IN THE INTERMEDIATE COURT OF APPEALS OF WEST VIRGINIA

Case No. 24-ICA-115

ANTERO RESOURCES CORPORATION,
Plaintiff Below, Petitioner,

v.

RUFUS FORDYCE PIKE, JOHN KENT PIKE, JR., DANIEL EDWARD PIKE, JAMES P. MOFFITT, TANYA L. YOHO, TED ARTHUR MCCULLOUGH, ROBERT A. BORCHERS, RITCHIE PETROLEUM CORPORATION, AMP FUND III, LP, AND DIVERSIFIED PRODUCTION LLC, SUCCESSOR IN INTEREST TO ALLIANCE PETROLEUM CO. LLC,
Defendants Below, Respondents.

REPLY BRIEF OF PETITIONER ANTERO RESOURCES CORPORATION

Civil Action No. 19-C-22
In the Circuit Court of Tyler County, West Virginia
(Honorable C. Richard Wilson)

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I. INTRODUCTION

In contravention of over a hundred years of settled precedent, the Circuit Court erroneously concluded that a co-tenant must provide actual notice to oust another co-tenant for purposes of adverse possession. In so doing, the Circuit Court misapplied long-settled law, misconstrued the facts, and mistakenly divested part of the interests of the surface and mineral owners of the Subject Property.[1]

Contrary to the Circuit Court's holding and the Pike Respondents' urging, constructive notice has long been sufficient to oust a co-tenant in West Virginia. *See, e.g.*, *Russell v. Tennant*, 63 W. Va. 623, 60 S.E. 609 (1908). When the Court applies the correct law, no material facts are in dispute and Antero is entitled to judgment as a matter of law on its adverse possession claim. Antero established that the surface and mineral owners of the Subject Property possessed it adversely, openly and notoriously, exclusively, continuously, and under color of title for much longer than the ten-year statutory period. As such, this Court should reverse the judgment of the Circuit Court and remand with instructions to enter summary judgment and declaratory judgment for Antero.

II. STATEMENT REGARDING ORAL ARGUMENT AND DECISION

This Court should hear oral argument under West Virginia Rules of Appellate Procedure 18 and 20(a) because oral argument will aid the decisional process and this appeal involves issues of fundamental public importance regarding the applicability of adverse possession and what notice is required. The Court should issue a published opinion. W. Va. R. App. P. 22.

[1] All defined terms retain the meaning given to them in the Brief of Petitioner Antero Resources Corporation dated June 27, 2024.

III. ARGUMENT

A. The Circuit Court Erred in Concluding that Actual Notice is Required to Oust a Co-Tenant under West Virginia Law

Contrary to the Circuit Court's conclusion and the Pike Respondents' arguments, West Virginia law is clear—constructive notice can sufficiently demonstrate a party's intent to oust their co-tenant. As such, and as further explained below, the Circuit Court erred in concluding that a co-tenant must have actual notice of the other co-tenant's intent to oust them.

1. The Cases Cited by the Pike Respondents Do Not Support Their Position that Actual Notice is Required

Despite their assertions to the contrary, the Pike Respondents' position will disrupt a century of settled West Virginia adverse possession law. West Virginia law does not require *actual* knowledge for a co-tenant to be ousted; rather, constructive knowledge is sufficient. *See* Syl. Pt. 4, *Russell v. Tennant*, 63 W. Va. 623, 60 S.E. 609 (1908) ("A tenant in common in sole possession of the land, may make his possession adverse to his fellow-tenant by repudiating or disavowing the relation of tenancy in common between them, *and any act or conduct of his signifying intention to hold, occupy and, enjoy the premises exclusively of which the tenant out of possession has knowledge, or of which he has sufficient information to put him upon inquiry, amounts to an 'ouster' of such tenant,* and from the time when he has notice thereof the possession of the other party is adverse.") (emphasis added); *Cooey v. Porter*, 22 W. Va. 120 (1883) ("The notice or knowledge required must be actual, as in the case of a disavowal or disclaimer of any right in his co-tenants; *or the acts relied on, as in the case of expulsion, making costly improvements and exercising exclusive ownership, must be of such an open, notorious character as to be notice of themselves*.") (emphasis added); *Reed v. Bachman*, 61 W. Va. 452, 57 S.E. 769 (1907) (same); *Justice v. Lawson*, 46 W. Va. 163, 33 S.E. 102 (1899) ("One tenant in common may oust his cotenant, and hold in severalty, but a silent possession, unaccompanied with any action amounting

