IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA
No. 17-0968

AT CHARLESTON

EQT PRODUCTION COMPANY,

Defendant Below, Petitioner,

vs.)

No.: 17-0968
(From the Circuit Court of Doddridge County, No. 14-C-64)

MARGOT BETH CROWDER AND DAVID WENTZ,

Plaintiffs Below, Respondent.

THE INDEPENDENT OIL AND GAS ASSOCIATION OF WEST VIRGINIA, INC.'S MOTION FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF IN SUPPORT OF PETITIONER EQT PRODUCTION COMPANY

Pursuant to Rule 30 of the West Virginia Rules of Appellate Procedure for the Supreme Court of Appeals of West Virginia, the Independent Oil and Gas Association of West Virginia, Inc. ("IOGA") respectfully requests leave of this Court to file an *amicus curiae* brief in support of Petitioner EQT Production Company.

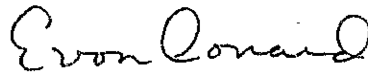
For almost sixty (60) years, IOGA has represented the interests of independent oil and gas producers in West Virginia, as well as others directly involved in the production of oil and natural gas. IOGA's members are vitally interested in emerging legal issues affecting the oil and gas industry in West Virginia, including the legal issue presented by the present case. The Court's resolution of the present appeal will affect not only the parties to the case but also oil and gas

producers of all sizes throughout West Virignia. IOGA files this *Motion for Leave To File Amicus Curiae* Brief In Support of Petitioner EQT Production Company following careful consideration and a unanimous vote of its Board of Directors.

On behalf of its members, IOGA respectfully requests permission to file a brief as *amicus curiae* in support of Petitioner EQT Production Company because the ruling of the Circuit Court of Doddridge County, West Virginia has significant negative implications upon existing and future oil and gas development in West Virginia. More particularly, the ruling of the Circuit Court of Doddridge County (i) misapplies and is contrary to longstanding West Virginia mineral property concerning the use of surface estates by owners of the underlying mineral estate and (ii) creates a material and substantial impediment to oil and gas development in West Virginia.

For these reasons, any others apparent to the Court, the Independent Oil and Natural Gas Association of West Virginia, Inc., respectfully requests leave to file a brief as *amicus curiae* in support of Petitioner EQT Production Company's appeal.

INDEPENDENT OIL AND GAS OF ASSOCIATION OF WEST VIRGINIA, INC.
By counsel,



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CERTIFICATE OF SERVICE

I, Evan G. Conard, hereby certify that on the 29 day of January, 2018, the foregoing *The Independent Oil and Gas Association of West Virginia, Inc.'s Motion for Leave To File an Amicus Curiae Brief in Support of Petitioner EQT Production Company* was served by mailing a true and exact copy thereof by United States mail, postage prepaid, upon the following:

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Plaintiffs Below, Respondent.

AMICUS CURIAE BRIEF OF THE INDEPENDENT OIL AND GAS ASSOCIATION OF WEST VIRGINIA, INC. IN SUPPORT OF PETITIONER EQT PRODUCTION COMPANY

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I. INTRODUCTION, IDENTITY OF AMICUS, AND STATEMENT OF INTEREST

The Independent Oil and Gas Association of West Virginia, Inc. ("IOGA") submits this brief *amicus curiae*.[1] For approximately 59 years, IOGA, a West Virginia trade association, has represented independent oil and gas producers and others directly involved in the production of oil and natural gas in West Virginia. IOGA's members are vitally interested in issues affecting the oil and gas industry, including the legal issue raised in this case. IOGA files this brief after careful consideration and unanimous vote of its Board of Directors.[2]

Between 2015 and 2016, natural gas production increased by twenty-one percent (21%) and is expected to increase annually by roughly nine to ten percent (9%-10%) through 2021.[3] This year, for the first time on record, natural gas is expected to overtake coal in terms of accounting for a larger share of overall State GDP.[4] Total employment for the State's energy sector is forecast to grow over the next five (5) years, and all of the growth is expected to come in the natural gas industry, which is expected to rebound from a low of about 7,000 jobs in 2016 to 8,800 jobs by 2021.[5] The West Virginia oil and gas industry is expected to add jobs at a rate of 4.6 percent per

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[1] Pursuant to West Virginia Rule of Appellate Procedure 30(b), IOGAWV notified counsel of record for all parties of its intention to file an *amicus curiae* brief ("amicus brief"). Accordingly, counsel for IOGAWV has filed a Motion for Leave to File Brief of *Amicus Curiae* IOGAWV contemporaneously herewith pursuant to West Virginia Rule of Appellate Procedure 30(a), (c).

