Private Actions Seeking Remediation or Restoration* Damages: Who Ensures the Cleanup Actually Occurs?

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I. INTRODUCTION

Lawsuits alleging environmental damages to real property often seek damages for the remediation or restoration of that property to its precontaminated state.[1] These actions may be founded upon a breach of an oil and gas lease that requires restoration of the surface at the

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* AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE (4th ed. 2000). "Remediation" is defined as the act or process of correcting a fault or deficiency, while "restoration" is defined as the act of being restored. Restored entails bringing something back to an original condition. *Id.* Throughout this Comment, both terms are used interchangeably.

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1. *See, e.g.*, Corbello v. Iowa Prod., 850 So. 2d 686, 691 (2003).

expiration of the term, a chemical plant explosion depositing hazardous particulate matter on private property, or a leaking underground storage tank that causes the migration of hydrocarbons onto adjacent property. In land remediation or restoration actions, the plaintiffs often advance purely private law claims, as opposed to public law claims or a combination of the two, in order to avoid the more strenuous procedural requirements found in public law causes of action.[2] The private law actions most often relied upon include trespass, nuisance, and breach of contract. In public law cases, governmental agencies ensure that cleanup takes place; however, in private law cases, there is no guarantee that damages awarded to remediate or restore contaminated property will ever be used for cleanup.

This Comment focuses on the aftermath of a judgment of liability for the remediation or restoration of property. It begins by briefly examining the public law—private law dichotomy and it discusses whether such a distinction is appropriate or necessary in the environmental contamination context.[3] The Comment then considers the various tort remedies available in private, environmental contamination actions. It next analyzes two recent cases dealing with restoration claims at the expiration of a lease. The Comment concludes by discussing whether some form of primary jurisdiction should compel state agencies to oversee remediation or restoration activity and examines Louisiana's recent attempt to effectuate such a system. This Comment does not advocate for the abolishment of private law remedies; it supports a stronger relationship between courts and administrative bodies to ensure that remediation occurs.[4]

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2. *See, e.g.*, CERCLA § 310, 42 U.S.C. § 9659 (1995) (requiring, among other things, compliance with the National Contingency Plan, public participation, and notice to alleged wrongdoers).

3. "Environmental contamination" as used in this Comment refers specifically to the environmental contamination of property.

4. For an interesting discourse on the virtues of environmental regulation versus tort law, see Keith N. Hylton, *When Should We Prefer Tort Law to Environmental Regulation?*, 41 WASHBURN L.J. 515 (2002), and Christopher H. Schroeder, *Lost in the Translation: What Environmental Regulation Does That Tort Cannot Duplicate*, 41 WASHBURN L.J. 583 (2002). *See also* Kenneth S. Abraham, *The Relation Between Civil Liability and Environmental Regulation: An Analytical Overview*, 41 WASHBURN L.J. 379 (2002).

II. IS ENVIRONMENTAL LAW PUBLIC OR PRIVATE? THE PUBLIC LAW—PRIVATE LAW DISTINCTION AND ITS NONEXISTENCE WITH RESPECT TO ENVIRONMENTAL CONTAMINATION ISSUES[5]

A discussion of whether remediation damages recovered through private law should be used as designated must begin with an examination of both the public and private law designation and the interconnectedness between the two in environmental contamination cases. Although a thorough analysis of the intricacies and contours of the public law—private law dichotomy is beyond the scope of this Comment, a generalized discussion of the traditional split is necessary to understand why such a dichotomy should be nonexistent in regards to the need for remediation or restoration.

Public law regimes entail action by or against government agents, while private law regimes concern suits between citizens.[6] Public law is defined as that "body of law dealing with the relations between private individuals and the government, and with the structure and operation of the government itself."[7] Public law encompasses specific areas such as constitutional law, administrative law, criminal law, and most environmental law.[8] The major concern with public law is the "effectuation of the public interest."[9] Private law, on the other hand, is used to describe that "body of law dealing with private persons and their property and relationships."[10] As Professor McConnaughay describes it, "public law concerns public harm, private law, private harms."[11]

Historically, environmental harms were addressed through private actions by the affected person against the polluter.[12] These actions traditionally relied on theories of nuisance or trespass.[13] Such private

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5. *See generally* 41 WASHBURN L.J. (2002) for a more thorough analysis of this paradigm as it relates to environmental law.

6. Hylton, *supra* note 4, at 515.

7. BLACK'S LAW DICTIONARY 1244 (7th ed. 1999).

8. *Id.*

9. John Henry Merryman, *The Public Law-Private Law Distinction in European and American Law*, 17 J. PUB. L. 3, 12 (1968).

