I Drink Your Milkshake: The Status of Hydraulic Fracture Stimulation in the Wake of Coastal v. Garza

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I. INTRODUCTION

The United States consumed 23.44 trillion cubic feet of natural gas in 2008.\(^1\) Despite a credit crisis and prices that surged as high as $13.31 MMBtu,\(^2\) the American appetite for natural gas proved insatiable; domestic consumption in 2008 was the highest on record.\(^3\) While surging prices and an economy in recession were enough to temper American demand for oil,\(^4\) the consumption of which dropped nearly 6% in 2008, natural gas consumption remained high, growing by a half a percentage point over the same period.\(^5\)

What’s more, the vast majority (over 80%) of the natural gas consumed in this country is also produced in this country,\(^6\) and the single largest source of domestic production is the State of Texas (27.8%).\(^7\) Long gone, however, are the days of Spindletop. Sophisticated technology is now used to make previously unrecoverable conventional natural gas reserves obtainable and profitable.\(^8\) Unconventional sources of natural gas, such as shale and tight sand formations, are becoming the key supply drivers, and Texas is brimming with these plays.\(^9\)

The importance of hydraulic fracture stimulation, the technological tool that is indispensable to this new production, cannot be overstated. Considered a necessary method of enhanced recovery by many in the industry, the procedure has never been without its detractors who view the unfettered and unrestrained use of this technique as a potential trespass.\(^10\) The Texas Supreme Court last year ended years of speculation and brought about a collective sigh of

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\(^7\) Id.


relief from the oil and gas industry with its decision in *Coastal Oil & Gas Corp. v. Garza Energy Trust*.\textsuperscript{11} The court analyzed (and artfully sidestepped) the question of whether a hydraulic fracture stimulation that extends across property lines constitutes a subsurface trespass.\textsuperscript{12}

The primary objective of this paper is to explore the importance and implications of hydraulic fracture stimulation, both in the energy industry and in energy law. The paper seeks to identify legal doctrine and cases that provide the existing legal context for this technology; analyze the effects of the Texas Supreme Court’s recent decision; and forecast the developments yet to come. Part Two provides a simple overview of hydraulic fracture stimulation. Part III provides a concise introduction to the *Garza* case, including a summary and a short synopsis of the case’s significance. Part IV, the Historical Overview, illustrates the development and interpretation of the legal doctrines implicated by hydraulic fracture stimulation. Part V analyzes the role of state regulation, specifically that of the Texas Railroad Commission, upon oil and gas exploration and its effects upon fracture stimulation. Part VI examines prior Texas case law considering the legal status of fracture stimulation. Part VII examines the Texas Supreme Court’s use of the concepts of subsurface trespass, rule of capture, and the implied covenant to protect from drainage; it will raise questions as to the logic of the supporting arguments for the court’s decision as well as the foreseeable impact on the conduct of oil and gas operators and royalty and mineral interest owners. Part VIII, Conclusion, provides a brief summation of the writer’s recommendations and suggestions.

II. AN INTRODUCTION TO HYDRAULIC FRACTURE STIMULATION

Hydraulic fracture stimulation or “fracing”\textsuperscript{13} is a method used to increase the production rate of oil and gas wells.\textsuperscript{14} Fracing is accomplished by pumping tens of thousands of gallons of fluid into a wellbore at a pressure rated as high as 2700 hydraulic horsepower– enough energy to power a thousand homes.\textsuperscript{15} Picture a fire hose shoved down an anthill, except that the procedure is typically performed two miles below the earth’s surface.

Copious amounts of fluid are injected into a wellbore at such enormous pressure that the reservoir rock – the formation in which the oil and gas molecules are encased – splits apart (or fractures).\textsuperscript{16} These fractures, 1/10th of an inch in diameter at the well and eventually diminishing to zero, spread out horizontally away from the wellbore as far as the fluid pressure and forces of nature will allow.\textsuperscript{17} If the process is stopped at this point and the liquid removed, the weight of the earth and the subsurface pressure existing two miles deep are so powerful as to slam these fractures shut, often as though they had never been split open in the first place.\textsuperscript{18}

\textsuperscript{11} 268 S.W.3d 1 (Tex. 2008).
\textsuperscript{12} See id.
\textsuperscript{13} In the interest of brevity and consistent with common industry terminology, hydraulic fracture stimulation will herein after sometimes be referred to as “frac,” “fraced,” “fracing,” etc.
\textsuperscript{14} *Garza*, 268 S.W.3d at 6-7.
\textsuperscript{15} Tony Martin & Peter Valko, *Hydraulic Fracture Design for Production Enhancement, in Modern Fracturing* 93, 95 (Michael J. Economides & Tony Martin, eds., Energy Tribune Publishing 2007).
\textsuperscript{16} Id.
\textsuperscript{17} Gregg v. Delhi-Taylor Oil Corp., 344 S.W.2d 411, 415 (Tex. 1961).
\textsuperscript{18} Martin & Valko, supra note 15, at 95; *Garza*, 268 S.W.3d at 6-7.
In order to sustain the fractures, the next step is to inject a propping agent, called “proppant.”\textsuperscript{19} The proppant can be anything from naturally occurring sand grains to specially engineered products like sintered bauxite.\textsuperscript{20} These tiny granules, when pumped into the wellbore, wedge themselves into the fractures created by the fluid.\textsuperscript{21} The fluid is then withdrawn, leaving the fractures and the proppant in place; these propped-open fractures are now pathways of increased conductivity between the reservoir and the wellbore.\textsuperscript{22} If everything goes right, the rate of production will have increased substantially; oil and gas can flow to the wellbore with greater ease and thus at a much greater rate.\textsuperscript{23} Indeed, production can increase by as much as one and one-half to thirty times over the rate of initial production.\textsuperscript{24}

The concept of fracturing a well to increase production has been with us since at least the 19th century.\textsuperscript{25} Explosive fracturing was used as far back as the 1860’s; it involved the use of a “torpedo,” basically a tin can filled with nitroglycerin.\textsuperscript{26} The explosion would crack the formation, thereby creating flow channels to the wellbore.\textsuperscript{27} The method was crude but very successful, even inspiring the experimental use of nuclear devices to fracture wells in the late 1950’s and early 1960’s.\textsuperscript{28} Explosive fracturing declined in use in the 1930’s and 1940’s after the introduction and acceptance of a technique called acidizing, whereby acid is pumped down the well in order to dissolve the reservoir rock.\textsuperscript{29} The very first hydraulic frac job was performed by Amoco Production Company in 1947 on the Klepper Gas Unit No. 1 well, in the Hugoton Gas Field in western Kansas.\textsuperscript{30}

Today, tens of thousands of fracturing operations are conducted every year, at costs ranging from $20,000 to $1 million.\textsuperscript{31} While both oil and gas wells can be fraced, most frac jobs are performed on gas wells.\textsuperscript{32} Indeed, as recently as 2006, gas well stimulation accounted for 70% of fracture treatments.\textsuperscript{33} The increased productivity generated by fracturing is most pronounced in gas wells, especially tight sand or shale formations like the Barnett Shale.\textsuperscript{34} Many if not most of these formations would be uneconomic without fracturing.\textsuperscript{35} In point of fact, “the majority of gas reserves in North America are only produced as a result of hydraulic fracturing.”\textsuperscript{36}

\textsuperscript{19} Martin & Valko, supra note 15, at 95.
\textsuperscript{21} Martin & Valko, supra note 15, at 95.
\textsuperscript{22} Id.
\textsuperscript{23} Id.
\textsuperscript{24} Burney, supra note 20, at §19.02(3)(c)(vi).
\textsuperscript{25} Martin & Valko, supra note 15, at 93.
\textsuperscript{26} Burney, supra note 20, at §19.02(3)(a).
\textsuperscript{27} Martin & Valko, supra note 15, at 93.
\textsuperscript{28} Burney, supra note 20, at §19.02(3)(a); and see Martin & Valko, supra note 15, at 93.
\textsuperscript{29} Id.
\textsuperscript{30} Martin & Valko, supra note 15, at 93; Burney, supra note 20, at §19.02(3)(c).
\textsuperscript{31} Id.
\textsuperscript{32} Michael J. Economides & Tony Martin, \textit{Introduction to this Book, in Modern Fracturing}, 3, 14 fig.1-13 (Michael J. Economides & Tony Martin, eds., Energy Tribune Publishing 2007).
\textsuperscript{33} Id.
\textsuperscript{34} Burney, supra note 20, at §19.02(3)(c)(vi); and see Coastal Oil & Gas Corp. v. Garza Energy Trust, 268 S.W.3d 1 (Tex. 2008).
\textsuperscript{35} Garza, 268 S.W.3d at 31.
\textsuperscript{36} Economides & Martin, supra note 32, at 14.
III. COASTAL V. GARZA: A BRIEF INTRODUCTION

A. Summary of Facts

The Coastal v. Garza case revolves around a 748 acre parcel of land called Share 13, located in Hidalgo County, Texas, and the various parties to the oil and gas leases covering the land. The lessors of Share 13, some forty-four individuals in all, are members of the extended Garza and Salinas families, two branches of the same family tree that have occupied Share 13 for over a century (sometimes referred to below as “respondents”). The lessee of Share 13 “at all times material” was Coastal Oil and Gas Corporation.