to an ouster, or giving notice to the cotenant that his possession is adverse, cannot be construed into an adverse possession."); *Custer v. Hall*, 71 W. Va. 119, 76 S.E. 183 (1912) ("Possession by one joint tenant, who asserts entire ownership, will not become adverse to his cotenant until he has knowledge, *actual or constructive*, of such claim.") (emphasis added); *Pickens v. Stout*, 67 W. Va. 422, 68 S.E. 354 (1910) ("He must have notice in some form. If not actual notice, he must have the equivalent thereof."); *Clark v. Beard*, 59 W. Va. 669, 53 S.E. 597 (1906) ("The notice or knowledge required must be either actual, or the act or acts relied on as an ouster must be of such an open and notorious character as to be notice of themselves, or *reasonably sufficient to put the disseised co-tenant on inquiry which, if diligently pursued, will lead to notice or knowledge in fact*.") (emphasis added); *Cecil v. Clark*, 44 W. Va. 659, 30 S.E. 216, 230 (1898) ("[O]ther circumstances, may warrant the presumption of disseisin or ouster by one coparcener or other joint owner").

The Pike Respondents have not cited any case law that supports their proposition that a would-be ousted co-tenant must have *actual* knowledge. Pike Resp. Br. at 16. Rather, the Pike Respondents rely on one case that does not stand for the proposition asserted: the language in *Reed v. Bachman* that "actual ouster of one tenant in common cannot be presumed, except where the possession has become tortious and wrongful by the disloyal acts of the co-tenant… [t]his conduct must amount to a clear, positive, and continued disclaimer and disavowal of his co-tenant's title, and an assertion of an adverse right; and a knowledge of this must be brought home to his co-tenant." Pike Resp. Br. at 16–17 (citing *Reed*, 61 W. Va. 452, 57 S.E. at 771 (1907)).

While the Court in *Reed* mentioned "actual notice," it nonetheless contemplated that constructive notice suffices to oust a co-tenant. The *Reed* Court states that "where one parcener occupies the common property notoriously as the sole owner … such acts will be regarded as

adverse from the time the coparcener has knowledge of such acts or occupation and claim of exclusive ownership" and that "the notice or knowledge required must be actual, as in the case of a disavowal or disclaimer of any right in his co-tenants, *or* the acts relied on, *as in the case of expulsion making costly improvements and exercising exclusive ownership, must be of such an open, notorious character, as to be notice of themselves*." *Reed*, 61 W. Va. 452, 57 S.E. at 771 (emphasis added) (citing *Cooey*, 22 W. Va. 120). To argue that this amounts to a clear requirement for actual notice is misleading at best.

The Pike Respondents also rely on a myriad of cases—which, again, do not require actual notice—to assert that the Supreme Court of Appeals has adopted an actual notice requirement. *See, e.g.*, *Laing v. Gauley Coal Land Co.*, 109 W. Va. 263, 153 S.E. 577 (1930). The Pike Respondents ignore that, in *Laing*, the Court reiterated *Pickens*, which provides that "[i]n order to effect an ouster, actual, express notice of the hostile claim must be given to the co–tenant, *or such acts must be done upon the land as he is bound to take notice of as being hostile.*" *Pickens*, 67 W. Va. 422, 68 S.E. at 359 (emphasis added). The *Laing* Court found that "both of these requirements are met"—actual notice *and* "the many acts of open, notorious, adverse possession, particularly the cutting of the timber," because they "were acts of which these women were bound to take notice as being hostile to them." *Laing*, 109 W. Va. at 263, 153 S.E. at 580.

The Pike Respondents also cite to *Justice*, which provides that "[o]ne tenant in common may oust his co-tenant, and hold in severalty; but a silent possession, unaccompanied with any act amounting to an ouster, or giving notice to the co-tenant that his possession is adverse, cannot be construed into an adverse possession." 46 W. Va. 163, 33 S.E. 102 (citing Syl. Pt. 4, *Pillow v. Southwest Va. Improvement Co.*, 92 Va. 144, 23 S. E. 32 (1895)). But *Justice* does not specify the type of notice required, nor does it disavow the possibility of constructive notice. *See id.* at 108

("If one co-tenant executes and delivers a deed of the entire estate, and the grantee causes the deed to be recorded, and enters into possession claiming title to the entirety, and openly exercises acts of ownership, this is a disseisin of the co-tenants."). The Pike Respondents also cite to *Harrell v. Cain*, 242 W. Va. 194, n.10, 832 S.E.2d 120, n.10 (2019), and erroneously assert that West Virginia law is "clear." However, *Harrell* does not address adverse possession; rather, the Pike Respondents cite to a footnote in which the Supreme Court cites to *Reed*, which again does not stand for the proposition for which it is cited.

