# **2 The Law of Pooling and Unitization, 3rd Edition § 21.01**

***The Law of Pooling and Unitization, 3rd Edition* > *CHAPTER 21 Operating Problems***

**§ 21.01 The Common-Law Antecedents Affecting Enhanced Recovery Operations—Liability Based on Negligence, Strict Liability, Trespass, or Nuisance**

1. **Introductory Concepts**

The development of enhanced recovery operations provided an impetus for voluntary and compulsory unitization activities because of the potential legal liability of lessees who engaged in this type of operation. It was the unusual case where the operator controlled enough acreage so that the enhanced recovery operation would not have external effects. For example, the migration of fluids or gas across property lines, or the replacement of more valuable wet gas with dry gas were some of the issues that confronted the operator in planning an enhanced recovery operation designed to increase the production of ***oil*** and gas. The common-law rule of capture and the traditional concepts of nuisance and trespass presented the operator with unknown risks of liability. This chapter will explore the early pre-unitization cases that created this aura of uncertainty, and then examine how governmental intervention through unitization or other conservation statutes affected the common-law rules regarding liability. It will also explore the problems created by the existence of unsigned, non-pooled, or non-unitized tracts or interest that may be affected by an enhanced recovery operation.

In private litigation between surface or mineral estate owners, there are four significant potential sources of common law liability for activities by the ***oil*** and gas operator that allegedly cause an injury to the surface estate.[[1]](#footnote-2)1 These same common law claims would also apply to adjacent tracts of land that are being impacted by off-tract activities by the surface and/or mineral owner. These four common law causes of action are: 1. Negligence, 2. Trespass, 3. Nuisance, and 4. Strict Liability.[[2]](#footnote-3)2

A simple negligence action requires the lessee or operator to owe a duty of care to the injured party, which duty has been breached through his or her conduct or failure to act; said conduct or non-conduct then must cause some actual loss or damage to the complaining party.[[3]](#footnote-4)3 Causation creates a proof issue, although a number of Louisiana decisions have been liberal in allowing negligence claims to proceed with just a minimal showing of causation.[[4]](#footnote-5)4 The application of the discovery rule or similar doctrine to toll the running of the statute of limitations has also created problems for courts dealing with negligence or other tort-base claims.[[5]](#footnote-6)5 Special problems have arisen in cases where the plaintiffs assert that various ***oil*** and gas operations, including hydraulic fracturing or injection of frac water may have caused earthquakes.[[6]](#footnote-7)6 An action seeking injunctive relief under the citizen suit provisions of La. Rev. Stat. 30:16 is not subject to prescription.[[7]](#footnote-8)6.1

While negligence is a fault-based cause of action, trespass only requires an intentional invasion of an owner’s possessory interest in land.[[8]](#footnote-9)7 The trespass may either be a surface trespass or an underground trespass.[[9]](#footnote-10)8 The Second Restatement of Torts limited a trespassory cause of action so as to exclude unintentional and non-negligent entries onto the land possessed by another.[[10]](#footnote-11)9

The third potential source of liability is nuisance, called by some the most “impenetrable jungle in the entire law … .”[[11]](#footnote-12)10 A private nuisance is an interference with the use and enjoyment of the land that is either intentional and unreasonable or unintentional and negligent.[[12]](#footnote-13)11 The traditional definition of a nuisance was eloquently set out in *Maranatha Temple, Inc. v. Enterprise Products Co.*[[13]](#footnote-14)12 The alleged nuisance was the operation of a gas pipeline and underground storage project. In rejecting the plaintiff’s claim that such operations consitute a nuisance, the court states:

The word means, literally, annoyance; in law, it signifies, according to Blackstone, “anything that worketh hurt, inconvenience or damage.” A private nuisance is defined to be anything done to the hurt, or annoyance of the lands, tenements, or hereditaments of another … . To constitute a nuisance, it is not necessary that the annoyance should be of a character to endanger health; it is sufficient if it occasions that which is offensive to the senses, and which renders the enjoyment of life and property uncomfortable. Even that which does but cause a well-founded apprehension of danger may be a nuisance. The word means, literally, annoyance; in law, it signifies, according to Blackstone, “anything that worketh hurt, inconvenience or damage.” A private nuisance is defined to be anything done to the hurt, or annoyance of the lands, tenements, or hereditaments of another … . To constitute a nuisance, it is not necessary that the annoyance should be of a character to endanger health; it is sufficient if it occasions that which is offensive to the senses, and which renders the enjoyment of life and property uncomfortable. Even that which does but cause a well-founded apprehension of danger may be a nuisance.[[14]](#footnote-15)13

Notwithstanding this very broad definition of what constitutes a nuisance, the court then stated that lawfully run industries, including the ***oil*** and gas industry, cannot as a matter of law create fear, apprehension or other emotional reactions that would satisfy even this broad nuisance standard.[[15]](#footnote-16)14 The fear of an accident that may or may not occur cannot be the basis of a nuisance cause of action.[[16]](#footnote-17)15

The Texas Supreme Court has recently engaged in a comprehensive review of nuisance law in order to provide some additional guidance for trial courts attempting to resolve private nuisance claims in *Crosstex North Texas Pipeline, LP v. Gardiner*.[[17]](#footnote-18)16 It noted that the older cases emphasized that determining liability for a private nuisance claim depended upon whether the acts were “reasonable … under all circumstances.”[[18]](#footnote-19)17 The court then provided the following definition of a nuisance: “… a condition that substantially interferes with the use and enjoyment of land by causing unreasonable discomfort or annoyance to persons of ordinary sensibilities attempting to use and enjoy it.”[[19]](#footnote-20)18 A nuisance is neither a cause of action nor the defendant’s conduct or operations, but reflects a particular type of legal injury which may be redressed in the courts. Determining whether specific conduct constitutes a nuisance under the above definition is necessarily ad hoc given that the interference must be unreasonable and the impairment substantial.[[20]](#footnote-21)19

The court then tackled the issue of whether there can be both a negligent-based nuisance as well as an intentional-based nuisance by first noting that a person asserting a nuisance claim must show that the action complained of constitutes a “legal wrong.”[[21]](#footnote-22)20 Thus, a nuisance, meaning the legal injury that the conduct causes, has to be based on either intentional or negligent actions. In order to prove an intentional nuisance, plaintiff must show that the defendant desires to cause the consequence of his actions or believes that the consequences are substantially certain to result from it.[[22]](#footnote-23)21 As with any intent requirement in the law, it is a subjective standard. As to a negligent nuisance claim, the plaintiff must prove the existence of a legal duty, a breach of that duty and damages.[[23]](#footnote-24)22 Finally, the court recognizes the unclear status of the law of strict liability in Texas, but concludes that it is possible for a nuisance to exist where the actor engages in abnormally dangerous activities that create a high degree of risk that substantially interferes with the use and enjoyment of land.

The Texas Supreme Court’s attempt to rationalize nuisance law, and more importantly, jury instructions on what constitutes a nuisance, is to be applauded. Due to the very nature of nuisance claims, they will remain hard to define and lead to the factfinder’s weighing of numerous factors. Nonetheless, the Court’s construct provides some parameters that will allow trial courts to better instruct factfinders as to when nuisance liability will attach.

Another issue that has plagued nuisance jurisprudence is the distinction between a trespassory cause of action and one grounded in nuisance.[[24]](#footnote-25)23 The primary difference between a trespass claim and a nuisance claim is that for a trespass claim one needs to show ownership of an interest in real property that has been invaded while for a nuisance claim one only need show an unreasonable interference with the use and enjoyment of an interest in real property. In *Northern Natural Gas Co. v. L.D. Drilling, Inc.*,[[25]](#footnote-26)24 the owner of a gas storage facility asserted that the defendants were committing a nuisance by continuing to produce injected gas through wells located outside of the FERC-certificated storage facility.[[26]](#footnote-27)25 Instead of having to show ownership of the injected gas, which it could not do under Kansas law,[[27]](#footnote-28)26 it has to show that the defendant’s actions constitute an unreasonable interference with the use and enjoyment of its property interest in the storage facility. The court concluded that the storage facility operator had shown that the continued production from the off-facility wells created “pressure sinks” which caused the storage gas to migrate several miles to the defendants’ producing wells.[[28]](#footnote-29)27 The Tenth Circuit also affirmed the trial court’s analysis in balancing the equities before it issued its preliminary injunction prohibiting the defendants from continuing to produce natural gas that was largely composed of injected gas that was migrating out of the storage facility to the producing wells.

In *Gerrity* ***Oil*** *& Gas Corp. v. Magness*,[[29]](#footnote-30)28 the court distinguished between causes of action based on negligence and trespass. A trespass occurs when there is a non-permissive physical intrusion upon the property of another. A trespass can also occur when a person with permission to enter remains longer than necessary to perform the activity for which the permission was granted. While trespass is an intentional tort, the intent is merely to cause the physical intrusion, not an intent to cause injury. Likewise, there is no requirement in trespass for the trespasser to act unreasonably. If an operator retains possession of the surface longer than allowed, a trespass occurs regardless of whether or not the operator’s actions are reasonable.

Decisions from other states reflect a widely disparate view of what constitutes a nuisance. For example, in *Union* ***Oil*** *Co. of California v. Heinsohn*,[[30]](#footnote-31)29 the Tenth Circuit applying Oklahoma law affirmed a jury verdict finding that a sour gas processing plant created a nuisance notwithstanding the fact that the plant had received all of the required permits to operate from the state environmental and ***oil*** and gas conservation agencies. This is consistent with the long-held Oklahoma position that a governmental permit does not insulate the permit holder from potential nuisance liability.[[31]](#footnote-32)30

In *Titan Operating, LLC v. Marsden*,[[32]](#footnote-33)31 the owner of the surface and mineral estate who executed an ***oil*** and gas lease with a no surface occupancy provision as well as a surface damages agreement claimed that the lessee’s operations off of his surface estate nonetheless constituted a nuisance due to the truck traffic and noise. The Court of Appeals, however, reversed the jury’s verdict in favor of the surface owner based on the quasi-estoppel doctrine whereby a party may be precluded from asserting a right that is inconsistent with a position previously taken. In this case by signing an ***oil*** and gas lease and entering into a surface damages agreement, the plaintiff took the position that drilling operations could take place so long as the conditions contained in both instruments were complied with. As such, the plaintiff may not complain of a loss of the use and enjoyment of his property interest by actions which he authorized.[[33]](#footnote-34)32

In *Sewell v. Phillips Petroleum Co.*,[[34]](#footnote-35)33 the court interpreted the nuisance cause of action in a way that would limit the ability of a surface owner to sue an ***oil*** and gas operator. The court’s analysis, predicting Arkansas law, was that nuisance is designed to prevent one landowner from unreasonably interfering with the rights of another landowner. Implicit in that definition is the existence of two separate tracts of land. The split estate created by the severance of the mineral and surface estate is not sufficiently analogous to the two separate tract situation to support a nuisance cause of action according to the court.[[35]](#footnote-36)34

In *Bad River Band of the Lake Superior Tribe v. Enbridge Energy Co.*,[[36]](#footnote-37)34.1 the court held that under federal common law a public nuisance, which is a substantial and unreasonable interference with a right common to the general public, has “three elements: (1) unreasonable interference with public rights, health, safety or welfare; (2) if not presently occurring, interference must be imminent or certain to occur; and (3) the defendant must have caused the nuisance.”[[37]](#footnote-38)34.2

Strict liability, which is of relatively recent origin in the law of torts, imposes liability without a finding of intent or fault based on some societal notion of justice and fairness.[[38]](#footnote-39)35 The case that served as the fountainhead of modern strict liability law is *Rylands v. Fletcher,*[[39]](#footnote-40)36 a case involving a subsurface escape of water into a working coal mine. Early development of the strict liability doctrine focused on injuries caused by parties engaging in ultrahazardous activities. As the doctrine has matured it has expanded in scope so that strict liability, in some jurisdictions, covers ordinary industrial and manufacturing behavior.[[40]](#footnote-41)37 In Texas there is at least one case that found that the normal operations involved in ***oil*** and gas exploration and production activities cannot be the foundation of a strict liability claim.[[41]](#footnote-42)38 On the other hand there are a series of recent Pennsylvania cases which have refused to dismiss on summary judgment motions, strict liability causes of action relating to ***oil*** and gas operations. Several early Pennsylvania cases concluded that neither the operation of a petroleum pipeline,[[42]](#footnote-43)39 or an underground storage tank,[[43]](#footnote-44)40 could constitute an ultrahazardous activity. But in *Fiorentino v. Cabot* ***Oil*** *& Gas Corp.*,[[44]](#footnote-45)41 the court refused to summarily dismiss a strict liability claim brought by surface owners asserting that there were questions of fact as to whether natural gas well drilling using hydraulic fracturing.[[45]](#footnote-46)42 The *Fiorentino* approach was followed in *Berish v. Southwestern Energy Prod. Co.*,[[46]](#footnote-47)43 where the court refused to reject the possibility that the surface owner could state a strict liability claim for the alleged migration of frac fluids out of the wellbore.[[47]](#footnote-48)44 But in *Ely v. Cabot* ***Oil*** *Corp.*,[[48]](#footnote-49)45 the court decided that as a matter of law allegations that ***oil*** and gas operations trigger a strict liability claim could be rejected even after the plaintiff was given an opportunity to submit expert witness reports regarding such operations.[[49]](#footnote-50)46

1. **Damages and Other Issues**

Because many of the injuries alleged in ***oil*** field-related cases are real property related injuries, a number of issues may arise that govern these causes of action. One such issue is who has standing to claim an injury to real property. It is axiomatic that a person alleging some type of tort damages to the surface estate have standing to bring that action. A typical case is reflected in *Senn v. Texaco, Inc.*,[[50]](#footnote-51)47 where the owners of the surface estate sued various ***oil*** and gas operators who had engaged in drilling and production activities many years before the owners purchased their interest. The deed to the present owners noted that there were no warranties about the quality of groundwater. The appraisal report noted that there were existing ***oil*** and gas activities on the premises. Under Texas law, a cause of action for injury to real property belongs to the person who owns the real property at the time of the injury.[[51]](#footnote-52)48 Since the defendants seeking a summary judgment had not engaged in any drilling or production activities after the owners had purchased the premises, the owners lacked standing to sue for alleged injury to the groundwater aquifer unless they were conveyed that cause of action in their deed.[[52]](#footnote-53)49 The court found that the deed did not convey the grantor’s cause of action but merely reaffirmed the grantee’s right to sue for injuries arising after the conveyance.

While the Texas rule is reasonably simple to apply, complications may arise where there are multiple owners of the allegedly damaged interest in real property. In *Vee Bar, Ltd. v. BP Amoco Corp.*,[[53]](#footnote-54)50 the court was faced with applying the Texas rule as to standing as it regards an interest in real property that was co-owned at the time of the alleged injuries. The plaintiff did not purchase the surface estate from five co-tenants until after the alleged injuries were incurred. In response to the mineral owner’s plea to the jurisdiction based on the failure of the co-tenants to specifically assign their claims for damages, the plaintiff obtained an assignment of the cause of action from three of the five co-tenants. Under Texas law, the general rule is that in a suit to recover for injury to real property all of the tenants in common must be joined.[[54]](#footnote-55)51 The rationale for the joinder requirement is to prevent: “(1) a multiplicity of suits; (2) several recoveries for one trespass; and (3) an inconvenience for the parties.”[[55]](#footnote-56)52 The court finds that the general rule is not applicable where, as here, the issue is one of standing to bring the action.[[56]](#footnote-57)53 Furthermore, the trial court dismissed the suit even though the plaintiff used Rule 39(a) to join the two non-consenting owners as defendants or involuntary plaintiffs.[[57]](#footnote-58)54 That decision was an abuse of discretion.

Louisiana applies the “subsequent purchaser” rule as to surface leases which states that: “an owner of property has no right or actual interest in recovering from a third party for damage which was inflicted on the property before his purchase, in the absence of an assignment or subrogation of the rights belonging to the owner of the property when the damage was inflicted.”[[58]](#footnote-59)55 While there was a split of authority between the courts of appeal as to whether or not the subsequent purchaser rule applies where a mineral lease is concerned, the Louisiana Supreme Court has clearly indicated that the rule applies to suits involving ***oil*** and gas leases.[[59]](#footnote-60)56 It does not matter whether the damages inflicted were apparent or latent.[[60]](#footnote-61)57 Where the transfer of the land occurs many years after the alleged injuries were incurred and after the termination of the mineral lease, that transfer will not assign any claim. There is a civil law analog to the common law rule that causes of action may be assigned along with the interest in real property. That analog is called a *stipulation pour autrui*.[[61]](#footnote-62)58 While recognizing the exception to the subsequent purchaser rule, the plaintiff still bears the burden of showing the existence of of a *stipulation pour autrui* that allows them to sue for injuries incurred prior to their ownership of the immovable property.[[62]](#footnote-63)59

In response to the impact that the subsequent purchaser doctrine has on surface owner claims relating to past contamination activities, a number of suits have been filed seeking to invoke the citizen suit provisions contained in Act 312 as a means to avoid that doctrine.[[63]](#footnote-64)59.1 These efforts, however, have not been successful to date in approving such litigation seeking damages for past contamination.[[64]](#footnote-65)59.2 Recent decisions, however, have refused to apply res judicata to the claims made under the citizen suit provision where analogous claims had been dismissed under the subsequent purchaser doctrine.[[65]](#footnote-66)59.3 The Louisiana Supreme Court has concluded that the current landowner retains the power to seek a regulatory cleanup of an allegedly contaminated site under the citizen suit provision of La. Rev. Stat. 30:16, even if a suit for damages is otherwise barred.[[66]](#footnote-67)59.4

In a number of early decisions, New Mexico courts applied the discovery rule that usually deals with statute of limitations issues to find that subsequent purchasers of interests in real property had standing to sue for surface contamination, improper disposal of salt water and other oifield-related injuries.[[67]](#footnote-68)60 But in *McNeill v. Rice Engineering & Operating, Inc.*,[[68]](#footnote-69)61 the Mexico Supreme Court rejected the theory that a subsequent owner may sue for trespassory damages that occurred prior to the plaintiffs’ ownership of the interest in real property. The parties settled the damages claims as to those damages incurred after October 27, 1994, the date the plainitffs became the owners of the surface estate. Relying on earlier non-***oil*** and gas trespass cases, the court found that the purchaser of real property may not maintain an action for trespass that was committed prior to the acquisition of the interest in real property.[[69]](#footnote-70)62 The mere fact that title to the surface estate has been conveyed does not afford the grantee the right to stand in the shoes of the grantor and sue for trespass based on activities that took place prior to the conveyance.[[70]](#footnote-71)63

Oklahoma, by statute, does not allow tort actions to be transferred. Thus, a subsequent owner of an ***oil*** and gas lease may not bring a tort action claiming an injury to its vertical well from the alleged cross-boundary migration of frac fluids from an adjacent lease.[[71]](#footnote-72)63.1

Virginia, on the other hand, appears to follow a different approach to the standing issue. Thus, “when an owner of property conveys it to another, that person assumes all the rights which belonged to the original owner, including any right to recover for damages to the property.”[[72]](#footnote-73)64

Standing issues may also arise where a claim is made by the surface owner that an underground injection of non-hazardous oilfield waste water crossed over the boundary line between the surface owner’s parcel and the adjacent parcel where the injection well was located. In *FPL Farming Ltd. v. Environmental Processing Systems, LC*,[[73]](#footnote-74)65 the court dealt with such a challenge.[[74]](#footnote-75)66 In order to bring a trespassory cause of action one must be the owner of the possessory estate that has allegedly been invaded by the defendant. EPS made two arguments as to why FPL had no standing to bring the trespass claim. The first was that FPL had not shown that it was the title owner of the surface estate since it had not adduced evidence of a proven chain of title. The court concluded that by placing into record the deeds conveying the surface estate to FPL, FPL had shown that it is the owner of the possessory estate being invaded since the surface owner owns the groundwater.[[75]](#footnote-76)67 In a trespass action, the plaintiff need only show that is has the right of possession, not that it has perfect title. The deed documents showed that FPL has the right of possession. The second was that FPL’s predecessors in interest had reserved the express right to store minerals under the subsurface of the tract. The court treats the reservation language as not expanding on the possessory mineral estate but merely granting the mineral owner an easement of storage or transportation. Because FPL was the owner of the possessory estate, albeit burdened by the express easement owned by a non-party to this litigation, it has standing to bring the trespass action.[[76]](#footnote-77)68

Upon appeal to the Texas Supreme Court, the Court of Appeals decision is reversed and the trial court judgment in favor of the injector is reinstated.[[77]](#footnote-78)69 The decision does not rely on standing but instead dealt with whether or not FPL Farming consented to the entry by the injector.[[78]](#footnote-79)70

In addition to the standing of plaintiffs to assert various tort-based causes of action, an analogous situation arises under certain federal environmental statutes as to which entity may be sued. In *Smith v. Mid-Valley Pipeline Co.*,[[79]](#footnote-80)71 the court dealt with the issue of whether a prior owner of a pipeline could be liable for environmental damage caused by a pipeline ***oil*** spill that occurred many years after ownership was transferred to third parties. Besides the common law claims relating to negligence, nuisance, trespass and strict liability, among others, the plaintiff sought damages under the ***Oil*** Pollution Act (OPA).[[80]](#footnote-81)72 Under the OPA, the party who is the owner or operator of the pipeline or facility that causes the pollution may be responsible. Since the defendant was not the owner or operator at the time of the spill, it could not be liable under the OPA. The allegations regarding gross negligence related to dilatory efforts to clean up the spill after it occurred. Since the defendant was not responsible for the cleanup, the court dismissed the gross negligence claim. The strict liability claim was not dismissed since it allegedly related to actions taken during the defendant’s ownership of the pipeline, although the court noted that operating a pipeline had not, to date, met the requirement of an “abnormally dangerous” activity that triggers strict liability.[[81]](#footnote-82)73 The court also found that claims based on trespass and nuisance also related back to the time that the defendant owned the pipeline and thus did not dismiss them. Likewise, since the allegations of negligence related to the care, maintenance, and repair of the pipeline that could have occurred at the time of defendant’s ownership, which claim likewise survived summary judgment.

Where a party alleges injury to a real property interest, there may be several applicable measures of damages. The traditional measure of damages where a property owner is asserting a permanent trespass or nuisance claim is the lost market value of the property interest.[[82]](#footnote-83)74 Lost market value is typically determined by looking at the before and after value of the premises. Landowner or layperson testimony may be admissible to ascertain the before and after market value but only if the testimony is not conclusory or speculative.[[83]](#footnote-84)75 In addition to the diminution in value measure of damages, courts in various circumstances and situations have also awarded damages based on the cost of restoration. In ascertaining which is the more appropriate measure, several factors are often typically weighed including the permanency of the injury, whether the injury is continuing, the cost of restoration, and the diminution in value.[[84]](#footnote-85)76 Restoration costs are usually not awarded where the injury is permanent and not temporary in nature.[[85]](#footnote-86)77 Because of the illusory nature of the permanent/temporary injury dichotomy, New Mexico has opted to abolish the dichotomy and replace it with a “reasonableness” test whereby the injured surface owner may be allowed to present evidence of the cost of repair or restoration of the surface in determining the amount of damages sustained.[[86]](#footnote-87)78 For continuing trespasses or nuisances, courts also have the power to grant injunctive relief.[[87]](#footnote-88)79 In a number of jurisdictions, where restoration costs may be allowed under certain circumstances, courts have restricted the damage award to the value of the land damaged by the oilfield operations.[[88]](#footnote-89)80

There also may be statutory provisions regarding the measure of damages for trespass.[[89]](#footnote-90)81 Louisiana has had a longstanding problem with the issue of awarding restoration costs in cases dealing with oilfield contamination. While Louisiana follows the general rule that limits damages for tortious injuries to immovable property,[[90]](#footnote-91)82 where the parties have contracted for the operator to restore the surface or otherwise not cause any injury, damages may be given that far exceed the value of the surface estate.[[91]](#footnote-92)83 Where the contract does not provide for restoring the surface, the Louisiana Supreme Court has held that the obligations implied from the Mineral Code,[[92]](#footnote-93)84 do not require the lessee to restore the surface in the absence of a showing of negligent or unreasonable surface user.[[93]](#footnote-94)85

The Louisiana Legislature responded to the concerns raised by *Corbello* and its progeny by enacting Act 312 of 2006.[[94]](#footnote-95)86 Act 312 establishes procedures for judicial resolution of claims for environmental damages arising from activities subject to the jurisdiction of the Department of Natural Resources, Office of Conservation. In *M. J. Farms, Ltd. v. Exxon Mobil Corp.*,[[95]](#footnote-96)87 the court identified the following component parts or procedures to be followed in dealing with an oilfield contamination or restoration case:

First, the act requires timely notice of such litigation to the State. La. Rev. Stat. § 30:29(B)(1);

Second, the act stays the litigation until thirty days after notice is given. *Id.*;

Third, the act permits the State to intervene in the litigation. *Id.* at § 30.29(B)(2);

Fourth, the act provides a role for the Office of Conservation with the Louisiana Department of Natural Resources in the determination of the most feasible plan for evaluation and/or remediation of environmental damage. *Id.* at § 30:29(C);

Fifth, the act provides for the payment of all damages for the evaluation or remediation of environmental damages and further provides that the Court shall oversee actual implementation of the plan adjudicated to be the “most feasible.” *Id.* at § 30.29(D) and (F);

Sixth, the act provides for the payment of all damages for the evaluation and remediation of environmental damages, and further provides that the Court shall oversee actual implementation of the plan adjudicated to be the “most feasible.” *Id.*[[96]](#footnote-97)88

The Louisiana Supreme Court found Act 312 to be constitutional in providing a comprehensive mechanism to resolve these kinds of cases.[[97]](#footnote-98)89

In *State v. Louisiana Land & Exploration Co.*,[[98]](#footnote-99)90 the Louisiana Supreme Court concluded that Act 312 does not cap damages at the amount necessary to fund the statutory remediation plan. It treated Act 312 as a procedural, not a substantive, statute, setting forth the requirements needed to claim remediation damages upon the contamination of the surface estate by the actions of mineral lessees. In the remand, the trial court ordered that the ***oil*** and gas operator engage in the remediation efforts as directed by the Department of Natural Resources’ plan, which was expected to cost $3.5 million.[[99]](#footnote-100)91 The trial court also awarded $1.5 million based upon the plaintiff’s strict liability claim but refused to award damages for breach of contract. The court of appeals remanded the case to the trial court saying that the jury verdict was inconsistent in finding that the operator had caused contamination that led to the awarded damages, but did not breach the contract so as to support a finding of additional damages under *Corbello* and the initial *LL&E* case. Upon appeal to the Louisiana Supreme Court, a majority of the court found that the earlier LL&E opinion was manifestly in error in the interpretation of Act 312 as it then existed insofar as it would allow for the recovery of damages in excess of the remediation costs.[[100]](#footnote-101)91.1 The supreme court defined its earlier decision as “misguided” by allowing: “(1) juries to decide the amount of damages necessary to remediate land to department standards; and (2) juries could award to the petitioner-landowners damages in excess of actual costs to remediate the land.”[[101]](#footnote-102)91.2 The supreme court found that its interpretation was consistent with the general rule that restoration is the traditional remedy awarded for damage to immovable property.[[102]](#footnote-103)91.3 Act 312, even prior to the 1914 amendments, was clear and unambiguous in restricting damages for environmental injuries to the amount paid into the registry of the court for use in the remediation of the premises. Thus, in the absence of an express contractual provision relating to environmental injuries or tortious behavior other than environmental damages, the surface owner’s remedy was limited to the funding of the Commissioner-approved remediation with any excess funds payable to the responsible party.[[103]](#footnote-104)91.4 In its opinion on rehearing, the Louisiana Supreme Court further added that non-remediation damages, including those involving a strict liability tort could be awarded in addition to the statutory remediation remedy of site restoration.[[104]](#footnote-105)91.5

In 2014, the Louisiana legislature once again amended Act 312 dealing with private damages. In *Moore v. Denbury Onshore, LLC*,[[105]](#footnote-106)92 the court found that the amendments were not intended to overrule *LL&E*, based on the legislative history, and thus allows the landowner to claim damages beyond ensuring the remediation of the damaged surface. The court, however, did dismiss the claims that the damages should be measured by the cost to remediate based on the original condition, since there was no contractual requirement to so remediate.

In *Sweet Lake Land &* ***Oil*** *Co. v. Oleum Operating Co., LC*,[[106]](#footnote-107)93 the court described the Act 312 process as follows:

As contemplated by [the provisions of Act 312] a trial court, upon a finding of liability/responsibility, (1) refers the matter to LDNR to develop a remediation plan, (2) orders the responsible party to develop a plan for the “evaluation or remediation to applicable standards” of the contamination and submit same to LDNR and the court, and (3) allows the plaintiff and other parties to review the plan submitted by the responsible party and to provide to LDNR and the court a plan, comment or input in response thereto. … LDNR then conducts a public hearing on the submitted plans and either approves one of the submitted plans or comes up with its own plan … . Thereafter LDNR files its final plan with written reasons in the trial court record.[[107]](#footnote-108)94

A dispute arose as to whether the LDNR submission was a final plan that requires the trial court to adopt it unless a party by a preponderance of the evidence shows that another plan would be more feasible.[[108]](#footnote-109)95 The court of appeals concluded that the trial court retained authority to make the determination as to whether the LDNR plan was a final one or not and if not, it was not under the statutory mandate to approve such plan. In subsequent decisions, the court of appeals awarded attorney’s and expert’s fees and treated the multiple defendants’ liability as non-solidary.[[109]](#footnote-110)95.1

In Montana there has always been an exception to the general rule that a party asserting a temporary injury to real property is solely entitled to the diminution of value caused by that injury.[[110]](#footnote-111)96 Relying on the Second Restatement of Torts, Montana allows a party to elect restoration costs as the measure of damages in appropriate cases.[[111]](#footnote-112)97 The exception is warranted only where the property owner possesses “personal reasons” for opting for restoration costs and those restoration costs are disproportionately in excess of the amount of the diminution in value. Thus, where a surface owner is seeking restoration costs for contamination caused by a compressor station of between $138,000 and $2.2 million and the fair market value of the surface estate is less than $2,400, the owner will be required to show “personal reasons” to justify the higher damage award.[[112]](#footnote-113)98 Restoration damages will be available for all types of land use and are not restricted to residential or recreational uses.[[113]](#footnote-114)99

As noted earlier, New Mexico abandoned the permanent/temporary dichotomy when it comes to ascertaining damages caused by oilfield contamination. In *McNeill v. Burlington Resources* ***Oil*** *& Gas Co.*,[[114]](#footnote-115)100 a surface owner claimed that the defendant’s predecessors in interest used surface pits to dispose of ***oil*** field wastes that caused injury to the surface estate. The theories proffered to support the claim were negligence, trespass and nuisance.[[115]](#footnote-116)101 In New Mexico the uniform jury instruction for damages to real property encompasses a single standard, namely the diminution in value test measured by before and after value.[[116]](#footnote-117)102 Plaintiffs argued that costs of remediation should be the proper measure of damages. In resolving the inconsistency between the uniform jury instruction and a number of New Mexico cases applying a different damage model, the court of appeals found that where a temporary injury to real property is proven, remediation costs are the appropriate measure of damages.[[117]](#footnote-118)103 The court then determined that whether an injury is permanent or temporary is a question of fact for the jury and not a question of law for the judge.[[118]](#footnote-119)104 Finally, the court determined that where a permanent injury is involved and thus the diminution-in-value test applies, the test should apply to the entire parcel owned by the plaintiff and not merely to the area that has been damaged.

On appeal,[[119]](#footnote-120)105 the New Mexico Supreme Court set forth new standards for assessing the amount of damages suffered by the surface owner upon a showing of negligent injury to the surface. The court read *Carter Farms* as not requiring the exclusion of evidence of the “cost of repair” of a premises in determining the damages caused by the negligent use of the surface.[[120]](#footnote-121)106 In this case the surface owner is entitled to proffer expert testimony that the cost to repair the surface is $1.2 million to support its claim that the surface estate has been rendered essentially valueless because the pre-injury value was shown to be $1.4 million. Such evidence meets the standard of relevancy and thus should be admitted. The court added, however, that the cost to repair may or may not be relevant under the circumstances of any case. Therefore the trial court still retained its gatekeeper function and was allowed to exclude such evidence in individual cases. Contrary to the trial court’s ruling, *Carter Farms* should not be interpreted to create a bright-line rule of excluding such evidence.[[121]](#footnote-122)107

Where the court makes new law is in its rejection of the permanent/temporary damages dichotomy that used to govern the damage recovery in injury to real property cases. *Carter Farms* had applied the traditional test that where the injury was permanent in nature, the measure of recovery was the before and after value. Where the injury was temporary the cost of restoration and/or remediation was relevant. The court likewise rejects the use of the uniform jury instruction for damages for injury to real property which focuses on the diminution in value as the proper measure. Instead, juries may consider both the cost to repair and the diminution in value standards regardless of whether the injury is permanent or temporary. The overriding standard will be one of reasonableness and there will be a cap on the amount of damages that will be measured by the diminution in value. The court further reaffirms the court of appeals’s view that even though the injury may be on a discrete portion of a larger tract, the post-negligent injury looks at the value of the entire tract and not the discrete portion.[[122]](#footnote-123)108

Where injected gas migrates from a storage reservoir formation to a second formation not owned or leased by the injector, the injector may be liable for trespassory damages. In *Beck v. Northern Natural Gas Co.*,[[123]](#footnote-124)109 several landowners sued the injector for the rental value of a formation into which injected gas had migrated. Northern argued that each of the individual landowners had not shown a trespass as to their acreage, only that there was migration somewhere in the 23,000-acre storage reservoir. The court agreed that each owner did not prove an individual trespass, but that the evidence they did proffer showing the highly permeable and interconnected nature of the two formations is sufficient to prove that the injector had invaded the possessory interests of the owners so as to constitute a trespass. The court then affirmed an award of $100.00/acre rental value as appropriate for this type of trespass. The United States Supreme Court has held that the due process clause of the Constitution places limits on the amount of punitive damages that can be awarded.[[124]](#footnote-125)110 As a rule of thumb punitive damage awards cannot exceed 100 times the amount of compensatory damages, although there is no bright line ratio.[[125]](#footnote-126)111

In addition to standing, statutes of limitation play an important role in determining whether a party may sue a former ***oil*** and gas operator under any of the appropriate causes of action for damages that may have occurred many years prior to the filing of the litigation.[[126]](#footnote-127)112 In *Exxon Corp. v. Emerald* ***Oil*** *& Gas Co., L.C.*,[[127]](#footnote-128)113 the current working interest owner and royalty owners brought suit against Exxon Corp. alleging that Exxon had improperly plugged and abandoned a number of wells after it decided to surrender the lease. Included in the causes of action were claims based on statutory and common law waste, negligence per se, negligent misrepresentation and tortious interference with contract. Under Texas law, all of these causes of action are governed by a two-year statute of limitations.[[128]](#footnote-129)114 While the plaintiffs argued that either the doctrine of fraudulent concealment tolls the running of the statute of limitations or the discovery rule defers the accrual of the causes of action, the court resolves the dispute based on the plaintiffs’ actual knowledge of the alleged injury.[[129]](#footnote-130)115 That knowledge was impart to the royalty interest owners and the current working interest owners who were the plaintiffs more than two years prior to the filing of the action. The royalty owners knew of the problem when they sent a letter to Exxon advising them that plugging the wells would constitute waste and the current working interest owners knew of the problem when they discovered that there was cut casing and “junk” in the wellbore.

