IN THE INTERMEDIATE COURT OF APPEALS OF WEST VIRGINIA

Docket No. 23-ICA-351

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Venable Royalty, LTD,
and V14, LP,

Plaintiffs Below, Petitioners,

v.

EQT Production Company, ET Blue Grass, LLC,
and AMP IV, L.P., et al.,

Defendants Below, Respondents.

Appeal from the final order
of the Circuit Court of Wetzel
County, West Virginia (21-C-19)

BRIEF OF PETITIONERS, VENABLE ROYALTY, LTD, and V14, LP

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STATEMENT OF THE CASE

I. Introduction

This appeal arises from the wrongful determination by the Circuit Court that a royalty interest in oil and gas is personal property, and the holding that, being personal property, an assessment of the royalty interest as real estate in the land books was improper, and a resulting tax sale was void. Petitioners, Venable Royalty, Ltd., and V14, LP (the "Venable Parties") argue instead that a royalty interest in oil and gas is an interest in real property, is subject to being assessed as real estate in the land books, and in case of a delinquency is subject to a tax sale, just like any other interest in real estate, and upon a sale the interest is subject to conveyance by deed.

II. Statement of Facts

In 1884 William McGary acquired 201 acres located in Wetzel County, West Virginia, in fee simple. JA 27, 57. In 1907 he conveyed the property to Joseph Carpenter in a deed that reserved "***one sixteenth of all the oil and one half the royalty of gas produced from the . . . premises***." (the "McGary Interest").[1] JA 27-28, 60-61. This reservation divided the ownership

[1] There is historical context for a conveyance of a one-sixteenth interest in the oil and one-half royalty interest in gas. Most early oil and gas leases provided that the owner/lessor would receive 1/8th of the oil in kind, and a flat rate, typically a set dollar value per year, for gas. For example, see the leases at issue in *Horner v. Philadelphia Co. of West Virginia*, 76 S.E. 662 (W. Va. 1912) (1/8th of the oil and $300 per year per gas well); *Lockhart v. United Fuel Gas Co*., 141 S.E. 521 (W. Va. 1928) (1/8th of the oil and $50 per gas well per year)*; Paxton v. Benedum-Trees Oil Co*., 94 S.E. 472, 476 (W. Va. 1917) (1/8th of the oil and $300 per gas well per year). In other lease forms, particularly in modern forms, the royalty on gas became 1/8th of either the proceeds from the sale of gas or 1/8th of the value. Compare the leases in *Cotiga Development Co. v. United Fuel Gas Co.*, 128 S.E.2d 626 (W. Va. 1962) (1/8th of the proceeds from sale of gas) and *Imperial Colliery Co. v. OXY USA*, 912. F.2d 696 (4th Cir. 1990) (1/8th of the market value of the gas). Suffice it to say that the "double fraction" in oil and gas royalty conveyances resulted from and mimicked the standard terms of oil and gas leases, and the obvious effort in many deeds was to convey 1/2 of the benefits derived by the owner from existing leases. Thus, we see conveyances like the present with the grant of 1/16 of the oil and 1/2 of the royalty on gas. *See, e.g., Permico Royalties, LLC v. Barron Properties Ltd*., No. 08-22-00168-CV, 2023 WL 4442007, at *4 (Tex. App. July 10, 2023) (explaining the origins of the ubiquitous 1/16 and 1/2 mineral conveyance).

In this case the outright reservation of 1/16 of the oil infers a clear interest in the oil, i.e. real estate for certain, however the complete phrase "1/16th of the oil and 1/2 of the royalty of gas **produced from … the premises"** infers a royalty interest, as the phrase "produced from the premises" or "when produced" is

of the property between the McGary reserved interest and all remaining interests in the land, including all remaining interests in the oil and gas. The McGary Interest was duly entered for ad valorem taxes as real estate under the name William McGary and described as: "Oil and Gas – 200 acres – Limestone Ridge 1/2." JA 72. Taxes appear to have been duly paid and collected by the county from the 1907 deed until 1962 (55 years) when the property became delinquent for the non-payment of taxes, and the McGary Interest was sold by the Sheriff of Wetzel County on October 21, 1963. No redemption of the delinquent taxes was made and by "Tax Deed" dated April 1, 1965, the McGary Interest was conveyed to J. H Riggenbach. JA 28, 77.

The ensuing chain of title is complex, however, there is no dispute that a parcel of 20 acres was carved out of the original 201 acres, and that the remaining tract of 181 acres is the subject of this case and it was subsequently subdivided into tracts of 1 acre, 100.19 acres and 79.81 acres. The Venable Parties trace their ownership of the McGary Interest by mesne deeds from J. H. Riggenbach.[2] Their claim rests on the premise that the McGary Interest is an interest in real estate, that the tax entry and payment and collection of taxes for 55 years was valid, and when the taxes were not paid, that the resulting sale and 1965 Tax Deed conveying the McGary Interest was valid. If valid, the ownership of the subdivided 181 acres is as follows:

generally interpreted to infer a royalty interest . *See Davis v. Hardman,* 133 S.E.2d 77 (W. Va. 1963). Importantly, the parties in this case have not disputed that the intent of the 1907 McGary conveyance was one-half of the oil and gas royalty.

