Who Owns Coalbed Methane in West Virginia

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I. INTRODUCTION .......................... 603

II. GAS CASES ........................................ 604
A. West Virginia Policy Concerns .................. 605
B. Foreign Cases Defining “All Gas” ............... 605
C. Reconciling Foreign Cases with West Virginia Policy .... 607

III. CASES DEALING WITH RIGHT OF COAL GRANTEE TO USE SPACE .......................... 608

IV. COALBED METHANE CASES ...................... 609
A. Pennsylvania ........................................ 610
B. Alabama ............................................. 611
C. Montana .............................................. 614
D. Wyoming ............................................. 617
E. Virginia .............................................. 618

V. WEST VIRGINIA ........................................ 619

VI. QUESTIONS REMAINING AFTER MOSS .................. 621

VII. CONCLUSION AND RECOMMENDATIONS .................. 623

I. INTRODUCTION

The gas known as “firedamp,” “coalbed gas,” “coal seam gas,” or coalbed methane (“CBM”) is a type of methane gas produced in the coalification process.\(^1\) Historically, this gas was vented by coalmine operators because of the danger it presented to coal miners.\(^2\) However, recent technological developments allow CBM to be recovered and used as an energy resource similar to the

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2 See Lewin, supra note 1, at 632. Mixtures of 5-14% methane in the air are explosive, and such explosions have caused many mine disasters. ENCYCLOPEDIA BRITANNICA 70 (15th ed. 1985).
way natural gas is recovered and utilized. The value of CBM as an energy resource has led to the question of who has the right to mine CBM absent an express grant from the original owner. This Article will explore this question and examine the current case law to determine who should be given the right to extract CBM. Additionally, this Article will analyze the recent West Virginia Supreme Court of Appeals case Energy Development Corp. v. Moss and identify important questions that remain unanswered while highlighting important policy concerns the court seemed to adopt in Moss. These policy concerns include the willingness of the court to adopt a policy that closely examines the intent of the parties in a conveyance in order to protect the original landowner’s interest in CBM.

Section II discusses cases dealing with gas within the state of West Virginia and other states in order to show how these cases are shaping CBM law in the state. Section III discusses West Virginia caselaw concerning a coal owner’s ability to use the space left over after mining and how the court allows a coal owner to use non-coal resources in the coal seam. Section IV examines CBM cases from various states in order to demonstrate how other states have handled CBM issues. Section V discusses the recent West Virginia Supreme Court of Appeals decision Moss and illustrates important points of law that can be drawn from the case. Section VI discusses the important questions that have yet to be decided in West Virginia regarding CBM and how certain answers to these questions can affect CBM ownership in the state. Section VII concludes by giving my recommendation on how the court should answer the questions that remain regarding CBM.

II. GAS CASES

Owners who have been granted the gas rights on a property contend that CBM should be included in the grant because CBM, by its nature, is a type of gas. Therefore, it is necessary to examine case law concerning the rights of grantees who have been granted gas rights to determine whether CBM should be considered a type of gas.


5 “CBM is not pure methane, but it generally contains in excess of 80% methane, which is also the primary component of ‘natural gas.’” Jeff L. Lewin et. al., Unlocking the Fire: A Proposal for Judicial or Legislative Determination of the Ownership of Coalbed Methane, 94 W. Va. L. Rev. 563, 572 (1992). For further discussion of CBM’s makeup and how it naturally occurs, see id.
A. West Virginia Policy Concerns

In a 1990 West Virginia case, the Fourth Circuit held that there was no common law correlative right for property owners to equitably share in the production of the common gas pool. In Trent v. Energy Development Corp., Energy Development Corporation leased the rights to drill a gas well giving the grantor a one-eighth royalty. EDC claimed that it did not have to pay the contractual one-eighth royalty because the gas is subject to the "correlative rights" of gas that underlies both properties. The court rejected this argument and said that any right EDC has in the gas pool "arises not from the common law, but solely from EDC's contracts with those parties." Therefore, the contract should be examined carefully to determine the intent of the parties.

While West Virginia has held the contract controlling, another policy concern of West Virginia is that it favors the conservation and maximum recovery of oil and gas. The West Virginia Supreme Court of Appeals affirmed this policy when it allowed a lessor the opportunity to continue to operate a well after the lessee had decided to stop production. Instead of letting the lessee cease production and plug up the well, the court mandated that the lessee give the lessor the opportunity to purchase the well equipment from the lessee to continue production of gas. This decision demonstrates the West Virginia Supreme Court of Appeals' willingness to implement the above mentioned policy. In order to further the policy of conserving and producing the most oil and gas possible, the court essentially created a common law right in the lessor that the lessor historically did not have. Similarly, the court will take the policy of conserving and producing the most oil and gas possible into consideration when deciding who has the right to CBM and will attempt to maximize the gas production when formulating an answer.

B. Foreign Cases Defining "All Gas"

While West Virginia does not have cases that specifically discuss what constitutes a gas when the term "all gas" is used in a contract, a number of juris-

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6 See Trent v. Energy Development Corporation, 902 F.2d 1143, 1147 (4th Cir. 1990). "Correlative rights' is defined . . . as 'the reasonable opportunity of each person entitled thereto to recover and receive without waste the gas in and under a tract or tracts, or the equivalent thereof.'" Id. (quoting W. VA. CODE § 22C-7-2(7) (2002)).

