In The

Supreme Court of Virginia

RECORD NO. 131590

SWORDS CREEK LAND PARTNERSHIP,

Appellant,

v.

DOLLIE BELCHER, *et al.*,

Appellees.

BRIEF OF APPELLEES

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I. Introduction

Swords Creek appeals the sound decision of the circuit court which was based on controlling Virginia law, established by this Court and the Virginia General Assembly and faithfully applied by numerous circuit courts. Swords Creek advances arguments made by coal owners since this Court's ruling in *Harrison-Wyatt v. Ratliff* and consistently rejected. 267 Va. 549, 593 S.E.2d 234 (2004). Swords Creek's arguments amount to an "everything but the kitchen sink" approach, and are not supported by Virginia law. Not one court has ruled in favor of the arguments Swords Creek advances, because this Court's holding in *Harrison-Wyatt* was unequivocal and clear – coalbed methane gas ("CBM") is gas and belongs to the gas estate owner.

Circuit courts in Virginia have consistently applied *Harrison-Wyatt*, uniformly backing gas interest owners in disputes with coal owners over CBM ownership. For example, in *Pobst, et al. v. Garden Realty Corp.*, the circuit court held that pursuant to *Harrison-Wyatt* and Virginia Code § 45.1-361.21:1, a conveyance of "coal . . . and other substances" did not include CBM, even

where the gas was produced solely by fracturing the coal seams. Chancery No. 486-08 at 6 (May 2, 2011, Buchanan Cty. Cir. Ct.) (copy attached hereto as Exhibit A).

Further, in *E.L.E., LLC v. Bull Creek Coal Co.*, the circuit court summarized the coal owner's claim stating, "the [c]ounterclaim asserts that the Plaintiff [gas estate owner] has failed to allege that it has the right to enter the coal seams where the CBM is located and that the Defendant is entitled to gas royalties because it is the owner of the coal seams from which the CBM was produced." Chancery No. 753-09 (May 5, 2012, Buchanan Cty. Cir. Ct.) (copy attached hereto as Exhibit B). The same circuit court judge who authored the *Harrison-Wyatt* trial court opinion, sustained the plaintiff's demurrer to the coal owner's counterclaims, holding that the right to access the coal seam from which CBM is extracted is irrelevant to the issue of who owns the CBM. *Id*.

In *Robinson v. Hurt McGuire Heirs*, the *Harrison-Wyatt* trial court judge held that while the plaintiffs had no right to fracture the coal, "to the extent that the coal is fractured and coalbed

methane is produced (even without mining activity) and sold to third parties, the plaintiffs are entitled to be compensated as owners of the coalbed methane." Chancery No. 04-202 (March 18, 2005, Buchanan Cty. Cir. Ct.) (copy attached hereto as Exhibit C).

Additionally, in *Wade v. Hugh McRae Land Trust and Torch Oil & Gas Co.*, the circuit court held that "*[a]s a matter of law*, title to the coalbed methane gas at issue was not conveyed with the coal underlying Plaintiff's land." Chancery No. 09-476 (August 31, 2010, Buchanan Cty. Cir. Ct.) (copy attached hereto as Exhibit D).

The 1887 severance deed at issue ("1887 Deed") is a coal and timber conveyance to Swords Creek's predecessors, and does not convey minerals, gas or CBM specifically. The 1887 Deed is unambiguous and the Appellees ("Gas Owners"), as the gas estate owners, own the CBM.[1]

[1] The Gas Owners also herein incorporate their arguments made in the Appellees' Answer to Petition for Appeal.

II. Statement of the Case

There is no error in the circuit court's ruling, which rests soundly upon *Harrison-Wyatt* and Virginia Code §§ 45.1-361.1, *et seq*. ("Gas Act"). This appeal does not present any issues of first-impression, but rather, is Swords Creek's attempt to reargue *Harrison-Wyatt*.

The Gas Owners do not object to Swords Creek's proffer of the Statement of the Case, (Br. at 4) except as follows. Swords Creek incorrectly states, "The royalties that the [Gas] Owners seek are paid under a lease that Swords Creek entered in 1991, two decades before the [Gas] Owners filed the instant actions." *Id.* As the record and Joint Appendix reflect, the Gas Owners do <u>not</u> seek any royalties under Swords Creek's lease. They were force pooled by the Virginia Gas and Oil Board ("Board") under the provisions of the Gas Act, and were deemed to have leased their interests to the operator (CNX Gas Company, LLC ("CNX")) under the terms of the Board's orders. JA 27-94. Accordingly, the CBM royalties generated and placed into escrow at the Board's direction were generated and paid under the terms of the Board's

deemed lease provisions pursuant to the Gas Act, not under the terms of Swords Creek's private lease with CNX.

III. Statement of Facts

A. The Gas Act

This case arises out of the Gas Owners' claims to royalties owed to them for the production and sale of CBM attributable to their gas interests. The Virginia General Assembly enacted the Gas Act in 1990, at a time of uncertainty in Virginia as to whether CBM was owned by the owners of the gas estate or by the owners of the coal estate. The Gas Act allows an operator, such as CNX, to produce and sell CBM when the CBM's ownership is uncertain, provided that royalties owed to the CBM owner are held pending a final agreement between the conflicting claimants or a determination as to CBM ownership. *See* Va. Code Ann. §§ 45-1-361.21 & 22.

Pursuant to the Gas Act, CNX applied to the Board to establish "forced pooled" CBM units (units in which the operator had failed to obtain voluntary leases from all interests), which the Board approved and entered orders accordingly. Once force

pooled, a gas owner has the opportunity to elect to either 1) sell or lease his gas interest; 2) enter into an agreement to share in the operation of the well; or 3) be a nonparticipating operator of the well on a carried basis. Va. Code Ann. § 45.1-361.21(C)(7). If the gas owner does not make an election, the Gas Act provides that he shall be "deemed to have leased his gas or oil interest to the gas or oil well operator as the pooling order may provide." *Id.* at § 45.1-361.21(E). The Board's orders establish the lease terms for deemed leased parties, such as the Gas Owners. JA at 27-94.

Each of the Board's orders at issue here identified the Gas Owners as having an "Oil & Gas Fee Ownership," in conflict with Swords Creek's "Coal Fee Ownership." *Id.*[2] Because of this conflict, the Board ordered that royalties attributable to the Gas Owners' CBM interests be placed into the Board's escrow account. *See* JA 30, 42, 56, 68, 82. The Gas Owners seek in this proceeding a judicial determination of their CBM ownership and a release of the royalties in escrow that are attributable to their gas interests.

[2] Tellingly, Swords Creek never objected to the operators' characterization of Swords Creek's interests as coal only.

Swords Creek's allegation that the "Gas Act does not determine ownership of CBM, or create any preference as to whom royalties from CBM are awarded" is not true. Br. at 10. The Gas Act clearly and unequivocally states, "A conveyance, reservation, or exception of coal shall not be deemed to include coalbed methane gas." Va. Code Ann. § 45.1-361.21(1). The General Assembly pronounced just as this Court did in *Harrison-Wyatt*, that CBM is not part of the coal estate, period. *Id.*

Proceeds attributable to the Gas Owners' interests have been placed into the Board's escrow account, and the Gas Owners are entitled to receive, in accordance with the Gas Act and well-established law, a release of their royalties from escrow and future royalties payments attributable to their deemed leases. Swords Creek erroneously alleges that the Gas Owners seek **all** royalties from CBM production. Br. at 11. (emphasis added). The Gas Owners only seek the royalties due to them under their "deemed" leases. They do not allege, and never have alleged, that CNX cannot or should not pay to Swords Creek any separate/additional royalties that CNX may owe to Swords Creek

for drilling into and fracturing its coal seams. However, such compensation can only be in addition to and separate from the royalties owed by CNX to the Gas Owners under the terms of the deemed leases.

B. The 1887 Deed

Swords Creeks alleges that the 1887 Deed severed three things: "(1) the coal, (2) the timber, and (3) the 'privileges hereinafter specified.'" Br. at 6. Tellingly, this is not what Swords Creek argued to the circuit court or in its Petition For Appeal ("Petition") to this Court. Up until now, Swords Creek has argued that its predecessor-in-interest was granted "coal and other things." See JA at 98, 305 and Pet. at 5.

The Gas Owners pointed out in their Response to Swords Creek's Petition that Swords Creek's argument was a misrepresentation of the language in the 1887 Deed. Swords Creek now attempts to switch horses midstream, alleging that "other things," which it claims includes CBM, were not expressly granted but are included in the "privileges hereinafter specified." Br. at 6. This argument, aside from being improper because it is

now being raised for the first time, has no support in Virginia law or the deed at issue.