[2] ET Blue Grass, LLC, an original defendant in this action conveyed all of its interest in the 181 acres to the Venable Parties, by deed dated May 31, 2022, and of record in the Office of the Clerk of the County Commission of Wetzel County, West Virginia, in Deed Book 494, page 356. With this deed the Venable Parties acquired all remaining interest in the McGary Interest.

Tax Map Parcel 8-14-5.2 (100.1900 acres) and Tax Map Parcel 8-14-5 (79.81 acres)				
		Land, except Oil and Gas	**Oil & Gas Executive/Leasing Right Rental Right Develop Right Bonus Right**	**Oil & Gas Royalty Interest**
a.	The Tracy Trust	100%	50.0000%	25.0000%
a.	Venable Royalty, Ltd.	0.0000%	43.75%	65.6250%
b.	V14. LP	0.0000%	6.25%	9.3750%
	TOTAL	**100%**	**100%**	**100%**

and

Tax Map Parcel 8-14-5.1 (1.0000 acre)				
		Land, except Oil and Gas	**Oil and Gas Executive/Leasing Right Rental Right Develop Right Bonus Right**	**O&G Royalty Interest**
a.	Eva Anne Mavety and Susanne Mavety	100%	50.0000%	25.0000%
a.	Venable Royalty, Ltd.	0.0000%	43.75%	65.6250%
b.	V14, LP	0.0000%	6.25%	9.3750%
	TOTAL	**100%**	**100%**	**100%**

The Respondents, however, asserted in the lower court that the McGary Interest is an interest in personal property, that the assessment for ad valorem taxes as real estate was improper,

and that the 1965 Tax Deed, upon which the Venable Parties rely, was void. If the assertion that the interest is personal property is determined to be correct, the McGary Interest would have been distributed to the William McGary heirs, and the parties are in agreement that William McGary died in 1931 and that his personal property would have been distributed to two children, Esther L. Snodgrass (1/2 interest) and Amos D. McGary (1/2 interest). Assuming that, in accordance with the laws of distribution in effect in 1931, that there was a surplus of personal property after the payment of all expenses, and further assuming there were no bills of sale or other unrecorded sales of the McGary Interest, AMP IV, L.P., one of the Respondents, acquired the interests of the successors to Amos D. McGary. The other one-half of the McGary Interest, distributed to Esther L. Snodgrass, passed to her distributees and a search of these successors revealed the remaining Respondents.

Aside from the possibility that a McGary heir sold their interest in a bill of sale or other unrecorded document, the parties agreed in the court below that respondents include all heirs and their successors of William McGary and, accordingly, the sole issue determined in the court below, and the sole issue raised in this appeal, is whether the McGary Interest is personal property or an interest in real estate.

III. Procedural History

Petitioners filed their Complaint in the Wetzel County Circuit Clerk's office on July 13, 2021, seeking to quiet title to the oil and gas underlying the Subject Property, naming all known heirs to William McGary and Charlotte B. McGary and all other existing parties and entities believed to have a potential claim to the land. JA 16-354. Appalachian Mineral Partners ("AMP") thereafter filed its Answer, Counterclaim and Crossclaim on October 15, 2021. JA 201. In its Counterclaim, AMP agrees that the McGary Interest carved out in the 1907 deed reserved to the McGarys a 50% interest in the oil and gas produced from the subject tract. JA 234. However,

AMP asserts that this was an interest in personal property, not real property, and could not be subject to land book tax assessments or tax sales. JA 234. Therefore, AMP asserts the 1965 tax sale was invalid and the interest remained vested in the McGarys and their heirs, and was eventually partially conveyed to AMP. JA 234. McGary heirs Steven A. Snodgrass and Nancy J. Barker answered Petitioners' Complaint and also denied that the 1962 tax sale transferred the McGary Interest. JA 257, 269. Additional McGary heirs Linda W. Nuckolls, Larry W. Wiles, Sherry D. Compher, Vicki Snodgrass Starr, Donna Grimm Hansen, Maureen Grimm Plumstead, Gail Grimm, and Bonnie Snodgrass Hayton answered Petitioner's Complaint, also denying Petitioner's claim to the McGary Interest. JA 334.

After the close of discovery, AMP filed its motion for summary judgment and accompanying memorandum of law, asserting that royalty interests are personal property and therefore the 1965 tax sale of the McGary Interest was void. JA 355, 374. McGary heirs Steven A. Snodgrass and Nancy J. Barker also moved for summary judgment arguing that the McGary Interest, as personal property, was never divested via tax sale. JA 338, 392. McGary heirs Linda W. Nuckolls, Larry W. Wiles, Sherry D. Compher, Vicki Snodgrass Starr, Donna Grimm Hansen, Maureen Grimm Plumstead, Gail Grimm, and Bonnie Snodgrass Hayton filed a third motion for summary judgment, making identical arguments. JA 497.

