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Oilfield Contamination Litigation in Louisiana: Property Rights on Trial

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I. INTRODUCTION

Landowners who have sued oil companies for the contamination of their property have met stiff opposition in Louisiana, both in the courts

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This Article is respectfully dedicated to Bill Corbello, the lead plaintiff in that case who passed away in a farm accident on September 26, 2011. He was my cousin and one of my dearest friends. I will miss him.

and in the legislature. As a consequence, the fundamental rights of Louisiana citizens to protect their property from contamination are being tested now as never before in the history of the state. The purpose of this Article is to trace these developments and in the process expose certain myths that have supported this unprecedented attack on property rights.

II. HARD FACTS ABOUT WATER

Water is the source of life. Our very existence on planet Earth depends on it. As the Louisiana Department of Environmental Quality (LDEQ) has declared: “Humans can go for weeks without food but will die within days without water.”¹

Anyone who looks at a globe sees immediately that the majority of the earth’s surface is covered by oceans. This creates the impression that the water supply for the humans, animals, and plants living on land is abundant.

That impression is false. The great majority of the earth’s water—97%, in fact—is too salty to be drinkable by humans and animals or usable by plants.² Of the remaining 3% that constitutes fresh water, it is estimated that 99.9% of that is inaccessible because it is frozen in glaciers, too far underground to be of use, trapped in soil, or too contaminated to be drinkable. That leaves a total of .003% of all the water in the world that is drinkable.³

The hard, cold fact is that drinkable fresh water is scarce—and becoming scarcer. As the human population grows, its demand for drinkable fresh water increases. As human activity pollutes and contaminates that water, the supply diminishes. This combination of expanding demand and shrinking supply is particularly alarming because “fresh water may be unique in that there is no replacement for it in the world.”⁴ In the blunt words of the LDEQ: “Take away fresh water or pollute it to the point it can no longer be used and plants, animals, and humans that depend on it will have to move or die.”⁵

Our primary source of fresh water is rainfall. When rain falls to the ground, four things happen to the water: (1) it runs off into streams and lakes and becomes surface water; (2) it is absorbed into the ground,

1. LA. DEP’T OF ENVTL. QUALITY, WATER QUALITY STUDY GUIDE 2 (2005).

2. “Most people know that roughly 71% of the earth’s surface is covered with water. . . . But, of that huge amount some 97% (271.6 billion liters/person) is unfit to drink because it is too salty.” *Id.*

3. *Id.*

4. *Id.*

5. *Id.*

where it collects in underground aquifers and becomes groundwater; (3) it is absorbed by plants; or (4) it evaporates and becomes part of water vapor that eventually falls back to the earth as rain.⁶

Groundwater is a vital and indispensable source of fresh drinking water. Across the United States, half of the population depends on groundwater for its drinking water.⁷ In Louisiana, approximately two-thirds of *all* Louisiana residents—rural *and* urban dwellers—get their drinking water from ground water.⁸

III. HOW OILFIELD OPERATIONS THREATEN FRESH WATER

Oilfield operations are a leading cause of groundwater contamination in Louisiana.⁹ When an oil well flows, four things come to the surface: (1) oil, (2) gas, (3) gas liquids (often referred to as “gasoline”), and (4) produced water (often referred to as “brine”).¹⁰ These four components of the well stream must be separated at the surface so that the first three can be sold for profit and the brine can be disposed.

Produced water typically contains high levels of dissolved solids with high salinity, as well as concentrations of heavy metals, naturally occurring radioactive material (NORM), and oil and grease.¹¹ As the name implies, brine has an extremely high salt content. By way of comparison, fresh water typically contains approximately 50 parts per million (ppm) of salt, or chlorides.¹² Ocean water, such as that found in the Gulf of Mexico, is reported to contain anywhere from 28,000 to

6. *Water Availability*, U.S. ENVTL. PROTECTION AGENCY, http://www.epa.gov/climate_change/effects/water/availability.html. For a useful discussion, see *Fresh Water*, WIKIPEDIA, http://en.wikipedia.org/wiki/Fresh_water (last visited Sept. 4, 2011).

7. U.S. GEN. ACCOUNTING OFFICE, DRINKING WATER: SAFEGUARDS ARE NOT PREVENTING CONTAMINATION FROM INJECTED OIL AND GAS WASTES 2, 8 (1989). Remarkably, 95% of rural households across the United States depend on groundwater as their sole or principal source of drinking water. *Id.* at 8.

8. LA. DEP’T OF ENVTL. QUALITY, *supra* note 1, at 3. In an earlier publication, the same agency estimated that 69% of Louisiana residents were dependent on ground water as a source of drinking water. LA. DEP’T OF ENVTL. QUALITY, THE LOUISIANA GROUND WATER PROTECTION STRATEGY 1 (Aug. 1989) [hereinafter PROTECTION STRATEGY].

9. PROTECTION STRATEGY, *supra* note 8, at 2-5, 15-16; LA. DEP’T OF ENVTL. QUALITY, GROUND WATER PROTECTION IN LOUISIANA: PROBLEMS AND OPTIONS 3-4 (1985).

10. EPA OFFICE OF COMPLIANCE, EPA/310-R-99-006, PROFILE OF THE OIL AND GAS EXTRACTION INDUSTRY, at vi, 3, 38, 49 (Oct. 2000).

11. *Id.* at 39, 45 tbl.2, 48-49.

12. *Groundwater Glossary*, GROUNDWATER FOUND., http://www.groundwater.org/gi/gw_glossary.html#F (last visited Sept. 28, 2011). The EPA has established Secondary Drinking Water Standards that set a maximum contaminant level of chloride in drinking water of 250 mg/L, or 250 ppm. *National Secondary Drinking Water Regulations*, EPA, <http://water.epa.gov/drink/contaminants/index.cfm#secondary> (last visited Sept. 27, 2011).

32,000 ppm of salt or chlorides.¹³ Brine has been found to contain as much as 300,000 ppm of salt or chlorides.¹⁴ As a result, a small amount of brine contamination can render thousands of barrels of fresh water undrinkable.