7 See id. at 1144.

8 See id. at 1145.

9 See id. at 1147.


12 See id.
dictions have addressed this issue. The Colorado Court of Appeals ruled that the term "all gas" could refer to carbon dioxide as well as natural gas.\textsuperscript{13} In \textit{Hudgeons v. Tenneco Oil Co.}, the dispute was over a conveyance of all the interest on a certain parcel of land "except all oil and gas rights."\textsuperscript{14} The plaintiff argued that the conveyance did not except carbon dioxide and only included natural gas.\textsuperscript{15} The court, rejecting this argument, held that based on the clear meaning of the word "gas," carbon dioxide should be included in the exception.\textsuperscript{16} The court went on to say that because no language in the deed existed that removed carbon dioxide or any other gas from this category, it could hardly say that carbon dioxide should not be included in the exception.\textsuperscript{17} It should be noted that the court made this decision regarding a purposeful exception to a conveyance instead of an actual conveyance. If the conveyance instead of the exception was "all gas" rights, the court may have been more reluctant to include the carbon dioxide. The court may follow a general policy of not allowing a conveyance of a valuable asset unless it is clear that the original owner meant to transfer it. The United States District Court of Wyoming held that the term "natural gas" included all gases emerging at the wellhead.\textsuperscript{18} In \textit{Exxon Corp. v. Lujan}, the issue was whether carbon dioxide should be considered a "natural gas" for the purposes of the Mineral Leasing Act of 1920 (MLA).\textsuperscript{19} If carbon dioxide were included as a "natural gas," then Exxon would have to allow other companies to use its pipeline as required by the act.\textsuperscript{20} Exxon claimed that carbon dioxide should not be considered a "natural gas," which would have placed the pipeline under the Federal Land Policy and Management Act (FLPMA) and therefore not subject to such requirements.\textsuperscript{21} The court disagreed with Exxon and stated that the term "natural gas" only excludes those gases that are artificially produced.\textsuperscript{22} As carbon dioxide is a naturally occurring gas, it should be considered a "natural gas" under the MLA.\textsuperscript{23} While this case stands for the proposition that the term "natural gas" should not only include CBM but other


\textsuperscript{14} See id. at 22.

\textsuperscript{15} See id.

\textsuperscript{16} See id.

\textsuperscript{17} See id. at 22-23.

\textsuperscript{18} See Exxon Corp. v Lujan, 730 F. Supp. 1535, 1544 (D. Wyo. 1990).

\textsuperscript{19} See id. at 1536.

\textsuperscript{20} See id. at 1537.

\textsuperscript{21} See id.

\textsuperscript{22} See id. at 1545.

\textsuperscript{23} See id.
naturally occurring gases, this court did not have to consider the intent of the parties in an actual conveyance of "natural gas."\footnote{Similarly, the Supreme Court of Wyoming did not have this consideration when it ruled that carbon dioxide was included as a "gas" in a state gross product tax statute. Amoco Prod. Co. v. State, 751 P.2d 379, 381 (Wyo. 1988).}

Courts have held that helium is included in the granting of "gas," unless it was expressly reserved.\footnote{See N. Natural Gas Co. v. Grounds, 292 F. Supp. 619, 686 (D. Kan. 1968).} In \textit{Northern Natural Gas Co. v. Grounds}, the lessor argued that the term was ambiguous and therefore should be construed in favor of the lessor.\footnote{See \textit{id}. at 662; \textit{see also} Martin v. Consol. Coal & Oil Corp., 133 S.E. 626, 628 (W. Va. 1926) (holding that an ambiguous oil and gas lease will be interpreted in favor of the lessor and against the lessee).} As a result, the lessor claimed that "gas" should only include those mixtures known as hydrocarbons.\footnote{See N. Natural Gas Co., 292 F. Supp. at 661.} However, the court did not agree and held that the term "gas" is unambiguous and includes all gases that emerge at the wellhead unless a gas is expressly reserved.\footnote{See \textit{id}. at 686.}

\section{Reconciling Foreign Cases with West Virginia Policy}

Much of the foreign precedent that has been discussed has held that when the term "all gas" is used, it includes not only hydrocarbons but other types of gases as well. The courts focus on the language and declare that "all gas" should literally mean all types of gas, regardless of what the drafters may have actually had in mind when using the language. This foreign precedent focuses on the claim that "all gas" is an unambiguous term. On the other hand, according to \textit{Trent}, it has been held that all gas rights come from the contract and not from the common law.\footnote{See Trent, 902 F.2d at 1147.} An across the board ruling that the term "all gas" is unambiguous and includes all types of gas would seem to conflict with the policy espoused in \textit{Trent} because it would ignore the intentions of the parties when they made the contract. This type of ruling would ignore the fact that both parties may have known of the existence of CBM when making the lease and may have left out a specific grant on purpose. More than likely, the court will look at the contract and determine that "all gas" is an ambiguous term that can have more than one meaning in the context of oil and gas leases and hold that one should look at the intent of the parties.\footnote{See Griffin v. Fairmont Coal Co., 53 S.E. 24, 30 (W. Va. 1905) (holding that the intentions of the parties should be examined when a term is deemed ambiguous).}

As a result, the aforementioned foreign precedent might be helpful when trying to determine who owns CBM in a lease that was executed before
CBM became economically valuable. This would be true because, before it was known that CBM could be economically extracted, neither party could have intended to transfer CBM in the grant. The question then becomes whether the parties intended to grant all rights to "gases" that could become valuable in the future. This question is much more difficult to answer and the court could use the reasoning of the aforementioned foreign precedent to make a decision. On the other hand, the court could use other policy concerns such as the policy of developing the maximum recovery of oil and gas to determine that it would be beneficial for the coal grantee to obtain the right to CBM. The following section will explore cases that deal with the rights of coal owners to use the space after the coal has been mined.