10. BLACK'S LAW DICTIONARY, *supra* note 7, at 1214.

11. Philip J. McConnaughay, *Reviving the "Public Law Taboo" in International Conflict of Laws*, 35 STAN. J. INT'L L. 255, 301-02 (1999) (citing Randy E. Barnett, *Foreword* to *Four Senses of the Public Law-Private Law Distinction*, 9 HARV. J.L. & PUB. POL'Y 267, 268 (1994)); JEFFRIE G. MURPHY & JULES L. COLEMAN, THE PHILOSOPHY OF LAW: AN INTRODUCTION TO JURISPRUDENCE 145 (1984).

12. *See, e.g.*, Madison v. Ducktown Sulphur, Copper & Iron Co., 83 S.W. 658, 659 (Tenn. 1904) (involving nuisance claims against the operator of a copper smelting facility to enjoin further operation of the facility).

13. *Id.*

actions for environmental harms remained the norm for much of the first half of the twentieth century.[14] However, that began to change; Rachel Carson's book, *Silent Spring*, on the harmful effects of chemical contamination started a movement that revolutionized environmental law.[15] Subsequently, a new era of environmental consciousness, public policy, and full-scale environmental regulation began.[16] This shift towards regulation and the resulting statutes removed or preempted the traditional private law actions that had previously dominated environmental contamination cases. Thus, environmental law largely became public law.

The major federal statutes, which initially offered hope for the recovery of damages for remediation outside of the traditional tort realm, included the Resource Conservation and Recovery Act (RCRA),[17] the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA or Superfund),[18] the Clean Water Act,[19] the Clean Air Act,[20] and the Oil Pollution Act of 1990.[21] Various state analogues to the federal statutes also offered the possibility of recovery under state law.[22] However, case law and administrative review has created or reinforced barriers to the recovery of damages when proceeding under these public law statutes.[23] Consequently, traditional common law causes of action such as negligence, strict liability, trespass, and nuisance remain the preferred theories of recovery for restoration and remediation claims.[24]

Some commentators argue that private, common law rights of action provide inadequate means of ensuring environmental safety and that environmental regulation, preferably at the federal level, must fill the

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14. Early statutes, such as the River and Harbors Act of 1899 (later named the Refuse Act), regulated environmental harm to some degree, but the environmental regulation mentioned here refers to the full-scale environmental regulation of air, water, and waste.

15. RACHEL CARSON, SILENT SPRING (1962).

16. Alyson C. Flournoy, *Building an Environmental Ethic from the Ground Up*, 37 U.C. DAVIS L. REV. 53, 56 (2003).

17. 42 U.S.C. §§ 6901-6992k (2000).

18. *Id.* §§ 9601-9675.

19. 33 U.S.C.§§ 1251-1387 (2000).

20. 42 U.S.C. §§ 7401-7671q.

21. 33 U.S.C. §§ 2701-2761.

22. *See, e.g.*, LA. REV. STAT. ANN. §§ 30.2271-30.2290 (2000), otherwise known as the Louisiana Baby Superfund Program.

23. Randall G. Vickery & Robert M. Baratta, Jr., *Back to the Legal Future: Environmental Claims Come Full Circle As Plaintiffs Return to the Common Law for Relief*, NAT'L L.J., June 10, 1996, at C1.

24. *Id.*

void.[25] However, while these private law actions may be inadequate for environmental protection, they are ingrained in the fabric of the American legal tradition and are not likely to disappear from the landscape.[26] The meaning of environmental harm has changed over time, but the application of the appropriate principles by the judiciary to fully effectuate the shift from *ex post* protection of private rights under the common law to the *ex ante* prevention of environmental destruction by public law regulation has been slow.[27] This is precisely the loophole which knowledgeable plaintiffs have exploited in their quest for remediation damages.

Recovery for remediation damages through private law actions is an *ex post* attempt to correct a past wrong. However, remediation of contaminated land can also constitute a preventative action. By remediating contaminated property, a landowner and/or a polluter prevents the contamination from persisting in the environment and posing either an immediate or latent danger to the public at large and subsequent purchasers of the contaminated land. Further, the remediation of the contaminated property prevents the migration of the contamination through hydrological pathways onto the property of neighboring landowners. Thus, while the private law actions currently used to recover damages are based on the traditional belief that the recovery is for *ex post* harm to an individual's property, a public law goal of protection and prevention from environmental harm may be served by severing the distinction between public and private law and recognizing that environmental contamination of private land affects both private individuals and the public at large.

III. THE RECOVERY OF REMEDIATION DAMAGES: PRIVATE TORT REMEDIES TRADITIONALLY AVAILABLE FOR CONTAMINATION OF PROPERTY

Section 929 of the Restatement (Second) of Torts provides that a person entitled to damages for harm to their land (including environmental contamination), when the harm does not totally devalue the property, is due "the difference between the value of the land before the harm and the value after the harm, or at [the owner's] election in an

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25. *See, e.g.*, ROBERT V. PERCIVAL ET AL., ENVIRONMENTAL REGULATION: LAW, SCIENCE, AND POLICY 104-11 (2d ed. 1996).

