IN THE CIRCUIT COURT OF DODDRIDGE COUNTY, WEST VIRGINIA

MARGOT BETH CROWDER and
DAVID WENTZ,

Plaintiffs,

v. **Civil Action No. 14-C-64**
Judge Timothy L. Sweeney

EQT PRODUCTION COMPANY,

Defendant.

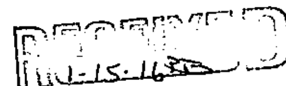
ORDER GRANTING PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT AND DENYING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

On December 17, 2015, came Margot Beth Crowder and David Wentz (collectively, "Plaintiffs"), by counsel David B. McMahon, David L. Grubb, and Kristina Thomas Whiteaker, and Defendant EQT Production Company ("Defendant" or "EQT"), by counsel Jonathan L. Anderson and Brian R. Swiger, for a hearing on: (a) Plaintiffs' Motion for Partial Summary Judgment; and (b) Defendant's Cross-Motion for Summary Judgment.

Following a full and complete review of the relevant evidence, an examination of the parties' motions and memoranda, an inspection of the Court file, an analysis of Rule 56 of the West Virginia Rules of Civil Procedure, a review of applicable case law, argument of counsel, and a thorough evaluation of the issues presented, the Court makes the following findings of fact and conclusions of law.

FINDINGS OF FACT

The facts pursuant to the pending motions are not in dispute. Accordingly, the Court FINDS as follows:



1. In 1901, Joseph L. Carr and his wife Bell Carr owned the surface and minerals in fee of a 351-acre tract in Doddridge County, Grant District, West Virginia.

2. By an agreement ("Carr Lease") dated August 5, 1901, and recorded in Deed Book 19 at page 140 in the Doddridge County Clerk's office, the Carrs entered into an agreement with EQT's predecessor in which they "granted, remised, leased and let [the same 351-acre tract] . . . for the sole and only purpose of mining and operating for oil and gas and of laying pipelines and of building tanks, stations and structures thereon to take care of the said products . . . for the term of ten years . . . and as long thereafter as oil or gas, or either of them, is produced therefrom by the party of the second part, its successors or assigns[.]"

3. EQT is the successor to the lessee of the Carr Lease, which is still in effect having been held by production from nine conventional vertical wells.

4. On November 30, 1936, R. L. McCulty and Elah D. McCulty conveyed "the surface only" of the same tract, with no further words expanding or limiting the meaning of those words, to Grace Lowther. The deed was recorded in Deed Book 96 at page 217 in the Doddridge County Clerk's office.

5. Plaintiffs are the successors to most but not all of Grace Lowther's surface interest.[1]

6. The aforementioned nine conventional vertical wells were drilled on the surface above the Carr Lease from 1910 through 1995.

7. On March 11, 2011, the lessors under the Carr Lease (the mineral owners) signed an amendment purportedly granting EQT the right to pool the Carr Lease with other lands.

8. In 2012, Plaintiffs were informed that EQT planned to use their surface lands to

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[1] During their marriage, Plaintiffs jointly owned three surface tracts overlying portions of the Carr Lease: Tracts C (51.26 acres), D (30.0 acres), and E (218.61 acres). Plaintiffs divorced in 2003. Pursuant to their divorce agreement, Mr. Wentz conveyed his interest in Tract E to Ms. Crowder. In turn, Ms. Crowder conveyed her interest in Tracts C and D to Mr. Wentz.

drill nine horizontal shale wells.

9. In response, Plaintiffs sent EQT a notice against entry letter advising EQT that it did not have the rights to burden the surface lands of Plaintiff Margot Beth Crowder and Plaintiff David Wentz to drill the wells.

10. Despite the notice against entry letter, EQT began clearing land and drilling wells in February of 2013.

11. It took EQT sixteen months to complete site preparation and finish drilling the nine horizontal wells, which were placed in production in June of 2014.

12. EQT states that 62.5% of the nine horizontal well bores are outside the Carr Lease, while 32.5% are within the boundary of the Carr Lease that underlies Plaintiffs' surface lands.[2]

13. After being warned not to do so, EQT nevertheless entered onto Plaintiffs' surface lands to drill into, frac, produce, and transport gas not only from the tract underlying Plaintiffs' surface lands, but also from five neighboring tracts (totaling 2,914 acres) using horizontal well bores.

14. Shortly before the instant lawsuit was filed, EQT sent Plaintiffs notice of their intention to drill three more horizontal shale wells on the same pad.

