Chapter 11

Subsurface Trespass and Hydraulic Fracturing:
An Examination of Relevant Precedent
from Texas and Beyond

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CITE AS 35 Energy & Min. L. Inst. 11 (2014)
§ 11.01. Introduction.

As hydraulic fracturing activities continue to rise, the number of lawsuits attacking the process increases. Most of the lawsuits to date have focused on the potential health risks of hydraulic fracturing, mainly involving claims that fracturing fluid chemicals pollute water supplies. Another emerging issue of growing importance is whether hydraulic fracturing activities should lead to actionable subsurface trespass claims, and whether they should do so regardless of whether actual damages are present.

The Second Restatement of Torts, in listing the elements of an intentional trespass, states that one is liable “irrespective of whether he thereby causes harm.”1 And a trespass “may be committed on, beneath, or above the surface of the earth.”2 But the Restatement carves out an exception for aircraft flight, making it a trespass only if the aircraft:

(1) enters “the immediate reaches” of the air space over the land; and

(2) “interferes substantially” with the landowner’s use and enjoyment of his land.3

As noted in the comments to the Restatement, “the advent of aviation” has meant that Sir Edward Coke’s statement “cujus est solum, ejus est usque ad coelum,” or “he who owns the soil owns upward unto heaven,” can “no longer be regarded as law.”4

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1 Restatement (Second) of Torts § 158 (1965) (emphasis added).
2 Id. at § 159 (1965).
3 Id.
4 Id. cmt. g.
But absent from the Second Restatement, published in 1965, is a similar carve-out for subsurface activity — namely, drilling and related activities. To the contrary, the comments to the Restatement state that a “trespass beneath the surface may be committed . . . by any . . . unprivileged entry on land beneath the surface.”5 There is “no distinction between deep versus shallow subsurface invasions”; the Restatement “directly extends its expansive scope of liability to include any activity that occurs beneath the earth, regardless of depth.”6 Nor is there a distinction for activities that cause no actual damage. Because drilling-related activities “would be considered intentional acts and could be done with intent or at least knowledge that such operations could invade neighboring subsurface,” they are subject to liability irrespective of damage pursuant to the Restatement’s treatment of intentional trespass.7

Yet modern courts have tended to treat subsurface trespass similarly to “how the Restatement [treats] airspace trespass” by subjecting subsurface ownership to certain limitations, such as requiring actual damages before an actionable trespass will be found.8 As courts begin to address subsurface trespass specifically as it relates to hydraulic fracturing, numerous practical concerns, such as the importance of oil and gas development, the power of the individual landowner (or the lack thereof), and the authority of regulatory agencies, will help determine whether such limitations continue to be imposed upon ownership of the subsurface.

§ 11.02. Texas Case Law.

Texas has a significant line of precedent addressing subsurface trespass, and two recent Texas cases, especially the seminal case of Coastal Oil & Gas Corp. v. Garza Energy Trust, which addresses subsurface trespass as it relates to hydraulic fracturing, have developed the issue.9 However, Texas

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5 Id. cmt. e.
7 Id. at 210.
8 Id.
9 Coastal Oil & Gas Corp. v. Garza Energy Trust, 268 S.W.3d 1 (Tex. 2008).
is alone; while other states have considered subsurface trespass claims arising from activities related to secondary recovery operations and wastewater injections, none has a standing decision addressing subsurface trespass as it relates to hydraulic fracturing. With the growing importance and presence of hydraulic fracturing, an increasing number of states’ courts will confront the issue, and they are sure to look to the Texas Supreme Court’s struggle with it for guidance.


In the 1950 case Hastings Oil Co. v. Texas Co., the Texas Supreme Court addressed whether a slant well completed without authorization beneath an adjoining parcel of land should be enjoined under a theory of subsurface trespass. Hastings Oil Co. and Texas Co. owned adjoining mineral leases, and Hastings drilled a well that deviated from its vertical path. The court found that there was “probable cause to believe” that the well bottomed out in Texas’s subsurface, and upheld an injunction against Hastings. In Hastings, the court readily applied a straightforward analysis to this trespass, which was “continuous in nature.” Indeed, in the drilling context, “the most obvious example of actionable trespass is the drilling of a directional well that bottoms out beneath neighboring property that is not part of the drilling unit for that well.” Such wells offer no public benefit “because the trespass is not necessary for the exploitation of oil and gas resources because a non-trespassing well could be drilled to exploit the same resources.”

10 Hastings Oil Co. v. Texas Co., 234 S.W.2d 389 (Tex. 1950).
11 Id. at 390-91.
12 Id. at 392, 98.
15 Id.

In the 1961 *Gregg v. Delhi-Taylor Oil Corp.*\(^{16}\) case, the Texas Supreme Court considered not whether hydraulic fractures that cross lease lines were subject to trespass law, but instead whether that very question was one for the courts to decide, or for the Texas Railroad Commission (“RRC”), the state’s regulatory agency for oil and gas. The plaintiff, Delhi-Taylor Oil Corp., owned the mineral estates in land surrounding the defendant’s lease.\(^{17}\) The defendant, Gregg, planned on hydraulically fracturing a common formation beyond his own property lines and into Delhi-Taylor’s lease. Delhi-Taylor filed suit to enjoin Gregg from fracturing, alleging that it would be a subsurface trespass.\(^{18}\) The trial court, without hearing evidence, dismissed the complaint on the ground that the RRC had primary jurisdiction.\(^{19}\) The appellate court reversed and remanded, ordering the case to be reinstated for trial.\(^{20}\)

The Texas Supreme Court granted an application for a writ of error, and affirmed the appellate court, holding that such a decision was in the purview of the courts, as the issue was “one inherently judicial in nature” and the Legislature had not “explicitly granted exclusive jurisdiction to the administrative body.”\(^{21}\)

But the real legacy of the case has proven to be in its dicta, in which the court suggested that hydraulic fractures should be considered similarly to a deviated drilling bit:

> The pleadings allege a physical entrance into Delhi-Taylor’s leasehold. While the drilling bit of Gregg’s well is not alleged to have extended into Delhi-Taylor’s land, the same result is reached if in fact the cracks or veins extend into its land and gas is produced therefrom by Gregg. To constitute a trespass, entry upon another’s

\(^{16}\) *Gregg v. Delhi-Taylor Oil Corp.*, 344 S.W.2d 411, 416 (Tex. 1961).