Where a party engages in allegedly negligent drilling operations, it may be subject to a class action lawsuit. In *Singleton v. Northfield Insurance Co.*,[[130]](#footnote-131)116 a well blew out causing an evacuation of the nearby population, the shutting down several manufacturing operations, and sub-surface losses to the reservoir. Plaintiffs filed a class action lawsuit based on the blow-out and designated two sub-classes, “above the ground” plaintiffs and “below the ground” plaintiffs. “Above the ground” plaintiffs were defined as parties residing in one of three parishes that suffered some type of loss as a result of the “blowout.” “Below the ground” plaintiffs were defined as those parties owning mineral interests in the designated unit where the well was located. After analyzing the four requirements for class certification—numerosity, typicality, adequacy of representation and predominance—the court upheld the class certification as to the “below the ground” sub-class, but remanded for a more restrictive definition of “above the ground” plaintiffs since the evidence clearly showed that the potential impact of the blowout would not have gone beyond a 5-mile area from the wellbore. The geographic limitation contained in the trial court’s definition extended well beyond a 5-mile radius.

In *AJ & K Operating Co. v. Smith*,[[131]](#footnote-132)117 an operator who wanted to plug and abandon a well and remediate the surface was prohibited from doing so by the surface owner who had received a temporary restraining order preventing such activities. The TRO was issued as part of a lawsuit alleging damage to the surface estate under various theories including negligence, negligence per se, nuisance, trespass, and strict liability. The ostensible irreparable harm that would be prevented by the TRO was the destruction of evidence relating to the plaintiff’s cause of action. The TRO was first issued in 1999, and although modified somewhat in later years, was still in force in 2002 when the operator sought to have it overturned so it could complete its site remediation activities. The Arkansas Supreme Court overturned the TRO because it could find no irreparable harm to support its continued operation. The surface owner was seeking monetary damages for alleged injuries to the surface estate. Monetary damages were an adequate remedy should any of the pleaded causes of action be proven at trial. Affecting the court’s decision was the fact that the ***Oil*** and Gas Commission required the operator to prepare a site remediation plan in order to properly plug and abandon the well. The claim that evidence might be destroyed could not support the TRO preventing site remediation activities. The surface owner had had four years to gather evidence and could be present during the site remediation process. The supreme court suggested that the ***Oil*** and Gas Commission could be allowed to supervise the site remediation so that it was performed in a correct and efficient manner.

The Law of Pooling and Unitization, 3rd Edition

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1. 1In addition to negligence, strict liability, trespass, or nuisance, there may be liability based on a “natural right” theory, or contractual liability based on the lease or other form of consensual agreement. *See generally* Keeton & Jones, *Tort Liability and the* ***Oil*** *and Gas Industry I and II*, 35 Tex. L. Rev. 1 (1956); 39 Tex. L. Rev. 253 (1961). A comprehensive review of the various common law and statutory duties imposed upon ***oil*** and gas lessees is given at Elizabeth Joyner et al., *The Last Phase of an* ***Oil*** *Field: Getting Sued*, 54 Inst. on ***Oil*** & Gas Law & Tax’n 4-1 (2003).

   It is not surprising that parties allege all of the potential causes of action when an ***oil*** and gas operator has allegedly caused injuries. *See, e.g.*, *A.B. Still Wel-Service, Inc. v. Antinum Midcon I, LLC, 2018 OK CIV APP 35* (suit asserting negligence, trespass and nuisance where frac fluid allegedly migrating to well bore in shallower formation must be filed in county where the real property interest is located); *In re* Apache Corp., 61 S.W.3d 432, 152 O.&G.R. 59 (Tex. App.—Amarillo 2001) (petition alleged the following causes of action: trespass, negligence, negligence per se, nuisance, negligent and intentional infliction of emotion distress, and strict liability); *In re* Discovery Operating, Inc., 216 S.W.3d 898, 168 O.&G.R. 431 (Tex. App.—Eastland 2007) (plaintiffs asserted negligence, negligence *per se*, common law and statutory waste claims against party disposing of salt water through injection wells); Bd. of Comm’rs of the Southeast La. Flood Prot. Authority-East v. Tenn. Gas Pipeline Co., LLC, 29 F. Supp. 3d 808 (E.D. La. 2014), 88 F. Supp. 3d 615 (E.D. La. 2015) (negligence, strict liability, natural servitude of drain, public nuisance, private nuisance and breach of contract claims alleged), *aff’d*, 850 F.3d 714 (5th Cir. 2017); Integrated Waste Services, Inc. v. Akzo Nobel Salt, Inc., 113 F.3d 296 (2d Cir. 1997), *aff’g in part and rev’g in part*, 921 F. Supp. 1037, 134 O.&G.R. 71 (W.D.N.Y. 1996) (surface owners alleged negligence, gross negligence, strict liability, nuisance and trespass).

   The development of enhanced recovery operations provided an impetus for voluntary and compulsory unitization activities because of the potential legal liability of lessees who engaged in this type of operation. It was the unusual case where the operator controlled enough acreage so that the enhanced recovery operation would not have external effects. For example, the migration of fluids or gas across property lines, or the replacement of more valuable wet gas with dry gas were some of the issues that confronted the operator in planning an enhanced recovery operation designed to increase the production of ***oil*** and gas. The common-law rule of capture and the traditional concepts of nuisance and trespass presented the operator with unknown risks of liability. This chapter will explore the early pre-unitization cases that created this aura of uncertainty, and then examine how governmental intervention through unitization or other conservation statutes affected the common-law rules regarding liability. It will also explore the problems created by the existence of unsigned, non-pooled, or non-unitized tracts or interest that may be affected by an enhanced recovery operation. The development of enhanced recovery operations provided an impetus for voluntary and compulsory unitization activities because of the potential legal liability of lessees who engaged in this type of operation. It was the unusual case where the operator controlled enough acreage so that the enhanced recovery operation would not have external effects. For example, the migration of fluids or gas across property lines, or the replacement of more valuable wet gas with dry gas were some of the issues that confronted the operator in planning an enhanced recovery operation designed to increase the production of ***oil*** and gas. The common-law rule of capture and the traditional concepts of nuisance and trespass presented the operator with unknown risks of liability. This chapter will explore the early pre-unitization cases that created this aura of uncertainty, and then examine how governmental intervention through unitization or other conservation statutes affected the common-law rules regarding liability. It will also explore the problems created by the existence of unsigned, non-pooled, or non-unitized tracts or interest that may be affected by an enhanced recovery operation.

   For issues relating to insurance coverage and the duty to defend suits alleging tort damages for ***oil*** and gas pollution, see Harken Exploration Co. v. Sphere Drake Insurance, PLC, 261 F.3d 466, 156 O.&G.R. 585 (5th Cir. 2001); Murphy ***Oil*** USA, Inc. v. Unigard Security Insurance Co., 347 Ark. 167, 61 S.W.3d 807 (Ark. 2001); Burlington Resources, Inc. v. United National Insurance Co., 481 F. Supp. 2d 567, 167 O.&G.R. 712 (E.D. La. 2007).

   In addition to common law causes of action, federal statutes, such as the Clean Water Act and the ***Oil*** Pollution Act, may provide some potential remedies for surface owners claiming environmental injuries. In Rice v. Harken Exploration Co., 250 F.3d 264, 154 O&G.R. 180, *reh’g en banc denied*, 263 F.3d 167 (5th Cir. 2001), the court rejected the application of the ***Oil*** Pollution Act, 33 U.S.C. §§ 2701–2720 to a claim relating to groundwater pollution. In Cheverez v. Plains All American Pipeline, LP, 2016 U.S. Dist. LEXIS 27818 (C.D. Cal. Mar. 3, 2016), the court enjoined the defendant’s actions in attempting to notify potential victims of an ***oil*** spill because it interfered with ongoing class action lawsuits seeking damages for the ***oil*** spill. In Andrews v. Plains All American Pipeline, LP, 2018 U.S. Dist. LEXIS 177797 (C.D. Cal. Apr. 17, 2018), the court issued an order certifying a number of sub-classes and allowing certain of plaintffs’ expert witnesses to file reports. The class certification order was subject to an interlocutory appeal which was subsequently denied. Andrews v. Plains All American Pipe Line Co., 2018 U.S. App. LEXIS 17496 (9th Cir. June 26, 2018); 2018 U.S. App. LEXIS 17717 (9th Cir. June 27, 2018), *on remand*, 2018 U.S. Dist. LEXIS 156631 (C.D. Cal. Aug. 28, 2018). The Ninth Circuit did reverse the district court’s creation of a subclass dealing with entities that suffered economic injury by virtue of the closure of the pipeline. Andrews v. Plains All American Pipeline, L.P., 777 Fed. Appx. 889 (9th Cir. 2019). Litigation continues relating to the designation of certain subclasses. Andrews v. Plains All American Pipeline, L.P., 2019 U.S. Dist. LEXIS 226681 (C.D. Cal. Dec. 12, 2019); 2019 U.S. Dist. LEXIS 212027 (C.D. Cal. Nov. 22, 2019). *See also* Fox v. Plains All American Pipeline, LP, 2020 U.S. Dist. LEXIS 137740 (C.D. Cal. June 24, 2020) (defendant’s summary judgment motion denied as to the remaining numerous tort and contract claims related to pipeline spill); Grey Fox, LLC v. Plains All Am. Pipeline, L.C., 2020 U.S. Dist. LEXIS 48089 (C.D. Cal. Jan. 28, 2020) (certification of class for declaratory relief and injunctive relief granted; certification of class for damages due to threatened nuisance denied); Venoco, LLC v. Plains Pipeline, LP, 2019 U.S. Dist. LEXIS 165005 (C.D. Cal. July 11, 2019), 2019 U.S. Dist. LEXIS 131001 (C.D. Cal. Apr. 23, 2019); Fox v. Plains All American Pipeline, LP, 2019 U.S. Dist. LEXIS 170086 (C.D. Cal. Apr. 8, 2019) (most claims of surface owner of tract where the pipeline spill occurred not subject to motions to dismiss). *See* *In re* ***Oil*** Spill by the ***Oil*** Rig “Deepwater Horizon” in the Gulf of Mexico, 2011 U.S. Dist. LEXIS 10497 (E.D. La. Feb. 2, 2011).

   Guitar Holding Co. v. El Paso Natural Gas Co., 2010 U.S. Dist. LEXIS 85817 (W.D. Tex. Aug. 18, 2010) (surface owner asserts nuisance, negligence, gross negligence and strict liability claims against pipeline contamination of soil); Louisiana v. Rowan Companies, Inc., 728 F. Supp. 2d 896 (S.D. Tex. 2010) (State files negligence, unjust enrichment, public nuisance and trespass claims against oilfield operator).

   Columbia Gas Transmission, LLC v. Raven, 2014 U.S. Dist. LEXIS 80480 (E.D. Ky. June 13, 2014), 2014 U.S. Dist. LEXIS 132174 (E.D. Ky. Sept. 17, 2014) (state administrative order finding defendant liable for violating state mining regulations is to be given preclusive effect in lawsuit alleging multiple torts by the mining operator that allegedly caused damage to the plaintiff’s pipeline).

   Where liability relating to joint tortfeasors for pollution may be covered by the Resource Conservation and Recovery Act, 42 U.S.C. § 6900 *et seq.*, the existence of statutory liability does not necessarily preclude the application of state doctrines relating to contribution and equitable indemnity between such joint tortfeasors. Sullins v. Exxon/Mobil Corp., 729 F. Supp. 2d 1129 (N.D. Cal. 2010).

   In Pennsylvania, while negligence per se is not an independent tort, it is treated as a tool by which a plaintiff proves two of the four required elements of a negligence claim, namely a duty and a breach of the duty. Fiorentino v. Cabot ***Oil*** & Gas Corp., 750 F. Supp. 2d 506, 515–16, 171 O.&G.R. 718 (M.D. Pa. 2010). In Roth v. Cabot ***Oil*** & Gas Corp., 919 F. Supp. 2d 476 (M.D. Pa. 2013), the court refused to dismiss the negligence per se cause of action because there were allegations that Cabot had been cited for violating the ***Oil*** and Gas Act as well as other statutes. In Kamuck v. Shell Energy Holdings GP, LLC, 2012 U.S. Dist. LEXIS 59113 (M.D. Pa. Mar. 19, 2012), *as modified*, 2012 U.S. Dist. LEXIS 59093 (M.D. Pa. Apr. 27, 2012), the District Court granted the defendant’s motion to strike the negligence per se claim of a surface owner challenging the hydraulic fracturing of adjacent lands because there were no allegations that such operations were in violation of any statute or regulation. In Kamuck v. Shell Energy Holdings GP, LLC, 2015 U.S. Dist. LEXIS 37538 (M.D. Pa. March 25, 2015), the District Court granted Shell’s motion for summary judgment and dismissed all of the remaining claims. *See also* Russell v. Chesapeake Appalachia, LLC, 2014 U.S. Dist. LEXIS 163401 (M.D. Pa. Nov. 21, 2014)*, motion denied,* 2015 U.S. Dist. LEXIS 24655 (M.D. Pa. March 2, 2015) (alleged violations of Solid Waste Management Act insufficient to trigger negligence per se doctrine).

   The common law tort doctrines of negligence, nuisance and trespass have been expanded to cover injuries allegedly caused by global warming and the emission of greenhouse gases (GHG). *See* Comer v. Murphy ***Oil*** USA, 585 F.3d 855 (5th Cir. 2009).

   The effect of the panel decision in *Comer* has been brought into doubt because the Fifth Circuit originally granted a motion for en banc consideration which usually has the effect of vacating the panel decision. Comer v. Murphy ***Oil*** USA, 598 F.3d 208 (5th Cir. 2010). Subsequently, however, a judge recused himself from the case, which left the en banc court without a quorum. Comer v. Murphy ***Oil*** USA, 607 F.3d 1049 (5th Cir. 2010). Since an en banc court cannot exercise any power without a quorum, a majority of the en banc panel merely dismissed the appeal without dealing with the impact of the original grant of the appeal to the en banc court.

   Where mass torts are alleged, the Class Action Fairness Act (CAFA), 28 U.S.C. § 1332(d), comes into play in determining whether the litigation is to take place in state or federal courts. *See* Robertson v. ExxonMobil Corp., 814 F.3d 236 (5th Cir. 2015) (alleged injury caused by ***oil*** pipe-cleaning operations subject to CAFA and removal to federal court).

   For a series of cases dealing with alleged pollution caused by a number of ***oil*** refineries, see Citgo Refining & Marketing, Inc. v. Garza, 94 S.W.3d 322 (Tex. App.—Corpus Christi 2002); Amerada Hess Corp. v. Garza, 973 S.W.2d 667 (Tex. App.—Corpus Christi 1996), *writ dism’d w.o.j. sub nom.* Coastal Corp. v. Garza, 41 Tex. Sup. Ct. J. 1242, 979 S.W.2d 318 (Tex. 1998). [↑](#footnote-ref-2)
2. 2These common law doctrines are likely to have been modified or altered by statutory changes, including the enactment of surface damages provisions in many ***oil*** and gas-producing states. *See* Patrick H. Martin & Bruce M. Kramer, Williams & Meyers ***Oil*** & Gas Law § 218.15 (2018).

   Many statutes dealing with ***oil*** and gas operations may have provisions in them that either preempt common law tort claims or allow them to be brought in addition to any statutory claim. *See, e.g.*, New Jersey Department of Environmental Protection v. Hess Corp., 2020 N.J. Super. Unpub. LEXIS 622 (Apr. 2, 2020); New Jersey Department of Environmental Protection v. Exxon Mobil Corp., 420 N.J. Super. 395, 22 A.3d 1 (App. Div. 2011) (New Jersey Spill Act expressly retains landowner’s right to sue for common law torts). [↑](#footnote-ref-3)
3. 3*Restatement (Second) of Torts* § 281 (1965) lists the elements of a cause of action for negligence as follows: “The actor is liable for an invasion of an interest of another, if: (a) the interest invaded is protected against unintentional invasion, and (b) the conduct of the actor is negligent with respect to the other, or a class of persons within which he is included, and (c) the actor’s conduct is a legal cause of the invasion, and (d) the other has not so conducted himself as to disable himself from bringing an action for such invasion.” *See also* W. Keeton, D. Dobbs, R. Keeton, D. Owen, *Prosser & Keeton on the Law of Torts,* 164–165 (5th ed. 1984).

   Where negligence or other tortious conduct is concerned, the use of the class action mechanism to join potential plaintiffs and/or defendants in a single action is becoming more commonplace. In Union Pacific Resources Co. v. Chilek, 966 S.W.2d 117, 139 O.&G.R. 658 (Tex. App.—Austin 1998, writ dism’d w.o.j.), the court allowed the revenue owners of 11 wells to be certified as a class to sue the lessee of a well which had allegedly been negligently plugged causing a migration of water from one formation to another.

   A series of cases dealing with the Macondo ***oil*** spill in the Gulf of Mexico has led to litigation by workers used in the clean-up operation who allege that they were exposed to various toxic chemicals. *See, e.g.*, McGill v. BP Exploration & Production, Inc., 830 Fed. Appx. 430 (5th Cir. 2020); Maas v. BP Exploration Production Co., 2021 U.S. Dist. LEXIS 243077 (M.D. Tenn. Dec. 21, 2021); Salmons v. BP Exploration & Production Co., 2021 U.S. Dist. LEXIS 99558 (S.D. Miss. May 26, 2021).

   The following cases all involve various types of ***oil*** and gas operations and review the basic rules of negligence as they apply in their respective jurisdictions:

   Alabama: Miller v. Southeast Supply Header, LLC, 2009 U.S. Dist. LEXIS 121795 (S.D. Ala. 2009) (elements of negligence cause of action are the existence of a duty, breach of that duty, injury suffered by plaintiff, and that the breach was the proximate cause of the injury; pipeline owner owes duty to install pipeline in manner that does not injure the servient estate);

   Arkansas: Hiser v. XTO Energy, Inc., 2013 U.S. Dist. LEXIS 140667 (E.D. Ark. Sept. 30, 2013), *aff’d*, 768 F.3d 773 (8th Cir. 2014) (applying Arkansas law) (negligence claim requires showing of a breach of the duty of ordinary care; jury verdict finding operator negligent for causing vibrations that damaged plaintiff’s home would not be overturned);

   Duncan v. Exxon Mobil Corp., 968 F. Supp. 2d 996 (E.D. Ark. 2013) (applying Arkansas law) (***oil*** pipeline leak);

   Tucker v. Southwestern Energy Co., 2012 U.S. Dist. LEXIS 20697 (E.D. Ark. Feb. 17, 2012), 2012 U.S. Dist. LEXIS 78310 (E.D. Ark. June 6, 2012) (portions of plaintiffs’ complaint alleging injuries from hydraulic fracturing operations dismissed for lack of sufficient detail in the pleadings; other portions, including allegations of strict liability damages allowed to continue);

   Sammons v. Seeco, Inc., 2012 Ark. App. 650, 425 S.W.3d 38 (in order to show that flooding was due to ***oil*** and gas operator’s maintenance and draining of two ponds, plaintiff must show more than an inference based on conjecture);

   California: Fox v. Plains All American Pipeline, LP, 2019 U.S. Dist. LEXIS 170086 (C.D. Cal. Apr. 8, 2019) (while California generally applies the economic loss rule to prevent tort damages for breach of contract claims where claims are a mix of contract and tort duties, the rule will not be applied); Unocal Corp. v. United States, 222 F.3d 528, 154 O.&G.R. 338 (9th Cir. 2000) (applying California law) (***oil*** pipeline leak);

   Newhall Land & Farming Co. v. Superior Court, 19 Cal. App. 4th 334, 23 Cal. Rptr. 2d 377 (1993), *review denied*, 1993 Cal. LEXIS 6940 (Cal. Dec. 30, 1993) (gas processing plant);

   Colorado: Gerrity ***Oil*** & Gas Corp. v. Magness, 946 P.2d 913, 138 O.&G.R. 1 (Colo. 1997) (***oil*** and gas drilling and production activities);

   Florida: Lincoln v. Fla. Gas Transmission Co., 2014 U.S. Dist. LEXIS 91849 (N.D. Fla. June 4, 2014), *magistrate’s report adopted*, 2014 U.S. Dist. LEXIS 91848 (N.D. Fla. July 7, 2014), *aff’d*, 608 Fed. Appx. 721 (11th Cir. 2015) (four elements of a negligence claim are: 1. the existence of a duty, 2. the breach of the duty, 3. a reasonably close causal connection between the breach and the injury, and 4. damages);

   Kansas: Alford Ranches, LLC v. TGC Industries, 2015 Kan. App. Unpub. LEXIS 1147 (Dec. 31, 2015) (surface owner’s claim for negligence based on seismic survey entry fails as a matter of law since there was no evidence that the seismic company acted unreasonably);

   Southern Star Central Gas Pipeline, Inc. v. Cline, 754 F. Supp. 2d 1257 (D. Kan. 2010) (surface owner’s claim for intentional infliction of emotional distress damages dismissed on statute of limitations grounds and because owner did not allege that the storage operation engaged in “extreme and outrageous” conduct);

   *Louisiana*: Bd. of Comm’rs v. Tenn. Gas Pipeline Co., LLC, 2015 U.S. Dist. LEXIS 18461 (E.D. La. Feb. 13, 2015) (negligence claims dismissed due to inability to prove a duty owed to prevent erosion since federal statutes do not create such a duty);

   Bd. of Comm’rs of the Southeast La. Flood Prot. Authority-East v. Tenn. Gas Pipeline Co., LLC, 29 F. Supp. 3d 808, 833 (E.D. La. 2014), 88 F. Supp. 3d 615 (E.D. La. 2015), *aff’d*, 850 F.3d 714 (5th Cir. 2017) (La. Civ. Code art. 2315 closely mirrors Restatement (Second) of Torts view on the elements for a negligence cause of action);

   Gulf Prod. Co. v. Hoover Oilfield Supply, Inc., 672 F. Supp. 2d 752 (E.D. La. 2009) (flow line pipe supplier potentially liable to surface owner and operator for damages caused by negligent pipe blowout);

   Brister v. Gulf Central Pipeline Co., 684 F. Supp. 1373 (W.D. La. 1988) (applying Louisiana law) (pipeline leak);

   Smith v. Urban ***Oil*** & Gas Group, LLC, 2022 U.S. Dist. LEXIS 68361 (W.D. La. Apr. 12, 2022) (premises liability only available to trespasser where owner acts intentionally or with gross negligence);

   Wall v. Kelly ***Oil*** & Gas Co., 44,604 (La. App. 2 Cir. 12/21/09), 27 So. 3d 1071, 172 O.&G.R. 499, *writ denied*, 31 So. 3d 372 (La. 2011) (where trespassing party is injured at a wellsite, that party must show that the operator is grossly negligent so that there was a want of even slight care and diligence);

   Michigan: Fredonia Farms, LLC v. Enbridge Energy Partners, LP., 2014 U.S. Dist. LEXIS 140623 (W.D. Mich. Oct. 3, 2014) (under Michigan law plaintiff must show it the defendant owed it a duty, that duty was breached, plaintiff suffered damages and the breach was the cause of the damages);

   Marathon Petroleum Co. LP v. Midwest Marine, Inc., 2012 U.S. Dist. LEXIS 150519 (E.D. Mich. Oct. 19, 2012), *on motion for reconsideration*, 2012 U.S. Dist. LEXIS 183186 (E.D. Mich. Dec. 17, 2012) (*Daubert* motions regarding testimony as to cause of an explosion in a storage tanks largely rejected as experts satisfied the *Daubert* requirements);

   Cloverleaf Car Co. v. Phillips Petroleum Co., 213 Mich. App. 186, 540 N.W.2d 297 (Mich. Ct. App. 1995) (underground storage tank);

   Mississippi: Donald v. Amoco Production Co., 735 So. 2d 161, 141 O.&G.R. 490 (Miss. 1999) (***oil*** and gas drilling and production activities, *on subsequent appeal sub nom.* Howard v. TotalFina E & P USA, Inc., 899 So. 2d 882, 162 O.&G.R. 803 (Miss. 2005));

   Placid ***Oil*** Co. v. Byrd, 217 So. 2d 17, 31 O.&G.R. 381 (Miss. 1969) (negligence standard is the same as the prudent operator standard);

   New Mexico: St. Paul Fire & Marine Ins. Co. v. Sedona Contractors, 2020 U.S. Dist. LEXIS 227632 (D.N.M. Dec. 4, 2020) (negligence claim requires the existence of a duty, a breach of said duty usually based on a standard of reasonable care, and a sufficient causal relationship between the breach and the damages incurred);

   Acosta v. Shell Western Exploration & Prod., 293 P.3d 917, 2013-NMCA-009, *rev’d*, 2016-NMSC-12, 370 P.3d 761 (plaintiff’s expert testimony allegedly showing causation between oilfield contamination and various illnesses should not have been excluded by the trial court under *Daubert*; plaintiff’s causation evidence sufficient to raise questions of fact on negligence, nuisance trespass and strict liability claims);

   New York: U.S. Energy Development Corp. v. Superior Well Services, Inc., 155 A.D.3d 1553, 65 N.Y.S.3d 364 (2017) (rejected application of economic loss doctrine to well owner’s negligence claim against drilling contractor based on alleged negligence in both the design and implementation of a hydraulic fracturing program);

   Ohio: Reece v. AES Corp., 638 Fed. Appx. 755 (10th Cir. 2016) (negligence claim requires allegations that plaintiffs were injured by the defendant’s alleged activities in disposing of various types of oilfield and other wastes);

   Baker v. Chevron U.S.A., Inc., 533 Fed. Appx. 509 (6th Cir. 2013), *aff’g* 680 F. Supp. 2d 865 (S.D. Ohio 2010) (in negligence case allegedly caused by underground migration of hydrocarbons spilled or deposited on the grounds of a refinery, plaintiff has the burden of proof to show that the acts of the defendant were the proximate cause of plaintiff’s injuries);

   Pluck v. BP ***Oil*** Pipeline Co., 640 F.3d 671 (6th Cir. 2011) (plaintiff must show specific causation between pipeline leaks containing benzene and plaintiff’s non-Hodgkins lymphoma; trial court properly struck plaintiff’s expert report under *Daubert*);

   Baker v. Chevron USA, Inc., 2011 U.S. Dist. LEXIS 95653 (S.D. Ohio Aug. 19, 2011) (defendant’s motion for summary judgment granted since plaintiffs were not able to show how the putative class members who did not live near the refinery, nor the underground plume were injured);

   Oklahoma: Blocker v. ConocoPhillips Co., 380 F. Supp. 3d 1178 (W.D. Okla. 2019) (court eschews finding a negligence claim for failure to warn but allows negligence claim for operational issues relating to onsite disposal of produced water); Carnahan v. Chesapeake Operating, Inc., 2015 OK CIV APP 22, 347 P.3d 753, *cert. denied*, 2015 Okla. LEXIS 32 (March 2, 2015) (plaintiff’s experts were qualified under *Daubert* to testify in contamination case involving trespass, public nuisance and private nuisance claims);

   Bays Exploration, Inc. v. PenSa, Inc., 771 F. Supp. 2d 1289, 173 O.&G.R. 651 (W.D. Okla. 2011);

   Marshall v. El Paso Natural Gas Co., 874 F.2d 1373, 105 O.&G.R. 532 (10th Cir. 1989) (applying Oklahoma law) (well plugging);

   Pennsylvania: Maghakian v. Cabot ***Oil*** & Gas Corp., 171 F. Supp. 3d 353 (M.D. Pa. 2016) (negligence/premises liability claim against ***oil*** and gas lessee will be dismissed since at time of injury the lessee had released the drilling rig it had under contract so that it was the contractor who was deemed possessor of the premises);

   Kamuck v. Shell Energy Holdings GP, LLC, 2015 U.S. Dist. LEXIS 37538 (M.D. Pa. March 25, 2015) (motion to dismiss remaining tort claims granted);

   Kamuck v. Shell Energy Holdings GP, LLC, 2012 U.S. Dist. LEXIS 59113 (M.D. Pa. Mar. 19, 2012), *on motion for reconsideration*, 2012 U.S. Dist. LEXIS 59093 (M.D. Pa. Apr. 27, 2012) (defendant’s motion to strike negligence claim based on defendant’s engaging in hydraulic fracturing operations on adjacent lands rejected since plaintiff alleged that they owed him a duty of care which had been violated);

   Ely v. Cabot ***Oil*** & Gas Corp., 2014 U.S. Dist. LEXIS 180162 (M.D. Pa. April 21, 2014) (elements of negligence cause of action include existence of a duty or obligation, defendant’s failure to conform to the standard of conduct, a causal connection between the conduct and the injury and actual loss or damage; plaintiff’s complaint sufficient to withstand motion for summary judgment), *magistrate opinion adopted*, 2015 U.S Dist. LEXIS 3106 (M.D. Pa. Jan. 12, 2015);

   Berish v. Southwestern Energy Prod. Co., 2012 U.S. Dist. LEXIS 61943 (M.D. Pa. May 3, 2012) (plaintiff allowed to amend complaint to assert negligence, private nuisance, strict liability, trespass, and statutory violations based on information uncovered during the discovery process);

   Berish v. Southwestern Energy Prod. Co., 763 F. Supp. 2d 702, 174 O.&G.R. 425 (M.D. Pa. 2011) (applying Pennsylvania law, claims for emotional distress are dismissed as to all but one party because in order to claim such injuries there must be an attendant physical injury; Pennsylvania, however, also recognizes claims for inconvenience and discomfort caused by interference with one’s peaceful possession of one’s real property);

   Tennessee: Texas Gas Transmission, LLC v. East, 2023 U.S. Dist. LEXIS 47694, at \*6 (W.D. Tenn. Mar. 21, 2022) (elements of negligence cause of action are: “(1) a duty of care owed by the defendant to the plaintiff; (2) conduct by the defendant falling below the standard of care amounting to a breach of that duty; (3) an injury or loss; (4) causation in fact; and (5) proximate or legal cause”).

   Texas: Holloman Corp. v. N2 Solutions, LLC, 2022 U.S. Dist. LEXIS 111211 (S.D. Tex. June 23, 2022) (gross negligence is not a separate cause of action from negligence; no negligence in the absence of a legal duty);

   *In re* Eagleridge Operating, LLC, 642 S.W.3d 518 (Tex. 2022) (*Occidental* applies even where seller of the working interest retains some interest so that the seller is not liable on a premises liability claim for an injury occurring after the sale);

   Occidental Chemical Corp. v. Jenkins, 59 Tex. Sup. Ct. J. 196, 478 S.W.3d 640 (2016) (premises liability claims are usually extinguished upon sale of premises; negligence claims may survive the sale of the premises);

   Texokan Operating, Inc. v. Hess Corp., 89 F. Supp. 3d 903 (S.D. Tex. 2015) (plaintiff’s expert report on damages caused by the alleged negligence of the defendant in drilling a well was barred under *Daubert* principles);

   Fugett v. DCP Midstream,L.P., 2015 U.S. Dist. LEXIS 14653 (N.D. Tex. Feb. 6, 2015) (plaintiff has burden of proof to show the existence of a legal duty, a breach of that legal duty, proximate causation and damages);

   Seitel Data, Ltd. v. Simmons, 362 S.W.3d 782 (Tex. App.—Texarkana 2012) (lay testimony by property owners sufficient to uphold jury verdict that defendant’s seismic operations caused damage to the owners’ water well);

   Bay Rock Operating Co. v. St. Paul Surplus Lines Insurance Co., 298 S.W.3d 216 (Tex. App.—San Antonio 2009) (drilling supervisor negligent where it failed to properly supervise the actual drilling operations; supervisor’s actions were the proximate cause of the well blow-out);

   Jones v. Texaco, Inc., 945 F. Supp. 1037 (S.D. Tex. 1996) (applying Texas law) (***oil*** and gas drilling and production activities).

   West Virginia: Hagy v. Equitable Prod. Co., 2011 U.S. Dist. LEXIS 46920 (S.D. W. Va. Apr. 28, 2011); 2011 U.S. Dist. LEXIS 80413 (S.D. W. Va. July 22, 2011); 2012 U.S. Dist. LEXIS 69099 (S.D. W. Va. May 17, 2012); 2012 U.S. Dist. LEXIS 69438 (S.D. W. Va. May 17, 2012); 2012 U.S. Dist. LEXIS 91773 (S.D. W. Va. June 29, 2012) (plaintiff must show that defendant owed a legal duty to the plaintiff that proximately caused injuries; court dismissed claims against numerous parties involved in the drilling and fracing of wells near the plaintiff’s residence);

   Conley v. Stollings, 223 W. Va. 762, 679 S.E.2d 594 (2009) (negligence/premises liability claim will be dismissed against pipeline operator who had key to a cable stretching across a private road because operator was not the owner of the premises upon which the cable was located nor did it have control over the premises);

   Wyoming: Northwest Pipeline GP v. Chevron Mining, Inc., 2013 U.S. Dist. LEXIS 190620 (D. Wyo. Feb. 26, 2013) (*Daubert* motion denied as to expert witness testifying as to damages relating to relocation and monitoring costs for interstate pipeline);

   William F. West Ranch, LLC v. Tyrrell, 2009 WY 62, 206 P.3d 722, 176 O.&G.R. 637 (landowner may bring private cause of action for negligence in the production and/or storage of groundwater produced as a by-product of CBM production);

   Davis v. Consolidated ***Oil*** & Gas Co., 802 P.2d 840 (Wyo. 1990) (damage done by seeping water from an improperly plugged well may support a cause of action for trespass and/or negligence).

