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NO. 12-0905

IN THE SUPREME COURT OF TEXAS

ENVIRONMENTAL PROCESSING L.C.,

Petitioner

v.

FPL FARMING LTD.,

Respondent

From the 9th Court of Appeals
Beaumont, Texas

BRIEF OF AMICUS CURIAE OF TEXAS FARM BUREAU

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IDENTITY OF PARTIES AND COUNSEL

The undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this case. These representations are made in order that the Judges of this Court may evaluate possible disqualification or recusal:

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STATEMENT OF INTEREST AND PURPOSES OF TEXAS FARM BUREAU

This Amicus Brief is presented by Texas Farm Bureau.

Texas Farm Bureau ("TFB") is a Texas Non-Profit Membership Corporation committed to the advancement of agriculture and prosperity for rural Texas. TFB has over 500,000 member families and is associated with 206 organized county Farm Bureau organizations across the state.

The policies of TFB are derived from its members' own proposals, which originate within county Farm Bureaus and are approved each year by a majority vote at a statewide annual meeting. TFB's formally adopted and published "State Policies" address the critical importance for affording the maximum protection of Constitutional and other land and water property rights of private landowners in Texas. In particular, TFB's policies oppose governmental entities and condemning authorities taking land and property in an oppressive manner and without providing due and proper compensation.

TFB respectfully submits this brief on behalf of its members, and TFB will pay the fees incurred in the preparation of this brief.

STATEMENT OF PAYMENT OF FEES FOR PREPARATION OF BRIEF

Pursuant to Texas Rule of Appellate Procedure 11, the fees incurred in the preparation of this brief are paid by TFB through the voluntary assessments of its members.

NO. 12-0905

IN THE SUPREME COURT OF TEXAS

ENVIRONMENTAL PROCESSING SYSTEMS, L.C.,

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From the 9th Court of Appeals
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BRIEF OF AMICUS CURIAE OF TEXAS FARM BUREAU

TO THE HONORABLE TEXAS SUPREME COURT:

Texas Farm Bureau submits this Amicus Curiae Brief in support of Respondent, FPL FARMING LTD (“FPL”), and as a friend of the Court and show as follows:

INTRODUCTION

This case involves a fundamental and longstanding concept of property ownership: absent a severance, the surface possessor’s right to exclusive possession extends downward to its subsurface property.

ENVIRONMENTAL PROCESSING SYSTEMS, LC ("EPS") seeks immunity from its subsurface trespass against FPL created by its subsurface injections of wastewater. Essentially, EPS refuses to recognize FPL's subsurface property rights altogether in an effort to avoid any recompense for its trespass as well as any compensation for the use of FPL's subsurface property.

SUMMARY OF THE ARGUMENT

Issue No. 1.

FPL Has the Right of Exclusive Possession of its Property, Surface and Subsurface

It is unquestioned that under Texas law FPL enjoys exclusive possession of the property which it owns, and the right to exclude others from that property. No Texas case has held otherwise, except in the oil and gas recovery context. The centuries old common law rule—*cujus est solum ejus est usque ad coelum et ad inferos*—that a property owner possess *all* property from heaven to hell within its boundaries has withstood the test of time, albeit modified in limited circumstances. In 2008, the Texas Supreme Court in *Garza* called into question this doctrine with respect to oil and gas recovery, but not wastewater injection. Nevertheless, the Texas Supreme Court did not wholly forsake the property owner's subsurface right to exclusive possession. Rather, it recognized that as long as a remedy remains to protect that right, the centuries old common law rule would seemingly be satisfied. Here, as this Court has previously noted, the Legislature has not acted to provide a remedy to affected dispossessed landowners – thus the situation is distinctly different from oil and gas recovery, and trespass concepts and remedies should therefore apply.

Issue No. 2.

