

# Wise County group's 5-year fight over disposal well goes to state Supreme Court

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Every time a car passes over the gravel roads in northeast Wise County, a plume of dust kicks up behind it. The whitish cloud blocks the panoramic view of a wind-swept grassland dotted with horses before settling back on the ground.

Jim Popp and his neighbors had a vision of those dust clouds climbing higher and swirling faster, becoming a blur as heavy trucks went to inject toxin-infused liquids deep into the ground beneath their community. The image was just a potential scenario, but it filled them all with a mix of dread and determination.

"Basically, it's David against Goliath," Popp said. "A generation of Texans has had drilled in their heads, 'You can't beat oil and gas.'"

Popp and his neighbors have fought for five years to keep a commercial saltwater disposal well out of their community. Along the way, they found themselves on a Kafkaesque search for a government agency with the authority to act on their concerns.

Last month, the case reached the Texas Supreme Court, where the nine justices will decide a question with far-reaching implications for energy exploration and production: Whom, if anyone, can Jim Popp and his neighbors turn to for help?

The natural gas drilling boom in North Texas was still in its early stages in 2005 when Pioneer Exploration applied with the Texas Railroad Commission to install a saltwater disposal well near the unincorporated community of Greenwood.

Disposal wells are the gas industry's favored approach to dealing with the waste byproduct from modern gas drilling.

Drillers extract natural gas from deep within the earth by blasting the geological formations with massive amounts of water, sand and chemicals. The process, called hydraulic fracturing, leaves behind millions of gallons of "frac water" filled with salt, contaminants and crude oil.

Drillers say the cost-effective way to dispose of frac water is to inject it into an underground formation deeper than the Barnett Shale. The wells are supposed to keep the polluted liquid contained, but recent cases of contaminated well water near disposal wells have raised questions.

There are over 7,000 operating saltwater disposal wells in Texas.

Greenwood-area residents immediately wondered whether Pioneer's plans endangered their water wells.

"You sure don't want your water to get contaminated," said one resident, Kelly Hall. "That's our livelihood. That's all the water we have."

Their fears multiplied when they learned that Pioneer wanted the well to be a commercial enterprise in which the company charged other operators to dispose of their drilling waste. Pioneer planned for the well to operate 24 hours a day and for 20 to 50 trucks to stop by daily.

Jim Johnson, another resident, didn't like the idea of so many trucks driving over the roads. He worried about his grandchildren, who played in the area, and about the dangerous blind curves not far from his home.

"We came here to get away from it all," Johnson said, but he could picture his serene surroundings slipping away. Popp quickly arranged a neighborhood meeting. Nearly 150 people showed up. Within a week, they had formed the nonprofit Texas Citizens for a Safe Future and Clean Water and formally protested Pioneer's application with the Railroad Commission.

### **Learning the laws**

So began the trips to Austin, the daylong hearings and the crash course in the state's energy laws.

At the first hearing in May 2005, Texas Citizens showed that Pioneer had omitted from their application that a gas well was within a quarter-mile of where they wanted to install the disposal well.

Pioneer Exploration did not return phone calls for this story.

In February 2006, the commission fined Pioneer \$500 but approved the company's application, ruling that groundwater wasn't threatened.

Although this frustrated Popp and his neighbors, they were more surprised at the commission's refusal to consider their fears about truck traffic. The examiners wrote that they didn't have jurisdiction to regulate traffic on state roads.

Texas Citizens' lawyer, David Frederick, noted that state law requires the commission to consider "the public interest" before approving disposal well permits.

Examiners Thomas Richter and James Doherty wrote that the agency's definition of public interest includes actions that encourage oil and gas production in Texas.

"The safe and proper disposal of produced saltwater in disposal wells such as the one proposed by Pioneer meets this need and thereby serves the public interest," they wrote.

The ruling felt like a slap in the face to Popp and his neighbors.

If the Railroad Commission didn't have the power to stop Pioneer's well because of traffic issues, they needed to find the government agency that did.

Only one problem.

There was no other agency.

### **Help hard to find**

On a page devoted to saltwater disposal wells on its website, the Railroad Commission directs those with concerns about traffic to go elsewhere for help: either the Texas Department of Transportation or their local government.

Transportation Department spokesman Chris Lippincott said the agency can't block a company from installing an injection well because of traffic problems that might occur later. The department can sometimes penalize a company for damaging a road if, say, its trucks weigh more than the legal limit.

That left local governments as the last resort.

