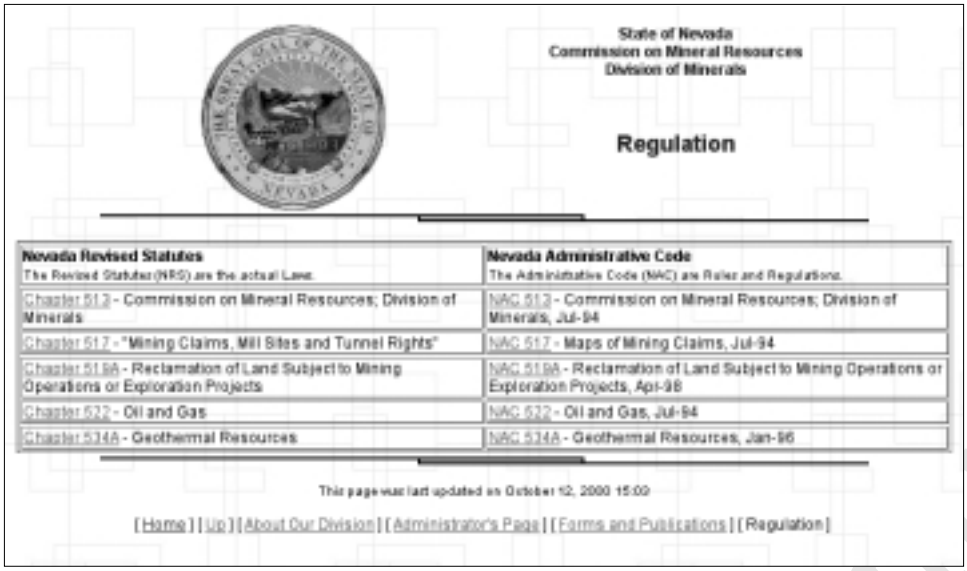

State of Nevada
Commission on Mineral Resources
Division of Minerals

Regulation

Nevada Revised Statutes The Revised Statutes(NRS) are the actual Laws.	Nevada Administrative Code The Administrative Code (NAC) are Rules and Regulations.
Chapter 513 - Commission on Mineral Resources; Division of Minerals	NAC 513 - Commission on Mineral Resources; Division of Minerals, Jul-94
Chapter 517 - "Mining Claims, Mill Sites and Tunnel Rights"	NAC 517 - Maps of Mining Claims, Jul-94
Chapter 519A - Reclamation of Land Subject to Mining Operations or Exploration Projects	NAC 519A - Reclamation of Land Subject to Mining Operations or Exploration Projects, Apr-98
Chapter 522 - Oil and Gas	NAC 522 - Oil and Gas, Jul-94
Chapter 534A - Geothermal Resources	NAC 534A - Geothermal Resources, Jan-96

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Chapter 2
Extent of Real Estate Interests

Broad acres are a patent of nobility; and no man but feels more of a man in the world if he have a bit of ground that he can call his own. However small it is on the surface, it is four thousand miles deep; and that is a very handsome property.

My Summer Is a Garden
Charles Dudley Warner (1871)

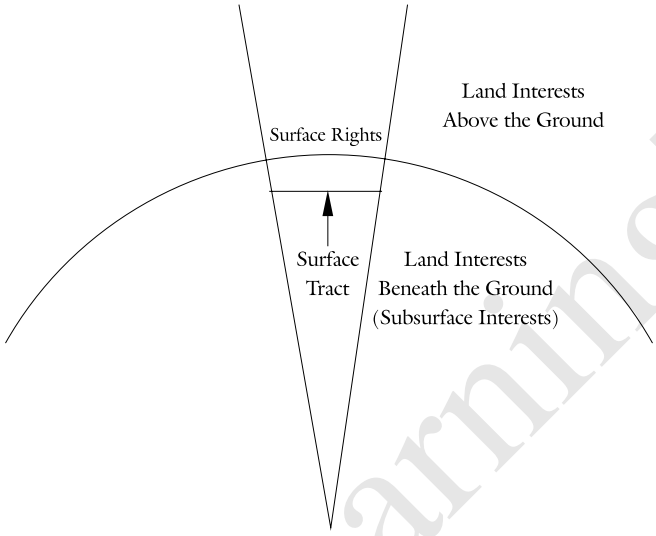
An old maxim in property law is "The owner of the soil owns also to the sky and to the depths." Land ownership involves so much more than surface rights. For example, the Trump Tower in New York City is built in the air rights once owned by Tiffany's. Tiffany's retained its surface rights but conveyed its air rights in its land to Donald Trump. This chapter answers the following questions: What do I own when I hold title to land? Where does my ownership interest start? Where does it end? Land ownership has been depicted as a wedge that runs from the core of the earth to the "heavens," as shown in Figure 2.1. Land interests include the surface, that which is below the surface, and the air that extends above the surface parcel.

LAND INTERESTS ABOVE THE SURFACE

Air Rights

The discussion of **air rights,** or the land interest above the surface, can be divided into two topics: (1) a determination of who can use the air and to what extent, and (2) a determination of what air interests can be transferred.

FIGURE 2.1 *Extent of Land Ownership*



WHO CAN USE THE AIR?

In dealing with topic 1, it must first be noted that the airspace of all property owners is used by others. In addition to constant air traffic in the airspace above property, manufacturers, processors, and auto drivers use the airspace in that their gases, smokes, and fumes invade the airspace in many pieces of property. Land owners enjoy limited protections in these types of uses through environmental regulation (see Chapter 20), but specific relief for individual landowners often requires them to bring suits in nuisance or trespass. (The concepts of nuisance and trespass are discussed later in this chapter.) The following case is an example of how much the airspace of another can be used and deals with the rights of landowners in preventing and controlling the use of their airspace.

United States v. Causby

328 U.S. 256 (1946)

Facts

Mr. and Mrs. Causby (referred to as respondents) owned 2.8 acres of land near an airport outside of Greensboro, North Carolina. On the property were a house where the Causbys resided and various outbuildings used for raising chickens. The end of the airport's northwest–southwest runway was 2,220 feet from the Causbys' barn and 2,275 feet from their house. The path of glide to the runway passed directly over their property at 67 feet above the house, 63 feet above the barn, and 18 feet above the highest tree. The United States government leased the airstrip in 1942, with the lease carrying renewal provisions until 1967. Bombers, transports, and fighters all used the airfield. At times the airplanes came close enough to blow old leaves off trees, and the noise of

the airplanes was startling. As a result of the noise, six to 10 of the Causbys' chickens were killed each day by "flying into the walls from fright." After losing 150 chickens, the Causbys gave up their business. They could no longer sleep well and became nervous and frightened.

The Causbys sued the United States government on the grounds that the United States was taking their airspace by eminent domain without compensating them. The lower court found for the Causbys, and the United States government appealed.

Judicial Opinion

Douglas, Justice. The United States relies on the Air Commerce Act of 1926. Under those statutes the United States has "complete and exclusive national sovereignty in the air space" over this country. They grant any citizen of the United States "a public right of freedom of transit in air commerce through the navigable air space of the United States."

And "navigable air space" is defined as "airspace above the minimum safe altitudes of flight prescribed by the Civil Aeronautics Authority." And it is provided that "such navigable airspace shall be subject to a public right of freedom of interstate and foreign air navigation." It is, therefore, argued that since these flights were within the minimum safe altitudes of flight which had been prescribed, they were an exercise of the declared right of travel through the airspace. The United States concludes that when flights are made within the navigable airspace without any physical invasion of the property of the landowners, there has been no taking of property. It is ancient doctrine that at common law ownership of the land extended to the periphery of the universe—*Cujus est solum ejus est usque ad coelum.* But that doctrine has no place in the modern world. The air is a public highway, as Congress has declared. Were that not true, every transcontinental flight would subject the operator to countless trespass suits. Common sense revolts at the idea. To recognize such private claims to the airspace would clog these highways, seriously interfere with their control and development in the public interest, and transfer into private ownership that to which only the public has a just claim.

But the general principle does not control the present case. For the United States conceded on oral argument that if the flights over respondents' property rendered it uninhabitable, there would be a taking compensable under the Fifth Amendment. It is the owner's loss, not the taker's gain, which is the measure of the value of the property taken. Market value fairly determined is the normal measure of the recovery. And that value may reflect the use to which the land could readily be converted, as well as existing use. If, by reason of the frequency and altitude of the flights, respondents could not use this land for any purpose, their loss would be complete. It would be as complete as if the United States had entered upon the surface of the land and taken exclusive possession of it.

The path of glide for airplanes might reduce a valuable factory site to grazing land, an orchard to a vegetable patch, a residential section to a wheat field. Some value would remain. But the use of the airspace immediately above the land would limit the utility of the land and cause a diminution in its value.

We have said that the airspace is a public highway. Yet it is obvious that if the landowner is to have full enjoyment of the land, he must have exclusive control of the immediate reaches of the enveloping atmosphere. Otherwise buildings could not be erected, trees could not be planted, and even fences could not be run. The principle is recognized when the law gives a remedy in case overhanging structures are erected on adjoining lands. The landowner owns at least as much of the space above the ground as he can occupy or use in connection with the land. The fact that he does not occupy it in a physical sense—by the erection of buildings and the like—is not material. As we have said, the flight of airplanes, which skim the surface but do not touch it, is as much an appropriation of the use of the land as a more conventional entry upon it. We would not doubt that if the United States erected an elevated railway over respondents' land at the precise altitude where its planes now fly, there would be a partial taking even though none of the supports of the structure rested on the land. The reason is that there would be an intrusion so immediate and direct as to subtract from the owner's full enjoyment of the property and to limit his exploitation of it. While the owner does not in any physical manner occupy that stratum of airspace or make use of it in the conventional sense, he does use it in somewhat the same sense that space left between buildings for the purpose of light and air is used. The superadjacent airspace at this low altitude is so close to the land that continuous invasions of it affect the use of the surface of the land itself. We think that the landowner, as an incident to his ownership, has a claim to it and that invasions of it are in the same category as invasions of the surface.

The airplane is part of the modern environment of life, and the inconveniences which it causes are normally not compensable under the Fifth Amendment. The airspace, apart from the immediate reaches above the land, is part of the public domain. We need not determine at this time what those precise limits are. Flights over private land are not a taking, unless they are so low and so frequent as to be a direct and immediate interference with the enjoyment and use of the land. We need not speculate on that phase of the present case. For the findings of

the Court of Claims plainly establish that there was a diminution in value of the property and that the frequent, low-level flights were the direct and immediate cause. We agree with the Court of Claims that a servitude has been imposed upon the land.

Affirmed.

Case Questions

1. What type of business did the Causbys operate?
2. How close was the airstrip to the Causbys' home?
3. How close to the Causbys' land were the airplanes (in altitude) upon their runway approach?
4. What happened to the Causbys' chickens as a result of the airplanes?
5. What happened to the Causbys as a result of the airplanes?
6. Are the Causbys suing for nuisance?
7. What statute does the government say is controlling?
8. Can the use of airspace diminish the value of the surface of the land?
9. Do the Causbys win?