Petitioners moved for summary judgment on the grounds that the royalty interest carved out in 1907 was properly assessed and taxed as real estate, and thus the 1965 tax sale was valid and the precursor to Petitioners' current ownership of the McGary Interest. JA 426.

The Circuit Court entered its Order on July 5, 2023, ruling for AMP and the McGary heirs. JA 743. The Court initially noted a lack of guidance from the West Virginia Supreme Court of Appeals as to whether a royalty interest in oil and gas could be assessed and sold as real property.

JA 743. The Court decided that it could not, "based upon the law this court feels is the most applicable to the facts." JA 743. Without referencing caselaw, the Court explained that there are two types of assessments with respect to oil and gas, (1) the value of the oil and gas in place, which is real property, and (2) the value of the royalty received from the production of oil and gas once it is produced, which is personal property. JA 744. The Court reasoned that the value of the McGary Interest fell into the latter category and thus was improperly assessed and could not serve as the basis of a sale for delinquent taxes, voiding the 1965 tax sale deed and, thereby, the title of the Petitioners. JA 744.

Petitioners timely noticed their appeal.

SUMMARY OF THE ARGUMENT

The Circuit Court erred when it held that the McGary Interest was personal property and that the 1965 Tax Deed, under which the Venable Parties derive their title, was void. This holding is contrary to nearly a century and a half of oil and gas jurisprudence in which the West Virginia court has held expressly that oil and gas constitute interests in real estate. Moreover, the holding in the court below is contrary to the majority of jurisdictions that also recognize oil and gas as interests in real estate. Like other jurisdictions West Virginia has affirmatively recognized the ability of owners to sever interests exactly like they did in this case with the reservation of "***one sixteenth of all the oil and one half the royalty of gas produced from the . . . premises***." Thus, just like any interest in real estate an owner can divide ownership into fractional interests so that owner X can own a 1/16th interest and owner Y can own a 15/16ths interest. Similarly, a royalty interest, or a partial royalty interest can be severed, so that one party can own 1/2 of the royalty and another can own the other 1/2 (like this case), and further, as to oil and gas and possibly other minerals or interests, the royalty interest, or any attribute of ownership, can be severed from other attributes of ownership. These attributes are commonly recognized to include the leasing and

development rights, the right to rentals, the right to bonuses, and the right to receive royalty. It makes no difference how the ownership is divided, whether fractions or attributes of ownership, the nature of the ownership does not somehow change from an interest in real estate to a personal property interest.

The ramifications of the decision in this case are huge. The case law cited in this brief demonstrates that severances like the one in this case are commonplace. Thus, an industry beginning in the mid to early 1800s[3] has implicitly, if not expressly, treated ownership of oil and gas as an interest in real estate, and as such, virtually all reported cases recognize that grants and reservations are made by deed, or possibly in a will, and that all of the formalities of a deed must be met to have a valid transfer. Significantly, the Recording Act provides an historical and tested method to document ownership of real estate, so that ownership can be traced and established. W. VA. CODE § 40-1-9. The provisions of the Act apply only to interests in real estate or liens on real estate. *Id.* They do not apply to cows, automobiles, contract rights or other forms of personal property.

Title of the Venable Parties can be tested by these basic principles. If as urged by Respondents, the McGary Interest is personal property, then, there is no means to make a traditional title search and determine if, from 1907 to the present, an owner has transferred an interest by a bill of sale, contract or other unrecorded transfer document. Obviously, current West Virginia law **and public policy** dictate that this court hold that the McGary interest is an interest in real estate, that title can be ascertained by a traditional title examination, that the 1965 Tax Deed is a valid deed and that the Venable Parties have title to the reserved interest in the oil and gas.

[3] *See generally*, David McKain, Where It All Began, International Standard Book Number 0-96419855; Library of Congress Catalogue Card Number, 94-7645, 1994, pages 1-10.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Petitioners request that this appeal be calendared for oral argument. Although the legal issue is straightforward, its resolution involves a significant question of law affecting oil and gas owners in West Virginia and an industry that relies on verifiable title to oil and gas interests. The argument could be significantly aided by oral argument.

STANDARD OF REVIEW

"A circuit court's entry of summary judgment is reviewed *de novo*." Syl. Pt. 1, *Painter v. Peavy*, 451 S.E.2d 755 (W. Va. 1994). Summary judgment is appropriate under Rule 56(c) of the *West Virginia Rules of Civil Procedure* where "it is clear that there is no genuine issue of fact to be tried and inquiry concerning the facts is not desirable to clarify the application of the law." Syl. Pt. 3, *Aetna Cas. & Sur. Co. v. Fed. Ins. Co. of N.Y.*, 133 S.E.2d 770 (W. Va. 1963).

