SO YOU'VE DRILLED A WELL, NOW WHAT?

In order to get your product to market, you will have to deal with such tasks as laying flow lines, setting up facilities, and establishing saltwater disposal wells. The parties the operator must deal with, the necessary agreements, and the limits of liability when agreements cannot be reached are largely established by the accommodation doctrine. In some states, the accommodation doctrine has been modified and codified in the form of surface owner protection acts. Saltwater disposal wells have separate and special considerations. In each case, it is desirable to understand the conceptual underpinnings.

The Accommodation Doctrine [1]

The Accommodation Doctrine is born of the need to balance the rights of the surface owner and the mineral owner. In Texas, and other oil-producing states, the mineral estate is dominant - Since 1862, Texas has recognized the ownership of minerals including the implied right to use as much of the surface as is necessary for the development and enjoying of the minerals. *Cowan v. Hardeman*, 26 Tex. 217, 222 (1862). This has led to some historically harsh results - *In Grimes v. Goodman Drilling Co.*, 216 S.W. 202 (Tex. Civ. App.-Fort Worth 1919, writ dism'd), Surface owner purchased property it knew was under lease. The lease contained one provision regarding surface use: "none of the residences now located on said lots shall be removed therefrom in pursuit of operations for oil and gas development" The evidence showed the slush pit ran along the side of the plaintiffs house and slush spattered on the house, doors and windows. Loud engines ran through the night next to plaintiff's house. *Id*. Nonetheless, the court held the lessee was entitled to drill as many wells as reasonably necessary, as long as lessee did not violate the provision of the lease by removing any of the houses on the land. Plaintiff argued the lessee was negligent and created a nuisance, however the court rejected these arguments because lessee's actions were usual and customary to drilling an oil well. Court did not explicitly say the lessee had acted with reasonable necessity but implied that circumstances dictate what is reasonable. By referring to lessee's actions and finding they were usual and customary under the circumstance the court found the lessee had not been negligent.

The limitations of what is reasonably necessary for oil and gas development has been heretofore determined by a series of cases –

Entry upon the Surface – A mineral owner has the right of reasonable ingress and egress upon the land for exploration and production of oil and gas. *Key Operating and Equipment, Inc. v. Hegar*, 435 S.W.3d 794, 799 (Tex. 2014).

Location of Wells and Facilities –The mineral owner has the right to select the location for wells and facilities. *Grimes v. Goodman Drilling Co.*, 216 S.W. 202 (Tex. Civ. App.-Fort Worth 1919, writ dism'd).

Construction of Roads to drill sites – The lessee has the implied right to build use and maintain roads upon the surface estate as reasonably necessary. *Gulf Oil Corp. v. Walton*, 317 S.W.2d 260, 262 (Tex. Civ. App.-El Paso 1958, no writ).

---

[1] The Accommodation Doctrine has been a frequent topic of CLE's and other continuing education events. This is not intended to be a comprehensive exploration, but an overview.

Construction of Pipelines – Lessee has the right to construct pipelines as part of the reasonably and necessary use of the surface. *Trenolone v. Cook Exploration Co.*, 166 S.W.3d 495 (Tex. Civ. App. – Texarkana 2005).

Use of Fresh Water – Mineral lessee has the right to take water reasonably necessary for the development of minerals. *Sun Oil Co. v. Whitaker*, 483 S.W.2d 808 (Tex. 1972).

Build storage tanks, power stations and structures. *Gregg v. Caldwell-Guadalupe Pick-Up Stations*, 286 S.W. 1083 (Tex. Com. App. 1926).

Construct salt water disposal pits. *Feland v. Placid Oil Co.*, 171 N.W.2d 829 (N.D. 1969).

The Texas case of Getty Oil Co. v. Jones, 470 S.W.2d 618 (Tex. 1971) is often cited as establishing the parameters of the accommodation doctrine, as it deals with the limits of reasonable necessity. John H. Jones, the surface owner, sued for an injunction to restrain Getty Oil Company from using space for pumping units that would prevent him from using an automatic irrigation sprinkler system. The surface owner had the burden to show the lessee/operator was unreasonable. Jones purchased property subject to oil and gas lease. *Id*. at 620.

