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TOPIC: **Sub-Surface Trespass**

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TIME: 7:30 AM Breakfast - 8:00 AM Presenters
8:50 AM Questions & Answers

INTRODUCTION: **E.O. (Trey) Scott, III, Trinity Mineral Management, Ltd.**

PRESENTERS: **Baldemar Garcia, Person, Whitworth, Borchers, and Morales**

Sub-Surface Trespass

- Basic Questions/Checklist
- Trespass Instrumentality
- Trespass Purpose
- Trespass Effect
- Cause of Action
- Property Trespassed
- Remedy
- Seismic
- Conclusion
- Subsurface Liability = Tumbler Lock

UPCOMING: Dec/Jan: Seasonal Break

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TRESPASS, SUBSURFACE TRESPASS AND THE TEXAS SUPREME COURT

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CHAPTER #

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TRESPASS, SUBSURFACE TRESPASS AND THE TEXAS SUPREME COURT

Cujus Est Solum Ejus Est Usque Ad Coelum Et Ad Inferos

"For Whoever Owns The Soil, It Is Theirs Up To Heaven And Down To Hell."

William Blackstone's *Commentaries on the Laws of England*

I. Scope of Article

The trespass action has a long history dating back to English common law. Since the nineteenth century, Texas courts have applied the trespass doctrine to disputes over the right to enter and control entry to real property. Shortly after the start of the twentieth century, on January 10, 1901, oil and gas began to spew hundreds of feet into the air from the Lucas No. 1 Well at Spindletop near Beaumont. Thereafter, Texas courts would be challenged to effectively apply age-old trespass concepts to a new world of subsurface exploration and utilization. This article will track the progression of the trespass action from its origins in the English common law, through its early use by Texas courts and finally to its latest application to modern oil and gas operations and subsurface waste disposal.

II. Trespass and English Common Law

Sir William Blackstone, the 18th century English jurist most famous for his Commentaries on the Laws of England,[1] "defined the right of property as 'that sole and despotic dominion, which one man claims and exercises over the external thing of the world, in total exclusion of the right of any other individual in the universe.' "[2] 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.[3] The real property owner's *in rem* right to exclude from English common law formed the basis for the trespass to real property cause of action we know and use today.[4] "In other words, trespass laws evolved from and were designed to protect the exclusive possession of an owner or occupier of land (*i.e.*, the right to exclude others from land)."[5]

While citizens of 1700s England often lodged claims in trespass to protect real property rights, American colonists from England, on the other hand, rarely did.[6] In English law, Blackstone defined trespass as "signif[ying] no more than an entry on another man's ground without a lawful authority, and doing some damage, however inconsiderable, to his real property."[7] No showing of damage was required to prove a claim of trespass to real property.[8]

However, in the New World, where land was much more plentiful, the attitudes of the colonists favored the public's right to real property—and likewise, so did their laws.[9] Property laws in America

[1] *Sir William Blackstone*, ENCYCLOPEDIA BRITANNICA, http://www.britannica.com/biography/William-Blackstone (last visited September 20, 2015).
[2] Jace C. Gatewood, *The Evolution of the Right to Exclude—More Than a Property Right, a Privacy Right*, 32 MISS. C. L. REV. 447, 447–48 (2014) (quoting WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 2 (photo. reprint, Univ. of Chi. Press 1979) (1766)).
[3] *Id.* at 448, 451.
[4] *Id.* at 451.
[5] *Id.* at 452.
[6] Brian Sawers, *Original Misunderstandings: The Implications of Misreading History in Jones*, 31 GA. ST. U. L. REV. 471, 492 (2015).
[7] Gatewood, *supra* note 2, at 451–52 (citing WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 3, at 209 (photo. reprint, Univ. of Chi. Press 1979) (1766)).
[8] *Id.* at 452.
[9] Sawers, *supra* note 6, at 492–93.

required landowners who wished to keep free-grazing livestock and roaming hunters off of their land to erect a fence.[10] Claims in trespass, therefore, were only actionable on "enclosed land," and otherwise, the public had the right to use private property without permission.[11]

Eventually, the states each began adopting Blackstone's English version of trespass in favor of the American rule that limited private property rights and the scope of the trespass doctrine.[12] However, some vestiges of the former American rule of trespass would have an impact on subsurface trespass jurisprudence in Texas years later, which is discussed in more detail below.