26. *See* Robert V. Percival, *"Greening" the Constitution—Harmonizing Environmental and Constitutional Values*, 32 ENVTL. L. 809, 869 (2002).

27. *Id.*

appropriate case, the cost of restoration that has been or may be reasonably incurred."[28] The comments to the section provide that a *reasonable* cost of replacement (restoration or remediation) to the original condition is generally allowable, but only if the replacement cost is not disproportionate to the loss of value.[29] These principles represent the traditional cost-benefit/economic-concern underpinnings of tort law.[30] However, tethering restoration costs to the diminution in value does not fully recognize the extent of the damage.[31]

There are several factors, apparent from the text of the Restatement and highlighted by case law, that should be considered when determining whether remediation damages, as opposed to recovery of the diminution in property value, are recoverable in tort suits.[32] These factors include a preference to award the diminution in value as damages, whether the contamination results in a temporary or permanent harm, caps on recovery, use of the property for "personal reasons," whether damages for restoration are reasonable in regards to the value lost, the landowner's intention or obligation to actually remediate and using restoration damages as a punitive measure.[33]

The general rule is to award damages based on the diminution in property value, except in an appropriate case.[34] Whether the specific facts of a claim make it an "appropriate case" is subject to judicial discretion.[35] The Colorado Supreme Court has held that when the contamination is to a private residence, the case is appropriate for awarding restoration damages, but only if the evidence can demonstrate that the market value would be inadequate compensation when taking into account the personal nature of the harmed property.[36] A corollary to this principle is the cap established by some courts for landowners seeking recovery for the remediation of environmental contamination on

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28. RESTATEMENT (SECOND) OF TORTS § 929 (1979).

29. *Id.* cmt. *b.* (emphasis added).

30. *See generally* United States v. Carroll Towing, Co., 159 F.2d 169 (2d Cir. 1947) (discussing Judge Learned Hand's analysis that an action is unreasonable only if the costs to prevent the injury are less than the cost of the injury discounted by the probability of the injury occurring).

31. DAN B. DOBBS, LAW OF REMEDIES: DAMAGES—EQUITY—RESTITUTION 502 (2d ed. 1993).

32. *See* James R. Cox, *Reforming the Law Applicable to the Award of Restoration Damages as a Remedy for Environmental Torts*, 20 PACE ENVTL. L. REV. 777, 782-802 (2003).

33. *Id.*

34. *Id.* at 782.

35. *Id.*

36. *Id.* at 782-83 (citing Bd. of County Comm'rs of Weld County v. Slovek, 723 P.2d 1309 (Colo. 1986)).

their property.[37] This cap is the diminution in value of the property when the cost to restore it would be disproportionate.[38] However, some courts allow for an exception to the cap when the landowner has personal reasons favoring restoration or if a reasonable belief exists that the plaintiff will actually remediate.[39] There is no mention of a requirement to remediate, only a belief that it will occur, for remediation damages to be awarded.

The requirement that a landowner seeking remediation must have a personal reason justifying such relief before remediation damages can be awarded seems to exist because it provides a reasonable belief that the property will actually be restored.[40] Personal use holdings have focused on the owner's recreational use of the property, whether the owner cared for the land and undertook remedial activities on his own, any aesthetic and historical interest in the property, and whether the owner intended to commercially develop the property.[41] However, as the commentator James Cox recognizes, focusing entirely upon personal reasons to the landowner when deciding whether to award restoration costs neglects overriding public policy concerns such as the "desirability of protecting unknowing members of the public and preserving property for future generations."[42]

Another factor to be considered is the distinction between temporary and permanent damages.[43] Restoration damages may be deemed appropriate if the damages are temporary and subject to restoration.[44] However, contamination to land can always be deemed temporary because pollutants will eventually degrade and break down into less harmful agents.[45] Cox advocates a separation of contamination

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37. *Id.* at 789-92; *see, e.g.*, Roman Catholic Church of the Archdiocese of New Orleans v. La. Gas Servicing Co., 618 So. 2d 874, 879-80 (La. 1993).

38. *Roman Catholic Church*, 618 So. 2d at 879.

39. *Id.*

40. Cox, *supra* note 32, at 792-94.

41. *See, e.g.*, St. Martin v. Mobil Exploration & Producing U.S., 224 F.3d 402, 408-11 (5th Cir. 2000) (holding that landowner who hunted and fished on property, lived adjacent to property, and worked with his own labor towards restoring property had a personal reason to want the property remediated); Keitges v. VanDermeulen, 483 N.W.2d 137, 143 (Neb. 1992) (holding that where plaintiff intended to use the property recreationally, remediation damages may be recovered); Heninger v. Dunn, 162 Cal. Rptr. 104, 108-09 (Cal. Ct. App. 1980) (recognizing an aesthetic interest in ornamental shrubbery and trees destroyed by trespass, but refusing to award restoration damages because cost of restoration was disproportionate to value).

