

Case Note

A House with a View

Lee County v. Kiesel, 705 So. 2d 1013 (Fla. Dist. Ct. App. 1998).

Environmentalists have generally contested private property rights and sought to restrict the scope of takings jurisprudence. Their goal has been to uphold government regulation, particularly land-use regulation, to protect the environment against takings claims.¹ But by developing a rigid anti-takings stance in the fight against property-rights advocates, environmentalists may be missing an opportunity to expand private property rights in order to protect the environment.

This Case Note examines a state appellate case that could prepare the way for an expansion of private property rights to protect the environment. In *Lee County v. Kiesel*,² the Florida District Court of Appeals recognized the property right of a landowner to view a river. The court held that invasion of that right, even if resulting from activity that occurred solely on neighboring properties, constituted a physical invasion of the landowner's property rights. Environmentalists should seek to create a powerful new tool to protect the environment by expanding this holding to encompass rights to view wildlife or to enjoy clean water. There are two parts to this argument: first, an expansion of takings doctrine to include property rights such as wildlife and clean water, and second, the use of these expanded

1. The attitude of much of the environmental community toward property-rights litigation is perhaps best exemplified by comments leading up to the Supreme Court's decision in *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992). Environmentalists feared that a decision in favor of Lucas would invite a tidal wave of takings claims that would roll back environmental regulations. See, e.g., Paul M. Barrett & Rose Gutfeld, *Justice Department Division Backs Curbs on Health, Safety, Environmental Rules*, WALL ST. J., Dec. 23, 1991, at A5; H. Jane Lehman, *Court Hears Case on Land Compensation*, WASH. POST, Mar. 7, 1992, at E18. The case was also decried as "the camel's nose under the tent as far as all types of environmental and public health regulations." James Rowley, *Administration Blasted for Stand in Anti-Erosion Case*, ASSOCIATED PRESS, Jan. 3, 1992, available in 1992 WL 5279848.

2. 705 So. 2d 1013 (Fla. Dist. Ct. App. 1998).

property rights to narrow the scope of takings challenges to environmental regulations.

I

The facts of *Kiesel* are quite simple. The Kiesel family had purchased riverfront property and built a home on the land. The county then built a bridge that obstructed the Kiesel family's view of the river from their property. Although the bridge did not physically encroach upon their property, the Kiesel family filed suit, alleging that the county had taken their property without compensation.³ At trial, the plaintiffs' expert witness testified that the bridge's obstruction of the river view had reduced the property's value by over \$300,000.⁴ The trial court found a taking, and the appellate court affirmed.⁵

At first, the decision seems mysterious under takings law. The Supreme Court has held that a *per se* taking of private property arises from a government's "permanent physical occupation" of the property.⁶ The county, however, never actually occupied any of the Kiesel family's property. Yet the Florida court "reject[ed] the county's argument that there was no physical taking here."⁷

The explanation is that the Florida court was interpreting Florida's riparian rights, "one of which is the right to an unobstructed view over the water to the channel. These rights constitute property, which the government may not take or destroy without paying just compensation to the owners."⁸ Thus, the obstruction "involved an actual physical intrusion to an appurtenant right of the Kiesel family's property ownership."⁹

II

While an unobstructed view of a river from riparian property might seem an unusual property right, other courts have recognized similarly unusual rights. Restricting access to a property by closing nearby streets may be a taking, even where government actions do not encroach upon the

3. The bridge blocked the view of the river without encroaching upon the Kiesel family's property because it crossed the river at an angle. *See id.* at 1014.

4. *See id.*

5. *See id.* at 1016.

6. *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 441 (1982).

7. *Kiesel*, 705 So. 2d at 1015.

8. *Id.* (citing *Thiesen v. Gulf, F. & A. Ry. Co.*, 78 So. 491 (Fla. 1918)).

9. *Id.* To support this point, the court cited *Palm Beach County v. Tessler*, 538 So. 2d 846, 849 (Fla. 1989), which held that obstructing a property's right of access constitutes a taking of an appurtenance to the property and entitles the owner to compensation.

property.¹⁰ The classic English case of *Keeble v. Hickeringill*¹¹ provides another example. In *Keeble*, the court held that a neighbor's use of explosives to scare ducks from the plaintiff's pond constituted an actionable tort, even though the explosives detonated on the neighbor's property.¹²

American courts have generally allowed the state and federal governments to regulate the hunting of wildlife by landowners and others.¹³ Nonetheless, the holding of *Kiesel* could expand to give landowners the right to see and enjoy the wildlife on their property.¹⁴ Environmentalists should press to expand the holding of *Kiesel*, which recognized the right to an unobstructed view of a river, to include the right to an unobstructed view of wildlife. Both rights can be important factors when a landowner purchases property, and may have an impact on the value of the property.¹⁵ Government infringement of the right to view wildlife would, under *Kiesel*, constitute a taking through physical invasion of the landowner's property.¹⁶

