FPL FARMING, LTD. V. ENVIRONMENTAL PROCESSING SYSTEMS, L.C.: SUBSURFACE TRESPASS IN TEXAS

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I. INTRODUCTION

In 2012, the Beaumont court of appeals became the first court in Texas to recognize a cause of action for subsurface trespass when fluids from an injection well leak into the ground beneath an adjacent property.1 The ruling was handed down in FPL Farming, Ltd. v. Environmental Processing Systems, L.C., a case involving a long-running dispute between a rice farmer (FPL) and an injection well operator (EPS) regarding the alleged leaking of nonhazardous wastewater from EPS’s well into a saltwater deposit beneath FPL’s land.2 EPS appealed the court’s decision to recognize FPL’s cause of action for trespass,3 and the Texas Supreme Court granted review in November 2013.4

The FPL Farming case attracted significant attention from the state’s oil and gas industry. While 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.5 In fact, the

3. FPL Farming II, 383 S.W.3d at 282.
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.6

On February 6, 2015, the Texas Supreme Court issued its opinion, reversing the Beaumont court of appeals’ decision and reinstating the trial court’s judgment.7 However, the court completely avoided the issue of subsurface trespass,8 electing instead to resolve the case on an ancillary issue of consent and burden of proof.9 Significantly, the court noted that it “neither approve[d] nor disapprove[d] of the court of appeals’ analysis and holding,” regarding the recognition of a claim for subsurface trespass from migrating injection fluids.10 Thus, the court has left injection well operators vulnerable to future subsurface trespass suits.

This Note will first provide a brief overview of injection wells. Next, it will examine the validity of the Beaumont court of appeals’ finding that Texas law recognizes claims for subsurface trespass from migrating injection fluids in light of prior case law in the state. This Note will then conclude by offering a prediction as to how the Texas Supreme Court might rule on the issue in the future.

II. BACKGROUND

A. Injection Wells

An injection well is essentially a hole that has been drilled deep into the ground, which is then used to store various fluids.11 The types of fluids injected into these wells include water, chemical-water mixtures, carbon dioxide, and other wastewater.12 These fluids are the byproduct of numerous industries, including oil and gas extraction, petroleum production, and chemical manufacturing.13 Injection wells are currently classified into six categories based on their usage and the types of fluids

8. Id. at *1.
9. Id. at *10.
10. Id.
12. Id.
13. Id.
they store. However, the Class I and II wells are at the center of the subsurface trespass debate in Texas.

The FPL Farming case involves a Class I well. Class I wells are used to dispose of both hazardous and nonhazardous waste from industrial and municipal entities. Class II wells are used in the production of oil and gas and include enhanced recovery wells used in hydraulic fracturing and other secondary recovery methods, waste disposal wells, and hydrocarbon storage wells. The latest available data indicate Texas is home to approximately 108 Class I wells and over 52,000 Class II wells.

B. Subsurface Trespass in Texas

As in most jurisdictions, Texas recognizes landowners’ right to exclude others from their property; thus, any unauthorized entry onto their land gives rise to an actionable trespass. However, a trespass does not necessarily require a person to enter the property; rather, simply causing a thing to enter the land is sufficient. Further, actual damages are not required.

While trespasses have traditionally been the result of surface invasions, Texas courts have recognized trespasses based on intrusions occurring below the surface. In Gregg v. Delhi-Taylor Oil Corp., mineral-right owners sought to enjoin a neighboring landowner from carrying out a fracturing operation that would create fissures beneath their land. Although the court did not reach the merits of the mineral owners’ claims, it did note that the creation of the fractures could constitute a trespass. Additionally, in Hastings Oil Co. v. Texas Co., the Texas Supreme Court held the drilling of a slant well, which crossed property lines and bottomed

14. Id.
15. Nixon, supra note 5, at 429.
16. Id.
24. Id. at 416.
under a neighboring property, constituted a trespass. Thus, a trespass in Texas is not necessarily limited to intrusions upon the surface property.

