

**ONE STICK IN THE BUNDLE:
CHARACTERIZING NONPARTICIPATING ROYALTY INTERESTS
UNDER WEST VIRGINIA LAW**

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I. INTRODUCTION

The question of whether to characterize a nonparticipating royalty interest (“NPRI”) in oil and gas as an interest in real property or an interest in personal property is an unsettled but important question with significant implications for West Virginia property jurisprudence, particularly given the recent and dramatic increase in oil and gas development in West Virginia. While other jurisdictions settled this issue years ago, West Virginia courts have only recognized the NPRI as a distinct and separable facet of mineral ownership and have not classified this ownership interest.¹ To draw upon the proverbial “bundle of sticks” analogy, the NPRI was recognized as a “stick” in the “bundle of sticks”² that describes real property rights, specifically mineral ownership.³ Despite 50 years of silence on this issue from West Virginia’s lone appellate court, the definitive characterization of NPRIs is important in numerous legal contexts including recordation of title, estate administration, choice of law doctrine, partition actions, and tax sales.

This Article asks: just what *is* the legal nature of the NPRI stick within the bundle? This Article concludes that an NPRI should be characterized as a non-possessory real property interest in the form of an incorporeal hereditament⁴ that vests upon conveyance, not as a possessory real property interest or personal property interest. West Virginia law recognizes that an interest in oil and gas in place is a real property interest.⁵ But the bundle of

¹ See *Davis v. Hardman*, 133 S.E.2d 77, 81–82 (W. Va. 1963).

² The “bundle of sticks” analogy was first introduced in 1923 by Wesley N. Hohfeld and was expounded upon by A.M. Honoré. See J.E. Penner, *The “Bundle of Rights” Picture of Property*, 43 UCLA L. REV. 711, 712 (1996) (“[T]he bundle of rights thesis is a combination of Wesley Hohfeld’s analysis of rights and A. M. Honoré’s description of the incidents of ownership.”). The analogy is generally used to discuss property theory and most law students learn the analogy in their first-year property class, but it is also useful for understanding the distinct elements of mineral ownership.

³ See *Davis*, 133 S.E.2d at 80–82.

⁴ An incorporeal hereditament is defined as “[a]n intangible right in land, such as an easement.” BLACK’S LAW DICTIONARY 794 (9th ed. 2009).

⁵ See *Boguess v. Milam*, 34 S.E.2d 267, 269 (W. Va. 1945).

sticks that comprises an undivided real property interest in minerals can be broken into its component sticks, which may include the executive or leasing right, an NPRI, and, in some states, a non-executive mineral interest.⁶

The answer to the question posed by this Article requires an examination of West Virginia oil and gas jurisprudence dating back to the late 1800s. West Virginia law is well-settled that an interest in the oil and gas in place is a real property interest, while an interest in the produced oil and gas (i.e., an accrued royalty interest in minerals) is a personal property interest.⁷ That is, once oil and gas are produced from a formation and brought to the surface, they cease to be real property and become personal property.⁸

An owner of an NPRI has a personal property interest in the royalties received upon production, but the unanswered question is how to classify an NPRI in the undeveloped minerals, or in other words, an unaccrued royalty interest. The majority of jurisdictions and authoritative commentators appear to treat an NPRI as a form of a real property interest called an “incorporeal hereditament,” which is an intangible right in land akin to an easement.⁹ Conversely, there is also law in West Virginia that supports the alternative characterization of an NPRI as a personal property interest that vests upon production of the oil and gas.¹⁰ However, characterizing an NPRI as personal property conflicts with majority theory and is pregnant with problems.

Part II of this Article will address the creation of NPRIs and royalty interests. Part III of this Article will set forth the two major competing property interest theories: the Real Property Theory, which treats NPRIs as real property interests in the form of incorporeal hereditaments, and the Personal Property Theory, which treats NPRIs as personal property interests that vest upon production of the minerals. In this part, the Article will examine the majority of jurisdictions’ treatment of the issue, Kansas’s minority approach and reasoning, and the significant criticism the Personal Property Theory has received. Part IV will discuss the implications of these theories for the rule against perpetuities, recordation of title, choice of law doctrine, partition actions, tax sales, and West Virginia jurisprudence generally. Part V recommends that the West Virginia Supreme Court of Appeals adopt the Real Property Theory in its treatment of NPRIs. The Real Property Theory represents the majority and better-reasoned

⁶ A non-executive mineral interest is defined as “an interest in oil and gas that lacks the right to join in the execution of oil and gas leases and (probably) the right to develop.” 8-N PATRICK H. MARTIN & BRUCE M. KRAMER, *WILLIAMS & MEYERS, OIL AND GAS LAW* 684 (2013) [hereinafter *WILLIAMS & MEYERS* 2013]. As Williams & Meyers explain, “the practical difference between a nonparticipating royalty and a nonexecutive mineral interest is that the latter shares in bonus and delay rental as well as royalty under existing and future leases[, while] [t]he former shares in royalty only.” *Id.*

⁷ See *Warren v. Boggs*, 97 S.E. 589, 592 (W. Va. 1918).

⁸ See *id.*

⁹ BLACK’S LAW DICTIONARY 794 (9th ed. 2009).

¹⁰ See *infra* Part III.B.

approach than the Personal Property Theory. Adopting the Real Property Theory will provide certainty for everyone, from legal practitioners to operators in the Appalachian Basin, who must deal with NPRI and who inevitably wonder how to characterize NPRI under West Virginia law.

II. NPRI & THE ACCRUED VS. UNACCRUED ROYALTY DISTINCTION

A. NPRI Depend on “The Kindness of Strangers”

One prominent oil and gas attorney aptly describes an NPRI as “an interest . . . that depends on the kindness of strangers” because “accrual of such royalty [from production] is completely dependent upon the actions of the holder of the executive rights”¹¹

An NPRI is a pure royalty interest that is carved out of fee title to a mineral estate by grant or reservation.¹² The only incident of mineral ownership possessed by the NPRI owner is the right to a share in the proceeds from the produced or developed minerals.¹³ In contrast, a person with a mineral interest in fee possesses the right to execute leases and to receive bonuses, delay rentals, and royalties under a lease.¹⁴ Thus, an NPRI owner has the right to receive proceeds from the production of oil and gas, but has no right to participate in developing the mineral estate that may lead to such production.¹⁵

¹¹ Benjamin Holliday, *New Oil and Old Laws: Problems in Allocation of Production to Owners of Non-Participating Royalty Interests in the Era of Horizontal Drilling*, 44 ST. MARY'S L.J. 771, 799 (2013) (quoting Allen D. Cummings, *Pooling and Community Leases: Problems and Options for the Executive Owner, the Non-Executive Owner and the Lessee*, 1997 15TH ANNUAL ADVANCED OIL, GAS & MINERAL LAW COURSE I-1, I-2); see also WILLIAMS & MEYERS 2013, *supra* note 6 (An NPRI is “an expense-free interest in oil or gas, as, if and when produced. The prefix ‘non-participating’ indicates that the interest does not share in bonus or rental, nor in the right to execute leases or to explore and develop.”).

¹² RICHARD W. HEMINGWAY, *LAW OF OIL AND GAS* § 2.5 (3d ed. 1991) [hereinafter HEMINGWAY I]; see also HEMINGWAY OIL AND GAS LAW AND TAXATION § 2.5(C) (Owen L. Anderson et al. eds., 4th ed. 2004) [hereinafter HEMINGWAY II] (“In jurisdictions that view royalty as a real property interest, a nonparticipating royalty interest can be conveyed or reserved apart from the mineral estate.”); Owen L. Anderson, *Royalty Valuation: Should Overriding Royalty Interests and Nonparticipating Royalty Interests, Whether Payable in Value or in Kind, Be Subject to the Same Valuation Standard As Lease Royalty?*, 35 LAND & WATER L. REV. 1, 17 (2000) (“[N]onparticipating royalty interests . . . are carved from the fee title.”).

¹³ See *Davis v. Hardman*, 133 S.E.2d 77, 81 (W. Va. 1963).

¹⁴ See *id.*

¹⁵ See C. J. Meyers, *The Effect of the Rule Against Perpetuities on Perpetual Non-Participating Royalty and Kindred Interests*, 32 TEX. L. REV. 369, 384–85 (1954); 38 AM. JUR. 2D *Gas and Oil* § 196 (2014) (“A nonparticipating gas and oil royalty is a nonpossessory interest that does not entitle the owner to produce the gas and oil himself or herself, but does entitle the owner to a certain share of the production proceeds, free of the expenses of exploration and production.”); 53A AM. JUR. 2D *Mines and Minerals* § 168 (2014) (“A ‘nonparticipating royalty’ is an interest in minerals which is nonpossessory, which means that it does not entitle the owner

In *Davis v. Hardman*, the West Virginia Supreme Court of Appeals set forth the distinguishing characteristics of an NPRI versus an interest in oil and gas in place:

The distinguishing characteristics of a non-participating royalty interest are: (1) Such share of production is not chargeable with any of the costs of discovery and production; (2) the owner has no right to do any act or thing to discover and produce the oil and gas; (3) the owner has no right to grant leases; and (4) the owner has no right to receive bonuses or delay rentals. Conversely, the distinguishing characteristics of an interest in minerals in place are: (1) Such interest is not free of costs of discovery and production; (2) the owner has the right to do any and all acts necessary to discover and produce oil and gas; (3) the owner has the right to grant leases, and (4) the owner has the right to receive bonuses and delay rentals.¹⁶

Aside from *Davis*, there is little West Virginia case law analyzing the nature of NPRIs. Looking to the contours of NPRI jurisprudence in other jurisdictions where NPRIs are considered real property, NPRIs can be of a perpetual or lesser duration¹⁷ and can be created before or after an oil and gas lease is executed.¹⁸

to produce minerals her- or himself or permit him or her to join in leases of the mineral estate, but merely entitles him or her to a certain share of the production under the lease, free of expenses of exploration and production.”); HEMINGWAY I, *supra* note 12, § 2.5 (“[A] ‘non-participating’ royalty interest . . . will not share in the right to lease, or in the other economic benefits from an oil and gas lease.”).

¹⁶ *Davis*, 133 S.E.2d at 81–82 (quoting *Mounger v. Pittman*, 108 So. 2d 565, 566 (Miss. 1959)).

¹⁷ See HEMINGWAY II, *supra* note 12, § 2.5(C); see also 53A AM. JUR. 2D *Mines and Minerals* § 168 (“The reservation or grant of a royalty interest prior to the lease of the subject property is generally termed a ‘perpetual nonparticipating royalty,’ if no right is granted or reserved to participate in the making of future leases.”).