10. See *Garrett v. City of Topeka*, 916 P.2d 21, 32-33 (Kan. 1996) (holding that restriction of access to a property by commercial vehicles through regulation may result in a taking); *Teachers Ins. & Annuity Ass'n v. City of Wichita*, 559 P.2d 347, 355-56 (Kan. 1977) (granting takings claims where the construction of a limited access highway had forced the neighboring commercial properties to gain access via circuitous side streets). State-owned airports can be liable for taking landowners' property when low-flying airplanes pass near their homes. Compensation is owed even if there is no actual entrance of the plane into the airspace above the landowner's property. See, e.g., *Martin v. Port of Seattle*, 391 P.2d 540 (Wash. 1964).

11. 88 Eng. Rep. 945 (Q.B. 1706).

12. See *id.* While the actual holding of the case involved the theory of malicious interference with trade, see *id.*, at least one American court has interpreted it as establishing the principle that property owners have "constructive" ownership of the wildlife on their property. See *Pierson v. Post*, 3 Cai. R. 175, 179 (N.Y. Sup. Ct. 1805).

13. See MICHAEL J. BEAN & MELANIE J. ROWLAND, *THE EVOLUTION OF NATIONAL WILDLIFE LAW* 36 (3d ed. 1997).

14. While American law has traditionally held that ownership of animals is not established until they are subdued or killed, it has also held that wildlife captured by a trespasser on private property becomes the property of the landowner. See DAVID S. FAVRE & MURRAY LORING, *ANIMAL LAW* 22-23 (1983); see also Thomas A. Lund, *Early American Wildlife Law*, 51 N.Y.U. L. REV. 703, 713-14 (1976) (noting that under 19th-century law, landowners could exclude hunters from their land by posting the borders of their property).

15. Some landowners arrange to protect their property from development after their ownership terminates (usually due to death). These arrangements indicate that one factor in the original purchase of the property might have been a desire to protect and observe wildlife. See, e.g., Catherine Lazaroff, *Georgia Gem*, *AUDUBON*, Mar. 1, 1998, at 147, 147 (reporting a landowner's donation of a conservation easement that "prohibits any use of the land that would detract from its value as a wildlife habitat").

16. Landowners have successfully obtained an injunction against government actions that harmed fishing and other recreational resources in an estuary where those resources made property bordering the estuary more valuable. See *Taylor Bay Protective Ass'n v. Ruckleshaus*, 687 F. Supp. 1319, 1325-27 (E.D. Ark. 1988) (holding that government operation of a flood-control project constituted a public and private nuisance where it harmed water quality and aquatic wildlife), *aff'd sub nom.* *Taylor Bay Protective Ass'n v. EPA*, 884 F.2d 1073 (8th Cir. 1989). While nuisance actions and takings actions are different, there is a strong parallel between the two claims. A takings claim depends on whether the government has infringed upon a property right; similarly, a nuisance claim depends on whether a neighbor has interfered with a property right. (A third major claim, trespass, is usually defined as a neighbor's interference with a property right through direct physical invasion or occupation.) Thus, American courts have rejected takings claims by analogizing to nuisance law. See *City of Wichita v. McDonald's Corp.*,

For example, a landowner may enjoy observing a bird population on his property. If the government drains a wetland on neighboring property that provides critical habitat for that bird population, the property owner could then sue the government for compensation. By destroying the wildlife that the property owner viewed on his property, the government has physically invaded a part of his property, and owes compensation.

Using *Kiesel* to expand property rights could have consequences beyond the confines of takings jurisprudence. Landowners should enforce their property right to view wildlife against neighbors who destroy wildlife resources that the claimants view and enjoy on their own property.¹⁷ For example, the neighbor might drain wetlands essential to the survival of birds that roost on the plaintiff's property. Under the principle of *Kiesel*, the plaintiff landowner would sue his neighbor for trespass.¹⁸ The court in *Kiesel* held that construction of the bridge constituted a physical invasion that required compensation by the government; the analogous cause of action when a private actor physically invades another private party's property is trespass. The landowner could seek either an injunction or compensation.¹⁹

971 P.2d 1189, 1198 (Kan. 1999) (relying on common-law nuisance principles to reject a takings claim based on a highway overpass blocking the public's view of a commercial building). Reciprocally, courts have found that when a government action constitutes a nuisance, it may result in a taking. *See Thornburg v. Port of Portland*, 376 P.2d 100, 105-07 (Or. 1962) (holding that overflights by airplanes to a municipal airport may constitute a sufficient nuisance such that the airport owes compensation, even if the overflights are not directly in the property's airspace); 2A NICHOLS ON EMINENT DOMAIN § 6.05[5] (Julius L. Sackman ed., 3d ed. 1999).