FPL Has a Subsurface Trespass Claim Because It Retains the Right of Exclusive Possession of its Surface and Subsurface Property

Unlike oil and gas recovery where the Texas legislature has provided for pooling and required oil and gas operators to give property owners a fair and reasonable opportunity to join the unit before compulsory pooling can be instituted, wastewater injection has no such remedies for property owners. The Court has noted this distinction. The groundwater, including the brine that is contaminated by EPS's industrial waste, clearly belongs to FPL while it is under FPL's property. While the groundwater remains underneath FPL's property, neither the rule of capture nor any other rule allows a third party to physically invade, contaminate and occupy the subsurface where the groundwater is located. In fact, damage is shown by the very fact that EPS is utilizing property for FPL for its own commercial purpose and advantage, yet pays FPL no compensation for that use. In order to preserve FPL's property rights, FPL must be able to assert a subsurface trespass claim against EPS.

<u>Issue No. 3.</u>

> **A TCEQ Permitting Process That Directly Enables Subsurface Trespass, Without Corresponding Civil Trespass Liability and Remedies Is an Unconstitutional Taking**

EPS is utilizing FPL property as subsurface storage for millions of gallons of industrial waste, and yet seeks to pay nothing for it. If the permitting process preempts common-law trespass rights, then TCEQ permitting constitutes a taking that must be statutorily authorized, for a public use, and with adequate compensation. First, there is no statute authorizing takings for injection wells. Second, it is admitted that EPS's use is for a private, for-profit function — not a public use. Third, the permanent occupation of FPL's property by EPS's industrial waste, even if it were for a public use, would be a taking for which FPL is entitled to be compensated.

STATEMENT REGARDING FACTS AND PRIOR PROCEEDINGS

Environmental Processing Systems, L.C. ("EPS") owns and operates a Class I non-hazardous wastewater disposal facility on leased property in Liberty County, Texas (the "Injection Well"). FPL Farming Ltd. ("FPL") owns two separate tracts of land very close to the EPS facility. The first FPL tract of approximately 116 acres is directly across the road and approximately 875 feet from the EPS facility; the second FPL tract of approximately 965 acres is located approximately 2,000 feet to the north-northwest of the EPS facility. Previously, in 1996, EPS sought a permit to operate its waste injection facility, at an injection rate of 96 gallons per minute. FPL's predecessor objected during the permitting process because the projected waste plume would reach its smaller property. FPL's predecessor later withdrew its objection upon reaching settlement wherein it received a $185,000.00 cash payment.

Approximately four and one-half years after EPS received its initial operating permit, the State altered certain restrictions governing EPS's operations, significantly increasing both the rate and volumes allowed by the initial permit. Although FPL contested EPS's proposal to change its permit, the requested changes were approved. Although FPL appealed that decision, the Austin Court of Appeals determined that the amendments would not impair FPL's existing rights, reasoning that "[t]he amended permits do not impair FPL Farming's existing or intended use of the deep subsurface." *FPL Farming Ltd. v. Tex. Natural Res. Conservation Comm'n,* No. 03–02–00477–CV, 2003 WL 247183, at *4 (Tex. App.—Austin Feb. 6, 2003, pet. denied) (mem. op.). Nevertheless, the Austin Court of Appeals expressly left open the question of whether FPL could recover damages in the event the well's waste plume entered below the surface of FPL's property, noting: "[S]hould the waste plume migrate to the subsurface of FPL Farming's property and cause harm, FPL Farming may seek damages from EPS." *Id.* at *5 (citing Tex. Water Code Ann. § 27.104 (West 2000)).

Approximately five years later, FPL sued EPS, alleging that the waste plume had migrated beneath its property, and claiming that the waste plume polluted the briny water found there. At trial, the jury rejected the three claims the trial court submitted, declining to find that EPS was negligent, that EPS had trespassed, or that EPS was unjustly enriched. Based on the jury's findings, the trial court rendered a judgment in EPS's favor.