Salt is toxic, meaning that it is bad for everything that depends on water—i.e., humans, plants, and animals. Animals and humans cannot drink salt water. Crops that are irrigated with salty water wither and die.¹⁵

To make matters worse, salt does not biodegrade, or break down. It only spreads. Thus, once fresh water is contaminated with salt, it cannot be ignored. Salty water can be cleaned up, or desalinated, but the process is expensive and time-consuming. As the LDEQ has observed, “[s]everely polluted water can be cleaned, but only at high cost.”¹⁶

When oil companies drill for oil and gas, they drill through shallow fresh groundwater on the way down to the targeted completion zone. When oil companies produce oil and gas, they pump the well fluids up through shallow fresh groundwater on the way back to the surface. When oil companies dispose of oilfield waste through underground injection, they inject it through shallow fresh groundwater on the way down to the targeted disposal zone. Each instance creates a potential for mixing well fluids with fresh groundwater and, thus, contaminating it.

From the earliest days of oilfield production, operators have been aware that produced brine and other waste had to be isolated from underground fresh water supplies—and that using antiquated (and cheap) methods of disposal, such as dumping the waste into unlined earthen pits, inevitably contaminated the surrounding soil and ground water.¹⁷ Indeed,

13. Haidee Anthony, *Physical Parameters—Creating and Comparing Various Saline Environments Within the Gulf of Mexico*, CONSORTIUM FOR OCEANOGRAPHIC ACTIVITIES FOR STUDENTS AND TCHRS., http://coast-nopp.org/resource_guide/elem_mid_school/physical_param_acts/saline.html (last modified June 11, 1999).

14. P. BALDONI-ANDREY ET AL., *IMPACT OF HIGH SALINITY OF PRODUCED WATER ON THE TECHNICAL FEASIBILITY OF BIOTREATMENT FOR E&P ONSHORE APPLICATIONS* 1 (2006); 2 FRANCIS S. MANNING & RICHARD E. THOMPSON, *OILFIELD PROCESSING OF PETROLEUM: CRUDE OIL* 145 (1995).

15. STEPHEN R. GRATTAN, UNIV. OF CAL., DAVIS, PUB. NO. 8066, *IRRIGATION WATER SALINITY AND CROP PRODUCTION* 1 (2002), available at <http://ucanr.org/freepubs/docs/8066.pdf>.

16. LA. DEP’T OF ENVTL. QUALITY, *supra* note 1, at 2.

17. For example, a committee member of the American Petroleum Institute (the leading industry organization) made a presentation in 1932 at a chapter meeting in Texas about the environmental problems arising from the use of unlined pits to store oilfield waste. V.L. Martin, *Disposal of Production Division Wastes* (Apr. 12, 1932) (on file with author). In that paper, the author issued the following warnings to the assembled peer group of oil and gas producers: “Without question, the greatest disposal problem that the industry faces is that of water produced with the oil.” *Id.* at 5. “We are only ‘kidding’ ourselves when we think we can dispose of salt water by solar evaporation from earthen ponds.” *Id.* at 7. “What we have attributed to evaporation was due to seepage Eventually, such seepage may either follow an impervious

the industry was aware early on that injection wells were a far better method of disposing of brine than earthen pits. As one oil industry expert reported:

The oil and gas industry began investigating the underground injection of produced waters utilizing salt water disposal (SWD) wells in certain areas of the country in the mid to late 1920s and 1930s. . . .

The initial SWD well in Louisiana came on line in +/- 1933 and over time SWD wells became the primary method for disposal of produced waters.¹⁸

Not only was the technology known and available at that time, but the industry also knew that public sentiment would eventually force it to abandon its leaking pits and adopt better methods of disposal. As early as 1932, one industry representative warned: “Apparently, it is only a question of time until the opposition to the escape of our waste will become strong enough to force us, as an economical measure, to dispose of them in such a manner as will not be objectionable to anyone”¹⁹ Despite this, the industry continued to use unlined pits in Louisiana until they were outlawed in the mid- to late 1980s.²⁰

Proving the maxim that “an ounce of prevention is worth a pound of cure,” saltwater disposal wells, when properly operated and maintained, are far less costly than cleaning up a contaminated fresh water supply. As the LDEQ has recognized, “It is much easier to prevent contamination than to clean it up.”²¹ Because the industry in Louisiana failed to heed its own warnings, however, there are scores of abandoned pits across the state that were never properly cleaned up or closed, and the contamination spreading from those pits has been a major part of landowners’ claims for property damage.

stratum to the surface where it may affect vegetation or may find its way to fresh water sources, either surface or subsurface, and in such quantities as to be objectionable.” *Id.* at 8. “Therefore, we cannot expect to successfully impound salt water without seepage, and that disposal by seepage is not as practical as methods which will confine the water to definite and known channels.” *Id.* Despite this clear warning in 1932, Louisiana’s regulators did not amend Statewide Order 29-B to outlaw the use of unlined pits until the late 1980s. *History*, OFFICE OF CONSERVATION, LA. DEP’T OF NATURAL RES., <http://dnr.louisiana.gov/index.cfm?md=pagebuilder&tmp=home&pid=47&pnid=0&nid=22> (last visited Sept. 28, 2011).

18. Letter from Calvin C. Barnhill, Registered Professional Engineer, to Mark D. Sikes et al., 24 (June 15, 2009) (on file with author). The letter deals with certain aspects of *M.J. Farms, Ltd. v. Exxon Mobil Corp.*, 2007-2371 (La. 7/1/08); 998 So. 2d 16, including oil and gas operations related to the case and the history of Louisiana oil and gas regulations. *Id.*

19. Martin, *supra* note 17, at 3.

20. Barnhill, *supra* note 18, at 28.

21. LA. DEP’T OF ENVTL. QUALITY, *supra* note 1, at 4.

A. *Failed Regulatory Response to Oilfield Contamination*

The first significant discovery of oil in Louisiana occurred in Jennings in 1901.²² Almost from the very beginning, Louisiana struggled to control and contain oilfield contamination through the regulation of exploration and production activities. Although the Louisiana Legislature passed the first of many laws regulating oilfield operations in 1906,²³ regulatory enforcement has never been adequately staffed or funded—and for that reason has been largely ineffective.²⁴ In fact, Louisiana’s regulatory scheme has been euphemistically described by various experts as one of “self-reporting,”²⁵ meaning that the system depends on oilfield polluters turning themselves in to regulators.