[2] All costs of filing this brief have been paid by IOGA with no contribution from any party involved in this proceeding. Neither Petitioner EQT Production Company nor counsel for Petitioner EQT Production Company, or any other party or entity, has made any contribution to IOGA in connection with this case.

[3] Bureau of Business & Economic Research, West Virginia University College of Business and Economics, *2017-2021, West Virginia Economic Outlook* (2016)(located at http://business.wvu.edu/files/d/f28ea037-57de-4c55-a177-a354b2312751/wv-economic-outlook-2017-1.pdf).

[4] Id.

[5] Id.

year (2017-2021) while natural gas production is projected to increase at nearly ten percent (10%) per year.[6]

The economic effects of Marcellus Shale development are unprecedented. In 2009, Marcellus Shale development generated $2.35 billion in business volume and approximately $1.16 billion in total value added in the West Virginia economy.[7] In 2009, the economic activities associated with the Marcellus Shale development created approximately 7,600 jobs and $297.9 million in employee compensation in the State.[8] Total severance taxes in 2015, including local government distributions, workers' compensation debt fund severance taxes, and regular state severance taxes, for oil and natural gas were $215,361,550.[9] Simply put, the economic benefits of horizontal drilling, past present and future, to West Virginia cannot be disputed.

III. IOGA respectfully requests that this Court reverse the ruling of the Circuit Court because it (i) misapplies and is contrary to longstanding West Virginia mineral property law; (ii) errs in holding that EQT, as a lessee of the owner of the mineral estate, committed a trespass by conducting operations on the surface of property owned by Respondents; and (iii) creates a material and substantial impediment to oil and gas development in West Virginia.

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[6] Id.

[7] Amy Higginbotham et al., *The Impact of the Natural Gas Industry and the Marcellus Shale Development in West Virginia in 2009*, (December 2010) at 24 (located at http://energyspeakswv.com/Resources/Docs/Studies/Economic%20Impact%20of%20the%20Marcellus%20Shale%202009%20FINAL.pdf).

[8] *Id.*

[9] *See* Mark B. Muchow et al., West Virginia Department of Revenue, *Joint Select Committee on Tax Reform, Severance Tax & Property Tax*, at p. 9, power point slide 18 (Sept. 14, 2015) (located at http://www.legis.state.wv.us/legisdocs/2015/committee/interim/TAX/TAX_20150914092541.pdf). Of this total $194,200,833 was attributable to natural gas and $21,160,717 to oil production.

The issues on appeal before this Court are of critical importance to the development of oil and gas in West Virginia. Matters relating to the reasonable use of the surface by mineral owners or their lessees to explore for and produce oil and gas by horizontal drilling methods are of critical importance to IOGA. Certainly, use of surface estates for the development of oil and gas by horizontal drilling is necessary for the development of the Marcellus Shale and other formations. IOGA believes its perspectives will be of assistance to this Court in resolution of this appeal.

II. PROCEDURAL POSTURE OF THE CASE

This case is pending before this Court on Petitioner EQT Production Company's ("EQT") appeal of the Order Granting Plaintiffs' Motion For Summary Judgment And Denying Defendant's Motion For Summary Judgment dated February 19, 2016 and the Judgment Order dated September 26, 2017, both entered by the Circuit Court of Doddridge County, West Virginia.

In its February 19, 2016 Order, the Circuit Court held that EQT committed a trespass against the surface estate owned by Respondents Margot Beth Crowder and David Wentz (collectively "Respondents") by utilizing Respondents' surface estate for oil and gas operations for the horizontal drilling[10] of shallow Marcellus formation wells without first obtaining an agreement from Respondents.

Additionally, at trial, the Circuit Court instructed the jury that EQT unlawfully trespassed on Respondents' surface estate and the amount of damages based on said trespass is determined by the fair and reasonable rental value thereof to EQT. The Circuit Court's measure of damages

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[10] Horizontal drilling is a process whereby a well is drilled from the surface to a subsurface location just above a target oil and gas reservoir, and the well bore is then deviated to intersect with the targeted reservoir at the "entry point" with a near-horizontal inclination, remaining within reservoir until the desired bottom hole location is reached. *See* Proctor, Jason A., *The Legality of Drilling Sideways: Horizontal Drilling and its Future in West Virginia,* 115 W. VA. L. REV. 491, 496 (2012).

is obviously wrong. However, it is the Circuit Court's ruling with respect to right to use surface that is devastating to the oil and gas industry.

