IN THE

Supreme Court of Virginia

RECORD NO. 030634

HARRISON-WYATT, LLC,

Appellant,

v.

DONALD RATLIFF, *et al.*,

Appellees.

OPENING BRIEF OF APPELLANT

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II. The Trial Court erred in failing to adopt the plain and common meaning of the term "coal" in the 19th century as presented in the defendant's uncontested evidence of such definitions that describe coal as a heterogeneous substance that includes gas, a meaning that was also supported by the defendant's uncontested evidence of the current meaning of the term "coal" as a generic term with constituent parts that vary greatly.

III. In the alternative, the Trial Court erred in failing to acknowledge the ambiguity in the term "coal" contained in the severance deeds at issue in this case, finding instead that the term unambiguously did not include CBM.

IV. The Trial Court considered evidence outside the record on the issue of the meaning of the term "coal" as used in the 19th century.

V. Having failed to either find ambiguity in the severance deeds or to adopt the common meaning of the term "coal" as used in the 19th century and as supported by current expert testimony, the Trial Court erred in failing to apply the proper rules of construction that should be applied to the severance deeds, finding instead that the grantors retained an interest in CBM when they could not beneficially use or enjoy the estate without trespassing on the coal owner's estate; and the coal owner could not beneficially use or enjoy the coal estate without trespassing on the purportedly retained estate of the grantor in the CBM. To do so, the Trial Court erroneously relies on a "common law" right of the coal owner to release CBM in connection with its coal operations.

VI. The Trial Court erred in adopting a simplistic construction of the severance deeds finding that the grantors on these severance deeds intended only to convey the solid core of the coal and none of its associated volatile components such as CBM. Specifically, the Trial Court held that "the only finding that would allow the Court to rule in favor of the coal owners is that the CBM is a constituent of the coal itself." In doing so, the Trial Court disregarded the law of Virginia on mineral rights, that mineral estates may include non-specified elements when those elements are substantially connected with or integrally a part of the granted estate. Here, CBM is substantially connected with coal and an integral part of the *in situ* coal.

VII. The Trial Court erred in construing the severance deeds to find that the grantors retained an interest in CBM when the grantors could not beneficially use or enjoy the estate without trespassing on the coal owner's estate; and the coal owner could not beneficially use or enjoy the coal estate without trespassing on the purportedly retained estate of the grantor in the CBM.

STATEMENT OF CASE

This case involves a significant question of first impression in Virginia: Where a surface owner or his predecessor in title has conveyed all coal in and under his property, has title to the coalbed methane (CBM) passed to the coal owner along with the coal? The resolution of this issue is long over-due in Virginia, as CBM has been commercially produced for over a decade, during which time this question has remained unanswered and caused millions of dollars in royalties to be escrowed. In passing the 1990 Virginia Oil and Gas Act, Va. Code § 45.1-361.1, et seq., (the "1990 Act"), the General Assembly cleared the way for commercial production of CBM, but specifically avoided answering this question of ownership, leaving it instead to future judicial determination. The 1990 Act provides that, on tracts where the question of ownership remains unresolved, the commercial production of the CBM may proceed by forced pooling of interests, but the royalties from such production must be escrowed pending a resolution of the issue of ownership. Va. Code § 45.1-361.22.

Harrison-Wyatt, LLC ("Harrison-Wyatt," "the defendant" or "coal owner"), the defendant below, is the successor grantee of coal severance deeds from the 19th century on three tracts of land in Buchanan County, Virginia (the "Mineral Tracts"). The plaintiffs below ("the plaintiffs" or "other mineral owners") are the owners of the surface and all unsevered "other minerals" on portions of the Mineral Tracts. CBM has been produced from the Mineral Tracts, and the royalties from that production have been escrowed pursuant to Virginia Code § 45.1-361.22(4).

The plaintiffs filed a Motion for Judgment in the Circuit Court of Buchanan County seeking a declaratory judgment as to their claim of ownership to CBM produced from the coal seams below the surface of their property, so as to allow them to receive the escrowed royalties and future

royalties from CBM production on their portions of these tracts. (App. 3-9)[1] Harrison-Wyatt denied that the surface owners owned the CBM. (App. 16-18)

The case was presented in a two day bench trial on June 24-25, 2002, with The Honorable Keary Williams presiding, with a subsequent ruling in favor of the plaintiffs. The trial court initially set forth its ruling in a letter opinion dated August 29, 2002. (App. 23-30) That opinion was subsequently modified by an opinion dated December 6, 2002. (App. 31-38) The trial court held that "a grant of coal right does not include title to the CBM absent an express grant of CBM, natural gases, or minerals in general; and that the surface owner holds the right to the CBM once it has separated from the coal." (App. 38) The trial court limited the plaintiffs' rights, holding that:

> the surface owners' right to the CBM only extends to that which has separated from the coal. The Court does not hold that the surface owners have the right to frac the coal in order to retrieve the CBM.

(App. 37, 41) The trial court entered a final order on December 23, 2002 (the "Final Order"), finding in favor of the plaintiffs, and adopting the findings set forth in its opinions. (App. 39-42) In the Final Order, the trial court made it clear that, even though the plaintiffs' rights to the CBM extends only to that which is separated from the coal, and even though the plaintiffs have no right to enter the coal and retrieve the CBM, if the coal owner removes the CBM from its coal, the plaintiffs receive the compensation as owners of the CBM. (App. 41)

Harrison-Wyatt noted an appeal to this Court, and filed a Petition for Appeal. By Order dated June 3, 2003, this Court awarded Harrison-Wyatt an appeal.

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[1] References to the Appendix will be denoted "(App. ___)."

QUESTION PRESENTED

I. WHETHER THE TRIAL COURT ERRED IN FINDING THAT, UNDER VIRGINIA LAW, THE GRANT OF COAL IN THE 19TH CENTURY SEVERANCE DEEDS UNAMBIGUOUSLY DOES NOT INCLUDE CBM. **(Assignments of Error I-VII).**

STATEMENT OF MATERIAL FACTS

The land in question is designated as Mineral Tracts 18, 19 and 56. The severance deeds for Mineral Tracts 18 and 19 were recorded on August 2, 1887. The coal severance language from these deeds conveys with general warranty "all the coal in, upon and underlying a certain tract or parcel of land. . . ." The severance deed for Tract 56 was executed on October 13, 1887, and contained similar language. (App. 47-56)

The coal on the Mineral Tracts is owned by Harrison-Wyatt. It has been leased over the years by Harrison-Wyatt (or its predecessor entities) and coal has been mined since the 1960's. (App. 395) During these years of coal production, CBM was known to be part of the coal, and it was vented in order to mine the coal. (App. 404-5) By necessity and by legislation, the coal miners have had to ventilate the CBM that is released by the mining activities.[2] The dangers associated with CBM, including underground explosions, presented safety concerns for the coal owner. (App. 231-2) Ventilation wells and large ventilation fans (1.6 million cubic feet per minute) were used by the coal miners to evacuate the CBM from the mining areas. (App. 181, 226, 405-6) The CBM was simply discharged into the atmosphere for many years. (App. 231) During the coal mining on these tracts, the plaintiffs never objected to the venting of this CBM by wells or by fans. (App. 424)

[2] From 1966 until 1994, Chapter 5 of the Virginia Mine Safety Law of 1966 provided laws relating to the ventilation of coal mines in Virginia. See Va. Code § 45.1-54 *et. seq.* These laws provided specific guidelines as to the maintaining of ventilation and air quality in mining operations.

In 1990, the General Assembly passed the 1990 Virginia Oil and Gas Act ("the "1990 Act"). The 1990 Act specifically defined CBM as "occluded natural gas produced from coalbeds and rock strata associated therewith." Va. Code § 45.1-361.1 (1990). This legislation created a structure by which CBM could be captured instead of discharged.

By lease dated February 14, 1990, Harrison-Wyatt's predecessor (Landon R. Wyatt, Jr. and Wales R. Harrison, Jr., Trustees), as coal owner, entered into a CBM lease with OXY USA, Inc. for producing and marketing "occluded methane and all associated natural gas and other hydrocarbons normally produced or emitted from coal formation or seams and any related associated or adjacent rock material," defined in the lease as "coalbed methane gas." (App. 57) The acreage contained in this lease included Tracts 18, 19 and 56, among others. (App. 88) As there was a conflict between the plaintiff surface owners and the defendant regarding ownership of the CBM, the royalties on the CBM produced from these tracts have been escrowed.

The trial of this case involved extensive evidence on the characteristics, origin, history and definitions of "coal" as well as the production techniques for coal and CBM, the relationship between coal and CBM, and the history of ventilation of CBM in connection with the mining of coal.

1. The definition of "coal" in the 19th century included CBM.

The severance deeds at issue were executed in the 1880's. Accordingly, in order to establish the meaning of these 19th century documents, the defendant introduced uncontested evidence of the 19th century definitions of "coal," without objection, by expert testimony and publications from the 19th century. The published definitions of "coal" from the time period describe coal as an "amorphous substance of variable composition" which could therefore not be defined as a crystallized or definite mineral could be. (App. 337-38)

These definitions noted that gases (now known as coalbed methane, but described as "marsh gas" at the time) "are present in considerable quantity in coal..." (App. 338) The American Encyclopedia from 1873[3] defined "coal" as:

> a term now commonly used to denote *all* kinds of mineral fuel....at the present time, when wood and charcoal are fast giving place to the mineral varieties of fuel, the term coal is applied to that class of this fuel in general use....Under the term coal, we may therefore embrace all classes of mineral fuel that will ignite and burn with flame or incandescent heat....The combinations of carbon, hydrogen, oxygen, and nitrogen with earthy impurities, to which the term mineral fuel may be properly applied, are infinite, ranging through all the grades of coal, from the hard, dense anthracite to the asphaltic varieties, and from the solidified petroleum to the gaseous naptha.

(App. 130, 338) The same American Encyclopedia confirms the understanding of the time that:

> All kinds of coal vary considerably both in mechanical structure and chemical composition....The gradations of carbon, hydrogen, and oxygen compounds, from almost the pure fixed carbon in anthracite, through the more volatile bituminous varieties of coal, to the free carbon and hydrogen of naptha, are infinite; and no formula can truly express the relative proportions which limit these compounds to the various classes of coals, or as mineral fuel.

(App. 134)

The Encyclopedia Britannica of 1877[4] confirms the same understanding of coal:

> Coal is an amorphous substance of variable composition and therefore cannot be as strictly defined as a crystallized or definite mineral can... .Coal is perfectly amorphous... .Gases, consisting principally of light carburetted hydrogen or marsh gas are often present in considerable quantity in coal, in a dissolved or occluded state, and the evolution of these upon exposure to the air, especially when a sudden diminution of atmospheric pressure takes place, constitutes one of the most formidable dangers that the coal miner has to encounter.

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[3] IV THE AMERICAN ENCYCLOPEDIA: A POPULAR DICTIONARY OF GENERAL KNOWLEDGE, 726 (Ripley and Dana eds., 1873).

[4] VI ENCYCLOPAEDIA BRITANNICA 45 (9th ed. 1877).

(App. 92) The same work also describes in detail the proportionate content of this CBM (a/k/a "marsh gas" or "fire damp") in various types of coal, listing it along with elements of carbonic acid, oxygen and nitrogen. (App. 119) The extent to which this CBM was released from the coal during the mining process was a considerable concern to coal miners. (Id.) Accordingly, 19th century researchers tested coal to see the rate at which it could be expected to emit the CBM. (Id.) This research, presented in the evidentiary record in this case, found that, of the entire volume of the CBM in the coal, "only one-third could be expelled at the temperature of boiling water, and the whole quantity, amounting to 650 cubic feet per ton, was only to be driven out by a heat of 300 degrees Celsius." (Id.) However, notwithstanding the tenaciousness of CBM, the Encyclopedia further cautioned that "blowers" can exist in these coal seams and

> the gases evolved from the sudden outbursts or blowers in coal, which are often given off at considerable tension, are the most dangerous enemy that the [coal miner] has to contend with. They consist almost entirely of marsh gas, with only a small quantity of carbonic acid, usually under 1 per cent, and from 1 to 4 per cent of nitrogen.

(Id.) The same definitions and discussions are also repeated in the "Americanized" Encyclopedia from 1892.[5] (App. 167-68)

The plaintiffs offered no evidence to contest or rebut this documentary evidence or the testimony that accompanied it through Harrison-Wyatt's expert, Dr. Thomas Novak[6].

2. Even under modern definitions, "coal" is a heterogeneous substance with many inherent constituents, including CBM.

"Coal" is currently defined as a "generic term or a generalized designation for a heterogeneous fossil fuel that contains varying amounts of fixed carbon, volatile matter and various

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[5] III AMERICANIZED ENCYCLOPAEDIA BRITANNICA 1642, 1647-8 (1892).