\(^{17}\) *Id.* at 412.

\(^{18}\) *Id.*

\(^{19}\) *Id.*

\(^{20}\) *Id.*

\(^{21}\) *Id.* at 415.
land need not be in person, but may be made by causing or permitting a thing to cross the boundary of the premises.22

The court cited Hastings as an example of it previously enjoining a subsurface trespass.23 As discussed below, this dicta would resurface in subsequent Texas Supreme Court holdings.


The following year, 1962, the Texas Supreme Court considered Railroad Commission of Texas v. Manziel.24 The Manziels sought to set aside and cancel an order of the RRC permitting their neighbors, the Whelans, to drill and inject water in the Whelans’ well at an irregular location as part of waterflooding, a secondary recovery operation. The Whelans’ tract adjoined the Manziels’ and they sought to engage in the waterflooding to increase the efficiency of their well production.25 Their proposed waterflood program was designed to maximize recovery from the their own lease, as opposed to maximizing recovery from the entire field, which included the Manziels’ lease.26 The Whelans sought an RRC order permitting injection at the irregular location to significantly reduce the amount of oil the waterflood program would push to a rival lease.27 But the irregular location would also significantly reduce the life of the Manziels’ well.28

The trial court entered a judgment cancelling the order and enjoining the Whelans from injecting the water.29 The judgment was appealed directly to the Texas Supreme Court.30

22 Id. at 416.
23 Id.
25 Id. at 562.
26 Id. at 563.
27 Id. at 564.
28 Id.
29 Id. at 562.
30 Id.
The RRC argued that it must have the authority to grant the location of injection wells pursuant to its directive of protecting correlative rights and preventing drainage.\textsuperscript{31} Without allowing an operator such as the Whelans to use effective methods to prevent oil from being pushed from beneath its property, the RRC claimed there would be no incentive for an operator to engage in certain secondary recovery operations that increase the recovery of oil.\textsuperscript{32} The Manziels conceded that the RRC had this authority, but asserted that the RRC could not authorize a “trespass by injected water that [would] result in the premature destruction of” the Manziels’ well.\textsuperscript{33}

The court began its trespass analysis by narrowly framing the issue before it:

The subsurface invasion of adjoining mineral estates by injected salt water of a secondary recovery project is to be expected, and in the case at bar we are not confronted with the tort aspects of such practices. Neither is the question raised as to whether the Commission’s authorization of such operations throws a protective cloak around the injecting operator who might otherwise be subjected to the risks of liability for actual damages to the adjoining property; rather we are faced with an issue of whether a trespass is committed when secondary recovery waters from an authorized secondary recovery project cross lease lines.\textsuperscript{34}

In considering the trespass claim, the Texas Supreme Court examined cases “covering almost every aspect of the oil and gas industry” where the plaintiff claimed damage to or encroachment on a subsurface estate.\textsuperscript{35} The court found only one situation in which an injunction was granted on a trespass theory: when there is a continuing, physical invasion by drilling across lease lines, such as the deviated well in Hastings.\textsuperscript{36} Almost the entirety of the remaining cases involved questions of liability for negligence.\textsuperscript{37}

\begin{itemize}
\item \textsuperscript{31} *Id.* at 565.
\item \textsuperscript{32} *Id.*
\item \textsuperscript{33} *Id.*
\item \textsuperscript{34} *Id.* at 566-67 (emphasis added).
\item \textsuperscript{35} *Id.* at 567.
\item \textsuperscript{36} *Id.* at 567 n.2.
\item \textsuperscript{37} *Id.* at 567.
\end{itemize}
The court cited *Gregg* for the proposition that a trespass requires “some physical entry upon the land by some ‘thing,’ but questioned whether “injected water that crosses lease lines from an authorized secondary project [is] the type of ‘thing’ that may be said to render the adjoining operator guilty of trespass.” But the court ultimately looked to societal and industry interests for its answer, noting that secondary recovery operations should be encouraged:

Secondary recovery operations are carried on to increase the ultimate recovery of oil and gas, and it is established that pressure maintenance projects will result in more recovery than was obtained by primary methods. It cannot be disputed that such operations should be encouraged, for as the pressure behind the primary production dissipates, the greater is the public necessity for applying secondary recovery forces. It is 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. As is pointed out by amicus curiae, if the Manziels’ theory of subsurface trespass be accepted, the injection of salt water in the East Texas field has caused subsurface trespasses of the greatest magnitude.

The court held that when the RRC validly “authorizes secondary recovery projects, a trespass does not occur when the injected, secondary recovery forces move across lease lines, and the operations are not subject to an injunction on that basis.” It concluded its trespass analysis by stating that the “technical rules of trespass have no place in the consideration of the validity of the orders of the Commission.”

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38 Id.
39 Id. at 568.
40 Id.
41 Id.
Until the Court Changes Its Mind.*

The Texas Supreme Court did not issue a ruling on a subsurface trespass case for another thirty years. Then, in 1992, the court decided *Geo Viking, Inc. v. Tex-Lee Operating Co.*42 Tex-Lee Operating Company had hired Geo Viking to hydraulically fracture a well with sand, commonly called “sand fracing,” and Geo Viking failed to adequately perform the task. Had the job been performed properly, there was evidence that Tex-Lee would have been able to capture an increased amount of oil and gas, including minerals from a neighboring tract.43 At trial, Geo Viking requested that the jury be instructed that it should not consider the value of oil and gas outside of Tex-Lee’s tract that may have been recovered by an adequate fracturing job.44 The trial court refused the instruction, and, after the jury found for Tex-Lee, Geo Viking appealed, arguing that without this instruction, “the jury was free to consider as part of its estimate of damages the value of production that Tex-Lee had no legal right to recover.”45

