

**Subsurface Trespass Claims Against Underground Injection Control
Operations**

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**SUBSURFACE TRESPASS CLAIMS AGAINST
UNDERGROUND INJECTION CONTROL OPERATIONS**

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ABSTRACT

This paper explores legal issues associated with claims of subsurface trespass made against underground injection control operations. Such claims have been made in civil litigation with plaintiffs asking for money damages or in state UIC permitting actions, where the claims are made in an effort to convince the administrative agency to deny the permit application. Generally, the claims are based on surface trespass precedent. Courts generally find in response to trespass claims for subsurface migration of fluids that evidence is required of actual interference with the use and enjoyment of the property. Further, where there is no interference with the use, or reasonable and foreseeable use, of plaintiff's property, there is no claim upon which relief may be granted. Administrative agencies in permitting actions have reached the same conclusion. To date, no plaintiff has been successful in a subsurface trespass claim against injection well operations.

I. INTRODUCTION

Over the last several years, underground injection control ("UIC") operations have been subject to periodic, but in recent times more frequent, challenges from nearby landowners or mineral interest owners. The challenges have been in the form of lawsuits or protests to UIC permitting actions. Among the primary bases for such challenges is the allegation that such UIC operations have perpetrated or will perpetrate, among other things, a subsurface trespass of the nearby owners' interests. This paper will provide an overview of some of these challenges with a particular focus on claims of subsurface trespass.

II. KEY NATIONAL CASES

A. *Chance et al v. B.P. Chemicals, Inc.*, 670 N.E.2d 985 (Ohio 1996).

The first reported court opinion relating to a challenge of UIC operations based on subsurface trespass occurred in *Chance v. B.P. Chemicals*. The plaintiffs in that case filed suit in 1991 alleging that they had been injured by operation of a chemical plant operated by B.P. Chemicals, Inc. in Lima, Ohio. The plaintiffs' claims focused on B.P.'s practice of disposing of hazardous waste from the manufacture of industrial chemicals through the use of "deep well" injection well technology. They alleged that the "injectate" placed under the surface of B.P.'s property had laterally migrated to be below the surface of plaintiffs' properties and that migration violated their rights as property owners. They sought to recover for trespass, nuisance, negligence, strict liability, and fraudulent concealment. They requested recovery of \$1 billion in general and punitive damages along with injunctive relief to stop such injection practices.

B.P. had operated three active deep wells at its Lima facility, with the oldest well having been used continuously since 1968. All three wells operated pursuant to permits and regulatory practices of both the Ohio Environmental Protection Agency and the U.S. Environmental Protection Agency ("EPA"). The wells were also authorized for hazardous waste injection pursuant to a no-migration petition granted by EPA. The Company argued that its wells were safe and the technology behind them effective.

During the trial, the plaintiffs claimed that B.P. had damaged the substrata of plaintiffs' properties and the substrata had been made unusable for other purposes, such as oil and gas extraction, and that their property values had been lowered by the deep well injection. Among the arguments they made in support of their case, was that B.P. was being unjustly enriched by using

plaintiffs' properties to dispose of toxins that would cost more to dispose of in some other way, so that plaintiffs deserved a part of B.P.'s profits in return for the use of their properties.

At the close of plaintiffs' case in chief, the trial court granted B.P.'s motion for directed verdict as to plaintiffs' claims of ultrahazardous activity, fraud, and nuisance. The trial court thus limited the case to plaintiffs' trespass claim, eliminating other claims, including negligence, from the suit.

B.P.'s presentation of its case included testimony of a geological engineer on the permeability and porosity of substrata into which the injecting was done. The geological engineer testified why, in his opinion, B.P.'s site in Lima was suited to deep well injection. Several impermeable layers of rock contained the injectate in the relatively permeable and porous, mostly sandstone injection zone, beginning at a depth of approximately 2,430 feet and in another zone approximately 2,813 feet below ground surface. In the geological engineer's opinion, the injectate was safely contained in the injection zone.