III. CASES DEALING WITH RIGHT OF COAL GRANTEE TO USE SPACE AFTER COAL REMOVAL

Cases discussing the rights of a coal grantee to use the space after the coal has been removed should be examined to determine what rights a coal owner has in the remaining property. The West Virginia Supreme Court of Appeals has held that the owner of a seam of coal has a right to use the seam as a passageway to transport minerals from adjacent lands. In Robinson, the plaintiff claimed that the defendant did not have a right to use the passageways of a coalmine to transport minerals from adjacent mines because it was a menace to the surface owner. The grant was a grant of "all the coal, limestone rock, ores, and minerals..." on a particular tract of land. The court disagreed with the plaintiff, holding that the grantee had the "right to use the said passageways in such manner as will not unreasonably interfere with the enjoyment by plaintiff of his interest in the land." Additionally, the court said, "[t]he term 'minerals' in its most enlarged sense may be described as comprising all substances which now form or which once formed a part of the solid body of the earth, both external and internal."

The court's holding in Robinson may be important for this discussion for two reasons. First, the holding that there is a right to use the land to transport adjacent minerals may indicate that the court will allow the grantee to use all assets in the seam for the benefit of the grantee. Thus, the way is paved for

33 Id.
34 Id.
35 Id.
36 Id.
37 See also Fisher v. West Virginia Coal & Transp. Co., 73 S.E.2d 633, 639 (W. Va. 1952)(holding that a coal grantee has the right to use the empty space of a coal seam as a pas-
the court to rule that CBM should be included in the grant of coal. Second, the broad definition of the term "minerals" may indicate that the court would similarly define the term "gases" broadly as including more than actual natural gas. This proposition would tend to lead to the conclusion that CBM should be included in a grant of "all gas." It is difficult to determine whether the court will embrace either proposition espoused in Robinson and act accordingly.

The West Virginia Supreme Court of Appeals limited the holding of Robinson in Tate v. United Fuel Gas Co. In Tate, the issue involved was whether a mineral owner who vacated all of the natural gas from the stratum could retain control of the stratum so as to store gas in the stratum. The original owner excepted the minerals, which included natural gas, in the deed to the plaintiff. The defendant tried to argue that the Robinson case should be applied to the facts and accordingly, the defendant should be able to use the empty space in the stratum. The court rejected this argument and distinguished Tate from Robinson by saying that the defendant in Tate had exhausted all of the minerals in the stratum. As a result, the defendant did not have the right to use the space in the stratum in such a way that unreasonably interferes with the surface rights of the owner. This limitation of Robinson demonstrates the reluctance of the court to expand the rights given to mineral owners. Because the court included the term natural gas in its definition of minerals, this case can also be seen as a reluctance of the court to expand the rights of natural gas owners as well.

IV. COALBED METHANE CASES

This section will explore case law from Pennsylvania, Alabama, Montana, Wyoming, and Virginia that have examined the question of who owns CBM rights.

sageway to transport coal from an adjacent coal seam regardless of ambiguous language in deed that seemingly limited the right to use the space).

38 71 S.E.2d 65, 71 (W. Va. 1952).
39 Id.
40 Id.
41 Id.
42 Id.
43 Id.
A. Pennsylvania

The Supreme Court of Pennsylvania has held that CBM rights necessarily belong to the owner of coal unless otherwise conveyed in the deed.\(^\text{44}\) In \textit{United States Steel Corp. v. Hoge}, the question was whether the plaintiff, who was granted the coal rights, could prevent the defendant, who owned the gas rights, from drilling for CBM in the coal seam. The grant to the plaintiff was for "\textit{a\]^\text{ll} the coal . . . [t]\together with all the rights and privileges necessary and useful in the mining and removing of said coal, including the right of mining without leaving any support . . . , [and] the right of ventilation and drainage and of access to the mines for man and materials . . . .}"\(^\text{45}\) The grant also reserved "the right to drill and operate through said coal for oil and gas without being held liable for any damages."\(^\text{46}\) Later, the original landowner granted all of the reserved gas and oil rights to the defendant.\(^\text{47}\)

In examining this situation, the court first ruled "effect should be given to the intentions of the parties to the instrument."\(^\text{48}\) Therefore, intent of the parties was once again an important consideration. The court also ruled that the language of the deed should be examined and consideration should be given to what the language meant at the time it was written.\(^\text{49}\) Using these rules, the court held that there was no way that the parties could have intended for CBM to be included in the reservation of "all gas" in 1920.\(^\text{50}\) The court reasoned that CBM was considered a waste product at that time and would not have been reserved.\(^\text{51}\) The court then held that "as a general rule, subterranean gas is owned by whoever has title to the property in which the gas is resting."\(^\text{52}\) By this reasoning, the court came to the conclusion that "such gas as is present in coal must necessarily belong to the owner of the coal."\(^\text{53}\) As a result, the court ruled that the defendant owned the rights to the CBM that was in the actual coal seam.\(^\text{54}\) Additionally, the court said that any CBM that escapes to the upper stratum


\(^{45}\) \textit{Id.} at 1382.

\(^{46}\) \textit{Id.}

\(^{47}\) \textit{Id.}

\(^{48}\) \textit{Id.} at 1384.

\(^{49}\) \textit{See id.}

\(^{50}\) \textit{Id.} "The parties of the first part [surface owners] hereby reserve the right to drill and operate through said coal for oil and gas without being held liable for any damages." \textit{Id.} at 1382.

\(^{51}\) \textit{Id.} at 1384.

\(^{52}\) \textit{Id.} at 1383.

\(^{53}\) \textit{Id.}

\(^{54}\) \textit{Id.}
would be the property of the surface owner. Accordingly, the *Hoge* case illustrates a hardline rule that CBM is included within a coal grant unless explicitly reserved.

The policy concern of this rule is to make it as easy as possible for the coal owner to extract the coal out of the coal mine. If the rights to CBM were given to another individual, the coal owner would have to wait for the CBM owner to mine the gas before mining the coal. Given that the coal owner has historically had the right to vent the dangerous gas before mining coal, the court basically ruled that the coal owner should have the right to capture CBM for the sake of convenience. The West Virginia Supreme Court of Appeals may be inclined to follow the lead of Pennsylvania in order to protect the interest of the state's large coal industry.