The catalyst for the litigation at hand – as for so much oil and gas litigation – was the drilling of a very productive well. The well, called the M. Salinas No. 3 (sometimes “Salinas #3”), was drilled by Coastal on Share 13 in 1993 and was by all accounts an exceptional producer. The well was drilled 1,700 feet north of the property line separating Share 13 and an adjacent tract, Share 12.

As it happened, Coastal was also the lessee for Share 12 at this time. The record does not state the motive, but within a year of the completion of the Salinas #3 well, Coastal purchased the mineral estate of Share 12 outright. The following year, Coastal drilled the “Coastal Fee No. 1” well on Share 12, at a distance of 467 feet away from the Share 13 boundary line – the minimum distance allowed under the Texas Railroad Commission rules. Coastal’s profit margin for a well drilled on Share 12 was much higher, of course, than the wells drilled on Share 13 which were burdened by the respondents’ royalty interest.

So eager was Coastal to place a Share 12 well as close as possible to the Salinas #3 that it shut in a producing well in order to make room for the Coastal Fee No. 1. In November of 1996, in the course of bringing production online, Coastal fraced the Coastal Fee No. 1, as it did all the wells on Share 12 and Share 13. The respondents believed that this frac was so close to the property line and so massive in scale as to effect subsurface fractures extending across the property line, thereby draining gas from Share 13 and the Salinas #3. Respondents sued

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37 Garza, 268 S.W.3d at 5.
38 Id. & n.4.
39 Id. at 5.
40 Id. at 6.
41 Id.
42 Id.
43 Id.
44 Id. at 5.
45 Id. at 5, 6.
46 Id. at 6; 16 Tex. Admin. Code § 3.37.
47 Garza, 268 S.W.3d at 6.
48 Id.
49 Brief of Respondent at Tab 5, Coastal Oil & Gas Corp. v. Garza Energy Trust, No. 05-0466 (Tex. 2008);
50 Garza, 268 S.W.3d at 7.
Coastal for, among other things, trespass and a breach of the implied covenant to protect from drainage, seeking to recover the value of their drained gas as damages.\(^{51}\)

The jury found, among other things, that “Coastal’s fracing of the Coastal Fee No. 1 well trespassed on Share 13, causing substantial drainage, which a reasonably prudent operator would have prevented…”\(^{52}\) The Court of Appeals for the Thirteenth District of Texas affirmed and allowed recovery of damages, based on the value of drained gas.\(^{53}\) Relying heavily on the 1961 Texas Supreme Court case Gregg v. Delhi-Taylor Oil Corp.,\(^ {54}\) the Garza appellate court noted “fracing can create a subsurface trespass…”,\(^ {55}\) and it concurrently overruled Coastal’s contention that, “Texas does not recognize a cause of action for subsurface trespass based on the hydraulic fracture stimulation treatment of a well.”\(^ {56}\)

The Texas Supreme Court reversed the lower court and remanded the case to the trial court for further proceedings.\(^ {57}\) The Court refused to declare, one way or the other, whether a hydraulic frac could be a subsurface trespass.\(^ {58}\) Justice Hecht, writing for the majority, stated that “We need not decide the broader issue here. In this case, actionable trespass requires injury, and Salinas’s only claim of injury – that Coastal’s fracing operation made it possible for gas to flow from beneath Share 13 to Share 12 wells – is precluded by the rule of capture.”\(^{59}\)

B. Garza’s Significance

Texas oil and gas operators are sleeping a bit more soundly following the release of the Garza opinion. Some had said that a contrary ruling could “potentially kill the state’s natural gas industry.”\(^ {60}\) The relatively compact and impermeable nature of the tight gas formations in Texas, like the Vicksburg T formation in the Garza case or the famous Barnett Shale, means that producing from these formations arguably isn’t profitable without fracing.\(^ {61}\) A win for the respondents in this case could have been devastating for the industry.

“If you don’t frac, you don’t get anything,” said John Holden, a partner at Dallas-based Jackson Walker LLP. ‘If you do frac, you’ve forfeited your right to capture.’”\(^ {62}\) Indeed the Texas Supreme Court received amicus curiae briefs “from every corner of the industry,” in

\(^{51}\) Garza, 268 S.W.3d at 6, 7.
\(^{52}\) Id. at 8.
\(^{54}\) 344 S.W.2d 411.
\(^{55}\) Mission Resources, Inc. v. Garza Energy Trust, 166 S.W.3d 301, 310-311 (Tex. App. 2005) (citing Gregg v. Delhi-Taylor Oil Corp., 344 S.W.2d 411 (Tex. 1961)). It should be noted that Mission Resources and Coastal Oil & Gas were both defendants in the initial suit; Mission Resource’s appeal was dismissed by the appellate court for want of prosecution, causing the change in petitioner names between the appellate and supreme court cases (see Mission, 166 S.W.3d at 309 n.1)
\(^{56}\) Id. at 310.
\(^{57}\) Garza, 268 S.W.3d at 5.
\(^{58}\) Id. at 12.
\(^{59}\) Id. at 12-13.
\(^{60}\) Tronche, supra note 10.
\(^ {61}\) Id; Garza, 268 S.W.3d at 16.
\(^ {62}\) Tronche, supra note 10.
support of Coastal’s position. The American Royalty Council, the Texas Railroad Commission, the Texas Oil & Gas Association, Chesapeake Energy Corp., and EOG Resources are just a few of the industry players that inundated the court with briefs, “almost always warning of adverse consequences in the direst of language.”

Not everyone is celebrating, however. Because the Texas Supreme Court refused to rule, one way or the other, whether a frac could constitute a trespass, questions still remain, and many insist that it will be a persistent source of debate and litigation in the future. Further, what the court gave with the rule of capture, it may have taken away with the implied covenant to prevent from drainage. “It’s not really a great decision for the industry,” says Greg Curry, a litigator in Thompson & Knight LLP’s Dallas office. ‘Now your lessor can sue you for not preventing drainage.”

IV. HISTORICAL OVERVIEW: THE LEGAL FRAMEWORK BEHIND FRACTURE STIMULATION

In Texas, it has long been established that the owner of an oil lease (or of a mineral estate or fee simple for that matter) owns the oil and gas in place beneath the surface of the earth. This "ownership in place" doctrine vests the owner of the land with ownership of all minerals underlying his parcel of land. This sets Texas apart, at least semantically, from some other states which adhere to the "exclusive right to produce" theory, by which an owner does not own the minerals in place but has instead the sole right to conduct extraction operations.

A. Pierson v. Post and the Modern Day Rule of Capture

The ownership in place doctrine does not apply to oil or gas that migrates across the lease or property line. "Each leaseholder, that is to say, is at the mercy of all those who adjoin him, since oil is a fugacious mineral, the movements of which are not confined by the artificial boundaries of surface tracts." A leaseholder's rights under the ownership in place doctrine are therefore subject to the rule of capture, whereby the leaseholder's oil and gas "in place" may be drained away by his neighbor.