15. The producing, horizontal portions of the well bores of two of these three wells (as set out in the permit applications) are entirely outside the boundaries of the mineral tract underlying Plaintiffs' surface lands. The horizontal bore of one new well lies in between the horizontal bore of another new well and the mineral tract underlying Plaintiffs' property.

[2] While Plaintiffs' calculations, based on the plats EQT submitted with its well permit applications, result in a slightly higher percentage (75%) of wells outside the Carr Lease, this small difference is neither significant nor probative in the present case.

16. Although permits for two of the three new wells were issued, no activity has taken place on Plaintiffs' surface with respect to these permits. EQT now states that the three wells have been cancelled.

CONCLUSIONS OF LAW

Based on the foregoing findings, the Court CONCLUDES:

1. In *Celotex v. Catrell*, 477 U.S. 317, 324 (1986), the United States Supreme Court noted that summary judgment is mandated:

> [I]f the pleadings, depositions, answers to interrogatories and admissions on file, together with affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to summary judgment as a matter of law.

See W.Va.R.Civ.P., Rule 56(c); *see also Sias v. W-P Coal Co.,* 185 W. Va. 569, 408 S.E.2d 321 (1991).

2. More recently, the West Virginia Supreme Court of Appeals reiterated its position on summary judgment, and made the following instructive observation:

> Roughly stated, a genuine issue for purposes of West Virginia Rule of Civil Procedure 56(c) is simply one half of a trialworthy issue, and a genuine issue does not arise unless there is sufficient evidence favoring the non-moving party for a reasonable jury to return a verdict for that party. The opposing half of a trialworthy issue is present where the non-moving party can point to one or more disputed material facts. A material fact is one that has the capacity to sway the outcome of the litigation under the applicable law.

Syllabus Pt. 2, *Fayette County National Bank v. Lilly*, 199 W. Va. 349, 350, 484 S.E.2d 232, 233 (1997) (quoting Syllabus Pt. 5, *Jividen v. Law*, 194 W. Va. 705, 461 S.E.2d 451 (1995)).

3. The task of the trial court is not "to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249, 106 S.Ct. 2505, 2511 (1986).

4. Finally, the moving party has the burden of showing that there is no genuine issue

of material fact. *Aetna Cas. & Sur. Co. v. Federal Ins. Co.*, 148 W. Va. 160, 133 S.E.2d 770 (1963).

5. In the present case, the Court CONCLUDES that there are no genuine issues of material fact regarding Defendant's alleged liability to Plaintiffs on the trespass claim.

6. Plaintiffs contend that Defendant's conduct constitutes an unlawful trespass.[3] As a result, Plaintiffs seek summary adjudication as to liability on their trespass claim.

7. EQT, however, disputes Plaintiffs' trespass claims and contends that it is entitled to summary judgment.

A. Plaintiffs' Motion for Partial Summary Judgment

8. Trespass is defined as "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, 591-592, 34 S.E.2d 348, 352 (1945).

9. "In every case where one man has a right to exclude another from his land, the common law encircles it, if not enclosed already, with an imaginary fence. And to break such imaginary fence, and enter the close of another, is a trespass[.]" *Haigh v. Bell*, 41 W. Va. 19, 23 S.E. 666, 667 (1895) (citations omitted.)

10. As Judge Goodwin subsequently observed, "any intentional use of another's real property, without authorization and without a privilege by law to do so, is actionable as a trespass without regard to harm." *Rhodes v. E.I. DuPont de Nemours and Co.*, 657 F. Supp. 2d 751, 771

[3] In their Complaint, Plaintiffs assert two trespass theories. First, Plaintiffs maintain that EQT's use of Plaintiffs' surface to drill into and produce gas from neighboring mineral tracts constitutes a trespass. Second, Plaintiffs argue that horizontal drilling is not within the contemplation of the parties and, therefore, the use of horizontal drilling exceeds the scope of EQT's implied surface rights and constitutes a trespass. Plaintiffs' Partial Motion for Summary Judgment, and this Court's analysis of same, is limited to the first trespass claim.

(S.D.W. Va. 2009) (applying West Virginia law, quoting W. Page Keeton, et al., PROSSER & KEETON ON THE LAW OF TORTS § 13, at 70 (5th ed. 1984)).

11. In this regard, 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 for well pads, roads, and pipelines to drill into, and produce gas from, but only from, the mineral tract underlying their surface lands.

12. In fact, as noted previously, nine conventional vertical wells were drilled on Plaintiffs' surface property into the 351-acre tract underlying their surface lands before EQT appeared.

