No. 17-0968

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.

REPLY OF PETITIONER EQT PRODUCTION COMPANY

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

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The question before this Court is whether EQT, as the mineral owner's lessee, can use the surface to develop the gas subject to the Lease together with gas from other leases from the same well, known as conjoint development, or whether doing so constitutes a trespass on the surface owners' land. Production in this manner is not new or unique to horizontal development. The general concept that gas from adjacent parcels may be produced through a well on a single surface owner's property – the rule of capture – has been recognized in West Virginia since at least 1945 and acknowledges the fact that a single well may drain gas from both the property on which the well sits and adjoining properties.[1] Likewise, the issue of what burden a surface owner must bear for the development of oil and gas has been contested since the severance of minerals from the surface was a possibility. The analysis necessary to decide this dispute requires examining whether EQT's use was reasonably necessary to develop the minerals beneath the surface. This has been established law in this state and all others for a century, but was disregarded by the Circuit Court and Crowder/Wentz. Because the Circuit Court did not undertake that analysis, and because the uncontroverted evidence showed the use was reasonably necessary, EQT cannot be liable for either trespass or unjust enrichment; all of its actions were permitted under the Lease, which did not limit the use of the surface in any manner.

The Respondents' Brief analyzes a different question, however, whether EQT can use the surface to produce gas from other parcels without producing the gas subject to the Lease. This attempt to change the question is evidenced both by the citations in the Respondents' Brief, which analyze the second question, not the one at issue here, and also by an analogy which

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[1] *See, e.g., Powers v. Union Drilling, Inc.*, 194 W. Va. 782, 787, 461 S.E.2d 844, 849 (1995) ("We announced in *Boggess* [*v. Milam*, 127 W. Va. 654, 34 S.E.2d 267 (1945)], what is referred to as the common law rule of capture ... .").

showcases both their fundamental misunderstanding of the question before this Court and the Circuit Court's error. Crowder/Wentz posit the following:

> 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 that 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.

Respondents' Brief, pp. 22. The question of whether EQT can produce gas from other tracts without producing from the subject tract is *not what is at issue in this case*. EQT is not transporting gas produced solely from other parcels across Crowder/Wentz's surface; no party argues it is. Instead, EQT is using the surface to produce gas conjointly from all of the properties.

Crowder/Wentz offer no reason this Court should depart from well settled law. All of their arguments (1) state, with no law in support, that the well-established "reasonably necessary" analysis is somehow avoidable, or (2) rely – like the above example – on law that does not address *conjoint development* of oil and gas. For the reasons set forth in the Brief of Petitioner EQT Production Company ("Petitioner's Brief"), and below, the Circuit Court's orders should be reversed and remanded with instructions to enter judgment for EQT.[2]

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[2] Crowder/Wentz reference the "jury's verdict" and an "award of damages." Respondents' Brief, pp. 1, 3 and n. 6. The only issue before this Court arises from Summary Judgment, meaning trial issues are irrelevant. Their discussion of "wheelage" involves damages – also not before this Court. *Id.* at pp. 18-19; *see also Amicus Curiae* on Behalf of West Virginia Farm Bureau, pp. 5-6; *Amicus Curiae* on Behalf of West Virginia Surface Owner's Rights Organization ("SORO"), pp. 2, 6. The Farm Bureau also discusses a "notice of intention" for three well bores "outside the boundaries of the mineral tract," Farm Bureau Brief, p. 4, which were never drilled and are not at issue here, as well as the "use of advancements in technology which unreasonably burdens or substantially harms the surface estate..." *id.*, pp. 15-17 and SORO Brief, pp. 10-11, even though this claim was dropped and is not at issue here. *See, e.g.*, Petitioner's Brief, p. 3.