¹⁸ See HEMINGWAY II, *supra* note 12, § 2.5(C). An example of language used to create an NPRI is seen in *Davis v. Hardman*:

There is reserved for the benefit of Alva L. Davis, his heirs and assigns, *his proportionate share of one-fourth (1/4) of the rest and residue of the oil and gas royalty, when produced, in and under said land*, but said second party, his heirs and assigns, to have the right to lease said land for oil and gas purposes and to receive the bonuses and carrying rentals.

133 S.E.2d at 78 (emphasis added). The italicized language creates the NPRI. An NPRI owner only has the right to receive royalties; he does not have any rights to sign leases or receive delay rentals or bonuses.

B. *Accrued vs. Unaccrued Royalties*

It is useful to understand the distinction between accrued and unaccrued royalties when understanding how to characterize NPRIs. Generally speaking, “[u]naccrued royalties are royalties that will be earned on minerals that have not yet been severed from the ground Accrued royalties are royalties due on minerals that have been severed.”¹⁹ Courts unanimously hold that royalties that have accrued from production and severance of the minerals constitute personal property.²⁰ However, courts have not so consistently agreed upon how to characterize unaccrued royalties, i.e., royalties to be paid from future production under a lease.²¹ The clear majority of jurisdictions treat an interest in unaccrued royalty as a real property interest, while prevailing authority in Kansas takes the minority position and treats an interest in unaccrued royalty as a personal property interest.²²

III. ARE NPRIS REAL OR PERSONAL PROPERTY? THE TWO COMPETING THEORIES

NPRIs have been classified in two alternative ways: as real property or as personal property. The approach taken by the majority of jurisdictions is the Real Property Theory, which treats NPRIs as real property in the form of an incorporeal hereditament. An incorporeal hereditament is an intangible right in land.²³ The minority approach is to treat NPRIs as personal property that vests upon production. West Virginia law is, at best, unsettled as to whether an NPRI should be treated as a real property or personal property interest.

¹⁹ ANR W. Coal Dev. Co. v. Basin Elec. Power Coop., 276 F.3d 957, 965 n.11 (8th Cir. 2002). See generally NANCY SAINT-PAUL, SUMMERS OIL AND GAS § 49:24 (3d ed. 2004).

²⁰ See HEMINGWAY I, *supra* note 12, § 2.5(B).

²¹ *Id.*

²² See *id.* For a detailed compilation of authority regarding “accrued” and “unaccrued” royalties and their classifications as either personalty or realty, see Martin J. McMahon, Annotation, *Oil and Gas Royalty as Real or Personal Property*, 56 A.L.R. 4th 539 (1987).

²³ See *supra* note 4 for the definition of an incorporeal hereditament. Under West Virginia law, “[a]n easement, whether affirmative or negative, is an incorporeal hereditament and as such is a species of real property.” Bennet v. Charles Corp., 226 S.E.2d 559, 563 (W. Va. 1976). Additionally, in the context of public energy and the power of eminent domain, the Legislature has defined real property interests to include “easements, . . . leases, licenses and all other incorporeal hereditaments” W. VA. CODE § 5D-1-5(14) (2014).

A. *The Real Property Theory: Treating NPRIs as Incorporeal Hereditaments*

The majority of jurisdictions treat NPRIs as they would any unaccrued royalty interest: as real property.²⁴ In such jurisdictions, an NPRI is treated as an incorporeal, or non-possessory, real property interest.²⁵ The seminal case analyzing the character of an NPRI as real property is the Arkansas case of *Hanson v. Ware*,²⁶ which held that an NPRI is a real property interest in the nature of an incorporeal hereditament²⁷ that immediately vests at the time of conveyance. The timing of vestment is central to the Real Property Theory adopted by the Arkansas court: because the perpetual NPRI vested at the time of conveyance, it did not violate the “rule against perpetuities,” which invalidates interests in property unless they vest within a specified time period.²⁸

The *Hanson* approach set forth by the Arkansas court has been followed in a majority of jurisdictions, including Florida, Indiana, New

²⁴ See Thomas J. Files, *Recording of Instruments Affecting Oil and Gas Interest in Federal Lands*, 3 ROCKY MTN. MIN. L. INST. 18 (1957) (“[A]n unaccrued oil and gas royalty interest, whether it is a royalty under an existing lease only, a royalty under an existing lease together with a proportionate interest in the minerals in place, a royalty interest under existing or future leases, or a perpetual nonparticipating royalty interest created before or after a lease, is everywhere held to be real property and an interest in land.”). As Hemingway explains, in jurisdictions which view royalty as a real property interest, a conveyance of an NPRI “may be made prior to the execution of an oil and gas lease, or at a time when a lease is presently outstanding. In the latter event, the conveyance would usually include a right to royalty under the present lease as well as the right to royalty out of future production.” See HEMINGWAY I, *supra* note 12, § 2.5(C).

²⁵ Joshua M. Morse III & Jaimie A. Ross, *New Remedies for Executive Duty Breaches: The Courts Should Throw J.R. Ewing Out of the Oil Patch*, 40 ALA. L. REV. 187, 194 (1988) (“Most states define the nonparticipating royalty interest as a cost-free incorporeal real property interest in gross mineral production.”).

²⁶ See 274 S.W.2d 359 (Ark. 1955).

²⁷ See *supra* note 23.

²⁸ See *Hanson*, 274 S.W.2d at 362–63 (“In the analogous case of a *profit à prendre*, such as the perpetual right to take game or fish from another’s land, the estate in real property is a present vested interest which is unaffected by the rule against perpetuities.”). The rule against perpetuities is

the common-law rule prohibiting a grant of an estate unless the interest must vest, if at all, no later than 21 years (plus a period of gestation to cover a posthumous birth) after the death of some person alive when the interest was created. The purpose of the rule was to limit the time that title to property could be suspended out of commerce because there was no owner who had title to the property and who could sell it or exercise other aspects of ownership. If the terms of the contract or gift exceeded the time limits of the rule, the gift or transaction was void.

BLACK’S LAW DICTIONARY 1447 (9th ed. 2009). See *infra* Part IV.A for an in-depth discussion of the rule against perpetuities and the challenge it presents to characterizing perpetual NPRIs as personal property. As discussed in Part IV.A, *infra*, one of the theoretical flaws of the Personal Property Theory is that it causes perpetual NPRIs to run afoul of the rule against perpetuities.

Mexico, Tennessee, and Wyoming,²⁹ and praised by notable commentators.³⁰ These courts have compared the NPRI to several types of incorporeal hereditaments: a *profit à prendre*,³¹ a real covenant running with the land,³² common-law rent,³³ or a covenant in aid of rent.³⁴

In sum, the majority of jurisdictions have adopted the view that an NPRI is a real property interest akin to an incorporeal hereditament, though the particular kind of incorporeal hereditament to which an NPRI is analogized

²⁹ See, e.g., *Conway Land, Inc. v. Terry*, 542 So. 2d 362, 365 (Fla. 1989); *Wedel v. Am. Elec. Power Serv. Corp.*, 681 N.E.2d 1122, 1136–37 (Ind. Ct. App. 1997); *Price v. Atlantic Ref. Co.*, 447 P.2d 509, 510 (N.M. 1968); *J.M. Huber Corp. v. Square Enters., Inc.*, 645 S.W.2d 410, 414 (Tenn. Ct. App. 1982); *McGinnis v. McGinnis*, 391 P.2d 927, 932 (Wyo. 1964); see also *Conway*, 542 So. 2d at 365 (“It is submitted that the result and reasoning in *Hanson v. Ware* is sound, as applied both to royalty and to non-executive mineral interests, and upon analytical and policy grounds. It should be accepted in all states . . .”) (citing 2 WILLIAMS & MEYERS, OIL AND GAS LAW § 323 (1985)). For additional discussion of how specific states classify mineral, royalty, and leasehold interests, see 1 WILLIAMS & MEYERS 2013, *supra* note 6, § 214.

³⁰ See HEMINGWAY I, *supra* note 12, § 2.5(C) (“Since the rule [against perpetuities] operates only against interests that are contingent in nature, in jurisdictions where royalty is considered to be real property in the nature of an incorporeal hereditament, a vested perpetual interest in royalty should not violate the rule. Although the cases are few, this view is apparently followed in most jurisdictions.”).

³¹ *Profit à prendre* is defined as “[a] right or privilege to go on another’s land and take away something of value from its soil or from the products of its soil (as by mining, logging, or hunting).” BLACK’S LAW DICTIONARY 1330 (9th ed. 2009).

³² A real covenant running with the land is defined as “[a] covenant intimately and inherently involved with the land and therefore binding subsequent owners and successor grantees indefinitely.” *Id.* at 421.

³³ “Rent [is] an interest closely akin to real covenants. Rent is an ancient and somewhat mysterious concept. After the statute *Quia Emptores*, three forms of rent were recognized in England. . . . Our concern is with the concept of rent as an incorporeal hereditament, a ‘right in the land of another,’ which runs with the servient estate in perpetuity.” Meyers, *supra* note 15, at 411.

³⁴ See, e.g., *Hanson v. Ware*, 274 S.W.2d 359, 362–63 (Ark. 1955) (analogizing to a *profit à prendre*); *Denney v. Teel*, 688 P.2d 803, 809 (Okla. 1984) (In dicta, the court reasoned that an NPRI “has been analogized to the incorporeal hereditament of common-law rent . . . [and] [s]ince royalty is inherently subject to another’s power to lease, it would not, under one theory, be subject to the rule against perpetuities.”) (applying Kentucky law to determine that a royalty is a real property interest, but deferring to Kentucky courts to ultimately decide whether a perpetual NPRI would be subject to the rule against perpetuities); Meyers, *supra* note 15, at 408–15 (discussing alternative classifications of NPRIs as real covenants running with the land, rent, and covenants in aid of rent). As Meyers states regarding covenants in aid of rent,

[a]dhering to the view that non-executive mineral interests are incorporeal hereditaments running with the mineral estate, we may observe one further analysis. If it be conceded that royalty may be assimilated to common-law rent, then the covenant to pay bonus, rental, and royalty may be regarded as a real covenant in aid of rent, unembarrassed for the most part by the restrictive rules concerning other real covenants.

Id. at 414.

differs with the jurisdiction. The Real Property Theory appears to be better reasoned than the Personal Property Theory as it avoids invalidation due to the rule against perpetuities.

