



Horizontal Drilling And Subsurface Trespass

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Horizontal and directional drilling has become more prevalent in the oil and gas industry, and so too have some of the legal challenges that come with it. According to the Baker Hughes Rotary Rig Count, as of May 7, 2010, there were 1,492 active rigs in the United States. Of those 1,492 rigs, 764 (51%) were drilling horizontal wells. Another 230 rigs (15%) were drilling directional wells. One of the challenges facing exploration and production companies and operators is how to address private, unleased or uncommitted tracts of land that will be intersected by the horizontal wellbore.

While the laws and regulations directly addressing horizontal drilling are relatively new and still developing, courts and the state agencies charged with regulating the industry have applied traditional theories in dealing with traversing unleased tracts of lands. The law is clear that any intentional or unintentional entry and traverse of a wellbore through an unleased or uncommitted tract of land will likely result in a claim of common law trespass, commonly referred to as "subsurface" trespass. Recent cases, however, have held that through a state's police power, basic property and contract rights can be modified by valid pooling orders issued by a state's oil and gas regulatory authority.

Case law and authorities from a number of jurisdictions differentiate between the bottoming of a well on the leased property that drains minerals from another property, (rule of capture), and a deviation, intentional or unintentional, that bottoms the well on another's property (common-law trespass). In a 2008 Texas case, the issue on appeal was whether subsurface hydraulic fracturing of a natural gas well extending into another's property was a trespass for which the value of gas drained could be recovered as damages. The court held that the rule of capture bars recovery of such damages. *Coastal Oil & Gas Corp. v. Garza Energy Trust*, 268 S.W.3d 1, 14 (Tex. 2008). The court reached this result by explaining that the rule of capture gives a mineral rights owner title to the oil and gas produced from a

lawful well bottomed on the property, even if the oil and gas flowed to the well from another owner's tract.

The Texas court explained that the owner whose property was intruded by the fracturing could protect against drainage by drilling his own well. However, the court continued, "[t]he gas produced through a deviated well does not migrate to the wellbore from another's property; it is already on another's property. One cannot protect against drainage from a deviated well by drilling his own well; the deviated well will continue to produce his gas. The justifications for the rule of capture do not support applying the rule to a deviated well." *Coastal Oil & Gas Corp.*, 268 S.W.3d at 14. The court also relied on public policy reasons for not imposing liability for hydraulic fracturing. The court worried that by imposing liability, operators and those involved in the fracturing would not do it if held liable for trespass, which in turn would limit the amount of recoverable natural resources. These same public policy reasons do not exist in the case of horizontal wells.

In *Continental Resources, Inc. v. Farrar Oil Co.*, (*Continental*), the court explained the rule of capture stating:

[c]apturing oil and gas that migrated from another's land was lawful, but the property law of trespass precluded drilling into the subsurface of another's land to extract oil and gas. A subsurface trespass remains defined that way: The bottoming of a well on the land of another without his consent. Subsurface trespass results from the drilling of a "slant" or directional well, which may be intentional or inadvertent. Since subsurface trespass is as wrongful as surface trespass, the same liability attaches, viz., the damages in the amount of the value of the oil produced.

559 N.W.2d 841, 844 (N.D. 1997).

In *Continental*, Farrar Oil Company was the working interest owner in a quarter section of land. Continental had sought to voluntarily pool all of the interests in the section in order to drill a horizontal well. When Farrar declined, Continental petitioned the North Dakota Industrial Commission to force pool Farrar's interest, which it did. After the well was drilled, Farrar brought an action against Continental for common-law trespass. The court noted that through the state's police powers, spacing and pooling orders modify the law of trespass and interest owners whose interests are force pooled cannot maintain an action for trespass by asserting a concept of individual ownership. *Id.* at 845-846.

Most, if not all, oil and gas producing states have adopted conservation legislation which give the state's regulating authority the power to pool separately owned interests and establish drilling units to prevent waste and protect correlative rights. For example, Colorado's legislation states that "[t]o prevent or to assist in preventing waste, to avoid the drilling of unnecessary wells, or to protect correlative rights, the commission . . . has the power to establish drilling units of specified and approximately uniform size and shape covering any pool." Colo. Rev. Stat. § 34-60-116(1). Subsection (6) of that same statute states that "[i]n the absence of voluntary pooling, the commission . . . may enter an order pooling all interests in the drilling unit for the development and operation thereof." Colo. Rev. Stat. § 34-60-116(6).


The statutes from Montana, New Mexico, Utah, and Wyoming all have almost identical language to that of Colorado. It is this type of legislation that courts have relied upon to effectively change the common law rule of trespass as it relates to pooling orders.

As illustrated by the *Continental* case, courts have held that pooling orders may supersede the common-law rule of trespass. Similar to the North Dakota court's ruling upholding the Industrial Commission's authority to exercise the police powers of the state in *Continental*, other jurisdictions have upheld their respective regulating authority's power to modify contract and property rights. One Wyoming court noted that the Commission "has jurisdiction and authority over all persons and property, public and private, necessary to effectuate the purposes and intent . . . of the [Oil and Gas Conservation] Act." *Union Pacific Resources Co. v. Texaco, Inc.*, 882 P.2d 212, 222-23 (Wyo. 1994). The Wyoming court further stated that, "[t]he Commission exercises the police power of the State of Wyoming when it issues its orders. Contract rights and property rights are subject to a reasonable exercise of police power." *Id.* at 223 (citing *Big Piney Oil & Gas Co. v. Wyoming Oil & Gas Conservation Com'n*, 715 P.2d 557, 563 (Wyo.1986); *Bulova Watch Co. v. Zale Jewelry Co. of Cheyenne*, 371 P.2d 409, 417 (Wyo.1962); *Delatte v. Woods*, 94 So.2d 281, 287 (La. 1957); *Superior Oil Co. v. Foote*, 59 So.2d 85, 93 (Miss. 1952)).

The Louisiana Supreme Court reached the same result in a 1986 case. In that case, the plaintiff brought an action for subsurface trespass for a well that was bottomed on his unleased tract of land that had been included in a compulsory unit. Although not a horizontal well, the surface location of the vertical well was near his property boundary but the well bore unintentionally deviated and was bottomed in his tract. The question considered by the court was, "whether the formation of a compulsory unit . . . affects the generally applicable principles concerning ownership of property and/or alters the concept of trespass beneath the surface owner's tract." *Nunez v. Wainoco Oil & Gas Co.*, 488 So.2d 955, 959 (La. 1986). The Louisiana Supreme Court

held, "when the Commissioner of Conservation has declared that landowners share a common interest in a reservoir of natural resources beneath their adjacent tracts, such common interest does not permit one participant to rely on a concept of individual ownership to thwart the common right to the resource as well as the important state interest in developing its resources fully and efficiently." *Id.* at 964.

With the role that horizontal drilling will continue to play in the future of our industry, companies will increasingly be required to deal with the legal challenges that come along with it. There are a number of risks associated with drilling through or near an unleased or uncommitted tract of land with a horizontal well, *i.e.*, common law trespass and/or violation of the rules of the state's regulating authority. However, courts have been willing to uphold orders issued by the state's appropriate authority as a reasonable and proper exercise of the state's police power and have treated these orders as a modification of individual property and contract rights.



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