

IN THE SUPREME COURT OF TEXAS

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No. 05-0466
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COASTAL OIL & GAS CORPORATION AND COASTAL OIL & GAS USA, L.P.,
PETITIONERS,

v.

GARZA ENERGY TRUST ET AL., RESPONDENTS

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ON PETITION FOR REVIEW FROM THE
COURT OF APPEALS FOR THE THIRTEENTH DISTRICT OF TEXAS
=====

Argued September 28, 2006

JUSTICE WILLETT, concurring.

James Michener may well be right: “Water, not oil, is the lifeblood of Texas”¹ But together, oil and gas are its muscle, which today fends off atrophy.

At a time of insatiable appetite for energy and harder-to-reach deposits—iron truths that contribute to \$145 a barrel crude and \$4 a gallon gasoline²—Texas common law should not give traction to an action rooted in abstraction. Our fast-growing State confronts fast-growing energy

¹ JAMES A. MICHENER, TEXAS v (1985).

² Energy Information Administration, Short-Term Energy Outlook, <http://www.eia.doe.gov/steo> (last visited Aug. 27, 2008). Fortunately, these all-time record highs from mid-July 2008 have fallen slightly. On August 27, 2008, the per-barrel price of light, sweet crude for October delivery settled at \$118. New York Mercantile Exchange, Home, <http://www.nymex.com/index.aspx> (last visited Aug. 27, 2008). On the retail side, Texas motorists paid an average of \$3.48 that day for a gallon of regular unleaded. American Automobile Association, Daily Fuel Gauge Report, <http://www.fuelgaugereport.com/TXavg.asp> (last visited Aug. 27, 2008).

needs, and Texas can ill afford its finite resources, or its law, to remain stuck in the ground. The Court today averts an improvident decision that, in terms of its real-world impact, would have been a legal dry hole, juris-imprudence that turned booms into busts and torrents into trickles. Scarcity exists, but *above-ground* supply obstacles also exist, and this Court shouldn't be one of them.

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Efficient energy production is profoundly important to Texas and to the nation:

- Reserves: Texas leads the nation in fossil fuel reserves (accounting for nearly a quarter of U.S. oil reserves and nearly 30% of natural gas reserves).³
- Production: Texas is also the top domestic producer of both oil and natural gas (generating 20% of the nation's crude and 28% of its natural gas).⁴
- Refining: Texas' twenty-five petroleum refineries represent "more than one-fourth of total U.S. refining capacity."⁵
- Consumption: Texas is not only the leading energy-producing state, but, given its large population and energy-intensive economy, is also the most power-hungry ("accounting for 11.5 percent of all U.S. energy use").⁶
- State Oil-and-Gas Tax Revenue: While high energy prices inflict acute pain on everyday consumers, tax receipts from oil and gas production have surged 58% and almost 30%, respectively, from just a year ago, "and higher energy royalties also have boosted Texas' educational endowments."⁷ The four

³ Energy Information Administration, State Energy Profiles: Texas, http://tonto.eia.doe.gov/state/state_energy_profiles.cfm?sid=TX (last visited Aug. 27, 2008).

⁴ *Id.*

⁵ *Id.*

⁶ TEXAS COMPTROLLER OF PUBLIC ACCOUNTS, THE ENERGY REPORT 2008, at 4-5 (2008), available at <http://www.window.state.tx.us/specialrpt/energy> [hereinafter TEXAS ENERGY REPORT].

⁷ Clay Robison, *High Oil Prices Bring a Mixed Bag for Texas' Economy*, HOUSTON CHRON., July 1, 2008, at B1.

public funds that receive oil and gas revenues—the general state revenue fund, the Rainy Day Fund, the Permanent School Fund, and the Permanent University Fund—have all jumped significantly this fiscal year, “posting growth of at least 30 percent and up to 84 percent over the prior year.”⁸

On both the supply and demand side, we inhabit an energy world transformed, and the data are growing increasingly sober:

- “[T]he days of near-total reliance on cheap and abundant fossil fuels may be drawing to a close.”⁹
- The U.S. has large undeveloped fossil-fuel deposits—undeveloped because of congressional drilling moratoria—and imports roughly 60% of its oil,¹⁰ much of it from unstable (and unfriendly) areas riven with geopolitical strife.¹¹
- Energy companies are experiencing sharp drop-offs in production despite triple-digit crude prices (an impetus to aggressive exploration).¹²

⁸ Dan Zehr, *Fuel Prices Good for Texas?*, AUSTIN AM.-STATESMAN, July 4, 2008, at A1.

⁹ TEXAS ENERGY REPORT, *supra* note 6, at 403.

¹⁰ Energy Information Administration, *Energy in Brief: May 1, 2008*, http://tonto.eia.doe.gov/energy_in_brief/foreign_oil_dependence.cfm (last visited Aug. 27, 2008).

¹¹ One scholar laments that “oil wealth often wreaks havoc on a country’s economy and politics, helps fund insurgents, and aggravates ethnic grievances . . . Today, with violence falling in general, oil-producing states make up a growing fraction of the world’s conflict-ridden countries . . . The number of oil-producer-based conflicts is likely to grow in the future as stratospheric prices of crude oil push more countries in the developing world to produce oil and gas.” Michael Ross, *Blood Barrels: Why Oil Wealth Fuels Conflict*, FOREIGN AFFAIRS, May-June 2008, available at <http://www.sscnet.ucla.edu/polisci/faculty/ross/BloodBarrelsFA.pdf>.

¹² Consider this opening sentence from a recent front-page article atop *The Wall Street Journal*: “The world’s premier energy monitor is preparing a sharp downward revision of its oil-supply forecast, a shift that reflects deepening pessimism over whether oil companies can keep abreast of booming demand.” Neil King, Jr. & Peter Fritsch, *Energy Watchdog Warns of Oil-Production Crunch*, WALL ST. J., May 22, 2008, at A1. The leader of the study warns, “This is a dangerous situation.” *Id.* (quoting Fatih Birol). It is notable that Irving-based Exxon Mobil, the world’s largest private oil company, has seen two straight quarters of tumbling oil and gas production, despite spending billions more than in previous years on finding and producing from new fields. Clifford Krauss, *Exxon’s Second-Quarter Earnings Set a Record*, N.Y. TIMES, Aug. 1, 2008 at C2. The production problems are industry-wide: “Adding together the output of all the major international oil companies, including Chevron, Conoco, BP, Shell, Total and Exxon, this appears to be the fourth straight quarter of production declines, according to Barclays Capital analysts. Barclays said the total decline