Louisiana is not unique in its regulatory failures. Indeed, the federal government has on at least two occasions reported that this is the rule rather than the exception across the country. In 1977, the United States Environmental Protection Agency issued a report declaring that “[u]nplugged abandoned wells are a hazard to our nation’s potable ground water supplies.”²⁶ Its survey of state laws concerning well

22. LA. DEP’T OF NATURAL RES., LOUISIANA ENERGY FACTS ANNUAL app. E, at E 19 (2003), available at http://dnr.louisiana.gov/assets/docs/energy/newsletters/energy_facts_annual/LEF_2003.pdf. The second major oilfield in Louisiana is said to have been the Caddo-Pine Island Field in north Louisiana, which was discovered in 1906. *Id.*

23. Letter from Calvin C. Barnhill to Mark D. Sikes et al., *supra* note 18, at 22. The first legislative response to oilfield contamination was Act 71 of 1906, which prohibited setting wells on fire and required gas wells to be plugged and abandoned. *Id.* Two years later, the Louisiana Legislature saw the need to form the Louisiana Commission for the Conservation of Natural Resources (the forerunner of the Office of Conservation), and did so by Act 144 of 1908. *Id.* at 21-22. In 1910, the legislature passed Act 183, which prohibited, inter alia, the discharge of brine into fresh water sources of irrigation between March and September of each year. *Id.* at 22-23. (Subsequent laws prohibited it altogether, particularly after the formation of the Louisiana Stream Control Commission in 1940. *Id.* at 25.) Thereafter, the legislature periodically enacted other laws until the 1930s, when it vested rulemaking authority for oilfield practices in what was then the Department of Conservation (now the Office of Conservation within the Louisiana Department of Natural Resources). *Id.* at 24. That agency promulgated Statewide Order A-1 in 1939 and has been regulating oilfield operations by rulemaking ever since. *Id.* at 26.

24. In an article published in March of 2011, past and present LDEQ regulators lamented that they had limited authority to impose minuscule fines and that, in at least one regulator’s experience, the few fines that were imposed were ultimately ignored. Ken Wells et al., *Built To Spill*, GAMBIT (Mar. 8, 2011), <http://www.bestofneworleans.com/gambit/built-to-spill/Content?oid=1608991>. In the article, Foster Campbell, a former state senator and now a member of the Louisiana Public Service Commission, declared, “Our record of regulating oil and gas is dismal Down here, nobody wants to punish anybody.” *Id.* (quoting Foster Campbell). Former LDEQ field inspector Kerry St. Pe added, “When oil companies see it’s cheaper to pollute than to prevent spills, it creates a culture of noncompliance.” *Id.* (quoting Kerry St. Pe).

25. See, e.g., Jon D. Harford, *Self-Reporting of Pollution and the Firm’s Behavior Under Imperfectly Enforceable Regulations*, 14 J. ENVTL. ECON. & MGMT. 293 (1987).

26. TYLER E. GASS ET AL., EPA-600/3-77-095, IMPACT OF ABANDONED WELLS ON GROUND WATER, at iv (1977).

abandonment procedures “expose[d] a disparity in the regulations in and among different states.”²⁷ Twelve years later, the General Accounting Office (GAO) submitted a report to a Congressional subcommittee more directly blaming systematic regulatory failure for polluted drinking water. After surveying the regulatory systems of various states, the GAO concluded that they were consistently ineffective in protecting drinking water from oilfield contamination.²⁸ The title of the document, *Drinking Water: Safeguards Are Not Preventing Contamination from Injected Oil and Gas Wastes*, left no doubt about its contents and conclusions.

All of this means one thing: If the legal system is going to protect our water supply, that protection must come from private law, rather than regulatory law.

B. Private Law Remedies for Oilfield Contamination

Beginning with the Digest of 1808, Louisiana civil law has consistently vested landowners with fundamental and unfettered rights to protect their property.²⁹ Until recently, this “bundle of rights”³⁰ always included the right to recover for wrongful damage to their property. Because land ownership in Louisiana includes everything above and below ground,³¹ this right to recover for property damage necessarily included the right to recover for damage to the water below ground.³²

As noted previously, oilfield pollution is a leading cause of groundwater contamination.³³ It comes as no surprise, therefore, to discover that landowners across the country have been taking oil companies to court over the contamination of their land for the better part of a century. In fact, there are reported decisions in numerous states going back nearly 100 years in which landowners have sued for damages arising from the contamination of their property with oilfield products.³⁴

27. *Id.*

28. U.S. GEN. ACCOUNTING OFFICE, *supra* note 7, at 42-43. Fourteen years later, the agency reached the same conclusion about the regulation of oil and gas activities on federal lands. See U.S. GEN. ACCOUNTING OFFICE, NATIONAL WILDLIFE REFUGES: IMPROVEMENT NEEDED IN THE MANAGEMENT AND OVERSIGHT OF OIL AND GAS ACTIVITIES ON FEDERAL LANDS (Oct. 30, 2003).

29. See LA. CIV. CODE ANN. art. 477 (2011).

30. This is a term often used by Louisiana courts to describe what constitutes full ownership of property in Louisiana. *E.g.*, *Lanza v. Lanza*, 898 So. 2d 280, 285 n.5 (La. 2005) (quoting *Rodrigue v. Rodrigue*, 218 F.3d 432 (5th Cir. 2000)).

31. LA. CIV. CODE ANN. art. 490.

32. *E.g.*, *Corbello v. Iowa Prod.*, 2002-0826, p. 16 (La. 2/25/03); 850 So. 2d 686, 699; *Magnolia Coal Terminal v. Phillips Oil Co.*, 576 So. 2d 475, 483 (La. 1991).

33. See PROTECTION STRATEGY, *supra* note 8.

34. *E.g.*, *Marblehead Land Co. v. City of Los Angeles*, 47 F.2d 528 (9th Cir. 1931); *Magnolia Petroleum Co. v. Smith*, 238 S.W. 56 (Ark. 1922); *Hamilton v. E. Kan. Oil Co.*, 173 P. 911 (Kan. 1918); *Shelley v. Ozark Pipe Line Corp.*, 37 S.W.2d 518 (Mo. 1931).

