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.

BRIEF 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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ASSIGNMENT OF ERROR

The Circuit Court erred in finding that the mineral owner's (or its lessee's) right to make reasonable use of the surface to develop the minerals did not include the right to reasonably use a tract of surface land in order to explore for and produce minerals conjointly from below that tract and neighboring mineral tracts. Because the Circuit Court incorrectly found that the mineral owner did not have this right, it incorrectly found EQT Production Company liable for both trespass and unjust enrichment.

STATEMENT OF THE CASE

The Circuit Court incorrectly found that EQT Production Company ("EQT") had trespassed on the property of Margot Beth Crowder and David Wentz ("Crowder/Wentz"), and in doing so had unjustly enriched itself.

I. Factual Background.

Joseph L. Carr owned both the surface of, and the minerals below, a 351 acre tract in Doddridge County (the "Carr Property"). *See* Appx. 4. In 1901 Carr leased the minerals below the surface of the Carr Property (the "Lease"), providing EQT's predecessor-in-interest the Carr Property for the "purpose of mining and opening for oil and gas, and of laying pipe lines, and of building tanks, stations, and structures thereon to take care of the said products … ." Appx. 76. There is no dispute in this case that the Lease remains in force and effect. The Lease therefore expressly permitted surface activity; it did not limit it in any way. *See id.* In 1936 the fee owners of the Carr Property conveyed "the surface only" of the Property, severing the mineral interest from the surface interest. *See* Appx. 80. This narrow grant likewise did not limit the activity the mineral owner could take on the surface. *See id.* In 1975, Crowder/Wentz purchased "the surface only" of nearly all of the Carr Property (the "Property"). *See* Appx. 7. The Property

– all of which is subject to the Lease – is comprised of three different tracts. *See id.* Although married when they purchased it, Crowder and Wentz have since divorced. Appx. 7-8. Wentz now owns 2 tracts, and Crowder owns 1. *See id.*

In 2011 the current-day lessors under the Lease entered into an Amendment and Ratification of Oil and Gas Lease (the "Amendment") that acknowledged EQT's right to pool and/or unitize the Lease with other lands.[1] *See* Appx. 8. EQT then unitized the Lease with other, neighboring tracts, and drilled nine horizontal wells from a wellpad on the surface of the Property. *See* Appx. 150. These nine horizontal wellbores are in four different production units, and the Lease is a part of each unit.[2] Appx. 150-151. Approximately 37.5% of the horizontal wellbores drilled from the Property run directly underneath the Lease; the remainder run beneath the other leases with which the Lease is unitized. Appx. 151. This is *not* a case about the Property being used solely for the benefit of neighboring mineral tracts; the Lease benefits from this production *more* than any other lease with which it is unitized. *See* above, n.3.

II. Procedural Background.

The Complaint was filed on November 26, 2014. *See* Appx. 1. Crowder/Wentz brought six claims. First, a trespass claim that using the surface of the Property to develop the minerals beneath that surface in conjunction with the development of neighboring properties – *i.e.*,

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[1] Unitization "refers to the combination of most, if not all, of the separate tracts in the field into one tract so that the reservoir may be operated without regard to surface boundary lines." Patrick H. Martin and Bruce M. Kramer, Williams & Meyers, *Oil and Gas Law* § 901 (2014). This Court described unitization, pooling, and any differences – or similarities – at length in *Gastar Exploration, Inc. v. Contraguerro*, 239 W. Va. 305, 800 S.E.2d 891, 893 n.1 (2017).

[2] Of the other five leases with which the Lease has been pooled, each only participates in – and thus only receives the benefit of – two units. Additionally, the Lease has the highest interest in the nine wells of any other lease with which it is unitized. In the South # 1 Unit, the Lease comprises roughly 47.5% of the unit. In the South # 2 Unit, the lease comprises roughly 40% of the unit, with two other leases, each with a smaller interest, comprising the rest. In the North # 1 Unit the Lease comprises roughly 19.5% of the unit, and in the North #2 Unit the Lease comprises 21.5% of the Unit, with only one other lease having a significantly larger interest in that unit. *See* Appx. 151.

running horizontal wellbores not only beneath the Lease but also across (subterranean) property lines and beneath other properties leased to EQT – was a trespass. *See* Appx. 17-21. Second, Crowder/Wentz brought another trespass claim, alleging that the use of the Property for *any* kind of modern drilling was impermissible, because it was not contemplated by the parties to either the Lease or the severance of the Carr Property. *See* Appx. 21-22. This second trespass claim was voluntarily non-suited by Crowder/Wentz, and is not at issue in this appeal. *See* Appx. 287. Third, Crowder/Wentz brought a claim for unjust enrichment. *See* Appx. 22-23. The final claims in the Complaint were for "Annoyance and Inconvenience," "Reasonable Attorney's Fees and Costs," and "Punitive Damages." *See* Appx. 23-24.

The Circuit Court granted Crowder/Wentz's Motion for Summary Judgment regarding the first (and only remaining) trespass claim. *See* Appx. 244-260. While there is no dispute in this case that EQT can use the surface of the Property to develop minerals from the Lease, *see* Appx. 249; 65, the Plaintiffs argued that it was improper for EQT to use the surface of the Property to develop minerals conjointly from both the Lease and other leases with which the Lease was unitized. *See, e.g.*, Appx. 249. The Circuit Court posited that in response to this "since there is no pooling agreement in the original lease, EQT relies heavily on a pooling amendment executed by subsequent owners of the underlying mineral tracts after severance of the minerals from the surface." *Id.* The lower court found that "this pooling amendment is not valid as to the use of their surface and cannot, as a matter of law, provide EQT the right to use their surface to drill into, and produce gas from, neighboring mineral tracts." *Id.* The Circuit Court reasoned that this was because "[a]t 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 … ." *Id.* Ultimately, the Court therefore found that "EQT did not obtain the right to use

Plaintiffs' surface lands to drill well bores into neighboring tracts from Plaintiffs, and it did not obtain the right through a subsequent 'pooling amendment' signed by mineral owners (since such owners never had those rights to give)." *See* Appx. 250. Relying entirely on its finding of a trespass in this regard, the Circuit Court also granted Crowder/Wentz's Motion for Summary Judgment regarding their unjust enrichment claim. *See* Appx. 293.