- The drilling of exploratory wells surged 138% from 2000 to 2007,¹³ but domestic oil production fell 12.4% over the same period, to levels not seen since 1947.¹⁴
- Texas oil and gas production continues to fall from its peak production period in the early 1970s. “[I]n recent years Texas crude oil output has fallen to less than one-third of its 1972 peak.” Natural gas production also peaked in 1972, and “output has declined steadily to less than three-fifths of that level.”¹⁵
- The world will doubtless diversify its energy profile in coming decades to reduce reliance on carbon-emitting fuel sources, but even assuming major advances in both efficiency and alternative sources, fossil fuels will still meet as much as 80% of global energy demand through 2030.¹⁶

might exceed 600,000 barrels a day, reflecting the difficulties the oil companies had in gaining access to new regions to make up for the decline of mature fields.” *Id.* “With new finds rare and the best sources in countries that limit Western investors, crude oil is no longer viewed as the abundant, dominant fuel it once was.” Russell Gold, *Exxon’s \$10.89 Billion Net Disappoints Investors, Fuels Gathering Political Storm*, Wall St. J., May 2, 2008, at B1.

¹³ Energy Information Administration, U.S. Crude Oil Field Production, <http://tonto.eia.doe.gov/dnav/pet/hist/mcrfpus1A.htm> (last visited Aug. 27, 2008). Drilling activity in Texas is also surging. Texas Railroad Commissioner Victor Carrillo recently predicted “the state should see about 24,000 drilling permits this year, the most since 1985.” Jim Fuquay, *Texas Execs Speak Out About High Energy Costs’ Sting*, FT. WORTH STAR-TEL., Aug. 22, 2008, at 3C.

¹⁴ Energy Information Administration, U.S. Crude Oil, Natural Gas, and Dry Exploratory and Developmental Wells Drilled, http://tonto.eia.doe.gov/dnav/ng/hist/e_ertw0_xwcd_nus_cA.htm (last visited Aug. 27, 2008).

¹⁵ Energy Information Administration, *supra* note 3. The Texas Energy Planning Council, charged with helping Texas meet its energy demands in the 21st century, reported that “Texas’ oil and gas production is quite mature, with marginal wells accounting for a third of statewide production.” TEXAS ENERGY PLANNING COUNCIL, TEXAS ENERGY PLAN 2005, at 15 (Dec. 2004), available at <http://www.rrc.state.tx.us/tepc/>; see also John W. Broomes, *Wrestling with a Downhole Dilemma: Subsurface Trespass, Correlative Rights, and the Need for Hydraulic Fracturing in Tight Reservoirs*, 53 ROCKY MTN. MIN. L. INST. 20-1, at 20-6 (2007); Terry D. Ragsdale, *Hydraulic Fracturing: The Stealthy Subsurface Trespass*, 28 TULSA L.J. 311, 335 (1993).

¹⁶ INTERNATIONAL ENERGY AGENCY, WORLD ENERGY OUTLOOK 2006, at 38 (2006), available at <http://www.worldenergyoutlook.org/2006.asp>.

Bottom line: We are more and more over a barrel as “our reserves of fossil fuels are becoming harder and more expensive to find.”¹⁷ Given this supply-side slide, maximizing recovery via fracing is essential; enshrining trespass liability for fracing (a “tres-frac” claim) is not. I join today’s no-liability result and suggest another reason for barring tres-frac suits: Open-ended liability threatens to inflict grave and unmitigable harm, ensuring that much of our State’s undeveloped energy supplies would stay that way—undeveloped. Texas oil and gas law favors drilling wells, not drilling consumers. Amid soaring demand and sagging supply, Texas common law must accommodate cutting-edge technologies able to extract untold reserves from unconventional fields.

Two additional comments on the Court’s decision:

First, it nixes trespass-by-frac suits for drainage (the only damages sought here) by invoking the rule of capture. I agree such suits would subvert this time-honored rule, but I would foreclose them a half-step sooner under the same “balancing of interests” approach we applied to subsurface fluid injection nearly a half-century ago in *Railroad Commission of Texas v. Manziel*.¹⁸ Such encroachment isn’t just “no actionable trespass”; it’s no trespass at all. As a practical matter, the distinction between “no actionable trespass” and “no trespass” may seem more rhetorical than real: recovery is denied either way. But orthodox trespass principles that govern surface invasions seem to me to have dwindling subterranean relevance, particularly as exploration techniques grow ever sophisticated. Given the pace of innovation, fueled by spiraling demand in a supply-constrained

¹⁷ Bruce Wright, *The Texas Portfolio*, FISCAL NOTES: SPECIAL ENERGY ISSUE, Apr. 2008, at 1, available at <http://www.window.state.tx.us/comptrol/fnotes/fnEnergy08/fnEnergy08.pdf>.

¹⁸ 361 S.W.2d 560 (Tex. 1962).

world, I would confront Lord Coke’s maxim directly and decide whether land ownership indeed “extends to the sky above and the earth’s center below,”¹⁹ or alternatively, whether that ancient doctrine “has no place in the modern world.”²⁰ The Court says there is no actionable trespass because there is no injury, and there is no injury because the rule of capture says so: “the gas he claims to have lost simply does not belong to him.”²¹ True, you cannot recover actual damages for trespass absent injury, but I would approach this case not as the Court does today but as the Court did in *Manziel*, focusing not on the injury caused by the alleged trespass but on whether the underlying act was wrongful to start with.²² Injury is the *result* of trespass, not part of its definition, and this case should turn not on the absence of injury but on the absence of wrongfulness. Balancing the respective interests as we did in *Manziel*, this type of subsurface encroachment, like the waterflood in *Manziel*, simply isn’t wrongful and thus isn’t a trespass at all, not just a nonactionable trespass.

Second, the Court implicitly leaves trespass as a potentially viable theory in suits seeking “nondrainage” damages,²³ for example, when a reservoir or nearby drilling equipment is damaged. But plaintiffs alleging nondrainage injuries already have a ready theory: negligence. In such cases,

¹⁹ ___ S.W.3d at ___.

²⁰ *Id.* at ___ (quoting *United States v. Causby*, 328 U.S. 256, 261 (1946)).

²¹ *Id.* at ___.

²² *Manziel*, 361 S.W.2d at 566-69; *see also* *Lyle v. Waddle*, 188 S.W.2d 770, 773 (Tex. 1945) (distinguishing the wrongful act that constitutes trespass from the harm caused by the trespass). Black’s Law Dictionary captures this view, defining “trespass” as an “unlawful act committed against the person or property of another; esp., wrongful entry on another’s real property.” BLACK’S LAW DICTIONARY 1541 (8th ed. 2004).

