THE OBLIGATION TO RESTORE OIL AND GAS PROPERTIES: THE VIEW FROM LOUISIANA AND OTHER STATES

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Introduction

The convergence— and conflict— between the goals of a healthy oil and gas industry and environmental protection is demonstrated by the recent proliferation of oilfield site restoration litigation. This article considers the mineral lessee's obligation to restore in Louisiana and other states, certain limitations on who may assert claims for restoration and when they may be asserted, and the applicable cleanup standard.

What Restoration Obligations Are Owed?

The Analysis in Louisiana

The Louisiana Supreme Court has issued two landmark decisions since February 2003 addressing a lessee's obligation to restore leased property. The decisions clarify that the legal analysis depends on whether the claim is based on contract, the Louisiana Mineral Code or tort.

Corbello v. Iowa Production, 2002-C-0826 (La. Feb. 25, 2003), 850 So.2d 686, involved a surface lease that required the lessee to "reasonably restore the premises as nearly as possible" to its condition at the start of the lease. The court affirmed a judgment based on breach of the contractual obligation, and awarded the landowners $28 million for injury to an aquifer near the leased premises, plus $5 million for damage to the surface itself—*the total award being more than 300 times the fair market value of the property*. It reasoned that the contract constitutes the law between the parties, and the contract did not limit the lessee's liability for reasonable restoration to the market value of the property. The court also concluded that it had no authority to modify a damage award in a breach of contract case to require the money be spent on restoration absent legislation mandating such a result, and that "[p]rivate landowners in Louisiana have no duty to seek relief from an administrative agency before filing suit against an oil company." *Id.* at 701.

Predictably, Louisiana courts have applied the same rules where restoration obligations are contained in mineral leases. *See Hazelwood Farm, Inc. v. Liberty Oil and Gas Corp.*, 2002-266 (La. App. 3d Cir. Apr. 2, 2003), 844 So.2d 380, *writ denied*, 2003-1585 and 2003-1624 (La. Oct. 31, 2003), 857 So.2d 476. And although post-*Corbello* legislation mandates that damages awarded for contamination of "usable ground water" must be paid into the court registry and expended on remediation, LA. REV. STAT. 30:2015.1 (2003 La. Acts No. 1166), its efficacy is limited by the fact that damages awarded for cleanup of soil, surface water or "non-usable" ground water must still be paid directly to a successful plaintiff, without any restoration requirement.

Terrebonne Parish School Board v. Castex Energy, Inc., 2004-C-0968 (La. Jan. 19, 2005), 893 So.2d 789, addressed whether a mineral lessee had an implied duty under the Louisiana Mineral Code to restore the surface of the leased premises *absent a contractual obligation* to do so. The court held that "in the absence of an express lease provision, article 122 [of the Mineral Code] does not impose an implied duty to restore the surface to its original, pre-lease condition absent proof that the lessee has exercised his rights under the lease unreasonably or excessively." *Id.* at 801. Thus, Louisiana plaintiffs face a heavier burden of proof if there is no contractual obligation to restore.

A third analysis applies if the claim is in tort. Louisiana courts have held that in tort cases, if the restoration costs are "disproportionate to the value of the property

or economically wasteful," the damages are limited to the difference in the value of the property before and after the harm, *unless* there is a reason personal to the owner for restoring the property to its original condition or there is a reason to believe the owner will, in fact, make the repairs. *See Grefer v. Alpha Technical*, 2002-1237 (La. App. 4th Cir. May16, 2005), 901 So.2d 1117, 1137, 1141-42, *citing Roman Catholic Church of the Archdiocese of New Orleans v. Louisiana Gas Service Company*, 92-C-0071 (La. May 24, 1993), 618 So.2d 874.

Different Approaches in Texas, Oklahoma and Mississippi

Texas is a far less plaintiff-friendly forum than Louisiana for recovery of restoration damages. An owner seeking compensation for surface damage must prove either (1) that the operator failed to use reasonable care in conducting its exploration and extraction activities, or (2) under what is known as the "accommodation doctrine," that the operator could have accomplished its ends through reasonable alternative means without damaging the land. *See Tarrant County Water Control & Improvement Dist. v. Haupt, Inc.*, 854 S.W.2d 909, 911 (Tex. 1993). Damages are classified as either temporary or permanent, but in either case they are limited to no more than the diminution in the fair market value of the property. *See Mieth v. Ranchquest*, No. 01-02-00461-CV, 2005 WL 615594, at *4 (Tex. App. – Houston Mar. 17, 2005). *Corbello*-type damages therefore do not appear possible.