The battle in Louisiana pitting landowners against oilfield polluters can be traced at least to the late 1920s and early 1930s, when a Shell employee was convicted of criminal damage to property for dumping brine into English Bayou, which was a source of rice field irrigation in southwest Louisiana.³⁵ Reported Louisiana cases involving civil claims for contamination go back at least a half century.³⁶

However, landowner litigation did not capture the oil industry's attention in a great way until the 2003 state supreme court decision in *Corbello v. Iowa Production Co.*, when a landowner recovered \$33 million from Shell Oil Company for historic brine contamination of a farm near LeBleu Settlement in southwest Louisiana.³⁷ The *Corbello* case actually involved three claims that yielded a total recovery of \$76 million: (1) for restoration of property upon the expiration of a surface lease covering 120 acres; (2) for damages arising from illegal saltwater disposal not permitted by the surface lease; and (3) for trespass for not leaving the premises when the lease expired.³⁸ But, clearly, the restoration award was the subject of most comment.³⁹

IV. THE INDUSTRY'S RESPONSE: CHANGE THE LAW, NOT OUR BEHAVIOR

The *Corbello* litigation began in 1992 and did not reach final judgment until 2003. Even before then, as Shell's application for rehearing was pending in the state supreme court, the oil industry hurriedly submitted a bill to the Louisiana Legislature to reverse the effects of the decision—retroactively.

The bill ultimately passed in a modified form that was limited to future awards for oilfield damage. The new law required that a portion of damage awards be escrowed in the registry of the court and used for funding a restoration plan that would be recommended by state regulators and approved by the court in proceedings subsequent to the

35. For an account detailing this and other evidence in the *Corbello* case, see J. MICHAEL VERON, SHELL GAME: ONE FAMILY'S LONG BATTLE AGAINST BIG OIL (2007).

36. *E.g.*, *Duhon v. Buckley*, 161 So. 2d 301 (La. Ct. App. 3d Cir. 1964).

37. 850 So. 2d 686.

38. *Id.*

39. *See, e.g.*, David B. Means, III, *Surface Owner Issues in the Mineral Owner, Lessee and Landowner Relationships*, in 53d ANNUAL INSTITUTE ON MINERAL LAW 219 (2006); Mary Beth Balhoff, Comment, *Corbello v. Iowa Production and the Implications of Restoration Damages in Louisiana: Drilling Holes in Deep Pockets for Thirty-Three Million Dollars*, 65 LA. L. REV. 271 (2004). For a complete discussion of the restoration award as well as other aspects of the *Corbello* case, see VERON, *supra* note 35.

original trial.⁴⁰ This law was amended three years later to move regulatory oversight from the LDEQ to the Louisiana Department of Natural Resources (LDNR), through its Office of Conservation, which was viewed by the industry as decidedly more sympathetic to its interests.⁴¹

The title of the bills euphemistically stated that they were directed to the “[r]emediation of oilfield sites and exploration and production sites.”⁴² However, their clear purpose was to remove any financial incentives for lawyers to bring such claims on behalf of landowners. This argument effectively pandered to antilawyer sentiment in the legislature.⁴³

To be sure, the new law did provide that attorneys could recover a “reasonable fee” upon the successful completion of a case.⁴⁴ However, the uncertainty of when each case will end (some cleanups take decades to complete) and what fee the court in its discretion may award at its conclusion effectively discourages lawyers from accepting these matters on the contingency that they will take whatever fee the court ultimately awards. And the alternative is unlikely: Few landowners can afford to pay a lawyer on an hourly basis to pursue these cases over a period of years.

Justice Holmes once observed: “A right without a remedy is like a ghost that stalks the law.”⁴⁵ More directly stated, a right without a remedy is no right at all.⁴⁶ To the extent that they took any portion of damage awards out of the landowners’ hands, the new oilfield contamination laws dramatically altered traditional property rights.⁴⁷ The remainder of this

40. Act No. 1166, 2006, La. Acts 3511, *amended by* Act No. 312, 2006 La. Acts 1472. The escrowed Fund would be administered by the court to restore the property to comply with regulatory standards. Any award for private claims based on contract or tort was reserved to the landowner. *Id.*

41. Act No. 312, 2006 La. Acts 1472.

42. *Id.*

43. This was particularly ironic because it came at a time when the price of gasoline at the pump was approaching \$4.00 per gallon in the spring of 2011. Jeff Brady, *\$4 A Gallon Gas Prices: Who’s To Blame?*, NAT’L PUB. RADIO (Apr. 21, 2011), <http://www.npr.org/2011/04/21/135605266/-4-a-gallon-gas-prices-whos-to-blame>. One opponent joked that the oil companies should not criticize legal fees until they started giving gasoline away at the pump.

44. LA. REV. STAT. ANN. § 30:29(E)(1), (J)(1) (2011).

45. *Amoco Prod. Co. v. Columbia Gas Transmission Corp.*, 455 So. 2d 1260, 1264 n.2 (La. Ct. App. 4th Cir. 1984) (quoting Justice Holmes).

46. *E.g.*, *Parish of St. Charles v. R.H. Creager, Inc.*, 10-180, p. 12 (La. App. 5 Cir. 12/14/10); 55 So. 3d 884, 892 (characterizing a right without remedy to be “a violation of basic due process rights”); *Hoy v. T.S. Grayson Lumber Co.*, 130 So. 651, 652 (La. App. 2d Cir. 1930).

47. In a series of decisions, the Louisiana Supreme Court has consistently held that any law that retroactively disturbs a vested property right violates due process and is therefore unconstitutional. *E.g.*, *Cheron v. LCS Corr. Servs., Inc.*, 2004-0703, p. 1 (La. 1/19/05); 891 So.

article will discuss certain “public policy” arguments that have been advanced as part of this “reform” of fundamental Louisiana property law.

