOURCES, LLC,
JEC PRODUCTION, LLC,
Et. Al.,

Respondents.

BRIEF OF RESPONDENT SEVERIN POA GROUP, LLC

Frank E. Simmerman, Jr. (WVSB # 3403)
Chad L. Taylor (WVSB # 10564)
Frank E. Simmerman, III (WVSB # 11589)
SIMMERMAN LAW OFFICE, PLLC
254 East Main Street
Clarksburg, West Virginia 26301
Phone: (304) 623-4900
Facsimile: (304) 623-4906
fes@simmermanlaw.com
clt@simmermanlaw.com
trey@simmermanlaw.com

Counsel for Severin POA Group, LLC

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I. COUNTER-STATEMENT OF THE CASE

Respondent Severin POA Group, LLC, ("Respondent or Severin"), is asking this Court to affirm the decision of the Circuit Court of Doddridge County, West Virginia which held that a provision contained in a May 12, 1902, Deed was an effective and actual reservation of ½ of the oil and gas mineral estate under a 117.55-acre parcel, ("the Parcel"), in Doddridge County, West Virginia.

Petitioners' recitation of the factual record in this matter is grossly inadequate for the Court's consideration of the Circuit Court's decision. Further, Respondents submit that a more detailed presentation of this action's procedural history will aid the Court. Accordingly, Respondent supplements Petitioners' Statement of the Case as follows:

A. F.W. Severin/Severin POA's Chain Of Title, A Summary Of Oil And Gas Activities On The Parcel Prior To The 1902 Deed, And Antero Resources Corporation's Conclusion That The 1902 1/16th Reservation Reserved ½ Of The Oil And Gas Estate In F.W. Severin, And Thus His Heirs, Including Severin POA/Respondents.

It is undisputed that as of January 1, 1902, F.W. Severin[1] was vested with one hundred percent (100%) of the surface, oil, gas and hydrocarbon fee estate related to 224 contiguous acres in the New Milton District of Doddridge County, West Virginia – a portion of which is comprised of the Parcel/117.55-acre parcel which is the subject of this appeal. (See Appx. 375-376, Appx. 501-527).[2]

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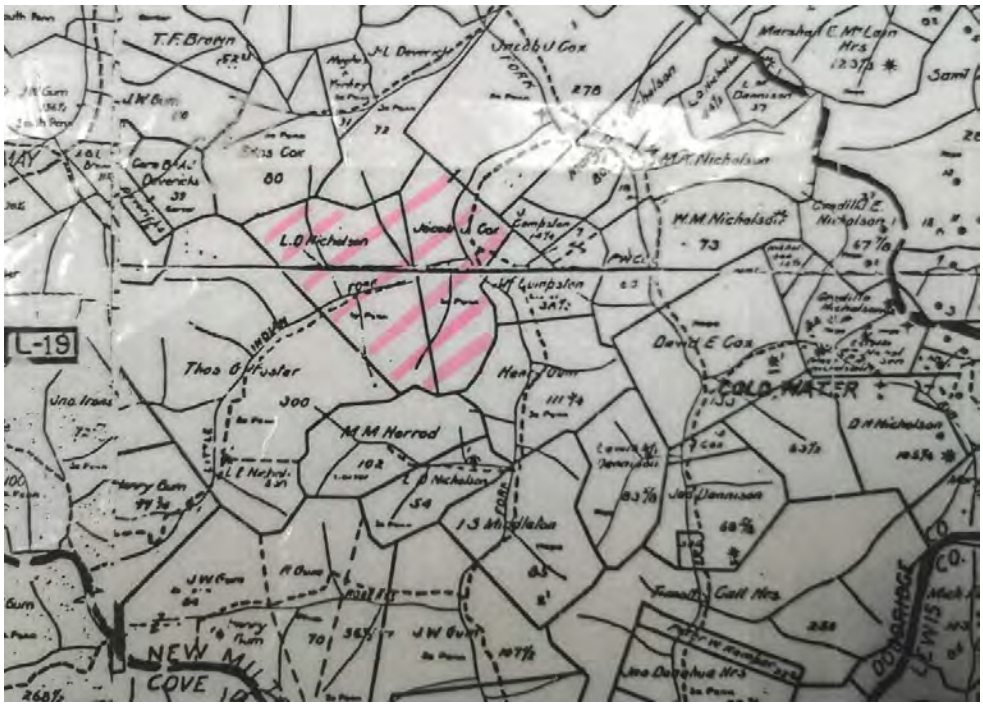
[1] F.W. Severin is incorrectly titled "J.W." Severin throughout Petitioners' Brief.

[2] This reality is wholly ignored by the Petitioners, their omission is glaring, which evidences the "piecemeal"/incomplete nature of their factual presentation at both the Trial Court level and on appeal. Further, the self-serving suggestion in Footnote 4 of Petitioners' Brief that a full picture of the facts before the Trial Court should not be presented and is not relevant to this Court's consideration is inappropriate and undermines the appellate process in the context of *de novo* review. See Gastar Expl. Inc. v. Rine, 239 W.Va. 792, 798 (internal citations omitted) (stating that "The term '*de novo*' means 'Anew; afresh; a second time.' 'We have often used the term '*de novo*' in connection with the term 'plenary' . . . Perhaps more instructive for our present purposes is the definition of the term 'plenary,' which means '[f]ull, entire, complete, absolute, perfect, unqualified.' 'We therefore give a new, complete and unqualified review to the parties' arguments and the record before the circuit court.' ").

Related to the 224-acre estate, the Circuit Court record is unequivocal (and it is uncontested on appeal) that prior to 1902 substantial oil and gas activities/operations were occurring on F.W. Severin's 224-acre tract located in the New Milton District of Doddridge County, West Virginia, said 224-acre parcel being generally evidenced as follows:



(Appx. 527).

For example, by lease dated December 27, 1897, F.W. Severin leased a portion of his oil and gas estate unto The South Penn Oil Company, reserving a traditional 1/8th royalty interest, free of cost, for "all oil produced and saved from the premises", and also establishing therein a flat rate gas payment of $200.00 per year "for the gas from each and every well drilled on said premises." (Appx. 528).