IOGA frames the primary question before the Court as whether, under West Virginia law, Respondents, as owners of a surface estate, obtained a right in the underlying mineral estates such that Respondents can prevent operations and development of the mineral estate when the surface estate owned by Respondents is utilized for development of the mineral estate. Stated more succinctly, the primary issue is whether Respondents have an absolute right to prevent oil and gas development on their surface estate without Respondents prior consent.

III. SUMMARY OF ARGUMENT AND RELEVANT FACTS

In the present case, the predecessor in interest to both Respondents and the owners of the oil and gas estate leased a tract of land containing 351 acres ("the Carr lease"). (J.A. at pg. 5). When the Carr lease was executed, the surface estate and mineral estate, including the oil and gas estate, had not been severed. (J.A. at pg. 4). Thereafter, Respondents' predecessor in interest was conveyed the "surface only" of the 351-acre tract, subject to the Carr lease. (J.A. at pg. 6). Respondents subsequently acquired title to a surface estate containing 299.87 acres of the 351-acre tract, subject to the Carr lease. (J.A. at pg. 7).

Several oil and gas wells were drilled pursuant to the Carr lease which remains valid and in effect. Five (5) gas wells were drilled on the Carr lease prior to Respondents acquiring title to the surface estate. (J.A. at pg. 5, 6). After they acquired title, our (4) additional wells were drilled on the surface estate owned by Respondents pursuant to the Carr lease. (J.A. at pg. 8). In 2011,

owners of the oil and gas estate granted pooling rights to EQT, the successor in interest to the lessee of the Carr lease.[11] (J.A. at pg. 8).

EQT drilled nine additional wells by horizontal drilling in the oil and gas estate underlying Respondents' surface estate and neighboring oil and gas estates. (J.A. at pg. 8-9). Respondents sued, claiming EQT did not have the right to use the surface to drill and produce oil and gas from neighboring lands without the Respondents' consent. (J.A. at pg. 20).

West Virginia law recognizes that a severance of the surface estate and the underlying mineral estate creates distinct real property interests with rights appurtenant to each. *See State by Dep't of Natural Res. v. Cooper*, 152 W. Va. 309, 314, 162 S.E.2d 281, 284 (1968). A right incident to the oil and gas estate is the right to grant leases, which necessarily includes the right to amend or modify leases. *See Davis v. Hardman*, 148 W. Va. 82, 90, 133 S.E.2d 77, 81-2 (1963). Further, this Court has recognized that a mineral lessee can transport minerals from adjacent lands using subterranean passageways to an opening on lands overlying the mineral estate of its lessor when such rights have been granted to the lessee by its lessor. *See Fisher v. West Virginia Coal & Transp. Co.*, 137 W. Va. 613, 624, 73 S.E.2d 633, 639 (1952).

Further, West Virginia mineral law has long held that a mineral owner may lawfully enter upon the surface estate so long as the mineral owner's entry is "in such a manner and with such means as would be fairly necessary for the enjoyment of the mineral estate." *Squires, et al. v. Lafferty*, 95 W. Va. 304, 309, 121 S.E. 90, 91 (1924). Where the use of a surface estate by a mineral owner is based on implied as opposed to express rights, "it must be demonstrated not only

[11] The 2011 pooling amendment, recorded in the Office of the Clerk of the Doddridge County Commission in Deed Book 257, page 237, provides that EQT "may pool or unitize any or all of the [Carr Lease] with other lands or interests to create pools or units of any size and shape, not to exceed 640 acres . . ." The 2011 amendment further provides that "[a]ny well or operations in a pool or unit shall . . . be considered a well or operations on the [Carr Lease]."

that the right is reasonably necessary for the extraction of the mineral, but also that the right can be exercised without any substantial burden to the surface owner." *Buffalo Mining Co. v. Martin*, 165 W. Va. 10, 18, 267 S.E.2d 721, 725-26 (1980).

IOGA submits that, pursuant to West Virginia law, only the owner of the mineral estate, and more particularly the oil and gas estate owner, has the right to amend or modify an oil and gas lease to allow for pooling of their oil and gas estate with neighboring oil and gas estates. Moreover, under *Buffalo Mining*, whether use of a surface estate constitutes a trespass under current West Virginia law requires proof that use of the surface estate caused complete destruction of the surface estate. That does not happen with horizontal drilling.

IV. ARGUMENT

A. The Circuit Court erred in finding EQT committed trespass by not obtaining a pooling amendment from Respondents when such rights are not part of Respondents' estate.