2. Cases Cited by Antero More Accurately Reflect West Virginia Law Regarding the Level of Notice Required to Oust a Co-Tenant

The Pike Respondents' attempt to distinguish the authority cited by Antero regarding the notice required to oust a co-tenant also fail. The Pike Respondents argue that *Custer v. Hall is* a "one-off" statement of law. Pike Resp. Br. at 17. Not so. Rather than aligning with the Pike Respondents' interpretation of "long-standing precedent" requiring actual notice, the Supreme Court in *Custer* instead reiterated that constructive notice is sufficient to oust a cotenant. "Possession by a joint tenant does not become adverse to his cotenant until knowledge of the hostile claim is brought home to him, either directly, or by such visible acts as will amount to the assertions of an exclusive right." *Custer*, 71 W. Va. 119, 76 S.E. at 186 (citing *Parker v. Brast*, 45 W. Va. 399, 32 S.E. 269, 271 (1898); *Justice*, 46 W. Va. 163, 33 S.E. 102; *Cooey*, 22 W. Va. 120) Ensuring proper interpretation, the Supreme Court enshrined this in a syllabus point: "[p]ossession by one joint tenant, who asserts entire ownership, will not become adverse to his cotenant until he has *knowledge, actual or constructive*, of such claim." Syl. Pt. 5, *Custer*, 71 W. Va. 119, 76 S.E. 183 (emphasis added).

In *Russell v. Tennant*, the Supreme Court stated, "any act or conduct of his signifying intention to hold, occupy, and enjoy the premises exclusively of which the tenant out of possession

has knowledge, *or of which he has sufficient information to put him upon inquiry*, amounts to an 'ouster' of such tenant." Syl. Pt. 4, 63 W. Va. 623, 60 S.E. 609 (emphasis added). This is consistent with the Court's ruling in *Cecil* that constructive notice is sufficient to place a cotenant upon notice: "other circumstances, may warrant the presumption of disseisin or ouster by one coparcener or other joint owner. And it was held that it required the statutory period of 10 years to bar the co–parcener's right to partition, where the adverse claimant entered into the possession of the co–parceny when there is no actual notice of adverse possession, *except such as might constructively arise from the possessor having a deed for the whole land from the co–parcener*." *Cecil*, 44 W. Va. 659, 30 S.E. at 230 (emphasis added).

In *Talbott v. Woodford*, 48 W. Va. 449, 37 S.E. 580 (1900), the Supreme Court discounted the idea of *actual* notice: "[i]t matters not, he being out of the state, whether he received the notice or not; for they were not required to do anything off the land, or out of the county where it lay, to amount to such notice, but *open, notorious, and exclusive possession on the land is all the law requires*." *Id.* at 581 (emphasis added). In *Talbott*, the Court ruled that adverse possession occurred when one co-tenant conveyed the property to a third-party who then conveyed it back to the co-tenant. The other co-tenant had left the country and was unaware of the ouster, but the Court held that fact did not matter because of the open and notorious acts of the ousting co-tenant. In *Clark v. Beard*, 59 W. Va. 669, 53 S.E. 597 (1906), the Supreme Court reviewed and rejected jury instructions because, as written, they may have led a jury to reasonably conclude that the only notice which could support ouster was actual and would therefore mislead the jury as to the law.

