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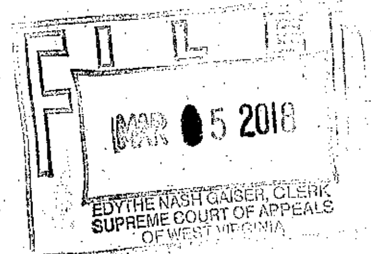

March 15, 2018

Re: *Margot Beth Crowder and David Wentz v. EQT Production Company*
No. 17-0968

Dear Ms. Gaiser:

Enclosed for filing with your office, please find the original and ten (10) copies of ***Respondents' Brief***. As the attached certificate confirms, a true and accurate copy of this document was served, this day, upon counsel of record.

Thank you for your kind attention to this matter.

Very truly yours,

DAVID GRUBB

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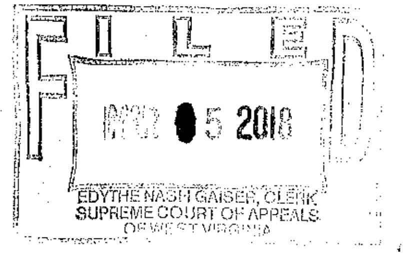

In the

Supreme Court of Appeals of West Virginia

Margot Beth Crowder and David Wentz, Plaintiffs Below, Respondents

v.

EQT Production Company, Defendant Below, Petitioner

BRIEF OF RESPONDENTS

On Appeal from Civil Action No. 14-C-64
Circuit Court of Doddridge County
West Virginia

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I. INTRODUCTION

This is Margot Beth Crowder and David Wentz's ("Respondents'") brief in opposition to EQT Production Company's ("Petitioner's" or "EQT's") petition for appeal. As is set forth in more detail below, the circuit court's challenged rulings are correct and based on sound legal precedent. As such, the instant petition is without merit and should be DENIED.

II. PRELIMINARY STATEMENT

This is an important case addressing the property rights of surface landowners in West Virginia. The circuit court's rulings and the jury's verdict in this case represent a positive, yet by no means excessive, outcome for Ms. Crowder and Mr. Wentz. Indeed, it was a vindication of their multi-year struggle to protect their land. More specifically, the Court ruled as a matter of law that EQT's conduct: (1) constituted a trespass; and (2) resulted in unjust enrichment. It is important to note, however, that Respondents did <u>not</u> pursue their unjust enrichment claim, electing instead to seek trespass damages. In this context, the jury subsequently returned a unanimous verdict in favor of Respondents on the damages flowing from Petitioner's trespass.

It is from the circuit court's two <u>legal</u> rulings on trespass and unjust enrichment that Petitioner appeals.[1] To be sure, Respondents disagree with the circuit court's rulings. However, throughout the trial, and in its rulings on the "at issue" dispositive motions, the circuit court acted in a moderate, deliberate, and fair manner. A cursory review of the circuit court's detailed and thorough findings of fact and conclusions of law underscores this point.

[1] In its Notice of Appeal, EQT referenced three assignments of error – i.e., the two rulings on dispositive motions, as well as the circuit court's Order on a motion *in limine* dealing with the appropriate measure of damages. However, Petitioner subsequently abandoned its appeal regarding the latter. Accordingly, the issue of damages (including the proper measure of trespass damages) is not before the Court.

The only thing the circuit court did not do is blindly accept EQT's self-serving, misguided, and legally flawed arguments. This does not mean, as Petitioner would have it, that the circuit court committed reversible legal error. It simply means that Petitioner's position was then, and is now, untenable. The fact that EQT is not pleased with the result – absent much more – does not provide sufficient grounds for an appeal. And here, there is absolutely nothing more. As mentioned before, and as the record reveals, there was no legal error committed.

III. STATEMENT OF THE CASE

EQT willfully and unlawfully entered Respondents' land for the purpose of drilling horizontal well bores into neighboring tracts.[2] With three important exceptions, Respondents do not disagree with Petitioner's statement of the case. (Pet'r's Br. 2-4.) The first exception is Petitioner's failure to mention that on June 8, 2012, Respondents provided EQT with a notice against entry letter prior to the commencement of site preparation and drilling activities. (J.A. 83-84.) Rather than seek clarification of its legal rights via declaratory judgment or otherwise, Petitioner simply initiated site preparation and drilling operations on February 13, 2013. The second exception is, as noted above, Petitioner's failure to disclose that Respondents elected prior to trial not to pursue their claim for unjust enrichment. The third, and final, exception is Petitioner's failure to indicate that Respondents moved to certify the question regarding the circuit court's dispositive ruling in order to clarify the legal questions presented and avoid the cost of protracted litigation. Over Petitioner's objection, the circuit court granted Respondents' motion. However, this Honorable Court declined to hear the certified question, noting that

[2] Respondents' original Complaint alleged two trespass theories. The first theory, which is the subject of this appeal, addressed the use of the surface to drill and produce gas from neighboring mineral tracts. The second theory maintained that horizontal drilling was not within the contemplation of the parties and, as a consequence, the use of horizontal drilling exceeds the scope of Petitioner's implied

"consideration of the question . . . was premature in the absence of the full development of a factual record in the lower court." (Order Den. Cert., Apr. 27, 2016.) Accordingly, the case was tried to a jury, resulting in a unanimous award of damages in the amount of $190,000.00.

IV. SUMMARY OF ARGUMENT

Respondents agree with Petitioner that a mineral owner has an implied right to use the surface in a manner that is reasonably necessary to develop the minerals beneath that surface. The circuit court, however, correctly concluded that this implied right does not entitle the mineral owner to use the surface to develop the minerals from neighboring tracts. Accordingly, absent express consent from the surface owner (which clearly did not occur here), the circuit court properly ruled that EQT's use of Respondents' surface to drill horizontal well bores into neighboring tracts was (and is) a trespass. Subsequently, and although not relevant to the eventual outcome of the trial, the circuit court correctly ruled that Petitioner's trespass constituted such circumstances that render its retention of the benefits received inequitable.

V. STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Respondents agree with Petitioner that this case is proper for oral argument under W.V.R. App. P. 18(a). Accordingly, oral argument should be heard pursuant to W.V.R. App. P. 20(a). Respondents do not request additional time beyond the twenty minutes per side permitted under W.V.R. App. P. 20(e).

VI. ARGUMENT

In reviewing a circuit court's entry of summary judgment, this Court applies a *de novo* standard of review. Syl. Pt. 1, *Painter v. Peavy*, 192 W. Va. 189, 451 S.E.2d 755 (1994). In this

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surface rights. Following the circuit court's dispositive ruling on the first theory, Respondents non-suited their second trespass claim. (J.A. 287.)

context, Petitioner asserts just two assignments of error. As was mentioned previously, and as will be conclusively demonstrated herein, neither assignment constitutes legal error. To ensure that the record is complete, Respondents will address each of the assignments in the order presented in the Petition.

A. Assignment Number One (Trespass) – The Court's Ruling that EQT's Conduct Constituted Trespass Was Proper and Consistent with Legal Precedent.

1. The Law of Trespass Is Not in Dispute.

The law of trespass is well-settled in West Virginia. The circuit court, quoting *Hark v. Mountain Fork Lumber Co.*, 127 W. Va. 586, 591-592, 34 S.E.2d 348, 352 (1945), correctly concluded that trespass is defined as "an entry on another man's ground without lawful authority, and doing some damage, however inconsiderable, to his real property." (J.A. 248.) Further, in every case "where one man has a right to exclude another from his land, the common law encircles it, if not enclosed already, with an imaginary fence. And to break such imaginary fence, and enter the close of another, is a trespass[.]" (*Id.*, quoting *Haigh v. Bell*, 41 W. Va. 19, 23 S.E. 666 (1895).) "Any intentional use of another's real property, without authorization and without a privilege by law to do so, is actionable as a trespass without regard to harm." *Rhodes v. E.I. DuPont de Nemours and Co.*, 657 F. Supp. 2d 751, 771 (S.D.W. Va. 2009) (applying West Virginia law, quoting W. PAGE KEETON, ET AL., PROSSER & KEETON ON THE LAW OF TORTS § 13, at 70 (5th ed. 1984)).

2. Petitioner's Suggestion that its Use of Respondents' Surface Was Reasonable and Necessary Continues to Miss the Point.

Petitioner bases its central argument upon the premise that using Respondents' surface to produce minerals from neighboring mineral tracts is "reasonably necessary." (Pet'r's Br. 4.) As

it did below, Petitioner here sets up a straw person argument and then attempts to knock it down. There is absolutely no disagreement regarding the existence of the "reasonably necessary" doctrine: a mineral owner has the implied right "to use the surface in such manner and with such means as would be fairly necessary for the enjoyment of the mineral estate." (*Id.*, quoting Syl. Pt. 1, *Adkins v. United Fuel Gas Co.*, 134 W. Va. 719, 61 S.E.2d 633 (1950). However, Petitioner's reference to *Adkins* omits key prefatory language from the Court's syllabus point:

> The owner of the mineral ***underlying land*** possesses as incident to this ownership the right to use the surface in such manner and with such means as would be fairly necessary for the enjoyment of the mineral estate.