West Virginia mineral law recognizes that separate and distinct estates may be created in a single parcel of land. *See State by Dep't of Natural Res. v. Cooper*, 152 W. Va. 309, 314, 162 S.E.2d 281, 284 (1968). The surface estate and mineral estate may be owned by different individuals by separate and distinct titles. *Id.*, *see also Faith United Methodist Church and Cemetery of Terra Alta, West Virginia v. Morgan*, 231 W. Va. 423, 430, 745 S.E.2d 461, 468 (2013) (stating that a fee owner may separate ownership into separate surface and mineral estates, with each having the same attributes as any other fee simple), *Boggess v. Milam*, 127 W. Va. 654, 658-59, 34 S.E.2d 267, 269 (1945) (stating that oil and gas in place is real estate subject to absolute ownership), and *West Virginia Dep't. of Transp. v. Veach*, 799 S.E.2d 78, 96 (Ketchum J., concurring) (a severance of the surface and minerals creates two separate property interests). Yet, each separate estate, even the mineral estates underlying the surface, remain a part of such tract or parcel of land. *Cooper*, 152 W. Va. at 314, and 162 S.E.2d at 284.

The *Morgan* Court explained the interplay between the terms "surface" and "subsurface" following a severance of estates. The *Morgan* Court held that the term "surface, when used in an instrument of conveyance, generally means the exposed area of land, improvements on the land, and any part of the underground actually used by a surface owner as an adjunct to surface use . . ." *Morgan*, 231 W. Va. at 442-43, 745 S.E.2d at 480-81. Justice Ketchum further elaborated on the distinction between the surface estate and mineral estate by stating that when the surface ownership is severed "everything else is the mineral estate." *Veach*, 799 S.E.2d at 96 (Ketchum, J. concurring). From the foregoing, it is thus apparent that the surface estate, which is limited to only the exposed area of land, and the mineral estate, once severed, are distinct estates in fee simple with separate rights appurtenant to each.

1. The right to pool, or not to pool, is a right exclusive to the oil and gas estate.

West Virginia law has long characterized the rights of an oil and gas estate as follows:

> "(1) [An] interest that is not free of costs of discovery and production; (2) *the owner has the right to do any and all acts necessary to discover and produce oil and gas*; (3) *the owner has the right to grant leases*[;] and the owner has the right to receive bonuses and delay rentals."[emphasis added]

Davis v. Hardman, 148 W. Va. 82, 90, 133 S.E.2d 77, 81-2 (1963) (emphasis added).

Recently, this Court held:

> "that where a lessee designates tracts of land for pooling regarding horizontal drilling and production of oil and gas . . ., which includes nonparticipating royalty interests, consent or ratification by the holders of the nonparticipating royalty interests to the pooling is not required, where the holders of the nonparticipating royalty interest [ ] have conveyed the oil and gas in place and the executive leasing rights thereto to the lessor."

Gastar Exploration, Inc. v. Contraguerro, No. 16-0429, 2017 W. Va. LEXIS 413 at *23-4, 800 S.E.2d 891, 901 (2017). Thus, the right to grant pooling or not grant pooling with respect to an oil and gas lease rests solely with the owner of the oil and gas estate.

The Supreme Court of Texas has recognized that where pooling is granted to a lessee by the oil and gas estate owner, and the lessee combines leases into a unit, the lessee has the right to use the surface of any of the tracts pooled into the unit in its production activities. *See Key Operating & Equipment, Inc. v. Hegar*, 435 S.W.2d 794, 798 (Tx. 2014). In *Hegar*, Key Operating & Equipment ("Key") acquired leases on contiguous tracts of sixty 60 acres and 191 acres and operated wells on each. *Id.* at 796. Key also built a road across the surface of the 191-acre tract to access wells located on the 60-acre tract. *Id.* Production ceased with respect to one well on the 191-acre tract, causing Key's lease to expire as to that tract. *Id.* Subsequently, Key's individual owners acquired an interest in the oil and gas estate in the 191-acre tract and leased the interest to Key. *Id.*

Thereafter, the Hegars bought the surface to part of the 191-acre tract, which included the road used by Key to access wells on the contiguous 60-acre tract. *Id.* The Hegars did not initially attempt to stop Key's use of the access road across their property. *Id.* However, after Key drilled another well on the 60-acre tract and traffic increased on the access road, the Hegars sued claiming trespass. *Id.* Recognizing that the primary legal consequence of pooling is that production anywhere in a pooled unit is treated as production on every tract in the unit, the *Hegar* court concluded that once production was realized from the unit, the surface estates of each tract in the unit could be utilized to produce the oil and gas underlying tracts in the unit. *Id.* at 799.

