

**SCRATCHING THE SURFACE: THE WEST VIRGINIA SUPREME COURT BATTLES
“UNCERTAINTY AND CONFUSION” IN *FAITH UNITED METHODIST V. MORGAN***

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I. INTRODUCTION

The year is 1907. Two siblings, Walter and Florence, have co-owned a tract of land as tenants in common for several years. They have previously sold the rights to the coal underlying the parcel to a third party. Now, Florence has a deed drawn up conveying to Walter her “one-seventh undivided interest in the surface only with the hereditaments and appurtenances thereto, (the coal and mining privileges having been previously sold).” The title transfers and is entered into the county tax books. Florence dies intestate in 1930. For over a century after the conveyance, nothing of note happens. Walter’s interest is sold a number of times, eventually coming into the ownership of a man named Morgan. Finally, in 2011, Morgan files a declaratory judgment action against Florence’s successors to establish himself as the sole owner of the oil and gas underlying the tract. The record does not contain a single mention of oil and gas rights in any of the deeds.

Who owns what interest in this parcel? What does the word “surface” mean in this conveyance? Is it a clear and unambiguous indicator of Florence’s intent, or does it have multiple possible meanings? These are questions the West Virginia Supreme Court of Appeals faced in its June 2013 decision *Faith United Methodist Church & Cemetery of Terra Alta v. Morgan*.¹ The court considered its own confusing precedent, as well as the fact that its previously controlling decision had “never been applied by this Court, only distinguished or ignored.”² The court arrived at a conclusion through which it sought to

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¹ 745 S.E.2d 461 (W. Va. 2013).

² *Id.* at 469.

counteract “uncertainty and confusion [in] our law of land titles.”³ By expressly overruling syllabus point one of *Ramage v. South Penn Oil Co.*⁴ and adopting a new syllabus point defining what the word “surface . . . generally means,”⁵ the Supreme Court received praise from several commentators for bringing certainty and predictability to the state’s mineral rights property law.⁶ However, in doing so, the court raised several new questions.

This essay seeks to provide guidance to practitioners by identifying and suggesting answers to these questions. First, what will be the direct impact of the holding in *Morgan* on practitioners conducting title examinations? Second, what is the potential impact of the court’s reasoning on other areas of law? Finally, what are the property tax implications of the *Morgan* decision? Before turning to these questions, this essay will briefly examine the history of the court’s “surface only” decisions.

II. THE EVOLUTION OF THE DEFINITION OF “SURFACE”

A. *An Era of Confusion: Ramage and Its Predecessors*

From 1902 to 1923, the West Virginia Supreme Court decided three cases involving conveyances of surface only and struggled to come to grips with the respective rights of surface owners and mineral owners. Each case arose out of the early days of mineral development in West Virginia, when disputes between surface and mineral owners represented a newer area of law.

First, in 1902, the court in *Williams v. S. Penn Oil Co.*,⁷ held that a conveyance of “all the surface” had “completely sever[ed] the surface from the various strata beneath it,” and offered the following definition: “[T]he word ‘surface’ has a definite certain meaning; that it is that portion of the land which is or may be used for agricultural purposes, for plowing, grazing, etc.”⁸ Nine years later, the court in *Dolan v. Dolan*⁹ distinguished the case from *Williams*, stating that *Williams* “was properly decided” because it involved a conveyance of surface “without more.”¹⁰ Finally, in *Ramage v. S. Penn Oil Co.*,¹¹ the court overturned *Williams* and substituted a new definition of surface that allowed it to be interpreted through extrinsic evidence.¹²

³ *Id.*

⁴ Syl. Pt. 1, *Ramage v. S. Penn Oil Co.*, 118 S.E. 162 (W. Va. 1923).

⁵ *Morgan*, 745 S.E.2d at Syl. Pt. 2.

⁶ See Joseph V. Schaeffer, *Yours, Mine or Ours? Morgan Clarifies Surface Versus Mineral Ownership in W. Va.*, SPILMAN THOMAS & BATTLE, PLLC (June 27, 2013), <http://www.spilmanlaw.com/resources/attorney-authored-articles/marcellus-fairway/yours-mine-or-ours—morgan-clarifies-surface-vers>; Cole T. Delancey, *West Virginia*, 1 TEX. A&M L. REV. 379, 383 (2014) (“Even more encouraging than the predictability and uniformity created by this case, is the willingness of the court to address a problem that has persisted since 1923.”).

⁷ 43 S.E. 214 (W. Va. 1903). While the South Eastern reporter lists January 14, 1903 as the date *Williams* was decided, the official West Virginia reporter, 231 W. Va. 423, gives the date as December 6, 1902. The text of this essay uses the date from the West Virginia reporter.

⁸ *Id.* at 217.