ARGUMENT

When a dispute arises between a surface owner and a mineral owner (or the mineral owner's lessee) over the propriety of actions taken on the surface of a severed property, the black letter law of West Virginia states that the mineral owner (or its lessee) can take any action on the surface that is "reasonably necessary" to develop the minerals. Petitioner's Brief, pp. 7-8. The Farm Bureau agrees with this contention. *See* Farm Bureau Brief, p. 2 ("Your Amicus believes that EQT's attempts to utilize Respondents' surface estate ... exceeds the implied easement established by law *under the reasonable necessity doctrine* ... .") (emphasis added). In this case – a dispute between a surface owner and a mineral owner's lessee – the Circuit Court refused to undertake this analysis, and this error of law requires that this Court reverse.[3] *Id.*, pp. 8-10. This Court should remand with instructions to enter judgment for EQT, because Crowder/Wentz did not meet their burden to prove EQT's use was not reasonably necessary to develop the minerals and the undisputed evidence made clear that it was. *Id.*, pp. 10-14.[4]

The Respondents' Brief offers no reason to doubt these simple conclusions. Although Crowder/Wentz agree with the Circuit Court that it did not need to conduct the "reasonably necessary" analysis, they provide no law in support of their conclusion, because none exists. That analysis has been required in disputes regarding severed mineral estates for a century, and

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[3] The SORO Brief states that EQT has argued its use of the surface was reasonably necessary because it "did not virtually destroy the entire surface tract." SORO Brief, p. 10. The SORO Brief fails to provide a citation to Petitioner's Brief where such an argument was made, because it was not. Although the Circuit Court did not undertake the analysis, and EQT did not have the burden to prove it, EQT provided uncontroverted evidence that its surface use was reasonably necessary. *See* Petitioner's Brief, pp. 10-14.

[4] Crowder/Wentz argue that the technology allowing for lengthy lateral wellbores "makes it less necessary to use Respondents' surface, not more." Respondents' Brief, n. 3. This position – that EQT can simply go drill on another surface owner's land – kicks the can. *See, e.g.*, SORO Brief, pp. 5 ("EQT can reach the minerals under the Respondents ... from more than two miles away – i.e., EQT can simply move the well pad ... ."); 8. Despite the technological ability to drill horizontal wellbores, the well still must be drilled from *somewhere*.

Crowder/Wentz rely on case law that provides no reason why this Court should diverge from it. The legal analysis actually offered by Crowder/Wentz either does not apply because it does not involve conjoint development or fails to distinguish applicable case law which supports EQT.

I. The "Reasonably Necessary" Analysis Applies to this Case.

The Circuit Court erred in not analyzing whether or not EQT's use of the Property to develop minerals beneath the Property conjointly with those from surrounding properties was "reasonably necessary." *See* Petitioner's Brief, pp. 7-10. The Respondents' Brief provides no reason this Court should diverge from the well-established "reasonably necessary" analysis and their attempts to abrogate this black letter law fail.

A. Crowder/Wentz Provide No Law In Support of their Contention that the "Reasonably Necessary" Analysis Does Not Apply.

Crowder/Wentz argue that "the reasonably necessary doctrine has clear limits. Most notably, it applies only to minerals underneath the surface land." Respondents' Brief, p. 5. Crowder/Wentz's position is that the black letter analysis applied in severed surface estate disputes in this state for a century is somehow inapplicable here. However, Crowder/Wentz provide absolutely no legal support for their proposition. They later state that "the mineral owner's only implied right was to use the surface in a reasonably necessary manner to develop the minerals underlying that surface[,]" Respondent's Brief, p. 8 (original emphasis), *again* without any law in support. *See also id.*, p. 7 (stating that "a mineral owner must possess the right before the reasonably necessary analysis is triggered[,]" and again making no citation to law); p. 12 (stating that "Petitioner never had any right – implied or otherwise – to use Respondents' surface to drill horizontal wells into neighboring tracts" and again making no citation to law).

The closest Crowder/Wentz come to providing any support for their departure from the last century of law in this state and others is a citation to *Adkins v. United Fuel Gas Co.*, 134 W. Va. 719, 61 S.E.2d 633 (1950). They quote the sole syllabus point of that case, which states:

> 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 enjoyment of the mineral estate.

Respondents' Brief, p. 5 (quoting Syl. Pt. 1, *Adkins*) (emphasis by Respondents). Even this emphasized language does not support Crowder/Wentz's position that the "reasonably necessary" analysis is inapplicable here because the *Adkins* case does not address conjoint development and provides no indication that the "mineral underlying land" refers only to the minerals directly beneath the surface estate, or the minerals directly beneath the surface estate at a given time. Gas from adjacent properties – which under the rule of capture would belong to whomever produced it from a well, and on unitized tracts would be properly developed by a well on other properties – is "underlying" the surface immediately before production. *Adkins* makes clear that the question of whether EQT can develop the "underlying land" conjointly with neighboring minerals rests on whether or not that activity is "fairly necessary for" EQT's "enjoyment of [its] mineral estate." *Id.*

