

Surface Use
and
Subsurface Migration Trespass
(Beauty is only skin deep.)

Michael P. Miller
Managing Attorney, Sadler Law Firm, LLP


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Michael P. Miller

Michael P. Miller is a managing attorney at Sadler Law Firm, LLP, and devotes 100% of his practice to oil, gas and energy. Prior to joining Sadler, he was a landman with J. Mark Smith and Associates. He has a B.B.A. Management from Texas A&M University, College Station, Texas, and graduated from South Texas College of Law in 1996. He is a member of the College of the State Bar of Texas, Oil and Gas Division of the Texas Bar Association, Alternative Dispute Resolution Division of the Texas Bar Association, Association of Professional Landmen, United States Oilfield Association, Texas Association of Mediators, Association of Conflict Resolution Houston, and Order of Kentucky Colonels. Prior to becoming an attorney, Michael was a Divisional Manager with MetLife Resources and held (now FINRA or NASAA) series 6, 63, 7 and 24 licenses. His most recent article, *Lean Times Beget Lien Times*, appeared in the United States Oilfield Association website.

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“Look again at that dot. That's here. That's home. That's us. On it everyone you love, everyone you know, everyone you ever heard of, every human being who ever was, lived out their lives. The aggregate of our joy and suffering, thousands of confident religions, ideologies, and economic doctrines, every hunter and forager, every hero and coward, every creator and destroyer of civilization, every king and peasant, every young couple in love, every mother and father, hopeful child, inventor and explorer, every teacher of morals, every corrupt politician, every "superstar," every "supreme leader," every saint and sinner in the history of our species lived there--on a mote of dust suspended in a sunbeam.”

Dr. Carl Sagan, *Pale Blue Dot: A Vision of the Human Future in Space*

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*Just like heaven. Ever'body wants a little
piece of lan'. I read plenty of books out
here. Nobody never gets to heaven, and
nobody gets no land.*

John Steinbeck, *Of Mice and Men*

Does the incursion of fluids injected into a disposal well constitute a trespass if the injected fluids migrate beyond the boundary of the lease tract where the injection well is located?

I. Scope of this Article.

Prior to the spectacle of *FPL Farming, Ltd. v. Environmental Processing Systems, L.C.*,¹ (“FPL”), this specific issue above had never been addressed by a Texas court of appeals. The decade old saga has been closely watched by many in the oil, gas, and injection contractor communities, and “[w]hile the case dealt with an injection well for nonhazardous waste disposal—a so-called Class I well—industry experts expressed concern that the appeals court’s holding would also apply to Class II wells, which are widely used in oil and gas extraction.”²

¹ *Environmental Processing Systems, L.C. v. FPL Farming Ltd.*, 457 S.W.3d 414 (Tex. 2015); *FPL Farming Ltd. v. Environmental Processing Systems, L.C.*, 383 S.W.3d 274 (Tex.App.—Beaumont 2012); *FPL Farming Ltd. v. Environmental Processing Systems*, 351 S.W.3d 306 (Tex. 2011); *FPL Farming LTD. v. Environmental Processing Systems, L.C.*, 305 S.W.3d 739 (Tex. App.—Beaumont 2009, pet. granted)

² Charles Nixon, *The Continuing Saga of FPL Farming v. Environmental Processing Systems: Will the Texas Supreme Court Set New Rules of Liability for Underground Trespass?*, 8 Tex. J. Oil Gas & Energy L. 428, 429 (2013).

In fact, the Texas Oil and Gas Association filed an amicus brief with the Texas Supreme Court noting that, if the decision were to stand, individual property owners could shutdown oil and gas injection well operations across the state with claims of subsurface trespass.³⁴

The answer to the question above was answered in the affirmative by the Beaumont appellate court in 2012. However, the Texas Supreme Court granted review in 2013, during which it specifically refused to consider the issue. Specifically, the Court stated “any error in submitting the question of trespass for deep subsurface wastewater migration [to the jury during trial] was harmless because the jury found no such liability, which obviates the need to address whether this is a viable cause of action in Texas.” Significantly though, the court said that it “neither approve[d] or disapprove[d] of the court of appeals’ analysis and holding,” regarding this issue, thus ensuring continued uncertainty over the issue.

Although FPL has not provided certainty in the law of subsurface trespass as it relates to migrating deep wastewater injection wells, it is a great platform for review of the issues and analysis surrounding such potential trespass. To address the question posed at the top of this article, we shall begin with a quick review of a few rights and burdens appurtenant to surface ownership, and then look at the analysis presented during the various phases of FPL. At the end of the day, a few conclusions will be drawn, but a correct guess as to the final answer will be left up to the good judgment of each practitioner.

³ See Brief of Amicus Curiae Texas Oil and Gas Association in Support of Petition for Review, *Envtl. Processing Sys. L.C. v. FPL Farming Ltd.* at 1, No. 12-0905, 2015 WL 496336 (Tex. Feb. 6, 2015), 2013 WL 145861, at *1.

⁴ David Mann, *FPL Farming, Ltd. v. Environmental Processing Systems, L.C.: Subsurface Trespass In Texas*, https://stcl.edu/southtexaslawreview/case_notes.html

II. Review of Surface Basics for Oil & Gas Operations.

Practice does not make perfect. Only perfect practice makes perfect.

Vince Lombardi

A. The Surface.

For apparent reasons, the author of this article would sometimes remind his dates during his undergrad years that *looks aren't everything*, and that *it's what on the inside that counts*. At the time, little was it realized that my oil and gas attorney preparations were already underway, because nothing could be more true and important when it comes to the body of real property rights in oil and gas.

Courts constantly struggle to apply the logic and certainty of society's established rules of law to new issues presented by the rapidly changing technologies of today and tomorrow. For example, a common law rule which stood for the concept that the owner of the surface had exclusive dominion from the core of the earth to the stars above was widely relied upon during the days of Shakespeare and Elizabeth I. However, this concept began to be rudely interrupted by hot air balloons and early municipal sewer systems. Today, such dominion is limited by astronauts and satellites,⁵ Comcast and municipal flood districts, neighborhood cats and neighbors with too many cars and too many kids. Indeed, each of us today have a quite limited reign over of our own little castles.

The origins of *Cuius est solum, eius est usque ad coelum et ad infernos*, "whoever's is the soil, it is theirs all the way to Heaven and all the way to the depths below" (the "ad coelum doctrine"), is traced back to 13th century Italian

jurist Franciscus Accursius.⁶ It was subsequently adopted in common law by Sir Edward Coke,⁷ and embraced by Sir William Blackstone,⁸ who further "defined the right of property as 'that sole and despotic dominion, which one man claims and exercises over the external things of the world, in total exclusion of the right of any other individual in the universe.'" ⁹ The 'right to exclude' is an *in rem* right—one of the 'bundle of sticks' belonging to an owner of an interest in real property,¹⁰ which is the foundation for the common law cause of action for trespass.

Other than as a topic in conversations today, *Ad coelum* "has no place in the modern world."¹¹

⁶ Dominic Roughton, Rights (& Wrongs) of Capture: *International Law & the Implications of the Guyana/Duriname Arbitration*, 26 J. Energy & Nat. Resources L. 374 383 (2008).

⁷ See *Bury v. Pope* (1587) Cro Eliz 118. Additionally, said Chief Justice William Best in 1824, "The fact is, Lord Coke had [often] no authority for what he states, but I am afraid we should get rid of a great deal of what is considered law in Westminster hall, if what Lord Coke says without authority is not law. He was one of the most eminent lawyers that ever presided as a judge in any court of justice." See Gareth H. Jones, *Sir Edward Coke English jurist*, Encyclopedia Britannica,

<http://Britannica.com/biography/Edward-Coke>

⁸ William Blackstone, *Commentaries on the Laws of England*, 4 vols. (Oxford 1765-1769) Book 2, Chapter 2.

⁹ Baldemar Garcia, Jr., et al., *Trespass, Subsurface Trespass and the Texas Supreme Court*, State Bar of Texas 30th Annual Advanced Oil, Gas and Energy Resources Law (2015) (citing Jace C. Gatewood, *The Evolution of the Right to Exclude—More Than a Property Right, a Privacy Right*, 32 Miss. C. L. Rev. 447 (2014) (quoting William Blackstone, *Commentaries on the Law of England*)).

¹⁰ *Id.*

¹¹ *Coastal Oil & Gas Corp. v. Garza Energy Trust*, 268 S.W.3d 1 (Tex. 2008); (citing *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*,

⁵ See Restatement (Second) of Torts § 159 cmt. g (1965) (recognizing air transportation as an exception to *ad coelum*).

“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.”¹² “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.”¹³

A description of land includes the surface and all of the minerals naturally existing underneath.¹⁴ When minerals are severed from the surface, either by a conveyance or reservation, the surface estate encompasses all rights to use and enjoy the surface except for those surface rights belonging to the mineral owner.¹⁵ However, in the “modern world,” such rights are not always exclusive for reasons of public policy.

B. What’s in a name? "Other" Minerals Defined.

—————
*Call me Billy one more time and I will stab
you with this ink quill.* William Shakespeare¹⁶
—————

Most mineral conveyances and reservations include the words “oil, gas and other minerals,” and historically Texas courts have grappled with defining “other minerals.” Prior to June 8, 1983, the court used the “surface-destruction test” to determine whether a particular bounty from the earth was a mineral, for substances

http://www.rrc.state.tx.us/divisions/og/wateruse_barnett_shale.html (last visited Aug. 27, 2008).)