B. The Personal Property Theory: Treating NPRIs as Interests in Personal Property Vesting upon Production

The Personal Property Theory, which treats NPRIs as personal property interests that vest upon production, is the minority view. In fact, as noted by one commentator, Kansas and perhaps only one or two other jurisdictions adopt this theory.³⁵ Kansas treats unaccrued royalty interests, including NPRIs, as personal property interests that are subject to the rule against perpetuities.³⁶ An examination of Kansas's adoption of the Personal Property Theory is useful to understand this approach's contours and why the Real Property Theory is the preferred approach.

In *Cosgrove v. Young*,³⁷ the Kansas Supreme Court held that a conveyance of a royalty interest is void for violating the rule against perpetuities if the instrument of conveyance does not require execution and delivery of gas leases at a future time, i.e., fails to vest title.³⁸ In reaching this conclusion, the *Cosgrove* court relied heavily upon *Lathrop v. Eystone*,³⁹ a quiet title action in which the Kansas Supreme Court held that a royalty interest is personal property.⁴⁰ The *Cosgrove* court reasoned that:

[i]f it is not certain the vesting will occur within the time stated in the rule [against perpetuities], then the rule has been violated and the conveyance is void. Even if an oil and gas lease were required to be executed within the time prescribed by law, there would still be no vesting of title until royalty becomes due and payable to the grantor or his successor.⁴¹

The *Cosgrove* court noted that more than 31 years had passed since the conveyance; therefore, the conveyance was void because it violated the rule

³⁵ See HEMINGWAY I, *supra* note 12, § 2.5(B) (citing cases from Kansas, Ohio, Illinois, and a federal court in Mississippi as treating a lessor's interest in unaccrued royalty as a personal property interest); see also HEMINGWAY II, *supra* note 12, § 2.5(B) (citing the same jurisdictions, as well as a Board of Tax Appeals case from the Tenth Circuit).

³⁶ See HEMINGWAY I, *supra* note 12, § 2.5(C); see also HEMINGWAY II, *supra* note 12, § 2.5(C).

³⁷ 642 P.2d 75 (Kan. 1982).

³⁸ *Id.* at 77–83 (citing *Lathrop v. Eystone*, 227 P.2d 136, 140–41 (Kan. 1951)).

³⁹ 227 P.2d 136 (Kan. 1951).

⁴⁰ *Id.* at 143–44.

⁴¹ 642 P.2d at 83.

against perpetuities.⁴² In reaching this conclusion, the *Cosgrove* court acknowledged that “some other jurisdictions might well reach a different result in applying their case law to the issue herein. However, the parties hereto seek no alteration of our existing case law and we see no compelling reason for change.”⁴³

Although the *Cosgrove* majority saw no reason to overrule *Lathrop* and discard the problematic Kansas rule that an NPRI is a personal property interest subject to the rule against perpetuities, many others have seen compelling reasons for change and have voiced these opinions. Beginning with the dissent to *Cosgrove*, Justice Harold S. Herd commented that *Lathrop* “was written to apply narrowly to sales of a future interest dependent upon a condition precedent to vesting. The majority opinion extends the rule against perpetuities to all sales of oil and gas royalty in Kansas which extend beyond the twenty-one years”⁴⁴ Justice Herd noted that *Lathrop* is “peculiar to Kansas” and has been disapproved of by authoritative commentators and other courts.⁴⁵ Justice Herd concluded that “[i]n theory, I would reverse *Lathrop v. Eystone* and make Kansas law conform to the better rule of *Hanson v. Ware*.”⁴⁶

In *Rucker v. DeLay*,⁴⁷ the Kansas Supreme Court acknowledged many calls to overrule *Cosgrove* and *Lathrop* but declined to take action. The *Rucker* court was urged by one of the parties and amicus curiae to overrule *Lathrop* and *Cosgrove*.⁴⁸ The *Rucker* court acknowledged that these cases have been “criticized as conceptually invalid” and that other Kansas decisions, decided after *Lathrop* but before *Cosgrove*, are difficult to reconcile with these cases.⁴⁹ The *Rucker* court concluded that “[t]he criticism about this court’s prior vesting analysis has some merit” and declined “to extend it to royalty interests reserved in the grantor.”⁵⁰ Nonetheless, the *Rucker* court ultimately decided to not

⁴² *Id.* at 84.

⁴³ *Id.*

⁴⁴ *Id.* at 89 (Herd, J., dissenting).

⁴⁵ *Id.* at 89–90 (citing 3A SAINT-PAUL, *supra* note 19, § 576 at 31–32; 1 EUGENE KUNTZ, OIL & GAS, § 17.3 at 392–93 (1989); 2 WILLIAMS & MEYERS 2013, *supra* note 6, § 323 at 13–16, § 324.4 at 59–60).

⁴⁶ 642 P.2d at 90 (Herd, J., dissenting).

⁴⁷ 289 P.3d 1166 (Kan. 2012).

⁴⁸ *Id.* at 1172.

⁴⁹ *Id.* at 1172–73 (citing *Froelich v. United Royalty Co.*, 290 P.2d 93 (Kan. 1955) (upholding a nonparticipating mineral interest because it vested immediately), *modified on reh’g*, 297 P.2d 1106 (Kan. 1956); *Howell v. Coop. Refinery Ass’n*, 271 P.2d 271 (Kan. 1954) (upholding lease agreement provision creating overriding royalty interest in future leases because the interest vested when the assignment was made and accepted); *Kenoyer v. Magnolia Petroleum Co.*, 245 P.2d 176 (Kan. 1952) (upholding lease agreement’s unitization clause and royalty interest agreement because those interests vested upon the lease’s execution and delivery)).

⁵⁰ *Id.* at 1173.

overrule *Lathrop* and *Cosgrove* because the issue was “not squarely before [it].”⁵¹

In sum, Kansas’s adoption of the Personal Property Theory has received considerable criticism,⁵² and, if the *Rucker* court’s acknowledgement of the severity of that criticism is any indication of its proclivity to overrule *Lathrop* and *Cosgrove*, the Kansas approach is not likely to remain good law for much longer. As one commentator noted, the Kansas approach certainly causes more “shale era disputes” revolving around the rule against perpetuities and the classification of nonparticipating royalty interests.⁵³ This only further entangles the law governing the field.⁵⁴

C. *West Virginia Law Regarding the Characterization of NPRIs Is Unsettled*

Unlike other oil and gas jurisdictions, West Virginia has scant authority addressing the proper characterization of NPRIs. On the one hand, West Virginia law has long considered an interest in oil and gas in place as a real property interest, and any interest in produced or developed minerals is a

⁵¹ *Id.*

⁵² The Supreme Court of Florida notes that Kansas’s approach has received much criticism from scholars. *Conway Land, Inc. v. Terry*, 524 So. 2d 362, 365 (Fla. 1989) (citing 1 KUNTZ, *supra* note 45, §§ 15.4, 17.3 (1987); 3A W. SUMMERS, *THE LAW OF OIL AND GAS* § 605 (1958); 2 H. WILLIAMS & C. MEYERS, *OIL AND GAS LAW* § 323 (1985); Meyers, *supra* note 15, at 375).

⁵³ See Laura H. Burney, *Oil, Gas, and Mineral Titles: Resolving Perennial Problems in the Shale Era*, 62 U. KAN. L. REV. 97, 132–36 (2013) (citing as an example *Drach v. Ely*, 703 P.2d 746 (Kan. 1985) (where “the Kansas Supreme Court again avoided the rule against perpetuities by interpreting a grant as creating a non-participating *mineral* interest” (emphasis added))). One commentator offered the following criticism of the *Drach* court’s approach:

Ironically, the grantor’s express retention of these elements of a mineral interest helped to establish, in the court’s view, that the conveyed interests were mineral interests and not royalty interests. The court concluded that the conveyance was of undivided shares of the mineral estate, nonparticipating in rentals and bonuses. Consequently, the conveyance did not violate the rule against perpetuities, as it would have if the court had construed it to be the conveyance of royalty interests. This result was prompted, in part, by the general view that courts should favor a construction that complies with the rule against perpetuities over one that violates the rule. A more forthright approach would have been to overrule the Kansas view that perpetual nonparticipating royalty interests violate the rule against perpetuities. Kansas is alone in holding this view, which is unsupported by logic or policy.

Phillip E. DeLaTorre, *Recent Developments in Kansas Oil and Gas Law (1983-1988)*, 37 U. KAN. L. REV. 907, 925–26 (1989) (citations omitted). As is clear from Mr. DeLaTorre’s discussion, a non-executive mineral interest contains more rights than an NPRI: “a non-executive mineral interest includes bonus or rental in addition to royalty, while a non-participating royalty interest is limited solely to proceeds derived from the production of oil or gas.” Meyers, *supra* note 15, at 384.

⁵⁴ See Burney, *supra* note 53, at 132–36.

personal property interest.⁵⁵ On the other hand, the West Virginia Supreme Court of Appeals has not extended these principles of law to NPRI. Although there is case law in West Virginia to support the Personal Property Theory, there are several significant reasons why the Personal Property Theory should be rejected as problematic. These reasons are discussed below and are contrasted with the benefits provided by adhering to the Real Property Theory.

1. The Problem with the Personal Property Theory

Following Kansas's approach, the following argument can be made that an NPRI is a personal property interest under West Virginia law: because an NPRI owner, by definition, has an interest in the minerals only once those minerals are produced from the ground, an NPRI interest arises only once the minerals have transitioned from real property to personal property by virtue of production. In other words, an NPRI owner's interest only vests upon production and is therefore a personal property interest.

A series of West Virginia Supreme Court of Appeals decisions lends some support to the argument that a royalty interest arises only upon production of the minerals and that any interest in produced or developed minerals is a personal property interest.⁵⁶ *Warren v. Boggs* established the basic tenant of West Virginia law that when oil or gas is "brought to the surface and reduced to possession[,] it ceases to be real estate and becomes personal property"⁵⁷ Relying on *Warren*, the court held in *McIntosh II* that a conveyance of royalty was a personal covenant rather than a real covenant running with the land.⁵⁸ The conveyance of royalty employed the following language: "[b]ut if oil or gas is found in paying quantities on said lands, first party and her assigns shall yield and pay to parties of the second party or their assigns, one full sixteenth (1/16) of the oil and gas produced and marketed from said lands."⁵⁹ The court reasoned that use of the term "produced" in the conveyance made "clear that *it was not intended by the grantor that the grantees were to be vested upon delivery of the deed of any interest in real property.*"⁶⁰

Most recently, in *Davis*, the West Virginia Supreme Court of Appeals analyzed an oil and gas conveyance to determine whether the interest conveyed was an interest in the oil and gas in place or only a royalty interest in the oil and

⁵⁵ See *Consol. Gas Supply Corp. v. Riley*, 247 S.E.2d 712, 715 n.4 (W. Va. 1978); *Bogges v. Milam*, 34 S.E.2d 267, 269 (W. Va. 1945); *Warren v. Boggs*, 97 S.E. 589, 592 (W. Va. 1918).