ARGUMENT

The Circuit Court erred when it determined that a royalty interest in oil and gas is an interest in personal property. West Virginia and numerous other jurisdictions have made it clear that royalty interests in oil and gas can be carved out of a mineral estate and assessed, sold, and conveyed as any other subset of mineral rights—i.e., as real estate. The treatment of oil and gas royalty interests as real estate is in line with our state's history of mineral rights, public policy, and persuasive authority from other states.

I. West Virginia Treats Oil & Gas Ownership as Real Estate.

From the earliest land transactions to the current era, courts throughout the United States have recognized the ability to divide ownership of land in a myriad of ways. As a rule, subdivided parcels, fractional interests, future interests, reversionary interests, severed interests, mineral interests and others have all been viewed as being real estate and owned absolutely with generally recognized bundles of rights and protections applicable to real estate.

With development of oil, and later gas, beginning around the mid-1800s it became widely known that these minerals were fugacious and, like wild animals, could move from one property to another. *See Robinson v. Milam*, 24 S.E.2d 236, 237 (W. Va. 1942). Given this nature, courts adopted three different theories of ownership: first, a theory of absolute ownership in which oil and gas are owned the same as any other ownership of real estate, *see, e.g., Boggess v. Milam,* 34 S.E.2d 267, 269 (W. Va. 1945); second, a theory of qualified ownership in which the owner of oil and gas has title only so long as these minerals remain under his land, *see, e.g., Sinclair Oil & Gas Co. v. Corp. Comm'n*, 378 P.2d 847, 851 (Ok. 1963)[4]; and third, a theory of non-ownership under which oil and gas are not the subject of ownership in place but the landowner has the exclusive right to reduce them to possession, at which time they become personal property and are subject to ownership as such, *see, e.g., Whitehall Oil Co. v. Heard*, 197 So. 2d 672, 675 (La. Ct. App. 1967).

West Virginia initially adopted a qualified ownership theory, but subsequently has uniformly and firmly held that oil and gas are the subject of absolute ownership as real estate.[5] As such, conveyances or transfers of oil and gas must be by deed or will, like any other interest in real estate. *See* W. VA. CODE § 36-1-1. Importantly, only real property interests are protected by the recording act so that a recorded deed conveying real estate provides notice to the world of the

[4] Under the qualified theory of ownership, an owner has the exclusive right to drill on his own land and reduce oil and gas to possession, and in the process, he may drain neighboring lands. *Sellars v. Ohio Valley Trust Co.*, 248 S.W.2d 897 (Ky. 1952); *Kelly v. Ohio Oil Co.*, 49 N.E. 399 (Oh. 1897); *Barnard v. Monongahela Natural Gas Co.*, 65 A. 801 (Pa. 1907).

[5] *See Wood Cnty. Petroleum Co. v. W. Va. Transp. Co.*, 28 W. Va. 210, 215 (1886); *Boggess*, 34 S.E.2d 267; *Preston v. White*, 50 S.E. 236, 237 (W. Va. 1905); *Couch v. Clinchfield*, 139 S.E. 314 (W. Va. 1871). Ownership of such minerals may be conveyed, even while subject to an oil and gas lease. In such case the new owner of the minerals in place assumes the position of the lessor. *Toothman v. Courtney*, 58 S.E. 915 (W. Va. 1907); *Headley v. Hoopengarner*, 55 S.E. 744 (W. Va. 1906); *Snodgrass v. Koen*, 96 S.E. 606 (W. Va. 1918).

ownership. *See* W. VA. CODE § 40-1-9. Also, and significantly, ownership of oil and gas interests are treated as real estate for descent purposes and, importantly for this case, are taxed as real estate for ad valorem tax purposes. *See Dolan v. Dolan*, 73 S.E. 90, 92 (W. Va. 1911), *Toothman v. Courtney*, 58 S.E. 915, 916 (1907).

II. Oil and Gas Estates May Be Severed into Distinct Rights.

Under the principles set out above, courts have recognized the further ability to sever and create separate ownership of the core rights or attributes associated with ownership of the oil and gas. Five rights are generally recognized, namely: the right to lease (or the executive right), the right to develop, the right to receive rent, the right to receive royalty, and the right to receive bonuses. *See Eisenbarth v. Reusser*, 18 N.E.3d 477, 488-89 (Ohio Ct. App. 2014), *aff'd*, 150 Ohio St. 3d 342 (2016); *Altman v. Blake*, 712 S.W.2d 117, 118 (Tex. 1986) ("There are five essential attributes of a severed mineral estate[.]" (citing R. Hemmingway, Law of Oil and Gas §§ 2.1–2.5 (1971)). Theoretically, each of these five rights could be owned by five different owners. *See Aery v. Hoskins, Inc.*, 493 S.W.3d 684, 699 (Tex. App. 2016) ("[A]ny of the five attributes of a mineral estate, including the royalty interest, can be separated from the mineral estate and held by a different owner."); *Davis v. Hardman*, 133 S.E.2d 77, 82 (W.Va. 1963) (recognizing the ability to sever ownership of the royalty interest from the right to lease, receive rent and receive bonuses).

