

Court of Appeals Issues Significant Mineral Trespass Opinion Upholding Multi-Million-Dollar Future Damages Award

By Emily Anglewicz & David Wigham

On January 18, 2023, in *TERA, LLC v. Rice Drilling D, LLC, et al.*, --- N.E.3d ----, 2023-Ohio-273, the Seventh District Court of Appeals issued a key decision concerning mineral trespass law in Ohio. The court of appeals upheld the trial court's summary judgment decisions in favor of the landowner, Plaintiff TERA, LLC, and against the producers, Defendants Rice Drilling D, LLC and Gulfport Energy Corporation, on the issue of liability and bad faith trespass. The Court additionally upheld a sizable future damages award to TERA following a jury trial on damages. The decision by the court of appeals included holdings on important and current topics in Ohio oil and gas law including the standard for good faith / bad faith trespass and the proper calculation of mineral trespass damages.

The dispute in *TERA* centered on two oil and gas leases in which TERA's predecessor (and sole member) Thomas Shaw leased to Rice Drilling D "all the oil, gas minerals and their constituents (not including coal) in the formations commonly known as the Marcellus Shale and the Utica Shale" underlying 271 acres of property in Belmont County, Ohio. The leases further reserved to the lessor "all formations below the base of the Utica Shale." Defendant Gulfport Energy later acquired an interest in the leases. Portions of the property were pooled into several units and horizontal wells were drilled and began producing. However, each of the six wells were drilled past the Utica Shale formation and were producing oil and gas from the Point Pleasant formation, which is located below the base of the Utica formation.

Accordingly, Plaintiff TERA filed a lawsuit against the oil and gas producers for conversion and trespass. The trial court granted partial summary judgment in favor of TERA on the issue of liability, concluding that the unambiguous language in the leases reserved the subsurface rights to the Point Pleasant formation to the surface owner. Subsequently, the trial court granted a partial summary judgment in favor of TERA on the issue of bad faith trespass—a determination that significantly increased the amount of potential damages—because the measure of bad faith mineral trespass damages is the value of the oil and gas unlawfully produced at the time of removal without any deductions for any cost or expense incurred by the producers. The case proceeded to a jury trial on damages, just prior to which the trial court issued a ruling limiting the defendants' ability to present evidence about the actual quantity of gas produced from the wells or the actual price for which it sold, as a sanction for failing to provide that information to TERA during discovery. Ultimately, the jury awarded TERA \$40,129,357 in damages, comprised of \$23,171,457 in compensatory damages and \$18,958,462 in consequential damages, the total being reduced by \$2,000,559 for royalties previously paid. The trial court denied the producers' motions for judgment notwithstanding the verdict and remittitur. The producers appealed to the Seventh District Court of Appeals. In a 2-1 decision, the Court upheld the trial court's summary judgment decisions that the defendants trespassed and that they did so willfully and in bad faith.

Among other important holdings, in *TERA*, the Seventh District held that "the act of trespassing [in the mineral context] creates a presumption of willfulness and places on the defendant not merely the burden of going forward, but also of proving by a preponderance of the evidence that he acted in good

faith.” *TERA* at ¶¶ 55. The Court affirmed the trial court’s summary judgment decision that the defendants had trespassed and that they had done so in bad faith. *Id.* at ¶¶ 52 and ¶¶ 58. The Court further held that damages for a willful trespass are measured by the market value of the oil and gas unlawfully produced at the time of removal and are calculated without any deductions for any cost or expense. *See TERA* at ¶¶ 120.

The Court upheld the jury’s award of future damages, concluding that the “application of the pv-10 multiplier was essential to compensate Tera for the damages sustained due to the oil and gas companies’ bad faith trespass.” *Id.* at ¶¶ 132. And the Court concluded that TERA had proven present and future damages to a reasonable degree of scientific certainty based on expert testimony. *Id.* at ¶¶ 100.

The Court did reverse and remand the case for further hearing to determine the share of compensatory damages due TERA. This remand was necessary, per the court of appeals, because a during the period from the first quarter of 2015 to the last quarter of 2017 a portion of the trespassed parcel was not owned by TERA, LLC, but rather by Shaw in his individual capacity. Shaw was not a plaintiff to the suit. *See id.* at ¶¶ 102-116.

An application for reconsideration by the producers was denied sua sponte by the Seventh District on February 7, 2022.

Given the breadth and depth of mineral trespass topics covered by the TERA opinion, it has piqued the attention of landowner- and producer-side practitioners alike. Please contact any of the listed Roetzel attorneys for further information.

David J. Wigham
330.762.7969 | dwigham@ralaw.com

Jeremy D. Martin
330.849.6611 | jmartin@ralaw.com

Emily Anglewicz
330.849.6687 | eanglewicz@ralaw.com

Michelle Nouredine
234.274.4731 | mnouredine@ralaw.com

Sara E. Fanning
614.463.9792 | sfanning@ralaw.com

Timothy B. Pettorini
330.762.7968 | tpettorini@ralaw.com

J. Benjamin Fraifogl
330.849.6651 | bfraifogl@ralaw.com