The absence of law supporting Crowder/Wentz's position to limit a mineral owner's rights must be juxtaposed with the recent law of this Court making clear the limited nature of Crowder/Wentz's property rights. The severance in this case granted the surface owners – Crowder/Wentz's predecessors-in-interest – "the surface only" of the Property. Appx. 80. This Court has recently interpreted this exact language, and made clear that:

> [T]he use of the word 'only' ... to qualify the word 'surface' in that sense means *solely* or the equivalent of the phrase *and nothing else*. [The grantor] chose the words 'surface only' as the subject of conveyance to mean *nothing more than the surface*, and to retain all the remainder of the property.

Faith United Methodist Church & Cemetery of Terra Alta v. Morgan, 231 W. Va. 423, 444, 745 S.E.2d 461, 482 (2013) (quotations omitted, emphasis added). The Circuit Court held that the "reasonably necessary" analysis "only becomes relevant if the right to use the surface to bore into neighboring tracts was legally obtained or reserved in the first place." Appx. 250. In the case of the severance here, however, this Court has held that "solely" the surface "and nothing else" were granted to Crowder/Wentz, making clear that the mineral owner retained, among other things, the right to take all actions reasonably necessary on the surface of the Property. Crowder/Wentz – holders of "nothing more than the surface" – should not be permitted to sidestep the well-established analysis necessary to protect the rights the mineral owner holds to use the surface as reasonably necessary to develop the minerals.

B. Crowder/Wentz Fail to Distinguish the West Virginia Cases Applying the "Reasonably Necessary" Analysis.

Unlike *Adkins*, which does not address conjoint development, the cases applying West Virginia law that have addressed this issue all make clear that the "reasonably necessary" analysis must be undertaken. As discussed in Petitioner's Brief, in *Miller v. N.R.M. Petroleum Corp.*, 570 F. Supp. 28 (N.D. W. Va. 1983), Chief Judge Maxwell dealt with a situation essentially identical to the one before this Court. There, the lessee "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 entire pool." The surface owner asked the *Miller* court to certify the following question to this Court: "whether or not an oil and gas lessee may use the surface of a particular tract in connection with the operations on other tracts which have been unitized or pooled with the subject tract." *Id.* Faced with the precise issue now before this Court, Chief Judge Maxwell refused to certify the question to this Court, holding that "[i]t seems only

reasonable that the surface area of each tract in a pool should be available for use in connection with the construction and operation of a well, *as long as the use is reasonably necessary.*" (Emphasis added). *See also id.* ("[I]t is the majority rule in other jurisdictions...that pooling grants the rights to use the surface of any tract in the drilling unit to produce gas or oil from the pool.") (quoting *Gulf Oil Corp. v. Deese*, 153 So.2d 614 (Ala. 1963); *Miller v. Crown Cent. Petroleum Corp.*, 309 S.W.2d 876 (Tex. Civ. App. 1958)). Crowder/Wentz's attempts to distinguish *Miller* do nothing to diminish that case's applicability here. *See* Respondents' Brief, pp. 24-27.

First, Crowder/Wentz attempt to distinguish the facts of *Miller*, stating that it involved "the driller's use of a road across ... land to drill a vertical well on his neighboring ... tract[,]" while this case "is about horizontal wells actually drilled" on the Property. Respondents' Brief, p. 24. This distinction in the facts – an access road versus a horizontal well – actually *addresses the "reasonably necessary" analysis.* The only reason the facts matter is so they can be scrutinized for their reasonableness. Whether or not a case is distinguishable from this one due to the use of the surface undertaken in that case, when compared with the surface use in this case, analyzes whether or not the use of the surface in this case is reasonably necessary. Crowder/Wentz's first attempt to distinguish *Miller* shows exactly why the "reasonably necessary" analysis must be undertaken here.

