In Re Hoery v. United States: Compensating Homeowners for Loss of Property Value Due to Toxic Pollution under the Continuing Tort Doctrine

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IN RE HOERY v. UNITED STATES: COMPENSATING HOMEOWNERS FOR LOSS OF PROPERTY VALUE DUE TO TOXIC POLLUTION UNDER THE CONTINUING TORT DOCTRINE

I. INTRODUCTION

In 1980, Congress enacted the Comprehensive Environmental Response, Compensation, and Recovery Act (CERCLA). Commonly known as “Superfund,” it “confers broad authority upon the Environmental Protection Agency (EPA) to investigate releases of hazardous substances and to undertake response actions, or cleanups.” The highest priority sites are placed on the National Priority List (NPL) and are eligible for Superfund remediation funds. As of January 31, 2003, there were 1,499 sites in the continental United States.

Landowners who are in close proximity to a Superfund site frequently experience a loss of property value. According to the EPA,

3. See, e.g., Robert L. Glickman et al., ENVIRONMENTAL PROTECTION LAW AND POLICY 841 (2003) (explaining Superfund availability limited to NPL sites) (citing 40 C.F.R. § 300.425(b)(1)).
4. Matt Richtel, E.P.A. Takes Second Look at Many Superfund Sites, N.Y. TIMES, Jan. 31, 2003, at A26 (reporting current number of Superfund sites). Trichloroethylene (TCE), a chemical solvent, contaminates one-third to one-half of the sites. Id. A site makes the NPL under the following circumstances:

When faced with the report of a release, EPA undertakes a preliminary assessment of a site for the purpose of determining the extent to which the release presents a threat to public health or the environment. EPA conducts this assessment in accordance with the provisions of the “hazardous ranking system” (HRS), which contains criteria for making a quick evaluation of the threat presented by contamination at a site. Application of the HRS produces a “score” for the site. If that score reaches a certain level, then the site is proposed for inclusion on the . . . NPL.

HYSON, supra note 2, at 16.

Superfund sites generally reduce off-site residential property values by two to eight percent.\(^6\) Homeowners and other private plaintiffs seeking to recover economic damages caused by hazardous pollution face two major obstacles. First, CERCLA does not permit private plaintiffs to recover loss in property value; accordingly, private plaintiffs must seek alternate avenues of recovery.\(^7\) One option is to seek compensation under state law by asserting a claim for continuing trespass or continuing nuisance under the Federal Tort Claims Act (FTCA).\(^8\)

Second, many environmental violations occur over an extended time period and are difficult to discover.\(^9\) As a result, plaintiffs often learn about potential violations after the two-year statute of limitations period has run.\(^10\) Plaintiffs may counter the statute of limitations defense by invoking the "continuing tort doctrine."\(^11\) This doctrine permits a plaintiff to "recover for acts which, if viewed individually, would be time-barred by treating them as part of a pattern of violations or as a single violation."\(^12\) This doctrine is an effective tool because it allows homeowners to recover economic damages caused by another individual's hazardous pollution.\(^13\)

While in some cases the property values recover after remediation, most properties never recover because they have become "stigmatized." Property Values, supra. Generally, stigma is "an adverse public perception that is often intangible or not quantifiable." Id. In other words, it is "a loss in value because of unspecified greater perceived risk associated with a property." Guntermann, supra, at 531.

6. See Property Values, supra note 5 (reporting losses in property value).


8. See Hyson, supra note 2, at 191 n.16 (recognizing plaintiffs may seek economic damages under state law). Under the FTCA, state law controls. Federal Tort Claims Act, 28 U.S.C. § 1346(b) (2004). For further discussion of liability under the FTCA, see infra notes 64-77 and accompanying text.

9. See Hyson, supra note 2, at 191 n.16 (noting continuous nature of environmental law violations).

10. See id. (acknowledging tension between statute of limitations and nature of environmental violations); see generally MacAyeal, supra note 7 (addressing difficulty with statute of limitations).

11. See MacAyeal, supra note 7, at 589 (explaining continuing tort doctrine may overcome statute of limitations defense).

