

MEMORANDUM
Concerning Seismic Testing in Highway Rights of Way

QUESTION:

When a landowner's property boundary extends to the center line of a county road, may the county highway superintendent grant a permit to a company to perform seismic testing along the county road right of way without the landowner's consent or does the company's entry upon the property without the landowner's consent constitute a trespass?

CONCLUSION:

While there do not appear to be any existing legal decisions, statutes, regulations or advisory legal opinions in New York State that might provide a definitive answer to this question, a very strong argument can be made that the highway superintendent may not grant a permit to a third party for seismic testing because such an action exceeds the scope of the superintendent's authority and the limited purpose for which the county right of way was granted. Accordingly, the continued conduct of such tests after the landowner has refused to permit such testing is arguably a trespass.

DISCUSSION:

New York State does not regulate seismic testing. It is not necessary for a seismic testing company to obtain a permit to conduct such tests. Thus, in New York State, a landowner has limited recourse to prevent or limit seismic testing adjacent to his property. When a landowner has signed a "printed form" lease without negotiated provisions in the landowner's favor with a gas exploration company, that lease typically expressly permits geophysical exploration activities. By virtue of having signed the lease, the landowner has consented to the seismic testing. In the absence of a lease permitting such exploration, the seismic testing company's entry upon the landowner's land without the landowner's consent would constitute a trespass, either civil or criminal depending on the circumstances, for which the landowner would have a legal remedy.

The issue becomes more complicated when the testing company conducts its tests along the side of a county road within the county right of way pursuant to a permit issued by county superintendent of highways. While New York law provides little guidance, other states have enacted laws that protect the rights of landowners. See, e.g., Oklahoma Statutes Title 52 Oil and Gas Section 318.23 "It shall be unlawful for any person, firm, corporation or entity to conduct any seismic test hole blasting within two hundred (200) feet of any habitable dwelling, building or water well without written permission from the owner of the property." This statute would appear to be the outcome of a lengthy process that began as early as 1982 with the issuance of the then Attorney General's opinion (1982 OK AG 10). Among others, it answered the question of whether the Board of County Commissioners could "permit seismic operations to be carried out on section line road right of way without the permission of either the mineral owner or the mineral lessee." The Attorney General's response is worth quoting in full since it is fully analogous to the question at hand.

The Attorney General stated: “ it is well-settled in Oklahoma that title to the land upon which a section line road runs is in the abutting owner, subject to an easement for highway purposes in the public.... Certainly, whatever rights the county may have under an easement for public highway purposes, they do not include the right to explore for minerals beneath the right of way or upon adjacent land. Therefore, it follows that the county could not create such a right in a third person. Since the county has insufficient rights to authorize geophysical exploration on the land of another, issues of consent of abutting owners or mineral lessees are immaterial.”

On the other extreme, the city of Madison, Mississippi has just denied a Texas-based company permission to use the City’s rights of way to perform seismic tests for potential carbon dioxide pockets across Madison County. The company had received the consent of many landowners and the Madison County supervisors had granted the company the use of county rights of way. When the company ignored the City’s denial and set up their equipment on the City’s right of way, the City sued the company in municipal court charging trespass. The hearing was scheduled to take place on August 2, the court hearing was scheduled for November 21. See Clarionledger.com 7/31/08, 8/1/08 and 8/2/08.

A number of possible legal theories exist that might provide grounds on which to limit seismic testing over the long run. None of these, however, have been developed or tested in New York State. The concept of seismic trespass, also referred to as geophysical trespass, has developed in Texas, Louisiana and elsewhere. The difficulty with this theory is that courts have held that actual physical entry is required as an element of proving geophysical trespass. See, e.g., Villarreal v. Grant Geophysical, Inc. Starr County, Texas No. 04-03-00541 2004; See also Musser Davis Land Company v. Union Pacific Resources Company, Western District Louisiana. The concept of subsurface trespass and the rule of capture might also be stretched from their traditional applications to the drilling phase to include the product of seismic testing -- valuable information. This would appear to be a less likely avenue perhaps than the development of a new tort advocated by some scholars called “wrongful appropriation of the right to explore” which is also highly controversial. The basic arguments used (needless to say, by the developers) against pushing the traditional concept of trespass beyond the requirement of actual physical trespass are economic and predictable. It would be too time-consuming and too expensive to obtain permission from everyone and, of course, it would hamper the development of a needed resource.

