State of West Virginia
Office of the Attorney General

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The Honorable Shawn R. Turak
Ohio County Prosecuting Attorney
1500 Chapline Street
Wheeling, WV 26003

Dear Prosecutor Turak:

You have asked for an Opinion of the Attorney General about whether a particular oil and gas lease is exempt from the excise tax on real property transfers. This Opinion is issued under West Virginia Code § 5-3-2, which provides that the Attorney General "may consult with and advise the several prosecuting attorneys in matters relating to the official duties of their office." When this Opinion relies on facts, it depends solely on the factual assertions in your correspondence and discussions with the Attorney General's Office.

You explain that the Ohio County Clerk is considering whether to apply deed stamps to and collect excise tax for a 2025 oil and gas lease agreement between the State and an energy company, which you refer to as a "four year paid up lease." Under that agreement, the State grants the energy company the right to explore and drill for oil and gas underneath an approximately 78.4-acre segment of the Ohio River, in Ohio County. For that privilege, the energy company paid a $196,097.50 "bonus" payment ($2,500 per acre). The agreement provides that if the energy company finds, produces, and sells oil and gas from the property, it must pay the State 20% of the gross proceeds as a "royalty." The agreement remains in place for four years and as long thereafter as production continues. And the energy company may not enter the surface property or conduct surface operations; it must drill horizontally from adjoining property.

With those facts in mind, your letter raises the following question:

> *Does the oil and gas lease agreement qualify as a "lease" exempt from excise taxes pursuant to West Virginia Code § 11-22-1(9)?*

We conclude that the specific oil and gas lease you've provided qualifies as a "lease" as that term is used in West Virginia Code § 11-22-1(9). Thus, the agreement is not a "document" subject to excise tax on real property transfers. W. VA. CODE § 11-22-1(9); *id.* § 11-22-2(a). The terms of this agreement track traditional terms of oil and gas leases, and the West Virginia Supreme Court of Appeals has long held that leases for mineral rights, even those in which the lessee extracts the minerals, are indeed "leases"—not sales. The presence of a bonus is merely consideration for the agreement and doesn't affect this outcome.

DISCUSSION

To resolve whether the agreement is a "lease" under West Virginia Code § 11-22-1(9), we turn to the Supreme Court of Appeals' "well-established rules of statutory construction." *Ancient Energy, Ltd. v. Ferguson*, 239 W. Va. 723, 726, 806 S.E.2d 154, 157 (2017). Thus, "[w]e look first to the statute's language." *Appalachian Power Co. v. State Tax Dep't*, 195 W. Va. 573, 587, 466 S.E.2d 424, 438 (1995). If the statute's language "is free from ambiguity, its plain meaning is to be accepted and applied without resort to interpretation." Syl. pt. 2, *Crockett v. Andrews*, 153 W. Va. 714, 172 S.E.2d 384 (1970).

West Virginia Code § 11-22-2(a) provides that "[e]very person who delivers, accepts, or presents for recording any document" must pay "an excise tax upon the privilege of transferring title to real estate." Once the tax is paid, stamps are affixed to the document. *Id.* § 11-22-4. The County Clerk may not record any document without the necessary stamps. *Id.* § 11-22-6. A "document" is "any deed, or instrument or writing by which any real property within this state or any interest in real property is granted, conveyed or otherwise transferred to the grantee, purchaser or any other person." W. VA. CODE § 11-22-1. "Leases" do not qualify as "[d]ocument[s]." *Id.* § 11-22-1(9).

The statute does not define "leases," but "this lack of definition does not render the statute ambiguous." *State v. McClain*, 247 W. Va. 423, 429, 880 S.E.2d 889, 895 (2022). An undefined term must be given its "common, ordinary and accepted meaning." *State v. Soustek*, 233 W. Va. 422, 426, 758 S.E.2d 775, 779 (2014) (cleaned up). And the West Virginia Supreme Court of Appeals has previously provided that meaning: "[a] 'lease' is a letting out of property for use during a definite period which is always for a shorter term than the lessor has in the premises." Syl. pt. 2, *Green Line Terminal Co. v. Martin*, 122 W. Va. 483, 10 S.E.2d 901 (1940). It is both a "conveyance" of possession for a term and "a contract." *Teller v. McCoy*, 162 W. Va. 367, 383, 253 S.E.2d 114, 124 (1978).