The court of appeals determined that such an argument was in direct opposition to the rule of capture, and that an injured landowner’s remedy is generally self-help.46 But the Texas Supreme Court, in a *per curiam* opinion issued in April 1992, held otherwise, noting that, although minerals can be drained legitimately under the rule of capture, the owner “is accorded the usual remedies against trespassers who appropriate the minerals or destroy their market value.”47 The court held, for the first time, that “fracing under the surface of another’s land constitutes a subsurface trespass,” citing the *Gregg* dicta for support. “Therefore, the rule of capture would not permit Tex-Lee to recover for a loss of oil and gas that might have been

43 Id. at *2.
44 Id.
45 Id. at *2.
produced as the result of fracking beyond the boundaries of the tract.”48 The court noted that the appellate court’s decision “held Geo-Viking liable for the loss of oil production that would have been produced by means of a subsurface trespass.”49

But barely six months later, the court issued another per curiam opinion withdrawing both its initial Geo Viking opinion and its granting of the application for writ of error, stating that it “was improvidently granted.”50 The court further stated that, in denying the application for writ of error, it “should not 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.”51 The previously reversed court of appeals’ decision is left standing.


[a] — Background.

In the 2008 case Coastal Oil & Gas Corp. v. Garza Energy Trust, the plaintiff, Salinas, leased the mineral rights in a 748-acre tract of land to Coastal Oil & Gas Corp.52 Coastal also owned, in fee, the mineral estate in an adjacent tract. After drilling an “exceptionally” productive well on a tract leased from Salinas, Coastal, on the adjacent tract it owned in fee, drilled a well as close as possible to the exceptionally productive well.53 Coastal hydraulically fractured both tracts.54

Salinas asserted, among other things, a claim of trespass against Coastal, alleging that Coastal’s fracturing on the adjacent tract invaded the reservoir below the Salinas tract, causing damage in the form of substantial drainage of gas from Salinas’ property to the adjacent tract.55 Salinas

48 Id. (citing Gregg, 344 S.W.2d at 416).
49 Id.
51 Id. at 798.
52 Garza, 268 S.W.3d at 5.
53 Id. at 6.
54 Id.
55 Id. at 7.
believed that Coastal was allowing gas on the land Coastal leased from Salinas — and on which Coastal owed Salinas a royalty — to drain to the adjacent tract owned by Coastal unburdened by a royalty obligation.56

At trial, the jury found, among other things, that Coastal’s hydraulic fracturing trespassed on Salinas’ property, causing substantial drainage in the amount of $1 million.57 The jury also found that Coastal acted with malice and appropriated the Salinas property unlawfully, and assessed $10 million in punitive damages.58 After the trial court reduced the drainage damages to the maximum amount supported by the evidence, the court of appeals affirmed these findings, and Coastal appealed to the Texas Supreme Court.59

[b] — *Garza Majority Opinion.*

The Texas Supreme Court majority opinion opened its subsurface trespass analysis with a firm reprobation of Lord Coke’s maxim — and, implicitly, the Second Restatement of Torts:

Had Coastal caused something like proppants to be deposited on the surface of Share 13, it would be liable for trespass, and from the ancient common law maxim that land ownership extends to the sky above and the earth’s center below, one might extrapolate that the same rule should apply two miles below the surface. But that maxim — *cujus est solum ejus est usque ad coelum et ad inferos* — “has no place in the modern world.” Wheeling an airplane across the surface of one’s property without permission is a trespass; flying the plane through the airspace two miles above the property is not. Lord Coke, who pronounced the maxim, did not consider the possibility of airplanes. But neither did he imagine oil wells. The law of trespass need no more be the same two miles below the surface than two miles above.60

56 *Id.* at 6.
57 *Id.* at 8.
58 *Id.*
59 *Id.* at 9.
60 *Id.* at 11.
The court briefly considered the *Gregg*, *Manziel*, and *Geo Viking* cases, noting that it “had not previously decided whether subsurface fracturing can give rise to an action for trespass.”61 The majority then stated that it “need not decide the broader issue here” of whether subsurface fracturing could give rise to a claim for trespass.62 Instead, an actionable trespass on a reversionary interest (the interest possessed by Salinas) requires an actual injury, and Salinas’ only claim of injury — that Coastal’s fracturing operation made it possible for gas to flow from Salinas’ tract to the adjacent tract’s wells — was precluded by the rule of capture.63 The rule of capture only provided Salinas with the right to capture the gas beneath his tract, as opposed to granting him ownership of the gas itself; the gas he claimed to have lost “simply [did] not belong to him.”64 Thus, because Salinas incurred no actual damages, the majority reasoned, no actionable claim of trespass could be sustained, and the court did not have to rule on whether the entry of hydraulic fracturing fluid into another’s land that causes injury constitutes a trespass.

The majority addressed Salinas’ argument that fracturing beyond one’s property “is no different from drilling a deviated or slant well”65 — an argument echoing the *Gregg* dicta. But the majority determined that the rule of capture did not apply to a slant well, because the rule “determines title to gas that drains from property owned by one person onto property owned by another. It says nothing about the ownership of gas that has remained in place.”66 The court further explained:

The gas produced through a deviated well does not migrate to the wellbore from another’s property; it is already on another’s property. The rule of capture is justified because a landowner can protect himself from drainage by drilling his own well, thereby avoiding the uncertainties of determining how gas is migrating through

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61 Id. at 11-12.
62 Id. at 12.
63 Id. at 12-13.
64 Id. at 13.
65 Id.
66 Id. at 14.
a reservoir. It is a rule of expedience. One cannot protect against drainage from a deviated well by drilling his own well; the deviated well will continue to produce his gas. Nor is there any uncertainty that a deviated well is producing another owner’s gas. The justifications for the rule of capture do not support applying the rule to a deviated well.67

The majority then offered four reasons “not to change the rule of capture to allow one property owner to sue another for oil and gas drained by hydraulic fracturing that extends beyond lease lines”:68

1. “First, the law already affords the owner who claims drainage full recourse” in the form of self-help, implied covenants imposed on lessees, and pooling.69

2. “Second, allowing recovery for the value of gas drained by hydraulic fracturing usurps to courts and juries the lawful and preferable authority of the [RRC] to regulate oil and gas production.”70 Such recovery would be contrary to the rule of capture, and the rule of capture allows the RRC to protect the correlative rights of owners and regulate production.71

3. “Third, determining the value of oil and gas drained by hydraulic fracturing is the kind of issue the litigation process is least equipped to handle.”72 Specifically, “trial judges and juries cannot take into account social policies, industry operations, and the greater good which are all tremendously important in deciding whether fracing should or should not be against the law.”73

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67 Id.
68 Id. at 14.
69 Id.
70 Id. at 14-15.
71 Id. at 15.
72 Id. at 16.
73 Id.