¹² *Id.* (referring to 1 FOWLER V. HARPER, FLEMING JAMES, JR., & OSCAR S. GRAY, HARPER, JAMES AND GRAY ON TORTS § 1.3, at 7 (3d ed. 2006))

¹³ *Coastal*, 268 S.W.3d 1, 11.

¹⁴ *Unknown Heirs v. Whatley*, 133 Tex. 608, 131 S.W.2d 89, 92 (Tex.Comm’n App. 1939, opinion adopted).

¹⁵ Joseph Shade, *Primer on the Texas Law of Oil and Gas*, 4th edition.

¹⁶ Cuthbert Soup, *Another Whole Nother Story* (2010).

not specifically described in a conveyance or reservation.

Reasoning that a surface owner would not intend to convey substances which could reasonably require the destruction of his or her surface during the course of commercial extraction, the court held that near-surface substances were not included in the description “other minerals”.¹⁷ Therefore, under this test, the conveyance or reservation of “other minerals” did not include any substance that was at the surface, i.e., three to four feet below the surface, or any substance that was within 200 feet below the surface, if *any* reasonable method of extracting the substance would destroy the surface.

The surface-destruction test was replaced with the “ordinary and natural meaning test,” in *Moser v. United States Steel Corp.*,¹⁸ and should be applied to all conveyances or reservations executed after June 8, 1983.¹⁹ Under this test, “other minerals” includes “all substances within the ordinary and natural meaning of that word.” It does not matter how a mineral was extracted or what harm occurred to the surface during the extraction process. Of course, this created more questions than it answered, so effectively it opened the door to each substance being tested by litigation.

Take away: The author has prepared a decision tree which will assist in determining whether or not a substance falls under the “other minerals” tag, included herein as Addendum “A”.

¹⁷ See *Acker v. Guinn*, 464 S.W.2d 348 (Tex. 1971); *Reed v. Wylie*, 597 S.W.2d 743 (Tex. 1980).

¹⁸ *Moser v. United States Steel Corp.*, 676 S.W.2d 99 (Tex. 1984).

¹⁹ See *Friedman v. Texaco, Inc.*, 691 S.W.2d 586 (Tex. 1985); *Holland v. Kiper*, 696 S.W.2d 588 (Tex. App.—Tyler 1984, writ ref’d n.r.e.).

C. The Mineral Estate is Superior.

All animals are equal, but some animals are more equal than others.

George Orwell, *Animal Farm*

The mineral estate is dominant over the surface estate, which is burdened by servitude. The mineral estate owner has a right to use so much of the surface as may be reasonably necessary to develop the mineral estate,²⁰ and has a superior right to interfere with the surface owner's use of it.²¹

However, the mineral owner's superior rights are not unfettered. Surface use by the mineral estate is limited to or by: (1) reasonable use, (2) the Accommodation Doctrine, (3) contractual provisions included in a lease or surface use agreement, (4) in compliance with regulations or ordinances, and (5) the requirement that activities be carried out in a non-negligent manner.

D. Reasonable Use.

Reasonable use permits a mineral lessee to use as much of the surface in a manner that is reasonably necessary to effectuate the purpose of the lease, and is a rule well entrenched in Texas law.²² A few examples of reasonably necessary activities include the construction of roads,²³ geophysical exploration,²⁴ and the placement of necessary building structures,

²⁰ *Harris v. Currie*, 142 Tex. 93, 176 S.W.2d 302 (Tex. 1943); *Ball v. Dillard*, 602 S.W.2d 521 (Tex. 1980).

²¹ *Vest v. Exxon*, 752 F.2d 959, 961 (5th Cir. 1985).

²² *Warren Petroleum Corp. v. Monzingo*, 304 S.W.2d 362 (Tex. 1957); *Brown v. Lundell*, 344 S.W.2d 863 (Tex. 1961); *TDC Engineering, Inc. v. Dunlap*, 686 S.W.2d 346 (Tex. Civ. App.—Eastland 1985, writ ref'd n.r.e.).

²³ *Gulf Oil Corp. v. Walton*, 317 S.W.2d 260 (Tex. Civ. App.—El Paso 1958, no writ); *Humble Oil & Refining Co. v. Williams*, 420 S.W.2d 133, 135 (Tex. 1967).

²⁴ *Phillips Petroleum Company v. Cowden*, 241 F.2d 586 (5th Cir. 1957); *Yates v. Gulf Oil Corporation*, 182 F.2d 286 (5th Cir. 1950).

pipelines, tanks and treatment facilities.²⁵ The burden of proof is on a disgruntled surface owner to prove that the surface was not used in a reasonable manner. This can often be “a very difficult burden of proof in litigation since the lessee/operator will always have a witness or two who will testify that all of the operator's actions were reasonable.”²⁶

E. The Accommodation Doctrine.

So, what I say to people is that politics has got to be about principle and values above all. Of course, there are times when you have to make accommodations.

Chris Patten, last British Governor of Hong Kong

Reasonable use must be tempered with due regard for the rights of the surface owner.²⁷ Due regard was well defined in *Getty Oil Company v. Jones*, 470 S.W.2s 618 (Tex. 1971), a case which is still studied in most Texas law schools. The ruling in *Getty* is credited with creating the “accommodation doctrine,” which is also referred to as the doctrine of “alternative uses”.

In 1955, *Jones* acquired 653 acres of farm land subject to an existing 1948 mineral lease, and installed a self-propelled circular irrigation system in 1965, which could only clear objects less than 7 feet in height. The existing lease contained no language of limitation upon the vertical height of operations equipment, but did provide that all pipelines would be buried below plow depth.

²⁵ See *Joyner v. R.H. Dearing & Sons*, 134 S.W.2d 757 (Tex. Civ. App.—El Paso 1939, writ dism'd judgment cor.).

²⁶ Robert G. “Bob” West, et al., *Oil, Gas, and Mineral Lease Issues from the Surface Owner's Perspective*, State Bar of Texas 36th Annual Advanced Real Estate Law Course (2014).

²⁷ *Humble Oil & Refining Co. v. Williams*, 420 S.W.2d 133 (Tex. Sup. 1967); *General Crude Oil Co. v. Aiken*, 162 Tex. 104, 344 S.W.2d 668 (1961); *Brown v. Lundell*, 162 Tex. 84, 344 S.W.2d 863 (1961).

Subsequent to installation of the irrigation system, operator Getty drilled two wells and installed pumping units which reached 17 and 34 feet in upstroke height, respectively, precluding Jones from using much of his irrigation system and causing significant agricultural value depreciation to Jones' land. Evidence showed that another operator on Jones' tract, Adobe, had placed its pumps in concrete cellars, so as to allow clearance for the surface owner's irrigation equipment. Additionally, another operator near Getty's operations, Amerada, used hydraulic pumping units that are less than 7 feet in height and which did not interfere with the same type of sprinkler system used on another portion of Jones' tract. At trial, witness testimony was presented indicating there was a critical shortage of labor that necessitated the use of automatic sprinkling equipment.

Jones' did not claim that Getty was negligent, nor deny Getty's right to determine the location of its wells; his position was that under the facts and circumstances, it was not reasonably necessary for Getty to install pumping units which denied Jones' the use of his irrigation equipment. Getty's contention was that it had an absolute right to exclusive use of the airspace above the limited surface area occupied by their pumps and that only the lateral surface of the land should be subject to the established rule of reasonably necessary surface usage.

While noting that where a mineral owner or lessee has only one method for developing and producing the minerals, that method may be used regardless of surface damage,²⁸ the Court held that "where there is an existing use by the surface owner which would otherwise be precluded or impaired, and where under the established practices in the industry there are

alternatives available to the lessee whereby the minerals can be recovered, the rule of reasonable usage of the surface may require the adoption of an alternative by the lessee."

Upon motion for rehearing, the court stressed that the burden is on the surface owner to establish that (1) he has no alternative reasonable means for developing his land (in this case, for agricultural purposes), and (2) demonstrate that there are alternative methods used in the industry and available to the operator which would not interfere with the existing use of the surface estate. Note that the surface use must already be in existence, (future plans do not count), and the Accommodation Doctrine is "limited to situations in which there are reasonable alternative methods that may be employed by the lessee on the leased premises to accomplish the purposes of...(the)...lease." *Sun Oil Co. v. Whitaker*, 483 S.W.2d 808 (Tex. 1972).

The scope of existing use was narrowed by the court in *Merriman v. STO Energy, Inc.*, 407 S.W.3d 244 (2013). In this case, XTO drilled a well which impaired surface owner Merriman's corral and annual cattle round-up. On appeal, the court generally categorized Merriman's existing use as "agricultural;" a rather broad spectrum which handed Merriman the difficult burden of showing there was no reasonable alternative agricultural use. However, the Texas Supreme Court held that the existing use should "be classified more narrowly" to the cattle operations at issue.

Merriman is important because it illustrates the courts restrictive application of the Accommodation Doctrine. While Merriman was inconvenienced, he failed to prove that he could not construct facilities that would accommodate his cattle operations elsewhere on his surface, and therefore, was not granted the injunctive relief which he sought.

²⁸ *Citing Kenny v. Texas Gulf Sulphur Co.*, 351 S.W.2d 612 (Tex.Civ.App.—Waco 1961, writ ref'd); see *Tarrant Cnty. Water Control & Improvement Dist. No. One v. Haupt, Inc.*, 854 S.W.2d 618 (Tex. 1971).

TAKE AWAY: The mineral estate is superior to the surface estate, which permits a mineral lessee to use as much of the surface in a manner that is reasonably necessary to effectuate the purpose of the lease. The burden of proof is on a disgruntled surface owner to prove that the surface was not used in a reasonable manner, which can be a tough burden for most land owners to pursue because the operator will typically employ expert witnesses to counter any claims by a splenetic surface owner.

