Commentary: Court cases suggest Texas is heading to a subsurface lease market

By Leslie Ritchie Robnett

With a subsurface trespass case pending before the Texas Supreme Court and a recent $3 million nuisance verdict that has been called the nation’s “first fracking trial,” the industry may be wondering whether Texas is headed toward a subsurface lease market. At least that’s what FPL Farming v. Environmental Processing Systems and Parr v. Aruba Petroleum seem to suggest.

The Supreme Court has already once considered FPL Farming, when it rejected the operator’s argument that a valid injection permit immunizes a wastewater injector from trespass liability. After a jury found no trespass upon remand, the Beaumont Court of Appeals held — for the first time ever — that neighboring landowners have valid a claim for trespass.

Now that the Supreme Court stands poised to finally rule on the trespass issue, the Texas Association of Oil & Gas and Association of Energy Services Companies of Texas argue that transactional costs to the entire industry will rise dramatically if a jury can hear trespass claims without regard to a plaintiff’s injury. Given the high cost of trespass litigation, AESC argues that it could become cheaper just to pay neighboring landowners for subsurface leases to keep them from suing — a modern take on what the industry has traditionally called a holdout.

FPL Farming welcomes subsurface leasing, reasoning: “EPS could have easily identified and negotiated subsurface leases with the neighboring landowners that it knew would be affected by its operations. It simply chose not to do so. Indeed, the situation is no different than that of the developer of a shopping mall, residential subdivision, or industrial complex who needs a large amount of land to construct the planned project. No one would suggest, for example, that such a developer could simply build a parking lot on other peoples’ property free of charge.”

If FPL Farming is correct, and the Supreme Court blesses a subsurface lease market, this could impact the industry as much as Parr v. Aruba Petroleum, another unprecedented case in which a Dallas County jury recently awarded damages for the intentional creation of a private nuisance. For years, the industry has shielded itself from such jury awards with successful challenges to causation (how do you prove it’s my fluid causing the nuisance and not someone else’s?) and/or damages (how do you link my injections to your injuries?). With Parr as a model, landowners now enjoy invaluable legal precedent illustrating how to survive such challenges.

While Parr and FPL Farming will likely break the dam on legitimate claims suffered by landowners, perhaps the bigger industry concern is how to handle a growing amount of legal challenges from the “Not-In-My-or-Anybody’s Backyard” opponents of subsurface injection. With the recent influx of earthquakes around Texas shale plays, such opposition grows stronger daily.

To these landowners, successful verdicts against the industry provide greater ammunition to oppose a neighboring property’s use of subsurface injection. Given the expense of defending against nuisance and trespass claims, operators and service companies could be persuaded to move their fracking or injection on down the road so as to avoid potential litigation. Or, at the very least, the high nuisance value of these lawsuits could provide opposing landowners with a nice settlement before anything ever goes into the ground: Hence, a subsurface lease market.

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