17. Several cases have held that damages to wildlife resources due to landowner actions can result in an actionable nuisance. *See, e.g., Colorado Div. of Wildlife v. Cox*, 843 P.2d 662, 664 (Colo. Ct. App. 1992) (holding that the introduction of non-native wildlife may constitute a public nuisance because of the threat to native wildlife); *Wood v. Picillo*, 443 A.2d 1244, 1248 (R.I. 1982) (holding that a toxic waste spill is a nuisance because of the threat to wildlife and humans). *Picillo* held that the plaintiffs had established both a public and a private nuisance for damage to wildlife resources. *See Picillo*, 443 A.2d at 1247-48. In finding a private nuisance, the court thus established that property owners have a property right to wildlife, which has been infringed by the party committing the nuisance.

18. Although the cases discussed *supra* note 17. involve nuisance claims, they can equally support a trespass claim under the theory of *Kiesel*. A direct, physical invasion of a property right constitutes trespass, while an invasion of the property right by "indirect and intangible interferences" constitutes a nuisance. *See Thomas W. Merrill, Trespass, Nuisance, and the Costs of Determining Property Rights*, 14 J. LEGAL STUD. 13, 14 (1985). Thus, if the courts establish that a property right exists in the context of nuisance law, that property right should be equally protected against physical invasions such as those established in *Kiesel*. As Merrill notes, and a sampling of cases reveals, the border between trespass and nuisance is very difficult to draw. For instance, deposition of sooty particulate matter on a property will constitute a trespass, while odor on the property (caused by deposition of particles that are simply too small to see) will be considered a nuisance. *Compare Borland v. Sanders Lead Co.*, 369 So. 2d 523 (Ala. 1979) (holding that particulate matter could constitute a trespass), *with Born v. Exxon Corp.*, 388 So. 2d 933 (Ala. 1980) (holding that an odor did not constitute trespass). In fact, this Case Note's argument creates a legal fiction of "physical invasion" of certain environmental goods (such as wildlife or clean water), which also blurs the distinction between trespass and nuisance.

19. *See 75 AM. JUR. 2D Trespass* § 110 (1991).

Environmental plaintiffs should extend these arguments to other environmental resources. Landowners could argue that *Kiesel* implies that riparian landowners have the right to view and to use not just any river, but a clean, free-flowing, and unspoiled river. The diminution in property value because of the obstruction of their river view established the Kiesel's takings claim. It is entirely possible, however, that an equal diminution in value of their property would have occurred if the river had instead been turned into an open sewer by the government, ruining its scenic value. Both harms should be compensated.²⁰ Such a property right, protected by takings and trespass law against physical invasion, could discourage further intrusions by thirsty western cities on the riparian rights of rural landowners by requiring compensation for the damage to the rivers.²¹

Environmental advocacy groups following this strategy should look for a test case with facts such as these: A nonprofit conservation organization owns and maintains a preserve specifically for the protection and observation of a species of wildlife. A state government is attempting to construct a highway through the feeding grounds of a rare bird species that roosts nearby, on the conservation organization's refuge. Destruction of the feeding grounds would eliminate the rare bird species from the area, and thus eliminate the refuge's usefulness to its owner. The organization could file a takings claim alleging a direct physical invasion of its property rights to observe, enjoy, and protect the animal species. As in *Kiesel*, even though the government never actually physically invades the refuge, the destruction of an important environmental appurtenance of the property would constitute a physical invasion,²² and thus a per se taking.²³

If the defendant in the test case were a neighboring landowner instead of the government, then the action would be for trespass.²⁴ Trespass requires that the defendant intended to occupy, and did physically occupy, the property right in question.²⁵ Intent in this type of case should attach,

20. There is authority in nuisance law that landowners have a right to clean water. *See, e.g.,* *Branch v. Western Petroleum, Inc.*, 657 P.2d 267, 272-74 (Utah 1982) (holding a company liable for contamination of groundwater resources).

21. *See generally* MARC REISNER, *CADILLAC DESERT* (rev. 1993) (describing the history of water diversions and dam construction in the American West).

22. The closer geographically the harmful government action is to the plaintiff's property, the greater the chances for success, because the direct impact would be more obvious. In *Kiesel*, the bridge seems to have been very close to the plaintiff's property. *See Kiesel*, 705 So. 2d at 1014.