III. Origins of Trespass in Texas

Carter v. Wallace was one of the first (if not the first) trespass to real property cases before the Texas Supreme Court.[13] In *Carter*, plaintiff, Wallace, alleged that, defendants, Carter and Hunt, "did with force and arms enter your petitioner's close, lying and situated in the county aforesaid, and pulled down and removed from thence your petitioner's fence and converted the same to their own use . . . ."[14] After a verdict for Wallace, and on appeal to the Texas Supreme Court, Carter and Hunt claimed that the trial court improperly refused to present a particular charge to the jury.[15]

In their desired charge, Carter and Hunt sought to include a question of justification for their entry onto the premises being that the land had actually become their property.[16] However, Carter and Hunt had only filed a general denial to Wallace's petition, and never made any allegation of superior title to the property in their pleadings.[17] "To determine whether [the charge] ought to have been given, it is material to ascertain with some precision what was the real subject of controversy as disclosed by the pleadings."[18]

The Court criticized Wallace's petition as "very carelessly and defectively framed."[19] The Court stated that his petition appeared to be, "in form, trespass *quare clausum fregit*,"[20] or "the tort of wrongful entry on real property."[21] However, it appeared to be "in substance, trespass *de bonis asportatis*, or *trover*,"[22] which means "a common law action to recover the value of goods wrongfully converted to another's own use."[23]

Despite the petition's shortcomings, the Court held that, "[f]or each of these injuries separately an action will lie."[24] For Wallace's claim of trespass *quare clausum fregit*, "an action will lie . . . though no special damage be proved, because every unwarrantable entry or breach of a man's close is supposed necessarily to carry along with it some injury or other . . . ."[25] Therefore, while *Carter*'s precedential value largely stands for its contributions to proper pleading standards in Texas,[26] it also illustrates the Texas Supreme Court's early adoption of the English rule for the doctrine of trespass.

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[10] *Id.* at 493.
[11] *Id.*
[12] *Id.*
[13] *Carter v. Wallace*, 2 Tex. 206 (1847).
[14] *Id.* at 207.
[15] *Id.*
[16] *Id.*
[17] *Id.*
[18] *Id.* at 208.
[19] *Id.*
[20] *Id.*
[21] *Definition of trespass quare clausum fregit*, MERRIAM-WEBSTER, http://www.merriam-webster.com/dictionary/trespass%20quare%20clausum%20fregit (last visited September 20, 2015).
[22] *Carter*, 2 Tex. at 208.
[23] *Definition of trover*, MERRIAM-WEBSTER, http://www.merriam-webster.com/dictionary/trover (last visited September 20, 2015).
[24] *Carter*, 2 Tex. at 210.
[25] *Id.*
[26] William V. Dorsaneo, III, *The History of Texas Civil Procedure*, 65 BAYLOR L. REV. 713, 718–19 (2013).

IV. Trespass Takes Flight (*Ad Coelum*)

Cujus est solum, ejus est usque ad coelom et ad inferos is the Latin maxim meaning that "the rights of the surface owner extend upward to the heavens (*ad coelum*) and downward to the center of the earth (*ad inferos*)."[27] Yet another contribution by Sir William Blackstone to English common law, the *ad coelum* doctrine was officially adopted by England after its inclusion in Blackstone's Commentaries on the Laws of England in 1766.[28] The doctrine's original authorship, however, is usually attributed to Lord Coke, "although its real origin is lost in history and may have emanated from Roman law or Jewish law."[29]

For many years prior to Blackstone's commentaries, English law recognized the surface owner's unlimited right to his airspace.[30] However, as Chief Justice Hecht so eloquently put it, "Lord Coke, who pronounced the maxim, did not consider the possibility of airplanes."[31]

After the Wright Brothers' breakthrough and the advent of wide-scale air travel, the *ad coelum* doctrine required modification. "[T]he early English doctrine that airspace was an appurtenance to land giving an absolute and exclusive proprietary right to the owner 'to the highest heavens' has been repudiated. That exclusive dominion has been qualified to make airspace a public highway."[32]

Texas was among the states to adopt limitations on the *ad coelum* doctrine, finding that "the aeronaut's rights generally terminate at, and the landowner's exclusive dominion extends at least to the altitude of the owner's existing and effective reasonable use of the land."[33] To prove a trespass into one's airspace, the surface owner now had to show that the trespasser's impermissible entry was made at an altitude within the landowner's reasonable control of the surface.[34]

V. Trespass Goes Underground (*Ad Inferos*)

"Before Blackstone's intervention . . . the law recognized that a landowner had title only to the region immediately underneath the surface, which he could physically use for a productive purpose (the near-surface standard)."[35] However, in post-1766 England, as well as the new United States, the *ad inferos* doctrine governed title to the subsurface of land.