Initially, the Beaumont Court of Appeals affirmed the trial court's judgment, and holding, with respect to the trespass claim, that "under the common law, when a state agency has authorized deep subsurface injections, no trespass occurs when fluids that were injected at deep levels are then alleged to have later migrated at those deep levels into the deep subsurface of nearby tracts." *FPL Farming Ltd. v. Envtl. Processing Sys., L.C.,* 305 S.W.3d 739, 744–46 (Tex. App.—Beaumont 2009), *rev'd,* 351 S.W.3d 306 (Tex. 2011). After granting FPL's petition for review, the Supreme Court held a person holding a permit issued by the TCEQ was not shielded "from civil tort liability that may result from actions governed by the permit." *FPL Farming Ltd. v. Envtl. Processing Sys., L.C.,* 351 S.W.3d 306, 308, 314 (Tex. 2011).

On remand, the Beaumont Court of Appeals held that Texas law recognized FPL's property interest in its briny water and a subsurface trespass claim existed for FPL to vindicate its property rights. *FPL Farming Ltd.*, 305 S.W.3d at 282. The court of appeals also held that that the trial court improperly placed the burden of proving consent to entry on FPL when that burden should have been placed on EPS, and thus has ordered a Remand. *Id.* at 289.

ARGUMENT

1. FPL Has the Right of Exclusive Possession of its Property

The basic question in this case, the existence of a claim for subsurface trespass, hinges on the extent of ownership FPL enjoys in its property. The right of possession, which is unquestionably held by FPL, is by its very nature exclusive. *See Marcus Cable Assoc. v. Krohn*, 90 S.W.3d 697, 700 (Tex. 2002) (recognizing a property owner's right to exclude others). Accordingly, the exclusive right of possession certainly includes the right to prevent contamination of one's own property. For centuries it has been held by the courts that right includes the underground portions of the owner's land:

> The surface possessor's right to exclusive possession extends downward *usque ad inferos* within the planes of his surface boundaries, except where subsurface estates have been severed by grant, or where mineral locators have statutory rights to pursue their veins and lodes extralaterally beneath his premises. **The possessory right is not limited to a depth of foreseeable user, but extends to all nonliquid parts of the subsoil and to all caverns and containing spaces.** Technical intrusions into caverns that have no practicable access from the overlying surface have been held as tortious as the removal of minerals, or permanent encroachments by tunnels and foundation walls. The right does not extend, however, to oil and gas or ground waters, in that these substances were long assumed to be migratory and beyond the control of the surface occupant. Although he cannot prevent

> their drainage to adjoining land and capture by wells thereon, his right to the exclusive possession of subsurface containing spaces entitles him to recover in trespass against a neighbor whose well drifts into that part of the reservoir within the planes of his surface boundaries.

The American Law of Property, Vol. VIA, §28.3 (1952) (citations omitted); *See also Spann v. City of Dallas*, 235 S.W. 513, 515 (Tex. 1921). Accordingly, FPL has the right to exclusive possession of its surface and subsurface property—including, but not limited to, its briny water.

In an effort to reject the old common law rule, EPS relies upon *Garza*, which cites to United States Supreme Court dicta that seemingly casts the old common law rule of property ownership away.[1] *Coastal Oil & Gas Corp. v. Garza Energy Trust*, 268 S.W.3d 1, 11 (Tex. 2008). However, the Texas Supreme Court in *Garza* did not categorically reject the exclusive right of possession for subsurface property. Instead, the Court recognized that in the case of oil and gas recovery, the old common

[11]In *United States v. Causby*, however, the court only dealt with airspace, which the court essentially equated with the high seas: "The air is a public highway . . . were that not true, every transcontinental flight would subject the operator to countless trespass suits. Common sense revolts at the idea . . . .". 328 U.S. 256, 261 (1946). As the Court noted in *Causby*, the public highway analogy is limited because overflights *can* impose "trespass" or even "taking" liability, and often do. *See, e.g.*, *id.*; *City of Austin v. Travis Cnty. Landfill Co., L.L.C.*, 73 S.W.3d 234, 238–41 (Tex. 2002). *Causby* is not analogous here because this case does not involve a subsurface "highway." Instead, this case involves wastewater injections that are polluting FPL's subsurface property as well as storage sold under FPL's land without consent or compensation.