The *Causby* case illustrates the limitations on the use of airspace. The landowner is subject to use of the airspace by air traffic but is entitled to compensation in the event that the airspace is used in such a manner as to prevent use of the surface property. Other uses of airspace can interfere with the land of another. For example, when the eaves of a building or branches from a tree located on one parcel of land hang over onto another landowner's parcel of land, there is a taking of airspace. In the *Causby* case, the court mentioned that a remedy is available for overhang. The property owner affected by the overhang can bring suit for a court order requiring the removal of the eaves or branches, and in some states is even permitted to unilaterally end the invasion by clipping the tree branches.

WHAT AIR RIGHTS CAN BE TRANSFERRED?

The second aspect of landowners' rights in the air covers the ability of landowners to transfer interests in the air located above their property. The air above property is divided into two areas, the **column lot** and the **air lot.** The column lot comprises everything between the earth's surface and an imaginary plane 23 feet above the surface, and the air lot comprises everything above the 23-foot plane. It is possible for landowners to transfer some interest in their column or air lot.

Practical Tip

Check property for noise, air activity, and overhangs. Determine flight paths and plans for construction of airports, runways, and possible expansion of airport capacity and facilities.

For example, both the column lot and the air lot could be sold for the construction of a large building. Those constructing the building need only have title to or an easement (see Chapter 3) for small segments of the land surface for the placement of beams or the steel girder foundations of the building. In these types of transfers of column and air lots, landowners retain title to the surface but have conveyed their air rights or a portion thereof.

The construction and sale of condominiums is an example of the use and transfer of airspace. When buyers purchase condominiums, they are actually purchasing the airspace located between the walls of their particular units. Ground or surface ownership is not conveyed as part of the title, but the condominium owners do hold real property interests. (See Chapter 11 for a complete discussion of condominiums.)

http://

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In addition to the previously mentioned Trump Tower, there are several other examples of large buildings constructed through the use of airspace. In Chicago, the Prudential Mid-America building is built in both the air and column lots above

the Illinois Central Terminal. The 52-story Prudential Tower is built in the column and air lots above Boston. In New York, the 59-story Met Life building is built in the column and air lots above Grand Central Station. These examples illustrate that dividing air and surface ownership enables maximum use of real property. Transfers of air rights have become so common that many states are reviewing the Model Airspace Act for possible adoption to govern these transfers.

Practical Tip

The sale of air rights has become more popular in areas where upward construction is the only means for growth and expansion of existing facilities. Building height limitations in some areas, such as San Francisco, increase the value of limited air space. Creative solutions to the space problems businesses face include contacting current surface holders to determine their interest in the transfer of air rights.

The Right to Light

Corresponding to the ownership of air as part of a real property interest is the ownership of light. In this era of energy-technology development, the issue of who owns the light is becoming a critical one. Suppose the following hypothetical situation has occurred:

> *Anna and Beverly are neighbors. Anna has installed a series of solar collectors on the roof of her home. The collectors are positioned so that Anna obtains maximum efficiency in the use of the sun. However, Beverly has decided to plant several trees for backyard shade and within three years of planting, the now tall trees are interfering with the collection of sunlight by Anna's collectors.*

In the absence of any statutory right and under common law, Anna has no legal rights against Beverly unless Anna can establish that Beverly's conduct was malicious and done with the intent of obstructing light from the collectors.

Many states have passed statutory protections for the right to light, and New Mexico (N.M.S.A. §§ 47-3-1 *et seq.*) and Wyoming (W.S.A. §§ 34-22-101 *et seq.*) both grant a statutory right to sunlight. Under the statutes, the first user of light for solar energy purposes acquires the right to unobstructed continued use. Other states have passed **solar easement laws** that permit the execution and recognition of easements for the protection of solar access.[1] These easement laws do not, however, create or protect solar rights. Some states have encouraged zoning as a tool to be used to incorporate solar access considerations.[2] Other states have enacted statutes that permit solar energy users to petition administrative review boards when adjoining landowners refuse to negotiate solar access easements.[3] Finally, California applies the law of easements to solar easements that meet the requirements of the statute (Cal. Civ. Code 801.5).

In California, deed restrictions or covenants that prohibit or restrict the installation of solar energy systems are void and unenforceable (Cal. Civ. Code § 714). Presently, proposed uniform laws on solar rights and solar energy systems are being developed for use by state legislators in regulating this area of land ownership.

The courts have undertaken some protection for solar rights through the use of property theories. In *Prah v. Maretti*, 321 N.W.2d 182 (Wis. 1982), the court held, "The law of private nuisance is better suited to resolve landowners' disputes

1. California, Colorado, Florida, Georgia, Idaho, Illinois (although *O'Neill v. Brown*, 609 N.E.2d § 55 Ill 1995 held that Illinois was not a solar easement state despite its comprehensive solar energy Act), Kansas, Kentucky, Maine, Maryland, Minnesota, New Jersey, North Dakota, and Virginia.
2. Connecticut, Minnesota, Oregon, and Utah. Note: Oregon affords considerable authority to planning commissions in treating rights for solar systems.
3. Iowa and Wisconsin.

about property development in the 1980s than is a rigid rule which does not recognize a landowner's interest in access to sunlight."

At common law, the **Doctrine of Ancient Lights** provided protection for the use of light. Under the doctrine, anyone who used the light for an uninterrupted period of 20 years was entitled to protection for use of that light, and obstruction was prohibited. However, this doctrine has been rejected by the American courts, with most of them following the ruling set forth in the following landmark light-obstruction case.

Fontainebleau Hotel Corp. v. Forty-Five Twenty-Five, Inc.

114 So.2d 357 (Fla. 1959)

Facts

The Fontainebleau, a luxury hotel, was constructed in Miami facing the Atlantic Ocean in 1954. In 1955, the Eden Roc, another luxury hotel, was constructed adjoining the Fontainebleau and also facing the Atlantic Ocean. Shortly after the construction of the Eden Roc in 1955, the Fontainebleau undertook the construction of a 14-story addition to extend 160 feet in height and 416 feet in length running from east to west. During the winter months from about two in the afternoon and for the remainder of the day, the shadow of the addition would extend over the cabana, swimming pool, and sunbathing areas of the Eden Roc.

The Eden Roc (Forty-Five Twenty-Five Corp., plaintiff/appellee) brought suit against the Fontainebleau Hotel Corp. (defendant/appellant) to stop construction of the addition after eight stories had been built. The Eden Roc alleged the construction would interfere with its sunlight, cast a shadow, and interfere with the guests' use and enjoyment of the property. The Eden Roc further alleged the construction of the addition was done with malice. The trial court found for Eden Roc. Fontainebleau appealed.

Judicial Opinion

Per Curiam. It is well settled that a property owner may put his own property to any reasonable and lawful use, so long as he does not thereby deprive the adjoining landowner of any right of enjoyment of his property which is recognized and protected by law, and so long as his use is not such a one as the law will pronounce a nuisance.

No American decision has been cited, and independent research has revealed none, in which it has been held that—in the absence of some contractual or statutory obligation—a landowner has a legal right to the free flow of light and air across the adjoining land of his neighbor. Even at common law, the landowner had no legal right, in the absence of an easement or uninterrupted use and enjoyment for a period of 20 years, to unobstructed light and air from the adjoining land.

There being, then, no legal right to the free flow of light and air from the adjoining land, it is universally held that where a structure serves a useful and beneficial purpose, it does not give rise to a cause of action, either for damages or for an injunction even though it causes injury to another by cutting off the light and air and interfering with the view that would otherwise be available over adjoining land in its natural state, regardless of the fact that the structure may have been erected partly for spite.

We see no reason for departing from this universal rule. If, as contended on behalf of plaintiff, public policy demands that a landowner in the Miami Beach area are [*sic*] to refrain from constructing buildings on his premises that will cast a shadow on the adjoining premises, an amendment of its comprehensive planning and zoning ordinance, applicable to the public as a whole, is the means by which such purpose should be achieved.

The record affirmatively shows that no statutory basis for the right sought to be enforced by plaintiff exists. The so-called Shadow Ordinance enacted by the City of Miami Beach at plaintiff's behest was held invalid in *City of Miami Beach v. State ex rel. Fontainebleau Hotel Corp.* It also affirmatively appears that there is no possible basis for holding that plaintiff has an easement for light and air, either express or implied, across defendant's property, nor any prescriptive right thereto—even if it be assumed, *arguendo,* that the common-law right of prescription as to

"ancient lights" is in effect in this state. And from what we have said heretofore in this opinion, it is perhaps superfluous to add that we have no desire to dissent from the unanimous holding in this country repudiating the English doctrine of ancient lights.

Reversed.

Case Questions

1. Who owns the Eden Roc?
2. Who brought the original suit?
3. Why was the suit brought?
4. Will the court recognize the Doctrine of Ancient Lights?
5. Will the court recognize an easement?
6. What remedy does the court suggest?
7. Who wins on appeal?

Today, some courts have begun to use a theory of prescriptive easements (see Chapter 3) or one of nuisance (discussed later in this chapter) to afford some protection for a landowner's light.

However, there are still only limited statutory and judicial protections afforded for solar access, so it is easy to conclude that parties desiring to maintain rights to light should do so through the execution of private agreements with adjoining landowners who will give them easements for such rights. Some mortgage lenders that are lending for property with solar panels will require such easements to be obtained before the mortgage money will be advanced to the borrower. However, in spite of the need for such easements, many parties do not take the time to protect their rights. Recent surveys reveal that 95 percent of all owners of solar energy systems have not obtained easements for the protection of sunlight.

If an easement for light is executed, the document should carefully specify the extent of the easement. Stating the purpose (for solar panels, windows, or a swimming pool) of the easement in the document helps indicate the intent of the parties as to the extent and scope of the easement. Including the times of day when the sun is to be unobstructed will make the rights of the parties clear and can limit the burden on the adjoining land. An easement may be needed from more than just the adjoining landowners because light obstructions can come from larger structures located some distance away. Establishing rights and remedies for obstruction in the parties' agreement can prevent litigation later. The agreement should set forth in detail the types of structures (height, width, and so on) that cannot be constructed. Finally, every agreement and easement should comply with any statutory restrictions.

Practical Tip

Before buying, selling, or listing property, ask the following questions and find answers:

1. Does the home have solar reliance, passive or active?
2. Are the solar components in compliance with the CC&Rs?
3. Do the CC&Rs permit installation of solar devices?
4. Are there restrictions in the CC&Rs on expansion of solar units?
5. Are there obstructions or potential obstructions for the solar units (growing trees; possible construction)?
6. Does an easement for light exist?
7. Can I get an easement for light?
8. Are there statutory protections for light access?
9. Is there backup power for the solar panels and system?

Homeowners' associations and the conditions, covenants, and restrictions (CC&Rs) for subdivisions should address the issues of type, attachment, and aesthetics of solar units. The following language is an example of CC&R restrictions on solar devices upheld in California (*Palos Verdes Homes Ass'n. v. Rodman,* 182 Cal. App.3d 324, 227 Cal. Rptr. 81 [1986]):

> 1. Solar Units not on the roof should be maintained a minimum of 5 ft from the property line and concealed from the neighboring view, and a fence or wall of sufficient height to accomplish same may be appropriate.
> 2. Solar Units on a roof should be within the wall line of the structure.

http://
Visit the Florida Solar Energy Center at: **http://www.fsec.ucf.edu/**.