⁹ 73 S.E. 90 (W. Va. 1911).

¹⁰ *Id.* at 92. *Dolan* involved a devise of “surface” in a will that also included a separate exception of some mineral rights. This “something more” allowed the court to avoid applying *Williams*.

¹¹ 118 S.E. 162 (W. Va. 1923).

¹² *Id.* at 171. (“[T]he term ‘surface,’ when used as the subject of conveyance, does not have a definite legal meaning, and . . . in construing such a conveyance, . . . we should give consideration to the context of the agreement, the situation of the contracting parties, the business in which they were engaged, the subject-matter of the conveyance, the purposes sought to be accomplished, and the conduct of the parties under it.”).

Over the course of two decades and three cases, the West Virginia Supreme Court had gone from interpreting the word “surface” as absolutely unambiguous to interpreting it as absolutely ambiguous. After this brief period of seemingly constant reconsideration, the definition of “surface” remained untested for nearly a century.

B. An Attempt at Clarity: Faith United Methodist Church & Cemetery of Terra Alta v. Morgan

In *Faith United Methodist Church & Cemetery of Terra Alta v. Morgan*,¹³ the parties to the deed in question were Florence and Walter Forman, who owned 1/7 and 6/7, respectively, of a 225-acre tract of land in Preston County.¹⁴ In 1907, Florence conveyed to Walter her interest in the “surface only” of the tract.¹⁵ Marvin D. Morgan eventually bought Walter’s interest in 1967.¹⁶ Florence died intestate in 1930, with Faith United Methodist Church and Trinity Methodist Church as her successors.¹⁷ In a bench trial following Morgan’s declaratory judgment action in 2011, the trial court relied on *Ramage* in admitting extrinsic evidence to interpret the meaning of “surface only” in the 1907 deed.¹⁸ The court ruled that Florence intended to transfer all of her rights in the property, including the oil and gas.¹⁹

On appeal, the Supreme Court focused its analysis on the legal meaning of “surface” as a subject of conveyance and whether it is ambiguous by nature, and thus open to modern-day interpretation.²⁰ The Court concluded that it was obligated to overturn *Ramage*,²¹ and turned to the question of what the meaning of “surface” should be. It reviewed the history of the word as a subject of conveyance and the evolution of efforts to define it.²² In the end, rather than returning to the *Williams* definition, the Court composed a new definition:

We hold that the word “surface,” when used in an instrument of conveyance, generally means the exposed area of land, improvements on the land, and any part of the underground actually used by a surface owner as an adjunct to surface use (for example, medium for the roots of growing plants, groundwater, water wells, roads, basements, or construction footings).²³

¹³ 745 S.E.2d 461 (W. Va. 2013).

¹⁴ *Id.* at 464.

¹⁵ *Id.*

¹⁶ *Id.* at 465.

¹⁷ *Id.*

¹⁸ *Id.* Morgan called two witnesses during the trial: a land agent who testified to the fact that Florence never “mentioned any oil and gas rights in any conveyance after 1907,” and the county tax assessor, who testified that, unlike the coal estate, the oil and gas rights had never been separately taxed. *Id.*

¹⁹ *Id.* at 465–66 (“Because Ms. Forman never ‘demonstrate[d] an intent to retain an ownership interest in the Subject Tract’ after 1907, the circuit court determined that she must have intended to convey her entire 1/7 interest to the tract including the oil and gas, and not merely ‘the surface,’ to her brother Walter.”).

²⁰ *See id.* at 477 (“The legal question at the heart of this case is simple: is every deed of the ‘surface’ presumed to be ambiguous and open to interpretation using extrinsic evidence to contradict, alter or add to the deed’s language? Or does the term ‘surface’ have some definite, certain meaning that the average person can rely upon?”).

²¹ *See id.* at 474 (“Syllabus Point 1 of *Ramage* is not sound law because it violates two fundamental public policies. First, . . . [b]y assuming that the term ‘surface’ has no concrete meaning, *Ramage* has made the drafting of deeds, wills and other instruments of conveyance much more complex. Second, . . . *Ramage* . . . requir[es] a court to turn back the clock and go beyond the document to discern the parties’ intent from parol and other extrinsic evidence.”).

²² *Id.* at 476–78.

²³ *Id.* at 480–81. Interestingly, the Court acknowledged that the meaning of “surface” has changed over time, with the Industrial Revolution and new developments in mineral extraction affecting its definition. The Court noted that “[s]ince the

Once the Court overturned the *Ramage* presumption of ambiguity and set its own definition for “surface,” its remaining analysis was simple and straightforward: the churches had inherited and still owned a 1/7 interest in the oil and gas under the 225-acre tract.²⁴

There can be little doubt that the *Morgan* decision is consistent with the Court’s stated desire to eliminate uncertainty and confusion. In reaching its decision, however, the Court raised further questions that are examined below.