law rule had been modified: the rule of capture governed a property owner's right to the oil and gas beneath its land. *Id.* at 12. *Garza*'s holding was limited to the category of *oil and gas recovery*, specifically through fracing. *Id.* at 12-13. The Court held that the property owner in question could suffer no actual damages since it had a means to vindicate its right to the oil and gas beneath its land by drilling for itself (i.e., the rule of capture). *Id.*

Subsequently, the Texas Supreme Court reinforced this reading of *Garza* in *FPL Farming Ltd.* 351 S.W.3d at 314. There, the Court noted that wastewater injection was distinct from oil and gas recovery through injecting substances to aid recovery (e.g. fracing): "[I]njecting substances to aid in the extraction of minerals serves a different purpose than does injecting wastewater." *Id.* (citing Tex. Water Code Ann. §27.011).

While property owners have a remedy to vindicate their rights for oil and gas beneath their land (i.e., the rule of capture and pooling laws), there is no comparable remedy for property owners whose subsurface property suffers a trespass from wastewater injections. *Id.* Consequently, the Texas Supreme Court has adopted a remedy/rights analysis for subsurface property rights in the context of oil and gas recovery.

Therefore, as long as a property owner has a remedy to vindicate its right of exclusive possession to its subsurface property, that property right remains protected. Yet, this wrinkle to the centuries old common law rule only applies to *oil and gas recovery*, not to wastewater injections.

2. <u>FPL Has a Subsurface Trespass Claim Because It Retains the Right of Exclusive Possession of its Property, Surface and Subsurface</u>

In Texas, the right of property is a natural inherent and inalienable right, not of grace from the legislature, but flowing from the Constitution, and it is a fundamental right. *See Texas Rice Land Partners, Ltd. v. Denbury Green Pipeline-Texas, LLC*, 363 S.W.3d 192, 204 (Tex. 2012) ("Locke deemed the preservation of property rights "[t]he great and chief end" of government, a view this Court echoed almost 300 years later, calling it "one of the most important purposes of government."); *see Spann*, 235 S.W. at 515. The concept that an owner has the right to control the use, and prevent the invasion, of his property within his own boundary is a centuries old concept, and one that is ignored by EPS. *See Spann*, 235 S.W. at 515

> The ancient and established maxims of Anglo-Saxon law which protect these fundamental rights in the use, enjoyment and disposal of private property, are but the outgrowth of the long and arduous experience of mankind . . . . These great maxims, which are but the

> reflection of that experience, may be better trusted to safeguard the interests of mankind than experimental doctrines whose inevitable end will be the subversion of all private right.

Even the wrinkle provided in the oil and gas recovery context eludes EPS: oil and gas cases like *Garza* and *Manziel* do not categorically remove a property owner's right to control and protect its subsurface property – even this Court rejected such a reading. *See FPL Farming Ltd.*, 351 S.W.3d at 313–14.

EPS and others lament the economic costs that a subsurface trespass claim might cause, but economic arguments (just as in in condemnation cases) are secondary to the fundamental private property interests at stake. *See* Tex. Const. Art. I, §17. The Court's previous opinions on subsurface property rights, even in oil and gas recovery, indicate that property owners retain their rights and must have remedies to protect those rights.

As the Court points out, the remedy/rights analysis is not satisfied in the case of wastewater injection. *FPL Farming Ltd.*, 351 S.W.3d at 314. For example, in oil and gas recovery there are pooling laws that are beneficial not only to the property owner but also to the oil and gas industry, by allowing compulsory pooling if a fair and reasonable offer has been made. *See generally* Tex. Nat. Res. Code Ann. §§102.001–.112 (West 2013); *see also Railroad Comm'n v. Pend Oreille Oil & Gas Co.*, 817 S.W.2d 36 (Tex. 1991).