   Negligent injury to the common source of supply can lead to a damage recovery by the owners of the common source of supply regardless of whether the jurisdiction is an ownership or non-ownership jurisdiction. *See, e.g.*, Manufacturers’ Gas & ***Oil*** Co. v. Indiana Natural Gas & ***Oil*** Co., 155 Ind. 461, 57 N.E. 912 (1900); Breaux v. Pan American Petroleum Corp., 163 So. 2d 406, 20 O.&G.R. 476 (La. Ct. App. 1964) 165 So. 2d 481, 246 La. 581, 20 O.&G.R. 501 (1964); Mobil Exploration & Producing U.S., Inc. v. Certain Underwriters Subscribing to Cover Note 95-3317(A), 2001–2219 (La. App. 1 Cir. 11/20/02), 837 So. 2d 11, 19–22, 159 O.&G.R. 271, *writ denied*, 841 So. 2d 805 (La. 2003), *writ denied*, 843 So. 2d 1129 (La. 2003), *writ denied*, 843 So. 2d 1130 (La. 2003); Elliff v. Texon Drilling Co., 146 Tex. 575, 210 S.W.2d 558 (1948); Comanche Duke ***Oil*** Co. v. Texas & Pacific Coal Co., 298 S.W. 554 (Tex. Comm. App. 1927); Atkinson v. Virginia ***Oil*** & Gas Co., 72 W. Va. 707, 79 S.E. 647 (1913). *See also* Thomas v. A. Wilbert & Sons, LLC, 217 So. 3d 368 (La. Ct. App. 2017), *reh’g granted in part*, 2017 La. App. LEXIS 811 (2017).

   In Hayes Fund for the First United Methodist Church of Welsh, LLC v. Kerr-McGee Rocky Mt., LLC, 149 So. 3d 280 (La. App. 2014), the court awarded damages caused by the allegedly improper drilling techniques that did not isolate the producing zones from the non-producing zones leading to a loss of production and injury to the common source of supply. On appeal, Hayes Fund for the First United Methodist Church of Welsh, LLC v. Kerr-McGee Rocky Mt., LLC, 193 So. 3d 1110, 2014–2592 (La. 12/08/15), the Louisiana Supreme Court reversed the Court of Appeals and reinstated the trial court’s judgment that the plaintiffs should take nothing. The Supreme Court said that appellate courts are to review disputed issues of fact under the very deferential manifest disregard standard and that the Court of Appeals had essentially reviewed the conflicting expert testimony de novo. *See also*: Jon W. Wise, *The Future of Claims Arising from Alleged Damage to* ***Oil*** *and Gas Reservoirs After Hayes Fund*, 64 Loy.L.Rev. 123 (2018).

   In the absence of proof that reserves could not, or were not, produced from a formation, there cannot be a finding that the driller used negligent techniques in drilling a horizontal well. Pioneer Natural Resources USA, Inc. v. W.L. Ranch, Inc., 127 S.W.3d 900, 167 O.&G.R. 56 (Tex. App.—Corpus Christi 2003, rev. denied).

   In Integrated Waste Services, Inc. v. Akzo Nobel Salt, Inc., 113 F.3d 296 (2d Cir. 1997), *aff’g in part and rev’g in part*, 921 F. Supp. 1037, 134 O.&G.R. 71 (W.D.N.Y. 1996), the surface owners alleged that the salt mining company was negligent when it was operating in a salt cavern, causing it to collapse, thus depriving the surface owners of the use of the empty caverns they owned upon cessation of salt mining operations. *See* International Salt Co. v. Geostow, 878 F.2d 570, 104 O.&G.R. 276 (2d Cir. 1989). The court found that there was no duty owed by the mining company to the surface owner and therefore no liability. There were, however, material issues of fact on the subsidence claim made by the surface issues that had to be resolved at trial. For subsequent litigation relating to this situation, see Mehlenbacher v. Akzo Nobel Salt, Inc., 207 F. Supp. 2d 71 (W.D.N.Y. 2002), *on remand from* 216 F.3d 291 (2d Cir. 2000), *vacating and remanding*, 71 F. Supp. 2d 179 (W.D.N.Y. 1999).

   In Davis v. Hanson Aggregates Southeast, Inc., 952 So. 2d 330 (Ala. 2006), the court reversed a jury verdict finding that the defendant mining operation was negligent but failing to award damages, because damages are an essential part of a negligence action.

   In Jackson v. Unocal Corp., 231 P.3d 12, 175 O.&G.R. 293 (Colo. App. 2009), the court reversed a class certification order issued by the trial court relating to alleged environmental injuries caused by the excavation of a pipeline. The court determined that the proponent for class certification has the burden of proof to show that all of the requirements have been met by a preponderance of the evidence. It further determined that where there was conflicting evidence as to the nature of the damages that may have been caused by the alleged pollution, the trial court must weigh the evidence and resolve the testimonial differences before certifying the class. On appeal, the Colorado Supreme Court reversed the Court of Appeals decision. Jackson v. Unocal Corp., 262 P.3d 874 (Colo. 2011). The Supreme Court found that while the trial court must conduct a rigorous analysis of the evidence to see that the elements for class certification are met, the trial court has substantial discretion to certify a class and need not apply the preponderance of the evidence standard on the plaintiff. 262 P.3d at 881. It therefore reinstated the class certification order of the trial court.

   In Remax the Mt. Co. v. Tabsum, Inc., 280 Ga. App. 425, 634 S.E.2d 77 (2006), *cert. denied*, the court applied the economic loss doctrine to deny the plaintiffs’ negligence claims against a mining operator for allegedly disposing of groundwater in a way that impaired access to the plaintiffs’ businesses. The court stated that economic loss is only recoverable where the negligence causes injury to the premises owned by the plaintiff.

   In D.T. Atha, Inc. v. Land & Shore Drilling, Ltd., 2008-Ohio-6217 (Ohio App.) (unreported opinion), the court found that damages caused to an adjacent land were, under the states’ comparative negligence doctrine, apportionable between various parties).

   The economic loss doctrine, which bars recovery for negligent acts where there is no contractual relationship between the parties and there has been no damage to the plaintiffs or their property, has been applied in cases involving oilfield operations. TS & C Investments, LLC v. Beusa Energy, Inc., 2009 U.S. Dist. LEXIS 7609 (W.D. La. 2009). *See also* La. Crawfish Producers Ass’n v. Amerada Hess Corp., 935 So. 2d 380 (La. Ct. App. 2006). After having their Louisiana tort claims dismissed, plaintiffs sought to file in federal court a maritime tort claim. *See* *In re* Louisiana Crawfish Producers, 772 F.3d 1026 (5th Cir. 2014); La. Crawfish Producers Ass’n West v. Amerada Hess Corp, 2015 U.S. Dist. LEXIS 154659 (W.D. La. Nov. 12, 2015), *recons. denied*, 2016 U.S. Dist. LEXIS 33812 (W.D. La. March 14, 2016). After a number of defendants were dismissed from the case, the court granted all but one of the remaining defendants’ motion for summary judgment. *In re* Louisiana Crawfish Producers, 852 F.3d 456 (5th Cir. 2017).

   While Louisiana generally recognizes a tort under Restatement (Second) of Torts § 324A dealing with a party who undertakes an action to provide services that may benefit a third party, the plaintiff must allege that the ***oil*** and gas operators actually performed such services that created a duty to the landowners. Watson v. Arkoma Development, LLC, 2018 U.S. Dist. LEXIS 42842 (W.D. La. Feb. 5, 2018), 2018 U.S. Dist. LEXIS 203596 (W.D. La. Nov. 15, 2018), *report and recommendation adopted*, 2018 U.S. Dist. LEXIS 203562 (W.D. La. Nov. 30, 2018).

   Where plaintiffs add a claim based on the Comprehensive Environmental Response, Compensation and Liability Act of 1980, 42 U.S.C. § 9601 *et seq.*, to their multiple state law tort claims including negligence that allegedly causes surface damage, removal of the CERCLA claim to the federal courts is mandatory while the state, common law claims may be remanded back to the state courts. May v. Apache Corp., 870 F. Supp. 2d 454 (S.D. Tex. 2012). [↑](#footnote-ref-4)
4. 4*See e.g.*, Morgan Plantation, Inc. v. Tennessee Gas Pipeline Co., LLC, 2017 U.S. Dist. LEXIS 178264 (W.D. La. Oct. 26, 2017); 2017 U.S. Dist. LEXIS 178782 (W.D. La. Sept. 21, 2017); 2017 U.S. Dist. LEXIS 46578 (W.D. La. Mar 28, 2017); 2017 U.S. Dist. LEXIS 47347 (W.D. La. Feb. 8, 2017); Guilbeau v. Hess Corp., 2015 U.S. Dist. LEXIS 43868 (W.D. La. Feb. 27, 2015), *report and recommendation adopted*, 2015 U.S. Dist. LEXIS 43925 (W.D. La. April 2, 2015); (dismissal of most tort claims); Alford v. Chevron U.S.A., Inc., 2015 U.S. Dist. LEXIS 3302 (E.D. La. Jan. 12, 2015); Alford v. Chevron U.S.A., Inc., 2014 U.S. Dist. LEXIS 44621 (E.D. La. Apr. 1, 2014); Alford v. Anadarko E&P Onshore LLC, 2014 U.S. Dist. LEXIS 55724 (E.D. La. Apr. 22, 2014). In these shotgun lawsuits brought in Louisiana, the courts have consistently refused to require the plaintiffs to allege more than a description of the area allegedly contaminated along with their theory or theories underlying the defendants’ liability. *Alford*, *op cit*; Constance v. Austral ***Oil*** Exploration Co., 2013 U.S. Dist. LEXIS 177725 (W.D. La. Dec. 13, 2013); Guthrie v. Plains Res. Inc., 2012 U.S. Dist. LEXIS 186505 (W.D. La. Nov. 27, 2012), *aff’d*, 2013 U.S. Dist. LEXIS 16294 (W.D. La. Feb. 5, 2013), 2013 U.S. Dist. LEXIS 80670 (W.D. La. June 5, 2013); Martin v. Tesoro Corp., 2012 U.S. Dist. LEXIS 71392 (W.D. La. May 21, 2012); Gaspard One, L.L.C. v. BP Am. Prod. Co., 2008 U.S. Dist. LEXIS 26150 (W.D. La. Mar. 31, 2008); Brownell Land Co., LLC v. Ranger ***Oil*** Co., 2006 U.S. Dist. LEXIS 3903 (E.D. La. Feb. 1, 2006).

   In subsequent decisions in *Alford*, the court granted some partial summary judgment motions in favor of the defendants after determining that no mineral servitudes were involved. *See* Alford v. Chevron U.S.A., Inc., 2015 U.S. Dist. LEXIS 3302 (E.D. La. Jan. 12, 2015); Alford v. Chevron U.S.A. Inc., 13 F. Supp. 3d 581 (E.D. La. 2014); 2015 U.S. Dist. LEXIS 3302 (E.D. La. Jan. 12, 2015), 2015 U.S. Dist. LEXIS 13389 (E.D. La. Feb. 4, 2015). *See also* Vintage Assets, Inc. v. Tennessee Gas Pipeline Co., LLC, 2017 U.S. Dist. LEXIS 133693 (E.D. La. Aug. 22, 2017) (court relied on *Alford* to dismiss negligence claims against lessees for allowing canals to be widened by erosion).

   In Davis v. BP Exploration & Production Co., 2022 U.S. Dist. LEXIS 117456 (E.D. La. July 5, 2022), the court dismissed several tort claims based upon exposure to chemicals used in the Deepwater Horizon clean-up because plaintiff had not submitted any expert reports showing causation between the alleged exposure and plaintiff’s alleged injuries. *See also* Harrison v. BP Exploration & Production Co., 2022 U.S. Dist. LEXIS 115616 (E.D. La. June 30, 2022), 2022 U.S. Dist. LEXIS 116498 (E.D. La. July 1, 2022) (court granted defendant’s motion in limine to exclude plaintiff’s expert on the issue of causation; without such expert evidence the tort claims for injury due to exposure to chemicals were dismissed).

   While being somewhat liberal in not dismissing negligence claims on the pleadings in these legacy cases, the federal courts have dismissed generalized allegations of fraud or fraudulent concealment under Fed. R. Civ. P. 9(b). *See, e.g.*, Jacques v. Baker Hughes, 2021 U.S. Dist. LEXIS 67259 (W.D. La. Apr. 6, 2021); D & J Invs. of Cenla, LLC v. Baker Hughes A GE Co., LLC, 2021 U.S. Dist. LEXIS 43467 (W.D. La. Mar. 8, 2021); Prairie Land Co. v. ConocoPhillips Co., 2020 U.S. Dist. LEXIS 174128 (W.D. La. Sept. 22, 2020); Watson v. Arkoma Development, LLC, 2018 U.S. Dist. LEXIS 203596 (W.D. La. Nov. 15, 2018); Guthrie v. Plains Resources, Inc., 2013 U.S. Dist. LEXIS 80670 (W.D. La. June 7, 2013).

   In a series of cases involving a sinkhole caused by the collapse of a salt dome, the courts have applied a reasonably strict causation requirement on the allegedly injured party to show that the defendant’s actions or inactions caused the pipeline to be damaged. Florida Gas Transmission Co., LLC v. Texas Brine Co., LLC, 282 So. 3d 256 (La. App. 2019), *writ denied*, 282 So. 3d 1006 (La. 2019); Pontchartrain Natural Gas System v. Texas Brine Co., LLC, 281 So. 3d 1 (La. App. 2019). In a subsequent appeal, the court allocated fault between the three defendants relating to the cause of the appearance of the sinkholes in a manner different than that applied by the trial court. Pontchartrain Natural Gas Systems v. Texas Brine Co., LLC, 317 So. 3d 715 (La. App. 2020), *reh’g denied*, 2021 La. App. LEXIS 135 (La. App. Feb. 10, 2021), *writs denied*, 2021 La. App. LEXIS 608 (Apr. 23, 2021), 2021 La. LEXIS 1310, 1321 (June 8, 2021). *See also* Florida Gas Transmission Co., LLC v. Texas Brine Co., 2021 La. App. LEXIS 673 (La. App. May 3, 2021).

   In cases dealing with the ***oil*** spill and clean-up from the Deepwater Horizon incident, the Fifth Circuit has required that any claimants must provide expert testimony as to both general and specific causation issues arising from alleged exposure to toxic chemicals. Seaman v. Seacor Marine, LLC, 326 F. Appx. 722 (5th Cir. 2009); Brown v. BP Exploration & Production Inc., 2022 U.S. Dist. LEXIS 209291 (E.D. La. Nov. 18, 2022): Stephens v. BP Exploration & Production Inc., 2022 U.S. Dist. LEXIS 92686 (E.D. La. June 24, 2022), *dism’d*, 2022 U.S. Dist. LEXIS 1199901 (E.D. La. June 29, 2022); *In re* ***Oil*** Spill, 2021 U.S. Dist. LEXIS 248281 (E.D. La. Apr. 1, 2021).

   An ancillary issue in these oilfield contamination cases is whether they can be removed from state to federal court. In Green v. BP America Production Co., 2018 U.S. Dist. LEXIS 195208 (W.D. La. Oct. 26, 2018), the court denied the plaintiffs motion to remand because while some of the earlier operators were Louisiana-based corporations, they were defunct at the time of the current litigation. *In accord*: Lowry v. Total Petrochemcials & Refining USA, Inc., 2018 U.S. Dist. LEXIS 195112 (W.D. La. Oct. 26, 2018).

   Mere allegations of pollution and injury are insufficient in the absence of a showing of a causal relationship between the pollution and the injury. Koehn v. Ayers, 26 F. Supp. 2d 953 (S.D. Tex. 1998), *aff’d*, 194 F.3d 1309 (5th Cir. 1999). *See also* Houssiere v. Asco United States, 12-791 (La. App. 3 Cir. 01/16/13), 108 So. 3d 797 (court excluded some of plaintiff’s proffered expert testimony relating to causation and upheld jury verdict finding no environmental injury by virtue of defendants’ ***oil*** and gas operations); Duke Energy Field Services, L.P. v. Meyer, 190 S.W.3d 149 (Tex. App.—Amarillo 2005, rev. denied) (evidence was insufficient to show that break in pipeline spilling ***oil*** was the cause of several cows losing their calves).

   In Anthony v. Chevron USA, Inc., 284 F.3d 578, 154 O.&G.R. 299 (5th Cir. 2002), the Fifth Circuit agreed with the *Koehn v. Ayers* holding (cited above in this footnote) that allegations of pollution and injury from alleged saltwater contamination are insufficient, even if provided by expert witnesses, if the allegations are too speculative. The court also listed the following four elements that would need to be proved by the plaintiff in order to sustain a negligence cause of action against an ***oil*** and gas lessee injecting saltwater as part of a secondary recovery operation: “(1) that Chevron owed a specific duty to them, (2) that Chevron breached that duty, (3) that Chevron’s breach caused their injury, and (4) that they suffered damages as a result of that breach.” *Id.* at 583.

   Other states are not as liberal in dealing with the causation requirement. Lovejoy v. AMCOX ***Oil*** & Gas, LLC, 2022 U.S. Dist. LEXIS 222278 (S.D. W. Va. Dec. 9, 2022) (plaintiff’s negligence claim dismissed for failure to plead causation between alleged contamination and her injuries). [↑](#footnote-ref-5)
5. 5The use of the discovery rule to toll the statute of limitations on negligence or other torts has received mixed results in oilfield contamination cases. *Compare* Donald v. Amoco Prod. Co., 735 So. 2d 161, 141 O.&G.R. 490 (Miss. 1999), *on subsequent appeal sub nom.* Howard v. TotalFina E & P USA, Inc., 899 So. 2d 882, 162 O.&G.R. 803 (Miss. 2005) (discovery rule applies) *with* Jones v. Texaco, Inc., 945 F. Supp. 1037 (S.D. Tex. 1996) (discovery rule inapplicable where injury not inherently undiscoverable).

   In Louisiana the discovery rule falls under the doctrine of *contra non valentem*. The doctrine prevents the running of liberative prescription where the cause of action is not known or reasonably knowable by the plaintiff. Kling Realty Co., Inc. v. Chevron USA, Inc., 575 F.3d 510 (5th Cir. 2009); Eldredge v. Martin Marietta Corp., 207 F.3d 737 (5th Cir. 2000); Cole v. Celotex Corp., 620 So. 2d 1154 (La. 1993). Whether prescription starts to run is dependent on the reasonableness of the injured party’s actions. *Kling Realty*; Terrebonne Parish School Board v. Mobil ***Oil*** Corp., 310 F.3d 870, 157 O.&G.R. 1167 (5th Cir. 2002). Louisiana courts strictly construe the requirements of *contra non valentem* because it is an exception to the statutory rule of prescription. Where a party signs a release from surface damages and then asserts some 30 years later that it was unaware of the scope and extent of the oilfield pollution, the doctrine will not apply. *Kling Realty*, 575 F.3d at 518.

   In State v. Louisiana Land & Exploration Co., 339 So. 3d 1163 (La. 2022), the Louisiana Supreme Court split on how to apply the discovery rule to an oilfield contamination case. At least one justice wanted to create a “bright-line” rule that hiring an attorney to explore a potential lawsuit always starts the running of the prescriptive period while others wanted to apply a multi-factor, ad hoc analysis to determine if the discovery rule should be applied. The per curiam opinion merely affirmed the trial court’s ruling that the strict liability claim had not prescribed. [↑](#footnote-ref-6)
6. 6The issues surrounding induced seismicity are analyzed in: Keith B. Hall and Hannah J. Wiseman, Hydraulic Fracturing: A Guide to Environmental and Real Property Issues 179–199 (ABA 2017); Monika Ehrman, *Earthquakes in the Oilpatch: The Regulatory and Legal Issues Arising out of* ***Oil*** *and Gas Operation Induced Seismicity*, 33 Ga. St. U.L. Rev. 609 (2017); Belza, *Inverse Condemnation and Fracking Disasters: Government Liability for the Environmental Consequences of Hydraulic Fracturinjg Under a Constituitonal Takings Theory*, 44 B.C. Envtl. Aff. L. Rev. 55 (2017); Meredith A. Wegener, *Shake, Rattle, and Palsgraf: Whether an Actionable Negligence Claim can be Established in Earthquake Damage Litigation*, 11 Tex. J. ***Oil*** Gas & Energy L. 115 (2016); Keith B. Hall, *Induced Seismicity: An Energy Lawyer’s Guide to Legal Issues and the Causes of Man-Made Earthquakes*, 61 Rocky Mtn. Min. L Inst. 5-1 (2015). Most of the litigation has not been reported but the Oklahoma Supreme Court in Ladra v. New Dominion, LLC, 353 P.3d 529 (Okla 2015), allowed a tort action to proceed finding that the Oklahoma Corporation Commission did not have subject matter jurisdiction over common law tort claims.

   In Meier v. Chesapeake Operating, LLC, 778 Fed. Appx. 561 (10th Cir. 2019), *aff’g* 324 F. Supp. 3d 1207 (W.D. Okla. 2018), the court dismissed a putative class action claim where plaintiffs argued that defendants’ actions caused induced seismicity which would lead to an increase in the plaintiffs’ homeowners’ insurance policy. [↑](#footnote-ref-7)
7. 6.1State *ex rel.* Tureau v. BEPCO, L.P., 351 So. 3d 297 (La. 2022). [↑](#footnote-ref-8)
8. 7Restatement (Second) of Torts § 158 (1965) defines a trespassory cause of action as follows: “One is subject to liability to another for trespass, irrespective of whether he thereby causes harm to any legally protected interest of the other, if he intentionally (a) enters land in the possession of the other, or causes a thing or a third person to do so, or (b) remains on the land, or (c) fails to remove from the land a thing which he is under a duty to remove.” *See also* Prosser & Keeton on the Law of Torts, op. cit., at 67–84 (W. Keeton, 5th ed. 1984).

   In Alabama, a trespass is the “entry on the land of another without express or implied authority” and a continuing trespass includes a structure such as a gas pipeline that is located on the premises. Business Realty Inv. Co. v. Insituform Techs., Inc., 2014 U.S. App. LEXIS 8230 (11th Cir. May 1, 2014) (applying Alabama law), *aff’g* Business Realty Inv. Co. v. Jefferson County, 2013 U.S. Dist. LEXIS 94403 (N.D. Ala. July 8, 2013). *See also* Motisi v. Alabama Gas Corp., 485 So. 2d 1157 (Ala. 1986).

   In Arkansas, the surcharge of an easement, either express or implied, will constitute a trespass. Hill v. Southwestern Energy Co., 2013 U.S. Dist. LEXIS 139917 (E.D. Ark. Sept. 26, 2013). In Alabama, a trespass is the “entry on the land of another without express or implied authority” and a continuing trespass includes a structure such as a gas pipeline that is located on the premises. Business Realty Inv. Co. v. Insituform Techs., Inc., 2014 U.S. App. LEXIS 8230 (11th Cir. May 1, 2014) (applying Alabama law), *aff’g* Business Realty Inv. Co. v. Jefferson County, 2013 U.S. Dist. LEXIS 94403 (N.D. Ala. July 8, 2013). *See also* Motisi v. Alabama Gas Corp., 485 So. 2d 1157 (Ala. 1986).

   In California, there are various types of trespass that affect both the applicable statute of limitations and the damage recovery. In Starrh & Starrh Cotton Growers v. Aera Energy LLC, 153 Cal. App. 4th 583, 63 Cal. Rptr. 3d 165, 168 O.&G.R. 152 (2007), *rev. denied*, 2007 Cal. LEXIS 12027 (Cal. Oct. 24. 2007), a farmer sued an ***oil*** and gas operator after produced water migrated from the surface disposal pits on adjacent lands to groundwater aquifers underneath the farmer’s land. Such a migration constitutes a trespass under Cassinos v. Union ***Oil*** Co. of California, 14 Cal. App. 4th 1770, 18 Cal. Rptr. 2d 574, 125 O.&G.R. 472, *rev. denied*, 1993 Cal. LEXIS 3771 (Cal. July 15, 1993). If the trespass is permanent than the cause of action starts to run at the time that of the entry. If the trespass is continuing, meaning that it may be discontinued or abated, the cause of action accrues over the period of time that the trespass continues. Furthermore, if the trespass is permanent the measure of damages includes past, present and future injuries. If the trespass is continuing, the measure of damages only includes past damages because the trespass may be abated at any time. Because the operator continued to use unlined ponds as the principal method to dispose of the produced water, the court treated the trespass as continuing. That eliminated the operator’s statute of limitations defense. The court, however, remanded the case back to the trial court to deal with the damages issue. Damages should fully compensate the plaintiff for injuries that have occurred or are likely to occur in the future. The evidence proffered by the farmer as to the cost of remediation/restoration which might be available under certain circumstances was insufficient to support the verdict. Such costs have to be balanced against the diminution in value of the real property interest and reflect the economic realities of the circumstances.

   In C&C Props., Inc. v. Shell Pipeline Co., 2015 U.S. Dist. LEXIS 127856 (E.D. Cal. Sept. 23, 2015), *report and recommendation adopted*, 2015 U.S. Dist. LEXIS 163905 (E.D. Cal. Dec. 3, 2015), the court said: “A trespass is an invasion of the interest in the exclusive possession of land, as by entry upon it … The cause of action for trespass is designed to protect possessory—not necessarily ownership—interests in land from unlawful interference.” The same definition was used in C&C Properties, Inc. v. Shell Pipeline Co., 2018 U.S. Dist. LEXIS 100109 (E.D. Cal. June 14, 2018). *In accord*: Orange County Water Dist. v. Sabic Innovative Plastics US, LLC, 14 Cal App. 5th 343, 222 Cal. Rptr. 3d 323 (2017), *review denied*, 2017 Cal. LEXIS 8780 (Nov. 15, 2017).

   For subsequent litigation regarding the measure of damages for the underground trespass, see C&C Properties v. Shell Pipeline Co., 2019 U.S. Dist. LEXIS 206439 (E.D. Cal. No. 27, 2019), 2022 U.S. Dist. LEXIS 160369 (E.D. Cal. Sept. 2, 2022), *aff’d in part, rev’d in part and vacated and remanded in part sub nom.* C&C Properties, Inc. v. Alon Bakersfield Property, Inc., 2023 U.S. App. LEXIS 8569 (9th Cir. Apr. 11, 2023), *as modified,* 2023 U.S. App. LEXIS 11246 (9th Cir. May 8, 2023).

   California has an unusual statute of limitations that applies to underground trespasses caused by ***oil*** and gas operations. Cal. Civ. Proc. Code § 349-3/4, interpreted in Travelers Indemnity Co. of Illinois v. City of Redondo Beach, 28 Cal. App. 4th 1432, 34 Cal. Rptr. 2d 337, 131 O.&G.R. 12 (1994).

   In Illinois, a trespass is “an invasion in the exclusive possession and physical condition of land,” that can occur through either a negligent or intentional act. City of Evanston v. Northern Illinois Gas Co., 229 F. Supp. 3d 714 (N.D. Ill. 2017).

   In Kansas, a trespass involves an unauthorized entry with an intention to enter upon another’s land whether or not the actor knows or should know that it is not entitled to so enter. Armstrong v. Bromley Quarries & Asphalt, Inc., 378 P.3d 1090 (Kan. 2016).

   In Kentucky there is a significant difference in the damage models that apply to intentional versus unintentional or negligent trespasses. While the owner is always entitled to nominal damages regardless of the type of trespass, with an intentional trespass, the owner may be entitled to a just compensation recovery upon proof of actual injury to the real property interest. Smith v. Carbide & Chems. Corp., 226 S.W.3d 52, 172 O.&G.R. 98 (Ky. 2007). This opinion was in response to a certified question from the Sixth Circuit, which rendered its opinion in Smith v. Carbide & Chems. Corp., 507 F.3d 372, 172 O.&G.R. 85 (6th Cir. 2007). The *Smith* cases deal with groundwater pollution from a nuclear weapons assembly facility. The Sixth Circuit determined that there were fact issues regarding whether the alleged pollution constituted a trespass since the quantities that were being measured were in the parts per billion.

   Kentucky recognizes three types of trespassory actions. The first is based on extra-hazardous activities, the second involves an intentional trespass and the third involves a negligent trespass. All three require the defendant to enter or remain upon land in the possession of another without consent. Energistica, S.A. v. Mercury Petroleum, Inc., 2008 U.S. Dist. LEXIS 103474 (W.D. Ky. Dec. 22, 2008); Smith v. Carbide, *op cit*.

   In Louisiana, a trespass “is an act of unlawful physical invasion of the property of another.” Vintage Assets, Inc. v. Tennessee Gas Pipeline Co., LLC, 2017 U.S. Dist. LEXIS 133693 (E.D. La. Aug. 22, 2017). *In accord*: Jacques v. Baker Hughes, 2021 U.S. Dist. LEXIS 67259 (W.D. La. Apr. 6, 2021); Richard v. Richard, 24 So. 3d 292, 296 (La. App. 2009).

   Where natural events such as erosion cause a canal to be widened beyond the original servitude boundaries, there is no trespass. Vintage Assets, Inc. v. Tennessee Gas Pipeline Co., LLC, 2017 U.S. Dist. LEXIS 133693 (E.D. La. Aug. 22, 2017).

   Louisiana appears to require an intentional, affirmative act in order to prove a trespass. Jacques v. Baker Hughes, 2021 U.S. Dist. LEXIS 67259 (W.D. La. Apr. 6, 2021); Hogg v. Chevron USA, Inc., 45 So. 3d 991 (La. 2010). *In accord*: Barrett v. Dresser, LLC, 2021 U.S. Dist. LEXIS 2173 (W.D. La. Jan. 6, 2021); Petry v. R360 Envtl. Sols. of La. L L C, 2020 U.S. Dist. LEXIS 206643 (W.D. La. Nov. 4, 2020).

   In Montana, a trespass is “an intrusion into a party’s right to exclusive possession of his property.” Mines Management, Inc. v. Fus, 398 Mont. 15, 2019 MT 276, 453 P.3d 371, 378.

   In New Jersey “an action for trespass arises upon the unauthorized entry onto another’s property, real or personal. … A trespass requires that the invasion be to land that is in the exclusive possession of the plaintiff. New Jersey Department of Environmental Protection v. Hess Corp., 2020 N.J. Super. Unpub. LEXIS 622 (App. Div. Apr. 2, 2020), relying on New Jersey Department of Environmental Quality v. Ventron Corp., 94 N.J. 473, 468 A.2d 150 (1983). In *Hess*, the state’s interest in the lands in question related to its public trust responsibilities which would not constitute exclusive possession.

   In North Dakota, the surcharge of an easement, either express or implied, will constitute a trespass. Raaum Estates v. Murex Petroleum Corp., 2015 U.S. Dist. LEXIS 130425 (D.N.D. Sept. 28, 2015).

   In Ohio, a party asserting a trespass “must demonstrate that (1) they had a possessory interest in the property, and (2) the offending party entered the property without consent or prior authorization or authority.” Baatz v. Columbia Gas Transmission, LLC, 926 F.3d 767, 772 (6th Cir. 2019). *In accord*: Keesecker vs. G.M. McKelvey Co., 141 Ohio St. 162, 47 N.E.2d 211 (Ohio 1943). But *Baatz* and Chance v. BP Chemicals, Inc., 77 Ohio St. 3d 17, 670 N.E.2d 985 (Ohio 1996), find that when it comes to underground pore space, there is no trespass by the encroachment of migrating fluid plumes unless the property owner can prove “that the invasion ‘actually interfered with [their] reasonable and foreseeable use of the subsurface.’ ” 926 F.3d at 772.

   In Oklahoma, a trespass involves: “an actual physical invasion of the real estate of another without the permission of the person lawfully entitled to possession.” Max ***Oil*** Co. v. Range Production Co., 681 Fed. Appx. 710 (10th Cir. 2017).

   In Pennsylvania, a trespass is simply defined as an “unprivileged, intentional intrusion upon land in possession of another.” Kamuck v. Shell Energy Holdings GP, LLC, 2012 U.S. Dist. LEXIS 59113 (M.D. Pa. Mar. 19, 2012), *as modified*, 2012 U.S. Dist. LEXIS 59093 (M.D. Pa. Apr. 27, 2012), citing to Graham ***Oil*** Co. v. BP ***Oil*** Co., 885 F. Supp. 716, 725 (W.D. Pa. 1994); Kopka v. Bell Tel. Co., 371 Pa. 444, 91 A.2d 232, 235 (1952). *In accord*: Rauterkus v. United States, 2019 U.S. Dist. LEXIS 197808 (W.D. Pa. Nov. 14, 2019). In Briggs v. Southwestern Energy Production Co., 224 A.3d 334 (Pa. 2020), the Pennsylvania Supreme Court said: “a trespass occurs when a person who is not privileged to do so intrudes upon land in possession of another, whether willfully or by mistake.” *Id*. at 346. In order to find a trespass, the owner must show some type of physical invasion of its property interest. *Id.*; Briggs v. Southwestern Energy Prod Co., 245 A.3d 1050, 2020 Pa. Super. Unpub. LEXIS 3780 (2020); McDonald v. CNX Gas Co., LLC, 2020 PA. Super. Unpub. LEXIS 2861 (Sept. 10, 2020). There is no cause of action in Pennsylvania for “anticipatory trespass” although one may seek injunctive relief for an “anticipatory nuisance.” *Kamuck, op cit*. In Kamuck v. Shell Energy Holdings GP, LLC, 2015 U.S. Dist. LEXIS 37538 (M.D. Pa. Mar. 25, 2015), the remaining tort claims not previously dismissed were dismissed.