In Texas, the Supreme Court first adopted the theory that the owner of the surface is the owner of the subsurface, including the groundwater beneath it, in *Houston & T.C. Ry. Co. v. East*.[36] The defendant in *East*, the Houston & Texas Central Railroad Company, installed a water well on its property from which it pumped 25,000 gallons of water per day for industrial use.[37] The water that the Railroad pumped

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[27] John G. Sprankling, *Owning the Center of the Earth*, 55 UCLA L. Rev. 979, 980–81 (2008).
[28] *Id.* at 982–83.
[29] Patrick Wieland, *Going Beyond Panaceas: Escaping Mining Conflicts in Resource-Rich Countries Through Middle-Ground Policies*, 20 N.Y.U. ENVTL. L. J. 199, 204 n.15 (quoting Adrian J. Bradbrook, *The Relevance of the Cujus est Soum Doctrine to the Surface Landowner's Claims to Natural Resources Located Above and Beneath the Land*, 11 ADEL. L. REV. 462, 462 (1987-1988)).
[30] *Id.* at 985.
[31] *Coastal Oil & Gas Corp. v. Garza Energy Trust*, 268 S.W.3d 1, 11 (Tex. 2008).
[32] *Schronk v. Gilliam*, 380 S.W.2d 743, 744 (Tex. Civ. App.—Waco 1964, no writ) (citing *United States v. Causby*, 328 U.S. 256 (1946)).
[33] *Id.*
[34] *See id.* at 744–45.
[35] Sprankling, *supra* note 26, at 983.
[36] *City of Del Rio v. Clayton Sam Colt Hamilton Trust*, 269 S.W.3d 613, 617 (Tex. App.—San Antonio 2008, pet. denied) (citing *Houston & T.C. Ry. Co. v. East*, 81 S.W. 279, 281 (Tex. 1904)).
[37] *East*, 81 S.W. at 280.

from its well was "supplied entirely by water percolating through its soil and that of adjacent lands . . . ."[38] Those "adjacent lands" from which some of the water was being pumped belonged to the plaintiff, East.[39]

East's well was located on land that East owned in fee simple and used as his homestead.[40] His well was dug prior to the Railroad's well, and he had always used the water from his well for only household purposes.[41] While the Railroad had done so unintentionally, it dried up East's well causing a little over $200 in damages to him.[42]

The court of civil appeals found for East, reversing the judgment of the district court and holding that the industrial operation of the Railroad's well "was not a reasonable use of their property as land," under the doctrine of reasonable use applied to "defined streams."[43] However, the Texas Supreme Court disagreed.[44]

While this is the first Texas Supreme Court case that recognized the surface owner's title to the groundwater, it is also the first to adopt the 'rule of capture.'[45]

> That the person who owns the surface may dig therein and apply all that is there found to his own purposes, at his free will and pleasure; and that if, in the exercise of such right, he intercepts or drains off the water collected from the underground springs in his neighbor's well, this inconvenience to his neighbor falls within the description of *damnum absque injuria*, which cannot become the ground of an action.[46]

Therefore, the Railroad was justified in drying up East's well, pursuant to the rule of capture.[47]

Consistent with the *ad inferos* doctrine, the Texas Supreme Court also found early on that the oil and gas beneath the surface are a part of the realty held by the surface owner.[48] Therefore, the rule of capture also applies to oil and gas.[49] The rule of capture echoes principles of early American trespass law, where it was the duty of the landowner to erect a fence to keep trespassers out. Under the rule of capture, subject to the administrative protections of correlative rights, the mineral owner must drill an offset well to prevent drainage of his oil and gas reserves.[50]

The rule of capture, however, is not an absolute protection to claims of drainage. In *Eliff v. Texon Drilling*, Eliff owned land next to Driscoll, and both tracts overlaid a large reservoir of gas.[51] Texon drilled an offset well on Driscoll's tract, and upon reaching a depth of nearly 7,000 feet, the well blew out and cratered.[52] The blowout caused "huge quantities of gas, distillate and some oil" from the reservoir to be lost.[53] As the crater increased in size, it eventually