SUMMARY OF ARGUMENT

It is black letter law in West Virginia and throughout the country that the mineral estate is the dominant estate and the surface estate is servient. As a result, it is undisputed that – absent express limiting language, which no party argues is present here – the mineral owner (or its lessee) can make any use of the surface that is "reasonably necessary" to develop the minerals. The only relevant question regarding what rights a lessee like EQT has on the surface, therefore, is whether the use of the surface to develop the minerals below the property conjointly with minerals in neighboring tracts is "reasonably necessary." The Circuit Court never answered this question, and in failing to do so committed reversible error. Had the lower court answered the question, the undisputed facts clearly showed that this use was "reasonably necessary" and therefore permissible. It was Crowder/Wentz's burden to show otherwise and they did not.

This conclusion comports with West Virginia's public policy of encouraging the development of as much oil and gas as possible, as efficiently as possible. The conclusion is also accepted throughout the country, and is not changed by the laws regarding the transportation of coal, a resource whose physical differences from natural gas make the comparison inapplicable. This kind of multi-lease development is reasonably necessary, and cannot – and does not – constitute either trespass or unjust enrichment.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

This case is proper for oral argument under W. V. R. App. P. 18(a). The parties have not waived argument, the appeal is not frivolous, at least one of the dispositive issues has not been authoritatively decided, and the decisional process would be significantly aided by oral argument. Oral argument should be heard pursuant to W. V. R. App. P. 20(a). The case involves an issue of first impression, which is also one of fundamental public importance.[3]

ARGUMENT

When reviewing a Circuit Court's entry of summary judgment, this Court's "review is plenary." *Jane Doe-1 v. Corp. of President of the Church of Jesus Christ of Latter-day Saints*, 239 W. Va. 428, 801 S.E.2d 443, 457 (2017) (quoting Syl. Pt. 1, *Painter v. Peavy*, 192 W. Va. 189, 451 S.E.2d 755 (1994) for the statement that "[a] circuit court's entry of summary judgment is reviewed *de novo*."). "Moreover, although findings of fact are generally reviewed under a clearly erroneous standard, 'ostensible findings of fact, which entail the application of law or constitute legal judgments which transcend ordinary factual determinations,' are also reviewed *de novo*." *Gastar*, 800 S.E.2d at 898 (quoting Syl. Pt. 1, in part, *State ex rel. Cooper v. Capteron*, 196 W. Va. 208, 470 S.E.2d 162 (1996)). This Court's plenary review should be exercised here to make clear that EQT's behavior constituted neither a trespass nor unjust enrichment.

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[3] EQT does not request additional time beyond the 20 minutes per side permitted under W. V. R. App. P. 20(e).

I. West Virginia Law Allows the Mineral Owner to Take All Actions on the Surface of the Property That are Reasonably Necessary to Develop the Minerals, Including Pooling and the Concomitant Burdening of the Surface.

It is black letter West Virginia law that the mineral estate is dominant, and absent express limiting language which is not present here the mineral estate owner – or its lessee – can take all actions on the surface that are reasonably necessary to develop the minerals. This proposition means that, if reasonably necessary for the development of the minerals, the right to pool the property – and to impact the surface accordingly – is a right that remains with the mineral owner regardless of a conveyance of the surface.

A. Parties Can Contract to Limit the Use of the Surface, But That Did Not Occur Here.

If the parties to an oil and gas lease, or a severance deed, wish to limit the use of the surface of a property pursuant to either of those instruments, they can do so. *See, e.g.*, Syl. By the Court, *Watson v. Buckhannon River Coal Co.*, 95 W. Va. 164, 120 S.E. 390 (1923) ("The writing is the repository of what the parties meant … ."). That did not occur here. The Lease grants EQT's predecessor-in-interest the Property for "mining and opening for oil and gas, and of laying pipe lines, and of building tanks, stations and structures thereon; to take care of the said products … ." Appx. 76. There is no limitation whatsoever placed on the use of the surface. *See id.* Similarly, the deed providing the surface to Crowder/Wentz's predecessors-in-interest provided "the surface only … ." Appx. 80. There is no limitation whatsoever placed on the use of the surface. *See id.* While the parties could have chosen to limit the mineral interest owner's rights to use the surface, here no such limitation was made. *See, e.g., Faith United Methodist Church & Cemetery of Terra Alta v. Morgan*, 231 W. Va. 423, 444, 745 S.E.2d 461, 482 (2013) (interpreting a deed which, like the deed here, granted "the surface only" and finding that "the use of the word 'only' in the 1907 deed 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.") (quotations omitted, emphasis added).

B. The "Reasonably Necessary" Doctrine is Well-Established West Virginia Law.

Absent any relevant contractual language limiting the use of the surface – which is not present here – 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." Syl. Pt. 1, *Adkins v. United Fuel Gas Co.*, 134 W. Va. 719, 61 S.E.2d 633 (1950) (citations omitted). *See also Whiteman v. Chesapeake Appalachia, LLC*, 729 F.3d 381, 388 (4th Cir. 2013) (the mineral owner has the right to do what is necessary for the "reasonably profitable enjoyment" of its property in the minerals) (citations omitted). "[T]he general, common law rule in West Virginia is that a mineral owner or developer" can "do that which is 'fairly necessary' or 'reasonably necessary' for the extraction of the mineral." *Thornsbury v. Cabot Oil & Gas Corp.*, 231 W. Va. 676, 681, 749 S.E.2d 569, 574 (2013). *See also id.* (quoting and discussing, for the same proposition, *Porter v. Mack Mfg. Co.*, 65 W. Va. 636, 64 S.E.2d 853 (1909); *Buffalo Mining Co. v. Martin*, 165 W. Va. 10, 267 S.E.2d 721 (1980); *Whiteman*; *Faith United*; *Coffindaffer v. Hope Natural Gas*, 74 W. Va. 107, 81 S.E. 966 (1914)). This concept of black letter law is not disputed in this case. *See, e.g.*, Appx. 249 ("Plaintiffs do not dispute that the owner of the mineral tract underlying their property has the implied right to 'reasonable use' of their surface lands ... ."); Appx. 65 (Crowder/Wentz recognizing that "[t]he 'fairly necessary' or 'reasonably necessary' doctrine of mineral law implies, in favor of the mineral owner, a surface right to access the reserved minerals via means that are fairly necessary.").