Id. (Emphasis added.) *See also Porter v. Mack Mfg. Co.*, 65 W. Va. 636, 64 S.E. 853 (1909) (mentioning doctrine in relation to fire clay, coal, and other minerals underlying surface); *Squires v. Lafferty*, 65 W. Va. 636, 64 S.E. 853 (1924) (applying doctrine to the owner of minerals underlying the surface); *Buffalo Mining Co. v. Martin*, 165 W. Va. 10, 267 S.E.2d 721 (1980) (same).

As a result, when viewed in its proper context, the reasonably necessary doctrine has clear limits. Most notably, it applies only to the minerals underneath the surface land. In addition, the manner and means utilized must be fairly necessary, not merely more convenient. *See Whiteman v. Chesapeake Appalachia*, 729 F.3d 381 (4th Cir. 2013), citing *Marvin v. Brewster Iron Mining Co.*, 55 N.Y. 538, 1874 WL 11019 (1874).

Nevertheless, Petitioner suggests that this Court should expand the implied right to encompass far, far more than just the land underneath Respondents' surface. Indeed, EQT seeks to broaden the right to include minerals underlying any surface that can be reached (for several miles) via modern, horizontal drilling technology. Thus, if Petitioner has the implied right to use Respondents' surface to extract the oil and gas from underneath Respondents' surface, then it

should also have the right to use Respondents' surface to extract minerals from any and all neighboring tracts of land (or even tracts of land beyond their neighbors). Not only is this an unwise and unnecessary expansion of an implied right, but it also continues to miss the point. As the circuit court correctly ruled:

> The reasonable use doctrine relied upon by EQT only becomes relevant if the right to use the surface to bore into neighboring tracts was legally obtained or reserved in the first place.

(J.A. 250.) Here, it clearly was not.

The record demonstrates that the fee owners of the surface and minerals executed a lease ("Carr Lease") in 1901 to EQT's predecessor-in-interest. The lease granted the lessee the right to explore for and produce oil and gas from the mineral estate, but was completely silent regarding any right to pool the mineral interests with neighboring tracts (or any right to use the surface for production from those neighboring tracts). (*Id.* 76.) As a result, the lessee obtained certain implied rights to use the surface. However, the lessor retained all other rights to the surface not conveyed expressly or by implication.

Subsequently, ownership of the surface was severed from the ownership of the minerals in 1936. (*Id.* 80-81.) Respondents thereafter purchased their surface land in 1975. In 2011, a pooling amendment was signed by the mineral owners (and not Respondents). (*Id.* 8, 150.) As such, this pooling amendment cannot grant additional rights to use the surface because the mineral owner who signed it did not own the additional rights to use the surface. In other words, the proverbial "bundle of sticks" owned by the mineral owner did not include the stick for expanded use of the surface for production of gas from neighboring mineral tracts at the time the amendment was signed. That right, then and now, belonged to the surface owner.

In light of the foregoing, the circuit court properly concluded that "because the mineral

owners no longer owned the right to use the surface lands for exploration and production from neighboring tracts, they could not have given that right to EQT in the subsequent pooling amendment." (*Id.* 250.)

Nevertheless, Petitioner incorrectly insists that the circuit court's analysis is backwards – i.e., the court should have focused first on whether the use of Respondents' surface was reasonably necessary. But, as the circuit court noted, a mineral owner must possess the right before the reasonably necessary analysis is triggered. Here, the right possessed by the mineral owner (and its lessee) at the time of severance in 1936 was the implied right to use the surface to produce the minerals underlying the surface. There was no implied right to do anything more.

In its argument below, Petitioner claimed that the mineral owner's pooling amendment "expressly acknowledged EQT's right to pool and/or unitize the Carr Lease with other lands." (*Id.* 150.) The amendment, however, does not just "acknowledge" pooling rights or a right to use Respondents' surface for that purpose. Instead, it actually attempts to modify the original Carr Lease, as follows: "2. Amendments. The Lease is hereby amended and modified to include the following provisions: . . . [.]" (*Id.* 233.) (Emphasis added.) Subparagraph (a) is entitled "Pooling/Unitization." The last two sentences of that provision state:

> Lessee may use the entire Leased Premises for the operation of any pools or units that contain a part of the Leased Premises, including to drill for, produce, transport, and remove gas and oil regardless of location. The surface location of a horizontal/directional well which is producing in a pool or unit may or may not be located on the Leased Premises or lands pooled or unitized therewith.

(*Id.*) In this regard, and contrary to Petitioner's characterization, the 2011 amendment was not merely an acknowledgment of an established, implied right. The amendment was an effort to change the original agreement to grant an express right to use the surface for the production of gas and oil from neighboring lands with which the Carr lease was pooled. Indeed, the

amendment belies Petitioner's central (unsound) argument. If the implied right always existed, there would be no need for the amendment. Instead, such language was deemed necessary precisely because use of the surface to produce from neighboring tracts must be expressly granted. And, as noted before, that right belonged to the surface owner.

The circuit court then concluded:

> [T]he execution of the pooling amendment occurred after the severance of the ownership of the minerals from the ownership of the surface. At the time of the severance, the mineral owners did not obtain the right to use the surface tract for exploration and production from neighboring mineral tracts, and certainly did not obtain the right to place extra burden on the surface to do so. Any such right remained with the severed lands.

(*Id.* 249-250.)

Based on the foregoing, Petitioner's suggestion that the proper "starting point" for the circuit court's analysis should be the "reasonably necessary analysis" is dead wrong.[3] At the time the surface was severed from the minerals in 1936, the mineral owner's only implied right was to use the surface in a reasonably necessary manner to develop the minerals underlying that surface.

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[3] Even assuming, *arguendo*, that Petitioner had a legal right to use Respondents' surface to drill into neighboring tracts, its argument that drilling such wells is reasonable and necessary to produce from the Carr lease is not supported. All parties agree that new technology allows horizontal well bores to be drilled thousands of feet long. One of the wells EQT has already drilled, API 047-017-06051H, was permitted to have an 8,450 foot horizontal bore. This technique allows the mineral tract underlying Respondents' land to be reached from a drill pad a mile or more outside the borders of Respondents' surface tract. So it is an astounding reversal of logic for Petitioner to argue that this technology makes it somehow *necessary* to use Respondents' surface to drill the wellbores that will pass through neighboring tracts, as well as the underlying tracts. In fact, the new technology makes it less necessary to use Respondents' surface, not more. Petitioner cites no cases for the proposition that a new technology, one which requires greater rights from, and increased burdens on, the surface than are stated in a lease or deed, constitutes grounds for creating, expanding, or implying those greater rights into a lease or deed. To the contrary, Justice McHugh in *Phillips v. Fox*, 193 W. Va. 657, 665, 458 S.E.2d 327, 335 (1995), stated: "Finally, in *Buffalo Mining*, we concluded that 'where implied as opposed to express rights are sought, the test of what is reasonable and necessary becomes more exacting, . . . In order for a claim for an implied easement for surface rights in connection with mining activities to be successful, it must be demonstrated . . . that the right can be exercised without any substantial burden to the surface owner.'" As was argued below, and as the circuit court found, the new burden here was indeed substantial. (J.A. 70-74, 250-252.)

And since no such additional right was ever obtained prior to severance (and prior to Respondents' purchase of the surface land), the circuit court correctly concluded that "no further inquiry regarding reasonable use is necessary." (*Id.* 250.)

Ultimately, the question presented on appeal goes directly to the nature of the implied right possessed by the mineral owner. Based on clear precedent, Respondents submit that this implied right is limited to the minerals underlying Respondents' surface. As a result, the circuit court expressly and rightly held that Petitioner had "no lawful authority to: (a) use Plaintiffs' land for drilling horizontal well bores into neighbors' mineral tracts; or (b) produce gas from those neighboring mineral tracts using Plaintiffs' surface lands." (*Id.* 251.)

3. The Circuit Court's Ruling Is Supported by West Virginia Law and Public Policy.

Petitioner places great weight on several legislative pronouncements regarding the importance of fostering, promoting, and encouraging the development of natural gas resources in West Virginia. (Pet'r's Br. 17-21.) Petitioner also emphasizes the dominant and servient nature of the mineral and surface estates, respectively. (*Id.* 4.) However, Petitioner completely ignores subsequent legislative enactments that underscore the balance that must be struck between these seemingly competing interests:

> Exploration for and development of oil and gas reserves in this state must coexist with the use, agricultural or otherwise, of the surface of certain land and that ***each constitutes a right equal to the other.***

W. Va. Code § 22-6B-1(a)(1) (2011). (Emphasis added.) Precisely this same language – underscoring the "equal" relationship of oil and gas development with surface uses – has been the law since 1983. *W. Va. Code* § 22-7-1(a)(1) (1983).