²³ ___ S.W.3d at ___.

where the rule of capture is inapposite, I would end definitively any lingering flirtation of Texas law with equating hydraulic fracturing with trespass. I would say categorically that a claim for “trespass-by-frac” is nonexistent in either drainage or nondrainage cases.

As for the dissent, it would take an indispensable innovation in an indispensable industry²⁴ and make it a tort. In doing so, it would usurp the Railroad Commission’s vast authority to oversee, through carefully balanced regulations, the production of oil and gas in this State, and replace that legislatively conferred discretion with wide-open tort liability for an essential recovery practice used in every producing region of Texas. It would take a meat-ax approach to a task that demands scalpel-like precision, all to address a problem that, even assuming it exists, surely has better solutions. The dissent’s view would invite a nightmarish flood of litigation over unknowable facts. It would slow the spigot and make it far tougher to find that next barrel of crude, that next cubic foot of natural gas, particularly in less-desirable pockets. It would reward the free rider who would rather sue for trespass than drill his own well. And it would do all this at the worse possible time—one of falling production, surging demand, and near-record-high prices for both crude oil and gasoline. Under the dissent, the newest “enhanced-recovery technique” would be a wildcatting plaintiff who sues for multi-millions after his neighbor fracs a well. Why hire a drilling contractor and field geologist to drill an unsightly and unpredictable offset well when you can go for a gusher in the courtroom? Just hire a lawyer and retain a testifying expert who can summarize with mind-boggling precision the fluid dynamics and fracture geometry that transpired beneath millions of tons of earth.

²⁴ The oil and gas industry is a mainstay of the Texas economy. Its share of gross state product was 15.7% in 2006, when it employed more than 312,000 Texans who earned almost \$31 billion in total wages. TEXAS ENERGY REPORT, *supra* note 6, at 29-30.

I. A Comment on the Court’s Decision

A. Another Reason for Barring Trespass-by-Frac Suits: Unbounded Tort Liability Would Impose Exorbitant Costs on Society

Although it disallows tres-frac damages under the rule of capture, the Court is unconvinced that tort exposure would necessarily crimp production and inflict broad-based economic harm. I am not nearly so sanguine. The dire alarms sounded in the amicus curiae briefs, including one from the State’s oil and gas regulatory body, strike me as more factual than fanciful.

The amici depict a grim future for the Texas energy industry and economy if we permit trespass-by-frac lawsuits. These warnings—from public and private observers alike—counsel pause before we declare into existence a tort action they insist will undeniably imperil production. The Share 13 Plaintiffs label these concerns “a ‘sky is falling’ Chicken Little refrain,” but if the warnings sound overwrought, it may be because, in this case, style is inextricable from substance: Allowing trespass-by-frac suits to impede what is perhaps the single most essential technique in modern oil and gas production would be a calamitous mistake.

i. Tres-Frac Liability Would Squeeze Much-Needed Production

The views of one amicus curiae merit particular attention: the Railroad Commission, legislatively commanded to superintend the Texas energy industry and given jurisdiction over each and every one of our State’s 200,000-plus producing oil and gas wells.²⁵

²⁵ TEX. NAT. RES. CODE § 81.051(a)(2).

As to its irreplaceable role in modern energy exploration, fracing, says the Railroad Commission, is:

- “often necessary to maximize production and assure that the oil and gas reserves . . . are not left in the ground”;
- “used widely and prolifically throughout Texas as a production technique”;
- “a vital component of oil and gas production in Texas and, in those parts of the state where tight sands and shale formations are found, it is absolutely essential to the economic production of oil and gas”; and
- responsible for “the production of large quantities of oil and gas that otherwise would never have been recovered.”

As to the devastating blow that tort liability would impose, such exposure, according to the Commission, would:

- “create a significant disincentive for oil and gas operators to continue to use and refine this longstanding and effective production technique”;
- “result in many fewer wells being drilled and substantially decreased oil and gas production in Texas”; and
- “impede the exploration and development of, and lead to the ‘waste’ of, our state’s oil and gas resources, a result that is completely contrary to the fundamental concept of oil and gas conservation and our agency’s mission to support enhanced development and economic vitality for the benefit of Texans.”

Fracing is not a luxury, but a must-have recovery tool that is vital today and will remain vital tomorrow (along with other promising recovery technologies). Easy-to-produce reserves are increasingly uncommon, and meeting spiking demand requires advanced techniques to make uneconomical fields economical.

Exhibit A is a huge expanse of dense, gas-bearing rock called the Barnett Shale, spanning about 5,000 square miles across several north central Texas counties.²⁶ The nation's most active drilling basin, home to more than 7,500 producing gas wells, the Barnett Shale is considered by some experts to be the largest and most prolific natural gas field in the continental United States, producing an estimated three billion cubic feet of natural gas every day.²⁷ However, the Barnett Shale, as its name implies, is known for its unforgiving shale, and "technological improvements in recovery methods"—*i.e.*, fracing innovations—are widely credited with sparking the so-called Barnett Shale boom, which created an estimated 83,823 jobs in 2007 alone, injecting more than \$8.2 billion into the local economy and almost \$1.1 billion into state and local tax coffers.²⁸ One current railroad commissioner calls the Barnett Shale the "shining star" of modern energy-production success stories and adds "[a]dvanced exploration techniques have transformed this once marginal trend into a giant."²⁹ The Railroad Commission itself has stated: "The success of the Barnett Shale is in large part a result of the use of stimulation technology," namely hydraulic fracturing.³⁰ The Commission's amicus brief notes that for many years after its initial discovery, "the field was

²⁶ Railroad Commission of Texas, Barnett Shale Information, <http://www.rrc.state.tx.us/barnettshale/index.html> (last visited August 27, 2008).

²⁷ TEXAS ENERGY REPORT, *supra* note 6, at 68 ("The Barnett Shale is one of the most active natural gas production zones in the state and the nation."); Clifford Krauss, *There's Gas in Those Hills*, N.Y. TIMES, Apr. 8, 2008, at C1.

²⁸ *Study: Barnett Shale Boosting North Texas Economy*, DALLAS BUS. J., Mar. 28, 2008. As the Railroad Commission recently noted, "The Barnett Shale must be stimulated—treated to increase permeability—in order for the field to be economic." Railroad Commission of Texas, *Water Use in the Barnett Shale*, http://www.rrc.state.tx.us/divisions/og/wateruse_barnettshale.html (last visited Aug. 27, 2008) [hereinafter "Water Use"].

²⁹ Elizabeth Ames Jones, Op-Ed., *Energy Security 101*, WASH. POST, Oct. 9, 2007, at A17.