13. Plaintiffs contend that there is no implied right to any use of their surface lands for well pads, roads, and pipelines to drill into, and produce gas from, neighboring mineral tracts in the absence of a valid pooling agreement in the original lease or a later valid amendment.

14. In this regard, and 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.

15. However, Plaintiffs argue 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.

16. The Court agrees.

17. More specifically, the execution of the pooling amendment occurred after the severance of the ownership of the minerals from the ownership of the surface. At the time of the severance, the mineral owners did not obtain the right to use the surface tract for exploration and production from neighboring mineral tracts, and certainly did not obtain the right to place extra

burden on the surface to do so. Any such right remained with the severed surface lands.

18. Therefore, 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.

19. Based on the foregoing, 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).

20. In fact, no document signed by anyone other than Plaintiffs or their predecessors can expand Defendant's rights to use of the surface.

21. Importantly, the reasonable use doctrine relied upon by EQT only becomes relevant if the right to use the surface to bore into neighboring tracts was legally obtained or reserved in the first instance.

22. Since the Court CONCLUDES that no such right was ever obtained, no further inquiry regarding reasonable use is necessary.[4]

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[4] Moreover, and assuming *arguendo* that there is some form of implied right, such a right could only be exercised where there is no substantial burden on the surface owner. This was reaffirmed in an opinion authored by Justice Thomas McHugh in *Phillips v Fox*, 193 W. Va. 657, 458 S.E.2d 327 (1995) (an implied easement must not only be necessary, it must be exercised without any substantial burden to the surface owner):

> Finally in *Buffalo Mining*, we concluded that 'where implied as opposed to express rights are sought, the test of what is reasonable and necessary becomes more exacting, since the mineral owner is seeking a right that he claims not by virtue of any express language in the mineral severance deed, but by necessary implication as a correlative to those rights expressed in the deed.'
>
> Accordingly, we held, in Syllabus Points 2 and 3, respectively, of *Buffalo Mining*, supra:
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> > Where there has been a severance of the mineral estate and the deed gives the grantee the right to utilize the surface, such surface use must be for purposes reasonably necessary to extraction of the minerals.
> >
> > In order for a claim for an implied easement for surface rights in connection with mining activities to be successful, it must be demonstrated not only that the right is reasonably necessary for the extraction of the

23. Accordingly, and for the additional reasons set forth below, the Court CONCLUDES that EQT has no lawful authority to: (a) use Plaintiffs' land for drilling horizontal well bores into neighbors' mineral tracts; or (b) produce gas from those neighboring mineral tracts using Plaintiffs' surface lands.[5]

> mineral, but also that the right can be exercised without any substantial burden to the surface owner.

Id. at 665, 458 S.E.2d at 335 (citations omitted).

Here, EQT's drilling activities constitute a cognizable, material, additional servitude on Plaintiffs' surface lands. This issue is of a particular public policy concern to all West Virginia citizens who own surface land, particularly those who live on, farm, timber, or otherwise enjoy the benefits derived from such ownership. More specifically, the record reveals that EQT's drilling pad, which was cleared and flattened into a plateau at the top of the mountain on Plaintiffs' surface lands, is 19.7 acres. An additional twenty-two acres is on an adjoining tract to the north for a water impoundment, road, and pipeline, resulting in a total surface disturbance of forty-two acres.

Further, the record demonstrates that the drilling of just one new horizontal well on the pad required 10,900,000 gallons of water, which had to be trucked to the site. Additives to this water (used for frac'ing) included a friction reducer, biocide, scale inhibitor, hydrochloric acid, a gelling agent, an oxidizing breaker, and an enzyme breaker. The completion reports filed on July 10, 2014, by EQT for all nine of the horizontal wells indicate that EQT used a total of 1,852,811 pounds of sand. However, the 1962 conventional gas well, the 1990 conventional gas well, the 1991 conventional gas well, and the 1995 conventional gas well <u>together</u> used only 305,000 pounds of sand. That is approximately 16% of the sand used by the horizontal wells. Moreover, the Water Management Plans that EQT submitted to the DEP after drilling was completed showed that the total water usage (some of which may have been reused from processed flow back) by all nine of EQT's horizontal Marcellus Shale wells was ninety-five million gallons.