During the recently-concluded legislative session, the rights of surface landowners were

once again recognized with passage of the "Co-tenancy Modernization and Majority Protection Act." Specifically, while the new law is designed to foster and encourage natural gas production, it also declares that the public policy of the state is, *inter alia*, to "[s]afeguard, protect and enforce the rights of surface owners[.]" *W. Va. Code* 37B-1-2 (2018). In this regard, the statute implements this key policy by requiring a surface landowner's consent prior to use of the surface:

> When any tract of mineral property where an interest in the oil or natural gas in place is owned by a nonconsenting cotenant is used or developed pursuant to §37B-1-4 of this code, ***in no event shall drilling be initiated upon, or other surface disturbance occur, without the surface owner's consent regardless of whether such surface owner possesses any actual ownership in the mineral interest***: *Provided*, That this subsection shall not require surface owner consent for tracts on which surface disturbance does not occur or tracts otherwise subject to an existing surface use agreement, oil and gas lease which includes surface use rights, or other valid contractual arrangement in which the owner has granted rights to the operator to use the surface for horizontal drilling or any other use for which this article is used.

W. Va. Code § 37B-1-6(a) (2018). (Emphasis added.) Therefore, there is no sense in which the current public policy of this State favors development of oil and gas resources over surface uses – i.e., <u>both must coexist</u>.

This is not to suggest that development of our natural resources is unimportant or that horizontal well technology is uniformly deleterious. In fact, as Petitioner points out, the West Virginia Surface Owners' Rights Organization ("SORO"), a non-profit organization devoted to protecting the rights of surface landowners, touts the potential benefits of horizontal drilling. (Pet'r's Br. 21.) However, as it did below, Petitioner oddly (and conveniently) omits the following crucial language from the SORO website:

> The bad thing about horizontal drilling is that, while there is less total surface damage, it is all concentrated on one surface owner. WVSORO believes that the law does not permit drillers to do that without obtaining permission (in writing) from that one surface owner, whether the surface owner does or does not own the minerals . . . . And if the surface owner does agree to allow the centralized pad to be drilled on their land, then the surface owner should insist on environmental and surface <u>protections that other drillers have agreed to</u>, in particular a liner covering

> the pad should be used so that spills do not leach down into groundwater. And surface owners, particularly those who do not own the minerals and so will not be getting any royalty, should be compensated for the use of their surface based not on what the surface was worth to them before the driller showed up, but based on what the use of their surface is worth to the driller! It costs $3 to $7 Million to drill each well on a pad, and they are drilling multiple wells. If you are a surface owner who also owns the minerals and will be getting royalty, you should ask for $25,000 per well. That is only 8/100ths to 4/100ths of 1% of the cost of drilling each well. If you do not own the minerals, and if you want to let them drill, and if you get paid less than that, you are being played. Unfortunately you will probably have to hire a lawyer to get that because the State will grant them their permit if it has the environmental protections the State wants, and leave it to you to protect your surface ownership rights.

(J.A. 206.)

In this context, the West Virginia Supreme Court of Appeals has previously stated, albeit in *dicta*, that the implied right does not extend to use of the surface for neighboring lands. In *King v. South Penn Oil Co.*, 110 W. Va. 107, 157 S.E. 82 (1931), the Court addressed implied rights in an oil and gas case. At the time the surface was severed from the minerals, the tract consisted of 4,000 acres in Roane and Clay counties. The mineral owner reserved the right to use the surface for ingress, egress, and production of the minerals. The Court held that even if the surface was subsequently subdivided, the mineral owner could use any of it to produce oil and gas. The Court affirmed the implied right of the mineral owner to use the surface "in such manner and with such means as would be fairly necessary for the enjoyment of the mineral estate." *Id.* at 107, 157 S.E. at 84 (citing *Squires*, 95 W. Va. 307, 121 S.E. 90 (1924)). However, the Court then stressed: "True, the rule quoted applies to the mining and production of minerals from a given tract of land, and does not contemplate the use of such tract in connection with the production of minerals from another and different tract[.]" *Id.* (Emphasis added.)

Not surprisingly, Petitioner fails to distinguish, or even mention, this Court's language in *King*. Instead, EQT now relies heavily on an unpublished case of limited persuasive authority.

The case is *American Energy-Marcellus, LLC v. Mary Jean Templeton Poling*, No. 15-C-43 H (Cir. Ct. Tyler Co. Apr. 15, 2016), in which the Tyler County Circuit Court addressed an 1894 lease that was held by production but which was silent on the subject of pooling. After several mineral owners refused to sign pooling amendments, American Energy-Marcellus LLC ("American Energy," now known as Ascent Resources-Marcellus, LLC) filed a declaratory judgment action. The circuit court ruled that "there is an implied right to pool or unitize the oil and gas lease at issue in this matter with other mineral and leasehold interests for the purpose of developing oil and gas." *Id.* at 2. It is worth noting that the Tyler County Circuit Court's ruling is of no greater precedential authority than the Doddridge County Circuit Court's ruling in this case. Moreover, *American Energy-Marcellus* is inapposite for several reasons. First, the case involved a dispute between mineral owners and their lessee. As such, it did not involve the rights of surface land owners (who were not parties to the litigation). Second, like Petitioner here, the circuit court noted that horizontal drilling is reasonably necessary to produce oil and gas from the shale formations. However, and again, this analysis misses the point: here, Petitioner never had any right – implied or otherwise – to use Respondents' surface to drill horizontal wells into neighboring tracts. And the fact that it may not be economical to produce oil and gas from one parcel without also drilling into neighboring parcels does not, and should not, extend the mineral owner's (or lessee's) right to burden the surface for off-parcel minerals (absent an express agreement to do so). *See* Taryn Phaneuf, *Professor Says Judge's Opinion on Implied Pooling Rights Marks Departure from State Oil and Gas Law*, West Virginia Record, *at* https://wvrecord.com/stories/510990698-professor-says-judge-s-opinion-on-implied-pooling-rights-marks-departure-from-state-oil-and-gas-law (Aug. 11, 2016).

4. General Treatises on Oil and Gas Law and Other Academic Authorities Also Agree with the Circuit Court's Analysis.

A chorus of general treatises on oil and gas law concur with the circuit court's analysis. The most thorough of the treatises addresses the subject in some detail:

> The usual express easements and implied surface easements of a mineral owner or lessee are limited to such surface use as is reasonably necessary for exploration, development and production ***on the premises described in the deed or lease.*** Of course the instrument may expressly grant easements in connection with operations on other premises . . . . ***Absent such express provision, clearly the use of the surface by a mineral owner or lessee in connection with operation on other premises*** [that were not part of the surface at the time the ownership of the minerals was separated from the ownership of the surface if the ownership has been separated, or if the ownership has not been separated, at the time the lease was signed] ***constitutes an excessive use of his surface easements*** . . . . The consensus is that such veto power exists, although there is little case authority on the matter. ***The reason for the dearth of such authority is that such veto power appears generally assumed*** . . . . In § 218.4, supra, we indicated our conclusion on the basis of available case authority that unless the deed or lease authorized use of the surface in connection with operations on other premises, the surface owner may prevent the use of the surface for a well location [to produce gas from other premises] . . . .

HOWARD R. WILLIAMS & CHARLES J. MEYERS, OIL AND GAS LAW, § 218.4, at 211-12 (Patrick H. Martin & Bruce M. Kramer eds., 1998) ("Conduct of Operator Injurious to Others").[4] (Emphasis added.)

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[4] In response to this treatise, Petitioner references not the treatise, but a statement by one of its co-editors, Patrick H. Martin, in a paper delivered to the Rocky Mountain Mineral Law Foundation. (Pet'r's Br. 26.) Respondents agree with the first part of the quote – i.e., that pooling and unitization are generally favored. However, the legal right to use land for those purposes must still be obtained from the lawful owner of those properties. More importantly, the language of the treatise remains unchanged. And the only reason for the "dearth" of authority is because the circuit court's analysis (and Respondents' position) on this issue is so obvious. Finally, not only is no case law cited for the statement, but additional language from the paper may explain the dichotomy between Petitioner's interpretation of the quote and the express language of the treatise. Indeed, the presumed factual context is very different than the present case. Professor Martin queries: "May the interest owner or his or her lessee also use the surface <u>for access</u> to drilling operation on adjacent acreage <u>when the land is included in the unit</u> for which the operations are being undertaken?" Patrick H. Martin, *State Conservation Regulation and Overview of Standard Spacing and Pools*, Rocky Mountain Mineral Law Foundation Special Institute on Horizontal Oil and Gas Development, 2-34 (2012) (emphasis added). In the first place, Professor Martin is talking about putting a road or pipeline across a surface tract to reach a drilling

Similarly, the author of another well-known treatise, Professor Kuntz, states: "If the title to all minerals have been severed, the mineral owner is entitled to the use of the surface for the purpose of extracting minerals from such land . . . . Such mineral owner should not have the right to use the surface for the other purposes, such as the purpose of removing minerals from another tract of land." 1 EUGENE KUNTZ, A TREATISE ON THE LAW OF OIL AND GAS, § 12.8, at 357 (1989).