[38] *Id.*
[39] *Id.*
[40] *Id.*
[41] *Id.*
[42] *Id.*
[43] *Id.*
[44] *Id.*
[45] *Id.* at 280–81.
[46] *Id.* at 280.
[47] *Id.* at 282.
[48] *Eliff v. Texon Drilling Co.*, 210 S.W.2d 558, 561 (Tex. 1948) (citing to several prior decisions that stand for the proposition that oil and gas are part of the realty).
[49] *Id.* (citing *Brown v. Humble Oil & Refining Co.*, 83 S.W.2d 935 (Tex. 1935)).
[50] *See Coastal Oil & Gas Corp. v. Garza Energy Trust*, 268 S.W.3d 1, 17 n.57 (Tex. 2008) (duty of lessee in an oil and gas lease to drill an offset well to prevent drainage).
[51] *Id.* at 559.
[52] *Id.*
[53] *Id.*

enveloped the Eliff No. 1 well on Eliff's property.[54] It, too, "cratered, caught fire and burned for several years."[55]

Eliff sued Texon for damages for "gas and distillate wasted 'from and under' the lands of petitioners, due to respondents' negligence . . . ."[56] The trial court rendered judgment for Eliff but was reversed on appeal. The court of civil appeals held that "since substantially all of the gas and distillate which was drained from under petitioners' lands was lost through respondents' blowout well, petitioners could not recover because under the law of capture they had lost all property rights in the gas or distillate which had migrated from their lands."[57]

The Texas Supreme Court reversed the court of civil appeals holding that "the negligent waste and destruction of petitioners' gas and distillate was neither a legitimate drainage of the minerals from beneath their lands nor a lawful or reasonable appropriation of them."[58] Therefore, the rule of capture did not apply to preclude Eliff from recovery or shield Texon from liability for negligence.[59]

While *Eliff* shows a limitation by the Texas Supreme Court on the rule of capture, in which the mineral owner can recover for damage to minerals, *Eliff* is distinguishable from subsurface trespass cases. The two are often confused, as the owner of the surface, not the owner of the minerals, is who controls the subsurface.[60] The cases in the following section illustrate the distinguishing characteristics between these two concepts.

VI. Origins of Subsurface Trespass Action

Subsurface trespass as a cause of action in Texas has its origins in two Texas Supreme Court cases that were appeals from orders granting applications for injunction. To be granted an injunction, a claimant must first plead some form of permanent relief, vis-à-vis, a viable cause of action.[61] Therefore, the basic question before the Texas Supreme Court in the following two cases was whether subsurface trespass was a viable cause of action upon which injunctive relief could be granted.

In *Hastings Oil Co. v. Tex. Co.*, the Texas Supreme Court for the first time "recognized that the law of trespass applies to invasions occurring on adjacent property but at a level beneath the surface."[62] Texas Co. and Hastings both owned oil and gas leases on adjoining tracts of land.[63] After drilling a vertical well on its own tract, Texas Co. alleged that Hastings' wellbore had actually deviated approximately 250 feet into the Texas Co. tract.[64] In response, Texas Co. filed an application for temporary injunction in district court to enjoin any further drilling operations by Hastings, pending a directional survey of the wellbore.[65] The trial court granted the injunction to which Hastings appealed and lost before the court of civil appeals.[66]

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[54] *Id.*
[55] *Id.*
[56] *Id.*
[57] *Id.*
[58] *Id.* at 563.
[59] *Id.*; *see also Comanche Duke Oil Co. v. Tex. Pacific Coal and Oil Co.*, 298 S.W. 554 (Tex. 1927).
[60] *Lightning Oil Co. v. Anadarko E&P Onshore LLC*, No. 04-14-00903-CV, 2015 WL 4933439, at *5 (Tex. App.—San Antonio August 19, 2015, no pet.) (opinion has not been released for publication).
[61] *Butnaru v. Ford Motor Co.*, 84 S.W.3d 198, 204 (Tex. 2002).
[62] *FPL Farming Ltd. v. Envtl. Processing Sys., L.C.*, 383 S.W.3d 274, 280 (Tex. App.—Beaumont 2012, pet. granted) (citing *Hastings Oil Co. v. Tex. Co.*, 234 S.W.2d 389, 396–97 (Tex. 1950)) *rev'd on other grounds, Envtl. Processing Sys., L.C. v. FPL Farming Ltd.*, 457 S.W.3d 414 (Tex. 2015).
[63] *Hastings*, 234 S.W.2d at 390.
[64] *Id.* at 391.
[65] *Id.* at 390.
[66] *Id.*