The rule of capture as applied to oil and gas finds its roots in analogies fashioned from other fields of law dealing in property of a likewise migratory nature. The time-honored case of

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63 Garza, 268 S.W.3d at 16-17.  
64 Id.  
65 Tarics, supra note 9.  
66 See Garza, 268 S.W.3d at 17-19.  
67 Tarics, supra note 9.  
68 Elliff v. Texon Drilling Co., 210 S.W.2d 558 (Tex. 1948); Peterson v. Grayce Oil Co., 98 S.W.2d 781 (Tex. 1936).  
70 Id. at 94.  
72 Id.  
73 Id.
Pierson v. Post, an early nineteenth-century decision by the Supreme Court of New York involving a dispute over two hunters’ claims to the same fox, provides a classic encapsulation of the common law rule of capture. “Post, being in possession of certain dogs and hounds under his command… and whilst there hunting, chasing and pursuing the [fox] with his dogs and hounds, and when in view thereof, Pierson, well knowing the fox was so hunted and pursued, did, in the sight of Post, to prevent his catching the same, kill and carry it off.” While the Pierson court never uses the term “rule of capture,” it goes to great length to point out that property ferae naturae (or of a wild nature) is “acquired by occupancy only”.

The analogy only goes so far. The technical knowledge of the oil patch, even the technical knowledge of the courts, has come a long way since Pierson. Any notion that oil and gas move on its own like a fox evading a hound has been dispelled: “courts generally have come to recognize that oil and gas, as commonly found in underground reservoirs, are securely entrapped in a static condition in the original pool, and, ordinarily, so remain until disturbed by penetrations from the surface.”

That having been said, “these minerals will migrate across property lines towards any low pressure area created by production from the common pool.” Oil and gas reservoirs can and often do straddle two or more tracts of land. Once disturbed by drilling operations, the oil, gas and associated hydrocarbons will move according to a myriad of Mother Nature’s factors (for example, permeability and porosity) from an area of high pressure towards an area of relatively low pressure such as a freshly drilled well – in other words, “drainage”. Thus for all our scientific advancement, the rule of capture still provides that one acquires title, as personal property, to any oil and gas produced by a well drilled on one’s land, notwithstanding the possibility that such oil and gas may have flowed from beneath a neighboring parcel of land.

B. Trespass and Negligence

A corollary to the rule of capture is the doctrine of Correlative Rights, a phrase first coined by the United States Supreme Court in Ohio Oil Co. v. Indiana. This doctrine dictates that “a lessee’s or leaseholder’s right to capture oil and gas from the property is restricted by the duty to exercise that right without waste or negligence.” Just as the ownership in place doctrine is subject to the rule of capture, so too is the rule of capture limited by claims of negligence and trespass.
Perhaps the most apparent limitation on the rule of capture is that of trespass. By way of
illustration, had Pierson pursued the fox onto Post’s property and there killed it, the rule of
capture would not have applied. Likewise, in the hunt for oil and gas one may not violate the
subsurface boundaries dividing disparate mineral estates in the name of the rule of capture. Case
law and industry lore are replete with references to slant drilling using “whipstocks,” “knuckle
joints,” and various other devices whereby a wellbore may be bottomed under the surface of
another. The rule of capture does not apply here. The oil and gas drained from underneath the
adjoining tract did not migrate across boundary lines in this scenario; rather, it was produced
directly from the neighboring tract. As such, the rule of capture is not an open invitation to
outright theft.

The rule of capture, likewise, is no excuse for drilling operations which, by their nature or
in the manner of their execution, are so negligent or haphazard as to waste oil and gas that would
otherwise be put to productive use. Elliff v. Texon Drilling Co. involved a royalty owner
(Elliff) and his dispute with an oil company (Texon) that had drilled a well on an adjoining
tract. While Texon was engaged in drilling, “the well blew out, caught fire and cratered.
Attempts to control it were unsuccessful, and huge quantities of gas, distillate and some oil were
blown into the air, dissipating large quantities from the reservoir into which the... well was
drilled.”

The jury estimated the value of the wasted natural gas and distillates at $78,580.46 and
$69,967.73, respectively. Texon argued that these damages were precluded based on the rule
of capture, and the Civil Court of Appeals agreed. In reversing the trial court, the appeals court
noted, “the evidence showed that all of the gas and distillate drained from under [Elliff’s] land
had migrated... and was lost through the blowout well located upon property not owned by them,
[Elliff] could not recover therefore under... the law of capture.”

The Texas Supreme Court reversed, holding that “the negligent waste and destruction of
(Elliff’s) gas and distillate was neither a legitimate drainage of the minerals from beneath their
lands nor a lawful or reasonable appropriation of them. Consequently, [Elliff] did not lose their
right title and interest in them under the law of capture.” Texon, the court held, had failed to
exercise due care in conducting its drilling operations.

85 See, e.g., Peterson v. Grayce Oil Co., 37 S.W.2d 367, 373 (Tex. Civ. App. 1931), abrogated on other grounds by
Coastal Oil & Gas Corp. v. Garza Energy Trust, 268 S.W.3d 1, 13 (Tex. 2008).
86 See generally, Humble Oil & Refining Co. v. L & G Oil Co., 259 S.W.2d 933 (Tex. App. 1953); Lee v. Robinson,
2004); Hastings Oil Co. v. Texas Co., 234 S.W.2d 389 (Tex. 1950).
87 210 S.W.2d 588 (Tex. 1948).
88 Id.
89 Id. at 559.
90 Id. at 560.
92 Id. at 555.
93 Elliff v. Texon Drilling Co., 210 S.W.2d 558, 563 (Tex. 1948).
94 Id. at 563.
V. THE POLICE POWER: THE TEXAS RAILROAD COMMISSION

There is arguably no greater restriction on the unfettered rule of capture than the exercise of the state’s police power through its administrative agency, which in Texas is the Railroad Commission.\textsuperscript{95} One may drill and produce oil and gas from beneath his land, “so long as he operates within the spirit and purpose of conservation statutes and orders of the Railroad Commission.”\textsuperscript{96} The legislature granted the Texas Railroad Commission jurisdiction over all oil and gas production in 1919,\textsuperscript{97} and since that time Texas courts have afforded the commission a considerable degree of deference ever since.\textsuperscript{98}

Due to a high burden of proof imposed by both the courts and by the legislature as well, overturning a Commission ruling can be difficult.\textsuperscript{99} Any order or ruling by the Railroad Commission is presumed to be valid.\textsuperscript{100} As such, a court will uphold the decision making power of the commission so long as it is not exercised in an unreasonable or arbitrary manner.\textsuperscript{101}

The Commission, in the name of conservation, the prevention of waste, and in the protection of correlative rights, may dictate how much oil and gas a well may produce, how close to a property line an operator may drill a well, and how many wells may be drilled in a unit.\textsuperscript{102} Indeed, the Railroad Commission has considerable discretion in deciding whether a well may be drilled at all.\textsuperscript{103} Many have argued that the exercise of such broad discretion can constitute a property taking, but they have often failed.\textsuperscript{104} “When the orders [of the Commission] are supported by evidence establishing that they are necessary in order to prevent waste or to protect correlative rights, the fact that the application of the order has resulted in economic loss to some does not warrant a finding that there has been a deprivation of property without due process of law.”\textsuperscript{105}

The broad powers wielded by the Railroad Commission can, however, cut both ways; as just explained, they limit the full enjoyment of the rule of capture, but they can also, in many ways, impair an owner’s ability to preserve the value of the minerals in place.\textsuperscript{106} For virtually every tool or rule at the Commission’s disposal, there is an exception that the Commission may

\textsuperscript{95} \textit{See} Tex. Nat. Res. Code §§ 85.201-85.207.
\textsuperscript{96} Elliff, 210 S.W.2d at 562.
\textsuperscript{98} \textit{See} R.R. Comm’n of Tex. v. Pend Oreille Oil & Gas Co., 817 S.W.2d 36, 42 (Tex. 1991); R.R. Comm’n of Tex. v. Goodrich Oil Co., 912 S.W.2d 790, 792 (Tex. 1995).
\textsuperscript{99} R.R. Comm’n of Tex. v. Goodrich Oil Co., 912 S.W.2d 790 (Tex. 1995); \textit{but see}, R.R. Comm’n of Texas v. Gulf Production Co., 132 S.W.2d 254 (Tex. 1939) (held that the granting of a permit to prevent confiscation constituted an abuse of power by the Commission).
\textsuperscript{100} Corzelius v. Harrell, 186 S.W.2d 961, 967 (Tex. 1945).
\textsuperscript{101} R.R. Comm’n of Tex. v. Manziel, 361 S.W.2d 560, 572 (Tex. 1962).
\textsuperscript{103} 16 Tex. Admin. Code §3.5(c).
\textsuperscript{104} \textit{See}, \textit{e.g.} R.R. Comm’n of Tex. v. Rowan & Nichols Oil Co., 310 U.S. 1021 (1940); R.R. Comm’n of Tex. v. Manziel, 361 S.W.2d 560 (Tex. 1962).
\textsuperscript{105} \textit{Manziel}, 361 S.W.2d at 565.
\textsuperscript{106} \textit{See id.}
grant. For example, a Rule 37 exception may be granted permitting an operator to locate a well closer to a lease line or another well than the rules would otherwise permit; a Rule 38 exception may be granted permitting an operator to drill more wells in a given unit than the rules would otherwise allow.