C. The Circuit Court Failed to Examine Whether or Not The Right to Pool – and Burden the Surface Accordingly – is Reasonably Necessary to Develop the Minerals.

It is undisputed that a mineral owner can take whatever action on the surface is "reasonably necessary" to extract the mineral owner's minerals. *See* above, Argument § I.A. Here, neither the Lease nor the deed severing the surface of the Carr Property contained any language altering this common law rule. *See* above, Statement of the Case § I. Therefore, the starting point in any conflict between a mineral owner (or the mineral owner's lessee) and a surface owner is whether the activity at issue was reasonably necessary to extract the mineral owner's minerals. If the action was reasonably necessary for extraction, the mineral owner had the right to take the action, regardless of whether or not the mineral owner owns the surface. If the action was not reasonably necessary for extraction, the mineral owner does not have the right to take the action over the objection of the surface owner. The Circuit Court erred because it decided the mineral owner did not have the right to burden the surface without ever deciding whether or not that burden was "reasonably necessary." The Circuit Court did not conduct the requisite analysis.

The Circuit Court held that after the Carr Property was severed "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." Appx. 250. The problem with this analysis is that it skips the required first step. In a severance, the mineral owner retains all rights to use the surface as "reasonably necessary," but the Circuit Court made its decision without first analyzing if the use was "reasonably necessary." *See, e.g.*, Appx. 250 ("[T]he 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."). The Circuit Court improperly adopted Crowder/Wentz's arguments on this point in full. *See, e.g.*, Appx. 212 (Crowder/Wentz arguing that "the reasonable use doctrine only becomes relevant if the right to use the surface to bore into neighboring tracts was legally obtained or reserved in the first place."). As a result of this improper analysis, the Circuit Court held 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." Appx. 250.

The Circuit Court held that a severance must expressly reserve the right of multi-lease development, otherwise that right is transferred with the surface. *See, e.g.*, App. 250 ("[T]he 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 instance."). This is error. There is no question that the mineral owner always has the right to burden the surface as reasonably necessary, and there is no canon of law requiring an owner of a right to expressly list all rights that owner is *preserving* when transferring other rights. The mineral owner has the right to burden the surface as reasonably necessary to develop the minerals and unless the mineral owner grants that right to the surface owner along with the surface, it remains with the mineral owner. *See Faith United*, 231 W. Va. at 444, 745 S.E.2d at 482 (interpreting a deed which granted "the surface only" and finding that 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.") (emphasis added).

The Circuit Court reasoned that by conveying the surface the mineral owner lost the right to allow the use of the surface for multi-lease development. The Circuit Court then decided that because the mineral owner didn't have this right, the "reasonably necessary" analysis was

unnecessary. This is the wrong order in which to have conducted the analysis: whether or not the mineral owner had the right *depends on the outcome of the reasonably necessary analysis*. There is no dispute that the mineral owner has the right to do whatever is "reasonably necessary" to extract its minerals, and in so doing burden the surface. Therefore, if pooling the minerals to develop them conjointly with adjoining tracts, and in so doing burdening the surface, was "reasonably necessary" to extract the minerals, then the mineral owner *did* retain this right. Because the Circuit Court did not undertake that analysis, it erred and must be reversed.

D. The Only Evidence Offered Below Showed Pooling was Reasonably Necessary.

It was Crowder/Wentz's burden in the Circuit Court to show that EQT's use of the Crowder/Wentz Property was not reasonably necessary. *See, e.g., Whiteman*, 729 F.3d at 391-92 (4th Cir. 2013) (under West Virginia law, the burden is upon the surface owner claiming trespass to prove the mineral owner's use of the surface is not reasonably necessary – "the burden to prove unauthorized entry or use in trespass is on the plaintiff").[4] Crowder/Wentz failed completely to carry this burden.

There is no question that Crowder/Wentz's Memorandum of Law in Support of their Motion for Partial Summary Judgment discusses the activity EQT took on the surface. *See* Appx. 70-74. Further, in certain places Crowder/Wentz even compare the surface activity taken by EQT to drill horizontal wellbores with the surface activity taken when vertical wells were drilled. *See id.* What Crowder/Wentz do not provide, however – and the reason they failed to carry their burden – is any evidence regarding whether or not the burden EQT placed on the

[4] Other states come to the same conclusion. *See Hunt Oil Co v. Kerbaugh*, 283 N.W.2d 131, 137 (N.D. 1979) ("[T]he burden of proof in such a determination is upon the servient estate owner."); *Getty Oil Co v. Jones*, 470 S.W.2d 618, 623 (Tex. 1971).

Property was reasonably necessary. Simply evidencing that drilling an unconventional well burdens a property more than drilling a conventional well does not mean that an unconventional well is not reasonably necessary. This kind of conclusion – whether or not developing the Property conjointly was reasonably necessary – required expert testimony. *See, e.g.*, *Cook v. Cook*, 607 S.E.2d 459, 466 (W. Va. 2004) (noting that expert testimony is required when the subject is not "readily ascertainable, demonstrable or the subject of common knowledge") (quotations omitted). There is no reasonable definition of "common knowledge" which would require a lay jury to be aware of whether it is reasonably necessary to drill a mile beneath the earth, turn pipe horizontally, create small explosions, pump fluids through the well, and extract natural gas. *See, e.g.*, http://marcelluscoalition.org/marcellus-shale/production-processes/drilling/ (last visited Jan. 12, 2018); http://marcelluscoalition.org/marcellus-shale/production-processes/casing-the-well/ (last visited Jan. 12, 2018); http://marcelluscoalition.org/marcellus-shale/production-processes/fracture-stimulation/ (last visited Jan. 12, 2018). Because a lay jury could not make the determination of whether or not multi-lease development, and the surface burdens it entails, was reasonably necessary, Crowder/Wentz were required to provide an expert to set forth this testimony. *See Cook*, 607 S.E.2d at 466. Crowder/Wentz failed to do so, and therefore failed to carry their burden in this regard.