A similar conclusion to that drawn by the Supreme Court of Texas in *Hegar* was reached by United States District Court for the Northern District of West Virginia in *Miller v. N.R.M. Petroelum Corp.*, which recognized "that a majority of jurisdictions would hold that pooling grants the right to use the surface of any tract in [a] drilling unit to produce gas or oil from the pool." 570

F. Supp. 28, 30 (1983). Pooling has been approved in West Virginia at least since 1945. *Boggess*, 127 W. Va. at 658-59, 34 S.E.2d at 269 (1945). The essence of the pooling is that

> "oil and gas found [in certain strata] is so situated that one well may efficiently drain a rather large area of land, and that the establishment of drilling units may permit the sharing of resources and prevent [ ] waste of requiring each tract owner to drill a well [to] enjoy his or her minerals."

Miller, F.Supp. at 30.

When Respondents took ownership of the surface estate, five (5) gas wells were drilled on the surface estate pursuant to the Carr lease. (J.A. at pg. 5, 6). Four (4) more gas wells were drilled pursuant to the Carr lease after Respondents took ownership of the surface estate. (J.A. at pg. 8). Respondents had notice that their surface estate had been utilized for development of the underlying oil and gas. Respondents were on notice that the owners of the oil and gas could negotiate with a lessee for future development pursuant to the Carr lease. Thus, Respondents were on notice that the owners of the oil and gas estate could grant pooling rights to its lessee, which the oil and gas estate owners did by executing the 2011 amendment.

However, the Circuit Court held the 2011 pooling amendment EQT obtained from the oil and gas owner was invalid as to the use of the surface for production of oil and gas from neighboring tracts. (J.A. at pg. 248). Specifically, the Circuit Court ruled the mineral owners exceeded the scope of the rights reserved by them by executing the pooling amendment because they did not retain the right to use the surface of the Carr lease tract for exploration and production of oil and gas from neighboring tracts. (J.A. at 249-50). 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 (J.A. at pg. 250), which granted to the surface owners a right they did not and do not hold.

This is plain error. The irony in the Circuit Court's ruling is that it expands the rights of the Respondents, as owners of the surface estate with respect to development of the oil and gas estate, in which Respondents own no interest. Whether the oil and gas estate underlying the surface tract owned by Respondents would be jointly developed with neighboring oil and gas estates is a right exclusive to the oil and gas estate. As a result, the ruling of the Circuit Court should be reversed.

2. While the original oil and gas lease, executed prior to severance of the surface and oil and gas estates, did not contain a pooling clause, the lease has been amended by the oil and gas estate owner to allow for such rights.

The Circuit Court determined that the oil and gas estate owners did not obtain the right to use the surface for exploration and production from neighboring mineral tracts. (J.A. at pg. 249). However, by virtue of the 2011 amendment, the owner of the oil and gas estate explicitly granted pooling rights to EQT.

The *Davis* court recognized that the right to grant leases, which necessarily includes the right to amend or modify the leases, is one of the defining characteristics to fee ownership of the oil and gas estate. *See Davis*, 148 W. Va. at 90, 133 S.E.2d at 81-2. This Court has also recognized that "in the absence of a right arising out of contract, a [lessee of coal] has no right to use the surface. . . [to] transport[] and process[] coal admittedly mined form [adjoining lands]." *Fisher v. West Virginia Coal & Transp. Co.*, 137 W. Va. 613, 620, 73 S.E.2d 633, 638 (1952). Here, EQT held that right, properly granted by the oil and gas estate owner. In its holding, the *Fisher* court stated:

> "when [a mineral lessee] leased coal . . . from the fee simple owner thereof, *under the provision of the lease giving it that authority*, [the mineral lessee] has the right to transport subterranean passageways coal mined from adjoining lands so long as the coal underlying [the leased premises] was not exhausted or abandoned and the mining operations were conducted with due diligence."

Id. at 622, 73 S.E.2d at 639.

The facts of *Fisher* are relevant to the present case. In *Fisher*, a deed conveyed all the coal to an individual with a right of way across the surface for the mining and removing of all coal. *Id.* at 615-6, 73 S.E.2d at 635. Thereafter, the owner of the coal estate leased the right to mine and remove the coal. *Id.* at 617, 73 S.E.2d at 636. Owners of the surface estate sued the coal lessee, contending that the coal lessee had no right to use their surface estate for transportation of coal mined from adjacent lands. *Id.* at 619, 73 S.E.2d at 637.