**B. Alabama**

The Supreme Court of Alabama used the *Hoge* reasoning to hold that the grant of "coal" to someone necessarily implies a grant of CBM. In *Vines v. McKenzie Methane Corp.*, the plaintiff was a surface owner who sued the defendant, the coal owner, to collect damages for wrongfully extracting CBM from his land. In 1902, the original owner leased "all of the coal, iron ore, and other minerals, in, under, and upon" the property. The court stated that the issue in the case was whether the mineral lease in question conveyed the CBM. The court found that "the process of drilling for coalbed methane gas and mining for coal are inextricably intertwined." The court also noted that since 1888, the Supreme Court of Alabama has held "that one who is granted the exclusive right to mine coal upon a tract of land has the right of possession so far as is reasonably necessary to carry on his mining operations." The court then said that a ruling that does not give a coal owner the right to extract CBM would interfere with this right. On the other hand, the court limited its holding...

55 *Id.*
56 *Id.* at 1384.
57 *See* *Vines v. McKenzie Methane Corp.*, 619 So. 2d 1305, 1309 (Ala. 1993).
58 *See* *id.* at 1306.
59 *Id.*
60 *See* *id.* at 1307.
61 *Id.* at 1308.
62 *Id.* (citing *Williams v. Gibson*, 4 So. 350 (Ala. 1988)).
63 *Vines*, 619 So. 2d at 1308-09.
by explaining that it was "not inclined to hold that a grantor may never grant separate estates in coal and coalbed methane gas."\textsuperscript{64}

The Alabama Supreme Court talked about many of the policy considerations that were discussed in \textit{Hoge}. Both courts seemed to make their decision based on what would be best for the removal of coal from the coal seam.\textsuperscript{65} Similarly, both courts looked at the intent of the parties and determined that the parties could not have intended to include CBM in the conveyance.\textsuperscript{66} It should be noted that both of these cases involved deeds that were executed prior to the ability to economically exploit CBM.

While the language in these cases seems to strongly favor a position where CBM would always be tied to the coal, the cases could be interpreted narrowly. For instance, the court could proclaim that deeds executed after it was known that CBM was a valuable resource fall under a different rule. Instead, the court could assume that the grantor knew about the value of CBM. If this assumption would hold true, then the court might rule that one cannot convey CBM away unless a clear intention exists. This ruling would be based on the policy that a property owner should not be able to inadvertently convey a known valuable asset. The court would have to balance this policy consideration with that of assuring that the coal owner can effectively mine the coal. The balancing could lead the court to construct a different rule for this type of situation.

In a later case the Supreme Court of Alabama took a closer look at issues surrounding CBM and decided to limit the holding of \textit{Vines}.\textsuperscript{67} In \textit{West}, the plaintiff brought a suit to quiet title to the CBM gas on a piece of property against the defendant who owned the gas rights.\textsuperscript{68} The deed conveying the coal rights to the plaintiff included a reservation of

all of the . . . gas . . . in, on and under and that may be produced from any part [of the Property], together with . . . the full and exclusive right at all times to enter upon . . . and occupy said lands for the purpose of . . . developing the said lands and holdings for the production of . . . gas . . . and, in addition and without limiting the foregoing, each and every other right and privilege necessary and proper for the full enjoyment of the owner-

\textsuperscript{64} \textit{Id.} at 1309.

\textsuperscript{65} \textit{See U.S. Steel Corp.}, 468 A.2d at 1383; \textit{Vines}, 619 So. 2d at 1309.

\textsuperscript{66} \textit{See U.S. Steel Corp.}, 468 A.2d at 1384; \textit{Vines}, 619 So. 2d at 1309 ("Neither instrument bears any limiting language that would indicate that the grantor intended to retain any portion of any substance that could be characterized as a part of the coal or intended to grant anything less than total control over such a substance.").

\textsuperscript{67} \textit{See NCNB Texas Nat'l Bank v. West}, 631 So. 2d 212 ( Ala. 1993).

\textsuperscript{68} \textit{See id.}
ship of all such . . . gas . . . in, on, under and that may be produced from said lands and each and every right incident to Grantor's full ownership thereof.\textsuperscript{69}

The plaintiff urged the trial court to rule, as a matter of law, that the gas was a part of the coal estate, notwithstanding the language of the gas reservation.\textsuperscript{70} The trial court determined that the \textit{Vines} decision controlled this issue and accepted the ruling urged by the plaintiff.\textsuperscript{71}

On appeal, the court limited the \textit{Vines} decision by declaring it "held only that, when there is no reservation other than of surface rights, an express grant of 'all coal and other minerals' conveyed, and did not reserve in the grantor, an interest in coalbed methane gas."\textsuperscript{72} The court overturned the trial court's ruling that, as a matter of law, CBM is not included in a reservation of "all gas."\textsuperscript{73} The court found this ruling problematic because it would lead to the conclusion that CBM located outside of the coal seam would be owned by the coal owner.\textsuperscript{74} This conclusion would interfere with the intent of the conveyance because no scientific or legal basis exists "to support the proposition that coalbed methane gas should be treated as a resource separate and distinct from other natural gas, or from any other gas."\textsuperscript{75} Essentially, the court ruled that the fact that CBM was produced in the coal seam does not determine that CBM is a part of the coal estate.\textsuperscript{76} Instead, ownership of CBM "depends upon its location at the time the gas is recovered or 'captured,' at which time it is reduced to possession."\textsuperscript{77}