A third major general treatise on oil and gas law states: "[T]he dominant mineral estate servient surface estate relationship obligates the surface of a tract to accept the burden of surface access, installation and other use that is necessary to develop the tract's underlying minerals, ***but not more***." SUMMERS OIL AND GAS, § 56:9 (Nancy Saint-Paul, ed., 3d ed. 2009). (Emphasis added.)

Other authorities likewise articulate the accepted principle. "[A]bsent broader surface use provisions in the original severance instrument or effective pooling or unitization, surface use by the mineral owner in connection with the exploration of exploitation of minerals on other lands is beyond the scope of the mineral owner's right of reasonable use at the common law." Owen L.

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operation on another surface tract. A road or pipeline is less of an intrusion on the surface tract being crossed than placing the "drilling operations" on the surface tract to drain all the mineral tracts in a unit. Indeed, placing drilling operations for horizontal shale wells on a surface tract is a much greater imposition (as set forth in Respondents' initial memorandum below). (J.A. 70-74.) In the second place, the professor is talking about land that has been successfully placed in a unit. Here, the pooling amendment came too late to grant Petitioner the right to use Respondents' surface to drill into neighboring tracts.

Petitioner also cites a presentation by Bruce Kramer, the other co-editor of WILLIAMS & MYERS. (Pet'r's Br. at 26.) Importantly, Respondents agree with the general principle stated in Mr. Kramer's presentation: "Widely-accepted general rule is that the implied easement of surface use does not extend to support activities benefitting off-leasehold premises." (J.A. 208.) And yes, as pointed out by Mr. Kramer, this analysis can change "when either voluntary or compulsory pooling unitization occurs." (J.A. 209.) However, in the instant case neither occurred. At present, ***there is no forced pooling for horizontal Marcellus Shale wells in West Virginia***.

Anderson & Eugene Kuntz, *Surface "Trespass": A Man's Subsurface Is Not His Castle*, 49 Washburn L. Rev. 247, 264 (2010).

Further, an article that appeared in the Eastern Mineral Law Foundation (now the Energy and Mineral Law Foundation) followed suit. It was written by two lawyers: Rex Burford, who was Executive Director of the West Virginia Oil and Natural Gas Association from 1976 to 1991, and John Johnson, who was head of the West Virginia Office of Oil and Gas from 1985 to 1989. They wrote: "[C]ase law holds generally that the surface of one tract may not be used for mineral production from an adjacent tract without permission of the surface owner." Rex Burford and John H. Johnston, *Legal and Developmental Issues Involving Horizontal Drilling in the Appalachian Basin*, EASTERN MINERAL LAW INSTITUTE 21 (1991) (footnote omitted).

Finally, a somewhat exhaustive examination of the topic concludes:

> The mineral owner should not be permitted to use the surface that lies above his mineral tract to drill a horizontal well that crosses from the subjacent mineral tract into a neighboring mineral tract. While a surface owner has no choice but to allow a mineral owner to do what is necessary to reach the mineral <u>directly below</u> his surface, the mineral owner [*sic*, "surface owner"] should not be forced, <u>without his consent or any additional compensation</u>, to allow the surface owner [*sic*, "mineral owner"] to use his land in order to reach minerals that are not directly below his surface. Considering the substantially increased cost, time, manpower and surface area required to drill a horizontal well, <u>the surface owner should be able to prevent a natural gas producer from using his land to drill a horizontal well that is meant to retrieve gas at another location</u>.

Jason A. Proctor, Note, *The Legality of Drilling Sideways: Horizontal Drilling and Its Future in West Virginia*, 115 W. Va. L. Rev. 491, 519 (2012). (Emphasis added.)

5. West Virginia and Other States' Mineral Law in the Coal Context Establishes the Principle that the Operator's Use of Overlying Surface Lands to Produce Minerals from Neighboring Mineral Tracts Is a Trespass.

As early as 1883, the Supreme Court of Appeals of West Virginia held that the right to use the surface of one tract to extract coal from a neighboring tract has to be specially stated in a conveyance – i.e., it is not implied. *Findley v. Armstrong,* 23 W. Va. 113 (1883). In *Findley*, a contract for sale of coal under a tract of land was signed that used the terms "the coal and coal-privileges." To carry out the contract, a deed had to be prepared by the buyer and signed by the seller. The buyer inserted a provision in the proposed deed that would have allowed the surface of the tract subject to the contract to be used for removing coal from neighboring "coterminous" coal tracts. The West Virginia Supreme Court held that inserting that provision in the deed went beyond the terms of the contract. The grant of the right to use the surface for production of neighboring mineral must be specifically stated.

Similarly, in *Armstrong v Maryland Coal Co.*, 67 W. Va. 589, 69 S.E. 195 (1910), the Court held that a purchaser, "may not . . . demand as mining rights the right to remove over, through and under the lands in which the coal conveyed is situated coal thereafter acquired by the purchaser." Demonstrating the importance of the issue, in *Armstrong* the other objections by the vendee were deemed waived, but not the one at issue in the present case.

The *Findley* holding was again reaffirmed in *Fisher v. West Virginia Coal & Transport Company*, 137 W. Va. 613, 620, 73 S.E.2d 633, 638 (1952). The *Fisher* Court cited not only *Findley*, but also numerous secondary authorities:

> In the absence of a right of arising out of contract, the corporate defendant has no right to use the surface of the 1-acre tract of land for transporting and processing coal admittedly mined from lands adjoining the 16-acre tract. *See Findley v.*

> *Armstrong*, 23 W. Va. 113, 122; 48 A.L.R 1406, 58 C.J.S., Mines and Minerals, §158, subparagraph (D); 36 Am. Jur. Mines and Minerals, SCCS. 177, 180.

The eventual holding in *Fisher* allowed defendant to use the surface because they did, in fact, have the right to do so based on a valid lease. *Id.* However, when, like here, there is no "right arising out of contract," Petitioner's use of Respondents' surface is unlawful.

The very same principle is also recognized and discussed in *Ross Coal Co. v. Cole*, 249 F.2d 600, 605 (4th Cir. 1957):

> The same necessity does not exist and the same implication does not arise with respect to the removal of coal from adjacent lands, particularly when the coal on the adjacent lands was not owned by Ross on the date of the deed, nor was it owned by Ross at the time this controversy arose. Extending the implied right to operate a tipple for the removal of coal from adjacent lands would materially increase the burden upon the servient estate. Unless the deed, itself, provided such right, it is not to be implied.

It is worth emphasizing again that Respondents do <u>not</u> dispute that the owner and lessee of the oil and gas rights to the mineral tract underlying Respondents' surface land have the implied right to do what is reasonable and necessary[5] in order to drill well bores into the underlying oil and gas reservation to produce gas from that tract. In fact, this has already occurred. Nine such conventional vertical wells have been drilled into the oil and gas mineral reservation under Respondents' lands. (J.A. 77.) However, Petitioner has no legal right to drill from Respondents' surface land horizontally into neighboring mineral tracts.

a. <u>Other States' Mineral Law in the Coal Context Agrees that the Mineral Operator's Use of Overlying Surface Lands to Produce Minerals from Neighboring Mineral Tracts is a Trespass</u>.

Our neighboring state of Kentucky agrees with West Virginia. The Court of Appeals of Kentucky denied a coal lessee the right to use the surface for operations related to the production

of coal from neighboring coal leases. *Moore et al. v. Lackey Mining Co.*, 215 Ky. 71, 284 S.W. 415 (1926). The court held that the right of a lessee of coal underlying a surface tract to "'use the pits or shafts or openings to the surface and the surface in cleaning, screening, loading, and marketing coal from adjacent lands . . . must be contracted for and granted by the deed, lease, or reservation." *Id.* at 417. The Kentucky court then held: "The lease in question granted . . . neither expressly nor by implication any such right." *Id.* at 418, citing 40 C.J.S. § 612, at 1012.

Likewise, the American Law Reports states: "It may be stated as a rather strict general rule that in the absence of contractual permission, the holder of the minerals underlying a tract of land will not be permitted to use the surface thereof in aid of mining operations on adjacent, adjoining, or other tracts of land." W. C. Crais III, Annotation, *Right of Owner of Title to or Interest in Minerals Under One Tract to Use Surface, or Underground Passages, in Connection with Mining Other Tract*, 83 A.L.R.2d 665, 668 (1962).

b. The Practice of "Wheelage" Supports the Circuit Court's Ruling.