In 1963, Jones installed an irrigation system that consisted of 1,300 feet of pipe that rotated in a circle. *Id*.

In 1967, Getty drilled two wells in the area the irrigation system covered and installed pumping units. *Id*.

One of the pumping units required a height of 17 feet for operation and the other required 34 feet. *Id*.

The irrigation system could negotiate most obstacles less than seven feet so Jones could no longer use his irrigation system. *Id*.

Evidence showed the irrigation system was a reasonable means for Jones to irrigate due to the lack of manpower. *Id*. at 623.

Evidence also showed two other lessees producing on Jones property had installed their pumping units in below-ground cellars so as to not interfere with Jones irrigation system. *Id*. at 620.

In Getty, the court held "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 rules of reasonable usage of the surface may require the adoption of an alternative by the lessee." *Id*.

On rehearing the court clarified its holding:

> The burden of establishing unreasonableness of the lessee's surface use is on the surface owner. *Id* at 628.

Whether use is reasonable is to be determined by the circumstances of both owners. *Id* at 629.

This means looking at the surface condition and uses made by the surface owner as well as the reasonableness of the mineral estate method of surface use. *Id*. at 628.

When determining the reasonableness of the mineral owner the court should look to usual, customary and reasonable practices in the industry under similar circumstances. *Id*.

The Court described the accommodation doctrine as a fact inquiry:

> The reasonableness of a surface use by the lessee is to be determined by a consideration of the circumstances of both and, as stated, the surface owner is under the burden of establishing the unreasonableness of the lessee's surface use in this light. The reasonableness of the method and manner of using the dominant mineral estate may be measured by what are usual, customary and reasonable practices in the industry under like circumstances of time, place and servient estate uses. What may be a reasonable use of the surface by the mineral lessee on a bald prairie used only for grazing by the servient surface owner could be unreasonable within an existing residential area of the City of Houston, or on the campus of the University of Texas, or in the middle of an irrigated farm. What we have said is that in determining the issue of whether a particular manner of use in the dominant estate is reasonable or unreasonable, we cannot ignore the condition of the surface itself and the uses then being made by the servient surface owner. . . . If the manner of use selected by the dominant mineral lessee is the only reasonable, usual and customary method that is available for developing and producing the minerals on the particular land then the owner of the servient estate must yield. However, if there are other usual, customary and reasonable methods practiced in the industry on similar lands put to similar uses which would not interfere with the existing uses being made by the servient surface owner, it could be unreasonable for the lessee to employ an interfering method or manner of use. These [conditions] involve questions to be resolved by the trier of the facts. *Id*. at 627-28.

The court also said Jones had met his burden by showing:

He had no reasonable alternative to his land use (developing crops) other than the irrigation system.

The Getty surface use was unreasonable because an alternative industry-accepted method was available that would allow Getty to produce without interfering with Jones' existing use.

Therefore, Getty was bound to convert to a non-interfering system.

More recently, the Court in *Merriman v. XTO Energy Inc.*, 407 S.W.3d 244 (Tex. 2013) clarified what was necessary to prove a surface owner had no reasonable alternative method by which to continue an existing use. *Id* at 250

The court stated the surface owner has the burden to prove the inconvenience of continuing the existing use by the alternative method is so great as to make the alternative unreasonable. *Id*

Evidence of inconvenience and unquantified amount of additional expense does not suffice. *Id* at 253

Coyote Lake Ranch, LLC v. City of Lubbock, 498 S.W.3d 53 (Tex. 2016) addressed the issue of Whether the accommodation doctrine also applies between a landowner and the owner of an interest in the groundwater.