Next, Crowder/Wentz argue that *Miller* is distinguishable because it "involve[d] voluntary pooling provisions in the leases for two tracts, not forced pooling." *Id.*[5] "Forced pooling" does not apply either here or in *Miller*. Acknowledging that, Crowder/Wentz next

[5] Crowder/Wentz make assumptions about the facts of *Miller* – the decision uses neither the words "voluntary" nor "forced," and never states what kind of well – vertical, horizontal, or otherwise – was at issue. *See generally Miller.*

argue that the "voluntary pooling provision" here "was signed by new mineral owners only after the ownership of the surface had been separated from the ownership of the minerals" and therefore, they claim, "the mineral owners did not own, and ... could not lease, the right to use the surface for developing neighboring mineral tracts pursuant to the later pooling amendment." *Id.*, p. 25 (Respondents' emphasis). This argument is simply wrong. Whether or not the mineral owners could provide EQT the right to use the surface of the Property for conjoint development depends upon whether or not that use was reasonably necessary. *See* Petitioner's Brief, pp. 14-16. Because the use of the Property for conjoint development is reasonably necessary here, the mineral owners retained that right and properly passed it to EQT before EQT began surface work – either via the Lease itself in 1901 or via the pooling amendment signed in 2011. *See id.*

Crowder/Wentz argue that the language of the pooling amendment "was not merely an acknowledgement of an established, implied right" but instead a "grant [of] an express right to use the surface for the production of gas and oil from neighboring lands with which the Carr lease was pooled." Respondents' Brief, p. 7. Crowder/Wentz claim that this "belies [EQT's] central (unsound) argument" because "[i]f the implied right always existed, there would be no need for the amendment." *Id.*, p. 8. This position is wrong because whether or not "the implied right" to burden the surface for conjoint development was passed from the mineral owner to the mineral lessee in the Lease or in the pooling amendment is immaterial to the surface owner, as long as the right was passed prior to the lessee's use of the surface. The transfer of that right from the mineral owner to its lessee has no impact on the surface owner; whether the right is held by the mineral owner or its lessee, it is *not* held by the surface owner.

The timing of when the pooling amendment was signed does not distinguish *Miller* from this case. It is also the *only* basis on which Crowder/Wentz attempt to distinguish another case

applying West Virginia law in which the court found surface use for conjoint development proper. *See* Respondents' Brief, pp. 27-28 (discussing *SWN Production Co., LLC v. Edge*, 2015 WL 5786739 (N.D. W. Va. Sept. 30, 2015)). For this same reason, Crowder/Wentz's attempts to distinguish other authority are unpersuasive. *See, e.g.*, Respondents' Brief, n. 4, pp. 29, 31.

Finally, Crowder/Wentz discuss, in the context of *Miller*, the distinction between cases decided under pooling statutes and those decided under voluntary pooling provisions. *See* Respondents' Brief, pp. 26-27. This is a distinction without a difference. There is no reason mineral owners subject to compulsory pooling would be entitled to use the surface of tracts in the unit, but mineral owners who agree to pool their interests would not.

C. Crowder/Wentz Fail to Distinguish Other States' Cases Applying the "Reasonably Necessary" Analysis.

Crowder/Wentz also attempt to distinguish the many cases from other jurisdictions which show EQT's actions are permissible. *See* Petitioner's Brief, pp. 22-26; Respondents' Brief, pp. 28-31. First, Crowder/Wentz argue that *EQT Production Co. v. Opatkiwiecz*, G.D. No. 13-013489 (C.C.P. Allegheny Co. Apr. 8, 2014) is inapplicable because it "involved an interpretation and application of an amendment to" a Pennsylvania statute which has no corollary "in West Virginia's oil and gas laws." Respondents' Brief, p. 28. Crowder/Wentz overlook the *Opatkiwiecz* court's holding that the "statute ... merely clarifies existing rights," specifically the fact that a surface owner has "little right to dictate the manner of [a mineral owner or its lessee's] use of the surface estate while it is developing the subsurface estate, as long as [the mineral owner or its lessee's] methods are reasonably necessary." *Opatkiwiecz*, p. 7 (citing *Belden & Blake Corp. v. Commonwealth*, 969 A.2d 532-33 (Pa. 2009)).

Crowder/Wentz's attempts to distinguish *Kysar v. Amoco Production Co.*, 93 P.3d 1272 (N.M. 2004) and *Key Operating & Equipment, Inc. v. Hegar*, 435 S.W.3d 794, 799 (Tex. 2014)

development permit the use of the surface for conjoint development. *See, e.g.*, Petitioner's Brief, pp. 17-20, 22-26. With these distinctions in mind, Crowder/Wentz's cases discussing the development of coal – a fixed-situs mineral, which is not developed conjointly in the manner that oil and gas are – are irrelevant. *See, e.g.*, Respondents' Brief, pp. 16-19.

