

## Enter Carefully:

*West Virginia Supreme Court Defines Scope of Implied Surface Use Rights for Mineral Development*

### INTRODUCTION

The West Virginia Supreme Court of Appeals' recent decision in *EQT Production Company v. Crowder, et al.*, addresses the scope of implied surface use rights available to a mineral estate owner for development of the mineral estates underlying the surface or which may be developed from neighboring properties. Specifically, the *Crowder* court was required to balance longstanding West Virginia mineral law allowing a mineral owner or its lessee to use so much of a surface estate as may be reasonably necessary to develop the underlying mineral estate with concepts of trespass to determine if a mineral owner or its lessee could develop foreign minerals from neighboring properties through operations conducted on the surface overlying the mineral estate.

### FACTS

Landowners challenged an oil and gas operator's use of the landowners' surface estate to drill horizontal wells into adjoining and neighboring properties. The Landowners' predecessor-in-interest leased the oil and gas underlying a 351-acre tract. The surface estate and oil and gas estate were severed after the lease, with the Landowners' predecessor acquiring ownership to a portion of the surface estate. The lease was developed by three conventional oil and gas wells before the surface and oil and gas estate were severed and six conventional oil and gas wells after the severance of the surface and oil and gas estates.

Before conducting horizontal drilling operations, the oil and gas operator obtained a pooling modification from the current owners of the oil and gas estate to allow the lease to be jointly developed with neighboring properties. However, the Landowners informed the oil and gas operator that the Landowners believed the operator could only use the Landowners' surface to develop the oil and gas estate underlying the Landowners' surface. Further, the Landowners advised the oil and gas operator not to enter onto the Landowners' surface for oil and gas operations. Notwithstanding Landowners' warning, the oil and gas operator commenced construction of a well pad and other infrastructure for its operations on the Landowners' surface. The oil and gas operator then drilled nine horizontal wells from the Landowners' surface, developing the underlying oil and gas estate and the oil and gas estates of neighboring properties.

### PROCEDURAL HISTORY

The Landowners sued the oil and gas operator and claimed that the oil and gas operator's lease did not allow the operator to develop adjoining and neighboring properties from the Landowners' surface estate without Landowners' consent. The circuit court entered summary judgment against the oil and gas operator, finding that the operator committed trespass by using the Landowners' surface estate to drill into adjoining properties without the Landowners' consent. The circuit court found that the oil and gas operator only had an implied right to drill into and produce gas from the oil and gas estate underlying the Landowners' surface.

### ANALYSIS

Traditionally, application of the "reasonably necessary" doctrine in West Virginia mineral law recognized that a mineral estate owner has the implicit right to use the surface estate overlying the minerals in a reasonable manner to access and remove the minerals. The *Crowder* court noted that a mineral owner is required to demonstrate

that a proposed surface use is a reasonably necessary method to extract the mineral, and the proposed surface use will not create a substantial burden on the surface owner. Additionally, prior West Virginia precedent and other persuasive authorities cited by the Court limited the implied surface use right to development of minerals underlying the burdened surface absent an express agreement with the surface owner granting broader rights.

The *Crowder* court rejected the oil and gas operator's argument that its pooling amendment modified the lease to enable the operator to use the surface estate for development of neighboring mineral estates. In particular, the court interpreted the severance deed, splitting ownership of the surface estate and mineral estate, as reserving to the surface owner the exclusive right to negotiate matters relating to surface use under the lease.

## CONCLUSION

The *Crowder* court ultimately held that, absent an express right from the surface owner, a mineral owner's implied surface use rights are limited to those uses that are reasonable and necessary to develop minerals underlying the surface. A mineral owner's implied surface use rights do not allow a mineral owner or its lessee to utilize the overlying surface for mining or drilling operations on other lands.

Importantly, the court's decision did not address whether the operations actually used by the oil and gas operator satisfied the "reasonably necessary" doctrine and did not evaluate whether the oil and gas operator's surface burden was "substantial" under the Court's "reasonably necessary" doctrine. The *Crowder* court's holding does not limit or restrict drilling methods chosen by industry for development of minerals.

The specific issue contested in *Crowder* may have been better addressed by the Legislature or relevant government agency, with input from interested parties. However, it is unlikely that the *Crowder* court's decision will drastically impede oil and gas drilling activities because many West Virginia operators already obtain surface use agreements from surface owners before commencing drilling operations.

## ABOUT THE AUTHOR



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