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4. And “[f]ourth, the law of capture should not be changed to apply differently to hydraulic fracturing because no one in the industry appears to want or need the change.”\textsuperscript{74} The court reviewed amicus curiae briefs filed in the case from the RRC and numerous other organizations and companies “from every corner of the industry — regulators, landowners, royalty owners, operators, and hydraulic fracturing service providers” — all of which opposed liability for hydraulic fracturing, and “almost always warning of adverse consequences in the direst of language.”\textsuperscript{75}

The majority held that damages for drainage by hydraulic fracturing “are precluded by the rule of capture.”\textsuperscript{76} But, “[i]t should go without saying” that the rule cannot protect “misconduct that is illegal, malicious, reckless, or intended to harm another without commercial justification.”\textsuperscript{77}

[c] — \textit{Garza Concurrence}.

In his strong and colorful concurring opinion, Justice Willett went a step further than the majority. Justice Willett opened his opinion by referring to oil and gas as the “muscle” of Texas, and noted that “Texas common law should not give traction to an action rooted in abstraction.”\textsuperscript{78} He took issue with the majority “implicitly leav[ing] trespass as a potentially viable theory in suits seeking ‘nondrainage’ damages.”\textsuperscript{79} Willett was concerned with “whether the underlying act was wrongful to start with”; he would have found that the encroachment by Coastal’s fracturing “wasn’t just ‘no actionable trespass’, but was instead no trespass at all.”\textsuperscript{80} Instead, he noted, plaintiffs alleging such injuries can bring a suit in negligence.\textsuperscript{81} Willett

\textsuperscript{74} Id.
\textsuperscript{75} Id. at 16-17.
\textsuperscript{76} Id. at 17.
\textsuperscript{77} Id.
\textsuperscript{78} Id. at 27.
\textsuperscript{79} Id. at 30.
\textsuperscript{80} Id. at 29.
\textsuperscript{81} Id.
“would end definitively any lingering flirtation of Texas law with equating hydraulic fracturing with trespass,” and “say categorically that a claim for ‘trespass-by-frac’ is nonexistent in either drainage or nondrainage cases.”Willett pointed to the court’s Manziel decision in which it declared that “injecting water beneath your neighbor’s land was simply not a trespass because it was not wrongful.”

Willett’s concurrence focused on the concern of “[taking] an indispensable innovation in an indispensable industry and mak[ing] it a tort.” He worried that the majority opinion would usurp the “legislatively conferred discretion” of the Railroad Commission and replace it with “wide-open tort liability” that would result in “exorbitant costs on society.” Due to the imprecise nature of fracturing — which creates “fissures of immeasurable length and uncontrolable direction” — operators lack absolute control, and “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.” Further, “it would reward the free rider who would rather sue for trespass than drill his own 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?” And less fracturing of course means less tax and royalty revenues for the state of Texas. So Willett agreed with the court “as far as it goes,” and given the choice between “(1) extend[ing] trespass liability to thwart a proven and widespread recovery technique or (2) extend[ing] the rule of capture — perhaps ‘the most important single doctrine of oil and gas law,’” Willett chose the latter.

82 Id.
83 Id. at 37 (citing Manziel, 361 S.W.2d at 568-69).
84 Id. at 30.
85 Id.
86 Id. at 32-33.
87 Id. at 30.
88 Id. at 33-34.
89 Id. at 35.
[d] — Garza Dissent.

Justice Johnson authored the dissenting opinion, to which Chief Justice Jefferson and Justice Medina both joined in on the relevant part. These Justices objected to the majority’s failure to rule on whether a subsurface trespass occurred at all, and stated that, until that very issue is addressed, Coastal’s fracturing into the Salinas tract must be considered an illegal trespass. And because Coastal did not legally recover the gas it drained from Salinas’ tract, the rule of capture should not apply to protect the activity. Coastal had conceded that gas must be legally obtained in order to come within the rule of capture, and, as the dissent noted, without the “legal” requirement, “the rule of capture becomes only a license to obtain minerals in any manner . . . .”

The dissent would expressly decide the trespass issue by holding that hydraulic fracturing does constitute a trespass. For support, the dissent looked to the court’s past holdings that a trespass occurs in cases of a deviated well drilling across lease lines, and likened the two processes: both are intentional actions by operators to insert foreign materials, without permission, into another’s tract, and employ those foreign materials in the extraction of minerals. The dissent also noted a practical concern for unsophisticated individuals who own small parcels of land and are unlikely to utilize such remedies as self-help and pooling. Specifically, the majority’s holding reduced incentives for operators to lease from such property owners because the operators could “drill and hydraulically fracture to ‘capture’ minerals from unleased and unpoled properties that would otherwise not be captured.”