Additionally, on July 26, 1898, F.W. Severin entered into a subsequent oil and gas lease with the Carter Oil and Gas Company for a portion of his mineral estate, similarly reserving a traditional 1/8th royalty interest, free of cost, for "all oil produced and saved from the premises", and also establishing therein a flat rate gas payment of $200.00 per year. (Appx. 531-532).

Within this framework and factual context, by handwritten deed, ("the Deed"), dated April 18, 1902, F.W. Severin conveyed to L.D. Nicholson, a predecessor in title to the Petitioners, his interest in the Parcel (a 117.5 acre portion of his 224 acre total fee estate), subject to the following reservation related to the oil and gas estate: "the parties of the first [F.W. Severin] also reserve the one sixteenth of all the oil and gas in and under said land." (Appx. 375-376).

Stated differently, F.W. Severin reserved in himself, and thus subsequently his successors and heirs, effectively Severin POA in large part, ½ of the oil and gas in place, and related oil and gas royalties, by an express reservation of "one sixteenth of the oil and gas in an under said land" – known commonly as a one-half of the royalty interest reservation, being a 1/2 of an 1/8, or 1/16th. See Id.

In 1902, this was a common and accepted practice in West Virginia for reserving such interests, a one-half oil and gas/royalty interest, under West Virginia jurisprudence and title/abstracting practices in 1902. (Appx. 186-188).

To expand, Richard Starkey, Esq., the lone expert disclosed at the Circuit Court level, opined as follows related to the reservation at issue in appeal: "(1) the deed reservation in question in this action reserves an undivided one-half interest of the oil and gas; and (2) the land book records involving the assessment of the interest at issue in this action evidence that the parties to the deed intended the reservation to mean one-half of the oil and gas interest." (Appx. 187).[3]

The reasoning behind such a conclusion is that 1/16th was a term of art/oil and gas trade in 1902, as it was 1/2 of the traditional 1/8 royalty, as will be further discussed below.

At the Circuit Court level, consistent with Richard Starkey, Esq.'s disclosure, Severin POA reviewed, analyzed, and presented the Doddridge County Land Books to the Circuit Court, starting

[3] As part of a confidential settlement reached between Petitioners and Antero, Mr. Starkey's opinions were ultimately withdrawn.

immediately after the 1902 F.W. Severin – L.D. Nicholson transaction, and walking the oil and gas estate forward.

From 1902 through 1911 the oil and gas estate was not recorded/separately itemized on the Doddridge County Land Books. Beginning in 1912, the entries are as follows:

(Appx. 501 – 522).

LAND BOOK YEAR/NAME	ACREAGE DESCRIPTION	MINERAL ESTATE DESCRIPTION
1912 – F.W. Severin	224 Acres – Robert's Fork	1/2 C O G
1913 – F.W. Severin	224 Acres – Robert's Fork	All C, ½ O.G.
1914 – F.W. Severin	224 Acres – Robert's Fork	C ½ " "
1915 – F.W. Severin	224 Acres – Robert's Fork	½ " "
1916 – F.W. Severin	224 Acres – Robert's Fork	½ " "
1917 – F.W. Severin	224 Acres – Robert's Fork	½ " "
1918 – F.W. Severin	224 Acres – Robert's Fork	½ O.G.
1919 – F.W. Severin	224 Acres – Robert's Fork	½ OG
1920 – F.W. Severin	224 Acres – Robert's Fork	½ O.G.
1921 – F.W. Severin	224 Acres – Robert's Fork	½ COG.
1925 – F.W. Severin	224 Acres – Robert's Fork	C.O.G.

Plainly, the best evidence, from the relevant timeframe, establishes that the 1902 reservation was a reservation of ½ of the oil and gas estate, as established by the Circuit Court, consistent with general transactional practice/custom in 1902.

Concerning the present dispute, it is only when Antero Resources Corporation, ("Antero"), adopted Severin POA's interpretation and construction of the April 18, 1902 Deed – that the Petitioners first claimed that they owned ½ of the oil and gas mineral estate under Parcel.

To expand, in June of 2013 Antero approached the heirs of F.W. Severin, effectively Severin POA, concerning lease modifications which would allow for modern production methods, noting therein that "if not I need to send all living heirs of F.W. Severin modifications [sic] and the ½ interest would be divided out among each." (emphasis added) Id.

Ultimately, consistent with Antero's title determination, the heirs of F.W. Severin were paid an up-front bonus payment on a ½ oil and gas estate ownership basis – and multiple horizontal Marcellus Shale legs were drilled on the parcel, with payments being made to Severin POA on a ½ oil and gas estate ownership basis up and until this litigation was commenced. (Appx. 384).

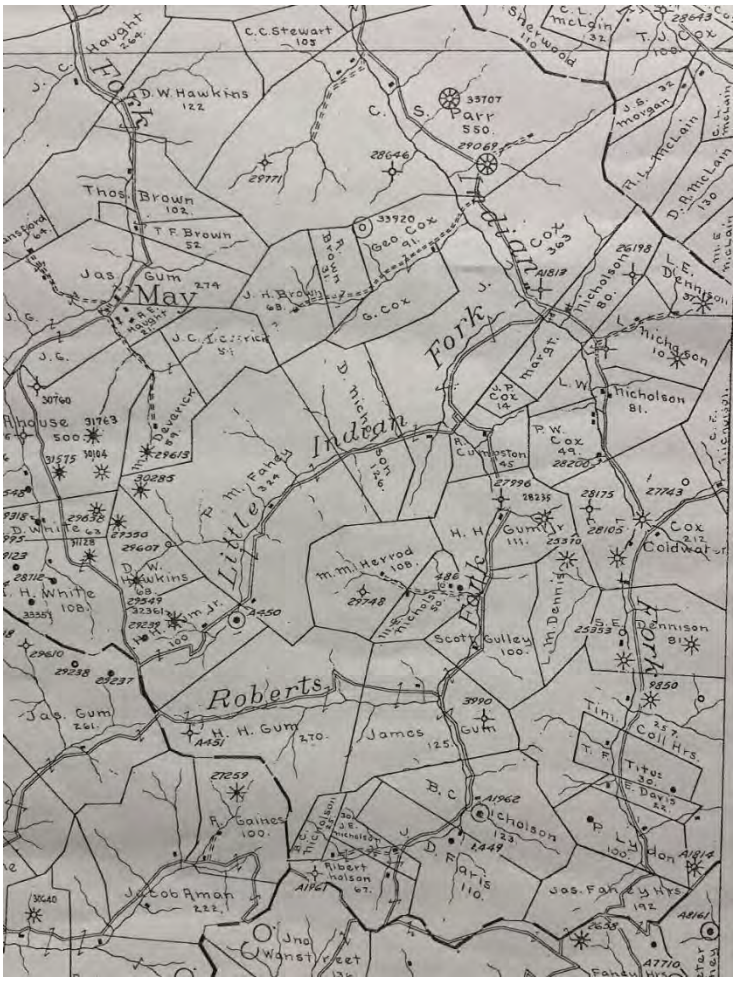
After the litigation commenced, Severin POA's ½ oil and gas estate payment interest was placed in suspense pending the outcome of this litigation.