Conversely, although it was not EQT's burden to prove that its activity was "reasonably necessary," it did precisely that. Attached as an exhibit to EQT's Response in Opposition to Plaintiffs' Motion for Partial Summary Judgment and Cross-Motion for Summary Judgment was the affidavit of Joseph M. Sinnott. *See* Appx. 193-199. Mr. Sinnott is EQT's Director of Reserves Engineering, and has "extensive experience in producing natural gas from the shale

formations in West Virginia." *See* Appx. 193. In his role, Mr. Sinnott supervises "the review of production forecasts and coordinate[s] an annual audit of all reserves[,]" as well as "evaluate[s] and report[s] to various departments regarding production forecasts as well as actual production." *Id.* With these qualifications, Mr. Sinnott offered evidence – completely undisputed by Crowder/Wentz – which made clear developing the Lease conjointly with adjoining leases was reasonably necessary.

First, Mr. Sinnott stated that "[p]roduction of natural gas from the Marcellus and Geneseo Shale formations in commercial quantities using conventional vertical well technology" – the precise well technology to which Crowder/Wentz compared unconventional drilling in their summary judgment briefing – "is not operationally feasible." Appx. 194. This is because "a vertical wellbore only pierces the formation at a single point within the formation and the geological conditions prevent commercial quantities of natural gas from flowing from the formation into the vertical wellbore." *Id.* Mr. Sinnott opined that developing the Property in this manner "would not produce natural gas in commercial quantities and would not otherwise be operationally feasible." *Id.*

After making clear what would *not* be a reasonably necessary manner in which to develop the Property – the vertical development with which Crowder/Wentz attempted to compare EQT's activities – Mr. Sinnott stated what would be reasonably necessary: "In contrast to vertical well development, horizontal drilling is specifically designed to allow for commercial production of formations such as the Marcellus and Geneseo Shale formations because it allows the wellbore to penetrate the formations for long distances." Appx. 194-195. When this method of development is utilized, "commercial quantities of natural gas are recoverable." Appx. 195. As such, Mr. Sinnott stated that "EQT's use of horizontal drilling is, therefore, reasonably

necessary to develop the minerals underlying the Plaintiffs' surface." *Id.* Mr. Sinnott also made clear that it would "not be feasible to limit horizontal development to only the minerals underlying the Carr Lease." *Id.* There was a specific reason provided for why multi-lease development was required: "[H]orizontal drilling allows for the commercially viable production of formations such as the Marcellus and Geneseo Shale formations because it allows the wellbore to penetrate the formations for long distances. However, *to accomplish the distances required, it is necessary to unitize the mineral interests underlying the Plaintiffs' surface with the mineral interests of neighboring tracts.*" Appx. 195-196 (emphasis added).

Finally, this Court has recently recognized that EQT's position that unconventional drilling *is* reasonably necessary to effectuate the development of certain gas formations is broadly shared:

> The amici curiae maintain that horizontal or directional drilling, pooling and unitization are particularly suitable to development of the Marcellus Shale Formation in West Virginia. In that regard, Gastar states that it determined that it was necessary and advisable to pool the 105.9 acres with other parcels to prevent waste, to facilitate the orderly development of the minerals, to preserve correlative rights and to effect equitable participation within the pooled unit to be formed. *See* Nancy Saint-Paul, Vol. 4, *Summers Oil and Gas* § 56:2 (3rd ed. 2009) ('[T]here are cases holding that the power to lease does comprehend the power to pool, and this view better accords with the realities of the oil and gas industry where pooling powers are always desirable, and sometimes essential, if a property is to be developed.").

Gastar, 800 S.E.2d at 901 n.16. It was Crowder/Wentz's burden to show that EQT's activities on the surface of the Property were not reasonably necessary to develop the minerals beneath that property; they failed entirely to do so, only offering evidence of what had occurred on the property, but not whether it was reasonably necessary. EQT – who had no burden to meet – showed exactly why its activities were reasonably necessary to extract the minerals beneath the property. *See, e.g., id.*

West Virginia law permits EQT, as the mineral owner's lessee, to take all actions that are reasonably necessary to develop the minerals. The Circuit Court failed to ask the critical question of whether or not those actions were reasonably necessary; therefore the Circuit Court erred. Further, Crowder/Wentz failed entirely to carry their burden of showing that EQT's activities were *not* reasonably necessary while EQT – although it need not have – provided undisputed evidence that the activities it took *were* reasonably necessary. Because the actions EQT took were reasonably necessary to extract the minerals beneath the Property, they were within the property rights maintained by the mineral owner – EQT's lessee – at the time of the severance and all other times. The Circuit Court's grant of summary judgment to Crowder/Wentz should be reversed. This Court should remand with instructions to enter judgment for EQT.

E. EQT Has Held the Right to Burden the Surface as Reasonably Necessary for Pooling Since the Execution of the Lease.

In the Circuit Court Crowder/Wentz placed great weight on the fact that "the pooling amendment was only signed by new mineral owners after the ownership of the surface had been separated from the ownership of the minerals, and years after Plaintiffs purchased their surface lands." Appx. 219. *See also, e.g.*, Appx. 225. This is irrelevant. The mineral owner *always* has the implied right to do what is reasonably necessary to obtain the minerals beneath the surface. *See* above, Argument § I.A. It is not the case that by conveying "the surface only" the mineral owner also conveyed the right to take reasonably necessary action to procure the minerals. *See* above, Argument § I.B. Because the mineral owner has always had these rights, and could always convey them to its lessee, that conveyance occurred at the time of the Lease, in 1901, before Crowder/Wentz's predecessors-in-interest had any right to the surface of the Property.

Even had the right not been transferred in 1901, because the mineral owner maintained that right, it could have transferred it to EQT in 2011, through the Amendment.

Courts in both West Virginia and Pennsylvania have recognized that the right to jointly develop property is impliedly granted to a lessee *when an oil and gas lease is signed.* In *American Energy-Marcellus, LLC v. Mary Jean Templeton Poling*, No. 15-C-43 H (Cir. Ct. Tyler Co. Apr. 15, 2016), p. 2, the court declared "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." The court found that due to the geologic tendencies of the Marcellus shale, the property at issue "must be combined – or pooled or unitized with – mineral and leasehold interests in other tracts and developed in one or more units to provide sufficient horizontal wellbore length for development and production ... ." *Id.*, at p. 3. Therefore, "[t]he implied right to pool or unitize is necessary for Plaintiff to exercise its rights and to fulfill its responsibilities under the Lease utilizing horizontal development ... ." *Id.*, at p. 9.