The City of Lubbock had purchased the groundwater rights of Coyote Lake Ranch in 1953. The deed had included provision regarding the City's use of the surface. *Id* at 57

In 2012, the City planned to drill 20 test wells and 60 new groundwater-production wells. *Id* at 58

The Ranch sued for a temporary injunction, pleading the City had a contractual and common law responsibility to use the amount of surface that was reasonably necessary. *Id*

The Ranch argued the proposed drilling would increase erosion and injure the surface unnecessarily. *Id*

The trial court granted the injunction, the court of appeals reversed and remanded to the trial court holding the accommodation doctrine applied but that it did not extend to groundwater owners. *Id* at 59

The Texas Supreme Court affirmed the court of appeals judgment to remand but held the accommodation doctrine did apply between a land owner and groundwater owner. *Id* at 66

Limitations on the Accommodation Doctrine - Surface Owner Protection Acts

The Accommodation Doctrine has been codified in some states as Surface Owner Protection Acts. The various Acts limit the ability, in many cases, of operators to contract with the surface owner for flowlines and facilities after the drilling of the well, as the notification periods precede the drilling of the well. A summary and discussion of Acts in certain oil-producing states follows –

North Dakota

North Dakota Century Code Chapter 38-11.1 provides for compensation for surface damage caused by oil and gas production. Section 38-11.1-01 provides that among other things, the Legislative Assembly has found that owners of the surface estate and other persons should be justly compensated for injury to their persons or property and interference with the use of their property occasioned by oil and gas development. The purpose and interpretation of Chapter 38-11.1 is contained in Section 38-11.1-02. This section provides that it is the purpose of Chapter 38-11.1 to provide the maximum amount of constitutionally permissible protection to surface owners and other persons from the undesirable effects of the development of minerals. Section 38-11.1-03.1 provides that upon request of the surface owner or adjacent landowner, the State Department of Health is to inspect and monitor the well site on the surface owner's land for the presence of hydrogen sulfide. If the presence of hydrogen sulfide is indicated, the State Department of Health is required to issue appropriate orders under Chapter 23-25 to protect the health and safety of the surface owner. Section 38-11.1-04 provides for payments to the surface owner for damage and disruption caused by oil and gas development. This section requires the mineral developer--the person who acquires the mineral estate or lease for the purpose of extracting or using the minerals for nonagricultural purposes—to pay the surface owner a sum of money equal to the amount of damages sustained by the surface owner and the surface owner's tenant, if any, for loss of agricultural production and income, lost land value, lost use of and access to the surface owner's land, and lost value of improvements caused by drilling operations. Section 38-11.1-05 requires the mineral developer to give the surface owner written notice of drilling operations contemplated at least 20 days before commencement of operations, unless waived by mutual agreement of both parties. The notice must officially disclose the plan of work and operations to enable the surface owner to evaluate the effect of drilling operations on the surface owner's use of the property. Section 38-11.1-06 concerns the protection of surface and ground water. This section provides that if the domestic, livestock, or irrigation water supply of a person who owns an interest in real property within one-half mile of where geophysical or seismograph activities are or have been conducted or within one mile of an oil or gas well site has been disrupted, or diminished in quality or quantity by drilling operations and a certified water quality and quantity test has been performed by the person who owns an interest in real property within one year preceding the commencement of drilling operations, the person who owns an interest in real property is entitled to recover the cost of making such repairs, alterations, or construction that will ensure the delivery to the surface owner of that quality and quantity of water available to the surface owner before commencement of drilling operations. A person who owns an interest in real property who obtains all or a part of that person's water supply for domestic, agricultural, industrial, or other beneficial use from an underground source has a claim for relief against a mineral developer to recover damages for disruption or diminution in quality or quantity of that person's water supply proximately caused by drilling operations conducted by the mineral developer. This section provides further that a tract of land is not bound to receive water contaminated by drilling operations on another tract of land, and the owner of a tract has a claim for relief against a mineral developer to recover the damages proximately resulting from natural drainage of waters contaminated by drilling operations. The mineral developer is also responsible for all damages to person or property resulting from a lack of ordinary care by the mineral developer or resulting from a nuisance caused by drilling operations. However, this section does not create a cause of action if an appropriator of water can reasonably acquire the water under the changed conditions and if the changed conditions are a result of the legal appropriation of water by the mineral developer. Section 38-11.1-09 provides that if the person