The *Fisher* court held that a mineral lessee could transport coal from adjacent lands using subterranean passageways to an opening on lands owned by its lessee. *Id.* at 624, 73 S.E.2d at 639. Additionally, the court in *Fisher* declined to construe the deed conveying the coal and related mining rights as limited to mining under the tract conveyed. *Id.* at 623, 73 S.E.2d at 639 (stating that the deed language did not deprive the grantee of the coal and the coal lessee of the coal of the legal right to an estate in coal and the right to use passageways formerly occupied by coal which has been mined).

Based on the record, it does not appear that any limitations were placed on the mineral estates, including the oil and gas estate, when Respondents' predecessors-in-interest were conveyed the "surface only" to the tract of land subject to the Carr lease. The title acquired by Respondents' predecessors-in-interests to the "surface only" also does not appear to have granted any rights to the mineral estates.

Further, it does not appear from the record that any rights to the oil and gas estate have ever been conveyed to Respondents. Yet, the Circuit Court's ruling erroneously limits the rights of the oil and gas estate by stating that the owners of the oil and gas estate did not have the right to give

EQT pooling rights with respect to the oil and gas simply because the pooling amendment was granted after the surface estate and oil and gas estate were severed. (J.A. at pg. 249-50)

Notwithstanding the Circuit Court's ruling, the oil and gas estate owner had the *exclusive right* to grant EQT the option of pooling the Subject Tract with neighboring tracts for exploration and production of gas. Moreover, the oil and gas owner, *in its discretion*, may determine whether to lease or not lease the minerals and, if leased, whether the oil and gas interest may be pooled with other oil and gas interests from neighboring tracts and developed conjointly.

According to this Court's ruling in *Fisher*, EQT obtained the explicit rights to pool the oil and gas estate underlying Respondent's surface estate with neighboring lands by virtue of the 2011 pooling amendment. It would analogously follow that, based on *Fisher*, EQT can utilize the surface estate overlying the oil and gas estates that it pooled and to produce oil and gas from the pool. Therefore, Circuit Court erred in finding that the pooling amendment granted to EQT did not modify the lease to allow the oil and gas estate to be pooled with neighboring tracts and for gas to be produced on the surface estate overlying the oil and gas estate and its Order dated February 19, 2016 should be reversed.

B. The Circuit Court's ruling failed to apply the 'reasonably necessary' standard established in *Buffalo Mining Co. v. Martin* and consider whether, and to what extent, Respondents' use their surface estate was substantially burdened by EQT's operations.

A longstanding principle of West Virginia case law states that a mineral owner may lawfully enter upon the surface estate so long as the mineral owner's entry is "in such a manner and with such means as would be fairly necessary for the enjoyment of the mineral estate." *Squires, et al. v. Lafferty*, 95 W. Va. 304, 309, 121 S.E. 90, 91 (1924). Where the use of a surface estate by a mineral owner is based on implied as opposed to express rights, "it must be demonstrated not only that the right is reasonably necessary for the extraction of the mineral, but

also that the right can be exercised without any substantial burden to the surface owner." *Buffalo Mining Co. v. Martin*, 165 W. Va. 10, 18, 267 S.E.2d 721, 725-26 (1980). Determining the scope of a mineral estate owner's implicit surface use rights requires fact-specific analysis on a case-by-case basis. *See Whiteman v. Chesapeake Appalachia, L.L.C*, 729 F.3d 381, 393 (4th Cir. 2013).

Here, when the surface estate and oil and gas estate of the Carr property were severed, the Respondents' predecessors-in-interest were conveyed the "surface only"[12], subject to the Carr lease. (J.A. at pg. 6). According to the record, the deed did not provide any explicit rights to the mineral estates, including the oil and gas estate, to enter upon the surface estate for development of the oil and gas or any rights necessary for the development of the mineral estates. Nonetheless, the right of an owner of the mineral estate to use the surface estate is an implied right incident to the mineral estate by virtue of its interest in real property. *See Porter v. Mack Mfg. Co.*, 65 W. Va. 636, 638, 64 S.E. 853, 855 (1909).

1. The Circuit Court did not consider if EQT's operations completely destroyed Respondents use of the surface estate so as to not be reasonably necessary.