TAKE AWAY: The Accommodation Doctrine hands the burden of proof to the surface owner to show (1) there are no alternative methods of using the land for its current purposes, other than ones requiring inconvenience or financial burdens so significant such alternative use is unreasonable, and (2) the existence of alternative methods of operations which could reasonably be employed by the operator.

F. Negligence.

I apprehend no danger to our country from a foreign foe... Our destruction, should it come at all, will be from another quarter. From the inattention of the people to the concerns of their government, from their carelessness and negligence, I must confess that I do apprehend some danger.

Daniel Webster

Operations, even though reasonable, must be conducted in a non-negligent manner. If a negligent act causes harm to the surface, the surface owner may be able to recover damages for the impact of such acts.²⁹ As with “reasonableness” and “accommodations”, the burden of proof falls on the shoulders of the surface owner. A few examples of instances where the court found negligence and the

²⁹ See *Texaco, Inc. v. Spires*, 435 S.W.2d 550 (Tex. Civ. App.—Eastland 1968, writ ref’d n.r.e.); *McCarty v. White*, 314 S.W.2d 155 (Tex. Civ. App.—Eastland 1958, no writ).

operator was held liable for damages include: causing harm by negligently handling salt water,³⁰ destroyed quarter horses due to a negligently constructed and maintained cattle guard,³¹ and damage due to oil leaks caused by negligence.³²

Suits for surface damages are usually held in the surface owner’s home county, and juries are typically not friendly to the defendant in such actions. Therefore, although the legal standard for reasonable use is negligence, it is common for oil companies to settle such suits out of court, even though negligence may be difficult to prove by the surface claimant.

G. Lease Surface Protections and Provisions.

The owner of the mineral estate is entitled by law to exercise their developmental rights, which includes the right of ingress and egress onto the surface for the purpose of developing the underlying mineral estate. While common law requires mineral owners or lessees to use the surface in a reasonable and not negligent manner, and to accommodate existing surface use when reasonably possible, the burden to prove otherwise is often very limiting on surface owners.

There is no implied duty to restore the surface to its condition prior to exploration activities,³³ and Texas does not offer much statutory surface-protection for land owners. Therefore,

³⁰ *Brown v. Lundell*, 162 Tex 84, 344 S.W. 2d 863 (Tex. 1961); *General Crude Oil Co. v. Aiken*, 162 Tex. 104, 344 S.W.2d 668 (Tex. 1961); *Currey v. Ingram*, 397 S.W.2d 484 (Tex. Civ. App.—Eastland 1965, writ ref’d n.r.e.); *Ellis Drilling Corp. v. McGuire*, 321 S.W.2d 911 (Tex. Civ. App.—Eastland 1959, writ ref’d n.r.e.).

³¹ *Texaco, Inc. v. Spires*, 435 S.W.2d 550.

³² *Speedman Oil Co. v. Duval County Ranch Co.*, 504 S.W.2d 923 (Tex Civ. App.—San Antonio 1973, writ ref’d n.r.e.); *Scurlock Oil Co. v. Harrell*, 443 S.W.2d 337 (Tex. Civ. App.—Austin 1969, writ ref’d n.r.e.).

³³ *Exxon Corp. v. Pluff*, 94 S.W.3d 22 (Tex.App.—Tyler 2002); *Warren Petroleum Corporation v. Monzingo*, 304 S.W.2d 362 (Tex. 1957).

surface owners in Texas place a heavy reliance upon contractual provisions as a means of surface protection assurance.

The surface owner's ability to protect their surface is enhanced when they own *any* of the minerals underneath the subject land. When a surface owner also has a mineral interest beneath their tract, they may (and often do) negotiate lease terms which provide for assurances that their surface interest will be protected. Although such terms are frequently included in an oil and gas lease granted by the surface owner, they may be separately agreed to in a surface use agreement. From a practical standpoint, the size and importance of both the surface and mineral interest under consideration will normally dictate a lessee's willingness to negotiate special terms.

When the surface owner only has a fractional mineral interest, they will not have complete control over their surface. Co-owners in the minerals retain their right to develop the mineral estate, independent of other co-owners, and the surface will remain inferior to such superior rights.

If the surface owner has no interest in the underlying mineral estate, their only option is to negotiate a surface use agreement with the lessee or operator. However, because the mineral owner or lessee is not obligated to obtain a surface use agreement with a surface owner, nor to be responsible for reasonably accommodating non-negligent surface damages, such an agreement may be difficult to obtain.

Lastly: common surface protection clauses are many and varied and there are numerous CLE articles with example surface provisions available on the Texas Bar site, including Brent Hamilton, *Representing Surface Landowners Affected by Oil & Gas Operations* (2015); M.C. Cottingham Miles, *Not In My Back Yard! Protecting Your Client's Surface Interests Through Surface Use, Water Use, and Seismic*

Access Agreements (2011); Robert G. "Bob" West, et al., *Oil, Gas, and Mineral Lease Issues From The Surface Owner's Perspective* (2014); and David W. Wallace, *Surface Use in Oil and Gas Lease Operations* (2015).

TAKE AWAY: As the landman's aphorism goes, "Everything in a lease agreement is negotiable except the names of the parties and the legal description of the subject lands."

TAKE AWAY: Frequently the surface and mineral estates are severed, in which case the surface owner usually has non-existent influence on terms of the lease. The buyer of an un-severed tract, in which the seller is reserving the minerals at the time of surface conveyance, should negotiate to obtain some portion of the minerals so they will be in a better position to negotiate surface use restrictions with the lessee. If this is not possible, the buyer may attempt to negotiate covenants restricting surface use in any future lease granted by the retaining mineral owner, their assigns or successors in interest. Such covenant language should clearly establish that such covenants are not personal and run with the lands. Where the seller only owns the surface and no interest in the underlying mineral estate, it may be advisable for the buyer to attempt to obtain a small fractional share of the minerals from a current mineral owner, to provide the surface buyer *some* opportunity to negotiate surface use in any future lease.

Take Away: If representing a lessor, keep everything in perspective. Small mineral acreage owners should be aware that they might be wise to temper their demands and not be "too aggressive" with their desired terms. A lease may be taken by an operator/lessee to "lock in the land". However, if everything else is even (science, facilities, etc.), operators have been known to exclude acreage from a unit based upon "kinder" terms contained in the competing leases of adjoining tracts. As one East Texas small operator once said to the

author, "The closest I ever feel like God is when I draw unit boundaries."

H. Surface Burdens and Pooled Units.³⁴

When the burdens of the presidency seem unusually heavy, I always remind myself it could be worse. I could be a mayor.

Lyndon B. Johnson

As a very general rule, a lessee is not permitted to use the surface of one lease tract to aid in the mining operations on another, adjacent lease tract. *Robinson v. Robbins Petroleum Corporation*, 501 S.W.2d 865 (Tex. 1973). Therefore, absent contractual agreements or conditions otherwise, an operator may be liable in a cause of action for trespass if they use the surface estate of one tract, for production from another tract. However, pooling and unitization can alter permissible burdens.

In *Robbins*, Robinson acquired an 80 acre surface tract in 1964, wherein the minerals underneath the surface were subject to a 1943 lease ("Waggoner Lease") to Robbins, granted by Waggoner on 221 acres, to which Waggoner owned the complete fee and from which Robinson's 80 acres surface was subsequently taken.

After Robinson's acquisition, three fieldwide secondary waterflood units were established, with each including all or part of the 221 acres Waggoner Lease, and other lands. Robbins used a former well on Robinson's 80 acres to produce salt water, which was injected and drove the three waterflood units. Robinson sued for compensation for the extraction of his saltwater used to recover oil beyond what was under his surface.

³⁴ For extensive coverage of pooling issues, see George A. Snell III, and Carroll Martin, *Pooling Oil & Gas Leases in Texas* (2013), available on the AAPL website.

In overturning the court below, the Texas Supreme Court held that operator Robbins could not use an asset of the surface (the saltwater) for the benefit of the rest of the fieldwide secondary recovery unit. In reaching its decision, the fact that that the original Waggoner Lease did not contain a pooling provision was a key factor. The result of Robbins would have been different if the Waggoner Lease contained pooling language which allowed for burdens with other lands. Robinson was awarded compensation for water used in the waterflood recovery units, except for that amount which was used in the Waggoner 221 acres.

In its conclusion, the court observed:

The fact that the Railroad Commission entered orders approving the recovery units may be relevant to the propriety of the use of the water for production from lands of the Wagoner lease, but no statute or order purports to diminish the title or otherwise extend the burden upon Robinson's surface estate.

Contrast *Robbins* with several other appellate cases. *Property Owners of Leisure Land, Inc., et al. v. Woolf & Magee, Inc.*, 786 S.W.2d 757 (Tex.App.--Tyler 1990), represented a challenge by subdivision lot owners to an operator, Woolf & Magee, Inc., ("Woolf"), for constructing an emergency evacuation roadway across several lots of land in the subdivision, and on which Woolf owned the surface rights. The roadway in question was a necessary requirement for the permitting of a well adjacent to the subdivision, a well comprised of numerous pooled leases. The roadway violated deed restrictions which were enacted prior to Woolf's acquisition of the surface lots in question, but after the mineral estate had been severed from the surface.