[6] Dr. Novak, who has a Ph.D. in Mining Engineering, is a Professor and the head of the Mining and Minerals Engineering Department at Virginia Tech. (App. 334-35)

other constituents" such as water, ash, sulphur, and carbon dioxide. (App. 337, 339, 341) "Methane is an inherent constituent of the *in situ* [i.e., in place] coal, the same as moisture, ash, sulphur, etc." (App. 253, 356-7) Methane is an extremely explosive gas. (App. 380) Accordingly, miners have always had to contend with these dangers and find ways to safely ventilate the gas from mining areas. (App. 231-32, 358, 362)

CBM is actually produced in the same natural process that results in coal (the coalification process), and it stays there in the coal. (App. 352) A coal seam consists of a tremendous number of small grains of coal, each one of which contains a micropore structure filled with small voids. (App. 347) To illustrate the incredible surface area of this sponge-like substance, anecdotal reference was given at trial that each gram of coal has the surface area of two or three football fields; this entire surface area is adsorbed[7] with methane. (App. 347) Each ton of coal in the Pocahontas 3 seam (the one at issue in this case) contains 600 cubic feet of CBM per ton of coal. (App. 345) Ninety-eight per cent (98%) of the CBM in a coal seam is actually adsorbed to the coal itself. (App. 348)

3. The nature of CBM and the manner in which it is stored in coal and then produced differs substantially from conventional natural gas.

Unlike conventional natural gas, which is created in one location and then migrates to another geological trap, coal is both the source and the reservoir for CBM. (App. 352) Conventional natural gas wells are drilled into a geological "trap" where the gas exists under significant pressure. (App. 352) The natural pressure in the trap allows the conventional gas to be produced without supplemental energy. (Id.) Other than drilling through the stone that creates this trap, no other action is typically required in order to produce conventional natural gas. As to the production of the CBM at issue here, testimony was presented from Claude Morgan, the Vice-

[7] "Adsorbed" means "physically attached" to the micropore walls in the coal matrix. (App. 348)

President of Operations of CNX Gas Company, a subsidiary of Consol Energy, the operator of this field. (App. 228-9) Mr. Morgan testified that, in contrast to conventional natural gas wells, in order to produce the CBM, it is necessary to actually invade the coal seam itself to induce the flow of the gas out of the coal. (App. 237) If you drill into the coal seam without any active mining and without any fracturing of the coal, you are not able to produce the CBM in commercial quantities. (App. 238, 353) "Frac" or fracture wells are created by pumping water and sand or nitrogen foam and sand into the coal seam at high pressure in order to fracture the coal and open cracks within the coal in order to release enough gas to produce. (App. 352-54) It is not uncommon to put as much as 50,000 pounds of sand into one well in order to accomplish this objective. (App. 355)

Once the coal seam is fractured, it still will not produce gas into a well until water is pumped out of the coal seam. Water (beginning with a large amount and becoming less) must be pumped from the coal seam in order to release the pressure on the coal and cause the fractured coal to release its CBM. (App. 239) These frac wells are generally drilled in advance of mining. (Id.) Unlike conventional gas production, CBM is produced almost at atmospheric pressure, so it requires substantial compression. (App. 244) Since it is not "free" gas (floating around in the reservoir), CBM must actually be sucked from the coal seam. (App. 374) Testimony at trial established that these wells are not removing gas that has already been liberated from the coal seam. "It hasn't been liberated from the coal. You're sucking it out of the coal." (App. 374)

Within mine works, horizontal holes are often drilled into the coal seam to capture the methane in advance of mining. These horizontal holes also penetrate into the coal seam and extract the gas from the seam in much the same manner as FRAC wells. (App. 257)

Longwall mining[8] causes the mined-out area behind the miner to collapse, thereby causing the mined coal seam as well as the overlaying strata of coal and related strata to subside and fracture. This is a tremendously effective 'frac'turing of the seam and those seams above it, releasing a substantial amount of CBM. (App. 365) Without a well to capture or vent the CBM from both the mined coal and the coal above it, the CBM would migrate down towards the area of low pressure created by the mining activity. (App. 240) The CBM wells used to capture this gas are referred to as "GOB" wells. GOB wells are connected to the active mining operation, and it is essential that all of this CBM is evacuated from the mine area. (App. 251) Any restriction on what the GOB well is producing forces gas back into the active mining area. (Id.) The overriding concern with the operation of GOB wells is the safety of miners. (Id.)

The chemical content of CBM is different from conventional natural gas. CBM contains 96.6% methane, whereas conventional natural gas has a methane content of only 80-90%, and usually contains higher hydrocarbons such as ethane, propane and butane. (App. 255-56, 356)

4. Historic treatment of CBM under legislation regarding natural gas in Virginia indicates that CBM has never been considered to be part of the natural gas estate and gas producers have been prevented from producing it.

Chapter 12 of the Virginia Mine Safety Law of 1966 provided for oil and gas operations in general and in relation to coal operations. Virginia Code § 45.1-122 (1966) (Repealed by Acts 1982, c. 347) specified that, in the event that gas wells were drilled penetrating one or more coal

[8] Longwall mining is a process that involves tunnels that are driven alongside a large block of coal that may be anywhere from 600 feet to 1000 feet wide. These tunnels are driven along each side of that block of coal, anywhere from 5,000 to 10,000 feet in length and then connected at the ends. These access tunnels allow the movement of men and machines as well as ventilation. A mining machine is then set up across the full width of the block of coal. A series of large hydraulic supports called shields are put in place to support the roof above the active working area. A large revolving drum shearer essentially chews the coal off of that face and puts it on to a conveyor system. As the shearer moves forward, the large hydraulic shields move forward behind it. The rock and strata above the shields are allowed to cave in as the shields move forward. (App. 241-42)

beds, they should be drilled and cased in such a manner as to be sealed to the coal bed and areas thirty feet below and twenty feet above the same. Similar provisions applied to wells passing through areas where the coal had already been removed. Va. Code § 45.1-125 (Repealed by Acts 1982, c. 347). Accordingly, under these laws, commercial production of gas from coal seams was simply not legally possible.

These Code provisions continued largely unchanged until 1982, when the Oil and Gas chapter of Virginia Mine Safety Law of 1966 was repealed and replaced with the Virginia Oil and Gas Act, which was still codified in the Mines and Mining section of the Code at Virginia Code § 45.1-286, et. seq. (1982) (Repealed by Acts 1990, c. 92). The 1982 Oil and Gas Act defined gas as "all natural gas whether hydrocarbon or non-hydrocarbon or any combination or mixture thereof, including hydrocarbons, hydrogen sulfide, helium, carbon dioxide, nitrogen, hydrogen, casing head gas, and all other fluids not defined as oil in this section." Va. Code § 45.1-288(24) (1982) (Repealed by Acts 1990, c. 92). The 1982 Oil and Gas Act contained provisions for wells drilled through coal seams and mined-out seams, similar to those of the Virginia Mine Safety Law of 1966. See Va. Code § 45.1-334 and 336 (1982) (Repealed by Acts 1990, c. 92). The 1982 Oil and Gas Act effectively excluded CBM from gas regulation in that Virginia Code § 45.1-300(B)(1) (1982) (Repealed by Acts 1990, c. 92) excluded

> wells located in Buchanan, Dickenson, Lee, Russell, Scott, Tazewell and Wise Counties and the City of Norton, within the area thereof having outcropping strata of the Pennsylvanian age and drilled to produce from depths shallower than the base of the Devonian shale, with a total depth not more that 300' below the base of the Devonian shale if the penetration below the base of the Devonian shale does not result in production from strata deeper than the base...

The 1982 Virginia Oil and Gas Act was repealed in 1990 and replaced with the 1990 Virginia Oil and Gas Act ("the "1990 Act"). The 1990 Act specifically defined CBM as **"occluded**

natural gas produced from coalbeds and rock strata associated therewith." Va. Code § 45.1-361.1 (1990). The definition of "gas" or "natural gas" was defined separately in the same manner as in the 1982 Act. Va. Code § 45.1-361.1 (1990). The General Assembly found it necessary to enact an entirely new statute to deal with CBM and CBM wells largely because of the physical connection between coal and CBM, as well as the distinctions in production process and coal mine safety.

5. The coal mining operations at the Oakwood Field are closely tied to CBM and safety concerns.

The CBM field at issue is referred to as the Oakwood Field. (App. 230) The CBM from this area was previously removed and vented by fans and wells prior to the passage of the 1990 Act. (App. 233-34) Although CBM vented out of the coal seams in connection with the mining in the Oakwood Field was high quality, the coal operators did not have an infrastructure for removing this CBM and selling it commercially. (App. 234) Moreover, until the passage of the 1990 Act, these coal operators were not willing to take the risk of being considered trespassers in removing the CBM for commercial production. (App. 235) The 1990 Act resolved this trespass concern and allowed the escrow of royalties on tracts where there were conflicting claims of ownership (i.e., where the owner did not hold the entire undivided fee estates of surface, coal, mineral and gas). (Id.)

Accordingly, these coal operators (through related companies) built the necessary infrastructure to produce the CBM and began commercial CBM operations at Oakwood Field in 1992. (App. 231, 245) The production of CBM from this field is closely associated with coal mining operations and plans. (App. 247-48) Among the primary safety concerns of producing CBM in connection with mining of coal are the safety of the coal mines and the ability to mine the coal after the removal of the gas. (App. 250) With the dual concerns of producing CBM and

mining coal, the operator has to maintain continuous communication with the conditions underground that impact the miner's safety. (App. 252-53) Decisions that might be good for the production of CBM might have disastrous effects on the miners. (App. 252) The CBM operator (that is owned by the coal producer in this field) has control over the methods of production as there are or will be mining operations in the areas from which CBM is produced. (App. 237, 250-52)

ARGUMENTS AND AUTHORITIES

I. WHETHER THE TRIAL COURT ERRED IN FINDING THAT, UNDER VIRGINIA LAW, THE GRANT OF COAL RIGHTS DOES NOT INCLUDE CBM.

A. Summary of argument.

This case presents a question of interpretation of language used in deeds executed over 100 years ago whereby plaintiffs granted "the coal" to Harrison-Wyatt. The trial court erroneously found that the term "coal" in the deeds was not ambiguous, and concluded that the plaintiffs owned the CBM "which has been separated from the coal." (App. 40-41). The trial court's ruling is erroneous in that it failed to apply the commonly understood and plain meaning of the term "coal" from the time that each instrument was drafted so as to give effect to the intent of the parties. Alternatively, the trial court failed to acknowledge the ambiguity in the term "coal" as used in the deeds, and failed to construe the deeds against the plaintiffs as required by well-recognized rules of construction.

Moreover, the trial court purported to discern the intent of the parties to the severance deeds by looking to factual findings and definitions not presented as evidence in this case. In looking at the intent of the parties, the trial court refused to consider the historic production techniques for coal and CBM, rejecting this as the "production" analysis as if it was irrelevant to

the determination of the intent of the parties. (App. 34-35) Here, however, the facts conclusively established that CBM (a finite resource unlike ground water that continues to migrate and flow through a tract of land from other sources) was known in the 19th century to be a part of coal and to be partially released, partially harvested, and forever dissipated as part of the coal mining process. For example, the Encyclopaedia Britannica of 1877, offered into evidence by Harrison-Wyatt, made it plain that some gas (in dangerous quantities) was released from coal during mining, but as much as two-thirds could not be expelled unless the coal was heated to 300 degrees Celsius. (App. 119) The coal mining techniques and these historic writings establish the 19th century understanding that the CBM would have either been released during mining of the coal or it would have been contained in the coal even after it was mined and sold. Accordingly, a consideration of this historical "production" information was relevant as to what the parties to these deeds would have understood to be included in the conveyance of coal.

Although the trial court may have stated that it was attempting to effectuate or discern the intent of the original parties to these severance deeds, it could not have done so without looking at these historic mining techniques and understandings about the nature of this gas that was contained within the coal. Rather, it seems much more likely that, by focusing on the very recent developments that have made harvesting of CBM possible, and by ignoring this very substantial body of historic evidence, the court was actually trying to effectuate the current owners' desires rather than the original grantors' intent.

However, even setting aside the wealth of historic evidence that the trial court disregarded, the ultimate paradox of the trial court's ruling -- that the plaintiffs intended to retain something that they (even now) have no right to enjoy unless and until the defendant decides to produce or fracture its coal estate – underscores the error in the trial court's analysis. Indeed, it

is the close association of coal and CBM that compelled the trial court's bifurcation of ownership and production rights; and, it is this same close association between coal and CBM that supports the coal owner's assertion of ownership and of ambiguity in the meaning of the deeds.

B. The issue here is not as simple as plaintiffs claimed below, as evidenced by the facts of the case and the trial court's strained ruling.

The plaintiffs' primary (and only) argument at trial and the one that was accepted by the trial court is that, since "gas is gas" and "coal is coal," the sale of all the coal in and under real property did not include the gas (CBM) that was contained within that coal. The plaintiffs' almost indignant assertion of ipso facto ownership is best viewed from this simplistic vantage point. It depends entirely on an analysis that looks only at the characterization of CBM as "gas" once it is released from the coal (an issue that is not disputed by the coal owner). Moreover, it depends on an analysis of the deeds that admits no ambiguity. By contrast, the coal owner here asserts that the issue of whether the grant of "coal" included CBM in these 19th century severance deeds is not resolved solely by the characterization of the post-release CBM as "gas" and, at the very least, it is profoundly ambiguous.