However, the Art Jury may require more roof area between solar unit and roof edge if the roof overhang is minimal. . . . 4. Solar Units should be in or below the plane or roofing material. 5. Solar Units should be constructed of rigid materials . . . The Art Jury may ask for alternative combinations in smaller groupings when large areas of grouped solar panels are found not to be aesthetically satisfactory.

Ethical Issue

While case law makes it clear that in the absence of any private agreement or statutory protection there is no right to light, individuals and their property values are affected greatly when an adjoining landowner obstructs light. While the obstruction may not interfere with solar access, the obstruction nonetheless affects the character of the property and perhaps its value. What are the ethical issues in a situation in which a new landowner or current owner of a neighboring property undertakes a construction project that interferes with the light of surrounding property owners? How should the conflict between the right to use their property and the rights of adjoining landowners be resolved? Are the issues different when, as in the *Eden Roc* case, the effect will be a loss of business and strength for the competitor/adjoining landowner? How do you feel about the statement, "All landowners assume the risk of changes in the use of surrounding property?"

Practical Tip

There is no right to a view. If property is purchased or carries additional value because of location and view, the owner's only protection from obstruction is an easement, height restrictions, or other covenants placed on the adjoining properties. There are no legal guarantees that a view will always be preserved.

Right to a View

Several recent cases have raised the issue not of the right to light, but the right to a view. Many resort homes and homes in high-rises or located near mountains, oceans, or other scenic vistas carry a premium price because of the view from the home's interior. Do landowners in these premium properties have any rights when construction on adjoining properties results in obstruction of their view? In the following case, the court discusses the new issue of "right to a view."

Pierce v. Northeast Lake Washington Sewer and Water District

870 P.2d 305 (Wash. 1994)

Facts

Arthur and Patricia Pierce (petitioners) own property on a hillside near Seattle. The Northeast Lake Washington Sewer and Water District (District), a municipal corporation providing water and sewer services to 50,000 people, acquired 5.4 acres of residential property adjacent to the Pierces' land. The District applied for a permit to construct a 4.3-million-gallon water storage facility on the site. The District chose the location because the sloping hillside would enable it to obscure the sight of the tank from neighboring residences. The permit was granted with modifications in the tank's location.

However, the final position of the constructed tank blocked the panoramic view the Pierces had enjoyed of wooded terrain, Lake Washington, Mount Rainier, and the Cascades. The tank was visible from any window in the house.

After an appraiser issued his opinion that the construction of the tank resulted in a $30,000 reduction in value of the Pierces' property, the Pierces filed suit against the District for nuisance, trespass, negligence, and inverse condemnation. The trial court dismissed the suit for the failure to demonstrate compensable damages and the court of appeals affirmed. The Pierces appealed.

Judicial Opinion

Smith, Justice. This is an action in inverse condemnation brought by Petitioners against Northeast Lake Washington Sewer and Water District, a municipal corporation. Inverse condemnation is an action to "recover the value of property which has been appropriated in fact, but with no exercise of the [condemnation] power." "Our constitution requires that just compensation be paid a landowner in the event of either a governmental 'taking' or 'damaging' of property."

Under a general takings analysis, the elements of an inverse condemnation action are not in dispute. However, the only Washington case which considered a property owner's right to a view is *State v. Calkins*. In that case the court stated

> Clearly, there has been no specific declaration by our legislature of an intention to pay compensation for nonexistent property rights; i.e., access, air, view, and light; furthermore, absent such rights, the condemnation proceedings herein do not violate Art. I, Section 16, of our state constitution, which requires the payment of just compensation for the taking or damaging of property rights.

Although *Calkins* was not an action for inverse condemnation based upon interference with a property owner's right to a view, it is nevertheless somewhat indicative of this court's position on the matter. Because our own decisions have not squarely addressed this issue, we may look to decisions from other jurisdictions . . .

In *Pacifica Homeowners' Ass'n v. Wesley Palms Retirement Comm'ty,* 224 Cal. Rptr. 380 (1986), the California Court of Appeal concluded that "[a]s a general rule, a landowner has no natural right to air, light or an unobstructed view and the law is reluctant to imply such a right." However, "[s]uch a right may be created by private parties through the granting of an easement or through the adoption of conditions, covenants and restrictions by the Legislature."

In *Pacifica,* the Homeowners' Association (Association) attempted to enjoin the Wesley Palma Retirement Community from allowing trees on its property to grow higher than the Association's five-story building. The Association claimed a conditional use permit placed a limitation on tree height, which was "imposed particularly for the benefit of the uphill landowners including the Association." However, the court rejected the Association's arguments and stated that "[i]n the absence of any agreement, statute or governmentally imposed conditions on development creating a right to an unobstructed view, it cannot be said Wesley Palms . . . interfered with any right."

In *Gervasi v. Board of Comm'rs of Hicksville Water Dist.,* 256 N.Y.S.2d 910 (1965), the facts closely parallel those in this case. The plaintiffs in that case sought to enjoin the water district from completing construction of a water tank or to recover damages measured by the reduced value of their homes caused by construction of the water tank. In that case, the water district constructed a storage tank on its own property. The plaintiffs claimed construction and maintenance of the tank reduced the market value of their properties. The Court concluded that the plaintiffs had failed to state a cause of action because they had not been deprived of "property within the meaning of that provision as it ha[d] been construed by the courts." The court determined that the plaintiffs had no cause of action because the water district constructed the water tank on its own property. The court found no deprivation of property under the takings clause of the New York Constitution.

Similarly, in the case now before us, the District constructed a water tank on its own property. We conclude that Petitioners have not been deprived of any property rights because the District is acting only upon its property.

The court in *Gervasi* further concluded that "[d]amages cannot be recovered because of the unsightly character of a structure and aesthetic considerations are not compensable in the absence of a legislative provision." . . . we conclude that Petitioners are not entitled to compensation for damages solely because of the unsightly character and the unaesthetic appearance of the water tank.

Following the reasoning of . . . *Pacifica* . . . and *Gervasi,* we conclude that Petitioners do not have a cause of action for inverse condemnation based on their claimed "right to a view." The water tank was a permissible use constructed and maintained solely upon the property of the District.

Property value, or landowners' economic interest in their property, may be considered an essential element of ownership. In *Highline Sch. Dist. 401 v. Port of Seattle,* 548 P.2d 1085 (1976) this court concluded that "an inverse condemnation action for interference with the use and enjoyment of property *accrues when the landowner sustains any measurable loss of market value* . . . " Although *Highline* involved inverse condemnation based on aircraft noise and vibration, the premise that a measurable loss in a market constitutes interference with a landowner's use and enjoyment of property would be applicable in this case only if the decline in market value was caused by unlawful government interference.

In this case, based upon appraisal of Petitioners' property, there is no dispute that there was in fact a measurable loss in market value after construction of the water tank. David E. Hunnicutt conducted an appraisal and concluded that construction of the tank had caused an actual loss in value to Petitioners' property of at least $30,000.00. However, our prior decisions do not lead to the conclusion that loss in market value of Petitioners' property is of itself

evidence of governmental interference with the use and enjoyment of property entitling them to compensation. If property, or a substantial portion of that property, is destroyed by the government for a public purpose, the landowner would unquestionably be entitled to compensation. . . . That section, however, does not "authorize compensation merely for a depreciation in market value of property when caused by a legal act."

Petitioners claim they are entitled to compensation because the unaesthetic appearance of the unsightly water tank and the proximity of the tank to their property has caused a loss in market value. This court has not allowed compensation based merely upon proximity of a building or structure.

Petitioners further claim the overbearing presence of the water tank interferes with their use and enjoyment of their property and that they should therefore be compensated for damages. "Damages for which compensation is to be made is a damage to the property itself, and *does not include a mere infringement of the owner's personal pleasure or enjoyment.* Merely rendering private property less desirable for certain purposes, or even causing personal annoyance or discomfort in it use, will not constitute the damage contemplated . . . but the property itself must suffer some diminution in substance, or be rendered intrinsically less valuable by reason of the public use."

Petitioners are not entitled in this case to just compensation under the takings clause of the Washington Constitution. They cannot establish a property right or interest in their right to a view.[4]

Affirmed.

Case Questions

1. Describe the problem with the placement of the tank and the impact on the Pierces' property.
2. What are the grounds the Pierces use for their claim?
3. Is there a right to a view for which the Pierces are entitled to compensation?
4. Is the right to a view a property interest?

Ethical Issue

In 1997, Donald Trump began construction of his Riverside South project in New York City on a railroad yard located between Lincoln Towers and the Hudson River. The first two towers (of 16 planned) blocked the views of the Lincoln Towers residences. One resident noted, "Can you imagine what this man is taking away? Can you imagine somebody taking away the moon?" Another said, "All of a sudden, here was this thing looming up against the sky. You couldn't see the sky. I felt anger—that someone could be allowed to take away your beauty for money." Those in the Lincoln Towers apartments with views of the Trump project have trouble selling their units and overall have fewer prospects view their units. The price difference between a Trump-facing apartment and one facing the river is $50,000. Evaluate the ethical issues in development projects like Trump's.

SURFACE AND SUBSURFACE RIGHTS

The preceding discussion covered ownership of rights above the land. This section deals with the second part of Blackstone's famous quote, which is the ownership of subsurface rights. Ordinarily, landowners own to the center of the earth, so that mineral rights are included in fee simple absolute ownership. However, landowners are free to convey their subsurface rights as liberally as the air rights can be conveyed. When subsurface rights are conveyed independently of surface rights, there are two different landowners. The owner of the surface rights

4. Some states have begun to classify interference with a view as a nuisance (see infra at page 36). There are also municipalities passing ordinances that prevent interference with views. *Kucera v. Lizza,* 69 Cal. Rptr. 2d 582 (1997). However, the statutes are only for prospective actions and do not grant an easement for, or property rights in, a view.

cannot affect the ownership rights of the subsurface owner. Likewise, the subsurface owner cannot destroy the surface and thereby destroy the surface owner's interest.

Mineral Rights: Oil and Gas Ownership

NATURE OF OIL AND GAS

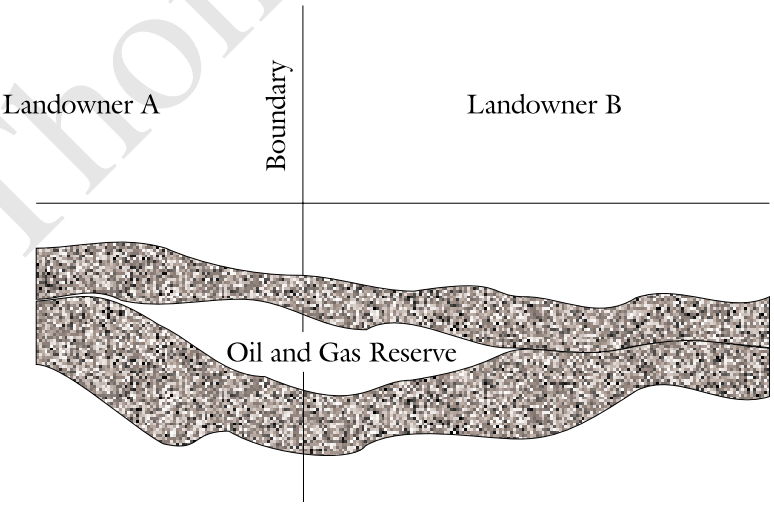
Oil and gas are petroleum found in liquid and gaseous forms, respectively, beneath the earth's surface. Because oil and gas are not solid like other minerals and will flow from one location to another very readily, this type of property interest presents legal issues not encountered in connection with other subsurface mineral rights.

http://
Regulations on Nevada mineral rights are at: **http://minerals.state.nv.us**.