IV. Argument

A. Response to Assignment of Error No. 1: The Circuit Court Did Not Err in Determining That the Severance Deed Did Not Convey the Rights to CBM Or the Royalties Therefrom.

An appellate court reviews a trial court's interpretation of a deed *de novo*. *Fairfax County Redevelopment and Housing Auth. v. Riekse*, 281 Va. 441, 444, 707 S.E.2d 826, 828 (2011).

1. The 1887 Deed is Unambiguous

In interpreting a deed, a court will interpret the deed as a whole. *Virginian Ry. Co. v. Hood*, 152 Va. 254, 258 146, S.E.2d 284, 285 (1929). Additionally, a court must "ascertain the intention of the parties, gathered from the language used, and the general purpose and scope of the instrument in the light of surrounding circumstances. When such intention appears by giving the words their natural and ordinary meaning, technical rules of construction will not be invoked." *Bailey v. Town of Saltville*, 279 Va. 627, 634, 691 S.E.2d 491, 493 (2010).

As this Court recently confirmed, "[w]here the language of a deed clearly and unambiguously expresses the intention of the parties, no rules of construction should be used to defeat that intention." *CNX Gas Co., LLLC v. Rasnake*, 287 Va. 163, 166, 752 S.E.2d 865, 867 (2014).

The 1887 Deed plainly states that the grantors:

> [G]rant unto the said [grantees], **all the coal**, in, upon, or underlying a certain tract of land, **and the timber** and privileges hereinafter specified as appurtenant to said tract of land . . .

JA 16, 434. The deed conveyed coal and timber and the privileges necessary to <u>access</u> the coal and timber, and nothing else. The circuit court correctly recognized this, finding that the 1887 Deed conveyed coal and timber, and not CBM. JA 224, 411.

Aside from the fact that Swords Creek's argument that CBM was a "privilege hereinafter specified" is an improper one, as this is not what it argued below, its argument still fails. *See Prince Seating Corp. v. Rabideau*, 275 Va. 468, 469, 659 S.E.2d 305, 306-7 (2008) (holding that the appellant was barred from asserting an argument which was not made to the circuit court.) *See also* Rule 5:25 of the Rules of the Supreme Court of Virginia.

The *Harrison-Wyatt* trial court recognized that "[a]s a separate mineral, CBM is capable of comprising a severable estate in itself." JA 141. The trial court correctly held that CBM is part of the gas estate. It is not incorporated as a "privilege" to access the coal and timber estates granted, as Swords Creek now asks this Court to hold.

The 1887 Deed granted coal and timber and "privileges hereinafter specified as appurtenant" to the property. The 1887 Deed went on to specifically define those "privileges" as access necessary to mine the coal and harvest the timber.

The 1887 Deed states:

> And, **as appurtenant to said tract of land, and the rights hereinbefore granted**, all the timber except as hereinbefore excepted on said tract of land that may be necessary to use to successfully and conveniently mine said coal and other things **above mentioned and granted**; and the right to the said [grantees and their assigns] to enter on, over, upon and through said tract of land for the purpose of digging, mining, or otherwise securing the coal and other things in and on said tract of land **hereinbefore specified**, and removing the same from off said lands; the right to pass through, over, and upon said tract of land by railway or otherwise, to reach any other lands belonging to the said [grantees] for the purpose of digging for, mining, or otherwise securing the coal and other things **hereinbefore specified** and removing the same off such other land . . .

Id. (Emphasis added). The phrase “and other things” relied on by Swords Creek is qualified by the phrases “above mentioned and granted” and “hereinbefore specified.” The only property rights “above mentioned and granted” and “hereinbefore specified” are coal and timber. The circuit court correctly held that “[t]he term ‘and other things’ contained in the deed relates back to the timber included as appurtenant to the coal. . .” JA 410. The 1887 Deed simply does not contain a conveyance of minerals, gas or CBM specifically.

By misrepresenting the language of the 1887 Deed, Swords Creek cannot create ambiguity where there is none. Swords Creek acknowledges that CBM was not conveyed “explicitly in the deed.” Br. at 7. Nor, in this case, was CBM embraced through a conveyance of “gas” or “minerals” in general. *See Warren v. Clinchfield*, 166 Va. 524, 529, 186 S.E. 20 (1936) (holding that a conveyance of “all the coal and minerals of every description” conveyed the petroleum, oil and gas). As the *Harrison-Wyatt* trial court held, and this Court affirmed, “[t]he grant of coal rights does not include rights to CBM absent an express grant of

coalbed methane, natural gases, or minerals in general." 267 Va. at 553, 557.

The 1887 Deed is unambiguous. As a matter of law, the 1887 Deed's conveyance of coal and timber cannot be interpreted to include a conveyance of CBM. Accordingly, Swords Creek's claim to the CBM fails.

Even if the Court finds that the 1887 Deed is ambiguous, Swords Creek's claims still fail. If the language of a deed is "obscure and doubtful," a court may consider the surrounding circumstances and motives of the parties. *Rasnake*, 287 Va. at 166. To interpret the "other things" language as Swords Creek asks this Court to do would ignore the specific/limited conveyance language and mean that <u>everything</u>, including all minerals (such as oil and gas), gravel, clay and every other conceivable substance was conveyed. However, this is clearly not what the parties to the 1887 Deed intended, as they refrained from granting the property in fee simple absolute, and rather only referenced coal and timber and the rights to access the same.

2. The *Harrison-Wyatt* Deed Is Not Distinguishable

Swords Creek alleges that the 1887 Deed is distinguishable from the *Harrison-Wyatt* severance deed, in that the *Harrison-Wyatt* deed was a "coal only" deed and the 1887 Deed does not fall under the same category of deeds. Br. at 14. The categories of deeds which Swords Creek created are not based in law or fact and have no applicability here. The *Harrison-Wyatt* severance deed conveyed "the coal with seventy acres of timber for mining [and] road making purposes, of all the remaining tract of the 770 acres survey hereinbefore specified." JA 280.[3] The Harrison-Wyatt deed was not a "coal-only" deed, but rather, just like the 1887 Deed at issue here, conveyed coal and timber and delineated the rights to access the same. There is no material difference between the 1887 Deed and the deed at issue in *Harrison-Wyatt*.

[3] The Joint Appendix contains an incomplete copy of this *Harrison-Wyatt* severance deed. Appellee's have simultaneously filed a motion to supplement the Joint Appendix with a complete copy of this deed, attached hereto as Exhibit E.

3. ***Harrison-Wyatt*** **held that CBM, while located <u>in</u> the coal, is not part of the coal estate.**

Harrison-Wyatt recognized that "it was common knowledge that CBM was contained **within** the coal." 267 Va. at 553. (emphasis added). The *Harrison-Wyatt* trial court also held that the gas owner is entitled to CBM once separated from the coal, whether before, during or after the mining process. JA 294. This Court affirmed that holding. *Harrison-Wyatt*, 267 Va. at 557.

Neither *Harrison-Wyatt* or Va. Code Ann. § 45.1-361.21:1 distinguish between CBM from a gob well and CBM from a frac well. There is no difference – CBM is a gas and part of the gas estate regardless of how it is produced. Colloquially speaking, *Harrison-Wyatt* and Section 45.1-361.22:1 stand for the premise that "gas (including CBM) is gas and coal is coal." Both case law and statutory law in Virginia make it clear that a coal owner, by virtue of his coal ownership, does not own the CBM. There is no exception to this rule.

4. Swords Creek's Rights as a Coal Owner Are Irrelevant to Ownership of CBM.

Swords Creek argues its "exclusive" rights as a coal owner entitle Swords Creek to the CBM. Br. at 26. Swords Creek does not cite a single case where a Virginia court has accepted this argument, despite Virginia circuit court rulings to the contrary. *See E.L.E., LLC*, Chancery No. 753-09 and *Robinson*, Chancery No. 04-202.

The *Harrison-Wyatt* trial court recognized coal owners' rights, holding that "[t]he surface owner does not have the right to frac[ture] the coal in order to retrieve the CBM."[4] The *Harrison-Wyatt* trial court also held that "the coal owner must necessarily have the right to expel the CBM as an incident to mining coal but it does not follow that the coal owner implicitly owns the rights to the CBM, but '. . . simply reflects the established common-law right of the owner of one mineral estate to use, and even damage, a neighboring estate as necessary and reasonable to the extraction of his own minerals.'" JA 288 (citing

[4] This Court declined to address this issue in its affirmation of the circuit court's ruling. *Harrison-Wyatt*, 267 Va. at 557 n.3.

Amoco Production Co. v. Southern Ute Tribe, 526 U.S. 865, 878 (1999). *See also Geiger v. U.S.*, 456 F. Supp. 2d 885, 889 (W.D. Ky. 2006) (right of coal owner to vent CBM gas does not equate to ownership of the gas).