There are no similar remedies for property owners to vindicate their subsurface property rights in the case of wastewater injections. *FPL Farming Ltd.*, 351 S.W.3d at 314 (Tex. 2011):

> Mineral owners can protect their interests from drainage through means such as pooling or drilling their own wells. That is not necessarily the case when a landowner is trying to protect his or her subsurface from migrating wastewater.

A subsurface trespass claim provides the *only* remedy currently available to FPL to protect its subsurface property rights, not limited to just its briny water. In confirming the existence of FPL's subsurface trespass claim, the court of appeals specifically noted that the factual findings here preclude EPS from asserting *any* ownership interests in FPL's subsurface where it has trespassed:

> EPS's permits merely represent the TCEQ's authorization for a landowner to exercise the rights the landowner possesses by virtue of its ownership of the fee: the permits did not give EPS an ownership interest in the formations below FPL's property that are at issue in this case.

FPL Farming Ltd., 383 S.W.3d at 281. Since FPL did not consent according to the court of appeals, a subsurface trespass claim remains the only remedy available for FPL to protect its rights. *Id.*

Additionally, basic trespass principles dictate that actual damages are not necessary to prove, or to prevent a trespass. A trespass can be caused by causing or permitting a thing to cross a boundary of the premises, and can be committed on, beneath or above the surface of the earth. *Gregg v. Delhi-Taylor Oil Corp*., 344 S.W.2d 411, 412, 416 (1961) (subsurface flow of sand and liquid a trespass). This Court *already* distinguished *Garza* from the present case: the owner in *Garza* attempting to assert a subsurface trespass claim had to prove actual damages because it was *not* in possession of the mineral rights like FPL is here. *See FPL Farming Ltd.*, 351 S.W.3d at 314. Thus, FPL need not prove actual damages in order to prevail on its trespass. Furthermore, once an unauthorized physical entry is shown, the intent or motive prompting the trespass is immaterial. *Trinity Universal Insurance v. Cohen*, 945 S.W.2d 819, 827 (Tex. 1997) (citing *McDaniel Bros. v. Wilson,* 70 S.W.2d 618, 621 (Tex. Civ. App.—Beaumont 1934, writ ref'd)).

A party suing for trespass is not even required to show economic damages. *See General Mills Restaurants, Inc. v. Texas Wings, Inc.,* 12 S.W.3d 827 (Tex. App.—Dallas 2000, no writ). In such an event, the plaintiff is still entitled to nominal damages, and is also entitled to injunctive relief as a proper remedy to restrain an ongoing trespass. *See City of Arlington v. City of Fort Worth*, 873 S.W.2d 765 (Tex. App.—Fort Worth 1994, writ dism. w.e.j.); *Cargill v. Buie*, 343 S.W.2d 746 (Tex. Civ. App.—Texarkana 1960, writ ref'd n.r.e.); *MGJ Corp. v. City of Houston*, 544 S.W.2d 171 (Tex. Civ. App.—Houston [1st Dist.] 1976, writ ref'd n.r.e.). These remedies are available, even without damages present, to protect FPL's right to exclude others and to control its own property.

Similarly trespass has been found, and compensated, in situations involving subsurface use of caves extending across property boundary lines, *even though* the cave entrance only provided access on one of the involved properties. In other words, even if an owner could not use the cave, there was still a trespass for use under that owner's surface. *See Edwards v. Lee's Administration*, 96 S.W.2d 1028 (Kentucky App. 1936); *see also Loehle v. Rainwater* 1994 WL 111016 (Tenn. Ct. App. 1994) (rights to control cave under own land, despite no entrance); *Marengo Cave v. Ross*, 10 N.E.2d 917 (Ind. 1937) (adverse possession case).