The agreement here fits comfortably within that definition. Like most oil and gas leases, the agreement "is designed to accomplish the main purpose of the owner of the land and of the lessee (or its assignee) as operator of the oil and gas interests: securing production of oil or gas or both in paying quantities, quickly and for as long as production in paying quantities is obtainable." Syl. pt. 1, *McCullough Oil, Inc. v. Rezek*, 176 W. Va. 638, 346 S.E.2d 788 (1986). So, it is "both a conveyance and a contract." *Id.* It also "convey[s] an estate less than the [State] ha[s] in the premises; it … remain[s] in force for the term of [four] years … , and as long thereafter as oil or gas, or either of them, was produced from the premises." *Headley v. Hoopengarner*, 60 W. Va. 626, ___, 55 S.E. 744, 748 (1906). "[I]t contain[s] the usual words essential to its operation, which are, 'grant, lease and let.'" *Id.* It gives the energy company the right to enter the "lands for oil and gas operations, with the profits derived therefrom"—though only underground through adjoining property. *Id.* And "the [State] i[s] to be recompensed by [its] receiving a certain part of the production as royalty." *Id.* Also, the agreement contains a reversionary right, a right to reentry, and ongoing covenants benefiting the State, as lessor—all typical of a lease. *See Napier v. Napier*, 211 W. Va. 208, 212, 564 S.E.2d 418, 422 (2002); *McCoy*, 162 W. Va. at 383-87, 253 S.E.2d at 124-26; *Bowlby-Harman Lumber Co. v. Commodore Servs., Inc.,* 144 W. Va. 239, 246, 107 S.E.2d 602, 606 (1959).

The agreement's contemplated end—extraction and sale of the minerals—confirms its character as a lease. The West Virginia Supreme Court of Appeals has drawn the line between the sale of minerals in place and a "lease" thereof. Where operations continue for a definite period and the lessee pays a royalty only on what it extracts, "such contract is a lease and not a sale." *Babcock Coal & Coke Co. v. Brackens Creek Coal Land Co.*, 128 W. Va. 676, 680, 37 S.E.2d 519, 522 (1946). A "contract purporting to be a lease for mining purposes" can be considered a "sale and not a lease" only if the contract requires the lessee "to [extract] and pay for *all* the [minerals] in the land or to pay for [minerals] whether the same is [extracted] or not." *Id.* at 680, 37 S.E.2d at 521 (emphasis added).[1] The agreement here does not require the energy company to pay for all of the oil and gas on the property. Rather, the energy company must only remit a royalty on oil and gas severed and sold.

The "bonus" doesn't convert the agreement into a sale, either. The so-called "bonus" is simply "consideration" for the lease—not a purchase price for minerals. *See*, *e.g.*, syl. pt. 1, *Pyle v. Henderson*, 65 W. Va. 39, 63 S.E. 762 (1909). Indeed, "[t]h[e] Court has, for over a century, recognized that the payment of an up-front bonus is the consideration that will support an oil and gas lease when the lessee is not bound to drill or pay any other delay rentals." *Chesapeake Appalachia, LLC v. Hickman*, 236 W. Va. 421, 443, 781 S.E.2d 198, 220 (2015). Without the bonus, the agreement might be defective; "royalty only" leases are "held unenforceable for lack of mutuality, based on the elementary principle of the law of contracts that if one party to a contract is under no obligation to perform at all, the contract is void." *Id.* (cleaned up).[2]

Thus, the agreement is a "lease" under West Virginia Code § 11-22-1(9) exempt from excise taxes.

Sincerely,

John B. McCuskey
West Virginia Attorney General

[1] *Babcock* is a coal case, and coal is obviously a solid mineral in place. In contrast, "oil and gas are fugacious." *Robinson v. Milam*, 125 W. Va. 218, ___, 24 S.E.2d 236, 239 (1942). But that difference is immaterial because "it is held in this jurisdiction that oil and gas in place are a part of the land." *Id.*

[2] But even if the agreement was a sale, it still might be excluded from the definition of "document" as a "[t]ransfer[] … from the … State of West Virginia, or … any of [its] instrumentalities, agencies or political subdivisions, by … deed." W. VA. CODE § 11-22-1(15).

Holly J. Wilson
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