However, the dissent was not blind to the importance of hydraulic fracturing, and provided a solution it hoped would quell the fears of those con-

\[\text{id. at 43.}\]
\[\text{id. at 47.}\]
\[\text{id. at 44.}\]
\[\text{id. at 45.}\]
\[\text{id.}\]
cerned with stymieing the process. The dissent argued that, “[e]ven if it were to be decided that hydraulic fracturing is subject to traditional trespass rules, equitable considerations are proper in determining the availability of damages for trespass related to the recovery of minerals . . . .”\textsuperscript{97} In other words, just because hydraulic fracturing may lead to an actionable trespass claim doesn’t mean that the law can’t be flexible in considering the circumstances of the claim and balance the interests involved. The dissent specifically promoted the idea of precluding exemplary damages in certain cases.\textsuperscript{98}

[6] — \textit{FPL: Subsurface Trespass Protects a Possessory Interest.}

[a] — \textit{FPL, Round One.}

In the 2011 case \textit{FPL Farming Ltd. v. Environmental Processing Systems, L.C.},\textsuperscript{99} (“\textit{FPL I}”) FPL Farming Limited (FPL) sued Environmental Processing Systems (EPS) for trespass based on subsurface activity, among other things. FPL owned two tracts of land used for rice farming, and owned all of the surface and subsurface rights to the parcels, save for the mineral rights.\textsuperscript{100} EPS operated a wastewater injection well on land adjoining one of those tracts, and had obtained a permit to drill and operate the well from a Texas agency.\textsuperscript{101} FPL alleged that the injected wastewater, which was not designated as hazardous, likely migrated onto its property and contaminated its water supply.\textsuperscript{102}

After a jury failed to find that a trespass had occurred, FPL appealed, and the court of appeals considered “whether EPS was shielded from civil tort liability merely because it received a permit to operate its deep subsurface wastewater injection well.”\textsuperscript{103} The court of appeals concluded that EPS

\textsuperscript{97} \textit{Id.} at 47.
\textsuperscript{98} \textit{Id.}
\textsuperscript{100} \textit{Id.} at 308.
\textsuperscript{101} \textit{Id.}
\textsuperscript{102} \textit{Id.} at 307.
\textsuperscript{103} \textit{Id.} at 309.
was in fact shielded, reasoning that “when a state agency authorized deep subsurface injections, no trespass occurs when fluids that were injected at deep levels are then alleged to have later migrated at those deep levels into the deep subsurface of nearby tracts.” The court relied heavily on the 1962 case Manziel, discussed above, in its ruling.

The Texas Supreme Court took issue with the appellate court’s opinion granting a permit holder “immuniz[ation] from trespass liability by virtue of receiving a permit.” The Texas Supreme Court determined that this was in error, and reversed and remanded, relying on the “general rule [that] a permit granted by an agency does not act to immunize the permit holder from civil tort liability from private parties for actions arising out of the use of the permit.” In other words, “a permit is not a get-out-of-tort-free card.” Instead, it’s more like the licensing of an attorney or the regulation of a restaurant — it removes a government-imposed bar to the activity, but does not shield the licensee or operator from liability. The Texas Supreme Court explicitly stated that it was not deciding whether subsurface wastewater migration could constitute a trespass, or whether it did so in this case.

[b] — On Remand, Round Two.

On remand, the Beaumont Court of Appeals in “FPL II” finally addressed whether Texas law recognizes trespass to protect a possessory interest in subsurface rights, as opposed to the reversionary interest addressed in Garza. The court found that it does, relying on the early Hastings ruling that a slant well is a trespass, and the dicta from Gregg suggesting that subsurface fractures that cross lease lines could result in a trespass. The

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104 Id.
105 Id. at 310.
106 Id.
107 Id. at 311.
108 Id.
109 Id. at 314-15.
111 Id. at 280, 282.
court also relied on a third case, *Edwards Aquifer Authority v. Day*, in which the Texas Supreme Court recognized that a landowner owns the groundwater underneath his property. The Beaumont court noted that the Texas Legislature “ha[d] not provided adjoining landowners of tracts used to inject nonhazardous waste with a right to pool their affected properties, allowing adjacent owners to obtain revenue for the commercial storage value of their subsurface.” Thus, “without a trespass remedy, a party . . . does not have all of the legal remedies typically available to owners to protect the owner’s right to the exclusive use of its property.” In Texas, mineral owners do have the ability to pool.

EPS appealed, and on January 7, 2014, the Texas Supreme Court heard oral arguments on two issues, including whether a trespass cause of action should protect FPL’s interests. EPS’s arguments focused in part on public interest: injection wells are safe, effective, critical, and widely used. Amicus briefs were filed in support by the Texas Oil and Gas Association, Texas Chemical Council, Association of Energy Service Companies, and the Underground Injection Technology Council. EPS also argued that the Texas Supreme Court has disfavored recognizing deep subsurface trespasses, especially absent actual harm. EPS noted that, “despite having been asked several times to recognize a cause of action for trespass based on deep subsurface migration of fluids” — including in *Manziel* and *Garza* — “this [c]ourt has never done so.”

Further, EPS argued that FPL demonstrated no actual damages. The water under FPL’s subsurface was already “toxic brine,” and the water EPS was injecting was briny as well, so nothing was contaminated. And any

113 *FPL Farming Ltd.*, 383 S.W. 3d at 282.
114 *Id.*
117 *Id.* at 35.
118 *Id.* at 2, 11-12.
119 *Id.* at 29.
claim by FPL that “it may, someday, want to desalinate the toxic brine” was insufficient to show actual damages, as “the brine naturally occurring [underneath FPL’s property] is four times more saline than seawater,” of which there is a virtually unlimited supply.120

FPL, in addition to maintaining that the increasing ability to use brackish groundwater (such as for heating greenhouses and land-based aquaculture) meant that it had suffered actual injury,121 argued that Texas has always protected traditional real property rights, and should continue to do so.122 FPL cited Hastings and its ruling addressing slant wells for the proposition that under settled Texas law, a property owner can protect his subsurface rights via a trespass suit.123

FPL further argued that “the hypothetical negative impact on the oil and gas industry EPS laments is entirely imaginary.”124 The injection well at issue is a Class I well, which is used to inject certain wastes not associated with oil and gas production, while Class II wells are used for secondary recovery operations and disposal of oil and gas associated wastes. In Texas, Class I and Class II wells are regulated by different agencies, are subject to different regulatory schemes, and “implicate different policy considerations.”125 Thus, any ruling affecting the Class I well at issue should not affect Class II wells associated with mineral production.

§ 11.03. Case Law Beyond Texas.