42. Cox, *supra* note 32, at 793-94.

43. *Id.* at 784.

44. *Id.*

45. *Id.*

into two components: the remedial component and the nonremedial component, and compensating for restoration costs for the remedial component and diminution costs for the nonremedial component.[46] This split is based upon the level of contamination; contamination above regulatory levels is deemed remediable and that below regulatory action levels is deemed nonremedial.[47] While this distinction relies on public law for standards of cleanliness, it fails to take into account the public law goal of actually achieving remediation because there would still be no requirement that the property actually be restored. Further, current remediation technology can achieve reductions in the levels of contamination to at least background levels.[48] Ultimately all contamination to land is temporary because technological advancements will render virtually all contamination remediable. Therefore, the questions that must be asked are what price is society willing to pay and how clean is clean?

The final noteworthy observation made by Cox is that "the principal impediment to an affirmative rule establishing the full cost of restoration as the default measure of damages in cases involving damage to property is the concern that the plaintiff will not actually use the award to effectuate cleanup."[49] The general concern is that an award of remediation costs, in excess of the diminution in value, provides a windfall to the property owner and results in an inefficient use of economic resources.[50] However, as a Wisconsin court tacitly recognized, economic inefficiency is not all that goes into a determination of whether remediation damages are compensable: "The vitally important work of protecting the life sustaining forces around us, collectively referred to as the environment, is basic and fundamental to our survival."[51] Thus, in Wisconsin, landowners with property contaminated by hazardous substances are legally obligated to remediate the contamination.[52] This legal obligation, although not contingent upon whether the appropriate state agency takes action, is not incurred unless and until the

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46. *Id.* at 788.

47. *Id.*

48. Background levels are those levels at which the contaminant is found on similarly situated property unaffected by the pollution. *See* Cary Coglianese & Gary E. Marchant, *Shifting Sands: The Limits of Science in Setting Risk Standards*, 152 U. PA. L. REV. 1255, 1290 (2004).

49. Cox, *supra* note 32, at 798.

50. *Cf.* Nischke v. Farmers & Merchs. Bank & Trust, 522 N.W.2d 542, 552 (Wis. Ct. App. 1994) (holding that a landowner may recover restoration damages even if such damages "exceed the diminution in fair market value").

51. *Id.* at 551.

52. *See* WIS. ADMIN. CODE § 144.76 (1985).

"understaffed and underfunded"[53] state agency takes action against the landowner. Cox's concern is that "if [a] plaintiff is not required by an enforcement action, or by a third-party civil action brought by neighboring property owners, to actually use the award to clean up the property, how are the public's interests, and those of future property owners, protected?"[54] Ostensibly they are not, which is why Cox recommends the establishment of a constructive trust for the benefit of the property and all present, future, and adjoining landowners and the public as a whole.[55]

The foregoing discussion relating to the tort remedies available for restoration damages in the context of environmental contamination is indicative of some of the requirements that plaintiffs in a land restoration case must overcome. It also illustrates that while tort is an adequate theory of recovery for purely personal damages, tort does not adequately address the effects of land contamination on society in general.

IV. THE RECOVERY OF REMEDIATION DAMAGES: BREACH OF CONTRACT RESTORATION CLAIMS AT THE EXPIRATION OF A LEASE

The obligations of a lessee and the duties of a lessor incumbent upon the lease instrument and breaches to such an agreement sound in contract and not in tort.[56] Thus, the available remedies for breach of contract are different than those for tort claims. This discussion focuses on a lessee's duty to remediate contamination so that the property transfers back to its pre-lease state at the expiration of the lease. This issue most often arises in cases dealing with oil and gas leases. If an oil and gas lease agreement does not expressly state that the property must be restored to its pre-lease condition at the lease's expiration, whether such a duty is implied depends on the laws of the state in which the property is situated.[57] The determination of whether and in what states an implied duty to restore exists is beyond the scope of this Comment. This Comment focuses on those cases in which such a duty has been found or

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53. Steven J. Levine, *The Ongoing Friction Between Site Remediation and Tort Litigation*, 17-SPG NAT. RES. & ENV'T 216 (2003).

54. Cox, *supra* note 32, at 800.

55. *Id.*

56. *See* Exxon Corp. v. Pluff, 94 S.W.3d 22, 29 (Tex. App. 2002).

57. *Compare* Bonds v. Sanchez-O'Brien Oil & Gas Co., 715 S.W.2d 444 (Ark. 1986) (holding that restoration of surface to pre-lease condition will be implied in Arkansas), *with Exxon Corp.*, 94 S.W.3d 22 (citing Warren Petroleum Corp. v. Monzingo, 304 S.W.2d 362 (Tex. 1957), to provide Texas's most recent affirmation that an obligation to restore the surface will not be implied if not expressly provided for in the lease).

alluded to, but where the landowner bears no reciprocal duty to actually use the recovered monies for remediation.[58] A look at the competing recent case law of Louisiana and Mississippi provides two different rationales that exemplify the concerns of most states on this issue.