The *Harrison-Wyatt* trial court held, and this Court affirmed, that a "grant of coal ***rights*** does not include rights to CBM." *Id*. at 553, 557 (emphasis added). The trial court did not limit its holding to mere ownership of coal, but applied its holding to all the ***rights*** encompassed with a grant of coal. Accordingly, *Harrison-Wyatt* recognized, as did the court below here, that "[t]he right to access CBM . . . is irrelevant to the [Gas Owners'] rights to royalties as owners of the CBM." JA 177.

The *Harrison-Wyatt* trial court held that a "surface owner's rights to the CBM only extend to that which has separated from the coal." 267 Va. at 557 n.3. Swords Creek claims that this is a "significant[]" point (Br. at 27), but the trial court's statement was simply a recognition by the court that the Gas Act requires a gas operator to obtain the coal operator's consent to stimulate its coal seams, and that under the provisions of the Gas Act, CBM

may not be produced absent this consent by the coal operator. Va. Code Ann. § 45.1-361.29(F)(2).

In *Robinson v. Hurt McGuire Heirs*, the *Harrison-Wyatt* trial court judge held that "the plaintiffs own the coalbed methane once it is no longer absorbed in or attached to the coal." Chancery No. 04-202. The court recognized that "the plaintiffs have no right to fracture the coal. However, to the extent that the coal is fractured and coalbed methane is produced **(even without mining activity)** and sold to third parties, the plaintiffs are entitled to be compensated as owners of the coalbed methane." *Id.* (emphasis added). Reiterating the *Harrison-Wyatt* holding, the court held that the "plaintiffs should be compensated as owners of the coalbed methane **for any coalbed methane captured and sold** to third parties before, after or during the mining and venting process." *Id*. (emphasis added).

As the lower court recognized in this case, the Gas Owners do not seek this Court's permission to fracture Swords Creek's coal seams in order to retrieve CBM. It is undisputed that Swords

Creek voluntarily granted CNX permission to fracture its coal seams. Br. at 8, 10.

B. Response to Assignment of Error No. 2: The Circuit Court Correctly Found That Swords Creek's Right To Authorize Entry Into Its Coal Seam Is Inconsequential to Plaintiffs' Rights to the CBM Royalties.

"Because the decision whether to grant a demurrer is a question of law," this Court should review the circuit court's decision *de novo*. *Ayers v. Shaffer*, 286 Va. 212, 217, 748 S.E.2d 83, 86 (2013).

1. The Circuit Court Did Not Find That Swords Creek Cannot Be Compensated Under the Terms of Its Lease With CNX.

Swords Creek erroneously represents to this Court that the circuit court held that Swords Creek may not be compensated for granting CNX permission to enter its coal seams. Swords Creek's second assignment of error states, "The circuit court erred in concluding that Swords Creek's ownership of the coal and appurtenant rights do not include the right to control extraction and recovery of CBM by a lease *in consideration for the payment of a royalty*." Br. at 1. (emphasis added). The circuit court,

however, did not find that Swords Creek could not be separately compensated by CNX under the terms of its lease.

The circuit court correctly held that Swords Creek was not entitled to *the Gas Owners' CBM royalties*. Nothing in the circuit court's rulings prevents Swords Creek (as a coal owner, not a CBM owner) from recovering a payment from CNX for granting CNX permission to enter its coal seams. The circuit court merely, and correctly, held that as the coal owner Swords Creek is not entitled to the escrowed CBM royalties (which belong to the Gas Owners).

Whatever compensation Swords Creek is owed under the terms of its private lease with CNX is not affected by the circuit court's ruling. Swords Creek can seek to recover any compensation it is owed under the terms of its agreement with CNX, from CNX and CNX alone. Swords Creek cannot deprive the Gas Owners' of <u>their</u> CBM royalties.

2. *Harrison-Wyatt* Applies To All CBM.

Swords Creek asserts that *Harrison-Wyatt* did not address the ownership of CBM from frac wells, but only of CBM from gob

wells. Br. at 27. The trial court and this Court's opinions in *Harrison-Wyatt* were not limited to gob wells. The *Harrison-Wyatt* trial court held that "[t]he surface [gas estate] owners should be compensated as owners of the coalbed methane on any coalbed methane captured and sold to third parties before, during, or after the mining and venting process." JA 294 (emphasis added). The trial court's order applied to all methods of CBM production, including from frac wells, which are drilled "before" the mining and venting process. This Court affirmed, without limitation, this ruling of the trial court. 267 Va. at 557.

Harrison-Wyatt's opening Appellant's Brief criticized the trial court's failure to make a distinction between frac wells and gob wells. In doing so, Harrison-Wyatt (unsuccessfully) urged this Court to adopt the Alabama Supreme Court's ruling in *NCNB Texas Nat'l Bank, N.A. v. West*, 631 So.2d 212 (Ala. 1993), stating:

> The practical effect of the NCNB holding is to bifurcate ownership between the gas owner and 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 [the] coal seam, fracture the coal, and then [suck] 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 circuit court's ruling requires that the plaintiffs receive <u>all</u> compensation for the CBM, even when it is sucked directly from the defendant's coal.**

Harrison-Wyatt App.'s Br. at 34 (Excerpts attached hereto as Exhibit F) (underlining in original; bold emphasis added).

In its analysis, this Court specifically recognized and discussed the different types of CBM wells:

> There are three methods for fracturing coal in order to capture CBM as an economic resource. One method is by drilling wells from the surface into the coal seam. A second method is by the use of horizontal degasification wells from inside the coal mine. The third way is by employing what are called "gob" wells relating to long-wall mining.

Harrison-Wyatt, 593 S.E.2d at 235. The Court specifically considered the argument that Swords Creek again presses, and did not limit its holding to gob wells.

3. The Gas Owners Have Not Breached the Covenants of General Warranty and Quiet Possession.

Swords Creek claims that by the Gas Owners' defending their gas estate interest and claiming the associated CBM

royalties, they have breached the covenants of general warranty and quiet possession of the coal estate. Br. at 34. "[T]he grantors **conveyed the coal**" to Swords Creek's predecessors with "'the covenant that they will warrant generally the property **hereby conveyed'**" and that Swords Creek's predecessors-in-interest will have "quiet possession **of the said property**.' JA 222, 438." *Id*. (emphasis added). As Swords Creek itself argues, the covenants of general warranty and quiet possession apply to "the property hereby conveyed," that being coal and not gas. *Id.*

Swords Creek then argues that "[b]y virtue of filing their action seeking a declaration of both their ownership of the gas and their exclusive right to all royalties from its production, the Gas Owners have breached" the covenants of general warranty and quiet possession of the coal estate. Br. at 34. Clearly, as the court below recognized, this cannot be so.

Swords Creek argues that the "covenant of quiet possession negates the grantor's right to enter the property." Br. at 35 (citing *Sheffey's Ex'r v. Gardiner*, 79 Va. 313, 318 (1884)). As the court below found, the Gas Owners "have taken no action to

affect Swords Creek's coal or coal rights." JA 390. Nothing about this action interferes with Swords Creek's separate rights as a coal estate owner.

As the circuit court found in granting the demurrer to Swords Creek's Second Amended Counterclaim, "[The Gas Owners] have made no claims or demands on the coal interest conveyed to the defendant through this litigation that creates a cloud of its title." JA 225. The covenants of general warranty and quiet possession only extend to those estates which Swords Creek was granted – coal and timber. The Gas Owners make no claims or demands against the coal or timber estates and have not in any way interfered with the rights of the same. Swords Creek fails to explain, because it cannot, how the Gas Owners could be liable for actions by CNX to which Swords Creek consented. JA 107-126, 512-31, Br. at 8.

C. Response to Assignment of Error No. 3: The Circuit Court Correctly Rejected Swords Creek's Claim For Unjust Enrichment.

"Because the decision whether to grant a demurrer is a question of law," this Court should review the circuit court's

decision *de novo*. *Ayers v. Shaffer*, 286 Va. 212, 217, 748 S.E.2d 83, 86 (2013).

Swords Creek alleges that the circuit court applied an incorrect legal standard in sustaining Plaintiffs' Demurrer to count six of Swords Creek's Second Amended Counterclaim. Br. at 40. The circuit court correctly found that to prevail on a cause of action for unjust enrichment, the claimant "must assert '(1) that [they] conferred a benefit on the counter-defendant[s], (2) that the counter-defendant[s] knew of the benefit and should have reasonably expected to repay the counter-plaintiff, and (3) that the counter-defendant[s] accepted or retained the benefit without paying for its value.'" JA 226. (citing *In re Multi-Circuit Church Property Litigation*, 2012 Va. Cir. LEXIS 4, at *231 (Va. Cir. Jan. 10, 2012)); (citing *Schmidt v. Household Finance Corp.*, 276 Va. 108, 116, 661 S.E.2d 834, 838 (2008)).

