

## What's Underground Is Still Up For Grabs in Texas

Since the first explorationist drilled the first water disposal well, cases have come through the courts in the U.S. trying to determine what rights each estate owner has, as well as the potential liability attributable to using those rights. Among the topics to be considered by courts is whether such injection could be a trespass. Based on multiple amicus briefs filed in *Env't'l Processing Sys., L.C. v. FPL Farming Ltd.*, No. 12-0905 (Tex. Feb. 6, 2015), many thought the Texas Supreme Court would clarify the law on this issue. It did not.

The dispute in *FPL* was whether deep subsurface wastewater migration is actionable as a common law trespass in Texas. The action was originally brought by FPL Farming Ltd. ("FPL"), seeking damages for water migrating into the subterranean tract of its estate. The migrating water at issue was injected into the adjacent estate by a wastewater disposal facility owned by Environmental Processing Systems, L.C. ("EPS").

Following a series of appeals that included a remand from the Texas Supreme Court, a jury found that no subsurface trespass occurred. However, the Texas Ninth Court of Appeals reversed this decision after determining that the jury instruction did not properly include lack of consent as an element of a trespass cause of action. In its opinion, the Court noted EPS' argument that "Texas law does not recognize a claim for trespass to protect possessory rights at the depths that are at issue in this case." After reviewing two Texas Supreme Court opinions, the Court of Appeal assumed that Texas recognized a subsurface trespass claim at the depths at issue in this action. (See, *Gregg v. Delhi-Taylor Oil Corp.*, 162 Tex. 26 (1961); *Hastings Oil Co. v. Texas Co.*, 149 Tex. 416 (1950).)

However, instead of analyzing this assumption made by the Court of Appeals, the Texas Supreme Court, on the petition for review of the Court of Appeals decision, decided not to address the question of whether deep subsurface trespass is actionable, but instead reversed the ruling by finding that the jury instructions of the lower court were in fact proper, and therefore the findings of the jury were affirmed.

*FPL* is similar to a 2007 California decision, *Starrh and Starrh Cotton Growers v. Aera Energy LLC*, 153 Cal.App. 4th 583 (2007), which also dealt with a subsurface trespass claim brought by a farming company against an entity disposing of wastewater. In *Starrh*, the California Court of Appeal for the Fifth District held that "[c]ausing subsurface migration of oil field wastewater into a mineral estate (groundwater pore space) of another without that landowner's consent is a trespass under California law." In this case, the California Supreme Court denied review, making the law in at least one state that subsurface trespass for wastewater migration be actionable.

With the amount of water disposal and hydraulic fracturing being utilized in Texas, claims similar to those in *FPL* will certainly be heard again by the courts. However, until the Texas Supreme Court decides to address the issue, certain risks will be presented to operators in Texas that employ wastewater disposal. Accordingly, for the time being, operators seeking to reduce the risk must weigh whether the price of entering into subsurface agreements with adjacent landowners exceeds the risk of being sued for subterranean wastewater migration.