³⁰ *Water Use*, *supra* note 28.

considered uneconomic or only marginally economic,” and the spike in activity and production “are largely attributable to the development of a specialized fracture stimulation technique that has allowed operators to ‘unlock’ the gas trapped for millennia.” This success, in turn, has prodded exploration elsewhere. As the Comptroller’s May 2008 Texas Energy Report states, “The success of the Barnett Shale production zone has spurred efforts to produce gas in many other areas and geological formations that were previously considered unrecoverable or uneconomic.”³¹ The importance of fracing to Texas fields like the Barnett Shale and the Vicksburg T is impossible to overstate; vast energy supplies are being recovered from areas long thought to be depleted (or else passed over because of low native permeability).³²

Fracing is required but also imprecise. As the Court notes, we are talking about fissures of immeasurable length and uncontrollable direction. Whether a fracture’s effective length actually crossed an adjacent lease line miles beneath the Earth’s surface cannot be determined until after the fact.³³ As for controlling a fracture’s precise direction, plaintiffs’ lead expert conceded there is no

³¹ TEXAS ENERGY REPORT, *supra* note 6, at 68. “The largest issue involving natural gas is supply.” *Id.* at 77. Without “continuing advancements in technology, natural gas producers may find it more difficult to keep producing adequate supplies.” *Id.* This supply pinch must be mitigated by innovation, explaining why “Texas producers now pursue unconventional gas plays throughout the onshore part of the state, fracturing rock formations with sand-bearing liquids to expand the gas-producing areas underground.” *Id.*

³² *See, e.g.*, Krauss, *supra* note 27, at C1.

³³ As described by plaintiffs’ expert, who has written several books in this area, a fracture’s *effective* length is shorter than its initial propped length. Even if the induced fracture crossed over the lease line momentarily, and even if experts had the wherewithal to confirm as much, who is to say the effective portion of the fracture—the part that actually captures oil and gas from the reservoir—did not remain completely within Coastal’s Share 12 lease boundaries? Plaintiffs made no attempt to determine the fracture’s effective length in this case. Because drainage occurs exclusively via this *effective* frac length, not the original frac penetration length, liability, if at all, must reasonably be limited to trespass that inflicts actual injury—drainage—not an encroachment that produces no ill effect. This is particularly true where, as here, plaintiffs alleged felony theft in an attempt to avoid the statutory cap on punitive damages. *See* TEX. CIV. PRAC. & REM. CODE § 41.008(b)(1), (c)(13). Only the fracture’s *effective* length, not its hydraulic or propped lengths,

way to do so: “the fracture azimuth is preordained. There is very little that we can do to affect the fracture orientation.” Creating a fracture is itself a geological and engineering marvel; controlling its length and direction (in three dimensions) is simply beyond present capabilities.

Risk-taking entrepreneurs contend daily with such uncertainties, but Texas law deserves greater predictability than permitting exemplary damages for invisible torts. Because operators of fraced wells lack absolute control, the specter of tort liability will convince many rational operators to forego fracing altogether and leave otherwise recoverable resources in the ground, to the detriment of the State as a whole. It defies belief that exposure to exemplary tort damages will do anything other than sharply curtail fracing and sharply curtail production (thus reducing supply, thus pushing up prices . . . for everything).³⁴

We wisely took into account similar policy concerns in *Manziel*, where we rejected trespass liability for a waterflood that breached lease boundaries. We found it “obvious that secondary recovery programs could not and would not be conducted if any adjoining operator could stop the project on the ground of subsurface trespass.”³⁵ The Railroad Commission urges the Court to

speaks to whether the fracture is actually draining hydrocarbons. The cross-examination of Dr. Economides on this point was illustrative. Although he “estimated” that 25-35% of the fracture penetrated plaintiffs’ property, plaintiffs’ expert made no attempt to measure its *effective* length, the part that actually captures minerals and inflicts the complained-of injury: “I did not do any other elaborate calculation in terms of drainage and interference or whatever else.”

³⁴ Under the rules, a well may be as close as 467 feet from a lease line, but given that the center of a forty-acre square tract (the smallest permitted size) is only 660 feet from its edge, an operator realistically has no risk-free place to drill a fraced well without facing possible trespass liability. See 16 TEX. ADMIN. CODE § 3.37 (spacing rules); see Laura H. Burney & Norman J. Hyne, *Hydraulic Fracturing: Stimulating Your Well or Trespassing?* 44 ROCKY MTN. MIN. L. INST. 19-1, at 19-14 (1998) (estimating the length of a fracture in tight sand reservoir at a few thousand feet); see also Ragsdale, *supra* note 15, at 338 n.128 (noting that a typical fracture runs 2,500 to 4,500 feet from the wellbore).

³⁵ *R.R. Comm’n of Tex. v. Manziel*, 361 S.W.2d 560, 568 (Tex. 1962).

accommodate real-world concerns here “as it has in the past,” urging us to “give careful consideration to the policy implications of a decision recognizing a new cause of action.” Like recovery by waterflood, recovery by fracturing is key to maximizing recovery.

ii. Less Fracing Means Less Tax and Royalty Revenue for Texas

Robust energy production enriches Texas’ fiscal bottom line. In fiscal year 2007, severance taxes on oil and gas production produced more than \$2.7 billion for the State, about 7% of all tax revenue, and preliminary figures for the current year suggest revenues may surpass \$3 billion.³⁶ In addition, drilling on State lands annually generates millions in oil and gas royalty revenue for the State’s general fund.³⁷

The two state agencies most involved in oil and gas production see ominous fiscal threats posed by tres-frac liability. As to tax revenue, the Railroad Commission contends that increased litigation exposure would ratchet up exploration costs and “result in a significant impact on the state’s revenues generated from oil and gas production.” As to royalty revenue, the General Land Office (GLO), which oversees twenty million acres of State-owned minerals, underscores that the State’s lease of drilling rights to energy firms sends hundreds of millions of dollars annually in royalty revenue to the Permanent School Fund to help finance Texas public schools (thus “reducing the need for tax revenue” by offsetting local property taxes). Although GLO, constitutionally

³⁶ Zehr, *supra* note 8, at A1; Texas Comptroller of Public Accounts, Texas Net Revenue by Source—Fiscal 2007, <http://www.window.state.tx.us/taxbud/revenue.html> (last visited Aug. 27, 2008); *see also* TEXAS ENERGY REPORT, *supra* note 6, at 30-31.