   In Kennedy v. Consol Energy, Inc., 116 A.3d 626, 2015 PA Super 93, *app. denied*, 2015 Pa. LEXIS 3203 (Dec. 31, 2015), the court defined a trespass as an “intentional entrance upon land in the possession of another without a privilege to do so.” 116 A.3d at 636. Consol was privileged to enter strata adjacent to its coal estate in order to extract the coal and thus did not commit a trespass. *In accord*: Gerhart v. Energy Transfer Partners, LP, 2020 U.S. Dist. LEXIS 206157 (M.D. Pa. Nov. 4, 2020); Gerhart v. Energy Transfer Partners, LP 2020 U.S. Dist. LEXIS 55107 (M.D. Pa. Mar. 30, 2020).

   In Texas a court has identified the following as the four elements for a trespassory cause of action: “(1) the claimant has a lawful right to possess the property, (2) the defendant physically enters the property, (3) the entry was intentional and voluntary, and (4) the defendant’s trespass causes an injury to the claimant’s right of possession.” Sciscoe v. Enbridge Gathering (N. Tex.), L.P., 2015 Tex. App. LEXIS 5530, at \*17 (Tex. App.—Amarillo June 1, 2015). The court notes that *Coastal* ***Oil*** shifts the focus from the nature of the interference to the injury caused by the physical invasion. On appeal, the Texas Supreme Court reversed on statute of limitations grounds. Town of Dish v. Atmos Energy Corp., 60 Tex. Sup. Ct. J. 990, 519 S.W.3d 605 (Tex. 2017). It did not discuss the Court of Appeals’ discussion about the elements of a trespass.

   In Barnes v. Mathis, 353 S.W.3d 760, 764 (Tex. 2011), the court said that a trespass to real property “is an unauthorized entry upon the land of another and may occur when one enters—or causes something to enter—another’s property.” relying in part on Coastal ***Oil*** & Gas Corp. v. Garza Energy Trust, 268 S.W.3d 1, 172 O.&G.R. 521 (Tex. 2008).

   The *Barnes* definition was followed in Lightning ***Oil*** Co. v. Anadarko E&P Onshore, LLC, 520 S.W.3d 39 (Tex. 2017). *Lightning* ***Oil*** involved an alleged subsurface trespass by the owner of the mineral estate which was transversed by a wellbore that was accessing the minerals on an adjacent lease for which the surface owner had given consent. The court noted that “ownership of property does not necessarily include the right to exclude *every* invasion or interference based on what might, at first blush, seem to be rights attached to the ownership.” 520 S.W.3d at 46. The court was concerned that a small volume of hydrocarbons that might be located in the wellbore cuttings would allow the mineral owner to claim a trespass and otherwise prevent the production of minerals from the off-tract location. The Texas Supreme Court has not developed a test to determine when a physical invasion by the cross boundary migration of fluids or gasses will be too insufficient or too insubstantial so as not to constitute an actionable trespass. Regency Field Services, LLC v. Swift Energy Operating, LLC, 622 S.W.3d 807, 816 n.19 (Tex. 2021).

   In TCA Building Co. v. Entech, Inc., 86 S.W.3d 667, 675 (Tex. App.—Austin 2002, no writ), the court said that a “civil trespass requires an unauthorized physical entry upon another’s land.”

   In Virginia, a trespass is “an unauthorized entry onto property that causes an interference with the property owner’s possessory interest in the property.” Flora v. Mt. Valley Pipeline, LLC, 2018 U.S. Dist. LEXIS 130697, at \*13–14 (W.D. Va. Aug. 3, 2018). See also: First Vigrinia Banks, Inc. v. BP Exploration & ***Oil***, Inc., 206 F.3d 404, 409 (4th Cir. 2000); Cooper v. Horn, 248 Va. 417, 448 S.W.2d 403, 406 (Va. 1994).

   In Whiteman v. Chesapeake Appalachia, L.L.C., 729 F.3d 381 (4th Cir. 2013) (applying West Virginia law), the court defined a common law trespass as “an entry on another man’s ground, however inconsiderable, to his real property.” Hark v. Mountain Fork Lumber Co., 127 W. Va. 586, 591–92, 34 S.E.2d 348 (1945). The party asserting a trespass has the burden of proof to make a prima facie case that there was an invasion of his property interest. *See also* Moore v. Equitrans, LP, 49 F. Supp. 3d 456 (N.D. W. Va. 2014) (quotes *Whiteman* for the definition of a trespass allegedly caused by a misplaced pipeline), *judgment stayed*, 2015 U.S. Dist. LEXIS 59168 (N.D. W. Va. May 6, 2015) (pipeline’s motion to stay pending condemnation filing granted), *motion to stay continued*, 2016 U.S. Dist. LEXIS 40784 (N.D. W. Va. Mar. 29, 2016). In EQT Prod. Co. v. Crowder, 241 W. Va. 738, 828 S.E.2d 800 (2019), a trespass was defined as “an entry on another man’s ground without lawful authority, and doing some damage, however inconsiderable, to his real property.” West Virginia recognizes two kinds of trespass, intentional and unintentional with intentional trespasses capable of supporting higher damage recoveries. Moore v. Equitrans, L.P., 27 F.4th 211 (4th Cir. 2022), *aff’g in part and rev’g in part* 2021 U.S. Dist. LEXIS 83753 (N.D. W. Va. Jan. 4, 2021). *See also* Moore v. Equitrans, L.P., 818 Fed. Appx. 212 (4th Cir. 2020).

   In Wyoming, there is a statutory civil trespass claim through the unlawful collection of “resource data” by a party who has neither a contract or property right to engage in such seismic activity. Wyo. Stat. § 40-27-101. In Devon Energy Production Co., LP v. Grayson Mill Operating, LLC, 2020 WY 28, 458 P.3d 120, the Wyoming Supreme Court concluded that the district court had jurisdiction to determine if such a civil trespass took place. If it did so determine, then the Wyoming ***Oil*** & Gas Conservation Commission would have jurisdiction to see whether or not it should review its decision to grant multiple applications for permit to drill to the alleged trespasser.

   In Davilla v. Enable Midstream Partners L.P., 913 F.3d 959 (10th Cir. 2019), the court concluded that as to either Tribal or allottee lands, consent was required under federal statutes before an easement may be granted. 25 U.S.C. §§ 323, 324. Where allotted lands are involved, consent by one of the cotenants is insufficient to support the affirmative defense of a consensual entry.

   In Baker v. Conoco Pipeline Co., 280 F. Supp. 2d 1285, 158 O.&G.R. 758 (N.D. Okla. 2003) and Cason v. Conoco Pipeline Co., 280 F. Supp. 2d 1309, 158 O.&G.R. 899 (N.D. Okla. 2003), the surface owners of lands burdened with a pipeline easement filed a claim for trespassory and inverse condemnation damages when the pipeline company engaged in tree clearing operations outside of the 30-foot right-of-way. The pipeline company sought to stay the action until an arbitration panel could resolve the issue under the terms of the easement deed mandating arbitration for claims relating to “damage to crops, fences and timber, which may arise from laying, maintaining, operating or removing such pipe lines.” 280 F. Supp. 2d at 1306. The court found that the arbitration clause was enforceable against successors in interest as a real covenant but that the scope of the clause did not cover the issues relating to whether the right-of-way was limited to a 30-foot width. Thus, as to both the trespass and inverse condemnation claims, the court retained jurisdiction to resolve those issues pending the arbitrational panel’s resolution of issues relating to damages occurring within the 30-foot strip.

   In Carnahan v. Chesapeake Operating, Inc., 2015 OK CIV APP 22, 347 P.3d 753, *cert. denied*, 2015 Okla. LEXIS 32 (Mar. 2, 2015), the court allowed plaintiff’s experts to opine on the following three factors as impacting the after value of the surface estate allegedly contaminated by the defendant’s ***oil*** field operations: “(1) cost effect, such as deductions for remediation costs, (2) use effect, such as limitations or restrictions on use, and (3) risk effect, such as environmental risk or uncertainty or market stigma perceptions.” 2015 OK CIV APP 22 at \*P32.

   Increasingly, trespass actions are being brought in circumstances involving air pollution or emissions that allegedly cross property lines. The trend in recent cases, not all involving ***oil*** and gas operations, is to find that in such circumstances a trespassory cause of action is possible. The following cases all deal with the issue of the migration of airborne pollutants:

   Stevenson v. E.I. DuPont de Nemours & Co., 327 F.3d 400, 405–06 (5th Cir. 2003) (applying Texas law; trans-boundary airborne particulates may support trespassory cause of action);

   *In re* TVA Ash Spill Litig., 805 F. Supp. 2d 468, 483–484 (E.D. Tenn. 2011) (applying Tennessee law; dust, gas or odor migration may support trespassory cause of action);

   Borland v. Sanders Lead Co., 369 So. 2d 523 (Ala. 1979) (airborne particulates);

   Williams v. Oeder, 103 Ohio App. 3d 333, 659 N.E.2d 379, 382 (1995) (airborne pollutants);

   Ream v. Keen, 112 Or. App. 197, 828 P.2d 1038, 1040 (1992) (smoke and soot);

   Martin v. Reynolds Metals Co., 221 Or. 86, 342 P.2d 790, 794 (fluorides and particulates);

   Sciscoe v. Enbridge Gathering (N.Tex.), L.P., 2015 Tex. App. LEXIS 5530 (Tex. App.—Amarillo June 1, 2015) (odors, noise and pollutants from natural gas compressors), *rev’d and rendered on statute of limitations grounds*, Town of Dish v. Atmos Energy Corp., 60 Tex. Sup. Ct. J. 990, 519 S.W.3d 605 (Tex. 2017).

   The following cases all involve various types of ***oil*** and gas operations and review the basic rules of trespass as they apply in their respective jurisdictions:

   Arkansas: Sewell v. Phillips Petroleum Co., 197 F. Supp. 2d 1160, 158 O.&G.R. 403 (W.D. Ark. 2002);

   California: Newhall Land & Farming Co. v. Superior Court, 19 Cal. App. 4th 334, 23 Cal. Rptr. 2d 377 (1993), *review denied*, 1993 Cal. LEXIS 6940 (Cal. Dec. 30, 1993) (gas processing plant);

   Colorado: A-W Land Co., LLC v. Anadarko E & P Co. LP, 2012 U.S. Dist. LEXIS 139242 (D. Colo. May 3, 2012), 2012 U.S. Dist. LEXIS 139241 (D. Colo. Sept. 26, 2012), *rev’d in part on other grounds*, 2013 U.S. Dist. LEXIS 88215 (D. Colo. June 24, 2013), 2015 U.S. Dist. LEXIS 37922 (D. Colo. Mar. 16, 2015), *motion granted*, 2017 U.S. Dist. LEXIS 152980 (D. Colo. Sept. 20, 2017), *rev’d and remanded on other grounds sub nom.,* 912 F.3d 1249 (10th Cir. 2018) (trespass is a physical intrusion onto the land of another without proper permission of the owner);

   Gerrity ***Oil*** & Gas Corp. v. Magness, 946 P.2d 913, 138 O.&G.R. 1 (Colo. 1997) (***oil*** and gas drilling and production activities);

   Louisiana: Corbello v. Iowa Production Co., 850 So. 2d 686, 157 O.&G.R. 1120 (La. 2003) (surface lease for ***oil*** storage purposes);

   Michigan: Cloverleaf Car Co. v. Phillips Petroleum Co., 213 Mich. App. 186, 540 N.W.2d 297 (Mich. Ct. App. 1995) (underground storage tank);

   Oklahoma: Moore v. Texaco, Inc., 244 F.3d 1229, 148 O.&G.R. 58 (10th Cir. 2001) (applying Oklahoma law);

   Pennsylvania: Valley Rod & Gun Club v. Chesapeake Appalachia, LLC, 2013 U.S. Dist. LEXIS 77436 (M.D. Pa. June 3, 2013) (trespass claim will not lie for alleged pollution caused while ***oil*** and gas lessee properly on the premises);

   Roth v. Cabot ***Oil*** & Gas Corp., 919 F. Supp. 2d 476 (M.D. Pa. 2013) (trespass claim will not lie for alleged pollution caused while ***oil*** and gas lessee properly on the premises);

   Texas: Environmental Processing Systems, LC v. FPL Farming Ltd., 457 S.W.3d 414, 419 (Tex. 2015) (a trespass is an “(1) entry (2) onto the property of another (3) without the property owner’s consent or authorization”); Barnes v. Mathis, 353 S.W.3d 760, 764 (Tex. 2011) (a trespass to real property “is an unauthorized entry upon the land of another and may occur when one enters—or causes something to enter—another’s property.”); Port of Corpus Christi Authority of Nueces County v. Port of Corpus Christi, LP, 57 F.4th 432 (5th Cir. 2023) (applies *FPL’*s tri-partite definition in remanding case back to state court); Cook v. Cimarex Energy Co., 2021 Tex. App. LEXIS 2474, at \*6 (Tex. App.—Amarillo Mar. 31, 2021) (applies *FPL*’s tri-partite definition);

   Virginia: C.L. Ritter Lumber Co. v. Consolidation Coal Co., 2011 U.S. Dist. LEXIS 95131 (W.D. Va. Aug. 25, 2011) (“A trespass is an unauthorized entry onto property which results in interference with the property owner’s possessory interest therein.” Only those who have a possessory interest can maintain an action in trespass.);

   West Virginia: Whiteman v. Chesapeake Appalachia, L.L.C., 729 F.3d 381 (4th Cir. 2013) (applying West Virginia law) (a common law trespass is “an entry on another man’s ground, however inconsiderable, to his real property.”)

   Wyoming: Stone v. Devon Energy Production Co., L.P., 2009 WY 114, 216 P.3d 489 (trespass cause of action requires plaintiff to show that it had the right to take immediate possession at the time of the alleged trespass).

   Virginia follows the general view that the party suffering a trespass has an election of remedies. The party can sue in tort receiving the difference in value between the pre-trespass and post-trespass time periods or it can waive the tort and sue in assumpsit for contract-based damages such as fair rental value. Ark Land Co. v. Harlan Lee Land, LLC, 2011 U.S. Dist. LEXIS 125926 (E.D. Ky. Oct. 31, 2011) (applying Virginia law). *See also* Preston Mining Co. v. Matney, 197 Va. 520, 90 S.E.2d 155 (1955); Raven Red Ash Coal Co. v. Ball, 185 Va. 534, 39 S.E.2d 231 (1946).

   West Virginia follows the general rule that in order to prove a trespass the plaintiff must prove that there has been an unlawful entry onto the possessory property interest of another. Hagy v. Equitable Prod. Co., 2011 U.S. Dist. LEXIS 46920 (S.D. W. Va. Apr. 28, 2011); 2011 U.S. Dist. LEXIS 80413 (S.D. W. Va. July 22, 2011); 2012 U.S. Dist. LEXIS 69099 (S.D. W. Va. May 17, 2012); 2012 U.S. Dist. LEXIS 69438 (S.D. W. Va. May 17, 2012); 2012 U.S. Dist. LEXIS 91773 (S.D. W. Va. June 29, 2012) (trespass claims against various parties involved in the drilling and fracing of several wells adjacent to the plaintiff’s surface estate dismissed due to lack of allegations of a physical invasion of a possessory estate). West Virginia also distinguishes between permanent and continuing trespasses insofar as it would impact the running of the statute of limitations. *See, e.g.*, Moore v. Equitrans, L.P., 49 F. Supp. 3d 456 (N.D. W. Va. Sept. 23, 2014), *judgment stayed*, 2015 U.S. Dist. LEXIS 59168 (N.D. W. Va. May 6, 2015), *motion to stay continued*, 2016 U.S. Dist. LEXIS 40784 (N.D. W. Va. Mar. 29, 2016); Moore v. Equitrans L.P., 818 Fed. Appx 212 (4th Cir. 2020); Moore v. Equitrans, L.P., 27 F.4th 211 (4th Cir. 2022), *aff’g in part and rev’g in part* 2021 U.S. Dist. LEXIS 83753 (N.D. W.Va. Jan. 4, 2021); EQT Gathering Equity, LLC v. Fountain Place, LLC, 2011 U.S. Dist. LEXIS 130235 (S.D. W. Va. Nov. 9, 2011).

   There are special rules regarding injuries to fisheries and/or oyster lease holders concerning liability caused by oilfield activities. *See* Boquet Oyster House, Inc. v. United States, 2011 U.S. Dist. LEXIS 126295 (E.D. La. Oct. 31, 2011) (decision of National Pollution Funds Center to deny damage claims under ***Oil*** Pollution Act for alleged injuries to oyster leases upheld); Jurisic & Sons, Inc. v. TransTexas Gas Corp., No. G-02-769 (S.D. Tex. Oct. 7, 2005) (cause of action for economic injury to oyster beds survives motion for summary judgment); Blue Gulf Seafood, Inc. v. TransTexas Gas Corp., 24 F. Supp. 2d 732, 733, 141 O.&G.R. 578 (S.D. Tex. 1998), *aff’d in part*, 244 F.3d 135 (5th Cir. 2000) (plaintiff must own proprietary interest in state lease in order to assert claim for economic injury to oyster beds); State of Louisiana *ex rel.* Guste v. M/V Testbank, 752 F.2d 1019 (5th Cir. 1985); State of Louisiana *ex rel.* Guste v. M/V Testbank, 524 F. Supp. 1170 (E.D. La. 1981).

   Whether plaintiffs can allege a continuing trespass may determine whether the prescriptive period or the statute of limitations has run on the alleged tort. *See* Gulf & Miss. River Transp. Co. v. Chevron Pipeline Co., 2011 U.S. App. LEXIS 21652 (5th Cir. Oct. 25, 2011). [↑](#footnote-ref-9)
9. 8In Coastal ***Oil*** & Gas Corp. v. Garza Energy Trust, 268 S.W.3d 1, 172 O.&G.R. 521 (Tex. 2008), the Texas Supreme Court distinguished between the historic forms of trespassory causes of action some of which required the plaintiff to prove actual damages while others did not in ultimately concluding that a cross-boundary migration of frac fluids did not constitute a trespass. The holding in *Coastal* ***Oil***, however, that no trespass exists where frac fluids migrate across property lines was not followed in FPL Farming Ltd. v. Envtl. Processing Sys., L.C., 383 S.W.3d 274, 178 O.&G.R. 510 (Tex. App.—Beaumont 2012), *on remand from*, FPL Farming, Ltd. v. Envtl. Processing Sys., L.C., 351 S.W.3d 306, 178 O.&G.R. 500 (Tex. 2011). *FPL Farming* involved an alleged trespass caused by an underground cross-boundary migration of injected non-hazardous waste fluids. Relying on Gregg v. Delhi-Taylor ***Oil*** Corp., 344 S.W.2d 411, 415–16, 14 O.&G.R. 106 (Tex. 1961) and Hastings ***Oil*** Co. v. Texas Co., 234 S.W.2d 389, 396–97 (Tex. 1950), the court said that a trespass may exist for an underground injection of fluids where the fluids will remain in place and are not part of a process to produce ***oil*** and gas. 383 S.W.3d at 280–81. On the issue of which party has the burden of proof on the affirmative defense of consent to the use of the underground strata, the Court of Appeals places that burden on the injector who was asserting that affirmative defense. 383 S.W.3d at 285. The *FPL* court did not resolve the issue as to whether a trespass could occur without the plaintiff showing actual harm or injury, leaving it to the jury on remand to determine what, if any, the amount of damages would be. On appeal, Envtl. Processing Sys., L.C. v. FPL Farming Ltd., 457 S.W.3d 414, (Tex. 2015), the Texas Supreme Court reversed the Court of Appeals on the issue of which party has the burden of proof to show consent. Trespass in Texas requires the party asserting the trespass to show “… three elements: (1) entry (2) onto the property of another (3) without the property owner’s consent or authorization.” 457 S.W.3d at 419. While noting some inconsistent holdings in earlier trespass cases, the Supreme Court concluded that lack of consent or authorization is part of the plaintiff’s trespassory cause of action and therefore the plaintiff bears the burden of proof. In this case, the jury had answered a specific instruction relating to consent and authorization in the negative which supported the trial court’s take-nothing judgment. The court specifically eschewed answering the question of whether a subsurface migration of injected fluids constituted an actionable trespass since the jury found that the entry was either authorized or consented to.

   In Lightning ***Oil*** Co. v. Anadarko E&P Onshore, LLC, 520 S.W.3d 39 (Tex. 2017), the court cited *Barnes* for the definition of a trespass but then noted that “ownership of property does not necessarily include the right to exclude *every* invasion or interference based on what might, at first blush, seem to be rights attached to the ownership. The court also said that its conclusion that the owner of the mineral estate did not have a trespass claim for the loss of hydrocarbons contained in the cuttings through which the wellbore would be drilled did not minimize the holding in *FPL Farming* regarding subsurface trespass.

   *Lightning* ***Oil*** was followed in XTO Energy, Inc. v. Goodwin, 584 S.W.3d 481 (Tex. App.—Tyler 2017, pet. denied). A horizontal lateral that strays over a property line constitutes a trespass of the surface estate but the surface owner must proffer relevant and credible evidence as to the damages caused by this permanent trespass.

   *See generally* Joseph A. Schremmer, *Pore Space Property*, 21 Utah L. Rev. 1 (2021). The notion that not every physical invasion will constitute an actionable trespass in the case of cross-boundary migration of injected fluids or gas was reaffirmed in Regency Field Services, LLC v. Swift Energy Operating, LLC, 622 S.W.3d 807 (Tex. 2021). The court eschewed developing a test to determine the extent to which a cross-boundary migration would be too insufficient or insubstantial so as to constitute an actionable trespass, since the issue before it was when the injury occurred as the injector was asserting that the statute of limitations had run against the adjacent lessee’s trespass and other tort claims. 622 S.W.3d at 816 n.19. In *Regency*, the negligence and nuisance claims were brought by the severed mineral owner and thus the injury would not accrue until there was either an unreasonable interference with the use and enjoyment of the mineral estate or an interference with the mineral owner’s right to explore for and produce minerals.

   Ohio also follows the *Coastal* ***Oil*** rule that requires a person alleging an underground trespass through the migration across the boundary line of a pollutant must show actual damages and an interference with the owner’s reasonable and foreseeable use of the subsurface in order to recover. Baatz v. Columbia Gas Transmission, LLC, 929 F.3d 767, 772 (6th Cir. 2019), *cert. denied*, 140 S. Ct. 906 (2020), *aff’g* 295 F. Supp. 3d 776 (N.D. Ohio 2018); Baker v. Chevron USA, Inc., 2013 U.S. App. LEXIS 16219, at \*34–\*37 (6th Cir. Aug. 2, 2013); Chance v. BP Chems., 77 Ohio St.3d 17, 670 N.E.2d 985 (1996); Lueke v. Union ***Oil*** Co., 2000 Ohio App. LEXIS 4845 (Oct 20, 2000). *Chance* and *Baker* were relied on in Baatz v. Columbia Gas Transmission, LLC, 295 F. Supp. 3d 776 (N.D. Ohio 2018) to find that no trespass is alleged for the storage of natural gas in subsurface strata by a FERC-certificated storage operator who has not condemned the underground strata for such a use. Without a finding of actual damages or interference with a use by the owner, there can be no trespass. The court also dismissed a claim for unjust enrichment which was based on the storage or rental value of the underground storage facility because the named plaintiffs were not the owners of the subsurface at the time that the natural gas was being stored. On appeal, the Sixth Circuit affirmed the holding and the rationale of the trial court is dismissing the subsurface owner’s trespass claim for the injection of natural gas without permission. Baatz v. Columbia Gas Transmission, LLC, 929 F.3d 767, 772 (6th Cir. 2019), *cert. denied*, 140 S. Ct. 906 (2020). *See also* Baatz v. Columbia Gas Transmission, LLC, 814 F.3d 785 (6th Cir. 2016).

   *Chance* was cited in ***Kerns*** v. Chesapeake Exploration, LLC, 762 Fed. Appx. 289, 2019 U.S. App. LEXIS 3450 (6th Cir. 2019), *aff’g* 2018 U.S. Dist. LEXIS 99180 (N.D. Ohio June 13, 2018), for the proposition that the surface owner does not have a property interest that would be subject to Fifth and Fourteenth Amendment protection where the state force unitized a tract of land and allowed a horizontal lateral to be located under a surface estate owner who had otherwise not consented to the unitization.

   In Oklahoma a claim for trespass or negligence caused by the migration of frac fluids into a shallower formation must be filed in the county where the interest is real property is located. A.B. Still Wel-Service, Inc. v. Antinum Midcon I, LLC, 2018 OK CIV APP 35, applying 12 Okla. Stat. Ann. § 131. [↑](#footnote-ref-10)
10. 9Restatement (Second) of Torts § 166 (1965). *See also* Keeton & Jones, *Tort Liability and the* ***Oil*** *and Gas Industry II*, 39 Tex. L. Rev. 253, 256 (1961).

    A trespass cannot be shown where the alleged polluting activities took place at a time when the ***oil*** and gas operator owned both the surface and mineral estates. Moore v. Texaco, Inc., 244 F.3d 1229, 148 O.&G.R. 58 (10th Cir. 2001).

    Where a lateral extends under the lands owned by another there may be a trespass as to both the mineral owner and the surface owner. In Aston Meadows, Ltd. v. Devon Energy Prod. Co., L.P., 359 S.W.3d 856, 181 O.&G.R. 617 (Tex. App.—Ft. Worth 2012, rev. denied), the court dismissed the trespass claims because the owner had constructive notice of an ***oil*** and gas lease that covered tracts of land in two counties even though the lease was filed of record in only one of the two counties. *See also* XTO Energy, Inc. v. Goodwin, 584 S.W.3d 481 (Tex. App.—Tyler 2017, pet. denied).

    A mineral owner who uses an unreasonable or excessive amount of the surface estate may be liable as a trespasser. In A-W Land Co., LLC v. Anadarko E&P Co. LP, 2012 U.S. Dist. LEXIS 139241 (D. Colo. Sept. 26, 2012), *as modified by*, 2013 U.S. Dist. LEXIS 88215 (D. Colo. June 24, 2013), the District Court held that some of the issues raised by the plaintiffs/surface owners regarding the alleged excessive use of the surface estates through the decision to drill vertical, rather than directional, wells should be certified for class action treatment. Those issues did not include whether or not an actual trespass occurred but whether the mineral lessor could be held liable for trespasses caused by its mineral lessees. The court also certified questions relating to the interpretation and/or ambiguity of the express easements created in the original severance documents.

    In Oklahoma the cross-boundary migration of airborne particulates or odor is considered to be an intangible or impalpable invasion and therefore only supports a trespass claim where there is evidence of substantial damage to the property. Barton v. Ovintiv Mid-Continent, Inc., 2021 U.S. Dist. LEXIS 76680 (W.D. Okla. Apr. 21, 2021). *See also* Beal v. Western Farmers Electrical Co-op, 2010 OK CIV APP 6, 228 P.3d 538, 541. [↑](#footnote-ref-11)
11. 10W. Keeton, D. Dobbs, R. Keeton, D. Owen, Prosser and Keeton on the Law of Torts, 616 (5th ed. 1984). *See also* Keeton & Jones, *Tort Liability and the* ***Oil*** *and Gas Industry II*, 39 Tex. L. Rev. 253, 256–257 (1961). The authors there conclude:

    Although the distinction between invasions that constitute an interference with possession and those that do not is fundamental and important, the line of demarcation cannot be drawn, as is often true with other legal dichotomies, with mathematical exactness. Actually there has been surprisingly little effort made by the courts to explore this problem. The results of many cases are inconsistent, albeit very little discussion of the problem is contained in the opinions.

    39 Tex. L. Rev. at 257.

    The following cases all involve various types of ***oil*** and gas operations and review the basic rules of nuisance as they apply in their respective jurisdictions:

    Valley View Angus Ranch, Inc. v. Duke Energy Field Services, Inc., 497 F.3d 1096 (10th Cir. 2007) (surface owner not prevented by claim or issue preclusion doctrines from filing a common law negligence, nuisance, and trespass action to assert damages from a pipeline leak, where in an earlier suit the pipeline company had won an injunction preventing the surface owner from interfering with the pipeline company’s access to the land);

    *In re* Exxon Valdez, 104 F.3d 1196, 136 O.&G.R. 463 (9th Cir. 1997) (applying Alaska law) (***oil*** spill);

    Parks Hiway Enterprises, LLC v. CEM Leasing, Inc., 995 P.2d 657 (Alaska 2000) (underground storage tanks);

    Sewell v. Phillips Petroleum Co., 197 F. Supp. 2d 1160, 158 O.&G.R. 403 (W.D. Ark. 2002) (applying Arkansas law) (***oil*** and gas drilling and production activities);

    Ogala v. Chevron Corp., 2014 U.S. Dist. LEXIS 68518 (N.D. Cal. May 19, 2014) (only parties alleging special injury can assert a claim for a public nuisance; “private nuisance … requires the plaintiff to prove an injury specifically referable to the use and enjoyment of his or her land”);

    Carson Harbor Village, Ltd. v. Unocal Corp., 990 F. Supp. 1188 (C.D. Cal. 1997), *aff’d in part, reversed in part, remanded*, 227 F.3d 1196, 154 O.&G.R. 477 (9th Cir. 2000), *reh’g granted en banc*, 240 F.3d 841 (9th Cir. 2001), *aff’d in part, reversed in part, remanded*, 270 F.3d 863, 154 O.&G.R. 509 (9th Cir.), *cert. denied sub nom*. Carson Harbor Village, Ltd. v. Braley, 535 U.S. 971, 122 S. Ct. 1437, 152 L. Ed. 2d 381 (2002) (applying California law) (oilfield wastes);

    City of Evanston v. Northern Illinois Gas Co., 229 F. Supp. 3d 714 (N.D. Ill. 2017) (private nuisance is an invasion of another’s interest in the use and enjoyment of land; public nuisance is a substantial and unreasonable interference with a public right);

    Northern Natural Gas Co. v. L.D. Drilling, Inc., 405 F. Supp. 3d 981 (D. Kan. 2019) (elements of continuing private nuisance include nature of the causative structure, nature of the damages, and ability to ascertain damage);

    Northern Natural Gas Co. v. L.D. Drilling, Inc., 2019 U.S. Dist. LEXIS 180602 (D. Kan. Oct. 18, 2019) (admissibility of damages evidence in nuisance claim);

    N. Natural Gas Co. v. L.D. Drilling, Inc., 697 F.3d 1259 (10th Cir. 2012), *aff’g* 759 F. Supp. 2d 1282 (D. Kan. 2010) (interference with gas storage facility by continued production of off-facility wells);

    Williams v. Amoco Production Co., 241 Kan. 102, 734 P.2d 1113, 93 O.&G.R. 60 (Kan. 1987) (natural gas seepage into water well);

    Cloverleaf Car Co. v. Phillips Petroleum Co., 213 Mich. App. 186, 540 N.W.2d 297 (Mich. Ct. App. 1995) (underground storage tank);

    Christmas v. Exxon Mobil Corp., 138 So. 3d 123, 125 (Miss. 2014) (A private nuisance “is a nontrespassory invasion of another’s interest in the use and enjoyment of his property.”);

    Donald v. Amoco Production Co., 735 So. 2d 161, 141 O.&G.R. 490 (Miss. 1999), *on subsequent appeal sub nom.* Howard v. TotalFina E & P USA, Inc., 899 So. 2d 882, 162 O.&G.R. 803 (Miss. 2005) (***oil*** and gas drilling and production activities);

    T.K. Stanley, Inc. v. Cason, 614 So. 2d 942, 124 O.&G.R. 247 (Miss. 1992) (injection well);

    Amoco Production Co. v. Carter Farms Co., 103 N.M. 117, 703 P.2d 894, 86 O.&G.R. 84 (1985) (where a negligence cause of action can be pleaded, private nuisance recovery is not warranted for alleged surface contamination), *rev’d on other grounds*, McNeill v. Burlington Res. ***Oil*** & Gas Co., 2008-NMSC-022, 143 N.M. 740, 182 P.3d 121, 167 O.G.R. 200;

    Union ***Oil*** Co. v. Heinsohn, 43 F.3d 500, 130 O.&G.R. 623 (10th Cir. 1994) (applying Oklahoma law) (gas processing facility);

    Blocker v. ConocoPhillips Co., 380 F. Supp. 3d 1178 (W.D. Okla. 2019) (defining what a “special injury” is for purposes of proving a public nuisance);

    Fischer v. Atlantic Richfield Co., 774 F. Supp. 616 (W.D. Okla. 1989) (applying Oklahoma law) (***oil*** and gas drilling and production activities);

    Meinders v. Johnson, 2006 OK CIV APP 35, 134 P.3d 858, *cert. denied* (***oil*** field production and exploration activities);

    Briscoe v. Harper ***Oil*** Co., 1985 OK 43, 702 P.2d 33, 86 O.&G.R. 361 (***oil*** and gas drilling and production activities);

    Fernlund v. TransCanada USA Servs., 2014 U.S. Dist. LEXIS 14920 (D. Or. Jan. 3, 2014), *report and recommendation adopted*, 2014 U.S. Dist. LEXIS 15227 (D. Or. Feb. 5, 2014) (odors emanating from a natural gas compressor and treatment facility);

    Russell v. Chesapeake Appalachia, LLC, 2018 U.S. Dist. LEXIS 216893 (M.D. Pa. Dec. 27, 2018) (nuisance involves an intentional and unreasonable invasion of another’s use and enjoyment of land; nuisance claims subject to two-year statute of limitations);

    Tiongco v. Southwestern Energy Prod. Co., 214 F. Supp. 3d 279 (M.D. Pa. 2016) (follows *Butts* and the application of Restatement (Second) of Torts in defining a private nuisance; plaintiff has pled sufficient facts to defeat defendant’s motion for summary judgment);

    Gerhart v. Energy Transfer Partners, LP, 2020 U.S. Dist. LEXIS 55107 (M.D. Pa. Mar. 30, 2020) (follows *Tiongco* and use of Restatement (Second) of Torts);

    Ely v. Cabot ***Oil*** & Gas Corp., 2017 U.S. Dist. LEXIS 49075 (M.D. Pa. Mar. 31, 2017) (jury verdict on nuisance claim overturned due to several factors warranting granting the defendant’s motion for a new trial);

    Butts v. Southwestern Energy Prod. Co., 2014 U.S. Dist. LEXIS 111637 (M.D. Pa. Aug. 12, 2014), *recons. denied*, 2014 U.S. Dist. LEXIS 130216 (M.D. Pa. Sept. 15, 2014) (Pennsylvania follows Restatement (Second) of Torts § 821F to define a nuisance; complaint sufficiently alleges facts relating to excessive noise and light and water pollution to survive motion for summary judgment);

    Roth v. Cabot ***Oil*** & Gas Corp., 919 F. Supp. 2d 476 (M.D. Pa. 2013) (allegations that quality of groundwater changed after ***oil*** and gas drilling operations commenced sufficient to defeat motion for summary judgment on nuisance claim);

    Natural Gas Pipeline Co. of America v. Justiss, 397 S.W.3d 150, 153 (Tex. 2012) (follows the *Barnes* definition of a nuisance);

    Barnes v. Mathis, 353 S.W.3d 760, 763 (Tex. 2011) (“A nuisance is a condition that substantially interferes with the use and enjoyment of land by causing unreasonable discomfort or annoyance to persons of ordinary sensibilities”);

    Cerny v. Marathon ***Oil*** Corp., 480 S.W.3d 612 (Tex. App.—San Antonio 2015) (Nuisance claim even where plaintiffs eschew personal injury damages still requires plaintiffs to prove causation and more than lay testimony);

    Sciscoe v. Enbridge Gathering (N.Tex.), L.P., 2015 Tex. App. LEXIS 5530 (Tex. App.—Amarillo June 1, 2015) (three classes of nuisance, negligent invasions, intentional invasions and other inappropriate conduct), *rev’d and rendered on statute of limitations grounds*, Town of Dish v. Atmos Energy Corp., 60 Tex. Sup. Ct. J. 990, 519 S.W.3d 605 (Tex. 2017);

    Crosstex North Tex. Pipeline, LP v. Gardiner, 505 S.W.3d 580 (Tex. 2016), *aff’g* 451 S.W.3d 150 (Tex. App.—Ft. Worth 2014) (Texas Supreme Court provides guidance as to nuisance law relating to negligent nuisance, intentional nuisance and strict liability nuisance);

    Town of Dish v. Atmos Energy Corp., 60 Tex. Sup. Ct. J. 990, 519 S.W.3d 605 (Tex. 2017) (cites *Crosstex* for the proposition that nuisance is not a cause of action but a type of legal injury);

    Aruba Petroleum, Inc. v. Parr, 2017 Tex App. LEXIS 873 (Tex. App.—Dallas Feb. 1, 2017) (follows *Gardiner’s* definition of an intentional nuisance; reverses jury verdict based on lack of evidence);

    Rankin v. FPL Energy, LLC, 266 S.W.3d 506, 174 O.&G.R. 234 (Tex. App.—Eastland 2008, rev. denied) (nuisance cannot be based solely on alleged emotional and/or aesthetic injury; wind farms on adjacent land does not constitute a nuisance based on *Maranatha Temple*);

    Hicks v. Humble ***Oil*** & Refining Co., 970 S.W.2d 90 (Tex. App. Houston [14th Dist.] 1998, writ denied) (***oil*** and gas drilling and production activities);

    Maranatha Temple v. Enterprise Products Co., 893 S.W.2d 92 (Tex. App. Houston [1st Dist.] 1994, writ denied) (gas pipeline and storage facilities);

    Branch v. Western Petroleum, Inc., 657 P.2d 267, 76 O.&G.R. 144 (Utah 1982) (escape of produced water);

    Lovejoy v. Jackson Resources Co., 2021 U.S. Dist. LEXIS 132399 (W.D. W. Va. July 16, 2021), 2021 U.S. Dist. LEXIS 217801 (W.D. W. Va. Nov. 10, 2021) (public versus private nuisance distinguished; public nuisance requires showing of a “special injury” different in character than that inflicted upon the general public). [↑](#footnote-ref-12)
12. 11Restatement (Second) of Torts § 822 defines a private nuisance as follows:

    One is subject to liability for a private nuisance if, but only if, his conduct is a legal cause of an invasion of another’s interest in the private use and enjoyment of land, and the invasion is either (a) intentional and unreasonable, or (b) unintentional and otherwise actionable under the rules controlling liability for negligent or reckless conduct, or for abnormally dangerous conditions or activities.