However, when the Texas Supreme Court has been faced with suits for subsurface trespass involving oil and gas injection operations, it has been more reluctant to find a cause of action. In Railroad Commission v. Manziel, the court considered whether injection fluids crossing property lines during a secondary oil recovery operation could constitute a trespass. The court held that because the Railroad Commission had authorized the injections, they could not be enjoined based on a trespass claim. Notably, the court also concluded that in the context of oil and gas operations, the traditional rules governing surface trespasses should not be applied to subsurface trespasses. Rather, a court should weigh the substantial public interest in secondary oil and gas recovery activities against the interests of the landowner suffering the harm. Thus, in Manziel, the court effectively discarded traditional trespass law in favor of a balancing of the equities test in subsurface trespass cases involving oil-and-gas-related injections.

Nearly fifty years later, the court heard another case involving a claim of subsurface trespass from a secondary recovery operation in Coastal Oil & Gas Corp. v. Garza Energy Trust. In that case, landowners sought to recover damages from the loss of gas recovered by an adjacent property owner as a result of his hydraulic fracturing operation. The suit was based on a theory of subsurface trespass of the fluids used in the fracturing operation. However, the court again declined to find trespass, concluding that the rule of capture gave the neighboring well operators the right to extract the gas, even though it may have originated below the landowner’s property. Thus, the owner could not prove any injury to his property rights, as required to recover damages for trespass.

The Garza court also noted that a cause of action for trespass was unnecessary to protect the landowner from losses because the law already provides other sources of protection. Specifically, the court noted three

27. Id. at 568.
28. Id.
29. Id.
30. Coastal Oil & Gas Corp. v. Garza Energy Trust, 268 S.W.3d 1, 4 (Tex. 2008).
31. Id. at 9.
32. Id.
33. The rule of capture holds that “the owner of a tract of land acquires title to the oil or gas which he produces from wells on his land, though part of the oil or gas may have migrated from adjoining lands.” Elliff v. Texon Drilling Co., 210 S.W.2d 558, 561–62 (Tex. 1948).
34. Garza, 268 S.W.3d at 12–13.
35. Id.
36. Id. at 14.
remedies available to a landowner in this situation: (1) drilling his own well, (2) enforcing the implied covenant to protect against drainage, and (3) seeking a pooling arrangement. Again, the court avoided recognizing a subsurface trespass in the context of an oil and gas operation, relying in part on policy arguments.

While Texas courts have managed to avoid determining if the migration of injection fluids could constitute a trespass, the Beaumont court of appeals was confronted with the issue in FPL Farming.

C. The FPL Farming Case: Facts, Analysis & Opinion

The FPL Farming dispute dates back to 1996 when EPS initially applied for permits to operate two Class I injection wells on property that was near FPL’s land. As part of the application process, EPS filed projections showing the fluids from the injection well would seep beneath FPL’s property within ten years. Once FPL learned about the future leakage, it opposed EPS’s permit application. However, the parties eventually settled out of court for $185,000, and the permits were granted.

Three years later, EPS sought a permit amendment to increase the amount of fluids it could inject into its wells. FPL again opposed the permits, claiming the migrating fluid would impair its right to use its subsurface property. This time the case made it to the Austin court of appeals. The court of appeals held that FPL could not successfully oppose the permit amendment without showing actual harm from the projected fluid migration. Thus, the court left open the possibility of bringing suit in the future, if FPL could prove actual harm.

As a result, in 2006, FPL sought an injunction against EPS’s continued operation of the wells, alleging causes of action for trespass and negligence. In support of its claims, FPL alleged that the fluids from EPS’s well would contaminate a saltwater deposit below its land, which

37. Id.
39. Id.
40. Id.
41. Id.
42. Id.
43. See id.
44. Id. at *2.
45. Id. at *4.
46. Id. at *5.
FPL claimed it had a legal interest in. After a jury trial, verdict was entered in favor of EPS, which FPL appealed. On appeal, FPL submitted three issues related to the denial of its trespass claim. However, the Beaumont court of appeals, relying on the traditional understanding of the Manziel and Garza cases, held that FPL had no cause of action for trespass because a state agency had issued the permit authorizing the injections. FPL appealed the decision, and the Texas Supreme Court granted review in 2011.