III. WHAT EFFECT WILL *MORGAN* HAVE ON TITLE EXAMINATIONS?

West Virginia has recently experienced significant expansion of natural gas development in the Marcellus Shale play, which has resulted in a title examination boom in some regions of the state.²⁵ Because such title searches focus specifically on mineral ownership, practitioners are likely to encounter more “surface only” deeds like the one at issue in *Morgan*.²⁶

A practitioner conducting a title examination should understand that, after *Morgan*, a conveyance of “surface only” acts as an effective reservation of the grantor’s mineral rights. For example, in *Morgan*, Florence and Walter Forman severed the coal rights prior to the conveyance in question.²⁷ Therefore, when Florence conveyed her interest in the “surface only” to Walter, she reserved only her 1/7 rights to the oil and gas.²⁸ Florence’s reservation of mineral rights would be effective against any future purchasers, even if it were not contained in any subsequent deeds.²⁹ As a result, a practitioner conducting a full title examination on a parcel like the one at issue in *Morgan* would have to run at least three separate chains of title: (1) the surface chain that passed through Walter Forman; (2) the coal chain created by the coal severance; and (3) the oil and gas chain created by the “surface only” conveyance from Florence to Walter.

Following the first two chains of title (the surface and the coal) forward to the present would likely present little challenge for a practitioner: Walter’s surface rights passed through several outright conveyances to Marvin Morgan; the coal purchaser’s rights likely also passed in an orderly fashion through outright conveyances. However, following the oil and gas rights in such a situation could be somewhat more complex. If the grantor, like Florence Forman, never did anything with the reserved mineral rights during his or her lifetime, the ownership would pass either through a will or intestate succession.

1930s, the term ‘surface’ has largely been regarded as a word of clear meaning, unless that meaning is plainly altered by other language in the instrument of conveyance.” The Court could have interpreted the process by which “surface” developed a stable meaning by the 1930s as evidence that it was in fact ambiguous when Florence and Walter Forman signed the deed in 1907. *See id.* at 476–78.

²⁴ *Id.* at 483.

²⁵ *See id.* at 469 n.22 (“We have not found a specific accounting of the number of surface deeds in West Virginia. We suspect the number to be significant . . .”).

²⁶ *See* John W. Fisher, II, *Title Examinations, When Is Action on the Security Instrument Barred*, 114 W. Va. L. Rev. 1, 35 (2011) (“However, the recent resurgence of interest in natural gas, particularly in the Marcellus shale and coal bed methane, has significantly increased recent minerals title examinations.”). Some counties have gone so far as to limit the number of people who can enter record rooms in order to manage the flood of attorneys and abstractors. Pam Kasey, *Standing Room Only Outside Tyler County Records Room*, STATE J. (W. Va.) (Jan. 25, 2013, 1:52 PM), available at <http://www.statejournal.com/story/20707748/standing-room-only-outside-tyler-county-records-room>.

²⁷ *Faith United Methodist Church & Cemetery of Terra Alta v. Morgan*, 745 S.E.2d 461, 464, n.2 (W. Va. 2013).

²⁸ *Id.* at 483.

²⁹ *See* *Malamphy v. Potomac Edison Co.*, 83 S.E.2d 755, 759 (W. Va. 1954).

If the grantor has a will, but does not expressly devise the mineral rights, the rights will pass through the will's residuary clause.³⁰ If the grantor does not have a will, the rights will pass through the laws of intestate succession, more specifically the laws of intestate succession in effect at the time of the grantor's death.³¹ Thus, a practitioner attempting to follow such a chain must be aware of what the law was at the time of death in order to determine who inherited the mineral rights. For example, if the grantor died prior to the major statutory reform of the 1990s, the inheritor could be different than it would be today.³² If the grantor truly did not understand and know that he or she was reserving mineral rights, a practitioner may find himself or herself following the chain of title through several generations of residuary clauses or intestate inheritances or combinations of the two.

IV. SHOULD THE REASONING IN *MORGAN* APPLY TO COALBED METHANE OWNERSHIP AND CONVEYANCES OF "MINERALS ONLY"?

In its *Morgan* opinion, the West Virginia Supreme Court put particular emphasis on eliminating "uncertainty and confusion [in] our law of land titles" and argued that *Ramage* "violates two fundamental public policies."³³ First, the Court pointed to the difficulty faced by courts and practitioners under *Ramage*: "in drafting deeds or other instruments of conveyance, courts and practitioners want terms with definite meanings By assuming that the term 'surface' has no concrete meaning, *Ramage* has made the drafting of deeds, wills and other instruments of conveyance much more complex."³⁴ Second, the Court discussed the preference for interpreting contracts and deeds using the "four corners" approach:

[C]ourts want to reach a result which the parties intended, and therefore attempt to confine themselves to the four corners of the document to divine the parties' intent. *Ramage* violates this fundamental policy by requiring a court to turn back the clock and go beyond the document to discern the parties' intent from parol and other extrinsic evidence.³⁵

While many areas could benefit from similar attempts at achieving certainty, this essay focuses on the potential application of the *Morgan* reasoning to two areas of mineral rights law: the ownership of coalbed methane where it was not expressly addressed in a deed or lease, and the ownership of mineral rights where a deed refers only to "minerals."