12. Id.

13. See, e.g., MacAyeal, supra note 7, at 589, 618-19 (discussing continuing tort doctrine as means to recover otherwise time-barred acts).
The recent case, *In re Hoery v. United States*,\(^\text{14}\) illustrates the difficulty that courts face when applying the continuing tort doctrine to environmental pollution cases.\(^\text{15}\) Nevertheless, the court’s reasoning and holding provides a good model for other courts when grappling with this issue.\(^\text{16}\) In *In re Hoery*, the Colorado Supreme Court addressed: (1) whether the continued migration of toxic chemicals from defendant’s property to plaintiff’s property constituted continuing trespass and/or nuisance; and (2) whether the ongoing presence of toxic chemicals on plaintiff’s property constituted continuing trespass and/or nuisance.\(^\text{17}\) The Colorado Supreme Court answered both questions affirmatively.\(^\text{18}\)

This Note reviews the continuing tort doctrine and how the Colorado Supreme Court’s interpretation presents an alternative avenue for private plaintiffs to recover economic damages. Part II details the facts, procedural history and holding of *In re Hoery*.\(^\text{19}\) Part III briefly explains CERCLA, the continuing tort doctrine and pertinent Colorado case law.\(^\text{20}\) Part IV summarizes the analysis and

\(^{14}\) 64 P.3d 214 (Colo. 2003) (en banc), remanded to 324 F.3d 1220 (10th Cir. 2003).

\(^{15}\) See id. at 227 (Kourlis, J., dissenting) (recognizing there is “no clear guidance from other courts or from the commentators”).


The jurisdictional split is illustrated by *In re Hoery*’s majority and dissenting opinions. The majority relied on the reasoning of the Sixth and Ninth Circuits and decisions from Washington, Massachusetts and New York. *See In re Hoery*, 64 P.3d at 221 (citing Nieman v. NLO Inc., 108 F.3d 1546, 1559 (6th Cir. 1997); Arcade Water Dist. v. United States, 940 F.2d 1265, 1266 (9th Cir. 1991); In re ASARCO/Vashon-Maury Island Litig., No. COO-695Z, 2001 U.S. Dist. LEXIS 7154, at 11-13 (W.D. Wash. May 23, 2001); Taygeta Corp. v. Varian Assoc., 763 N.E.2d 1053, 1065 (Mass. 2002); Kulpa v. Stewart’s Ice Cream, 144 A.D.2d 205 (N.Y. App. Div. 1988)).


\(^{17}\) *See In re Hoery*, 64 P.3d at 220 (outlining certified questions).

\(^{18}\) See id. at 223 (answering certified questions affirmatively).

\(^{19}\) For a full discussion of facts and procedural history, see infra notes 24-45 and accompanying text.

\(^{20}\) For a full discussion of CERCLA, see infra notes 46-63 and accompanying text. For a full discussion of FTCA, see infra notes 64-75 and accompanying text. For a full discussion of the continuing tort doctrine as a method to recover eco-
reasoning employed by the Colorado Supreme Court in *In re Hoery*. Part V critically analyzes the court’s opinion. Finally, Part VI explores the potential impact of this decision.

II. FACTS

Lowry Air Force Base (Lowry) was an active military base from the 1940s until September 1994. During that time, the United States used the base as a disposal site for toxic chemicals, including trichloroethylene (TCE). TCE is a colorless cleaning solvent that can cause significant health problems, including nervous system damage and even death. As a result of imprudent disposal, TCE leached into the groundwater creating plumes of toxic pollution that spread underground for several miles north of Lowry.

In 1993, Robert Hoery bought a residence in the East Montclair neighborhood of Denver, Colorado, seven blocks north of Lowry. The TCE plume emitted from Lowry extended under

nomic damages see infra notes 76-100 and accompanying text. For a full discussion of Colorado case law, see infra notes 101-18 and accompanying text.

21. For a full discussion of the court’s reasoning, see infra notes 119-47 and accompanying text.

22. For a critical analysis of the court’s decision, see infra notes 179-89 and accompanying text.

23. For a full discussion of the impact of *In re Hoery*, see infra notes 190-99 and accompanying text.


25. *See In re Hoery*, 64 P.3d at 216 (noting Air Force discharged TCE between 1940s - 1994). The United States dumped the TCE into landfills on the base. *See id.* According to the Agency for Toxic Substances and Disease Registry (ATSDR): Trichloroethylene is a mild skin, eye, and respiratory tract irritant. Inhalation or ingestion of trichloroethylene can produce CNS [Central Nervous System] effects including headache, dizziness, lack of coordination, stupor, and coma. Respiratory depression or cardiac dysrhythmia from high-level exposures can result in death. Other effects of acute exposure include hypotension, nausea, vomiting, and diarrhea. *Medical Management Guidelines (MMGs) for Trichloroethylene (C₃H₆Cl), available at:* http://www.atrsdr.cdc.gov/M...HMI/mmg19.html (last visited Aug. 9, 2004).