B. Related Transactions In The 1902 Timeframe, And Related Oil And Gas Activities In The New Milton District Of Doddridge County, West Virginia.

At the time of the conveyance noted above, on the same date, F.W. Severin also issued a contemporaneous May 12, 1902, Deed conveying 107.35 surface acres to Jacob J. Cox, which also contained a similar reservation stating that "the parties of the first [F.W. Severin] also reserve the one sixteenth of all the oil and gas in and under said land." (Appx. 472).

This reality evidences the fact that this was the commonly accepted practice/custom to reserve ½ of the oil and gas estate at this time.

Per the West Virginia State Archives, and farm maps, as oil and gas permitting did not exist in the early 1900s in West Virginia, substantial oil and gas production was occurring in the New Milton District of Doddridge County, West Virginia in 1902, with a number of gas wells, oil wells and dry holes being drilled in the area/timeframe, as depicted by the following image/farm map:



(Appx. 474).

To expand, the chart above depicts the status of developed oil and gas acreage by 1924 in the New Milton District of Doddridge County, West Virginia – facts in the parties' minds during the drafting of the 1902 Deeds. Id.

Speaking further on this point, and the reality that fractional conveyances/reservations were the norm in the early 1900s in West Virginia, the conduct of Petitioners' predecessor-in-title, L.D. Nicholson, is highly probative of the issues on appeal.

Indeed, L.D. Nicholson, after the 1902 transaction with F.W. Severin, utilized the same "fractional" approach, or "double fraction" of the traditional 1/8th oil and gas royalty interest, in subsequent conveyances and reservations recorded in Doddridge County, West Virginia.

More specifically:

- In a Deed dated June 5, 1909, L.D. Nicholson conveyed his entire oil and gas estate under a parcel in the Trough Fork region of Greenbrier District, Doddridge County, describing the interest as a fraction, similar to the reservation at issue, as follows: "the said interest herein conveyed being the one-sixty-fourth (1/64) part of all the oil produced and saved from said land and the one-eighth (1/8) part of the royalty on the gas in and under said land." (Appx. 475).

- In a Deed dated October 10, 1908, L.D. Nicholson utilized a fractional reservation, evidencing the accepted practice at this time, as follows: "there is reserved and excepted from this conveyance the following: first; the one sixteenth party of the royalty of the oil and the one-half of the net proceeds derived from the gas in an under the above described land . . . ." (Appx. 476-477).

Stated succinctly, the Petitioners' predecessors-in-title having effectively utilized the same language as F.W. Severin, Petitioners should not now be allowed to disavow/challenge such title practices, customs and language in the context of the present reservation before this Court.

C. The Procedural Background And The Circuit Court's Order.

In April of 2021, Petitioners filed a declaratory judgment claim seeking a declaration that pursuant to a 1902 handwritten Deed the grantee therein, J.D. Nicholson became vested with 15/16ths of the oil and gas estate, and F.W. Severin solely reserved 1/16th of the oil and gas estate in and under the Parcel. (Appx. 17-25).

On June 14, 2021, Severin POA filed its Answer to Amended Complaint, Affirmative Defenses and Counterclaims, therein asserting a competing Counterclaim which requested that the "Court declare the parties' respective rights, interests and obligations related to both mineral ownership and royalty ownership/payment within the framework of the April 18, 1902 Deed and the subsequent developments." (Appx. 128-129). Antero similarly filed a Counterclaim seeking a declaration concerning the parties' rights and obligations relative to the 1902 Deed. (Appx. 108-113).

Following initial pleadings, the parties entered into a Scheduling Order concerning the declaratory judgment issues present in this litigation, with opening briefs being due March 2, 2022, so that these issues could be timely presented to the Circuit Court. (Appx. 170-173).

Within the litigation, at the Circuit Court level, limited discovery occurred related to the competing declaratory judgment claims of Petitioners, Severin and Antero. Indeed, interpretation and construction of the 1902 Deed was submitted to the Court, by agreement of the parties, at the dispositive motion stage. Id., 172.

By Declaratory Judgment Order entered September 28, 2022, the Circuit Court held that "construction of the deed on the date of its execution, April 18, 1902, supports the conclusion that the reservation of 1/16th of the oil and gas operates to reserve ½ of the oil and gas estate under West Virginia law in 1902 and the early 1900s." (Appx. 565).[4]

II. SUMMARY OF ARGUMENT

At issue in this case is the interpretation of a reservation contained in a 1902 Deed, which provides that "the parties of the first [F.W. Severin] also reserve the one sixteenth of all the oil and gas in and under said land." (Appx. 375-376).

Petitioners fundamentally insist that all this Court must do is strictly adhere to the rules of arithmetic – and that such a basic application warrants reversal of the Circuit Court's opinion and would more rapidly end title litigation which emanates from fractional reservations in the early 1900s West Virginia era.

The problem with Petitioners' simplistic and flawed approach is that in the law a reservation of "one-sixteenth" equaled one half in the context of reservations of mineral interests at the time of the conveyance/reservation at issue, April 18, 1902.

[4] At various points the Petitioners' brief incorrectly states that the Circuit Court's holding was limited to ruling that Respondents "reserved a one-half interest in the oil and gas royalties." See Petitioners' Brief, Pg. i, Section VI, B.

To expand, as will be discussed below, the rules that courts must utilize are fundamentally not those of arithmetic, as emphasized by the Petitioners, but are rather those of detailed and comprehensive textual analysis, interpretation and construction – within the framework of the law, custom/usage at the time of a transaction and the parties' understanding at the time of a given transaction.