In the case, the appellate court affirmed the holding of the court below, stating (1) the roadway was a use related to the right of the lessee of a severed mineral interest, to use the

surface estate for access and reasonably necessary usages in the removal of oil, gas, and other minerals, and (2) the restrictive covenants imposed on the lots did not affect or limit the severed mineral estate to reasonably use the surface inasmuch as such covenants were imposed subsequent to the severance of the mineral estate. Furthermore, the court observed a prior established rule, stating:

The owner of the severed mineral estate and its lessee have the right to use the surface to the extent that is reasonably necessary to develop and produce the minerals. *Robinson v. Robins Petroleum Corp.*, 501 S.W.2d 865, 867 (Tex 1973); *Getty Oil Co. v. Jones*, 470 S.W.2d 618, 621 (Tex.1971). This implied surface easement of reasonable usage extends to the surface of the pooled or unitized area. *Delhi Gas Pipeline Corp. v. Dixon*, 737 S.W.2d 96 (Tex.App.—Eastland 1987, writ denied); *Miller v. Crown Central Petroleum Corp.*, 309 S.W.2d 876 (Tex.Civ.App.—Eastland 1958, writ dism'd by agr.).

Take away: When the surface estate is severed from the minerals and such surface was not taken (1) subject to a prior right to pool or (2) otherwise taken subject the burdens for the benefit of future pooled lease tracts, it is the author's opinion that a surface use agreement should be obtained as a precautionary move to hopefully prevent future litigation. Language should include the right to extract saltwater, and to use the reservoir for injection storage purposes.

III. Subject Matters Related to FPL.

A. Water Use (Generally).

I never drink water because of the disgusting things that fish do in it. W.C. Fields

According to the Texas Water Development Board, Texans use 16.1 million acre-feet of water, of which, about 60% is groundwater.

The water of the ordinary flow, underflow, and tides of every flowing river, natural stream, and lake, and of every bay or arm of the Gulf of Mexico, and storm water, floodwater, and rainwater of every river, natural stream, canyon, ravine, depression, and watershed in the state is the property of the state.³⁵ However, this does not mean the state asserts its sovereignty over every drop of surface water. Frequently, original grants from the sovereign imparted the right to use water, and the composition of such rights depend upon the laws of the originating sovereign (Spain, Mexico, Republic of Texas, or State of Texas).

With the above said, most attorneys are aware that the current law of water use rights is rapidly changing and water use is subject to numerous statutes, and administrative and municipal agencies. A general discussion of water use is well beyond the scope of this presentation, and the Texas Bar CLE website maintains an extensive collection of materials that cover this subject.³⁶

Water, both fresh and brine, belongs to the surface estate. "As stated in *Edwards Aquifer Authority v. Day*,³⁷ the Texas Supreme Court recognized that groundwater beneath the soil is part of the realty, and that each landowner owns it separately, distinctly, and exclusively, subject to police regulations and the law of capture."³⁸ "Saline content has no consequence upon ownership," *Robinson v. Robbins Petroleum*.³⁹

³⁵ Texas Water Code Ann. § 11.021(a).

³⁶ See, Susan M. Maxwell, *The Water That Doesn't Belong to You: A Surface Water Overview*, 1.1 State Bar of Texas Water Rights 101, February 24, 2016

³⁷ 369 S.W.3d 814, 832 (Tex.2012).

³⁸ *FPL Farming Ltd.*, 383 S.W.3d 274.

³⁹ 501 S.W.2d 865 (Tex. 1973).

In total, it is estimated that “[a]ll shale gas wells drilled and completed in the United States in 2011 consumed on the order of 135 billion gallons of water, equivalent to about 0.3 percent of the total U.S. freshwater consumption.”⁴⁰ Typically, fracking a well can require four to six million gallons of water, and although water use for fracking represents less than one percent of all water used in Texas, operators must often scramble to ensure they have supplies. This is particularly true in areas such as the Midland-Odessa region, where “reservoirs have set 95% empty and cities and towns have been under severe water rationing for years...”⁴¹ The industry is relying more and more upon the use of new technologies and brackish water, frequently pumped from the very surface where the well is located, to modify its need of fresh water.⁴²

Although fracking accounts for less than 1 percent of the state’s total water use, in parts of the Permian Basin that figure has reached double digits and drilling continues to intensify. “[T]his [oil] play, the magnitude of it, has taken us by surprise, really. And so we’re all playing catch up,” said [Tommy] Taylor of Midland based Fasken Oil & Ranch. “We’re working at a feverish pace to try to come up with alternative ways [to drill] and still make good wells.”⁴³

Waterflooding is a common procedure used as a secondary recovery process. During the primary recovery stage, natural underground pressure forces oil out of the reservoir and into

the well. However, the average primary recovery may be only 15% of the oil in the reservoir because the pressure ultimately is dissipated and the remaining oil is no longer driven to the well. To partially alleviate this and force some of the remaining oil towards the well, the reservoir is injected with water to push some of the remaining oil towards the well. A properly operated waterflood should recover an additional 15% to 20% of the oil in place.⁴⁴

B. Injection and Disposal Wells.

It’s a good thing that beauty is only skin deep, or I’d be rotten to the core.

Phyllis Diller

An injection well is one where fluids are re-injected into the reservoir to increase underground pressure and drive oil and gas to an extracting wellbore. In contrast, a disposal well does not promote additional production, it is merely storage of spent drilling fluids.

“Class II wells are used exclusively to inject fluids associated with oil and natural gas production,”⁴⁵ and the Texas RRC maintains authority over Class II injection wells in Texas. There are three types of Class II wells: (1) disposal wells, which account for approximately 20% of the total number of Class II wells, are used primarily by the oil and gas industry to dispose of wastewater from hydraulic fracturing; (2) enhanced recovery wells, which account for approximately 80% of the total number of Class II wells, used to increase subsurface pressure for purposes their name suggest, and (3) hydrocarbon storage wells, of which there are over 100, and are typically in a salt dome and primarily used

⁴⁰ Jesse Jenkins, Energy Facts: How Much Water Does Fracking for Shale Gas Consume? (April 6, 2013), <http://www.theenergycollective.com/jessejenkins/205481/friday-energy-facts-how-mu> (last visited May 4, 2016).

⁴¹ Mose Buchele, *Brackish Water for Fracking Rising Amid Challenges*, The Texas Tribune, March 28, 2013.

⁴² *Id.*

⁴³ *Id.*

⁴⁴ *Oil Production & Secondary Recovery*, www.usoilandgas.net (last visited June 22, 2016).

⁴⁵ US Environmental Protection Agency, Underground Injection Control Well Classes, www.epa.gov/uic/underground-injection-control-well-classes

to store the U.S. Strategic Petroleum Reserve.⁴⁶

Regardless of the liquid mixture used during the fracking process, hydraulic fracking produces millions of gallons of fluids which are returned to the surface as (generally, hazardous) waste water requiring environmentally safe disposal. In 2012 alone, it is estimated that 280 billion gallons of such waste water was produced in the United States.⁴⁷ Disposal wells are euphemistically called “saltwater disposal wells,” because of the toxicity caused by high salt content, hydrocarbons, and industrial compounds⁴⁸ which are injected into them.

When done correctly, injection wells are quite safe for the environment. The right to dispose of wastewater is a right that is incident to surface ownership; the mineral estate owns no interest in the surface and does not have a right to lease the land for disposal.⁴⁹

*[T]he surface of the leased lands remaining as the property of the respective landowners include the geological structures beneath the surface, together with any such structure that might be suitable for the underground storage of extraneous gas produced elsewhere.*⁵⁰

⁴⁶ Class II Oil and Gas Related Injection Wells, United States Environmental Protection Agency, <https://www.epa.gov/uic/class-ii-oil-and-gas-related-injection-wells> (last visited June 28, 2016).

⁴⁷ Suzanne Goldenburg, Fracking produces annual toxic waste water enough to flood Washington DC,” The Guardian, October 4, 2013, <http://www.theguardian.com/environment/2013/oct/04/fracking-us-toxic-waste-water-washington> (last visited May 4, 2016).

⁴⁸ Wendy Lyons Sunshine, *What is a Saltwater Disposal Well?*, (updated May 3, 2016), <http://energy.about.com/od/drilling/qt/What-Is-A-Saltwater-Disposal-Well.htm>

⁴⁹ See, *Emery v. U.S.*, 188 Ct. Cl. 1024 (1969).

⁵⁰ *Id.*

However, due to the subservient nature of the surface, a lessee’s right to use the surface estate for exploration and production purposes also extends to a lessee the right to dispose of wastewater produced from wells located on that lease, or to storage of production from the lease- unless lease terms prohibit such activities.

However, the calculus changes if an operator desires to dispose of wastewater, or store production from other leases. Such operations will need permission from the surface owner, unless such permission was previously granted and the current surface owner took with notice.

C. Subsurface Trespass.

A number of Texas cases have held that breaking the plane of an adjoining tract is actionable as a subsurface trespass,⁵¹ and the earlier courts have seemed to respect *ad coelum*. However, as time and technologies have advanced, so to have carve outs and exceptions to this doctrine.

(1.) In the early Texas case of *Hastings Oil Co. v. Texas Co.*, 234 S.W.2d 389 (Tex. 1950), the Court found that an error causing a well to bottom about 250 feet into the subsurface of an adjoining tract was an actionable subsurface trespass because the wellbore itself broke the plane of the plaintiff, thus being true to *ad coelum*.

(2.) The court considered whether the lessee of an adjoining mineral estate could use their surface next to the leasehold, to directionally drill into the adjacent leasehold which it owned, in *Humble Oil & Refining Co. v. L & G*

⁵¹ For a good discussion of these cases and more, see Donald D. Jackson and Mike D. Stewart, *Underground Trespass*, State Bar of Texas Oil & Gas Disputes Course, January 8-9, 2015.