Davis v. Hardman is the leading case in West Virginia to recognize this ability to sever attributes of an oil and gas estate. That case involved two deeds in which the respective owners of a one-fourth interest in a tract of land conveyed their interests, but reserved their "proportionate share of one-fourth (1/4) of the rest and residue of the oil and gas royalty, when produced." 133 S.E.2d at 78. The deeds provided that the grantee would "have the right to lease . . . and to receive the bonuses and carrying rentals." *Id.* In *Davis*, therefore, the Court recognized the ability of an owner to create these separate interests in the oil and gas, so that the royalty interest

could be owned separate from the right to lease (the executive right), the right to receive rents and the right to receive bonuses.[6] Further, the Court recognized the nomenclature often given to the royalty interest, stripped of the right to lease or the executive interest, as a "nonparticipating royalty interest." *Id.* at 82 (citing *Mounger v. Pittman*, 108 So. 2d 565 (Miss. 1959).[7] The phrase "nonparticipating" simply means that the owner of this interest does not need, or have the right, to participate or join in a lease or the development of the oil and gas.

More recently, the Court in *Gastar Exploration, Inc. v. Contraguerro* explained that the right to receive royalties from an oil and gas estate may be retained where the executive right has been conveyed to another owner. 800 S.E.2d 891, 894 (2017). Drawing from the language in the *Davis* opinion, the Court explained that the retained royalty interest is a "nonparticipating royalty interest" or "NPRI" and cited authority stating that it is a "non-possessory **real property interest**." *Id*. at 898-99 (emphasis added).

III. Each Distinct Right of an Oil and Gas Estate, Including the Right to Receive Royalty is an Interest in Real Estate.

[6] Similarly, the Court in *Donohue v. Bills*, 305 S.E.2d 311 (W. Va. 1983), recognized in a conveyance of land the reservation of one of the severed attributes of a mineral estate—the executive right. In that case, a reservation to the grantor of "one-half of all minerals underlying the soil, with the right to lease, enter on said premises, prospect and explore and drill for, and mine, excavate and remove same . . ." was held to reserve to the grantor 100% of the leasing or executive right. *Id*. at 312.

[7] The characteristics of a non-participating royalty interest are:

> (1) Such share of production is not chargeable with any of the costs of discovery and production; (2) the owner has no right to do any act or thing to discover and produce the oil and gas; (3) the owner has no right to grant leases; and (4) the owner has no right to receive bonuses or delay rentals. Conversely, the distinguishing characteristics of an interest in minerals in place are: (1) Such interest is not free of costs of discovery and production; (2) the owner has the right to do any and all acts necessary to discover and produce oil and gas; (3) the owner has the right to grant leases, and (4) the owner has the right to receive bonuses and delay rentals.

Davis, 133 S.E.2d at 81-82.

The importance of *Davis* was that the West Virginia court for the first time recognized the clear language of the deed in that case and held that the royalty interest in the oil and gas could be severed from the other attributes of ownership in the oil and gas. 133 S.E.2d at 80-81. In making this determination, the *Davis* Court affirmed a prior line of West Virginia cases construing similar but different language, and recognized that those opinions properly construed the terms used in the deeds in question based on the peculiar facts in those cases, but held that where a deed clearly and unambiguously severs an attribute of ownership, like a royalty interest in oil and gas, effect will be given the deed.[8] Like the current case, the royalty interest in *Davis* was created by reservation in a deed, duly recorded, and the reservation was thereafter noted in future deeds conveying the other interests in the land.[9] *Id*. at 79.

Recently, the Supreme Court of Appeals of West Virginia in *Collingwood Appalachian Minerals III, LLC v. Erlewine*, 889 S.E.2d 697, 700 (W. Va. 2023) confirmed that an oil and gas royalty interest may be taxed as real estate and that a subsequent tax deed is valid. 889 S.E.2d 697, 700 (W. Va. 2023). In *Collingwood*, a 1909 deed conveyed 135 acres of land, but reserved

[8] In some West Virginia cases, the grant or reservation of the "oil rental", or the "oil and gas royalty", or the "royalties, incomes and rentals", were, under the peculiar facts in each case, held to be grants of all attributes of ownership of the oil or oil and gas. These cases were relied upon by the losing side in *Davis,* when the argument was advanced that the reservation of a royalty or rental interest was actually a reservation of all attributes of ownership, to include the right to lease, to rentals, to bonuses and to the right to develop. *See United Carbon Co. v. Presley*, 29 S.E.2d 466, 467 (W. Va. 1944); *Paxton v. Benedum-Trees Oil Co.*, 94 S.E. 472, 473 (W. Va. 1917); *Toothman v. Courtney*, 58 S.E. 915, 916 (W. Va. 1907).