In *Parker v. Brast*, the Supreme Court clearly recognizes the parameters of constructive knowledge by stating: "[a] grantor claiming the common title of the co-tenancy under a deed from one of the co-tenants is under the burden of showing *some notorious act of ouster or adversary*

possession, which has ripened into perfect title by its unbroken continuation during the statutory period of 10 years, with the full knowledge and acquiescence of the disseised co-tenants. Syl. Pt. 3, 45 W. Va. 399, 32 S.E. 269 (emphasis added). This reference, as it was in *Custer*, relates to "visible acts as will amount to the assertion of an exclusive right." 71 W. Va. 119, 76 S.E. at 186. In *Justice*, the Supreme Court, once again, alluded to the sufficiency of constructive notice, writing that "[o]ne tenant in common may oust his cotenant, and hold in severalty, but a silent possession, *unaccompanied* with any action amounting to an ouster, or giving notice to the cotenant that his possession is adverse, cannot be construed into adverse possession." Syl. Pt. 3, 46 W. Va. 163, 33 S.E. 102 (emphasis added).

Although the Pike Respondents assert that actual notice was central to the holding in *Cooey v. Porter*, the Court's direct reference to actual notice is followed by a caveat: acts of expulsion, such as "costly improvements and exercising exclusive ownership, must be of an open, notorious character as to be notice of themselves." Syl. Pt. 5, 22 W. Va. 120. The Supreme Court recognized the adequacy of constructive notice, providing that acts of expulsion "must be of such an open, notorious character as to be notice of themselves *or reasonably sufficient to put the disseised co-tenants on enquiry, which, if diligently pursued, will lead to notice or knowledge in fact*." *Id*. at 125.

This Supreme Court should disregard the Pike Respondents' weak attempts to distinguish these cases and review the Non-Pike Respondents' actions using the correct standard. As discussed in more detail below, the Non-Pike Respondents' actions clearly establish reasonable and sufficient notice to put the disseised Pike Respondents on notice. For instance, the Non-Pike Respondents have implemented costly improvements to the Subject Property and possessed and exercised exclusive ownership of the Subject Property in an adverse, hostile, open, and notorious

character. Over the last 70 years, the Non-Pike Respondents have built structures and improvements, entered into oil and gas leases and right-of-way agreements, and subdivided and sold the Subject Property, all indicative of their exclusive and hostile ownership of the Subject Property and constituting disseisin. These acts of exclusive and hostile ownership of a property inconsistent with co-tenancy such as construction of improvements, entry into oil and gas leases and right-of-way agreements and subdivision of the property are all of "such open, notorious character as to be notice of themselves." *Reed*, 61 W. Va. 452, 57 S.E. at 771 (citing *Cooey*, 22 W. Va. 120).

Moreover, the Pike Respondents' excuse that they did not receive notice because they lived in a distant state is inapposite. *See Talbott*, 48 W. Va. 449, 37 S.E. at 581. "It matters not, he being out of state, whether he received notice or not; for they were not required to do anything off the land, or out of the county where it lay, to amount to such notice, *but open, notorious, and exclusive possession on the land is all the law requires*." *Id.* at 581 (emphasis added). Thus, this Court should not be persuaded by the Pike Respondents' artificial creation of a rule requiring actual notice to another co-tenant to start the clock for adverse possession and should apply the recognized constructive notice standard.

B. Antero Established Each of the Elements Required to Succeed on its Declaratory Judgment Claim for Adverse Possession

When the Court applies the correct legal standard, there are no material facts in dispute—Antero is entitled to judgment as a matter of law as to its declaratory judgment claim for adverse possession.[2] As discussed in more detail below, the surface and mineral owners of the Subject

[2] As an aside, even if the Court were unconvinced regarding adverse possession of the mineral estate, it should reverse the Circuit Court's erroneous conclusion regarding the surface estate of the Subject Property. In the circuit court proceedings, the Pike Respondents disclaimed any intention to contest ownership of the surface tracts owned by Ted McCullough, James Moffitt, and Tanya Yoho. A.R. 394–95. This position is not only internally inconsistent—ignoring the surface estate owned by similarly situated Ritchie Petroleum—it is also inconsistent with the position the Pike Respondents now take on appeal.

Property possessed it adversely, openly and notoriously, exclusively, continuously, and under color of title in excess of the ten-year statutory period.