When oil was first discovered in 1859 at Titusville, Pennsylvania, the courts applied the standard Blackstone adage of he who owns the surface owns what is beneath the surface as well. However, when a well is drilled and oil and gas are brought to the surface, it is impossible to tell whether they came from directly beneath the landowner's surface or were drawn from another pool under adjoining land. Figure 2.2 illustrates the possible conflicting claims of oil and gas ownership between adjoining landowners.

Under Blackstone's rule of subsurface ownership, a landowner pumping oil and gas would be liable to other nearby landowners in the event the well drew oil from reservoirs that extended beneath property owned by others. Such a taking would constitute trespass and would discourage development of the resource. As a result, the courts developed a different rule of ownership for oil and gas rights called the **Rule of Capture.** Simply stated, the rule gives the owner of a tract of land title to all the oil and gas produced by wells located on his or her land even though some of the oil and gas may have migrated from adjoining lands or the well is actually taking oil and gas from a reservoir that stretches across a boundary line onto another's property. This form of ownership protects the driller from liability for trespass so long as the drilling is conducted from his or her property.

FIGURE 2.2 *Oil and Gas Ownership Issues*



However, drilling at an angle would be a physical trespass and is not protected under the Rule of Capture.

Two theories are followed under the Rule of Capture. So-called **ownership states** follow the Rule of Capture but provide that the landowner is the owner of the mineral rights that can be lost only if someone else first captures the oil and gas through drilling. The **nonownership states**—which include California, Louisiana, Oklahoma, and Wyoming—provide that no one owns the oil and gas until it has been captured. The difference between these two theories is simply the status of the rights prior to capture. Once capture has occurred, the rights are identical and vest at the same time under either theory.

The Rule of Capture has limits. For example, the rule does not apply after the gas is first captured by someone and stored in a subsurface or surface area. In other words, once the gas or oil has been captured, someone else cannot tap into the storage area and claim ownership under the Rule of Capture. The rule applies to drilling of oil and gas in their natural as opposed to stored states. Also, the Rule of Capture does not apply to what are referred to as "enhanced recovery operations," or sweeping. These types of processes involve, for example, using high-pressure water systems to drive oil reservoirs from beneath another's property to sweep them into reservoirs on your property so as to capture this oil and gas once it is beneath your land. Again, the Rule of Capture applies to oil and gas located naturally beneath your land or acquired through drilling from your land and not to recovery initiated by artificial shifting of the minerals. Some states permit recovery for trespass against those who use these "sweeping" techniques to recover oil and gas. Others will not permit a trespass action for "sweeping" if it can be shown that the adjoining landowner would not respond to a reasonable and fair proposal for recovery of the oil and gas. The idea behind this immunity for trespass is to encourage the development of the resource.

The **Doctrine of Correlative Rights** is another limitation on the Rule of Capture that imposes a good-faith requirement that no action will be taken that will cause the destruction of the oil and gas beneath the surface to prevent recovery by adjoining landowners. In other words, landowners cannot use the Rule of Capture to take action that prevents others from capturing the resources beneath their property. This type of action could occur if one landowner allowed a well to burn and drain the oil and gas from an adjoining landowner's subsurface reservoir.

A final limitation on the Rule of Capture is government regulation. Both state and federal governments have oil and gas conservation laws to both prevent waste of these resources and control the extent of drilling. For example, well-spacing regulations limit the number of wells that can be erected according to either a per-acre basis or the amount of space between wells. Also, particularly at the federal level, production limitations control the amount of drilling that can be done. Often referred to as **prorationing rules,** they establish limits on daily, weekly, or monthly production. Prorationing rules can be established either to prevent the early exhaustion of a well or to meet fluctuations in the price of oil and gas in the international markets.

CLASSIFICATION OF OIL AND GAS INTERESTS

States vary in their positions as to whether oil and gas rights are real or personal property and what type of property interests they are. For example, some states treat oil and gas rights as a ***profit a prendre,*** or simply the right to enter the land

of another and take a part or product of that land (see page 61). Other states have characterized these interests as fee simple determinables that end upon the Rule of Capture ownership by another. Other states have established a separate set of rules for oil and gas rights and the determination of issues such as trespass and suits to resolve title issues. The classification of oil and gas rights as real or personal property also varies and may largely be determined by taxation statutes that control whether the rights would be taxed as real or personal property under the state's revenue system.

TYPES OF OIL AND GAS INTERESTS

Acquiring the right to drill for oil and gas can take several different forms. For example, many oil firms will refer to the fact that they own a **fee interest.** This form of ownership simply means that the company owns both the surface and subsurface rights. In other words, the firm has a fee simple absolute in the property where it is drilling.

Other firms will state that they own the **mineral rights** or a **mineral interest.** This form of ownership simply means that the subsurface rights have been severed from the surface and air rights, and the company has the right to use the surface to capture the minerals but does not own the surface. This form of ownership affords the owner an easement on the surface to bring in the equipment necessary for drilling. In Louisiana, this form of ownership is called a **mineral servitude.**

A commonly used term, the **oil and gas lease,** is a form of ownership in which a portion of the mineral interest is assigned, usually in exchange for a royalty or share of the profits. A lease is the right to use the surface *and* remove the oil and gas. The lease could be an interest in perpetuity or one that ends when oil and gas are no longer produced. For example, suppose that farmer Adam has fee simple title to his farm and the subsurface rights. Farmer Adam could sell a mineral interest to Exxon. Exxon could then lease the interest to Xavier Oil Company in exchange for a share of the profits. Farmer Adam could also simply lease his mineral interest to Exxon and Exxon could use the surface to recover the oil and gas.

The oil and gas lease may also be used to create a **royalty interest,** which is a share of the oil produced from the land without any payment for the costs of its production. Royalty interests are usually stated in fraction form, such as one-eighth of production. Different amounts and names for royalty interests are used according to whether a landowner, lessee, or mineral interest is involved. Royalty interests are not real property interests. They are very similar to the personal property interest in the form of book royalties.

The various forms of ownership of oil and gas rights have many combinations, and the only limitations seem to be the creativity of those involved in the proposals. Any agreement for oil and gas rights should cover the issues of rights and responsibilities when land ownership is divided in this way between surface and subsurface interests. The issue of liability for damage to the surface caused by the subsurface owner should also be covered.

CREATION OF OIL AND GAS INTERESTS

For purposes of the **Statute of Frauds,** oil and gas interests are treated as real property, and the documents creating these interests, regardless of type, must be in writing. The documents should specify the types of minerals that are to be included if more than oil and gas are covered. For example, in *Western Nuclear, Inc. v. Andrus,* 664 F.2d 234 (10th Cir. 1981), the parties were in a dispute about

who owned the right to gravel on a piece of property, because it was unclear whether gravel was a mineral and the mineral rights had been severed from the surface rights.[5]

The agreement should list all forms of consideration to be paid under the agreement whether in the form of full payment for subsurface rights or as a royalty interest or some combination of the various interests.

Geothermal Energy

Another difficulty in the classification of subsurface rights arises in connection with geothermal resources, because of the difficulty of classifying these resources. Because **geothermal energy** consists of steam in rock-surrounded pockets, some states classify it as a water resource and use their water laws to determine ownership and other rights. Other states classify it as an energy resource similar to oil or coal and treat it as a mineral. Some states (such as Idaho) have declared that geothermal resources are neither minerals nor a water resource and have developed a specialized scheme of regulation for this interest in real estate. Parties transferring land with geothermal resources should specify whether title to those areas is conveyed or reserved in the transferor.

The federal government has passed two acts relating to geothermal resources. The Geothermal Steam Act of 1970 (30 U.S.C. §§ 1001 *et seq.*) regulates permits and use, and Geothermal Energy Research, Development, and Demonstration Act (30 U.S.C. §§ 122 *et seq.*), encourage the development of this resource. Much of this resource is found on federal lands.

Practical Tip

Mineral rights are complex and require special details in the sale or lease agreement. The questions to be answered: Who owns the mineral rights? Will ownership be exclusive? Can the surface be used? What is included in the mineral rights? oil? gas? How and when is payment made? How much will the payments be? What happens upon default?

Water Rights

The rights to take water and use water on land are considered to be a real property interest. The rules of law that establish the nature and the extent of a landowner's right to use water vary depending on both the type of water source and the geographic region. The rules of law that developed in the Eastern jurisdictions where water is plentiful are quite different from the rules of law in the West, where water is scarce.

Water rights also vary according to the type of water body involved. The first type is surface or navigable waters, or those that flow. Ownership is considered to be in the states as trustees for the public, subject to any federal rights and programs such as dams and water conservation systems built by the Army Corps of Engineers. Navigable water is defined as water that could be used for navigation regardless of whether it is so used, including natural and artificial lakes, rivers, and streams. Two theories of water rights are applicable to these bodies of waters: the **Riparian Doctrine** and **Prior Appropriation Doctrine.** Most states east of the Mississippi follow the Riparian Doctrine, and the arid Western states follow the Prior Appropriation Doctrine.[6] Some states employ a combination of the two theories.[7]

5. In a subsequent case, *Watt v. Western Nuclear, Inc.,* 462 U.S. 36 (1983), the U.S. Supreme court reversed all prior gravel cases (pertaining to federal lands) and held that gravel is indeed a mineral.
6. Alaska, Arizona, Montana, Nevada, Utah, and Wyoming.
7. California, Kansas, Mississippi, Nebraska, North Dakota, Oklahoma, Oregon, South Dakota, Texas, and Washington.

The Riparian Doctrine is based on sharing, and the Prior Appropriation Doctrine is based on "first in time is first in right," or the first to use the water has first claim to it. Figure 2.3 summarizes and compares the two doctrines. (The figure deals only with water use rights and not with the actual ownership of the land [riverbed] beneath the water.)

The title to the riverbeds or land beneath surface water is different from the water rights and may be with the state. Or the state may follow what is known as the **centerline rule,** which provides that the streambed is owned to the center by the abutting landowners.

http://
Look at the history of water rights in New Mexico at: **http://nm.water.usgs.gov/public/publications/biblio75-93.html**.