The well-established concept "wheelage" supports the circuit court's trespass ruling. "Wheelage is "[a] duty or toll for a vehicle to pass over certain property." BLACK'S LAW DICTIONARY 1733 (9th ed. 2009). "Wheelage" is a payment that, for example, a coal operator makes for the privilege of transporting mined coal across surface property, or through previously mined coal voids.[6]

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[5] *See* Clinton W. Smith, Note, *Disturbing Surface Rights: What Does 'Reasonably Necessary' Mean in West Virginia?*, 85 W. Va. L. Rev. 817 (1983).

[6] Coal production is not the only place where "wheelage" is paid. Wheelage is also paid by timber operators to take timber across railroad rights of way. Moreover, Respondents' expert witness, John Bullock of Gaddy Engineering, testified at trial that the concept of wheelage has also been applied in West Virginia in the oil and gas context to compensate landowners for the use of their surface land. (J.A. 610-621.)

In the mineral context, the wheelage fee is commonly calculated based on the amount of mineral passing through the property. A federal district court in Virginia explained the scenario in *U.S. v. 180.37 Acres of Land, More or Less, in Dickenson County, Com. of Va.*, 254 F. Supp. 678, 684 (W.D. Va. 1966): "Since [mineral owner] Pittston did not have the right to haul its coal over tract 404, it would have to pay for this privilege, presumably on a per ton basis. This type of payment is called 'wheelage' and is recognized in this area as an acceptable practice. *See Preston Mining Co. Inc. v. Matney*, 197 Va. 520, 90 S.E.2d 155 (1955); *Raven Red Ash Coal Co., Inc. v. Ball*, 185 Va. 534, 39 S.E.2d 231 (1946)."

Until the advent of horizontal boreholes, there was no occasion to apply the wheelage practice to natural gas extraction. The gas was transported by pipelines (the right of ways for which were obtained from the surface owners or as part of leases obtained from the fee owners). Now that natural gas operators seek to likewise burden and occupy the surface above a mineral tract in ways not agreed to (or contemplated) in the severance deed, that property right must be negotiated and purchased. If not, a trespass has occurred.

The principles that support the general acceptance of wheelage apply squarely to this action: a right to transport the minerals specified in the severance deed does not include the right to transport minerals from elsewhere. Therefore, the mineral owner undertaking such transportation of minerals from elsewhere must acquire the right to do so, usually by paying an agreed wheelage (or surface use) fee.[7]

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[7] Petitioner suggests that coal cases are not relevant because coal is different than oil and gas. However, Petitioner does not make that claim based on the actual difference between the two. Indeed, in mineral law the difference is that coal cannot migrate through rock (and across man-made boundaries), whereas oil and gas can. In this context, Petitioner is not suggesting that it has a right to use Respondents' surface to produce the gas because the gas migrated naturally through the permeability and porosity of the rock to the mineral tract underneath Respondents' surface (which is the justification for the "rule of capture" in oil and gas law). Rather, EQT wants to use Respondents' surface land to drill

6. Other States' Oil and Gas Law Supports the Circuit Court's Ruling.

Other states have recognized the same principles followed by the circuit court in the context of oil and gas drilling. For instance, the Texas Supreme Court has applied this legal principle, not in horizontal drilling, but in secondary recovery of oil across mineral and surface tract boundary lines. In *Robinson v. Robbins Petroleum Corp. Inc.*, 501 S.W.2d 865 (Tex. 1973), several tracts totaling 221 acres were leased in 1943 to Robbins Petroleum Corporation by the fee owner. Oil wells were drilled and the lease held in force by production. Later, in 1964, Robinson purchased eighty acres of the surface, subject to the lease provisions. After execution of the deed to Robinson, all or part of the 221-acre lease was included in three "waterflood" units (totaling several thousand acres) formed by order of the Texas Railroad Commission for the purpose of water flooding.[8] Robbins Petroleum then began using a former oil well located on Robinson's surface to produce salt water to be injected in wells located elsewhere within the three units.

The Texas Supreme Court, citing secondary authority, held:

> Robinson took his surface title subject to the [1943] lease and the implied right of the mineral owner to make reasonable use of the surface to produce certain minerals from the land covered by the [1943] lease. Nothing in the Wagoner lease or the reservation contained in the Robinson's deed authorized the mineral owners to increase the burden on the surface estate for the benefit of additional lands. See 1 Williams & Meyers, Oil and Gas Law s 219.6, p 286 (Matthew Bender 1972); Losee, Legal Problems a Water Supply for the Oil and Gas Industry, 20th Oil 7 Gas Inst. 61 (Matthew Bender 1969).

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into neighboring mineral tracts with man-made technologies that bore holes into the neighboring tracts in order to produce gas back through the tract underlying Respondents' surface lands. This is similar to coal mining technology that extends a tunnel from one mineral tract into an adjacent mineral tract. As a result, in the actual context of the issue presented here, the coal cases cited herein (involving virtually identical property interests between surface landowners and mineral owners) are highly relevant.

[8] "Waterflooding" or water injection is a secondary recovery technique where water is injected into certain wells, thereby displacing or flushing oil to adjacent, wells for production.

Id. at 867-868. And while the court ruled that use of the water from the well located on Robinson's eighty acres could be used to produce oil from the 221-acre leasehold, it could not be used to produce oil from the acreage outside the lease. The court stated: "Robinson, as owner of the surface, is entitled to protection from uses thereof, without his consent, for the benefit of owners outside of and beyond premises and terms of the [ ] lease." *Id.*

It is worth noting that the waterflooding units in *Robinson* were not voluntary, but were formed by the Texas Railroad Commission. This fact strengthens the persuasive authority of the case: even where the production units were involuntary, the mineral owner had no right to use the surface tract for production outside the underlying lease tract.[9] In the instant case, the pooling amendment was executed by the mineral owners long after severance; therefore, it could not, to use the *Robinson* court's language, "extend the burden upon [the] surface estate."[10] *Id.* at 868.

Similarly, the United States Circuit Court of Appeals for the Ninth Circuit, on appeal from a Montana District Court decision, held that the surface owner was entitled to extra damages "done" to his land because the driller used the surface owner's land to produce oil and gas from neighboring mineral lands. *Franz Corporation v. Fifer*, 295 F. 106, 107-108 (9th Cir.

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[9] "The fact that the Railroad Commission entered orders approving the recovery units may be relevant to the propriety of the use of water for production from the lands of the Wagoner lease, but no statute or order purports to diminish the title or otherwise extend the burden upon Robinson's surface estate." *Id.* at 868.

[10] The Texas Supreme Court, however, does not always decide cases consistent with West Virginia precedent. *See, e.g., Coastal Oil & Gas Corp. v. Garza Energy Trust,* 268 S.W.3d 1 (2008) (holding that claims of trespass by hydraulic fracturing into unpooled land were barred by the rule of capture). However, *Coastal Oil* was a five to four decision, with a particularly vigorous dissent. Judge John Preston Bailey of the Northern District of West Virginia issued a ruling in April, 2013, in which he held: "[T]his Court finds, and believes that the West Virginia Supreme Court of Appeals would find, that hydraulic fracturing under the land of a neighboring property without that parties' consent is not protected by the 'rule of capture,' but rather constitutes an actionable trespass." *Stone v. Chesapeake Appalachia, LLC,* No. 5:12-cv-102, 2013 WL 2097397, at *8 (N.D.W. Va., Apr. 10, 2013). Judge Bailey

1924).

More recently, the Tenth Circuit held: "The authorities clearly hold that a surface owner of a tract of land on which minerals were reserved to the Government when patented under the Act of Jul 17, 1914, may object to surface use of his lands by an oil and gas lessee for operations conducted upon other lands under a different ownership." *Mountain Fuel Supply Company v. Smith*, 471 F.2d 594 (10th Cir. 1973); *see also Bourdiem v. Seaboard Oil Corporation of Delaware*, 38 Cal. App. 2d 11, 100 P.2d 528 (1940).

The Ninth Circuit also stated the rule of law:

> It is a well-established principle of property law that the right to use the surface of land as an incident of the ownership of mineral rights in the land, does not carry with it the right to use the surface in aid of mining or drilling operations on other lands (See 36 Am.Jur., Mines and Minerals, § 177, § 180 and § 181; anno.: 48 A.L.R. 1406, 1407). That such use by The Texas Company was tortious admits of no doubt.

Russell v. Texas Co., 278 F.2d 636, 642 (9th Cir. 1956).

7. The Law Regarding Pipeline Easements Illustrates that EQT's Use of Respondents' Surface Land Is a Trespass.

The analogous issue of pipeline easements illustrates that Petitioner's actions here were a trespass. For example, several of the driller's horizontal well bores were drilled from Respondents' surface tract into a neighboring mineral tract for which E. H. Garrett and others are now the royalty owners. If a vertical gas well was drilled on the surface lands above the neighboring E. H. Garrett mineral tract, and if that driller wanted to pipe the gas from that well to market by crossing the surface lands owned by Respondents, the driller would have to obtain an easement or right of way to do so. Petitioner cannot dispute, and has not disputed, this key fact.