1. The Owners of the Subject Property Possessed It Adversely and Hostilely as to the Pike Respondents

For the element of "hostile" or "adverse" possession, the party claiming adverse possession must show that their possession of the property was against the right of the true owner and was inconsistent with the title of the true owner. "The word 'hostile' is synonymous with the word 'adverse' and need not and does not import that the disseisor must show ill will or malevolence to the true owner." *Somon v. Murphy Fabrication & Erection Co.*, 160 W. Va. 84, 90, 232 S.E.2d 524, 528 (1977). The Supreme Court has recognized that permission in the context of adverse possession can be express or implied. *See Fantasia v. Schmuck*, 183 W. Va. 361, 395 S.E.2d 784 (1990); *O'Dell v. Stegall*, 226 W. Va. 590, 703 S.E.2d 561 (2010). A co-tenant's conveyance of property to a stranger and the stranger's subsequent possession of the same constitute "notorious and unequivocal acts of ownership of such a nature as to give notice to other co–tenants that the entry and possession are hostile and adverse to their title." Freeman, *Co–Tenancy*, § 224; *Pickens*, 67 W. Va. 422, 68 S.E. 354, 363–64 (Brannon, J. concurring); *see also Talbott*, 48 W. Va. 449, 37 S. E. 580; *Bennett v. Pierce*, 50 W. Va. 604, 40 S. E. 395 (1901); *Perkins v. Pfalzgraff*, 60 W. Va. 142, 53 S. E. 913 (1906). The Circuit Court erred when it ruled that there was no adverse and hostile possession of the Subject Property because Margaret Fordyce Pike did not have actual notice of the adverse and hostile possession. A.R. 625. As addressed above, actual notice is not required. However, Margaret Fordyce Pike was on notice *and* the actions of Rufus G. and Edna L. Fordyce and Daisy Everhart were adverse and hostile.

Despite the Pike Respondents' assertions to the contrary, the sale of the surface of the Subject Property by Rufus G. and Eda L. Fordyce and Daisy Everhart was an act of exclusive

ownership that would satisfy the adverse and hostile requirement. Rufus G. and Edna L. Fordyce and Daisy Everhart conveyed the entire Subject Property, while reserving their non-oil-and-gas mineral rights, without regard to Margaret Fordyce Pike's property ownership. This was not an act of mere silent possession. This is an act that is adverse and hostile to their co-tenancy because they sold the entire property, including Margaret Fordyce Pike's interest. Accordingly, the Circuit Court's conclusion that there was no adverse or hostile claim is erroneous, as it did not consider the exclusive acts of ownership initially made by Rufus G. and Edna L. Fordyce and Daisy Everhart and continued by the successor owners. Nor did the adverse and hostile possession end there. As discussed in more detail below, the surface and mineral owners of the Subject Property have consistently possessed it in a manner that is adverse and hostile to the Pike Respondents' interest.

2. The Owners of the Subject Property Actually Possessed It

Unlike the Pike Respondents, who have resided out of state for decades, the Non-Pike Respondents have regularly and actually possessed the Subject Property. The uncontroverted evidence before the circuit court reflects this reality.

Surface owner Ritchie Petroleum Company has owned part of the surface of the Subject Property since 1989. A.R. 320. During that time, it made improvements, erected buildings, subdivided the surface, and entered into agreements for use of the Subject Property. A.R. 322. In approximately 1990, for example, Ritchie replaced an old barn with a large barn in which it stores equipment. *Id.* Ritchie also granted rights-of-way for the surface of the Subject Property. *Id.*

Similarly, surface owners James P. Moffitt and Tanya L. Yoho (and their predecessors) possessed and used the surface of their tract of the Subject Property. A.R. 330–31. Between 1990 and 2004, a predecessor of Moffitt and Yoho installed a mobile home, which they now use as a

weekend home. *Id.* at 331. Around 2004, Moffitt erected a pump house on the Subject Property. *Id.*

Surface owner Ted McCullough, along with his predecessors-in-title, also possessed and used his surface tract of the Subject Property since at least 2004. A.R. 352. For example, in the 1990s, McCullough's predecessor erected a trailer and a building now used as a chicken coop. *Id.* Later on, McCullough's immediate predecessor-in-title erected a carport. *Id.* McCullough rents the property out to a full-time resident. A.R. 355. These undisputed facts show that the surface owners have actually possessed the Subject Property.

Likewise, there is no genuine dispute that the mineral owners have actually possessed the Subject Property since at least November 1989, when the CNG Well was drilled. A.R. 375. By drilling a producing well, the mineral owners actually possessed the gas and oil underlying the Subject Property. *See* Syl. Pt. 3, *Lloyd v. Mills*, 68 W. Va. 241, 69 S.E. 1094 (1910) (holding that commercial drilling and operating of producing oil wells constitutes actual possession for adverse possession of the mineral estate).

