Torts in the Oil Patch

Prof. Tracy Hester

September 11, 2017
Announcements

• Field trip to Weatherford drilling rig: **Friday, Sept. 29, 2017**

• Guest speakers –
  – Dr. John Nielsen-Gammon, **Wednesday, Sept. 13, at 6 pm in BLB 109**
  – Roger Martella, GE VP for EHS, **Wednesday, Oct. 25, time and place TBA**
  – Dr. Gavin Clarkson - November

• IEL, AIPN, GCPA
Review

• Basics of Oilfield E&P

• Types of contamination created by E&P work

• Categories of likely tort actions

• Reasons to pursue tort remedy rather than agency action
Environmental Law of First Resort: Tort Claims

- Nuisance
- Negligence (including negligence per se)
- Trespass
- Unjust Enrichment
- Emotional Distress
- Strict Liability – Ultrahazardous Activity
- Exotic claims (business torts, civil conspiracy)
Likely Parties

- Plaintiffs:
  - Surface estate owners
  - Neighbors – both surface and mineral estate owners
  - Agencies and governments
  - NGOs

- Defendants: working interest owners, operators and contractors
Duties Owed by Oil Company

• Be a reasonably prudent operator
  • “Restore” the surface?
  • plow depth
  • concrete pads and foundations?
  • oil, saltwater, etc. contamination?

• What else does the lease (contract) say?
Nuisance

- Material or substantial injury to a person of ordinary health and sensibilities in that particular locale – **private vs public nuisance**
  - no statute of limitations if public nuisance
  - diminution in property value vs injunction or abatement (cost)
  - yesterday’s economic accommodation may become tomorrow’s nuisance (Texas: to persons of “ordinary” sensibilities)

- Permit to discharge is usually not a defense

- Permanent, temporary, and/or continuing
  - “Coming to the nuisance” doctrine may not be applicable if “temporary” and “continuing”
Trespass

• Conduct that leads to the invasion of a person’s interest in his or her rightful exclusive possession of property

  • La: unlawful physical invasion of property of another

• Typically, intentional tort that requires a showing of fault

• Often 2 or 3 year SOL. Arkansas allows continuing trespass claims for last 3 years

• Subsurface trespass?
Trespass (cont’d)

• Trespass claims do not “run with the land”
  • Important to determine whether the sale of land included a transfer of “rights to claims” at time of sale

• Some states require “intent” to establish trespass

• La: “bad faith” trespass damages can include profits made by trespasser
Negligence

- The usual ingredients: standard of care owed (duties) to another, a breach of that legal duty, which proximately causes injury

- What constitutes reasonable conduct under standard of care
  - Standard of care: determined by courts or agencies?
  - The temporal element – do you use standard of care at time of drilling (1950’s) or at time of injury (2014) if conduct is continuing?
Negligence (cont’d)

• Industry custom – API standards?

• Compliance with regulations – necessary, but not sufficient?

• Company policies and standards – best practices, zero tolerance, internal auditing

• Texas: as with trespass, Caveat Emptor
  • Deed recordations and notices in deeds
  • Tort doesn’t “run with the land”
Negligence – Gross

- Gross Negligence
  - Wanton or reckless conduct, fraud or malice
  - Punitive damages
Negligence *Per Se*

- Oil company violates a statute or regulations which then causes pollution

- 16 Texas Administrative Code – Rule 3.8
  - Defines 18 types of pits
  - 3.8(a)(28): Pollution of surface or subsurface water--The alteration of the physical, thermal, chemical, or biological quality of, or the contamination of, any surface or subsurface water in the state that renders the water harmful, detrimental, or injurious to humans, animal life, vegetation, or property, or to public health, safety, or welfare, or impairs the usefulness or the public enjoyment of the water for any lawful or reasonable purpose.
Unjust Enrichment and Restitution

• The argument: Oil company benefited from not spending money to protect the environment

• Amount of “enrichment” is measure of damages, compounded by interest

• Claim may allow access to financial records
Common Issues in Environmental Tort Actions: Measure of Damages

• How much in damages?
  – Traditional = diminution in property value not to exceed the value of the property
  – Trend toward either
    • restore the surface
      – how far down?
      – how clean?
    • cost to remediate
Common Issues in Environmental Torts:
Permanent v. Temporary Damages

• If it’s abatable or remediable, courts will usually classify the damage as temporary
  • abate means to reduce in amount, degree, or intensity; to lessen or diminish
  • remediate means to correct or reverse environmental damage
  • at what cost?
  • 1950’s v. 2014 technology?

• two year statute of limitations
  • permanent measured from date of injury
  • temporary measured from last event
  • continual or periodic leaks and spills?
Common Issues in Environmental Torts: Statutes of Limitation and Discovery Rule

- Statute of Limitations vs. Statute of Repose

- Discovery Rule: Tolls the running of the SOL
  - Starts when plaintiff “knows or should have known”

- Limited by Texas Supreme Court (*City of DISH v. Atmos Energy*, 5/19/17)

- Environmental Contamination?
Common Issues in Environmental Torts: How Clean is “Clean”?

• pristine, background, or “something else”?

• natural remediation?

• hydrocarbons v. salt/radiation (NORM)

• Risk Based Corrective Action (RBCA) -- “Rebecca”
• Texas Risk Reduction Program (TRRP) – “Terp”
Questions?

Professor Tracy Hester
University of Houston Law Center

tdheste2@central.uh.edu
713-743-1152 (office)