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Federal Judge Rules That "Fracking" into Neighboring Tracts Is a Trespass

(Charleston, W.Va.) Mineral owners should know that a driller who, without a proper lease, "fracks" into their mineral tract from a well bore on a neighboring mineral tract is trespassing, and that driller might be made to pay for the total value of the gas obtained that way, according to the West Virginia Surface Owners' Rights Organization (WV-SORO). The rule of capture applies if the mineral owner's gas migrates to a well bore on a neighboring tract through pre-existing natural porosity and permeability, and the driller next door does not have to pay for that. However, according to a ruling by a federal judge last year, it is unlawful for a driller to use a horizontal well bore in one mineral tract to inject hydraulic fracturing fluid into, and so take gas from, a neighboring tract without an appropriate lease to the neighboring tract.

District Court Judge John Preston Bailey issued the ruling in April 10, 2013. On July 30, the same year, the judge entered an order stating, "The parties have informed this court that all matters in controversy have been settled. . ." and granted a motion by the parties to "vacate" the ruling. The vacated District Court ruling is still available to the public on PACER and private legal research services and is citable for it persuasive weight. Since it was not an appeals court decision, vacating the ruling only has an effect on the original parties to the case. So WV-SORO wants people to be aware of its existence, and understand its implications, and know that the opinion still counts for something.

The ruling was made by a U.S. District Court judge in the Northern District of West Virginia and therefore is not precedent that other courts would have to follow, as it would be if it were a ruling of a state or federal appeals court. However, there is no appeals court ruling that would bind a West Virginia court to a different ruling, and having a U.S. District Court judge make the ruling will be persuasive to any other judge in the state.

That is particularly true, according to WVSORO, because the Judge said, "[T]his Court finds, and believes that the West Virginia Supreme Court of Appeals would find, that hydraulic fracturing under the land of a neighboring property without that party's consent is not protected by the 'rule of capture,' but rather constitutes an actionable trespass." *Stone et al. vs. Chesapeake Appalachia, LLC et al.* , No. 5:12-CV-102, PACER Doc 41, 2013 WL 2097397 (N.D.W.Va., April 10,2013)

According to David McMahon, a lawyer and co-founder of WV-SORO, "The ruling would help mineral owners, particularly small mineral landowners, in two ways. First, mineral owners should not allow their arms to be twisted by landmen into signing a lease, or an unfavorable lease, by telling the mineral owner that the driller will take the mineral owner's gas even if they don't sign the lease. Moreover, if mineral owners who were told that and as a result did sign leases with unfavorable terms, they might be able to sue."

"Second," McMahon continued, "the ruling would help mineral owners if a driller 'fracked' into their mineral tract when the mineral owner had not signed a lease at all or had not signed a lease or an amendment to a lease that contains a "pooling" clause. If there was no lease, or if there was a lease that does not have a pooling clause

and no pooling amendment has been signed, then those mineral owners could sue to be paid by the driller for maybe the full value of the gas removed -- not just the royalty percent."

In the case before the judge, Chesapeake Appalachia, LLC and Statoil USA Onshore Properties, Inc. had a lease for the tract where the well bore was going to be located, plus another old lease for the neighboring tract owned by Marion Stone. However the lease for Ms. Stone's neighboring tract did not have a pooling provision that would have allowed the tracts to be developed together by horizontal drilling and hydraulic fracturing. Chesapeake and Ms. Stone did not come to an agreement to amend the lease to add in a pooling clause. Chesapeake drilled anyhow and fractured a horizontal well bore that ran only "tens of feet" away from the boundary of Ms. Stone's tract. Chesapeake claimed that the "rule of capture" made it legal for them to take the gas that came to their well bore as a result of "fracking" into the neighboring tract without paying royalty for it, relying on a Texas Supreme Court decision *Coastal v Garza*. Chesapeake asked the judge to dismiss the Stone's case. U.S. District Court Judge John Preston Bailey refused to dismiss the case. The judge instead said that Chesapeake had trespassed and cited a dissent filed by several of the Texas Supreme Court justices in the *Coastal* case.

According to the West Virginia judge's ruling, "The Garza [majority] opinion gives oil and gas operators a blank check to steal from the small landowner. Under such a rule, the companies may tell a small landowner that either they sign a lease on the company's terms or the company will just hydraulicly fracture under the property and take the oil and gas without compensation. In the alternative, a company may just take the gas without even contacting a small landowner. . . . [T]his Court simply cannot believe that our West Virginia Supreme Court would permit such a result."

The rule of capture, the judge reasoned, was developed as a rule of necessity near the turn of the Twentieth Century primarily as a rule of necessity where gas inevitably migrates on its own from neighboring tracts to the well bore and was difficult to measure. It does not apply where the driller trespassed onto neighboring property using artificial means to stimulate the flow of gas from neighboring tracts.

"We have been saying all along that this is what the law is, but there were no court decisions in West Virginia stating that 'fracking' would be a trespass, just that poorly reasoned four to three majority opinion against us from the Texas Supreme Court," said McMahon of WV-SORO. "Now a Federal District Court Judge has issued an opinion that agrees with us and the Texas court's three judge minority about what the West Virginia Supreme Court would say if it had the chance. The opinion is still public record and it can be cited to persuade other courts, and we think that mineral owners will be able to use the opinion to persuade other judges in other cases and on appeal." One-third of WV-SORO's members also own the minerals under their land -- though often subject to old outdated "standard" leases with low royalties and no pooling clauses, according to McMahon.

"It is difficult getting good case decisions to rein in the industry's abusive practices," said McMahon. "When we have a good decision in our favor, or even just a good case pending, the industry offers enough money to get the plaintiffs to settle. When that happens, the industry can still get away with saying that the law is what the industry wants it to be, and use that to take advantage of citizens they deal with. People need to talk to a knowledgeable lawyer in any dealings with industry. People pay for homeowner's insurance and car insurance in case of a fire or wreck. They should think of paying a lawyer as insurance to protect themselves from industry abuses -- at least until we get some favorable decisions from our appellate courts."

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