Stated differently, it was the Circuit Court's difficult duty to determine the meaning of the words at issue when they were drafted, even if the use of the same words might generate a different meaning today.

As will be set forth below, consistent with West Virginia jurisprudence and title customs in existence at the time the instrument at issue was drafted and executed, April 18, 1902, authority which aligns with how leading oil and gas jurisdictions analyze such issues pursuant to the Estate Misconception Theory, the Circuit Court correctly held, after thorough analysis and consideration of the case law and customs/surrounding circumstances, that the reservation, and the equation "one-sixteenth" equals one-half of the mineral estate in the context of the 1902 instrument at issue.

Alternatively, should the Court conclude that the 1902 instrument/reservation is ambiguous, the only conclusion this Court can reach, looking at the actual conditions which existed prior to and post 1902 reservation and the parties' own, practical construction of the underlying 1902 instrument, particularly the land book records, is that the 1902 instrument reserved ½ of the oil and gas estate, such that the Circuit Court's Order can be affirmed on alternative grounds.

III. STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Oral argument is unnecessary because the issues have been authoritatively and correctly decided by the Circuit Court of Doddridge County, West Virginia and because the factual record and legal arguments are adequately presented in the briefs on appeal. Accordingly, the decisional process would not be significantly aided by oral argument.

IV. STANDARD OF REVIEW

"Where the issue on an appeal from the circuit court's ruling is clearly a question of law or involving an interpretation of a statute, we apply a *de novo* standard of review." Syl. Pt. 1 Chrystal R.M. v. Charlie A.L., 194 W. Va. 138, 459 S.E.2d 415 (1995). Additionally, this Court's review of a summary judgment order is *de novo*. Powderidge Unit Owners Ass'n v. Highland Props., 196 W. Va. 692, 700, 474 S.E.2d 872, 880 (1996).

V. ARGUMENT

A. The Circuit Court Was Correct In Viewing And Interpreting The 1902 Handwritten Deed As Of The Date Of Its Execution On April 18th, 1902, Thus Most Of The Precedent Cited By The Petitioners Has No Relevance To The Present Dispute.

In West Virginia, "[a] deed will be interpreted and construed as of the date of its execution." Syl. Pt. 2, Oresta v. Romano Bros., Inc., 137 W.Va. 633, 73 S.E.2d 622 (1952). See also Bruen v. Thaxton, 126 W.Va. 330, 340, 28 S.E.2d 59, 64 (1943) ("It goes without saying that the intent of the parties sought to be reached is intent existing at the time the contract was made.").

Second, the law existing at the time and place of the making of a deed or contract is usually deemed a part of the contract, as though expressly referred to or incorporated in it. Syl. Pt. 1, Franklin Sugar Refining Co. v. Martin-Nelly Grocery Co., 94 W.Va. 504, 119 S.E. 473 (1923) ("The laws which subsist at the time and place where a contract is made and to be performed enter into and become a part of it to the same extent and effect as if they were expressly incorporated in its terms.")

And third, in West Virginia, a "severance deed is to be construed in light of the conditions and reasonable expectations of the parties at the time it is made." (emphasis added) Cogar v. Sommerville, 180 W.Va. 714, 719, 379 S.E.2d 764, 769 (1989); see also 11 Richard A. Lord, Williston on Contracts § 30:19, at 203-04 (4th ed. 1999) ("[T]he incorporation of applicable

existing law into a contract does not require a deliberate expression by the parties. Except where a contrary intention is evident, the parties to a contract . . . are presumed or deemed to have contracted with reference to existing principles of law. The rationale for this rule is that the parties to the contract would have expressed that which the law implies had they not supposed that it was unnecessary to speak of it because the law provided for it. Consequently, the courts, in construing the existing law as part of the express contract, are not reading into the contract provisions different from those expressed and intended by the parties, as defendants contend, but are merely construing the contract in accordance with the intent of the parties.").

With these principles in mind, this Court should examine the status of the law in West Virginia prior to 1902, and near in proximity to 1902, to determine and give meaning to the reservation contained in the 1902 handwritten Deed, and the majority of the case law cited by Petitioners is inapplicable, and should be ignored by this Court.

B. As The Circuit Court Was Correct In Its Conclusion That Construction Of The Deed On Its Date Of Execution, April 18, 1902, Leads To The Conclusion That A Reservation Of 1/16th Of The Oil And Gas Estate Reserved ½ Of The Oil And Gas Estate Under West Virginia Law In 1902/The Early 1900s, The Circuit Court's Order Should be Affirmed.

In Kilcoyne v. Southern Oil Company, 61 W.Va. 539, 56 S.E. 888 (1907),[5] in 1899 McDougal sold and conveyed to Conway one-sixteenth of the oil underlying a parcel of land in Wetzel County. Subsequently, McDougal leased the land for oil and gas purposes, the royalty to be one-eighth of the production. As summarized by the later decision of Paxton v. Benedum-Trees Oil Co., 80 W.Va. 187, 94 S.E. 472, contrary to Petitioners' briefing, in the context of the 1899 oil and gas transaction Kilcoyne "held that the purchaser of the one-sixteenth of the oil in place was entitled to receive one-half of the royalties or one-sixteenth of the oil delivered to him in the pipe

[5] The cases are presented in temporal fashion.

line." Paxton, 193. Plainly, the custom/prevailing understanding in 1899, as summarized by the Supreme Court, was that a reservation or conveyance of 1/16th operated as an effective reservation or conveyance of ½ of the oil and gas estate.

In McCoy v. Ash, 64 W.Va. 655 (1908), William A. Ash and his wife sold[6] to Isaac McCoy "one-sixteenth of all the oil and gas underlying all of a certain tract or parcel of land" located in the McElroy District of Tyler County, West Virginia, and litigation ensued as to the right to one half[7] of the royalty; that is one sixteenth of the oil, coming from an oil well producing on what was referred to as "the little Gorrell Tract". (emphasis added).

In addressing the application of the underlying transaction as to ownership of mineral production proceeds from "the little Gorrell Tract", the West Virginia Supreme Court plainly noted that in the early 1900s in West Virginia, a statement in a deed of a conveyance of 1/16th was a plain declaration that the parties were facilitating the sale of half of the underlying mineral asset. Id., 657 (stating that "[t]he evidence is plain that these parties were dealing for the sale of half of Ash's entire royalty. Where is any reason for the sale of half of the royalty in the Home Farm and the exception of the royalty in the little piece of Gorrell land?").