The Alabama Supreme Court went on to find that "[t]he grant of coal mining rights would be useless if it did not include the right to ventilate methane gas from the coal mining area, pursuant to the requirements of the law."	extsuperscript{78} Therefore, it is necessary to give the rights to all CBM located in the coal seam to the owner of the coal rights.\textsuperscript{79} This is mandated because "[t]he rights to 'all

\begin{thebibliography}{99}
\bibitem{69} Id. at 220.
\bibitem{70} Id.
\bibitem{71} Id. at 221.
\bibitem{72} Id.
\bibitem{73} Id. at 222-23.
\bibitem{74} Id. at 224.
\bibitem{75} Id. at 222.
\bibitem{76} Id.
\bibitem{77} Id. at 223.
\bibitem{78} Id. at 228.
\bibitem{79} See id.
\end{thebibliography}
gas' reserved by the grantor cannot . . . impair coal mining operations."\(^{80}\) As a result, the court ruled that "the reservation of coalbed methane gas does not include coalbed gas contained within its source coal seam, and that the holder of the coal estate has the right to recover in situ such gas as may be found within the coal seam."\(^{81}\) Nonetheless, "absent a clear showing to the contrary, the reservation of all gas includes the right to coalbed methane gas that migrates into other strata from out of the source coal beds where it formed."\(^{82}\)

The *West* decision clarified many points of law concerning CBM that were not discussed in *Vines*. This decision by the Alabama Supreme Court seemingly produced some favorable rulings for coal owners and also some favorable rulings for gas owners. These holdings may have been an attempt to appease both parties in an effort to interpret the law. The ruling that all CBM in the coal seam should belong to the coal owner is a reiteration of the policy that favored the removal of coal, which was espoused in *Hoge* and *Vines*.\(^{83}\) The court expanded the effect of this policy consideration even further in *West* with its ruling that the reservation of CBM does not include the gas located in the coal seam.\(^{84}\) This expansion of the rights of coal seam owners by the Alabama Supreme Court indicates that the court is not willing to allow a property owner to grant separate estates in the CBM located in the coal seam.

This holding gives a windfall to coal mine owners in Alabama because not only will they be able to mine the coal in the mine but they will also be able to retrieve CBM in the coal seam. Under the Alabama rule, this would hold true even if the original landowner attempted to grant CBM to another party. While this rule is effective in furthering the ability of the coal miner to mine his coal, it is harsh on the original property owner because he is unable to profit from a known resource present in the estate. A rule such as this is too rigid and gives no effect to the intent of the property owner. A property owner would not be able to maximize the profit to his land because he would be forced to include the CBM within the coal estate instead of being able to separate the estate and sell it in a larger market.

C. Montana

The Montana Supreme Court has taken a completely different approach in its treatment of the CBM issue.\(^{85}\) In *Carbon County*, the landowner executed

\(^{80}\) *Id.* at 229.

\(^{81}\) *Id.*

\(^{82}\) *Id.*

\(^{83}\) *See* *Hoge*, 468 A.2d at 1383; *Vines*, 619 So. 2d at 1308-09.

\(^{84}\) *See* *West*, 631 So. 2d at 228-29.

\(^{85}\) *Carbon County* v. *Union Reserve Coal Co.*, 898 P.2d 680 (Mont. 1995).
a deed and delivered it to the defendant on November 1, 1984. The deed conveyed "[a]ll coal and coal rights with the right of ingress and egress to mine and remove the same from the following described acreage." On August 21, 1990, the landowner then executed and delivered an oil and gas lease to the plaintiff that leased rights to "oil and all gas including coal seam methane of whatsoever nature or kind." The plaintiff soon after sought quiet title to the CBM in the coal seam. The defendant answered by asserting that the CBM was conveyed as a part of the coal estate and therefore a property of the defendant. The district court agreed with the Alabama and Pennsylvania foreign precedent and declared that CBM was transferred to the defendant as a part of the coal estate.

On appeal, the Montana Supreme Court determined that "the plain meaning of the language of the deed must be examined to determine the intent of the parties." Therefore, the court first decided that "coal seam methane gas is not a constituent part of coal and, thus, it may be severed from the coal estate." Like the court in West, the Montana Supreme Court reasoned that CBM could not be defined as coal because it was not a solid substance but was instead a gas. The court then looked at the language of the deed to determine whether a gas could have been conveyed in the phrase "coal and coal rights." The court pointed out that the grant did not mention gas of any kind and that the royalty clause only provided "for a per ton royalty on coal but did not provide for a royalty on the coal seam methane gas." These omissions were problematic for the coal owner because such omissions portrayed a lack of intent to convey CBM.

Next, the court turned to the defendant's claim that their control of the CBM estate was necessary so that the coal operator could protect its miners. Rejecting this argument, the court said that "the evidence at trial clearly demon-
strated that the owner of the gas estate can also safely extract and produce coal seam methane gas either in advance of or during coal mining operations. As a result, the rights to mine coal do not include the right to extract CBM for commercial purposes without specific language granting that right. However the rights to mine coal do include "a mutual, simultaneous right to extract and to capture such gas for safety purposes, incident to its actual coal mining operations." The court then declined to decide whether the CBM owner should be compensated for "gas extracted and captured incident to the coal owner's mining operations."

Unlike the Supreme Court of Alabama in West, the Supreme Court of Montana recognized that the property owner should be given the ability to convey away a CBM estate within the coal seam. The Supreme Court of Montana did not believe that the strict rule favoring the coal owner in all cases was necessary to protect coal miners. Instead, the court believed that a balancing of rights could occur by allowing the property owner to convey a CBM estate while giving the coal owner a right to ventilation when necessary for the safety of the miners. While the court allows a property owner to maximize his profits in this approach, problems could arise in the enforcement of the rights. For instance, if a CBM owner has not drained the coal seam and the coal owner wants to begin mining the coal, how long would the CBM owner be given to capture the CBM before the coal miner can go ahead and ventilate? Even the court in West identified the problem of whether the CBM owner would be entitled to the profits from CBM captured by the coal owner when it was necessary for safety. Either the court or the legislature would have to formulate a rule that would solve this problem. Because problems such as these would be created, it is easy to see why a court may not want to adopt a rule similar to the rule that was adopted in Carbon County simply for the sake of convenience. On the other hand, a court could be uneasy with the idea that a property owner is not allowed to get maximum value out of the resources on his property solely for the sake of convenience.