One case involving oil and gas which Crowder/Wentz do discuss is *King v. South Penn Oil Co.*, 110 W. Va. 107, 157 S.E. 82 (1931). *See* Respondents' Brief, p. 11. *King* involved a severed estate of a 4,000 acre property, of which a 64 acre piece had been sold. *Id.* at 83. The *King* court expressly held that the surface of that 64 acre tract could be used for development of other portions of the original 4,000 acre property. *See id.* at 84. *King* did not address conjoint development, or the reasonable necessity of conjoint development, and thus its simple statement that a tract of land cannot be used "in connection with the production of minerals from *another* and *different* tract" is not relevant here. *See id.* (emphasis added). The citation to *King* is a perfect example of the flaw in Crowder/Wentz's reasoning discussed at the outset of this Reply Brief. The question in this case is not whether the surface of the Property can be used to develop gas solely "from another and different tract," *see id*, the question is whether the surface of the Property may be used to develop gas from beneath the Property *conjointly with* gas from surrounding properties. *King* does not address that question.

Because all of the relevant cases applying West Virginia law to the question before the Court come out in favor of EQT, *see Miller*, above; *Edge*, above; *see also Gastar Exploration, Inc. v. Contraguerro*, 239 W. Va. 305, 800 S.E.2d 891 (2017), Crowder/Wentz attempt to cite cases from outside West Virginia that they believe support their departure from the well-established "reasonably necessary" analysis. *See* Respondents' Brief, pp. 20-22. They fail to

also fail. *See* Respondents' Brief, pp. 29, 31. They attempt to differentiate those cases from this one based on the timing of the grant of pooling rights, but this distinction fails for the same reason discussed above. *See* Argument § I.B, above. They attempt to distinguish *Delhi Gas Pipeline Corp. v. Dixon*, 737 S.W.2d 96 (1987) based on the activity occurring on the surface in that case, *see* Respondents' Brief, p. 30, but that differentiation merely goes to whether or not the activity at issue is reasonably necessary, *not* the propriety of the reasonably necessary analysis itself. *See* Argument § I.B, above. Their attempt to distinguish *Gulf Oil Corp. v. Deese*, 153 So.2d 614 (Ala. 1963) based on the fact that that case involved a compulsory pooling statute also fails, *see* Respondents' Brief, p. 26. Whether pooling occurs by statute or voluntarily has no impact on the applicability of the reasonably necessary analysis. *See* Argument § I.B, above; Petitioner's Brief, n. 5. Finally, Crowder/Wentz do not even attempt to distinguish *Holt v. Southwest Antioch Sand Unit, Fifth Enlarged*, 292 P.2d 998 (Ok. 1955), in which the Oklahoma Supreme Court explicitly permitted a mineral owner's lessee's use of saltwater under a surface interest to produce oil from wells on other properties in the unit. *See* Petitioner's Brief, pp. 25-26.

Without support of the law of this State or others, Crowder/Wentz claim EQT's reliance on well-established law will significantly expand the rights of mineral owners. For example, they claim that "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 … ." Respondents' Brief, pp. 5-6. *See also* Farm Bureau Brief, pp. 18-19 (arguing that allowing the reasonably necessary use of the surface "would destroy peace of mind of landowners as they go to sell their land … ."); SORO Brief, p. 8 ("If the rights of mineral owners to use of a surface

tract depend on the economics of drilling, a reliable title opinion for surface tracts ... would be impossible."). This claim ignores the fact that conjoint development must still be *reasonably necessary*. *See* Petitioner's Brief, pp. 6-17. This claim also ignores the fact that development of a neighboring tract's minerals has always been permitted via the rule of capture and a vertical well situated close to that neighboring tract's property line. If anything, conjoint development requires *less* burden on a surface owner: instead of one well in the center of a property (to develop that tract) *and* another well near a property line (to develop a neighboring tract), conjoint development allows for one well to develop both tracts. EQT's position does not expand any right a mineral owner has had in this state for the last century; the mineral owner has the right to use the surface as is reasonably necessary to develop the minerals.