A. A Private Landowner Has a Right to Seek Judicial Relief but Has No Duty to Remediate

The state of Louisiana has traditionally maintained a private landowner's right to recover remediation damages while simultaneously recognizing that the landowner could abscond with the funds and never effectuate a cleanup.[59] In 1991, Justice Lemmon of the Louisiana Supreme Court expressed concerns with this system in his concurring opinion in *Magnolia Coal Terminal v. Phillips Oil Co.*:

> The majority apparently awards damages in the amount of $2,100,000 for defendant's breach of its duty to clean the oil contamination . . . . The most difficult [aspect of] affirming the part of the trial court's judgment which awards damages for failure to clean up the oil contamination is that the landowner receives a money judgment with no restriction on the use of the money. Plaintiff is apparently free to use this money for purposes other than restoring the land, and the public is thus left unprotected.[60]

This concern was more recently addressed in *Corbello v. Iowa Production*.[61] In *Corbello*, restoration damages were awarded to the plaintiff landowner as a result of the lower court's finding that Shell Oil Co. (one of the defendants) breached its mineral lease agreement by failing to return the property in the condition it was received.[62] The decision was appealed up to the Louisiana Supreme Court on the issue of whether the restoration damages awarded to the plaintiffs were appropriate.[63] Shell argued that the plaintiffs were effectively recovering for a public injury and that they had "no legal duty to use the award to restore the property."[64] Shell claimed that the "public will go unprotected

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58. For a more thorough discussion of the duty to restore the surface in oil and gas lease expiration or abandonment cases, see T. Craig Jones, *Implied Covenant to Restore Surface—Judicial 'Wildcatting' Yields Valuable Right for Surface Owners:* Bonds v. Sanchez-O'Brien Oil & Gas Co., 41 ARK. L. REV. 173 (1988), and Christopher M. Alspach, *Surface Use by the Mineral Owner: How Much Accommodation Is Required Under Current Oil and Gas Law?*, 55 OKLA. L. REV. 89 (2002).

59. *See* Corbello v. Iowa Prod., 850 So. 2d 686, 692-701 (La. 2003).

60. 576 So. 2d 475, 486 (La. 1991).

61. 850 So. 2d at 692-701.

62. *Id.* at 690-92.

63. *Id.*

64. *Id.* at 698.

if private plaintiffs are allowed to recover for strictly public injuries,"[65] because a Louisiana Statute[66] prevents a defendant from being charged twice with the cost of restoration; once by a private plaintiff who did not remediate and then again by the state who would remediate.[67]

The court began its analysis by examining recent legislation pertaining to oil field contamination and noted the legislature's pronouncement that "a present and future benefit to the environment, public health, safety, and welfare would be to clean up, close, and restore oilfield sites[,]" and that "proper and timely clean up, closures, and restoration of orphaned oilfield sites must be assured."[68] However, the court recognized that despite those intentions, the legislature was "careful not to take away a private landowner's right to seek redress against oil companies"; the legislature did provide for credit to be given to an oil company for any damages assessed and paid for restoration.[69] The court then distinguished a Mississippi case[70] holding that landowners seeking restoration damages for contamination by oil and gas operations must first exhaust any possible administrative relief.[71] The Louisiana Supreme Court explained that private landowners in Louisiana have no duty to seek administrative relief for contamination damages and that such damages are within the conventional knowledge and expertise of the trier of fact.[72]

Finally, the court recognized the "two opposing public policy concerns" bearing on the case.[73] First, the general public is put at risk if the plaintiffs do not use their award of damages for remediation and hazardous substances later leech into the drinking water supply.[74] Secondly, the court noted that, without private plaintiff suits against oil companies for cleanup costs, the burden of bringing such suits would fall upon "understaffed and underfunded state agencies to oppose the oil companies."[75] In balancing these competing interests, the court looked at

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65. *Id.*
66. LA. REV. STAT. ANN. § 30:89.1 (2004).
67. *Corbello*, 850 So. 2d at 698.
68. *Id.* at 699 (citing LA. REV. STAT. ANN. § 30:81(A)(2)). It should also be noted that, presumably because of the result of *Corbello*, the Louisiana Legislature enacted LA. REV. STAT. ANN. § 30:2015.1, which will be discussed in relevant part later in this Comment.
69. *Id.*
70. Chevron U.S.A., Inc. v. Smith, 844 So. 2d 1145 (Miss. 2003).
71. *Corbello*, 850 So. 2d at 701.
72. *Id.*
73. *Id.*
74. *Id.*
75. *Id.*