A distinction is drawn between burdens on surface use by the mineral estate that virtually destroy the surface for its normal use and those that merely disturb the surface. *See Buffalo Mining Co.*, 165 W. Va. at 15, 267 S.E.2d at 724, *see also Whiteman*, 729 F.3d at 390 (stating that the "*Buffalo Mining* [Court's] articulation of what is 'reasonably necessary without substantial burden' permits disturbances of the surface but not destruction of the surface). Impermissible use of the surface estate by the mineral owner will involve claims of widespread destruction of the surface, such as when the surface is removed, relocated, or destroyed when strip mined, whereas surface

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[12] As previously mentioned, based on this Court's ruling in *Morgan*, such interest in the "surface only" is limited to "the exposed area of land . . . and any part of the underground actually used by a surface owner as an adjunct to surface use (for example medium for growing plants, groundwater, water wells, roads, basements, or construction footings." 231 W. Va. at 442-43, 745 S.E.2d at 480-81.

disturbances will be permitted and found to not be unnecessary where the mineral owner constructs roads to access a well with machinery, lays pipeline over the surface from the well, and ditches the surface for drainage. *See Id.* at 391.

In *Adkins*, operations for drilling of a well occurred after the surface estate and mineral estate had been severed. *Id.* at 719, 61 S.E.2d at 634. The severance deed included language reserving to the mineral estate, including the oil and gas estate, ". . . the right to mine for the same, and rights of way over, through and under said lands . . . subject to the right of the [surface owner] to mine all coal upon said premises required for [ ] domestic use." *Id.* at 720, 61 S.E.2d at 634. The drilling of the well occurred where the surface owner maintained a farm for alfalfa, corn, and other vegetables. The Court found the lessee's use reasonably necessary. *Id.*

Similarly, the Fourth Circuit Court of Appeals in *Whiteman* found that the burden of proving unauthorized entry or use in a trespass action is on the plaintiff. *See* 729 F.3d at 392. The oil and gas lessee operated three gas wells on the surface estate of the landowner's property. *Id.* at 383. The operations conducted on the surface estate occupied ten acres out of the 101 acres of surface owned by the landowners. *Id.* Although the landowners were no longer able to utilize the ten acres where the oil and gas lessee's wells and drill waste pits were located, the oil and gas lessee's operations did not diminish the landowner's property value and any pecuniary loss to the landowner from the inability to farm the property was minimal. *Id.*, 392. The lessee held the right, the question was damages.

In their Complaint, Respondents contended EQT cleared approximately forty-two (42) acres, including a 19.7-acre well pad, on Respondent's surface estate. (J.A. at pg. 8). The acreage cleared amounted to only about fourteen percent (14%) of the surface estate actually owned by

Respondents, a portion of which will temporary.[13] Although Respondents alleged that two to four trucks associated with EQT's operations drove over Respondents' land, passing "close to one of their residences", the record fails to provide any information indicating that Respondents' were denied access to the portion of the surface estate not used for EQT's operations. There is no evidence in the record that Respondents ever used the portion of the surface estate where EQT's operations are located for any prior purpose that is no longer available to them.

The Circuit Court determined that EQT's use of Respondent's surface estate constituted a trespass *ipso facto.* (J.A. at pg. 248, n.3). Further, the Circuit Court concluded that no further inquiry as to whether EQT's use of Respondent's surface was reasonable or necessary. (J.A. at 248, n.3). The factual findings in its February 19, 2016 Order relate to EQT's operations within the oil and gas estate. Specifically, the Circuit Court found that 62.5% of EQT's well bores extend beyond the Carr lease while only 32.5% of the well bores are located within the Carr lease boundary. (J.A. at pg. 246). However, the laterals of EQT's wells are confined exclusively to the mineral estate not Respondents' surface estate.

Additionally, the Circuit Court found that "[i]t took EQT sixteen months to complete site preparation and complete drilling [ ] nine horizontal wells." (J.A. at pg. 246). That EQT's drilling operations took sixteen months to complete does not itself demonstrate that the operations were not reasonably necessary because it does not consider if that length of time is unreasonably long based on industry standards. Further, the Circuit Court should have considered the burdens imposed on Respondent's surface estate and the manner in which EQT conducted its operations

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[13] The Circuit Court's February 19, 2016 notes that Respondents owned in the aggregate 299.87 acres. However, pursuant to their divorce agreement in 2003, Respondent Margot Beth Crowder was granted a tract of 218.61 acres whereas Respondent David Wentz was granted a tract of 51.26 acres and a tract of 30.0 acres. (J.A. at pg. 250).

on Respondent's surface estate before determining that EQT's use of the surface estate in the present case was a trespass.