The Texas Supreme Court affirmed the intermediate court, holding that "[t]respasses of this character are irreparable because they subtract from the very substance of the estate, hence equity is quick to restrain them."[67] The court further found that Hastings' subsurface trespass was "continuous in its nature."[68]

While the Supreme Court did recognize a subsurface trespass cause of action for the first time in *Hastings*,[69] the Court was still noticeably uncertain whether it was dealing with an invasion of the mineral estate or an invasion of the surface state.[70] Eleven years later, the Court was again presented with a subsurface trespass dilemma in the *Gregg v. Delhi-Taylor Oil Corp.* case.[71]

In *Gregg*, W.A. Gregg owned an oil and gas lease on property that was surrounded by property under lease by Delhi-Taylor Oil Corp.[72] Gregg wanted to utilize hydraulic fracturing measures on a well drilled on his lease to increase the productivity of the well.[73] Gregg's hydraulic fracturing, or "fracing," would involve "shooting sand and liquid at very high pressure through holes in his drilling pipe."[74] Delhi-Taylor claimed that the resulting fractures would extend beyond Gregg's boundary into Delhi-Taylor's subsurface and improperly drain its minerals.[75] Therefore, Delhi-Taylor filed suit to enjoin Gregg's subsurface trespass.[76]

Gregg attempted to argue that the court lacked jurisdiction because the Railroad Commission of Texas had exclusive jurisdiction over oil and gas matters.[77] The Supreme Court disagreed holding that "the courts are not ousted from jurisdiction unless the Legislature, by a valid statute, has explicitly granted exclusive jurisdiction to the administrative body."[78]

Instead, the Court found that the "allegations are sufficient to raise an issue as to whether there is a trespass" because "Gregg's well would be, for practical purposes, extended to and partially completed in Delhi-Taylor's land."[79] The *Gregg* Court cited to *Comanche Duke v. Tex. Pacific Coal and Oil Co.*, which stated,

> one owner could not properly erect his structures, surface or underground, in whole or part 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 or as might come there except for these structures.[80]

Once again, the Texas Supreme Court in *Gregg*, while recognizing the propriety of subsurface trespass as a cause of action, was still not entirely clear as to whether the cause of action for subsurface trespass belonged to the mineral owner or subsurface owner.[81] More recent subsurface trespass cases (discussed in

[67] *Id.* at 398.
[68] *Id.*
[69] *See Gregg v. Delhi-Taylor Oil Corp.*, 344 S.W.2d 411 (Tex. 1961) (citing *Hastings*, 234 S.W.2d at 389) ("This Court heretofore has enjoined subsurface trespass.")
[70] *See id.* ("[I]n instances of trespass to mining property greater latitude is allowed courts of equity than in restraining ordinary trespasses to realty, 'since the injury goes to the immediate destruction of the minerals which constitute the chief value of this species of property.' ").
[71] *Gregg*, 344 S.W.2d 411.
[72] *Id.* at 415.
[73] *Id.*
[74] *Id.*
[75] *Id.*
[76] *Id.* at 412.
[77] *Id.* at 414.
[78] *Id.* at 415.
[79] *Id.* at 416.
[80] *Id.* at 418 (quoting *Comanche Duke Oil Co. v. Tex. Pacific Coal and Oil Co.*, 298 S.W. 554, 559 (Tex. 1927)).
[81] *See id.* at 418–19.

detail below) make a clearer distinction between subsurface trespass actions and actions lying in trespass, conversion, or waste to minerals in their place beneath the surface.[82]

VII. Subsurface Trespass Today

In the year 2015, identifying an actionable subsurface trespass can be challenging. To do so, several questions must be asked: (1) what trespassed (drill pipe, hydraulic fracture fluid/proppant/effective fracture, salt/wastewater); (2) its purpose (traversal, secondary recovery, disposal); (3) its effect (drainage or well/reservoir damage); (4) the cause of action involved (trespass or breach of implied covenant); (5) type of interest (surface, mineral, possessory or non-possessory); and (6) the remedy sought (injunctive or monetary). Depending on the answers, a civil suit may be well or ill advised.