Shell's refusal to restore the property even after recommendations that it do so by its own experts and its seventy-year history of negligent operations in the field at issue.[76] The court acknowledged that it could not legally bind the plaintiffs to restore the land, but it still upheld the lower court's restoration award of $33 million.[77] The court affirmed the award because it believed that the plaintiffs might actually restore the property; it was confident Shell would not.[78] It is estimated that if the property is restored to its pre-lease value, it will be worth $108,000.[79]

B. To Ensure Remediation Actually Occurs, a Private Landowner Must First Seek Redress Through the Appropriate Administrative Body

Several states require a landowner damaged by oil and gas contamination on their property to seek administrative adjudication of his or her restoration claim. These states include Oklahoma (through the Oklahoma Corporate Commission)[80] and Mississippi (through the Oil and Gas Board).[81] The overriding concern in these states is not the protection of landowner rights to bring private suits for contamination; it is the protection of the general public from the inherent dangers of oil and gas production,[82] conservation of the environment, and reclamation of contaminated land.[83]

In *Chevron U.S.A., Inc. v. Smith*, the Mississippi Supreme Court held that contamination damage to property previously subject to an oil and gas lease must first be addressed by the Mississippi Oil and Gas Board before any claim can be brought in a court of law.[84] Specifically, the court stated that, landowners must first seek to have the property restored through the Mississippi Oil and Gas Board before the question of damages can be raised in a court of law.[85]

The dispute in *Chevron* involved property contaminated with naturally occurring radioactive material (NORM) as a result of the

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76. *Id.*
77. *Id.*
78. *Id.*
79. *Id.* at 693.
80. *See* OKLA. STAT. ANN. tit. 52, § 318.0-318.9 (1991).
81. *See* MISS. CODE ANN. § 53-1-17(l) (1999).
82. *See id.*
83. *See* Schneberger v. Apache Corp., 890 P.2d 847, 853 (Okla. 1994).
84. Chevron U.S.A., Inc. v. Smith, 844 So. 2d 1145, 1146 (Miss. 2003).
85. *Id.*

storage and disposal of produced water[86] in a one-acre facility on the property.[87] The property owners were retirees who intended to build a retirement getaway on the property.[88] They were aware of the oil and gas operations on the property at the time of their purchase.[89] Following a discussion of the relative position of the defendants in the case, the court noted that one of the defendants had offered to clean the property but was rebuffed by the plaintiff landowners.[90]

Relying on Mississippi precedent, the court reiterated that where "private plaintiffs are seeking clean up of oil production byproducts, the Oil and Gas Board 'remedy is adequate and should . . . [be] exhausted prior to filing a private suit.'"[91] The court further recognized that "[p]ollution resulting from operations like Chevron affects the entire population of Mississippi, and every citizen has an interest in seeing that violations . . . are enforced . . . [and] pollution clean up operations have been deemed the responsibility of the Oil and Gas Board."[92] Due to its specialized knowledge of the dangers of oil and gas contamination and the proper disposal methods of contaminated waste, the court noted that the Oil and Gas Board is "the best asset available in developing an effective disposal plan" and that "[t]he board is more suited than the average juror to understand the broad scope of the regulations and the factual scenarios presented by each case of environmental pollution."[93]

Throughout the opinion, the court focused on the protection of the "average Mississippian" from the dangers of environmental contamination.[94] The court worried that, with no legal authority to order the plaintiff to actually clean up the pollution, a decision in favor of the plaintiff would constitute a windfall because the court felt the plaintiff had no intention to remediate the property (as evidenced by the plaintiff's refusal to allow the defendants to clean up the land before trial).[95] The court concluded by stating that "[t]he citizens of [Mississippi] are better served by having an expert regulatory agency enforce the environmental statutes rather than waiting for the private citizen to bring individual

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86. *Id.* at 1147. "Produced water" is the term associated with the saltwater bought to the surface as a normal result of oil and gas production. *Id.*

87. *Id.* at 1146-47.

88. *Id.*

89. *Id.* at 1147.

90. *Id.*

91. *Id.* at 1148 (quoting Donald v. Amoco Prod. Co., 735 So. 2d 161, 177 (Miss. 1999)).

92. *Id.*

93. *Id.*

94. *Id.*

95. *Id.*

actions for damages and restoration, which are no guarantee that the pollution will be eradicated."[96] As recognized by the Mississippi Supreme Court, environmental contamination affects everyone, not just the owner of the contaminated land, and the remediation of contaminated sites is a public concern that should be overseen by governmental agencies.

The two competing views in Louisiana and Mississippi are in stark contrast to each other. The Louisiana court was more concerned with private landowner rights while the Mississippi court put the health and protection of the state's citizens ahead of landowner rights. However, in both states, a plaintiff landowner that recovers remediation damages for the breach of a contract is not required to use the award to restore the property. Louisiana courts apparently are content with this anomaly while Mississippi courts require that cleanup operations be addressed before any damages can be awarded.