seeking compensation rejects the offer of the mineral developer, that person may bring an action for compensation in the court of proper jurisdiction. If the amount of compensation awarded by the court is greater than that which had been offered by the mineral developer, the court is required to award the person seeking compensation reasonable attorney's fees, any costs assessed by the court, and interest on the amount of the final compensation awarded by the court from the day drilling is commenced. The Montana, Tennessee and West Virginia statutes are modeled after the North Dakota Statute.[2]

New Mexico

New Mexico enacted a surface owner protection statute[3] in 2007 which places additional obligations on operators as compared with the obligations imposed by surface owner protection statutes in other states. The New Mexico statute requires the mineral developer to give notice 5 days before nonsurface disturbance activities and not less than 30 days before planned oil and gas operations. For oil and gas operations, the notice must include an offer of compensation. If the owner does not accept the operator's compensation agreement within 20 days, the operator may proceed with bonding. The surface owner can negotiate or go to binding mediation or arbitration. If bonding is required, the statute requires a $10,000 bond per well or a $25,000 blanket bond, letter of credit, cash, or certificate of deposit with a New Mexico surety company or financial institution. Concerning damages, the New Mexico statute requires damages for lost agricultural production and income, lost land value, lost use and access of land, and lost value of improvements. The New Mexico statute requires attorney's fees if the operator conducts operations without notice, conducts operations without agreement or bonding, or conducts operations outside the scope of the agreement. The New Mexico statute requires attorney's fees and treble damages if an operator willfully and knowingly does not give notice, enters the surface owner's property without agreement or bond, or violates the access and compensation agreement. A surface owner is subject to attorney's fees for not exercising good faith in complying with the New Mexico statue or agreement entered pursuant to the statute and treble damages for willfully and knowingly violating an access and compensation agreement. Damages are determined by agreement, arbitration, mediation, or litigation. In addition, the notice requires disclosure of the plan of operations, a copy of the Surface Owners Protection Act, proposed surface use agreement, and the name and contact information of the operator.

Wyoming

The Wyoming statute[4] requires notice 5 days before entry for nonsurface disturbance activities and 30 days to 180 days before entry for surface disturbance activities. Before entry, the operator must attempt good-faith negotiations, obtain an agreement, or enter under bond. Wyoming requires a $2,000 bond per well or a blanket bond approved by the state. The Wyoming statute provides for damages for loss of production and income, lost land value, and lost value of improvements. Damages are determined by a court unless otherwise agreed.

[2] Mont.Code.Ann Section 82-10-501; Tenn.Code.A.. Section 60-1-601; W.Va.Code Section 22-7-1
[3] NM Stat. Ann. Section 70-12-1
[4] Wyo.Stat. Section 30-5-401

Oklahoma

The Oklahoma statute[5] requires that the surface owner be notified prior to commencement of operations. The surface owner and operator are to enter into negotiations within five days of the notice. This will either result in an agreement prior to the commencement of operations or the filing of a request for the appointment of appraisers. If appraisal is necessary, the appraisers are appointed by the court, and the appeal from the judgment of appraisers is to the court. Additionally, a blanket bond in the amount of $25,000.00 is required.

Texas

Texas' statute[6] requires only that the surface owner be notified within 15 days of the issuance of an RRC permit for a new well or reentering a well that has been P&A'd. There is no penalty for violation.

Limitations on Surface Owner Protection Acts

Federal preemption

There is no federal judicial recognition of an accommodation doctrine and to date, no case has applied the state judicial accommodation doctrine to federal split estates. There are serious constitutional questions on whether it could be applied to federal minerals. The application of state surface damage legislation to federal minerals, and whether such legislation unconstitutionally interferes with the management of the federal mineral estate, likewise raises serious legal questions.