The undisputed facts that support such a conclusion include: (1) CBM is formed and stored on an intramolecular level within the coal where it is tightly compressed within the coal and cannot be removed without the fracturing or mining of the coal; (2) the purpose of the coal severance deeds was to allow the coal owner to mine the coal on these properties; (3) the coal cannot be mined without releasing large quantities of CBM, something that, until 1990, necessarily required the ventilation of the CBM into the atmosphere; (4) the definitions and reference documents relating to coal at the time of the deeds note that coal contained gas, that the release of this gas was the primary danger faced by coal miners, that coal retained considerable quantities of CBM even once it was mined, and defined coal very broadly to include gas; (5)

even today, CBM cannot be commercially produced without mining or fracturing the coal, something that, even under the trial court's ruling, the plaintiffs have no power to do; (6) the General Assembly found it necessary to adopt entirely new legislation that separately defined CBM in order to allow for the production of CBM; (7) the plaintiffs and their predecessors have never asserted any ownership rights or complaints that would indicate a claimed reservation of the CBM in the coal even during prolonged periods of coal mining when the CBM was vented to the atmosphere by the coal miners; (8) the mineral rights cases in Virginia have not looked only to the characterization of a substance to determine ownership rights but have, instead, looked to whether the claimed mineral rights of one owner are so closely associated with those of another mineral owner as to defeat the claimed rights; and (9) the production of CBM is closely associated with coal mining and safety concerns presented by the mining activities.

If, as the plaintiffs assert, their unambiguous claim of ownership to the CBM flows so naturally from the maxim of "gas is gas," we respectfully submit that: (1) the General Assembly would not have purposefully avoided this issue; (2) every state where CBM production occurs would not have had to deal with this issue legislatively or judicially; (3) those courts that have addressed this ownership issue would not have reached such different holdings for such different reasons; (4) the Circuit court in McDowell County, West Virginia (two counties over from Buchanan County, Virginia) would not have reached the opposite conclusion at the precise time that the trial court in this case was reaching its conclusion; (5) the Supreme Court of West Virginia would not be presently considering this issue; and (6) the trial court here would not have been compelled to make a determination of ownership based on characterization of the mineral as a gas and a determination of that owner's production rights based upon the location of the mineral (i.e., only once it is released from the coal seam). The scientific fact that some CBM

remains in the coal even after it is mined and sold by the coal owner further exposes the inappropriate simplicity of this "gas is gas" analysis of this complicated issue.

The primary error here is that the trial court attempted to solve this complex question by conditioning the answer on a formula that is too simple from a historic, scientific and linguistic standpoint and is erroneous from the standpoint of Virginia law. It began with the wrong premise -- that "the only finding that would allow the Court to rule in favor of the coal owners is that the CBM is a constituent of the coal itself." (App. 36) The Court then reached outside of the record in this case to find definitions of coal that would support its conclusion that the 19th century understanding of "coal" did not include CBM as an actual "constituent" element of the coal. As noted below, the trial court was wrong in each respect. Virginia law does not require a finding that CBM is a constituent element of coal in order to support a finding that the grant of coal included CBM. The evidence as to the 19th century definitions of coal should have been limited to those presented in this case. Given all of the evidence, the trial court should have at least acknowledged the ambiguity present here. And, the deeds should have consequently been construed in favor of the coal owner.

C. The standard of review permits this Court to review de novo the trial court's finding that the deeds were not ambiguous.

On appeal, this Court is not bound by the trial court's interpretation of the deeds, and has "an equal opportunity to consider the words of the contract within the four corners of the instrument itself." Eure v. Norfolk Shipbuilding & Drydock Corp., 263 Va. 624, 631, 561 S.E.2d 663, 667 (2002). "The question whether the language of a contract is ambiguous is a question of law which [this Court] review[s] de novo." Id. (citing Langman v. Alumni Ass'n of the Univ. of Va., 247 Va. 491, 498, 442 S.E.2d 669, 674 (1994)); see also Colony Council Bd. of Dirs. v. Hightower Enterprises, 228 Va. 197, 200, 319 S.E.2d 772, 774 (1984) (reversing the trial

court and finding as a matter of law that the term "unsold" as used in an owners association's bylaws was ambiguous).

Well-established principles guide this Court's analysis of the issue presented. The fundamental rule of construction in Virginia is that the purpose or intent of a written instrument is to be determined from the language used in the light of the circumstances under which it was written. Traylor v. Holloway, 206 Va. 257, 260, 142 S.E.2d 521, 523 (1965). The intent of the parties to a deed is paramount and must be determined by construing the instrument as of the date and under the circumstances of its execution, although, in case of ambiguity, it is to be construed against the grantor. Ellis v. Commissioner, 206 Va. 194, 202, 142 S.E.2d 531, 536 (1965).

"When an agreement is plain and unambiguous on its face, the Court will not look for meaning beyond the instrument itself. However, when a contract is ambiguous, the Court will look to parol evidence in order to determine the intent of the parties." Eure, 263 Va. at 632, 561 S.E.2d at 667-668 (internal citations omitted). To determine if an ambiguity exists, the Court examines the contract within the four corners of the document. Id. at 632, 561 S.E.2d at 668. If the pertinent language in the agreement can be interpreted or understood in more than one way, then the agreement is ambiguous. Id.; Renner Plumbing, Heating & Air Conditioning, Inc. v. Renner, 225 Va. 508, 515, 303 S.E.2d 894, 898 (1983) (citing Berry v. Klinger, 225 Va. 201, 207, 300 S.E.2d 792, 796 (1983)).

D. The trial court erred in applying a litmus "constituent part" test in determining whether the CBM was conveyed with the coal under these severance deeds, disregarding Virginia law and instead holding that, "the only finding that would allow the Court to rule in favor of the coal owners is that CBM is a constituent of the coal itself."

This case turns on the intent of the parties to the 19th century severance deeds. The real issue in this case is whether the grantors under these severance deeds intended to reserve the CBM when they conveyed the coal. However, the trial court here stated both in its opinion and in its final order that **"the only finding that would allow the Court to rule in favor of the coal owners is that CBM is a constituent of the coal itself."** (App. 36, 40) In other words, the trial court narrowed the entire ownership issue of this two-day trial to one question: "is CBM a constituent of coal." As a practical matter, however, the scientific evidence established that CBM is a constituent of coal while it is in the coal seam. (App. 356-57) ("methane is an inherent constituent of the in situ coal the same as moisture, ash, sulfur, etc."); and (App. 253) ("It is an inherent part of the coal seam until such time as it is released.") Therefore, for practical purposes, the trial court actually further limited and simplified the inquiry down to "whether CBM is a constituent of coal once it is released from the coal?" This is, in fact, the only question so limited and simple to embrace the "gas is gas" maxim. Consequently, the trial court could not reach the correct legal conclusion because the dispositive issue was never properly framed. In this manner, the inquiry of the trial court disregards the facts of this case and the applicable legal analysis.

Under clear Virginia precedent, the trial court could have found that the CBM was conveyed with the coal (i.e., not reserved) without a finding that "CBM is a constituent of coal itself." Indeed, *proper* terminology is only a part of the proper inquiry. For example, this Court has already found that oil and gas are "minerals" even though they are not hard, crystallized or metallic substances. Warren v. Clinchfield Coal Corp., 166 Va. 524, 527-528, 186 S.E. 20, 21-22 (1936).[9] Therefore,

[9] This Court cited a variety of sources: the American and English Encyclopedia of Law (2d Ed.), vol. 20, p. 683 ("By the term 'minerals' are meant all the substances in the earth's crust which are sought for and removed by man for the substance itself. It is not limited to metallic substances, . . . and even petroleum and natural gas have been held to be minerals."); *In Corpus Juris*, vol. 40, p. 738 ("Unless it appears that the term was used in a more restricted sense, the

this Court has already rejected the plaintiffs' primary argument that "gas" should not be confused with rock-like substances.

Moreover, precedent from this Court confirms that inquiries into mineral rights require more analysis than simply the "constituent part" test adopted by the trial court here. In Buery v. Shelton, 151 Va. 28, 37-38, 144 S.E. 629, 631-632 (1928), this Court held that a reservation of "minerals" by the grantor did not include limestone even though limestone is a mineral, where the limestone was substantially connected with the surface. The Court stated "...there is no practical guiding rule for use in all cases, but that what the term [mineral] includes differs as the facts of each case differ, and what courts attempt to do is to ascertain what the parties intended..." Id. at 37, 144 S.E. at 632. However, in construing mineral deeds, the deed should not be interpreted as to allow the grantor "to take back or destroy the thing that is granted." Id. at 42, 144 S.E. at 633.

In Shores v. Shaffer, 206 Va. 775, 778-779, 146 S.E.2d 190, 193 (1966), this Court similarly held that a grant of minerals did not include quartzite sand even though the sand is "geologically and technically a mineral" because the sand is "an integral part of the surface." Yet, even though the quartzite was a mineral and could be separated from the surface just like most CBM can ultimately be separated from coal, this Court held that the quartzite did not pass to the mineral purchaser. So too, even though limestone could be separated from the surface in the Buery case, this Court reached the same conclusion as to a reservation of minerals.

Underlying these and similar cases is the basic Virginia mineral law concept that, once severed, mineral estates convey land, just as if the tracts were horizontal rather than vertical. Lee v. Bumgardner, 86 Va. 315, 318, 10 S.E. 3, 4 (1889). If the grantor reserved a mineral interest, it reserved "land." Consequently, the grantor and the purchaser/grantee become vertical neighbors

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term 'mineral' ordinarily embraces oil or petroleum, and natural gas; and has also been held to embrace water").

much like condominium owners. They are not unlike lot owners in a subdivision with the grantor being the subdivider. Just like traditional undivided fee simple property owners must respect their neighbor's rights, so too must the vertical property owners respect their neighbor's rights. Thus, this Court has tended to look to whether the claimed reservation or grant is so closely associated with the "neighbor's" interest that to recognize the claimed right would require intrusion or destruction of the other neighbor's "land." Unless it is clear that such was the intent, the claim should not be recognized.

Thus, it is clear that the "constituent part" test adopted by the trial court here has been specifically rejected as a litmus test to mineral rights in Buery, 151 Va. at 37-38, 144 S.E. at 631-632 (where limestone was a constituent part of the reserved minerals, but not effectively reserved because of substantial connection with surface); and in Shores, 206 Va. at 778-779, 146 S.E.2d at 193 (where quartzite was a constituent part of the term mineral, but was not granted with other minerals because of integral connection with the surface).

E. The trial court incorrectly framed the issue in this case; the proper question under Virginia law is whether the coal estate and the supposedly reserved CBM estate are so integrally connected that, in order to retain a right to own and benefit from the reserved CBM, the grantor would have had to specifically reserve such right.

If the proper question were framed under the facts of this case and the law of Virginia, the uncontested facts require a finding that the CBM passed with the coal estate under these severance deeds. At the most basic level, these uncontested facts establish that 98% of the CBM is physically adsorbed to the coal seam. (App. 348) In other words, it is contained within the conveyed coal seam. It is, thus, integrally connected with the coal. Since the CBM is contained within the coal, it would have been physically impossible for the grantor to reserve and enjoy this land (the CBM) that the plaintiffs claim their predecessors reserved, without specifically reserving the right to re-enter

the estate of the coal owner. Moreover, a varying amount of the CBM remains in the coal even after it is mined. (App. 119) Since some of the CBM invariably remains in the coal once it is mined, it would have been impossible for the grantor to beneficially retain all of the CBM unless he somehow wanted to surcharge a royalty for the btu content of this gas that remained in the coal. Also uncontested is the fact that the historic coal mining techniques caused a substantial release of CBM as part of the mining (a fact of common knowledge in mining country). (App. 119, 180, 231, 404-5) On a modern level, it is also uncontested that production techniques for CBM make it impossible to commercially produce CBM without entering into the coal and actually fracturing or mining it. (App. 237)

These facts, all of which are uncontested in the record, establish that it is unlikely that the parties to these deeds intended that the grantor reserve this resource that was: (1) contained within the granted coal, (2) that could not be accessed without trespassing on the granted coal estate, (3) that would necessarily be dissipated as part of the coal mining processes known at the time of the conveyance, and (4) that could only be produced through the fracturing or mining of the coal, something over which the coal owner has complete control. Thus, the trial court erred in failing to properly apply Virginia mineral law and in failing to find that CBM is an "integral part" of the coal and that it is "substantially connected" with the coal such that the grant of coal included the CBM.

F. The lengths to which the trial court went to avoid the problems caused by its ruling underscore the existence of an "integral connection" between the coal and CBM that should have resulted in a ruling in favor of the coal owner.

The fact that the trial court erred in this regard is apparent from the fact that it felt compelled to hold that "the surface owner's right to the CBM only extends to that which has separated from the coal." (App. 37-38, 41) Essentially, the trial court's finding means that the CBM owner has no rights to enter the coal seam and to produce the gas that the trial court says that it owns. Rather, the

CBM owner must wait for the coal owner to decide to produce its coal or to ventilate the coal in connection with coal mining. The fact that this type of restriction was necessary to support the trial court's decision is clear evidence of the degree to which the CBM is an integral part of the coal. It is also evidence that the conveyance of the coal included the CBM that is attached to the coal in its natural state, not merely the solid bituminous core of the coal.