Additionally, the Commission may authorize the use of “unnatural” or “artificial” devices or mechanisms such as vacuum pumps to further stimulate a well’s production. Provided the Commission has some reasonable rationale sounding in conservation or correlative rights, it is well within its discretion to grant one leaseholder a Rule 37 exception or a vacuum pump authorization while, at the same time, denying these privileges to his neighbor. One of the consequences of such a decision, of course, would be to allow one leaseholder greater production and hence, substantially greater drainage at the expense of the neighboring leaseholder.

A. When a Trespass is Not a Trespass

While the power and discretion of the Railroad Commission is not limitless, the rulings and general positions of the commission carry considerable weight with the courts. So much so that a decision by the commission has, in the past, allowed the courts to evade some of the more rigid technicalities of oil and gas law. In Corzelius v. Railroad Commission, the Commission authorized a leaseholder to slant-drill a well beneath the surface of an adjoining leasehold in order to drain off gas and consequently kill a well that had caught fire. The conflagration was not only a danger to the surrounding area, but it was also wastefully burning copious amounts of gas. The owner of the gas well inferno sued to enjoin the slant drilling, arguing that it was clearly a trespass. The court upheld the decision noting, “the only practical and reasonable way to prevent such waste was to kill the Corzelius well by the drilling of a directional well for that purpose, as the Railroad Commission found, and to do so required the entry below the surface upon Corzelius’s property, the Commission had, under the conservation

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107 See, e.g., 16 Tex. Admin. Code § 3.10(b) (2008) (Exception to the general restriction of production from different strata); § 3.23 (Exception, in certain circumstances, to the prohibition against the use of vacuum pumps); § 3.37 (Exception available to minimum lease-line and well spacing rule); § 3.38 (exception available for well densities). In Garza, Coastal initially sought a rule 37 exception for its Coastal Fee No. 1 well as it was too close to an existing well. The request was denied, forcing Coastal to shut in the existing well in order to drill the Coastal Fee No. 1 at a legal location.
109 Id. at § 3.38.
111 See Seagull Energy v. R.R. Comm’n, 226 S.W.3d 383 (Tex. 2007); Manziel, 361 S.W.2d 560; Marrs v. R.R. Comm’n of Tex., 177 S.W.2d 941 (Tex. 1944).
112 See Manziel, 361 S.W.2d 560.
113 See, e.g. Seagull Energy v. R.R. Comm’n, 226 S.W.3d 383 (Tex. 2007); Manziel, 361 S.W.2d 560; Marrs v. R.R. Comm’n of Tex., 177 S.W.2d 941 (Tex. 1944).
114 See Corzelius v. R.R. Comm’n, 182 S.W.2d 412 (Tex. App. 1944); Manziel, 361 S.W.2d 560.
115 182 S.W.2d 412 (Tex. App. 1944).
116 Id at 414.
117 Id.
laws, the power to authorize such entry. And being authorized by law such entry did not constitute a trespass.”

In addition to its many other responsibilities, the Railroad Commission is also charged with authorizing secondary recovery operations. These methods necessitate the injection of an external substance (usually water or gas) in order to maintain or increase reservoir pressure and push oil towards the wellbore. An operator will often convert an existing oil or gas well into an injection site in order to “waterflood” the reservoir and thereby sweep much of the remaining oil toward the other producing wells.

The down-side to such operations is that due to the often disparate make-up of subsurface geological formations, the same water that one leaseholder injects to increase his oil production can often “water-out” his neighbor’s wells producing from the same reservoir. In this manner, when the Commission authorizes such a secondary recovery, the consequence is often that the party performing the operation reaps most or all of the benefits while the other must reconcile himself to the sad and eventual reality that his wells will decrease in or cease production, all in the name of greater overall production.

This was the case in Railroad Commission of Texas v. Manziel, wherein an operator not only received permission to conduct a secondary recovery operation, but also to stake the injection well at a location closer to his neighbor’s lease line than the Commission rules would otherwise have permitted. The neighbor, Manziel, sought to enjoin the activity, arguing among other things that since the injected water would flow beneath his land, resulting in loss and injury to his oil and gas interests, the operation constituted a trespass.

The court disagreed with Manziel, upholding the Commission’s decision. The court did not state that water injection was an exception to the law of trespass, but instead, based almost entirely on the weight of the Commission’s decision in this matter, ruled that, “the technical rules of trespass have no place in the consideration of the validity of the orders of the Commission.”

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118 Id. at 417; but see Humble Oil & Refining Co. v. L & G Oil Co., 259 S.W.2d 933, 939 (Tex. App. 1953) (Hughes, J., concurring) (noting that, “…the Commission could not grant authority for one person to trespass on the property of another.”).
120 Manziel, 361 S.W.2d at 564.
122 Manziel, 361 S.W.2d 560; and see Amoco Prod. Co. v. Alexander, 622 S.W.2d 563 (Tex. 1981).
123 See Manziel, 361 S.W.2d 560.
124 361 S.W.2d 560 (Tex. 1962).
125 Id. at 561, 564.
126 Id. at 565.
127 Id. at 574.
128 Id. at 568-569.
129 Id.
B. The Railroad Commission and Hydraulic Fracture Stimulation

Despite the fact that frac jobs are often performed during the primary recovery stage of a well, they are often referred to as secondary recovery operations.\textsuperscript{130} Regardless, fracing is a form of enhanced recovery.\textsuperscript{131} It is therefore surprising that the Railroad Commission has chosen not to draft any rules concerning the procedure, especially when one considers the immense number of frac jobs performed in Texas and the fact that the Commission, at least in some manner, administers virtually every other aspect of the exploration and production of oil and gas in the state.\textsuperscript{132}

This anomaly is due, in large part, to a pair of companion cases decided in 1961, \textit{Gregg v. Delhi-Taylor Oil Corp.},\textsuperscript{133} and \textit{Delhi-Taylor Oil Corp. v. Holmes}.\textsuperscript{134} In \textit{Gregg}, an operator on a .42 acre strip of land sought to frac a well a mere 37.5 feet from the lease line separating him from the adjoining tract, the leasehold of which was held by Delhi-Taylor.\textsuperscript{135} Delhi-Taylor sued to enjoin the frac job, arguing that it was a subsurface trespass.\textsuperscript{136} Gregg countered that the courts had no authority to hear the case since the Railroad Commission had “primary jurisdiction” in this matter.\textsuperscript{137}

The legislature, Gregg contended, had “delegated to the Commission general powers to regulate the oil and gas industry… that more particularly, the Commission has the power and duty to supervise the drilling and completion of wells (with the further contention that sand fracturing is part of the completion process)”\textsuperscript{138} In other words, Gregg argued that this was a matter for the Commission, to the exclusion of the courts, to determine whether a frac job was permissible or was a subsurface trespass.\textsuperscript{139}

While it was not disputed that the Commission has been vested with primary jurisdiction over oil and gas drilling and production, the \textit{Gregg} court stated that in these matters, “the courts do have jurisdiction. The questions presented are primarily judicial in nature.”\textsuperscript{140} Indeed, the Commission itself had declined an invitation by Dehli-Taylor to rule on the matter specifically because the issue sounded in trespass.\textsuperscript{141} The court, in asserting its jurisdiction, also relied heavily on the fact that the Commission had not drafted or promulgated any rules concerning fracing.\textsuperscript{142}

\begin{footnotesize}
\begin{enumerate}
\item See, e.g., Gregg v. Delhi-Taylor Oil Corp., 344 S.W.2d 411 (Tex. 1961).
\item See \textit{Garza}, 268 S.W.3d at 7.
\item \textit{Garza}, 268 S.W.3d 1 at 17; and see Martin & Valko, supra note 15, at 93.
\item 344 S.W.2d 411 (Tex. 1961).
\item 344 S.W.2d 420 (Tex. 1961).
\item \textit{Gregg}, 344 S.W.2d at 412.
\item \textit{Id.}
\item \textit{Id.}
\item \textit{Id. at} 413.
\item \textit{Id. at} 412.
\item \textit{Id. at} 415.
\item \textit{Id. at} 415 n.7.
\item \textit{Id. at} 414-415
\end{enumerate}
\end{footnotesize}
While the cases reached the Texas Supreme Court solely on the jurisdictional issue, the court produced an inordinate volume of dicta concerning the question of whether a frac could be a subsurface trespass. It was, in fact, the tone and length of this dictum that, in many ways, led the appellate court in the Garza case to rule that a frac which crossed a lease line was a subsurface trespass. The Gregg court states, “We think the allegations are sufficient to raise an issue as to whether there is a trespass…. Gregg’s well would be, for practical purposes, extended to and partially completed in Delhi-Taylor’s land.” It is a small wonder then, that the appellate court, in Garza, concluded that, “the supreme court’s statement cannot be discounted entirely as dictum, if it is dictum at all.”