Wyoming placed itself at the center of the preemption debate in 2005 when the WOGCC determined that Wyoming's new Split Estates Act applies to federal minerals. In response to proposed rules applying the Act to federal minerals, BLM submitted comments in opposition, asserting that the WOGCC's rules should only apply tostate and private minerals.[7] In response to BLM's comments, the Wyoming Attorney General challenged BLM to sue the state if it wanted to assert a preemption argument.[8] To date, there has been no suit, and the question remains unresolved.

Protections of Surface Owner Protection Acts likely not available to surface owner who retains all or part of the minerals

The North Dakota Supreme Court has previously considered whether the provisions of the Surface Owner Protection Act apply to a surface owner who owned all or part of the minerals, and answered that question in the negative.[9]

---

[5] 52 Okla.Stat. Section 318.2

[6] Tx.Nat.Res.Code Section 91.751

[7] Matt Micheli, "Showdown at the OK Corral - Wyoming's Challenge to U.S. Supremacy on Federal Split Estate Lands," 6 *Wyo. L. Rev*. 31, 34 (2006)

[8] Associated Press, "BLM Disputes Wyoming Split Estate Law," *Billings Gazette* (Jun. 22, 2005)

[9] Knife River Coal Mining Co. v. Neuberger, 466 N.W.2d 606, (ND 1991)

The defendants, Dennis and Shirley Neuberger, acting as the personal representatives of the Ella Neuberger Estate, and Dale Neuberger (Neubergers), appealed from the judgment of the District Court for the South Central Judicial District dated July 25, 1990. The district court denied the Neubergers' counterclaims which sought damages from Knife River Coal Mining Company (Knife River) under the Surface Owner Protection Act. The Neubergers asserted that the district court erred in holding that Knife River was not liable for payments under the Surface Owner Protection Act, by allowing parol evidence concerning the interpretation of the two coal leases to be admissible at trial, and by finding that the six-year statute of limitations barred any relief under the Act prior to 1981. The Supreme Court affirmed the decision of that District Court, stating in pertinent part –

> Upon reviewing the Act, we note that the purpose of the statute is to protect surface owners from the undesirable effects of development "without their consent." § 38-18-03, N.D.C.C. The language of the statute further provides that the provisions of the Act are to be interpreted to benefit the surface owners "regardless of how the mineral estate was separated from the surface estate." § 38-18-03, N.D.C.C. (emphasis added). We conclude the legislature intended the Act to apply only where the surface owner hadnot consented to the development. Section 38-18-06(3), N.D.C.C., discusses the effect of leases in determining consent: "3. A certified copy of a mineral lease executed by the surface owner in favor of the mineral developer proposing the mining project or his agent, or a certified copy of a surface lease executed by the surface owner in favor of the mineral developer proposing the mining project or his agent, if filed with the application for a permit to surface mine, may be used to fulfill the subsection 2 requirement of a statement of consent to have surface mining conducted. Any previously executed mineral lease or surface lease in favor of the mineral developer, his successors, assigns, or predecessors in title runs with the land and is binding on a subsequent mineral owner or owners or surface owner or owners, as the case may be."
>
> In the case at hand, Adam and Ella Neuberger were owners of both the surface and mineral interest of the land in question. By entering into the leases, Adam and Ella, the surface owners, consented to the coal mining operations. See § 38-18-06(3). The binding effects of the two leases run with the land and also apply to the subsequent surface owners, the Neubergers. See § 38-8-06, N.D.C.C. Therefore, we conclude that the relief provisions of the Act could not be applied to the case at hand. Having so concluded, we need not address the remaining issues which have been presented on appeal.

To restate the Court's conclusion, where the surface owners are free to contract for any limitations on the use of the surface via the mineral leasing process, the lease terms will govern.