In addition, according to the "Plant-Wide Emission Summary" pages of EQT's application for an air permit, the horizontal Marcellus Shale gas well pad on Plaintiffs' surface lands has the potential to emit over ninety-two tons per year of volatile organic compounds ("VOCs"), approximately forty tons per year of other pollutants that are that are subject to National Ambient Air Quality Standards, 26,000 tons per year of greenhouse gases, and eight tons per year of hazardous air pollutants, all of which occur <u>after</u> the emissions are treated by the control equipment required by the State permit.

Lastly, the record shows that while the pad is currently operating, tanker trucks (some with HAZMAT warning placards) come to the pad every day, load up, and drive off down a road above the residence of one of the Plaintiffs in order to haul away the liquids that settle out of the gas as it is produced. The record also indicates that at least one truck runs almost every day (and several on most days).

[5] The analogous issue of pipeline laying illustrates that EQT's actions here constitute a trespass. Indeed, several of EQT's horizontal well bores were drilled from Plaintiffs' surface tract into a neighboring mineral tract for which E. H. Garrett and others are now the royalty owners. If, on the other hand, a vertical gas well was drilled on the surface lands above the neighboring Garrett mineral tract, and if that driller wanted to pipe the gas from that well to market by crossing the surface lands owned by Plaintiffs, the driller would have to obtain an easement or right of way from Plaintiffs to do so. Even if there was no other way to get the gas to market, EQT could not install a pipeline across Plaintiffs' surface lands without getting a right of way to do so. And while EQT has the right to do whatever is reasonably necessary to the surface lands above the E. H. Garret tract in order to produce gas from that tract, EQT does <u>not</u> have the right to put a pipeline across a *neighboring* surface tract without first obtaining a right of way to do so. The mineral owner's right to use the surface lands above its tract does <u>not</u> convey the right to use the surface above

24. The West Virginia Supreme Court has already stated, albeit in *dicta*, agreement with this Court's conclusions in *King v. South Penn Oil Co.*, 110 W. Va. 107, 157 S.E. 82, 84 (1931): "[T]he [reasonable use] rule quoted applies to the mining and production of minerals from a given tract of land, and does not contemplate the use of such tract in connection with the production of minerals from another and different tract[.]"

25. Moreover, this Court's conclusions and the Supreme Court's statement in *King* are consistent with West Virginia mineral law in the coal context.

26. As early as 1883, the West Virginia Supreme Court of Appeals held that the right to use the surface of one tract to extract coal from a neighboring tract has to be specially stated in a conveyance – i.e., it is not implied. *Findley v. Armstrong,* 23 W. Va. 113 (1883).

27. In *Findley*, a contract for sale of coal under a tract of land was signed that used the terms "the coal and coal-privileges." To carry out the contract, a deed had to be prepared by the buyer and signed by the seller. The buyer inserted a provision in the proposed deed that would have allowed the surface of the tract subject to the contract to be used for removing coal from neighboring "coterminous" coal tracts.

28. The *Findley* Court held that inserting that provision in the deed went beyond the terms of the contract. The grant of the right to use the surface for production of neighboring mineral must be specifically stated.

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neighboring surface tracts for transport to market. Therefore, if EQT does not have the right to use Plaintiffs' surface lands for a pipeline to produce and transport the gas from the E. H. Garrett mineral tract to market, then EQT does not have the right to use Plaintiffs' surface lands for a well pad to do so (or, in addition, to drill and frac the well bores in the neighboring mineral tract). Moreover, the impact on Plaintiffs' surface lands related to installation of well pad to accommodate horizontal drilling activities is likely more disruptive than a pipeline. Yet, despite the fact that installation of a pipeline (absent Plaintiffs' consent) would clearly constitute a trespass, EQT maintains that it has a right to install a significantly larger well pad (to accommodate the horizontal drilling activities) without Plaintiffs' prior approval (and without additional compensation). In light of the foregoing, this position is not tenable.

29. Similarly, in Syllabus Point 7 of *Armstrong v Maryland Coal Co.*, 67 W. Va. 589, 69 S.E. 195 (1910), the Court held that a purchaser, "may not . . . demand as mining rights the right to remove over, through and under the lands in which the coal conveyed is situated coal thereafter acquired by the purchaser."

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

> In the absence of a right of arising out of contract, the Corporate Defendant has no right to use the surface of the 1-acre tract of land for transporting and processing coal admittedly mined from lands adjoining the 16-acre tract. *See Findley v. Armstrong*, 23 W. Va. 113, 122; 48 A.L.R 1406, 58 C.J.S., Mines and Minerals, §158, subparagraph (D); 36 Am. Jur. Mines and Minerals, SCCS. 177, 180.