VI. THE DOG THAT REFUSES TO BARK: IS FRACTURE STIMULATION A TRESPASS?

With the exception of Garza and its procedural predecessors, the only other case to address whether fracture stimulation is a trespass is Geo Viking v. Tex-Lee Operating Co. At first glance, the Geo Viking case was an unlikely candidate for the subsurface trespass issue as the litigation was based entirely on a deceptive trade practices action. Tex-Lee Operating had drilled a well, 8,000 feet deep, in Lee County, Texas. The targeted formation, the Austin Chalk, is “an extremely tight formation,” necessitating the use of fracture stimulation. Geo Viking was hired to perform the frac job; due to equipment failure, the frac job was unsuccessful, and the well was eventually plugged and abandoned.

Tex-Lee sued to recover as damages the value of the oil and gas that it otherwise would have obtained. Tex-Lee prevailed, and Geo Viking appealed arguing, among other things, that the trial court should have included its requested instruction to the jury advising them not to include the value of any oil and gas that would have been obtained from beyond the property line. The frac job, Geo Viking claimed, “if completed as designed, would have extended beyond the unit.” Geo Viking argued that such oil and gas could not have been legally captured or claimed by Tex-Lee, that the fracture would have passed under the surface of the adjoining tract and thus Tex-Lee had no right to such oil and gas because of trespass.

In the initial opinion, Justice Grant, writing for the court, dismissed the argument with a mere paragraph, noting that Geo Viking’s argument “is in direct opposition to the rule of

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143 Id. at 415.
145 Gregg, 344 S.W.2d at 416.
146 Mission Resources, 166 S.W.3d at 310.
147 817 S.W.2d 357 (Tex. App. 1991).
148 Id. at 359.
149 Id.
150 Id.
151 Id. at 359-360.
152 Id. at 360, 364.
153 Id. at 363-364.
154 Id. 364.
155 Id.
The court did not consider and did not address the trespass issue, and upon a motion for rehearing, Justice Grant, the author of the original opinion, reversed his view. Relying heavily on the Texas Supreme Court’s decision in *Gregg*, Grant states, “Tex-Lee could not claim as damages loss of oil and gas to which it was not entitled”. However, as Judge Grant amusingly notes, because his first opinion, “was so persuasive and well-reasoned, the other two judges of this [appellate] court continue to embrace the holdings in the initial opinion.”

Like the Corpus Christi Court of Appeals in *Garza*, Judge Grant relied extensively on the Texas Supreme Court’s comments in *Gregg v. Delhi-Taylor Oil Corp.* Likening the frac job to a slant-well bottomed under another’s tract, Grant argued that Tex-Lee could not claim as damages the value of the oil and gas that would have been extracted from beyond the property line.

The Texas Supreme Court initially granted a writ of error in this case. Further, the court, at least at first, reversed the court of appeals, stating, “Fracing under the surface of another’s land constitutes a subsurface trespass.” The per curiam opinion notes that the appellate court’s dependence on the rule of capture was ill founded. The rule of capture “would not permit Tex-Lee to recover a loss of oil and gas that might have been produced as the result of fracing beyond the boundaries of its tract.”

The author of this per curiam opinion, however, like Justice Grant, had a change of view. Six months after the original opinion was rendered, it was withdrawn. Not only that, the order granting the writ of error was withdrawn. Further, the supreme court stressed, “we should not be understood as approving or disapproving the opinions of the court of appeals analyzing the rule of capture or trespass as they apply to hydraulic fracturing.” It was as if the court were saying “forget we every brought it up.”

While it is possible to draw parallels between *Garza* and cases like *Elliff* and *Manziel*, the fact remains that the *Garza* and *Geo Viking* cases in many ways stand alone. With the exception of malicious slant drilling or title disputes litigation alleging naked subsurface trespass

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156 *Id.*
157 *Id.* at 364-365.
158 *Id.* at 365.
159 *Id.* at 364-365.
160 *Id.* at 364-365.
161 *Id.* at 365-366.
164 *Id.*
165 *Id.*
166 *See Geo Viking, Inc. v. Tex-Lee Operating, Co.*, 839 S.W.2d 797, 798 (Tex. 1992).
167 *Id.*
169 *Id.* at 798.
170 *See Coastal Oil & Gas Corp. v. Garza Energy Trust, 268 S.W.3d 1 (Tex. 2008); Elliff v. Texon Drilling, 210 S.W.2d 558 (Tex. 1948); R.R. Comm’n v. Manziel, 361 S.W.2d 560 (Tex. 1962); *Geo Viking, Inc. v. Tex-Lee Operating, Co.*, 817 S.W.2d 357 (Tex. App. 1991).
is extremely rare. Oil and gas litigation sounding in trespass almost always involves negligence, waste, or a Railroad Commission rule or decision.\textsuperscript{171} The practical consequence of this pattern is that most of the courts’ analysis in these cases is consumed by an examination of the standard of care issue or is focused upon a particular Commission rule which has been violated.\textsuperscript{172} Neither the standard of care nor a Commission rule is present or alleged in Geo Viking or Garza.\textsuperscript{173}

As has been pointed out, the Railroad Commission has not drafted any rules concerning hydraulic fracturing.\textsuperscript{174} Further, the frac performed by Coastal was not alleged to have been conducted in a negligent or deficient manner.\textsuperscript{175} The losses sustained by the respondents were not an indirect or inadvertent consequence of the frac job.\textsuperscript{176} On the contrary, everything that happened subsequent to the frac job was a direct and intended result of it.\textsuperscript{177} The dearth of precedent is one of the reasons that the answer to the trespass question remains so elusive.

In every instance where a court might look for subsurface trespass precedent, it encounters discussions of negligence or Railroad Commission rules, discussions which have little relevance to such a pure subsurface trespass case.\textsuperscript{178} Invoking archaic rule of capture doctrine is similarly frustrating. Pierson has not strayed onto Post’s property in these circumstances, but the deposit of fluid, proppant, and fractures beneath the surface of another’s tract could arguably be likened to Pierson’s hounds released onto Post’s property to compel the fox onto Pierson’s land.

While such analysis might satisfy a simplistic trespass examination, its application to modern day oil and gas exploration, in general, and fracture stimulation, specifically, is questionable. If for no other reason, the analysis fails because it does not take into account public policy considerations: the social and economic utility inherent in fracture stimulation. In other words, one can go to great lengths to establish that frac job can be a trespass, but given the economic consequences of such a determination, perhaps the proper question to ask is whether fracture stimulation should be a trespass.

VII. CRITICAL ANALYSIS: THE TEXAS SUPREME COURT’S DECISION AND ITS IMPLICATIONS

The Texas Supreme Court rendered its decision in Garza at the height of the energy crisis, and the court simply would not and could not allow a decision which would, at the very

\textsuperscript{172} Id.
\textsuperscript{173} See Garza, 268 S.W.3d 1; Geo Viking, Inc. v. Tex-Lee Operating, Co., 817 S.W.2d 357 (Tex. App. 1991).
\textsuperscript{174} Garza, 268 S.W.3d at 15.
\textsuperscript{175} See Garza, 268 S.W.3d 1.
\textsuperscript{176} Id.
\textsuperscript{177} Id.
\textsuperscript{178} Id; and see, e.g. Elliff v. Texon Drilling, 210 S.W.2d 558 (Tex. 1948); R.R. Comm’n v. Manziel, 361 S.W.2d 560 (Tex. 1962); Comanche Duke Oil Co. v. Texas Pac. Coal & Oil Co., 268 S.W.2d 554 (Tex. 1927); Phillips Petrol. Co. v. American Trading & Prod. Corp., 361 S.W.2d 942 (Tex. App. 1962).
least, have placed prohibitive restraints on the practice of fracing. To rule otherwise in the face of $13 per MMBtu natural gas during an election year would have been absolute folly.