FIGURE 2.3 *Water Rights*

The Common Law Rules of Riparian Water Rights Compared with and Distinguished from the Doctrine of Prior Appropriation

Common Law Riparian Rules	Prior Appropriation Doctrine
1. THE DISTINGUISHING FEATURES OF THE COMMON LAW RIPARIAN RULES ARE EQUALITY OF RIGHTS AND REASONABLE USE—There is no priority of rights; the reasonable or permitted use by each is limited by a similar use in every other riparian.	1. THE DISTINGUISHING FEATURE OF THE PRIOR APPROPRIATION DOCTRINE IS FIRST IN TIME IS FIRST IN RIGHT—There is no equality of rights and no reasonable use limited by the rights of others.
2. To be a riparian, one needs only to be an owner of riparian land. Riparian land is land that abuts or touches the water of a lake or stream.	2. To be a prior appropriator, one must do four things: (a) have an intent to appropriate water, (b) divert the water from the source of supply, (c) put such water to a beneficial use, and (d) when applicable, follow the necessary administrative procedures.
3. No one can be a riparian who does not own riparian land.	3. One need not own land to be a prior appropriator. There is one exception—in some jurisdictions such as Arizona, if the appropriation is for irrigation purposes then the appropriator must own arable and irrigable land to which that water right is attached.
4. Riparian lands are lands bordering the stream and within the watershed. Under the natural flow theory, a riparian cannot use water on nonriparian lands. Under the reasonable use theory, a riparian may use water on nonriparian lands if such use is reasonable.	4. The prior appropriator may use the appropriated water on riparian and nonriparian lands alike. The character of the land is quite immaterial.
5. Under the common law riparian rules, the use of water for natural purposes is paramount and takes precedence over the use of water for artificial purposes. Natural uses include domestic purposes for the household and drinking, stock watering, and irrigating the garden. Artificial purposes include use for irrigation, power, mining, manufacturing, and industry.	5. The prior appropriation doctrine makes no distinction between uses of water for natural wants and for artificial and industrial purposes.
6. The riparian owner, simply because he owns riparian land, has the right to have the stream of water flow to, by, through, or over his land under the riparian rights doctrine.	6. An owner of land, simply as such owner, has no right to have a stream of water flow to, by, through, or over his land under the prior appropriation doctrine.

continued

FIGURE 2.3 *Water Rights, continued*

The Common Law Rules of Riparian Water Rights Compared with and Distinguished from the Doctrine of Prior Appropriation

Common Law Riparian Rules	Prior Appropriation Doctrine
7. The riparian has the right to have the water in its natural state free from unreasonable diminution in quantity and free from unreasonable pollution in quality.	7. The prior appropriator has the right to the exclusive use of the water free from interference by anyone, reasonable or unreasonable.
8. The rights of the riparians are equal.	8. The rights of the appropriators are never equal.
9. The basis, measure, and limit of the riparian's water right is that of reasonable use (unless natural flow states: limit use to not interrupting the natural flow)	9. The basis, measure, and limit of the water right of the prior appropriator is the beneficial use to which he has put the water. He has no right to waste water. If his needs are smaller than his means of diversion, usually a ditch, then his needs determine his right. If his ditch is smaller than his needs, then the capacity of his ditch determines his right.
10. The doctrine of riparian rights came to this country from the common law of England, although it seems to have had its origin in French law.	10. The doctrine of prior appropriation is statutory in our western states, although its origin seems lost in antiquity.

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Many landowners have private ponds that are contained solely within the boundaries of their properties. These ponds are considered part of their real estate, and they have all rights in them with the exception of any waters passing through them from upper to lower lands.

Still another type of water is *percolating* or *groundwater.* This type of water is defined to include all subsurface water other than water that flows in underground streams. The waters included in this group are Artesian waters, aquifers, underground lakes or pools, and waters that seep, ooze, or filter from an unknown source. These waters are subject to both the Riparian Doctrine and the Prior Appropriation Doctrine; however, the application of the rules differs because of the nature of the water source.

In the following case, the court discusses the rights of Riparian landowners with respect to government regulation of the use of bodies of water.

Stupak-Thrall v. U.S.

70 F.3d 881 (6th Cir. 1995)

Facts

Kathy Stupak-Thrall and others (plaintiffs) own land on the northern shore of Crooked Lake in Michigan's Upper Peninsula near the Wisconsin border. Under Michigan law, these property owners are riparians and as such are given the right to use the surface of the lake including those uses "absolutely necessary for the existence of the riparian proprietor and his family, such as to quench thirst and for household purposes." Additional permissible riparian uses include "those which merely increase one's comfort and prosperity/ . . . such as commercial profit and recreation."

The United States is also a riparian owner along Crooked Lake because about 95 percent of the lake's shoreline lies within the Sylvania Wilderness Area, a national wilderness administered by the Forest Service.

In 1992, the Forest Service adopted regulations (Amendment 1) that prohibit "sail-powered watercraft," "watercraft designed for or used as floating living quarters," and "nonburnable disposable food and beverage containers" on the lake. The regulations also discouraged use of electronic fish-finders, boom boxes, and any other mechanical or battery-operated devices.

Stupak-Thrall and other property owners filed suit challenging the authority of the federal government to regulate lake use on several grounds including their rights as riparians. The federal district court found for the Forest Service and the landowners appealed.

Judicial Opinion

Moore, Circuit Judge. . . . riparian rights are not absolute. Michigan law divides riparian uses into uses for "natural purposes," which are "those absolutely necessary for the existence of the riparian proprietor," and uses related to "artificial purposes," which are "those which merely increase one's comfort and prosperity." Each use for an artificial purpose must be for the benefit of the underlying land and reasonable in light of the correlative rights of the other proprietors. In other words, riparian uses such as sailing, waterskiing, and swimming are subject to "reasonable use" limitations and may not interfere materially with other riparian owners' similar rights. In *Thompson v. Enz,* 154 N.W.2d 473 (Mich. 1967), the court stated that a finding of reasonableness should center on three factors: (1) the "watercourse and its attributes," (2) the "use itself" and its effect on the water, and (3) the "consequential effects" on other riparian proprietors and the state.

We do not agree that the "reasonable use" doctrine governs the federal government's actions in this case. Although the *Thompson* decision is important here because it shows that the riparian rights of private citizens are not absolute under Michigan law, the "reasonable use" doctrine itself only makes sense when one riparian owner challenges another's use as unreasonable and the court makes a subsequent determination of reasonableness. It is inapplicable when one riparian proprietor unilaterally decides to ban certain uses of others, whether or not the uses themselves are unreasonable, and whether or not the banning proprietor actually has the power to do so. Indeed, the federal government's ability to impose restrictions does not stem from its status as a fellow riparian proprietor; it stems from its status as a sovereign. Its authority to regulate cannot come from a state law doctrine that merely balances the property rights of private owners vis-a-vis one another.

. . . the Forest Service possesses a power delegated to it by Congress that is "analogous to the police power," and its exercise of this federal power does not violate Congress's express limitation deferring to "existing" state law rights in wilderness act, so long as it does not exceed the bounds of permissible police power regulation under state law.

Amendment 1's purpose of preserving wilderness character is undoubtedly a proper aim under the Property Clause's police power and under Congress's delegation to the Forest Service, and the prohibition of certain forms of mechanical transport and certain types of food containers on Crooked Lake is certainly rationally related to achieving this goal.

Given the "minimal impact on plaintiffs' riparian uses of Crooked Lake," we conclude that the Forest Service's restrictions here are a valid exercise of the police power under state law, and they are therefore a valid exercise of the police power conferred on the Forest Service by the Property Clause and limited by Congress's express reservation for state law rights in the wilderness acts.

Affirmed.

Case Questions

1. What regulations were considered objectionable?
2. What rights did riparians have under Michigan law?
3. Are riparian rights subject to government regulation?
4. What advice could you offer those who purchase property near government-controlled wilderness areas?

Consider 2.1

Shanty Hollow Corporation was issued a permit by the New York State Department of Environmental Conservation to withdraw water from Schoharie Creek for purposes of its snowmaking equipment. Shanty Hollow operates a winter sport recreational area. The Catskill Center for Conservation and Development, property owners along the creek, and anglers brought suit against both the state and Shanty Hollow for excessive withdrawal of water from the creek. What is the result under the Riparian Doctrine? In contrast, what would be the result under the Prior Appropriation Doctrine? Like the *Stupak-Thrall* case, could there be a justification on the grounds that water use needs to be regulated? *Catskill Center v. NY Dept. of Environ.,* 642 N.Y.S.2d 986 (1996)

Water Rights at the Crossroads

The discussion of water rights presented here is the longstanding law. However, this area of real estate law has proven to be a dynamic one over the past few years because of the role of environmental regulation (see Chapter 20 for more information on environmental regulations on water user). Some scholars have written that the prior appropriation doctrine is often at odds with environmental goals and have encouraged government intervention regardless of water rights. For example, many state and local authorities have intervened in water-use and water-level issues because of public safety or issues surrounding the flora and fauna in or around the water. For example, in *Wortelboer v. Benzie County,* 537 N.W.2d 603 (Mich. App. 1995), the court upheld the right of the state to maintain lake levels to avoid the death of fish and the resulting smell.

Development projects that involve water (see Chapter 22 for more information on development) have been subjected to municipal and county reviews for project approval. California courts have noted that the traditional lines of legal reasoning on water rights and use have been changed to broader ones that are based primarily on whether the water use is "reasonable or wasteful." *Imperial Irrigation District v. State Water Resources Control Board,* 225 Cal. App.3d 548 (1990).

Thompson on Real Property summarizes the changes in water rights and their relationship to real property as follows: "Although the general rule is that water rights are a species of real property, that designation refers to the right of access to the water while it is in its natural state. Once the right is exercised and water is reduced to possession, it may be considered personal property of the water-right holder. As such, it may become an article of commerce." So the distinction between the traditional laws of real property and the new trends is that the proposed commercial use of water once it is captured pursuant to the legal rights can be regulated by various government entities. These entities now grapple with those who sell their riparian rights, for example, to nonriparians. The issue becomes one of deciding whether to honor the real property origins of water rights and the reliance land owners have placed on that system or to intervene for the sake of allocation of a scarce resource, protection of the environment, and easier commercial transfers. In resolving the issue, states, local governments and courts have asked whether cities should have higher priorities than the countryside, whether government can intervene for protection of water quality, whether water can be moved to address shortages and allocation proposals and who will do the moving, and what the legal status of water rights should be. Perhaps at the heart of evolving changes in water rights is the classic economic issue of supply and demand. Water shortages were not a uniform issue at the time the traditional water rights were de eloped. Intervention may be necessary, and the law is adjusting to permit intervention with private property rights.

PROTECTION OF PROPERTY RIGHTS

Trespass

Trespass is defined as the intentional interference with landowners' reasonable use and enjoyment of their property. General examples of trespass include parties' walking across another property owner's land or placing objects on another's

land, although trespass can also arise from indirect objects intentionally set in motion by the trespasser. For example, if one landowner were to dam water so that it flooded an adjoining landowner's property, trespass has occurred. Even the simple act of opening shutters so that they extend across a boundary line to an adjoining property owner's land is an act of trespass. Bullets fired across the land of another also constitute trespass. In one unique trespass case, a child hurled a brick at a neighbor. When the neighbor reached across the boundary line and grabbed the child, he committed not only the torts of assault and battery but also that of trespass.

Practical Tip

Landowners faced with periodic trespassers should take precautions in protecting themselves from liability. Signs and barriers should be erected so that trespassers do not gradually become classified as guests because of the owners' implied acquiescence through inaction. Furthermore, if physical action does not stop the trespass, a court injunction or damages may be appropriate so that the landowners have judicial records of their positions on and relationships to trespassers.