³⁷ Texas Comptroller of Public Accounts, Biennial Revenue Estimate (2008-2009), http://www.window.state.tx.us/taxbud/bre2008/html/sched_I_GR.html (last visited Aug. 27, 2008).

charged with maximizing revenue from State-managed lands, might see a trespass cause of action as a *positive* development—after all, Texas could be a plaintiff in these cases—the agency worries that such exposure “will create a significant impediment to the aggressive exploration and development of Texas’ oil and gas reserves” and “will result in waste as operators, seeking to avoid tort liability, leave otherwise recoverable reserves in the ground rather than perform the fracture treatments necessary to produce economically.”³⁸ The upshot, GLO insists, will be ruinous: “Fewer wells drilled will mean less development of the oil and gas reserves underlying State lands, which means less royalty revenue for the Permanent School Fund.”

iii. Texas Statutory and Common Law Suggest the Court’s Decision Should Be Informed by Concern for the Public Good

The interplay of common-law trespass and oil and gas law must be shaped by concern for the public good. In *Hastings*, we recognized a trespass cause of action to combat slant-hole drilling as “in line with the public policy of this state.”³⁹ In *Manziel*, we stated that “[s]econdary recovery operations are carried on to increase the ultimate recovery of oil and gas,” and that “[i]t cannot be disputed that such operations should be encouraged.”⁴⁰ If anything, encouraging the use of leading-edge technology is a greater concern today than in 1962 when *Manziel* was decided. Hydraulic fracturing involves unique practical and policy considerations that Texas common law cannot ignore.

³⁸ The Legislature has declared waste in oil and gas production to be unlawful, TEX. NAT. RES. CODE §§ 85.045, 86.011, and has commanded the Railroad Commission to prevent waste, *id.* § 86.082. “Waste” includes “physical waste or loss incident to or resulting from drilling, equipping, locating, spacing, or operating a well or wells in a manner that reduces or tends to reduce the total ultimate recovery of oil or gas from any pool.” *Id.* § 85.046(6); *see also id.* § 86.012(5).

³⁹ *Hastings Oil Co. v. Tex. Co.*, 234 S.W.2d 389, 396 (Tex. 1950).

⁴⁰ *Manziel*, 361 S.W.2d at 568.

Our statutory law certainly doesn't. The Legislature, consistent with its focus on maximizing recoverable reserves, affirmatively champions fracturing by granting severance tax exemptions for production from dormant oil and gas wells brought back into production and from fields the Commission designates as tight sands areas, formations where fracking is the sole method capable of producing in commercial quantities.⁴¹ Fracture stimulation is the "universal well completion technique in tight gas sands,"⁴² and Texas law aims to facilitate economic production from areas with poor native porosity and permeability, like in South Texas. Coastal's expert testified that Hidalgo County, where this case arose, produces more than double the gas it produced a quarter-century ago, and the reason is undisputed: sophisticated fracking techniques. As of May 2008, the Railroad Commission had approved roughly 1,300 tight gas formations in the State,⁴³ and the Commission understands fully that "to be able to produce gas at volumes that are economical, reservoirs with low permeability must be treated."⁴⁴

Given the omnipresence of fracking in modern industry practice, as recognized by Texas law, the Railroad Commission, and the Land Commission, it is unwise to expose operators to punitive sanctions and broader society to the manifold costs of reduced energy supply.

⁴¹ See TEX. TAX CODE § 201.057; 16 TEX. ADMIN. CODE § 3.101.

⁴² Burney & Hyne, *supra* note 34, at 19-17.

⁴³ Railroad Commission of Texas, Oil & Gas-Statewide Rule 101-Approved Tight Gas Formation-Index Listing, <http://www.rrc.state.tx.us/divisions/og/publications/hgindex.html> (last visited Aug. 27, 2008).

⁴⁴ Water Use, *supra* note 28.

B. Fracing Is Not Merely Non-Actionable Trespass, But No Trespass at All

I agree with the Court as far as it goes. If the choice is (1) extend trespass liability to thwart a proven and widespread recovery technique or (2) extend the rule of capture—perhaps “the most important single doctrine of oil and gas law”⁴⁵—I favor the latter.⁴⁶ To recognize a rule of capture yet at the same time prohibit fracing would create an asymmetry in Texas oil and gas law that leaves the rule of capture frozen in time (at the worst possible time), unable to adapt to essential new technologies.

My departure from the Court’s reasoning is a narrow one. The Court says “no liability” because, while it presumes a trespass occurred, the rule of capture precludes injury: no injury, no lawsuit. I would instead tackle a more threshold issue, one we addressed in *Manziel* almost a half-century ago: whether formalistic trespass principles apply with equal force to the recovery of ever-dwindling supplies of natural resources miles below the surface.

⁴⁵ 1 ERNEST E. SMITH & JACQUELINE LANG WEAVER, TEXAS LAW OF OIL & GAS § 1.1(A) (2d ed. 2006). We have recognized for almost a century that drainage of oil or gas from beneath another’s land is perfectly legal if the wellbore itself does not cross lease boundaries and the operator complies with Railroad Commission requirements. See *Bender v. Brooks*, 127 S.W. 168, 170 (Tex. 1910); SMITH & WEAVER, *supra* § 1.1(E). Plaintiffs do not allege that Coastal’s wellbore encroached into its property, and it is undisputed that Coastal complied with all pertinent Railroad Commission regulations.

⁴⁶ The rule of capture has variously been explained as (1) a practical acknowledgment of the difficulties in determining the source of a well’s production, (2) justified due to the availability of self-help, and (3) “a practical accommodation of the infant oil industry.” SMITH & WEAVER, *supra* note 45, § 1.1(A). As to the last justification, “[a]n accounting for oil drained from other tracts would have placed the entire risk of a dry hole or unproductive well upon the driller while allowing neighboring landowners to benefit from a successful venture.” *Id.* While the Texas energy industry is no longer in its infancy—indeed, it is quite mature (hence the imperative need for advanced recovery technologies)—these same concerns, including the free-rider problem, persist and are equally applicable to fracturing. The liability decision should not turn on whether proppant and frac fluid migrate across an imaginary vertical plane separating two properties miles underground (particularly when the fact of such migration is often unknowable). See Burney & Hyne, *supra* note 34, at 19-3 (“The extent of the fractures out from the wellbore can be determined only by *theoretical* calculations.” (emphasis added)).

To many people, a subsurface intrusion of fissures, fluid, and proppant invites a simple application of rudimentary trespass principles. Why not call a tort a tort? Well, *we* affix that common-law label, and not every technical intrusion, no matter how small, warrants damages, no matter how large. Trespass is a court-defined doctrine, and it falls squarely on this Court’s shoulders to decide what is actionable. In doing so, we made clear in *Manziel* the common law must permit common-sense accommodations for technological breakthroughs that benefit society.

