

## Chapter 11

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

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### Synopsis

<b>§ 11.01.</b>	<b>Introduction.....</b>	<b>360</b>
<b>§ 11.02.</b>	<b>Texas Case Law .....</b>	<b>361</b>
	[1] — <i>Hastings Oil Co.</i> : A Slant Well Is a Subsurface Trespass .....	362
	[2] — <i>Gregg</i> : Pay Attention to the Dicta .....	363
	[3] — <i>Manziel</i> : Secondary Recovery Activities Are Protected by Permit .....	364
	[4] — <i>Geo Viking</i> : Fracing Is a Subsurface Trespass Until the Court Changes Its Mind .....	367
	[5] — <i>Garza</i> : Deferring to the Rule of Capture .....	368
	[a] — Background.....	368
	[b] — <i>Garza</i> Majority Opinion .....	369
	[c] — <i>Garza</i> Concurrence .....	372
	[d] — <i>Garza</i> Dissent.....	374
	[6] — <i>FPL</i> : Subsurface Trespass Protects a Possessory Interest .....	375
	[a] — <i>FPL</i> , Round One.....	375
	[b] — On Remand, Round Two.....	376
<b>§ 11.03.</b>	<b>Case Law Beyond Texas .....</b>	<b>378</b>
	[1] — Subsurface Trespass Claims Involving Hydraulic Fracturing .....	379
	[a] — West Virginia: <i>Stone</i> .....	379
	[2] — General Subsurface Trespass Claims.....	381
	[a] — Ohio: <i>Chance</i> .....	382
	[b] — Colorado: <i>Board of County Commissioners</i> .....	382
	[c] — Oklahoma: <i>Rosecrans</i> and <i>Lillard</i> .....	383
	[d] — Arkansas: <i>Jameson</i> .....	383

§ 11.04. **Lessons from the Texas Supreme Court** ..... 385  
 [1] — Potentially Successful Subsurface  
     Trespass-By-Fracing Claims .....385  
     [a] — *FPL II*: Nominal Damages  
         Are Likely Insufficient .....387  
     [b] — The Importance of Mineral Production .....387  
 § 11.05. **Conclusion**..... 388

**§ 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.*”<sup>1</sup> And a trespass “may be committed on, beneath, or above the surface of the earth.”<sup>2</sup> 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.<sup>3</sup>

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.”<sup>4</sup>

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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 “[t]respass beneath the surface may be committed . . . by any . . . unprivileged entry on land beneath the surface.”<sup>5</sup> 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.”<sup>6</sup> 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.<sup>7</sup>

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.<sup>8</sup> 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.<sup>9</sup> However, Texas

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<sup>5</sup> *Id.* cmt. e.

<sup>6</sup> Owen L. Anderson, “Lord Coke, the Restatement, and Modern Subsurface Trespass Law,” 6 *Tex. J. Oil Gas & Energy L.* 03, 208 (2011).

<sup>7</sup> *Id.* at 210.

<sup>8</sup> *Id.*

<sup>9</sup> *Coastal Oil & Gas Corp. v. Garza Energy Trust*, 268 S.W.3d 1 (Tex. 2008).