V. IS SOME FORM OF QUASI-PRIMARY JURISDICTION THE ANSWER?

Primary jurisdiction is a prudential doctrine that allows a court to transfer an issue to an appropriate administrative agency for resolution.[97] Issues of primary jurisdiction occur when a claim is filed in a court with subject matter jurisdiction, but where an agency has statutory authority to resolve the issue as well.[98] Primary jurisdiction does not divest a court of its subject matter jurisdiction. Instead, it is a doctrine of "judicial deference and discretion" that allows agencies and courts to work towards the same goal in an orderly and sensible manner.[99] Under the primary jurisdiction doctrine, courts retain the ability to issue a final ruling on the issue based on, and in conjunction with, the agency's recommendation.[100] However, for primary jurisdiction to be invoked, the agency must have statutory authority to treat the issue being deferred.[101] More precisely,

> [P]rimary jurisdiction . . . applies where a claim is originally cognizable in the courts, and comes into play *whenever enforcement of the claim requires the resolution of issues* which, under a regulatory scheme, have been placed within the special competence of an administrative body; in

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96. *Id.* at 1149.

97. *See* Michael Penney, *Application of the Primary Jurisdiction Doctrine to Clean Air Act Citizen Suits*, 29 B.C. ENVTL. AFF. L. REV. 399, 399 (2002).

98. *Id.* at 400-01.

99. *See* Travelers Ins. Co. v. Detroit Edison Co., 631 N.W.2d 733, 737 (Mich. 2001).

100. Penney, *supra* note 97, at 401.

101. *See Travelers Ins. Co.*, 631 N.W.2d at 740-41.

> such a case the judicial process is suspended pending referral of such issues to the administrative body for its views.[102]

Claims in tort usually do not implicate the primary jurisdiction doctrine because such claims are generally not dependent upon a regulatory scheme.[103] Therefore, exclusive reliance on the primary jurisdiction doctrine to ensure that remediation actually occurs would be fruitless. Apparently recognizing this limitation, several states have enacted statutory schemes to ensure that remediation takes place. Among these states are Wisconsin,[104] Mississippi,[105] and Oklahoma.[106] The appropriate agency in each of the above states is recognized as having specialized experience and knowledge in land remediation and being capable of balancing the public and private interest. In Oklahoma, a plaintiff is not prevented from claiming damages in a court under the Surface Damages Act, but can only recover for the lesser of remediation costs or diminution in value; the Oklahoma Corporate Commission retains control over the remediation of the property and ensures that the property is actually cleaned.[107] The costs of remediation are assessed against the polluter, but "in no event will the surface . . . owner collect damages in excess of the fair market value of the land."[108] This system "attempts to resolve in as fair a manner as possible the inequities inherent in a situation regarding two competing interests."[109]

Partly because of the limitation on the use of the primary jurisdiction doctrine in tort actions, and because of the need to protect, conserve, and replenish the natural resources of the state, the Louisiana legislature recently enacted a statutory provision to try and ensure that contamination affecting groundwater sources is remediated.[110]

This statute reads, in relevant part:

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102. *Id.* at 741.

103. *See* Ameritech Mich. v. Detroit Edison Co., No. 237856, 2004 WL 134023, at *1 (Mich. Ct. App. Jan. 27, 2004).

104. *See* Nischke v. Farmers & Merchs. Bank & Trust, 522 N.W.2d 542 (Wis. Ct. App. 1994).

105. *See* MISS. CODE ANN. § 53-1-17(l) (1999).

106. *See* OKLA. STAT. ANN. tit. 52, § 318.0-318.9 (1991).

107. Schneberger v. Apache Corp., 890 P.2d 847, 855 (Okla. 1994).

108. Gary Linn Evans, *Texas Landowners Strike Water—Surface Estate Remediation and Legislatively Enhanced Liability in the Oil Patch—A Proposal for Optimum Protection of Groundwater Resources from Oil and Gas Exploration and Production in Texas*, 37 S. TEX. L. REV. 477, 478 (1996).

109. *Schneberger*, 890 P.2d at 852.