23. Physical invasion constitutes a per se taking, with no requirement for a total diminution of value or a balancing of the public and private benefits from the government action. *See Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 441 (1982).

24. In a lawsuit by a conservation organization making such a claim, the connection to *Keeble* would be quite strong. In *Keeble*, the fact that the plaintiff had constructed a decoy to capture the ducks and had earned money from the hunting appeared to be quite significant to the court. *See Keeble v. Hickingrill*, 88 Eng. Rep. 945, 945 (Q.B. 1706). Similarly, an environmental organization that invests in and manages land for its wildlife resources relies on the preservation of the wildlife into the future to ensure the success of its efforts.

25. *See* 75 AM. JUR. 2D *Trespass* § 27 (1991).

whether or not the defendant neighbor is aware that damage to wildlife will result from his actions.²⁶

III

There are two good reasons for environmentalists to explore using property rights to defend the environment, rather than simply attempting to justify expanded government intervention by restricting the scope of private property rights.²⁷

First, establishing stronger common-law property rights in environmental resources such as wildlife and clean air or clean water might help buttress government regulation against takings claims. The leading case on takings challenges to environmental regulations is *Lucas v. South Carolina Coastal Council*.²⁸ In *Lucas*, the Court held that a land-use regulation that denies all economically valuable uses of a property constitutes a per se taking of the property, requiring compensation.²⁹

However, the Court in *Lucas* recognized an exception to the new per se takings rule for regulations that comported with the "background principles of the State's law of property and nuisance"³⁰ and the limits those principles already placed on the use and ownership of private property. If an action was already prohibited under the common law of nuisance in a state, the property owner never had the right to undertake that action (for example, the construction of a factory that pollutes the air) in the first place. Thus, codification of that nuisance principle in a statute (through a prohibition on the construction of polluting factories, even if that was the only economically viable use of the property) could not be a taking. Because the landowners never owned the property rights that are excluded by nuisance law, the Court reasoned, the state may restrict those rights without paying compensation.

26. *See id.* § 9.

27. The argument that takings jurisprudence could be used to expand private property rights in order to protect the environment has been made by at least one other commentator, albeit in a much narrower context. *See* Royal C. Gardner, *Invoking Private Property Rights for Environmental Purposes: The Taking Implications of Government-Authorized Aerial Pesticide Spraying*, 18 STAN. ENVTL. L.J. 65 (1999). Gardner argues that aerial pesticide spraying of malathion to control Mediterranean fruit fly infestations could be seen as a temporary or intermittent physical invasion of private property. *See id.* at 91-95. Gardner then proposes that environmental groups and property owners affected by spraying join forces to sue for compensation for the per se taking caused by the invasion. *See id.* at 95-102. He thus also concludes that expansion of private property rights could benefit the environment. *See id.* at 98-105. Gardner's argument is narrower than the one offered in this Case Note, however, as it is restricted to the relatively specific fact pattern of aerial pesticide spraying, and does not advocate the broader expansion of private property rights to include environmental amenities such as wildlife, clean air, and clean water.

28. 505 U.S. 1003, 1029 (1992).

29. *See id.* at 1019.

30. *Id.* at 1029.

Seizing on this exception, several writers have argued that the nuisance exception can include the “public trust” doctrine. Under this doctrine, courts have held that certain interests in land or resources “such as navigation and fishing” were “preserved for the benefit of the public in perpetuity.”³¹ Even if the landowner had title to the property on which the rights were located, the state could withdraw, alter, or regulate those rights without taking the landowner’s property. Some scholars have attempted to expand this doctrine to include environmental goods such as wetlands³² and endangered species,³³ which they argue are held in “trust” for the benefit of the public. These scholars have argued that the “background principles of nuisance law” identified in *Lucas* must include these “public trust” reservations of resources such as wetlands or endangered species. Because these “public trust” rights must be reserved by the state for the public, regulation of resources such as wetlands or endangered species cannot be seen as taking any property rights of the landowners, and so no compensation is owed under *Lucas*’s “background principles” exception.