27. *See In re Hoery*, 64 P.3d at 216 (explaining extent of pollution).

28. *Id.* (noting proximity of Lowry to Hoery’s property).
Hoery's property and contaminated his groundwater well. In 1997, the United States confirmed the presence of TCE in Hoery's well at four times the maximum level allowed by Colorado law. Although the United States stopped dumping TCE at Lowry in 1994, this pollutant continued to migrate into Hoery's groundwater and soil on a daily basis. Moreover, the United States had taken no corrective action.

In 1998, Hoery filed a FTCA claim against the United States. He alleged the United States was negligent when it released the TCE that contaminated his property. Further, he contended the United States was liable for continuing trespass and continuing nuisance because it failed to abate the pollution. In response the United States filed a motion to dismiss the claims for lack of subject matter jurisdiction.

29. See Lowry: Ecology - Cleanup Sites, available at: http://www.lowry.org/ecology/cleanup_sites.htm (last visited Aug. 9, 2004) (describing origin and direction of TCE plume); see also In re Hoery, 64 P.3d at 216 (describing property). "The well is approximately forty-eight feet deep and pumps underground water in the alluvial material above the Denver Aquifer." In re Hoery, 64 P.2d at 216 n.1. The well water is used to irrigate the Hoery's lawn and vegetable garden. See id. at 216.

30. In re Hoery, 64 P.2d 214, 216 n.2 (Colo. 2003) (establishing facts of case). The 1997 test, conducted by the United States, detected TCE in groundwater samples from Hoery's well at 20 micrograms per liter. The State of Colorado maximum contaminant level for TCE in drinking water is 5 micrograms per liter. See id. (citing Memorandum from Versar Inc. to Lowry Air Force Base (Aug. 19, 1997)).

31. See id. at 216 (reporting daily migration of TCE onto Hoery's property).

32. See id. (establishing defendant took no corrective action). Hoery's expert hydrologist testified in his affidavit that, based on the information available in 1999, the contamination was not permanent. Id. at 216 n.4. Additionally, he testified, remediation strategies could restore the property. Id. The court recognized, "the record at this stage of the litigation indicates that the contamination is not permanent – that is, it is remediable or abatable." Id. at 222-23. The court declared, however, "[w]e express no opinion nor were we asked to define the legal standards to apply the factual determination of whether the continued migration and ongoing presence of the toxic pollution can be abated." Id. at 223 n.12. According to EPA, remediation strategies have been underway at the Lowry site since 1994 when the Record of Decision (ROD) formally identified the cleanup plan for the Lowry Landfill site. See Region 8 - Lowry Landfill, infra note 50. Generally, the strategy is to "contain migration of contaminants." Id. For detailed information of corrective strategies, see United States Environmental Protection Agency, September 30, 2002 Five Year Review Addendum, available at: http://www.epa.gov/region8.sупperfund/sites/co/lowry5yr.html.

33. See In re Hoery, 64 P.3d at 216 (describing basis of action). For a more detailed discussion of the FTCA, see infra notes 64-75 and accompanying text.

34. In re Hoery, 64 P.3d at 216 (outlining claims). He alleged that the TCE contaminated his property, including his ground water, soil and well. Id. Negligence is a required element of a claim against the United States according to the FTCA. 28 U.S.C. §§ 2671-80 (2004).

35. See In re Hoery, 64 P.3d 214, 216 (Colo. 2003) (reciting Hoery's initial claims).

36. See id. (noting United States' motion to dismiss).
The district court granted the government’s motion for two reasons. First, it concluded Hoery’s permanent tort claims were time barred and subsequently dismissed them for lack of subject matter jurisdiction. Second, the district court held Colorado case law limited the United States’ liability for nuisance and trespass to the actual release of TCE; therefore, liability did not extend to the continued migration and ongoing presence of TCE on Hoery’s property.