Consider 2.2

Brian Barton, Craig Barton, and Timothy Barton are brothers who acquired 53.5 acres of wooded property in Gray, Maine, from their grandmother. The property was bordered on the east by land belonging to Gordon Fraser. In 1987, the Barton brothers hired a contractor to harvest timber from their land. Because of several errors the Barton brothers' father had made in laying out the boundary lines, the contractor cut and removed trees valued at $9,742.84 from Fraser's property. Fraser brought suit against the Bartons for trespass. Was there a trespass? Who is liable for the trespass? *Fraser v. Barton,* 628 A.2d 146 (Me. 1993)

Nuisance

"Use your own property in such a manner as not to injure that of another [*Sic vere tuo et alienum non laedas*]." **Nuisance** is the unreasonable interference with others' use and enjoyment of their property. Nuisances are generally thought of as bad odors and excessive noise. Pollutants from a factory causing property damage and medical problems can constitute a nuisance. "A nuisance may be merely a right thing in the wrong place, like a pig in the parlor instead of the barnyard."[8]

Practical Tip

Verify property boundaries prior to sale, lease, purchase, listing, construction, landscaping, or excavation of that property.

Nuisances can be classified as private, public, or frequently a cross between the two. A nuisance affecting one property owner or a small group of property owners is a private nuisance. For example, a restaurant's storage of garbage bins behind a store is a private nuisance affecting the immediate neighbors.

However, the burning of used car materials to salvage metal can create smoke and smells affecting an entire community and would thus be labeled a public nuisance.

The remedies for nuisance usually fall into one of two categories: monetary or equitable relief. **Monetary relief** is compensation for illness and medical expenses or compensation for the reduction in property values because of the nuisance. For example, destruction of plants or paint caused by pollutants would be compensable. **Equitable relief** is injunctive relief where the nuisance-creating party is ordered by a court to cease the nuisance-creating activity. This injunctive relief is used sparingly since in some circumstances the result will be the closing of a business. In determining whether injunctive relief will be afforded, courts

8. *Village of Euclid, Ohio v. Amber Realty Co.,* 272 U.S. 365 (1926).

balance the extent of the property owner's harm against the beneficial aspects of the wrongdoer's conduct. The following case deals with both a trespass issue and a nuisance issue, particularly in balancing landowners' interests against the economic interests of others as well as the interests of the public in a suit where the landowners have requested injunctive relief.

Jordan v. Georgia Power Co.

466 S.E.2d 601 (Ga. App. 1995)

Facts

Larry Jordan purchased property in Douglas County, Georgia, in 1972. At the time of the purchase, Jordan was aware of an easement Georgia Power held in the property. Power lines were built on the property in 1973. Mr. Jordan married Nancy in 1983 and she then moved into his home. In 1985, Nancy Jordan was diagnosed with breast cancer, and in 1989, she was diagnosed with non-Hodgkin's lymphoma. In 1990, the Jordans moved from the property but had a difficult time selling the house. The bank foreclosed on the property because it did not sell, and Larry Jordan could no longer continue to make double payments on their new house and the old one.

The Jordans filed suit in 1991 against Georgia Power Company and Olgethrope Power Corporation, alleging that electromagnetic radiation from the electromagnetic fields (EMFs) created by the presence of the power lines on their property caused Mrs. Jordan's breast cancer and lymphoma. Their suit alleged both trespass and nuisance. The trial court found for the power company and the Jordans appealed.

Judicial Opinion

Pope, Presiding Judge. The Jordans claim that the court erred in granting summary judgment on their trespass claim. They argue that the court invaded the province of the jury.

In their motion for summary judgment, Oglethorpe and Georgia Power argued that EMFs are not tangible matter and that their alleged presence on the Jordans' property could not constitute a trespass. In response, the Jordans filed the affidavit of Roy Martin, a licensed professional electrical engineer, in which he stated that electromagnetic radiation from high power lines is tangible. Martin further stated that a magnetic field could be detected and measured by appropriate measuring devices and that such fields obeyed physical laws.

In its order granting the motion, the court concluded that although the Jordans claimed that there was a detectable entry on their property by the EMF's, these fields were not tangible as defined by law for purpose of trespass determinations. The court stated: "in Georgia a physical invasion of some kind is required in order to state a cause of action for trespass. There has been no physical injury to the real estate alleged. There has been no physical entry alleged. The plaintiffs allege there is a detectable entry by non-tangible, magnetic fields. However, such fields are not tangible as that term is defined by law for purpose of trespass determination."

OCGA Section 1-3-3(20) provides: "This '[t]respass' means any misfeasance, transgression, or offense which damages another's health, reputation or property." With respect to injuries to real estate, OCGA Section 51-9-1 defines the cause of action for interference with enjoyment of property, stating: "[t]he right of enjoyment of private property being an absolute right of every citizen, every act of another which unlawfully interferes with such enjoyment is a tort for which an action shall lie."

Although arguably the Jordans' trespass action could present a jury question, we conclude that for policy reasons, the trial court's grant of summary judgment was proper. The scientific evidence regarding whether EMF's cause harm of any kind is inconclusive; the invasive quality of these electric fields cannot generally constitute a trespass. In reaching this conclusion, we do not close the door on the possibility that science may advance to a point at which damage from EMF's is legally cognizable and a trespass action may lie.

The Jordans claim that the court erred by granting a directed verdict on the nuisance and property damage claims. In directing the verdict, the court concluded that there were no measurable damages or injury and that there was no nuisance.

Here, the Jordans argue that the court's conclusion that there was no evidence of property damage ignored the fact that the trial was bifurcated as to damages and causation. They contend that because of the bifurcation, evidence of nominal damages was sufficient to prove this claim.

OCGA Section 41-1-1 defines a nuisance as "anything that causes hurt, inconvenience, or damage to another and the fact that the act done may otherwise be lawful

shall not keep it from being a nuisance. The inconvenience complained of shall not be fanciful, or such as would affect only one of fastidious taste, but it shall be such as would affect an ordinary, reasonable man." Moreover, "while a physical invasion is generally necessary, noise, odors and smoke which impair the landowners' enjoyment of his [*sic*] property are also actionable nuisances, if, and only if, a partial condemnation of the property results."

Here, the trial court properly directed a verdict on the nuisance claim. . . . the present state of science does not authorize recovery based on these facts.

While the court found there was no cause of action for trespass or nuisance, it did reverse the case for error on evidence admissibility and for retrial on the other grounds the Jordans alleged for liability including negligence.

Reversed on other grounds.

Case Questions

1. What do the Jordans allege occurred as a result of the power lines being located on their property?
2. Is it important that the Jordans could not sell their house?
3. What is missing that is needed to establish nuisance?
4. What is missing that is needed to establish a trespass?

Consider 2.3

Spur Industries operates a cattle feedlot near Youngtown and Sun City (communities 14 to 15 miles west of Phoenix). Spur had been operating the feedlot since 1956, and the area had been agricultural since 1911.

In 1959 Del E. Webb began development of the Sun City area, a retirement community. Webb purchased the 20,000 acres of land for about $750 per acre.

In 1960 Spur began an expansion program in which it grew from an operation of five acres to 115 acres. Webb began to experience sales resistance on the lots nearest Spur's business because of strong odors. Nearly 1,300 lots could not be sold. Webb then filed suit alleging Spur's operation was a nuisance because of flies and odors constantly drifting over Sun City.

At the time of the suit, Spur was feeding between 20,000 and 30,000 head of cattle, which produced 35 to 40 pounds of wet manure per head per day, or over one million pounds per day. How should the court rule? Should it make any difference that Spur was there first? How does the court balance retirement communities and beef production being two of Arizona's biggest industries? *Spur Industries, Inc. v. Del E. Webb Development Co.,* 494 P.2d 700 (Az. 1972)

Consider 2.4

In each of the following circumstances, determine whether a nuisance is involved, whether it is public or private, and what remedy would be appropriate. Determine any additional facts that would aid in the decision.

a. Damage and annoyance caused by blasting in a nearby quarry (the town developed because of the quarry)
b. Operation of a dog kennel
c. Construction of a proposed nuclear power plant
d. A neighbor with 55 cats residing in her three-bedroom/1200 square-feet home

DUTIES OF LANDOWNERS

In addition to avoiding the problems of trespass and nuisance, landowners owe certain responsibilities to those entering their property. Those parties entering property are classified into one of three categories: trespassers, licensees, and invitees. Traditionally, each category has a different status when on another's property, and landowners owe different degrees of responsibility to those in each

category. While these differing categories and duties are discussed here, states are blending together the responsibilities and degree of care more and more so that the standard becomes one of reasonable care.

Trespassers

Trespassers are persons on the property of another without permission. Landowners may take the appropriate actions to seek removal of the trespassers, but while trespassers are on their property, landowners have only the responsibility of not intentionally injuring them—that is, landowners may not intentionally injure trespassers or erect mantraps to injure or kill trespassers.

Licensees

Licensees are persons on the property of another who have some form of permission to be there. For example, in most states, fire protectors, police officers, and medical personnel would be classified as licensees. These groups have an implied invitation to a landowner's property so that their services are available to the landowner when needed. It is possible that meter readers would be classified as licensees because the implied invitation arises from the use of the utility or service. In some states, social guests are classified as licensees because although there may not be an express invitation to all social guests, an implied invitation arises from friendship.

To the licensees, landowners owe a greater duty of care. In addition to the duty not to injure intentionally is the responsibility of warning licensees of any defects of which landowners have knowledge. Thus, landowners must warn of broken steps, cracked concrete, or dangerous animals.

Practical Tip

Many malls and shopping centers are providing additional security guards. Grocery stores often mandate that customers be accompanied by an employee when they return to their cars in the parking lot. The issue of potential liability to their invitees has taken new prominence in security procedures for commercial areas.

Invitees

Invitees are persons on the property of another by express invitation. Every public place offers an express invitation to all members of the public. Customers are always invitees in places of business. A repair person on the premises to fix a washer or refrigerator is there at the landowner's express request. Invitees are afforded the greatest degree of protection by landowners. Landowners must exercise reasonable care to protect invitees from injury. This generally includes the duty not only to warn invitees of any defects of which they have knowledge but also to inspect their property for defects and take reasonable steps to correct them. For example, a leaf of lettuce on the floor in the produce section of a grocery store is a hazard for invitees. Grocery store owners are required to periodically check and sweep aisle areas to protect invitees. Figure 2.4 provides a summary view of landowner liability and duty.

Consider 2.5

Classify each of the following parties in terms of landowners' responsibilities. Describe the landowner's duty to each.

a. Paramedic
b. Customer in a department store
c. Marketing researcher doing a door-to-door survey
d. Burglar

FIGURE 2.4 *Landowner Duties and Liabilities*

Type of Person Entering Property	Landowner Duty	Liability*
Trespasser	Not to intentionally injure	Liable for intentional injury; mantraps, automatic traps, etc.
Licensee	Not to intentionally injure	Correct defects aware of; Liability for intentional injury; injury caused by known defects
Invitee	Not to intentionally injure; Correct defects aware of or should be aware exist	Above, plus liability for should-have-known-defects

* There are variations from state-to-state. For example some states classify social guests as licensees whereas, others classify them as invitees, hence changing the duties and liability of the landowners.

Breach of Duty

A landowner's breach of any of the above responsibilities can result in the imposition of tremendous liability, especially if the trespasser, licensee, or invitee is seriously injured. Landowners must be cautious in exercising their responsibilities and can be further protected through maintenance of adequate insurance.