Not only was the circuit court correct in its application of the law, Swords Creek pled this very standard in count six of its Second Amended Counterclaim. Addressing its unjust enrichment claim, Swords Creek stated:

> A cause of action arises when:
> a) The Defendant confers a benefit upon the Plaintiff.
> b) The Plaintiff knows that the benefit conferred is profitable and knows or should know that the Plaintiff should be expected to repay the Defendant for the benefit conferred and
> c) The Plaintiff accepts and retains such a benefit without paying for its value.

JA 216-17. Swords Creek pled this standard and the circuit court, accordingly, conducted the proper analysis and applied the correct legal standard. Swords Creek now effectively attempts to amend its counterclaim, again, and asks this Court to apply a different standard than that which it pled below.

In applying the legal standard that Swords Creek pled, the circuit court correctly found that Swords Creek could not demonstrate that the Gas Owners impliedly promised to pay for the fracturing of Swords Creek's coal seams. Not only has Swords Creek not rendered any service to the Gas Owners but the Gas Owners have never implied or promised that they would pay Swords Creek for the right to stimulate the coal seams. As such, Swords Creek is not entitled to the Gas Owners' royalties and cannot reasonably claim that the Gas Owners will be unjustly

enriched if they are allowed to receive CBM royalties that the Gas Owners rightfully own.

Even if this Court should find that the circuit court erroneously applied the standard proffered by Swords Creek, Swords Creek's claim of unjust enrichment still fails for two reasons. First, it is not inequitable that the Gas Owners are compensated under the terms of the deemed leases imposed on them in accordance with the Gas Act. Such result is exactly what the Gas Act anticipates and requires under the structure of the forced pooling process.

Secondly, contrary to Swords Creek's representations, the Gas Owners do not seek "all" or "exclusive" compensation. The Gas Owners seek only those royalties that are attributable to their gas interests, including the royalties held in the Board's escrow account and all future royalties attributable to their gas interests. The Gas Owners seek the royalties held in the Board's escrow account attributable to their gas interests and all future royalties of the same.

If Swords Creek is owed compensation for the fracturing of its coal seams, it is CNX who owes Swords Creek such compensation, not the Gas Owners. Swords Creek may seek any royalties that may be owed to them by CNX, but Swords Creek has no basis to claim a portion of the royalties separately owed by CNX to the Gas Owners under their deemed leases.

VI. Conclusion

There is no error in the circuit court's "careful consideration of all the evidence." JA 227. Swords Creek's arguments are nearly identical to those made before the *Harrison-Wyatt* circuit court and were rejected then and should be rejected now. The Gas Owners respectfully request that this Court affirm the decision of the circuit court.

Respectfully submitted,

DOLLIE BELCHER, DORIS DYE, RUBY LAWSON, PAUL RICHARDSON, MAE RICHARDSON AND RUTH RICHARDSON

By Counsel:

Dated: May 5th, 2014

_____

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VII. Certificate of Service

Pursuant to Rule 5:26(h), fifteen (15) copies of this Brief of Appellees, with one electronic copy on CD, were delivered to the Supreme Court of Virginia via hand delivery on May 5th, 2014. I further certify that three (3) copies, with one electronic copy on CD, of the same were served, UPS Ground Transportation, on May 5th, 2014 to:

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This the 5th day of May, 2014.

_____
Terrance Shea Cook

Addendum

EXHIBIT A

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Re: *Richard K. Pobst, et al. v Garden Realty Corporation*, Case No.: 486-08

Dear Counsel,

The above-styled case is now before the Court on the Plaintiff's Motion for Summary Judgment. Richard K. Pobst, et al. (Plaintiffs) filed a Complaint for Declaratory Judgment against Garden Realty Corporation, CNX Gas Company, LLC, and Island Creek Coal Company to determine the ownership of coalbed methane gas (CBM). Subsequent to the filing of the Complaint, CNX Gas Company, LLC and Island Creek Coal Company were dismissed as parties, leaving Garden Realty Corporation (Defendant) as the sole Defendant. On March 2, 2011, this Court conducted a hearing on the Plaintiff's Motion for Summary Judgment. After thorough review of the court file, submitted briefs, evidence, and oral arguments presented at the February 23, 2011

hearing, the Court now makes the following ruling on the Plaintiff's Motion for Summary Judgment.

I. Facts

The current dispute is the result of the extraction of CBM from a 250.22-acre tract of land (Subject Property). The Defendant in this case owns the coal estate. The Plaintiffs in this case assert that they are the owners of all oil and gas located in or upon the Subject Property. Prior to this action, the coal estate of the Subject Property was severed and conveyed to the Defendant by deed.

Pursuant to separate agreements with the Plaintiffs and the Defendant, CNX Gas, LLC is extracting CBM from the Subject Property. As part of this process, CNX Gas has physically stimulated the coal seam by a method known as fracturing. Fracturing of the coal seam results in CBM collecting within gas wells. CNX Gas has declared that there are conflicting ownership claims to the CBM located under the Subject Property, and therefore, to the gas royalties generated by the wells. These royalties have been deposited into an escrow account, in accordance with Virginia law, until the ownership issue is resolved.

A. The Deeds

There are three consecutive severance deeds, all involving the Subject Property, that are pertinent to the present case. First, a deed executed on December 4, 1937 (Prater-Pobst Deed), in which the Prater Land Company conveyed certain property rights to F.H. Combs and H. Claude Pobst. (Ex. C to Compl.). Second, a deed executed on December 28, 1937 (Pobst-Levisa Deed), in which H. Claude Pobst, Mary Alice Pobst, F.H. Combs, and Harriet R. Combs conveyed certain property rights to Levisa Coal Corporation. (Ex. D to Compl.). Third, a deed executed on January 8, 1941 (Levisa-Garden Deed), in which Levisa Coal conveyed certain property rights to the Defendant. (Ex. E to Compl.). An analysis of the explicit language contained within these three severance deeds is necessary to determine the ultimate outcome of this case.

The language of the Prater-Pobst Deed grants and conveys to F.H. Combs and H. Claude Pobst, "all of the coal, oil, and gas as well as all such other minerals, metal and timber as the party of the first part may own or be entitled to in or upon the lands hereinafter identified." (Ex. C to Compl.). The Prater-Pobst Deed subsequently identifies the Subject Property. *Id.*

The language of the Pobst-Levisa Deed grants and conveys to Levisa Coal, "all of the coal, metals, and timbers, together with all rights, privileges and easements incident thereto, in, or under the following described parcels of land...." (Ex. D to Compl.). The Pobst-Levisa Deed subsequently describes the Subject Property. *Id.*

The language of Deed C grants and conveys to the Defendant, "all of the coal, metals, and timber and other substances and all rights, privileges and easements... on or under" the Subject Property. (Ex. B to Compl.).

In sum, the Prater-Pobst Deed explicitly conveys the rights to coal, oil, gas, minerals, metals, and timber in or upon the Subject Property. The Pobst-Levisa Deed explicitly conveys the rights to coal, metals, and timber in or under the Subject Property. The Levisa-Garden Deed explicitly conveys the rights to coal, metals, and timber and other substances on or under the Subject Property.

Accordingly, when the Pobst-Levisa Deed was executed, it did not include the rights to oil, gas, or minerals, as the Prater-Pobst Deed had explicitly included. Indeed, the Pobst-Levisa Deed contains a narrower conveyance than the Prater-Pobst Deed.

B. The Pobst and Combs Transfers

By deed dated April 23, 1947, H. Claude Pobst and Mary Alice Pobst conveyed "all of the oil and gas in, on and under" their undivided one-half interest in the Subject Property to their children, John W. Pobst, Nancy S. Ellis and W. Kent Pobst. (Ex. F to Compl.). The Plaintiffs, Richard K. Pobst, Nancy C. Pobst, John W. Pobst, Jr., Virginia Lee Linwick, and Meredith Ellis Jennings are the heirs and successors of the children of H. Claude Pobst and Mary Alice Pobst.

F.H. Combs died in 1956, leaving two descendents, C.H. Combs and Helen Combs Johnson. The will of F.H. Combs is recorded in the Clerk's office of the Circuit Court of Buchanan County at Will Book 2, Page 554. C.H. Combs and Helen Combs Johnson each inherited a one-half interest of F.H. Combs one-half interest in the Subject Property. The Plaintiffs, Carol C. Irvin, Martha E. Combs, Frederick Harmon Combs II Testamentary Trust, Kelly Combs Necessary, Trustee, and Fairview Limited Partnership are the heirs and successors of the children of F.H. Comb and Harriet R. Combs.