The law of trespass in New York State also requires physical trespass in order to be successful. New York’s Penal Law Section 140.05 states that a person is guilty of criminal trespass “when he knowingly enters or remains unlawfully in or upon premises.” If a person enters upon unimproved and apparently unused land that is not marked in any way to exclude outsiders, then the outsider must be personally notified that he is trespassing or the property must be posted. A person may be liable for civil trespass if they *or someone hired by them* enters the land and thereafter refuses to leave. Knowledge is not necessarily an element of civil trespass.

The advantage of a trespass action is that it could reach both the testing company and the company that hired it. The disadvantages of a trespass action, assuming for the moment that such a claim can be brought by the landowner alone if the testing involves use of county rights of way, are (i) that it cannot be brought until a trespass has occurred and (ii) the disincentives for the company to stop are (absent a disaster) minor enough to be chalked up as a cost of doing business. The landowner may have an action for trespass if the county is found to have violated the terms of the grant of the right of way from the landowner but it is possible that a court would not look past the grant of the permit and deny the landowner standing to sue.

Thus, in the absence of government action or cooperation at the state or local level to regulate even minimally the conduct of seismic testing in New York State, the individual landowner is left only with the possibility of costly legal action with a likelihood of failure. It appears that local government officials and their attorneys are of the opinion that they have “no authority to deny use of these rights of way.” See Gas seismic testing rights of way, email from Jim Goldstein to numerous recipients, dated March 1, 2008. I disagree. The question is not whether a county highway superintendent has the authority to deny the permit but rather whether he has the authority to *grant* the permit.

The New York State Highway law Section 102 sets forth the general powers and duties of a county superintendent. He has supervision of all roads and bridges that are a part of the county highway system. His duties and authority extend to those actions that are necessary or advisable to repair, maintain, construct, and improve. This includes tree removal, snow removal, sidewalk construction, vehicle removal, drainage and, of course, the right to acquire lands for county rights of way and other purposes. Section 118 states that “the execution by the property owner of an option to purchase, or of a release or agreement giving the county the right to enter and occupy property *for highway purposes (italics added)* shall be deemed to be a sufficient acquisition of right of way under this article....” A county superintendent has the authority to issue permits for such work within the county road right of way pursuant to Section 136 of the Highway Law. He has the authority to charge fees and require bonds to secure the performance of the work covered by the permits. He further must impose a fine of “not less than twenty five dollars nor more than one thousand dollars for each day” on any person who violates the permitting provisions and may remove any person from the county right of way not having a lawful permit as a trespasser by petition to the county or supreme court. See Highway Law Section 136.

In short, not even a generous reading of the relevant provisions of the Highway law governing the county road system could lead to the conclusion that a county superintendent has the authority to issue a permit to any person for the purpose of conducting seismic testing for a private purpose unrelated to the construction, repair, maintenance or improvement of a county road in order to determine whether the property of adjacent landowners would make a good drilling site. This is particularly galling given that there is ample evidence to show that the gas companies are exploiting this situation. The county superintendents do not have the authority to issue permits for seismic testing. In doing so, they violate the limitations imposed upon the grant of the right of way. The county superintendents have the authority to impose fines and sue violators as trespassers. It might even be argued that they have a duty to sanction and prevent violations.

THIS MEMORANDUM IS FOR EDUCATIONAL PURPOSES ONLY AND SHALL NOT BE USED OR RELIED UPON AS LEGAL ADVICE, AND IS OFFERED SOLELY FOR EDUCATIONAL AND DISCUSSION PURPOSES.

Authored by Jane Welsh, Esq. in the public interest 2008