



## First Decision Issued Under Colorado Reasonable Accommodation Act

By: [Ken Wonstolen](#)

In 2007, after several attempts at passing a surface owner compensation statute (similar to those recently adopted in Wyoming and New Mexico), the Colorado General Assembly went down another path. In House Bill 1252, the legislature codified the common law doctrine of reasonable accommodation, as it had been enunciated in the case of *Gerrity v. Magness*, 946 P.2d 913 (Colo. 1997). Under the statute, an operator must “minimiz[e] intrusion upon and damage to the surface of the land.” CRS 34-60-127. In order to do so, the operator is obliged to “select[] alternative locations for wells, roads, pipelines, or production facilities, or employ[] alternative means of operation, that prevent, reduce, or mitigate the impacts of the oil and gas operations on the surface, where such alternatives are technologically sound, economically practicable, and reasonably available to the operator.”

In a case captioned *Zeiler Farms v. Anadarko & Unioil* (No. 07-CV-01985), plaintiff landowners alleged that Unioil’s plan to drill four (vertical) wells in the COGCC-designated “drilling windows” for the Greater Wattenberg Area (see COGCC Rule 318.A) would violate the accommodation doctrine.♦ Zeiler asserted that Unioil should drill its wells directionally, at its own expense, to accommodate its future ability to develop the surface. In the alternative, if Unioil were to drill its wells vertically, Zeiler claimed damages for the area utilized for the wells, as well as the local government setback surrounding the wells, based on land development acreage valuation. Zeiler claimed that directional drilling is a proven, common technique, and proffered expert testimony that Unioil would realize a reasonable return on investment, despite the incremental cost increase.

Unioil countered with a motion for summary judgment, noting that Zeiler had entered into a surface use agreement (with Champlin Petroleum, Anadarko’s predecessor) which stated that it was “intended to avoid and resolve any and all disputes of whatever nature ... including rights to extract, remove or market [oil and gas], including any disputes that may arise hereafter ....” This surface use agreement further provided express easements and rights to enter upon the Zeiler premises for such oil and gas operations as may be

---

♦ The case was originally filed in Weld County District Court, but was removed by Unioil based on diversity.

“necessary or convenient” in order to develop oil and gas “from any portion of the” property. In return for executing this agreement, Zeiler was entitled to a 2.5% royalty payment (this was a standard agreement used by Union Pacific Railroad, the original mineral owner under a United States land grant).

Judge Daniel noted that HB 1252 expressly provides that it is not to “be construed to prevent an operator from entering upon and using that amount of the surface as is reasonable and necessary to explore for, develop and produce oil and gas.” He further noted that the statute is not to be construed “to abrogate or impair a contractual provision ... that expressly provides for the use of the surface for the conduct of oil and gas operations ....”

In its response to the motion for summary judgment, Zeiler relied on a strained and constricted reading of the wording of the surface use agreement, as well as a provision in the Anadarko lease that wells may not be drilled without the consent of the surface owner. Zeiler further claimed that the phrase “necessary or convenient” should be interpreted in the context of modern oil and gas operations.

Judge Daniel rejected all of Zeiler’s counter-arguments and ruled that the accommodation doctrine does not apply to this dispute, whether as a matter of common or statutory law. He further dismissed Zeiler’s supplemental claims of breach of the implied duty of good faith and fair dealing, and anticipatory repudiation. This is an important first decision construing Colorado’s reasonable accommodation statute that upholds the legislative directive not to apply it so as to impair or abrogate contracts between landowners and operators.

Another case is pending in U.S. District Court wherein the surface owners and a land development company are making similar demands for directional drilling. In this case, no surface use agreement exists; however, the deed contains a strong reservation for mineral development. Also at issue in this case is whether the accommodation obligation extends to future, speculative surface development. Finally, the operators are asserting Senate Bill 237, CRS 24-65.5-101 et seq., as an affirmative defense. SB 237 provides a “mechanism for resolution” of surface owner disputes regarding oil and gas operations in the “Greater Wattenberg Area.” With respect to “qualifying surface developments,” if an agreement cannot be reached, the land developer may restrict drilling to designated “oil and gas operations areas,” only if it is willing to pay incremental directional drilling costs. Motions for summary judgment have been filed by both sides. Stay tuned.

(Mr. Wonstolen is co-counsel for Unioil in both of the referenced cases, and was instrumental in negotiating and drafting HB 1252 and SB 237)