

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)

SUMMARY RESPONSE OF RESPONDENTS, LINDA W. NUCKOLLS, LARRY W. WILES, SHERRY D. COMPHER, VICKI SNODGRASS STARR, DONNA GRIMM HANSEN, MAUREEN GRIMM PLUMSTEAD, GAIL GRIMM, AND BONNIE SNODGRASS HAYTON

Counsel for Respondents,
Linda W. Nuckolls, Larry W. Wiles, Sherry D. Compher, Vicki Snodgrass Starr, Donna Grimm Hansen, Maureen Grimm Plumstead, Gail Grimm, And Bonnie Snodgrass Hayton

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Come now the Respondents, Linda W. Nuckolls, Larry W. Wiles, Sherry D. Compher, Vicki Snodgrass Starr, Donna Grimm Hansen, Maureen Grimm Plumstead, Gail Grimm, and Bonnie Snodgrass Hayton, by and through counsel, S. David Wilharm and Christian E. Turak, pursuant to Rules 10(e) of the W.Va. Rules of Appellate Procedure, and for their Summary Response state as follows:

Respondents request this Honorable Court deny the Petition for Appeal and Affirm the Order of the Circuit Court of Wetzel County granting the Respondents Motion for Summary Judgment. The circuit court correctly held that the nonparticipating royalty interest reserved by the Respondents' ancestor, William McGary, is a personal property interest and as such the sale of said interest for delinquent real estate taxes was void.

The Respondents do not dispute that oil and gas in place is a real property interest which is taxable on the land books as real estate. A nonparticipating royalty interest is not oil and gas in place. In short, a nonparticipating royalty owner has one right – to receive money if and when the oil and gas gets produced and sold. In Davis v. Hardman, 148 W.Va. 82, 133 S.E. 2d 77 (W.Va. 1963), the Supreme Court of Appeals explained the difference between oil and gas in place (a real property interest) and a nonparticipating royalty interest:

The distinguishing 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 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.

Id., 148 W.Va at 90, 133 S.E. 2d at 81-82 (citing Mounger v. Pittman, 108 So. 2d 565 (Miss. 1959)).

In 2017, the Supreme Court of Appeals again acknowledged the difference between a nonparticipating royalty interest and oil and gas in place when holding that a nonparticipating royalty owner does not have the right to object to the pooling or unitization of their interest:

Generally, a nonparticipating royalty interest (“NPRI”) describes a right to share in royalties from oil and gas drilling and production operations where the holder thereof has conveyed away all other interests in the oil and gas he or she may have had, including any possessory interest and the right to lease the minerals. See Benjamin Holliday, *New Oil and Old Laws: Problems in Allocation of Production to Owners of Non-Participating Royalty Interests in the Era of Horizontal Drilling*, 44 Saint Mary’s L. J. 771, 799 (2013)(“An NPRI is a nonpossessory interest, which means that the NPRI owner does not own the minerals in place but instead holds only a presently vested right to a stated fraction of production from any and all minerals produced.”)

Gastar Exploration, Inc. v. Contraguerro, 239 W.Va. 305, 308, 800 S.E.2d 891, 894 (W.Va. 2017).

West Virginia law has long recognized that interests in royalty are personal property and not interests in real property. “[W]here oil has been brought to the surface the royalty therein has been said to be personal property.” McIntosh v. Vail, 126 W. Va. 395, 28 S.E.2d 607, 610 (1943) citing Warren v. Boggs, 83, W.Va. 89, 97 S.E. 589 (W.Va. 1918). “When oil and gas is produced and marketed from said lands, it loses its character of real property and, as shown in the Warren case, assumes the quality of personal property.” Id. Since Respondent’s interest is only in the proceeds after oil and gas has been produced and marketed, Respondent’s interest is clearly personal property.

The William McGary nonparticipating royalty interest should not have been assessed as a real property interest. “[O]nly real property is to be assessed on the land books.” Blair v. Freeburn Coal Corp., 163 W.Va. 23, 253 S.E.2d 547 (W.Va. 1979). “Personal property erroneously entered upon the land books as real property constitutes a void assessment and can serve as no valid basis for the sale thereof by the Commissioner of Forfeited and Delinquent Lands.” Id., Syl. Pt. 3. “A deed made pursuant to a tax sale under a void assessment is void.” Id., Syl. Pt. 4.

Here, there is no dispute that the interest reserved by William McGary is a nonparticipating royalty interest. Since the William McGary nonparticipating royalty interest was a personal property interest, it should not have been entered in the Wetzel County lands books and assessed as a real property interest and the sale of the interest for delinquent taxes is void as a matter of law; as such, the circuit court did not err and was clearly consistent with the state of the law addressing this issue.