Oil Co., 259 S.W.2d 933 (Tex. Civ. App.—Austin 1953, writ ref'd n.r.e.). Humble owned the mineral estate under the adjacent surface tract (which was drilled through to reach the adjoining leasehold), and sought an injunction. In denying Humble's request, the appellate court upheld the trial court's finding that there was no interference with Humble's rights under its lease.

(3.) In *Gregg v. Delhi-Taylor Oil Corp.*, 344 S.W.2d 411 (Tex. 1961). Under a Rule 37 exception permit, Gregg was planning to fracture a well drilled on a 0.42 acre, 75 foot lease, surrounded by a mineral estate owned by Delhi-Taylor. Delhi-Taylor brought suit to enjoin Gregg from fracturing the common formation beyond Gregg's own property lines, under the tort of trespass. Gregg pleaded that the Railroad Commission was the proper venue and had 'primary jurisdiction'. The Hay's County District Court agreed and dismissed the case and subsequently the Court of Civil Appeals in Austin reversed and reinstated it for trial in the District Court.

The issue that traveled up to the Texas Supreme Court is "...whether the courts have the power to determine whether a subsurface trespass is occurring or is about to occur, or whether the Railroad Commission has this power to the exclusion of the courts, with the courts having the power only to review, ...the action of the Commission."

The Court held that the judiciary does have the authority to issue an injunction to ascertain whether there is (subsurface) trespass, and to enjoin it if there is.

Although not concluding that a trespass had occurred, the Court states:

We think the allegations are sufficient to raise an issue as to whether there is a trespass. ...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 [caused by fracing] extend into its land and the gas is produced therefrom by Gregg.

In reaching its decision, the Court cited past subsurface oil and gas cases: *Elliff v. Texon Drilling Co.*, 1948, 146 Tex. 575, 210 S.W.2d 558, 4 A.L.R.2d 191, and *Comanche Duke Oil Co. v. Texas Pacific Coal and Oil Co.*, Tex.Com.App. 1927, 298 S.W. 554. In *Elliff*, the defendant's well blew out and caused vast amounts of damage and waste. The Court said, "Each owner of land owns separately, distinctly and exclusively all of the oil and gas under his land and is accorded the usual remedies against trespassers who appropriate the minerals or destroy their market value."

In *Comanche Duke*, the plaintiff's well was destroyed by the defendant's negligent use of 600 quarts of nitroglycerin, and the court stated that "...one owner could not properly erect his structures, surface or underground,...beyond the dividing line, and thereby take oil on or in the adjoining tract, or induce that oil to come onto or into his tract, so as to become liable to capture there or prevent the owner of the adjoining tract from enjoying the benefit of such oil as might be in his land...except for these structures."

In concluding dicta, the Court stated:

"Our attention is called to secondary recovery operations involving water or gas injection waterflooding, the injection and storage of salt water, and the recycling of gas." "The validity and reasonableness of the rules and orders involved in those operations may be passed upon when and if they reach this Court.

(4.) Another case that seems to have carved a little more from the doctrine of *ad coelum*, is *Railroad Comm'n of Texas v. Manziel*, 361 S.W.2d 560 (Tex. 1962). *Manziel* is not an action in trespass, rather, it was a challenge to the Railroad Commission order which

approved secondary recovery. The Texas Railroad Commission permitted water injection to increase the production of wells owned by the Whelans, under a plan that was “not set up out of a consideration of what pattern would result in the most recover from the entire filed; but rather a plan ... that would result in the most recover from ...[the Whelans’ wells].”

While conceding that Whelans have a right to protect their leases from drainage, and the Commission has the power to issue reasonable orders to aid such a purpose in an attempt to prevent waste or confiscation, Manziel asserts that the Commission may not authorize a trespass by injected water that will result in the premature destruction of their producing wells.

The Court stated it is “not the providence of this court to substitute itself for the Commission in determining the wisdom and advisability of the particular order in question, but the Court will sustain the action of the Commission so long as its conclusions are reasonably supported by substantial evidence.”

Over time, permitted saltwater injections had reduced pressure in a field and caused harm to plaintiff Manziel, and the relevant issue considered by the Court is whether trespass is committed when secondary recovery waters from an authorized secondary recovery project cross lease lines.

For reasons which are aligned with public policy, the Court acknowledged the value of secondary recovery techniques, despite any migration which might take place, and held that waterflooding was an exception to 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 resources. ... 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 operation 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. (at 568)

(5.) While *Gregg* could have provided a reasonable conclusion that fracing operations which travel into other tracts does constitute an action in trespass, 30 years later the issue remained unclear. In a DTPA action where the plaintiff operator sued for damages caused by faulty work done by the service company defendant, including damages for the value of oil that would have resulted from a fracture that extended onto adjacent tracts, in *Geo Viking v. Tex-Lee Operating*, 1992 WL 80263 (Tex. 1992), withdrawn, 839 S.W.2d 797, the Court first held that fracing into the mineral estate of another would be an illegal trespass. Citing the rule of capture, the court of appeals upheld the trial court’s ruling that jury instructions should not include the limiting instruction that a fracture off of the lease premises would be an illegal trespass.

Although the Court initially held in a per curiam opinion that such fracing did constitute trespass, in a rare move it soon recanted and withdrew its opinion, stating it had “improvidently” granted a writ of error. The Court further advised that they “should not be understood as approving or disapproving the opinions of the court of appeals analyzing the rule of capture and trespass, as it applies to hydraulic fracturing.”

Interestingly, prior to withdrawing its opinion in *Geo Viking*, a U.S. District Court found in *Gifford Operating v. Indrex*, No. 2:89-CV-0189, 1992 US Dist. LEXIS 22505 (N.D. Tex 1992), that sand fracing across lease lines is an actionable

trespass. The court cited *Gregg* and *Geo Viking* during its analysis and application of Texas law.(6.) *Coastal Oil and Gas v. Garza Energy Trust*, 268 S.W.3d 1 (Tex. 2008), was a much watched and discussed case where the primary issue was whether subsurface hydraulic fracturing of a natural gas well that extends into another's property, is a trespass for which the value of gas drained as a result may be recovered as damages. As in *Viking*, the Court once again did not follow the suggestions in *Gregg*. The Court held that the rule of capture barred recovery of such damages.

Additionally, as relevant to oil and gas, the Court held:

1. Mineral lessors with a reversionary interest have standing to bring an action for subsurface trespass causing actual injury; but they must show a permanent injury to their interest, not speculative, rather actual concrete harm;
2. The measure of damages for breach of the implied covenant to protect against drainage is the value of the minerals lost because the lessee's failure to act with reasonable prudence (for which there was no evidence of such value in this case); and
3. Some evidence supported the jury's finding of breach of implied covenant to develop, and the jury's finding of bad faith pooling.

Coastal owned a fee simple mineral estate in one tract, and leased an adjoining tract from Salinas. Coastal drilled and fraced a well on their own royalty free, fee mineral estate tract, precisely 467 feet from the leased Salinas tract, as close as the RRC would allow. Salinas claimed that the fractures crossed over into their tract and that Coastal was draining minerals from their land. At trial, plaintiff's witness did not prove where such fracing trespass had occurred. On appeal, the court cited *Gregg* and held that trespass by hydraulic fracturing is recognized in Texas.

While not deciding whether fracing can give rise to a subsurface trespass in Texas, the Supreme Court reversed the court below on grounds that mineral lessors with only a reversionary right in the mineral estate must prove actual damages, and the plaintiffs had failed to so do.

Leading up to FPL, the Texas Supreme Court has dived around the issue of subsurface invasions caused by oil and gas operations, leading many to openly guess and speculate where such actions are heading. Unfortunately, FPL provided little certainty and a fair amount of speculation.

IV. Subsurface Trespass and the FPL Chronicles.

Get your facts first, then you can distort them as you please. Mark Twain

The recent Court ruling in the decade long drama of FPL⁵² has left more than a few subsurface use geeks--like this author--feeling cheated. FPL was expected to have been an important environmental trespass case, anticipated to provide guidance to the uncertainty surrounding the question of whether migrating permitted subsurface wastewater can give rise to a cause of action for trespass. However, the Court issued a final narrow holding, leaving a definitive answer to this question for another day. Regardless, a close read of the pageant is instructive.

⁵² *Environmental Processing Systems, L.C. v. FPL Farming Ltd.*, 457 S.W.3d 414 (Tex. 2015); *FPL Farming Ltd. v. Environmental Processing Systems, L.C.*, 383 S.W.3d 274 (Tex.App.—Beaumont 2012); *FPL Farming Ltd. v. Environmental Processing Systems*, 351 S.W.3d 306 (Tex. 2011); *FPL Farming LTD. v. Environmental Processing Systems, L.C.*, 305 S.W.3d 739, (Tex. App.—Beaumont 2009, pet. granted)

A. FPL: The Exposition Begins.

Stories don't have a middle or an end any more. They usually have a beginning that never stops beginning. Steven Spielberg

Although other issues are in contention between FPL Farming and EPS, the discussion herein shall be limited to the issue of subsurface trespass.

According to the facts explained in the final Supreme Court ruling regarding *FPL*,⁵³ the stage was set before interest in the Liberty County, Texas tract ("Subject Tract"), became vested in the plaintiff, FPL Farming Ltd. ("FPL Farming").⁵⁴ Environmental Processing Systems, L.C., ("EPS") leased a five-acre tract adjacent to the Subject Tract, where it constructed and began operating a commercial non-hazardous wastewater injection disposal facility under a permit issued in 1996 by the Texas Commission on Environmental Quality ("TCEQ"), formerly the Texas Natural Resource Conservation Commission ("TNRCC")⁵⁵. Under its operations, EPS injected non-hazardous wastewater into a saltwater reservoir in the Frio rock formation, approximately 8,000 feet below the surface.