    Many of the ***oil*** and gas production jurisdictions follow the Restatement (Second) of Torts §§ 821–22 (1979) in terms of defining a nuisance. Michael J. Mazzone, Mike Stewart & Amy Rose, *Nuisance Cases Against Energy Companies*, The Law of Fracking: Federal, State, and Local Regulation of Modern ***Oil*** and Gas Developments 5-1, 5-8 (Rocky Mtn. Min. L. Fdn. 2019).

    To the two types of conduct listed above, Texas has added a third described as “other conduct, culpable because abnormal and out of place in its surroundings, that invades another’s interest.” Hicks v. Humble ***Oil*** & Refining Co., 970 S.W.2d 90, 96 (Tex. App. Houston [14th Dist.] 1998, writ denied), citing Watson v. Brazos Elec. Power Co-op, Inc., 918 S.W.2d 639, 644 (Tex. App. Waco 1996, writ denied). It is also the case that the nuisance must affect the land of another so that the acts of the landowner on her own land cannot constitute a nuisance. *See* Jones v. Texaco, Inc., 945 F. Supp. 1037, 1051 (S.D. Tex. 1996), Hicks, *op cit.*

    Even though Texas defines a nuisance as a non-trespassory invasion, one can allege both a nuisance and a trespass under certain circumstances. Rankin v. FPL Energy, LLC, 266 S.W.3d 506 (Tex. App.—Eastland 2008, rev. denied) (wind farm).

    Even though Texas defines a nuisance as a non-trespassory invasion, one can allege both a nuisance and a trespass under certain circumstances. Rankin v. FPL Energy, LLC, 266 S.W.3d 506, 174 O.&G.R. 234 (Tex. App.—Eastland 2008, rev. denied) (wind farm).

    A Texas court has defined a nuisance as “a nontrespassory invasion of another’s interest in the private use or enjoyment of land.” *In re* Premcor Ref. Group, Inc., 233 S.W.3d 904, 907, 174 O.&G.R. 592 (Tex. App.—Beaumont 2007).

    However, use by a prior owner of the land may constitute a nuisance where disposal of ***oil*** field wastes from other lands was occurring. Donald v. Amoco Prod. Co., 735 So. 2d 161, 141 O.&G.R. 490 (Miss. 1999), *on subsequent appeal sub nom.* Howard v. TotalFina E & P USA, Inc., 899 So. 2d 882, 162 O.&G.R. 803 (Miss. 2005).

    Ohio has described a nuisance cause of action as follows: “The term ‘nuisance designates a distinct tort, consisting of anything wrongfully done or permitted that unreasonably interferes with another in the enjoyment of his property … . To maintain an action for nuisance, there must be a real, material, and substantia l injury.” Natale v. Everflow Eastern, Inc., 195 Ohio App. 3d 270, 2011-Ohio-4304, 959 N.E.2d 602 (11th Dist.). In *Natale*, the court found that an ***oil*** and gas operator’s use of an adjacent tract of land for the location of the well and supporting equipment did not cause such an unreasonable interference.

    Pennsylvania generally follows the Restatement (Second) of Torts § 822 list of factors in determining the existence of a nuisance and defines a private nuisance as: “a nontrespassory invasion of another’s interest in the private use and enjoyment of land.” Kamuck v. Shell Energy Holdings GP, LLC, 2015 U.S. Dist. LEXIS 37538 (M.D. Pa. Mar. 25, 2015). citing Philadelphia Elec. Co. v. Hercules, Inc., 762 F.2d 303, 313 (3d Cir. 1985). In Bootes v. PPP Future Development, Inc., 2023 U.S. Dist. LEXIS 50038 (W.D. Pa. Mar. 21, 2023), the court said: “A private nuisance exists when a person’s conduct invades ‘another’s interest in the private use and enjoyment of land,’ and that invasion is either intentional and unreasonable or unintentional and negligent.”

    West Virginia defines a private nuisance as “a substantial and unreasonable interference with the private use and enjoyment of another’s land. Lovejoy v. Jackson Resources Co., 2021 U.S. Dist. LEXIS 132399 (S.D. W. Va. July 16, 2021), quoting from Hendricks v. Stalnaker, 181 W. Va. 31, 380 S.E.3d 198 (W. Va. 1989).

    The servient owner of a surface estate subject to a pipeline easement may be sued in Pennsylvania under a hybrid tort theory known as tortious interference with the dominant owner’s property interest. That tort is independent of a claim for a private nuisance. Duhring Resources, Co. v. U.S., 775 Fed. Appx. 742, 748 (3d Cir. 2019); Gerhart v. Energy Transfer Partners, LP, 2020 U.S. Dist. LEXIS 206157 (M.D. Pa. Nov. 4, 2020).

    The owner of a pipeline easement cannot be sued for creating a nuisance unless the owner exceeds the scope of the easement. Quintain Development, LLC v. Columbia Natural Resources, Inc., 210 W. Va. 128, 556 S.E.2d 95, 159 O.&G.R. 630 (2001). A similar analysis was used in Andrews v. Antero Resources Corp., 241 W. Va. 796, 828 S.E.2d 858 (2019), where the surface owner of a tract adjacent to a tract which had a horizontal lateral underneath it asserted that the use of hydraulic fracturing underneath the neighboring land constituted a nuisance.

    On occasion, a cause of action may be stated for public nuisance. The Restatement (Second) of Torts § 821B(1) defines a public nuisance as “an unreasonable interference with a right common to the general public,” and lists a number of circumstances that may indicate that a public nuisance has been created. *Id.* at § 821B(2). In *In re* Methyl Tertiary Butyl Ether (“MTBE”) Products Liability Litigation, 175 F. Supp. 2d 593, 627–28, 164 O.&G.R. 931 (S.D.N.Y. 2001), the court found that the various plaintiffs had asserted public nuisance claims under the laws of California, Florida, Illinois and New York.

    In Bd. of Comm’rs of the Southeast La. Flood Prot. Authority v. Tenn. Gas Pipeline Co., LLC, 29 F. Supp. 3d 808, 854 (E.D. La. 2014), 88 F. Supp. 3d 615 (E.D. La. 2015), *aff’d*, 850 F.3d 714 (5th Cir. 2017), the court defined a public nuisance as: “an unreasonable interference with a right common to the general public.”

    In New Jersey Department of Environmental Protection v. Hess Corp., 2020 N.J. Super. Unpub. LEXIS 622 (App. Div. Apr. 2, 2020), the court applied the Restatement (Second) definition of a public nuisance and further noted that a governmental entity is not entitled to recover money damages when it brings such an action.

    In Bad River Band of the Lake Superior Tribe v. Enbridge, 626 F. Supp. 3d 1030, 2022 U.S. Dist. LEXIS 161080 (W.D. Wis. 2022), the court defined a public nuisance under federal common law as a “claim that has three elements: (1) unreasonable interference with public rights, health, safety or welfare; (2) if not presently occurring, interference must be imminent or certain to occur; and (3) the defendant must have caused the nuisance.” In Bad River Band of the Lake Superior Tribe. v. Enbridge Energy Co., 2022 U.S. Dist. LEXIS 213368 (W.D. Wis. Nov. 28, 2022), the court approved the issuance of an injunction against the continued use of the pipeline which it had found to be a public nuisance. [↑](#footnote-ref-13)
13. 12Maranatha Temple, Inc. v. Enterprise Prods. Co., 893 S.W.2d 92 (Tex. App.—Houston [1st Dist.] 1994, writ denied); Rankin v. FPL Energy, LLC, 266 S.W.3d 506, 174 O.&G.R. 234 (Tex. App.—Eastland 2008, rev. denied); Meinders v. Johnson, 2006 OK CIV APP 35, 134 P.3d 858, *cert. denied* (Oklahoma statutory definition of a public nuisance).

    In N. Natural Gas Co. v. L.D. Drilling, Inc., 697 F.3d 1259, 1267 (10th Cir. 2012), *aff’g* 759 F. Supp. 2d 1282 (D. Kan. 2010), the court defines a nuisance under Kansas law as “a tort related to the unlawful interference with a person’s use or enjoyment of his land” citing Smith v. Kan. Gas Serv. Co., 285 Kan. 33, 169 P.3d 1052, 1061 (2007). The party asserting a nuisance must prove that:

    (1) the defendant acted with the intent of interfering with the use and enjoyment of the land by those entitled to that use; (2) there was some interference with the use and enjoyment of the land of the kind intended, although the amount and extent of that interference may not have been anticipated or intended; (3) the interference that resulted and the physical harm, if any, from that interference proved to be substantial; and (4) the interference was of such a nature, duration, or amount as to constitute unreasonable interference with the use and enjoyment of the land.

    697 F.3d at 1267 citing Williams v. Amoco Production Co., 241 Kan. 102, 734 P.2d 1113, 1124–25, 93 O.&G.R. 60 (1987). Maranatha Temple, Inc. v. Enterprise Prods. Co., 893 S.W.2d 92 (Tex. App.—Houston [1st Dist.] 1994, writ denied); Rankin v. FPL Energy, LLC, 266 S.W.3d 506, 174 O.&G.R. 234 (Tex. App.—Eastland 2008, rev. denied); Meinders v. Johnson, 2006 OK CIV APP 35, 134 P.3d 858, *cert. denied* (Oklahoma statutory definition of a public nuisance).

    In N. Natural Gas Co. v. L.D. Drilling, Inc., 697 F.3d 1259, 1267 (10th Cir. 2012), *aff’g* 759 F. Supp. 2d 1282 (D. Kan. 2010), the court defines a nuisance under Kansas law as “a tort related to the unlawful interference with a person’s use or enjoyment of his land” citing Smith v. Kan. Gas Serv. Co., 285 Kan. 33, 169 P.3d 1052, 1061 (2007). The party asserting a nuisance must prove that:

    (1) the defendant acted with the intent of interfering with the use and enjoyment of the land by those entitled to that use; (2) there was some interference with the use and enjoyment of the land of the kind intended, although the amount and extent of that interference may not have been anticipated or intended; (3) the interference that resulted and the physical harm, if any, from that interference proved to be substantial; and (4) the interference was of such a nature, duration, or amount as to constitute unreasonable interference with the use and enjoyment of the land.

    697 F.3d at 1267, citing Williams v. Amoco Production Co., 241 Kan. 102, 734 P.2d 1113, 1124–25, 93 O.&G.R. 60 (1987). [↑](#footnote-ref-14)
14. 13893 S.W.2d at 98, citing Burditt v. Swenson, 17 Tex. 489, 502 (1856). In Hicks v. Humble ***Oil*** & Refining Co., 970 S.W.2d 90, 95 (Tex. App.—Houston [14th Dist.] 1998, writ denied), the court defined a nuisance as “a condition which substantially interferes with the use and enjoyment of land by causing unreasonable discomfort or annoyance to persons of ordinary sensibilities attempting to use and enjoy it.”

    In Cerny v. Marathon ***Oil*** Corp., 480 S.W.3d 612 (Tex. App.—San Antonio 2015), a majority of the Court of Appeals affirmed the summary dismissal of plaintiffs’ nuisance and negligence claims even though there were allegations of foul odors, noise and bright lights because there was a lack of causation evidence.

    In Ohio there are two kinds of nuisances, absolute or qualified. “An absolute nuisance, or nuisance *per se*, consists of either a culpable and intentional act resulting in harm, or an act involving culpable and unlawful conduct causing unintentional harm, or a nonculpable act resulting in accidental harm, for which, because of the hazards involved, absolute liability attaches notwithstanding the absence of fault … . A qualified nuisance, or nuisance dependent on negligence, consists of an act lawfully but so negligently or carelessly done as to create a potential and unreasonable risk of harm, which in due course results in injury to another.” Cong v. Conoco Phillips Co., 250 F. Supp. 3d 229 (S.D. Tex. 2016) (a nuisance is a non-trespassory invasion of another’s property interest); American Energy Corp. v. Texas Eastern Transmission, L.P., 2010 U.S. Dist. LEXIS 28413, \*33–34 (S.D. Ohio 2010) (citations omitted). Ohio, like many other states, treats nuisance jurisprudence as impenetrable or unfathomable.

    In *In re* Premcor Ref. Group, Inc., 233 S.W.3d 904, 907, 174 O.&G.R. 592 (Tex. App.—Beaumont 2007), the court also used the term “permanent nuisance” to describe an activity that will be presumed to continue indefinitely, for the purposes of finding that the plaintiffs lacked standing to sue for such a nuisance allegedly caused by continued emissions from several refineries.

    In Walton v. Phillips Petroleum Co., 65 S.W.3d 262, 270, 152 O.&G.R. 310 (Tex. App.—El Paso 2001, writ denied), the court said that a nuisance “may arise by causing (1) physical harm to property, such as by the encroachment of a damaging substance or by the property’s destruction, (2) physical harm to a person on his property from an assault on his senses or by other personal injury, and (3) emotional harm to a person from the deprivation of the enjoyment of his property through fear, apprehension, or loss of peace of mind.” The court dismissed the nuisance claims, however, based on the running of the statute of limitations.

    The definition of a nuisance given in *Walton* and *Maranatha Temple* was cited with approval in Union Pacific Resources Co. v. Cooper, 109 S.W.3d 557, 159 O.&G.R. 622 (Tex. App.—Tyler 2003, rev. denied). The *Cooper* court rejected the claim that a nuisance could be pleaded merely upon a showing of fear and apprehension that sour gas might be produced from a well located within 700 feet of a residence.

    The court concluded: “Fear of the unknown is not a nuisance.” 893 S.W.2d at 98, citing Burditt v. Swenson, 17 Tex. 489, 502 (1856). In Hicks v. Humble ***Oil*** & Refining Co., 970 S.W.2d 90, 95 (Tex. App.—Houston [14th Dist.] 1998, writ denied), the court defined a nuisance as “a condition which substantially interferes with the use and enjoyment of land by causing unreasonable discomfort or annoyance to persons of ordinary sensibilities attempting to use and enjoy it.” [↑](#footnote-ref-15)
15. 14893 S.W.2d at 100. [↑](#footnote-ref-16)
16. 15893 S.W.2d at 100. The court noted that if a legitimate enterprise could be found to be a nuisance if it was operating lawfully, it would be a tremendous disincentive for businesses to locate within the state. [↑](#footnote-ref-17)
17. 16Crosstex North Texas Pipeline, LP v. Gardiner, 505 S.W.3d 580 (Tex. 2016), *aff’g*, 451 S.W.3d 150 (Tex. App.—Ft. Worth 2014). [↑](#footnote-ref-18)
18. 17505 S.W.3d at 590–91, relying on Gulf, Colo. & Santa Fe Ry. Co. v. Oakes, 94 Tex. 155, 58 S.W.999, 1000 (Tex. 1900), Barnes v. Mathis, 353 S.W.3d 760, 763 (Tex. 2011), and Natural Gas Pipeline Co. of America v. Justiss, 397 S.W.3d 150, 153 (Tex. 2012), among other cases. [↑](#footnote-ref-19)
19. 18505 S.W.3d at 590–591. [↑](#footnote-ref-20)
20. 19505 S.W.3d at 599–601. The court cites to the Restatement (Second) of Torts §§ 827, 828 and various texts to list some of the many factors that may be considered. The notion that nuisance is not a cause of action was reaffirmed in Town of Dish v. Atmos Energy Corp., 519 S.W.3d 605 (Tex. 2017). [↑](#footnote-ref-21)
21. 20505 S.W.3d at 601. The court further adds that in the rare case of a strict liability nuisance claim, the notion of what constitutes a legal wrong is very different. [↑](#footnote-ref-22)
22. 21505 S.W.3d at 604–605. [↑](#footnote-ref-23)
23. 22505 S.W.3d at 605–606. The Texas Supreme Court disagrees with the conclusion of Dean Keeton that the term nuisance should not be used at in in the context of negligence since negligence is its own cause of action. [↑](#footnote-ref-24)
24. 23*See* W. Keeton, D. Dobbs, R. Keeton, D. Owen, Prosser and Keeton on Torts 622 (5th ed. 1984); Keeton & Jones, *Tort Liability and the* ***Oil*** *and Gas Industry II,* 39 Tex. L. Rev. 253, 256–257.

    An issue that is common to both trespass and nuisance claims is whether the alleged trespass and/or nuisance is permanent on continuing. That will impact such matters as the statute of limitations and available remedies. *See, e.g.*, Russell v. Chesapeake Appalachia, LLC, 2018 U.S. Dist. LEXIS 216893 (M.D. Pa. Dec. 27, 2018) (court analyzes Pennsylvania law and applies three-factor test to determine if nuisance is permanent or continuing).

    In both trespass and nuisance claims, the injured party has the burden of proof to show that it was damaged, although in trespass claims, nominal damages would be presumed by the unlawful entry. *See* Danks v. Slawson Exploration Co., 2021 U.S. Dist. LEXIS 250000 (D.N.D. Oct. 2, 2021); 2021 U.S. Dist. LEXIS 196732 (D.N.D. Oct. 13, 2021); 2020 U.S. Dist. LEXIS 10083 (D.N.D. Jan. 22, 2020); 2019 U.S. Dist. LEXIS 178764 (D.N.D. Oct. 16, 2019). [↑](#footnote-ref-25)
25. 24N. Natural Gas Co. v. L.D. Drilling, Inc., 759 F. Supp. 2d 1282 (D. Kan. 2010), *aff’d*, 697 F.3d 1259 (10th Cir. 2012). [↑](#footnote-ref-26)
26. 25Earlier litigation by the storage field operator had unsuccessfully sought to bring a conversion action, the personal property analog to a trespass, for the same actions. *See, e.g.*, N. Natural Gas Co. v. Martin, Pringle, Oliver, Wallace & Bauer, L.L.P., 289 Kan. 777, 217 P.3d 966 (2009); N. Natural Gas Co. v. Nash ***Oil*** & Gas, Inc., 526 F.3d 626, 168 O.&G.R. 258 (10th Cir. 2008), *aff’g* 506 F. Supp. 2d 520, 168 O.&G.R. 249 (D. Kan. 2007); N. Natural Gas Co. v. Trans Pac. ***Oil*** Corp., 2007 U.S. App. LEXIS 22443 (10th Cir. Sept. 19, 2007), *aff’g* 2005 U.S. Dist. LEXIS 21002 (D. Kan. Sept. 23, 2005). [↑](#footnote-ref-27)
27. 26Northern Natural Gas Co. v. ONEOK Field Servs. Co., L.L.C., 296 Kan. 906, 296 P.3d 1106 (2013). [↑](#footnote-ref-28)
28. 27759 F. Supp. 2d at 1299. [↑](#footnote-ref-29)
29. 28Gerrity ***Oil*** & Gas Corp. v. Magness, 923 P.2d 261, 132 O.&G.R. 514 (Colo. Ct. App. 1995), *aff’d in part, rev’d in part on other grounds,* 946 P.2d 913, 138 O.&G.R. 1 (Colo. 1997). The case is discussed in John Erich Johnson, *Gerrity* ***Oil*** *& Gas Corp. v. Magness: Colorado’s Furtive Shift Toward Accommodation in the Surface-use Debate*, 33 Tulsa L.J. 943 (1998).

    In Exxon Corp. v. Tyra, 127 S.W.3d 12, 159 O.&G.R. 539 (Tex. App.—Tyler 2003, rev. denied), the court dismissed an action brought by a surface owner against a former ***oil*** and gas lessee for damages to the surface estate caused by the alleged failure to remove ***oil*** field equipment and/or remediate certain ***oil*** field conditions. While the jury had awarded a monetary recovery based on a nuisance claim, the court interpreted the cause of action as one based on a breach of contract. Since the jury had made other findings that found no breach of the contractual duties to remove equipment and/or remediate the surface, the court reversed the money judgment. If the duty to take action is based on a contract, a breach of contract finding is required before the lessee may be held liable for surface damages. *In accord*: Cook v. Exxon Corp., 145 S.W.3d 776, 167 O.&G.R. 27 (Tex. App.—Texarkana 2004) (no continuing tort claim where lessee is alleged to have left ***oil*** field equipment on the premises that allegedly create a nuisance).

    The same issues arising in *Tyra* were analyzed in OXY USA, Inc. v. Cook, 127 S.W.3d 16, 158 O.&G.R. 526 (Tex. App.—Tyler 2003, rev. denied). Essentially, the surface owner alleged that failing to remove and/or remediate surface conditions and facilities were a nuisance. As with *Tyra*, the court said that if the gist of the action is based in contract, no independent tort arises. Thus, if the duty to remove the facilities or remediate the surface arises from the ***oil*** and gas lease, there can be no separate nuisance cause of action. Thus, as a matter of law, the jury verdict finding a nuisance had to be reversed. Since the jury also found that the lessee had not used more of the land than was reasonably necessary to produce ***oil*** and gas, the surface owner was not entitled to recover any damages. [↑](#footnote-ref-30)
30. 29Union ***Oil*** Co. of Californai v. Heinsohn, 43 F.3d 500, 130 O.&G.R. 623 (10th Cir. 1994). Compare the holding in this case with *Maranatha Temple*, discussed *supra* at text accompanying note 12. [↑](#footnote-ref-31)
31. 30Okla. Rev. Stat. tit. 50, § 1 was first enacted in 1910. *See also* Briscoe v. Harper ***Oil*** Co., 1985 OK 43, 702 P.2d 33, 86 O.&G.R. 361; Dobbs v. Durant, 1949 OK 72, 201 Okla. 382, 206 P.2d 180. This topic is also discussed in § 21.02 *below*.

    While Oklahoma utilizes a much broader definition of what a nuisance is, courts still require the plaintiff to prove that the alleged acts of the defendant caused the pollution. Moore v. Texaco, Inc., 244 F.3d 1229, 148 O.&G.R. 58 (10th Cir. 2001). In addition, a purchaser of the surface estate from the owner of the previously unified estate who had operated a tank farm on the premises cannot make a nuisance or negligence claim against its predecessor in interest. *Id.*

    *Moore* is followed in Blocker v. ConocoPhillips Co., 380 F. Supp. 3d 1178 (W.D. Okla. 2019), where the court reiterated the position that a nuisance claim is “designed to protect neighboring landowners from conflicting uses of property, not successor landowners from conditions on the land they purchased.” [↑](#footnote-ref-32)
32. 31Titan Operating, LLC v. Marsden, 2015 Tex. App. LEXIS 9076 (Tex. App.—Ft. Worth Aug. 27, 2015, rev. denied). [↑](#footnote-ref-33)
33. 322015 Tex. App. LEXIS 9076, at \*20–22. *In accord*: Ainsworth v. ***Oil*** City Brass Works, 271 S.W.2d 754 (Tex. Civ. App.—Beaumont 1954, no writ). [↑](#footnote-ref-34)
34. 33Sewell v. Phillips Petroleum Co., 197 F. Supp. 2d 1160, 158 O.&G.R. 403 (W.D. Ark. 2002). [↑](#footnote-ref-35)
35. 34197 F. Supp. 2d at 1171–72. This decision ignores the fundamental nature of the severed estate, each being separate and independent of each other, as well as the jurisprudence of most states that allows a surface owner to assert a nuisance cause of action against mineral owners. See cases cited in notes 9–10 *supra*. [↑](#footnote-ref-36)
36. 34.1Bad River Band of the Lake Superior Tribe v. Enbridge Energy Co., 2022 U.S. Dist. LEXIS 213368 (W.D. Wis. Nov. 28, 2022); Bad River Band of the Lake Superior Tribe v. Enbridge Energy Co., 626 F. Supp. 3d 1030, 2022 U.S. Dist. LEXIS 161080 (W.D. Wis. 2022). For other cases dealing with the potential liability of Enbridge for continued use of an easement that allegedly had terminated, see Bad River Band of the Lake Superior Tribe v. Enbridge Energy Co., 2022 U.S. Dist. LEXIS 187965 (W.D. Wis. Oct. 14, 2022); 2022 U.S. Dist. LEXIS 183929 (W.D. Wis. Oct. 7, 2022); 2022 U.S. Dist. LEXIS 167412 (W.D. Wis. Sept. 16, 2022); 2022 U.S. Dist. LEXIS 62164 (W.D. Wis. Apr. 4, 2022). [↑](#footnote-ref-37)
37. 34.2Bad River Band of the Lake Superior Tribe v. Enbridge Energy Co., 626 F. Supp. 3d 1030, 2022 U.S. Dist. LEXIS 161080, at \*73–74 (W.D. Wis. 2022). *See also* Michigan v. U.S. Army Corps of Engineers, 758 F.3d 892, 900 (7th Cir. 2014). [↑](#footnote-ref-38)
38. 35*See* W. Keeton, D. Dobbs, R. Keeton, D. Owen, Prosser and Keeton on Torts, 539–568 (5th ed. 1984). [↑](#footnote-ref-39)
39. 36Rylands v. Fletcher, 3 H.L. 330 (1868).

    In Williams v. Amoco Prod. Co., 241 Kan. 102, 734 P.2d 1113, 93 O.&G.R. 60 (1987), the Kansas Supreme Court rejected the application of the *Rylands* doctrine to the operation of a gas well in the Hugoton Field in Kansas. While the *Williams* decision refused to find strict liability in this case, it basically adopted the Second Restatement’s view of *Rylands,* but concluded that operating a gas well per se is not an ultrahazardous activity. 734 P.2d at 1122–1123. [↑](#footnote-ref-40)
40. 37The theory and application of the strict liability doctrine to ***oil*** and gas activities is discussed in the following articles: Green, *Hazardous* ***Oil*** *and Gas Operations: Tort Liability,* 33 Tex. L. Rev. 574 (1955); Keeton & Jones, *Tort Liability and the* ***Oil*** *and Gas Industry I,* Tex. L. Rev. 1, 7–11 (1956); Masterson, *The Legal Position of the Drilling Contractor,* 1 Sw. Legal Fed’n ***Oil*** & Gas Inst. 183, 196 *et seq.* (1949); Robertson, *Tort Liability for* ***Oil*** *and Gas Operations in Louisiana,* 14 L.S.U. Min. L. Inst. 49 (1967).

    Strict liability has been applied in the following cases involving ***oil*** and gas operations, including the disposal of produced water, salt water or waste water: Pridemore v. Columbia Gas of Kentucky, Inc., 598 F. Supp. 3d 541 (E.D. Ky. 2022) (allegations that provision of natural gas into a residence is an ultrahazardous activity); Mowrer v. Ashland ***Oil*** & Refining Co., 518 F.2d 659, 52 O.&G.R. 351 (7th Cir. 1975) (crude ***oil*** and salt water leakage into fresh water well); Cities Service Co. v. State, 312 So. 2d 799 (Fla. Dist. Ct. App. 1975) (escape of phosphate slime); Williams v. Amoco Production Co., 241 Kan. 102, 734 P.2d 1113, 1123, 93 O.&G.R. 60 (1987) (rejecting claim that natural gas well drilling and production operations met the *Rylands* standard); Branch v. Western Petroleum, Inc., 657 P.2d 267, 76 O.&G.R. 144 (Utah 1982) (escape of produced water).

    In Hill v. Southwestern Energy Co., 2013 U.S. Dist. LEXIS 139917 (E.D. Ark. Sept. 26, 2013), *dismissed in part sub nom.*, Stroud v. Southwestern Energy Co., 2015 U.S. Dist. LEXIS 129609 (E.D. Ark. Sept. 25, 2015), the court eschewed answering the question of whether an AOGCC permitted injection well is an ultrahazardous activity, instead concluding that the complaint did not allege contamination or pollution but merely that the injected fluids had migrated sub-surface into its lands. That claim involves a trespass and not strict liability. On appeal, the Eighth Circuit reversed on the evidentiary matter relating to the exclusion of plaintiff’s proffered expert testimony. Hill v. Southwestern Energy Co., 2017 U.S. App. LEXIS 8862 (8th Cir. May 22, 2017).

    The basis for the “ultrahazardous activities” strict liability tort in Louisiana is La. Civil Code article 667. In its most recent form strict liability is quite limited. Suire v. Lafayette City-Parish Consolidated Government, 907 So. 2d 37, 48 (La. 2005); Barasich v. Columbia Gulf Transmission Co., 2006 U.S. Dist. LEXIS 86062 (E.D. La.). In *Barasich* the court refused to apply strict liability to claims made by Louisiana residents that activities of pipeline operators and ***oil*** and gas operators aggravated the damage caused by Hurricane Katrina. Even if strict liability is applied, the injured party must prove causation and damages. In 1996, Louisiana amended article 667 to impose a negligence standard and move the strict liability standard to article 2317.1. Bd. of Comm’rs v. Tenn. Gas Pipeline Co., 2015 U.S. Dist. LEXIS 18461 (E.D. La. Feb. 13, 2015). After 1996, there are four elements to a strict liability claim under article 667. They are a proprietor who conducts work on his property that causes damage to his neighbor in a negligent manner may be liable. Watson v. Arkoma Development, LLC, 2018 U.S. Dist. LEXIS 42842 (W.D. La. Feb. 5, 2018), 2018 U.S. Dist. LEXIS 203596 (W.D. La. Nov. 15, 2018), *report and recommendation adopted*, 2018 U.S. Dist. LEXIS 203562 (W.D. La. Nov. 30, 2018) (at pleading stage court would not dismiss Article 667 action based on alleged storage of hazardous waste in surface pits); Morgan Plantation, Inc. v. Tennessee Gas Pipeline Co., LLC, 2017 U.S. Dist. LEXIS 178264 (W.D. La. Oct. 26, 2017); 2017 U.S. Dist. LEXIS 178782 (W.D. La. Sept. 21, 2017); 2017 U.S. Dist. LEXIS 46578 (W.D. La. Mar 28, 2017); 2017 U.S. Dist. LEXIS 47347 (W.D. La. Feb. 8, 2017); Alford v. Anadarko E&P Onshore LLC, 2015 U.S. Dist. LEXIS 13389 (E.D. La. Feb. 4, 2015); Alford v. Chevron U.S.A., Inc., 2015 U.S. Dist. LEXIS 3302 (E.D. La. Jan. 12, 2015). *See also*: Aertker v. Dresser, LLC, 2022 U.S. Dist. LEXIS 81266 (W.D. La. May 4, 2022) (strict liability claim dismissed); Barrett v. Dresser, LLC, 2021 U.S. Dist. LEXIS 2173 (W.D. La. Jan. 6, 2021) (strict liability claim dismissed because plaintiff did not plead that their alleged injury did not require substandard conduct to cause said injury); Prairie Land Co. v. Conoco Phillips Co., 2020 U.S. Dist. LEXIS 174128 (W.D. La. Sept. 22, 2020) (strict liability claim sufficient supported by allegations in complaint to deny defendant’s motion for summary judgment); Tureau v. 2H, Inc., 2015 U.S. Dist. LEXIS 100942 (W.D. La. June 18, 2015), 2015 U.S. Dist. LEXIS 100937 (July 31, 2015), 2015 U.S. Dist. LEXIS 103974 (W.D. La. Aug. 6, 2015) (premature to determine if defendant’s ***oil*** and gas operations constitute an ultrahazardous activity).