Oklahoma is similar to Texas in that damages to land are classified as either temporary or permanent, but in either event damages are limited to the reduction in the land's fair market value. *Schneberger v. Apache Corp.*, 890 P.2d 847, 853 (Okla. 1994). In Oklahoma, however, the Surface Damages Act (SDA), 52 Ok. St. § 318.2 *et seq*., requires the lessee, before entering the leased premises, to post security to cover surface damage that may be caused by future operations. While the SDA does not bar a landowner from subsequently bringing a tort action for pollution damages, s*ee Ward Petroleum Corp. v. Stewart*, 64 P.3d 1113 (Okla. 2003), *Corbello*-type awards still are not likely to occur given that damages are limited to diminution in fair market value.

Mississippi landowners are required, under *Chevron, U.S.A., Inc. v. Smith*, 844 So.2d 1145 (Miss. 2002), to exhaust their administrative remedies before the state's Oil and Gas Board before filing suit. Through this decision, the Mississippi Supreme Court appears to have imposed a formidable roadblock to *Corbello*-type damage awards, since restoration cases are unlikely to ever reach a jury.

Who May Sue? And When?

Under state law, a buyer of contaminated oil and gas properties may not have the right to assert a restoration claim absent an assignment of the claim from the seller. For example, in January 2005, a federal district court in Louisiana dismissed a restoration suit on grounds that the plaintiff landowner, which purchased the property *after* the alleged oil and gas contamination occurred, lacked standing to sue for its restoration. *See Frank C. Minvielle, L.L.C. v. IMC Global Operations, Inc.*, 2004 WL 3418335 (W.D. La. Oct. 19, 1904), *motion to vacate denied* (Jan. 12, 2005); c*f. Exxon Corp. v. Pluff*, 94 S.W.3d 22 (Tex. App. Tyler 2002), *pet. denied*.

Another issue is whether restoration claims may be asserted while mineral operations are ongoing. At least one restoration suit has been dismissed as premature because the mineral lease had not yet terminated. *See Grand Lake Hunting Club v. BP America Production Co.*, Docket No. 2002-4112, 12th Judicial District Court, Avoyelles Parish, Louisiana, Judgment on Exceptions dated Nov. 6, 2003. A Louisiana appellate court, however, recently reversed a similar dismissal, holding that claims seeking damages and costs of restoration based on negligence, breach of contract, exemplary damages, trespass and maritime tort may be brought despite continuing operations on a portion of the property. *Dore Energy Corp. v. Carter-Langham, Inc.*, 04-1373 (La. App. 3d Cir. May 4, 2005), 901 So.2d 1238.

What is the Cleanup Standard?

An emerging issue in oilfield restoration litigation concerns the cleanup standard. The resolution will likely hinge on which regulatory agency has jurisdiction over the cleanup. Many regulators and members of the regulated community have generally understood that the Louisiana Department of Natural Resources (LDNR) has jurisdiction over the operation and cleanup of oil and gas properties, while the Louisiana Department of Environmental Quality (LDEQ) has jurisdiction over the cleanup of other types of contamination and over oilfield wastes that are released off-site. Louisiana plaintiffs are challenging this division of authority, apparently seeking to apply the more stringent LDEQ cleanup standards to the restoration of oil and gas properties, and recent court decisions support their efforts.

For example, in *Dore Energy Corp. v. Bohlinger*, 2003-2768 (La. App. 1st Cir. Oct. 29, 2004), 889 So.2d 295, *rehearing denied* (Dec. 29, 2004), the court ordered LDEQ to review an oilfield site remediation plan submitted by the landowner in order to set up a restoration cost recovery claim under Chapter 12 of the Louisiana Environmental Quality Act (LEQA), La. R.S. 30:2271, *et seq.*—sometimes referred to as Louisiana's "mini-Superfund" statute—which is administered by LDEQ. The court approved LDEQ's referral of the plan to LDNR for review, but concluded that ultimate responsibility for approving or disapproving the plan remained with LDEQ.

Moreover, two Louisiana federal courts recently remanded cases based on the oil company defendants' failure to show that the landowners had no possibility of recovering from LDEQ on grounds that the agency negligently failed to inspect oilfield production facilities. In so ruling, the courts at least implicitly rejected the argument that LDNR, in lieu of LDEQ, has jurisdiction over oilfield wastes. *See Sarpy v. Energen Resources*, 2005 WL 2036880, 2005 U.S. Dist. LEXIS 17820 (E.D. La. July 25, 2005); *Hebert v. Energen Resources Corp.*, No. 05-541 (W.D. La. June 27, 2005).

Conclusion

Oilfield site restoration litigation will undoubtedly continue to be a battleground between landowners and the oil and gas industry. It is hoped that the legislatures, agencies and courts grappling with these issues will be able to strike a balance that promotes the vitality of the industry as well as environmental protection.

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