3. The Owners of the Subject Property Possessed It Openly and Notoriously

The Pike Respondents' argument that Dora Jewell and his successors did not openly and notoriously possess the Subject Property is unsupported—both in law and in fact. In order for a cotenancy to be destroyed by ouster, a party must demonstrate "such open and notorious acts of ouster as amount to a disseisin, and which has ripened by actual adverse possession into perfect title." *Parker*, 45 W. Va. 399, 32 S.E. at 271. "For possession to be open and notorious, it is generally meant that the acts asserting dominion over the property must be of such quality to put a person of ordinary prudence on notice of the fact that the disseisor is claiming the land as his own." *Wallace v. Pack*, 231 W. Va. 706, 711, 749 S.E.2d 599, 604 (2013) (citations omitted). As

to ouster against a cotenant, "[a]cts of exclusive ownership by one of two co–tenants, such as the open sale, conveyance, and delivery of possession thereunder of the whole subject-matter, amount to a complete ouster of the other co–tenant . . . ." Syl. Pt. 1, *Talbott*, 48 W. Va. 449, 73 S.E. 580.

The sale of the Subject Property by Rufus G. and Edna L. Fordyce and Daisy Everhart was an act of exclusive ownership that satisfies the open and notorious requirement, thus permitting ouster. Disregarding this case law, the Pike Respondents argue that because Rufus G. and Edna L. Fordyce and Daisy Everhart did not convey their non-oil-and-gas mineral interest with the surface property, Dora Jewell did not adversely possess the property. The Pike Respondents' assertion is nonsensical. In fact, the Pike Respondents identify a case that directly contradicts this argument. *See Lloyd*, 68 W. Va. 241, 69 S.E. 1094. In *Lloyd*, the Court provided that "[i]f one cotenant make[s] an executory contract for sale to a stranger of the entire tract, not merely his interest, and the purchaser enter[s] into actual possession, this is an ouster of the other cotenant, and such possession for the period of the statute of limitations will bar his rights without other notice of an adverse claim." Syl. Pt. 1, 68 W. Va. 241, 69 S.E. at 1094. In *Lloyd*, three children inherited their mother's estate, which included real property. *Id.* Two of the children made an executory contract for the sale of the entire property—not just for the sale of their interests—completely ignoring the ownership interest of the third heir. *Id.* at 1096. The *Lloyd* Court ruled that when the purchaser took possession of the property conveyed for the requisite time period, the third heir was ousted by her cotenants. *Id.*

The situation in *Lloyd* is precisely what happened here. Rufus G. and Edna L. Fordyce and Daisy Everhart conveyed property without regard to Margaret Fordyce Pike's interest and ousted Margaret Fordyce Pike. The deed stated that "the said parties of the first part doth grant and convey with covenants of general warranty, unto the said Dora Jewell that two certain tracts or parcels of

real estate." A.R. 204. This deed encompasses the entire property. These actions of ouster continued with Dora Jewell's heirs and future owners of the property until the statutory time period lapsed, clearing the title to the Subject Property.

Dora Jewell's successors in title have continued to possess the Subject Property openly and notoriously. As discussed above, by subdividing the Subject Property, paying real property taxes, building and maintaining structures and improvements on the Subject Property, and granting rights-of-way and surface use agreements to others, the surface owners have possessed the Subject Property openly and notoriously. So too with the mineral owners, who entered into leases and received royalties from production of minerals underlying the Subject Property. The Circuit Court's failure to recognize this open and notorious possession is error.

4. The Owners of the Subject Property Possessed it Exclusively

The Circuit Court erred by ruling that the owners of the Subject Property did not *exclusively* possess it. As discussed in more detail above and in Antero's opening brief, the Circuit Court erred by conflating Margaret Fordyce Pike's purported lack of actual notice with insufficient exclusive possession. Knowledge and notice of ouster and exclusive possession are two different concepts, and Antero set forth uncontroverted evidence that the property was exclusively possessed.