Accordingly, each Plaintiff asserts the following ownership interest in the gas and oil rights of the Subject Property:

1. Richard K. Pobst- 8.33%
2. Nancy C. Pobst- 8.33%
3. John W. Pobst- 8.33%
4. Virginia Lee Linswick- 8.33%
5. Meredith Ellis Jennings- 8.33%
6. Frederick Harmon Combs II Testamentary Trust, Kelly Combs Necessary, Trustee- 8.33%
7. Carol C. Irvin- 8.33%
8. Martha E. Combs- 8.33%
9. Fairview Limited Partnership- 25%

This ownership ratio of the gas and oil rights of the Subject Property is not in dispute. (Def.'s Answer 14-15).

II. Applicable Law

A. *Harrison-Wyatt*

In *Harrison-Wyatt v Ratliff*, 267 Va. 549 S.E.2d 234 (2004), the Supreme Court of Virginia heard an appeal of a Buchanan County Circuit Court ruling involving a similar set of facts as those in the present case. In that case, Ratliff and others owned the surface and all minerals located upon and within the relevant property, except the coal. *Id.* at 550. Through a series of severance deeds, Harrison-Wyatt, LLC became the eventual owner of the coal estate. *Id.* The issue in *Harrison-Wyatt* was whether title to the CBM passed with the severance of the coal estate. *Id.* Harrison-Wyatt contended that the owner of the coal estate was also the owner of the CBM. *Id.* The surface owners filed for declaratory judgment asking the Court to determine the owner of the CBM. *Id.* The Circuit Court entered judgment in favor of the surface owner and the Supreme Court of Virginia affirmed. *Id.* at 557.

In deciding *Harrison-Wyatt*, the Circuit Court examined the language of the concerned severance deeds and the definition of coal at the relevant time period. *Id.* at 553. From this examination, the Circuit Court determined that CBM is not a chemical constituent of coal and is a severable estate. *Id.* Accordingly, the Circuit Court determined that, "the grant of coal rights does not include rights to CBM absent an express grant of coalbed methane, natural gas, or minerals in general." *Id.* Therefore, in the event that a grantor executes a severance deed conveying the coal estate to a grantee, the grantor retains the CBM absent an express grant of CBM, natural gas, or minerals in general.

B. Virginia Code § 45.1-361.21:1.

Subsequent to the Supreme Court of Virginia's decision in *Harrison-Wyatt*, the Virginia Legislature enacted Virginia Code § 45.1-361.21:1. This portion of the Code serves to codify the decision of Harrison-Wyatt and states, in part, "a conveyance, reservation, or exception of coal shall not be deemed to include coalbed methane gas...." Va. Code Ann. § 45.1-361.21:1.

III. Discussion

A. Plaintiff's Argument

In resolving the ultimate issue of this case, the Plaintiffs would have the court adopt the following reasoning: (1) the Pobst-Levisa Deed did not make an express grant

of coalbed methane, natural gas, or minerals in general; (2) without such an express grant, the rights to CBM did not pass to Levisa Coal through the execution of the Pobst-Levisa Deed; (3) therefore, Levisa Coal could not subsequently convey the CBM to the Defendant in the Levisa-Garden Deed; and (4) consequently, the named heirs and successors of H. Claude Pobst and F.H. Combs own the CBM.

B. Defendant's Argument

The Defendant objects to this line of reasoning on two grounds.

i.

First, the Defendant proposes that *Harrison-Wyatt* does not result in the inflexible rule that a grant of coal rights does not include rights to CBM absent express language in the conveyance. Rather, the Defendant views *Harrison-Wyatt* as a guide for Courts to examine what has been conveyed in a deed. Specifically, the Defendant notes that in the Circuit Court's Letter Opinion, when interpreting the terms of the severance deeds specific to *Harrison-Wyatt*, it stated, "the Court is left with no alternative but to examine the terms used in light of the common understandings, along with other facts and circumstances, during that time period." (Op. at 5) In light of this statement, the Defendant argues that it was the intent of the parties to include a conveyance of the CBM upon the execution of the Levisa-Garden Deed.

In support of this, the Defendant points to the words "other substances" found in the Levisa-Garden Deed. (Ex. E to Compl.). In oral argument, Counsel for the Defendant asserted that the term "other substances" includes CBM. In his written brief, Counsel for Defendant presents several well-conceived reasons as to why "other substances" was intended to include CBM.

However, this argument cannot overcome fact that a grantor cannot convey what the grantor does not own. The Supreme Court of Virginia has held, when construing the terms of a deed:

> where the language in the deed... is clear, unambiguous, and explicit... a court called upon to construe such a deed should look no further than the four corners of the instrument under review. Furthermore, if the language is explicit and the intention is thereby free from doubt, such intention is controlling, if not contrary to law or to public policy, and auxiliary rules of construction should not be used.

Irby v Roberts, 256 Va. 324, 329 (1998).

The Pobst-Levisa Deed, which was executed in 1937, does not contain an express grant of coalbed methane, natural gas, or minerals in general. (Ex. D to Compl.) Furthermore, this Court finds that the language used in Pobst-Levisa Deed is clear, unambiguous, and explicit. As is such, Levisa Coal did not obtain the rights to the CBM from H. Claude Pobst, F.H. Combs, Mary Alice Pobst, and Harriet R. Combs. Consequently, it was impossible for Levisa Coal to subsequently convey those rights to the Defendant in the Levisa-Garden Deed.

ii.

In addition, the Defendant argues that if the Court were to rule in favor of the Plaintiffs, it would be permitting a trespass upon the Defendant's coal seam. This Court rejects this argument as it did in *Harrison-Wyatt*. As previously stated:

> the surface owner need not trespass on the coal estate to retrieve the CBM because the Court holds 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... Once the coal is removed, the surface owners retain the ownership of the resulting void and have full rights to retrieve the CBM left behind, as well as the rights to profit from CBM captured during the venting process.

(Op. at 7-8).

IV. Conclusion

Rule 1:11 of the Supreme Court of Virginia promulgates the standard for summary judgment. In part, Rule 1:11 states, "it must appear from the pleadings, an order made at a pretrial conference, or an admission in the proceedings, or after the court has sustained a motion to strike the evidence, that the movant is entitled to judgment." A Court may not grant summary judgment if any material fact is genuinely in dispute. *Carwile v Richmond Newspapers*, 196 Va. 1 (1954). Furthermore, all reasonable inferences must be drawn in favor on the non-moving party. *Andrews v Ring*, 266 Va. 311 (2003).

The language of the Pobst-Levisa Deed is clear and unambiguous. It does not contain an express grant of the gas estate to Levisa Coal. Rather, the Pobst-Levisa Deed conveys to Levisa Coal, "all the coal, metals, and timber." (Ex. D to Compl.). Stated earlier, CBM is not conveyed with the coal estate absent express language. *Harrison-Wyatt*, 267 Va. at 553. Therefore, H. Claude Pobst, F.H. Combs, Mary Alice Pobst, and Harriet R. Combs retained ownership of the CBM when they executed the severance deed to Levisa Coal. As Levisa Coal did not acquire the rights to the CBM in 1937, it was

impossible for Levisa Coal to convey the CBM to the Defendant in the subsequent Levisa-Garden Deed.

There is no genuine issue of material fact before the Court at this time. The sole issue presently before the Court is the application of law to the language of the relevant severance deeds. As such, after drawing all reasonable inferences in favor of the Defendant, it appears to this Court that the Plaintiff is entitled to summary judgment. The Plaintiffs, in accordance with the interest ratio stated above, are the owners of the CBM located in or upon the Subject Property.

Mr. Sexton is directed to prepare an Order reflecting the findings of this Court and to forward the same to Mr. Whitesell and Mr. Gardner for endorsement and then to the Court for entry.

Sincerely,

Judge Keary R. Williams

KRW/cmb

EXHIBIT B

Commonwealth of Virginia

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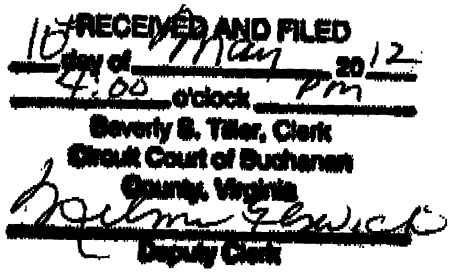


RE: *E.L.E., LLC v. Bull Creek Coal Company, LLLP*, Buchanan County Circuit Court Case No.: 753-09

Dear Counsel:

E.L.E., LLC (Plaintiff) filed a Motion for Judgment Pursuant to Declaratory Judgment Act Virginia Code 8.01-184 on July 9, 2009. The Motion asserts that the Plaintiff is the owner of certain tracts of land containing 100 acres more or less in Buchanan County, Virginia (Subject Property); that the Plaintiff is the owner of all rights to the Subject Property with exception to the coal rights pursuant to a coal severance deed; that Bull Creek Coal, LLLP (Defendant) currently owns the coal estate of the Subject Property; and that a conflict exists between the Defendant and the Plaintiff as to ownership of the CBM in the Subject Property. In accordance with Va. Code Ann. § 8.01-184 (2012), the Plaintiff seeks a determination from the Court over ownership of the CBM located within the Subject Property.