A Pennsylvania court made a similar ruling in *EQT Production Company v. Opatkiewicz*, G.D. No. 13-013489 (C.C.P. Allegheny Co. Apr. 8, 2014). *Opatkiewicz* involved "sixteen leases, fourteen ... [of which] do not explicitly permit nor prohibit joint development with contiguous properties." *Id.* at p. 4. The lessors in that case challenged the Pennsylvania Oil and Gas Lease Act § 34.1 (commonly known as "Act 66"), which stated that "[w]here 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 a lease." The lessors argued that applying Act 66 "to leases created before it became effective would violate" sections of the Pennsylvania and United States Constitutions "which bar the passage of any *ex post facto* law, or any law impairing the obligation of contracts." *Id.* at p. 6. The court however, noted that in

Pennsylvania – like in West Virginia – the lessors "have little right to dictate the manner of EQT's use of the *surface* estate while it is developing the subsurface estate, as long as EQT's methods are reasonably necessary." *Id.* at p. 7 (citing *Belden & Blake Corp. v. Commonwealth*, 969 A.2d 532-33 (Pa. 2009) (original emphasis). "So long as the lessors' rights granted by lease and law are not impinged upon, the lessee has broad powers to develop the oil and gas estate as it sees fit, *including crossing property lines between contiguous leases while engaging in horizontal drilling*." *Id.* (emphasis added). Thus, because the leases themselves gave EQT the right to take reasonably necessary actions, including jointly developing contiguous properties, EQT always had those rights, and Act 66 merely clarified them. *See id. See also id.* at p. 8 (addressing the lessors' argument that "the property right ... [they] claim to lose ... is the right to determine whether or not their property may be developed jointly" by noting that "unless specifically retained, an oil and gas lease transfers from the lessor to the lessee the right to determine how to develop the oil and gas estate of the lease.").

Because both West Virginia and Pennsylvania courts have recognized that a *lease* transfers to the lessee the right to pool or unitize the property, and take all actions necessary to do so, EQT's predecessors-in-interest in this case have had this right from 1901, the time the Lease was executed, decades prior to the 1936 severance in which Crowder/Wentz's predecessors-in-interest first gained any right in the surface. Even were that not the case, because the mineral owner never *loses* the right to take actions reasonably necessary on the surface to develop the minerals, the mineral owner could have validly transferred those rights to EQT through the Amendment in 2011.

II. West Virginia Public Policy Calls for the Most Efficient Manner of Maximizing the State's Oil and Gas Development; this Requires a Finding that Pooling, and any Concomitant Burdens on a Surface Owner, are Reasonably Necessary for the Development of Natural Gas.

"It is ... the public policy of this state and in the public interest to ... [e]ncourage the maximum recovery of oil and gas." W. Va. Code § 22-C-9-1(a)(3). This Court has recognized that "[t]he West Virginia Legislature has indicated that the policy of this State favors the conservation and maximum recovery of oil and gas." *Wellman v. Energy Resources, Inc.*, 210 W. Va. 212, 557 S.E.2d 254, 266 (2001).

A. Cases Applying West Virginia Law Find that Pooling – and a Resulting Burden on the Surface Owner – is Reasonably Necessary.

One of the cases applying West Virginia law to facts most similar to those before the Court – *Miller v. N.R.M. Petroleum Corp.*, 570 F.Supp. 28 (N.D. W. Va. 1983) – also best showcases why this state's public policy requires a finding that EQT's actions were proper here. In *Miller*, the plaintiffs were the surface owners of two contiguous tracts of land. *Id.* at 29. The defendant held a lease on the oil and gas beneath both tracts. *See id.* The defendant pooled the two tracts, and asserted its right to cross one tract, to place a well on the second tract, in order to develop the entire pool. *See id.* The Plaintiffs sought to certify the question of "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.* Chief Judge Maxwell held that certification was unnecessary because, under West Virginia law, *the use was permitted*: "It 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." *Id.* at 30.

Chief Judge Maxwell began his analysis by noting that it is "the majority rule in other jurisdictions ... 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 30 (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)). In line with West Virginia's policy pronouncement to maximize recovery and minimize waste, the Chief Judge reasoned that "the establishment of drilling units may permit the sharing of resources and prevent the waste of requiring each tract owner to drill a well in order to enjoy his or her minerals." *Id.* (citing W. Va. Code §§ 22-4A-1, *et seq.*). The *Miller* court also looked to legislation recently passed at that time, specifically W. Va. Code § 22-4-1m(a), which required a well work permit applicant to notify both the owners of the surface of the well tract, as well as the owners of surface tracts that would be utilized for development activity other than the well itself (i.e. "roads or other land disturbance"). *See id.* at 30-31. The court noted that this legislation "contemplates surface disturbance on adjacent tracts within a drilling unit or pool and thereby furnishes a positive answer to the question proposed for certification." *Id.* at 31.

Even more recently than *Miller*, the Northern District of West Virginia confronted an argument by a severed surface owner which is identical to that put forward by Wentz/Crowder here: that the mineral owner's lessee "cannot use the surface of the[] property to engage in horizontal drilling into neighboring lands so as to extract and produce the oil and gas from those neighboring lands." *SWN Production Co., LLC v. Edge*, 2015 WL 5786739, at *2 (N.D. W. Va. Sept. 30, 2015). The court found no merit in this argument, and granted the lessee's motion for preliminary injunction requiring the severed surface owner to permit the lessee on to the property. *See id.*, at *7. The court relied in part on the fact that "[t]he public policy of the State of West Virginia favors the responsible development of the state's natural gas resources in a

manner similar to that proposed by" the lessee, *i.e.* multi-lease development. *Id.* at *6 (citing W. Va. Code § 22-6A-2(a)(8)).