II. Crowder/Wentz's Argument Ignores the Issue Here – Conjoint Development.

Crowder/Wentz's argument misses the issue in this case. They allege that EQT "bases its central argument upon the premise that using Respondents' surface to produce minerals from neighboring tracts is 'reasonably necessary.'" Respondents' Brief, p. 4. That is wrong. EQT's "central argument" is that "using Respondents' surface to produce minerals from" *the Property, conjointly with* "neighboring mineral tracts is 'reasonably necessary.'" *Id.*; Petitioner's Brief, pp. 7-17. Crowder/Wentz set up a strawman issue of whether EQT can use the surface of the Property to produce minerals *only* from neighboring properties, however, because that issue is not what is at issue in this case, all of their arguments are irrelevant.

A. The Case Law Crowder/Wentz Rely on Does Not Address Conjoint Development of Natural Gas.

Crowder/Wentz rely extensively on cases decided in the context of coal, a completely different mineral readily distinguishable from the natural gas development at issue here. *See, e.g.*, *Ohio Oil Co. v. Indiana*, 177 U. S. 190, 202 (1900) ("True it is that oil and gas, like other

minerals, are situated beneath the surface of the earth, but except for this one point of similarity, *in many other respects they greatly differ*") (emphasis added); *Brown v. Spilman*, 155 U.S. 665, 669-70 (1895) ("Petroleum gas and oil are substances of a peculiar character, and decisions in ordinary cases of mining for coal, and other minerals which have a fixed situs, cannot be applied to contracts concerning them without some qualifications"); Petitioner's Brief, pp. 27-29. They argue that coal cases are applicable here because they claim horizontal drilling "is similar to coal mining technology that extends a tunnel from one mineral tract into an adjacent mineral tract." Respondents' Brief, p. 20. This surface-level comparison of the development of different minerals is incomplete. While it is true that wellbores traverse subterranean property lines in the same way that a tunnel in a coal mine might, that is where the similarities stop. Coal production has two key characteristics which are different from the development of oil and natural gas. First, coal remains in place; coal can only be removed from the properties on which "a tunnel" is located. Natural gas, however, does not remain in place, and can be removed from a well on another parcel.[6] Second, and relatedly, because coal cannot migrate it can be definitively determined from whose property every ounce of coal taken out of the ground has been removed. Natural gas, on the other hand, may have come from any number of properties that surround a wellbore, and this is one of the most basic reasons why modern day development of natural gas takes places in units, conjointly. *See, e.g.*, 1-2 The Law of Pooling and Unitization, § 2.02 (3d ed.) (discussing "voluntary and forced pooling and unitization" as concepts arising due to the implementation of the rule of capture). This need for conjoint development of natural gas is one of the reasons why courts which have addressed this issue *in the context of natural gas*

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[6] Gas migration occurs due to fracturing, both naturally and through the production process. *See, e.g.* SORO Brief, p. 12 (discussing migration of gas in shale "in the absence of a fracture.").

identify a single case where a court has denied the mineral owner of a pooled or unitized tract the right to the reasonable and necessary use of the surface.

First, Crowder/Wentz cite *Robinson v. Robbins Petroleum Corp., Inc.*, 501 S.W.2d 865 (Tex. 1973) in support of their position, but *Robinson* and Texas law are directly contrary to it. In *Robinson*, the plaintiff owned the surface estate of an 80-acre tract, which was one of several tracts that were part of the underlying 221-acre mineral lease, referred to as the Wagoner lease. Under the Wagoner lease, the lessee was given the right and power to pool the acreage with other land into units not exceeding forty acres each. *Robinson v. Robbins Petroleum Corp.*, 487 S.W.2d 794, 797 (Tex. App.—Tyler 1972). Subsequently, the Railroad Commission approved three secondary recovery units. The size of the three units varied from 1,295 acres to 1,807 acres, and each included all or part of the 221-acre Wagoner lease. 501 S.W.2d at 866. The defendant was using a former oil well on the plaintiff's 80-acre surface to produce salt water to be injected and drive the three waterflood units. *Id.* The plaintiff sought to recover damages from the operator and owners of the unit for salt water taken from his tract for purposes of waterflooding the entire unit. The plaintiff argued the operator had no right to take salt water from his 80-acre tract unless it was used for operations in connection with the underlying Wagoner lease or tracts pooled with it in accordance with the lease's provisions. 487 S.W.2d at 796-97. The Court of Appeals held the operator had the right to use the salt water for the benefit of the entire unit. *Id.* at 798. On appeal, the Texas Supreme Court reversed. Whereas the Wagoner lease only gave the lessee the right to pool the acreage with other lands into units not exceeding forty acres each, the Railroad Commission's order created three secondary recovery units involving thousands of acres. The court held that this did not give the operator the right to

use the plaintiff's surface for the benefit of lands outside the Wagoner lease or those, under its terms, authorized to be pooled with it. *See id.* at 867-68 (citation omitted).