In *Manziel*, our watershed waterflood case, we flatly rejected an absolutist trespass standard, stressing that the definition of trespass must make room for industry innovations.⁴⁷ We unanimously rejected a theory of trespass based on an earlier-developed secondary recovery practice (waterflooding) that was used to develop the giant East Texas field.⁴⁸ In a waterflood, usually conducted after primary production methods have ceased, water is injected under pressure into a reservoir to push residual oil toward certain output wells. The plaintiffs in *Manziel* complained the waterflood amounted to “trespass by injected water” that would drain oil from beneath their lease by pushing it to other properties and “result in the premature destruction of their producing . . . well.”⁴⁹ We held that injected water that crosses lease lines did not constitute trespass: “The orthodox rules and principles applied by the courts as regards surface invasions of land may not be appropriately applied to subsurface invasions as arise out of the secondary recovery of natural

⁴⁷ *R.R. Comm’n of Tex. v. Manziel*, 361 S.W.2d 560, 566-70 (Tex. 1962).

⁴⁸ *Id.* at 568-69 & n.5.

⁴⁹ *Id.* at 565.

resources.”⁵⁰ Basically, we held the law of trespass must not be applied in an unduly dogmatic manner to the oil and gas industry,⁵¹ a statement I believe counsels against the *existence* of liability, not merely the *extent* of liability.⁵²

Notably, we did not concede in *Manziel* that waterflood amounted to trespass but opt against liability because the good outweighed the bad. Indeed, if encroachment from waterflooding were deemed trespassory, then public policy considerations could not even be factored in.⁵³ Nor did we say the rule of capture precluded the plaintiffs whose oil was swept away from claiming a compensable injury. Rather, this Court, employing a balancing-of-interests analysis more common to nuisance cases, unanimously declared that injecting water beneath your neighbor’s land was simply not a trespass because it was not wrongful:

Certainly, it is relevant to consider and weigh the interests of society and the oil and gas industry as a whole against the interests of the individual operator who is damaged; and if the authorized activities in an adjoining secondary recovery unit are found to be based on some substantial, justifying occasion, then this court should sustain their validity.⁵⁴

⁵⁰ *Id.* at 568.

⁵¹ *Id.*

⁵² As for the plaintiffs’ contention that the rule of capture ceases to apply when a producer uses an “unnatural” recovery technique, I too, like the Court, am unpersuaded. Plaintiffs nowhere define “natural” production, but granting protection under the rule of capture only if the minerals flow totally unaided is assuredly un-natural and would deny protection to scores of everyday recovery techniques above and beyond fracturing—techniques that the Railroad Commission has long permitted. Indeed, all modern production technologies are artificial to some degree; oil and gas do not ordinarily seep out of the ground by themselves or when Jed Clampett’s errant bullet sends up a geyser of “bubbling crude.” This natural/artificial dichotomy has no support in Texas law and is rather hard to take seriously; the common law must be informed by common sense.

⁵³ *Manziel*, 361 S.W.2d at 568-69.

⁵⁴ *Id.*

No intervening event, legal or technological, in the forty-six years since *Manziel* urges a different result today than in that case, which incidentally involved a far greater physical invasion (waterflood) that, according to some, inflicts far greater (and irreversible) damage than fractures extending from a wellbore.⁵⁵ Plus, with waterflooding, migration across lease lines is guaranteed; with fracing, it's not, since fracture length and direction cannot be precisely controlled. Fracing (like waterflooding) involves the injection of fluids across lease lines, but fracing (like waterflooding) is not a trespass because fracing (like waterflooding) is not wrongful because fracing (like waterflooding) generates societal and economic benefits that outweigh any harm to individual operators. Allowing wide-open trespass damages would unleash a judicial waterflood, as it were, driving out a large amount of oil and gas production, and driving up the cost of any frac-based production that remained.

C. Landowners Already Have Non-Trespass Remedies in Non-Drainage Cases

The Court reserves judgment on whether fracing might constitute trespass in non-drainage cases—for example, if Coastal's frac job had damaged the Share 13 plaintiff's wells or the Vicksburg T formation beneath their property. The plaintiffs claim no such injuries, but I would foreclose the possibility of trespass-based damages in non-drainage cases for a simple reason: settled Texas law already affords ample relief in such cases. Our precedent dating back 60 years makes clear that, notwithstanding the rule of capture, adjacent property owners may sue a driller who,

⁵⁵ Broomes, *supra* note 15, at 20-23 to 20-24 (“By contrast [to fracing], a waterflood inflicts catastrophic damage to mineral owners who are not included in the secondary recovery unit . . . A waterflood could fairly be described as the atomic bomb of subsurface trespasses because its effects are the complete, irreversible destruction of the potential to produce oil and gas from the flooded zones on any land onto which the water encroaches.”).

through fracturing or otherwise, negligently damages a common reservoir, thus reducing recoveries and causing waste.⁵⁶ Other settled precedent makes clear that Texas law affords no rule-of-capture immunity for waste or destruction stemming from a negligent well blowout.⁵⁷

II. A Comment on the Dissent

A. Fracing Is Not Slant-Hole Drilling by Another Name

The dissent likens fracing to slant-hole drilling, intentionally bottoming a drill bit beneath the vertical boundaries of another's land. I see multiple and meaningful distinctions between fraced wells and deviated wells, as does the Railroad Commission.

First, a slant-hole driller exerts absolute control, knowing and directing with GPS-like precision *exactly* where the drillbit is and where it's going. Fracing, as plaintiffs' expert conceded, is highly unpredictable; under present-day petroleum engineering technology, a fracture's direction cannot be determined or controlled, except by Mother Nature, and a fracture's length cannot be precisely measured.⁵⁸ Second, a slant-hole well, encased in connecting pipe, remains open at its bottom-hole location, while only a portion of the initial fracture actually contributes to capturing minerals.⁵⁹ Third, nobody contends that bottoming a wellbore beneath your neighbor's property is

⁵⁶ See *Elliff v. Texon Drilling Co.*, 210 S.W.2d 558, 562-63 (Tex. 1948) (recognizing negligence liability for harming the common reservoir); see also *HECI Exploration Co. v. Neel*, 982 S.W.2d 881, 886-88 (Tex. 1998).

⁵⁷ See *Comanche Duke Oil Co. v. Tex. Pac. Coal & Oil Co.*, 298 S.W. 554 (Tex. Comm'n App. 1927, judgment adopted) (jury finding that using 600 quarts of nitroglycerin to boost production ruined a nearby offset well).

⁵⁸ See *Ragsdale*, *supra* note 15, at 338 n.128.