Although *Neuberger* concerns coal, the terms of the Surface Owner Protection Act for coal are the same as for oil and gas, albeit as a freestanding Code section.[10] Although not dispositive in North Dakota for oil and gas development, and certainly not dispositive in other jurisdictions,

[10] North Dakota Century Code Chapter 38-18.06

its logic is compelling. Even in a jurisdiction with some form of Surface Owner Protection Act, look to the lease.

Saltwater Disposal Wells

Justification, Authorization and Pitfalls

The difference between what is commonly referred to as an injection well and a disposal well is that an injection well re-injects fluids into the reservoir from which they came in order to promote secondary recovery, while a disposal well does exactly what it sounds like—it does - disposes of wastewater into underground intervals that are not productive of oil or gas. Frac fluid does not come from the ground, and so cannot be "reinjected" for secondary recovery and must be disposed of or recycled. This is why the disposal well industry is seeing such a rise in activity; as more and more wells are fraced, the amount of wastewater grows exponentially.

The right to dispose of wastewater under someone's land is a right that is incident to surface ownership. As part of an oil and gas lessee's right to use the surface estate to explore for and produce oil and gas, the lessee has the right (unless prohibited by the lease) to drill a disposal well on that lease to dispose of the wastewater produced from wells located on that lease. However, if an operator desires to dispose of wastewater from other leases or from other operators for a fee, the operator must reach a separate agreement with the surface owner. An owner of the mineral estate who owns no interest in the surface does not have the right to lease the land for disposal. *See* Emeny v. U.S., 188 Ct.Cl. 1024 (1969). Likewise, operators of commercial disposal wells (as opposed to lease disposal wells) must have an agreement with the surface owner for the use of the property and the underground space. It should be noted that there is one case, *Mapco v. Carter*, which did not follow the rule from *Emeny* and instead suggested that ownership of the empty cavern of a salt dome could be an incident of the mineral estate. *See* Mapco, Inc. v. Carter, 786 S.W.2d 368 (Tex.App.-Beaumont 1989, *rev'd on other grounds*). *Mapco* represents an outlier that has not been followed in this respect to our knowledge and the circumstances of the holding are largely fact-specific. The common understanding in Texas, and what the industry relies on, is that the right to use land for subsurface disposal is an incident of ownership of the surface estate.

A disposal well site typically does not take up much space (approximately 2 acres is common) and usually includes unloading facilities, storage tanks, separators, pumps, equipment, and the wellbore itself. The wellbore can be newly drilled or a recompleted, formerly producing well, but in either case, a new permit is required. The fluid injected into the ground by a disposal well is mostly saltwater.

Suppose that the fluids injected into a disposal well migrate beyond the boundary of the land owned by the surface owner with whom the operator has an agreement; does that incursion of fluids into and under the neighbor's property constitute a trespass? Until recently, this question had never been addressed by a Texas appellate court, and the assumption in the disposal industry was that such incursion was not actionable. The Beaumont Court of Appeals, in *FPL Farming Ltd.* ("FPL") *v. Environmental Processing Systems, L.C.* ("EPS"), concluded that the neighbor does have a trespass claim. The Beaumont Court of Appeals has issued two opinions in the case; the first was appealed to the Supreme Court which reversed and remanded to the Court of Appeals, and the second has also been appealed to the Supreme Court, as described below. FPL Farming

Ltd. v. Environmental Processing Systems, L.C., 305 S.W.3d 739 (Tex.App.-Beaumont), *reversed and remanded* 351 S.W.3d 306 (Tex. 2011), on remand 383 S.W.3d 274 (Tex.App.-Beaumont May 24, 2012, *pet. filed 1/18/13*).