The jury returned a general verdict in favor of B.P. on the trespass claim. Plaintiffs appealed the verdict and the appeals court affirmed, thus upholding the jury verdict in favor of B.P.

The plaintiffs then appealed the case to the Ohio Supreme Court. In considering the case, the Ohio Supreme Court rejected B.P.'s argument of the applicability of the "negative rule of capture," based on the Texas case of *Railroad Commission of Texas v. Manziel*, 361 S.W.2d 560, 568 (Tex. 1962). In *Manziel*, the Supreme Court of Texas explained the negative rule of capture in the following way:

Just as under the rule of capture a landowner may capture such oil and gas as will migrate from adjoining premises to a well bottomed on his land, so also may he inject into a formation substances which may migrate through the structure to the land of

others, even if it thus results in a displacement under such land of more valuable with less valuable substances.

The Court found that the situation before them was not analogous to those present in the oil and gas case, around which a special body of law had risen based on special circumstances not present there. Thus, since B.P.'s injection well operations had nothing to do with the extraction or storage of oil and gas, the Court found that the negative rule of capture was inapplicable to their consideration of that case, and, for the same reason, they rejected plaintiffs' argument that the Ohio Supreme Court's opinion in *Columbia Gas Transmission Corp. v. An Exclusive Natural Gas Storage Easement*, 620 N.E.2d 48 (Ohio 1993), which involved the determination of compensation due for the appropriation of an underground gas storage easement, is relevant to the resolution of the case before it.

Similarly, the Ohio Supreme Court, based on prior precedent, rejected plaintiffs' argument that as the owners of land, they had absolute ownership of all the subsurface property below their land. The Court cited with approval modern cases that noted that the doctrine of common law that ownership of land extends to the periphery of the universe, has no place in the modern world. Such doctrine, known as the *ad coelum* doctrine was rejected by the Court, which ruled that plaintiffs' subsurface rights are not absolute. In an important finding, the Court determined that the plaintiffs' subsurface rights in their properties include the right to exclude invasions of the subsurface property that actually interfere with plaintiffs' reasonable and foreseeable use of the subsurface.

The Court, in its opinion, also discussed the difficulty plaintiffs had in proving that trespass had actually occurred. At trial, there was apparently conflicting testimony on the lateral extent of injectate and the diffusivity of the injectate into the brine, where the concentration of the injectate

decreases as the distance from the injection point increases. Thus, the Court found that the plaintiffs' trespass claim was somewhat speculative.

The Ohio Supreme Court ultimately decided that, given all the factors present in the case, plaintiffs did not, as a matter of law, establish an unlawful entry on their properties by B.P. It noted that the trespass alleged is an indirect one and due to the type of invasion alleged, physical damage or actual interference with the reasonable and foreseeable use of the properties must be demonstrated. The Court pointed out that plaintiffs' trespass claim was a novel one not previously recognized by any court. Thus, the Court upheld the jury verdict for B.P. and noted that the trial court could have granted a directed verdict to B.P. at the close of plaintiffs' presentation of evidence.

B. *Mongrue v. Monsanto Company*, No. 98-2531, 1999 WL 970354 (E.D. La. Oct. 21, 1999).

In *Mongrue v. Monsanto Company*, nearby property owners sued Monsanto as a result of Monsanto's operation of several underground injection wells at its facility in Luling, Louisiana. The plaintiffs alleged three causes of action: (1) they claim that the subsurface migration of wastewater onto their property constituted a trespass or unlawful physical invasion of their property; (2) they contended that the subsurface migration results in an unconstitutional taking of property for which just compensation is owed them; and (3) they asserted that storage of Monsanto's wastewater in plaintiffs' substrata unjustly enriches Monsanto. Monsanto moved for summary judgment arguing that a temporary subsurface migration of a discharge authorized by the state cannot constitute a trespass. Further, Monsanto argued that it did not unconstitutionally take plaintiffs' property, because it lacks legislative authority to expropriate private property. Finally, Monsanto insisted that

the plaintiffs cannot satisfy the elements necessary to raise an equity claim of unjust enrichment. Finally, Monsanto argued that plaintiffs' claims are preempted by the Safe Drinking Water Act and cannot lawfully collaterally attack a valid order of the State environmental agency.