⁵⁹ Plaintiffs' expert testified that hydraulic fracturing produces four lengths: (1) fracture length, (2) hydraulic length, (3) propped length, and (4) effective length, stating "I not only agree [that those lengths exist], I'm the author of those definitions." No one disputes that only the effective length enhances mineral recovery.

indispensable to Texas oil and gas production; everybody—including plaintiffs’ own expert—agrees that fracing is absolutely critical in low-permeability areas like South Texas.⁶⁰ Fourth, the Railroad Commission has never treated slant-hole drilling and frac drilling the same. In exercising its expertise, the Commission sees sharp distinctions between slant-hole wells and fraced wells, regulating the former heavily and the latter hardly at all: “the Commission has never categorized wells that have been fracture stimulated as ‘deviated’ wells by requiring a permit for the fracture job or attempting to determine the location of the fractures to assess compliance with spacing rules of other Commission rules.”⁶¹ The Commission has always focused on the location of the wellbore itself, not any fractures or other subsurface features that might impact drainage.

B. We Should Defer to the Railroad Commission’s Discretion, Not Usurp It

Oil and gas drilling is painstakingly regulated by the Railroad Commission, which possesses sweeping jurisdiction over all Texas oil and gas wells and all persons engaged in drilling or operating such wells.⁶² The Legislature has conferred open-ended authority to “adopt all necessary rules for governing and regulating persons and their operations” within the Commission’s jurisdiction.⁶³ This

⁶⁰ As plaintiffs’ expert testified, in such areas it is indispensable to viable production: “without hydraulic fracturing, there is no hope for economically attractive production in any . . . of the formations that I know of [in South Texas].” We have recognized that lessees have a duty to use successful modern production methods. *Amoco Prod. Co. v. Alexander*, 622 S.W.2d 563, 567 & n.1 (Tex. 1981). Hydraulic fracturing is a paradigm example of such a method. If the dissent’s view controlled, an operator, particularly one operating on a smaller tract, would face a dilemma of fracing a well and thus risking a high-stakes trespass lawsuit from nearby landowners, or declining to frac and thus risking a high-stakes “failure to develop” lawsuit from its lessor.

⁶¹ Commission rules governing the approval and operation of slant-hole wells are comprehensive to say the least, *see* 16 TEX. ADMIN. CODE § 3.11, but the Commission has never required special permitting to frac a well.

⁶² TEX. NAT. RES. CODE § 81.051.

⁶³ *Id.* § 81.052.

jurisdiction includes “the use of techniques to enhance production and protect correlative rights.”⁶⁴ More specifically, the Commission has the authority to make rules and issue orders that “require wells to be drilled and operated in a manner that will protect injury to adjoining property.”⁶⁵

In exercising that jurisdiction, the Railroad Commission has promulgated extensive regulations regarding oil and gas drilling generally but none that single out fracing specifically.⁶⁶ If, in the course of advancing its legislative mandate to prevent waste and safeguard correlative rights, the Commission deems fracturing a practice potentially unfair to nearby landowners, it has wide discretion to weigh the competing interests and strike the proper regulatory balance. The Commission could, after listening to all interested parties, modify Statewide Rule 37 regulating the minimum distance a well can be located from a property line.⁶⁷ But whether that distance should be stretched to 500 feet, 1,000 feet, or 1,500 feet is utterly beyond this Court’s expertise. The Commission could, as Georgia regulators do, require notice before commencing a frac job.⁶⁸ Indeed, the Commission could impose any number of targeted spacing, density, pooling, production, or other rules on fraced wells in order to achieve the legislative objectives of preventing waste, calibrating

⁶⁴ *Amarillo Oil Co. v. Energy-Agri Prods., Inc.*, 794 S.W.2d 20, 26 (Tex. 1990).

⁶⁵ TEX. NAT. RES. CODE § 85.202(a)(4); *see also Texaco, Inc. v. R.R. Comm’n*, 583 S.W.2d 307, 310 (Tex. 1979) (“It is now well settled that the Railroad Commission is vested with power and charged with the duty of regulating the production of oil and gas for the prevention of waste as well as for the protection of correlative rights.”).

⁶⁶ *See, e.g.*, 16 TEX. ADMIN. CODE § 3.24 (requiring check valves where more than one well is connected to a common line, separator, or manifold); § 3.37 (statewide spacing rule); § 3.38 (well densities). The Commission does require notification, as part of forms W-2 and G-1, when fracing will be used on a well, but it does not require permission. *See* §§ 3.16, 3.51, 3.80(a).

⁶⁷ 16 TEX. ADMIN. CODE § 3.37 (providing that no well shall be drilled closer than 467 feet to any property or lease line).

⁶⁸ GA. COMP. R. & REGS. §§ 391-3-13-.11, 391-3-13-.12(2).

correlative rights and preventing undue injury to adjoining land.⁶⁹ It could do administratively what other states (notably not Texas) have done legislatively and require operators to obtain a permit⁷⁰ before fracing a well. But it has not done so, and this restraint, far from showing the absence of public policy, demonstrates the Commission pursues its legislative charge in a manner that facilitates technological innovation.

The Share 13 Plaintiffs argue “Coastal and the *amici* can always seek legislation or [Railroad Commission] rules to properly address their concerns.” That puts the shoe on the wrong foot. Hydraulic fracturing occurs daily throughout Texas, encouraged by state tax law aimed at boosting production from tight, hydrocarbon-bearing formations, and is a technique championed by the agency vested with broad powers to regulate it. Why must Coastal seek legislative or administrative action to thwart a cause of action this Court has never formally recognized when the agency that oversees oil and gas production has issued no rules or orders that tie Coastal’s hands? The Commission’s considerable policymaking expertise strongly militates against recognizing a new form of open-ended tort liability.⁷¹

⁶⁹ See TEX. NAT. RES. CODE § 86.081(a)(2) (authorizing Commission to regulate gas production to “adjust the correlative rights and opportunities of each owner of gas in a common reservoir”); § 85.202(a)(4) (directing Commission to promulgate rules and orders that “require wells to be drilled and operated in a manner that will prevent injury to adjoining property”).

⁷⁰ VA. CODE ANN. § 45.1-361.11; W. VA. CODE ANN. § 22-6-12.

⁷¹ In 2005, one current commissioner (who was then chair) reported to the United States Congress that “[h]ydraulic fracturing is a decade’s old process for completing over 90% of the oil and natural gas wells drilled in the United States,” and that “the states have been responsible for regulating this process.” *Energy Policy Act of 2005: Hearing Before the Subcomm. on Energy and Air Quality of the H. Comm. on Energy and Commerce*, 109th Cong. 111 (2005) (statement of Victor Carrillo, Chairman, Railroad Commission of Texas), available at <http://www.rrc.state.tx.us/commissioners/carrillo/press/energytestimony.html>. Another current commissioner (also a former chair) wrote this a few months ago: “Innovative technology is bringing on line oil and gas production from heretofore noncommercial and unconventional geological reservoirs . . . Important new gas fields have been developed

I would defer to the Railroad Commission, whose competence in this matter far surpasses our own, to balance the competing interests and fine-tune the production of Texas hydrocarbons. If the Commission believes free-market practices have become too clamorous, it can flex its regulatory muscle over the offending production activities. But whether drainage results from honest mistake or dishonest misdeed, the Commission is best positioned to strike the smartest balance to protect landowners' rights and safeguard the viability of fracing amid shrinking reserves. We should leave the regulation of Texas' energy sector to the regulators as the Legislature intended.