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followed the articulate reasoning of the dissent in *Coastal Oil* and ruled that frac'ing into the formation for which the lease did not provide pooling was a trespass.

Even if that was the <u>only</u> way for the driller to get the gas from the E. H. Garrett mineral tract to market, the driller cannot construct a pipeline across Respondents' surface lands without getting permission from Respondents to do so. The driller may very well have the right to do whatever is reasonably necessary to the surface lands above the E. H. Garret tract in order to produce gas from <u>that</u> tract, but the driller does <u>not</u> have the right to put a pipeline across a *neighboring* surface tract without first obtaining an easement or right of way to do so. Simply put, a mineral owner's right to use the surface above its tract does <u>not</u> convey the right to use the surface above neighboring surface tracts for transport to market.

If EQT does not have the right to use Respondents' surface land for a pipeline to produce and transport the gas from the E. H. Garrett mineral tract to market, then, by strong analogy, EQT does not have the right to use Respondents' surface land for a well pad to do so (or, in addition, to drill and fracture the well bores in the neighboring mineral tract). In the instant case, Petitioner's drilling operations have had an infinitely more disruptive impact on Respondents' surface land than a mere pipeline. (J.A. 70-74, 250-252.) Yet, despite the fact that the pipeline would have been a trespass, EQT believes it should have the right to put in its enormous and intrusive well pad (and constantly-used well road) on Respondents' surface land without first obtaining Respondents' permission. The circuit court correctly concluded that Petitioner's belief was misplaced.

8. The Cases Cited by Petitioner Are Readily Distinguishable and Not Binding Authority.

As it did below, Petitioner cites numerous cases from other jurisdictions, or from federal district courts attempting to interpret West Virginia property law. Some of these cases are readily distinguished from the case at bar. Some support Petitioner's position, but are wrongly

decided. And still others, actually support Respondents' arguments. The point, however, is not what Texas or Alabama or New Mexico or any other state thinks about their state's property laws; rather, the real question is what is right for West Virginia and consistent with our State's legal precedent.

That said, Petitioner's appellate argument relies in part on *Miller v. N.R.M. Petroleum Corp.*, 570 F. Supp. 28 (N.D.W. Va. 1983). In *Miller*, Chief Judge Maxwell predicted that this Court would "adopt the view that pooling grants the right to use the surface of any tract in the drilling unit to produce gas or oil from the pool." *Id.* at 31. However, reliance on *Miller* is problematic for several reasons. First, *Miller* presents a very different factual scenario than the instant case. In *Miller*, the owner of a twenty-five acre tract refused to agree to the driller's use of a road across his land to drill a vertical well on his neighboring thirty-eight acre tract of land. The present case is about horizontal wells actually drilled into non-porous and non-permeable shale formations in neighboring tracts (not vertical wells into sand formations that rely on the "rule of capture" to legally produce gas that flows naturally from neighboring tracts).

Second, and importantly, *Miller* appears to involve voluntary pooling provisions in the leases for two tracts, not forced pooling.[11] And while the facts are somewhat vague in *Miller*, it appears that the owner of the twenty-five acre tract refused to sign an easement to use the road for a drilling pad on the thirty-eight acre tract. Then, and only then, did the driller opt to pool the two tracts: "The defendant then declared a unitization of the two properties in question and thereby asserted the right to cross the first tract for the purpose of developing oil and gas on the

[11] The case does not indicate whether the wells were statutory "deep" wells that might have been subject to West Virginia's forced pooling legislation.

entire pool." *Id.* at 29. While *Miller* extols the legitimate benefits of pooling,[12] the driller obviously pooled the two tracts in order to obtain a road right of way, and not to give the owner of the twenty-five acre tract the legitimate benefits of pooling (by paying him royalties for the gas being drained from his mineral estate). In *Miller*, pooling was essentially a tool used to do an end-run around a landowner who wanted compensated for, or not to have, a road across his property to a well somewhere else.

Here, it is a matter of record that the original Carr lease did not have a voluntary pooling provision. Instead, the pooling amendment was signed by new mineral owners only after the ownership of the surface had been separated from the ownership of the minerals, and decades after Respondents purchased their surface lands. In this regard, the mineral owners still had the right to amend the agreement related to their mineral rights – such as, an amendment agreeing to join their mineral tract rights with mineral neighbors and determining how to divide royalties among the mineral owners. However, the mineral owners did not own, and therefore could not lease, the right to use the surface for developing neighboring mineral tracts pursuant to the later pooling amendment.

The *Miller* decision correctly acknowledged the general law, citing *King* for the proposition that "the reasonable use doctrine does not allow the use of surface tracts in connection with production of minerals from other tracts of land." *Id.* at 30. After that, the district court became mired in a confusing discussion of a forced pooling statute that applies only to deep wells. This analysis was entirely misplaced. Instead, the court should have referenced the provisions of the statute dealing specifically with surface use (if it was going to rely on the

[12] Pooling for vertical wells should be used to combine interests in oil and gas tracts so that fewer wells can be used to produce more total gas without leaving spaces in between that cannot be drilled because they are too small (and to pay royalties to everyone being drained).

statute at all). This likely would have resulted in an entirely different outcome because the specifically statute provides that even forced pooling <u>cannot</u> require a well to be placed on a surface owner who does not consent.[13] The deep well forced pooling statute further bolsters this public policy protecting surface owners: "[I]n no event shall drilling be initiated on the tract of an unleased owner without the owner's written consent."[14] *W. Va. Code* § 22C-9-7(b)(1).

In *Miller*, the district court also refers to an interpretation of the Alabama pooling statute in *Gulf Oil Corporation v. Deese*, 275 Ala. 178, 153 So.2d 614 (1963), noting its similarity with the West Virginia legislation. And Petitioner labels *Deese* "[p]erhaps the most on-point decision." (Pet'r's Br. 22.) Again, such reliance is entirely misplaced. The well under consideration in *Deese* was drilled pursuant to that state's <u>forced</u> pooling statute. The *Deese* court specifically said: "Whether in the absence of such pooling law, there might be reason for applying the same principle to oil as is applicable to solid minerals, there is no occasion to decide . . . the well was located and constructed pursuant to a pooling order under [the pooling act]." *Deese*, 275 Ala. at 182, 153 So.2d at 618. There is also no indication that *Deese* was about a horizontal well, or even a slant drilled well.[15]

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[13] *W. Va. Code* § 22C-9-7(b)(4) plainly states:

> No drilling or operation of a deep well for the production of oil or gas shall be permitted upon or within any tract of land unless the operator shall have first obtained the written consent and easement therefor, duly acknowledged and placed on record in the office of the county clerk, for valuable consideration of all owners of the surface of such tract of land, which consent shall describe with reasonable certainty, the location upon such tract, of the location of such proposed deep well, a certified copy of which consent and easement shall be submitted by the operator to the commission.

[14] It should be emphasized that the forced pooling statute allows only one well per unit (unlike what occurred on Respondents' property). *See W. Va. Code* §§ 22C-9-7(a)(3), (a)(3)(E), and (a)(5).

[15] Petitioner's analysis and the *Miller* decision both further err in relying on changes enacted in 1983 to West Virginia's oil and gas statutes. Indeed, the 1983 enactments are not about surface owners' property rights. Instead, they are about environmental protections. More specifically, they give the surface owner special notice of the drillers proposed activities, but they do not give the surface owner the ability to dispute the driller's right to be there in the first place. The surface owners' comments can only lead to rejection or modification of the driller's permit application if: "(1) The proposed well work will

In addition to the foregoing, the *Miller* decision was wrong to suggest that there is any majority rule that *voluntary* pooling somehow enlarges the right to use the surface of one tract to produce gas from other tracts. *Miller*, 570 F. Supp. at 30. In this regard, the district court also cited *Miller v. Crown Cent. Petroleum Corp.*, 309 S.W.2d 876 (1958). In that case, however, "[The surface owner's] title to the surface was acquired after execution of the oil and gas leases and with both actual and constructive knowledge of the [pooling] rights of the owners of the minerals and royalties." *Id.* at 877. Here, Respondents could not have had actual or constructive knowledge of pooling rights to use the surface since the pooling amendment was signed after the land was purchased (and it was executed solely by the mineral owners).[16]

Next, Petitioner cites *SWN Production Co., LLC v. Edge*, No. 5:15cv108, 2015 WL 5786739 (N.D.W. Va. Sept. 30, 2015). In *Edge,* however, the district court did not specifically adjudicate the merits of the parties' respective positions. Rather, the court granted the driller's motion for a preliminary injunction, finding that it was "likely" to succeed on the merits. *Id.* at *4. In any event, and unlike the instant case, the surface landowners in *Edge* purchased their property in 1980 <u>after</u> the mineral owners leased the oil and gas rights to Columbia Gas Transmission Corporation in 1977 (with express provisions authorizing the lessee to pool "with

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constitute a hazard to the safety of persons; or (2) The plan for soil erosion and sediment control is not adequate or effective; or (3) Damage would occur to publicly owned lands or resources; or (4) The proposed well work fails to protect fresh water sources or supplies." *W. Va. Code* § 22-6-11. The statute provides surface owners with the right to comment on each of the foregoing topics if the proposed access road crosses his or her land, even if the well is located on a neighbor's tract. This provision, however, is in recognition of the fact that the mineral owner has the right to use all the surface above his or her severed tract, even if the surface of the tract has been subsequently subdivided. This also recognizes the situation where leases with pooling provisions were signed before the surface was separated. The 1983 statute also established an arbitration procedure for citizens to obtain compensation for the drillers' use of their land (by using rotary drilling that was not contemplated by the parties at the time of the severance) without having to go to court. But, in doing so the statute specifically preserved a citizen's option to go to court under the common law (as occurred in the instant case).