The court was unwilling or perhaps unable to answer or resolve the primary question: is a subsurface frac that crosses beneath another’s land a subsurface trespass? Despite the court’s ruling, the question is not moot, as shall be discussed. The court takes a two pronged approach to its analysis: the first being a balancing of interests to identify the mandate of public policy, and the second a technical analysis of trespass law.

A. The Greater Good: The Court’s Public Policy Analysis

The Texas Supreme Court makes the bold assertion that to impose liability for a fracture stimulation would be to “change the rule of capture.” Having framed the issue in this manner, the court was able to cite a great many reasons for preserving the status quo. Indeed, the court even went so far as to declare that, “no one in the industry appears to want or need,” a decision which would create liability for frac jobs.

The court notes that, “social policies, industry operations, and the greater good… are all tremendously important in deciding whether fracing should or should not be against the law.” It must be pointed out that the court’s view on hydraulic fracing from a public policy standpoint has evolved a great deal. In Gregg v. Delhi-Taylor, the court stressed that “There is nothing to show that… fracturing will either cause or prevent waste. While the process may increase production from an individual well, there is nothing… to show that the process is necessary from the public’s standpoint to increase the total recovery from the common source.”

Now, however, the court makes clear that fracing is “not optional; it is essential…” Much of the gas deposits located throughout Texas would be rendered commercially unproductive without it. “Fracing is not a luxury but a must-have recovery tool that is vital…” The experts, not only for Coastal but for the respondents as well, agree that such operations are a necessity.

One of the reasons, however, cited by the court for not “changing” the rule of capture is that “determining the value of oil and gas drained by hydraulic fracturing is the kind of issue the litigation process is least equipped to handle.” This is a surprising statement since courts very frequently make determinations of exactly this kind. Any case where drainage is alleged as a

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179 Garza, 268 S.W.3d at 12-13.
180 Id. at 9-13, 14-17.
181 Id. at 14.
182 Id. at 14-16.
183 Id. at 16.
184 Id.
186 Garza, 268 S.W.3d at 16.
187 Id.
188 Id. at 31 (Willet, J., concurring).
189 Id. at 16.
190 Id.
result of negligence or waste requires a similar determination; any case where an operator is deemed to have violated its implied covenant to protect against drainage requires this kind of determination.\footnote{See, e.g. Kerr-McGee Corp. v. Helton, 133 S.W.3d 245 (Tex. 2004); Amoco Prod. Co. v. Alexander, 622 S.W.2d 563 (Tex. 1981).} Indeed, the Texas Supreme Court in this very opinion recognizes a cause of action for breach of this implied covenant based entirely on drainage resulting from fracture stimulation.\footnote{Garza, 268 S.W.3d at 4, 14.} Nonetheless, the public policy considerations appear amply satisfied by the court’s analysis. A technique so crucial, not only to the energy industry, but to the economy as whole must be in the greater interest of the public than the resulting drainage that is arguably unavoidable if the technique is to be employed at all.

\section*{B. The Texas Side-Step: The Court’s Trespass Analysis}

The court’s trespass analysis ultimately fails. Unlike in Manziel, the court in Garza was unable to declare that this method of enhanced recovery was simply not a trespass.\footnote{R.R. Comm’n of Tex. v. Manziel, 361 S.W.2d 560, 568-569 (Tex. 1962).} This was not for lack of effort, however. At one point the court notes that, “flying the plane through the airspace two miles above the property is not [trespass],”\footnote{Garza, 268 S.W.3d at 11.} but the court then states that the “law of trespass need no more be the same two miles below the surface than two miles above.”\footnote{Id. at 12 (italics added).} The Texas Supreme Court went to extraordinary lengths to avoid announcing, one way or the other, whether a frac was a subsurface trespass. Even if it is a trespass – and the court’s not saying that it is – “In this case, actionable trespass requires injury,” which is precluded by the rule of capture.\footnote{RESTATEMENT (SECOND) OF TORTS § 158 (1965); and see Garza, 268 S.W. 3d at 11 n.28 (citing W. Page Keeton et al., Prosser and Keeton on the Law of Torts §13 at 75 (W. Page Keeton ed., West Publishing 5th ed. 1984) (1941)).} Generally, trespass requires no damage,\footnote{Garza, 268 S.W.3d at 9.} and, in order for the Court to hold to the contrary in Garza, it focused on the lack of respondents’ possessory rights in Share 13.\footnote{Id. at 9-11 & nn.20-24, 27-28.} In support of its statement, the court drew on old distinctions in trespass, rooted in landlord and tenant law.\footnote{Garza, 268 S.W.3d at 10 (citing KEETON ET AL., THE LAW OF TORTS §1.3 at 8 & n.14 (Little, Brown & Co. 2nd ed. 1991) (1986).}

A landlord may sue in trespass for damages to his reversionary interest, but in order to maintain the suit, “he must show more than the trespass-- namely, actual permanent harm to the property of such sort as to affect the value of his interest.”\footnote{Id. at 10 (citing KEETON ET AL., supra note 197, at 78).} The court distinguishes this from trespass \textit{quare clausm fregit} which is an action brought as a result of a disturbance to a party’s peaceable possession.\footnote{Id. at 9-10; and see 87 C.J.S. Trespass § 72 (2008) (citing Bray v. Spencer, 82 A.2d 794 (Me. 1951)).} As such, the tenant, who holds the right to possess the land, may maintain a suit for mere trespass without the necessity of showing substantial damages.\footnote{RESTATEMENT (SECOND) OF TORTS § 158 (1965); and see Garza, 268 S.W.3d at 11 n.28; and see FOWLER V. HARPER ET AL., THE LAW OF TORTS §1.3 at 8 & n.14 (Little, Brown & Co. 2nd ed. 1991) (1986).}
If, for example, the neighborhood kids cross the front lawn of a leasehold property on their way to school, the tenant can sue, regardless of whether there are actual damages.\textsuperscript{203} Nominal damages may be awarded the tenant, and he may sue to enjoin further trespasses.\textsuperscript{204} The landlord, however, may not sue; he must show that the trespass resulted in actual damages sufficient to impact the value of his reversionary estate.\textsuperscript{205}

Further, if the neighborhood kids trample the flower bed as they cross the lawn, the tenant can once again sue for trespass, obtain damages for the flowers, and seek to enjoin further trespass across his property.\textsuperscript{206} The landlord, arguably, cannot sue, as the damages done to the flower bed are not sufficient to impact the landlord’s reversionary interest.\textsuperscript{207} The landlord may not sue for nominal damages or sue to enjoin further trespass as the tenant could.\textsuperscript{208} Finally, if the neighborhood kids burn down the garage, the landlord could sue since the damage to his garage has likely lessened the value of his reversionary interest in the property.\textsuperscript{209}

The court then analogized these landlord-tenant doctrines to oil and gas law.\textsuperscript{210} When a landowner enters into an oil and gas lease, he has essentially conveyed a fee simple determinable.\textsuperscript{211} The landowner has retained a possibility of reverter similar to a landlord’s retained reversionary interest in the property subject to his tenant’s leasehold.\textsuperscript{212} The Texas Supreme Court thus compares the respondents to the landlord in the above scenarios, stating that the respondents cannot sue on trespass alone – if it were a trespass, and the court is not saying it is.\textsuperscript{213} Actual damages must be shown, and while the drained gas might provide sufficient damages under this analysis, the court essentially regards it as a moot point because any such damage would be precluded by the rule of capture.\textsuperscript{214}