    The application of Louisiana Civil Code art. 667 dealing with strict liability for ultrahazardous activity has been rejected in cases involving ***oil*** field operations that have led to environmental damage. *See* TS &C Investments, LLC v. Beusa Energy, Inc., 637 F. Supp. 2d 370 (W.D. La. 2009); La. Crawfish Producers Ass’n West v. Amerada Hess Corp., 935 So. 2d 380 (La. App. 2006); *but cf*. Watson v. Arkoma Development, LLC, 2018 U.S. Dist. LEXIS 42842 (W.D. La. Feb. 5, 2018), 2018 U.S. Dist. LEXIS 203596 (W.D. La. Nov. 15, 2018), *report and recommendation adopted*, 2018 U.S. Dist. LEXIS 203562 (W.D. La. Nov. 30, 2018).

    In Bd. of Comm’rs of the Southeast La. Flood Prot. Authority-East v. Tenn. Gas Pipeline Co., LLC, 29 F. Supp. 3d 808 (E.D. La. 2014), 88 F. Supp. 3d 615 (E.D. La. 2015), *aff’d*, 850 F.3d 714 (5th Cir. 2017), the court interpreted La. Civ. Code art. 2317 and 2317.1 as requiring the plaintiff to show that the alleged tortfeasor owes a duty to the plaintiff to refrain from the allegedly ultrahazardous activity.

    In Alford v. Chevron U.S.A., Inc., 2015 U.S. Dist. LEXIS 3302 (E.D. La. Jan. 12, 2015), 2015 U.S. Dist. LEXIS 13389 (E.D. La. Feb. 4, 2015), the court rejected the application of article 667 to the lessee’s ***oil*** and gas exploration and production activities, including the dredging of canals.

    Arkansas uses a two-pronged test to determine if an activity such as hydraulic fracturing is an ultrahazardous activity. If the activities “(1) necessarily present a risk of serious harm which cannot be eliminated by the exercise of utmost care and (2) are not a matter of common usage, the answer is ‘yes.’ ” Tucker v. Southwestern Energy Co., 2012 U.S. Dist. LEXIS 20697, at \*9 (E.D. Ark. Feb. 17, 2012), citing Zero Wholesale Gas Co. v. Stroud, 264 Ark. 27, 571 S.W.2d 74, 76 (Ark. 1978). *See also* Tucker v. Southwestern Energy Co., 2012 U.S. Dist. LEXIS 78310 (E.D. Ark. June 6, 2012).

    Florida, like many states, applies the six-factor test contained in the Restatement (Second) of Torts § 520 (1977) to determine whether an ultrahazardous or abnormally dangerous activity has been established. Peoples Gas Sys. v. Posen Constr., Inc., 2011 U.S. Dist. LEXIS 131088 (M.D. Fla. Nov. 14, 2011) (court rejects claim that owning, operating, and maintaining natural gas distribution facilities is ultrahazardous).

    Smith v. Mid-Valley Pipe Line Co., 2007 U.S. Dist. LEXIS 33179 (E.D. Ky. 2007); Cantrell v. Marathon Ashland Pipe Line, LLC, 2005 U.S. Dist. LEXIS 45192 (E.D. Ky. 2005) (Kentucky has not yet recognized the operation of an ***oil*** pipeline as an “abnormally dangerous” activity).

    In Louisiana, in order to bring a strict liability claim, one must show that the party owed a duty of care to the plaintiff and either knew, or in the reasonable exercise of case should have known, of the ruin, vice or defect. Board of Commissioners v. Tennessee Gas Pipeline Co., 850 F.3d 714 (5th Cir. 2017).

    Michigan also applies the six-factor Restatement test to determine whether an ultrahazardous or abnormally dangerous activity has been established. In Holder v. Enbridge Energy, L.P., 2011 U.S. Dist. LEXIS 99220 (W.D. Mich. Sept. 2, 2011), the court said it could not decide the issue as it related to a pipeline transporting bitumen from the Alberta ***oil*** sands because the record was insufficiently established. The court further noted that it is the court that will determine if strict liability is to apply.

    New Jersey also applies the six-factor Restatement test to determine the existence of an ultrahazardous or dangerous activity. New Jersey Department of Environmental Protection v. Ventron Corp., 94 N.J. 473, 468 A.2d 150 (1983); New Jersey Department of Environmental Protection v. Hess Corp., 2020 N.J. Super. Unpub. LEXIS 622 (App. Div. Apr. 2, 2020). In *Hess*, the court found that the operation of a large tank farm containing crude ***oil*** and other hydrocarbon liquids could be an ultrahazardous activity.

    Oklahoma requires a party asserting a strict liability claim to show that they were injured by the alleged ultrahazardous activity. Reece v. AEF Corp., 638 Fed. Appx. 755 (10th Cir. 2016).

    Oklahoma generally applies the Restatement (Second) of Torts § 520 factors to determine if a particular activity is ultrahazardous in nature. Barton v. Ovintiv Mid-Continent, Inc., 2021 U.S. Dist. LEXIS 76680 (W.D. Okla. Apr. 21, 2021).

    Pennsylvania jurisprudence is mixed on the issue with cases finding that strict liability claims should not be summarily dismissed, but also concluding that, as a matter of law, ***oil*** and gas operations do not constitute ultrahazardous activities under the Restatement analysis.

    Texas rejects the application of the strict liability doctrine to allegedly ultrahazardous activities. Fugett v. DCP Midstream, LP, 2015 U.S. Dist. LEXIS 14653 (N.D. Tex. Feb. 6, 2015).

    Washington also applies the six-factor Restatement (Second) of Torts test to determine what is an abnormally dangerous activity for which the strict liability doctrine will apply. Hurley v. Port Blakely Tree Farms, LP, 332 P.3d 469 (Wash. App. 2014).

    Massachusetts allows an allegedly injured party to seek a remedy of future medical monitoring where “(1) the defendant’s negligence (2) caused (3) the plaintiff to be exposed to a hazardous substance … (4) for which an effective medical test for reliable early detection exists, (5) and early detection … will significantly decrease the risk of death or the severity of the disease, illness, or injury, and (6) such diagnostic medical examinations are reasonably … necessary, … , and (7) [plaintiff must prove] the present value of the reasonable cost of such tests and care, as of the date of the filing of the complaint.” Hamelin v. Kinder Morgan, Inc., 2022 U.S. Dist. LEXIS 227568 (D. Mass. Dec. 19, 2022), quoting from Donovan v. Philip Morris USA, Inc., 455 Mass. 215, 914 N.E.2d 891, 902 (Mass. 2009).

    Pennsylvania has a Hazardous Sites Cleanup Act (HSCA), which authorizes citizen suits to remediate any spill as well as to provide for damages, including future medical evaluations. 35 P.S. § 6020.1000 *et seq.* The statute imposes a strict liability standard on the party causing the discharge of a hazardous substance. While there is a notice requirement imposed on a citizen to inform the Department of Environmental Protection or the municipality, that notice requirement is applicable only to claims for damages and not for response costs. Fiorentino, 750 F. Supp. 2d at 510–11; Roth v. Cabot ***Oil*** & Gas Corp., 919 F. Supp. 2d 476 (M.D. Pa. 2013); 287 F.R.D. 293 (M.D. Pa. 2012); Two Rivers Terminal, L.P. v. Chevron USA, Inc., 96 F. Supp. 2d 426 (M.D. Pa. 2000). In Ely v. Cabot ***Oil*** & Gas Corp., 2014 U.S. Dist. LEXIS 180162 (M.D. Pa. April 21, 2014), the Magistrate recommended the summary dismissal of the lessor/surface owner’s HSCA claim because their complaint failed to allege that there had been an actual or threatened release of a hazardous substance on their property interest. The Magistrate’s recommendation was accepted in Ely v. Cabot ***Oil*** Corp., 2015 U.S. Dist. LEXIS 3106 (M.D. Pa. Jan. 12, 2015).

    Pinnacle Mining Co., LLC v. Bluestone Coal Corp., 624 F. Supp. 2d 530 (S.D. W. Va. 2009); *In re* Flood Litigation, 216 W. Va. 534. 607 S.E.2d 863 (W. Va. 2004).

    In *In re* Mantle ***Oil*** & Gas, LLC, 2012 Tex. App. LEXIS 8898 (Tex. App.—Houston [1st Dist.] Oct. 25, 2012), plaintiffs tried to argue that because Louisiana does not provide for a medical monitoring remedy, a tort action filed in Texas relating to a Louisiana well blowout would be appropriate. The court dismissed the suit on *forum non conveniens* grounds.

    While West Virginia recognizes a cause of action for medical monitoring costs, Rhodes v. E.I. Du Pont de Nemours & Co., 657 F. Supp. 2d 751 (S.D. W. Va. 2009); Bower v. Westinghouse Elec. Corp., 206 W. Va. 133, 522 S.E.2d 424, 431 (W. Va. 1999), the plaintiff must prove that she has, relative to the general population, been significantly exposed to a proven hazardous substance through the tortious conduct of the defendant so that the plaintiff has suffered an increased risk of contracting a serious latent disease. In Hagy v. Equitable Prod. Co., 2011 U.S. Dist. LEXIS 46920 (S.D. W. Va. Apr. 18, 2011), the court granted an ***oil*** and gas service company’s motion to dismiss the plaintiffs’ medical monitoring claim due to the complaint’s failure to allege several of the requirements for such a claim.

    A similar result is reached in Ohio which also recognizes a damage recovery for medical monitoring costs resulting from exposure to pollution. Baker v. Chevron U.S.A., Inc., 2013 U.S. App. LEXIS 16219, at \*40–44 (6th Cir. Aug. 2, 2013); Hirsch v. CSX Transp., Inc., 656 F.3d 359 (6th Cir. 2011). [↑](#footnote-ref-41)
41. 38Fugett v. DCP Midstream, LP, 2015 U.S. Dist. LEXIS 14653 (N.D. Tex. Feb. 6, 2015). In general, Texas does not apply the *Rylands* doctrine to allegedly abnormally dangerous activities or operations, limiting *Rylands* to abnormally dangerous products. See Turner v. Big Lake ***Oil*** Co., 128 Tex. 155, 96 S.W.2d 221, 221–22 (1936); Barras v. Monsanto Co., 831 S.W.2d 859, 865 (Tex. App.—Houston [14th Dist. 1992). [↑](#footnote-ref-42)
42. 39Melso v. Sun Pipe Line Co., 394 Pa. Super. 578, 576 A.2d 999 (1990). [↑](#footnote-ref-43)
43. 40Smith v. Weaver, 445 Pa. Super. 261, 665 A.2d 1215 (1995). There are other cases dealing with underground gasoline storage tanks that reach a contrary result. *See e.g.*, Yommer v. McKenzie, 255 Md. 220, 237 A.2d 138, 141 (1969); City of Northglenn v. Chevron U.S.A., Inc., 519 F. Supp. 515, 516 (D. Colo. 1981). [↑](#footnote-ref-44)
44. 41Fiorentino v. Cabot ***Oil*** & Gas Corp., 750 F. Supp. 2d 506, 171 O.&G.R. 718 (M.D. Pa. 2010). [↑](#footnote-ref-45)
45. 42750 F. Supp.2d at 511–12. The court found that neither *Melso*, note 39 *supra*, nor *Smith*, note 40 *supra*, were definitive findings under the Restatement test. [↑](#footnote-ref-46)
46. 43Berish v. Southwestern Energy Prod. Co., 763 F. Supp.2d 702, 174 O.&G.R. 425 (M.D. Pa. 2011), 2012 U.S. Dist. LEXIS 61943 (M.D. Pa. May 3, 2012). The plaintiff was allowed to allege that the alleged migration of frac fluids out of the wellbore could trigger a strict liability claim under the Restatement (Second) of Torts §§ 519–520. There was a fact question as to whether the multi-pronged Restatement test to define what is an ultrahazardous or abnormally dangerous activity was alleged. [↑](#footnote-ref-47)
47. 44Ely v. Cabot ***Oil*** Corp., 2014 U.S. Dist. LEXIS 40930 (M.D. Pa. Mar. 27, 2014), *motion to amend complaint allowed*, 38 F. Supp.3d 518 (M.D. Pa. 2014). *Berish* and *Fiorentino* were also cited in Kamuck v. Shell Energy Holding GP, LLC, 2012 U.S. Dist. LEXIS 59113 (M.D. Pa. Mar. 29, 2012), *as modified*, 2012 U.S. Dist. LEXIS 59093 (M.D. Pa. Apr. 27, 2012). In *Kamuck*, the defendant’s motion to strike the strict liability claim by a surface owner against an ***oil*** and gas operator who was hydraulically fracturing underneath adjacent lands. But in Kamuck v. Shell Energy Holdings GP, LLC, 2015 U.S. Dist. LEXIS 37538 (M.D. Pa. Mar. 25, 2015), the court granted Shell’s summary judgment motion on the strict liability claim. While noting *Fiorentino* and *Berish*, as well as Pennsylvania’s adherence to the Restatement analysis, the court felt that Pennsylvania was cautious in expanding strict liability claims. [↑](#footnote-ref-48)
48. 45Ely v. Cabot ***Oil*** Corp., 38 F. Supp.3d 518 (M.D. Pa. 2014). In a subsequent trial on the merits of their nuisance claim, a jury verdict in favor of the plaintiffs was overturned when the trial court granted Cabot’s motion for a new trial. Ely v. Cabot ***Oil*** Corp., 2017 U.S. Dist. LEXIS 49075 (M.D. Pa. Mar. 31, 2017). The court also eliminated the supersedeas bond that it had imposed upon Cabot due to the court’s granting of the motion for a new trial. Ely v. Cabot ***Oil*** Corp., 2017 U.S. Dist. LEXIS 63290 (M.D. Pa. Apr. 26, 2017). [↑](#footnote-ref-49)
49. 4638 F. Supp.3d at 528–29. The court reviews cases from other jurisdictions dealing with the application of *Rylands* and the Restatement test to ***oil*** and gas operations. Eventually, this case went to trial on a nuisance claim which led to a jury verdict which was essentially reversed by the court’s granting of Cabot’s motion for a new trial based on a variety of factors. Ely v. Cabot ***Oil*** Corp., 2017 U.S. Dist. LEXIS 49075 (M.D. Pa. Mar. 31, 2017). [↑](#footnote-ref-50)
50. 47Senn v. Texaco, Inc., 55 S.W.3d 222, 155 O.&G.R. 314 (Tex. App.—Eastland 2001, writ denied). [↑](#footnote-ref-51)
51. 48Bayouth v. Lion ***Oil*** Co., 27 Tex. Sup. Ct. J. 369, 671 S.W.2d 867, 868, 80 O.&G.R. 426 (Tex. 1984); Vann v. Bowie Sewerage Co., 127 Tex. 97, 90 S.W.2d 561 (1936); Ceramic Tile Int’l, Inc. v. Balusek, 137 S.W.3d 722, 724 (Tex. App.—San Antonio 2004, no pet.).

    In Exxon Corp. v. Emerald ***Oil*** & Gas Co., L.C., 54 Tex. Sup. Ct. J. 342, 331 S.W.3d 419 (Tex. 2010), the court followed the general rule that the only person who can sue for an injury to real property is the owner of the real property at the time the injury occurs, unless that owner specifically transfers the claim to its grantee. *In accord:* Ranchero Esperanza, Ltd. v. Marathon ***Oil*** Co., 488 S.W.3d 354 (Tex. App.—El Paso 2015) (only party owning the real property at the time the cause of action accrues can sue in the absence of an express assignment of the cause of action; action accrued not at time of allegedly negligent plugging of a well but many years later when the salt water seeped through the well and injured the surface).

    Similar issues regarding the accrual of the cause of action can apply in nuisance actions depending on whether the court determines that the nuisance is permanent or temporary. Schneider National Carriers, Inc. v. Bates, 48 Tex. Sup. Ct. J. 6, 147 S.W.3d 264 (Tex. 2004). *See also*: Russell v. Chesapeake Appalachia, LLC, 2018 U.S. Dist. LEXIS 216893 (M.D. Pa. Dec. 27, 2018) (finds *Schneider* to be persuasive in absence of Pennsylvania law). [↑](#footnote-ref-52)
52. 49The court also rejected expanding the nature and scope of the discovery rule, as it applies to the statute of limitations, to the issue of conferring standing on a party. 55 S.W.3d at 225.

    The *Senn* holding was followed in Exxon Corp. v. Pluff, 94 S.W.3d 22, 157 O.&G.R. 648 (Tex. App.—Tyler 2002, rev. denied). Under similar facts, a surface owner who purchased his interest long after Exxon had conveyed its interest in the mineral estate to third parties was found to lack standing to sue Exxon based on alleged negligent use of the surface as evidenced by Exxon’s alleged failure to remove various concrete derrick corners. Without a new injury or a transfer of the cause of action from the owner of the real property at the time the injury occurred, the surface owner lacked standing to sue.

    In Ranchero Esperanza, Ltd. v. Marathon ***Oil*** Co., 488 S.W.3d 354 (Tex. App.—El Paso 2015), the court acknowledged the *Senn* and *Pluff* holdings that only the surface owner at the time that the injury accrues has standing to sue. But the court then concluded that the injury accrued not at the time that the well was allegedly negligently but at the time when the surface damages resulted from the alleged deficient plugging.

    Mr. W. Fireworks v. Southwest Royalty, Inc., 2010 Tex. App. LEXIS 6300 (Tex. App.—Eastland Aug. 5, 2010), on later appeal, 2013 Tex. App. LEXIS 13200 (Tex. App.—Eastland Oct. 24, 2013) (follows *Senn* and finds that current surface owner has no standing to claim that fence erected by mineral owner on his right-of-way prior to the surface owner’s purchase was a surcharge of the easement).

    In *In re* Premcor Refining Group, Inc., 233 S.W.3d 904 (Tex. App.—San Antonio 2007), the court followed *Senn* in dismissing nuisance claims against several refineries for their continued emissions of air pollutants over a lengthy period of time.

    DBMS Investments, L.P. v. ExxonMobil Corp., 2009 Tex. App. LEXIS 4140 (Tex. App.—Corpus Christi, June 11, 2009) (follows *Pluff* and *Vann*; notes that to recover on an assigned cause of action the party claiming the assigned right must prove that the cause of action existed that was capable of being assigned and that it was in fact assigned).

    Brooks v. Chevron USA, Inc., 2006 Tex. App. LEXIS 4479 (Tex. App.—Corpus Christi, rev. denied) (follows *Pluff* and *Vann* in holding that only the owner of the real property at the time of the injury has standing to sue for surface damages unless there is an express conveyance of the cause of action; use of a general warranty deed in the conveyance of the surface is not an implied transfer of the cause of action).

    *Senn* and *Pluff* were followed in Exxon Corp. v. Tyra, 127 S.W.3d 12, 159 O.&G.R. 539 (Tex. App.—Tyler 2003) to dismiss on standing grounds any claims made by the owner of the surface estate who purchased the surface long after the wells had been plugged and abandoned; Denman v. Citgo Pipeline Co., 123 S.W.3d 728, 159 O.&G.R. 509 (Tex. App.—Texarkana 2003) to dismiss an action against a pipeline for alleged damages to the surface that occurred long prior to the present owner’s purchase of the surface estate; and Exxon Corp. v. Cook, 145 S.W.3d 776, 167 O.&G.R. 27 (Tex. App.—Texarkana 2004) to dismiss on standing grounds a suit alleging nuisance and trespass claims for allowing ***oil*** field equipment to remain on the premises. In a remand of the *Denman* case, the court reiterated the rule that injuries to the surface that occur prior to the present owner’s acquisition of ownership of the surface estate bar the present owner from suing for such injuries. The court found, however, that the surface owners’ petition contained allegations of injuries suffered subsequent to their purchase of the surface. As to those claims, the plaintiffs had standing to sue subject to a determination as to whether the alleged injuries were permanent or temporary in nature. Denman v. SND Operating, L.L.C., 2005 Tex. App. LEXIS 7795, 165 O.&G.R. 349 (Tex. App.—Texarkana Sept. 23, 2005) (unreported opinion).

    *Denman* and *Cook* were distinguished in Vial v. Gas Solutions, Ltd., 187 S.W.3d 220, 165 O.&G.R. 349 (Tex. App.—Texarkana 2006) on two bases: first, that the successors in interest took through testate succession, and second, that the cause of action was for fraud and not injury to real property. [↑](#footnote-ref-53)
53. 50Vee Bar, Ltd. v. BP Amoco Corp., 361 S.W.3d 128 (Tex. App.—El Paso 2011). [↑](#footnote-ref-54)
54. 51Gulf, C. & S.F. Ry. Co. v. Cusenberry, 26 S.W. 43, 44–45 (Tex. 1894); Hicks v. Southwestern Settlement & Development Corp., 188 S.W.2d 915, 921 (Tex. Civ. App.—Beaumont 1945, writ ref’d w.o.m.). [↑](#footnote-ref-55)
55. 52361 S.W.3d 128, 132 (Tex. App.—El Paso 2011). [↑](#footnote-ref-56)
56. 53361 S.W.3d 128, 133–34 (Tex. App.—El Paso 2011). [↑](#footnote-ref-57)
57. 54Tex. R. Civ. P. 39(a). [↑](#footnote-ref-58)
58. 55Eagle Pipe & Supply, Inc. v. Amerada Hess Corp., 79 So. 3d 246, 256–57 (La. 2011). *See also* Guilbeau v. 2 H, Inc., 2016 U.S. Dist. LEXIS 112894 (W.D. La. Aug. 23, 2016); Grace Ranch, LLC v. BP America Production Co., 252 So. 3d 546 (La. App. 2018); Broussard v. Dow Chemical Co., 2012 U.S. Dist. LEXIS 171994 (W.D. La. Dec. 2, 2012), *aff’d*, 550 Fed. Appx. 241 (5th Cir. 2013) (subsequent purchaser may not sue prior owner of mineral lease in the absence of an express assignment of the cause of action); Black River Crawfish Farms, LLC v. King, 246 So. 3d 1 (La. Ct. App. 2018) (applies subsequent purchaser rule); Boone v. Conoco Phillips Co., 2014 La. App. LEXIS 1204 (3d Cir. May 7, 2015) (subsequent purchaser of surface estate cannot sue prior owner of mineral lease for injuries allegedly caused prior to the purchaser’s acquisition of its ownership interest); Duck v. Hunt ***Oil*** Co., 134 So. 3d 114 (La. Ct. App. 2014); LeJeune Bros. v. Goodrich Petroleum Co., L.L.C., 981 So. 2d 23, 29, 167 O.&G.R. 410 (La. Ct. App. 2007), *writ denied*, 978 So. 2d 327 (La. 2008); *but cf*. Walton v. Burns, 2013 La. App. LEXIS 41 (2d Cir. Jan. 16, 2013). In a subsequent opinion, Walton v. Exxon Mobil Corp., 162 So. 3d 490 (La. App. 2015), the Second Circuit dismissed the monetary damages claims because of the subsequent purchaser doctrine as announced in *Eagle Pipe*.

    The *Eagle Pipe* result was applied to a familial transfer of real property without consideration in Louisiana Wetlands, LLC v. Energen Resources Corp., 330 So. 3d 674 (La. App. 2021), *writ denied*, 330 So. 3d 614 (La. 2022). Since there was no reference to the conveyance of the cause of action for contamination, the subsequent purchaser doctrine precluded the tort claims from being adjudicated.

    Where the mineral lease has expired prior to a plaintiff’s ownership, that plaintiff cannot be the recipient of a *stipulation pour autrui* because it is impossible to transfer rights to an assignee under an expired mineral lease. Litel Explorations, LLC v. Aegis Development Co., LLC, 307 So. 3d 1087 (3d Cir. 2020), *writ denied*, 310 So. 3d 184 (La. 2021), *relying on* LeJeune Brothers, Inc. v. Goodrich Petroleum Co., LLC, 981 So. 2d 23, 28 (La. App. 2007), *writ denied*, 978 So. 2d 327 (La. 2008). [↑](#footnote-ref-59)
59. 56In Duck v. Hunt ***Oil*** Co., 134 So. 3d 114 (La. App. 2014), *writs denied*, 2014-0709, (La. 06/13/14), 140 So. 3d 1189, the Third Circuit concluded that a subsequent land owner did have standing to sue because the litigation involved a real right. The First Circuit agreed with that position in an unreported opinion, but the Louisiana Supreme Court in Global Mktg. Solutions, LLC v. Blue Mill Farms, Inc., 2010-1922, (La. 03/02/12), 84 So. 3d 538 granted the ***oil*** and gas lessees’ supervisory writs and remanded so that the First Circuit consider its holding in *Eagle Pipe*. Upon remand, the First Circuit concluded that the remand was clear in applying *Eagle Pipe* to mineral leases. Global Mktg. Solutions, LLC v. Blue Mile Farms, Inc., 153 So. 3d 1209, 1212 (La. App. 2014), *reh’g denied*, 2014 La. App. LEXIS 1711 (La. App. Nov. 1, 2014), *writ denied*, 173 So. 3d 164 (La. 2015). The Third Circuit then changed its mind in light of the Supreme Court’s mandate and applied the subsequent purchaser rule to cases involving mineral leases. Bundrick v. Anadarko Petroleum Corp., 159 So. 3d 1137 (La. App. 2015). *Duck* was distinguished in Grace Ranch, LLC v. BP America Production Co., 252 So. 3d 546 (La. App. 2018), which found that the subsequent purchaser rule does apply to mineral, as well as surface, leases.

    In Lexington Land Development, LLC v. Chevron Pipeline Co., 327 So. 3d 8 (La. App. 2021), *reh’g denied*, 2021 La. App. LEXIS 1067 (July 13, 2021), *writs denied*, 2021 La. LEXIS 2172 (La. Nov. 17, 2021), the court interpreted the two *Global Marketing* opinions as setting forth the general rule that a prior lessor or surface owner cannot transfer any real rights where the assignment is executed after the lease and/or servitude has been extinguished.

    A related problem is whether or not tort claims may be assigned prior to the initiation of litigation. In QuarterNorth Energy, LLC v. Crescent Midstream, LLC, 2022 U.S. Dist. LEXIS 173780 (E.D. La. Sept. 26, 2022), the court found that such an assignment is valid since it involves more than a purely personal right which would be unassignable. [↑](#footnote-ref-60)
60. 57Eagle Pipe & Supply, Inc. v. Amerada Hess Corp., 79 So. 3d 246 (La. 2011). [↑](#footnote-ref-61)
61. 58For cases finding a *stipulation pour autrui*, *see, e.g.*: Kling Realty Co., Inc. v. Chevron USA, Inc., 575 F.3d 510 (5th Cir. 2010); Boone v. ConocoPhillips Co., 2014 La. App. LEXIS 1204 (3d Cir. May 7, 2014); Duck v. Hunt ***Oil*** Co., 134 So. 3d 114 (La. App. 2014); Hazlewood Farm, Inc. v. Liberty ***Oil*** & Gas Corp., 790 So. 2d 93, 152 O.&G.R. 15 (La. App. 2001), *writ denied*, 794 So 2d 834 (La. 2001); Magnolia Coal Terminal v. Phillips ***Oil*** Co., 5876 So. 2d 475, 111 O.&G.R. 506 (La. 1991); Broussard v. Northcott Exploration Co., 481 So. 2d 125, 127 (La. 1986).

    For cases not finding a *stipulation pour autrui. See e.g.*, Bundrick v. Anadarko Petroleum Corp., 159 So. 3d 1135 (La. App. 2015); Global Marketing Solutions, LLC v. Blue Mile Farms, Inc., 153 So. 3d 1209 (La. App. 2014); Broussard v. Dow Chemical Co., 550 Fed. Appx. 241 (5th Cir. 2013), *aff’g* 2012 U.S. Dist. LEXIS 171994 (W.D. La. Dec. 2, 2012); LeJeune Bros. v. Goodrich Petroleum Co., L.L.C., 981 So. 2d 23, 29, 167 O.&G.R. 410 (La. Ct. App. 2007), *writ denied*, 978 So. 2d 327 (La. 2008).

    In Litel Explorations, LLC v. Aegis Development Co., LLC, 307 So. 3d 1087 (3d Cir. 2020), *writ denied*, 310 So. 3d 184 (La. 2021), the court concluded that a landowner who became an owner of an allegedly contaminated surface estate after the termination of the mineral lease could not receive any rights that may have been held by the former mineral lessor. [↑](#footnote-ref-62)
62. 59Broussard v. Dow Chem. Co., 2012 U.S. Dist. LEXIS 171994 (W.D. La. Dec. 3, 2012), *aff’d*, 550 Fed. Appx. 241 (5th Cir. 2013), relying on Eagle Pipe & Supply, Inc. v. Amerada Hess Corp., 79 So. 3d 246 (La. 2011). *See also* Lexington Land Development, LLC v. Chevron Pipeline Co., 327 So. 3d 8 (La. App. 2021), *reh’g denied*, 2021 La. App. LEXIS 1067 (July 13, 2021), *writs denied*, 2021 La. LEXIS 2172 (La. Nov. 17, 2021); Guilbeau v. 2H, Inc., 2016 U.S. Dist. LEXIS 112894 (W.D. La. Aug. 23, 2016); Broussard v. TMR Co., 2013 U.S. Dist. LEXIS 142331 (W.D. La. Sept. 17, 2013); Bundrick v. Anadarko Petroleum Corp., 159 So. 3d 1137 (La. App. 2015). [↑](#footnote-ref-63)
63. 59.1That avenue for potential liability under La. Rev. Stat. 30:16 was mentioned, but not approved of, in Marin v. Exxon Mobil Corp., 48 So. 3d 234, 256 n.18 (La. 2010). [↑](#footnote-ref-64)
64. 59.2For example, in Tureau v. BEPCO, LP, 404 F. Supp. 3d 993 (W.D. La. 2019), the court applied the *Burford* abstention doctrine to avoid having to make an *Erie*-guess as to whether the Louisiana Supreme Court would allow the 30:16 citizen suit provisions to be used to avoid the application of the subsequent purchaser doctrine. But the Fifth Circuit in Grace Ranch, LLC v. BP America Prod. Co., 989 F.3d 301 (5th Cir. 2021), concluded that *Burford* abstention should not be applied even though the district court would have to make an *Erie*-guess as to the application of La. Rev. Stat. 30:16. After remanding to the state court, plaintiff was able to withstand prescription and res judicata affirmative defenses. State *ex rel*. Tureau v. BEPCO, L.P., 326 So. 3d 925 (La. App. 2021, *reh’g denied*, 330 So. 3d 1107 (La. App. 2021); 2021 La. App. 785 (La. App. May 19, 2021), *aff’d, rendered & remanded*, 351 So. 3d 297 (La. 2022). *See also*: Watson v. Arkoma Development, LLC, 2018 U.S. Dist. LEXIS 42842 (W.D. La. Feb. 5, 2018), *report and recommendation adopted* 2018 U.S. Dist. LEXIS 41835 (W.D. La. Mar. 13, 2018); Guilbeau v. 2 H, Inc., 2016 U.S. Dist. LEXIS 112894 (W.D. La. Aug. 23, 2016), *aff’d sub nom.* Guilbeau v. Hess Corp., 854 F.3d 310 (5th Cir. 2017); Global Marketing Solutions, LLC v. Blue Mill Farms, Inc., 267 So. 3d 96 (La. App. 2018). [↑](#footnote-ref-65)
65. 59.3*See e.g*., State *ex rel*. Guilbeau v. BEPCO, L.P., 2021 La. App. LEXIS 1293 (La. App. Sept. 20, 2021); State *ex rel*. Tureau v. BEPCO, L.P., 326 So. 3d 925 (La. App. 2021, *reh’g denied*, 330 So. 3d 1107 (La. App. 2021); 2021 La. App. 785 (La. App. May 19, 2021), *aff’d, rendered & remanded*, 351 So. 3d 297 (La. 2022). [↑](#footnote-ref-66)
66. 59.4State *ex rel.* Tureau v. BEPCO, L.P., 351 So. 3d 297 (La. 2022). [↑](#footnote-ref-67)
67. 60Initially in McNeill v. Rice Engineering & Operating, Inc., 2003-NMCA-78, 133 N.M. 804, 70 P.3d 794, 159 O.&G.R. 1119, *cert. denied*, 133 N.M. 771, 70 P.3d 761 (N.M. 2003), the court did not get to the issue of whether a present owner could sue for alleged damages to the surface estate caused by a salt water disposal operation that antedated the plaintiff’s ownership of the surface. The court focused instead on the interpretation of a “release agreement” as to whether or not it authorized the disposal of off-site generated salt water. It left the question open and in McNeill v. Burlington Resources ***Oil*** & Gas Co., 141 N.M. 212, 153 P.3d 46, 2007-NMCA-024, 167 O.&G.R. 188, *aff’d and remanded*, 2008 NMSC 022, 143 N.M. 740, 182 P.3d 121, 167 O.&G.R. 200, the court applied the discovery rule in distinguishing the Texas rule as set forth in Senn v. Texaco, Inc., 55 S.W.3d 222, 155 O.&G.R. 314 (Tex. App.—Eastland 2001, writ denied) and Exxon Corp. v. Pluff, 94 S.W.3d 22, 157 O.&G.R. 648 (Tex. App.—Tyler 2002, rev. denied). [↑](#footnote-ref-68)
68. 61McNeill v. Rice Eng’g & Operating, Inc., 148 N.M. 16, 229 P.3d 489, 2010-NMSC-015. [↑](#footnote-ref-69)
69. 62229 P.3d at 492, citing Garver v. Public Service Co. of New Mexico, 77 N.M. 262, 421 P.2d 788, 794 (N.M. 1966) and Caledonian Coal Co. v. Rocky Cliff Coal Mining Co., 16 N.M. 517, 120 P. 715. 716 (N.M. 1911). [↑](#footnote-ref-70)
70. 63229 P.3d at 492–93. A similar analysis was applied to the plaintiff’s unjust enrichment claim, which likewise accrued to the prior owner and was not conveyed to the current owner. *See also*: Heimann v. Kinder-Morgan CO2 Co., L.P., 2006 NMCA 127, 140 N.M. 552, 144 P.3d 111. [↑](#footnote-ref-71)
71. 63.1Raw Crude ***Oil*** & Gas, LLC v. Ovintiv Mid-Continent Inc., 2021 U.S. Dist. LEXIS 249667 (W.D. Okla. Oct. 4, 2021). *Compare* 12 Okla. Stat. § 2017(A) (contract action) *with* 60 Okla. Stat. § 2017(D) (contract action). [↑](#footnote-ref-72)
72. 64Healy v. Chesapeake Appalachia, LLC, 2011 U.S. Dist. LEXIS 759 (W.D. Va. Jan. 5, 2011), relying on City Lynchburg v. Mitchell, 76 S.E. 286, 287 (Va. 1912). *Mitchell* was cited in an early West Virginia case suggesting that such claims may be conveyed. Barkers Creek Coal Co. v. Alpha-Pocahontas Coal Co., 96 W. Va. 700, 123 S.E. 803 (1924). [↑](#footnote-ref-73)
73. 65FPL Farming Ltd. v. Envtl. Processing Sys., L.C., 383 S.W.3d 274, 178 O.&G.R. 510 (Tex. App.—Beaumont 2012), *rev’d and rendered*, 457 S.W.3d 414 (Tex. 2015). [↑](#footnote-ref-74)
74. 66383 S.W.3d at 279–80. The case was on remand from FPL Farming, Ltd. v. Envtl. Processing Sys., L.C., 351 S.W.3d 306, 178 O.&G.R. 500 (Tex. 2011) which had found that the alleged trespasser’s authorization to inject such fluids was not determinative of the common law trespass issues. The Texas Supreme Court decision is analyzed in greater detail at §§ 22.05 and 24.02 *infra*. [↑](#footnote-ref-75)
75. 67383 S.W.3d at 279–80. The need to prove title from sovereignty to the present is required where there are two competing claims of ownership. Prince v. Sanders, 298 S.W.2d 650 (Tex. Civ. App.—Beaumont 1957, writ dism’d). In Texas, it is the surface owner who owns the groundwater, whether it be fresh or briny groundwater. Robinson v. Robbins Petroleum Corp., 501 S.W.2d 865, 867, 46 O.&G.R. 348 (Tex. 1973). [↑](#footnote-ref-76)
76. 68383 S.W.3d at 280 relying on McCammon & Lang Lumber Co. v. Trinity & B. V. R. Co., 133 S.W. 247, 248–49 (1911). [↑](#footnote-ref-77)
77. 69Envtl. Processing Sys., L.C. v. FPL Farming Ltd., 457 S.W.3d 414 (Tex. 2015). [↑](#footnote-ref-78)
78. 70The merits of the case are more fully discussed at §§ 22.05 and 24.03 *infra*. [↑](#footnote-ref-79)
79. 71Smith v. Mid-Valley Pipeline Co., 2007 U.S. Dist. LEXIS 33179 (E.D. Ky. May 4, 2007). Where a party is seeking contribution from an alleged joint tortfeasor under both common law and OPA principles, the OPA allows such contribution while the relevant Utah statute dealing with common law claims does not. Chevron Pipe Line Co. v. PacifiCorp, 2016 U.S. Dist. LEXIS 54433 (D. Utah Apr. 22, 2016); 2016 U.S. Dist. LEXIS 165622 (D. Utah Nov. 29, 2016); 2017 U.S. Dist. LEXIS 11778 (D. Utah Jan. 27, 2017); 2017 U.S. Dist. LEXIS 123447 (Aug. 4, 2017). [↑](#footnote-ref-80)
80. 7233 U.S.C. § 2701(32)(E). 33 U.S.C. § 2701(32)(E). [↑](#footnote-ref-81)
81. 73*See* Cantrell v. Marathon Ashland Pipe Line, LLC, 2005 U.S. Dist. LEXIS 45192 (E.D. Ky.).