In its opinion, the Texas Supreme Court took issue with the Beaumont court of appeals’ conclusion that a permit from a state agency shields a well operator from tort liability. In fact, the court came to the opposite conclusion, finding that both case law and statutes reject this notion. More importantly, the court concluded that both the Manziel and Garza cases were not controlling in this situation because those cases involved oil and gas interests, which were not present in FPL Farming. The court noted that in the case of oil and gas extraction, landowners have remedies available to protect their mineral interests, such as pooling or drilling their own well, which are not available to landowners harmed by wastewater injections. Thus, the Manziel and Garza holdings had no bearing on the issues presented by the FPL Farming case. Yet, the court still declined to decide if injection fluid migration could constitute trespass, electing instead to leave that determination to the Beaumont court of appeals on remand.

On remand, the Beaumont court of appeals found that Texas law does recognize a cause of action for subsurface trespass and that FPL had a valid claim for such trespass. While no Texas cases had yet recognized a cause of action for trespass based on leakage of injection well fluids, the court relied on the holdings in Gregg and Hastings Oil to find that such a cause of action exists in Texas.

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49. FPL Farming I, 305 S.W.3d at 742.
50. Id. at 744–45.
51. Id. at 310.
53. Id. at 312–13.
54. Id. at 314.
55. Id.
56. Id.
57. Id.
58. Id. at 314–15.
60. Gregg v. Delhi Taylor Oil Corp., 344 S.W.2d 411, 416 (Tex. 1961) (holding subsurface fissures from hydraulic fracturing constituted trespass).
Having concluded that subsurface trespass was actionable, the court next considered whether a landowner has a protected interest in the groundwater beneath the landowner’s property. On this issue, the court found that Texas law explicitly recognizes surface owners’ rights to any water deposited below their land. Accordingly, the court of appeals held that landowners in Texas may bring an action for subsurface trespass to protect their legally recognized right to the water beneath their property. Thus, FPL could bring a trespass claim to protect its interest in the saltwater below its land.

III. ANALYSIS OF THE BEAUMONT COURT OF APPEALS’ DECISION

The Beaumont court of appeals’ decision appears to be in line with prior case law regarding subsurface trespasses in Texas. Clearly, the Gregg and Hastings Oil cases stand for the proposition that Texas recognizes an actionable trespass may result from subterranean invasions. It is also clear that Texas recognizes landowners’ rights to the water located below their land. Thus, any unauthorized invasion occurring below the surface that interferes with that right should constitute an actionable trespass.

However, the FPL Farming case involved a Class I well, which is not associated with oil and gas extraction. The Texas Supreme Court has already made it plain that a different set of rules apply to injection wells used in the exploitation of oil and gas, i.e., the rule of capture and equitable considerations. Thus, it seems the oil and gas industry’s concern that the FPL Farming holding would apply to Class II wells is misplaced. The Texas Supreme Court has been perfectly willing to distinguish oil and gas injection wells from the remaining categories of wells in past decisions. Accordingly, when it decides to rule on this issue, the Texas Supreme Court will likely recognize that a cause of action exists for subsurface trespass from migrating injection well fluids, but limit it to those injection wells not used in oil and gas extraction.

62. FPL Farming II, 383 S.W.3d at 280 (citing Gregg, 344 S.W.2d at 415–16; Hastings Oil, 234 S.W.2d at 396–97).
63. Id.
64. Id.
65. Id. at 282.
66. Id.
67. See supra notes 24–25 and accompanying text.
68. See supra note 64 and accompanying text.
69. Nixon, supra note 5, at 429.
70. See supra notes 28–29, 34–37, 55–57 and accompanying text.
V. CONCLUSION

Texas case law seems to recognize subsurface trespass as a valid cause of action against leakages from Class I injection wells. However, in the past, the Texas Supreme Court has been unwilling to recognize a similar trespass as it relates to underground intrusions involving oil and gas injection fluids. Thus, it is likely the Texas Supreme Court will eventually acknowledge that subsurface trespass is actionable with regard to migrating fluids from injection wells that are not associated with the oil and gas industry. Although the court passed on the opportunity to resolve this issue in *FPL Farming*, its holding in that case has made it certain that the court will confront the issue again in the near future. Next time, the court should seize the opportunity to provide much needed guidance on a controversial area of the law.

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