A. *“Landowners Won’t Use Awards To Clean Up”*

All through the litigation of the *Corbello* case, Shell and its co-defendants argued that the landowners should be denied any recovery for the proven contamination of their property because there was no guarantee that they would use the money to clean it up.⁴⁸ Thus, the parties responsible for contaminating soil and water—and refusing to clean it up—attempted to shift the blame by attacking the innocent landowners’ integrity and intentions. Leaving aside whether this issue is relevant (it does not tend to prove or disprove the amount of damage), the argument was not successful in *Corbello*, but reportedly achieved some success in other oilfield contamination trials.⁴⁹

It was also the trumpet call of the oil industry lobbyists in Baton Rouge, who, with their clients, persuaded the legislature that landowners’ historic rights to sue for property damage should be altered. Under the new law (first enacted in 2003 and then amended in 2006), landowners with property damaged by oilfield contamination are required to deposit any damage award in the registry of the court. From that point, the parties must proceed to a hearing in the LDNR.⁵⁰

At the LDNR, a hearing officer receives and weighs evidence submitted by any “interested party” about the “most feasible” plan for restoring the property to regulatory standards.⁵¹ (Regulatory standards,

2d 1250, 1251; *Bourgeois v. A.P. Green Indus., Inc.*, 2000-1528, pp. 5-6 (La. 4/3/01); 783 So. 2d 1251, 1257 (citing *St. Paul Fire & Marine Ins. Co. v. Smith*, 609 So. 2d 809, 816 (La. 1992)); *Gilboy v. Am. Tobacco Co.*, 582 So. 2d 1263, 1265 (La. 1991); *Faucheaux v. Alton Ochsner Med. Found. Hosp. & Clinic*, 470 So. 2d 878, 878-79 (La. 1985) (citing *Terrebonne v. S. Lafourche Tidal Control Levee Dist.*, 445 So. 2d 1221 (La. 1984); *Lott v. Haley*, 370 So. 2d 521 (La. 1979)).

In addressing Act 312 of 2006, the Louisiana Supreme Court determined that the new law did *not* disturb vested rights because it did not diminish them but rather “supplement[ed]” them. *See M.J. Farms, Ltd. v. Exxon Mobil Corp.*, 2007-2371, p. 16 (La. 7/1/08); 998 So. 2d 16, 28. It remains to be seen how this decision will be applied in future cases as the impact of Act 312 on landowner rights becomes more apparent.

48. *Corbello v. Iowa Prod.*, 2002-0826 (La. 2/25/03); 850 So. 2d 686, 700-01.

49. This argument was made by the oil company defendants, in an effort to minimize damage awards, based on the Louisiana Supreme Court decision in *Roman Catholic Church v. Louisiana Gas Service Co.*, 618 So. 2d 874 (La. 1993). In that case, the Louisiana Supreme Court essentially held that an owner of damaged property could not recover more than its value in tort unless the trier of fact was persuaded that the owner would in fact make the repairs. *Id.* at 879-80. The court refused to apply this rule in *Corbello* because the landowners’ claim was based on a specific provision in a contract (surface lease) between the parties that obligated Shell to restore the property to its earlier condition. *Corbello*, 850 So. 2d at 694-95.

50. LA. REV. STAT. ANN. § 30:29(c) (2011).

51. *Id.*

particularly those contained in Statewide Order 29-B, RECAP,⁵² and NORM,⁵³ are more tolerant of contamination and require less remediation than most lease contracts. In surface leases associated with oilfield operations, the lessee is often required to restore the property “as near as practicable to original condition,” regardless of whether the conditions violate some unrelated state regulation.) The hearing officer then recommends the “most feasible” plan for restoring the property to regulatory standards. Once that recommendation is made, the parties must return to the district court, which is not bound by the recommendation and may adopt any plan.⁵⁴ Once the district court rules, the matter can be appealed through the court system.⁵⁵

Those who opposed the law pointed out that bogging the process down with bureaucracy and multiple hearings was inefficient and wasteful. As even industry sympathizers now admit, that prediction proved to be true. In a recent presentation, two attorneys representing the industry wrote: “If anything, Act 312 has only served to lengthen and increase the cost of legacy litigation.”⁵⁶

This should not have come as a surprise to anyone. To the contrary, it should have been apparent from the outset that forcing the victims of contamination to jump through these additional hoops would delay the conclusion of litigation and run up its cost in the process. In turn, this would further discourage landowners and lawyers from suing oilfield contaminators.

52. “RECAP” is an acronym for Risk Evaluation and Corrective Action Program, which is a program promulgated by the LDEQ that attempts to define acceptable limits of toxic contamination, i.e., contamination that is insufficiently toxic to constitute a danger to public health and safety. *RECAP*, LA. DEP’T ENVTL. QUALITY, <http://www.deq.state.la.us/portal/tabid/2929/Default.aspx> (last visited Sept. 30, 2011).

53. “NORM” is an acronym for Naturally Occurring Radioactive Material, which is found in produced water. EPA OFFICE OF COMPLIANCE, *supra* note 10, at 48-49.

54. LA. REV. STAT. ANN. § 30:29(c)(5).

55. *Id.* § 30:29(c)(6).

56. Michael R. Phillips & Louis M. Grossman, *Act 312 Updates—Louisiana Revised Statute § 30:29 in 57TH MINERAL LAW INSTITUTE* 286 (2010). In the words of the Supreme Court of Louisiana:

“Legacy litigation” refers to hundreds of cases filed by landowners seeking damages from oil and gas exploration companies for alleged environmental damage in the wake of this Court’s decision in *Corbello v. Iowa Production*, 02-0826 (La.2/25/03), 850 So. 2d 686. These types of actions are known as “legacy litigation” because they often arise from operations conducted many decades ago, leaving an unwanted “legacy” in the form of actual or alleged contamination.

Marin v. Exxon Mobil Corp., Nos. 2009-2368 & 2009-2371, p. 1 n.1 (La. 10/19/10); 48 So. 3d 234, 238 n.1 (citing Loulan Pitre, Jr., “LEGACY LITIGATION” AND ACT 312 OF 2006, 20 TUL. ENVTL. L.J. 347 (2007)).

Skeptics of the industry's proposal argued that this was the real agenda. Their fear was that, without the threat of landowners' claims, oilfield contamination would never be cleaned up at all. In any event, all of this ran counter to the traditional legal presumption that a plaintiff who recovered damages would act in his own self-interests to repair the damage to his property.