In the summary judgment proceeding, the Court found that summary judgment was inappropriate for the trespass claim, because there was a genuine issue of material fact that existed regarding the harm caused to plaintiffs by the migration of injectate onto their property. The Court noted that plaintiffs attest that they have been deprived of the opportunity to use or lease their underground storage space and demand compensation for any storage of waste products below their surface property. The Court cited with approval the *Chance v. B.P. Chemicals* case and determined that although plaintiffs have the burden of demonstrating that the migration of wastewater interfered with a reasonable and foreseeable use of their property, significant questions of fact remained that would allow plaintiffs to satisfy their burden, therefore making summary judgment inappropriate at that time.

The Court agreed with Monsanto that the company cannot be liable for taking under Louisiana law, because it was not a private entity authorized by Louisiana law to expropriate private property for a public and necessary purpose. The Court noted that Louisiana restricts the private entities that may lawfully expropriate land to those in corporations constructing and operating roads, railways, and canals; utilities providing water, energy, and communications; and, companies performing other select functions related to natural gas, coal, and carbon dioxide. The Court noted that Monsanto does not engage in any of these activities, and further, even if Monsanto were authorized to expropriate plaintiffs' property by its lawful permit to operate the injection wells, Monsanto would not do so for a public and necessary purpose. For the taking of plaintiffs' property

to constitute a public and necessary purpose, there must exist a general public right to a definite use of plaintiffs' property. The Court explained that Monsanto does not act under a general public right to store its waste under others' property. The company's production and storage of waste underground directly benefits the Monsanto Corporation.

With respect to the unjust enrichment claim, the Court found that plaintiffs are not entitled to a claim of unjust enrichment, because the law provides them a viable trespass remedy. With respect to the preemption and collateral attack allegations, the Court found that plaintiffs did not challenge the legal authority of the defendant to dispose its waste through the use of an injection well. Rather, plaintiffs based their claim on the unauthorized migration of Monsanto's waste onto plaintiffs' property. The Court noted that unlike an action for injunctive relief against Monsanto's operation of the injection well, this lawsuit does not confront the wisdom of the Safe Drinking Water Act or the State's authorization for deep well operation.

Thus, in summary judgment, the Court denied Monsanto's motion on the claim of trespass and granted the motion with respect to claims of unconstitutional taking and unjust enrichment. Further, it found that Monsanto's motion for summary judgment on preemption was denied as moot.

As a result of the summary judgment and dismissal of most of plaintiffs' claims, plaintiffs voluntarily dismissed their subsurface trespass claims, because they were unable to develop evidence of interference with the subsurface or property damage to support the claims.

C. *Bourgeois v. Cytec Industries, Inc.*, No. 99-3433, (E.D. La., Jan. 5, 2002).

Plaintiffs brought a class action suit against Cytec alleging damages from the migration of waste injected into its deep well. Following the dismissal of plaintiffs' claims in *Mongrue*, the *Bourgeois* plaintiffs decided to dismiss their claims as well.

III. TEXAS CASES

To date, no Texas cases have resulted in a written opinion by a court. The following will provide a very brief summary of the cases, from information that is available.

A. *Frank Aleman, et al v. Browning-Ferris Industries, Inc., et al.*, No. 95-58427 (165th Dist. Ct., Harris County, Tex. (June 24, 1998)).

In this case, plaintiff sued Browning-Ferris claiming trespass and nuisance as a result of operation of the company's deep wells. Houston District Court Judge Elizabeth Wray granted summary judgment against plaintiffs on these claims.

B. *Benevides, et al v. Chemical Waste Management, Inc., et al.*, No. 95-4968-C (94th Dist. Ct., Nueces County, Tex. (April 26, 2002)).