The following case deals with an evolving and important area of the liability of landowners. The case involves an issue of the landowner's liability to invitees when the invitee is injured by the criminal activity of a third party.

Delta Tau Delta v. Johnson

712 N.E.2d 968 (Ind. 1999)

Facts

Delta Tau Delta (DTD) is a fraternity located on the campus of Indiana University at Bloomington and is the local chapter for the national DTD. On October 13, 1990, Tracey D. Johnson, an undergraduate student at Indiana University, attended a party at the DTD fraternity house, at the invitation of a DTD member.

When Johnson arrived at the DTD house at about 10:00 P.M., the beer was flowing and the atmosphere was rather chaotic. At about midnight, as Johnson and her friends prepared to leave the party, they encountered Joseph Motz, an alumnus of DTD who had driven into Bloomington that day for the football game. Motz brought along his own case of beer, which he kept in room C17 of the DTD house. At the time of this encounter, Motz had already quaffed four to five beers.

While Johnson and Motz spoke, Johnson's friends left and she was without a ride to her home. Motz offered to drive her home and she agreed, but only after he had sobered up some. The two went to C17, where they had some hard liquor and listened to music with other guests.

Sometime between 3:30 and 4:00 A.M., Johnson searched for a ride again and Motz offered again, whereupon Johnson again required that he become sober. Motz then locked himself and Johnson alone into C17 and Motz sexually assaulted her there.

Johnson field suit against Motz and DTD, both the local and the national fraternities. The trial court denied motions by DTD for summary judgment, the Court of Appeals reversed all the denials and the parties appealed to the Indiana Supreme Court. (Note: Motz pled guilty to sexual battery.)

Judicial Opinion

Selby, Justice. The question of whether and to what extent landowners owe any duty to protect their invitees

from the criminal acts of third parties has been the subject of substantial debate among the courts and legal scholars in the past decade. See, e.g., *McClung v. Delta Square Ltd. Partnership,* 937 S.W.2d 891, 897 (*Tenn.* 1996) (noting that the debate caused the court to reconsider its law in this area). The majority of courts that have addressed this issue agree that, while landowners are not to be made the insurers of their invitees' safety, landowners do have a duty to take reasonable precautions to protect their invitees from foreseeable criminal attacks. Indiana courts have not held otherwise.

A further question arises, however, in that courts employ different approaches to determine whether a criminal act was foreseeable such that a landowner owed a duty to take reasonable care to protect an invitee from the criminal act. There are four basic approaches that courts use to determine foreseeability in this context: (1) The specific harm test, (2) the prior similar incidents test (PSI) (3) the totality of the circumstances test, and (4) the balancing test.

Under the specific harm test, a landowner owes no duty unless the owner knew or should have known that the specific harm was occurring or was about to occur. Most courts are unwilling to hold that a criminal act is foreseeable only in these situations.

Under the prior similar incidents test, a landowner may owe a duty of reasonable care if evidence of prior similar incidents of crime on or near the landowner's property shows that the crime in question was foreseeable. Although courts differ in the application of this rule, all agree that the important factors to consider are the number of prior incidents, their proximity in time and location to the present crime, and the similarity of the crimes. Courts differ in terms of how proximate and similar the prior crimes are required to be as compared to the current crime.

The public policy considerations are that under the PSI test the first victim in all instances is not entitled to recover, landowners have no incentive to implement even nominal security measures, the test incorrectly focuses on the specific crime and not the general risk of foreseeable harm, and the lack of prior similar incidents relieves a defendant of liability when the criminal act was, in fact, foreseeable.

Under the totality of the circumstances test, a court considers all of the circumstances surrounding an event, including the nature, condition, and location of the land, as well as prior similar incidents, to determine whether a criminal act was foreseeable.

Courts that employ this test usually do so out of dissatisfaction with the limitations of the prior similar incidents test. The most frequently cited limitation of this test is that it tends to make the foreseeability question too broad and unpredictable, effectively requiring that landowners anticipate crime.

Under the final approach, the balancing test, a court balances "the degree of foreseeability of harm against the burden of the duty to be imposed." In other words, as the foreseeability and degree of potential harm increase, so, too, does the duty to prevent against it. This test still relies largely on prior similar incidents in order to ensure that an undue burden is not placed upon landowners.

We agree with those courts that decline to employ the specific harm test and prior similar incidents test. We find that the specific harm test is too limited in its determination of when a criminal act is foreseeable. While the prior similar incidents test has certain appeal, we find that this test has the potential to unfairly relieve landowners of liability in some circumstances when the criminal act was reasonably foreseeable.

As between the totality of the circumstances and balancing tests, we find that the totality of the circumstances test is the more appropriate. The balancing test seems to require that the court ask whether the precautions which plaintiff asserts should have been taken were unreasonably withheld given the foreseeability of the criminal attack. In other words, the question is whether defendant took reasonable precautions given the circumstances. We believe that this is basically a breach of duty evaluation and is best left for the jury to decide.

On the other hand, the totality of the circumstances test permits courts to consider all of the circumstances to determine duty. In our view and the view of other state supreme courts, the totality of the circumstances test does not impose on landowners the duty to ensure an invitee's safety, but requires landowners to take reasonable precautions to prevent foreseeable criminal acts against invitees.

Applying the totality of the circumstances test to the facts of this case, we hold that DTD owed Johnson a duty of reasonable care. Within two years of this case, two specific incidents occurred which warrant consideration. First, in March 1988, a student was assaulted by a fraternity member during an alcohol party at DTD. Second, in April 1989 at DTD, a blindfolded female was made, against her will, to drink alcohol until she was sick and was pulled up out of the chair and spanked when she refused to drink. In addition, the month before this sexual assault occurred, DTD was provided with information from National concerning rape and sexual assault of college campuses. Amongst other information, DTD was made aware that "1 in 4 college women have either been raped or suffered attempted rape," that "75% of male students and 55% of female students involved in date rape had been drinking or using drugs," that "the group most likely to commit gang rape on the college campus was the fraternity," and that fraternities at seven universities had "recently experienced legal action taken against them for rape and/or sexual assault." We believe that to hold that a sexual assault in this situation was not foreseeable, as a

matter of law, would ignore the facts and allow DTD to flaunt the warning signs at the risk of all of its guests.

As a landowner under these facts. DTD owed Johnson a duty to take reasonable care to protect her from a foreseeable sexual assault. It is now for the jury to decide whether DTD breached this duty, and, if so, whether the breach proximately caused Johnson's injury. While this may be the exceptional case wherein a landowner in a social host situation is held to have a duty to take reasonable care to protect an invitee from the criminal acts of another, when the landowner is in a position to take reasonable precautions to protect his guest from a foreseeable criminal act, courts should not hesitate to hold that a duty exists.

The final issue which Johnson raises is whether National owed her a duty of care. Johnson contends that genuine issues of material fact exist concerning whether National assumed such a duty. Specifically, Johnson argues that National undertook actions which raise the inference that it assumed a duty to protect against date rape and alcohol abuse. Thus, she concludes, the trial court was correct to deny National's motion for summary judgment.

In the present case, the most compelling evidence which Johnson presents in support of her claim refers to a series of posters which National sent DTD to hang for the public to see. These posters professed that the Delta Tau Delta Fraternity was a leading fighter against date rape and alcohol abuse, and they were placed, by DTD, in places where they could be seen by the public. These posters do not create an inference that National gratuitously assumed a duty. For example, one poster stated that, "It may come as a surprise, but one of the most active organizations in the fight against alcohol abuse, date rape and hazing is a fraternity." Another stated that, "while date rape may be all too commonplace an occurrence, there's absolutely no place for it at Delta Tau Delta." The posters did not profess to have security available as did the pamphlet in *Ember*, nor did they state that one could call National for help with problems such as date rape or alcohol abuse. This Court, therefore, while it expresses no review with regard to any other theory of liability, reverses the trial court's denial of summary judgement [*sic*] on the gratuitous assumption of duty theory.

We vacate the Court of Appeals decision and affirm the trial court in part and reverse the trial court in part.

Affirmed in part and reversed in part.

Case Questions

1. What duty does a landowner owe to invitees for protection against criminal activity by third parties?
2. What evidence existed that DTD knew there was a risk of date rape?
3. List the differences between the "totality of circumstances" test, the "prior similar incidents" test, the "specific harm" test, and the "balancing" test.
4. Will the case eventually be decided by a jury?

Consider 2.6

Jane Doe, a 16-year-old runaway, using a pass obtained by another person, entered the Brainerd International Raceway (BIR) to watch the Quaker State Northstar National race. Doe indulged in alcohol and drugs, which were supplied to her by other patrons at the race.

An annual tradition at the race was a wet T-shirt contest. Flyers had been printed advertising the contest, and they were posted at the raceway at the time of the race. Doe participated in the contest, which began with sopping of the contestants' clothes and ended with Doe completely naked and subjected to crowd (consisting of 2,000 to 3,000 men) fondling for 45 minutes, all of which was captured on a videotape by one of the spectators.

Doe filed suit contending that BIR had breached its duty to her as an invitee in its failure to warn her about the contest and by not providing adequate security at the event. BIR maintains that Doe was a trespasser who did not have a valid pass for the event, which required that pass holders be age 18 or above.

Doe has requested damages for BIR's breach of duty as the property owner. Was Doe a trespasser or an invitee? Should BIR be held liable? *Doe v. Brainerd International Raceway,* 514 N.W.2d 811 (Ct. App. Minn. 1994)

CAUTIONS AND CONCLUSIONS

The discussion in this chapter has centered on ownership of land and what is included as part of that land. To avoid problems in this area, there are several circumstances in which the parties should take precautions. In the first circumstance, a buyer is purchasing property, and all parties (seller, buyer, agents, and financiers) should analyze the sale with the following questions:

1. What water is available? Are the water rights protected?
2. Are mineral rights being transferred? What minerals are included? If minerals are not being transferred, who owns them and what do they own? What land use rights do they have? What are the royalties or payments and who is entitled to receive them?
3. Is light available to the buildings, landscaping, and solar panels? If not, is an easement possible? Will future structures block the light?
4. Are the column and air lots included or have they been transferred? Who owns them?
5. Is air traffic unusually burdensome, close, or noisy?
6. Do any nuisances such as pollution, smell, or insects exist? Can they be remedied?
7. Are there any persons using the property? Do they hold any rights or are they trespassers?

Failure to check on these seven factors can result in losses to the buyer and the possible imposition of liability on the seller or the broker or agent for failing to disclose relevant information.

In the second circumstance, a property owner wishes to convey mineral rights and may be faced with a complex and lengthy document. The situation may be clarified by answering the following questions:

1. What interest is being conveyed? What minerals? Subsurface only? Fee simple interest? Lease? Right of removal?
2. What rights are given on surface use? Will the lessee pay for restoration?
3. How much is the royalty? Are there any other fees to be paid? If no minerals are drawn, is there any payment?
4. Can the land be sold to someone else? Who gets the royalties?
5. Can they transfer the mineral rights to someone else? Will the same restrictions apply?

