

## COURTS RULE FOR OIL AND GAS DEVELOPERS IN CONTAMINATION CLAIM SUITS

BY: HODGSON RUSS LLP

One unsurprising result of the well published opposition to the use of fossil fuels, and especially to “fracking” (as misspelled by the press and antis), has been increased attention on the oil and gas industry from plaintiffs’ law firms. Their attention has not been limited to unconventional oil and gas activities, as four recently concluded, unsuccessful suits involving conventional wells demonstrate. In separate cases, suits claiming property damage and personal injury from nearby gas wells were rejected at the summary judgment stage, avoiding costly trials. When a Court grants a motion seeking summary judgment, the Court is determining the outcome of a case based on available evidence and applicable law, and concluding there are no remaining issues for which a trial is needed.

In the first lawsuit, the plaintiffs claimed that U.S. Energy Development Corporation and Universal Well Services, Inc., by their drilling activities, caused barium to enter the plaintiffs’ water well, resulting in adverse medical conditions. Barium is a naturally occurring alkaline earth metal. It can be found in many products and is used as a component in drilling muds. Jessica Copeland of Hodgson Russ LLP on behalf of U.S. Energy and Goldberg Segalla LLP on behalf of Universal obtained summary judgement dismissing all of plaintiffs’ claims. Their summary judgment motion relied on the affidavit of U.S. Energy’s expert, who concluded that the barium present in the plaintiffs’ water occurred naturally. Before reaching this conclusion, the expert studied the plaintiffs’ claim, tested their water, and studied the geology of the area, including the aquifer to which the water well that feeds the plaintiffs’ home is drilled. The plaintiffs also submitted an expert report, but without an accompanying affidavit by the alleged expert. The Court held that the plaintiffs failed to adduce evidence sufficient to raise any triable issue of fact. The court emphasized that the plaintiffs’ expert report had no probative force, since it was speculative and unsupported by any evidentiary foundation.

In the second case Ms. Copeland successfully defended U.S. Energy in an action for trespass, negligence, and nuisance. Here, the plaintiffs alleged that U.S. Energy’s drilling activities

on adjacent land caused iron bacteria to enter into the plaintiffs’ water well, resulting in damage to their home and personal injury. Plaintiffs claimed that U.S. Energy was liable for the alleged contamination of the plaintiffs’ well, arguing that their water had always been good and clean until U.S. Energy commenced drilling activities. However, the report of U.S. Energy’s expert showed that iron bacteria contamination occurred naturally, at least as early as the 1990s, during periods of drought. The Court held that U.S. Energy, through its expert and the supporting legal arguments, established a prima facie case, requiring dismissal, which the plaintiffs failed to rebut. The Court held that the plaintiffs could not support a trespass claim based on contaminated ground water, as a matter of law, since ground water is the property of the state rather than a private individual. On the plaintiffs’ negligence and nuisance claims, the court held that the plaintiffs’ speculative assertions were insufficient to establish a causal link between U.S. Energy’s drilling and the alleged contamination.

The third and fourth lawsuits were related cases against Ardent Resources, Inc. and the landowner on whose property Ardent conducted drilling operations. The suits involved plaintiffs’ claims that construction of a wellsite and access road caused plaintiffs’ property to be inundated with floodwater, debris, and contaminants.

On behalf of Ardent, Charles Malcomb of Hodgson Russ LLP successfully argued that the plaintiffs proffered no admissible evidence from which a reasonable jury could infer that the defendants caused the alleged flooding on their property. The evidence that the plaintiffs tendered included deposition testimony by one of the plaintiffs, wherein he opined that there had been an increase in water on the plaintiffs’ land which was caused by the construction of the wellsite and access road and related activities. The plaintiffs also submitted a letter from the District Manager of the Wyoming County Soil and Water Conservation District (“WCSWCD”), which suggested measures

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|-----------------------|---------------------------|
| 716-372-0395          | ALSO ADMITTED IN:         |
| 716-372-0446 (F)      | PENNSYLVANIA AND COLORADO |
| <b>JOHN H. HEYER</b>  |                           |
| ATTORNEY AT LAW       |                           |
| P.O. Box 588          | EXCHANGE NATIONAL         |
| OLEAN, NEW YORK 14760 | BANK BLDG.                |

|                                   |                         |
|-----------------------------------|-------------------------|
| <b>John C. Currie, P.E.</b>       |                         |
| President                         |                         |
| <b>Oakridge Engineering, P.C.</b> |                         |
| Petroleum Engineering Specialists |                         |
| Cell: (585) 727-6202              | 340 Oakridge Drive      |
| Office: (585) 342-7815            | Rochester, NY 14617 USA |
| Email: jcurrie@rochester.rr.com   |                         |

COURTS RULE...CONTINUED

that Ardent could implement to address plaintiffs' drainage concerns. Ardent provided an expert's report showing that the wet conditions on plaintiffs' properties existed prior to any activities by Ardent and that the measures implemented by Ardent, which were different than those suggested by the WCSWCD, actually diminished the flow of water to plaintiffs' lands. Further, Mr. Malcomb provided excerpts from the plaintiffs' deposition testimony showing that they had not suffered any damages. The Court ruled that the allegations in the plaintiffs' deposition testimony and the recommendation by the WCSWCD manager lacked probative value in that they were speculative and not based on scientific analysis of empirical data. However, the expert report submitted by Ardent was based on analysis and data, and required an expert response. The Court held that the plaintiffs' failure to counter the expert findings of the defendants' expert, by submitting a contrasting opinion from a comparable expert, warranted summary

judgment on behalf of Ardent and the landowner.

These cases demonstrate that negligence, nuisance, and trespass claims against oil and gas companies require expert testimony and show that real science can triumph over conjecture and unfounded allegations. Appropriate experts were identified, and facts and deposition testimony were used to demonstrate that no triable issue of fact existed and that judgment for the defendants was warranted as a matter of law, without a trial. Proper use of expert witnesses was critical to defending these lawsuits successfully, in a cost-effective manner. 



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P.O. BOX 330  
WELLSVILLE, NY

585.593.4760



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