The trial court also strained to get around the argument that, if the coal owner did not own the CBM, and the coal owner has been venting this CBM for years (without objection from the grantor), then the act of mining the coal and releasing the CBM would have been a trespass or waste of the CBM owner's estate. The very nature of this problem supports the "integral connection" analysis set forth in Shores and Beury. However, the trial court dismissed this issue by making two holdings without reference to any precedent in support thereof. First, the trial court held that "[v]enting the CBM was and is an incident to mining coal, as is controlling water flow in the mines." (App. 36) The fact is, however, that there is a substantial difference between water (a renewable resource) and CBM. Once released, CBM is gone forever and it does not replenish. So this comparison to water removal does not seem to apply. Second, the trial court held that, to the extent that the consent of the grantor/CBM owner was required, it was "implied by the common law right of the coal owner to impede upon the CBM estate as a necessity to mining of the coal." (App. 38) Again, this reference to the common law right was without citation to any authority; and, more importantly, there is no such authority in Virginia.

It is clear that the trial court had to strain to get around all of the facts that so plainly establish the close and integral connection between coal and CBM. However, the court never addressed the analysis set forth in Shores and Beury, nor did it explain why it rejected that analysis. This line of cases was plainly pointed out to the trial court by the coal owner in its trial

brief and in argument during trial. Yet the court appears to have simply disregarded this authority.

G. Without reference to the "integral connection" analysis under Virginia law, the plain meaning of "coal" in the late 19th century establishes the common understanding that "coal" included CBM, which was the largest danger facing coal miners.

The only evidence presented at trial established that the term "coal" in the late 19th century:

(1) was "commonly used to denote *all* kinds of mineral fuel" (App. 130);

(2) embraced "all classes of mineral fuel that will ignite and burn with flame or incandescent heat..." (App. 130);

(3) ranged "through all the grades of coal, from the hard, dense anthracite to the asphaltic varieties" (App. 130);

(4) varied "considerably both in mechanical structure and chemical composition..." (App. 134);

(5) was known to have "infinite" "gradations of carbon, hydrogen, and oxygen compounds, from almost the pure fixed carbon in anthracite, through the more volatile bituminous varieties of coal, to the free carbon and hydrogen of naptha" (App. 134);

(6) was describable by no formula that could "truly express the relative proportions which limit these compounds to the various classes of coals, or as mineral fuel" (App. 134);

(7) was a substance of such variable composition that it could not be strictly defined as a "crystallized or definite mineral" could be (App. 92);

(8) was "perfectly amorphous..." (App. 92); and

(9) contained gases, "consisting principally of light carburetted hydrogen or marsh gas... often present in considerable quantity in coal, in a dissolved or occluded state" (App. 92)

Indeed, this evidence from the time period at issue even described in detail the proportionate content of this CBM (a/k/a "marsh gas" or "fire damp") in various types of coal, listing it along with elements of carbonic acid, oxygen and nitrogen. (App. 119)

H. The trial court erred by disregarding the evidence in this case as to the meaning of "coal" in the late 19th century, and going outside the record to adopt findings and evidence not presented in this case and not relevant to this dispute.

Even having erroneously fashioned the "constituent part" litmus test as a predicate to ruling in favor of the defendant coal owner, the trial court still had to reach the conclusion that CBM was not a considered to be a "constituent part" of coal at the time of these deeds. As there was no evidence presented in the record in this case to support such a conclusion, the trial court disregarded the uncontested evidence in this case and went outside the factual record here to draw factual findings made by the United States Supreme Court in a completely different and non-binding case involving land grants. AMOCO Prod. Co. v. Southern Ute Indian Tribe, 526 U.S. 865 (1999). However, the court should have accepted the uncontested evidence in this case's record for what it said and for what is was expertly explained to mean.

As a general rule, it is inappropriate and unfair for a trial court to go outside the factual record of the case at issue because it denies the parties the opportunity to review and rebut the evidence considered. This is particularly true where, as here, the trial court made no indication that it was doing so during the trial or at any point thereafter until it rendered its opinion. See Darnell v. Barker, 179 Va. 86, 93, 18 S.E. 2d 271, 275 (1942) (Under Virginia law, "the

individual and extrajudicial knowledge on the part of a judge will not dispense with proof of facts not judicially cognizable, and cannot be resorted to for the purpose of supplementing the record.") This same principle was repeated in State Farm Mutual Auto. Ins. Co. v. Powell, 227 Va. 492, 497-8, 318 S.E.2d 393, 395 (1984), where this Court found that the trial court erred by taking judicial notice of the common rural practice of equipping pickup trucks with gun racks. The Court noted that "[b]ecause the 'additional' facts surfaced for the first time when the court announced it decision, [the defendant] had no opportunity to be heard either to dispute the "facts" or to object to the court's action." Id. at 497, 318 S.E.2d at 395. Moreover, this was not a matter on which the trial judge could properly take judicial notice. Id.; see also Whitfield v. Whittaker Mem. Hosp., 210 Va. 176, 181, 169 S.E.2d 563, 567 (1969) (finding that trial court could not take judicial notice that hospital was a charitable organization). So too, a trial court cannot borrow from the record of another judicial proceeding in lieu of actual evidence. See Bernau v. Nealon, 219 Va. 1039, 1041-2, 254 S.E.2d 82, 84 (1979) (where this Court held that even when the trial judge was the same judge in the former adjudication, *res judicata* could not be established without a complete record in the current case).

Here, in order to appreciate the extent of the trial court's error, we must first get past the judicial fiction that there was no ambiguity in the severance deeds on this issue. If that were actually the case, it is highly unlikely that the trial court would have received evidence as to the historic understandings regarding coal and CBM. Moreover, it is highly unlikely that the trial court would have sought additional historic reference materials outside the record had there been no ambiguity involved in these terms. In fact, a weighing of the preponderance of the evidence is indicated by the trial court's reference that "most" dictionaries of the day support its finding

that the 19th century understanding of CBM was that it was contained within coal but that it was a distinct substance. (App. 36)

The ambiguity as to the historic meaning and understanding on these terms was profound, and the trial court acted as a fact finder resolving the ambiguity without actually acknowledging that it existed. Unfortunately, in resolving this factual issue, the trial court's Opinion makes it clear that the court plucked definitions and factual findings as to the 19th century meaning and common understanding of "coal" and its relationship with CBM from the AMOCO case concerning an issue and a time period completely unrelated to the evidence in this case. (App. 34, 36) In its Opinion, the trial court quoted extensively from these factual findings in AMOCO, noting that the United States Supreme Court was "persuaded that the common conception of coal" at that time in history "was the solid rock substance that was the country's primary energy resource." (Id.) Moreover, the trial court here adopted additional factual findings from the AMOCO case that, **"[i]n contrast, dictionaries of the day defined CBM...as a distinct substance, a gas contained in or given off by coal, but not the coal itself," citing 3 Century Dictionary and Cyclopedia 2229 (1906).** The litigants in this case know nothing of this reference as it was not presented in the evidentiary record here.

In the record in this case, there were no 19th century or even early 20th century definitions of CBM offered or accepted as evidence. Rather, there were broad definitions of "coal" and treatises on coal that included descriptions of the now-called CBM as part of the coal, two-thirds of which could not be removed unless the coal was heated to 300 degrees Celsius. (App. 119) Further, the AMOCO findings are from a time period twenty years later than the deeds in this case and the actual definitions may or may not be accurately reflected by the Court's holding in AMOCO. However, this borrowed AMOCO conclusion as to how the "dictionaries of the day"

defined CBM became the fulcrum for the trial court's opinion and ruling in this case that, since CBM was not a "constituent of coal," the trial court could not rule in favor of the coal owner.

Having referenced the factual findings of the Supreme Court in AMOCO, (App. 34), the trial court then makes it clear that it actually adopted the same factual conclusion in this case later in the Opinion, holding that, "[a]s the Supreme Court in Amoco noted, 'most dictionaries of the day defined coal as the solid fuel resource and CBM as a distinct substance that escaped from coal during mining, rather than as part of the coal itself.'" (App. 36) The uncontested fact remains that none of the "dictionaries from the day" that were presented as evidence in this case[10] in any way support this conclusion; and since these other "dictionaries of the day" are not included in the trial record that has been supplied from the trial court, it is highly unlikely that the trial court actually reviewed any such dictionaries from other sources. Rather, it seems clear that, just like the litigants in this case, the trial court had no opportunity to actually examine these important evidentiary documents.

I. The decision in AMOCO is not controlling, concerns different issues, and does not apply Virginia law.

In AMOCO, there was a dispute arising from the meaning of "coal" reserved by the government in land patents granted under the Coal Lands Act of 1909 and 1910. It is a case of legislative interpretation, not deed construction. The Supreme Court sought to discern Congress' intent as to whether it reserved CBM when it reserved coal.

The majority in AMOCO focused primarily on the erratic history of land grants in the United States. 526 U.S. at 867-871. The legislation at issue there had its genesis in a coal famine that occurred in the West at the turn of the 20th Century as well as widespread fraud in the

[10] For example, defining the 19th century reference to "coal" as a word "commonly used to denote *all* kinds of mineral fuel" (App. 130); and embracing "all classes of mineral fuel that will ignite and burn with flame or incandescent heat..." (Id.)

administration of federal coal lands. Id. at 868. In 1906, President Theodore Roosevelt responded to the "crisis" by withdrawing 64 million acres of public land thought to contain coal, thereby outraging homesteaders. Id. at 869. As a result, Congress considered proposed bills, many of which had broad reservations of mineral including oil and natural gas, to re-grant the lands at issue. Id. Ultimately, however, Congress rejected those bills and passed the Coal Lands Act of 1909, which authorized the Federal Government, for the first time, to re-grant the lands at issue with a narrow reservation of only coal. Id. at 870. Some of these lands had previously been ceded to the United States by the Ute Indian Tribe in 1880 in connection with a swap for reservation land. These were returned, in trust, to the Utes in 1938, giving them equitable title to the coal reserved by the United States. Id. As successors in interest to the United States, the Utes argued that the reservation of coal in these Coal Land Acts also reserved CBM.

The specific issue was whether: (1) having taken land from the Ute Indians, (2) then having given it away to settlers, (3) then having taken it back from the settlers, (4) then acting to give it away again (but with a reservation of coal), did Congress intend to reserve CBM under these Acts when it reserved coal? The Court examined the events leading up to the Congressional Acts, considered the coal crisis which Congress was attempting to address, and found that Congress "was dealing with a practical subject in a practical way." Id. at 873. With this historic backdrop, the Court held that Congress "intended to reserve only the solid rock fuel that was mined, shipped throughout the country, and then burned to power the Nation's railroads, ships, and factories." (i.e., the thing that was the subject of the "crisis"). Id. at 875. In this rather brief analysis, the Court concluded that "the most natural interpretation of 'coal' as used in the 1909 and 1910 Acts does not encompass CBM gas." Id. at 880 (emphasis added).

The Supreme Court in AMOCO was not concerned with many of the issues of property law that would bind civilians. Nor did the Supreme Court consider Virginia law in reaching its determination of congressional intent. Moreover, the Supreme Court did not consider the definitions and encyclopedias relating to 19th century coal that were introduced into evidence in this case. Indeed, this was probably appropriate as the AMOCO case involved a different time period and a congressional record. Accordingly, the holdings in AMOCO are not applicable here; and, in any event, it was fundamentally unfair and erroneous for the trial court to extend its deference to the AMOCO holding to the point of adopting its factual findings.

J. Even if the 19th century understanding of the term "coal" does not establish that a grant of the coal necessarily included CBM, these definitions and the "integral connection" between coal and CBM were sufficient to establish a profound ambiguity in the severance deeds, which should be construed against the grantor plaintiffs.

The trial court specifically held that the deeds at issue were not ambiguous. (App. 40). Given the definitions that were presented by the coal owner from the 19th century and the facts related to the "integral connection" between coal and CBM both then and now, at the very least, the term "coal" can be interpreted in more than one way when viewed in the context of the issue presented here. It can quite reasonably be interpreted as the coal owner proposes, as intending to contain and/or convey CBM within the word "coal." And the plaintiff argues vehemently that it means just the opposite. While the mere existence of this dispute does not establish an ambiguity, the other surrounding facts and the latent nature of the dispute certainly do.

Even if this Court assumes that the trial court was correct that the 19th century "coal" definitions do not conclusively establish that CBM was considered to be a part of the coal, under no circumstances can it be denied that these definitions establish a common historic understanding that CBM was contained within the coal and that the mining of the coal caused the partial release of the

CBM and consequent explosion hazards for miners. An understanding that CBM was contained within the coal seam and the mined coal necessarily means that the parties would have understood that the surface owners could not have used the allegedly retained CBM without trespassing on the coal owner's property. Again, at the very least, these facts highlight an ambiguity as to whether the CBM was intended to be conveyed with the coal.