C. Aggrieved Lessors Have Existing Remedies Short of Seeking Millions in Trespass Damages

The Share 13 Plaintiffs are not without alternative remedies. In this case, they pursued claims against their lessee, Coastal, for failure to protect against drainage and other claims. The clearest remedy is not a new-fangled tort action alleging trespass, but an old-fangled contract action alleging breach of the implied covenant to protect against uncompensated drainage, which the plaintiffs brought here.⁷² Even when a mineral estate is under lease, the lessor's threat of litigation or actual litigation can spur a lessee to drill offset wells or engage in voluntary pooling, as apparently occurred in this case. The Share 13 Plaintiffs contend in their brief that "[i]t was only after suit was filed that Coastal acted to protect Share 13 from drainage."

Aside from litigation, a plaintiff can drill an offset well if he believes a fraced well on nearby property is causing drainage; self-help is the settled remedy under Texas law. As one venerable

in areas that geologists once considered goat pasture." Jones, *supra* note 29, at A17.

⁷² See *Amoco Prod. Co. v. Alexander*, 622 S.W.2d 563, 567-68 (Tex. 1981) (recognizing such liability where, as here, the lessee was the party doing the draining by producing from an adjacent tract).

Texas oil and gas authority opined: “There is no reason for giving an injured party a cause of action for the violation of some legal right resulting from a reasonable use of adjacent land if the aggrieved party’s remedy of self-help is completely adequate for his proper protection.”⁷³ Our law has long recognized that if a landowner desires the hydrocarbon riches beneath his property, he should drill a well. This common-sense approach, also emphasized in the Railroad Commission’s amicus brief, is especially warranted when the landowner sees that his neighbor has drilled a successful well next door. The landowner should drill his own, not sue his neighbor for trespass; the rule of capture recognizes this simple concept, and I would preserve it. Self-help remedies are not always cheap or convenient (although a cheap fix in this case would have been a demand from Plaintiffs that Coastal drill some offset wells on Share 13) but their availability is another reason not to announce a new common-law tort. “The landowner is privileged to sink as many wells as he desires upon his tract of land and extract therefrom and appropriate all the oil and gas that he may produce, so long as he operates within the spirit and purpose of conservation statutes and orders of the Railroad Commission.”⁷⁴ Should the law be different when the neighbor uses an advanced recovery

⁷³ A.W. Walker, Jr., *Property Rights in Oil and Gas and Their Effect Upon Police Regulation of Production*, 16 TEX. L. REV. 370, 374 (1938).

⁷⁴ *Elliff v. Texon Drilling Co.*, 210 S.W.2d 558, 562 (Tex. 1948).

technique, without which drilling would be impractical?⁷⁵ The dissent thinks so, but in my view fails to reason so.

D. Allowing Tres-Frac Damages Would Portend Many Inconvenient Truths

Permitting trespass liability would be a grave blunder, auguring industry-wide tumult, the resulting tremors of which would be substantial and far-reaching. Both worldwide and in our energy-intensive State, energy is at once increasingly desired and increasingly scarce, and thus increasingly expensive. Courts shape the common law, but we cannot repeal the law of supply and demand any more than we can repeal the law of gravity. We occupy a petroleum-addicted world, and decades may pass before scalable fossil-fuel alternatives (wind, nuclear, solar, etc.) comprise a significantly larger piece of our diversified energy portfolio. Until then, letting neighbors file tres-frac suits against each other will only yield these stubborn realities: fewer wells will be drilled; fewer older (but still productive) wells will undergo remedial fracing to enhance recovery and will instead be plugged prematurely; huge swaths of Texas land will remain undeveloped, their resources utterly wasted.⁷⁶ The Texas economy would not grind to a halt, but it would feel the dampening effects of such a decision, and those effects would be real and acute.

⁷⁵ In the pending case, expert testimony confirmed that drilling in this region would not be economically viable without fracturing. Certain “tight formations” produce gas in commercial quantities only through fracturing, and all the wells in the Vicksburg T field, including all of the wells drilled on Share 13, received fracture treatments. Coastal’s expert testified that every well in South Texas has been subjected to at least one fracture treatment. The Share 13 Plaintiffs’ expert testified that without fracturing “there is no hope for economically attractive production” in the Vicksburg T.

⁷⁶ As the Texas Energy Planning Council reported in its 2005 Texas Energy Plan: “Extending the useful and productive life of marginal wells encourages the domestic production of oil and gas. Once these wells are abandoned and plugged, Texas will lose access to this valuable natural resource.” TEXAS ENERGY PLANNING COUNCIL, *supra* note 15, at 15.

Sixteen years ago in *Geo Viking, Inc. v. Tex-Lee Operating Co.*, we opened the door to trespass-by-fracture claims: “Fracing under the surface of another’s land constitutes a subsurface trespass.”⁷⁷ This attention-grabbing pronouncement had a short shelf life. We withdrew the opinion six months later, noting *Geo Viking* had been improvidently granted and expressly disavowing that anything we said should be “understood as approving or disapproving the opinions of the court of appeals analyzing the rule of capture or trespass as they apply to hydraulic fracturing.”⁷⁸ Fortunately, we avoid a similar mistake today.

* * * * *

Given Texas’ unrivaled leadership in shaping the nation’s dynamic energy sector, “[o]ther states frequently look to Texas decisions when confronted with a new or unsettled issue of oil and gas law.”⁷⁹ While I would tackle the trespass issue slightly differently, the reasoning underlying the Court’s no-liability outcome provides a valuable legal roadmap. I agree that Texas law should not equate hydraulic fracturing across a lease boundary with actionable subsurface trespass. I also agree with the Court on all the various nontrespass issues.

Don R. Willett
Justice

OPINION DELIVERED: August 29, 2008.

⁷⁷ 1992 WL 80263, at *2, *on reh’g*, 839 S.W.2d 797 (Tex. 1992).

⁷⁸ 839 S.W.2d at 797.

⁷⁹ Ernest E. Smith, *Implications of a Fiduciary Standard of Conduct for the Holder of the Executive Right*, 64 TEX. L. REV. 371, 375 n.13 (1985).