99 Id. at 689.
100 Id.
101 Id.
102 Id.
103 West, 631 So. 2d at 228; Carbon County, 898 P.2d at 688.
104 Carbon County, 898 P.2d at 688-89.
105 631 So. 2d at 228-29.
D. Wyoming

The Wyoming Supreme Court recently adopted an approach similar to that taken by Montana. In Newman v. RAG Wyoming Land Company, the question was whether the granting of “coal and minerals commingled with coal that may be mined or extracted in association therewith or in conjunction with such coal operations” included the right to extract CBM. The court first decided that the question should come down to “whether the parties to the deed in question intended thecoalbed methane to be conveyed along with the coal estate or reserved to the grantor as part of the oil and gas estate.” Because no explicit grant of CBM existed in the deed, the court said that it would look at “surrounding circumstances, facts showing the relations of the parties, the subject matter of the contract, and the apparent purpose of making the contract.”

The court determined that, while CBM was a mineral that commingled with coal, it was a mineral that was at the time of the contract “ventilated” or “released” from the coal seam rather than “extracted” with the coal. This finding was crucial to the court’s decision that, in this particular instance, CBM should not be included with the grant of coal because the grant only included those minerals that “may be mined or extracted in association therewith or in conjunction with such coal operations.”

Additionally, the Supreme Court of Wyoming went on to reject the proposition that the right to ventilate CBM should imply the ownership of CBM. Accordingly, the court also held that a coal seam operator has the right to ventilate CBM when it is reasonable and necessary. Therefore, the right to extract CBM will remain with the owner of the property unless there is language or circumstances present that indicate the parties meant for CBM to be included in the conveyance.

Like the other CBM cases, the Wyoming Supreme Court emphasized that the general intent of the parties should be examined to decide who has the right to CBM. As in the other cases, an intent to transfer CBM could not be

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106 53 P.3d 540 (Wyo. 2002).
107 Id. at 542.
108 Id. at 544.
109 Id. (quoting Boley v. Greenough, 22 P.3d 854, 858 (Wyo. 2001)).
110 Id. at 545.
111 Id.
112 Id. at 550 (citing Amoco Prod. Co. v. S. Ute Indian Tribe, 526 U.S. 865, 879 (1999)).
113 Id.
114 Id.
115 Id.
easily ascertained because the extraction of CBM was not known to be economically profitable at the time the deed was written. Unlike the Supreme Courts of Alabama and Pennsylvania, the Supreme Court of Wyoming decided that ownership of CBM was not necessary to protect the right to ventilate a coal seam.\textsuperscript{116} This determination seems to be key in figuring out how a court will determine the intent of the parties when they drafted the document. A court that has determined that ownership of CBM is necessary to ventilate a coal seam will rule that the parties necessarily intended to convey CBM with the coal estate. A court that has determined that ownership of CBM is not necessary for ventilation of the coal mine will be able to claim that CBM was not conveyed with the coal estate but was reserved to the owner. Courts following the latter approach will have more flexibility in determining what the intent of the parties could have been in all conveyances. It must be noted that both the Wyoming Supreme Court and Montana Supreme Court concluded that there was no intent to include CBM in the conveyance of “coal.” Neither court dealt with the question of whether CBM should be included in the conveyance of “gas.”\textsuperscript{117}

E. Virginia

More recently, the Supreme Court of Virginia ruled that CBM was not included in the grant of “coal.”\textsuperscript{118} In Ratliff, the original property owner conveyed “all the coal in, upon, and underlying” the land to the grantee in 1887.\textsuperscript{119} The plaintiffs (Ratliff et. al.) owned all rights to the land other than the coal rights and brought a suit seeking a determination that they owned the CBM rights as well.\textsuperscript{120} The defendant, (Harrison-Wyatt, LLC) who was the successor grantee of the coal rights, denied that the plaintiffs owned CBM and instead claimed that it owned the CBM.\textsuperscript{121} The trial court ruled for the plaintiff by concluding that “CBM is simply a by-product of coal and a severable estate.”\textsuperscript{122} As a result, the trial court ruled “[t]he grant of coal rights does not include rights

\textsuperscript{116} Id.

\textsuperscript{117} See Newman, 53 P.3d 540; Carbon County, 898 P.2d 680. However, the United States Supreme Court has held that CBM was not included in a reservation of coal by the Coal Land Acts of 1909 and 1910. See Amoco Prod. Co. v. S. Ute Indian Tribe, 526 U.S. 865, 880 (1999). Amoco is distinguishable from the current discussion because the case was an interpretation of a specific act of Congress concerning Native American lands. Because property law is inherently a state issue, the Amoco case is not binding or relevant to the issue at hand.

\textsuperscript{118} Harrison-Wyatt, LLC v. Ratliff, 593 S.E.2d 234 (Va. 2004). The Ratliff case was decided after Moss.

\textsuperscript{119} Id. at 235.

\textsuperscript{120} Id.

\textsuperscript{121} Id.

\textsuperscript{122} Id. at 236.
to CBM absent an express grant of coalbed methane, natural gases, or minerals in general.  