In much less extreme mineral cases, the Supreme Court of Virginia has had little difficulty in recognizing ambiguity. Buery v. Shelton, 151 Va. 28, 37-38, 144 S.E. 629, 631-632 (1928). In Buery, this Court dealt with the ambiguity in the term "mineral," ruling that:

> what the term includes differs as the facts of each case differ, and what the courts attempt to do is to ascertain what the parties intended, determining this from the language employed in the instrument, if that may be done with certainty, and if doubtful, then to call to their aid the facts and circumstances surrounding the transaction, so the court may view the situation of the parties when the instrument was executed.

Id.

So too, this Court has recognized ambiguities in many other contexts. E.g., Prospect Dev. Co. v. Bershader, 258 Va. 75, 84, 515 S.E.2d 291, 296 (1999) (term "premium lot" in a real estate contract was ambiguous); American Reliance Ins. Co. v. Mitchell, 238 Va. 543, 549, 385 S.E.2d 583, 586-587 (1989) (meaning of the terms "employee" and "loaned" in an insurance contract was ambiguous); Colony Council Bd. of Dirs. v. Hightower Enterprises, 228 Va. 197, 200, 319 S.E.2d 772, 774 (1984) (uncertainty as to the meaning of the word "unsold" created an ambiguity that should have been construed against the drafter); Dart Drug Corp. v. Nicholakos, 221 Va. 989, 993, 277 S.E.2d 155, 157 (1981) (lease language as to "additions" or extensions" was ambiguous).

If viewed fairly, there is no doubt that an ambiguity is presented in the deeds at issue here. Accordingly, Virginia law requires that the ambiguity must be construed against the grantors -- the plaintiffs here. Buery, 151 Va. at 41, 144 S.E. at 633.

K. The trial court erred in following precedent from other jurisdictions rather than the basic deed construction law of Virginia (that would have required at least a finding of ambiguity and construction in favor of the grantee) and the mineral law of Virginia (that required an analysis of whether the CBM was substantially connected or an integral part of the coal).

Rather than follow the law of Virginia, the trial court essentially copied a 1999 United States Supreme Court case that is not binding authority on the issue presented here. AMOCO Prod. Co. v. Southern Ute Indian Tribe, 526 U.S. 865 (1999). The trial court accepted this authority as persuasive, if not binding. The AMOCO case, however, cannot negate Virginia authority about the construction of mineral deeds. It is not controlling authority in this case; and, as noted above, it is quite distinguishable.

In addition to the AMOCO case, the CBM ownership issue has been considered by the highest courts in several states that now have CBM production along with coal production. Those states have reached different rulings. The first such case was United States Steel Corp. v. Hoge, 468 A.2d 1380 (Pa. 1983). In Hoge, the Pennsylvania Supreme Court reviewed a 1920 severance deed that granted all the "coal" and reserved "the right to drill and operate through said coal for oil and gas without being liable for any damages." 468 A.2d at 1382. The court noted that "coalbed gas is always present in coal seams; its molecules are absorbed in micropores of coal, and even the smallest particle of coal always contains, and when exposed emits, some coalbed gas." Id. The Pennsylvania high court concluded that "such gas as is present in the coal, must

necessarily belong to the owner of the coal, so long as it remains within his property and subject to his exclusive dominion and control." Id. at 1383.

Alabama first addressed this issue in the case of Rayburn v. USX Corp., 1987 U.S. Dist. LEXIS 6920 (N.D. Ala. July 28, 1987), aff'd without opinion, 844 F.2d 796 (11th Cir. 1988). In Rayburn, the United States District Court, applying Alabama law, considered a 1960 severance deed in which USX was granted all minerals except oil and gas. The reserved rights as to oil and gas well exploration were subject to the requirement that all coal seams were to be encased or grouted off 50 feet above the top of the seam and 50 feet below the seam. Both parties claimed ownership to the CBM, but the court found that by including the language about grouting off the coal seam, the parties clearly expressed the intent that CBM was not included in the reservation. Further, at the time of the deed in 1960, CBM was not intended to be included in a reservation of "gas" because it was not commercially recoverable.

Notably, under Virginia law at least since 1966, Virginia Code § 45.1-122 (1966) has specified that, in the event that gas wells were drilled penetrating one or more coal beds, they should be drilled and cased in such a manner as to be sealed to the coal bed and areas thirty feet below and twenty feet above the same. Similar provisions applied to wells passing through areas where the coal had already been removed. Va. Code § 45.1-125. These code sections, like the deed in Rayburn, reflect a common understanding that the gas owner could not remove the coal owner's CBM. The idea that CBM was somehow reserved to the grantor of coal is only a very recent concept, born out of the hope that the grantor can now capitalize on what the coal owner has accepted as a responsibility, liability and duty for over a century.

The Alabama Supreme Court addressed this issue in NCNB Texas National Bank, N.A. v. West, 631 So.2d 212 (Ala. 1993), where that court reached a hybrid ownership holding. The

court held that, even where the grantor specifically reserved "all of the oil, gas, petroleum and sulfur...", a grant of "all the coal, and mining rights" conveyed an interest in the CBM within the coal seam. Id. at 220. However, the grantor, who had reserved to himself the "gas," retained an interest in the CBM only outside the coal seam. Noting that Alabama adheres to the "nonownership theory" and the "rule of capture,"[11] the court held that once the CBM leaves the seam, the coal owner loses ownership of it. Id. at 223-224. The practical effect of the NCNB holding is to bifurcate ownership between the gas owner and the coal owner, with the coal owner having the rights to CBM from FRAC wells and horizontal hole wells, but not from GOB wells where the gas has migrated out of the coal seam. Here, the trial court could have reached the same conclusion that would allow the coal owner to benefit from the wells that actually go into coal seam, fracture the coal, and then such the gas out of the coal to the surface. The plaintiffs would then benefit from the GOB or free gas that is liberated by the process of mining. Instead, the trial court's ruling requires that the plaintiffs receive all compensation for the CBM, even when it is sucked directly from the defendant's coal.

Montana addressed this issue in Carbon County v. Union Reserve Coal Company, 898 P.2d 680 (Mont. 1995), considering whether a 1984 severance deed of "all coal and coal rights" included the rights to CBM. The Montana Court noted that the commercial value of CBM was "certainly established by 1984." Id. at 684. It also distinguished the issue by application of Montana statutes which apparently require that determinations as to whether a substance is a gas should be made at the wellhead rather than *in situ*. Id. Based upon these considerations, the Court reversed the trial court's findings and ruled that the CBM was part of the gas estate and was not conveyed with the coal in 1984. The holding of the Montana court is

[11] The West court specifically acknowledged that "the majority of states followed the 'ownership-in-place' theory of ownership of natural gas." 631 So.2d at 224.

not particularly applicable to the facts of this case, which involve severance deeds from the 1880's and which do not have controlling statutes which dictate that the character of gas is determined at the wellhead rather than *in situ.*

Closer to home, on June 19, 2002, a McDowell County West Virginia Circuit Court, a jurisdiction very close to Buchanan County Virginia, addressed this issue in the context of a claim by a gas lessor that, when he entered in a conventional lease of "all oil and gas" in 1986, he did not include CBM, which is part of the coal estate. Energy Development Corp. v. Nancy Moss, et al, Civ. Action 98-C-173 (McDowell Co., W.Va., June 19, 2002).[12] The McDowell County court agreed, noting: "Coalbed methane can only be defined and described by reference to coal and the coal horizons. Inescapably, coalbed methane is associated with the coal estate. Coalbed gas cannot reasonably be viewed as unambiguously part of the gas estate." (App. 21, McDowell County court opinion, p. 12) In other words, the McDowell County court reached the opposite conclusion from the trial court here. That case has now been briefed on appeal before the West Virginia Supreme Court, Record No. 31238.

Ultimately, these cases from other jurisdictions can provide helpful information about the types of issues which have been considered as well as the factual background for CBM and its development. However, it is obvious that each court views this issue of CBM ownership based on the facts and circumstances of the particular case and the prevailing rules of construction and mineral rights in the jurisdiction at issue. As noted earlier, there are unique aspects of Virginia law which require that the present case be decided based on the deeds at issue and the general principles of mineral law in Virginia, as previously explained.

[12] A copy of this opinion is attached to this brief.

CONCLUSION

First, the trial court erred in applying a litmus "constituent part" test in determining whether the CBM was conveyed with the coal under these severance deeds, disregarding Virginia law and instead holding that, "the only finding that would allow the Court to rule in favor of the coal owners is that CBM is a constituent of the coal itself." This is, quite simply, not the law. Had the trial court applied the proper law to this case, it would have found that the CBM was and is integrally connected with the coal estate such that the conveyance of coal effectively conveyed the CBM contained within the coal.

Second, the trial court went outside the record in this case to adopt factual findings and evidence presented in an unrelated case with unrelated parties. The litigants here had no opportunity to examine this evidence and the trial court gave no advance warning that it intended to rely upon such evidence. There is no indication that the trial court actually examined the evidence.

Third, having created its own "constituent part" litmus test and having gone outside the record to find evidence that would not satisfy it, the trial court failed to apply the plain meaning of the word "coal" as presented in the evidence of this case from the time period of the deeds at issue. Had the trial court stayed within the bounds of the evidence before it, there is no doubt that CBM was contained within the common definitions of "coal" at the time of the severance deeds at issue.

Fourth, even assuming that the trial court could not have unequivocally held that the CBM was contained within the 19th century common understanding of the meaning of "coal," at the very least, the close association with coal created an ambiguity in the deeds on this issue. The resolution of this ambiguity should have then considered (1) the uncontested fact that it was

common knowledge that coal miners had to ventilate the CBM as a necessary part of their coal mining activities; (2) that ventilation occurred on these tracts; (3) that the surface owners never complained of these ventilation practices; (4) that CBM production methods require invasion and destruction of the coal estate; (5) that these deeds did not reserve the right of the surface owners to re-enter the coal estate for this purpose (or any other); (6) that Virginia law has construed mineral rights so as to exclude reserved interests that, while technically within the meaning of the words used in the deed, involve minerals that are integrally associated with the granted estate; and (7) ambiguities in such deeds are construed against the grantor. Had the trial court properly considered these issues, it would have found that the coal owner under these deeds also owns the CBM.

Accordingly, Harrison-Wyatt, LLC asks this Court to reverse the decision of the trial court.

Respectfully submitted,

HARRISON-WYATT, LLC

By: _____
Of Counsel

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CERTIFICATE OF SERVICE

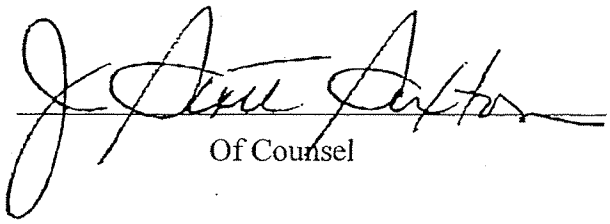
I hereby certify compliance with Rule 5:26(d) of the Rules of the Supreme Court of Virginia:

The appellant is Harrison-Wyatt, LLC, represented by J. Scott Sexton and Monica Taylor Monday, Gentry Locke Rakes & Moore, P. O. Box 40013, Roanoke, Virginia 24022-0013, (540) 983-9300.

The appellees are Donald Ratliff, Anna Pearl Ratliff, Bill Ratliff, Geneva Ratliff, Ira Ratliff, Juanita Ratliff, Connie Sue Ratliff, Dianna L. Graham, Curtis D. Graham, Jerry Raines, and Phyllis Raines, who are represented by Peter G. Glubiak, Glubiak Law Office, Post Office Box 144, Aylett, Virginia 23009, (804) 769-1616.

That on this 14th day of July 2003, the correct number of true and accurate copies of this Opening Brief of Appellant have been filed with the Supreme Court of Virginia and three copies have been mailed to counsel for the appellees.

The Appellant does not waive oral argument.



Of Counsel

IN THE CIRCUIT COURT OF McDOWELL COUNTY, WEST VIRGINIA

ENERGY DEVELOPMENT CORPORATION,
a Virginia corporation, PLAINTIFF,

v. CIVIL ACTION NO. 98-C-173

NANCY LOUISE MOSS, VIRGINIA SAYERS MOSS, JUDITH E. WADOSKY, C. DALE HARMAN, C. HENRY HARMAN, JR., ELIZABETH RUSS HARMAN, TRUSTEE, MARTIN L. HARMAN, JR., KATHERINE NICHOLSON, ESTHER PAULEY, DENNIS J. REIDY, EXECUTOR OF THE ESTATE OF NANCY H. DOONAN, DENNIS J. REIDY, TRUSTEE FOR ELEANOR H. WALL, DENNIS J. REIDY, TRUSTEE FOR LETITA LITTELL, HALL MINING COMPANY, a West Virginia corporation and LETITA H. THOMPSON,

and

GEOMET, INC., DEFENDANTS.

FINAL ORDER DENYING PLAINTIFF'S REQUEST FOR DECLARATORY RELIEF

On the 4th day of March, 2002, came the plaintiff by its president, William Evans, in person and by its attorneys, Kevin P. Oddo, and Danny W. Barie, defendants Nancy Louis Moss, et al, by Donald R. Johnson, their attorney, and GeoMet, Inc., a corporation, by Thomas McJunkin, its attorney, before the court for trial. At that time, witnesses for EDC and the defendants presented testimony and documentary evidence and were subject to cross-examination.