However, there are serious doubts about whether the “background principles” exception in *Lucas* can so readily accommodate the public trust doctrine as a justification for environmental regulation. The doctrine has traditionally been restricted to navigable waters and those lands covered by tidal flows,³⁴ not the upland habitats or freshwater wetlands that are the subject of much environmental law. Moreover, *Lucas* arguably rejects this type of broad interpretation of the public trust doctrine and state nuisance law. After all, South Carolina had passed the law under review in *Lucas* in order to preserve valuable beachfront habitat and to prevent the erosion of barrier islands due to development.³⁵

But expanding common-law property rights to environmental resources such as wildlife and clean water would help governments exploit the “background principles of nuisance” exception of *Lucas* without relying on

31. Joseph L. Sax, *The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention*, 68 MICH. L. REV. 471, 475 (1970).

32. See, e.g., Hope M. Babcock, *Has the U.S. Supreme Court Finally Drained the Swamp of Takings Jurisprudence? The Impact of Lucas v. South Carolina Coastal Council on Wetlands and Coastal Barrier Beaches*, 19 HARV. ENVTL. L. REV. 1, 2-5 (1995); Paul Sarahan, *Wetlands Protection Post-Lucas: Implications of the Public Trust Doctrine on Takings Analysis*, 13 VA. ENVTL. L.J. 537, 562-87 (1994).

33. See, e.g., Lynda Graham Cook, *Lucas and Endangered Species Protection: When “Take” and “Takings” Collide*, 27 U.C. DAVIS L. REV. 185, 211-17 (1993).

34. See Sarahan, *supra* note 32, at 559.

35. See *Lucas*, 505 U.S. at 1022 (discussing the findings of the South Carolina legislature in passing the act). The Court remanded the case to the lower court for a determination of whether these rationales were within the “background principles” of nuisance, although it was very skeptical that they would be. See *id.* at 1031. At least one commentator has interpreted *Lucas* as rejecting “the economy of nature” vision of property, which holds that maintenance of land in its natural state is as beneficial as development, or more so. See Joseph L. Sax, *Property Rights and the Economy of Nature: Understanding Lucas v. South Carolina Coastal Council*, 45 STAN. L. REV. 1433, 1446 (1993).

the public trust doctrine. In establishing that the destruction of wildlife or clean water resources enjoyed by property owners constitutes a physical invasion, courts would limit landowners' rights to destroy those resources. Governments could then point to such cases and argue that environmental regulations protecting wetlands, endangered species, or water resources merely codify these common-law property rights to wildlife and clean water. Then, under *Lucas's* "background principles," the government may regulate land use to protect those resources without effecting a taking.

Second, *Lucas* transfers the interpretation and future development of property law from legislators to judges.³⁶ Thus, if environmentalists seek to use government regulation to prevent harms to ecological and environmental goods, the proper route in the future may require expanding property rights in the courts in cases like *Kiesel*, instead of passing statutes in the legislature. Such a tool should not replace government regulation to prevent environmental harms;³⁷ statutory environmental law will still be an essential part of the prevention of environmental harms. However, an active effort to expand the definition of private property rights to include environmental resources could be a valuable additional tool in the cause of environmental protection.

Environmental activists should not necessarily see cases such as *Kiesel* as a blow to environmental regulation. Environmentalists can and should use takings and trespass law to expand private property rights to include environmental amenities. This approach would provide both another sword for environmental plaintiffs to use in court, and another shield for environmental lawyers to defend government regulation against takings claims.

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36. See *Lucas*, 505 U.S. at 1068-69 (Stevens, J., dissenting) ("The Court's holding today effectively freezes the State's common law, denying the legislature much of its traditional power to revise the law governing the rights and uses of property."); see also John A. Humbach, *Evolving Thresholds of Nuisance and the Takings Clause*, 18 COLUM. J. ENVTL. L. 1, 23-28 (1993).

37. On this point, the argument of this Case Note differs significantly from those of other commentators who have argued for the greater use of nuisance and takings law based on current property rights (whether in land or water) to protect the environment. See, e.g., Terry L. Anderson, *Enviro-Capitalism vs. Enviro-Socialism*, KAN. J.L. & PUB. POL'Y, Winter 1995, at 35, 38 ("A return to more reliance on the private law of torts and contracts is crucial to the definition and enforcement of property rights necessary for free market environmentalism."); Roger E. Meiners & Bruce Yandle, *Clean Water Legislation: Reauthorize or Repeal?*, in TAKING THE ENVIRONMENT SERIOUSLY 73, 75, 94-95 (Roger E. Meiners & Bruce Yandle eds., 1993) (calling for the repeal of the Clean Water Act and its replacement with common-law nuisance causes of action to prevent pollution). These commentators, often called "free market environmentalists," tend to be extremely hostile to government regulation and see the use of nuisance and takings law as a replacement for, rather than a supplement to, the current statutory schemes. See generally TERRY L. ANDERSON & DONALD R. LEAL, FREE MARKET ENVIRONMENTALISM (1991). In contrast, this Case Note argues that the development of broader private property rights in environmental amenities might help governments defend their environmental regulations against takings claims.