Only one other state, West Virginia, has had a ruling addressing subsurface trespass for hydraulic fracturing. A number of other states have relevant precedent addressing subsurface trespass in other contexts, such as the injection of wastewater. A selection of these cases is discussed below.

120 Id.
122 Id. at 7-10.
123 Id. at 1.
124 Id. at 31.
125 Id. at 31-32.

[a] — West Virginia: Stone.

In April 2013, U.S. District Judge John Preston Bailey of the Northern District of West Virginia handed down a ruling that appeared destined to give oil and gas producers — especially those active in the Marcellus Shale — cause for concern. Judge Bailey, interpreting the law as he believed the West Virginia Supreme Court of Appeals would, denied an oil and gas producer’s motion for summary judgment, finding that “hydraulic fracturing under the land of a neighboring property without that party’s consent is not protected by the ‘rule of capture,’ but rather constitutes an actionable trespass.”

In Stone v. Chesapeake Appalachia, LLC, Chesapeake Appalachia, LLC (“Chesapeake”) drilled a horizontal well on property neighboring the plaintiffs’ land. Chesapeake’s vertical wellbore was approximately 200 feet from the plaintiffs’, with the horizontal wellbore only tens of feet from the property line. Plaintiffs filed suit, alleging, among other things, that the defendants were illegally injecting hydraulic fracturing fluid into the formation underlying plaintiffs’ property, which constituted a trespass, and converting plaintiffs’ oil and gas. The defendants filed a motion for summary judgment, arguing that the rule of capture precluded plaintiffs’ trespass cause of action: the plaintiffs had no right to or interest in any minerals that the defendants captured, and thus could not recover any damages for it. Defendants relied on West Virginia case law interpreting and applying the rule of capture, and the Texas Supreme Court case of Garza for the rule’s application to hydraulic fracturing.

In his order, Judge Bailey considered the Garza opinion in detail. He repeated the Garza court’s four “justifications” for its decision, and then

127 Id. at *2.
130 Id. at 6-8.
largely followed the *Garza* dissent in debunking these justifications, focusing on the interests of the small, unsophisticated landowner. In addressing the first justification — that the law already provides full recourse to the landowner — Judge Bailey echoed Justice Johnson’s *Garza* dissent in pointing out “that not all property owners are sophisticated enough or have the resources to drill their own well.” Judge Bailey goes a step further, stating that “[t]he *Garza* opinion gives oil and gas operators a blank check to steal from the small landowner.” Specifically, Judge Bailey was concerned that, under Texas law, drilling companies may hydraulically fracture under a small landowner’s property without even contacting the landowner, or force them to sign a lease. Judge Bailey could not believe that the West Virginia Supreme Court would permit such a result.

Judge Bailey quickly dispensed of the second *Garza* justification, noting that the Texas RRC apparently “has far more regulatory power than West Virginia’s regulatory authority.” He dismissed the fourth justification as well, stating that “[t]his court sees no reason why the desires of the industry should overcome the property rights of small landowners.”

Regarding the third justification — that judges and juries are not equipped to consider social policies, industry concerns and the greater good in determining whether fracturing should be against the law, nor is litigation the ideal process through which to determine the value of any converted minerals — Judge Bailey stated that the relevant issue was not whether fracturing should be against the law, but whether it can be used on neighboring property, “thereby taking the neighbor’s oil and gas without compensation.” And Judge Bailey again cited Justice Johnson’s dissent in noting that “[d]ifficulty in proving matters is not a new problem to trial

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131 Stone, 2013 WL 2097397, at *12.
132 Id.
133 Id.
134 Id. at 12-13.
135 Id. at 14.
136 Id. at 15.
137 Id. at 14.
lawyers.”"138 Thus, the difficulty in proving the value of drained minerals in court was not a reason to preclude trespass as a cause of action.

But on July 20, 2012, Judge Bailey vacated his order in response to a joint motion to vacate after the parties settled the dispute.139 Though the decision no longer stands, it is still instructive, and when considered alongside Garza, it is not difficult to justify the two decisions, despite their opposite holdings. Judge Bailey was clearly concerned with the rights of the small landowner — it certainly seemed to be his greatest concern — but it’s a concern to which the Texas Supreme Court was not oblivious; as mentioned above, Justice Johnson addressed this concern in his dissent. But where Judge Bailey’s chief concern is the small landowner, the Garza holding has a strong and clear focus on the importance of oil and gas operations to Texas.

And the rights of the small West Virginia landowner may require more court-based protection than the rights of the small Texas landowner. Texas grants the RRC significant power and authority to regulate drilling operations, including the ability to force pooling, which can protect a small landowner.140 A landowner in West Virginia has no such recourse.141 And, as the Stone plaintiffs pointed out in briefing, the fact that they can sue the operator for a breach of the implied covenant to protect against drainage (which they did, in a separate count in the same lawsuit), is no reason to prevent plaintiffs from bringing a trespass claim.142


A number of states have addressed subsurface trespass claims in other contexts. And, as discussed below, those states’ courts have declined to recognize subsurface trespass claims absent actual damages — the authors are

138 Id. (quoting Garza, 268 S.W.3d at 45, n.3).
142 Id.
not aware of any cases in which a deep subsurface trespass claim has been recognized absent actual damage to the plaintiff’s property.

[a] — Ohio: *Chance*.

In a 1996 Ohio case, *Chance v. BP Chemicals, Inc.*, the Ohio Supreme Court considered a class action suit against BP Chemicals, Inc., in which property owners claimed subsurface trespass based on injected waste fluids migrating across property lines. The property owners argued that they had absolute ownership of their entire subsurface property. At trial, a jury found, among other things, that no trespass had occurred, and the court of appeals affirmed. The Ohio Supreme Court affirmed, rejecting the property owners’ argument and limiting their subsurface rights just as previous Ohio case law had limited absolute ownership of air rights. The court found that “some type of physical damages or interference with use must have been demonstrated” for the property owners to recover for a trespass.

[b] — Colorado: *Board of County Commissioners*.