In a series of partial summary judgment actions, the Court granted summary judgment on all issues of liability in damages against all plaintiffs in this case. Thus, no issues remained for trial. The plaintiffs had alleged that defendants' injection of liquid waste into a geologic formation filled with unusable brine approximately 5,000 below ground surface constituted a subsurface trespass. Injection was conducted pursuant to state authorization and according to state regulation and supervision. Defendants argued that the *ad coelum* doctrine is not recognized under Texas law and that to support a subsurface trespass claim, plaintiffs have to show that such migration interfered

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with the use of plaintiffs' property. Further, defendant argued that pursuant to the "negative rule of capture," according to *Manziel*, subsurface migration of waste from defendants' well across property lines does not constitute trespass under Texas law. Without comment or discussion, the Court granted a series of defendant's partial summary judgment motions. Finally, as noted above, in a final judgment dated April 26, 2000, Judge Hunter issued a take nothing judgment against the plaintiffs.

C. *Cordts, et al v. E.I. Dupont de Nemour, et al.*, No. 99-0085 (E.D. Tex., Mar. 14, 2001).

In this case, the plaintiffs, the McFaddin family, sued Dupont demanding \$173 million for underground storage and environmental damages as a result of Dupont's injection well activities at its Beaumont area facility. The plaintiffs also alleged pollution of their drinking water and damage to their mineral rights.

After an 11-day trial, the jury deliberated two hours and returned a verdict in favor of Dupont finding, in particular, no trespass, and no violation of plaintiffs' storage rights, and no intentional pollution. In interviews with jurors on the jury, they indicated that in general they felt Dupont's experts were simply more convincing. *See Corporate Counsel*, August 2001, at p. 65. They indicated that plaintiffs first paid professional witness "kept talking about the poison that Dupont was dumping on the McFaddins' property. It was 'the poison this, the poison that'." Nevertheless, the expert admitted that brine water that was approximately 5,000 feet underground was also very poisonous itself. Further, jurors were particularly unimpressed by plaintiffs' real estate expert, who although lived two miles from the McFaddin land, admitted he had never set foot on the property. The Dupont real estate expert in contrast, had walked all over the property and testified about a drag

strip on the land years before. One juror noted that he could confirm this fact, because he used to race cars there.

IV. FOCUS: ENVIRONMENTAL PROCESSING SYSTEMS, L.C. CASE

The Environmental Processing Systems, L.C. case ("EPS" or "Applicant") case provides a good overview of a Texas administrative law proceeding involving claims of subsurface trespass. EPS applied to the Texas Natural Resource Conservation Commission ("TNRCC") for amendments to its nonhazardous, commercial waste injection well permits, Permit Nos. WDW-316 and WDW-317, in July 1999, seeking an increase in the average injection rate from 68 gallons per minute (96 gallons per minute maximum) to an average and maximum of 660 gallons per minute and the annual volume injected from approximately 36 million gallons per year to approximately 347 million gallons per year for each well.

FPL Farming, Ltd. ("FPL" or "Protestant") requested a contested case hearing on the applications. Protestant owned two separate tracts of land, one allegedly affected by EPS's existing permitted waste plume and another tract not affected by the existing permitted waste plume. FPL alleged that the increased injection rate and volume would affect the tract of land nearest the EPS facility to a greater degree and would, for the first time, affect the second tract of land farthest from the EPS facility.¹

The Executive Director of the TNRCC declared the EPS applications administratively complete on August 2, 1999, and public notice of the applications was provided shortly thereafter.

¹ Protestant had requested a contested case hearing on the original EPS permit applications for these facilities, but a settlement was negotiated, without a contested case hearing proceeding, and Protestant withdrew its hearing request and the TNRCC issuing the original permits on September 27, 1996.