In the third and final circumstance, property owners are responsible for the way they use their property and may want to answer these questions in assessing potential liability:

1. Are there significant noises, smells, or other emissions from the property? Do they interfere with others' use and enjoyment of their own property?
2. Are there individuals using the property in an unauthorized manner? Are there trespassers? Are there any mantraps to injure them? Have steps been taken to prevent trespass?
3. Are there licensees on the property or potentially on the property? Are there appropriate signs and methods of warning them of dangers?

4. Do invitees enter the property? Are there any dangerous conditions? Have they been remedied? Are periodic inspections done to find and eliminate dangerous conditions?
5. Are nuisances from others affecting the property? Can action be taken to stop the conduct or recover damages?

The topics in this chapter have significant impact on landowners in various circumstances. The preceding questions integrate the topics and serve as a checklist to prevent or minimize legal problems

Key Terms

air rights, 17
column lot, 20
air lot, 20
solar easement laws, 21
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Chapter Problems

1. In 1962, Rudolph and Bonnie Sher entered into a long-term lease agreement with Stanford University. The lot they leased was in a residential subdivision on the campus known as Pine Hill 2. Design approval by Stanford was required prior to construction of any homes on the lots. Herbert and Gloria Leiderman leased their lot located next to the Shers shortly after the Shers had signed their lease agreement.

The Shers' home was designed and built to take advantage of the winter sun for heat and light. Their home was placed on the lot so that its length faced the south. The windows on the south of their home are larger than the other windows in the house. The south side of the house is serrated to expose the maximum area to the sun. Roof overhangs were designed and constructed to block sun in the summer and permit winter sunlight to enter the home. Deciduous trees and shrubs on the south side of the house aid in shading and cooling in the summer, yet allow winter sunlight to reach the house. The Sher home is known as a "passive" solar home because it does not make use of any active solar collectors or panels.

The Leidermans undertook a landscaping scheme designed to attract birds and other small creatures and provide shade and privacy. By 1972, the Leiderman trees were casting shadows on the Sher house in the winter. The offending trees were removed at the Shers' expense. By 1979, the Shers had spent $4,000 on tree maintenance and removal in the Leidermans' yard. In 1979, the Leidermans refused to allow any further trimming at anyone's expense.

As a result of the ever-expanding trees, the Sher's house was cast in shadow between 10:00 A.M. and 2:00 P.M. A skylight was added in the kitchen but had little impact. Heat loss from the shadows amounted to 60 therms of natural gas. The Shers brought suit on the grounds of private nuisance, violation of the California Solar Shade Control Act, and negligent infliction of emotional distress. Is the Leidermans' landscaping a nuisance? Does it violate the Shade Control Act? Is it significant that the case involves passive solar devices and not solar panel access? *Sher v. Leiderman,* 226 Cal. Rptr. 698 (Cal. App. 1986)

2. Barclay and Marjorie Sloan own property directly north of and higher than the property of Robert, Joe, and Myrtle Wallbaum. Water drained from the Sloans' property through the Wallbaums' property through a grassy drainage ditch. In 1985, the Sloans tiled their land and had the ditch sloped and somewhat straightened.

The result was erosion on the Wallbaums' property. The Wallbaums then blocked the ditch with a piece of tin and later fill dirt. The result was that the Sloans' property became flooded. The Sloans filed suit for an injunction ordering the removal of the blockage the Wallbaums had installed. Are the Sloans entitled to the injunction? Discuss the water rights issues (*Sloan v. Wallbaum,* 447 N.W.2d 148 [Iowa 1989]).

3. Glen Prah constructed a residence during 1978 and 1979. He installed solar collectors on the roof for purposes of supplying energy for heat and hot water. Richard Maretti purchased the lot adjacent to Prah's and submitted proposed home plans that would result in a substantial obstruction of Prah's solar collectors and a corresponding reduction in the system's output and efficiency. Prah brought suit claiming that the construction of the home would be a private nuisance. If Maretti simply repositioned the layout of his home, the impact on Prah's system would be reduced, but Maretti has refused because his plans are in compliance with all zoning ordinances and other regulations. What factors should the court examine in balancing the parties' interests (*Prah v. Maretti,* 321 N.W.2d 182 [Wis. 1982])?

4. Bruce Rankin occupies real estate in rural Platt County, Illinois, that is zoned for agricultural use. He has lived there since 1959 and, along with a partner, operates a business from his house known as Williams Trigger Specialties. In this business, Rankin, a federally registered gunsmith, works on firearm firing mechanisms.

Also located on the property, which has also been there since 1959, is a firing range. Rankin allows his friends to use the firing range in addition to using it himself. He does not permit strangers to use it. In the last several years, he has also permitted various law-enforcement agencies to use the range for training, practice, and qualification, including the Champaign Police Department, the Urbana Police Department, and the Ludlow Police Department. The Champaign Police Department Strategic Weapons and Tactics (SWAT) team, consisting of 12 people, has used the range 10 to 15 times in the last year.

Rankin has never charged a fee for use of the range. He has, however, considered putting his range to commercial use at some time in the future. Rankin is almost always present when the range is used by private individuals other than law-enforcement agencies. There has never been an injury or near injury or complaint to Rankin about the range or its use.

Charles Kolstad owns the property immediately west of Rankin's parcel. Mary Heath Hays and Mary Lucille Hays reside on another parcel of land to the west of Rankin's parcel. Kolstad and Mary Lucille Hays have children who play together.

The Kolstads and Hays lived with the noise from the gunshots but on October 4, 1988, they became alarmed when the new noise of rapid short bursts of gunfire sounded. Kolstad recognized the noise as the firing of automatic weapons. Both neighbors became concerned about their safety and filed suit for an injunction to halt the use of the property as a firing range. Should the court issue an injunction? Should it be an absolute prohibition on operation of the range or something less (*Kolstad v. Rankin,* 534 N.E.2d 1373 [Ill. 1989])?

5. The Great Cove Boat Club had a wharf on the Piscataqua River in Maine. The Bureau of Public Lands, in its work for the preservation of public waterways, entered into lease agreements with private parties so that they could create and operate wharfs, floats, and moorings for public enjoyment. One such 30-year lease resulted in construction of public access wharfs that flooded the area of the Great Cove's wharf cutting off access by the owners. Great Cove claimed, as a riparian, that its rights had been violated through the use of the water in such a fashion that its water access rights were destroyed. The Bureau of Public Lands claims that it has the right, as a state agency, to regulate land use and that leasing to parties is part of that regulation that Great Cove is subject to. Is the Bureau correct or have Great Cove's riparian rights been violated (*Great Cove Boat Club v. Bureau of Public Lands,* 672 A.2d 91 [Me. 1996])?

6. Consider whether the following types of conduct would constitute a nuisance, and discuss the type of remedy available. Be sure to use the doctrine of balancing interests.

- **a.** The operation of a dump causing smoke, odors, flies, rodents, and wild dogs to enter neighboring properties.
- **b.** Stadium lights on at night that disturb a neighbor's sleep.
- **c.** The operation of a 24-hour car wash next to a home when the car wash employees play loud music, curse, sell illegal drugs, urinate in plain view, and throw trash onto the grass surrounding the home. Would it matter if the customers were responsible for these activities (*Packett v. Herbert,* 377 S.E.2d 438 [Va. 1989])?

7. Alan C. Bir owned Lot 20 in the Meadows Subdivision located in Allegheny County, North Carolina. Michael Kent Lee and his wife, Anne P. Lee (plaintiffs), owned Lot 21 in that same subdivision.

In May or June, 1990, Bir contacted Kenneth Miles and asked Miles to cut down trees in an area he showed Miles from the deck of his home. Miles proceeded to cut trees down for two to three weeks. After the trees were cut, Miles began to chop up the trees and burn them. Bir appeared and told Miles, "hurry up," because "they were cutting on someone else's property." Bir also told Miles to keep quiet about the cutting. Miles later learned that he had been clearing trees from the Lees' property believing them to be located on Bir's property, with the removal needed for Bir's view.

When the Lees discovered that a significant amount of their property had been cleared, they filed suit against Bir. Two days before Miles was scheduled to give his deposition, Bir told Miles to say that the trees were cut because of damage from Hurricane Huge. What would be the basis of their suit (*Lee v. Bir,* 449 S.E.2d 34 [N.C. App. 1994])?

8. Douglas Margreiter was severely injured in New Orleans on the night of April 6, 1976. Margreiter was the chief of the pharmacy section of the Colorado Department of Social Services and was in New Orleans to attend the annual meeting of the American Pharmaceutical Association.

On Tuesday evening, April 6, Margreiter had dinner in the Royal Sonesta Hotel with two associates from Colorado who were attending the meeting and were staying in rooms adjacent to Margreiter's in the New Hotel Monteleone. Margreiter returned to his room between 10:30 P.M. and 11 P.M.; one of his friends, Peebles, returned to his adjoining room at the same time. Bogan, another friend, was to come by Margreiter's room later to discuss what meetings of the association each would attend the next day.

About three hours later, Margreiter was found severely beaten and unconscious in a parking lot three blocks from the Monteleone. The police who found him said they thought he was highly intoxicated; they took him to Charity Hospital. His friends later had him moved to the Hotel Dieu.

Margreiter said two men had unlocked his hotel room door and entered his room. He was beaten about the head and shoulders and had only the recollection of being carried to a dark alley. He required a craniotomy and other medical treatment and suffered permanent effects from the incident.

Margreiter sued the hotel on the grounds that it was negligent in not controlling access to elevators and hence to the guests' rooms. The hotel says Margreiter was intoxicated and met his fate outside the hotel. Should the hotel be held liable (*Margreiter v. New Hotel Monteleone, Inc.,* 640 F.2d 508 [5th Cir. 1981])?

9. Jane Doe was confronted by Billy Jo Hampton on February 23, 1994, as she was preparing to leave the Beckley Crossings Shopping Center in Raleigh County, West Virginia. She had been shopping at the Center's Wal-Mart store (defendants), which was managed by Belcher. The actual property itself was owned by B. C. Associates Ltd. Hampton placed a knife in her side, forced her into her car, drove the car out of the parking lot to a remote area, sexually assaulted her and then abandoned her and the car. Mr. Hampton was apprehended several days later in Greensboro, North Carolina, where he had abducted another woman. He was charged with attempted murder of Ms. Doe.

Ms. Doe filed suit against Wal-Mart and the limited partnership that owned and operated Beckley Crossings, alleging that they had failed to take reasonable precautions to prevent this kind of injury to customers invited to the shopping center. Is either Wal-Mart or the limited partnership liable (*Doe v. Wal-Mart Stores, Inc.,* 479 S.E.2d 610 [W.Va. 1996])?

10. A private foundation has proposed the construction of a 72-bed facility for the mentally disabled persons in a residential neighborhood. Two neighbors have filed suit to halt construction as a nuisance on the basis of evidence that residents of existing facilities tend to roam the neighborhoods going through trash cans and approaching neighbors for money and food. Will the facility be enjoined (*Miniat v. McGinnis,* 762 S.W.2d 390 [Ark. 1988])?

Internet Activities

For more information on state sponsorship of solar developments go to: **http://www.ncsc.ncsu.edu/**, which is The North Carolina Solar Center, located in the College of Engineering at North Carolina State University. It provides programs and resources that help people throughout North Carolina take advantage of solar energy. To view homes with solar energy go to: **http://www.ases.org**. List the new developments in solar energy.