    In order to prevail on a strict liability claim under the OPA, the government must show that the defendant is a responsible party for the facility or vessel from which the ***oil*** was discharged or from which there was a substantial threat of discharge into or upon navigable waters that resulted in removal costs and damages. United States v. Viking Resources, Inc., 607 F. Supp. 2d 808 (S.D. Tex. 2009). For other cases arising under the OPA, see Rice v. Harken Exploration Co., 250 F.3d 264 (5th Cir. 2001); Water Quality Insurance Syndicate v. United States, 632 F. Supp. 2d 108 (D. Mass. 2009); United States v. Jones, 267 F. Supp. 2d 1349 (M.D. Ga. 2003). [↑](#footnote-ref-82)
82. 74Natural Gas Pipeline Co. of Am. v. Justiss, 56 Tex. Sup. Ct. J. 151, 397 S.W.3d 150, 179 O.&G.R. 92 (Tex. 2012). [↑](#footnote-ref-83)
83. 75Natural Gas Pipeline Co. of Am. v. Justiss, 56 Tex. Sup. Ct. J. 151, 397 S.W.3d 150, 179 O.&G.R. 92 (Tex. 2012). [↑](#footnote-ref-84)
84. 76Meade v. Kubinski, 277 Ill. App. 3d 1014, 214 Ill. Dec. 733, 661 N.E.2d 1178 (1996) analyzes the appropriate factors in choosing the right measure of damages. *See also* Williams-Bowman Rubber Co. v. Industrial Maintenance, Welding & Machining Co., 677 F. Supp. 539 (N.D. Ill. 1987).

    *See also* ExxonMobil Corp. v. Lazy R Ranch, LP, 60 Tex. Sup. Ct. J. 471, 511 S.W.3d 538 (2017) (notes difference between permanent and temporary damages to real property; labels limit on damage recovery to value of the land the “economic feasibility exception”); Gilbert Wheeler, Inc. v. Enbridge Pipelines (E. Tex.), L.P., 57 Tex. Sup. Ct. J. 1465, 449 S.W.3d 474 (2014) (damages for permanent injury to land is the difference in the fair market value before and after the trespass); FLST, Ltd. v. Explorer Pipeline Co., 2017 U.S. Dist. LEXIS 10605 (E.D. Tex. Jan. 26, 2017); Kraft v. Langford, 565 S.W.2d 223, 227 (Tex. 1978), *disapproved on other grounds*, Schneider Nat’l Carriers, Inc. v. Bates, 48 Tex. Sup. Ct. J. 6, 147 S.W.3d 264 (Tex. 2004); Sherman Gas & Electric Co. v. Belden, 123 S.W.119 (Tex. 1909); Premium Valve Services, LLC v. Comstock ***Oil*** & Gas, L.P. 2016 Tex App. LEXIS 8666 (Tex. App.—Dallas Aug. 11, 2016). *See also* Crosstex North Texas Pipeline, LP v. Gardiner, 505 S.W.3d 580 (Tex. 2016), *aff’g* 451 S.W.3d 150 (Tex. App.—Ft. Worth 2014) (measure of damages for temporary versus permanent nuisance).

    A similar approach to the issue of damages as they impact the decision to classify a nuisance as permanent or continuing is reflected in Russell v. Chesapeake Appalachia, LLC, 2018 U.S. Dist. LEXIS 216893 (N.D. Pa. Dec. 27, 2018).

    California apparently also allows the cost of restoration to be used as evidence of the damages suffered in trespass cases under certain circumstances. Starrh & Starrh Cotton Growers v. Aera Energy LLC, 153 Cal. App. 4th 583, 63 Cal. Rptr. 3d 165, 168 O.&G.R. 152 (2007), *rev. denied*, 2007 Cal. LEXIS 12027 (Cal. Oct. 24. 2007). Cal. Civil Code § 3344 authorizes the award of damages based on the financial or economic benefits that inure to the benefit of the trespasser but there must be a nexus between the trespass and the alleged benefits. C&C Properties v. Shell Pipeline Co., 2019 U.S. Dist. LEXIS 206439 (E.D. Cal. No. 27, 2019), 2022 U.S. Dist. LEXIS 160369 (E.D. Cal. Sept. 2, 2022), *aff’d in part, rev’d in part and vacated and remanded in part sub nom.* C&C Properties, Inc. v. Alon Bakersfield Property, Inc., 2023 U.S. App. LEXIS 8569 (9th Cir. Apr. 11, 2023), *as modified*, 2023 U.S. App. LEXIS 11245 (9th Cir. May 8, 2023). *See also* Watson Land Co. v. Shell ***Oil*** Co., 130 Cal. App. 4th 69, 29 Cal. Rptr. 3d 343 (2005).

    While Montana follows the general rule that for injuries to real property the amount to be recovered is the difference between the before and after value, a limited exception is recognized that allows the recovery of restoration costs in excess of the property’s diminution in value where a person’s residence is involved and there are personal reasons in support of a restoration remedy. Sunburst School Dist. No. 2 v. Texaco, Inc., 338 Mont. 259, 165 P.3d 1079 (2007). The plaintiffs in a restoration case must establish that the award will actually be used to restore the premises. Lampi v. Speed, 362 Mont. 122, 261 P.3d 1000, 1006 (2011). These cases are discussed in Atlantic Richfield Co. v. Christian, 206 L. Ed. 2d 712, 2020 U.S. LEXIS 2105 (U.S. Apr. 20, 2020), where the U.S. Supreme Court allowed a state common law tort claim to go forward even though the land was within the boundaries of a Superfund site.

    An injury to the wellbore is an injury to real property so a court before it can calculate damages must determine whether the injury is permanent or temporary. Premium Valve Services, LLC v. Comstock ***Oil*** & Gas, L.P. 2016 Tex App. LEXIS 8666 (Tex. App.—Dallas Aug. 11, 2016). The court applied the factors set forth in *Gilbert Wheeler*, *op cit*. to make the permanent/temporary determination.

    Layperson or landowner testimony as to the before and after value is admissible so long as the testimony is neither too conclusory or too speculative. *Justiss*, *op cit.*; Dietz v. Consolidated ***Oil*** & Gas, Inc., 643 F.2d 1088 (5th Cir. 1981); Arkoma Basin Exploration Co. v. FMF Assocs. 1990-A, Ltd., 249 S.W.3d 380 (Tex. 2008); Coastal Transp. Co. v. Crown Cent. Petroleum Corp., 136 S.W.3d 227 (Tex. 2004).

    When an award is made ostensibly compensating a surface estate owner for a permanent injury to the surface, may a successor in interest bring an action asserting that new injuries occurred after the initial award is made? In Tatum v. Basin Resources, Inc., 141 P.3d 863 (Colo. Ct. App. 2005), the court allowed the successor in interest to assert a cause of action for damages caused by subsidence from an underground mine where the damages became apparent subsequent to an earlier award for subsidence-caused damages. The court, however, did subtract the amount of the earlier damage award from the later damage award.

    Whether the alleged damages from a continuing nuisance are classified as permanent or temporary will affect the applicable statute of limitations as well as the application of the discovery rule. Injuries resulting from nuisance-type activities that last for a number of years are typically treated as creating permanent, not temporary, damages in Texas. *See, e.g.*, Tennessee Gas Transmission Co. v. Fromme, 153 Tex. 352, 269 S.W.2d 336 (1954); Burke v. Union Pacific Resources Co., 138 S.W.3d 46, 59 O.&G.R. 38 (Tex. App.—Houston [1st Dist.] 2004, rev. denied); Walton v. Phillips Petroleum Co., 65 S.W.3d 262, 272–73, 152 O.&G.R. 310 (Tex. App.—El Paso 2001, writ denied).

    An analogous problem to whether an injury to real property is permanent or temporary is whether a nuisance is permanent or temporary. The distinction in the nuisance arena can affect both the amount of damages and the accrual of the statute of limitations Schneider National Carriers, Inc. v. Bates, 48 Tex. Sup. Ct. J. 6, 147 S.W.3d 264 (Tex. 2004). *Schneider* is treated as persuasive in Russell v. Chesapeake Appalachia, LLC, 2018 U.S. Dist. LEXIS 216893 (M.D. Pa. Dec. 27, 2018), which applies Pennsylvania law to resolve the question.

    *See e.g.*, Rose v. Tennessee Gas Transmission Co., 2009 U.S. Dist. LEXIS 114451 (E.D. La. 2009); Cook v. Exxon Corp., 145 S.W.3d 776, 167 O.&G.R. 27 (Tex. App.—Texarkana 2004).

    Where a surface lessee operates a gas plant and brine disposal wells on the premises in a way that causes pollution, damages can be awarded representing the lessee’s profits from operations carried on after the lease terminated, restoration costs, and the value of disposing of brine from off of the lease into leasehold disposal wells. Corbello v. Iowa Production Co., 850 So. 2d 686, 157 O.&G.R. 1120 (La. Feb. 25, 2003), *aff’g in part, rev’g in part, and remanding*, La. App. 01-0567, 806 So. 2d 32, 152 O.&G.R. 263 (La. App. Dec. 26, 2001).

    In Louisiana a juridical entity such as a limited liability corporation may not recover damages for negligent or intentional infliction of emotional distress, mental and emotional harm, or loss of enjoyment. Such entities can only recover for economic losses. Big Bucks Preserve, LLC v. Columbia Gulf Transmission Co., 2009 U.S. Dist. LEXIS 124148 (W.D. La. 2009).

    In order to show a continuing trespass, a surface owner must show continued entry or use and cannot rely on the original activities which may have caused the contamination. Guilbeau v. Hess Corp., 2015 U.S. Dist. LEXIS 43868 (W.D. La. Feb. 27, 2015), *report and recommendation adopted*, 2015 U.S. Dist. LEXIS 43925 (W.D. La. April 2, 2015); Tureau v. 2H, Inc., 2015 U.S. Dist. LEXIS 100942 (W.D. La. June 18, 2015), 2015 U.S. Dist. LEXIS 100937 (July 31, 2015), 2015 U.S. Dist. LEXIS 103974 (W.D. La. Aug. 6, 2015); Hogg v. Chevron USA Inc., 45 So. 3d 991 (La. App. 2010). *In accord*: Barrett v. Dresser, LLC, 2021 U.S. Dist. LEXIS 2173 (W.D. La. Jan. 6, 2021); Watson v. Arkoma Development, LLC, 2018 U.S. Dist. LEXIS 42842 (W.D. La. Feb. 5, 2018), 2018 U.S. Dist. LEXIS 203596 (W.D. La. Nov. 15, 2018), *report and recommendation adopted*, 2018 U.S. Dist. LEXIS 203562 (W.D. La. Nov. 30, 2018).

    In Virginia the existence of a continuing trespass or nuisance may allow the court in its discretion to grant injunctive relief in lieu of damages. Flora v. Mt. Valley Pipeline, LLC, 2018 U.S. Dist. LEXIS 130697 at \*13–14 (W.D. Va. Aug. 3, 2018). *See also* Levisa Coal Co. v. Consolidation Coal Co., 276 Va. 44, 662 S.E.2d 44, 53 (2008). [↑](#footnote-ref-85)
85. 77Where there is a permanent nuisance, the measure of damages uses the before and after test. Natural Gas Pipeline Co. of Am. v. Justiss, 56 Tex. Sup. Ct. J. 151, 397 S.W.3d 150, 179 O.&G.R. 92 (Tex. 2012). *See also* Kraft v. Langford, 21 Tex. Sup. Ct. J. 302, 565 S.W.2d 223 (Tex. 1978), *disapproved on other grounds*, Schneider Nat’l Carriers, Inc. v. Bates, 147 S.W.3d 264 (Tex. 2004); Mieth v. Ranchquest, Inc., 177 S.W.3d 296, 166 O.&G.R. 607 (Tex. App.—Houston [1st Dist.] 2005) (proper measure for permanent damages to land is diminution in value; proper measure for temporary damages to land is cost of restoration unless such cost exceeds the diminution in fair market value); Burke v. Union Pacific Resources Co., 138 S.W.3d 46, 59 O.&G.R. 38 (Tex. App.—Houston [1st Dist.] 2004, rev. denied); Walton v. Phillips Petroleum Co., 65 S.W.3d 262, 152 O.&G.R. 310 (Tex. App.—El Paso 2001, writ denied); *In re* Apache Corp., 61 S.W.3d 432, 152 O.&G.R. 59 (Tex. App.—Amarillo 2001) (surface owner sought remediation damages as well as damages for permanent injury to land caused by ***oil*** and gas well); Sadler v. Duvall, 815 S.W.2d 285 (Tex. App.—Texarkana 1991, writ denied).

    The distinction between a permanent and temporary injury to land applies not only to trespass claims but to contract claims. Gilbert Wheeler, Inc. v. Enbridge Pipelines (E.Tex.), LP, 57 Tex. Sup. Ct. J. 1465, 449 S.W.3d 474 (2014) (easement deed and contract required pipeline to bury pipeline and not cut trees; upon cutting of trees the pipeline is liable for the permanent injury to the land). In Texas, there is an exception to the application of the loss of fair market value rule for permanent injuries to land where the injuries relate to the cutting down of trees. *Id.* *See also* Porras v. Craig, 675 S.W.2d 503, 504 (Tex. 1984).

    Even though Texas requires a party to show before and after damages where a permanent injury to real property is alleged, a party need not prior to trial show a quantitative model for damages, especially where there is also alleged a breach of contract regarding surface use. Trautmann v. Cogema Mining, Inc., 2007 U.S. Dist. LEXIS 25938 (S.D. Tex.). [↑](#footnote-ref-86)
86. 78McNeill v. Burlington Resources ***Oil*** & Gas Co., 2008-NMSC-22, 143 N.M. 740, 182 P.3d 121, *overruling in part*, Amoco Production Co. v. Carter Farms Co., 103 N.M. 117, 703 P.2d 894, 86 O.&G.R. 84 (1985). [↑](#footnote-ref-87)
87. 79Where there is a continuing trespass, the landowner may be entitled to a permanent injunction because the landowner has the exclusive right of possession which is being invaded by the continuing trespass. Davilla v. Enable Midstream Partners, L.P., 247 F. Supp. 3d 1233 (W.D. Okla. 2017). On appeal, the Tenth Circuit agreed with the finding that there was a continuing trespass but reversed and remanded so that the District Court could engage in a balancing of the equities analysis before ordering a permanent injunction requiring the defendant to remove the pipeline. Davilla v. Enable Midstream Partners L.P., 913 F.3d 959 (10th Cir. 2019). *See also* Miller v. Cudahy Co., 592 F. Supp. 976 (D. Kan. 1984); Belusko v. Phillips Petroleum Co., 198 F. Supp. 140 (S.D. Ill. 1961).

    In ExxonMobil Corp. v. Lazy R Ranch, LP, 60 Tex. Sup. Ct. J. 471, 511 S.W.3d 538 (2017), the plaintiff changed its requested relief from damages to an injunction seeking reclamation of the surface estate in order to get around the economic feasibility exception. The court did not decide whether seeking injunctive relief would be an effective way to impose costs on the operator in excess of that otherwise allowed because the matter was dismissed on statute of limitations grounds.

    In Florida, restoration and damages for future injuries may be awarded in cases involving a temporary or continuing trespass such as with blasting activities. SDI Quarry v. Gateway Estates Park Condominium Assoc., 249 So. 3d 1287 (Fla. Dist. Ct. App. 2018).

    In Mary v. QEP Energy Co., 2021 U.S. Dist. LEXIS 54074 (W.D. La. Mar. 22, 2021), *aff’d*, 24 F.4th 411 (5th Cir. 2022), the court found that the surface owners did not plead facts sufficient to show bad faith in the alleged mislocation of a pipeline. In the absence of bad faith, the remedy of disgorgement of profits was unavailable. In an earlier decision, Mary v. QEP Energy Co., 798 Fed. Appx. 811 (5th Cir. 2020), the court concluded that a pipeline was not a building so that La. Civil Code art. 670 was not applicable. [↑](#footnote-ref-88)
88. 80In Texas this limit is called the economic feasibility exception. In North Ridge Corp. v. Walraven, 957 S.W.2d 116, 139 O.&G.R. 649 (Tex. App.—Eastland 1997, writ denied), the court reversed a damage award of over $500,000 reflecting the cost of remediation to a one-acre parcel because remediation was economically infeasible given the fact such costs were well in excess of the fair market value of the parcel.

    The *Walraven* analysis was followed in Primrose Operating Co. v. Senn, 161 S.W.3d 258 (Tex. App.—Eastland 2005, rev. denied), where the court reversed a jury verdict awarding the surface owner $2.1 million in damages caused by the lessee’s alleged negligence in conducting ***oil*** and gas operations on the premises. Where the costs to restore the land are not “economically feasible” than as a matter of law, the surface owner is not entitled to those costs. Since the surface owner did not present any other evidence of damages caused by the alleged negligence, the court of appeals rendered a take nothing judgment against the surface owner. The economic feasibility exception for temporary injuries to land was confirmed by the Texas Supreme Court in Gilbert Wheeler, Inc. v. Enbridge Pipelines (E.Tex.), LP, 57 Tex. Sup. Ct. J. 1465, 449 S.W.3d 474 (2014) and ExxonMobil Corp. v. Lazy R Ranch, LP, 60 Tex. Sup. Ct. J. 471, 511 S.W.3d 538 (2017).

    Mississippi follows the general rule that where parties assert a permanent injury to real property, damages are measured by the value of the real property prior to the injury and the value after the injury. Union Producing Co. v. Pittman, 245 Miss. 427, 146 So. 2d 553, 556, 18 O.&G.R. 482 (1962); Abraham v. Sklar Exploration Co., L.L.C., 408 F. Supp. 2d 244, 162 O.&G.R. 860 (S.D. Miss. 2005).

    The Oklahoma cases are analyzed in Bowen v. Amoco Pipeline Co., 254 F.3d 925, 150 O.&G.R. 234 (10th Cir. 2001) and typically follow the general rule that limits remediation damages. Notwithstanding that rule which “prohibits double recovery for the same injury and limits monetary damages to the diminished value of the land,” 254 F.3d at 938, the court approved an arbitration award that provided for both a damage recovery and a multi-million dollar escrow fund ostensibly to provide for an abatement of the nuisance. *See* Schneberger v. Apache Corp., 1994 OK 117, 890 P.2d 847, 849–52, 131 O.&G.R. 587; Houck v. Hold ***Oil*** Corp., 1993 OK 166, 867 P.2d 451, 461, 128 O.&G.R. 93; Briscoe v. Harper ***Oil*** Co., 1985 OK 43, 702 P.2d 33, 36–37, 86 O.&G.R. 361.

    Where a trespass is alleged to have occurred on Indian land, the federal common law of trespass applies and not the trespass law of the state where the real property is located. Under certain circumstances, the federal common law of trespass may allow the plaintiff to recover a share of the profits earned by virtue of the trespass. Davilla v. Enable Midstream Partners, L.P., 2016 U.S. Dist. LEXIS 163525 (W.D. Okla. Nov. 28, 2016). In a subsequent opinion, Davilla v. Enable Midstream Partners, L.P., 247 F. Supp. 3d 1233 (W.D. Okla. 2017), the court issued a permanent injunction against continued use of the pipeline because a majority of the native American owners had not consented to the renewal of the easement. On appeal, the Tenth Circuit affirmed in part, reversed in part and remanded. 913 F.3d 959 (10th Cir. 2019). The court found that non-compliance with the statutory consent requirements for the granting of easements over either Tribal or allottee’s lands constitutes a trespass but then remanded on the issue as to whether the plaintiffs were entitled to a permanent injunction since the District Court had not engaged in a balancing of the equities analysis prior to granting injunctive relief.

    Parties are free to contractually limit the amount of damages payable where there has been contamination or pollution. In Coover v. Enerfin Field Servs., LLC, 2012 Tex. App. LEXIS 4376 (Tex. App.—Corpus Christi May 31, 2012), the court enforced a surface lease agreement requiring the lessee to remediate the property or in the case of permanent damage pay the fair market value for the surface estate. The surface lessor was limited in its damage recovery to an arbitrator’s finding of what the fair market value was. [↑](#footnote-ref-89)
89. 81In Hartman v. Texaco, Inc., 123 N.M. 220, 937 P.2d 979, 136 O.&G.R. 67 (N.M. Ct. App.), *cert. denied*, 123 N.M. 83, 934 P.2d 277 (1997), the court found that the double damage remedy authorized by statute for trespasses was not intended to cover subsurface trespasses such as occur with the migration of fluids injected as part of a secondary recovery operation. [↑](#footnote-ref-90)
90. 82In general, there are three approaches to measuring damages to immovable property: (1) the cost of restoration if the property may be adequately restored; (2) the difference in value prior to and following the damage; and (3) the cost of replacement, subject to the limitation that if the cost of restoring the property is disproportionate to the value of the property or economically wasteful, damages are limited to the difference in before and after value. Corbello v. Iowa Production Co., 850 So. 2d 686, 157 O.&G.R. 1120 (La. Feb. 25, 2003); Roman Catholic Church v. Louisiana Gas Service Co., 618 So. 2d 874, 879–80 (La. 1993); Dual Drilling Co. v. Mills Equipment Investments, Inc., La. App. 97-1010, 705 So. 2d 1246 (La. App. Jan. 7, 1998).

    In State v. La. Land & Exploration Co., 110 So. 3d 1038 (La. 2013), the court noted that the *Roman Catholic* placed some limits on the plaintiff’s ability to get restoration damages that are disproportionate to the value of the property or otherwise wasteful. There must be some personal reason for requiring restoration and there must be a reasonable belief that the damages will, in fact, use the recovery to restore the premises. But the court also noted that *Corbello* announced a damage rule different from *Roman Catholic*. In the subsequent appeal, however, State v. Louisiana Land & Exploration Co., 2021 La. LEXIS 1488 (La. June 30, 2021), *motion for reh’g granted*, 326 So. 3d 257 (La. 2021), the court reversed its earlier decision and concluded that the pre-2014 version of Act 312 did not authorize a jury to award damages in excess of the restoration costs as determined under the provisions of Act 312. In a substituted opinion, State v. Louisiana Land & Exploration Co., 339 So. 3d 1163 (La. 2022), the court affirmed its earlier opinion finding that as to environmental damages, the statutory remediation remedy is the exclusive remedy available to surface owners whose lands have been damaged. The Louisiana Supreme Court specifically held that “non-remediation damages” including a strict liability claim could be recovered.

    In Hero Lands Co., LLC v. Chevron USA, Inc., 2023 La. App. LEXIS 388 (La. App. Mar. 7, 2023), the court applied the 2014 version of Act 312 and limited the plaintiff/landowner to remediation damages as set forth by DNR. The court affirmed a jury verdict that as to one portion of the landowner’s surface estate, there was not unreasonable or excessive use so that no damages could be awarded.

    In Rose v. Tennessee Gas Transmission Co., 2009 U.S. Dist. LEXIS 114451 (E.D. La. 2009), the court followed *Roman Catholic Church* in a suit brought by the owner of an estate traversed by two pipeline canals claiming that the canals had not been properly maintained over the course of their use. It refused to allow the owner to claim restoration damages in the absence of evidence of a “personal” stake in the land above and beyond mere ownership.

    Where there is a continuing trespass in Louisiana, the trespasser may be required to disgorge all the fruits of its unlawful exercise of its rights. In Aertker v. Placid Holding Co., 2012 U.S. Dist. LEXIS 139204 (M.D. La. Sept. 27, 2012), the court found that Placid who had trespassed on the plaintiff’s surface estate by placing a pipeline on the premises without the plaintiff’s permission was liable for the profits generated by the pipeline plus pre-judgment interest. *In accord*: Corbello v. Iowa Prod., 2002-0826 (La. 06/20/03), 850 So. 2d 686, 157 O.&G.R. 1120. In Mary v. QEP Energy Co., 798 Fed. Appx. 811 (5th Cir. 2020), *replacing* 787 Fed. Appx. 203 (5th Cir. 2019), *rev’g* 2017 U.S. Dist. LEXIS 204775 (W.D. La. Dec. 6, 2017), the court found that the district court had misapplied the rules as to good or bad faith trespass since the alleged trespass or encroachment was by a pipeline and not a building. On later appeal, Mary v. QEP Energy Co., 24 F.4th 411 (5th Cir. 2022), the Fifth Circuit affirmed a trial court judgment that plaintiff had not shown bad faith and was thus not entitled to a disgorgement of all profits from the operation of the wrongly-located pipeline.

    The Second Restatement of Torts § 929 suggests that under certain circumstances a landowner who has suffered temporary damages should be able to elect to seek restoration damages instead of diminution of value damages even where there is a disproportionate ratio between the more expensive restoration damages and the less expensive diminution in value. One of the rationales for allowing restoration damages is to discourage injury to land whose intrinsic value is minimal. Typically, the landowner will have to show “personal reasons” for seeking restoration damages, although that may only require a showing that the owner wishes to continue to use the land as she has done in the past. *See, e.g.*, G & A Contractors v. Alaska Greenhouses, 517 P.2d 1379 (Alaska 1974); Board of County Comm’rs v. Slovek, 723 P.2d 1309 (Colo. 1986); SDI Quarry v. Gateway Estates Park Condominium Assoc., 249 So. 3d 1287 (Fla. App. 2018); *Roman Catholic Church, op cit.*; McEwen v. MCR, LLC, 368 Mont. 38, 2012 MT 319, 291 P.3d 1253; McNeill v. Burlington Res. ***Oil*** & Gas Co., 2008-NMSC-022, 143 N.M. 740, 182 P.3d 121. Not every state has followed the Restatement (Second) view on the availability of remediation damages that are in excess of the diminution in value before and after the trespass. [↑](#footnote-ref-91)
91. 83Corbello v. Iowa Production Co., 850 So. 2d 686, 157 O.&G.R. 1120 (La. Feb. 25, 2003); Magnolia Coal Terminal v. Phillips ***Oil*** Co., 576 So. 2d 475, 111 O.&G.R. 506 (La. 1991); Simoneaux v. Amoco Production Co., La. 2002-1050, 860 So. 2d 560, 160 O.&G.R. 1077 (La. App. 1 Cir. 9/26/03); Hazelwood Farm, Inc. v. Liberty ***Oil*** & Gas Corp., 844 So. 2d 380, 158 O.&G.R. 35 (La. App. 3 Cir. Apr. 2, 2003), *writ denied*, 857 So. 2d 476 (La. 2003).

    The interplay between actions based on breach of contract, property, and tort actions is explored in Terrebonne Parish School Board v. Columbia Gulf Transmission Co., 290 F.3d 303, 158 O.&G.R. 1 (5th Cir. 2002). *See also* Vintage Assets, Inc. v. Tennessee Gas Pipeline Co., LLC, 2017 U.S. Dist. LEXIS 133693 (E.D. La. Aug. 22, 2017); Vintage Assets, Inc. v. Tennessee Gas Pipeline Co., LLC, 2016 U.S. Dist. LEXIS 97467 (E.D. La. July 26, 2017); Bernstein v. Atlantic Richfield Co., 2015 U.S. Dist. LEXIS 69625 (E.D. La. May 29, 2015).

    For cases dealing with the issue of improper joinder of defunct corporations in order to defeat diversity jurisdiction, see Morgan Plantation, Inc. v. Tennessee Gas Pipeline Co., LLC, 2017 U.S. Dist. LEXIS 47347 (W.D. La. Feb. 8, 2017), report and recommendation adopted, 2017 U.S. Dist. LEXIS 46578 (W.D. La. March 28, 2017); Weinstein v. Conoco Phillips Corp., 2014 U.S. Dist. LEXIS 29175 (W.D. La. March 5, 2014); Ashley v. Devon Energy Corp., 2015 U.S. Dist. LEXIS 23319 (M.D. La. Feb. 25, 2015).

    The jury in Chevron U.S.A. Inc. v. Smith, 844 So. 2d 1145, 156 O.&G.R. 201 (Miss. 2002), *cert. denied,* 540 U.S. 881, 124 S. Ct. 327, 157 L. Ed. 2d 147 (2003), awarded the surface owner nearly $2.35 million in damages fixed to the cost of restoring the surface where the surface estate was valued at $55,000. The verdict was reversed because the majority opinion relied on Donald v. Amoco Production Co., 735 So. 2d 161, 141 O.&G.R. 490 (Miss. 1999), to require the surface owners to exhaust their administrative remedies before being able to sue for the cost of restoration. A concurring and dissenting opinion would not award the surface owners the full cost of restoration, but would require Chevron to restore the surface regardless of cost. 844 So. 2d at 1149–50 (MacRae, P.J. concurring and dissenting). Another judge would have remitted the $2.35 million award to the value of the surface estate. 844 So. 2d at 1151–52 (Easley, J. concurring and dissenting). After *Donald* was remanded for trial, the trial judge dismissed the claims based on *Chevron USA v. Smith.* But the Mississippi Supreme Court in Howard v. TotalFina E & P USA, Inc., 899 So. 2d 882, 162 O.&G.R. 803 (Miss. 2005) finds that the Mississippi ***Oil*** and Gas Board lacks jurisdiction over the claims the plaintiff raised because the pollution in *Howard/Donald* deals with the commercial disposal of waste products where the ***Oil*** and Gas Board’s jurisdiction is limited to the non-commercial disposal of ***oil*** field exploration and production wastes. Since the only claims that the plaintiffs are making are common law claims, they do not have to exhaust their administrative remedies before filing suit.

    In Town of Bolton v. Chevron ***Oil*** Co., 919 So. 2d 1101, 162 O.&G.R. 817 (Miss. Ct. App. 2005), the court sought to reconcile the holdings in *Chevron USA, Inc. v. Smith* and *Howard v. Totalfina E&P USA, Inc.* As in *Chevron v. Smith*, the alleged contamination for which monetary damages were sought flowed from the disposal of oilfield products used in the normal course of drilling and producing ***oil*** and gas. Those types of activities, including the disposal of technically enhanced naturally occurring radioactive materials (TENORM), are subject to State ***Oil*** and Gas Board regulation. Thus, while the Board lacked the power to resolve the common law claims, it had the power to deal with the type of harm alleged by the surface owners. As such, the surface owners had to exhaust their administrative remedies before they were entitled to bring their common law actions. The court further added that as to the nonmunicipal plaintiffs whose causes of action may be covered by statutes of limitation, their monetary claims should be stayed pending Board action. [↑](#footnote-ref-92)
92. 84La. Min. Code 31:122. [↑](#footnote-ref-93)
93. 85Terrebonne Parish School Board v. Castex Energy, Inc., La. 2004-0968, 893 So. 2d 789, 161 O&G.R. 747 (La. 1/19/05), La. 2001-2634, 878 So. 2d 522, 158 O.&G.R 1078 (La. App. 1 Cir. 03/19/04).