Unequivocally, as correctly determined by the Circuit Court, there is no reason to treat a reservation differently than a conveyance as, at this time, different from present, in 1902 the general rule in West Virginia was not to construe documents against the grantor. See Koen v. Bartlett, 41 W.Va. 559 (1895), Syl. Pt. 2 (stating that "[t]he rule that a deed is to be construed most strongly against the grantor is seldom to be relied upon.").[8]

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[6] There is no indication in the opinion as to the date(s) of deeds/instruments.

[7] The reality that the parties in McCoy were fighting over a ½ interest demonstrates the custom and understanding of one-sixteenth fractional language in the early 1900s within West Virginia jurisprudence/abstracting practices.

[8] Affirming the Circuit Court's opinion will not create title uncertainty across the state. Rather, the opposite is true. Abstracters/title practitioners know that in early 1900s a 1/16th was an effective reservation of a ½ interest.

Pursuant to, and consistent with the foregoing, the reservation of 1/16th set forth in the 1902 handwritten Deed plainly reserved ½ of the oil and gas estate consistent with the logic of McCoy, such that a ½ interest in the oil and gas estate should be confirmed by this Court as being vested in the heirs of F.W. Severin.

Similar to McCoy, in Horner v. Gas Co., 71 W.Va. 345 (1912), the West Virginia Supreme Court was again called upon to interpret "one-sixteenth" language in the context of an 1899 deed/mineral transaction.

More specifically, in Horner, by deed dated the 18th day of December, 1899, Martin and wife granted to L. S. Horner and C. S. Sands for cash "all of the one half of the royalty, being the one sixteenth, of all the oil and one half of all the gas within" a tract of 44 ½ acres located in Harrison County, West Virginia. (emphasis added) Id.,

Although there is a distinction at present based on a royalty vs. ownership interest, in Horner, the West Virginia Supreme Court was firm that the law in West Virginia in the relevant timeframe required the Court to look to the practical circumstance of the parties, and the events surrounding the transaction in determining the true intent of the parties in an early 1900s deed transaction:

> We are enabled to say that by the deed to Horner and Sands Martin and wife only intended to pass the half of what they were authorized to transfer, half of the royalty they had reserved, that is, half the eighth of the oil and half the $ 300.00 for each gas well. **This Michael lease existing, and surely known to the parties, and providing taxes or dues or rents for the use of the land for oil and gas, shall we not say that the parties treated with eyes open to it, meaning to transfer to Horner and Sands half of what the lease gave to the landowners, a fraction of oil produced, and a specific rental or royalty for a gas well?**
>
> **I confidently assert that the parties contracted with a view to the Michael lease, meaning to pass to Horner and Sands one half of what that lease gave to Martins**. That lease gave light and direction

> to the transfer to Horner and Sands; that light reflects on the deed to Horner and Sands, and other light would be misguiding. We must interpret the transfer to Horner and Sands by that lease.
>
> We cannot believe that for the sum of $ 445.00 Martin and wife would sell absolutely in fee that large fraction of oil and gas, and thus renounce control so as to debar themselves from again leasing the entirety. We have placed ourselves in the situation of the parties at the time of the transfer to Horner and Sands, having the fact of the Michael lease as a circumstance then existing and known to the parties.
>
> By our cases it is settled that oral evidence may be accepted, to aid in construction of a deed, where there is ambiguity, to apply the deed to its subject matter, **to show the circumstances surrounding the parties so as to place the court in their place and circumstance, to reflect their intent**; but prior or contemporaneous conversations of the parties are not admissible. Crislip v. Cain, 19 W. Va. 438; Long v. Perine, 41 W. Va. 314; Martin v. Railroad Co., 48 W. Va. 542.

(emphasis added) Horner, 349-350.

Fundamentally, consistent with Horner, Severin POA submits that when viewed through the lens of applicable West Virginia authority from the relevant timeframe, the Circuit Court's decision was firmly rooted in West Virginia law.[9]

And finally, also relevant to the present discussion is United Carbon Co. v. Presley, 126 W.Va. 636 (1944). In United Carbon Co., the interpretation/construction of a reservation contained in a 1907 Deed, which stated as follows was at issue:

> It is expressly understood that there is excepted and reserved from the operation of this conveyance and the same does not convey the one half of the oil and gas royalty upon and as to said two tracts of land, containing 20 acres, more or less, and 38 acres more or less, that is to say the said Shatto reserves the undivided one sixteenth of the oil and gas underlaying said two small parcels of land. . . . Id. (emphasis added).

[9] The language of Lockhart v. United Fuel Gas Co., 105 W.Va. 69, 141 S.E. 521 (1928) also supports Respondents' position, and the Circuit Court's ruling, as such language indicates that the terms 1/16th and ½ were used interchangeably to commonly refer to ½ of the oil and gas estate.

In determining that this reservation vested in the grantor pursuant to the 1907 Deed ½ of the value of the asset/mineral development, the West Virginia Supreme Court expressly held in Syl. Pt. 1, that "in a reservation in a deed of conveyance reading: one half of the oil and gas royalty upon and as to said two tracts of land . . . that is to say that the said Shatto reserves the undivided one sixteenth of the oil and gas underlaying said" land, the latter clause is definitive of the term "royalty" used as a measurement of yield of oil and gas rather than ownership thereof in place, and the reservation, properly construed, entitles grantor and his successors in title, upon development of the land under an oil and gas lease providing for a royalty of one-eighth, to receive one-half of such royalty." Although United Carbon Co. involves a royalty interest, not an interest in fee, the fundamental logic of United Carbon Co. again supports of construction that the reservation contained in the 1902 handwritten Deed vested ½ of the mineral estate in F.W. Severin – the reality which should be confirmed by this Court.

C. As The Record Solely Contains Custom/Usage Evidence Which Supports The Construction That The 1902 Reservation Was A Reservation Of A ½ Interest In The Oil And Gas Estate, The Circuit Court's Holding Should be Affirmed As A Reservation Of 1/16th Was A Term Of Art In The Early 1900s in West Virginia – A Reality Confirmed By The Parties' Conduct Near The Time Of The 1902 Reservation.