On appeal to the Tenth Circuit Court of Appeals, Hoery argued the continued migration and ongoing presence of TCE on his property constituted continuing torts under Colorado case law. In response, the United States contended the alleged torts were permanent and, therefore, time barred under Colorado law. The Tenth Circuit discerned no clear precedent and suspended the proceedings pending the Colorado Supreme Court’s answer to two certified questions. The questions were as follows:

37. See id. at 216-17 (explaining district court’s reasoning).
38. See id. at 216 (reciting district court’s reasoning). The district court held Hoery’s claims were time-barred under Fed. R. Civ. P. 12(b)(1). Id.

Permanent tort claims accrue either when the injury first occurs or when the plaintiff learned or should have learned of his injury and the cause, which ever happens later. See id. at 216-17 (citations omitted). Comparatively, claims for continuing torts accrue as long as the tortious conduct continues. See id. The “plaintiff’s recovery is limited to the statute of limitations period dating back from when plaintiff’s complaint was filed.” Id. at 217 (citation omitted). “Because a two year statute of limitations applies to FTCA claims, the District Court held that Hoey’s 1998 claims were untimely because Hoery knew or should have known his property might be contaminated by TCE from Lowry as of 1995.” Id. Hoery did not appeal that ruling. Id. (citation omitted).

39. See id. at 217 (recounting District Court’s holding). Under the FTCA, the government is liable “in accordance with the law of the place where the act or omission occurred.” 28 U.S.C. § 1346(b) (2004). The District Court reasoned that no continuing tort had been alleged because “the only ‘wrongful act’ alleged by Hoery was the actual release of toxic chemicals by the United States,” and this act ended in September 1994. In re Hoery, 64 P.3d at 217 (explaining District Court’s holding). In reaching this conclusion, the district court relied on two of Colorado’s “irrigation ditch cases”: Middelkamp v. Bessemer Irrigating Ditch Co., 103 P. 280 (Colo. 1909) and Hickman v. N. Sterling Irrigation Dist., 748 P.2d 1349 (Colo. App. 1987). Id. (citing cases district court relied on). For further discussion of the irrigation ditch cases, see infra notes 106-10 and corresponding text.

40. See In re Hoery, 64 P.3d 214, 217 (Colo. 2003) (recounting Hoery’s argument on appeal). Hoery cited Wright v. Ulrich, 91 P. 43 (Colo. 1907), in which the court held the statute of limitations did not preclude the plaintiff’s claim because noises and smells emanating from an adjacent slaughterhouse constituted a continuing nuisance. See Wright, 91 P. at 43-44.

41. See In re Hoery, 64 P.3d at 217 (recounting United States’ argument on appeal).
42. See id. (stating outcome of appeal).
CONTINUING TORT DOCTRINE

(1) Does the continued migration of toxic chemicals from defendant's property to plaintiff's property, allegedly caused by chemical releases by the defendant, constitute continuing trespass and/or nuisance under Colorado law?

(2) Does the continued presence of those chemicals on plaintiff's property constitute continuing trespass and/or nuisance under Colorado law?48

The Colorado Supreme Court granted review and explained: "the continuing migration and ongoing presence of toxic chemicals originally emanating from Lowry constitute a continuing trespass and nuisance."44 It answered both certified questions affirmatively and returned the case to the Tenth Circuit.45

III. BACKGROUND

A. The Roles of CERCLA and FTCA as Instruments for Private Plaintiff Recovery of Economic Loss

1. CERCLA

CERCLA was enacted in December 1980, during the last days of the Carter Administration.46 CERCLA imposed a tax on the chemical and petroleum industries creating a "Superfund."47 The Superfund proceeds would be used to clean up abandoned and inactive hazardous waste sites.48 CERCLA was "designed to provide for cleanup of abandoned and inactive hazardous waste sites, and

43. See id. at 220 (identifying certified questions) (emphasis added).
44. See id. at 221-22 (answering certified questions).
45. See id. at 223 (presenting conclusion).
47. See id. (stating how CERCLA works).
48. See id. (explaining legislative intent). According to Boston and Madden: Although the legislative history of CERCLA . . . is not a paragon of clarity, it is nonetheless clear that one of Congress' primary objectives was 'assuring that those responsible for any damage, environmental harm, or injury from chemical poison bear the costs of their actions. See S. Rep. No. 848 at 13, to S. 1480, 96th Cong., 2d Sess. (1980). The objective of providing toxic tort compensation (such as for personal injury or emotional distress or medical monitoring damages) contained in earlier versions of the bill was deleted as part of last-minute compromises, in exchange for the establishment of a study group . . . to examine toxic tort laws and determine if a federal tort compensation system was justified. CERCLA § 301(e).