There are other reasons why landowners can be trusted to utilize damage awards to restore their property. Unlike a wrecked car that is "totaled," contaminated land cannot be hauled away to a junkyard. Indeed, contaminated land can have a less-than-zero, or negative, value (i.e., a liability to its owner). The landowner will not be able to sell the land in its contaminated state (no bank will lend money to a buyer without an environmental survey). If he doesn't clean it up, he will leave it to his children, who will inherit the liability.

It could be argued that the oil interests who contaminated the property (and then refused to clean it up, necessitating "legacy lawsuits" in the first place) are not the best source of advice on how landowners should clean up their property.⁵⁷ In any event, the real issue is whether or not the law should make polluters generally liable for the environmental damage they cause. Allowing them to shift the blame to an innocent landowner by claiming he seeks a "windfall" hardly seems like good public policy.

Corbello effectively announced that oilfield operators who polluted would (like any other wrongdoer who caused property damage) remain liable for doing so. Maintaining that traditional damage liability for contamination continued an important disincentive for oilfield operators to pollute. In simple terms, businesses react to financial stimuli. If it remained unprofitable to pollute, they would not pollute. However, if the new law alleviated their concerns about landowners bringing lawsuits, they would have no incentive to operate in a clean manner (and thus avoid lawsuits). Therefore, the issue was not how many contaminated properties would be cleaned up by landowners, but how many properties would not be contaminated in the future because the oil companies preferred to avoid more *Corbello*-type claims.

57. Indeed, the oil companies' criticism of landowners for not cleaning up their property can be criticized as hypocritical. For instance, Shell bought property adjacent to the *Corbello* property from the owners of that property as part of the settlement of an oilfield contamination claim they had brought. Act of Cash Sale, No. 610984, Clerk of Court for Jefferson Davis Parish, La. (filed Apr. 1, 2005, 10:40 AM) (on file with author). The idea was that in purchasing the property from the plaintiffs and becoming its owner, Shell would assume any and all responsibility to restore the property. That transaction was completed in 2004. Shell has done nothing since acquiring the property to clean it up.

B. The Strange Saga of the Corbello Wetlands Permit

Still, the oil industry made much to do about the fact that the *Corbello* landowners supposedly did not spend their award restoring their property. This was a remarkable argument, because two oil companies had a direct hand in opposing the *Corbello* landowners' efforts to clean up their property.

In lobbying against the original "anti-*Corbello*" law in 2003,⁵⁸ the *Corbello* attorney met with Governor Foster's Executive Counsel and Chief of Staff in the Governor's Office on the fourth floor of the State Capitol during the legislative session. The administration's representatives proposed to amend the new law so as not to be retroactive on the condition that the *Corbello* plaintiffs agree to escrow a portion of their judgment for cleanup. They readily agreed.⁵⁹

After the session was over, the family authorized their environmental expert to proceed with cleanup plans. The family signed an initial contract, for \$1.65 million, to have a plastic liner installed below ground to contain the largest area of groundwater contamination before further work was undertaken.⁶⁰ Because the property contained wetlands, this required a wetlands permit. (In fact, all of the proposed cleanup would require a wetlands permit.) The environmental consultant then applied for what he expected would be a routine wetlands permit grant from the United States Army Corps of Engineers to begin the work. (For instance, nationwide wetlands permits—referred to as NWPs—for laying pipelines are routinely granted by the Corps of Engineers through paperless online applications.)

In a remarkable turn of events, the *Corbello* consultant was informed that the permit was not being issued. Instead, he was summoned to a meeting in Baton Rouge with Corps of Engineers representatives, as well as representatives from state agencies. When he arrived, he was surprised to find one of Shell's attorneys from the trial at the meeting, as well as an attorney representing Exxon. No one explained to the landowners' representative why oil company lawyers had been invited to the meeting or what right they had to discuss whether a wetlands permit should be issued to allow the landowners to begin cleaning up their property.

58. The Louisiana Supreme Court has characterized this law as the "Corbello Act" of 2003. *Marin*, 48 So. 3d at 240 n.7.

59. Remarkably, no one from the state ever requested that the agreement be put in writing. This indicated, perhaps, that the negotiation was more symbolic than substantive.

60. These and other papers documenting the described events are on file with the author.

It soon became apparent that the attorneys were there to oppose the landowners' plans. While they were excluded from the meeting at the landowners' insistence, they were invited to meet with the regulators separately afterward. While the exact nature of the oil companies' opposition was not disclosed to the landowners, it was unquestionably effective: Despite repeated efforts over the following year, the landowners were never able to obtain a permit.

Had the *Corbello* landowners obtained a permit and commenced work, the oil industry would have lost its most valuable argument to oppose landowners' claims for oilfield contamination. The oil companies' strategy to oppose the permit preserved this argument for use not only in court but in the legislature when lobbying for changes to the law.

Ironically, a significant portion of the *Corbello* landowners' judgment from 2003 remains in escrow to this day.⁶¹

C. *"The Corbello Decision Will Drive Oil Companies Out of Louisiana"*

Another "parade of horrors" argument advanced by the oil interests in the wake of the *Corbello* decision was that, unless the law was changed, the supreme court's opinion in the case would destroy the oil and gas business in Louisiana. In short, the argument was that making oil companies liable for their pollution would cause them to pull up stakes and leave.⁶²

This propaganda is easily refuted.

61. Editorial, *As Offshore Oil War Continues, Quieter Pollution Battles Being Fought on Land*, LENS (July 27, 2010), <http://thelensnola.org/2010/07/27/act-312-lawsuits/>.

62. An example of the hyperbole surrounding the *Corbello* lawsuit and its progeny were these statements from Don Briggs on the Web site of the Louisiana Oil and Gas Association (LOGA) in 2003: "Plaintiff attorneys are slowly killing your economy. . . . The personal injury and class action plaintiff's bar is running business out of your state. My perception and experience is that the plaintiff's bar owns the Louisiana judiciary." Don G. Briggs, *Legacy-Site Litigation: A Feeding Frenzy of Nuisance Lawsuits*, LA. OIL & GAS ASS'N (Sept. 16, 2004), <http://www.loga.la/articles/040916.html>.