A. *The Reasoning in Morgan Should Not Apply to Ownership of Coalbed Methane*

The methane gas contained within seams of coal was historically considered a waste product, the ventilation of which has been mandated by federal law since 1969.³⁶ Thus, the question of which party owned the rights to the methane was never addressed in most coal severance deeds or coal rights leases; coalbed methane was only mentioned in most deeds in connection with the right of the coal owner to use

³⁰ Syl. Pt. 1, *Irwin v. Zane*, 15 W. Va. 646 (1879) ("General words in a residuary clause will carry every estate or interest of the testator, which is not expressly, or by necessary implication, excluded from its operation.").

³¹ See Syl. Pt. 2, *King v. Riffée*, 309 S.E.2d 85 (W. Va. 1983) (holding that inheritance is "governed by the statute on intestate succession in effect at the time of . . . death . . .").

³² See *id.*

³³ *Morgan*, 745 S.E.2d at 469.

³⁴ *Id.* at 474

³⁵ *Id.*

³⁶ 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, 566 n.5 (1992); see also *U.S. Steel Corp. v. Hoge*, 468 A.2d 1380, 1382 (Pa. 1983).

the surface of the land to ventilate the methane.³⁷ In the second half of the twentieth century, however, production methods developed to the point that it was increasingly economical to produce coalbed methane as an energy source, rather than to discard it as a dangerous by-product of coal mining.³⁸

As coalbed methane development increased, courts nationwide began to face disputes about the ownership of the gas within a coal seam where different parties owned the coal rights and the gas rights under a tract.³⁹ The adjudication of such cases depended necessarily on whether the methane was defined as a gas within the meaning of the oil and gas deed or lease.⁴⁰ Invariably, oil and gas rights owners argued that coalbed methane is a gas, while coal owners contended that it should be more properly defined as a part of the coal estate.⁴¹ The arguments were about more than who could develop coalbed methane: extraction of coalbed methane severely hampers or destroys the ability to extract coal, depending on the method of extraction; conversely, extracting coal makes extracting methane from the coal seam nearly impossible.⁴²

The West Virginia Supreme Court has declined to rule definitively on whether coalbed methane is a gas. In *Energy Dev. Corp. v. Moss*,⁴³ the Court reviewed the persuasive precedent from other jurisdictions, finding that although the “decisions in this area are all over the map[,] . . . the greatest common factor . . . is a consideration for the intent of the parties, with emphasis on the state of affairs at the time of the grant, lease, or conveyance.”⁴⁴ The Court acknowledged the “seductive” temptation of simply “declar[ing] coalbed methane to be either ‘coal’ or ‘gas,’” noting that it would make for “short work to decide this appeal and end this opinion.”⁴⁵ However, the “precise question” the Court sought to answer was not the definition of coalbed methane, but was instead the effect of a gas lease executed “before the widespread commercial production of coalbed methane in West Virginia”⁴⁶ The Court answered this question by holding that the owner of gas rights does not own coalbed methane absent “specific language to the contrary or other indicia of the parties’ intent”⁴⁷

The Court’s syllabus point in *Moss* contains two parts. The first part—“specific language to the contrary”—conforms with the Court’s reasoning in *Morgan*: if there is express language in the deed or lease, there is no ambiguity and the parties can rely on the four corners of the instrument. The second part,

³⁷ See *Hoge*, 468 A.2d at 1389 (“In the year 1920, coalbed gas was primarily regarded as a lethal substance to be removed from mines and wasted into the atmosphere . . .”).

³⁸ See *Energy Dev. Corp. v. Moss*, 591 S.E.2d 135, 155 (W. Va. 2003) (Albright, J., dissenting) (noting the limitation on coalbed methane extraction caused by “the lack of technology for the commercially justified production of methane gas from coalbeds.”); see also Michelle D. Baldwin, *Ownership of Coalbed Methane Gas: Recent Developments in Case Law*, 100 W. Va. L. Rev. 673, 673–74 (1998).

³⁹ *Moss*, 591 S.E.2d at 146 (“Perhaps the best indicator that this is a complex and elusive issue, not lending itself to simple solutions, is the fact that the decisions in this area are all over the map.”).