I. RELEVANT PROCEDURAL HISTORY

CNX was originally a named Defendant in this case, but on October 19, 2009, the Court found that no case or controversy had been pled as to CNX and entered an order dismissing CNX.

On September 10, 2010, the Plaintiff filed a Motion for Summary Judgment. The Motion for Summary Judgment was denied by Order dated January 7, 2011.

On December 8, 2010, the Defendant filed an Amended Motion for Judgment Pursuant to Declaratory Judgment Act Virginia Code 8.01-184. The Defendant responded on January 28, 2011 with an Answer, Counterclaim, Demurrer, and Motion to Dismiss for Failure to Join Necessary Parties.

On February 11, 2011, the Defendant filed a Demurrer to the Plaintiff's Counterclaim.

The Court now addresses the Defendant's Demurrer, the Motion to Dismiss for Failure to Join Necessary Parties, the Plaintiff's Demurrer to the Counterclaim, and the Plaintiff's Motion to File a Second Amended Motion for Judgment. Specifically, the Court denies both the Defendant's Demurrer and Motion to Dismiss, sustains the Plaintiff's Demurrer to the Counterclaim, and sustains the Plaintiff's Motion to File a Second Amended Motion for Judgment in part.

II. DEFENDANT'S DEMURRER

Rule 1:4(d) of the Supreme Court of Virginia provides, "every pleading shall state the facts on which the party relies in numbered paragraphs, and it shall be sufficient if it clearly informs the opposite party of the truth of the claim or defense." A demurrer can be sustained only if the allegations, considered in the light most favorable to the claimant, fail to state a cause of action. *W.S. Carnes, Inc. v. Board of Supervisors*, 252 Va. 377, 384, 478 S.E.2d 295, 300 (1996).

The Court finds that the Amended Motion for Judgment sufficiently states a cause of action. Specifically, the Plaintiff seeks a determination of CBM ownership where there appears to be a real conflict.

This Court has had the opportunity to hear this issue on several occasions. The conflict in this type of case consistently involves the following scenario with some variation: The property owner conveys the coal estate through the execution of a severance deed. The severance deed typically utilized fails to specifically address ownership of the CBM. In recent years, the value of CBM ownership has become increasingly appreciated. In situations where there are conflicting claims of ownership to CBM, the gas royalties are held in escrow until a court resolves the issue of ownership. This has led to a conflict between the surface owner (or the owner of the residual

estate) and the coal owner as to ownership of the CBM. These conflicts are typically resolved through the mechanism of a declaratory judgment action.

The Supreme Court of Virginia handled an aspect of this conflict in the case *Harrison-Wyatt v. Ratliff*, 267 Va. 549, 593 S.E.2d 234 (2004). In that case, the *Harrison-Wyatt* Court affirmed the trial court's ruling that "the grant of coal rights does not include rights to CBM absent an express grant of coalbed methane, natural gases, or minerals in general." *Id.* at 553, 293 S.E.2d at 236. Clearly, the Supreme Court of Virginia's ruling in that case supports the instant Amended Motion for Judgment in the face of a demurrer. The Plaintiff has stated a claim that sufficiently states a cause of action. The Defendant's Demurrer is overruled.

III. DEFENDANT'S MOTION TO DISMISS

The Defendant filed a Motion to Dismiss for Failure to Join Necessary Parties. In support thereof, the Defendant presents *Mendenhall v. Douglas L. Cooper, Inc.*, 239 Va. 71, 387 S.E.2d 468 (1990). On the issue of necessary parties, the *Mendenhall* Court stated:

> A court is powerless to proceed with a suit unless all necessary parties are properly before the court. We have said that
>
> [a necessary party's] interests in the subject matter of the suit, and in the relief sought, are so bound up with that of the other parties, that their legal presence as parties to the proceeding is an absolute necessity, without which the court cannot proceed. In such cases the court refuses to entertain the suit, when these parties cannot be subjected to its jurisdiction. *Bonsal*, 111 Va. at 597-98, 69 S.E. at 979 (quoting *Barney v. Baltimore City*, 73 U.S. (6 Wall.) 280, 284 (1867)). *Accord, Walt Robbins, Inc. v. Damon Corporation*, 232 Va. 43, 348 S.E.2d 223 (1986); *Buchanan Co. v. Smyth*, 115 Va. 704, 80 S.E. 794 (1914); *Sweeney v. Foster*, 112 Va. 499, 71 S.E. 548 (1911). *See also Kennedy Coal v. Buck'n Coal*, 140 Va. 37, 124 S.E. 482 (1924). It follows, therefore, that a suit, time-barred as to any necessary party, must be dismissed because such necessary party is not subject to the court's jurisdiction.
>
> Consequently, we must determine whether the new defendants in the present case are necessary parties. We define "necessary parties" broadly:
>
> **Where an individual is in the actual enjoyment of the subject matter, or has an interest in it, either in possession or expectancy, which is likely either to be defeated or diminished**

> **by the plaintiff's claim, in such case he has an immediate interest in resisting the demand, and all persons who have such immediate interests are necessary parties to the suit.** *Raney v. Four Thirty Seven Land Co.*, 233 Va. 513, 519-20, 357 S.E.2d 733, 736 (1987) (quoting *Gaddess v. Norris*, 102 Va. 625, 630, 46 S.E. 905, 907 (1904)) (citation omitted).

Mendenhall, 239 Va. at 74-75, 387 S.E.2d at 470 (1990) (emphasis added).

The Defendant argues that because landowners of adjacent tracts of land that contribute to one of the wells at issue in this case are not parties to this action, the Court must dismiss due to a lack of necessary parties. However, by virtue of the Amended Motion for Judgment, the subject of this case only involves the CBM located in the Subject Property as identified in deed book 486 page 693. The adjacent landowners do not have an interest in the CBM located within the Subject Property and therefore do not have an interest that is likely to be defeated or diminished by the Plaintiff's claim. The nature of the Amended Motion for Judgment will limit any ruling on ownership of CBM to the Subject Property; thus, no adjacent landowner's interest can be affected. In addition, the Court notes that the Defendant's own Counterclaim states that all necessary parties are before the Court. Consequently, the Defendant's Motion to Dismiss for Failure to Join Necessary Parties is overruled.

IV. PLAINTIFF'S DEMURRER

The Defendant filed a Counterclaim to the Plaintiff's Amended Motion for Judgment on January 28, 2011. The Counterclaim asserts that the Plaintiff has failed to allege that it has the right to enter the coal seams where the CBM is located and that the Defendant is entitled to gas royalties because it is the owner of the coal seams from which the CBM was produced. In response, the Plaintiff filed a Demurrer to the Defendant's Counterclaim.

This Court adopts the position taken by the Russell County Circuit Court in *Belcher v. Swords Creek Land Partnership*, Case No. CL11-283 and *Richardson v. Swords Creek Land Partnership*, Case No. CL11-321. In addressing a similar counterclaim in a case analogous to the instant action, Judge Michael L. Moore stated in his letter opinion:

> The defendant's counterclaim fails to state a cause of action. In its counterclaim, the defendant seeks the same royalties that the plaintiffs seek as CBM owners. The defendant bases this claim on its ownership of the coal seam from which the CBM was extracted. The right to access CBM by invasion of the defendant's coal seam, however, is irrelevant to the plaintiff's rights to royalties as owners of the CBM. Even if the defendant were entitled to some form of

> damages resulting from a trespass on its coal seam, these damages would be separate from the royalties due to the CBM owners.

Accordingly, the Russell County Circuit Court found that the counterclaim failed to allege facts leading to an actionable claim and sustained the plaintiff's demurrer to the defendant's counterclaim. For the same reasoning, this Court sustains the Plaintiff's Demurrer to the Defendant's Counterclaim. This is not to say definitively that the Defendant is not the owner of the CBM; the owner of the CBM will be ascertained through an interpretation of the relevant deeds. That issue is already properly before the Court in the form of the Amended Motion for Judgment.