Boston & Madden, supra note 46, at 557-58.
to assign liability to the responsible parties for those cleanup costs."  

In 1994, after approximately a decade of investigation, EPA placed the Lowry Landfill on its NPL, which made it eligible for Superfund remediation. Over several decades, "millions of gallons of industrial waste [had been] dumped into unlined pits" at the landfill. The chemicals leached into the groundwater supply and several contaminated "groundwater plumes" emerged, creating a public health risk. The main plume, created by poor storage and disposal techniques, ran beneath Hoery's property.

In August 2002, the Air Force contracted most of the environmental cleanup efforts to a private organization, the Lowry Redevelopment Authority (LRA). As a result, the Air Force maintained


Unlike most of the other major environmental statutes, its objective is not largely regulatory in the sense of command and control regulation although CERCLA does contain some regulatory provisions. It is designed instead to establish rules of liability upon certain classes of actors for the necessary costs of undertaking cleanups, and to establish measures of compensation of those who have in fact undertaken the cleanup of sites where hazardous substances have been released or are threatened to be released.

Id.

Put another way, CERCLA "regulates the remediation of all hazardous substance releases — whether resulting from an accidental spill or an intentional discharge as well as provides the federal government with a scheme for assigned liability." Reed Cornia, Note, Westling v. County of Mille Lacs: Property Values, CERCLA, and Contamination Taxes, 7 Wis. ENVT. L.J. 197, 199 (2000) (citing 42 U.S.C. §§ 9601, 9608 (1994)).


51. Id. (explaining duration and nature of toxic chemical dumping at Lowry).

52. Lowry: Ecology - Cleanup Sites, supra note 29. According to EPA, "groundwater is used for drinking water by more than 50% of the people in the United States, including almost all rural residents. The largest use for groundwater is to irrigate crops." Id. EPA emphasizes, however, that Denver's drinking water supply comes from high mountain snow melt so the contaminated groundwater from Lowry is not consumed as drinking water. Id.

53. Id. (describing origin and direction of TCE plume). Specifically, EPA describes it as "flow[ing] northward under households in the East Montclair Neighborhood." Id. The plume runs five to forty feet beneath ground. Id.

54. Id. (noting recent privatization of cleanup efforts). While it is unclear why the Air Force decided to privatize much of its clean-up efforts, one possibility is to "promote the economic redevelopment" of the area. See generally Superfund Cleanup Figures, available at http://www.epa.gov/superfund/action/process/mgmtrpt.htm (last updated Oct. 21, 2003) (noting by end of FY 2000, "more than

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ultimate liability for the cleanup while the LRA assumed management responsibility for cleaning up the groundwater plume invading Hoery’s property.\textsuperscript{55} According to the EPA, the LRA implemented two cleanup systems to treat contaminated groundwater in the main plume: (1) a groundwater extraction system; and (2) a series of wells that withdraw contaminated water, re-injecting clean water.\textsuperscript{56}

CERCLA does not permit recovery for economic loss; therefore, homeowners adversely affected by the pollution cannot receive compensation through Superfund for any depreciation of property value.\textsuperscript{57} Under section 107(a)(4)(B), a plaintiff may recover the “necessary costs of response incurred . . . consistent with the national contingency plan.”\textsuperscript{58} Thus, a private plaintiff can only obtain relief to the extent it incurred “costs of response.”\textsuperscript{59}

Cost of response is defined as the cost of both removal and remedial action.\textsuperscript{60} Therefore, damages for personal injury and economic damages, such as loss of property value, are not recoverable under CERCLA.\textsuperscript{61} Scholars have noted that CERCLA is complementary to the law of toxic torts because it concentrates on liability and compensation.\textsuperscript{62} Accordingly, when private plaintiffs suffer a

\textsuperscript{32,000} sites have been removed from the CERCLIS [Comprehensive Environmental Response, Contamination, and Liability Information System] waste site list to help promote the economic redevelopment of these properties”.

\textsuperscript{55} See Lowry: Ecology – Cleanup Sites, supra note 29 (explaining allocation of responsibility between LRA and EPA under clean-up agreement).