⁴⁰ See Patrick C. McGinley, *Legal Problems Relating to Ownership of Gas Found in Coal Deposits*, 80 W. VA. L. REV. 369, 370 (1978).

⁴¹ See, e.g., *Moss*, 591 S.E.2d at 143 (“There is a great temptation in this case, urged on us by both sides, to wave a wand and declare coalbed methane to be either ‘coal’ or ‘gas.’”).

⁴² *Hoge*, 468 A.2d at 1387 (“Harm to the mining potential of coal arises from the fact that the inherently uncontrollable lesions caused by hydrofracturing permanently damage the coal seams, rendering any future mining operation slower in production, less safe, and more expensive.”).

⁴³ 591 S.E.2d 135 (W. Va. 2003).

⁴⁴ *Id.* at 146.

⁴⁵ *Id.* at 143.

⁴⁶ *Id.* For a different take on the rights of gas owners with respect to coalbed methane, see *EnerVest Operating, LLC v. Sebastian Mining, LLC*, 676 F.3d 1144 (8th Cir. 2012) (holding that the owners of gas under a parcel were granted coalbed methane rights and were therefore entitled to royalties from production of methane).

⁴⁷ *Moss*, 591 S.E.2d at Syl. Pt. 8.

on the other hand—“other indicia of the parties’ intent”—seems, at first glance, to create uncertainty. Examining the extrinsic evidence for indicia of intent is exactly what the *Ramage* court advocated in cases of “surface only” deeds.⁴⁸ By establishing a “definite meaning” for coalbed methane, the Court arguably could reduce complexity and bring certainty to drafting instruments of conveyance. However, upon a more thorough examination, it is clear that the *Morgan* reasoning should not apply to coalbed methane.

Despite the initial similarities between the two issues, coalbed methane ownership is far more complex. Economically, the development of both coal and coalbed methane are important.⁴⁹ However, development techniques like hydrofracturing interfere with the production of coal. A court adjudicating a coalbed methane dispute is faced with parties with competing interests that are in direct conflict. The economic importance of both coal and coalbed methane, the difficulty of developing both, and the fact that commercial development of coalbed methane is relatively recent require a court to carefully consider the intent of the parties and examine all available evidence, including extrinsic evidence. Establishing a definition of coalbed methane would hamper a court’s ability to determine the parties’ intent. Because the economic viability of producing coalbed methane is a relatively recent development, understanding what the parties to the deed knew about coalbed methane and its potential for extraction is essential to understanding their intent.

The fact that the legislature has spoken on the relative value of coal versus coalbed methane further complicates the issue.⁵⁰ The legislature’s declaration that “the value of coal is far greater than the value of coalbed methane” essentially bars one of the two possible definitions the court could apply.⁵¹ While defining coalbed methane, which is gaseous in form, as a gas would make the most logical sense, it would conflict with the legislative preference for coal production. Therefore, because of the inherent conflicts between ownership of coal and ownership of coalbed methane, the court should not apply its reasoning in *Morgan* to the ownership of coalbed methane.

B. *The Reasoning in Morgan Should Not Apply to Conveyances of “Minerals Only”*

Just five years before its decision in *Ramage*, the West Virginia Supreme Court faced a question about the meaning of the word “mineral” in *Rock House Fork Land Co. v. Raleigh Brick & Tile Co.*⁵² The case involved a conveyance of “all the coal and other minerals of every kind and description, except gas and oil in and underlying” a tract of land.⁵³ The defendant-surface owner sought to use the clay on the land to manufacture bricks.⁵⁴ The plaintiff-mineral owner claimed “that the grant to it of the coal and

⁴⁸ Syl. Pt. 1, *Ramage v. S. Penn Oil Co.*, 118 S.E. 162 (W. Va. 1923) (“[I]n determining [the meaning of surface] regard may be had, not only to the language of the deed in which it occurs, but also to the situation of the parties, the business in which they were engaged, and to the substance of the transaction.”).

⁴⁹ See W. VA. CODE § 22-21-1(b) (2013) (“It is hereby declared to be the public policy of this state and in the public interest to: (1) Preserve coal seams for future safe mining; facilitate the expeditious, safe evacuation of coalbed methane from the coalbeds of this state, and maintain the ability and absolute right of coal operators at all times to vent coalbed methane from mine areas; (2) Foster, encourage and promote the commercial development of this state’s coalbed methane by establishing procedures for issuing permits and forming drilling units for coalbed methane wells without adversely affecting the safety of mining or the mineability of coal seams[.]”).

⁵⁰ *Id.* § 22-21-1(a) (“The Legislature hereby declares and finds . . . that the value of coal is far greater than the value of coalbed methane and any development of the coalbed methane should be undertaken in such a way as to protect and preserve coal for future safe mining and maximum recovery of the coal[.]”).