V. PLAINTIFF'S MOTION TO FILE SECOND AMENDED MOTION FOR JUDGMENT FOR DECLARATORY RELEIF AND TO JOIN CNX GAS COMPANY, LLC, AS AN ADDITIONAL PARTY

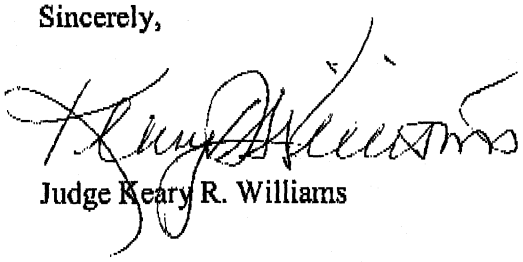
The Court grants the Plaintiff's Motion for the purposes of referencing the additional gas well units. The Court denies the addition of CNX as a defendant in this case. Again, on October 19, 2009, this Court entered an Order Dismissing CNX Gas Company, LLC and found that no case or controversy had been pled as to CNX. The Court also finds that CNX is not a necessary party in this case; they do not have an interest that will be defeated or diminished by the Court's determination of ownership of the CBM located in the Subject Property.

VI. CONCLUSION

This ruling does not reach the ultimate issue in this case—ownership CBM located in the Subject Property. The question of who owns the CBM will be settled through the analysis and interpretation of the relevant deeds. It is untimely for the Court to reach that issue at this point. Again, the Court denies both the Defendant's Demurrer and Motion to Dismiss and sustains the Plaintiff's Demurrer to the Counterclaim.

Mr. Cook is directed to prepare an Order reflecting the findings of the Court within 30 days and to forward the same to Mr. Gardner and Mr. Whitesell for endorsement within 30 days thereafter and then to the Court for entry.

Sincerely,



Judge Keary R. Williams

EXHIBIT C

VIRGINIA:

IN THE CIRCUIT COURT FOR THE COUNTY OF BUCHANAN

KYLE P. ROBINSON and EDITH A. ROBINSON,	)	
Plaintiffs,	)	CH04000202-00
v.	)	
HURT MCGUIRE HEIRS, *et al.*	)	

Defendants.

FINAL ORDER

THIS DAY came the parties to this action, by counsel, upon the plaintiffs' Motion for Judgment Pursuant to Declaratory Judgment Act, Virginia Code 8.01-184 and represented to the Court the following findings:

a) Plaintiffs, Kyle P. Robinson and Edith A. Robinson (collectively "Plaintiffs"), are the owners of all estates other than coal in certain real property described in Deed Book 221, page 458 of the Clerk's Office of the Circuit Court of Buchanan County (the "Real Estate").

b) The defendant, Charles Green, trustee for the Hurt-McGuire Land Trust ("Hurt McGuire") is the successor-in-title to the interest conveyed by severance deed dated June 11, 1903, where the grantors therein conveyed coal on and under the Real Estate to the grantees therein (Deed Book W, page 349) (the "Severance Deed"). Hurt McGuire owns the coal on the Real Estate together with rights incident thereto.

c) The defendant, Reserve Coal Properties Company is the lessee of certain coal rights in the Real Estate. CNX Gas Company LLC is the lessee of gas, including coalbed methane gas and certain extraction rights in the Real Estate, under a lease from Hurt-McGuire.

d) For a period of years, coalbed methane has been commercially produced from the Real Estate at issue; and, pursuant to Virginia law, the royalties from the sale of such coalbed methane have been escrowed under the direction of the Virginia Oil and Gas Board pending a determination as to the ownership of the coalbed methane.

e) Generally, coalbed methane is produced either in advance of mining, as part of the mining process, following mining or independently of mining. In order to produce coalbed methane commercially, the coal seam must be fractured either by artificial means or by the mining process.

f) With regard to the Real Estate at issue, the ownership of coalbed methane is simply a question of whether it is owned by the residual owners, the plaintiffs (who have never separately severed the gas or mineral interests except for coal) or the coal owner, Hurt McGuire.

g) Coalbed methane is largely attached or "adsorbed" to the coal. Accordingly, the release of coalbed methane is inherent in coal mining; and ventilation for coalbed methane in coal mines is required by law.

Based on these findings, this Court rules as follows with regard to the Real Estate at issue:

1. The coal owner or operator has the right to expel or ventilate the coalbed methane as an incident to mining. However, such rights do not give the coal owner any ownership rights to the other mineral estates not conveyed to the coal owners.

2. The coal owner, Hurt McGuire, does not own the coalbed methane, as the Severance Deed does not expressly grant coalbed methane, natural gases, or minerals in general.

3. To the extent of their ownership in all estates other than coal, the plaintiffs own the coalbed methane once it is no longer adsorbed in or attached to the coal.

4. The plaintiffs have no right to fracture the coal. However, to the extent that the coal is fractured and coalbed methane is produced (even without mining activity) and sold to third parties, the plaintiffs are entitled to be compensated as owners of the coalbed methane.

5. The plaintiffs should be compensated as owners of the coalbed methane for any coalbed methane captured and sold to third parties before, during or after the mining and venting process.

6. This Order is a final order adjudication of the rights of the plaintiffs' to the coalbed methane on the Real Estate at issue. The plaintiffs shall be paid escrowed funds and future royalties from the production of coalbed methane on the Real Estate at issue according to their interests shown in any existing or revised Pooling Order by the Virginia Gas and Oil Board. Distribution of escrowed funds shall be made on or before the time period specified by Virginia law.

Entered this 18th day of March, 2005.

JUDGE

We ask for this Order:

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Glubiak Law Office
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Aylett, Virginia 23009
Counsel for Plaintiffs

16809/1/1247812.1

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Counsel for Charles Green, Trustee for Hurt McGuire Land Trusts

Stephen M. Hodges (VSB No.1220)
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Counsel for Reserve Coal Properties Company and
CNX Gas Company, LLC

Seen without objections:

_____
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EXHIBIT D

VIRGINIA:

IN THE CIRCUIT COURT FOR THE COUNTY OF BUCHANAN

SARAH KATHLEEN WADE, **Plaintiff,** **v.** **HUGH MACRAE LAND TRUST And TORCH OIL & GAS COMPANY, et al., a Delaware corporation,** **Defendants.**	**Civil Action No.: CL09-476**

ORDER GRANTING MOTION FOR SUMMARY JUDGMENT

This matter, having come before the Court on the Motion of Plaintiff Sarah Kathleen Wade ("Plaintiff") for Summary Judgment, and the Court having reviewed the papers submitted by the parties and having heard oral argument of counsel, and for good cause shown, hereby ORDERS:

1. Plaintiff brings this action, pursuant to Virginia Code § 8.01-184, as a suit for a declaration of rights under the Virginia Gas and Oil Act (the "Act"), Virginia Code § 45.1-361.1 *et. seq.* Specifically, Plaintiff seeks a determination under the Act that in connection with the ostensible ownership conflict between Defendants and Plaintiff regarding the parties' coalbed methane ownership rights in certain tracts, as a matter of controlling law under *Harrison-Wyatt v. Ratliff*, 267 Va. 549, 593 S.E.2d 234 (2004) and Virginia Code § 45.1-361.21:1, no such ownership conflict exists.

2. The Act states that "[t]he Board shall order payment . . . from the escrow account to conflicting claimants only after . . . a final decision of a court of competent

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jurisdiction adjudicating the ownership of coalbed methane gas as between them." §45.1-361.22.5 (emphasis added).

3. Pursuant to the express language of the statute, the ownership determination is binary: either the gas is owned by one conflicting claimant, or it is owned by the other conflicting claimant. Ownership conflicts under the Act are by definition limited to conflicts only between the named conflicting claimants.

4. It is undisputed that in 1997 and 1998, Defendant CNX filed with the Gas and Oil Board a series of forced pooling petitions that related to the tracts at issue in this case. In each of those petitions, CNX claimed that a conflict existed regarding ownership of the coalbed methane rights, which conflict required CNX to deposit all royalties into an escrow account.

5. In each of the petitions filed, pursuant to the statutory requirements, CNX identified the two "conflicting claimants": Sarah Kathleen Wade (the land owner) and Hugh Macrae Land Trust (the coal owner).

6. Consistent with the dictates of the Act, this Court's role is to determine whether an ownership conflict exists "as between" Ms. Wade and the Land Trust. If such a conflict exists, then the money should remain in escrow; if such a conflict does not exist, then the money must be released from escrow.

7. The Virginia Supreme Court held in *Ratliff* that when a surface owner or his predecessor-in-title "has conveyed all the coal in and under his land, title to the coal bed methane gas in the tract has not passed to the coal owner along with the coal."