1. Drilling Pipe

Although a slant-hole well bottomed underneath a neighbor is still not permissible under *Hastings Oil Co. v. Texas Co.*,[83] a traversing drill pipe does not trespass against a mineral estate as long it is not perforated. In *Lightning Oil Co. v. Anadarko E&P Onshore LLC*, a mineral lessee (Anadarko) was granted an easement from an adjoining surface owner (Briscoe Ranch) to place drilling rigs and drill through the dirt and rock to its minerals.[84] The mineral lessee underneath the easement (Lightning) sued for trespass, claiming it had the exclusive right to the subsurface. Holding that the surface owner controls "the matrix of the underlying earth," the San Antonio Court of Appeals affirmed summary judgment in favor of the easement grantee.[85] Ownership of the hydrocarbons does not include ownership of the surrounding earth,[86] or the mass that undergirds the surface.[87] But a traversing drill pipe cannot be perforated in a mineral estate it does not own.[88] The legality of using a surface site or a traversing drill pipe to obtain seismic data of another's mineral estate was raised but not answered due to lack of evidence.[89] Despite its holding and cited precedent, the *Lightning* opinion warned that its decision could have been different if the reserved mineral estate or lease had included the right to the subsurface.[90] Neither the dominant/subservient relationship between the mineral and surface estates nor the accommodation doctrine was discussed.[91] The lesson from *Lightning* to mineral owners and lessees is to expressly reserve or lease the subsurface in order to prevent traversing drill pipes.

2. Fracture Fluid, Proppant, and Effective Fracture Length

A hydraulic fracture stimulation that crosses underneath property lines and causes drainage only is not actionable as a trespass, but could be actionable by other claims and for other damages. In *Coastal Oil & Gas Corp. v. Garza Energy Trust*, lessors sued their lessee to recover damages for the hydraulic fracturing of a neighboring well.[92] It was undisputed that the hydraulic length [distance the fracing fluid emits from the well bore] and propped length [shorter distance the accompanying proppant travels] crossed beneath the

[82] *See Lightning Oil Co. v. Anadarko E&P Onshore LLC*, No. 04-14-00903-CV, 2015 WL 4933439, at *5 (Tex. App.—San Antonio August 19, 2015, no pet.) ("[T]he surface estate owner controls the earth beneath the surface estate.") (opinion has not been released for publication).
[83] *Hastings Oil Co. v. Tex. Co.*, 234 S.W.2d 389 (1950).
[84] *Lightning Oil*, 2015 WL 4933439, at *1.
[85] *Id.*
[86] *Springer Ranch, Ltd. v. Jones*, 421 S.W.3d 273, 283 (Tex. App.—San Antonio 2013, no pet.).
[87] *Dunn-McCampbell Royalty Interest, Inc. v. Nat'l Park Serv.*, 630 F.3d 431, 441–42 (5th Cir. 2011).
[88] *Lightning Oil*, 2015 WL 4933439, at *6.
[89] *Id.* at *4.
[90] *Id.* at *1, *5.
[91] *SWEPI LP v. R.R. Comm'n of Texas*, 314 S.W.3d 253 (Tex. 2010); *Getty Oil Co. v. Jones*, 470 S.W.2d 618, 621 (Tex. 1971).
[92] *Coastal Oil & Gas Corp. v. Garza Energy Trust*, 268 S.W.3d 1, 8 (Tex. 2008).

lease lines, but there was a dispute as to whether the effective length [draining distance] did.[93]

The Texas Supreme Court first explained that a non-possessory royalty owner only has standing to sue for trespass if actual, permanent injury has been inflicted.[94] Then it conceded not answering the subsurface trespass question before, despite:

> (1) finding and exercising exclusive jurisdiction to enjoin a trespassing fracture stimulation, to the exclusion of the Texas Railroad Commission;[95]
> (2) refusing to enjoin as a trespass and affirming a RRC order that allowed secondary recovery by waterflooding, although tort liability could nonetheless exist;[96] and
> (3) ultimately issuing an opinion answering the subsurface trespass question in the affirmative by denying the recovery of drainage damages made possible by a boundary-crossing hydraulic fracture, only to withdraw it six months later.[97]