⁵⁶ See *Davis v. Hardman*, 133 S.E.2d 77 (W. Va. 1963); *McIntosh v. Vail (McIntosh II)*, 28 S.E.2d 607 (W. Va. 1943); *Warren v. Boggs*, 97 S.E. 589 (W. Va. 1918).

⁵⁷ 97 S.E. at 592 (emphasis added).

⁵⁸ *McIntosh II*, 28 S.E.2d at 615.

⁵⁹ *Id.* at 608.

⁶⁰ *Id.* at 610 (emphasis added).

gas once produced.⁶¹ The *Davis* court acknowledged that inconsistent usage of the term “royalty” “has resulted in great confusion” and that “it is helpful to bear in mind the meaning of certain terms as they are used and understood in the oil and gas industry.”⁶² The court then held that language reserving or granting a royalty does not include rentals and income with that royalty; if it does, it is a reservation of minerals in place, not a pure royalty.⁶³ In support of this holding, the *Davis* court reasoned that use of the term “when produced” makes clear that the grant or reservation is not an interest of the oil and gas in place but rather a “royalty interest which would follow production of oil or gas, or both.”⁶⁴ In defining “royalty,” the West Virginia Supreme Court of Appeals explained that “[t]he concept of royalty *always presupposes development or production* of the mineral to which it relates.”⁶⁵

By applying these principles in the context of the NPRI, one could argue that given the nature of an NPRI—that is, an interest in the produced or developed gas only and not the minerals in the ground—it is reasonable to conclude that an NPRI owner does not have a property interest until the minerals are brought to the surface and produced. Therefore, at the moment that the NPRI owner’s interest vests in the produced minerals, those minerals simultaneously cease to be real estate and become personal property.⁶⁶ Accordingly, under the very definition of an NPRI, there is no opportunity for its holder to have an interest in the minerals in place—i.e., a real property interest. In sum, under this theory of West Virginia law, the NPRI owner can only have a personal property interest. However, this theory contains several flaws that mitigate against its adoption.

2. West Virginia Law Supporting the Personal Property Theory Is Inconsistent and Outdated

Much of the West Virginia case law that one could use to support the Personal Property Theory is either inconsistent or outdated. *McIntosh II* was one of two cases decided on the same day in 1943, and it appeared to flatly contradict its companion decision.⁶⁷ Although the instruments under

⁶¹ 133 S.E.2d at 89.

⁶² *Id.* at 81.

⁶³ *Id.* at 88, 80.

⁶⁴ *Id.* at 82.

⁶⁵ *Id.* at 81 (emphasis added) (citing *McIntosh v. Vail*, 28 S.E.2d 95, 97 (W. Va. 1943)).

⁶⁶ See *McIntosh II*, 28 S.E.2d at 610 (“When oil and gas is produced and marketed from said lands, it loses its character of real property and, as shown in the *Warren* case, assumes the quality of personal property.”).

⁶⁷ See *McIntosh v. Vail (McIntosh I)*, 28 S.E.2d 95, 96 (W. Va. 1943); *McIntosh II*, 28 S.E.2d at 607.

examination in *McIntosh I* and *McIntosh II* used very similar language, the West Virginia Supreme Court of Appeals reached different conclusions.

In *McIntosh I*, the West Virginia Supreme Court of Appeals considered the following language: “[b]ut in the event of oil or gas being developed on said land, said second party or his assigns *shall be entitled* to one full sixteenth of all oil marketed and one half of the next [sic] proceeds from all gas sold from next land.”⁶⁸ The parties argued that the issue presented by this language was whether it created a real or personal covenant, but the court disagreed with their presentation of the issue and said that “this appraisal of the provision is inadequate and [we think] that a right or interest more substantial than a mere covenant was created.”⁶⁹ As it observed seven years later in *Collins v. Stalnaker*,⁷⁰ the court said the issue that the *McIntosh I* court actually decided was whether the minerals were “embraced in the reservation contained in the deed.”⁷¹ The *McIntosh I* court did not explicitly state that a nonparticipating royalty interest was a real property interest or a real covenant running with the land—only that the interest at issue was “more substantial than a mere covenant.”⁷²

In contrast, in *McIntosh II*, the West Virginia Supreme Court of Appeals considered the following similar language: “[b]ut if oil or gas is found in paying quantities on said lands, first party and her assigns *shall yield and pay to* parties of the second party or their assigns, one full sixteenth (1/16) of the oil and gas produced and marketed from said lands.”⁷³ Despite its similarity to the language at issue in *McIntosh I*, the *McIntosh II* court held that this conveyance of royalty was a personal covenant rather than a real covenant running with the land.⁷⁴ This holding supports the argument that an NPRI is not a real property interest.

However, *McIntosh II* was strongly criticized by two dissenting judges as having been incorrectly decided. In his vigorous dissent, Judge Fred L. Fox, with Judge William T. Lovins joining, stated that *McIntosh II* should have followed the reasoning of *McIntosh I*.⁷⁵ Judge Fox viewed a royalty interest as an interest in real property, regardless of whether it was a real covenant running with the land.⁷⁶ He determined that there was no difference between the

⁶⁸ *McIntosh I*, 28 S.E.2d at 96 (emphasis added).

⁶⁹ *Id.*

⁷⁰ 48 S.E.2d 430 (W. Va. 1948).

⁷¹ *Id.* at 434.

⁷² *McIntosh I*, 28 S.E.2d at 96.

⁷³ *McIntosh II*, 28 S.E.2d 607, 608 (W. Va. 1943) (emphasis added).

⁷⁴ *Id.* at 612.

⁷⁵ *Id.* at 614–15 (Fox, J., dissenting).

⁷⁶ *Id.*

language in the two conveyances of *McIntosh I* and *McIntosh II*.⁷⁷ He then opined, “It may be that it is correctly described as a covenant running with the land. *I prefer to treat it as an interest in land*, which passed to the grantees under the deed, and which would pass by conveyance of the land, unless specifically reserved.”⁷⁸ Judge Fox further reasoned that treating a nonparticipating royalty interest as an interest in land is correct because it will vest immediately and provides certainty of title:

*The law favors certainty in the vesting of estates, and this applies particularly to lands and interests in lands, for the reason that the free transmission of title thereto is supposed to encourage use and development and is, therefore, in the public interest. Were we to hold the oil and gas interest here involved to be such as passed with the land, where not reserved, there would never be any question as to its ownership; or, if reserved or separated from the surface, it would necessarily be by recordable writing, and thus the owner could be located. On the other hand, if we treat it as a personal estate, or a personal covenant, the real ownership of the interest may be difficult, if not impossible, to locate.*⁷⁹

Ultimately, Judge Fox concluded that the royalty interest in question “passed by the granting clause of the deed and then became fully vested in the owners of the land conveyed, and was at all times an interest attached to the ownership of the land.”⁸⁰ Judge Fox stated that this reasoning is the same as that applied in *McIntosh I* and that applying this reasoning “decree[s] the same result” in both cases.⁸¹ The reasoning set forth by Judge Fox in the *McIntosh II* dissent comports with the Real Property Theory adopted in a majority of jurisdictions.

Furthermore, *Warren*, the cornerstone case for the argument that West Virginia may view an NPRI as personal property, may be unsuitable for attempting to characterize royalty interests for the purpose of modern partition actions because at the time it was decided, West Virginia law did not allow for partition in kind of oil and gas.⁸² In *Warren*, the West Virginia Supreme Court of Appeals held that “[r]oyalty in oil brought to the surface is ‘personal property’ and as such is susceptible of partition among its co-owners.”⁸³ Additionally, the court notes that it is not “dealing with the

⁷⁷ *Id.* at 615 (“What is the real difference between the two expressions? I do not think there is any. There is nothing sacrosanct in these expressions.”).

⁷⁸ *Id.* at 614 (emphasis added).

⁷⁹ *Id.* at 616 (emphasis added).

⁸⁰ *Id.* at 613.

⁸¹ *Id.* at 615.

⁸² *See Warren v. Boggs*, 97 S.E. 589 (W. Va. 1918).

⁸³ *Id.* at Syl. Pt. 5.

condition presented by *Hall v. Vernon*, . . . a case involving the right to partition oil and gas in place where the ownership of the minerals had been separated from the ownership of the overlying surface.”⁸⁴

In *Hall v. Vernon*,⁸⁵ the West Virginia Supreme Court of Appeals held that oil and gas owned by co-owners could not be partitioned in kind, only by sale and division of the proceeds.⁸⁶ The court’s decision was based upon the notion that:

oil and gas are fugitive, and that co-owners of them, not owning the surface, have a mere right to explore for them, and that it is impossible to partition the same in kind, owing to the nature of oil and gas, and that a court cannot be called on to do an impossible thing, and has no jurisdiction to partition such a right by allotting gas and oil under certain sections of the surface.⁸⁷

Twenty years later, the *Warren* court sought to avoid *Hall*’s limitation by highlighting the fact that once the mineral has been produced, the royalty interest is personal property.⁸⁸ This allowed the parties to seek a division of the royalty, instead of forcing a sale of all of their interests.⁸⁹ The Legislature effectively overruled *Hall* in 1939 when it amended West Virginia Code section 37-4-1 and established the right to partition mineral interests in kind, if feasible.⁹⁰ Thus, *Warren* may be viewed as an attempt to sidestep an inconvenient feature of the law that is now no longer in existence and therefore should not be relied upon as decisive authority by the modern court.

IV. THE CONSEQUENCES OF CHARACTERIZING NPRIS AS REAL OR PERSONAL PROPERTY

West Virginia’s potential treatment of NPRIs as personal property will have important legal ramifications that impact the state’s oil and gas jurisprudence, NPRI owners, and operators. These consequences are explored in the context of perpetual NPRIs, title recordation, choice of law, and oil and

⁸⁴ *Id.* at 592 (citation omitted) (citing *Hall v. Vernon*, 34 S.E. 764 (W. Va. 1899)).