Petitioner cites case law from other jurisdictions which support their position that a nonparticipating royalty interest should be treated as a real property interest. Petitioner must rely on cases from other jurisdictions because there are no West Virginia cases that hold that a

nonparticipating royalty interest is an interest in real property. The closest the Petitioners can come is dicta in Gastar, supra, in which the court, in describing the nonparticipating royalty interest owned by the respondents, cited a 2014 law review article that discusses the authors' opinions of what they believe should be the law of the State of West Virginia. See Andrew S. Graham, Allison J. Farrell, Petitioner, 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). However, the issue in Gastar was whether or not a nonparticipating royalty owner was required to consent to pooling and unitization of their interest, not whether or not the nonparticipating royalty interest was real or personal property. There was no discussion by the court about characterizing the interest as real or personal property. Thus, Gastar is not persuasive or controlling in any respect.

Petitioners also argue that Collingwood Appalachian Minerals III, LLC vs. v. Erlewine, 889 S.E.2d 697 (W.Va. 2023) confirmed that an oil and gas royalty interest may be taxed as real estate and sold for delinquent taxes. While it is true that the Collingwood case contains a reservation of similar language as the case at bar (“oil and gas royalty”), the court does not provide any analysis of whether the interest is personal property or real property. The issue before the Court in Collingwood was whether or not a tax sale of an oil and gas interest was proper when the oil and gas interest was taxed separately from the surface even though the owner of the oil and gas interest was the same as the owner of the surface. The court acknowledged that the deeds referred only to a royalty interest, however, the parties in the case maintained, and the circuit court below, referred to the royalty interests as ownership of the oil and gas.¹ Since no party to the case raised the issue, the Court analyzed the case as if the deeds concerned interests in the oil and gas in place.

¹ “The parties maintain, and the circuit court found, that all of the interests at stake in this appeal are total of a fifty percent interest in the oil and gas. But, as noted in the facts below, the deeds in the record prior to the 1991 and 1995

Finally, Petitioner argues that public policy requires that the Court reverse the circuit court and find that a nonparticipating royalty interest is an interest in real property. This argument appears to be based upon the idea that determining ownership of a nonparticipating royalty interest is rendered more difficult if the nonparticipating royalty interest is personal property. Petitioner's argument fails to identify a single valid public policy which would be supported by such a ruling. The difficulty, if any, in identifying the owners of a nonparticipating royalty interest is not an obstacle that would run afoul of any public concern. Since the nonparticipating royalty owners do not sign leases and do not need to consent to pooling or unitization, the difficulty in locating owners does not place any barrier to the extraction of oil and gas. Rather, the oil and gas companies can simply hold the nonparticipating royalty owners' interests in suspense until such time as title is established to the company's satisfaction. Quite simply, no public interest is bolstered by characterizing a nonparticipating royalty interest as real property.

In conclusion, the Circuit Court below correctly held that the McGary nonparticipating royalty interest was a personal property interest and its sale for delinquent taxes was void. The Petitioner cannot identify any West Virginia law that would support otherwise or any public policy in favor of their position. Accordingly, the circuit court's order should be affirmed.

RESPECTFULLY SUBMITTED,

LINDA W. NUCKOLLS, LARRY W. WILES,
SHERRY D. COMPHER, VICKI SNODGRASS
STARR, DONNA GRIMM HANSEN, MAUREEN
GRIMM PLUMSTEAD, GAIL GRIMM, AND
BONNIE SNODGRASS HAYTON, Respondents

tax deeds refer to these interests as interests in the "oil and gas royalty." To avoid confusion, we will refer to these interests as the parties did, rather than as the deeds provided." Collingwood Appalachian Minerals III, LLC vs. v. Erlewine, 889 S.E.2d 697, 699 n.2. (W.Va. 2023). "As noted above, the parties and the circuit court refer to these royalty interests as ownership of a percentage of the oil and gas. And for purposes of our analysis, we refer to these interests using the parties' and circuit court's terminology." Id. at 700 n.6.

By /s/ S. David Wilharm
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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this 21st day of December, 2023, the foregoing *Summary Response Of Respondents, Linda W. Nuckolls, Larry W. Wiles, Sherry D. Compher, Vicki Snodgrass Starr, Donna Grimm Hansen, Maureen Grimm Plumstead, Gail Grimm, And Bonnie Snodgrass Hayton* was served using the electronic File & ServeXpress system, which will send copies of such filings to registered counsel of record.

/s/ S. David Wilharm
S. David Wilharm (WV #10830)