    Arkansas had agreed with the lower court decision that an ***oil*** and gas lessee is under an implied duty to restore the surface of the land to the condition it was prior to the commencement of drilling operations. Bonds v. Sanchez-O’Brien ***Oil*** & Gas Co., 289 Ark. 582, 715 S.W.2d 444, 91 O.&G.R. 11 (1986). While state agency regulations regarding surface restoration activities may be relevant, compliance with such regulations may not be sufficient to satisfy the implied duty to restore the surface. Taylor Family Limited Partnership “B” v. XTO Energy, Inc., 2022 Ark. App. 521, 658 S.W.3d 455, *reh’g denied*, 2023 Ark. App. LEXIS 31 (June 25, 2023).

    The *Castex* holding that in the absence of an express leasehold or contractual provision to the contrary, the Mineral Code does not impose upon the lessee the duty to restore the surface to its original condition so long as the lessee acts reasonably and non-negligently was followed in Hardee v. Atlantic Richfield, La. App. 05-1207, 926 So. 2d 736 (La. App. 3 Cir. 4/5/06), and Dore Energy Corp. v. Carter-Langham, Inc., La. App. 04-1202, 901 So. 2d 1238, 162 O.&G.R. 897 (La. App. 3 Cir. 5/4/05), *writs denied*, 918 So. 2d 1042, 918 So. 2d 1043, 918 So. 2d 1045, 918 So. 2d 1047 (La. 2006). The *Hardee* court also found that an action for surface damages could be brought even though the lease was still in existence based upon allegations of negligent or unreasonable surface use. *In accord*: Moore v. Denbury Onshore, LLC, 2016 U.S. Dist. LEXIS 11932 (W.D. La. Feb. 1, 2016), *motion for reconsideration granted in part*, 2016 U.S. Dist. LEXIS 25822 (W.D. La. March 1, 2016); Tureau v. 2H, Inc., 2015 U.S. Dist. LEXIS 100942 (W.D. La. June 18, 2015), 2015 U.S. Dist. LEXIS 100937 (July 31, 2015), 2015 U.S. Dist. LEXIS 103974 (W.D. La. Aug. 6, 2015).

    In Emerald Land Corp. v. Trimont Energy (BL) LLC, 2021 U.S. Dist. LEXIS 146292 (W.D. La. Aug. 4, 2021), the court applied *Castex* to summarily dismiss a tort claim seeking to have flowlines removed from the premises since the lease specifically authorized the lessee to install pipelines, which include flowlines, and there were no specific provisions requiring their removal.

    La. Civil Code articles 2683 and 2692 require the lessee to restore the premises to its “original condition, less normal wear and tear.” Tureau v. 2H, Inc., 2015 U.S. Dist. LEXIS 100942 (W.D. La. June 18, 2015), 2015 U.S. Dist. LEXIS 100937 (July 31, 2015), 2015 U.S. Dist. LEXIS 103974 (W.D. La. Aug. 6, 2015).

    In Alford v. Chevron U.S.A., Inc., 2015 U.S. Dist. LEXIS 3302 (E.D. La. Jan 12, 2015), 2015 U.S. Dist. LEXIS 13389 (E.D. La. Feb. 4, 2015), the court followed *Castex* and concluded that Article 122 only imposes upon a lessee the duty to act reasonably and does not create a duty to remediate any damages caused by ***oil*** and gas operations. Where the ***oil*** and gas lease contains an express power to dredge canals, the lessor may not seek damages for subsidence, and other injuries caused by the canals in the absence of a showing that the canals were not reasonably constructed and operated.

    In Carmichael v. Bass P’ship, 95 So. 3d 1069 (La. App. 2012), 92 So. 3d 1274 (unpublished opinion), *vacated on reh’g*, 2012 La. App. Unpub. LEXIS 503 (La. App. July 13, 2012), *reh’g opinion recalled and remanded*, 2012 La. App. Unpub. LEXIS 525(La. App. Aug. 15, 2012), 160 So. 3d 593 (La. App. 2015), the court was interpreting a mutual indemnity clause between parties assigning an ***oil*** and gas lease regarding which parties owed indemnification duties in an action brought by the lessor for surface restoration damages.

    In Barasich v. Columbia Gulf Transmission Co., 467 F. Supp. 2d 676, 164 O.&G.R. 449 (D. La. 2006), plaintiffs tried to argue that La. Civil Code article 667–69 created an obligation by pipelines and ***oil*** and gas operators to restore the surface and wetlands; neglecting this obligation meant that when Hurricane Katrina moved onshore, the damages caused by the storm were aggravated. While the Civil Code does create a duty not to injure neighboring lands, the scope of the duty has historically been limited to immediately adjacent lands. In addition, the court follows *Castex* in denying any general duty to restore the surface in the absence of express contractual language imposing such a duty. *Barasich* was relied on in Bd. of Comm’rs of the Southeast La. Flood Prot. Authority East v. Tenn. Gas Pipeline Co., 29 F. Supp. 3d 808, 854 (E.D. La. 2014), 88 F. Supp.3d 615 (E.D. La. 2015), *aff’d*, 850 F.3d 714 (5th Cir. 2017), to hold that plaintiff’s negligence claim relating to damages caused by the defendants’ canal building program necessarily implicates federal laws.

    In Kinder Gas, Inc. v. Reynolds, 11-1012 (La. App. 3 Cir. 02/01/12), 84 So. 3d 695, the court rejected the notion that an action for restoration damages could be filed while the lease was still alive given the fact that the contractual duty to restore only arises upon the termination of the lease.

    In Houssiere v. Asco United States, 12-791 (La. App. 3 Cir. 01/16/13), 108 So. 3d 797, the court upheld a jury verdict finding that there was no breach of any contractual duty by the lessee in failing to remediate two pits used in ***oil*** and gas production-related activities.

    In Amoco Production Co. v. Carter Farms Co., 103 N.M. 117, 703 P.2d 894, 897, 86 O.&G.R. 84 (1985), the court said: “Traditionally, most courts have refused to impose an implied contractual duty to completely restore the surface estate to its original condition as it existed prior to the commencement of drilling operations in the absence of an express provision in the mineral lease.” *Carter Farms* was reversed on other grounds in McNeill v. Burlington Res. ***Oil*** & Gas Co., 2008-NMSC-22, 143 N.M. 740, 182 P.3d 121, 167 O.&G.R. 300. *McNeill* did not discuss any implied duty to restore the premises but focused on how to measure damages in the case of negligent injury to the surface.

    Where there are multiple lessees, each may be liable *in solido* (jointly and severally) for obligations arising under the lease, including restoring the surface where there has been negligent use of the surface. In Santa Fe Minerals, Inc. v. BEPCO, L.P. (*In re* 15375 Mem. Corp.), 382 B.R. 652 (Bankr. D. Del. 2008), a lessee who assigned its interest long before the alleged negligent disposal of produced water in unlined pits occurred was suing an assignee who was responsible for the alleged negligent disposal for contribution after it had settled with the surface owners. The matter was complicated by the putative dissolution of one of the corporations that owned the lease as well as by the bankruptcy petition filed by another related corporation.

    Because of the large sums of money that may be involved in remediation cases, an operator may file a bankruptcy petition in order to get out from under such potential liabilities. In Santa Fe Minerals, Inc. v. BEPCO, L.P. (*In re* 15375 Mem. Corp.), 382 B.R. 652, 166 O.&G.R. 162 (Bankr. D. Del. 2008), *as clarified by* 386 B.R. 548 (Bankr. D. Del. 2008), the court dealt with the impact of the bankruptcy laws, a corporate dissolution and a settlement by one of the former operators on a remediation claim by a landowner showing improper pit disposal operations and contamination of the aquifer. The decision of the bankruptcy judge was reversed in BEPCO, L.P. v. 15375 Mem’l Corp. (*In re* 15375 Mem’l Corp.), 400 B.R. 420, 168 O.&G.R. 374 (D. Del. 2009), where the court determined that the bankruptcy filings should have been dismissed because they were an attempt to gain an advantage over other parties in the pending Louisiana pollution/contamination cases. [↑](#footnote-ref-94)
94. 86Codified at La. R.S. 30:29, 29.1, 2015.1(L). [↑](#footnote-ref-95)
95. 87M. J. Farms, Ltd. v. Exxon Mobil Corp., 07-2371 (La. 7/1/08), 998 So. 2d 16. [↑](#footnote-ref-96)
96. 88998 So. 2d at 29. For a somewhat different view of the procedures to be followed under Act 312, see Houssiere v. Asco USA, 2012-791 (La. App. 3 Cir. 1/16/13), 108 So. 3d 797; Germany v. ConocoPhillips Co., 07-1145 (La. App. 3 Cir. 3/5/08), 980 So. 2d 101, 167 O.&G.R. 577; Duplantier Family P’ship v. BP Amoco (La. App. 4 Cir. 5/16/07), 955 So. 2d 763, *writs denied*, 964 So. 2d 367 (La. 2007); Brownell Land Co., L.L.C. v. Oxy USA Inc., 538 F. Supp. 2d 954 (E.D. La. 2007). [↑](#footnote-ref-97)
97. 89998 So. 2d at 29. In Petry v. R360 Petry v. R360 Envtl. Sols. of La. L L C, 2020 U.S. Dist. LEXIS 206643 (W.D. La. Nov. 4, 2020), the court concluded that Act 312, specifically La. Rev. Stat. 30:29, did not cover alleged contamination from injection wells dealing with non-***oil*** and gas-related waste. [↑](#footnote-ref-98)
98. 90State v. Louisiana Land & Exploration Co., 110 So. 3d 1038 (La. 2013). [↑](#footnote-ref-99)
99. 91State v. Louisiana Land & Exploration Co., 241 So. 3d 1258 (La. App. 2018), *aff’d*, 2021 La. LEXIS 1488 (La. June 30, 2021), *motion for reh’g granted*, 326 So. 3d 257, 2021 La. LEXIS 1927 (2021), *opinion on reh’g*, 339 So. 3d 1163 (La. 2022). The final opinion was highly fractured. There was a per curiam opinion, a concurring opinion by Justice McCallum, a partial dissent by Chief Justice Weimer, a partial concurring and partial dissenting opinion by Justice Hughes and a partial concurring and partial dissenting opinion by Justice Crichton. [↑](#footnote-ref-100)
100. 91.1State v. Louisiana Land & Exploration Co., 2021 La. LEXIS 1488 (La. June 30, 2021), *motion for reh’g granted*, 326 So. 3d 257, 2021 La. LEXIS 1927 (2021), *opinion on reh’g,* 339 So. 3d 1163 (La. 2022). [↑](#footnote-ref-101)
101. 91.2State v. Louisiana Land & Exploration Co., 339 So. 3d 1163, 1168–69 (La. 2022). The Louisiana Supreme Court affirmed the court of appeals decision relating to the finding that the plaintiff Vermillion Parish School Board’s tort claims had not prescribed. *Id.* at 1170–71. [↑](#footnote-ref-102)
102. 91.3339 So. 3d at 1168–69. The court relied on Terrebonne Parish School Board v. Castex Energy, Inc., 893 So. 2d 789 (2005) and Roman Catholic Church of the Archdiocese of New Orleans v. Louisiana Gas Services Co., 618 So. 2d 874 (La. 1993). [↑](#footnote-ref-103)
103. 91.4339 So. 3d at 1166. [↑](#footnote-ref-104)
104. 91.5State v. Louisiana Land & Exploration Co., 339 So. 3d 1163 (La. 2022). [↑](#footnote-ref-105)
105. 92Moore v. Denbury Onshore, LLC, 2016 U.S. Dist. LEXIS 11932 (W.D. La. Feb. 1, 2016), *motion for reconsideration granted in part*, 2016 U.S. Dist. LEXIS 25822 (W.D. La. Mar. 1, 2016). *See also* Hero Lands Co., LLC v. Chevron USA, Inc., 2023 La. App. LEXIS 388 (Mar. 7, 2023). [↑](#footnote-ref-106)
106. 93Sweet Lake Land & ***Oil*** Co. v. Oleum Operating Co., LC, 229 So. 3d 993 (La. App. 2017), *writ denied*, 2018 La. LEXIS 142 (Jan. 12, 2018). [↑](#footnote-ref-107)
107. 94229 So. 3d at 999. A similar result and analysis was reached in State v. Louisiana Land & Exploration Co., 241 So. 3d 1258 (La. App. 2018). [↑](#footnote-ref-108)
108. 95La. Rev. Stat. § 30:20(C)(5). [↑](#footnote-ref-109)
109. 95.1Sweet Lake Land & ***Oil*** Co., LLC v. Oleum Operating Co., LC, \_\_\_ So. 3d \_\_\_, 2021 La. App. LEXIS 1800 (La. App. Dec. 1, 2021), *writ granted in part*, 345 So. 3d 1022, 1023 (La. 2022), *on further remand*, 2022 La. App. LEXIS 2126 (La. App. Dec. 7, 2022), *writ denied*, 2023 La. LEXIS 449 (La. Mar. 7, 2023). The ultimate court of appeals decision found that attorney’s and expert’s fees were limited by La. Rev. Stat. 30:29 to those incurred in determining two issues, to wit, environmental damages and remediation of that damage under Act 312. [↑](#footnote-ref-110)
110. 96McEwen v. MCR, LLC, 368 Mont. 38, 2012 MT 319, 291 P.3d 1253, citing Sunburst Sch. Dist. No. 2 v. Texaco, Inc., 338 Mont. 259, 2007 MT 183, 165 P.3d 1079 and Lampi v. Speed, 362 Mont. 122, 2011 MT 231, 261 P.3d 1000. [↑](#footnote-ref-111)
111. 97Restatement (Second) of Torts, § 929, 291 P.3d at 1260–61. [↑](#footnote-ref-112)
112. 98*McEwen*, note 48 *supra*. In *McEwen*, the Supreme Court upheld a jury verdict awarding restoration cost damages. [↑](#footnote-ref-113)
113. 99291 P.3d at 1264. Colorado follows a similar approach to diminution in value versus restoration damages. Board of County Comm’rs v. Slovek, 723 P.2d 1309 (Colo. 1986). *In accord* Roman Catholic Church v. Louisiana Gas Serv. Co., 618 So. 2d 874 (La. 1993). [↑](#footnote-ref-114)
114. 100McNeill v. Burlington Resources ***Oil*** & Gas Co., 2007 NMCA 024, 141 N.M. 212, 153 P.3d 46, 167 O.&G.R. 188, *aff’d and remanded*, 2008-NMSC-022, 143 N.M. 740, 182 P.3d 121, 167 O.&G.R. 300. [↑](#footnote-ref-115)
115. 101153 P.3d at 49. The court found that one can plead both negligence and private nuisance as separate causes of action, although where one pleads and proves negligence, the measure of damages would be the same so where the trial court strikes the private nuisance claim, it is not reversible error. The court also interpreted Amoco Production Co. v. Carter Farms Co., 103 N.M. 117, 703 P.2d 894, 86 O.&G.R. 84 (1985) as not precluding the pleading of both causes of action, but merely recognizing that the jury could not find a private nuisance existed where the plaintiff did not allege such a cause of action. Language in *Carter Farms Co.*, however, suggests that since one must prove either negligence or unreasonable behavior to show a private nuisance, if a jury finds that the surface use has been reasonable and necessary, no private nuisance can be asserted. 703 P.2d at 896–97. [↑](#footnote-ref-116)
116. 102UJI 13 1819 NMRA. [↑](#footnote-ref-117)
117. 103153 P.3d at 52–53, citing Amoco Production v. Carter, note 53 *supra*, and Ruiz v. Varan, 110 N.M. 478, 797 P.2d 267 (1990). [↑](#footnote-ref-118)
118. 104153 P.3d at 54–55. The court cites Morsey v. Chevron, USA, Inc., 94 F.3d 1470, 1476 (10th Cir. 1996) for the general tests relating to permanent versus temporary injuries. [↑](#footnote-ref-119)
119. 105McNeill v. Burlington Res. ***Oil*** & Gas Co., 2008-NMSC-22, 143 N.M. 740, 182 P.3d 121, 167 O.&G.R. 300. [↑](#footnote-ref-120)
120. 106182 P.3d at 125. The court uses the phrase “cost of repair” rather than “cost of restoration” which is the more typical term used to describe the costs involved in bringing the surface back into the same condition it was prior to the ***oil*** and gas activities. [↑](#footnote-ref-121)
121. 107182 P.3d at 126. By refusing to admit that evidence in this case, the trial court committed reversible error. Thus, the remand for a new trial that was ordered by the court of appeals is affirmed. *Id.* at 126–27. [↑](#footnote-ref-122)
122. 108182 P.3d at 128–29. [↑](#footnote-ref-123)
123. 109Beck v. Northern Natural Gas Co., 170 F.3d 1018, 142 O.&G.R. 1 (10th Cir. 1999).

     The type of damages awarded in *Beck* is consistent with the general view that the party suffering the trespass may waive the tort and sue in assumpsit. Typically the damages under the assumpsit theory are measured by the fair rental value of the land being trespassed on. Ark Land Co. v. Harlan Lee Land, LLC, 2011 U.S. Dist. LEXIS 125926 (E.D. Ky. Oct. 31, 2011) (applying Virginia law). *See also* Preston Mining Co. v. Matney, 197 Va. 520, 90 S.E.2d 155 (1955); Raven Red Ash Coal Co. v. Ball, 185 Va. 534, 39 S.E.2d 231 (1946). [↑](#footnote-ref-124)
124. 110Cooper Industries, Inc. v. Leatherman Tool Group, Inc., 532 U.S. 424, 121 S. Ct. 1678, 149 L. Ed. 2d 674 (2001); BMW of North America, Inc. v. Gore, 517 U.S. 559, 116 S. Ct. 1589, 134 L. Ed. 2d 809 (1996).

     In Louisiana, under former La. Rev. Stat. 2315.3 in effect from 1984 to 1996, punitive damages were allowed where the defendant acted wantonly or with reckless disregard for public safety. In order to seek punitive damages, one has to show that a viable cause of action existed during the time period that former article 2315.3 was in effect. Prairie Land Co. v. Conoco Phillips Co., 2020 U.S. Dist. LEXIS 174128 (W.D. La. Sept. 22, 2020); Sweet Lake Land & ***Oil*** Co. LLC v. Exxon Mobil Corp., 2012 U.S. Dist. LEXIS 650 (W.D. La. Jan. 3, 2012).

     In Vance v. Enogex Gas Gathering, LLC, 2017 OK CIV APP 14, 393 P.3d 718, the court affirmed a punitive damages award in a pipeline leak case that was made pursuant to 23 Okla. Stat. Ann. § 9.1. [↑](#footnote-ref-125)
125. 111*See, e.g.,* TXO Prod. Corp. v. Alliance Resources Corp., 509 U.S. 443, 113 S. Ct. 2711, 125 L. Ed. 2d 366, 126 O.&G.R. 576 (1993) (slander of title damages in ***oil*** and gas litigation); *In re* Exxon Valdez, 270 F.3d 1215, 154 O.&G.R. 1 (9th Cir. 2001) ($5 billion punitive damage award for ***oil*** spill violates *Cooper* and *BMW*); Johansen v. Combustion Engineering, Inc., 170 F.3d 1320 (11th Cir. 1999) (reduction of punitive damage award from $45 million to $4.35 million required in case involving pollution from abandoned mine); McNeill v. Rice Eng’g & Operating, Inc., 133 N.M. 804, 70 P.3d 794, 2003-NMCA-078, 159 O.G.R. 1119, *cert. denied*, 133 N.M. 771, 70 P.3d 761 (N.M. 2003) (disposer of salt water entitled to summary judgment on the issue of punitive damages because evidence introduced insufficient to establish the required reckless or wanton conduct).

     Punitive damages may be awarded by an arbitration panel if such damages are allowed under state law. Bowen v. Amoco Pipeline Co., 254 F.3d 925, 150 O.&G.R. 234 (10th Cir. 2001).

     Punitive damages are not awarded for breach of contract claims, even though they may be analogous to tort claims for injuries to real or immovable property. Hazelwood Farm, Inc. v. Liberty ***Oil*** & Gas Corp., 844 So. 2d 380, 390–91, 158 O.&G.R. 35 (La. App. 3 Cir. Apr. 2, 2003), *writ denied*, 857 So. 2d 476 (La. 2003). [↑](#footnote-ref-126)
126. 112For cases dealing with the application of the discovery rule for causes of action relating to permanent damage to land, see Sewell v. Phillips Petroleum Co., 197 F. Supp. 2d 1160, 158 O.&G.R. 403 (W.D. Ark. 2002) (analyzes continuing trespass theory); ExxonMobil Corp. v. Lazy R Ranch, LP, 60 Tex. Sup. Ct. J. 471, 511 S.W.3d 538 (2017) (claims of surface and groundwater contamination barred by statute of limitations); Lahjani v. Merit Energy Co., LLC, 2022 Tex. App. LEXIS 6045 (Tex. App.—Houston [14th Dist. Aug. 18, 2022) (defendant met burden of proof to show that plaintiff was aware of the alleged contamination more than two years prior to filing suit thereby refuting claim that discovery rule should apply); Mustafa v. Americo Energy Resources, LLC, 650 S.W.3d 760 (Tex. App.—Houston [14th Dist.] 2022); FLST, Ltd. v. Explorer Pipeline Co., 2017 U.S. Dist. LEXIS 10605 (E.D. Tex. Jan. 25, 2017); 2017 U.S. Dist. LEXIS 35211 (E.D. Tex. March 13, 2017); 2017 U.S. Dist. LEXIS 71805 (E.D. Tex. May 11, 2017); Exxon Corp. v. Emerald ***Oil*** & Gas Co., 54 Tex. Sup. Ct. J. 342, 331 S.W.3d 419, 171 O.&G.R. 710 (2010), *rev’g and rendering* 228 S.W.3d 166, 171 O.&G.R. 703 (Tex. App.—Corpus Christi 2005) (fraudulent concealment doctrine and discovery rule not available where party had actual knowledge of facts more than 2 years prior to filing of suit for common law waste, negligence per se and negligent misrepresentation); Bayouth v. Lion ***Oil*** Co., 27 Tex. Sup. Ct. J. 369, 671 S.W.2d 867, 80 O.&G.R. 426 (Tex. 1984); Boyles v. Exxon Corp., 2005 Tex. App. LEXIS 1039 (Tex. App.—Corpus Christi Feb. 10, 2005) (discovery rule and fraudulent concealment theory not applicable where owner of overriding royalty had actual knowledge of alleged wasteful activity by a former lessee more than four years prior to filing the action); Mitchell Energy Corp. v. Bartlett, 958 S.W.2d 430, 139 O.&G.R. 126 (Tex. App.—Ft. Worth 1997, no writ); Terrebonne Parish School Board v. Mobil ***Oil*** Corp., 310 F.3d 870, 157 O.&G.R. 1167 (5th Cir. 2002); Terrebonne Parish School Board v. Columbia Gulf Transmission Co., 290 F.3d 303, 158 O.&G.R. 1, *reh’g and reh’g en banc denied*, 44 Fed. Appx. 655 (5th Cir. 2002); Boudreaux v. Jefferson Island Storage & Hub, LLC, 255 F.3d 271, 157 O.&G.R. 61 (5th Cir. 2001); Terrebonne Parish School Board v. Bass Enterprises Production Co., La. App. 2002-2119, 852 So. 2d 541, 161 O.&G.R. 190 (La. App. 1 Cir. 8/8/03) (trial court’s decision finding cause of action prescribed was reversed because of lack of joinder of indispensable party); Hazelwood Farm, Inc. v. Liberty ***Oil*** & Gas Corp., La. App. 2002-266, 844 So. 2d 380, 389, 158 O.&G.R. 35 (La. App. 3 Cir. Apr. 2, 2003), *writ denied*, 857 So. 2d 476 (La. 2003); Amoco Production Co. v. Texaco, Inc., La. App. 2002-240, 838 So. 2d 821, 159 O.&G.R. 242 (La. App. Jan. 29, 2003).

     In Illinois, the courts apply both the continuing tort or continuing violation rule and the discovery rule in cases involving underground trespass and nuisance claims. Finite Resources, Ltd. v. DTE Methane Resources, LLC, 521 F. Supp. 3d 754 (S.D. Ill. 2021), *aff’d on other grounds*, 44 F.4th 680 (7th Cir. 2022); City of Evanston v. Texaco, Inc., 19 F. Supp. 3d 817, 827 (N.D. Ill. 2014).

     In Louisiana, the doctrine of *contra non valentam* is the civil law analog of the discovery rule in common law jurisdictions. In *Marin v. Exxon Mobil Corp.*, 48 So. 3d 234, (La. 2010), the Louisiana Supreme Court found that the lower courts had erred in applying the doctrine of *contra non valentem* to suspend prescription on plaintiffs’ tort claims. Moreover, the oilfield contamination at issue did not constitute a continuing tort, so plaintiffs’ tort claims had prescribed, and so had their claim to punitive damages. Because mineral and surface leases were still in effect as to one group of plaintiffs (the “Marin plaintiffs”), Exxon owed a duty to remediate the contaminated property, which they had failed to do. The court interpreted the lessee’s remediation duties under its lease and the Mineral Code to be co-extensive with the restoration duty of Act 312 of 2006, La. R.S. 30:29, 29.1, and 2015.1(L), as applied under Rule 29B of the Louisiana Office of Conservation.

     The *Marin* decision applying the one-year prescription period for tort claims relating to damages caused to the surface estate was followed in Lexington Land Development, LLC v. Chevron Pipeline Co., 327 So. 3d 8 (La. App. 2021), *reh’g denied*, 2021 La. App. LEXIS 1067 (July 13, 2021), *writs denied*, 2021 La. LEXIS 2172 (La. Nov. 17, 2021); Hogg v. Chevron USA, Inc., 45 So. 3d 991 (La. 7/6/10); and Kinder Gas, Inc. v. Reynolds, 84 So. 3d 695 (La. App. 3 Cir. 2/1/12). The court in *Kinder Gas* found that the *contra non valentem* doctrine was not applicable to toll the running of the prescriptive period because the lessors knew about the alleged contamination that had occurred pursuant to a long-term surface lease. *See also* Rebstock v. Seismic Exch., Inc., 2013 La. App. Unpub. LEXIS 663 (1st Cir. Nov. 1, 2013).

     In State v. Louisiana Land & Exploration Co., 339 So. 3d 1163 (La. 2022), the court upheld the trial court finding that the discovery rule should apply to the plaintiff’s strict liability claim involving oilfield contamination.

     In Constance v. Austral ***Oil*** Exploration Co., 2014 U.S. Dist. LEXIS 150141 (W.D. La. Oct. 2, 2014), the court dismissed a pollution claim against an operator who had plugged and abandoned several wells on the lease in 1998 on prescription grounds because the plaintiff was unable to show what the *contra non valentem* doctrine should apply.

     In Swift Energy Operating, LLC v. Regency Field Services, LLC, 608 S.W.3d 214 (Tex. App.—San Antonio 2019), *replacing* 2019 Tex. App. LEXIS 2867 (Tex. App.—San Antonio Apr. 10, 2019), *rev’d and remanded*, 622 S.W.3d 807 (Tex. 2011), the court of appeals dismissed negligence, gross negligence and nuisance claims by a mineral owner/lessee as to some leases it owned because it had actual notice of the migration of injected fluids across boundary lines causing damage to producing wells more than two years prior to the filing of the claims. As to other leases where such notice did not occur, the tort claims should proceed to trial. Upon appeal to the Texas Supreme Court, the dismissal of the tort claims as to that one lease was reversed since the court said the record at this point in the proceedings did not prove that the legal injury relating to the negligence and nuisance claims occurred more than two years from the date the litigation was filed.

     In Alabama, there is a rule of repose, separate from the statute of limitations, that bars suits brought more than 20 years from when the actions giving rise to the claim occurred. The rule of repose, however, does not depend on the accrual of the cause of action, nor are considerations relating to the tolling of the statute under the discovery rule applicable. In Morgan v. Exxon Corp., 869 So. 2d 446, 159 O.&G.R. 829 (Ala. 2003), the court found that various claims made against an ***oil*** and gas lessee for damage to the surface were barred by the operation of the rule of repose. The court further found that the Comprehensive Environmental Response, Compensation and Liability Act’s provisions that preempt certain types of state statutes of limitations (42 U.S.C. § 9658(a)(1)) were not applicable because the alleged damages in this case did not involve the discharge of hazardous materials and thus would not be covered by the general CERCLA regulatory program.

     The determination as to whether a trespass or nuisance is a continuing injury will also impact the application of the statute of limitations. In cases where there is a continuing injury the statute of limitations will not bar recovery although damages may be limited to the limitations period. *See e.g.*, Rose v. Tennessee Gas Transmission Co., 2009 U.S. Dist. LEXIS 114451 (E.D. La. 2009); Cook v. Exxon Corp., 145 S.W.3d 776, 167 O.&G.R. 27 (Tex. App.—Texarkana 2004); Burke v. Union Pacific Resources Co., 138 S.W.3d 46 (Tex. App.—Houston [1st Dist.] 2004, writ denied); Walton v. Phillips Petroleum Co., 65 S.W.3d 262, 272–73, 152 O.&G.R. 310 (Tex. App.—El Paso 2001, writ denied); Tennessee Gas Transmission Co. v. Fromme, 153 Tex. 352, 269 S.W.2d 336 (1954). [↑](#footnote-ref-127)
127. 113Exxon Corp. v. Emerald ***Oil*** & Gas Co., L.C., 54 Tex. Sup. Ct. J. 342, 331 S.W.3d 419, 171 O.&G.R. 710 (2010), *rev’g and rendering* 228 S.W.3d 166, 171 O.&G.R. 703 (Tex. App.—Corpus Christi 2005).

     In Cornett v. Magnum Hunter Production Co., 585 F. Appx. 316 (6th Cir. 2014), the court dismissed a claim for common law waste under Ky. Rev. Stat. § 381.350. Plaintiff argued that although the lessee was producing natural gas it was not paying any royalty because the post-production costs exceeded the depressed price. The court found no waste given the fact that the lessee was authorized to produce the natural gas and contractually obligated only to pay royalty on the value of the gas at the well. [↑](#footnote-ref-128)
128. 114Tex. Civ. Prac. & Rem. Code § 16.003(a). [↑](#footnote-ref-129)
129. 115For another case dealing with oilfield contamination and the discovery rule, see DBMS Investments, L.P. v. ExxonMobil Corp., 2009 Tex. App. LEXIS 4140 (Tex. App.—Corpus Christi June 11, 2009).

     Due to heightened pleading requirements for fraud and/or fraudulent concealment as it relates to the tolling of the statute of limitations, a number of Louisiana actions relating to alleged oilfield contamination have been dismissed pleadings based on the lack of such specific allegations. Alford v. Chevron U.S.A., Inc., 2014 U.S. Dist. LEXIS 44621 (E.D. La. Apr. 1, 2014); Alford v. Anadarko E&P Onshore LLC, 2014 U.S. Dist. LEXIS 55724 (E.D. La. Apr. 22, 2014); Guthrie v. Plains Res. Inc., 2013 U.S. Dist. LEXIS 80670 (W.D. La. June 5, 2013); Martin v. Tesoro Corp., 2012 U.S. Dist. LEXIS 71392 (W.D. La. May 21, 2012).

     Where a party is asserting damage to the surface estate caused by subsidence, the cause of action does not accrue until the subsidence occurs, rather than when the mining took place. Gillespie Cmty. Unit Sch. Dist. No. 7 v. Union Pac. R.R. Co., 2015 Ill. App. (4th) 140877, 398 Ill. Dec. 245, 43 N.E.3d 1155 (pet. denied).

     In Max ***Oil*** Co. v. Range Production Co., LLC, 681 Fed. Appx. 710 (10th Cir. 2017), the court refused to apply the discovery rule to a case where an owner of a well complained that the defendant’s operations at a deeper depth interfered with its production from the shallower formation. Oklahoma has different statutes of limitation for continuing and non-continuing trespass claims.

     In Marcum v. Columbia Gas Transmission, LLC, 423 F. Supp. 3d 115 (E.D. Pa. 2019), the court found that under Pennsylvania law an independent cause of action does not exist for fraudulent concealment of allegedly tortious behavior. *See also* Marcum v. Columbia Gas Transmission, LLC, 2023 U.S. Dist. LEXIS 32706 (E.D. Pa. Feb. 28, 2023). [↑](#footnote-ref-130)
130. 116Singleton v. Northfield Insurance Co., 826 So. 2d 55, 157 O.&G.R. 69 (La. App. May 15, 2002)*, writ denied,* 825 So. 2d 1200 (La. Sept. 30, 2002).

     In the aftermath of *Singleton*, Burlington Resources, a non-operating working interest owner, sought reimbursement from its liability insurer after it made payment to the operator whose negligence caused the injuries. In Burlington Resources, Inc. v. United National Insurance Co., 481 F. Supp. 2d 567 (E.D. La. 2007), the court found that the contractually-imposed indemnification liability provision of Burlington fell within the terms of the excess liability policy and thus the insurer must reimburse Burlington for the payments it had made to the operator.

     It is beyond the scope of this Treatise to discuss the issues surrounding mass tort litigation and Fed. R. Civ. P. 23 but there are a number of cases dealing with class certification issues in mass tort situations. *See, e.g.*, Andrews v. Plains All American Pipeline, LP, 2018 U.S. Dist. LEXIS 177797 (C.D. Cal. Apr. 17, 2018), *rev’d*, 777 Fed. Appx. 889 (9th Cir. 2019); Cheverez v. Plains All American Pipeline, LP, 2016 U.S. Dist. LEXIS 191367 (C.D. Cal. Feb. 25, 2016) (both cases dealing with an onshore ***oil*** pipeline spill where the ***oil*** ended up in the Pacific Ocean). [↑](#footnote-ref-131)
131. 117AJ & K Operating Co. v. Smith, 355 Ark. 510, 140 S.W.3d 475, 162 O.&G.R. 661 (Ark. 2004). [↑](#footnote-ref-132)