⁸⁵ 34 S.E. 764 (W. Va. 1899).

⁸⁶ *Id.* at Syl. Pt. 1.

⁸⁷ *Id.* at 764.

⁸⁸ *See* 97 S.E. at 592.

⁸⁹ *Id.* at 593.

⁹⁰ *See* *Consol. Gas Supply Corp. v. Riley*, 247 S.E.2d 712, 716 (W. Va. 1978) (“There can be little doubt that the 1939 amendment must be construed to permit partition in kind of oil and gas interest. By using the broad term ‘minerals’ and excluding the right of lessees of oil and gas *to partition in kind*, it is obvious that the Legislature intended to include oil and gas interests within the term ‘minerals.’” (emphasis added)).

gas jurisprudence. In contrast, the potentially negative consequences of classifying NPRIs as real property in the context of partition actions and tax sales are avoidable by classifying NPRIs as incorporeal hereditaments.

A. Perpetual NPRIs Run Afoul of the Rule Against Perpetuities

If NPRIs are treated as a type of personal property that does not vest until production, perpetual NPRIs violate “the rule against perpetuities.” The statutory rule against perpetuities, adopted in West Virginia in 1992, states that any “nonvested property interest is invalid unless” it meets certain conditions, namely that it is certain to vest or terminate within a specific timeframe.⁹¹ As explained by the Supreme Court of Florida in *Conway Land, Inc. v. Terry*, “the rule that a royalty interest is personal property which does not vest until the oil is severed from the ground” is “an attempt to create a perpetual nonparticipating royalty interest [that] violates the rule against perpetuities.”⁹²

Treating NPRIs as non-vesting personal property interests subject to the rule against perpetuities would greatly complicate determining ownership of NPRIs and may create an incentive for executive rights owners to holdout on executing leases until such interests have expired. West Virginia adopted the Uniform Statutory Rule Against Perpetuities in 1992, which set forth a “wait-and-see” approach⁹³ that added an alternate 90-year period measured from the

⁹¹ See W. VA. CODE §§ 36-1A-1 to -8 (2014).

⁹² 542 So. 2d 362, 365 (Fla. 1989) (discussing how Kansas “has squarely adopted” this approach and has since had to invalidate NPRIs for being void under the rule against perpetuities); see also *Cosgrove v. Young*, 642 P.2d 75, 83 (Kan. 1982) (“If it is not certain the vesting will occur within the time stated in the rule, then the rule has been violated and the conveyance is void. Even if an oil and gas lease were required to be executed within the time prescribed by law, there would still be no vesting of title until royalty becomes due and payable to the grantor or his successor.”). For additional discussion on this topic, see 2 WILLIAMS & MEYERS 2013, *supra* note 6, §§ 322–23.

⁹³ The Uniform Law Commission, the drafter of the wait-and-see approach, explains:

Rather than invalidating future interests based on hypothetical possibilities, the Uniform Statutory Rule provides a period of time within which an interest can actually vest. If it does, it is saved. If it does not, then it is invalid. We wait and see, in other words, if an interest will, in fact, vest.

....

The initial part of the Rule restates the common law and validates interests that meet the basic test. The second part of the Uniform Statutory Rule deals with invalidation. It sets a period of time, 90 years, within which actual vesting validates an interest. Invalidation can occur only if the future interest has not vested 90 years after its creation. We “wait and see” 90 years.

Why a fixed number of years? It is the simplest and least capricious way to measure time. Why 90 years? To give ample time, within the lifetimes involved in measuring these interests, for a nonvested future interest to vest. Ninety years represents an estimate of the actual time most extended future interests will take, at the outside, to vest. If they do not vest, 90 years is a sufficient time to justify invalidating such interests.

creation of the interest to allow for vesting.⁹⁴ Those wishing to determine whether a perpetual NPRI is valid would be forced to undergo an analysis similar to the analysis of whether a particular lease is held by production. As experience has shown, this determination can be difficult where production data is missing or incomplete. Furthermore, successors in interest to the original grantor of the NPRI may be tempted to refrain from executing leases until the 90-year period has expired so that the perpetual NPRI will be deemed invalid, vesting such successors with the royalty rights.⁹⁵ From a legal perspective, there are several reasons why NPRI should be distinguished from other property interests subject to the rule against perpetuities. One significant reason is that the purpose of the rule against perpetuities—to prevent the tying up of interests indefinitely—has no relevance to the NPRI holder because such owners have no decision-making authority.⁹⁶ Another reason is that ownership of an NPRI is choate; there is no possibility of contingent remaindermen or reversion. As the *Hanson* court reasoned,

In [contingent remainderman cases,] the physical property is known to exist; the uncertainty is whether the contingent remainderman or some third person will eventually acquire the absolute ownership. Here, however, no third person is involved. The appellees' title being complete, the doubt is occasioned not by the possibility that someone else may acquire the property but by the possibility that there may be in fact no oil and gas within the land. In short, the typical contingent remainderman has an uncertain interest in the fee simple, while these appellees have a fee simple interest in the uncertain.⁹⁷

Statutory Rule Against Perpetuities Summary, THE NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS, available at <http://uniformlaws.org/ActSummary.aspx?title=Statutory+Rule+Against+Perpetuities> (last visited Nov. 19, 2014).

⁹⁴ See W. VA. CODE §§ 36-1A-1 to -8.

⁹⁵ While executive rights owners may be prohibited from doing so because of a fiduciary duty owed to NPRI owners, West Virginia law is somewhat unclear as to the contours of this fiduciary duty. See *Donahue v. Bills*, 305 S.E.2d 311, 312–13 (W. Va. 1983) (“Although the Bills[es] have the right to lease, they are entitled only to one-half of the proceeds of the rental payments. Furthermore, the Bills[es] must share any fees or other inducements they may receive for entering into a lease with the Donahues on a fifty-fifty basis. In effect, the Bills[es] are fiduciaries for the Donahues and will be held to strict fiduciary standards.”). But see Ernest E. Smith, *Implications of a Fiduciary Standard of Conduct for the Holder of the Executive Right*, 64 TEX. L. REV. 371, 406 n.167 (1985) (citing Discussion Note, *Mineral Reservations: Grantor’s Retention of “Executive Right”—Validity and Function*, 79 OIL & GAS REP. 372 (1984)) (noting that one commentator “has suggested that the West Virginia court was applying the fiduciary standard only in the context of the executive’s obligation to account for moneys received”).

⁹⁶ See *infra* Part IV.E.4.

⁹⁷ *Hanson v. Ware*, 274 S.W.2d 359, 362 (Ark. 1955).

Finally, from a practical standpoint, why tangle with the rule against perpetuities when it can be avoided under the Real Property Theory?

B. Inability to Achieve Clear Record Title

Classifying NPRIs as personal property will undercut the ability to achieve clear record title when owners of NPRIs die, whether testate or intestate. West Virginia law protects ownership of real property when proof of that ownership is recorded in the county in which the real property is located.⁹⁸ West Virginia law also provides for recordation of foreign wills conveying real property interest upon death in the county in which the realty is located.⁹⁹ In the case of intestacy, a normal intestate administration may be opened in the county in which the real estate is located; this probate will be ancillary to the probate conducted in the decedent's domicile.¹⁰⁰ The intestate administration process includes an appraisal of the property owned by the decedent at the time of his or her death and a listing of the heirs who inherited that property.¹⁰¹ This document should be recorded in the county in which the real property is located. As Judge Fox recognized in his dissenting opinion in *McIntosh II*, by classifying an interest as personal property, "the real ownership of the interest may be difficult, if not impossible, to locate."¹⁰² But by classifying an NPRI as an interest in real property, a full record of ownership of that NPRI may be maintained in the county in which it is located because wills or probate documents belonging to decedents from outside West Virginia or outside the situate county can be recorded in the county of situs. Of course, this envisions an ideal world in which executors, heirs, and devisees take affirmative action to apprise the world of what happened to a decedent's interests. Nonetheless, the ability to achieve clear record title exists for those who desire to complete the paperwork.

In sum, classifying NPRIs as personal property will prohibit clear record title. In contrast, classifying NPRIs as real property will enable clear records of ownership of NPRIs to be maintained in the county in which those minerals are located. This will allow for enhanced clarity and certainty of title, which are important to the courts, lawyers, record-keepers, mineral owners, and operators.

⁹⁸ See W. VA. CODE §§ 40-1-8 to -9.

⁹⁹ *Id.*; see also W. VA. CODE § 41-5-13 (allowing for probate of foreign will). By filing the will within a year, the decedent's heirs are protected against bona fide purchasers. W. VA. CODE § 41-5-19.

¹⁰⁰ Christopher J. Winton, *Probate Happens: How to Perform an Ancillary Administration to West Virginia Real Estate*, W. VA. LAW., May-June 2007, at 28, 28.

¹⁰¹ W. VA. CODE § 44-1-44 (requiring appraisal of property); W. VA. CODE § 44-1-13 (requiring affidavit showing heirs, distributees, devisees, and legatees of decedent).

¹⁰² *McIntosh II*, 28 S.E.2d 607, 616 (W. Va. 1943).

C. *Choice of Law: Applying West Virginia Law to NPRIs in Minerals Within the State*

West Virginia adheres to the doctrine known as *lex loci rei sitae*, which means that the law of the state where real property is located governs a transaction affecting the real property.¹⁰³ This doctrine is important for maintaining “certainty, predictability and uniformity of result and ease in the determination and application of the law to be applied concerning the transaction of property and the management of property.”¹⁰⁴ As Williams and Meyers explain, “classification of an interest as realty or personalty is of significance in the determination of the governing law for a transaction since the law of the situs will govern a transaction affecting real estate whereas such law may not govern a transaction not affecting real estate.”¹⁰⁵

Classifying NPRIs as real property would certainly provide more consistent treatment of NPRIs in the context of estate administration. Whereas personal property is governed by the law of the decedent’s domicile, real property is governed by the law of the jurisdiction in which it is located.¹⁰⁶ Classifying NPRIs as personal property would lead to practitioners and abstractors having to learn and apply the law of 50 states to ascertain who owns an NPRI in minerals in West Virginia. Instead, the Real Property Theory would allow those wishing to ascertain ownership of an NPRI in West Virginia minerals to look no further than West Virginia law. While treating NPRIs as real property may not resolve all choice of law disputes concerning NPRIs,¹⁰⁷ it

¹⁰³ *Keesecker v. Bird*, 490 S.E.2d 754, 766 (W. Va. 1997) (“We therefore hold that the choice of law doctrine of *lex loci rei sitae* controls as to property located in this State.”).