110. LA. REV. STAT. ANN. § 30:2015.1.B (2003).

> [U]pon the filing of any litigation, action, or pleading by any plaintiff in the principal demand, or his otherwise making a judicial demand which includes a claim to recover damages for the evaluation and remediation of any contamination or pollution that is alleged to impact or threaten usable groundwater,[111] such plaintiff filing same shall provide written notice by certified mail, return receipt requested, which notice shall contain a certified copy of the petition in such litigation, to the state of Louisiana through both the Department of Natural Resources and the Department of Environmental Quality. To the extent that any such litigation or action seeks to recover damages for the evaluation and remediation of any contamination or pollution that is alleged to impact or threaten usable ground water, the Department of Natural Resources or the Department of Environmental Quality, in accordance with their respective areas of constitutional and statutory authority and regulations adopted pursuant thereto, shall have the right to intervene in such litigation or action.[112]

The statute further provides that in cases where usable groundwater is affected, the defendant and plaintiff's remediation plans will be evaluated and responded to by the appropriate agency within sixty days after the plans are submitted.[113] After the plans are evaluated, the court, based upon the agency's recommendation, determines the most feasible plan which is consistent with the health, safety, and welfare of the people.[114] In addition, the statute requires that all damages or payments awarded for evaluation and remediation of contaminated property that threatens usable groundwater "shall be paid exclusively into the registry of the court."[115] The statute also gives the courts the authority to issue orders ensuring that any award of damages for remediation is actually used for the evaluation and remediation of the contamination.[116] It is important to note that the reach of this statute is limited; it only comes into effect if the contamination threatens usable ground water.[117]

While the Louisiana statute does not ensure remediation occurs in all instances of polluted land, a strong case can be made that the majority of contamination present on private land in Louisiana threatens the

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111. *Id.* § 30:2015.1.J.(1). Usable groundwater is defined by the statute as any ground water that is a primary drinking water source or is directly connected with a drinking water source (Groundwater Classification I), an agricultural supply, domestic supply or, any other supply source (Groundwater Classification II). *Id.*

112. *Id.* § 30:2015.1.B.

113. *Id.* § 30:2015.1.C(1).

114. *Id.* § 30:2015.1.C(3).

115. *Id.* § 30:2015.1.E(1)

116. *Id.* § 30:2015.1.E(3).

117. *Id.* § 30:2015.1.F(1).

usable groundwater in some capacity. Thus, the statute is monumental progress towards ensuring that remediation damages are used as designated. The statute also retains many of the traditional rights granted to landowners who are injured by contamination of their land, namely the right to bring suit and have a trier of fact award appropriate damages if liability is found.

The statute creates what can be termed "quasi-primary jurisdiction." Although state agencies may intervene in a private landowner's suit, they are not required to do so. However, the appropriate state agency is required to evaluate remediation plans and it must offer suggestions and recommendations to the court.[118] Under the statute, the agencies with expertise and experience in the protection of Louisiana's environment oversee appropriate remediation plans, but compensatory justice for the landowner remains available. This appears to be an optimal method of judicial and administrative cooperation that does not unduly interfere with individual rights but improves the welfare of all the citizens of Louisiana.[119]

VI. CONCLUSION

> Although modern regulatory regimes often interfere with individual and communal liberty, and although they are not free from failure on their own terms, regulation is often justified as a necessary response to limitations of private ordering. Regulation is at times necessary to solve a variety of familiar market failures . . . and to advance social programs that are widely desired but that tend to fail under private law.[120]

In cases of environmental contamination to private property, "the surface estate owner's desire for pecuniary gain and the legitimate need for environmental remediation inexorably conflict; damage assessments that are imposed may not be expended on remediation measures absent

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118. Id. § 30:2015.1.B–I.

119. *See* JULES COLEMAN, EFFICIENCY, UTILITY, AND WEALTH MAXIMIZATION (1988), *reprinted in* AVERY WIENER KATZ, FOUNDATIONS OF THE ECONOMIC APPROACH TO LAW 10-17 (1998). In environmental contamination cases handled under the Louisiana statutory scheme, private landowners are no worse off than before because they are still able to recover damages and they also get their property restored. The polluters are also no worse off than under the old scheme because in either case they would have to pay damages and remediation costs if held liable. The people of Louisiana, however, are better off under the new scheme because remediation of groundwater contamination is ensured whereas under the old system there was no such requirement.

120. Adam Feibelman, *Federal Bankruptcy Law and State Sovereign Immunity*, 81 TEX. L. REV. 1381, 1404-05 (2003).

administrative or court control."[121] To attempt to ensure that remediation occurs, some states rely on the primary jurisdiction of knowledgeable agencies to formulate remediation plans and execute those plans at the expense of the polluter. However, this remedy does not account for a landowner's entitlement to other damages, such as nuisance or trespass. Other jurisdictions allow a landowner to collect remediation damages along with other damages, but impose no requirement on the owner to actually remediate, thus neglecting the state's and its citizens' interest in having uncontaminated property. A better balance between landowner rights and the public interest is found in "quasi-primary jurisdiction." In such a system, the landowner can bring a cause of action for remediation of his property in a court of law, submit a restoration plan, which will be evaluated by the appropriate state agency, and recover for damages other than restoration damages; damages for restoration are placed under court control and dispensed only for remediation activities. Such a system properly balances the equities and results in appropriate outcomes for all affected parties.

121. Evans, *supra* note 108, at 491.