In a 2002 Colorado case, *Board of County Commissioners v. Park County Sportsmen’s Ranch, LLP*, the Colorado Supreme Court cited Ohio’s *Chance* case in similarly limiting property owner’s subsurface rights. The property owners sought a declaratory judgment that the storage of water in aquifers underneath their land constituted a trespass. The trial court found that such activity did not constitute a trespass, and the property owners appealed directly to the Colorado Supreme Court, which affirmed. Though relying on Colorado water law, the Colorado Supreme Court’s holding is still instructive as it rejected the trespass claim absent physical construction “on or in the Landowners’ properties.”

144 *Id.* at 991.
145 *Id.* at 992.
146 *Id.* at 993.
148 *Id.* at 693.
149 *Id.* at 715.
[c] — Oklahoma: Rosecrans and Lillard.

In a 1950 Oklahoma case, *W. Edmond Salt Water Disposal Association v. Rosecrans*, the Oklahoma Supreme Court considered an underground trespass claim by landowners alleging that saltwater injected into a well on adjoining property migrated onto their land. The trial court granted the landowners an injunction, and the landowners appealed directly to the Oklahoma Supreme Court. The court considered that the saltwater was injected into stratum that already contained saltwater. Additionally, the landowners presented no evidence of actual damage to their land or interference with the full use and enjoyment of their land. Absent such evidence, the court found a trespass claim unsustainable. In making its decision, the court took into account the common practice and utility of disposing saltwater underground. Later, in a 1954 case, *W. Edmond Lime Unit v. Lillard*, the Oklahoma Supreme Court allowed a trespass cause of action, but only after a jury found that the defendant’s subsurface injection of saltwater caused the plaintiff considerable expense in its drilling activity.

[d] — Arkansas: Jameson.

In a 1980 Arkansas case, *Jameson v. Ethyl Corp.*, the Arkansas Supreme Court heavily considered public policy concerns in deciding a case dealing with secondary recovery operations. Ethyl Corp. held leases for approximately 90 percent of the acreage within a certain field, allowing them to remove brine. The Jamesons owned a tract of land within that field, and which was surrounded on all sides by land leased to Ethyl Corp. Eth-
yl Corp. and the Jamesons attempted to negotiate a lease, but to no avail.\textsuperscript{159} Ethyl Corp. eventually engaged in secondary recovery operations that resulted in efficient and maximum recovery of brine from the field, and in the process substantially or totally depleted the valuable content of the minerals beneath the Jameson’s tract.\textsuperscript{160} Trial evidence established that it would not have been commercially feasible for Ethyl Corp. to engage in efforts to seal off the flow of the minerals from the Jamesons’ tract, nor would it have been practical for the Jamesons to drill production wells themselves.\textsuperscript{161} The trial court granted declaratory relief to Ethyl Corp., establishing the legality of its secondary recovery operations.\textsuperscript{162} The Jamesons appealed directly to the Arkansas Supreme Court.

The Arkansas Supreme Court discussed the rule of capture, stating that the language of the rule did not envision the processes used by Ethyl Corp.\textsuperscript{163} The court looked to Arkansas public policy, and noted that a “determination that a trespass or nuisance occurs through secondary recovery processes within a recovery area would tend to promote waste of such natural resources and extend unwarranted bargaining power to minority landowners.”\textsuperscript{164}

But the court also considered that an expansion of the rule of capture would “further extend the bargaining power of [entities such as Ethyl Corp.] to reduce royalty payments to landowners who are financially unable to [recover the minerals themselves].”\textsuperscript{165} The court held that “reasonable and necessary secondary recovery processes of pools of transient materials should be permitted, when such operations are carried out in good faith for the purpose of maximizing recovery from a common pool.”\textsuperscript{166} But the court expressly conditioned this permission “by imposing an obligation on

\begin{itemize}
\item \textsuperscript{159} \textit{Id.}
\item \textsuperscript{160} \textit{Id.} at 349.
\item \textsuperscript{161} \textit{Id.}
\item \textsuperscript{162} \textit{Id.} at 348.
\item \textsuperscript{163} \textit{Id.} at 350.
\item \textsuperscript{164} \textit{Id.} at 351.
\item \textsuperscript{165} \textit{Id.}
\item \textsuperscript{166} \textit{Id.}
\end{itemize}
the extracting party to compensate the owner of the depleted lands for the minerals extracted in excess of natural depletion . . . and for any special damages which may have been caused to the depleted property.”

§ 11.04. Lessons from the Texas Supreme Court.


As other states’ courts have left the door open to subsurface trespass liability when actual damages are present, so too has the Texas Supreme Court in the context of hydraulic fracturing, suggesting that potentially successful trespass-by-fracing claims can be based on the type of damages claimed by the plaintiff, and on the ownership interest retained by the plaintiff.

The court has suggested that a subsurface invasion resulting in actual damages could constitute an actionable trespass. While the Garza court precluded minerals lost via drainage from qualifying as actual damages on which to base a subsurface trespass claim, it noted that Salinas did not “claim that the hydraulic fracturing operation damaged his wells or the Vicksburg T formation beneath his property. In sum, Salinas [did] not claim damages that are recoverable.” The court seems open to finding an actionable subsurface trespass claim based on hydraulic fracturing activities if the appropriate damages are present.

Comparing the Manziel and FPL I decisions provides further evidence that actual damages could lead to an actionable trespass. Manziel declared that it is not a trespass when injected, secondary recovery forces move across leased lines if the RRC authorized the project, while FPL I declared that the court of appeals was in error in determining that because the a Texas agency permitted the injection wells, there was no trespass. While these are seemingly contradictory, the Manziel decision only authorized movement across leased lines of secondary injected forces, as opposed to authorizing any injurious movement of the forces. Additionally, the Manziel court explicitly stated that it was not granting injecting operators a “protec-

167 Id.
168 Garza, 268 S.W.3d at 13.
tive cloak,” nor was it “confronted with the tort aspects of subsurface . . . migration,”\^169 and the \textit{FPL I} ruling held that a permit does not preclude all liability for trespass. In both decisions, the court seems to have left the door open for an actor to be found liable for subsurface trespass when actual damages are found. While this would comport with the treatment other jurisdictions have applied to general subsurface trespass claims, it is this potential ruling which Justice Willett lamented in his \textit{Garza} concurrence.