¹⁰⁴ *Id.*

¹⁰⁵ See 1 WILLIAMS & MEYERS 2013, *supra* note 6, § 213.9.

¹⁰⁶ See *In re Estate of Briggs*, 134 S.E.2d 737, 740–41 (W. Va. 1964) (“The law of the domicile of the testator determines the validity of a holographic will as to personalty and the law of the situs governs as to realty.” (quoting 94 C.J.S. *Wills* § 201, at 1038)); *Keesecker*, 490 S.E.2d at 766 (“It is a universal principal that real property is subject to the law of the country or state within which it is situated.”).

¹⁰⁷ Other choice of law doctrines may result in disputes concerning NPRIs being resolved by the law of other jurisdictions. For instance, the West Virginia Supreme Court of Appeals has often turned to the RESTATEMENT (SECOND) OF CONFLICT OF LAWS, which provides that the law of the state with the most significant relationship to the dispute governs contractual disputes unless the parties’ contract contains a choice-of-law provision. *Pen Coal Corp. v. William H. McGee & Co.*, 903 F. Supp. 980, 983–984 (S.D.W. Va. 1995) (citing four West Virginia Supreme Court of Appeals cases and the RESTATEMENT (SECOND) OF CONFLICT OF LAWS, §§ 186–88 (1971 & Supp. 1989)). West Virginia also appears to follow the principle that the doctrine of “*lex rei sitae* governs as to contracts relating to real estate, as to [1] the rights of parties thereto, [2] the mode of transfer and alienation and [3] the nature and extent of the interest therein.” 4A MICHIE’S JURISPRUDENCE OF VIRGINIA & WEST VIRGINIA, *Conflict of Laws, Domicile and Residence* § 30. It is certainly possible for a West Virginia court to view a dispute concerning an instrument involving an NPRI as falling outside of the three categories where the

may provide an additional justification as to why West Virginia law should apply to transactions creating and affecting these interests in the choice of law analysis. Thus, treating NPRIs as real property would enhance the predictability of applicable law and outcome to the extent the *lex loci rei sitae* doctrine prevails with respect to transactions creating and affecting NPRIs. The Real Property Theory would also allow the West Virginia judiciary to shape the law as to NPRI transactions affecting oil and gas development within its borders as opposed to having to rely on extra-jurisdictional law.

D. Rational Oil and Gas Jurisprudence

The Personal Property Theory can lead to absurd jurisprudence. In *Hanson*, the Arkansas Supreme Court aptly explained why viewing an NPRI as a personal property interest vesting upon production is problematic:

It might also be argued that the estate would vest upon the actual production of oil and gas—the view to which the Kansas court was driven by reason of the royalty interest being considered as personal property. But in Arkansas the royalty interest is real property, and the severed oil or gas is personalty; there is no need to confuse the two. A particular producing well might be abandoned at any time, and even if operated to exhaustion it would drain only the oil-bearing stratum that it had penetrated, leaving untouched other deposits that might lie above or below. It is hard for us to conceive of an estate in real property which vests barrel by barrel or stratum by stratum. In the analogous case of a *profit à prendre*, such as the perpetual right to take game or fish from another's land, the estate in real property is a present vested interest which is unaffected by the rule against perpetuities. . . . Although the owner of such a privilege acquires a personal property interest whenever he bags a duck or lands a fish, this action is merely an incident in the enjoyment of the estate in real property.¹⁰⁸

Indeed, the Personal Property Theory leaves us to wonder whether an NPRI vested in a deeper stratum, such as the Marcellus shale, when the only production during the period provided by the rule against perpetuities was from shallow strata.

In sum, the Personal Property Theory leads only to legal and theoretical complications for lawyers, judges, court and county administrators, mineral

latter *lex rei sitae* principle applies, and instead turning to the “most significant relationship” rule, which may result in the application of another state’s law.

¹⁰⁸ *Hanson v. Ware*, 274 S.W.2d 359, 362–63 (Ark. 1955) (citation omitted).

owners, and operators, whereas the Real Property Theory provides for certainty and clarity.

E. Partition Actions

The characterization of NPRIs also affects the rights of cotenants to seek partition of commonly owned property. Under West Virginia law, cotenants are provided the statutory right of partition under the West Virginia Code.¹⁰⁹ This statute allows one cotenant to bring an action against his fellow cotenant wherein he can ask the court to partition the commonly owned real property in kind, allot the partitioned interest(s) to anyone who will pay for it, or sell the real property sought to be partitioned through a public auction on the courthouse steps.¹¹⁰

In *Stalnaker v. Stalnaker*,¹¹¹ the West Virginia Supreme Court of Appeals held that all owners with an interest in the real property sought to be partitioned are necessary parties to the partition action.¹¹² The court further stated that “[a] decree of partition rendered in a suit in which all the persons in interest were not parties is null and void.”¹¹³ The broad language of *Stalnaker* suggests that those owning a real property interest in the minerals which are the subject of a partition suit must be named as parties.¹¹⁴

In light of *Stalnaker*’s sweeping directive, the pertinent question becomes whether an NPRI constitutes “an interest in land” of such character as to require NPRI owners to be named as necessary parties in a partition action. As discussed below, by characterizing an NPRI as an incorporeal hereditament and looking at the basic purpose of partition actions, this concern can be eliminated.

¹⁰⁹ W. VA. CODE §§ 37-4-1 to -8 (2014). See generally John Mark Huff, *Chop It Up or Sell It Off: An Examination of the Evolution of West Virginia’s Partition Statute*, 111 W. VA. L. REV. 169 (2008).

¹¹⁰ See Huff, *supra* note 109; see also W. VA. CODE §§ 37-4-1 to -8.

¹¹¹ 80 S.E.2d 878 (W. Va. 1954).

¹¹² *Id.* at Syl. Pt. 1 (“In a suit to partition land, all known claimants to any part thereof, or interest therein, or at the time suit is instituted, or whose interests are made to appear at any stage of the cause, are necessary parties.” (citation omitted) (internal quotation marks omitted)).

¹¹³ *Id.* at Syl. Pt. 2; see also Syl. Pt. 2, *O’Daniels v. City of Charleston*, 490 S.E.2d 800 (W. Va. 1997) (holding that the circuit court erred in issuing a writ of mandamus involving real property when the property owners whose property was directly affected were not named as parties: “When a court proceeding directly affects or determines the scope of rights or interests in real property, any persons who claim an interest in the real property at issue are indispensable parties to the proceeding. Any order or decree issued in the absence of those parties is null and void.”); Syl. Pt. 4, *Oneal v. Stimson*, 56 S.E. 889 (W. Va. 1907) (“A decree of partition rendered in a suit in which all persons in interest were not parties is null and void.”).

¹¹⁴ *But see infra* note 124 and accompanying text (arguing that when read in context, *Stalnaker*’s mandate is perhaps not as broad as its language suggests because the remedy of partition is for cotenants as against other cotenants of the same estate).

1. Lack of Cotenancy Supports Not Naming NPRI Owners in Partition Suits

Assuming an NPRI is an incorporeal hereditament, the NPRI owner should not be named in the partition action because an NPRI owner is not a cotenant of the executive rights owner and has no possessory interest. Under the statute, partition is a remedy for cotenants,¹¹⁵ joint tenants,¹¹⁶ and/or coparceners¹¹⁷ against other cotenants, joint tenants and/or coparceners in the same land.¹¹⁸ Furthermore, although *Stalnaker* uses broad language when discussing the parties that need to be named in a partition action, the court

¹¹⁵ A “cotenancy” is defined as “[a] tenancy with two or more coowners who have *unity of possession*.” BLACK’S LAW DICTIONARY 1603 (9th ed. 2009) (emphasis added). Examples of forms of cotenancy include a joint tenancy and tenancy in common. *Id.* A “tenancy in common” is “[a] tenancy by two or more persons, in equal or unequal undivided shares, *each person having an equal right to possess the whole property* but no right of survivorship.” *Id.* at 1604 (emphasis added).

¹¹⁶ A “joint tenancy” is defined as “[a] tenancy with two or more coowners who take identical interests simultaneously by the same instrument and *with the same right of possession*.” *Id.* at 1603 (emphasis added). “A joint tenancy differs from a tenancy in common because each joint tenant has a right of survivorship to the other’s share” *Id.* A key feature of a joint tenancy is the four unities, which one commentator describes as follows:

In a joint tenancy there are said by Blackstone to be four unities, to wit, unity of interest, unity of title, unity of time, and *unity of possession*, or, in other words, joint tenants have one and the same interest, accruing by one and the same conveyance, commencing at one and the same time, and *held by one and the same undivided possession*.

2 TIFFANY REAL PROP. § 418 (3d ed. 1947) (emphasis added).

¹¹⁷ A “coparcener” is defined as “[a] person to whom an estate descends jointly, and who holds it as an entire estate; a person who has become a concurrent owner as a result of descent.” BLACK’S LAW DICTIONARY 385 (9th ed. 2009). As one commentator explains,

Coparceners constitute a single heir, and they occupy a position intermediate between joint tenants and tenants in common. *Like joint tenants they have unity of title, interest and possession*; like tenants in common, their estate is not subject to the doctrine of survivorship, and if there are three coparceners and one dies, her share passes separately to her heirs or devisee, not to the survivors, *though the unity of possession continues*. It follows that unity of time is not necessary to constitute coparcenary, for if a man has two daughters to whom his estate descends and one dies leaving a son, such son and the surviving daughter will be coparceners.

Id. (emphasis added) (quoting G.C. CHESHIRE, MODERN LAW OF REAL PROPERTY 553 (3d ed. 1933)).