In *Toothman*, the "oil rental" that was reserved in a prior deed was assessed for ad valorem taxation as real estate, the taxes became delinquent, the interest was sold in a subsequent tax sale and conveyed in a tax deed (much like the current case). *See* 58 S.E. 915, 916 (1907). The *Toothman* Court held that the description "oil rental" was unclear and under the facts in that case, construed the term to mean the oil and gas in place, not just the rental right. The severed oil and gas estate interest, being an interest in real estate, was subject to property tax as real estate and ultimately subject to a tax sale and conveyed by deed.

[9] *See Erwin v. Bethlehem Steel Corp*., 62 S.E.2d 337, 346 (W. Va. 1950) (a "reservation is the creation in behalf of the grantor of some new right issuing out of the thing granted,—that is to say, something which did not exist as an independent right").

to the grantor "one-half of all the oil and gas royalty." *Id.* This reservation was virtually identical to the reservation in this case. The 135 acres and the other half of the royalty interest were conveyed several times over the following decades, and as of 1988 the 135 acres and royalty interests were owned as follows:

- Original owner or successor: 50% royalty in oil and gas
- Osburn Dunham: 25% royalty in oil and gas
- Russell F. Stiles: 25% royalty in oil and gas
- Russell F. Stiles: 135 acres (including the land and all other interests in the oil and gas)

Id. at 700-701.

The Dunham and Stiles royalty interests in the property were entered for ad valorem property taxes as real estate, just like the McGary Interest here. *Id.* at 701. Eventually, the Dunham 25% royalty interest and the Stiles 25% royalty interest, became delinquent and were sold in separate sales for taxes in 1989 and 1993 by the sheriff, and tax deeds were ultimately issued for these interests. *Id.* at 701. The primary issues in the case involved an interpretation of a 1968 deed and the question of whether the assessment of the Stiles 25% royalty interest separate from the 135 acres was valid. The core premise that was assumed by the parties and Court, however, was that the assessments of the two 25% royalty interests in the oil and gas royalty as real estate were valid, as were the two tax deeds conveying these interests to the tax purchaser.

Although the parties in *Collingwood* did not question whether the royalty interest in the oil and gas was real estate or personal property, the Court undertook an in-depth analysis of the chain of title, the separately-conveyed oil and gas royalty interests, the tax delinquency and tax sale and

deeds and upheld the tax deeds. Implicit in this and other decisions is the basic premise that oil and gas royalty interests, just like any other interest in oil and gas, are *real property interests*.

In fact, the West Virginia court was not called upon in any of the cases cited to decide the specific question of whether a royalty interest in oil and gas is an interest in real estate, or for that matter whether any of the five core rights associated with oil and gas ownership are interests in real estate. However, it is intrinsic to the holdings in **every** opinion that oil and gas royalty interests are an interest in real estate. This is in line with cases from other jurisdictions. *See HECI Expl. Co. v. Neel*, 982 S.W.2d 881, 890 (Tex. 1998) ("A royalty interest is an interest in real property that is a distinct part of the mineral estate."); *Wedel v. Am. Elec. Power Serv. Corp*., 681 N.E.2d 1122, 1137-38 (Ind. Ct. App. 1997) ("[I]n Indiana, overriding or nonparticipating royalty interests are real property interests which vest immediately in the royalty holder [when] such interests are granted in property owned by the grantor at the time of conveyance[.]"); *Terry v. Conway Land, Inc*., 508 So. 2d 401, 404 (Fla. Dist. Ct. App. 1987), opinion approved of, 542 So. 2d 362 (Fla. 1989) ("a royalty interest in unsevered oil is an interest in real property"); *Price v. Atl. Ref. Co*., 447 P.2d 509, 510 (N.M. 1968) ("the royalty retained is real property, a present interest in the minerals in and under the land described"); *Yttredahl v. Fed. Farm Mortg. Corp*., 104 N.W.2d 705, 707 (N.D. 1960) ("A perpetual nonparticipating Oil and Gas Royalty is an interest in realty."); *Kentucky Bank & Tr. Co. v. Ashland Oil & Transp. Co*., 310 S.W.2d 287, 290 (Ky. 1958) ("The right to unaccrued royalties . . . retained by or vested in the owner of the land is of the nature of an incorporeal hereditament. It is *real property* or *an interest or estate* which passes to the purchaser of the land.") (emphasis added); *Hanson v. Ware*, 274 S.W.2d 359, 362 (Ar. 1955) ("[I]n Arkansas the owner of royalty has an estate in the land[.]").[10]

[10] Noting that this view of royalty interests is the majority view, the Supreme Court of Florida in *Terry* stated, "Apparently, only the State of Kansas has squarely adopted the rule that a royalty interest is

The 2014 West Virginia Law Review article, "One Stick in the Bundle: Characterizing Nonparticipating Royalty Interests Under West Virginia Law", authored by experienced energy and mineral law attorneys, examines this issue thoroughly, and presents a compelling analysis of West Virginia oil and gas jurisprudence and caselaw from other jurisdictions that favor Petitioners' position.[11] After characterizing the lone royalty interest, or NPRI, as a single stick in the "bundle of sticks" that make up property rights, the article explains that most jurisdictions treat the NPRI as an incorporeal hereditament, or an intangible right in land that is just as much a real property interest as a real covenant running with the land. *Id.* at 524-25.