Some North Texas cities have taken a hands-on approach to regulating gas drilling, including issuing moratoriums on saltwater injection wells or drilling permits.

But Pioneer's plan fell outside the jurisdiction of any city. The Wise County Commissioners Court was powerless as well.

"Counties don't really have any authority to regulate drilling, and traditionally the Railroad Commission has stayed away from any kinds of issues that have to do with nuisance, traffic or road use," said John McFarland, an oil and gas attorney in Austin who blogs about legal issues facing the industry. "That's why a subdivision in an unincorporated area is pretty much the Wild West."

In Tarrant County, Commissioner Roy Brooks tries to work with gas companies on behalf of the residents in his district, but he acknowledges that he lacks the authority to force the companies to cooperate.

"It would be far better to have legal protection than just count on folks' good will to do the right thing," Brooks said.

Wise County Commissioner Danny White said traffic is the one area of gas drilling he would like to regulate.

"They bring a lot of tax base into the community, but we spend a lot of money repairing the roads that they literally destroy. And you get pretty frustrated about it," he said.

State Rep. Phil King, R-Weatherford, said that he often receives calls from residents about injection wells in his district, which includes Wise County, and that the problem is usually related to traffic. He disagrees with the Railroad Commission's argument that it can't address traffic problems.

"Traffic is a legitimate concern in the placement and the location of an injection well," King said. "Public interest to me is a pretty clear definition, and I think the Railroad Commission currently has the authority to look at that."

### **Drill now -- but safely**

After the loss at the Railroad Commission, the pessimism was palpable for Texas Citizens. Many of the homeowners believed they had been outgunned and were ready to give up. A small contingent still felt motivated.

"We want energy independence. We want 'drill here, drill now,' but we want them to do it in a safe manner for everybody," Popp said.

About a month later, Popp and more than a dozen families sued the commission. They argued that the "public interest" criterion requires the agency to consider public safety concerns, including traffic.

A district court sided with the Railroad Commission in December 2006. A year later, the 3rd Court of Appeals in Austin disagreed and backed Texas Citizens.

"While the legislature did not specify which factors should be considered, the scope of 'the public interest' must be broader than the effect on oil and gas production," Justice Diane Henson wrote.

Last month, the case reached the Texas Supreme Court on appeal by the Railroad Commission. For 46 minutes, the justices grilled both sides about how an agency should define public interest.

Several justices questioned whether the commission's work would grind to a halt if they had to look at every matter that someone argues is in the public interest.

Justice Harriet O'Neill spent several minutes focused on why the Texas Commission on Environmental Quality is allowed to consider traffic issues in its permitting of municipal waste disposal wells but the Railroad Commission can't for disposal wells related to gas drilling.

The case has received attention in two centers of power in Texas: the legal community and the gas industry.

Ben Mesches, a partner with Haynes and Boone in Dallas, spoke about the case during a presentation at a symposium on Barnett Shale legal issues at Texas Wesleyan law school in Fort Worth.

"The justices are trying to figure out what the Legislature intended with this statute," Mesches said in a phone interview. "There seemed to be a concern in the court of a possible regulatory vacuum."

### **Legislative action**

The justices are likely to take months to rule. In the meantime, state lawmakers may end up tackling the issue.

House Speaker Joe Straus ordered the House Energy Committee to investigate local and state drilling ordinances this year and recommend possible changes to the Railroad Commission's authority.

Sen. Wendy Davis, D-Fort Worth, is working on a bill that would give the Railroad Commission authority to regulate drilling in unincorporated areas the same way city councils can.

She said the commission would need more staffers to handle the extra responsibility, which she hopes to fund by increasing the permit fees charged to gas companies.

It's the opposite approach to what Davis tried in 2009 when she proposed giving the Tarrant County Commissioners Court authority over gas drilling in unincorporated areas. The measure died amid resistance from the oil and gas industry.

Among the arguments against the bill was that the Railroad Commission already had the power to handle those issues.

The debate will continue, but Texas Citizens remains uncertain of its role once the case is decided.

Sitting around Cecile Carson's living room, Texas Citizens' de facto headquarters, Popp and his neighbors said their goal was always to keep a commercial saltwater disposal well out of their community. Pioneer hasn't put one in yet, but its permit is still valid pending the outcome of the lawsuit, according to the Railroad Commission.

After five years of fighting, they hope no one else has to face the same uphill battle to be heard that they have waged.

"It's a good ol' boy system," Carson said, as her neighbors nodded. "The commission just throws you under the bus."

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