¹¹⁸ See W. VA. CODE § 37-4-1 (2014) (“Tenants in common, joint tenants, and coparceners of real property, including minerals, . . . shall be compelled to make partition.”); see also *Brown v. Brown*, 67 S.E. 596, 596 (W. Va. 1910) (“[A] life tenant cannot compel a partition among remaindermen. A life tenant has not a particle of interest in estate in remainder, [is] not a cotenant with remaindermen, and nobody can have partition unless he have title to the thing to be partitioned. A life tenant owning with one or more others a life estate can have that estate divided between himself and co-owners of the life estate; but what colorable right has he to demand a partition among remaindermen?” (citations omitted)).

likely intended its holding to only apply to the cotenants who were not named in the action.¹¹⁹

The critical stick in the bundle that a cotenant must have as an element of the partition statute is *possession* of the estate.¹²⁰ In contrast, an incorporeal hereditament is a non-possessory interest by definition, and thus, NPRI owners do not have possession of the real estate, are not co-tenants, and lack the ability to partition the land.¹²¹ Because cotenants, joint tenants, and coparceners all hold an equal right to possession, and an NPRI, if treated as an incorporeal hereditament, is non-possessory, NPRI owners are not proper parties to a partition suit because they are not in a cotenancy, joint tenancy, or coparcenary with the executive rights owners of the mineral estate. As one commentator explains,

It should be borne in mind that the owner of a mere royalty interest has no present or prospective possessory interest in the land; that he owns no part of the minerals (as such) in place; that he does not become a cotenant in the mineral estate; that he cannot, therefore, demand or be forced into an involuntary partition of the mineral fee estate; and that his interest is merely a present vested incorporeal interest in the land.¹²²

¹¹⁹ See *Stalnaker v. Stalnaker*, 80 S.E.2d 878, 883 (W. Va. 1954) (“The trial court did not attempt to ascertain the interest of any of the *co-tenants* of the land A decree of partition of the land should not have been made, nor should the land have been directed to be sold before ascertaining the interest of all the *coparceners*.” (emphasis added)).

¹²⁰ See *supra* notes 12–14; see also *Cales v. Ford*, 28 S.E.2d 429, 436 (W. Va. 1943) (“[T]he right to possession is the test of the right to partition.”).

¹²¹ See RESTATEMENT (FIRST) OF PROPERTY § 473 cmt. a (1944) (“As the law has developed, corporeal interests are, in general, coincident with possessory interests; incorporeal interests with non-possessory interests.”); see also *id.* § 450 cmt. c (“[D]espite criticism which may properly be made with respect to the connotations of the words ‘incorporeal’ and ‘corporeal,’ the classification of interests into incorporeal and corporeal corresponds to a fundamental difference between nonpossessory and possessory interests and is therefore a useful one.”); RESTATEMENT (THIRD) OF PROPERTY § 1.2(1) (2000) (defining an easement as “a nonpossessory right to enter and use land in the possession of another”). Although an easement provides for limited use of the land, it is still a non-possessory interest:

[T]he nonpossessory feature of an easement differentiates it from an estate in land. Thus, the holder of an affirmative easement may only use the land burdened by the easement; the holder may not occupy and possess the realty as does an estate owner. . . . [A]n easement burdens land possessed by someone other than the easement holder. This characteristic is a corollary of the nonpossessory element of an easement. It emphasizes the distinction between possession and use and highlights the fact that a possessor and an easement holder can simultaneously utilize the same parcel of land.

JON W. BRUCE & JAMES E. ELY, JR., *THE LAW OF EASEMENTS AND LICENSES IN LAND* § 1.1, at 1-3 to 1-5 (2014).

¹²² Lee Jones, Jr., *Non-Participating Royalty*, 26 TEX. L. REV. 569, 569 (1948).

Similarly, the West Virginia Supreme Court of Appeals has held that parties with an interest in proceeds of mineral development hold “no tenancy in common” with the mineral owner and are therefore “not entitled to partition.”¹²³ In *Collins*, two brothers received from their father the following interest: “And in the event there is one or more wells drilled on said farm, then the proceeds of same shall be divided equally between my sons”¹²⁴ Their sister, Clara Stalnaker, had “the fee simple title to the property, subject to the provision as to grantor’s maintenance and support and the then one producing well,” which was already drilled upon the property.¹²⁵ The brothers sought to partition their interest from their sister’s interest.¹²⁶ The court interpreted the conveyances and held that the brothers had only a royalty interest.¹²⁷ Consequently, because the brothers “held no tenancy in common with the appellant, Clara Stalnaker, they [were] not entitled to partition or any other relief in this suit.”¹²⁸

¹²³ See *Collins v. Stalnaker*, 48 S.E.2d 430, 436 (W. Va. 1948).

¹²⁴ *Id.* at 431.

¹²⁵ *Id.* at 436.

¹²⁶ *Id.* at 432.

¹²⁷ *Id.*

¹²⁸ *Id.* at 436. A Texas Court of Appeals applied a similar approach under Texas’s former partition statute to hold in *Texas Oil & Gas Corp. v. Ostrom* that joinder of owners of non-possessory royalty interests (i.e., NPRIs) in a partition suit between owners of a mineral leasehold estate is not required. See 638 S.W.2d 231, 234–35 (Tex. App. 1982). The *Ostrom* court stated that “[t]he general rule in a partition case is that all owners of property must be joined.” *Id.* at 233 (citations omitted). Under Texas law, a “joint owner” is “one who owns any interest in the real estate entitling him to joint possession and use.” *Id.* at 234 (quoting *Tex. Co. v. Cain*, 177 S.W.2d 251, 253 (Tex. Civ. App. 1944)). The *Ostrom* court held that a “lessee has a corporeal interest in land and may compel partition, but the owners of non-possessory interests do not have standing to demand or defeat a partition.” *Id.* at 233. Accordingly, “[l]essors of a mineral estate and royalty interest owners, therefore, are not ‘joint owners’ of the mineral estate for purposes of art. 6082, the partition statute.” *Id.* at 234. The reason is that the lease divests “the grantor (lessor) of the right to possess, use or dispose of the oil and gas in, upon or under the land in question, and invests these rights in the grantee (lessee) of the lease.” *Id.* In regard to royalty owners, whether the minerals are leased or not, a pure royalty owner is not required to be joined to a partition action because that “interest would neither be increased or decreased by a partition, but would remain constant and unaffected; thus, ‘a nonpossessory interest is not affected by a partition and the owner of such interest is not a necessary party.’” *Id.* (quoting *Douglas v. Butcher*, 272 S.W.2d 553, 555 (Tex. Ct. App. 1954)); see also *Hudgins v. Lincoln Nat’l Life Ins. Co.*, 144 F. Supp. 192, 199 (E.D. Tex. 1956) (holding that a mere royalty owner “has no right of possession of any portion of the mineral estate, and therefore, has no right to compel a partition of the mineral estate”). However, the *Ostrom* court cautioned that although lessors and royalty interest owners are not required to be joined in a partition action, “it would be wise to join the lessors and the royalty interest owners.” *Ostrom*, 638 S.W.2d at 235. Additionally, Texas courts will allow joinder of these owners if the facts show that their interests will be affected. See *Ohrt v. Union Gas Corp.*, 398 S.W.3d 315, 335–36 (Tex. Ct. App. 2012) (holding that the trial court did not abuse its discretion by allowing the parties that were both lessors and royalty recipients to be joined where the royalties may have been paid prior to filing the unit designation, the

2. NPRI Owners Are Similar to Lienholders, Who Are Not Required To Be Named in Partition Suits in West Virginia

Second, assuming the NPRI is an incorporeal hereditament, an NPRI owner is much like a lienholder, and West Virginia law does not require lienholders to be made parties to a partition suit.¹²⁹ While the rights associated with a lien and an NPRI appear to vest immediately, the full benefits of ownership are not realized until some future event; in the case of a lien, that event is foreclosure, and in the case of an NPRI, that event is production.¹³⁰ Additionally, transfers of property in a partition action ordinarily do not affect a lienholder's interest therein if such interest is properly recorded.¹³¹

Depending on the type of incorporeal hereditament to which an NPRI is compared, a transfer of the mineral estate in a partition action should not

lessors/royalty recipients would not have been able to protect their interests, and the oil and gas company would have been exposed to multiple or inconsistent obligations).

¹²⁹ See *Tompkins v. Kyle*, 122 S.E. 150, 152 (W. Va. 1924) (“[I]n a suit for partition, it is not necessary to make lien creditors of a decedent parties to the suit.”). There are two exceptions to the general rule that lienholders do not need to be named in a partition suit: (1) lienholders should be named when the partition is meant to serve the additional purpose of determining and satisfying outstanding liens on the property; and (2) lienholders might need to be named when there are special circumstances that might impede a fair sale of the property. See *id.* at Syl. Pt. 3 (“[I]n [a partition] suit the holder of a trust lien debt on the land is not a necessary party, yet if such lien creditor be made a party and the bill and proceedings are for the additional purpose of ascertaining the liens and satisfying them out of the proceeds of a sale prayed for, it is error to decree a sale without having the legal title before the court.”); *Helmick v. Kraft*, 99 S.E. 325, 328 (W. Va. 1919) (“We are not to be understood . . . as holding that adult parties may not consent to the presence of lien creditors, or that creditors may not come in [the partition suit] with the assent of adult owners, in cases in which only adults are interested; nor as holding that a creditor may never be a necessary party, in the absence of consent. If the debts are uncertain in amount, or there are conflicting claims of priority, or other circumstances constituting an impediment to a fair sale, or there is a mortgagee in possession, after condition broken, lien creditors might be necessary parties.”).

¹³⁰ See RESTATEMENT (THIRD) OF PROPERTY-SECURITY (MORTGAGES) § 4.1 cmt. a(2) (1992) (“The substantial majority of American jurisdictions follow the lien theory. Under this theory, the mortgagee acquires only a ‘lien’ on the mortgaged real estate and the mortgagor retains both legal and equitable title and the right to possession until foreclosure or a deed in lieu of foreclosure.”); Meyers, *supra* note 15, at 413 (“It is believed . . . that [nonparticipating royalty and non-executive mineral interests], treated as incorporeal hereditaments, are presently vested, although payment may be contingent on the execution of leases.”).

¹³¹ See *Tompkins*, 122 S.E. at 152 (“The purpose of a partition suit is not to settle indebtedness, but to divide the inheritance between those entitled thereto, and if a division be made[,] the liens are not disturbed.”); *Helmick*, 99 S.E. at 328 (“If the estate is partitioned, the lien of the incumbrance fixed on an undivided part of it will, after the division and allotment, be confined to the particular share or part allotted to the party creating the incumbrance; and, if the state is sold, the purchaser will take it subject to the lien of the incumbrance upon the undivided share of the party against whom the mortgage or judgment was held before sale.” (citations omitted) (internal quotation marks omitted)).

affect an NPRI.¹³² At least one case has held that pure royalty owners (i.e., NPRI owners) are not necessary parties to a partition action because their interests remain “constant and unaffected” despite the outcome.¹³³ Thus, given the similarities between lienholders and NPRI owners, the rationale that supports not naming lienholders as defendants in a partition suit, namely, that their interests are not affected by the outcome, would also appear to support not naming NPRI owners.¹³⁴

3. No Case Law Appears To Require NPRI or Incorporeal Hereditament Owners To Be Named in Partition Suits

Third, no case law was found in Arkansas, Florida, Tennessee, New Mexico, or Wyoming—the jurisdictions specifically holding an NPRI to be real property—requiring an NPRI owner to be named in a suit for partition.¹³⁵ Additionally, no legal authority in West Virginia was found to affirmatively indicate that an individual who holds an easement, lease, license or other

¹³² See Myers, *supra* note 15, at 410–15 (exploring the classification of nonparticipating royalty interests and non-executive mineral interests as three types of incorporeal hereditaments—real covenants, rent, and covenants in aid of rent—and noting that by classifying an NPRI as a rent or covenant in aid of rent, the NPRI can run with the land without the many analytical issues associated with whether an NPRI can run with the land if treated as a real covenant). Practically speaking, if a title opinion has revealed NPRI owners through an examination of record title, any putative grantee in a partition sale should have constructive notice of the interest.