\textsuperscript{56} See id. (listing two clean-up systems); Region 8 - Lowry Landfill, supra note 50 (noting two initial clean-up measures). EPA acknowledges these are only “interim” measures, and additional treatment techniques will be necessary to clean up contaminated groundwater.” Lowry: Ecology – Cleanup Sites, supra note 29. Additionally, remedial action was recommended for one residence because of the “possibility that TCE, in a gaseous state, could rise through the soil into the basements of existing homes over the plume and create a health risk for residents.” Id.

\textsuperscript{57} See Hyson, supra note 2, at 189-91 (explaining economic loss not recoverable under CERCLA).


\textsuperscript{59} See id. at 190 (stating limited grounds for relief).

\textsuperscript{60} Id. (explaining term ‘response’ is defined to include ‘removal’ and ‘remedial action’). Both ‘removal’ and ‘remedial action’ are understood to include the element of necessity. Id.

\textsuperscript{61} See id. at 190-91. “Plaintiffs may not recover, as ‘costs of response,’ damages for economic or personal injury.” Id.

\textsuperscript{62} Boston & Madden, supra note 46, at 557 (recognizing similar goal of CERCLA and toxic tort law).
loss in property value due to close proximity of a Superfund site, they must seek economic relief under state tort law.\textsuperscript{63}

2. \textit{FTCA}

In 1948, Congress created the \textit{FTCA} as "a uniform, systematic and exclusive remedy for the torts of federal agencies."\textsuperscript{64} It was designed both to protect federal employees from personal tort liability actions in the context of their employment and to provide an avenue of redress against the United States for injured individuals.\textsuperscript{65} Under the \textit{FTCA}, the federal government may be held liable under state law where, under the same circumstances, a private individual would be held liable.\textsuperscript{66} Liability is determined according to "the law of the place where the act or omission occurred."\textsuperscript{67} Accordingly, when a plaintiff brings a tort action, state law determines whether the alleged tort was continuing or permanent.\textsuperscript{68}

A two-year statute of limitations applies to all \textit{FTCA} claims.\textsuperscript{69} This requirement becomes problematic in the environmental context.

\textsuperscript{63} See \textit{Hyson} \textit{supra} note 2, at 191, 228 n.16 (recognizing although economic recovery barred under \textit{CERCLA}, "[p]laintiffs may, of course, seek to recover such damages in a separate claim based upon state law").

\textsuperscript{64} Peak v. Small Bus. Admin., 660 F.2d 375, 378 (8th Cir. 1981). The \textit{FTCA} replaced the "\textit{sue and be sued}" approach established by the Court in 1939. \textit{See id. at 377.} "In \textit{Keifer & Keifer v. RFC}, 306 U.S. 381, 59 S. Ct. 516 (1939), the Supreme Court held that a '\textit{sue and be sued}' federal agency could be sued for its torts. In subsequently passing the \textit{FTCA}, Congress withdrew this right to sue federal agencies in tort under . . . '\textit{sue and be sued}' statutes." \textit{Id.} Accordingly, "if no recovery is allowed under the \textit{FTCA} for an action sounding in tort, there is simply no remedy afforded." \textit{Peak}, 660 F.2d at 378.


\textsuperscript{66} 28 U.S.C. \S 2674 (2004) (explaining federal liability). Section 2674 states: "[t]he United States shall be liable . . . in the same manner and to the same extent as a private individual under like circumstances . . . ." \textit{Id.} Under the \textit{FTCA}, a tort action brought against the United States may proceed when the injury is:

caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his [her] office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.


\textsuperscript{67} Federal Tort Claims Act, 28 U.S.C. \S 1346(b) (2004).

\textsuperscript{68} \textit{See, e.g., In re Hoey}, 64 P.3d 214, 217 (Colo. 2003). "Because the acts alleged here occurred in Colorado, our precedent controls as to whether the allegations constitute a continuing trespass and nuisance." \textit{Id.}