Notwithstanding the royalty owners' standing and the Court's jurisdiction, the Texas Supreme Court nonetheless concluded that the rule of capture precludes drainage damages, and consequently trespass liability for such damages, for hydraulic fracture stimulation.[98] Trespass liability for drainage damages from hydraulic fracturing would interfere with the RRC's regulating of production, preventing of waste, and protecting of correlative rights.[99] The judicial system, conversely, is not designed to consider social policies, industry operations, and the greater good that are all impacted by hydraulic fracture stimulation, which is now essential but impossible to accomplish without drainage.[100] The Court recognized that Lord Coke's maxim of "*ad coelum et ad inferos*" is no longer workable in a world of airplanes and oil wells.[101]

Coastal v. Garza's insulation of drainage damages from the fracture stimulation process did preclude damages not otherwise barred by the rule of capture and hinted at possible trespass liability for well or reservoir damage.[102] The availability of injunctive relief to stop continuing reservoir or well damage caused by ongoing hydraulic fracturing was not addressed.

In announcing its rule, the Court stated that a possessory interest could still sue for trespass without actual injury, and recover nominal damages.[103] Can this mean an owner of unleased mineral rights or a mineral lessee may still sue to enjoin hydraulic fracture stimulation?

Although both capture an adjacent owner's oil and gas, drainage from a fracture is less certain and can be protected against unlike drainage from a deviated/slant well.[104]

Coastal v. Garza then re-contoured the implied duty to protect a leasehold from drainage by allowing for hydraulic fracture-based claims.[105] A lessee must protect its lessor/royalty owner against drainage caused by hydraulic fracturing, and will be liable for the drainage a reasonably prudent operator should have prevented.[106] But there is no duty if a lessee cannot recover associated costs and reasonable profits.[107]

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[93] *Id.*
[94] *Id.* at 9–11.
[95] *Gregg v. Delhi-Taylor Oil Corp.*, 344 S.W.2d 411 (1961).
[96] *Railroad Comm'n of Tex. v. Manziel*, 361 S.W.2d 560 (Tex. 1962).
[97] *Geo Viking Inc. v. Tex-Lee Operating Co.*, No. D-1678, 1992 WL 80263 (Tex. April 22, 1992), *withdrawn on reh'g*, 839 S.W.2d 797 (Tex. 1992).
[98] *Coastal*, 268 S.W.3d at 12–13.
[99] *Id.* at 15–16.
[100] *Id.* at 16.
[101] *Id.* at 11.
[102] *Id.* at 13.
[103] *Id.* at 12 n.36.
[104] *Id.* at 13–14.
[105] *Id.* at 17–19.
[106] *Id.* at 18.
[107] *Id.* at 18 n. 57.

Coastal v. Garza implies viable trespass litigation for a non-possessory interest and possible trespass liability for non-drainage damage, while simultaneously creating drainage liability through a breach of implied duty claim. Presently, only four justices from *Coastal v. Garza* remain on the Texas Supreme Court: Hecht, Green, and Willett who were in the majority and Johnson who dissented. Justice Willett's concurrence stressed the economic importance of hydraulic fracture stimulation and would have gone farther than the majority—decreeing that "a trespass-by-frac" is non-existent in drainage and non-drainage cases.[108] Justice Willett predicted that trespass liability for hydraulic fracture stimulation would unleash free rider, wildcatting plaintiffs seeking courtroom gushers.[109]

3. Anti-Fracture Injunctive Relief

In *Railroad Commission of Texas v. Manziel*, the Texas Supreme Court dichotomized subsurface trespass according to its remedy.[110] Citing the "negative rule of capture", if secondary (waterflooding) recovery operations are approved by the RRC and injected forces migrate across lease lines, then an aggrieved mineral owner cannot obtain injunctive relief to stop the operations on that basis.[111] But RRC authorization will not "throw[] a protective cloak around the injecting operator who might otherwise be subjected to the risks of liability for actual damages to the adjoining owner."[112] The protective cloak withheld by *Manziel* has been partially extended by *Coastal v. Garza*.