8. Along the same lines, Virginia Code § 45.1-361.21:1, as amended, mandates that "a conveyance, reservation, or exception of coal shall not be deemed to include

coalbed methane gas, and in accordance with § 45.1-361.21:1(3), . . . an emergency exists and this act is in force from its passage. Approved by Governor - Chapter 730 (effective 4/13/10)."

9. Both *Ratliff* and the new statute stand for the basic proposition that when a landowner enters into a severance deed for coal only, the landowner retains the rights to the gas under her land. Thus, it is controlling Virginia law that when a landowner or her predecessors convey only coal to an operator through a severance deed or lease, there is a legal presumption that the landowner owns the rights to the gas under her land.

10. That presumption is rebuttable with admissible evidence that the other "conflicting party" named in the forced pooling petition owns the rights to the gas under the landowner's land. The coal or gas operator bears the evidentiary burden to come forward with such evidence of ownership. In the absence of such evidence, there is no ownership conflict "as between" the conflicting parties under the Act.

11. Turning to the facts of this case, Plaintiff has provided the Court with undisputed evidence that the severance deed related to the tracts in question conveyed only coal. *See* Complaint, Ex. F. As a matter of law, title to the coalbed methane gas at issue was not conveyed with the coal underlying Plaintiff's land.

12. This coal-only severance deed creates a legal presumption that Plaintiff owns the rights to the coalbed methane under her land.

13. To prove that an ownership conflict under §45.1-361.22.5 exists, the burden shifts to Defendants to adduce evidence that one of the other "conflicting parties" – and not Plaintiff – owns the rights to the gas.

14. Defendants have failed to produce any such evidence. Instead, Defendants argue that Plaintiff has not proven that she owns the gas. Defendants' attempts to shift the evidentiary burden to Plaintiff are unavailing.

15. Defendants have raised no questions of material fact that support their contention that there are conflicting ownership claims to the coalbed methane in the relevant tracts.

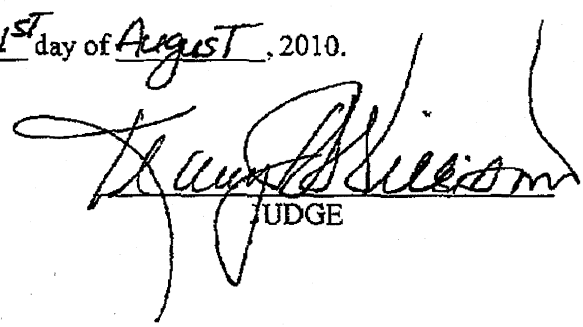
16. Because there are no issues of material fact in dispute regarding the ownership of the coalbed methane at issue, the Court grants Plaintiff's motion for summary judgment in full.

17. The Court rules that pursuant to §45.1-361.22.5 of the Act, the operator of the tracts at issue CNX is required within thirty days of notification of this decision to file with the Virginia Gas and Oil Board a petition to disburse from the escrow account to Plaintiff all principal and accrued interest associated with the tracts at issue, less the escrow account fees.

18. The Court directs the Virginia Gas and Oil Board to act expeditiously in disbursing Plaintiff's funds.

19. The Court retains jurisdiction over this matter until Plaintiff has received from the Board all principal and accrued interest, less escrow account fees.

SO ORDERED this 31st day of August, 2010.



JUDGE

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SEEN AND REQUESTED:

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Telephone: (804) 769-1616
Facsimile: (804) 769-1897
Counsel for Plaintiff

SEEN AND ~~AGREED~~ OBJECTED TO for reasons stated in oral argument, in Torch Oil & Gas Company's Response to Plaintiff's Motion for Summary Judgment, and in Torch's July 29, 2010 letter to the Court, as well as the objections stated on the attached list.

Kathleen L. Wright, Esquire
GENTRY LOCKE RAKES & MOORE, LLP
P. O. Box 40013
Roanoke, Virginia 24022-0013
Counsel for Torch Oil & Gas Company

SEEN AND AGREED:

with permission

Stephen M. Hodges, Esquire
PENN, STUART & ESKRIDGE
P. O. Box 2288
Abingdon, Virginia 24212
Counsel for CNX Gas Company, LLC

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EXHIBIT E

Deed Book B page 440

This Deed made this the 17th day of June in the year of our Lord 1909 Between Abednego Ratliff and Mary Ratliff the wife of the said Abednego Ratliff of the County of Buchanan & State of Virginia of the first part and Frank Howard and James A. Fuller of the County of Tazewell & State of Virginia of the second part witnesseth That in consideration one Dollar & twenty five cents & fifty Dollars Cash in hand paid the receipt whereof is hereby acknowledged by the parties of the first part: the said first parties have sold unto the said Frank Howard & James A. Fuller parties of the second part by these presents do grant, bargain, sell & convey with Covenants of General warranty all the Coal, in, upon & underlying a certain tract or parcel of land lying in the County of Buchanan Virginia on both sides of Yarings branch of Garden Creek a tributary stream of Levisa fork of Sandy River the said tract of land of 770 acres purchased by the said Abednego Ratliff from Thomas W. Davis of Russell County Va. agent & attorney in fact for the Owners, this Deed conveys the Coal with Seventy acres of timber for mining & Road making purposes, of all the remaining part of the 770 acres survey hereinbefore specified after deducting therefrom 112 acres Deeded to Paris M. Ratliff and 91 acres to Abednego J. McGlothlin by the aforesaid Abednego Ratliff the aforesaid seventy acres of timber is to be taken off of the said land on the dividing between yarings branch & John A. Ratliff land the size of timber taken for mining and road making purposes is not to exceed 18 inches in diameter the aforesaid tract of land of 770 acres out of which the said Howard & Fuller has the Coal and Seventy acres of timber hereinbefore specified all the Coal in upon and underlying five hundred & fifty seven acres The Entire tract of eleven hundred and seventy acres is Bounded as follows to wit Beginning at 2 Spanish Lines & corner to a survey made in the name of L. White and Corner to Nelly McGlothlin thence S 83 W 52 p to a water oak and white oak on a high point S 25 W 44 p to a chestnut S 57 W 82 p to a chestnut oak & maple N 80 W 64 p to a gum N 8 W 44 p to a chestnut & chestnut oak N 60 W 20 p to a chestnut oak N 20 W 54 p to a chestnut and stump wood S 74 W 83 p to a chestnut N 51 W 44 p to 3 maples on top of the ridge dividing Yarings & Gorge branch thence running the ridge S 20 E 306 p crossing yarings branch to a chestnut [illegible] one hundred and fifty

Harden and on a line of Lehr's Vandikes and with his line S 17 E 100 p to a birch maple and chestnut corner to J. A. Ratliff Thence S 40 E 26 p to a chestnut oak & thence S 19 W 34 p to a white oak and hickory S 37 E 76 p to a maple S 71 E 11 p to a chestnut S 40 E 30 p to a chestnut oak S 14 E 21 p to a stone pine N 44 E 54 p to a white oak S 70 E 24 p to a sugar tree on a line on a line of the white hickory and with it S 21 W 115 p to a stone on the north yonge branch S 26 E 72 p to the Beginning Together with all necessary and convenient use of the surface for opening and developing mines Rights of way for passing to and from the same or through & around the said land to other lands belonging to the said Howard and Tiller their heirs and assigns and those claiming by through or under them to erect on said Tract of land such buildings as may be necessary for the mining of said of said Coal and the right to remove same from off said lands the right to said Howard & Tiller their heirs & assigns and all persons claiming by through or under them to enter upon over and through said tract of land for the purpose of digging mining or otherwise securing the Coal in and on said Tract of land hereinbefore specified & removing same from off of said lands the right to pass through over and upon said tract of land by Rail way or otherwise to reach any other lands belonging to the said Howard & Tiller or those claiming such other lands by through or under them for the purpose of digging mining or otherwise securing Coal and the said Mordecai Ratliff and the said Mary Ratliff his wife do covenant that they will warrant generally the property hereby conveyed that they have the right to convey the same to the said Frank Howard & James A. Tiller their heirs and assigns and that the said Howard and Tiller shall have quiet possession of the said property free from incumbrances. This deed further witnesseth: that the parties of the 1st part expressly reserves a vendors lien for the residue or deferred purchase money which is to be paid within Eighty days from the date or as soon thereafter as survey can be made and title perfected. Perfecting title is to be done at the expense of parties of the first part. The said Howard & Tiller is to have free access to water, to have and to hold to them their heirs and assigns forever. Witness the following signatures and seals the day and date first above written.

A. B. Ratliff (seal)
for
Mary J. Ratliff (seal)

EXHIBIT F

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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Counsel for Appellant

July 14, 2003

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A Division of Lantagne Duplicating Services

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.