FPL filed its contested case hearing request on the applications pursuant to the public notice. The preliminary hearing was held on March 29, 2000, before Administrative Law Judge (“ALJ”) Kerry Sullivan, where party status was granted to FPL. The hearing on the merits was held on September 6, 2000, also before Judge Sullivan.

The hearing on the merits was not lengthy, because the parties were in virtual agreement about the facts and the evidence. The contested issues in the proceeding arose from the parties’ different positions on how the applicable rules and other legal requirements were to be interpreted and whether the evidence on the record was sufficient to meet EPS’ burden of proof necessary for issuance of the permit amendments.

Interestingly, there was no genuine dispute that groundwater and surface water would be adequately protected from pollution under the proposed permits. In briefing following the hearing on the merits, FPL contested that EPS had not met its burden of establishing that the proposed amendments were in the public interest as required by Texas Water Code § 27.051(a)(1). Section 27.051(a) of the Texas Water Code provides:

- (a) the commission may grant an application in whole or in part and may issue the permit if it finds:
 - (1) that the use or installation of the injection well is in the public interest;
 - (2) that no existing rights, including, but not limited to mineral rights, will be impaired;
 - (3) that, with proper safeguards, both ground and surface water can be adequately protected from pollution;
 - (4) that the applicant has made a satisfactory showing of financial responsibility if required by § 27.073 of this Code;

Secondly, the protestant contended that under the proposed amendments, injected waste from the wells would migrate to FPL's property, resulting in a trespass and impairment of FPL's property rights in violation of Texas Water Code § 27.051(a)(2). Protestant further argued that such existing rights are not limited to mineral rights, and the right being impaired was the right to exclude, i.e., the right to possess, control and use the subsurface. Finally, FPL alleged that this migration of waste would be a "taking" in violation of the United States Constitution.

With respect to whether the amendments are in the public interest, EPS argued that it sought an injection rate increase in order to serve its market area. It argued that such rationale is sufficient to satisfy a public interest inquiry for a nonhazardous injection well, in the absence of evidence to the contrary. EPS noted that there had been no evidence either refuting or calling into question this justification. Consequently, it argued that the amendments were in the public interest.

With respect to the impairment of rights argument, EPS argued that the Protestant's "right to exclude" clearly related to its perceived right to exclude materials moving into the subsurface below its property. This "right" was apparently based on Protestant's belief that it owned everything above and below its land, from the heavens to the center of the earth. It argued that such belief, sometimes described as the *ad coelum* doctrine, as described above, is not recognized under Texas law.

Applicant also argued that Protestant's "right to exclude" amounted to a claim for potential subsurface trespass. EPS further argued that according to *Chance* and *Mongrue*, recovery for subsurface trespass requires proof of actual interference with a reasonable and foreseeable use of protestants' property. At the hearing on the merits, EPS argued that protestant provided no evidence that the increased injection rates requested would interfere with any reasonable, foreseeable use of

its properties. It noted that interference with claims of future subsurface brine withdrawal operations or waste storage activities was wholly insufficient.

EPS further argued that the negative rule of capture, described above, according to *Manziel*, bars protestants' "right" in relation to its subsurface trespass claim. Furthermore, EPS argued that public policy favors application of the negative rule of capture to deep well injection operations. It noted that both TNRCC and the EPA authorized deep well injection, as a safe and effective method of disposing of liquid waste. And, like secondary recovery projects described in *Manziel*, safe disposal of liquid wastes benefits the society as a whole. Moreover, as in *Manziel*, the Applicant argued, a balance must be struck between the interests of society and the safe disposal of liquid waste and the interests of applicant in operating the wells versus the intangible, attenuated interest Protestant has in the deep subsurface of its properties. Thus, Applicant concluded that the balance leans heavily in favor of society and the operator of the wells, and that granting the permit amendment applications would not constitute an impairment of any right Protestant has in the subsurface below its properties.