But the Texas Supreme Court also left the door open to finding an actionable trespass when only nominal damages are present if the plaintiff retains a possessory interest in the mineral rights. In \textit{FPL I}, the Texas Supreme Court stated that in \textit{Garza} it “held that, because [Salinas was] not in possession of the mineral rights, [Salinas was] not entitled to sue for trespass based on nominal damages but had to prove actual injury.”\^170 A trespass against a possessory interest “does not require actual injury to be actionable and may result in an award of nominal damages.”\^171 In \textit{Garza}, the court noted that, as a mineral lessor, Salinas had only “a royalty interest and the possibility of reverter” should the leases terminate, but “no right to possess, explore for, or produce the minerals.”\^172

At common law, “trespass on the case” was not limited to physical invasions of a plaintiff’s possessory interest in land, and provided an action for injury to a non-possessory interest.\^173 In order to maintain an action for trespass on the case for injury to a non-possessory interest, a plaintiff, according to the \textit{Garza} court, “must show more than the trespass — namely, actual permanent harm to the property of such sort as to affect the value of his interest,”\^174 the corollary being that a landowner in possession of the mineral rights presumably could sue based on nominal damages. Thus, the Texas Supreme Court’s holding in \textit{Garza} leaves open the possibility of a

\^169 \textit{Manziel}, 361 S.W.2d at 566.
\^170 \textit{FPL}, 351 S.W.3d at 314 (citing \textit{Garza}, 268 S.W.3d at 10-11).
\^171 \textit{Garza}, 268 S.W.3d at 13 n.36.
\^172 \textit{Id.} at 9 (quoting \textit{Natural Gas Pipeline Co. of Am. v. Pool}, 124 S.W.3d 188, 194 (Tex. 2003)).
\^173 \textit{Id.} at 9-10.
\^174 \textit{Id.} at 10 (quoting W. Page Keeton \textit{et al.}, \textit{Prosser and Keeton on the Law of Torts} § 13, at 78 (5th ed. 1984)).

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subsurface entry caused by fracturing being deemed a trespass if the proper actual damages are present, or, instead, if only nominal damages are present and the plaintiff maintains a possessory interest in the minerals.

[a] — *FPL II*: Nominal Damages Are Likely Insufficient.

In *FPL II*, the Beaumont Court of Appeals did not explicitly address whether nominal damages were sufficient, but noted EPS’s argument that FPL’s injuries were “so trifling” as to be *de minimis* — insufficient to even meet the standard of nominal damages. The court declined to hold that the trespass was *de minimis* because, on remand, the jury might find that EPS’s operations caused real damage. On appeal before the Texas Supreme Court, the arguments raised by the parties in briefing focus on whether actual damages are present, as opposed to explicitly discussing the sufficiency of nominal damages. But EPS does suggest that, even if trespass can protect a property owner’s possession of his deep subsurface, an additional requirement of actual harm should be imposed. Considering that the other jurisdictions discussed above have never recognized a deep subsurface trespass absent actual harm, it is unlikely that Texas, with its concern for industry and its hesitancy to wholly embrace subsurface trespass claims, will be the first.

[b] — The Importance of Mineral Production.

As noted, the Texas Supreme Court has maintained an explicit deference to the importance of hydrocarbon production and the significance of hydraulic fracturing, despite leaving the door open to finding a “trespass-by-frac” in *Garza*. In *Manziel*, the court stated that, “[c]ertainly, 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 . . . .” In *Garza*, the court was sensitive to the public policy concerns of

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175 *FPL*, 383 S.W.3d at 280.
177 Pet’t Br. on the Merits, supra note 115, at 8 n. 26, 19, 31-35.
178 *Manziel*, 361 S.W.2d at 568.
its decision, noting the threat of “adverse consequences” should the rule of capture be changed to apply differently to hydraulic fracturing;\textsuperscript{179} even the dissent in Garza recognized and deferred to the importance of hydraulic fracturing in proposing limitations to potential trespass liability.\textsuperscript{180}

Additionally, the FPL I Court distinguished the wastewater injection activity it was considering from the secondary recovery operations of Manziel and Garza by noting that the latter two cases dealt with secondary recovery operations to increase the ultimate recovery of oil and gas — a socially important endeavor.\textsuperscript{181} And as the Texas Supreme Court considers FPL II, both parties devote significant portions of their briefing to industry and public policy concerns. Indeed, perhaps nothing demonstrates the court’s concern for the importance of hydrocarbon production than its curious withdrawal of its Geo Viking opinion only months after declaring that hydraulic fracturing would be subject to trespass law. Clearly, the importance of hydrocarbon production is more than a silent undercurrent in the court’s deliberations.

§ 11.05. Conclusion.

The Second Restatement of Torts and its identical treatment of trespass for the surface and subsurface is out of touch with the current state of the law. Absent actual damages from subsurface invasions, courts across numerous jurisdictions have refused to find a trespass, and the Texas Supreme Court, as it considers FPL II, is unlikely to hold otherwise.

And when it comes to addressing subsurface trespass specifically by hydraulic fracturing, Texas has the only direct precedent: the rule of capture precludes actual damages. If such a ruling is adopted by the jurisdictions discussed above, it will, in turn, preclude a finding of subsurface trespass for fracing, at least as far as drainage of minerals is concerned. But, though courts in other states will likely look to Texas and Garza when addressing the issue, it remains to be seen how favorably the precedent will be treated. The Stone opinion out of West Virginia, though since va-

\textsuperscript{179} Garza, 268 S.W.3d at 16-17.
\textsuperscript{180} Id. at 47.
\textsuperscript{181} FPL, 351 S.W.3d at 314.
cated, demonstrates as much; states will consider the authority of their own regulatory agencies, the relative power of the individual landowner, and the localized importance of the industry in determining how to treat this developing issue.