The court has thoroughly reviewed the filings of the parties herein, the evidence and exhibits submitted by the parties at trial and pertinent legal authorities. As a result of these

deliberations, and based on the findings of fact and conclusions of law set forth herein, the Court holds that the leases do not grant the oil and gas lessee the right to drill and produce coalbed methane from the coal seams covered by the lessees, and, accordingly, finds for the defendants and against the plaintiff, Energy Development Corporation.

This case involves a dispute over who has the right to develop coalbed methane to two tracts of land in Sandy River District, McDowell County, West Virginia. The central question is whether the lessee under two oil and gas leases has the right to drill for and produce coalbed methane from the coal seams in the properties covered by the leases. The action arises on the claim by the lessee, Energy Development Corporation, for declaratory judgment of its rights under the leases.

Procedural Background

The oil and gas leases at issue are both dated September 15, 1986. Except for the names of the lessors and property descriptions, the leases are identical. One lease is for 300 acres, more or less, on a tract known as the "Upper Slate Creek tract". This lease is of record in the McDowell County Clerk's Office in Deed Book 387, Page 179. The second lease is for 340 acres, more or less, on a tract know as the "Lower Slate Creek tract". This second lease is of record in the McDowell County Clerk's Office in Deed Book 387, Page 566.

Although the parties have now been realigned, this proceeding was initiated when the lessors, Nancy Louise Moss, et al., sued EDC for alleged breaches of the leases. In EDC's Answer and Counterclaim filed August 18, 1999, EDC asked the Court in Count II of its counterclaim to enter an order declaring "that EDC has the right to drill into the coal formations on the properties in question and produce natural gas therefrom, including coalbed methane."

By Order entered September 18, 2001, GeoMet, Inc. was permitted to intervene in opposition to EDC's assertion of entitlement to develop coalbed methane. GeoMet's intervention was based on GeoMet's interest as the lessee under two Coalbed Methane leases from the lessors, both dated August 15, 2001, relating to the same tracts described in the leases to EDC but limited exclusively to coalbed methane. Because all issues involved in the original litigation except EDC's claim respecting coalbed methane had been settled, GeoMet and the lessors, Nancy Louise Moss et al., moved for realignment of the parties with respect to that claim. By the court's Order entered October 22, 2001, the parties were realigned and the style of the case was changed to recognize EDC as the plaintiff and GeoMet and the lessors as the defendants.

On the 16th day of November, 2001, the parties appeared before the court on EDC's Motion for Summary Judgment. By Order of December 12, 2001, the court denied EDC's Motion for Summary Judgment and rejected EDC's contention that the language of the leases was unambiguous and entitled EDC to judgment as a matter of law. The court stated that the language of leases, like the language of deeds, must be interpreted and construed as of the date of execution and that a genuine issue of fact regarding the leases existed which required testimony and factual development.

At the pre-trial hearing on February 15, 2002, the defendants made a Motion to Identify an Expert Out of Time, which the court denied. Defendants further made a motion pursuant to West Virginia's so-called "Deadman's Statute," W.Va. Code § 57-3-1, to preclude the anticipated testimony at trial of EDC witnesses William Evans and Douglas Evans concerning a conversation which, based on their deposition testimony, they allegedly had during negotiation

of the leases in 1986 with C. Henry ("June") Harman, an individual lessor under one of the leases and president at the time of those negotiations of Hall Mining Company, a lessor under both leases. The basis of the defendants' motion was that C. Henry Harman, a named party to the original litigation, had died since commencement of the litigation and would therefore be unable to confront or contradict any statements EDC's witnesses might make regarding the alleged conversation. The court declined to rule on motion, deferring it for consideration, if necessary, during trial.

Finally, defendants moved for permission to introduce as an exception to the hearsay rule the sworn affidavit of recently-deceased Harris Hart, legal counsel to Hall Mining at the time the leases were negotiated and drafted in 1986. The affidavit had been prepared by Mr. Hart and submitted as an exhibit to the defendants' Memorandum in Opposition to EDC's Motion for Summary Judgment. The court ruled that the affidavit failed to meet the requirements for admissibility under the West Virginia Rules of Evidence Rule 804(b)(5), and denied the motion.

Summary of Positions

The leases in issue were entered into in 1986, before West Virginia law provided for the permitting and drilling of commercial coalbed methane wells and before any such wells had been drilled in McDowell County or elsewhere in the State. EDC's position is that the leases are unambiguous and that the court need not and should not look beyond the four corners of those documents. EDC argues that the leases apply to "all oil and gas" producible from formations above the statutory depth for shallow wells; that coalbed methane is a gas produced from coal seams; and that since coal seams are located above the statutory depth for shallow wells, the term

"all oil and gas" must be read as unambiguously granting EDC the right to produce coalbed methane from the lessors' coal seams in the subject properties.

The defendants' position is that the parties to the 1986 leases did not intend for EDC to have and did not grant EDC the right to produce coalbed methane from the coal retained by the lessors. The defendants argue that the leases, viewed in their entirety, are conventional oil and gas leases that granted EDC the right to drill "shallow wells" through coal seams to produce gas from gas-bearing formations located below coal horizons but not the right to drill wells into the lessor's coal seams to separate out and extract coalbed methane. Ambiguity in the leases regarding the right to develop coalbed methane is resolved, the defendants submit, by evidence plainly demonstrating that EDC did not regard itself as having the right and obligation to develop coalbed methane under the leases. The defendants thus dispute EDC's contention that the phrase "all oil and gas" encompasses the right to drill for and produce coalbed methane from the lessors' coal seams. Absent clear and unambiguous language specifically granting EDC the right to drill into the coal retained by the lessors, the defendants contend that EDC cannot claim that right.

Summary of Testimony

Trial of the matter was held before the court and without a jury on March 4, 2002. EDC presented its case in chief through its president, William Evans. On direct examination, Mr. Evans testified that EDC was formed in 1975 and drilled its first well that year; that although EDC has not yet drilled a coalbed methane well, it intends to do so later this year; and that he first became aware of the economic potential of coalbed methane in 1978 with passage of the 1978 Tax Reform Act, which provided for tax credits for the development of certain unconventional fuels including gas produced from coal seams. He testified further that through

trade journals, personal contact with a representative of U.S. Steel, and his awareness of the *U.S. Steel v. Hoge*, 468 A.2d 1380 (Penn. 1983) decision, he was specifically aware of coalbed methane and its economic potential at the time the leases were negotiated and entered into in 1986; and that EDC's right to develop coalbed methane was specifically covered by the leases, although no timetable was set for its development. He introduced the September 15, 1986 leases into evidence, and emphasized the language "all oil and gas" in all possible productive formations within the meaning of "shallow well," as defined by West Virginia law. He testified that coalbed methane is a gas and that coal seams occur above shallow well depth, that is, above the Onondaga Group. (Tr. 13-25).

On cross-examination, Mr. Evans testified that EDC has drilled approximately 150 natural gas wells since its inception, all of which are conventional shallow natural gas wells and none of which are coalbed methane wells. He also acknowledged that EDC has never drilled a coalbed methane well or sought a coalbed methane well permit, and that EDC could not produce any documents evidencing any intention on its part to drill a coalbed methane well. Prior to initiation of this legal action, EDC had never conducted well logs of coal seams to evaluate coalbed methane production potential or asked its geologists concerning the coalbed methane production potential of its leaseholds. (Tr. 25-29). Mr. Evans acknowledged that he and his father approached Mr. C. Henry Harman of Hall Mining in 1986 to solicit a right-of- way agreement and gas leases of the lessors' properties. (Tr. - 41). Mr. Evans admitted that he first became aware of the commercial potential of coalbed methane in 1978 and that prior to that time, the leases he entered into on behalf of EDC would not have consciously considered the inclusion of coalbed methane, although EDC's leases entered into prior to 1978, like the leases in issue

here, contain broad language all encompassing for gas (Tr. 35 - 38); and that for a gas lessee unaware of or indifferent to coalbed methane development, the prospect of coalbed methane production would not be a motivation for seeking or obtaining an oil and gas lease. (Tr. - 95). Finally, Mr. Evans acknowledged that oil, unlike coalbed methane, is not associated with a separate estate in land; and that in 1986 the West Virginia Code provided solely for wells to be drilled and cased through coal seams, not for the drilling of commercial coalbed methane wells. (Tr. 46 - 47).

Defendant GeoMet presented as its sole witness, Kim Walbe, a geologist and oil and gas consultant who was recognized by the court as an expert in geology and oil and gas permitting in West Virginia. Mr. Walbe presented testimony respecting the manner in which conventional gas wells and coalbed methane wells are drilled and produced. He emphasized that in developing a conventional well in West Virginia, the operator drills through the coal horizons to produce natural gas from the conventional gas-bearing formations located beneath the coals; and that after drilling through the coals, the operator "cases" or seals off the coal horizons to protect those horizons from the risk of natural gas coming back up the well bore from the lower gas-bearing formations. (Tr. 53 - 56). Mr. Walbe also emphasized that in 1986, West Virginia law provided no mechanism for the issuance of a permit to drill a well into a coal seam to commercially produce coalbed methane. (Tr. - 62). He testified that, in his view, an operator drilling down through coal seams who regarded that seam as a possible productive formation would engage in a series of tests or well logs to determine the potential of that horizon for the production of coalbed methane, stating that such an operator would definitely run a full suite of well logs or tests before casing off the coal horizon. (Tr. 57, 82, 86). Drilling a conventional well provides a

"window" of opportunity after drilling but before casing to protect the coal horizons during which wells may be logged to test the potential of the coals for the production of coalbed methane, he said.

Mr. Walbe testified that he had reviewed the well logs and records of the seven wells drilled by EDC on the leaseholds in question in this case; that each of these wells was a conventional well; and that no testing had been done by EDC on any well to gain information respecting the possible productive capability of the coal horizons. Mr. Walbe stated: "[t]hey were not looking then at the potential for coal seams." EDC's consultants had, however, looked at the potential of conventional gas-bearing horizons. Mr. Walbe noted that EDC's consultants' reports mention conventional horizons "but never the coals." (Tr. 58 - 60). The well records were introduced into evidence. Mr. Walbe also testified about the geology of coalbed methane. He testified that coal is not a conventional gas reservoir, and that to produce coalbed methane from a vertical well requires that the seam be stimulated by "fracing" of the coal in place. (Tr. - 96). He noted that fracing a coal seam could damage the layers between seams and greatly increase the chances of a roof fall during subsequent mining operations. (Tr. - 65). On cross-examination, he agreed that coalbed methane, although it could be viewed as either a liquid or a gas when totally absorbed and locked into the coal in place, is a gas when separated ("desorbed") from the coal and produced into a well bore. (Tr. - 95).

The lessors presented one witness, Dale Harman. Mr. Dale Harman testified that he is a named lessor under one of the leases and is a cousin of the now-deceased C. Henry Harman, and that although he had not participated directly in negotiation of the 1986 leases, he and his cousin C. Henry Harman, along with Hall Mining's counsel, Mr. Harris Hart, had discussed the leases

prior to execution. He stated that he had never heard of coalbed methane or its economic potential until 1990, and that he had not participated in any conversations about coalbed methane with C. Henry Harman or anyone else prior to that time. On cross- examination, he acknowledged that coal mining of the properties described in the leases was not considered economically viable in 1986 or currently. (Tr. 117). Mr. Harman testified that as a lessor himself under one of the leases in issue, he intended to grant EDC the right to produce gas, but did not intend to grant EDC the right to the coal estate or to develop coalbed methane. (Tr. 121). The two August 15, 2001 coalbed methane leases (and corresponding Memoranda) were entered into evidence through Mr. Harman (Tr. 100-111), as were other items of correspondence.

In rebuttal to Dale Harman's testimony, EDC presented Douglas Evans. Counsel for GeoMet renewed the defendants' motion to exclude testimony by the Evanses concerning the conversation which they allegedly had with C. Henry Harman in connection with negotiation of the 1986 leases. The court denied GeoMet's objection based on its view that the applicability of the Deadman's Statute, if any, had been waived by the presentation of Dale Harman as a witness on behalf of the defendants. Mr. Douglas Evans testified that in the spring of 1986, he and his son had called Mr. C. Henry Harman and arranged to meet with him at Mr. Harman's home in Abingdon, Virginia; that they traveled to his home and met with him in the living room and during that meeting specifically discussed the development of coalbed methane. Mr. Douglas Evans testified that C. Henry Harman was aware that tax credits were available for the production of coalbed methane and that he expressed a desire to have "all gas" developed, specifically stating his intention that EDC's rights and obligations would include the gas producible from the coals. (Tr. 123 - 128).