The surface owners of the Subject Property have acted as exclusive owners, possessing the property in all the ways that a typical property owner would. For instance, Ritchie Petroleum has made improvements, erected buildings, subdivided the surface, and entered into agreements for use of the Subject Property. A.R. 321–22. Predecessors of Moffitt and Yoho installed a mobile home, which continues to be used, and in approximately 2004, Moffitt erected a pump house. A.R. 331. McCullough's predecessors erected a trailer, a chicken coop, and a carport, and the property is still in use. A.R. 352, 355. The material facts are not in dispute—the surface owners of the Subject Property have possessed it exclusively, and the Pike Respondents have not exercised

ownership in a manner that would interfere with that exclusivity. Neither the Pike Respondents nor their mother, Margaret Fordyce Pike, ever lived in West Virginia. A.R. 288, 296–97, 309, 363–64. The Pike Respondents have not personally taken any other type of action that would constitute an exercise of ownership. A.R. 301, 367. Not until 2019, after the ten-year adverse possession period had long been satisfied, did the Pike Respondents assert a claim to the Subject Property. A.R. 32, 367. Thus, the surface owners' possession of the Subject Property was exclusive.

Likewise, the uncontroverted facts before the circuit court were that the owners of the mineral estate underlying the Subject Property have possessed it exclusively since at least 1989. The CNG Well, drilled in November 1989, remains in production, and only CNG and its successors-in-interest had a leasehold interest to develop the oil and gas underlying the Subject Property. A.R. 375. *See Thomas v. Young*, 93 W. Va. 555, 117 S.E. 909, 913 (1923) (ruling that exclusivity requirement is satisfied where coal operator physically mined and possessed the coal estate to the exclusion of the true owner); *Core v. Faupel*, 24 W. Va. 238, 245 (1884) (ruling that exclusivity requirement is satisfied where adverse possessor actually possessed the property to the exclusion of the true owner). Conversely, the Pike Respondents have neither executed oil and gas leases nor exercised ownership over the mineral estate underlying the Subject Property. A.R. 289, 295, 301, 365, 367.

5. The Owners of the Subject Property Possessed It Continuously for the Statutory Period of Ten Years

There is no genuine dispute that the surface owners of the Subject Property have continuously possessed it for nearly 70 years. Since the August 13, 1949 general warranty deed from the heirs of Margaret A. Fordyce and I.L. Fordyce to Dora Jewell, the surface estate has been continuously possessed. Likewise, the mineral owners of the Subject Property have continuously possessed it since 1989, when the CNG Well was drilled. A.R. 375; *see also Thomas*, 93 W. Va.

555, 117 S.E. at 913 (ruling that over fifteen years of operating coal mine during the seasons when there was a market constituted continuous possession); *Cent. Tr. Co. v. Harless*, 108 W. Va. 618, 152 S.E. 209, 214 (1930) (explaining that continuous possession in the mineral context requires unbroken duration of production, with no more than minimal cessation, such that the true owner could sue for trespass at any time during the ten years).

The Pike Respondent's argument that the Non-Pike Respondents did not continuously possess the property for the statutory period of ten years is based on their argument that Margaret Fordyce Pike and her successors-in-interest lacked actual notice of ouster, which would have triggered the running of the statute of limitations. However, as outlined above in Section A, actual knowledge of ouster is not required, and actions of an open, notorious, hostile, and exclusive character are sufficient to demonstrate ouster and accordingly trigger the running of the statute of limitations. Therefore, the actions demonstrating ouster—which began with the 1949 conveyance to Dora Jewell—triggered the start of the ten-year statutory period. Those ten years have long since passed.

6. <u>The Owners of the Subject Property Possessed It Under Color of Title</u>

The Pike Respondents' assertion that the Subject Property was not possessed under color of title because Rufus G. and Edna L. Fordyce and Daisy Everhart did not convey Margaret Fordyce Pike's interest, or their non-oil-and-gas mineral interests, is inconsistent with the entire concept of adverse possession. Adverse possession permits a party to claim ownership of real property when there is an appearance of valid title but in fact there is no valid title. The 1949 deed specifically conveyed: "the said parties of the first part doth grant and convey with covenants of general warranty, unto the said Dora Jewell that two certain tracts or parcels of real estate." A.R. 204. This conveyance encompasses the rights to the entire property, otherwise it would have

explicitly limited the deed language to the interests of Rufus G. Fordyce, Edna L. Fordyce, and Daisy Everhart.