The court thus sidesteps, for the time being, the primary question put to it by the parties. The court can engage in this doctrinal exercise in \textit{Garza} because the only party holding the required possessory interest in the mineral estate – and thus the only party with the power to sue for trespass alone – was the same party doing the trespassing – if it were a trespass, and the court is not saying that there is.\textsuperscript{215} Coastal, as noted, was the operator on both tracts and thus they wore both hats – that of the tenant and that of the trespasser - if there were a trespass.\textsuperscript{216}

\begin{footnotes}
\footnotetext[203]{Rest (2d) Torts § 158 (1965) (Illustrations 2-3); and see HARPER ET AL., \textit{supra} note 202, at 8.}
\footnotetext[205]{\textit{Garza}, 268 S.W.3d at 10; and see KEETON ET AL., \textit{supra} note 197, at 78.}
\footnotetext[206]{HARPER ET AL., \textit{supra} note 204, at 8.}
\footnotetext[207]{\textit{Garza}, 268 S.W.3d at 10; and see KEETON ET AL., \textit{supra} note 197, at 78.}
\footnotetext[208]{\textit{Id.}}
\footnotetext[209]{\textit{Id.}}
\footnotetext[210]{\textit{Garza}, 268 S.W.3d at 10-11.}
\footnotetext[211]{Jupiter Oil Co. v. Snow, 819 S.W.2d 466, 468 (Tex. 1991).}
\footnotetext[212]{\textit{Id.}; and see \textit{Garza}, 268 S.W.3d at 10.}
\footnotetext[213]{\textit{Id.} at 10-11.}
\footnotetext[214]{\textit{Id.} at 12-13.}
\footnotetext[215]{\textit{Id.}}
\footnotetext[216]{\textit{Id.} Coastal held the leasehold on the Salinas Share 13 tract and the fee on Share 12 and thus was the only party in possession of a sufficient possessory interest in either tract.}
\end{footnotes}
Garza, based on its narrow holding and its facts, does not prevent an oil and gas leaseholder (or working interest owner, mineral estate owner, or fee holder) from suing to enjoin the execution of a frac job based on the theory of subsurface trespass alone. Possession of a possessory interest means a suit for trespass may be maintained regardless of damages, and the rule of capture would not then shield an operator such as Coastal from a suit seeking injunction by a leaseholder on an adjoining tract.

C. The Absence of Railroad Commission Action

As noted above, the Railroad Commission has not promulgated any rules concerning fracture stimulation. It is ironic that this absence of rules is one of the facts that led the court in Gregg to rule that it had jurisdiction in matters pertaining to fracture stimulation, and yet this same absence is used to infer a tacit approval by the Commission for the status quo. “The Commission has never found it necessary to regulate hydraulic fracturing…. [Its] role should not be supplanted by the law of trespass.” Given that the Texas Supreme Court declared the issue of fracture stimulation essentially off-limits to the Commission specifically because of trespass law, one has to take this statement with a considerably sized grain of salt. Indeed, the primary reason for the Railroad Commission’s reluctance to draft rules on this matter was precisely because it sounded in trespass.

The court gives assurances that existing remedies already offer full recourse to any poor souls who find themselves in the respondents’ predicament. Offset wells, forced pooling, and allocated production – all of which are regulated by the Railroad Commission – are championed by the court as being perfectly adequate remedies to protect against the kind of drainage complained of here. In truth, however, none provides a realistic solution in the context of the circumstances presented in Garza.

217 Cf. Garza, 268 S.W.3d at 12-13; HARPER ET AL., supra note 202, at 8 (the analogy of the tenant in a leasehold relationship to that of the lessee in an oil and gas lease brought to its logical conclusion dictates that if the former may sue on trespass with no showing of actual damages, so may the latter). Recall that in Garza, it was stipulated that both the hydraulic fluid and the proppant crossed the property line.
218 Id.
219 Id.
220 Id. at 15.
221 Gregg v. Delhi-Taylor Oil Corp., 344 S.W.2d 411 (Tex. 1961); Garza, 268 S.W.3d at 15, 17.
222 Garza, 268 S.W.3d at 15-16.
223 See Garza, 268 S.W.3d at 11-12; and see Gregg, 344 S.W.2d 411.
224 Gregg, 344 S.W.2d at 415 n.7.
225 Garza, 268 S.W.3d at 14.
226 Id.
The respondents had no more offset wells to drill on Share 13.227 By 1997, the year in which respondents filed suit against Coastal, there were three offset wells that could potentially prevent drainage from a massive frac job protruding out from the Coastal Fee No. 1 wellbore.228 These wells, the M. Salinas Nos. 2V, 4, and 6 were drilled between the M. Salinas #3 and the Coastal Fee No. 1, and they were located at the minimum allowable distance from Share 12.229 As such, there was simply no way of drilling another offset well to counter the drainage complained of without such well being closer than 1200 feet from another well producing from the same reservoir or without being closer than 467 feet from the Share 12 property line – either of which would violate Railroad Commission Rule 37.230

Forced pooling, likewise, would have little or no application to the facts of this case.231 The Mineral Interest Pooling Act only applies to the holder of a mineral interest, “the productive acreage of which is smaller than [640 acres].”232 Share 13 contains 748 acres productive from the Vicksburg T field.233 In addition, Coastal as the lessee and operator had broad discretion, as lessees often do, to pool at its option and in its judgment.234 While such discretion is tempered with good faith, the court does not suggest an operator, in these circumstances, could be compelled to seek forced pooling. “Beyond the express terms of the lease, a lessor has no power to direct a lessee in its good faith pooling decisions…”235

The possibility of regulated production similarly rings hollow. The court is implying that, upon request, the Commission could impose some manner of production cap on the Share 12 wells to make sure that respondents received their fair share.236 While such tools are certainly at the disposal of the Commission and have been used in the past,237 this scenario is highly unlikely today. While natural gas prices have retreated from the summer highs, they remain high by historic standards.238 That being the case, the Commission is unlikely to suddenly demand that operators begin to throttle back their production. Indeed, since September of 1995, many if not most of the producing fields in Texas have been designated as Absolute Open Flow (AOF), meaning the Commission, rather than imposing production caps as it has in the past, allows these

227 See R.R. Comm’n of Texas, Form W-1: Application for Permit to Drill, Deepen, Plug Back or Re-Enter, M. Salinas #2V Plat, API No. 21531391 (1983), available at http://rrcsearch.neubus.com/esd-rrc/#results (select “Oil and Gas Potential” from the drop down menu, enter API number in appropriate field, and select result); R.R. Comm’n of Texas, Form W-1: Application for Permit to Drill, Deepen, Plug Back or Re-Enter, M. Salinas #4 Plat, API No. 21532472 (1997), available at http://rrcsearch.neubus.com/esd-rrc/#results (select “Oil and Gas Potential” from the drop down menu, enter API number in appropriate field, and select result); Comm’n of Texas, Form W-1: Application for Permit to Drill, Deepen, Plug Back or Re-Enter, M. Salinas #6 Plat, API No. 21532421 (1997), available at http://rrcsearch.neubus.com/esd-rrc/#results (select “Oil and Gas Potential” from the drop down menu, enter API number in appropriate field, and select result).
228 Id.
229 Id.
232 Id. at § 102.014.
233 Coastal Oil & Gas Corp. v. Garza Energy Trust, 268 S.W.3d 1, 5 (Tex. 2008).
234 Id. at 21.
235 Southeastern Pipe Line Co. v. Tichacek, 997 S.W.2d 166, 171 (Tex. 1999).
236 Garza, 268 S.W.3d at 14.
237 See, e.g. Benz-Stoddard v. Aluminum Co. of Am., 368 S.W.2d 94 (Tex. 1963).
operators to produce these wells at their full capacity. Further, the primary focus for any fields with remaining production schedules is the preservation of the reservoir pressure, not correlative rights. Moreover, the Texas Supreme Court has expressly stated that the Commission may not “regulate and prorate production for the protection of correlative rights” alone.

The absence of a Commission rule concerning subsurface trespass is telling. As was seen in previous cases such as Corzelius and Manziel, a decision or rule by the Commission carries enough weight to tip the scales. In Manziel, for example, the public policy argument was soundly articulated, weighing “the interests of society and the oil and gas industry as a whole against the interests of the individual…”, waterflooding was explicitly declared “not a trespass”; and the Commission had authorized this enhanced recovery procedure.