⁵¹ *Id.*

⁵² 97 S.E. 684 (W. Va. 1918).

⁵³ *Id.* at 684.

⁵⁴ *Id.*

other minerals except oil and gas passed this seam of clay.”⁵⁵ The court held that “[t]he term ‘mineral’ is not a definite one capable of a definition of universal application.”⁵⁶

In fact, the *Ramage* court cited *Rock House Fork Land Co.* in support of its contention that, like the word “mineral,” the word “surface” can have “various meanings.”⁵⁷ The *Ramage* court further noted that if “surface” was considered unambiguous while “mineral” was considered ambiguous, the result would be allowing a reservation of all minerals without scrutiny if the deed conveyed “surface only,” but subjecting the same reservation to heightened scrutiny if it reserved “minerals.”⁵⁸ The court cited to *Rock House Fork Land Co.* in its *Morgan* decision as well, noting it as an example of ambiguity in a dispute between owners of the surface and mineral estates, without touching on the issue of inconsistent reservations of minerals discussed in *Ramage*.⁵⁹

Later, in *West Virginia Dep’t of Highways v. Farmer*,⁶⁰ the court had to determine whether the term “other minerals” in a deed included sand and gravel.⁶¹ In *Farmer*, the owners of nine-tenths of the mineral interests argued that they were entitled to nine-tenths of the compensation for the sand and gravel in eminent domain proceedings.⁶² The court ruled that the term “other minerals” created an ambiguity due to the lack of express language including sand and gravel.⁶³ Therefore, the court looked at extrinsic evidence to determine the parties’ intent, holding that, because “[n]o owner of the minerals in the past had ever attempted to exercise any control whatsoever over the sand and gravel[, i]t is readily discernible that the reservation of the minerals created in 1911, did not intend to include sand and gravel.”⁶⁴

Like coalbed methane cases, “minerals only” cases would seem at first glance to be ripe for reinterpretation after *Morgan*. After all, Syllabus Point 1 of *Rock House Fork Land Co. v. Raleigh Brick & Tile Co.* is very similar to the *Ramage* Syllabus Point expressly overturned in *Morgan*.⁶⁵ Further, the fact that the new *Morgan* definition of “surface” allows an effective general reservation of minerals—a result that is not possible under *Rock House Fork Land Co.*—leads naturally to an argument that the inconsistency should be remedied by overturning *Rock House Fork Land Co.*

However, a deeper examination of the two concepts reveals significant differences that militate against defining “minerals.” First, if the court were to define “minerals,” what would the definition

⁵⁵ *Id.* at 685.

⁵⁶ *Id.* at Syl. Pt. 1.

The term “mineral” is not a definite one, capable of a definition of universal application, but is susceptible of limitation according to the intention of the parties using it, and in determining its meaning regard must be had, not only to the language of the deed in which it occurs, but also to the relative position of the parties interested, and to the substance of the transaction which the deed embodies.

Id. The Syllabus Point is strikingly similar to Syllabus Point 1 of *Ramage* five years later. *Ramage v. S. Penn Oil Co.*, 118 S.E. 162 (W. Va. 1923) (“The term ‘surface’ . . . is not a definite one capable of a definition of universal application . . .”).

⁵⁷ *Ramage*, 118 S.E. at 169.

⁵⁸ *Id.* at 171.

⁵⁹ *Faith United Methodist Church & Cemetery of Terra Alta v. Morgan*, 745 S.E.2d 461, 469 (W. Va. 2013).

⁶⁰ 226 S.E.2d 717, 719 (W. Va. 1976).

⁶¹ *Id.*

⁶² *Id.* at 719.

⁶³ *Id.* at 720 (“[T]he enumeration of oil and gas makes meaningless the term ‘other minerals’, except for minerals which are of the same kind, class or nature, that is, petroleum products. A grant or reservation of specifically named minerals conveys and reserves rights only in those minerals. Under this doctrine, then, sand and gravel are excluded from the reservation.”) (internal citations omitted).

⁶⁴ *Id.*

⁶⁵ *See supra* note 56 and accompanying text.

include? Courts that have attempted to define “minerals” have struggled.⁶⁶ Coal, oil, and natural gas obviously should be included. Would other substances, such as sand and gravel, also be included, thereby invalidating *Farmer*? Or would sand and gravel remain with the surface, despite not fitting into the *Morgan* definition?

The word “mineral” is susceptible to more interpretations than the word “surface.” Multiple mineral estates may exist under a typical West Virginia surface. For example, there may be several seams of coal at varying depths, each with a different owner.⁶⁷ Defining the word “surface” can counteract uncertainty and confusion because, once it is defined, it is a relatively simple concept to apply. Defining the word “mineral,” on the other hand, creates more confusion than it resolves, because it can refer to multiple property interests. Thus, the court should not apply its reasoning in *Morgan* to the ownership of mineral rights where the deed refers only to “minerals.”