Prior to the beginning of EPS's initial operations, the then owner of the Subject Tract, J.M. Frost III, ("Frost"), requested a hearing to contest the initial permit application by EPS. However, prior to the hearing, EPS wrote a check for \$185,000.00 and the parties

⁵³ 251 S.W.3d 306 (Tex. 2011)

⁵⁴ Reference footnote 55, below

⁵⁵Permitting during the fact phase of this case was issued by The Texas Natural Resource Conservation Commission ("TNRCC"), renamed the Texas Commission on Environmental Quality ("TCEQ"), by Act of May 28, 2001, 77th Leg., R.S., ch. 965, § 18.01, 2001 Tex. Gen. Laws 1933, 1985. For purposes of the discussion in this article, the agency is referred to under the current acronym "TCEQ", the same as existed during the litigation phase of *FPL*.

settled, memorializing their agreement in writing which reflected that the settlement was binding on all successors-in-title. Subsequent to this agreement, FPL Farming acquired the surface, but not the minerals, of the Subject Tract from Frost, for rice farming purposes.⁵⁶

B. FPL Round One.

In the choice between changing ones mind and proving there's no need to do so, most people get busy on the proof.

John Kenneth Galbraith

Summary

- (1) EPS was granted an amended permit to allow for expanded injection capacity, FPL Farming contested. TCEQ knew such injections would likely migrate.
- (2) Permit upheld because FPL's right to obtain a permitted injection well was not hindered.
- (3) Permit upheld because it was "assumed without deciding that FPL...could sue for damages."

⁵⁶The facts as stated herein, regarding the 1996 permit application contest by James M. Frost III and the agreed settlement of same, are as described in the most recent FPL Supreme Court of Texas case, *Envntl. Processing Sys., L.C. v. FPL Farming Ltd.*, 457 S.W.3d 414 (Tex. 2015); however, the first Appellate Case, *FPL Farming LTD. v. Envntl. Processing Systems, L.C.*, 305 S.W.3d 739, (Tex. App.—Beaumont 2009, pet. granted), recites that FPL Farming contested the permit in 1996 and ultimately settled for \$185,000. The author of this article notes that records of the Texas Secretary of State's Office indicate that James M. Frost is the Registered Agent, and Frost Ventures LLC, is the General Partner of FPL Farming LTD. Ford J. Frost is listed as the Registered Agent, Manager and a Director Frost Ventures, LLC. Upon remand, the court of appeals identifies Ford Frost as "the corporate representative of Frost Ventures, the managing partner of FPL," and observes that the Frost family acquired the Subject Tracts in the 1950's.

In 1999, EPS applied to the TCEQ to amend its permits to allow for an increased volume of injected wastewater. FPL Farming contested, arguing such injection would “impair” its “existing rights” in violation of Chapter 27 of the Texas Water Code.

While finding that wastewater would likely enter the subsurface of FPL Farming’s Subject Tract in the future, the administrative law judge found that FPL Farming did not have the right to exclude EPS from the deep subsurface because FPL Farming’s right to obtain its own injection well permit would not be impaired. The TCEQ granted EPS’s permit amendment and the district court affirmed. FPL Farming appealed to the Travis County district court, which affirmed the permit and FPL Farming appealed to the Austin Court of Appeals,⁵⁷ (“The 2003 Permit Appeal”), which in 2003 also affirmed the permit, stating it “assumed without deciding that FPL [Farming] had property rights in the subsurface land and would have standing to sue for damages if the wastewater migrated into FPL [Farming]’s land.”

C. FPL Round Two.

—————
That’s the beauty of argument, if you argue correctly, you’re never wrong.

Christopher Buckley
—————

Summary

Appellate Court

- (1) Three years later, FPL alleges wastewater migration into its subsurface. FPL sues for injunction and damages including trespass.
- (2) The court's threshold matter is whether FPL Farming had a trespass claim for subsurface trespass, when EPS had TCEQ permit, issued with full knowledge that the waste plume was projected to migrate.
- (3) Citing Manzeil, court decided no trespass occurs when a “state agency has authorized deep subsurface injections, which later migrate at those deep levels into the deep subsurface of nearby tracts.”

In 2006, less than three years after the 2003 Permit Appeal, FPL Farming alleged that EPL's wastewater had indeed migrated into the subsurface of the Subject Tract and possibly polluted the briny groundwater therein. FPL Farming sued for injunctive relief, and sought damages for trespass, negligence and unjust enrichment, all of which were rejected by the jury at trial.

On appeal,⁵⁸ the threshold matter considered by the court was whether FPL Farming had a trespass claim against EPS for subsurface trespass, when EPS had a permit allowing EPS to inject wastewater issued by TCEQ under the full knowledge that the waste plume was projected to migrate into the deep subsurface of the formation underlying the Subject Tract.

The appellate court noted the Texas Supreme Court had recently explained that Lord Coke’s famous maxim, which states that land ownership extends to the sky above and the earth’s center below, “has no place in the modern world.” Citing *Coastal*,⁵⁹ the Court reiterated that “[w]heeling an airplane across the surface of one’s property without permission is a trespass, flying the plane two miles above the property is not. ... The law of trespass need no more be the same two miles below the surface than two miles above.”

In reaching its conclusion that no trespass occurs when a “state agency has authorized deep subsurface injections, which later migrate at those deep levels into the deep subsurface of nearby tracts,” the court relied on *Railroad Commission of Texas. V. Manziel*, 361 S.W.2d 560 (Tex.1962), where it was held that “a secondary recovery operation involving the

⁵⁸ *FPL Farming LTD. v. Env'tl. Processing Sys., L.C.*, 305 S.W.3d 739, (Tex. App.—Beaumont 2009, pet. granted).

⁵⁹ *Coastal Oil & Gas Corp. v. Garza Energy Trust*, 268 S.W.3d 1 (Tex. 2008) (quoting *Unites States v. Causby*, 328 U.S. 256, 66 S.Ct. 1062, 90 L.Ed. 1206 (1946)) (footnotes omitted).

subsurface injection of salt water did not cause a trespass when the water migrated across property lines, in light of the Railroad Commission’s approval of the operation,” (at 568-69). The *Manziel* decision rests heavily on public policy analysis.

Because the appellate court’s threshold decision was that no trespass occurred, it did not address other trespass related claims by FPL Farming (“Other FPL Claims”), primarily being: (1) the trial court improperly denied FPL Farming’s motion for a directed verdict, (2) the trial jury charge erroneously shifted the burden of proof on consent to FPL Farming, and (3) the jury instruction erroneously failed to instruct the jury that injury is not a required element of trespass.⁶⁰

D. FL Round Three.⁶¹

Why in the world would you have it interpreted by nine lawyers? Antonin Scalia

<p style="text-align: center;"><u>Summary</u> Supreme Court</p> <p>(1) Securing a permit does not shield the applicant from tort. <i>Berkley, Magnolia</i></p> <p>(2) Unlike <i>Manziel</i> and <i>Garza</i>, where “Mineral owners can protect their interests from drainage through means such as pooling or drilling their own wells,” this is not the case with one protecting his or her subsurface from migrating wastewater.</p> <p>(3) The rule of capture is not applicable to wastewater injection</p>
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⁶⁰However, as to additional FPL Farming Claims, the appellate court held that FPL Farming failed to preserve error on its complaint that the jury’s finding on unjust enrichment was against the great weight and preponderance of the evidence, and the trial court’s implied finding that FPL Farming had not suffered an injury was not against the greater weight and preponderance of the evidence.

⁶¹*FPL Farming Ltd. v. Env’tl. Processing Sys., L.C.*, 351 S.W.3d 306, 54, (Tex. 2011)

In reviewing the court below, the Texas Supreme Court started by discussing the incongruent nature between the court’s statement in The 2003 Appeal, in which it “assumed...that FPL [Farming] had property rights in the subsurface land and would have standing to sue for damages if the wastewater migrated into FPL [Farming]’s land,” and a more recent Amarillo Court of Appeals Case which relied upon this statement, and held that “securing a permit does not immunize the recipient from the consequences of its actions if those actions affect the rights of third parties.” *Berkley v. Railroad Commission of Texas*, 282 S.W.3d 240 (Tex.App.—Amarillo 2009).

The Court further observed that the “crux of the court of appeals’ holding, determined... that FPL had no common law cause of action for trespass because the TCEQ approved “an amended permit allowing EPS to inject wastewater into the Frio formation...when information before the Commission showed that...[the waste plum would migrate under FPL’s property].””

In citing *Magnolia Petroleum Co. v. R.R. Comm’n*, 141 Tex. 96, 170 S.W.2d 189, 191 (1943), the Court stated that “[a]s a general rule, a permit granted by an agency does not act to immunize the permit holder from civil tort liability brought by private parties for actions arising out of the use of the permit. This is because a permit is a “negative pronouncement” that “grants no affirmative rights to the permittee.”” As stated in *Cf. MCI Sales & Serv., Inc. v. Hinton*, 329 S.W.3d 475, 494, 499 (Tex.2010), a permit is not a get out of tort free card.