On cross-examination, Mr. Douglas Evans acknowledged that most of EDC's leases refer to "all oil and gas" and that such terminology is commonplace in oil and gas leases. (Tr. - 134). He was asked to provide specific details of the location where the meeting with Mr. Henry Harman allegedly took place. Although he had been able to recount the alleged conversation in detail, he was unable to remember whether the house where the meeting allegedly took place was located above the road or below the road, on a hill or on the level. He was not able to recall any details about the living room of Mr. Harman's home. (Tr. 132 - 133). When asked if he could recall any details that might indicate that he had in fact had been in Mr. Henry Harman's home, he was unable to produce any such details. (Tr. 137 - 139). EDC then put Mr. William Evans back on the stand, also in rebuttal to the defendants' witness. Mr. William Evans, who had been present during his father's testimony, testified substantially to the same points as Mr. Douglas Evans, namely that Mr. Henry Harman had specifically raised the matter of coalbed methane and asked that it be developed and included within the scope of the leases. Mr. William Evans testified that this is the reason the lease contains the words "all gas" and also why the leases contained the definition set forth in paragraph 11 of the leases. (Tr. - 149). When Mr. William Evans was asked on cross-examination whether or not he could recall any details that would supplement his father's recollection of the place where the alleged meeting had taken place, he likewise was unable to provide any such details. (Tr. - 150).

In surrebuttal to the testimony of Douglas and William Evans, Mr. Dale Harman testified that Mr. Henry Harman was not a forceful individual who, to Mr. Dale Harman's knowledge, had never met with anyone respecting the rights of Hall Mining without having either Hall Mining's attorney, Mr. Hart, or himself, Mr. Dale Harman, present. He further testified that Mr.

Henry Harman's home was located 300 yards from the road, through a gate, across a creek, high on a hill, and was unforgettably stuffed with the glass collection amassed by Mr. Henry Harman and his wife. (Tr. 151 - 154).

Discussion

While the court recognizes that the issues involved in coalbed methane cases can be nettlesome, the fundamental issue in this case is the intent of the parties under the subject leases. The facts involved in this case are not complicated, and few are in dispute.

Lessors owned the properties in issue in fee at the time the oil and gas leases were executed. The leases were executed before any commercial coalbed methane wells had yet been drilled in West Virginia and before West Virginia Legislature enacted legislation relating to coalbed methane development. Although the lessors clearly leased to the lessee broad rights to develop gas from the lessors' properties, they clearly retained the coal estate in the properties and the sole and exclusive right to develop, lease or convey that estate. Thus, the central issue for the court is whether at the time of execution of the leases in 1986 the parties mutually intended and agreed that the lessee's rights would encompass not only the right to produce gas from formations not associated with the coal estate but the right to drill directly into the lessors' coal seams to extract coalbed methane.

Although the court recognizes EDC's position, the court is convinced that the result EDC urges would not reflect the intent of the parties at the time they executed the leases. Rules of construction are designed to assist courts in divining the intent of contracting parties, not to inhibit judicial determination of that intent. "Construction of a writing is for the purpose of determining the true intent of the parties to it, and, to this end, the subject-matter, the situation of

the parties, and the surrounding circumstances at the time the writing was executed, should be taken into consideration." Curtis v. Meadows, Syl., 84 W.Va. 94, 99 S.E. 286 (1919).

Coalbed methane can only be defined and described by reference to coal and the coal horizons. Inescapably, coalbed methane is associated with the coal estate. Coalbed gas cannot reasonably be viewed as unambiguously part of the gas estate. Absent more explicit language than the phrase "all oil and gas" to resolve the uncertainty regarding the right to develop coalbed methane, the ambiguity in the leases is both latent and inherent. The implications of recovering coalbed methane from a coal seam are distinctly different from the implications of recovering conventional natural gas from gas bearing formations, which accounts for the fact that West Virginia has entirely separate statutes for dealing with conventional oil and gas wells on the one hand and coalbed methane wells on the other.

In construing the leases to give effect to the intent of the parties, the court's objective is to insure that the parties' intent is carried out and that they receive what they bargained for. The court is convinced that EDC has received the benefit of what it sought and bargained for under the leases, and that to now determine that it has the right to develop coalbed gas from the lessors' coal seams would constitute an unintended accretion to EDC's rights under the leases.

In general, with respect to an oil and gas lease executed before the commencement of coalbed methane development in West Virginia and before West Virginia law provided for such development, the court concludes that the right to develop coalbed methane -- involving as it necessarily does the right to invade and to potentially damage the coal estate -- is not unambiguously granted by language leasing "all gas" or "all oil and gas." Because of the inherent association of coalbed methane with the coal estate, the parties' intent regarding the

right to develop coalbed methane must be unambiguously clear. This conclusion works no hardship on an oil and gas lessee who sought and secured the right to produce natural gas before the commencement of commercial coalbed gas development in the State, and insures that both the right to drill into the lessor's coal seams and the obligation to develop the lessor's coalbed methane are based on clearly expressed language rather than on an ambiguous and unintended claim to that right.

Findings of Fact And Conclusions of Law

Findings of Fact

1. EDC is a Virginia corporation qualified to do business in the State of West Virginia. Although it has developed properties in four other states, EDC primarily drills and produces natural gas from wells in McDowell County, West Virginia (Tr. 13, 14).

2. Hall Mining Company is a West Virginia corporation engaged in the business of acquiring real property which it then leases for the development of coal, oil and gas and coalbed methane. It conducts business in West Virginia and Virginia.

3. GeoMet, Inc. is an Alabama corporation qualified to conduct business in West Virginia engaged in the business of drilling for and developing coalbed methane.

4. Coalbed methane is defined and described by reference to coal and the coal horizons in land. It has historically been regarded in West Virginia as a hazard to coal miners and to coal mining operations and only recently recognized a commercially productive resource.

5. Coalbed methane is formed during "coalification" and is a constituent of and within the coal in place. Unlike other compounds formed with coal, coalbed methane can

become separated ("desorbed") from the coal in place and migrate within and beyond the coal horizon.

6. Coalbed methane can become desorbed from the coal in place as a consequence of the physical fracturing of the coal. This occurs unavoidably in the process of coal mining and is done intentionally in the process of drilling into and "fracing" a coal seam to stimulate the production of coalbed methane.

7. The commercial production of coalbed methane from a coal seam requires that the developer penetrate into and fracture the coal in place.

8. Before coalbed methane is desorbed from the coal with which it was formed, it may be characterized as either a liquid or as a gas, although the characterization is not determinative on the issue of the intent of the parties to an oil and gas lease respecting the right of the lessee to drill into the lessor's coal seams to produce coalbed methane.

9. After coalbed methane is desorbed from the coal in place, coalbed methane is a gas, although recognizing coalbed methane as a gas is not determinative on the issue the intent of the parties to an oil and gas lease respecting the right of the lessee to drill into the lessor's coal seams to produce coalbed methane.

10. On September 15, 1986, EDC entered into two oil and gas leases on two separate tracts located in Sandy River District, McDowell County, West Virginia. The first lease, of record in the McDowell County Clerk's office in Deed Book 387, page 179, relates to 300 acres, more or less, known as the "Upper Slate Creek tract." The second lease, of record in the McDowell County Clerk's office in Deed Book 387, page 566, relates to 340 acres, more or less, known as the "Lower Slate Creek tract." Hall Mining Company is a lessor of both tracts.

Additional lessors under the Upper Slate Creek Tract are five individuals, who are members of the Moss family. Additional lessors under the Lower Slate Creek Tract are 15 other individuals, one in the capacity of trustee, who are members of the Harman family.

11. The leases at issue are identical in language except for the names of the lessors and the descriptions of the subject properties. The leases "lease, let and demise" to EDC "all of the oil and gas and all of the constituents of either in and under the land hereinafter described in all possible productive formations therein and thereunder within the definition and meaning of the term 'shallow well' as set forth and defined in Chapter 22, Article 7, Section 2 of the West Virginia Code, as amended, by the West Virginia Legislature in 1986."

12. The leases in issue are not characterized or identifiable as coalbed methane leases. The leases do not use the terms coalbed methane, coalbed gas, gas from coal or any comparable terminology.

13. The 1986 leases do not state specifically that the lessee has the right to drill into and "frac" the lessors' coal seams to extract gas from the lessors' coal seams. The leases contain no language addressing or acknowledging the operational implications for the development of the coal estate which could arise from the development of coalbed methane, and vice versa.

14. Paragraph 11 of the leases states that "the term 'gas' as used herein denotes gas in its natural state as produced from the well, including its contents of liquid hydrocarbons and their constituent vapors, and all other gases." Although EDC witness William Evans suggested that the purpose of this definition was to clarify that the leases were intended to encompass gas from coal, the court is not persuaded. The leases lack any other language indicating that the parties contemplated either the production of gas from coal or the impact of coalbed methane production

on the coal reserved to the lessors. Moreover, if the parties had specifically intended to include language to clarify the inclusion of coalbed methane, far more clear and direct language could have accomplished that end far more easily.

15. Paragraph 14 of the leases requires that the lessee provide the lessors with all available information, including electric logs on each well drilled, with respect to coal seams encountered in the process of drilling wells. The parties to the leases were explicitly aware that the lessors retained the coal in the properties and wished to receive information respecting the coal estate.

16. Viewed in their entirety, the leases contain no language that distinguish them from conventional oil and gas leases.

17. William Evans and Douglas Evans solicited the leases on behalf of the lessee, EDC, and EDC prepared and submitted the initial draft of the leases to Hall Mining for review.

18. Counsel for Hall Mining, Harris Hart, suggested revisions which were incorporated into the leases, although the record does not indicate that Mr. Hart had any input on any provision of the leases at issue here.

19. EDC's counsel controlled the drafting process and prepared the final execution drafts of the leases, as indicated by the fact that the leases as executed and recorded are on stationary embossed with the name of the law firm that represented EDC. EDC's legal counsel with respect to the leases was William Evans' brother and Douglas Evans' son, Wayne Evans, and the law firm Wayne Evans was with at that time. Wayne Evans did not testify at trial.

20. In the oil and gas industry, language in an oil and gas lease leasing to the lessee the right to develop "all gas" in the properties described is commonplace. Such language was

typical for EDC's oil and gas leases dating back to its inception, and its first oil and gas lease entered into in 1975 contained such language. Similar language is contained in the two 1986 leases between EDC and the lessors at issue in this case.

21. As acknowledged by the testimony on behalf of EDC, the production of coalbed methane from the properties described in the leases would require EDC (or any other developer of the coalbed methane in those properties) to fracture the coal.

22. Fracturing a coal seam to stimulate the production of coalbed methane can cause cracks in the strata above a coal seam and create a hazard to future coal mining operations and to the coal miners engaged in such operations.

23. West Virginia's Coalbed Methane law, W.Va Code § 22-21-1, et seq., enacted in 1994, specifically recognizes that the fracing of a coal seam has implications for the safety and economics of future coal mining operations. That law requires as a precondition to granting a coalbed methane well permit that the proposed well operator demonstrate that it has obtained the consent of the owner of the coal and demonstrate that the proposed coalbed methane well will not diminish the safety of future coal mining operations or the recoverability of the coal. W.Va Code § 22-21-7, -13.

24. As acknowledged by EDC witness William Evans, to an oil and gas lessee who is either unaware of or indifferent to the commercial potential of coalbed gas at the time a lease is entered into, the inclusion of coalbed gas under the leasehold rights granted to the lessee would not constitute an economic inducement or motivation to the lessee for entering into the lease.

25. Coalbed methane has been known and recognized in McDowell County and elsewhere in West Virginia as a hazard to coal miners and coal mining operations since coal mining began in the State over one hundred years ago.

26. Oil, unlike coalbed methane, is not by definition and geology associated with a separate and distinct estate in land.

27. At the time the leases in question were negotiated and drafted in 1986: (1) No coalbed methane wells had been drilled or permitted in McDowell County or anywhere else in West Virginia; (2) West Virginia law did not provide for or contemplate the permitting of wells to be drilled into coal seams for the commercial production of coalbed methane; (3) and coalbed methane was generally recognized in West Virginia and in McDowell County not as a commercial resource but as a hazardous gas associated with coal mining.

28. At the time the leases were negotiated and executed in 1986, EDC had drilled only conventional shallow natural gas wells. At that time, EDC had never drilled a coalbed methane well, permitted a coalbed methane well or tested for the potential productive capacity of a coal seam for the production of coalbed methane.

29. Since its inception in 1975 and continuing to the present, EDC has drilled approximately 150 wells, all of which are conventional shallow natural gas wells. EDC has never drilled or permitted a coalbed methane well or conducted any well logs or tests to evaluate the potential of the coal seams in its leaseholds for the production of coalbed methane. EDC has never requested its geologists to advise it about the coalbed methane potential of its leaseholds.

30. EDC did not produce any documents indicating that it has ever intended to drill a coalbed methane well.

31. Under West Virginia law, both as it existed in 1986 and continuously to the present, wells permitted as shallow wells are to be drilled through coal seams to produce natural gas from gas-bearing formations. Shallow wells are also required by law to be "cased" through the coal horizons.

32. Wells to be drilled into coal seams for the purpose of producing coalbed methane are permitted under a separate article of the West Virginia Code than are wells to be drilled into gas-bearing formations situated below coal horizons. The provisions of West Virginia law that provide for the permitting of wells to be drilled into coal seams for the commercial production of coalbed methane were first enacted by the West Virginia Legislature in 1994. W.Va. Code § 22-21-1, et seq.