As recently as 2011, Briggs again claimed that oil and gas activity was somehow affected by legacy litigation: "LOGA claims the threat of these lawsuits—40 were filed last year statewide—is causing onshore exploration and production to stagnate." Ted Griggs, *Bill Targets Contamination Suits*, LA. OIL & GAS ASS'N (May 11, 2011), <http://loga.la/loganews/?p=1099>. However, when questioned under oath about the factors that affect their decision to drill for oil or gas at any location, industry representatives do not mention or identify the outcome of litigation or the content of laws to have any relevance or influence. *E.g.*, Videotaped Article 1442 Testimony of B.P. America, Inc., C.F. Henry Props., LLC v. Apache Corp. (No.10-18063), June 23, 2011, at 46-49, 59-60 (on file with author).

First, the *Corbello* opinion made no “new” law. Indeed, the Louisiana Supreme Court in *Corbello* simply applied historic contracts law to a surface lease whose unambiguous terms required the restoration of the property when the lease expired. The principle that “[c]ontracts have the effect of law for the parties” is deeply embedded in Louisiana civil law⁶³ and is familiar to every law student who survived his first year of law school.

For this reason, the notion that the *Corbello* opinion represented some radical departure from settled Louisiana law is clearly false. The law was not changed by *Corbello*; it was the same law under which oil companies (and all others) had been operating since at least 1870, when the present Louisiana Civil Code was adopted.

Second, the propaganda that *Corbello* was causing a decline in oil and gas exploration in the state is factually wrong. Public records from the Office of Conservation show that the number of drilling permits issued in 2005 (two years after the *Corbello* decision) was roughly *twice* the number of permits issued in 2002 (the year before the *Corbello* decision).⁶⁴ In fact, this trend continued to such an extent that, in 2008, Conservation Commissioner Jim Welsh declared on the agency’s Web site: “I think this is only the beginning of DNR setting various permitting and drilling records in Louisiana This is indeed a historical time in our great state.”⁶⁵ In fact, the number of drilling permits issued in Louisiana, Texas, and Arkansas from 2000 to 2010 correlate

63. LA. CIV. CODE ANN. art. 1983 (2011). In now-familiar language, the Louisiana Supreme Court declared long ago: “[S]ignatures to an obligation are not mere ornaments.” *Boult v. Sarpy*, 30 La. Ann. 494, 495 (La. 1878). Moreover, “[i]f a party can read, it behooves him to examine an instrument before signing it; and if he cannot read, it behooves him to have the instrument read to him and listen attentatively whilst this is being done.” *Snell v. Union Sawmill Co.*, 105 So. 728, 730 (La. 1925) (citing *Murphy v. Hussey*, 41 So. 692 (La. 1906); *Baker v. Myatt, Dicks Motor Co.*, 12 Orleans App. 281 (La. App. Orleans 1914)). In a more contemporary formulation, another Louisiana court declared: “The law does not compel people to read or to inform themselves of the contents of an instrument which they may choose to sign, but it holds them to the consequences, in the same manner and to the same extent as though they had exercised those rights.” *McGoldrick v. Lou Ana Foods, Inc.*, 94-400, p. 8 (La. App. 3 Cir. 11/2/94); 649 So. 2d 455, 460 (citing *Dugas v. Modular Quarters, Inc.*, 561 So. 2d 192 (La. Ct. App. 3d Cir. 1990)).

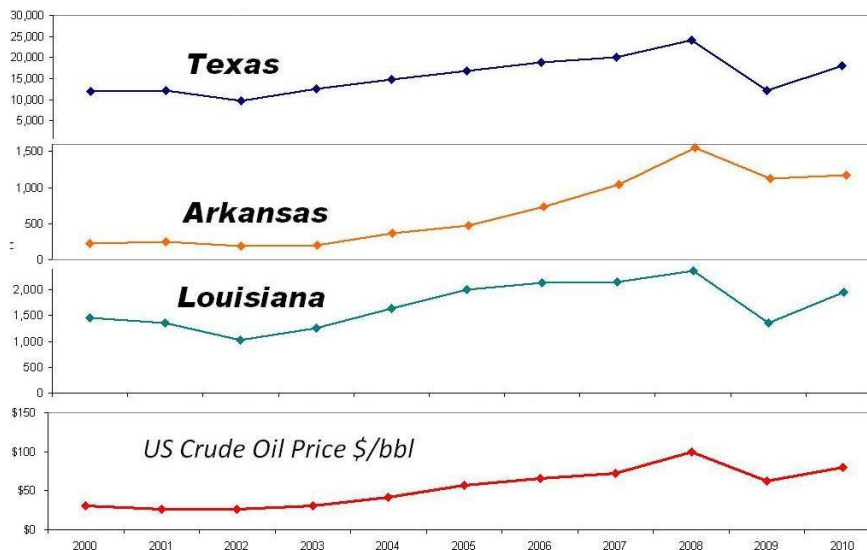
Consistent with this, Louisiana courts have long refused to rewrite contracts after the fact on the ground that “[c]ourts are not created to relieve men of their bad bargains made.” *Kenny v. Oak Builders, Inc.*, 235 So. 2d 386, 390 (La. 1970); *see also Gibbs Constr. Co. v. Thomas*, 500 So. 2d 764 (La. 1987); *TEC Realtors, Inc. v. D&L Fairway Prop. Mgmt.*, 2009-2145 (La. App. 1 Cir. 7/9/10); 42 So. 3d 1116.

64. *Louisiana Energy Facts*, LA. ENERGY FACTS NEWSL. (La. Dep’t Natural Res.), May 2006, at 1, available at <http://dnr.louisiana.gov/assets/docs/energy/newsletters/2006/2006-05.pdf>.

65. LA. DEP’T OF NATURAL RES., OFFICE OF CONSERVATION, DRILLING PERMIT SPIKE HIGHLIGHTS TREND OF INCREASING EXPLORATION (July 29, 2008), <http://dnr.louisiana.gov/index.cfm?md=newsroom&tmp=detail&aid=492> (quoting Jim Walsh).

very closely to economic considerations, such as the price of crude oil per barrel, rather than any litigation outcomes.