The Court further looked at The Injection Well Act, Chapter 27 of the Texas Water Code,⁶² (“Act”), as governing the drilling and use of deep subsurface injection wells such as the one at issue in this case. The Act’s policy and

⁶²TEX/ WATER CPDE §27.001 – 27.105.

purpose is to “maintain the quality of fresh water in the state...[and] to prevent underground injection that may pollute fresh water... .” Furthermore, “[t]he fact that a person has a permit issued under this chapter does not relieve him from any civil liability.”⁶³

“Instead of relying on the basic rule and the text of the Injection Water Act, the court of appeals based its ruling on....*Manziel*⁶⁴ and *Garza*.” The Court expanded this analysis by stating the court of appeals misinterpreted the Court’s holding in *Manziel*. In *Manziel*, the Court held that Railroad Commission authorizations of secondary recovery projects are not subject to injunctive relief based on trespass claims because “[t]he technical rules of trespass have no place in the consideration of the validity of the order of the [Railroad] Commission.”⁶⁵ *Manziel* is inapposite, because “[w]e made the point...that we were not deciding whether a permit holder is immunized from trespass liability by virtue of the permit.”⁶⁶

Likewise, the Court stated that their opinion in *Garza* “did not hold that agency authorization or permission resulted in blanket immunity from trespass liability”.⁶⁷ *Garza* dealt with a subsurface trespass issue wherein the mineral lessors (*Garza*) of one tract, sued Coastal Oil & Gas Corp., the lessees of the *Garza* tract-- who also owned the minerals outright on an adjoining tract where they drilled and fraced a well. *Garza* sued for trespass based on the underground invasion of the Lessor’s reservoir by injected proppant used by Coastal in fracturing to recover minerals from Coastal’s adjoining tract.⁶⁸

Because the Lessor’s had leased their minerals to Coastal, they “merely had a royalty interest and possibility of reverter but did not possess the minerals”.⁶⁹ “[B]ecause [the Lessors] were not in possession of the mineral rights, they were not entitled to sue for trespass based on nominal damages but had to prove actual injury.”⁷⁰ We [the Court] held that the rule of capture precluded damages for drainage by fracturing, and thus the [Lessors] could not recover.”⁷¹

Finally, the Court pointed out that *Manziel* and *Garza* considered the justification for the rule of capture in their analyses, and the public policy reasons for such rule—i.e. greater oil and gas recovery. However, as the Court pointed out, “the rule of capture is not applicable to wastewater injection.”⁷² “Mineral owners can protect their interests from drainage through means such as pooling or drilling their own wells.”⁷³ Such is not the case with one protecting his or her subsurface from migrating wastewater.

In its conclusion, the Court summarized their position by stating the court of appeals erred in determining that because the TCEQ permitted EPS’s injection wells, there was no trespass. The Court said they were not now deciding whether subsurface wastewater migration can constitute a trespass, or whether it did so in FPL’s case at hand. However, the case was remanded back to the court of appeals to determine the issues covered by the Other FPL Claims.⁷⁴

⁶³ Id. 27.104

⁶⁴ *Railroad Commission of Texas. V. Manziel*, 361 S.W.2d 560 (Tex.1962)

⁶⁵ Id, at 560-70

⁶⁶ Id, at 566.

⁶⁷ *Coastal*, 268 S.W.3d 1.

⁶⁸ Id, at 6-7.

⁶⁹ Id. at 9.

⁷⁰ Id. at 10-11.

⁷¹ Id. at 17.

⁷² Id. at 17.

⁷³ Id. at 14.

⁷⁴ As discussed above, the Other FPL Claims were: (1) the trial court improperly denied FPL Farming’s motion for a directed verdict, (2) the trial jury charge erroneously shifted the burden of proof on consent to FPL Farming, and (3) the jury instruction erroneously failed to instruct the jury that injury is not a required element of trespass.

E. FPL Round Four.

Isn't life a series of images that change as
they repeat themselves? Andy Warhol

Summary

Appellate Court

- (1) reservation of minerals and "the right to use the subsurface estate for the injection, storage, or transportation of minerals of whatsoever kind and in whatsoever manner..." is an easement. Fee passes to the grantee who has the right to exclude all others from the burdened property.
- (2) No distinction between underground ownership of fresh water and deep saltwater.
- (3) FPL Farming has a cause of action for trespass at common law.
- (4) Defendant bears burden to establish plaintiff consented to plume's entry on its tracts, and , the trial court misplaced the burden of proof.

On remand, EPS argued that one of FPL Farming's predecessors in title reserved the minerals as well as "the right to use the subsurface estate for the injection, storage, or transportation of minerals of whatsoever kind and in whatsoever manner..." The court analyzed that "[t]he deed's reservation of a right to use is in the nature of a reservation of an easement, consequently, the fee title passes to the grantee (of the land) who then has the right to exclude others (except the easement beneficiaries) from the property burdened by the easement."⁷⁵

Although EPS attempted to distinguish ownership of fresh underground water from deep subsurface saltwater formations, the appellate court pointed out that no such distinction is supported by the Texas Water Code,⁷⁶ either in the version existing at the time

⁷⁵ See *Gregg v. Delhi-Taylor Oil Corp.*, 162 Tex. 26, 344 S.W.2d 411, 415-16 (1961); *Hastings Oil Co. v. Tex. Co.*, 149 Tex. 416, 234 S.W.2d 389, 396-97 (1950).

⁷⁶ See Tex. Gen. Laws 4679-80; Tex. Water Code Ann. §§ 36.001, 36.002.

EPS was first issued its permits, nor the current version of the Code. Furthermore, the court observed that "[s]hortly before EPS received its initial permit, the Texas Legislature, by statute, acknowledged that landowner's ownership interest in the groundwater beneath the surface."⁷⁷

The appellate court concluded that the "Legislature has 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 exclusive use of its property." (at 282) Therefore, Texas law recognizes FPL Farming's property interest in the briny water underneath its property, and FPL Farming has a cause of action for trespass at common law.

Accordingly, because FPL Farming has a cause of action for trespass, the appellate court must address FPL's second issue, regarding FPL Farming's contention that the trial court incorrectly placed the burden of proof on the plaintiff, to prove that it had not granted consent for EPS to enter its subsurface. (All parties agree that the jury charge placed such burden on FPL Farming at trial.)

Although the Texas Supreme Court has never addressed the issue of which party bears the burden of proving consent in a claim of trespass, seven intermediate courts of appeal have addressed such issue and held that (1) first, the party in rightful possession of the

⁷⁷ See Act of May 29, 1995, 74th Leg., R.S., ch. 933, § 2, secs. 36.001, 36.002, 1995 Tex. Gen. Laws 4673, 4679-80 (sec. 36.002 amended 2001, 2005, 2011) (current version at Tex. Water Code Ann. §§ 36.001 (5), 36.002 (West Supp.2011)).

property must establish that the alleged trespasser's entry onto his property was unauthorized, and then (2) the burden of proving consent is on the party who is alleged to have committed the trespass (usually the defendant).⁷⁸

The court states, "...placing the burden of proof on EPS, who relies on consent to justify its entry onto FPL [Farming]'s property, is consistent with two principles of burden allocation: (1) the comparative likelihood that a certain situation may occur in a reasonable percentage of cases; and (2) the difficulty in proving a negative. See *20801, Inc. v. Parker*, 249 S.W.3d 392, 396-97 (Tex.2008)." Additionally it observes that placing the burden on the alleged trespasser is consistent with the Restatement (Second) of Torts.⁷⁹

Furthermore, while considering other non-trespass issues raised by the parties (but not covered herein), the court observed that consent to entry upon land is not required to be express, it may also be apparent.⁸⁰ As such, consent to entry may be implied when the owner fails to take reasonable steps to

⁷⁸ Compare *Stukes v. Bachmeyer*, 249 S.W.3d 461, 465 n. 1 (Tex.App.—Eastland 2007, no pet.); *Gen. Mills Rest., Inc. v. Tex. Wings, Inc.*, 12 S.W.3d 827, 835 (Tex.App.—Dallas 2000, no pet.); *Cain v. Rust Indus. Cleaning Serv., Inc.*, 969 S.W.2d 464, 470 (Tex.App.—Texarkana--1998, pet. denied); *Ward v. Ne. Tex. Farmers Co-Op. Elevator*, 909 S.W.2d 143, 150 (Tex.App.—Texarkana 1995, writ denied); *Carr v. Mobile Video Tapes, Inc.*, 893 S.W.2d 613, 623 (Tex. App.—Corpus Christi 1994, no writ); *Stone Res., Inc. v. Barnett*, 661 S.W.2d 148, 151 (Tex.App.—Houston [1st Dist.] 1983, no writ); *S. Pine Lumber Co. v. Smith*, 183 S.W.2d 471, 472 (Tex.Civ.App.—Galveston 1944, writ ref'd w.o.m.); *Shell Petroleum Corp. v. Liberty Gravel & Sand Co., Inc.* 128 S.W.2d 471, 474 (Tex.Civ.App.—Beaumont 1939, no writ).

⁷⁹ "[t]he burden of establishing the possessor's consent is upon the person who relies upon it." Restatement (Second) of Torts § 167 cmt. C (1965).

⁸⁰ *Gen. Mills Rest., Inc. v. Tex. Wings, Inc.*, 12 S.W.3d 827, 835 (Tex.App.—Dallas 2000, no pet.).

discourage entries about which the owner has actual knowledge.

In conclusion, the appellate court held that EPS bore the burden to establish that FPL Farming consented to the plume's presence on its tracts, and consequentially, the trial court misplaced the burden of proof, which should have been on EPS. Therefore, it was held that the trial court improperly placed the burden of proving consent to entry on FPL Farming. The trial court's judgment was reversed and the case was remanded back for new trial.

F. FPL Round Five.

Nothing ruins your day more than getting a bad review.