If a severed surface owner holds the right to prevent drilling on his or her property, that is devastating to the oil and gas industry and contrary to long standing West Virginia law. As a result, the case should be remanded to the Circuit Court for further consideration as to whether EQT's operations constituted an unreasonable, unnecessary use of Respondents' surface estate.

2. The Circuit Court failed to consider whether Respondents demonstrated that EQT operations deviated from industry standards to not be considered reasonably necessary.

West Virginia case law recognizes that reference in a deed to a prior deed providing a more particular description has the same effect as if the description were set forth in the deed in which the reference is made. *see, e.g.* Syl. Pt. 2, *Thomas v. Young*, 93 W. Va. 555, 558, 117 S.E. 909, 909 (1923). In the present case, Respondents' predecessors-in-interest were conveyed the "surface only" in the tract of land subject to the Carr lease. (J.A. at pg. 6). The Carr lease was in effect prior to the severance of the surface estates and the mineral estates. (J.A. at pg. 5, 6). The deed vesting title to the Respondents was also subject to prior reservations, which provided notice to Respondents of the severance. (J.A. at pg. 7). Thus, Respondents took ownership of the surface estate subject to the reservation of the mineral estates *and* the Carr lease.

Horizontal drilling has made development of the Marcellus Shale possible. Proctor, *The Legality of Drilling Sideways,* 115 W. VA. L. REV. at 496. "A single horizontal well, when located in a permeable reservoir such as the Marcellus Shale, can gather significantly more underground gas then a single vertical well in the same located." Id. at 497. Without the horizontal drilling technique, target gas locations would likely not be reached by using traditional vertical drilling. Id. Horizontal drilling techniques can actually reduce surface disturbances because several lateral wells can be drilled from the same surface well pad. Id. at 497-98.

The record is devoid of allegations EQT's operations were not conducted pursuant to industry standards or as required by West Virginia law. In fact, the essence of Respondents' argument is that EQT's operations were unreasonable simply because it utilized horizontal drilling methods. (J.A. at pg. 9-17). EQT provided notice to Respondents of its planned use of Respondents' surface estate for horizontal drilling operations as required by West Virginia law. (J.A. at pg. 9). Additional factual discovery is necessary to determine whether EQT's operations deviated from established horizontal drilling methods to be considered unreasonable. Thus, the Order of the Circuit Court should be reversed and the case remanded for additional discovery regarding the nature of EQT's operations.

V. CONCLUSION

Technological developments in oil and gas operations and discovery of new formations of minerals will inevitably create legal conflicts between the surface estate and the mineral estate to a tract of land. *See Faith United Methodist Church and Cemetery of Terra Alta, West Virginia v. Morgan*, 231 W. Va. 423, 431, 745 S.E.2d 461, 469 (2013). With respect to the present case, the ruling of the Circuit Court impermissibly expands the rights of surface estate owners with respect to the underlying mineral estate, particularly the oil and gas estate. The execution of the 2011 pooling amendment was within the discretion of only the oil and gas estate owner and, once executed, allowed the lessee of the oil and gas estate to utilize the surface for operations not only in the underlying oil and gas estate but also neighboring oil and gas estates. The surface owner took with notice that pooling could occur.

Further, pursuant to West Virginia law, whether a mineral owner, or its lessee, commits trespass from use of a surface estate for the development of its mineral estate requires a fact-specific analysis of the mineral owner's use of the surface to determine if such was reasonably necessary. By enacting the Horizontal Well Control Act, which provides for damages to surface

owners, our Legislature has approved the use of horizontal drilling. Use of more than one tract is necessary to drill horizontal wells in almost every case. IOGA preys that the decision of the Circuit Court be reversed and remanded to determine whether EQT's use was unreasonable or unnecessary.

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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA
No. 17-0968

AT CHARLESTON

EQT PRODUCTION COMPANY,

Defendant Below, Petitioner,

vs.)

MARGOT BETH CROWDER AND DAVID WENTZ,

Plaintiffs Below, Respondent.

No.: 17-0968
(From the Circuit Court of Doddridge County, No. 14-C-64)

***AMICUS CURIAE* BRIEF OF THE INDEPENDENT OIL AND GAS ASSOCIATION OF WEST VIRGINIA, INC. IN SUPPORT OF PETITIONER EQT PRODUCTION COMPANY**

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I, Evan G. Conard, hereby certify that on the 29 day of January, 2018, the foregoing *Amicus Curiae Brief of the Independent Oil and Gas Association of West Virginia, Inc.* was served by mailing a true and exact copy thereof by United States mail, postage prepaid, upon the following:

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