

NATURAL RESOURCE DAMAGES & LIABILITY LAW
PROFESSORS CAMPBELL, JACKSON, HALTER AND HESTER
FALL 2016

INSTRUCTIONS

This final examination is a take-home exam subject to the following requirements:

1. You will have **eight (8)** hours to complete the examination after you check it out from the UH Law Library reference desk. If you check out the examination at a time when the library will not accept take-home exams at the 8-hour deadline, you must turn in your exam **before** the library stops accepting exams that day. Examinations turned in the following day will be counted as late. You are responsible for knowing the Law Center's rules regarding when take-home exams can be picked up and turned in at the library.

As always, provide only your exam number (not your name) on your exam. LL.M. students should write "LL.M." next to the exam number on their exams. Foreign LL.M students will have an extra hours (i.e., ten (10) total hours) to complete the exam.

2. You may pick up your examination at the start of final exams period, i.e. **December 2 at 9:00 am**. The deadline to submit all final examinations is **December 7 at 5:00 pm**. We cannot accept any examinations submitted after that date.
3. This examination consists of three (3) essay questions. Each essay has a limit on the length of your answer. Rather than page limits, you will have a **2,500-word limit** (approximately 10 double-spaced pages) for **each** essay (i.e., your total exam answer should not exceed 7,500 words, or 30 double-spaced pages). Please remember that we do not require you to use all ten pages, and that a clear and concise five-page answer will get a higher grade than an unfocused answer that fills ten pages. We assume that you know the materials, so only recite definitions, quotes, background information or cases to the extent necessary to provide a cogent answer. Each question will weigh equally in your final grade, so please be sure to answer each of them fully.
4. This examination is **open book**. You can use your own notes and any materials distributed in class or posted to the class website. Do not use third-party commercial materials, outlines, other texts or online resources. You can access and use cases or direct primary materials (e.g., treaties) if they were specifically discussed in class or directly referenced in the website. The answers to these questions, however, should not require extra materials.
5. We are not requiring you to use the Electronic Blue Book for your typed answers. You are allowed to use spell checkers or other grammar software (subject to the source restrictions described above).

6. This final examination is subject to the University and the Law Center honor codes. Once you have received this examination, do not discuss it with any other student until after the full examination period closes (i.e., end of day on December 16).

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FINAL EXAMINATION

Question 1

Muskrat Creek is not a creek, and muskrats abandoned it long ago. The creek runs sluggishly through the teeming marshes of east Texonia, narrows into a continuously flowing stream, runs through the heart of a refinery, and then discharges into a drainage ditch that feeds into the Holdor River. Extensive historical contamination has smothered any life in the creek, and as a result its natural resource value is severely impaired.

That makes it your problem: you are the newest attorney in the state of Texonia's attorney general's office, and she has dropped the file onto your desk. As you begin to review the file, you begin to appreciate that this site has a long history.

Muskrat Creek has always had a continuous flow of water even during severe droughts, and as a result it historically supported a vibrant community of fish, plants, birds, frogs and mammals (including the rare Texonia river otter). Nearby communities caught fish from the creek for their subsistence diets, and the Ottowan Tribe has enjoyed fishing rights in the stream for over a century thanks to a treaty with the United States.

This bucolic scene came to a close, however, when the United States decided to build a refinery in Texonia as part of the World War II mobilization effort. The federal government built the refinery in a mad rush during 1940, and the Department of Defense installed minimal wastewater treatment systems because of time and resource constraints. As a result, the refinery discharged nearly raw industrial wastewater into the creek starting in 1940, and by 1950 the stream effectively became a dead zone. The sediments in the creek now contain so much historical hydrocarbons and spilled industrial chemicals that the creek quietly bubbles intermittently, and it consistently lumbers under a faint hydrocarbon sheen. The contamination also reaches down into the groundwater under the refinery, which has resulted in a layer of petroleum, gasoline and other hydrocarbons that is over four feet thick. This groundwater plume feeds into the creekbed at a slow and constant rate.

Once the creek exits the refinery, it flows into a drainage ditch that receives treated wastewaters from other refineries and chemical plants. While those additional discharges have contributed to potential contamination of the drainage ditch, it is unclear whether that downstream pollution has worked its way to the refinery and added to the natural resource damages there.

After the war, the United States decommissioned the refinery and put it up for sale to private parties. After a public auction, the multinational petroleum company Chevrell purchased the site "as is" through its U.S. subsidiary, Chevrell U.S.A. Chevrell's subsidiary has operated the refinery continuously for the past sixty years. During that time, Chevrell discharged wastewater into Muskrat Creek as allowed under Texonia law, and starting in 1972 pursuant to a permit issued under the federal Clean Water Act.

The Texonia Attorney General has heard that the United States will soon order Chevrell to bring a removal and remedial action at the refinery to remove the contaminated sediments and groundwater contamination from the site. She wants the State to have a hand in the cleanup so that it can assure that the remediation meets the state's standards and protects any desired future uses of the creek, and the Attorney General has decided that a natural resource damage action might offer the best vehicle to assure a robust restoration of Muskrat Creek. She wants you to provide a brief assessment of the strengths, weaknesses and potential strategies to pursue such an action and settlement.

Draft a brief memorandum to the Attorney General that outlines the type of relief that the state could seek as a natural resource trustee under federal law, the parties who might bear liability to support that restoration, their potential defenses to liability, and the best strategies and negotiation tactics that the state could pursue to obtain the most relief. Your discussion should include a frank assessment of the limits, if any, that a judicial natural resource damage action would face as well as creative opportunities to craft a win-win solution. The Attorney General doesn't want an advocacy piece – she wants your honest and realistic assessment of the best possible legal options open to the state at this point.