This Court has also recently recognized that allowing one dissenting, non-mineral owner to halt development is contrary to this state's public policy of producing as much gas as possible as efficiently as possible. In *Gastar*, this Court noted that "[a nonparticipating royalty interest] holder, by withholding consent, could unilaterally void an entire pooling agreement involving thousands of acres and the bargained for rights of dozens of other interest holders." 800 S.E.2d at 900. Here Crowder/Wentz – who, unlike a nonparticipating royalty interest holder, have *no* interest in production – are similarly attempting to "void an entire pooling agreement" which will impact the "bargained for rights of ... other interest holders." *Id.* Crowder/Wentz have an ownership interest in *the surface*. As a result of that – servient – surface interest, they are attempting to hold hostage not only the – dominant – mineral interest below the surface, not only the – dominant – lessee interest below the surface, but the mineral and mineral-lessee interests of every other property with which the Property is pooled. Perhaps most egregiously, Crowder/Wentz – owners of only *the surface* – ask to be compensated by being granted the value of *the minerals*, an estate in which they have absolutely no interest. *See, e.g.*, Appx. 25 (requesting damages "calculated as two percent of the gross sales price value of the natural gas and hydrocarbons produced ... "). This behavior is antithetical to the West Virginia legislature's command that the state "[e]ncourage the maximum recovery of oil and gas." W. Va. Code § 22-C-9-1(a)(3). It should not be permitted by this Court.

B. The Legislative Pronouncements of West Virginia and Neighboring States Indicate that Pooling – and a Resulting Burden on the Surface Owner – is Reasonably Necessary.

Here, just as in *Miller*, there is recent legislation to assist the Court and that evidences West Virginia's preference for the surface use at issue; and it is the same legislation relied on by the court in *Edge*. *See id.* In the Horizontal Well Act, W. Va. Code § 22-6A-1, *et seq.*, the West Virginia Legislature found that horizontal drilling has "created the opportunity for the efficient development of natural gas contained in underground shales and other geologic formations." *Id.* § 22-6A-2(a)(1). The Legislature further found, and this Court has recognized, that "the responsible development of our state's natural gas resources [through horizontal drilling] will enhance the economy of our state and the quality of life for our citizens while assuring the long term protection of the environment." *Id.* § 22-6A-2(a)(8) (quoted in *Gastar*, 800 S.E.2d at 901 n.16). In addition to these clear policy pronouncements, the Act also explicitly recognizes that horizontal drilling will cross multiple properties, requiring that a permit application identify "all surface tract boundaries within the scope of the plat proposed to be crossed by the horizontal lateral ... ." *Id.* § 22-6A-5(a)(6)(A). The Act also contains the same notice provisions referenced by the *Miller* court. *See id.*, § 22-6A-10(b)(1).

The West Virginia legislature is not the only body to have come to the conclusion that multi-lease development is reasonable and necessary for the production of oil and gas. *Opatkiewicz* showcases that neighboring Pennsylvania, like West Virginia, holds that an oil and gas lease grants the rights reasonably necessary to develop the oil and gas, which includes the right to pool. That recognition was explicitly set forth by the Pennsylvania legislature in Act 66 when it stated that "[w]here 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.P.S. § 34.1. This statement by the Pennsylvania legislature is therefore one, like that made by the West Virginia legislature, that multi-lease development is reasonable and necessary to develop oil and gas – meaning the use of the surface to do so must also, by definition, be reasonable and necessary.

Horizontal development comports with West Virginia's command to minimize waste and maximize efficient recovery; all sides of the issue agree. Specifically, the West Virginia Surface Owners' Rights Organization "advocate[s] for public policy and regulatory changes that will help surface owners have their rights recognized and respected by the oil and gas drillers ... ." https://wvsoro.org/ ("About" section, last visited Jan. 13, 2018). In literature titled "Why Multiple Horizontal Wells From Centralized Well Pads Should be Used for the Marcellus Shale," this surface rights owners' organization states:

> Having 6 or 8 horizontal wells drilled from one pad taking the place of 20 or 24 vertical wells each on their own well pad/site is a HUGE improvement for surface owners! ... . [W]ith horizontal drilling there is 1 well pad/site with one access road and one drilling pit and one frac water impoundment pond instead of 24 five-acre, vertical well pads/sites, and 24 access roads and 24 drilling pits and multiple frac water impoundments. ... . Not only is horizontal drilling of multiple Marcellus Shale gas wells from centralized well pads/sites better for surface owners, it is better for lots of other people and interests.

Appx. 204 - 205.

There is no dispute that pooling and horizontal development, despite any surface burden, are not only reasonably necessary to develop natural gas, but fall squarely within the West Virginia Legislature's command to develop as much natural gas as possible, as efficiently as possible.

III. The Law Nationwide Permits the Mineral Owner to Pool its Interests and Burden the Surface Owner Accordingly.

In addition to the law and public policy of West Virginia supporting the permissibility of EQT's behaviors, other states that have addressed the issue have also found that multi-lease development is a reasonably necessary method to develop minerals beneath a surface property, despite the burdens placed on that property. These findings cannot be, and are not, changed by cases regarding the transportation of coal that was not conjointly produced.

A. The Law in Numerous Other States Finds that it is Proper for a Mineral Owner to Burden a Surface Estate to Extract the Minerals Beneath that Surface Estate and Others.

Perhaps the most on-point decision to the facts now before this Court comes from Texas. *See Delhi Gas Pipeline Corp. v. Dixon*, 737 S.W.2d 96 (Tex. Ct. App. 1987). In *Dixon*, the surface owner purchased the property in 1973, but the prior owner retained the mineral rights. *See id.* at 97. Six years later that mineral owner leased the property, and the lease included a provision granting the lessee the right to pool or unitize the property. Just as Crowder/Wentz argued was dispositive in this case, in *Dixon* the writing evidencing the right to pool was executed by the mineral owner *after* the severance. *See* above, Argument §I.D. The property was unitized, and the mineral owner's lessee granted an easement to its gas purchaser to lay a gathering pipeline across the surface owner's property, to transport gas from the well that was producing in the unit. The Texas court found this action proper:

> The mineral owner ... and his lessee ... have the right to use as much of the premises as is reasonably necessary to produce and remove the oil, gas, and other minerals. This right includes the right to use as much of the surface estate as is reasonably necessary to produce oil or gas from a well located on a production unit with which the tract has been unitized.

Id. at 97-98. Despite the lease being executed after the severance of the minerals from the surface, the court found that the mineral owner's right to take actions reasonably necessary to

produce the minerals allowed the mineral owner to take actions on the surface of the property to benefit the entire pooled unit. This Court should find the same here.