4. Wastewater Disposal Injection

Outside of the oil and gas context, litigation between Environmental Processing Systems, L.C. and FPL Farming Ltd. spawned five opinions from which subsurface trespass law has evolved. First, EPS obtained a permit to dispose of nonhazardous wastewater by injection into a subsurface saltwater formation, which was affirmed by the Austin Court of Appeals because no existing rights would be impaired.[113] FPL, the neighboring rice farmer, did not own the minerals and was not using the deep subsurface.[114] But EPS was warned of future liability for any civil damages caused by harmful wastewater plume migration under FPL's property.[115]

Believing the legal prophecy, FPL sued for trespass but lost in the trial court and the Beaumont Court of Appeals affirmed, finding that no trespass occurred because the RRC had insulated EPS's wastewater injection by permit.[116] Fueling the prophecy further, the Texas Supreme Court reversed and reiterated that a permit does not immunize its holder from civil tort liability.[117] Just like a driver's license does not allow driving on a neighbor's lawn, a law license will not absolve attorney malpractice, nor a health certificate block recovery by sick customers, an injection well permit from the TCEQ is not a "get out of tort free card."[118] The express language in the Injection Well Act, which does not impede civil suit liability, controls.[119] *Manziel* similarly did not address tort liability and stripped operators of any

[108] *Id.* at 30.
[109] *Id.*
[110] *Railroad Comm'n of Tex. v. Manziel*, 361 S.W.2d 560 (Tex. 1962).
[111] *Id.*
[112] *Id.* at 566–67.
[113] *FPL Farming Ltd. v. Texas Natural Res. Comm'n*, No. 03-02-00477-CV, 2003 WL 247183 (Tex. App.—Austin Feb. 6, 2003, pet. denied).
[114] *Id.* at *1, *3 n.4, *4.
[115] *Id.* at *5 (citing TEX. WATER CODE ANN. § 27.104 (Vernon 1981); TEX ADMIN. CODE § 305.122 (c)(2000)).
[116] *FPL Farming Ltd v. Envtl. Processing Sys., L.C.*, 305 S.W.3d 739 (Tex. App.—Beaumont 2009), *rev'd*, 351 S.W.3d 306 (Tex. 2011).
[117] *FPL Farming Ltd. v. Envtl. Processing Sys., L.C.*, 351 S.W.3d 306, 310–12 (Tex. 2011).
[118] *Id.* at 311.
[119] *Id.* at 310–12 (citing TEX. WATER CODE ANN. § 27.104 (Vernon 1981)).

corresponding protective cloak.[120] Both *Manziel* and *Coastal v. Garza* were premised on the rule of capture, which has no applicability to wastewater injection.[121]

On remand, the Beaumont Appellate Court then reversed the trial court because the jury charge incorrectly placed the evidentiary burden on FPL to prove it did not consent to EPS's trespass.[122]

The Texas Supreme Court again reversed the Beaumont Court of Appeals (first for affirming, second for reversing), but ultimately declined to fulfill the prophecy:

> [we] … decline the invitation to address the remaining question presented in this appeal, namely, whether deep subsurface wastewater migration is actionable as a common law trespass in Texas.[123]

Charge error was the basis for reversal, with the Texas Supreme Court disagreeing with the appellate court agreeing with the trial court that a plaintiff bears the evidentiary burden to prove lack of consent to trespass.[124] The approved definition is:

> "Trespass" means an entry on the property of another without having consent of the owner. To constitute a trespass, entry upon another's property need not be in person, but may be made by causing or permitting a thing to cross the boundary of the property below the surface of the earth. Every unauthorized entry upon the property of another is a trespass, and the intent or motive prompting the trespass is immaterial.[125]

The FPL/EPS saga foreshadowed subsurface trespass liability by limiting the protective effect of a regulatory permit, but then ended short of an actual recovery for the affected landowner.

VIII. Conclusion

For over a century and a half, Texas courts have applied the trespass doctrine to disputes over the right to enter and control entry to real property. As technology allowed for use of the airspace above and the subsurface below, Texas courts continued to apply these concepts, while applying limitations to the traditional *ad coelum/ad infernos* doctrine along the way. As a result, determining actionable subsurface trespass requires inquiry as to (1) what object or thing trespassed (2) for what purpose (3) to what effect (4) the cause of action involved (5) the type of interest trespassed upon and (6) the remedy sought.

[120] *Id.* at 313.
[121] *Id.* at 314.
[122] *FPL Farming, Ltd. v. Envtl Processing Sys., L.C.*, 383 S.W.3d 274, 282-85 (Tex. App.—Beaumont 2012), *rev'd, Envtl. Processing Sys., L.C. v. FPL Farming Ltd.*, 457 S.W.3d 414 (Tex. 2015).
[123] *FPL*, 457 S.W.3d at 416, 418, 425, 426.
[124] *Id.* at 425.
[125] *Id.* at 417.