[16] Indeed, the American Law Reports cites only the above two distinguishable cases in subpart

other lands"). *Id.* at *1. As a result, the surface landowners purchased their property subject to a lease containing a pooling provision. Moreover, the surface landowners' deed expressly referenced the 1977 lease. Since Respondents did not purchase their land subject to any such pooling provisions, they were not "on notice" regarding the potential use of their surface to drill into neighboring tracts. As such, *Edge* is easily distinguished.

In *Gastar Exploration, Inc. v. Contraguerro*, 239 W. Va. 305, 800 S.E.2d 891 (2017), this Court addressed a very narrow legal question involving the rights of holders of nonparticipating royalty interests. The Court held that consent to pooling by such holders is not necessary where "the holders . . . have conveyed the oil and gas in place and the executive leasing rights thereto to the lessor." *Id.* at 901. As with the previous cases relied upon by Petitioner, this fact situation is inapposite to the instant case. Respondents are not attempting to, as Petitioner puts it, hold hostage the rights of mineral owners. Rather, they are simply asserting their own property rights. As such, their conduct is consistent with legal precedent and the public policy of the State.

Petitioner also relies upon *EQT Production Company v. Opatkiwiecz*, G.D. No. 13-013489 (C.C.P. Allegheny Co. Apr. 8, 2014). Importantly, *Opatkiwiecz* involved an interpretation and application of an amendment to Pennsylvania's Oil and Gas Lease Act enacted in 2013. The new statutory provision provides:

> Where an operator has the right to develop multiple contiguous leases separately, the operator may develop those leases jointly by horizontal drilling unless expressly prohibited by lease.

58 Pa. C.S. § 34.1. However, there is no such language in West Virginia's oil and gas laws. In

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(a) for the proposition adopted by the *Miller* decision, while subpart (b) cites a host of cases against it (although none are on point with voluntary pooling). *See* 53 A.L.R. 3rd 16 at §8[a].

fact, the West Virginia Legislature has failed to enact similar legislation despite numerous previous efforts.[17] Accordingly, *Opatkiwiecz* has absolutely no relevance to the case *sub judice*.[18]

Petitioner also cites *Kysar v. Amoco Production Co.*, 135 N.M. 767, 93 P.3d 1272 (2004). However, the very first sentence of the opinion distinguishes that case from the present one: "In this opinion, we discuss the surface access rights of a mineral lessee by virtue of a communitization [pooling] agreement, which the lessee was authorized to execute by a prior owner of the fee." *Id.* at 768, 93 P.3d at 1273. Significantly, the leases authorizing pooling in *Kysar* were executed before the surface rights were separated and long before the Kysars purchased the surface land. As noted many times previously, and emphasized again here, the pooling amendment in this case was signed by the mineral owners only after the surface had been separated and after Respondents purchased their land. At this point, the mineral owners had no surface rights to grant (beyond the implied right to use the surface to produce oil and gas underlying Respondents' surface). Even were that not true, in *Kysar* the federal district court certified two questions to the New Mexico Supreme Court. Petitioner clearly likes the Court's answer to the first one and thinks that it answers the present question. It does not. Specifically, the court ruled that if the surface owner's predecessor-in-interest signed a communitization [pooling] agreement, and the surface was later separated, the surface could be used for production from all the lands in the unit that was formed as a result of the communitization

[17] For example, this year H.B. 4574 contained a similar provision. However, the bill never made it to a committee agenda. In 2017, S.B. 576 passed the West Virginia State Senate with similar language. However, the language was subsequently deleted by the House Energy Committee (leaving only a co-tenancy provision, which failed on the last day of the legislative session). Likewise, in 2016 the bill containing similar language (S.B. 383) never made it to a committee agenda.

agreement. Respondents do not disagree with this legal holding; rather, they submit that it is not applicable to the case *sub judice*. However, the court's answer to the second certified question supports Respondents' (not Petitioner's) position. And while the facts of *Kysar* are labyrinthine, the ruling was straightforward: "On the second question, we conclude that a mineral rights lessee, by virtue of a communitization agreement the lessee was authorized to execute by a prior owner of the fee, does not enjoy a right of access over the surface estate of the portion of the leased area not subject to the agreement when the lease did not expressly grant this right." *Id.* at 781, 93 P.3d at 1286.

Equally unavailing is another case relied upon by Petitioner: *Delhi Gas Pipeline Corp v. Dixon,* 737 S.W.2d 96 (1987). This decision is a sparse two-page opinion from an intermediate appeals court in Texas. The case is distinguishable from the present case in several ways. First, it is unlikely (although it does not say) that it was about horizontal well bores. Second, it is only about the surface use for a pipeline, not a well site. Third, the gas is from a well-draining unit into which the underlying mineral tract had been pooled. The court's ruling does not indicate what role the Texas Railroad Commission (which has jurisdiction over all unitization and drilling in Texas) played in establishing the unit.

Citing *Key Operating & Equipment, Inc. v. Hegar*, 435 S.W.2d 794 (Tex. 2014), Petitioner inaptly states that the Texas Supreme Court (not merely an intermediate appeals court) also supports its position. But while the *Key Operating* court ruled that a driller has the implied right to use a road across a non-producing tract that has been pooled with a producing tract, Petitioner fails to note the key determining factor in the case – i.e., the surface owners "took their

[18] In *Opatkiwiecz*, the Court of Common Pleas in Allegheny County ruled that the statutory amendment was constitutional and, as a result, where EQT has the right to develop multiple contiguous oil and gas leases separately, it also has the right to develop those leases jointly by horizontal drilling.

surface title subject to the mineral lease assigned by Key's owners." *Id.* at 800. Importantly, the lease was executed prior to the purchase of the surface by the Hegars and the lease specifically provided for pooling. Here, Respondents took their surface title subject to the prior mineral lease that did not provide for pooling. Indeed, the pooling amendment to the lease in this case was not executed until decades after Respondents obtained their surface title. Thus, *Key Operating* is easily distinguished.

Lastly, EQT attempts to bolster its argument by referring to the Natural Gas Horizontal Well Act (hereinafter "HWA") and other statutory changes that were enacted by the West Virginia Legislature in a special session in 2011. And while the HWA found that horizontal drilling was an opportunity for efficient natural gas development, that this could enhance the economy of our State, and that it could contemplate horizontal drilling through multiple mineral tracts, absolutely nothing in the HWA gives drillers the right to surface use that the drillers did not previously possess. More specifically, it did not give drillers the right to use the surface of one tract to develop another tract. Instead, it merely acknowledged that technology had made it possible to do so when such rights already existed. Moreover, the purpose of the legislation was to regulate the environmental impacts of drilling practices (not to address property rights).[19]

[19] An enactment modifying the rights of long-severed mineral estates would surely raise constitutional concerns. The passage of a statute purporting to regulate horizontal drilling cannot authorize expanded surface uses any more than a zoning ordinance allowing for the industrial use of a tract of land can change the language of a restrictive covenant in a deed prohibiting the same. This is particularly true since no forced pooling powers were included in the legislation. In this regard, the precursor to the HWA was S.B. 424. That legislation, as introduced, actually contained a forced pooling provision. A forced pooling statute might have permitted the forced use of one property – even surface property – to extract minerals from another property and would have required oil and gas owners who did not want to lease their interests to participate in drilling units. That bill, however, did not pass. And a version without the forced pooling provision died on the last night of the 2011 regular legislative session. During a subsequent special session, the HWA was enacted. It, too, did not include any forced pooling provisions. In fact, strict forced pooling provisions have not passed in subsequent legislative sessions. As it exists now, the HWA simply addresses how an oil and gas well might be drilled. The oil and gas

9. IOGA's Amicus Brief Also Misses the Point.

Respondents agree with the Independent Oil and Gas Association's ("IOGA's") comments regarding the economic impact of the oil and gas industry in West Virginia. In fact, the record in this case underscores the point. Over the life of the one well pad located on Respondents' surface (consisting of nine horizontal wells), Petitioner estimated that over $300 million in gross revenues will be generated, with a net present value of just over $171 million. (J.A. 634-637.)