¹³³ *Ostrom*, 638 S.W.2d at 234. For additional discussion on this point, see *supra* note 128.

¹³⁴ Despite characterizing an NPRI owner as a personal property interest, Kansas has held that NPRI owners are not indispensable parties to an action to cancel a lease because an NPRI owner’s position remains unchanged despite the outcome of the lease cancellation action. *Dexter v. Brake*, 174 P.3d 924, 926 (Kan. Ct. App. 2008). The court in *Dexter* offered the following reasoning:

Absent parties with . . . a perpetual nonparticipating royalty interest in lands subject to an oil and gas lease are not so situated that the disposition of a cancellation action in their absence may . . . substantially impair or impede their ability to protect their interests. . . .the [NPRI] remains intact, leaving the interest in precisely the same position after the cancellation of the lease as it was before the lease was executed.

Id. at Syl. Pt. 9. The reasoning of the Kansas Court of Appeals arguably applies to a partition action as well as an action for cancellation of a lease. An NPRI remains the same no matter who owns the corresponding executive rights, so NPRI owners should not be deemed indispensable parties to a partition action.

¹³⁵ Florida has held that an NPRI owner has no right to demand partition. See *Welles v. Berry*, 434 So. 2d 982, 985 (Fla. Dist. Ct. App. 1983) (“The owner of the nonparticipating royalty interest cannot demand partition of the mineral fee estate and has no right to execute any leases.”). In addition to these jurisdictions, Texas’s Court of Appeals has also held that a pure royalty owner is not a necessary party to a partition action. See *Ostrom*, 638 S.W.2d at 234. For more on Texas’s stance that an owner of a pure royalty interest is not a necessary party to a partition action, see *supra* note 128.

incorporeal hereditament covering a tract of property is required to be named in a suit seeking to partition the real property in which the individual has an interest.¹³⁶ Moreover, a lease is preserved in a partition suit by statute in West Virginia.¹³⁷ Therefore, it would appear that an NPRI owner's right to receive royalties from any existing leases would be similarly preserved.

4. Naming NPRI Owners in Partition Suits Would Be Futile

Regardless of how an NPRI is characterized, naming NPRI owners in a partition action is pointless because the purpose of partition actions is to resolve disputes among concurrent owners of property.¹³⁸ Practically speaking, the need to partition an NPRI owner should never arise because NPRI owners have no say in the production of the minerals in the mineral estate and cannot impede production or a common development scheme.¹³⁹ The only owners who can impede production by refusing to execute leases are the executive rights owners, and thus, only those owners should be named in the partition action.¹⁴⁰

¹³⁶ Arguably, if an NPRI is to be characterized as an incorporeal hereditament, but the NPRI owner does not make his or her interest of record, a partition decree could potentially deprive such owner of his or her interest. *See Fanti v. Welsh*, 161 S.E.2d 501, 505 (W. Va. 1968) (where plaintiffs claimed easement to maintain private sewer through defendants' land but neither defendants nor defendants' predecessors in title had knowledge of the sewer, plaintiffs' easement "extinguished by the conveyance of the property" to the purchaser without notice of the easement). A purchaser is considered to have "such knowledge as he would have acquired by the exercise of ordinary diligence," including knowledge of those interests which are of record. *Id.* However, the West Virginia Supreme Court of Appeals has held that where a purchaser of land for value had a title opinion done by an attorney and that opinion did not uncover the easement, the buyer took the land free of the easement. *Id.* at 506.

¹³⁷ *See* W. VA. CODE § 37-4-7 (2014).

¹³⁸ *See* 3 POWELL ON REAL PROPERTY § 21.05 (2014) ("When two or more persons find themselves owning concurrent . . . interests in the same land, oil painting, bond, or other asset, one or more of these persons may wish to end the relationship with the others. The law of partition and judicially ordered sales provides a remedy. It specifies who can compel such a severance and who can be subjected to such a severance irrespective of his own preference, that is, who has the power to initiate such a procedure and who must respond to it."); *see also* Huff, *supra* note 109, at 169–70 ("What happens when co-tenants cannot agree on how to use a parcel of land? Worse yet, what happens when one faction of co-tenants wants to sell the property while the other faction wants the property partitioned in kind, particularly in West Virginia? In early England, there was no statutory provision for an action to partition land; rather, it was an action created at common law, but these common law provisions were later codified. Much like England, every state in the United States has a statute dealing with partitioning real property either in kind or by sale.").

¹³⁹ *See* *Davis v. Hardman*, 133 S.E.2d 77, 81 (W. Va. 1963) (noting that "the distinguishing characteristics of a non-participating royalty interest" include the fact that "the owner has no right to do any act or thing to discover and produce the oil and gas" and "no right to grant leases").

¹⁴⁰ *See id.* (noting that the owner of "an interest in minerals in place . . . has the right to do any and all acts necessary to discover and produce oil and gas").

F. If Treated as Incorporeal Hereditaments, NPRIs Should Survive Tax Sales

There is also debate as to how to treat NPRIs in the context of sales of minerals for delinquent property taxes. Treating NPRIs as real property may mean that any outstanding NPRIs at the time of the tax sale were sold to the tax sale purchaser.

Although West Virginia law does not appear to provide clear guidance as to whether incorporeal hereditaments are affected by tax sales of the estates to which they pertain, the majority of jurisdictions addressing this issue have determined that easements and covenants are not extinguished by tax sales.¹⁴¹ Thus, if West Virginia were to adopt the majority approach by preserving incorporeal hereditaments such as easements and covenants when minerals are sold for delinquent taxes, it should follow that NPRIs, if treated as incorporeal hereditaments, should also be preserved.

V. THE REAL PROPERTY THEORY IS THE RATIONAL CHOICE FOR WEST VIRGINIA

West Virginia is faced with a square-peg, round-hole dilemma: the NPRI does not neatly fit into the traditional property interest molds forged by the state's inconsistent, centuries-old jurisprudence. Williams and Meyers suggest that courts should consider "whether the oil and gas interest generally has the important characteristics which distinguish[] the interest described by a particular statute or common law rule sought to be applied" as opposed to trying to fit various oil and gas interests into "the straightjacket of common law concepts."¹⁴² While this *ad hoc* approach is not without merit, it would seem to inject even more uncertainty into the law governing mineral interests as subjective determinations may abound as to which property characteristics amount to "distinguishing." In a state that has already gained a reputation for having an arbitrary judiciary,¹⁴³ the more syllogistic, "straightjacket" approach that Williams and Meyers challenge would provide some much-needed certainty to industry participants.¹⁴⁴ Furthermore, although Williams and Meyers appear to support a more case-by-case approach, they also conclude that "in states in which the classification question has not been decided as to a

¹⁴¹ See generally Holly Piehler Rockwell, Annotation, *Easement, Servitude, or Covenant as Affected by Sale for Taxes*, 7 A.L.R. 5th 187 (1992) (discussing cases that consider the effect of a sale of real property for delinquent property taxes on private easements, servitudes, and restrictive covenants).

¹⁴² 1 WILLIAMS & MEYERS 2013, *supra* note 6, § 213.

¹⁴³ See AM. TORT REFORM FOUND., JUDICIAL HELLHOLES 2013/2014, at 19 (2013), <http://www.judicialhellholes.org/wp-content/uploads/2013/12/JudicialHellholes-2013.pdf> ("For the past decade, West Virginia has been included among the top 5 Judicial Hellholes.").

¹⁴⁴ See 1 WILLIAMS & MEYERS 2013, *supra* note 6, § 213.

particular interest, classification as realty rather than as personalty is preferable if the particular interest has the duration of a freehold.”¹⁴⁵

In line with this reasoning, the Real Property Theory is the most rational choice for West Virginia. Classifying NPRIs as interests in real property will promote clarity of title, avoid complex rule against perpetuities analysis, allow West Virginia to shape the law regarding oil and gas transactions within its border, and create more predictable jurisprudence. Most jurisdictions have adopted this approach and have consistently pointed out the faulty logic in the Personal Property Approach. In contrast, should West Virginia adopt the Personal Property Theory, it would join Kansas—the only other jurisdiction to adopt the Personal Property Theory—in the minority camp. Given the fact that Kansas’s courts have strongly criticized their own approach and may soon change it, West Virginia would likely be the only jurisdiction to follow this approach. The Personal Property Theory does not provide for clarity or certainty of title and would cause conveyances to regularly run afoul of the rule against perpetuities.

VI. CONCLUSION

In light of West Virginia’s jurisprudence, majority theory, and practical considerations, an NPRI should be properly classified under West Virginia law as a real property interest in the form of an incorporeal hereditament. Although West Virginia case law discussing oil and gas royalties lends some support to the Personal Property Theory, careful examination of these decisions reveals that they are outdated and inconsistent. Adopting the Real Property Theory would comport with the majority of oil and gas jurisdictions, which have held that an NPRI is a real property interest and analogized it to various types of incorporeal hereditaments. Only Kansas has classified NPRIs as personal property, and this decision has been severely criticized not only by authoritative commentators and courts of other jurisdictions, but also by Kansas’s own courts. Finally, the practical implications of the Real Property Theory make it the best choice for West Virginia. Classifying an NPRI as real property in the form of an incorporeal hereditament will allow for certainty of title, avoid complications associated with the rule against perpetuities, preserve the integrity of the partition action process, and provide for greater predictability in estate administration and choice of law questions. In sum, the West Virginia Supreme Court of Appeals, if given the opportunity, should hold that an NPRI is a real property interest in the form of an incorporeal hereditament.

¹⁴⁵ *Id.*