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

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

32. Further, this principle is consistent with, and supported by, legal authority from other jurisdictions in the coal context.

33. For example, the Kentucky Court of Appeals denied a coal lessor the right to use the surface for operations related to the production of coal from neighboring coal leases. *Moore et al. v. Lackey Mining Co.*, 215 Ky. 71, 284 S.W. 415 (1926). The court specifically held: "The lease in question granted . . . neither expressly nor by implication any such right." *Id.* at 418, citing

40 C.J.S. § 612, at 1012.[6]

34. Therefore, while EQT clearly has the right to do what is necessary[7] to Plaintiffs' surface land in order to drill well bores into the underlying oil and gas reservation to produce gas from its acreage, it does not have the legal right (absent consent) to drill from Plaintiffs' surface lands horizontally into neighboring mineral tracts.

35. In the context of oil and gas drilling activities that are at issue in this case, this Court's conclusions are also consistent with, and supported by, ample legal authority from other jurisdictions.

36. In *Robinson v. Robbins Petroleum Corp. Inc.*, 501 S.W.2d 865 (Tex. 1973), several tracts totaling 221 acres were leased in 1943 to Robbins Petroleum Corporation by the then fee owner. Oil wells were drilled and the lease held in force by production. In 1964, the surface owner purchased 80 acres of the surface overlying the lease. After execution of the deed to the surface owner, all or part of the 221-acre lease was included in three pools/units for water flooding.[8] The three units were from 1,295 acres to 1,807 acres. Robbins Petroleum then began using a former oil well on the surface owner's land to produce water. The water was taken to some wells elsewhere that were to serve as injection wells and forced through the oil-bearing formation to be produced from other wells.

37. In this context, the Texas Supreme Court, citing secondary authority, held:

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

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

[8] Water flooding is a secondary recovery technique whereby water is pumped down some wells, flushed through the oil bearing formation, and then produced through other wells.

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

Id. at 867-868.

38. While the Texas Supreme Court's ruling involved secondary recovery and not horizontal drilling, the basic legal principle is the same.

39. Likewise, the United States Circuit Court of Appeals for the Ninth Circuit, on appeal from a Montana District Court decision, held that the surface owner was entitled to extra damages "done" to his land because the driller used the surface owner's land to produce oil and gas from neighboring mineral lands. *Franz Corporation v Fifer*, 295 F. 106, 107-108 (9th Cir. 1924).

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

41. A number of general treatises on oil and gas law concur with this Court's conclusions.

42. In one of the most thorough treatments of the subject, the authors state:

> The usual express easements and implied surface easements of a mineral owner or

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

Howard R. Williams, et al., *Conduct of Operator Injurious to Others*, OIL AND GAS LAW, §§ 218.4 and 218.6 (emphasis added).

43. The author of a second treatise, Professor Kuntz, notes: "If the title to all minerals have been severed, the mineral owner is entitled to the use of the surface for the purpose of extracting minerals from such land . . . [s]uch mineral owner should not have the right to use the surface for the other purposes, such as the purpose of removing minerals from another tract of land." Eugene Kuntz, A TREATISE ON THE LAW OF OIL AND GAS, § 12.8.

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

45. Other authorities likewise articulate the accepted principle. "[A]bsent broader surface use provisions in the original severance instrument or effective pooling or unitization, surface use by the mineral owner in connection with the exploration of exploitation of minerals on

other lands is beyond the scope of the mineral owner's right of reasonable use at the common law." Owen L. Anderson & Eugene Kuntz, *Surface "Trespass": A Man's Subsurface Is Not His Castle*, 49 Washburn L. Rev. 247, 264 (2010).

46. Further, an article in the Eastern Mineral Law Foundation (now the Energy and Mineral Law Foundation) followed suit. Specifically, the authors[9] wrote: "[C]ase law holds generally that the surface of one tract may not be used for mineral production from an adjacent tract without permission of the surface owner." Rex Burford and John H. Johnston, *Legal and Developmental Issues Involving Horizontal Drilling in the Appalachian Basin.* EASTERN MINERAL LAW INSTITUTE 21 (1991) (footnote omitted).

47. Finally, an exhaustive examination of the issue from the West Virginia Law Review concludes:

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

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

48. EQT argues that its authority to use Plaintiffs' surface lands for the drilling of horizontal bore holes in neighboring mineral tracts arises from EQT's implied right to use Plaintiffs' surface to explore for and produce the minerals from the underlying tract.