The article goes on to warn of the dangers of treating NPRIs as personal property. Namely, NPRIs as personal property that do not vest until the mineral is severed from the ground run the risk of violating the rule against perpetuities. *Id.* at 535-36. Determining ownership of such an interest would necessitate determining when the interest was created and whether it had vested in production in time. *Id.* This creates an incentive for executive right owners to avoid executing mineral leases until those interests expire. *Id.* Another danger of treating NPRIs as personal property is undercutting the ability to determine ownership of such interests. *Id.* at 537. If royalty interests can be transferred, "the real ownership of the interest may be difficult, if not impossible, to locate." *Id.* (quoting *McIntosh v. Vail*, 28 S.E.2d 607, 616 (W. Va. 1943) (Fox, J. dissenting)).

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personal property which does not vest until the oil is severed from the ground so that an attempt to create a perpetual nonparticipating royalty interest violates the rule against perpetuities. *Cosgrove v. Young*, 642 P.2d 75 (Ks. 1982). This view has been criticized by scholars in the field. 1 E. Kuntz, A Treatise on the Law of Oil and Gas §§ 15.4, 17.3 (1987); 3A W. Summers, The Law of Oil and Gas § 605 (1958); 2 H. Williams & C. Meyers, Oil and Gas Law § 323 (1985); Meyers, C.J., THE EFFECT OF THE RULE AGAINST PERPETUITIES ON PERPETUAL NON–PARTICIPATING ROYALTY AND KINDRED INTERESTS, 32 Tex. L. Rev. 369, 375 (1954)." 542 So. 2d 362, 365 (Fla. 1989).

[11] Andrew S. Graham, Allison J. Farrell, Lauren A. Williams, Amber M. Moore, ONE STICK IN THE BUNDLE: CHARACTERIZING NONPARTICIPATING ROYALTY INTERESTS UNDER WEST VIRGINIA LAW, 117 W. Va. L. Rev. 519 (2014).

Another complication of treating NPRIs as personal property is that in estate administration personal property is governed by the law of the decedent's domicile, rather real property which is governed by the law of the jurisdiction in which the property is located. *Id.* at 538-39. This would result in mineral interests associated with West Virginia land being subject to the law of any number of different states. *Id*.

The Supreme Court of Appeals of West Virginia has already credited this article in *Gastar Exploration, Inc.*, by relying on its sound reasoning to determine that "the NPRI holders have a nonpossessory interest in the oil and gas underlying the … parcel." 800 S.E.2d 891, 899 (citing 117 W. Va. L. Rev. 519, 520, for the proposition that "NPRI holders have a "non-possessory real property interest."). As the article spells out, West Virginia history and caselaw and that of other jurisdictions, compels the treatment of royalty interests in oil and gas as presently vested interests in real property.

IV. West Virginia Cases Treat an Oil and Gas Royalty Interest as an Interest in Real Estate.

A uniform fact in each of the cases cited in this brief is that the instrument used to create the interest was a deed—the statutorily prescribed method of conveying or reserving an interest in real estate—or possibly a will. Indeed, if, as established in West Virginia, oil and gas are real estate, and if, as also established, the different attributes of ownership can be severed and owned by different parties, then the question becomes: when different attributes become owned by different parties, say the leasing or executive right in V, the right to rents in W, the right to bonuses in X, the right to develop in Y, and the royalties in the Z, would the separate interests all somehow change from real estate to personal property, or should this Court pick and choose which of the five rights are real estate and which have transformed to personal property? In making such an allocation, then with respect to those interests that have become personal property, it would be

further incumbent to specify how parties such as Respondents will prove their devolution of title from a time in the past, 1907 in this case.

In dissecting the West Virginia cases, one finds that in every one of them the means to create a royalty interest in oil and gas was a grant or reservation in a deed. By statute, a deed applies only to real estate.[12] It can be inferred in each case that the deed was recorded, an act only applicable to interests in real estate.[13] There are express statements that royalty interests are real estate and recognition that royalty interests in oil and gas are subject to being assessed for ad valorem taxes as real estate; and once so assessed are subject to tax sales and deeds. *See Collingwood Appalachian Minerals III, LLC,* S.E.2d 697, 700; *Gastar Exploration,* 800 S.E.2d 891, 894; *Davis,* 133 S.E.2d 77, 82; *Toothman,* 58 S.E. 915, 916.

While the underpinning of each cited case is that a royalty interest is an interest in real estate, no court deemed it necessary to make an express finding on this fact. *Collingwood* is the best example because it involves the same facts as this case: royalty interests entered as real estate and tax sales and deeds that were held to be valid. It is Petitioners' position that the fact that oil and gas royalty interests are real estate is "too obvious to need expression", borrowing from the

[12] *See* W. Va. Code 36-1-1 providing that "No estate … in lands… shall be created or conveyed unless by deed or will."