V. SHOULD MINERAL RIGHTS CREATED UNDER THE *MORGAN* DEFINITION OF SURFACE BE SUBJECT TO SALE FOR FAILURE TO PAY PROPERTY TAX?

Finally, the *Morgan* ruling raises the following questions: how should county tax assessors assess and tax oil and gas and other minerals rights that have been effectively reserved by a grantor who conveyed the “surface” of a tract, such as the one in *Morgan*? Should tax assessors attempt to tax such reserved rights? If a grantor effectively reserved oil and gas rights through a “surface only” deed but was never assessed a tax on it, are the grantor or his successors in danger of losing the interest for failure to pay tax?

In her testimony at trial in *Morgan*, Preston County Assessor Terri Funk stated that the common practice in Preston County was to assess land from which the coal rights had been severed as “coal” and “surface.”⁶⁸ She also noted “that historically the Assessor’s office did not separately assess oil and gas for real estate tax purposes unless and until specifically and expressly severed from the overlying surface estate.”⁶⁹ Oil and gas rights that were not severed were commonly assessed as part of the “surface.”⁷⁰

Under West Virginia’s property tax regime, “[i]t is the duty of the owner of land to have his land entered for taxation on the land books of the appropriate county.”⁷¹ A lien attaches to real property on July 1 each year for the following fiscal year’s property tax.⁷² Real property taxes are not considered delinquent, however, unless the two installments have not been paid by October 1 and April 1 of each fiscal year.⁷³ Failure to pay property taxes subjects the land to sale through the tax lien sale process.⁷⁴ Similarly, each landowner must enter property on the books of the appropriate county for property tax assessment, with the property subject to sale after failing to enter it for five consecutive years.⁷⁵

⁶⁶ See *Ida-Therm, LLC v. Bedrock Geothermal, LLC*, 293 P.3d 630, 634–35 (Idaho 2012) (noting that “other courts making this determination have arrived at a variety of definitions of ‘mineral’” which have “lead[] to widely divergent results”).

⁶⁷ See *McGinley supra* note 40, at 369 (“To complicate matters even more, a single tract may be overlaid by several coal seams, each of which may be owned by unrelated persons or corporate entities.”).

⁶⁸ *Morgan v. Cuppett*, No. 11-C-27, 2011 WL 10525289, at ¶ 14.b (W. Va. Cir. Ct. Nov. 9, 2011).

⁶⁹ *Id.*

⁷⁰ *Id.*

⁷¹ W. VA. CODE § 11A-3-37 (2013).

⁷² W. VA. CODE § 11A-1-2. As a result, there is always a tax lien on West Virginia real estate. See *Don S. Co., Inc. v. Roach*, 285 S.E.2d 491, 492 (W. Va. 1981).

⁷³ W. VA. CODE § 11A-1-3.

⁷⁴ W. VA. CODE § 11A-3-5.

⁷⁵ W. VA. CODE § 11A-3-37.

Any such sale or transfer of delinquent or non-entered lands is subject to due process notice considerations, requiring the tax lien purchaser to notify all parties with an interest in the property.⁷⁶ A purchaser who fails to do so “lose[s] all the benefits of his or her purchase.”⁷⁷ Title acquired through the tax lien sale process will be set aside if it can be shown “that the person who originally acquired such title failed to exercise reasonably diligent efforts to provide notice of his intention to acquire such title.”⁷⁸ Further, “this area of the law has undergone significant change” to “increase[e] the protections afforded the delinquent land owner.”⁷⁹ As such, the court will closely scrutinize the actions of a tax lien purchaser.⁸⁰

In *State v. Guffey*, the West Virginia Supreme Court held that “presumptively when there has been no separate assessment of estates in timber, coal, oil, gas or other interests in land, without a different showing, they are deemed to have been included in the entry of the land.”⁸¹ Thus, where a mineral estate has not been separately assessed, its value is assumed to have been included with the assessed value of the surface estate.⁸²

Because the *Morgan* definition of “surface” acts as a reservation of mineral rights, county tax assessors should begin entering such mineral interests in the county land books. While it is clear that a “surface only” deed would not have been interpreted as a specific and express severance prior to the *Morgan* decision, it is equally clear that such a deed does now constitute a specific and express severance. Therefore, county assessors should recognize all future deeds conveying “surface only” as reservations of mineral rights and enter those rights for taxation.

The more complicated issue is what, if anything, to do about mineral rights created by a “surface only” deed prior to *Morgan*. The amount of work required to go through historical records to identify “surface only” deeds would likely be prohibitive, not to mention the effort required to follow the chains of title forward to the present to determine which owners should be assessed taxes on the interest. County assessors likely lack the resources to undertake such a project. Therefore, mineral interests created by historical “surface only” deeds will likely remain hidden until a title examiner discovers them. As they are uncovered, “surface only” deeds should be entered for taxes going forward; however, those that remain hidden will remain untaxed.