Whether Rufus G. and Edna L. Fordyce and Daisy Everhart had the legal ability to convey Margaret Fordyce Pike's interest is irrelevant. Likewise, the fact that Rufus G. and Edna L. Fordyce and Daisy Everhart did not convey their non-oil-and-gas mineral interests is also irrelevant and does not negate that the possession was made under color of title. Dora Jewell received the Subject Property via deed that appeared to be valid and conveyed the entire surface and oil and gas estate of the Subject Property. This conveyance satisfies the color of title element, and the Pike Respondent's assertions to the contrary are not supported by West Virginia law.

7. As a Producer with a Leasehold Interest in the Subject Property, Antero May Bring an Action for Declaratory Judgment

Deep in the bowels of their brief, the Pike Respondents halfheartedly assert that Antero and Diversified, as mineral lessees of the Subject Property, cannot "properly assert the doctrine of adverse possession on behalf of any third party." A.R. 406. Notably absent from this argument is any citation to authority—likely because the relevant statute, the West Virginia Uniform Declaratory Judgments Act, permits "[a]ny person interested … or whose rights, status or other legal relations are affected" by a contract to "obtain a declaration of rights, status or other legal relations thereunder." W. Va. Code § 55-13-2. "For standing under the Declaratory Judgments Act, it is not essential that a party have a personal legal right or interest." Syl. Pt. 2, *Shobe v. Latimer*, 162 W. Va. 779, 253 S.E.2d 54 (1979).

To that end, the Supreme Court of Appeals has rejected any requirement that a plaintiff under the Declaratory Judgments Act be a party to the agreement of which it seeks interpretation. *Id.* at 784, 253 S.E.2d at 58. Rather, the relevant inquiry is whether a would-be plaintiff's "rights, status or legal relations are affected." W. Va. Code § 55-13-2; *see also* Syl. Pt. 3, *W. Va. Utility*

Contractors Ass'n v. Laidley Field Athletic & Recreational Ctr. Governing Bd., 164 W. Va. 127, 131, 260 S.E.2d 847, 850 (1979) (per curiam) ("For the purposes of a declaratory judgment action, a justiciable controversy exists when a legal right is claimed by one party and denied by another.").

Because Antero's leasehold interest is affected by the Pike Respondents' claim, Antero is entitled to seek a declaratory judgment quieting title to the Subject Property. *See* W. Va. Code § 55-13-2. Put another way, a justiciable controversy clearly exists because Antero claims that it has the right to produce from the Marcellus Shale formation underlying the Subject Property and the Pike Respondents deny the same.[3] *See* Syl. Pt. 3, *W. Va. Utility Contractors Ass'n*, 164 W. Va. at 127, 260 S.E.2d at 848; *see also* W. Va. Code § 55-13-12 (providing that the Declaratory Judgments Act is "remedial; its purpose is to settle and to afford relief from uncertainty and insecurity with respect to rights, status and other legal relations; and it is to be liberally construed and administered").

IV. CONCLUSION

For all of the foregoing reasons, this Court should reverse the circuit court's grant of partial summary judgment to the Pike Respondents on Antero's claims for adverse possession and declaratory judgment and remand the action to the Circuit Court of Tyler County, West Virginia with instructions to enter summary judgment and declaratory judgment for Antero.

Respectfully submitted this 3rd day of September, 2024.

[3] To the extent the Pike Respondents suggest Antero lacks Article III standing, such a suggestion is meritless. Antero has suffered an injury in fact that is concrete, particularized, and actual or imminent because its drilling operations on and around the Subject Property are jeopardized by the Pike Respondents' claim of ownership. *See* Syl. Pt. 5, *Findley v. State Farm Mut. Auto. Ins. Co.*, 213 W. Va. 80, 576 S.E.2d 807 (2002) (setting forth elements of first-party standing in West Virginia). There is a causal connection between Antero's injury and the conduct forming the basis of this lawsuit because Antero brought suit to quiet title to the Subject Property after the Pike Respondents asserted their claim of ownership. *See id.* Finally, Antero's injury is redressable through a favorable decision of this Court declaring that the Pike Respondents have forfeited any claimed interest through adverse possession. *See id.*

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CERTIFICATE OF SERVICE

I hereby certify that on the 3rd day of September 2024, I filed the "Reply Brief of Petitioner Antero Resources Corporation" via the File and ServeXpress system upon the following counsel of record:

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I further certify that on the 3rd day of September 2024, I served the foregoing "Reply Brief of Petitioner Antero Resources Corporation" upon the following parties, by depositing true copies thereof in the United States mail, postage pre-paid, in envelopes addressed as follows:

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