Since 1900, the West Virginia Supreme Court has held that custom and usage are relevant in defining terms of art/technical words contained within contracts:

> When a contract does not provide in a given particular, particular local custom may be proven for its interpretation, so it be brought home to the knowledge of the person to be affected by it, and so it do not violate fixed statutes or common law.
>
> It is a fundamental proposition that custom and usage are supposed to enter and form a part of all contracts where the use or custom prevails, in reference to the matter to which the contract relates, and that the contracting parties are not only presumed to be acquainted with such usage, but contract with reference to it . . . The principle upon which proof of usage is admitted is that it serves to explain and

> ascertain the interest of the parties upon some point as to which their contract is silent, and as to which there existed a usage so long continued and well known as to raise a fair presumption that it was within the view of the contracting parties when they made their agreement and contracted with reference to and in conformity with such usage, thus explaining the silence or omission of any express provision of the contract itself.

See Connolly v. Bruner, 48 W.Va. 71, 88-89, 35 S.E. 927 (1900).

Here, the Land Books, as set forth above, as well as the testimony of Robert Starkey, Esq., confirm that: "(1) the [1/16th] deed reservation in question in this action reserves an undivided one-half interest of the oil and gas; and (2) the land book records involving the assessment of the interest at issue in this action evidence that the parties to the deed intended the reservation to mean one-half of the oil and gas interest." (Appx. 186-189), (Appx. 501 – 522). Moreover, McCoy, Horner Gas, and Presley all evidence the reality that the term "one-sixteenth" was used synonymously with the term "one-half" in early 1900s oil and gas jurisprudence and transactions, given that it was generally understood that, at this time, "1/8" was widely used as a term of art to refer to the total mineral estate.

Accordingly, consistent with the Circuit Court's logic, and the evident title customs and practices at the time of the underlying transaction embodied in both the record in this matter and the West Virginia jurisprudence noted above, the Circuit Court's Order should be affirmed.

D. As The Circuit Court's Holding And Logic Aligns With Precedent From Other Leading Oil And Gas Jurisdictions, And Fully Aligns With The Estate Misconception Theory, The Circuit Court's Holding Should Be Affirmed And Title To ½ Of The Oil And Gas Estate Should Be Confirmed In Severin POA.[10]

Foreign courts have addressed the application of the estate-misconception theory and the historical use of 1/8 as the standard oil and gas royalty in the context of "fraction" or "double fraction" interpretative cases – and have repeatedly found that "a mechanically applied, mathematical approach" is simply not appropriate in the context of interpreting archaic oil and gas transactions. Hysaw v. Dawkins, 483 S.W.3d 1, 12 (Sup. Ct. Texas, 2016).

For example, in Heyen v. Hartnett, 235 Kan. 117 (1984), the Supreme Court of Kansas examined whether an assignment and conveyance of a 1/16th interest in and to oil, gas and other minerals constituted an assignment of a 1/16th interest, or an assignment/conveyance of a ½ interest, an issue nearly identical issue to the present issue before this Court.

More specifically, Heyen involved an action for a declaratory judgment to construe a 1925 mineral deed and to determine the ownership of the parties in the oil and gas and other minerals located in a certain tract of land in Stafford County, Kansas, when the 1925 handwritten Deed provided as follow, in relevant parts:

> Witnesseth: That the said party of the first part, for and in consideration of the sum of One Dollar and other valuable considerations. Dollars ($ 1.00) To us in hand paid by the said party of the second part, the receipt whereof is hereby acknowledged, does by these presents grant, bargain, sell, release and forever quitclaim unto the said party of the second part and to heirs and assigns forever an undivided 1/16 interest in and to all of the oil, gas and other minerals whatsoever in and under the following described lands situate in Stafford County, State of Kansas, to-wit . . . . (emphasis added).

Id., 118.

[10] The Petitioners' silence as to these cases speaks volumes.

After noting that there was no existing oil and gas lease on the tract at the time the mineral deed was executed in 1925, and that the Plaintiffs were seeking a declaration that they owned 15/16 of the oil and gas estate, and that the Defendants were suggesting a ½ interest reading of the 1925 Deed, the same factual scenario present in this matter, the Court went on to further note that the deed was ambiguous and then described in detail the logic behind the Court's conclusion that the 1/16th conveyance was a grant of ½ of the oil and gas estate.

Turning to the decision, Heyen referenced Shepard, Executrix v. John Hancock Mutual Life Ins. Co., 189 Kan. at 134-35, as an authority in which there is an excellent discussion of this early day misconception and misuse of the fraction "1/16th" when "1/2" was really intended in mineral deeds/transactions, stating as follows:

> It is not uncommon for parties to mineral deeds or reservations, where a royalty or mineral interest is conveyed or reserved subject to an existing oil and gas lease, to confuse the fractional interest conveyed or reserved. Such confusion occurred in the instant deed. The reservation states 'an undivided 1/4 of the landowners 1/8 royalty, or, 1/32 of the interest in and to oil, gas or other minerals . . . in and under the said land.
>
> This court has previously considered fractional discrepancies created by such confusion. (Lathrop v. Eyestone, [170 Kan. 419, 227 P.2d 136 (1951)]; Froelich v. United Royalty Co., [178 Kan. 503, 290 P.2d 93 (1955), modified 179 Kan. 652, 297 P.2d 1106 (1956)]; Magnusson v. Colorado Oil & Gas Corp., [183 Kan. 568, 331 P.2d 577 (1958)].)
>
> In the Magnusson case it was pointed out that it was not only persons in the petroleum industry who made this type of inadvertent mistake, but on occasion the mistake has been made by courts, and it was said:
>
> As the most common leasing arrangement provides for a one-eighth royalty reserved to the lessor, the confusion of fractional interests stems primarily from the mistaken premise that all the lessor-landowner owns is a one-eighth royalty.

> In conveying minerals subject to an existing lease and also assigning a corresponding fractional interest in the royalties received, mistake is often made in the fraction of the minerals conveyed by multiplying the intended fraction by one-eighth.
>
> Thus, if a conveyance of an undivided one-half of the minerals is intended, the parties will multiply one-half by one-eighth and the instrument will erroneously specify a conveyance of one-sixteenth of the minerals upon the assumption that one-sixteenth is one-half of what the grantor owns.
>
> An ambiguity is created because the instrument will also show that the conveyance of one-sixteenth of the minerals is meant to entitle the grantor to one-half of the royalty. Of course, an undivided one-half of the minerals is needed to carry one-half of any royalties reserved. (l.c. 576.)