Crowder/Wentz argue that *Robinson* stands for the proposition that there is no implied right to use the surface for the benefit of other pooled/unitized tracts outside the boundaries of the underlying mineral lease. Respondents' Brief, p. 21. However, this reading of *Robinson* was rejected by the Supreme Court of Texas in *Key Operating*. Specifically, in *Robinson*, under the terms of the Wagoner lease, the minerals under the plaintiff's surface had not been, and were not authorized to be, pooled with the tracts where the salt water was being used. *See Key Operating*, 435 S.W.3d at 800. Instead, in *Robinson*, the three large secondary recovery units were created by order of the Railroad Commission. The *Key Operating* court stated:

> The Hegars assert that *Robinson* prohibits a mineral lessee from using one surface to aid operations on another tract. But *Robinson* is distinguishable from the situation here. The minerals under Robinson's surface had not been, and could not be, pooled with tracts where the water was being used. *Id.* at 867 ("Robinson's complaint is against the lower court holding that the operator has the right to take salt water ... without his consent and without compensation for benefits flowing to premises *not covered by or authorized to be pooled* by the Wagoner lease." (emphasis added)). And Robinson himself recognized that the lack of pooling was significant, arguing in the court of appeals that he had authority to control use of the water subject to a lessee's water use to assist with production under his tract or "underlying tracts pooled therewith." *Robinson v. Robbins Petroleum Corp.*, 487 S.W.2d 794, 797 (Tex. App.-Tyler 1972), *rev'd* 501 S.W.2d 865 (Tex. 1973). *Robinson* does not control here.

Id. at 800. In this case, as in *Key Operating*, EQT has the right to pool and unitize the adjoining tracts. *Robinson* has no application.

Respondents' Brief also discusses *Frankz Corp. v. Fifer*, 295 F. 106 (9th Cir. 1924), *Mountain Fuel Supply Co. v. Smith*, 471 F.2d 594 (10th Cir. 1973), and *Russell v. Texas Co.*, 278 F.2d 636 (9th Cir. 1956). *See* Respondents' Brief, pp. 21-22. *See also* Farm Bureau Brief, pp. 19-20. Not a single one of these cases addresses surface use of a unitized tract for conjoint

development; each one of them simply involves the use of one piece of land for operations entirely and solely benefiting another piece of land. Each case is thus entirely irrelevant to the question before this court. Further, the Farm Bureau's citation to 83 A.L.R.2d 665 is similarly unavailing, as the only relevant discussion of this issue in the context of unitization actually supports EQT's position. *See, e.g.*, 83 A.L.R.2d 665, § I.2 n.18 (discussing *Grayson v. Lyons, Prentiss & McCord*, 226 La. 462 (1954), "where the court indicated that an oil and gas lessee on one tract which had been the subject of a pooling order by a government regulatory body unitizing it with adjoining tracts might, without contractual provision, acquire reasonable use of the surface of an adjoining tract within the unit in connection with drilling operations on the leased tract[,]" and *Miller*).

B. West Virginia Public Policy Does Not Support Depriving the Mineral Owner of the Right to Develop to Protect the Surface Owner.

Wentz/Crowder point to W. Va. Code § 37B-1-6(a) (2018) – passed after the Circuit Court's opinion in this case – as allegedly "requiring a surface landowner's consent prior to use of the surface." Respondents' Brief, p. 10. This statute has no application to the facts of this case. Specifically, this new law involves development "where an interest in the oil or natural gas in place is owned *by a nonconsenting cotenant*[,]" and discussion of the use of the surface in that scenario. W. Va. Code § 37B-1-6(a) (emphasis added). Here, there is no nonconsenting mineral owner, and this new law is therefore completely inapplicable. Similarly, the statute states that surface owner consent is *not* required for "tracts otherwise subject to an existing ... oil and gas lease which includes surface use rights[,]" as the one in this case does. *See id.*; Appx. 76. While Crowder/Wentz also cite to portions of the West Virginia Code which allegedly "underscore the balance that must be struck between" surface and mineral interests, *see* Respondents' Brief, p. 9,

none of the statutes cited pre-date the Lease, and therefore cannot abrogate the property rights – express and implied – granted by that Lease. W. Va. Const. Art. III-4.