Moreover, the *groundwater*, including the brine, in place under FPL's property belongs to FPL as the surface owner while it is under FPL property, not the State, and certainly not EPS. *FPL Farming Ltd.*, 383 S.W.3d at 281 (citing *Robinson v. Robbins Petroleum Corp., Inc.*, 501 S.W.2d 865, 867 (Tex. 1973)); *City of Sherman v. Public Utility Comm'n.*, 643 S.W.2d 681, 686 (Tex. 1983); Tex. Water Code Ann. §36.002 (West 2013). Groundwater and other minerals "belong to the owner of the land, and are part of it, so long as they are on it or in it." *Prairie Oil & Gas Co. v. State*, 231 S.W. 1088, 1091 (Tex. Comm'n App. 1921, judgm't adopted) (cited with approval in *Brown v. Humble Oil & Refining Co.*, 82 S.W.2d 935, 940 (Tex. 1935)). The groundwater, including the brine that is contaminated by this industrial waste, belongs to FPL while it is under FPL's property. While the groundwater remains underneath FPL's property, neither the rule of capture nor any other rule allows a third party to physically invade, contaminate and occupy the subsurface where the groundwater is located.

The simple fact that EPS utilizes FPL property for its own commercial and economic purpose and advantage shows commercial damage to FPL. Certainly that usage of FPL property has value to EPS, or it would not go to the extraordinary lengths it has pursued in order to gain that right "*for free*".

3. <u>A TCEQ Permitting Process That Directly Enables Uncompensated Subsurface Trespass Is an Unconstitutional Taking</u>

TCEQ permitting process that enable EPS's uncompensated subsurface trespass, without preservation of common law trespass and liability remedies is merely a bureaucratic cover for an unconstitutional taking. First, there is no statutory authorization to TCEQ to allow eminent domain taking by EPS of FPL's land: the Injection Well Act does not authorize it. *See generally*, Tex. Water Code Ann. §27.001 *et seq.* Second, even if such authorization existed, the Texas Constitution requires a taking be for a public use. It is undisputed that EPS's wastewater injection operation is for private use, not public use. *See Denbury*, 363 S.W.3d 192, 202 ("A sine qua non of lawful taking . . . for or on account of public use . . . is that the professed use be a public one in truth.") (internal citation omitted). Consequently, EPS's subsurface trespass, which resulted in taking FPL's subsurface storage capacity, constitutes an unconstitutional taking.

Even if there were statutory authorization for a taking and EPS satisfied the public use requirement, FPL has never received adequate compensation as demanded by the Texas Constitution. *See* Tex. Const. Art. I, §17. An undeniable factual reality here, is that FPL's subsurface is *also* being sold—but not by FPL.[3] EPS is profiting from its injection well permit issued by TCEQ while FPL's property rights remain in jeopardy. It is very clear that in this case that FPL's neighbor, and the well operator, are simply selling storage space under FPL's land, and being compensated quite handsomely for it, and yet FPL has been judicially denied the existence of any rights whatsoever.

The United States and Texas Constitutions protect against takings such as these. The Texas Constitution provides that no person's property may be taken, damaged, or destroyed for public use without adequate compensation.[4] *See* Tex. Const. Art. I, §17. The subsurface trespass

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[3]Previously, of course, FPL's predecessor was *also* compensated for the prior projected waste intrusion.

[4]In a legal sense, "property" signifies that dominion or indefinite right of use, control and disposition that one may lawfully exercise over a particular plot of land; that is, the sum of all the rights of use, enjoyment, and disposal of land. *Spann*, 235 S.W. 513 at 515;

made possible by the TCEQ permitting process, if it is without a retained common law remedy, violates this constitutional principle. It is FPL's right to determine whether or not it will allow millions of gallons of industrial waste to be stored in its property. FPL did not cede that right to the TCEQ, nor does the Texas Constitution allow the legislature to make that choice *for* FPL, without just compensation and for a public purpose.