Drilling Permits Issued and Crude Oil Price⁶⁶



Notwithstanding this clear evidence, certain oil interests went so far as to retain Louisiana State University economist Loren Scott to stump the state with the message that *Corbello* had caused the sky to fall. In presentations from Houma to Shreveport, Scott blamed the *Corbello* decision for creating a hostile environment for oil and gas producers.⁶⁷ As anyone familiar with oil companies knows, however, oil and gas producers do not decide to drill for oil and gas based on the legal climate at a proposed drill location; they decide based on whether there is oil or gas below the ground there.⁶⁸ As one wag put it, the legislature could

66. *Texas Drilling Statistics*, RAILROAD COMMISSION TEX., <http://www.rrc.state.tx.us/data/drilling/txdrillingstat.pdf> (last visited Oct. 24, 2011) (Texas permit statistics); *Louisiana State Oil and Gas Drilling Permits Issued by Type*, LA. DEP'T NAT. RESOURCES (Aug. 26, 2011), http://dnr.louisiana.gov/assets/TAD/data/facts_and_figures/table22.htm (Louisiana permit statistics); ARK. OIL & GAS COMM'N, ANNUAL REPORT OF PRODUCTION (2010), <http://www.aogc.state.ar.us/OnlineData/reports/Annual%20Report%20of%20Production%201970-2010.pdf> (Arkansas permit statistics); *History of Illinois Basin Posted Crude Oil Prices*, ILL. OIL & GAS ASS'N, http://www.loga.com/Special/crudeoil_Hist.htm (last visited Oct. 24, 2011) (crude oil prices); graphic provided by Michael G. Stag, Attorney, Smith Stag, L.L.C., New Orleans, Louisiana.

67. VERON, *supra* note 35, at 251.

68. See Videotaped Article 1442 Testimony of B.P. America, Inc., *supra* note 62, at 46-49, 59-60.

make it a felony to drill into the Haynesville Shale, and oil companies would do it anyway—because that’s where the hydrocarbons are.

In any event, some public officials ridiculed the suggestion that Louisiana was not totally sympathetic to the oil industry. After Act 312 was passed in 2006, Louisiana State Senator Butch Gautreaux did not mince words: “Whatever the oil companies want us to do, we do Louisiana doesn’t get any respect from other states because of it. People tell oil companies if they want to be abusive, go to Louisiana, because other states won’t let them get away with it.”⁶⁹ He was not alone in his sentiments.⁷⁰

V. “WE DIDN’T DO IT; OUR PREDECESSOR DID”

A familiar rallying cry among industry advocates for changing the law requiring oil companies to clean up property is that the contamination is “old,” suggesting that it resulted from operations conducted by a previous lessee, not the one being sued. This is usually followed by the claim that what the predecessor did was “normal and expected” at the time.⁷¹

This argument would suggest that courts are holding innocent operators responsible for someone else’s mess. However, that is not the case. Those who make these statements rarely disclose that, in order for an oilfield operator to be held liable for contamination caused by another party, the operator must have agreed to clean up that contamination in a contract. Typically, the operator has assumed responsibility for restoration in a surface lease or mineral lease with the landowner or in an assignment from a predecessor lessee. Thus, the short answer to any complaint that an operator is being held responsible for cleaning up someone else’s mess is that it should not have agreed to do so.

In addition, Louisiana courts have historically been unsympathetic to arguments that seek, after the fact, to escape obligations previously agreed upon in a contract. As the reported opinions often declare, “Courts are not created to relieve men of their bad bargains made.”⁷² This policy recognizes the obvious chaos and unpredictability that would result if parties were free to rewrite whatever contracts they later decided they did not like.

69. Jeremy Alford, *A Lasting Legacy*, GAMBIT (Apr. 11, 2006), <http://www.bestofneworleans.com/gambit/a-lasting-legacy/Content?oid=1245573> (quoting Sen. Butch Gautreaux).

70. See, e.g., Wells et al., *supra* note 24.

71. This is a common theme of the Louisiana Oil and Gas Association’s lobbying efforts. E.g., Briggs, *supra* note 62.

72. *Kenny v. Oak Builders, Inc.*, 235 So. 2d 386, 390 (La. 1970).

Beyond that, whether earlier operations were “normal and expected” at the time is ordinarily irrelevant to whether the present operator is obligated by contract with the landowner to restore property. Typically, lease provisions require restoration of damage caused by operations under the lease. They rarely limit the duty to restore contamination attributable only to the most recent operator or to contamination caused by operations that were not “normal and expected.”⁷³ Beyond that, an operator who is offered the assignment of a lease is free to inspect the property in question to assess its condition and, if concerned about contamination, either reject the assignment or negotiate for indemnity in the event of a later claim by the landowner. In any event, the new operator’s responsibility for an earlier operator’s contamination is something the new operator voluntarily assumed, not something that was imposed upon him without a legal cause.

VI. CONCLUSION

The assault on fundamental property rights by “Big Oil” is far from over. During the 2011 legislative session, industry sympathizers introduced bills far more radical than their two predecessors passed in 2003 and 2006.⁷⁴ In one form or another, these bills proposed to remove oilfield contamination cases from the courts altogether and require such claims to be heard in the Office of Conservation.⁷⁵ These radical proposals died in committee and were never heard on the House or Senate floors. However, it is apparent that the oil interests are far from through with their efforts to obtain immunity for contamination. Thus, this issue is likely to rear its head again in the future.

Like so-called tort “reform,” the recent “reform” of landowners’ property rights is not driven by any academic or disinterested desire to make the law better. Rather, it is driven by special interests who seek to make the law more profitable for themselves. In a democracy, that is their right. But these situations inevitably raise questions about whether the proposed change is better law or just an undeserved special favor. For that reason, any arguments advanced by special interests in support of legislative change should be scrutinized for accuracy. As this article shows, the arguments advanced by the oil industry to alter historic property rights of ownership are questionable at best.

73. See LA. REV. STAT. ANN. §§ 31:128-31:129 (2011); *Dore Energy Corp. v. Carter-Langham, Inc.*, 2008-645 (La. App. 3 Cir. 11/5/08); 997 So. 2d 826.

74. The 2011 bills were introduced as HB 563 and SB 146. H.R. 563, Reg. Sess. (La. 2011); S. 146, Reg. Sess. (La. 2011).

75. H.R. 563, Reg. Sess. (La. 2011); S. 146, Reg. Sess. (La. 2011).