However, Respondents part company with IOGA on the actual issues presented on appeal. Indeed, IOGA contends that Respondents sought, and the circuit court's ruling granted, the right to "block" oil and gas development in the State of West Virginia. (IOGA Br. 4.) IOGA further suggests that the circuit court "held that only Respondents, *as the surface owners*, could have validly executed the pooling amendment with respect to use of the surface[.]" (*Id.* 9.)

Like Petitioner's analysis, IOGA's discussion completely misses the point.[20]

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operator still must have the actual right to be on a piece of property before it can drill. The HWA did absolutely nothing – explicitly or implicitly – to expand express or implied property rights. In fact, the statute specifically provides that the "article shall not apply to or affect any rights bargained for in any agreement between a surface owner and operator made prior to the effective date of this article." *W. Va. Code* § 22-6A-3 (2011). And like the 1983 legislation, the HWA included another provision with simplified arbitration procedures for surface owners to obtain compensation for surface damages without court involvement. *W. Va. Code* § 22-6B-1, *et seq.* This arbitration provision also did not change property rights; rather, it simply created an arbitration process offering limited damages for individuals who want to avoid litigation. Perhaps most importantly, the legislation contains two separate provisions clarifying that all existing common law rights of action and remedies were preserved in favor of the surface owner. *See W. Va. Code* § 22-6B-4 and *W. Va. Code* § 22-6B-8 (2011). These are precisely the common law rights Respondents are asserting in this case. Moreover, while the recently enacted co-tenancy legislation allows for the pooling of units provided that at least seventy-five percent of the mineral owners agree, it provides clear protections for surface landowners and preserves their common law rights. *W. Va. Code* § 37B-1-6 (2018).

[20] For example, like Petitioner, IOGA also incorrectly cites *Key Operating* in support of its argument. As was demonstrated hereinbefore, however, the facts in *Key Operating* are wholly inapplicable to Respondents' situation. Consequently, the case has no persuasive force. As another example, IOGA references this Court's holding in *Fisher v. West Virginia Coal & Transp. Co.*, 137 W. Va. 613, 73 S.E.2d 633 (1952). However, *Fisher* actually supports Respondents' position, not

Respondents do not seek to block oil and gas development. And Respondents do not believe that they have the right to execute a pooling amendment. Rather, and simply, they contend that the implied surface use right possessed by the mineral owners (and extended to EQT via lease) is limited to the production of minerals underlying their surface estate. Accordingly, before EQT used the surface to produce oil and gas from neighboring tracts, it should have negotiated a surface use agreement with Respondents (or, perhaps, simply drilled on a different tract).

B. Assignment Number Two (Unjust Enrichment) -- The Court's Ruling Regarding Unjust Enrichment Was Proper and Consistent with Legal Precedent.

1. EQT's Position Would Not Change the Outcome.

EQT contends that the circuit court erred in granting Respondents' motion for partial summary judgment on unjust enrichment. As noted previously, prior to trial Respondents elected not to pursue their unjust enrichment claim. Instead, the case was tried to the jury solely on the issue of trespass-related damages.[21] As such, any perceived error on the part of the Court regarding this assignment or error is of no consequence since it would not have changed the outcome at trial.

Petitioner's. Specifically, the Court held that "[i]n the absence of a right arising out of contract, the corporate defendant has no right to use the surface of the acre tract of land for transporting and processing coal admittedly mined from lands adjoining the acre tract." The Court found that such a contract right existed by virtue of a lease executed by the owner of the mineral estate. Importantly, the language of the original deed conveying the coal underlying the property "granted such right of way as was necessary for the purpose of mining and removing the coal thereunder, together with 'all necessary mining rights and privileges necessary for the operation and removal of said coal and all subterranean rights and ways necessary or convenient for the proper working and mining of the coal under said land.'" Here, no such language exists apart from the *ex post facto* pooling amendment.

[21] A well-respected treatise on tort law notes in an oft-cited quotation:

> [T]here has developed the doctrine that where the commission of a tort results in the unjust enrichment of the defendant at the plaintiffs expense, the plaintiff may disregard, or "waive" the tort action, and sue instead on a theoretical and fictitious contract of restitution of the benefits which the defendant has so received. "Waiver" of the tort is an unfortunate term, since the quasi-contract action itself is still based on the tort, and there is merely an election between alternative, co-existing remedies[.]

2. Notwithstanding the Foregoing, EQT's Arguments Are Unavailing.

There is no dispute regarding the elements of Respondents' claim for unjust enrichment. Specifically, unjust enrichment occurs when: (1) there was a benefit conferred upon defendant; (2) there was an appreciation or knowledge by defendant of such benefit; and (3) there was an acceptance or retention by defendant of the benefit under such circumstances as to make it inequitable for defendant to retain the benefit without payment of its value. *See Employer Teamsters – Local Nos. 175/505 Health and Welfare Trust Fund v. Bristol Myers Squibb Company*, 969 F. Supp. 2nd 463, 471 (S.D.W. Va. 2016) (Chambers, J.); *Veolia Es Special Servs., Inc. v. Techsol Chem. Co.*, No. 3:07–cv–0153, 2007 WL 4255280, at *9 (S.D.W. Va. Nov. 30, 2007) (citing 26 WILLISTON ON CONTRACTS § 68:5 (4th ed.)). *See also Realmark Developments, Inc. v. Ranson*, 208 W. Va. 717, 542 S.E.2d 880, 884-85 (2000) (citing *Copley v. Mingo Cnty. Bd. of Educ.*, 195 W. Va. 480, 466 S.E.2d 139 (1995)). In this context, "if benefits have been received and retained [by the defendant] under such circumstance that it would be inequitable and unconscionable to permit the party receiving them [the defendant] to avoid payment therefore, the law requires the party receiving the benefits to pay their reasonable value [to the plaintiffs]." *Realmark*, 208 W. Va. at 721-22, 542 S.E.2d at 884-85.

There is also no factual dispute that EQT "benefitted" by its unlawful trespass on Respondents' surface land. In fact, the record demonstrates that EQT has earned significant revenues and profits by virtue of the unlawful trespass. (J.A. 269.) As the circuit court concluded: "Although the parties disagree regarding the nature of the benefit (as well as its method of calculation), there can be no dispute that a benefit was conferred on EQT as a result of its unlawful trespass." (*Id.* 293.) (Footnotes omitted.) Moreover, there is also no factual dispute

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W. PAGE KEETON, ET AL., PROSSER & KEETON ON THE LAW OF TORTS 672–73 (5th ed. 1984).

that EQT "appreciated" or "knew" about the benefit. (*Id.*) Indeed, the information and documents demonstrating the amount of revenues and profits received by EQT as a result of drilling the "at issue" nine horizontal wells was provided in discovery by EQT. (*Id.* 265-266, 269.)

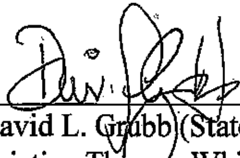
The key involves the phrase "under such circumstances as to make it inequitable for EQT to retain the benefit." In this context, the circuit court ruled that EQT's conduct constitutes an unlawful trespass. More specifically, the Court held: "[T]he Court CONCLUDES that EQT has no lawful authority to: (a) use Plaintiffs' land for drilling horizontal well bores into neighbors' mineral tracts; or (b) produce gas from those neighboring mineral tracts using Plaintiffs' surface lands." (*Id.* 293.) Given this ruling, the circuit court then correctly held that, as a matter of law, Petitioner's unlawful trespass constitutes "such circumstances" that render its retention of the benefit (without payment) wholly inequitable. (*Id.*)

VII. CONCLUSION

As has been conclusively demonstrated, the circuit court's contested rulings were legally sound. Accordingly, EQT's petition for appeal is without merit and should be rejected in its entirety.

Respectfully submitted,

MARGOT BETH CROWDER AND
DAVID WENTZ
Respondents
By counsel



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IN THE SUPREME COURT OF APPEALS
OF WEST VIRGINIA

MARGOT BETH CROWDER and
DAVID WENTZ,

Respondents (Plaintiffs Below),

v. **No. 17-0968**

EQT PRODUCTION COMPANY,

Petitioner (Defendant Below).

CERTIFICATE OF SERVICE

I, David Grubb, counsel for Plaintiffs, do hereby certify that I have this 15th day of March, 2018, served a true copy of the foregoing ***Respondents' Brief*** upon counsel of record, via first class United States mail, as follows:

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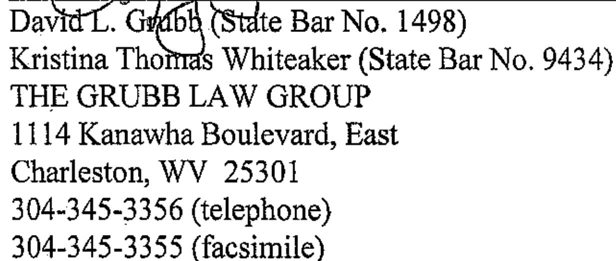

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