Crowder/Wentz move on to cite to provisions in "[t]he deep well forced pooling statute" which they argue indicate "the public policy protecting surface owners ... ." Respondents' Brief, p. 26. Again, the provisions of that statute and any "protection" it offers to surface owners are entirely inapplicable here. Forced pooling applies when the mineral is being developed without the consent of the mineral owner. *See, e.g.*, W. Va. Code § 22C-9-1, *et seq.* The protections put in place for the servient surface estate when the dominant mineral estate is being developed without consent have nothing to do with the facts of this case, in which the dominant mineral estate has permitted the development of minerals. The protections offered to the surface estate in this context are clear: it cannot be subjected to anything that is not reasonably necessary for the development of the minerals.

C. The Secondary Sources Crowder/Wentz Rely on All Support EQT's Position that it May Use the Surface of Pooled Property to Engage in Conjoint Development.

Like the case law and public policy they rely on, the secondary sources Crowder/Wentz rely on also fail to support their positions. For example, Crowder/Wentz cite to the 1998 edition of Oil and Gas Law. *See* Respondents' Brief, p. 13. Either that treatise has been amended significantly since it was drafted, or Crowder/Wentz left out the portion of it which directly relates to the issues before this Court, specifically that "[w]here the surface estate is severed prior to the execution of a lease with a pooling clause, a subsequent purchaser of the surface estate *must allow for surface use in relation to a pooled unit,* since production from the pooled unit well is treated as being production from the individual tracts comprising the pooled unit." 1-2

Williams & Meyers, Oil and Gas Law §218.4 (emphasis added).[7] Indeed, each of the authors of Oil and Gas Law has independently, since 1998, set forth their position that the surface use for conjoint development is reasonably necessary. *See* Petitioner's Brief, pp. 26-27. Crowder/Wentz's citation to the 1989 edition of Professor Kuntz's Treatise on the Law of Oil and Gas – which does not discuss conjoint development – also appears outdated. *See* Respondent's Brief, p. 14. Indeed, in 2010, Professor Kuntz and others stated that "*absent ... effective pooling or unitization*, surface use by the mineral owner in connection with the exploration or exploitation of minerals on other lands is beyond the scope of the mineral owner's right of reasonable surface use at common law." Anderson and Kuntz, *Surface "Trespass": A Man's Subsurface is Not His Castle*, 49 Washburn L. Rev. 247, 264 (2010) (emphasis added).

The other secondary sources cited by Crowder/Wentz are likewise unconvincing. The citation from Summers Oil and Gas that a "dominant mineral estate" owner can use the surface as "necessary to develop the tract's underlying minerals, but not more" is merely a restatement of the "reasonably necessary" rule. *See* Respondents' Brief, p. 14. Further, the citation to *Legal and Developmental Issues Involving Horizontal Drilling in the Appalachian Basin* includes no discussion of conjoint development, and is thus irrelevant here. *See id.*, p. 15. Finally, the citation to a Note authored by a law student in 2012, while revealing of that law student's opinion regarding what the "surface owner should be able to prevent," has no more persuasive authority than any other individual's opinion regarding what "should" or "should not" be permitted under the law. *See id.*

[7] Here the Lease was taken, the Property was severed, and then a pooling amendment was signed. *See* Petitioner's Brief, pp. 1-2.

CONCLUSION

There is a simple, well-settled rule of law that applies to disputes between the owners of a severed mineral estate: the mineral owner can take all actions on the surface which are reasonably necessary to develop the minerals. The Circuit Court refused to apply this well-established analysis and must be reversed. When it is reversed, judgement should be entered for EQT because the undisputed evidence shows its actions on the surface were reasonably necessary.

For the reasons stated in the Brief and above, the orders of the Circuit Court should be reversed and remanded with instructions to enter judgment for EQT.

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CERTIFICATE OF SERVICE

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