33. Once a borehole is drilled to a target conventional natural gas formation, the most opportune time to conduct tests on the coal seams drilled through to reach the target formation to determine the properties and potential to capture the gas from the coal seams is prior to casing through the coal seams as required by law. EDC has cased through the coal seams in all of its 150 shallow wells without first testing to evaluate the potential of the coal seams for the production of coalbed methane. EDC ran well logs to evaluate the gas production potential of conventional gas-bearing formations located above the target formations of its wells but not the potential of the coal horizons, even though William Evans stated that he was aware of the commercial potential of coalbed methane and regarded it as covered by the leases.

34. In 1986, coalbed methane was recognized as a commercially producible resource in states other than West Virginia and Virginia; and the *U.S. Steel v. Hoge, supra*, decision had

been decided by the Supreme Court of Pennsylvania (in 1983), emphasizing the controversy regarding the ownership of coalbed methane and the right to develop coalbed methane.

35. EDC's President William Evans testified that at the time the leases were negotiated and executed in 1986, he was aware of the commercial potential of coalbed methane and was specifically aware of and familiar with the, *U.S. Steel v. Hoge, supra* decision and the fact that it created uncertainty about the right to develop coalbed methane.

36. The first wells in West Virginia that commercially produced coalbed methane were initially drilled not to produce and market coalbed methane but as "vent holes" to increase miner safety and to reduce the hazard of coalbed methane in conjunction with coal mining. The first well permitted specifically to capture coalbed methane was an experimental well in Raleigh County in 1991. A well was permitted for commercial capture of coalbed methane in Wyoming County in 1992. The first well permitted in McDowell County to capture to coalbed methane occurred in 1996. The commercial development of coalbed methane occurred in northern West Virginia, during the same period as it occurred in the southern part of the state.

37. EDC's witness William Evans testified that EDC intends to drill a coalbed methane well in the very near future, and that EDC owns a very small interest in an existing coalbed methane well drilled and operated by another entity. However, EDC never provided any documentary evidence indicating that it has ever intended to drill a coalbed methane well. Nor did EDC provide documentary evidence of its small minority interest in a coalbed methane well, although the coalbed methane well in which EDC alleges to have an interest was apparently not drilled under a conventional oil and gas lease but pursuant to an explicit coalbed methane lease, evidenced by a Memorandum of Coalbed Methane Lease which is part of the record in this case.

38. Parties to an oil and gas lease granting the lessee the right to produce "all oil and gas" have not by that language alone clearly expressed the intent and agreement to include the development of coalbed methane within the lessee's drilling rights. With respect to an oil and gas lease entered into in West Virginia prior to the development of coalbed methane in the State, the court finds that it is reasonable and appropriate to presume, subject to rebuttal, the absent language in the lease clearly expressing the right to develop coalbed methane the parties did not contemplate, intend or agree that the lessee would have that right.

39. William Evans was generally aware of the development of coalbed methane in other states in 1986, and was at that time aware of the U.S. Steel v. Hoge decision.

39. At the time of negotiation and execution of the leases, EDC was in the best position to insure that the leases were explicit with respect to EDC's drilling rights and obligations under the leases.

40. At the time of negotiation and execution of the leases between the lessors and EDC, the inclusion or exclusion of coalbed methane under the terms of the leases was not a motivating factor or incentive to EDC in soliciting and entering into those leases.

41. The record contains no credible evidence that Dale Harmon, a lessor under one of the leases, was aware of the commercial development of coalbed gas in 1986 or that he contemplated or intended for the leases to grant that right to EDC.

42. The record contains no credible evidence that C. Henry Harman, Dale Harman or any of the lessors to the 1986 leases intended, contemplated or agreed that EDC would have the right and obligation to develop coalbed gas from the lessors' coal seams.

43. At the time the leases were negotiated and executed in 1986, the lessors did not have plans to lease or develop the coal located in the tracts described in the leases, but held the coal for possible future development.

44. The lessors entered into two Coalbed Methane Leases dated August 15, 2001 with GeoMet, as lessee, granting GeoMet the right to extract coalbed methane only from the same tracts as described in the leases between the lessors and EDC. Those leases state expressly GeoMet's right to extract coalbed methane. Those leases also set forth explicit drilling requirements that GeoMet must develop at least two wells within three years under each lease, and contain language that specifically addresses the rights of GeoMet as the developer of coalbed methane in relation to the development of the coal within the tracts described in those leases.

Conclusions of Law

1. Coalbed methane is inherently associated with coal, coal seams and the coal estate in land. Coalbed methane is not unambiguously part of the gas estate.

2. Under the 1986 leases, EDC was granted no interest or rights in the coal or the coal estate of the lessors. The lessors retained exclusive right, dominion and control over the coal in place and the coal estate in the properties described, including the right to mine, lease or convey the right to mine the coal seams located in those properties.

3. Parties to an oil and gas lease may express their intention and agreement to grant the lessee the right to develop the coalbed methane in the lessor's coal seams by employing language that unambiguously expresses that coalbed methane is included within the lessee's rights and obligations.

4. An oil and gas lease is generally to be construed strictly against the lessee. Martin v. Consol. Coal & Oil Corp., 101 W. Va. 721, 133 S.E. 626, 628 (1926) ("It is a recognized doctrine of this court that oil and gas leases generally are to be construed liberally in favor of the lessor and strictly against the lessee."); United Fuel Gas Co. v. Cabot, 96 W. Va. 387, 122 S.E. 922, 925 (1924) ("Oil and gas leases are construed most strongly against those who solicit and prepare them.").

5. EDC solicited the 1986 leases at issue in this case and prepared the initial and final documents. If EDC intended for the leases to include coalbed methane within its drilling rights and obligations, it was in the best position to insure that the leases were clear and unambiguous in that regard.

6. The leases will be construed as of the date of their execution. Oresta v. Romano Bros., Syl. Pt. 2, 137 W. Va. 633, 73 S.E.2d 622 (1952).

7. The question of whether ambiguity exists in an instrument is a question of law to be decided by the court. Berkeley County Pub. Sch. Dist. v. Vitro Corp., 152 W. Va. 252, 162 S.E.2d 189 (1968), Fraternal Order of Police v. City of Fairmont, 196 W. Va. 97, 468 S.E.2d 712 (1996). ("Courts sometimes may ponder extrinsic evidence to determine whether an apparently clear term actually is uncertain.").

8. Latent ambiguity, which does not appear upon the face of the document, may be created by intrinsic facts or extraneous evidence. Kopf v. Lacey, 208 W. Va. 307, 540 S.E.2d 170, 175 (2000); Bell v. Wayne Gas Co., Syl. Pt. 2, 116 W. Va. 280, 181 S.E. 609 (1935) ("Oral testimony of the general usages of the gas business, which must have been in the minds of the parties at the time of entering into the contract, is admissible to explain an ambiguity in a written

contract for the purchase of gas, whether the ambiguity be latent or patent."); Belcher v. Big Four Coal & Coke Co., Syl., 68 W.Va. 716, 70 S.E. 712 (1911) ("Parol evidence is always admissible to explain latent ambiguities in a written instrument.").

9. In the subject leases, lessors leases, let and demised to the lessee the right to develop "all oil and gas" in certain formations, but did not grant lessee rights to or in the coal estate retained by the lessors and did not unambiguously state or indicate that the lessee would have the right to extract coalbed methane from the lessors' coal seams. EDC's claim of the right to invade and to potentially damage the lessors' coal seams to extract coalbed methane conflicts with the lessors' retention of the coal estate.

10. An oil and gas lease entered into before any commercial coalbed methane wells had been permitted and drilled in West Virginia and before West Virginia law contemplated coalbed methane development which leased to the lessee "all oil and gas" does not unambiguously grant the lessee the right to drill into the lessor's coal seams to produce coalbed methane. Because coalbed methane is unavoidably associated with coal and is not unambiguously part of the gas estate and since the leases were executed before any coalbed methane development had commenced in West Virginia, the 1986 leases are latently ambiguous on the issue of whether they granted EDC the right to drill into lessors' coal seams to develop coalbed methane.

11. An oil and gas lease entered into before any commercial coalbed methane wells had been permitted and drilled in West Virginia and before West Virginia law provided for the drilling and fracing of coal seams to extract and market coalbed gas does not give the oil and gas lessee the right to produce gas from coal seams retained by the lessor, absent language

specifically providing for or clearly indicating the intention of the parties to allow for that right.

12. The references in the leases to the term "shallow well" and to "possible productive formations" are also ambiguous. West Virginia law in 1986 did not provide for or contemplate the drilling of commercial coalbed methane wells and required that oil and gas wells to be cased through the coal seams (W. Va. Code § 22B-1-18, currently W. Va. Code § 2-6-18) and thus did not regard "shallow wells" as coalbed methane wells and did not recognize coal horizons as possible productive formations.

13. The law must be read into and with a contract. Carleton Mining & Power Co. v. West Virginia N. R.R. Co., 106 W. Va. 126, 145 S.E. 42, 45 (1928). When relying upon the statutory law to construe a lease, "statutes which relate to the same subject matter should be read and applied together so that the Legislature's intention can be gathered from the whole of the enactments." Rollyson v. Jordan, 518 S.E. 2d 372, 378 (1999).

14. The language contained in the 1986 leases is similar to the language in conventional oil and gas leases executed by EDC a decade earlier. Although the plaintiffs' testimony about when EDC first learned of the existence and commercial value of coalbed methane was inconsistent, the testimony of William Evans indicates that 1978 was the earliest time that EDC would have determined that coalbed methane could be commercially developed.

15. The conduct of parties during the years subsequent to execution of the leases may be examined to ascertain the intention of the parties regarding the inclusion of coalbed methane in the leases. West Virginia courts have repeatedly applied the doctrine of practical construction to oil and gas leases. Hays and Co. v. Ancro Oil & Gas Co., 186 W. Va. 153, 155-56, 411 S.E.2d 478, 480-81 (1991) (reversing grant of summary judgment and noting practical construction is

proper for use to construe ambiguities in an oil and gas lease); John D. Stump & Assocs., Inc. v. Cunningham Mem'l Park, Inc., Syl. Pt. 7, 187 W. Va. 438, 419, S.E.2d 699 (1992); Kelley, Gidley, Blair & Wolfe, Inc. v. City of Parkersburg, 190 W. Va. 406, 409, 438 S.E.2d 586, 589 (1993).

16. The conduct of EDC does not indicate that EDC regarded its drilling rights and obligations under the leases to extend to coalbed methane and is inconsistent with its claim of the right to develop the coalbed methane in the tracts described in the leases.

17. All provisions in a mineral lease must be considered when determining the intent of the parties. Marmet v. Watson, Syl. Para. 2, 106 W. Va. 429, 145 S.E. 744 (1928). Every part of a lease must be considered in arriving at the intention of the parties. United Fuel Gas Co. v. Cabot, et al., 96 W. Va. 387, 122 S.E. 922 (1924).

18. The leases contain no language conferring upon the lessee the right -- or the obligation -- to drill into the lessors' coal to develop coalbed methane. Viewed in their entirety, the leases are conventional oil and gas leases, and were not intended to confer upon the lessee the right to develop coalbed methane.

19. Under the leases, EDC intended to secure and the lessors intended to grant to EDC the right to produce all gas above shallow well depth not associated with the lessors' coal, but the parties to the leases did not intend to and did not grant EDC the right to produce coalbed gas from the lessors' coal seams.

20. EDC as the lessee under the leases has received the benefit of what it bargained for, and to now grant it the right to drill for and produce coalbed methane would give EDC a right it did not seek, solicit or secure.

21. The lessors had full right and authority to enter into the August 15, 2001 coalbed methane leases with GeoMet, and under those leases GeoMet has the full and unencumbered right to develop coalbed methane from the lessors' properties, subject to the terms of those leases.

ORDER

Accordingly, EDC's request for an Order declaring that, under the terms of the two September 15, 1986 leases at issue in this case, EDC has the right to drill in the coal formations on the properties in question and produce natural gas therefrom, including coalbed methane is hereby DENIED, and that this legal action is hereby DISMISSED, with prejudice.

It is further ORDERED, declared and decreed that under the two Coalbed Methane Leases between defendants in this case as lessors and the defendant GeoMet as lessee dated August 15, 2001, GeoMet has the exclusive right to develop coalbed methane from the properties described in those Coalbed Methane Leases; and, further, that those Coalbed Methane Leases are valid and enforceable in accordance with their terms.

The Clerk is directed to mail copies of this Order to:

Thomas McJunkin, Esquire,
Jackson & Kelly,

P. O. Box 553
Charleston, West Virginia 25322

Donald R. Johnson, Esquire,
Sugar Loaf Crossing
1950 Electric Road
Roanoke, Virginia 24018

Danny W. Barie, Esquire,
93 Wyoming Street, Suite 207
Welch, West Virginia 24801

Kevin P. Oddo, Esquire,
Flippin, Densmore, Morse, Rutherford & Jessee,
1800 First Union Tower
Drawer 1200
Roanoke, Virginia 24006

ENTER this Order the 19th day of June, 2002.

Rudolph J. Murensky II

RUDOLPH J. MURENSKY, II, JUDGE

A TRUE COPY TESTE:
SALLY W. CHILDERS, CLERK
BY Judy Thigpen DEPUTY CLERK