Finally, with respect to the takings argument, Applicant argued that (1) FPL has no property right to the deep subsurface that is impaired; (2) there is no public use of FPL's property; and (3) there is no state action that effects an actual "taking" of FPL's property. The focus of EPS' argument here was that granting of the permit would not be a taking for "public use," as discussed in the *Monsanto* case.

After considering arguments by the Applicant, Protestant, Office of Public Interest Counsel and the Executive Director, and after considering the evidence and review of legal authorities, the ALJs concluded that the proposed permit amendments should be approved. The ALJs concluded

that there was sufficient evidence to establish a generalized need for the permit amendments. Further, they noted, the uncontroverted evidence in the record indicated there was a market need by wastewater generators for greater injection rates than those that were offered by the Applicant under the existing permits. In addition, the ALJs noted that the Commission had already determined that the underlying original permits were in the public interest, by virtue of their issuance in the first place. They explained that this issue was not determinative, but persuasive.

With respect to the arguments relating to subsurface trespass, the ALJs concluded that the proposed amendments would not impair FPL's existing rights. They noted that FPL did not own the oil and gas mineral interests in the property at issue, nor had FPL enumerated any intended use of the property that would definitely be impaired. Further, they indicated that FPL had failed to identify some actual harm resulting from the migration of injected wastewater. They noted that § 27.051 contains no reference to "trespass;" rather, the statute appears to focus on "harm," i.e., where there is some damage caused by the proposed injection well facilities. FPL had shown no specific or foreseeable damage to its property and no interference with its actual use of the subsurface.

Furthermore, the ALJs found that the negative rule of capture argument was persuasive. They indicated that if the Commission determines that the proposed permit amendments are in the public interest; then, under the authority of *Manziel*, it may also reasonably conclude that the migration of injected wastewater across deep subsurface property lines is an exception to the usual rules of property law and will not constitute a trespass. The ALJs noted that the Commission can reasonably rely on authorities from other jurisdiction, namely the *Chance* and *Mongrue* cases to supplement *Manziel*, and conclude that a trespass will not occur under the proposed permit amendments, because there is no evidence that FPL will suffer actual harm.

With respect to the takings issue, the ALJs explained that they could not conclude that FPL had an exclusive property right to the deep subsurface below the property. Further, the ALJs were not persuaded that the mere migration of wastewater into the subsurface of the property is an actual "taking." The ALJs noted that they were not persuaded that the permit amendments were, in fact, a public use of the subsurface. They explained that any migration of wastewater will be the result of Applicant's private, commercial waste injection activities. They reasoned that FPL still has the right to pursue private litigation against the Applicant to the extent that FPL can prove that it has been harmed by the Applicant's activities. Similar legal rights, however, do not exist when property is taken for public use, because of the application of the sovereign immunity doctrine or similar immunity defenses recognized by statute.

The Commissioners considered the ALJs' Proposal for Decision ("PFD") at an agenda meeting. The ALJs presented their PFD findings and Applicant and Protestant were allowed to provide comments to the Commissioners. The Commissioners debated the case for some time, but the bulk of the discussion amongst the Commissioners related to whether the permit amendments were in the public interest. Very little of the discussion was on the subsurface trespass or taking issues. The Commissioners ultimately voted by a 2-1 margin to approve the EPS permit amendments applications.

After accomplishing procedural requirements for challenging the Commission's actions in granting the permit amendments, FPL filed suit against the TNRCC in the District Court of Travis County, Texas. FPL's challenge is based on many of the same arguments it made in the administrative proceeding: (1) that the applications for permit amendments were not in the "public interest;" (2) that the permit amendments impaired existing rights; and (3) that granting the permit

amendment applications constituted a taking contrary to the U.S. Constitution. EPS has intervened, and a briefing schedule has been set. A final hearing on the merits is scheduled for June 25, 2002.

In summary, this case provides a good overview of an administrative proceeding involving a contested case hearing involving claims of subsurface trespass under state law. It remains to be seen how the District Court will decide on this case. Many in the industry are following this case, because it could have important implications for future protests of this sort and, ultimately UIC operations themselves.

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