On appeal, in a brief opinion, the Virginia Supreme Court affirmed the trial court by ruling that "the term 'coal,' as it was used in the late 19th century" was not ambiguous. The Virginia Supreme Court accepted the trial court's reasoning without much analysis of relevant policy concerns or the facts of the case. Unlike previous coalbed methane cases in other jurisdictions, the court did not discuss how it was important to look to the intentions of the parties of the lease to determine who owns CBM. In every other state that has ruled on coalbed methane ownership, the intentions of the parties have been held to be the determinative factor in deciding who owns CBM. As a result, the West Virginia Supreme Court of Appeals should view this case as non-persuasive authority.

V. WEST VIRGINIA

A recent West Virginia Supreme Court of Appeals case has shed some light on how the Supreme Court of West Virginia will handle certain CBM cases. In Energy Development Corporation v. Moss, Justice McGraw, writing for the court, declared that the intent of the parties who signed the lease was the determinative factor when deciding who has the right to extract CBM. In Moss, Energy Development Corporation (EDC) claimed that a document leasing it "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' . . ." entitled EDC to extract CBM from the coal seams on the land. The defendants claimed that CBM should remain with the original property owner because there was no specific mention of CBM in the document. The trial court ruled for the defendant saying that the intent of the parties was not to include CBM with the oil and gas estate and that CBM "is inherently associated with coal, coal seams and the coal estate in land."
On appeal, the West Virginia Supreme Court of Appeals affirmed the decision of the trial court in part by ruling that the parties did not intend to lease CBM with the oil and gas under the lease. \(^{132}\) The court reasoned that, because the lease was written before CBM was known to be economically profitable, an ambiguity existed as to whether the parties intended the phrase “all oil and gas” to include CBM. \(^{133}\) This ambiguity meant that the court could look at outside sources that would give clues to what the phrase “all oil and gas” would mean at the time the document was drafted. \(^{134}\) The court also stated that in West Virginia an oil and gas lease will be construed against the lessee when the lessee created the document. \(^{135}\) The court used the finding that “the production of coalbed methane was not a common practice in McDowell County at the time the leases were executed” to help explain why the lessor could not have intended to include CBM in the lease. \(^{136}\) Therefore, “in the absence of specific language to the contrary or other indicia of the parties’ intent, an oil and gas lease does not give the oil and gas lessee the right to drill into the lessor’s coal seams to produce coalbed methane gas.” \(^{137}\)

Apparently, the West Virginia Supreme Court of Appeals has declared that it will be presumed that the parties of an oil and gas lease, agreed to before CBM became economically valuable, did not intend to include CBM as a resource that could be exploited by the lessee. \(^{138}\) This presumption could be rebutted, however, with evidence that could tend to show that the parties did actually agree to include CBM. \(^{139}\) This ruling by the West Virginia Supreme Court of Appeals still leaves many questions open when it comes to CBM ownership rights. Would CBM be included in a lease or grant of coal before CBM became economically profitable? What about a lease of either coal or oil and gas that was agreed to after CBM became economically profitable? Also, is there a difference between a reservation and a grant? The court declined to answer many of these questions because it was reluctant “to make a sweeping pronouncement about the general ownership of all coalbed methane.” \(^{140}\) Instead, the court de-

\(^{132}\) Id. at 146.

\(^{133}\) See id. at 143-144.

\(^{134}\) Id. at 144 (citing Fraternal Order of Police, Lodge No. 69 v. City of Fairmont, 468 S.E.2d 712, 716, n.7 (1996)).

\(^{135}\) Id.

\(^{136}\) Id. at 145.

\(^{137}\) Id. at 146.

\(^{138}\) See id.

\(^{139}\) See id.

\(^{140}\) Id. at 153.
clared that a case by case approach should be used when deciding who has ownership of CBM. 141

It must be noted that Justice McGraw, in his opinion, talked about the Pennsylvania, Alabama, Montana and Wyoming cases that have previously been discussed in this Article. 142 In his analysis, he heavily emphasized that every case on CBM has focused on the intent of the parties. 143 In that sense, he believed that the decision by the West Virginia Supreme Court of Appeals was consistent with each of the previous cases while admitting that this case was decided more narrowly than each of the decisions. 144

VI. QUESTIONS REMAINING AFTER MOSS

The obvious question that was decided in each of the previous decisions but that the West Virginia Supreme Court of Appeals declined to decide was whether CBM necessarily should be the property of the coal owner so that the coal owner could ventilate the dangerous gas. 145 While the West Virginia Supreme Court of Appeals did not have to answer this question in Moss, this question is important because it will determine whether the court will rule that a lessor or grantor intended to lease or grant the right of CBM to the coal lessee or grantee. A ruling similar to Pennsylvania and Alabama that would declare CBM ownership necessary for the safe ventilation of the mine would mean that a grantor intended to grant or lease CBM to the coal owner unless there is specific evidence to indicate an intent to separate the CBM estate from the coal estate. 146 On the other hand, a ruling similar to Montana and Wyoming that the ownership of CBM is not necessary for the safe ventilation of the mine would mean that neither the gas owner nor the coal owner would be able to claim CBM unless there was specific evidence to indicate an intent to transfer the CBM rights. The former ruling would favor coal operators in West Virginia while disadvantaging the original land owner, while the latter ruling would favor the original land owner by protecting the right to not transfer a valuable asset without the specific intent to do so. 147

141 See id.
142 Id. at 146-150.
143 Id.
144 See id.
145 See id. at 141 n.10 ("The [lower] court also concluded that '[c]oalbed methane is inherently associated with coal, coal seams and the coal estate in land.' We do not find it necessary to go so far in our reasoning to decide this case").
146 Although, Alabama has ruled that CBM in the coal seam will always be the property of the coal seam owner even if there is explicit language attempting to separate the two estates. See West, 631 So. 2d at 228.
147 The Moss decision may have provided an indication that the West Virginia Supreme Court
The question also remains as to whether the court will presume that CBM was not included in the grant or lease of all gas if the instrument was executed after it was common practice to produce CBM for profit. The court noted that the customs and usage of the industry at the time the instrument was executed was important as to the finding of intent in this case. 148 If it can be found that a common practice of producing CBM for profit exists in a particular area, then the court may not conclude that the parties failed to contemplate including CBM in the agreement. If the court reaches this conclusion then the presumption that the parties did not intend to include CBM in the phrase all "oil and gas" would not be applicable. Therefore, the court could hold that a different rule for interpreting the intent of the parties will be used when the agreement was executed after CBM became economically profitable.