Consistent with the reasoning above, the Court in Heyen ultimately held that the handwritten, ambiguous mineral deed of 1925 should be construed to convey to the grantees an undivided ½ interest in the oil and gas and other minerals in and under the land in question, even though the deed expressly delineates the conveyance as a $1/16^{th}$ interest, so as to carry out the intent of the parties. Id., 125-126. Plainly, the Circuit Court's logic, and holding herein, is fundamentally consistent with the foregoing, such that it should be affirmed.

Additionally, the Supreme Court of Texas has looked at analogous fractional reservations and has labeled the issue before this Court as the "Estate Misconception Theory" – in generally confirming that fractional references, such as a $1/16^{th}$ reservation, indicate an intent to reserve ½ of the mineral estate given that the term "1/8" was widely used as a term of art to refer to the total mineral estate.

Indeed, in Hysaw, the Texas Supreme Court stated as follows:

> A related issue that may be implicated in double-fraction cases is the theory of 'estate misconception.' This theory refers to a once-common misunderstanding (perpetuated by antiquated judicial authority) that a landowner retained only 1/8 of the minerals in place

> after executing a mineral lease instead of a fee simple determinable with the possibility of reverter in the entirety. '**For example, a lessor who has leased the entire mineral estate, but desires to sell-one half [sic] of the minerals, would assume that he owned 1/8 of the minerals due to the existing lease . . . [and] would use the fraction 1/16, or a double fraction, 1/2 of 1/8, to convey 1/2 of what he perceived he owned**.' Laura H. Burney, The Regrettable Rebirth of the Two—Grant Doctrine in Texas Deed Construction, 34 S. TEX. L. REV. 73, 89 (1993).
>
> See also FN 10. Concord Oil Co., 966 S.W.2d at 459-60; Graham, 429 S.W.3d at 658; see Frank W. Elliott, Jr., The Fractional Mineral Deed 'Subject to' a Lease, 36 TEX. L. REV. 620, 622 (1958) (describing the 'greatest source of confusion" in construing mineral deeds is that '[t]he lessor often thinks of his ownership as a 1/8th royalty interest rather than a possibility of reverter in all the minerals').

(emphasis added).

Contrary to Petitioners' anticipated argument, the estate misconception theory and the historical use of fractional 1/8th references in oil and gas reservations does not violate the rule on using surrounding circumstances to create ambiguity.

Rather, it can inform this Court what the fraction/reference to 1/16th meant in the context it was used: a deed executed in 1902.

Stated differently, instead of creating ambiguity, it gives meaning to the intent of the parties to the deed, and the deed itself, as categorically confirmed by the parties' actions in the early 1900s as the 1/16th reservation was categorically labeled by the parties as a ½ reservation in the land books near the time of the transaction and was taxed accordingly.

Consistent with the foregoing authorities, the Court should affirm the Circuit Court's ruling.

E. Alternatively, This Court Can Determine That The 1902 Handwritten Deed Is Ambiguous/Contains A Latent Defect; And That The Totality Of The Record, Including The Opinions Of Richard Starkey, Esq., And The Related Land Books, Lead To The Inescapable Conclusion That ½ Of The Oil And Gas Estate Is Vested In Severin POA.

The general rule is that "[a] valid written instrument which expresses the intent of the parties in plain and unambiguous language is not subject to judicial construction or interpretation, but will be applied and enforced according to such intent." Syl. Pt. 1, Cotiga Development Co. v. United Fuel Gas Co, 147 W. Va. 484, 128 S.E.2d 626 (1963).

However, when a deed is unclear or ambiguous on its face, the Court must look to evidence of the parties' intent in construing the deed. Zimmerer v. Romano, 223 W. Va. 769, 778-79, 679 S.E.2d 601, 610-11 (2009) (citing Syl. Pt. 1 State v. Herold, 76 W. Va. 537, 85 S.E. 733 (1915) ("For ascertainment of the intent of the parties to a deed in which the description of the subject matter is inconsistent, contradictory and ambiguous, extrinsic evidence is admissible.").

Under West Virginia law, "[t]he term 'ambiguity' is defined as language 'reasonably susceptible of two different meanings' or language 'of such doubtful meaning that reasonable minds might be uncertain or disagree as to its meaning.' " Payne v. Weston, 195 W. Va. 502, 507, 466 S.E.2d 161, 166 (1995) (quoting Syl. pt. 1, in part, Shamblin v. Nationwide Mut. Ins. Co., 175 W.Va. 337, 332 S.E.2d 639 (1985).

As to latent ambiguity, "a latent ambiguity is one which arises not upon the words of the instrument, as looked at in themselves, but upon those words when applied to the object sought to be accomplished by the contract or the subject which they describe." Syl. Pt. 10, in part, Paxton v. Benedum-Tres Oil Co., 80 W. Va. 187, 94 S.E. 472 (1917); see also Syl. Pt. 2 and 3, Bank v. Catzen, 63 W.Va. 535, 60 S.E. 499 (1908) (stating that "[w]hen, in attempting to apply a deed to its subject matter or the parties thereto, a latent ambiguity of any kind is disclosed, parol evidence

is admissible to a limited extent, to show what was intended, not only by the instrument considered as a whole, but also by particular words or clauses thereof . . . Parol evidence, admissible for such purpose, is generally limited to the subject-matter, the relation of the parties thereto, their prior and subsequent conduct, their situation, and all the facts and circumstances existing at the time of the execution of the instrument.").

In Gastar Exploration, Inc. v. Rine, 239 W.Va. 792, 806 S.E.2d 448 (2017), the West Virginia Supreme Court was recently asked to determine whether a reservation of one-half of the oil and gas was ambiguous, such that it was appropriate to consider extrinsic evidence to determine the parties' intent.

In Gastar, in 1957, the Franklins, who owned a parcel of land in fee, sold the tract to the Yohos, reserving one-half of the oil and gas. Id., 796. For twenty years post sale, the tax assessments reflected that the Franklins owned an undivided one-half interest in the oil and gas and that the remaining undivided one-half interest in the oil and gas, as well as the surface, were owned by the Yohos. In 1977, the Yohos conveyed "the same property" to the McCardles by deed which contained identical reservation language that was used in the 1957 deed. Id.