[13] The Recording Act states:

> Every such contract, every deed conveying any such estate or term, and every deed of gift, or deed of trust or memorandum of deed of trust pursuant to section two, article one, chapter thirty-eight of this code, or mortgage, conveying **real estate** shall be void, as to creditors, and subsequent purchasers for valuable consideration without notice, until and except from the time that it is duly admitted to record in the county wherein the property embraced in such contract, deed, deed of trust or memorandum of deed of trust or mortgage may be.

W. VA. CODE § 40-1-9 (emphasis added).

Kentucky doctrine where the court, in holding that a matter deemed implicit need not be expressed, stated that such matters are "too obvious to need expression." *Holly Creek Production Corp. v. Rose*, 2011 WL 557562 (Ky. App. Ct. 2011).

Respondents have an incredibly contradictory means of proving their case. First, they agree that the McGary Interest was created in a *deed* in 1907 (JA 234), and then Respondent AMP subsequently got *deeds* for its claimed interest in 2021 (JA 236). It then had the *deeds* recorded, an act applicable only to real estate. In other words, AMP employed the means for transferring title to real estate and then availed itself of the protections of the recording act, applicable only to real estate, yet asserts that this interest is personal property. JA 255.

The public policy implications of this case are enormous. It is commonly known that oil and gas titles are often complex and ancient severances (just like this case and virtually all of the cited cases), are often followed by intestate deaths, name changes and inartful conveyances (again like this case). Although complex, real estate title can be traced by time tested and well recognized methods of examination of title in the public records. Aside from automobile titles and other limited forms of personal property, there is no such mechanism to prove title to personal property, especially one that cannot be physically possessed. This leads to the very practical issue: if a royalty interest in oil and gas, somehow changes from its former estate and becomes personal property, how will an owner ever establish title in a case like this where the interest was created in 1907 and there is no verifiable means to determine if any of the many succeeding successors made out-sales; and correspondingly, how can an operator who is obligated to pay royalty know who to pay, as the operator will be equally limited in the ability to establish ownership.

There is good reason why every West Virginia case involving a royalty interest in oil and gas has treated the interest as being an interest in real estate. To the extent an open issue is perceived it should be made clear that this interest is real estate.

CONCLUSION

Existing West Virginia precedent, compelling authority from other states, and public policy considerations command reversal of the Circuit Court's Order, and a holding that a fractional royalty interest in oil and gas, is, like the full interest in the oil and gas, an interest in real property. As such the 1965 Tax Deed and the subsequent deeds conveying the McGary Interest were valid, and vest title as follows:

Tax Map Parcel 8-14-5.2 (100.1900 acres) and Tax Map Parcel 8-14-5 (79.81 acres)				
		Land, except Oil and Gas	**Oil & Gas Executive/Leasing Right Rental Right Develop Right Bonus Right**	**Oil & Gas Royalty Interest**
a.	The Tracy Trust	100%	50.0000%	25.0000%
a.	Venable Royalty, Ltd.	0.0000%	43.75%	65.6250%
b.	V14, LP	0.0000%	6.25%	9.3750%%
	TOTAL	**100%**	**100%**	**100%**

and

Tax Map Parcel 8-14-5.1 (1.0000 acre)				
		Land, except Oil and Gas	**Oil and Gas Executive/Leasing Right Rental Right Develop Right Bonus Right**	**O&G Royalty Interest**
a.	Eva Anne Mavety and Susanne Mavety	100%	50.0000%	25.0000%
a.	Venable Royalty, Ltd.	0.0000%	43.75%	65.6250%
b.	V14, LP	0.0000%	6.25%	9.3750%
	TOTAL	**100%**	**100%**	**100%**

For the reasons set forth herein, Petitioners ask this Court to reverse the Circuit Court's ruling and hold that a royalty interest in oil and gas is an interest in real estate, and as such, can be conveyed only by deed and entered for ad valorem taxes as an interest in real estate, and award judgment in favor of the Petitioners.

Respectfully submitted by,

VENABLE ROYALTY, LTD.,
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V14, LP, a Texas limited partnership,

By Counsel,

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IN THE INTERMEDIATE COURT OF APPEALS OF WEST VIRGINIA

Docket No. 23-ICA-351

Venable Royalty, LTD,
and V14, LP,

Plaintiffs Below, Petitioners,

v.

EQT Production Company, ET Blue Grass, LLC,
and AMP IV, L.P., et al.,

Defendants Below, Respondents.

Appeal from the final order
of the Circuit Court of Wetzel
County, West Virginia (21-C-19)

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this **6th** day of **November 2023**, the foregoing ***Brief of Petitioners Venable Royalty, LTD., and V14, LP*** was served using the electronic File & ServeXpress system, which will send copies of such filings to registered counsel of record.

/s/ J. Mark Adkins
J. Mark Adkins (WVSB #7414)