Taylor Swift

Summary

Supreme Court

- (1) EPS challenges decision recognizing a trespass cause of action under the circumstances of the case, and the holding that consent is an affirmative defense to trespass.
- (2) "[N]o well-reasoned allocation of the burden of proving consent in trespass cases has emerged from our courts of appeals, despite FPL Farming's arguments to the contrary"
- (3) Consent is an issue in only a fraction of trespass cases, which reflects an assumption that landowners normally have no reason to expect trespassers or know about them.
- (4) It would not be difficult for a landowner to prove a lack of consent or authorization.
- (5) Thus, to maintain an action for trespass, it is the plaintiff's burden to prove that the entry was wrongful by establishing that entry was unauthorized or without its consent.
- (6) Consent is not an affirmative defense to a trespass action, but rather lack of consent or authorization is an element of trespass cause of action that a plaintiff must prove.
- (6) Any error in submitting the trespass question about a possible deep subsurface water migration was harmless, so Court did not decide whether Texas law recognizes a trespass cause of action for deep subsurface water migration.

Both parties petitioned the Court for review, and the Court *contataed* on February 6, 2015.⁸¹ EPS challenged the court of appeals' decision recognizing a trespass cause of action under the circumstances of the case, and the holding that consent is an affirmative defense to trespass. FPL Farming challenged the court of appeals' decision on matters not directly related to the subject of trespass under discussion herein.

Rarely has the Texas Supreme Court addressed trespass damages, and it has never "squarely addressed the question of which party bears the burden of proving consent in a trespass action, nor have the courts of appeals answered it uniformly."

The Court has consistently defined trespass as having three elements: (1) entry (2) onto the property of another (3) without the property owner's consent or authorization.⁸² Furthermore, the Court has reiterated that "[t]respass to real property is an unauthorized entry upon the land of another, and may occur when one enters—or causes something to enter—another's property." *Barnes v. Mathis*, 353 S.W.3d 760, 764 (Tex. 2011). The same holds true even if no damage is done. *Coinmach Corp. v. Aspenwood Apartment Corp.*, 417 S.W.3d 909 (Tex. 2013).

The Court observed that FPL Farming relies upon section 167 of the Restatement (Second)

of Torts as establishing consent is an affirmative defense to a trespass claim, which states "[t]he burden [of proof] of establishing the possessor's consent is upon the person who relies upon it."⁸³ However, it is not clear to the Court which party is the person who relies upon [consent]," and the only case in Texas to cite this comment is the court of appeals' opinion below. "Thus, no well-reasoned allocation of the burden of proving consent in trespass cases has emerged from our courts of appeals, despite FPL Farming's arguments to the contrary" (at 423).

Relying upon the first standard espoused in *20801, Inc.* (the comparative likelihood that a certain situation may occur in a reasonable percentage of cases), the Court points out that consent is an issue in only a fraction of trespass cases, which reflects "the assumption that landowners normally have no reason to expect trespassers or know about them."⁸⁴ Landowners or possessors normally do not have the opportunity to provide consent or authorization prior to entry.

As to the second standard applied in *20801, Inc.*, (the difficulty in proving a negative), the Court did not believe that it would be difficult for a landowner or possessory interest holder to prove a lack of consent or authorization. The Court reasoned that "only someone acting with the authority of the landowner or one with rightful possession" can authorize, or consent to, the entry. *See Gen. Mills Rests. Inc.*, 12 S.W.3d at 835.

Thus, to maintain an action for trespass, it is the plaintiff's burden to prove that the entry was wrongful by establishing it was unauthorized or without consent. Therefore, the original jury charge provided the correct definition and resulted in a verdict in favor of EPS. Any error in submitting the trespass question about a possible deep subsurface water migration was

⁸¹ *Environmental Processing Systems, L.C. v. FPL Farming LTD.*, 457 S.W.3d 414 (Tex. 2015).

⁸² *See Hall v. Phelps*, Dallam 435, 436 (Tex. 1841); *Houston & Great Northern Railroad Co. v. Meador*, 50 Tex. 77 (1878); *Pilcher v. Kirk*, 55 Tex. 208, 216 (1881); *Loftus v. Maxey*, 73 Tex. 242, 11 S.W. 272, 272 (Tex. 1889); *Motl v. Boyd*, 116 Tex. 82, 286 S.W. 458, 476 (Tex. 1926); *Tex.—La. Power Co. v. Webster*, 127 Tex. 126, 91 S.W.2d 302, 306 (Tex. 1936); *Shell Oil Co. v. Howth*, 138 Tex. 357, 159 S.W.2d 483 (Tex. 1942); *Trinity Universal Ins. Co. v. Cowan*, 945 S.W.2d 819, 827 (Tex. 1997); *State v. Shumake*, 199 S.W.3d 279, 285 (Tex. 2006); *Coastal Oil & Gas Corp. v. Garza Energy Trust*, 268 S.W.3d 1, 12 n.36 (Tex. 2008).

⁸³ § 167 cmt. C (1965).

⁸⁴ *The State of Texas v. Shumake*, 199 S.W.3d 279, 285 (Tex. 2006).

harmless. Therefore, the Court punted the issue of whether deep subsurface water migration was an actionable trespass in Texas, stating that FPL presented no need to decide whether Texas law recognizes a trespass cause of action for deep subsurface water migration.

The Texas Supreme Court disagreed with the court below regarding the affirmative defense of consent. "We agree with the trial court that consent is not an affirmative defense to a trespass action, but rather lack of consent or authorization is an element of trespass cause of action that a plaintiff must prove." At trial, "FPL Farming would have been entitled to a directed verdict if it conclusively established, as a matter of law, that it did not authorize or consent to ES's alleged entry." However, at trial, FPL Farming did not argue or present any evidence which conclusively established that FPL Farming did not consent to EPS's alleged entry.

Accordingly, upon petition, the Texas Supreme Court reversed the appellate court, and ruled that in an action for trespass, it is the plaintiff's burden to prove that entry was wrongful, and an element of the offense of trespass, which the plaintiff has the burden to prove, is that the plaintiff had not granted the defendant consent or authorization to enter the plaintiff's property. The Court reversed the court of appeals' judgment and reinstated the trial court's judgment that FPL Farming take nothing.

V. FPL Conclusion.

The secret of all victory lies in the organization of the non-obvious.

Marcus Aurelius

The much awaited final answer to the question, "Does the incursion of fluids injected into a disposal well constitute a trespass if the injected fluids migrate beyond the boundary of the lease tract where the injection well is located?" awaits another day.

FPL dealt with a Class I non-hazardous waste disposal well, (which are regulated by the TCEQ). Latest inventories indicate that Texas has 79 Class I hazardous wastewater wells, and 86 Class I "other" wastewater wells. This is compared to 54,332 Class II wells, (regulated by the Texas RRC), used primarily for the development of oil and gas.⁸⁵

New Conclusion

The *ad coelum* doctrine has been deeply rooted in the common law of real property rights for many centuries and was embraced in America as soon as early settlers began to fence-in their property. *Ad coelum* is adopted in the Restatement of Torts § 159.

In Texas, a state long protective of private property rights, actions in trespass are recorded as far back as 1847, in *Carter v. Wallace*, 2 Tex. 206 (1847), (a case involving, in part, defendants charged with entering the plaintiff's close). However, as Chief Justice Hecht so aptly pointed out in the 2008 case of *Coastal Oil & Gas Corp. v. Garza Energy Trust*,⁸⁶ even the Restatement recognized an exception to *ad coelum* due to the development of airplanes. Although, it has been pointed out that "[n]o such specific exception, ...yet exists in the Restatement for subsurface trespass,"⁸⁷ *ad coelum* "has no place in the modern world," and "[t]he law of trespass need no more be the same two miles below the surface than two miles above."⁸⁸

Currently, the Texas Supreme Court seems to continue its grapple with balancing the private

⁸⁵ UIC Inventory by State-2013, United States Environmental Protection Agency, <https://www.epa.gov/uic/underground-injection-well-inventory> (last visited June 24, 2016).

⁸⁶ 268 S.W.3d 1 (Tex. 2008)

⁸⁷ *Underground Trespass*, footnote 51

⁸⁸ *Coastal*, 268 S.W.3d 1, 11.

property rights of its citizens with the imperative needs and political influence of the most important sector of Texas' economy. As seen in prior cases such as *Manziel* and *Coastal*, the Texas Court has a "policy preference that subsurface property rights are not absolute, especially when an exercise of such rights might curtail oil and gas exploration."⁸⁹

which potentially could be affected or impacted by such operations.

FPL is significant because the Court (1) held that an unauthorized entry or lack of consent to an entry upon property is an element of the cause of action for trespass and the burden of proof is on the plaintiff, and (2) it neither approved nor disapproved the court of appeals holding regarding subsurface trespass.

However, post FPL, many questions remain, including whether (1) other courts of appeals and the Texas Supreme Court will follow the appellate court in Beaumont, (2) a different standard of trespass evolves dependent upon the depth at which such action occurs, (3) actual proven damages become a necessary element for a successful prosecution of all subsurface trespasses, and (4) a different standard of trespass develops for different uses of the subsurface?

Business and society do not like uncertainty, and these issues-- vital to the oil and gas industry, continue to remain perched on a cloud of analytical expectations. Hopefully, the Court will address these and similar issues in the not-to-*deep* future.

As it currently stands, in addition to maintaining adequate insurance, it is wise for those conducting subsurface injection or disposal operations to avert or minimize adverse claims by reaching contractual agreements with all parties who have a subsurface property interest

⁸⁹ C. Brannon Robertson, An Important Case On Subsurface Trespass (2014), [http://www.lexology.com/3083/author/C Brannon Robertson Brannon /](http://www.lexology.com/3083/author/C+Brannon+Robertson+Brannon/) (last visited June 29, 2016).