It is not just the intermediate appellate courts of Texas that support EQT's position here; the Supreme Court of Texas does as well. *See Key Operating & Equipment, Inc. v. Hegar*, 435 S.W.3d 794 (Tex. 2014). In *Key Operating*, the Texas high court went even further than the lower court in *Dixon* and held that a pooled surface could be burdened to enable production from a neighboring tract *even when that production was not also occurring from beneath the burdened tract*. *See id.* at 800. In that case a lessee held leases on two neighboring tracts, and pooled them. *See id.* at 796. It used a road over one tract (the Curbo tract) to access the well on the adjoining tract (the Richardson tract). *See id.* The trial court found that the well on the Richardson tract was *not* producing minerals from the Curbo tract. *See id.* at 797. The surface owner of the Curbo tract thus alleged a trespass, but the lessee "argue[d] that because its production from a tract pooled with others is legally treated as production from each tract within the unit, it has the right to use the surface of any of the units' pooled tracts in its production activities." *Id.* at 798. The Supreme Court of Texas agreed. *See id.* The court found that "the mineral owners[] and ... the mineral lessee, have implied property rights to use the ... surface." *Id.* at 799. Ultimately, the court ruled that the "right of ingress and egress includes the right to ingress and egress over the surface of any pooled acreage for the purpose of producing minerals from any part of the pooled acreage. Accordingly, [the mineral owners] did not increase the burdens on the surface estate by leasing their mineral interest to Key, nor did Key increase the burdens by pooling the Richardson and Curbo[] tract minerals." *Id.* at 800. The Supreme Court of Texas made clear that neither leasing nor pooling "increase[s] the burdens" on the surface estate. That estate is subject to the same burdens it always has been: whatever is reasonably

necessary to develop the minerals. The case before this Court now is *not* a request by a mineral owner to use the surface to develop lands solely beneath another property; it is a request by a mineral owner to use the surface to develop lands beneath the surface *conjointly with* other properties. However, under *Key Operating* even the former burden would be permissible.

The Supreme Court of Alabama also decided a case similar to this one in May of 1963. *See Deese*. In *Deese*, the surface owner of a pooled tract argued that the mineral owner had no right to use his surface in connection with the operations in the unit. 153 So.2d at 616. As Crowder/Wentz argued below, the surface owner in *Deese* cited to the general principle that "[t]he right to use the surface of land as an incident of ownership of mineral rights does not carry with it the right to use the surface in aid of mining or drilling operations on other or adjoining lands." *Id.* at 617 (internal citations and quotations omitted). The court noted that while this principle applied "to the mining of solid minerals," the different question in this case was "whether the same principle should be equally applicable when oil wells are involved." *Id.* at 617. The *Deese* court found the principle did not apply, noting that "[t]he mining of solid minerals has aspects essentially different from those involved in drilling and operating oil wells. For instance, there may be a pool of oil under several tracts of land with each tract having a different ownership, yet all of such oil might be removed by a single well on one of the tracts simply because of its fluidity ... ." *See id.* at 618. With this in mind, the *Deese* court issued its holding:

> The question then arises: If he [the surface owner] does not own any interest in the oil, and hence receives no benefit from its production, then why should his surface interest be burdened by action taken in recovering the oil? The obvious answer is that he acquired the surface subject to the right of the owner of the oil thereunder to use the surface in such manner as is reasonably necessary to recover the oil.

Id. at 618-19. Just as EQT now argues, the *Deese* court found that the surface owner's rights are subject to the mineral owner's ability to take actions reasonably necessary to access the minerals. This right of the mineral owner exists – just at the *Deese* court implicitly recognized – even after the property is severed.[5]

Similarly, in *Kysar v. Amoco Prod. Co.*, 93 P.3d 1272, 1278 (N.M. 2004), the surface owner relied upon the general principle that a mineral owner's implied right is limited to the use of the surface of the premises under which the mineral estate lies. The Supreme Court of New Mexico, however, stated that the issue must be analyzed within the more specific context of pooling and unitization. *See id.* ("In addition to these general principles, we must consider the specific principles developed in the context of pooling, unitization, and communitization."). The court held the mineral owner's implied right of surface usage extended to any property within the unit, regardless of where within the unit production is taking place.

> We hold that under New Mexico law a mineral lessee's implied surface right of reasonable ingress and egress to reach a well located inside the production unit that the lessee is operating pursuant to a pooling arrangement extends across lease boundaries within the unit to the surface of the entire area subject to the arrangement, regardless of where within the unit production is taking place.

Id. at 1282.

In *Holt v. Southwest Antioch Sand Unit, Fifth Enlarged*, 292 P.2d 998 (Ok. 1955), the Oklahoma Supreme Court also found in favor of the mineral owner. In that case a unitized

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[5] In the Circuit Court, when confronted with *Deese* and a plethora of additional authority, Crowder/Wentz argued that the case was distinguishable because it was decided regarding a unit formed under a state statute. *See, e.g.*, Appx. 220. Crowder/Wentz failed to put forth why this would matter, and in fact it is a distinction without a difference. There is no reason why mineral owners who are subject to compulsory pooling would be entitled to use the surface of tracts in the unit, but mineral owners who unanimously agree to pool and unitize their interests would not. The rationale for surface use would appear to be even stronger when voluntary pooling and unitization occurs – as it did in this case – as opposed to compulsory.

surface owner took issue with a mineral owner's lessee's use of saltwater under her surface interest that "was used to produce oil from wells in other lands in the said unit, none of them being on plaintiff's premises ... ." *Id.* at 999. The Oklahoma Court found that the use of the water was "a part of the operation of mining and removing the petroleum minerals under said lands[,]" and that therefore it made "no difference whether the oil was produced from plaintiff's lands or not ... ." *Id.* at 1000. In *Holt* the Plaintiff surface-owner complained that something of hers – saltwater – was used to produce oil from other lands. Here Crowder/Wentz, as surface owners, complain that something of theirs – the surface – was used to produce gas from other lands. Because in both instances the use is reasonably necessary, just as the Oklahoma court found the use proper there, so should this court here. *See id.* ("Her estate was not only limited but, in addition, was burdened by the mineral owner's right to use what was reasonably necessary for the proper development of the mineral estate. That included the right to the use of the salt water for the same purpose. Therefore, plaintiff's petition did not state a cause of action.").