In reality, the court’s decision in Garza should be viewed as an open invitation, perhaps even a plea, to the Railroad Commission to begin promulgating rules for fracture stimulation. Long gone are the days of Gregg, when the court stressed that these matters did not fall within the primary jurisdiction of the Commission but rather sounded in trespass and therefore were within the purview of the courts. In Garza, the court went so far as to “acknowledge that our opinions in Gregg and Manziel are in some tension and did not perfectly delineate the Commission’s authority to regulate secondary recovery operations.” In point of fact, one of the court’s primary rationales for not specifically addressing the trespass question or imposing such liability is the concern that doing otherwise “usurps to the courts and juries the lawful and preferable authority of the Railroad Commission…”

Indeed, the court takes pains to point out the aberration caused by the Commission’s extensive regulation of virtually every aspect of oil and gas production, other than fracturing. Justice Willet, in his concurring opinion, actually goes so far as to recommend possible rules that the Commission could promulgate. It could, for example, increase the minimum distance from a property line that a well may be drilled; it could require a notice to other operators before

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242 Coastal Oil & Gas Corp. v. Garza Energy Trust, 268 S.W.3d 1, 15 (Tex. 2008).
244 Manziel, 361 S.W.2d at 568.
245 Id. at 568-569.
246 Id.
247 See, e.g., Garza, 268 S.W.3d at 12, 14-15, 39.
248 Garza, 268 S.W.3d at 12; and see Gregg v. Delhi-Taylor Oil Corp., 344 S.W.2d 411 (Tex. 1961).
249 Garza, 268 S.W.3d at 12.
250 Id. at 14-15.
251 Id. at 17.
252 Id. at 39.
a frac job is commenced; or it could require a permit to frac.\textsuperscript{253} “Indeed, the Commission could impose any number of targeted spacing, density, pooling, production, or other rules on fraced wells…”\textsuperscript{254}

\textbf{D. Remaining Sources of Fracture Stimulation Liability: Implied Covenants and Negligence}

The court’s discussion regarding the possibility for respondents to recover based on a breach of the implied covenant to protect from drainage (hereinafter, sometimes, “Drainage Covenant”) also merits analysis.\textsuperscript{255} The court’s comments either reflect an artful sleight of hand or, perhaps, signal an expansion either of the Drainage Covenant or to the implied covenant to develop.\textsuperscript{256} The court notes that the proper standard to calculate damages based on such drainage is the value of “the drainage a reasonably prudent operator should have prevented.”\textsuperscript{257}

There is no exhaustive or exclusive list of measures by which an operator may prevent drainage.\textsuperscript{258} However, common remedial measures imposed by the Texas courts have included the drilling of offset wells, seeking regulatory exceptions, and reworking existing wells.\textsuperscript{259} As has already been addressed above, however, no further Coastal Fee No. 1 offset wells could be drilled on Share 13.\textsuperscript{260} A Rule 37 well spacing exception was sought by Coastal and denied in this field.\textsuperscript{261} There is no suggestion that these wells could be “reworked” to improve production, and all of these wells have already been fraced.\textsuperscript{262}

In a case such as this, where drainage due to fracing is suspected and no further offset wells can be drilled, the amount of drainage that a reasonably prudent operator can prevent is zero. If drainage is to be viewed as “unavoidable,”\textsuperscript{263} and if no further remedial measures other than what courts have already imposed in the past are introduced, there is nothing a reasonably prudent operator can do to prevent this drainage. Indeed, no further offset well to Share 12 has been drilled on Share 13, and none have been proposed to the Railroad Commission.\textsuperscript{264}

The duty to rework a well under the Drainage Covenant could, however, include the obligation not only to frac but to “re-frac.” As long as such an operation would be economic, an operator would be hard pressed to show why it would not re-frac one or all of the Share 13 offset wells, especially since the frac job on the Coastal Fee No. 1 (located less than 1000 feet away from the M. Salinas offset wells) was executed with almost twice the volume of proppant as the

\begin{footnotes}
\item[253] Id.
\item[254] Id.
\item[255] Id. at 17-20.
\item[256] See id.
\item[257] Garza, 268 S.W.3d at 18.
\item[259] Id.
\item[260] See R.R. Comm’n of Texas, supra note 227.
\item[261] Garza, 268 S.W.3d at 6.
\item[262] Id..
\item[263] Id. at 16.
\item[264] R.R. Comm’n of Tex., RRC Public GIS Map Viewer, API No. 21532318, http://gis2.rrc.state.tx.us/public/ (click accept, then enter API number in the appropriate field) (last visited 1.10.2009).
\end{footnotes}
initial frac jobs on the M. Salinas Nos. 3, 4, or 6. Again, assuming it could be shown that such an operation would be profitable, re-fracing these offset wells would increase their production and thus reduce the volume of Share 13 gas drained to the Coastal Fee wells.

Alternatively, if drainage is considered an inevitable consequence of fracture stimulation, and further, if fracing is considered a necessity for efficient performance, then a disparity in effective fracture stimulation (like the disparity alleged between the Coastal Fee No.1 and the M. Salinas offset wells) could arguably run afoul of the implied covenant to develop. It is possible that if Coastal had fraced the Share 13 wells with the same intensity as it fraced the Coastal Fee No. 1 (i.e. with 255,000 pounds of proppant as opposed to less than 140,000 pounds), the level of production from the Share 13 wells would be higher. Indeed, if respondents’ allegations are accepted, a Share 12 well, like the Coastal Fee No. 1, drilled 467 feet away from Share 13 and fraced at such intensity, would extend its fractures into Share 13 and thereby drain it. If so, then it is equally plausible that a Share 13 well, like the M. Salinas 2V, 4 or 6, drilled 467 feet away from Share 12 and fraced at such intensity, would extend its fractures into Share 12 and thereby drain it. Regardless of whether such re-fracing of the M. Salinas wells would drain from Share 13, Share 12, or both, the result would be an increase in production. This analysis could be articulated under the implied covenant to develop as a duty to adequately frac, or perhaps even as a duty to reciprocate drainage. Such a development could arguably address fracing inequities like those alleged in Garza. In the meantime, however, there remains uncertainty as to what role, if any, the implied covenants of drainage or development will play.

Moreover, while the court did not expressly address the issue in its majority opinion, it seems clear that Garza does not preclude the recovery of damages based on negligence. The rule of capture is tempered by the correlative rights doctrine, and consequently cannot shield one whose activities are conducted negligently and lead to waste or injury.

The Texas Supreme Court has, with the Garza decision, cut off one avenue of recovery. Future litigators may choose to attack how, rather than where, a frac job is conducted. Allegations that a particular fracture stimulation damaged the common reservoir or resulted in less overall recovery of the natural gas reserves are not barred by Garza or any other decisions.

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265 Brief of Respondent at Tab 5, Coastal Oil & Gas Corp. v. Garza Energy Trust, No. 05-0466 (Tex. 2008); and see R.R. Comm’n of Texas, supra note 227.
267 Brief of Respondent at Tab 5, Coastal Oil & Gas Corp. v. Garza Energy Trust, No. 05-0466 (Tex. 2008).
268 See Tarics, supra note 9.
269 See Garza, 268 S.W.3d at 30 (Willet, J., concurring).
270 Ohio Oil Co. v. Indiana, 177 U.S. 190 (1900); BLACK’S LAW, supra note 83.
271 Elliff v. Texon Drilling, 210 S.W.2d 558 (Tex. 1948).
272 See Garza, 268 S.W.3d 1 (holding that the rule of capture precludes damages based on fracture stimulation).
273 See Elliff, 210 S.W.2d 558; Comanche Duke Oil Co. v. Texas Pac. Coal & Oil Co., 268 S.W.2d 554 (Tex. 1927).
VIII. CONCLUSION

The court’s actions in Garza may induce the Texas Railroad Commission to insert itself into the fracture stimulation debate. The refusal by the Texas Supreme Court to say definitively whether a subsurface frac is a trespass, but that any resulting damages are precluded by the rule of capture, is an open invitation for rival oil and gas corporations on adjacent acreage to “shock and awe” one another with massive frac jobs. Such behavior will likely prompt the Railroad Commission to address frac jobs as it now addresses secondary recovery operations like waterflooding.

Indeed, the court’s doctrinal footwork arguably leaves the Commission no choice but to promulgate fracing rules. This case was, in some respects, an aberration. Without a doubt, a case will arise in the future where the fracing operator and the drained operator are not one and the same, and it is the drained operator who is suing. Should a case with such facts find its way to the court’s docket, the court’s delicate trespass analysis will be for nothing. In addition, some method for addressing potential abuse of fracing where the same operator is the lessee on adjacent tracts of land with differing profit margins must be developed, either by the courts or by the legislature.

For now, however, the practice of hydraulic fracture stimulation will continue unabated. The pace of its march may be diminished somewhat by the recent decline in natural gas prices. High gas prices, however, will return and with higher prices will come increased demand which in turn will cause more oil and gas industry players than ever to rattle the depths of the earth in search of more gas.