

Texas Supreme Court to Hear Landmark Underground Trespass Case

On Tuesday, January 7, 2014, the Texas Supreme Court will hear oral arguments in *Environmental Processing Systems, L.C. v. FPL Farming LTD.*, a landmark case involving the intersection of oil and gas production and private property rights. The question facing the court is whether trespass can occur nearly 1 mile underground when waste water from oil production that is disposed of in an injection well migrates under the property of another landowner. If you are interested, you may watch the argument online.

Factual Background

In 1997, Environmental Processing Systems (“EPS”), a disposal company, drilled a deep subsurface waste water injection well on its property, located about 400 feet from F.P.L. Farming’s (“Farming’s”) property, which is used for rice farming. In the past 17 years, EPS has disposed of over 100 million gallons of waste water in the well at a depth of approximately 7,000 feet. During the permitting process for the well, EPS admitted that the waste water injected into the well may reach the subsurface water beneath Farming’s property within about 10 years. Farming filed suit claiming that the waste water injected by EPS has migrated under Farming’s land into a deep saltwater aquifer and this migration constitutes trespassing, for which it should be compensated by EPS.

Procedural Background

This case has a long, complex procedural history. In the Liberty County Court, the case was tried to a jury that found in favor of EPS, concluding that no trespassing occurred. Farming appealed, and the Beaumont Court of Appeals affirmed, holding that there could be no trespassing claim because EPS held a valid permit for disposal from the Texas Commission on Environmental Quality. Farming appealed again, this time to the Texas Supreme Court. In 2011, the Supreme Court found for Farming, holding that the mere fact that EPS held a valid permit did not, alone, prevent a trespass claim. The Supreme Court, however, did not address the question of whether a cause of action for trespassing existed under these circumstances. Thus, the court reversed and remanded the case back to the Court of Appeals to determine whether a trespass did occur despite the valid TCEQ permit.

In September 2012, the Beaumont Court of Appeals found for Farming, holding that subsurface waste water migration did constitute actionable trespass. “We conclude that Texas law recognizes Farming’s property interest in the briny water underneath its property. We do not agree with EPS that no trespass action exists under Texas law to protect Farming’s legal interest to its property.” From this decision, EPS appealed to the Texas Supreme Court.

Trespass Law in Texas

In Texas, trespassing occurs when a person, not having title to the land, makes entry thereon without the consent of the landowner. In order to constitute a trespass, the entry need not be of a person, but trespassing can occur by allowing a thing to cross the boundary of the premises.

Arguments of the Parties

EPS' Arguments: EPS centers its argument on the prior Texas Supreme Court decision in *Coastal Oil & Gas Corp. v. Garza Energy Trust*, which found that a horizontal well drilled on one property that utilized fracking, which extended onto another property and drained a well underneath that property did not constitute a trespass. The Court reasoned that because oil and gas law is governed by the Rule of Capture, neighboring owners were barred from recovering royalties on gas that they allegedly lost due to horizontal drilling. EPS argues that the same reasoning should be applicable to disposal waste water. Further, EPS points to the Supreme Court's statement in *Coastal* that "the ancient common law maxim that land ownership extends to the sky above and the earth's center below...has no place in the modern world." EPS also relies upon the 1962 decision in *R.R. Comm'n of Texas v. Manziel*, which found that no trespass occurred when waters from a secondary recovery project migrated to the property of another below the surface.

Finally, EPS argues that Farming has suffered no damage, as the disposal water has not adversely impacted any farming activity and EPS has not sought to use the saltwater at issue. EPS also points out that were the Supreme Court to recognize a cause of action for subsurface trespass, it would be the first court in the country to do so. EPS cites to cases from Ohio, Oklahoma, and Louisiana that have all rejected subsurface trespass claims involving oil and gas production.

Farming's Arguments: Farming's primary argument is based upon the premise that a property owner owns his land to the center of the earth, a historic legal maxim. Farming also significantly relies upon the Texas Supreme Court decision in *Edwards Aquifer Authority v. Day*, which found that overlying property owners own the groundwater in place beneath the surface. Farming attempts to distinguish the *Coastal* and *Manziel* cases on the grounds that both of those cases involved the production of oil and gas, to which the Rule of Capture applies, as opposed to this instance which does not involve production, but merely disposal of waste water. This distinction is important, argues Farming, because when dealing with oil production, a landowner whose well is being drained has the option of drilling another well to prevent the drainage, the theory upon which the Rule of Capture is based. The same is not true for a landowner who faces migration of waste water from a disposal well.

Farming also argues that because of the toxic substances in the waste water, the migration into the water beneath its property has damaged the water. Although Farming admits that the water in the aquifer where the waste water is injected is too salty to drink and that it has not sought to use the water to date, it points to improvements in desalination techniques that could make this water drinkable in the future and argues that the contamination from the waste water could render

the water below its property unusable when it otherwise would have been because of potential desalination technology.

Finally, Farming argues that EPS benefits financially from disposing water, and that it should bear the burden of purchasing or leasing the property under which the water will be stored, pointing out that nothing would prohibit EPS from obtaining a subsurface lease from neighboring landowners to avoid trespass claims.

Amicus Curiae Arguments: Several additional organizations have filed *amicus curiae* (“friend of the court”) briefs in this case as well. For example, the Texas Oil and Gas Association argues that because the ability to produce oil and gas is tied to the ability to utilize disposal wells, a decision recognizing a trespass cause of action in this circumstance would likely threaten oil and gas production in the state. On the other hand, the Texas Farm Bureau argues that landowners enjoy the right to exclusive possession of their property, including the right to exclude others from that property.