There is no legal right in Texas to "nullify" a taking because the property taken is not then in use, nor is any such case cited. Private property rights in Texas are sacrosanct, and have distinct constitutional and common law protections. Uncompensated forced occupation of private property, particularly for private commercial activity, is a very real concern to landowners in the state of Texas, and is of concern to Texas courts. *See Marcus Cable v. Krohn*, 90 S.W.3d 697 (Tex. 2002). The fact that FPL does not currently develop its subsurface property is beside the

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Washer v. Smyer, 211 S.W. 985, 986 (Tex. 1919). "Property" is more than mere economic value; it also consists of the group of rights that the owner exercises in his or her dominion over the land, such as the right to possess, use, and dispose of it. *See generally Phillips v. Washington Legal Foundation*, 524 U.S. 156 (1998). Real property consists of land, and all of the rights and profits arising from and annexed to land that are of a permanent and immovable nature. Ownership of property contemplates the owner's exclusive control over the property. *In re Kelso*, 196 B.R. 363, 369 (Bankr. N.D. Tex. 1996) (applying Texas law).

point—there is *no* case which defines real property ownership by intended use. The physical invasion or trespass of EPS's waste, pursuant to its TCEQ permit, violated FPL's right to exclude that waste and to control and use its own property. *See Loretto v. Teleprompter Manhattan CATV Corp.*, 458 US 419, 434–35 (1982) ("[A] permanent physical occupation of property . . . [is] a taking to the extent of the occupation, without regard to whether the action . . . has only minimal economic impact on the owner.)

In the analogous case of underground natural gas storage, the "storer" has the right of eminent domain to secure use of appropriate geologic strata under adjoining tracts. Tex. Nat. Res. Code §71.171 *et seq.* No such right exists here. Nor is there any indication in the Injection Well Act that the adjacent property is only protected in the event the landowner already has developed its subsurface. A physical appropriation is "perhaps the most serious form of invasion of an owner's property interests . . . to the extent that the government permanently occupies physical property, it effectively destroys . . ." several existing property rights, including the right to occupy the space, the right to exclude others, the right of control over the property occupied, and the right to effectively transfer that property. *Id.* at 434–35.

The United States and Texas Constitutions protect their citizens from results such as these. They provide every citizen of Texas the right to have just and adequate compensation for property taken by the government. The right of property is a natural, inherent, and inalienable right, not of grace from the Legislature, but flowing from the constitution, and in the United States, it is fundamental. *Spann*, 235 S.W. at 515; *State ex rel. Pan American Prod. Co. v. Texas City*, 295 S.W.2d 697, 704 (Tex. Civ. App—Galveston 1956), *aff'd,* 303 S.W.2d 780. This right antedates the constitution and is guaranteed by it. This Court has stated:

> The demands of progress are inexorable and public improvements should not be discouraged; *but just as compelling is the principle that private property rights are to be protected with all citizens sharing equally in the cost of progress* . . . .

DuPuy v. City of Waco, 396 S.W.2d 103, 106 (Tex. 1965) (quoting in part from *Brewster v. City of Forney*, 223 S.W. 175 (Tex. Comm. App. 1920)).

In the absence of the common law trespass protection sought by FPL, the permit authorizations here are confiscatory as to FPL, and since authorized by state action, are an unconstitutional taking.

PRAYER

TFB requests this Court to affirm the Beaumont Court of Appeals' recognition of a subsurface trespass cause of action in the case of wastewater injection as opposed to other injections directly used in oil and gas recovery (e.g. fracing).

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that a true and correct copy of Texas Farm Bureau's Amicus Brief was served by certified mail, return receipt requested, on counsel for all parties this 2nd day of January, 2014.

/s/ Andy McSwain
ANDY McSWAIN

CERTIFICATE OF COMPLIANCE

The undersigned hereby certifies that on this date that the Word 2010 word count for this document pursuant to Misc. Docket No. 12-9190, is **4321** words, and is presented in Arial 14 point font, except for footnotes, which are presented in Arial 12 point font. Otherwise, counsel believes this document is in compliance with the Order of the Court with respect to length, presentation and electronic filing.

Dated: January 2, 2014.

/s/ Andy McSwain
Andy McSwain

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