B. Commentators Come to the Same Conclusion.

In the Circuit Court, Crowder/Wentz stated that the Williams & Meyers treatise is the "most thorough of the general legal treatises on oil and gas law." Appx. 63. Both of the authors of Williams & Meyers have explicitly stated that a mineral owner has the right to burden a pooled surface tract.

First, Patrick H. Martin, one of the two co-authors of the Williams & Meyers treatise, has stated that:

> When oil and gas rights have been severed from the ownership of the land, a mineral interest owner ordinarily possesses the right to use so much of the surface of the land as is reasonably necessary for operations to develop the land's oil and gas. May the interest owner and his or her lessee also use the surface for access to drilling operations on adjacent acreage when the land is included in the unit for which the operations are being undertaken? *There is no logical reason why the*

> *mineral interest owner should not have the same implied easement rights wherever the unit well would be located when the use of the land is reasonably necessary for the enjoyment of the mineral rights.*

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).

Bruce Kramer is the other co-author of Williams & Meyers. Professor Kramer has published a presentation entitled "The Legal Framework for Analyzing Multiple Surface Use Issues." Appx. 208. In that presentation, Professor Kramer acknowledges the general rule that the implied easement of surface use does not extend to support activities benefitting off-lease premises. Appx. 209. Professor Kramer then explicitly states, however, that this "[r]ule changes when *either* voluntary or compulsory pooling or unitization occurs." *Id.* (emphasis added).

Other respected oil and gas scholars have also noted that the general rule about use of one surface to develop minerals from another changes when that development is happening conjointly, as it does with pooling. In Anderson and Kuntz,[6] *Surface "Trespass": A Man's Subsurface is Not his Castle*, 49 Washburn L. Rev. 247, 264 (2010), it was stated that "*absent* 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 or exploitation of minerals on other lands is beyond the scope of the mineral owner's right of reasonable surface use at common law." (Emphasis added).

C. Cases Regarding the Transportation of Coal Do Not Change This Law.

Given that the clear majority rule permits EQT to utilize the Property in the manner that it did in developing gas, it is not surprising that in the Circuit Court Crowder/Wentz relied almost

[6] Eugene Kuntz and Owen Anderson are two of the co-authors of *A Treatise on the Law of Oil and Gas*.

exclusively on cases addressing surface use for developing coal. Case law in the coal context, which references the general principle that a mineral owner does not have the implied right to use the surface of one tract to produce minerals *only* from other, adjoining tracts, is entirely irrelevant. The basic oil and gas law precepts discussed above revolve around pooling and unitization, concepts unique to oil and gas. These concepts cannot be, and are not, changed by inapplicable law regarding the transportation of coal, not produced conjointly with coal from beneath the surface property, which is hauled across the surface property. The case before the Court is *not* a case of the Property being used solely for the benefit of neighboring mineral tracts; instead, the Property actually benefits from development *more* than any of the tracts with which it is unitized. *See* above, Statement of the Case, § I. This conjoint, simultaneous development of resources, in which the same activity benefits multiple properties simultaneously, is not – and due to the manner of coal's development cannot be – at issue in a case involving coal.

This distinction has been recognized for more than a century, by the highest court in the land. *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."); *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"). The cases that have expressly addressed the question now before this Court, in the oil and gas context, have explicitly noted that cases regarding coal and other solid minerals simply do not apply. *See, e.g., Deese*, 153 So.2d at 618 ("The mining of solid minerals has aspects essentially different from those involved in drilling and operating oil wells."); *Kysar*, 93 F.3d at 1278 ("In addition to these general

principles, we must consider the specific principles developed in the context of pooling, unitization, and communitization.")

In the Circuit Court Crowder/Wentz consistently attempted to distinguish the oil and gas cases addressing these issues because, they argued, the timing of the severance in those cases was dispositive. That was not, in fact, always a distinction, but even where it was, it was an irrelevant one; as long as the activity taking place was reasonably necessary the right to engage in that activity belonged to the mineral owner regardless of any conveyance of the surface and regardless of when that conveyance took place. *See* above, Argument § I.D. In contrast to Crowder/Wentz's irrelevant distinction of oil and gas cases, cases in the coal context are dispositively different from the question before this Court. Coal is not conjointly developed in the manner that oil and gas is, and therefore – unlike here – surface use to benefit a neighboring parcel's coal does not also benefit the parcel being used. The coal cases discussed by Crowder/Wentz in the Circuit Court do not involve the necessity of conjointly developing a mineral. Because conjoint development is at the heart of the analysis in this case and in every oil and gas case that decides these issues, the lack of any similar concept in the coal cases relied upon below by Crowder/Wentz negates any potential impact a coal decision may have here.

IV. Because EQT Had the Right to Take All the Actions it Took on the Property, EQT Was Neither a Trespasser Nor Unjustly Enriched.

Because EQT had the right to take the actions it took, it was not a trespasser or unjustly enriched.

A trespass is "an entry on another man's ground without lawful authority, and doing some damage, however inconsiderable, to his real property." *Hark v. Mountain Fork Lumber Co.*, 127 W. Va. 586, 592, 34 S.E.2d 348, 352 (1945) (citations omitted). A claim for unjust enrichment exists where "benefits have been received and retained under such circumstance that

it would be inequitable and unconscionable to permit the party receiving them to avoid payment therefore the law requires the party receiving the benefits to pay their reasonable value." *Realmark Developments, Inc. v. Ranson*, 208 W. Va. 717, 721-22, 542 S.E.2d 880, 884-85 (2000) (citations omitted). The rights granted by the Lease and acknowledged by the pooling amendment defeat both the trespass claim and the claim for unjust enrichment. *See* above. EQT had the right to utilize the Property in the manner that it did; therefore its entry on to that property was *with* "lawful authority," and EQT cannot be a trespasser. EQT's actions in developing the minerals beneath the Property and those adjacent properties with which it is pooled were proper; therefore it would not be "inequitable and unconscionable to permit" EQT to retain those benefits, and EQT was not unjustly enriched. The summary judgment orders entered by the Circuit Court on trespass and unjust enrichment should be reversed, and the case should be remanded with instructions to enter summary judgment for EQT on all claims.

CONCLUSION

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

Dated: January 29, 2018

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CERTIFICATE OF SERVICE

I hereby certify that on January 29, 2018 I caused the foregoing Brief of Petitioner EQT Production Company to be served by U.S. first class mail on the following counsel:

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