BY: IAN YOUNG

Natural resources are a major economic driver for much of the United States. An increasing portion of the natural resources extracted in the United States is from natural gas, through the practice of fracking. Through “horizontal drilling—the method in which well pipelines can drill down into the soil, curve at 90 degrees, and pull resources from up to two and a half miles away.”

In Colorado, this process has caused several controversies, the most recent of which relates to the forced pooling regulations that have been passed by the Colorado legislature. Currently, Wildgrass Oil and Gas Committee members, of a neighborhood affected by forced pooling, are suing the Colorado Oil and Gas Conservation Commission (COGCC) on the grounds that the forced pooling statute is unconstitutional. Colorado justifies its pooling law by asserting that the law’s existence is to reduce waste. These regulations allow private companies with government approval to harvest resources that are on the land of non-consenting and actively objecting owners. Further, the commission has the authority to compel pooling if the private company owns or has leased only one acre of the pooled area; the pooling area can be thousands of acres. These owners are given notice and an opportunity to be heard on the issue. The commission also has the authority to determine the reasonable compensation given to the individual being forced to pool their resources. Finally, a person who is forced to pool their resources is forced to pay out of their “reasonable compensation,” their share of the cost of the equipment above the well, 200% of their share of the cost of drilling, and 200% of their share of the cost of equipment below the well. The individual forced to pool their resources is, however, exempt from all liability for costs arising from a spill or other incident. This is known as the “risk penalty approach” to pooling. The effect of this is the mineral owner is entitled to a 12.3% interest in their share of the compensation until the deductions are taken from the other 87.3%.
The rationale for forced pooling in general is: “a mineral interest owner who refuses to enter into a lease should not be permitted to forestall development and production of the oil and gas resources.” Without forced pooling, a single landowner could make it nearly impossible for the mineral companies to harvest resources in an efficient manner. Gas companies would have to build more wells and compensation to those who consented to the drilling would decrease. Additionally, forced pooling is preferred by those who believe the gas companies would extract natural gas from the land without the landowners' consent and without compensation.

Wildgrass Oil and Gas Committee, as well as other groups in the area, have protested the forced pooling as an invasion of their property interests. The residents allege constitutional violations of the right to contract, a violation of the Fifth Amendment that amounts to a taking of property, and violations of the privileges and immunities clause among other violations. Other allegations and concerns expressed by residents include the COGCC “rubber stamping” the requests of oil and gas companies, and the ability of a single landowner, by leasing or selling property to the gas companies, to effectively give control of the land of hundreds of other landowners.

Opponents of fracking often cite that the laws allowing forced pooling have not kept up with the development of modern drilling and excavation techniques—the statute dates back to 1951. Additionally, residents have serious concerns about the health, safety, and environmental impacts of fracking that are beyond their control.

There have been several recent developments in forced pooling. A recent decision out of the Sixth Circuit ruled that forced pooling statutes in Ohio are not a violation of the Fifth Amendment takings clause. The court found that pooling procedures constitute a police power and that power is properly exercised when property rights are protected by “requiring a just, orderly, and efficient process for neighbors to extract common resources. Each landowner's property interest in the minerals remains intact; it is simply regulated.” In 2018, Colorado modified its current forced pooling regulations to ensure more protection and more information would be given to those affected.

While these steps are a start to regulating forced pooling in the modern age of resource excavation, more is required to ensure landowners are treated fairly. The legislature must act to ensure that its landowners' concerns are taken seriously and strike a better balance between the gas and oil industry and the residents who provide them with the resources they require to stay in business. This should require increasing the percentage of landowners needed to consent to the drilling operations, and taking more consideration to the health, safety, and environmental concerns. An equitable result for both sides is possible, but it will require the legislature to fairly balance the interests of the gas companies, landowners, and the state.

[ii] Id.


[v] Id. at 2-3.