Furthermore, there could be a difference in the way the court treats a reservation clause. If the clause in question is a grant of all land rights and a reservation of all "oil and gas," then the way the court interprets the intent could be very different based on the rulings in Moss. The court stated that, when interpreting ambiguous language, the leases should be construed in favor of the lessor because the lessee drafted the lease. 149 The court could treat an ambiguous reservation differently because it wants to construe the lease in favor of the lessor. For example, in the above situation the court would want to construe the language so that the reservation of "all gas" would include CBM and thus favor the lessor. The court could hold that a reservation clause is therefore different than a granting clause and that different rules for interpreting the intent of the parties would apply. A holding such as this would further protect the interest of the original property owner by requiring a finding that the original property owner intended to transfer CBM rights with the grant or lease.

If the court does decide to adopt an overall policy to protect the interest of the original landowner, one hypothetical may present a result that seems illogical. For instance, a landowner (A) owns a fifteen-acre tract of land in 1915 and decides to sell the separate estates of land on that particular tract. First he sells the oil and gas estate to B. Next he sells the coal estate to C. Then he sells the mineral estate to D. Finally he sells the surface rights to E. As a result, A believes that he owns no estate in that original fifteen-acre tract of land. Nevertheless, if the court adopts a policy that would protect the original property owner and demands that a clear intent be shown to convey CBM is necessary for

of Appeals may later adopt the latter approach when it said "that one making a grant of one interest need not specifically reserve every other possible interest, is in harmony with West Virginia law; ..." 591 S.E.2d at 150. (Talking about a Virginia trial court decision that held "a grant of coal rights 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 right to the CBM once it has separated from the coal." See Ratliff v. Harrison-Wyatt, LLC, Case No. 187-00 (29th Va. Cir. Ct. 2002)).

148 Moss, 591 S.E.2d at 145.
149 Id. at 144.
CBM to divest in an original landowner, it appears the court would rule that A still has the rights to the CBM estate. This result seems illogical because A has not owned any estate in the land for almost ninety years. Why should A be entitled to an estate in a tract of land which he sold ninety years ago just because he decided to sell the land as a separate estate instead of selling the entire tract to one person?

However, the court may eliminate this seemingly illogical result by looking at the general intent of the landowner. The court probably would not be able to point to specific language in any of the conveyances that would divest CBM ownership from A. On the other hand, a general intent to convey all A's rights in the property can be presumed by the severance of the property into separate estates and then the transfer of all of these estates to B, C, D, and E. In other words, the court could rule that A had the intent to divest himself of the entire tract of land. Using this logic, the court should rule that A cannot be the present owner of the CBM estate. Furthermore, the court should also rule that E (the surface owner) cannot be the present owner of the CBM estate. This is because, in the hypothetical, it does not appear that A intended to convey any subsurface rights to E. All of the subsurface rights apparently were transferred before the conveyance to E. Because CBM is a subsurface right, the court should rule that B, C, or D is the owner of the CBM rights.¹⁵⁰

VII. CONCLUSION AND RECOMMENDATIONS

Most of the above-mentioned precedent made it clear that the controlling factor when one is trying to decide who owns the right to produce CBM is the intent of the parties. *Moss* specifically held that this was what courts should examine, and it instructs courts on how to look at evidence when attempting to determine the intent of the parties.¹⁵¹ In attempting to discern this intent, a court in West Virginia should presume that the parties did not intend to include the right to CBM when there was a lease of “oil and gas” executed before CBM became economically profitable.¹⁵² This presumption can be rebutted by a showing of evidence that the parties actually did intend to include CBM in the lease.¹⁵³

¹⁵⁰ The court should make this choice by considering policy issues in the state. For instance, the court could say that the large coal industry necessitates that in this instance the coal owner should own CBM rights. The court could also make a ruling that CBM was a mineral for the purpose of that particular conveyance and should be transferred as such. The same could be said for the gas conveyance, although this result is unlikely after *Moss*. This policy decision would only be required, however, when it is clear that the original landowner had the intent to divest himself of the entire estate.

¹⁵¹ *Moss*, 591 S.E.2d at 144.

¹⁵² *Id.* at 146.

¹⁵³ *Id.*
Because the ruling in Moss was very narrow, other questions need to be answered about CBM in order to determine definite ownership of CBM. The court should rule and probably will rule as the courts in Wyoming and Montana have ruled that ownership of CBM is not necessary for the safe ventilation of a coal seam. This ruling would protect the original property owner and allow him/her to take advantage of their property to the fullest extent.

Similarly, the court should rule that “all gas” in a reservation has a different meaning than “all gas” in a grant or lease in order to protect the rights of the original property owner. These rulings would be consistent with the policies espoused in Moss that a landowner cannot give away a right to an asset without having an intent to do so. A property owner should be able to enjoy the fruits of his land to the fullest extent. Requiring an intent for CBM to be transferred will ensure that a landowner will be fully compensated for CBM produced on the land. In short, the state of law in West Virginia regarding CBM is still unclear at this point. Moss decided some important points of law but it will be hard to determine ownership of CBM until either the West Virginia Supreme Court of Appeals or the West Virginia legislature takes an affirmative stand on important CBM issues. The Moss decision indicates that the West Virginia Supreme Court of Appeals will adopt a policy that protects the interest of original landowners by requiring a showing of intent to transfer CBM ownership.

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