After 1977, the Yohos were not assessed for any taxes on the surface for the oil and gas, but their former assessment was transferred to the McCardles, who proceeded to pay the assessed taxes for over 30 years. Id., 797. After Ms. McCardle signed an oil and gas lease with Gastar Exploration, the Yoho heirs - through their estate administrator Gary Rine - filed a lawsuit, alleging therein that the Yohos had not conveyed their interest in the oil and gas to the McCardles. Id.

Initially, the Circuit Court of Marshall County decided that the 1977 deed was unambiguous and that the Yohos had reserved an undivided one-half interest in the oil and gas in the 1977 deed. Id. On appeal, the Court reversed and remanded the case, holding that the circuit

court erred in finding the 1977 deed unambiguous. In reaching this holding, the Court noted the longstanding contract rule that if a deed is ambiguous on its face, a court must look to extrinsic evidence of the parties' intent--including the parties' conduct "before and after" delivery of the deed. Id., 800-801. Further, the Court noted that a deed will be rendered ambiguous if reasonable minds might disagree as to its meaning and that the deed at issue was poorly drafted and reasonable minds could disagree as to exactly what had been conveyed/reserved, particularly because the deed contained no expressed intentions by the Yohos regarding the one-half oil and gas reservation. Id.

Here, similar to Gastar, this Court may determine that reasonable minds can interpret the reservation of "one sixteenth of all the oil and gas in and under said land" contained in the 1902 Deed in diametrically opposed ways. If the Court explores this avenue, Severin respectfully submits that the post-1902 transaction land book/tax records are dispositive as to the issue of ownership, as they unequivocally demonstrate that the parties placed a construction upon the 1902 Deed/reservation of 1/16th which is wholly consistent with the Circuit Court's holding:

LAND BOOK YEAR/NAME	**ACREAGE DESCRIPTION**	**MINERAL ESTATE DESCRIPTION**
1912 – F.W. Severin	224 Acres – Robert's Fork	1/2 C O G
1913 – F.W. Severin	224 Acres – Robert's Fork	All C, ½ O.G.
1914 – F.W. Severin	224 Acres – Robert's Fork	C ½ " "
1915 – F.W. Severin	224 Acres – Robert's Fork	½ " "
1916 – F.W. Severin	224 Acres – Robert's Fork	½ " "
1917 – F.W. Severin	224 Acres – Robert's Fork	½ " "
1918 – F.W. Severin	224 Acres – Robert's Fork	½ O.G.
1919 – F.W. Severin	224 Acres – Robert's Fork	½ OG
1920 – F.W. Severin	224 Acres – Robert's Fork	½ O.G.
1921 – F.W. Severin	224 Acres – Robert's Fork	½ COG.
1925 – F.W. Severin	224 Acres – Robert's Fork	C.O.G.

(Appx. 501 – 522); see also Camden v. McCoy, 48 W.Va. 377, 37 S.E. 637 (1900) (internal citation omitted) (stating that "If the words or terms of a contract are equivocal, resort may be had to the circumstances under which the contract was executed and to the contemporaneous construction given to the contract by the parties. . . . The subsequent acts are admitted to show how the parties understood their contract, and are a practical construction of it. . . . It is a familiar doctrine that when the terms of an agreement are in any respect doubtful or uncertain and the parties to it have by their own conduct placed a construction upon it which is reasonable such construction will be adopted by the court, because it is the duty of the court to give effect to the intention of the parties where it is not wholly at variance with the correct legal interpretation of the terms of the contract.").[11]

Stated succinctly, for the alternative reasons set forth herein, the Court can affirm the Circuit Court's finding on alternative grounds, such that Severin POA remains vested with a ½ interest in the oil and gas estate at issue.

VI. CONCLUSION

For the reasons set forth above, the Respondent respectfully requests that this Court affirm the Declaratory Judgment Order entered by the Circuit Court of Doddridge County, West Virginia.

[signature page follows]

[11] See also Palmer v. Newman, 91 W.Va. 13, 21, 112 S.E. 194, 197 (1922) (internal citations omitted) (reinforcing the practical construction doctrine and stating "[t]ell me what you have done under such a deed, and I will tell you what that deed means.").

Respectfully submitted,
Severin POA Group, LLC,
By Counsel:

/s/ Frank E. Simmerman, III

Frank E. Simmerman, Jr. (WVSB # 3403)
Chad L. Taylor (WVSB# 10564)
Frank E. Simmerman, III (WVSB # 11589)
SIMMERMAN LAW OFFICE, PLLC
254 East Main Street
Clarksburg, West Virginia 26301
Phone: (304) 623-4900
Facsimile: (304) 623-4906
fes@simmermanlaw.com
clt@simmermanlaw.com
trey@simmermanlaw.com

INTERMEDIATE COURT OF APPEALS OF WEST VIRGINIA

No. 22-ICA-207

EARL J. NICHOLSON, and
JOYCE A. NICHOLSON,

Petitioners,

vs.

Appeal from the Circuit Court of
Doddridge County, West Virginia
(Case No. 20-C-25)

ANTERO RESOURCES CORPORATION,
SEVERIN POA GROUP, LLC,
ROCKWELL RESOURCES, LLC,
JEC PRODUCTION, LLC,
Et. Al.,

Respondents.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that the attached "**BRIEF OF RESPONDENT SEVERIN POA GROUP, LLC**" was served upon the following counsel of record, by U.S. Mail, and electronic filing on March 15, 2023, addressed as follows:

Steptoe & Johnson PLLC Attn: Justin Rubenstein, Esq. 400 White Oaks Boulevard Bridgeport, WV 26330 Justin.Rubenstein@Steptoe-Johnson.com *Counsel for Antero Resources Corporation*	Andrew Cutright, Esq. Cutright Law PLLC 455 Suncrest Towne Centre, Suite 201 Morgantown, WV 26505 arcutright@cutrightlawwv.net *Counsel for Plaintiffs/Petitioners*
George Patterson, III, Esq. Bowles Rice LLP 600 Quarrier Street Post Office Box 1386 Charleston, WV 25301 gpatterson@bowlesrice.com *Counsel for JEC Production, LLC, Rockwell Resources, LLC and Robert R. Jones*	

/s/ Frank E. Simmerman, III
Frank E. Simmerman, III (WVSB# 11589)