The facts in *FPL* are these: EPS operates an injection well for non-hazardous waste on land adjacent to the land owned by FPL. FPL previously objected to an amendment of EPS's permit that increased the rate and volumes allowed to be injected. The Austin Court of Appeals affirmed the permit amendment over FPL's objections, ruling that "the amended permits do not impair FPL's existing or intended use of the deep subsurface." FPL Farming Ltd. v. Tex. Natural Res. Conservation Comm'n, 2003 WL 247183 (Austin 2003, *pet. denied*). FPL then sued EPS for trespass and negligence, alleging that injected substances had migrated under FPL's tract causing damage. FPL lost a jury trial and appealed. The Beaumont Court affirmed, holding that because EPS held a valid permit for its well, "no trespass occurs when fluids that were injected at deep levels are then alleged to have later migrated at those deep levels into the deep subsurface of nearby tracts." FPL Farming Ltd. v. Environmental Processing Systems, L.C., 305 S.W.3d 739, 744-745 (Tex.App.-Beaumont). The Supreme Court reversed, holding that Texas laws governing injection well permits "do not shield permit holders from civil tort liability that may result from actions governed by the permit." FPL Farming Ltd. v. Environmental Processing Systems, L.C., 351 S.W.3d 306, 314 (Tex. 2011). But the court was careful to say it was not deciding that owners of injection wells could be guilty of trespass if their injected fluids migrated onto other lands. "We do not decide today whether subsurface wastewater migration can constitute a trespass, or whether it did so in this case." *Id.* The court remanded to the court of appeals for it to consider the other issues raised by the appeal.

In its second opinion, the Beaumont court held that FPL did have a cause of action for trespass: "[T]he Texas Supreme Court has, by implication, recognized that the law of trespass applies to invasions occurring on adjacent property but at a level beneath the surface." *Id. Also See* Gregg v. Delhi-Taylor Oil Corp., 162 Tex. 26, 344 S.W.2d 411, 415-16 (1961) (holding that trial court had jurisdiction to hear landowner's suit seeking to enjoin the defendant from creating subsurface fractures that would extend below the property lines of the surface owned by the landowner); Hastings Oil Co. v. Tex. Co., 149 Tex. 416, 234 S.W.2d 389, 396-97 (1950) (upholding injunction against production from well that bottomed on lands owned by the Texas Company)." 383 S.W.3d at 280. Testimony was presented that the waste plume affected the briny water in place under FPL's property, "even though it was not presently using the briny water." *Id.* The court said that the briny water belongs to the surface owner, and that EPS's permits "did not give EPS an ownership interest in the formations below FPL's property that are at issue in this case. *Id.* at 281. The Beaumont court reversed and remanded the case for a new trial, holding that the trial court's jury instruction erroneously put the burden on the landowner to prove that he had not consented to the injection under his property. Additionally, the court noted that the fact that EPS is using the deep subsurface for commercial purposes indicates that the subsurface levels at issue have economic potential for storing waste, which otherwise, absent its safe storage, has the potential to adversely affect the environment. Thus, without a trespass remedy, a party—in this case, FPL—does not have all of the legal remedies typically available to owners to protect the owner's right to the exclusive use of its property. *Id.* at 282.

EPS also claimed that its trespass onto FPL's property did no actual harm. The court said that EPS had failed to show as a matter of law that no injury had occurred, and that FPL was entitled to a jury trial on that issue. *Id.*

In what should be the final word, both parties petitioned the Court for review, and the Court granted review on February 6, 2015.[11] 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.[12] 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."[13] 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."[14] 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 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

---

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

[12] *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).

[13] § 167 cmt. C (1965)

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

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 EPS'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.

So, even with a proper Saltwater Disposal Agreement in place, the operator still may face liability for subsurface trespass for fluids which escape the tract boundaries.

The author wishes to thank the following persons; this paper relied heavily on their prior work.

Andrew Potts, "Surface Use Issues for Horizontal Wells", 2019, for his review of the Accommodation Doctrine.

North Dakota Legislative Council staff for the Natural Resources Committee, August 2016, for their review of Surface Owner Protection Acts.

Michael P. Miller, "Surface Use and Subsurface Migration Trespass", June 2016, for his deep explanation of the FPL cases.

John B. McFarland and Nicholas C. Miller, "Saltwater Disposal Well Leasing", for additional explanation of the FPL cases and subsurface trespass generally.

And finally, **READ THE LEASE**.