The fact that some mineral rights created through a “surface only” deed will remain untaxed raises the next question: are such mineral rights owners in danger of losing their rights for failure to pay taxes? As discussed above, under West Virginia’s property tax regime, failure to enter the property on the land books for tax assessment for five consecutive years or to pay property taxes in any year subjects the

⁷⁶ W. VA. CODE § 11A-3-52(a); W. VA. CODE § 11A-3-1 (outlining the legislative intent of the statutory scheme, including “the rights of owners of real property to adequate notice and an opportunity for redemption before they are divested of their interests in real property for failure to pay taxes or have their property entered on the land books”). *See also* Syl. Pt. 1, *Lilly v. Duke*, 376 S.E.2d 122 (W. Va. 1988) (“There are certain constitutional due process requirements for notice of a tax sale of real property. Where a party having an interest in the property can reasonably be identified from public records or otherwise, due process requires that such party be provided notice by mail or other means as certain to ensure actual notice.”).

⁷⁷ W. VA. CODE § 11A-3-52(b).

⁷⁸ W. VA. CODE § 11A-4-4(b).

⁷⁹ *Mingo Cnty. Redevelopment Auth. v. Green*, 534 S.E.2d 40, 45 (W. Va. 2000).

⁸⁰ *See* John W. Fisher, II, *Delinquent and Non-Entered Lands and Due Process*, 115 W. VA. L. REV. 43 (2012).

⁸¹ 95 S.E. 1048, 1049 (W. Va. 1918).

⁸² *See id.* (“[T]he owners of these tracts, entered as ‘surface,’ for all the years for which forfeiture is claimed, continued to own undivided interests in the oil and gas, and presumptively the value of their interests therein was included in the valuation of the land entered as ‘surface,’ and certainly the general allegation that these oil and gas interests or estates were not subsequently taxed will not overcome the presumption that said undivided interests continued charged to the owners of the estates entered as ‘surface.’”).

land to sale through the tax lien sale process.⁸³ However, a sale of delinquent or non-entered lands is subject to due process notice considerations: the tax lien purchaser is responsible for notifying all parties with an interest in the property.⁸⁴ A purchaser who fails to properly notify all parties with an interest “lose[s] all the benefits of his or her purchase” and the title will be set aside.⁸⁵

Because all parties with a potential interest in delinquent and nonentered lands are entitled to notice, and because a tax lien sale will be set aside if such notice has not taken place, a mineral rights owner whose interest was created by a “surface only” deed and has not been entered for taxation should not be in danger of losing the interest. Such interests will likely come to light only through a title examination. After they are discovered, they should then be entered for taxation, with notice given to the current owner of taxes due. Only then should these mineral rights be eligible for a tax lien sale.

In addition, because mineral rights have not been expressly severed from the surface, and are therefore not assessed taxes separately, they are assumed to have been taxed as part of the surface. Therefore, the argument can be made that mineral interests created through a “surface only” deed are not delinquent or non-entered at all: they were entered on the land books and the taxes paid with the surface. The fact that taxes may have been paid by a different party than actually owns the rights after the *Morgan* decision does not change the fact that the taxes are not delinquent. Thus, because of due process notice issues and because nonentered mineral rights are assumed to have been taxes with the surface estate, mineral rights owners whose interests were created through a “surface only” deed should not be in danger of losing their rights due to failure to pay property taxes.

VI. CONCLUSION

In its unanimous 2013 decision in *Faith United Methodist Church & Cemetery of Terra Alta v. Morgan*, the West Virginia Supreme Court of Appeals took a significant step forward in clarifying and simplifying the state’s mineral rights property law. By establishing a definition for the word “surface” when used as a subject of conveyance, the Court made the process of interpreting a deed conveying the “surface only” of a tract of land far easier for lower courts and practitioners than it had been under the previously controlling *Ramage* definition, where the word surface was “presumptively ambiguous.” A court interpreting a deed after *Morgan* will usually not have the opportunity to review extrinsic evidence to determine the parties’ intent, allowing a court to restrict its analysis to the four corners of the deed. However, while this change brought greater clarity to this area of property law, it also created new questions and issues that West Virginia courts will likely face in coming years.

⁸³ W. VA. CODE § 11A-3-5; W. VA. CODE § 11A-3-37.

⁸⁴ W. VA. CODE § 11A-3-52(a); W. VA. CODE § 11A-3-1.

⁸⁵ W. VA. CODE § 11A-3-52(b); W. VA. CODE § 11A-4-4(b).