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[9] The article was written by two lawyers: Rex Burford, who was Executive Director of the West Virginia Oil and Natural Gas Association from 1976 to 1991, and John Johnson, who was head of the West Virginia Office of Oil and Gas from 1985 to 1989.

49. The Court rejects this argument.

50. While the "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, no relevant case in this jurisdiction has extended this implied right beyond the borders of the mineral tract underlying the surface tract.

51. The leading case on this issue is *Squires v. Lafferty*, 95 W. Va. 307, 121 S.E. 90 (1924), and its progeny. *Squires* concerned the surface rights to a 137-acre tract where the mineral owner owned the underlying coal. The Court held that the mineral owner, by virtue of owning the underlying mineral, also held the right to the use the surface as "fairly necessary" to extract those minerals. (*Id.* at 90-91.)

52. Notably, the *Squires* Court articulated the rationale for its holding: "This rule is based upon the principle that, when a thing is granted, all the means to obtain it and all the fruits and effects of it are also granted." (*Id.*)

53. In *Squires*, therefore, the "thing granted" was the underlying coal, and the coal owner possessed a right to obtain such underlying coal. *Squires* offers no support for any surface rights beyond the mineral boundaries granted; the rationale is simply that there must exist a "means to obtain" the mineral granted by the deed's clear language.

54. In the case *sub judice*, the "thing granted" is the underlying oil and gas. And using current technology, the underlying mineral tract can be reached from a gas well drilled on a well pad constructed a full mile outside of the boundaries of the surface. There is no principle, in *Squires* or elsewhere, that creates surface rights to produce and transport minerals from other tracts across the surface when such rights are not granted in the deed.

55. Accordingly, *Squires* offers no support for EQT's argument that the deed can be supplemented by implied terms that negate express terms.

B. Defendant's Motion for Summary Judgment

56. The thrust of EQT's dispositive motion rests on the premise that the use of Plaintiffs' surface to produce minerals from neighboring mineral tracts is "reasonable" and "necessary."

57. However, as noted above, the reasonable use doctrine does not come into play until and unless EQT has a legally obtained right to use the surface to bore into neighboring tracts.

58. Pursuant to the Court's previous conclusions, *supra*, no such right was ever obtained by EQT.

59. While a mineral owner clearly has an implied right to use the surface to produce minerals from an underlying mineral tract, there is no implied right regarding neighboring mineral tracts.

60. In terms of EQT's argument that it cannot produce gas from the mineral tract underlying Plaintiffs' surface absent pooling, the Court notes that at least a portion of the existing horizontal wells are doing just that.[10] In addition, whether this is true or not presents a genuine issue of material fact (and not a question of law). In the present context, and based on the Court's previous conclusions, this issue is neither relevant nor ripe.

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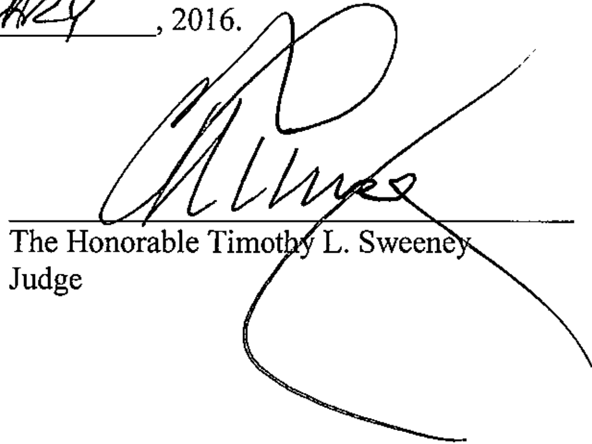
[10] EQT's position is based on an assertion that it is only economical to drill to the Marcellus Shale if long horizontal well bores are used, and the wells are drilled from the Plaintiffs' surface. This Court agrees with the Supreme Court of Alabama that, "It is not the role of this Court to disturb existing property rights by redefining existing property law in order to promise economic efficiency." *NCNB Texas Nat'l Bank, N.A. v. West,* 631 So.2d 212, 227 (Ala. 1993).

WHEREFORE, for these and other reasons stated on the record, the Court **GRANTS** Plaintiffs' Motion for Partial Summary Judgment and **DENIES** Defendant's Motion for Summary Judgment.

The Court notes the objections of counsel as to those matters adverse to their respective interests. The Clerk is directed to send certified copies of this Order to all parties or counsel of record.

Entered this 19th day of February, 2016.



The Honorable Timothy L. Sweeney
Judge