\textsuperscript{69} 28 U.S.C. \S 2401(b) (2004). Section 2401(b) provides in pertinent part: "A tort claim against the United States shall be forever barred unless it is presented in writing to the appropriate Federal agency within two years after such claim accrues[.]" \textit{Id.} (emphasis added).
text because many environmental violations are not discovered within the requisite two-years.\textsuperscript{70} In this context, the distinction between continuing and permanent torts is crucial because it determines when the statute of limitations begins to run.\textsuperscript{71} Under the FTCA, a permanent tort claim accrues for limitations purposes when the injury first occurs or when the plaintiff learned or should have learned of his injury and its cause.\textsuperscript{72} A continuing tort claim accrues and the statute of limitations begins to run only when the harmful condition is removed.\textsuperscript{73} Whether an alleged tortious act is classified as permanent or continuing depends on the state's interpretation of the continuing tort doctrine.\textsuperscript{74} The continuing tort doctrine effectively extends the statute of limitations; therefore, each state must balance the countervailing concerns of equity and public policy against the benefits of stricter limitations periods.\textsuperscript{75}

\textsuperscript{70} See generally MacAyeal, supra note 7, at 589, 618-19 (articulating interplay between statute of limitations and continuing tort doctrine). “The practical significance of the continuing tort concept is that, for statute of limitation purposes, the claim does not begin to accrue until the tortious conduct has ceased.” In re Hoery, 64 P.3d at 218 (citing Fowler v. Harper et al., THE LAW OF TORTS § 1.7 (3d ed. 1996)). In other words, “the statute of limitations begins to run only when the defendant abates the nuisance and removes the cause of damage.” Decision, Colorado Supreme Court Holds Unabated Hazardous Waste Migration Is Continuous Tort: Robert N. Hoery v. United States, NAT'L ENVT'L. ENFORCEMENT J., June 2003, at 16 [hereinafter Decision] (explaining Hoery court's reasoning and holding).

\textsuperscript{71} See Lin, supra note 69, at 756 (citing Developments, supra note 69, at 1200-01).
B. The Continuing Tort Doctrine as a Method of Recovery for Economic Damages

In civil environmental penalty actions, plaintiffs frequently encounter time-based problems due to the unique nature of hazardous pollution.\(^76\) The continuing tort doctrine offers plaintiffs the means to overcome these obstacles.\(^77\) "Under the continuing tort doctrine, a statute of limitations does not begin to run until a series of tortious acts has ceased."\(^78\) In other words, "the statute of limitations begins to run only when the nuisance is abated and the cause of damage removed."\(^79\) To establish a continuing tort, the plaintiff must show a "substantial nexus" between the violations outside and within the limitations period.\(^80\) If the violations are "sufficiently related" they are treated as one continuous violation and the statute of limitations will not be tolled because the tortious act has not ceased.\(^81\)

To explain the distinction between permanent and continuing torts, some jurisdictions focus on either the "'cause' of the harm or the 'harm' resulting from that cause."\(^82\) For example, in Breigggar Prop., L.C. v. H.E. Davis & Sons, Inc.,\(^83\) the Utah Supreme Court looked exclusively at the act constituting the trespass and not the resulting harm.\(^84\) Conversely, in Wood v. American Aggregates Corp,\(^85\) the Ohio Court of Appeals emphasized the resulting harm of the

\(^76\) See Boston & Madden supra note 46, at 879 (recognizing common problems encountered by plaintiffs); see also, MacAyeal supra note 7, at 589 (explaining unique nature of toxic pollution).

\(^77\) See generally MacAyeal, supra note 7, at 641 (advocating application of continuing violation doctrine to environmental violations).

\(^78\) MacAyeal, supra note 7, at 618. The "significance of the designation 'continuing trespass' is primarily that of relieving some of the strictures of limitations periods within which the possessor would have to bring a toxic tort claim." Boston & Madden, supra note 46, at 24 (citing RESTATEMENT (SECOND) OF TORTS § 161 cmt. b. (1963)).

The continuing tort doctrine is invoked in a variety of legal arenas, including environmental law, employment discrimination law, anti-trust law and criminal law. See Lin, supra note 69, at 745-55 (discussing and comparing continuing torts within environmental law, employment discrimination law, criminal law and anti-trust law).

\(^79\) See Decision, supra note 71, at 16.

\(^80\) See MacAyeal, supra note 7, at 656 (explaining continuing tort test).

\(^81\) Id. (stating effect of satisfied test).


\(^83\) 52 P.3d 1133 (Utah 2002).

\(^84\) Id. at 1135 (considering act not harm).

\(^85\) 585 N.E.2d 970, 973 (Oh. App. 1990).
A number of jurisdictions have held that "even if the condition causing the contamination has ceased, provided the contamination remains on the plaintiff's land or continues to migrate onto the plaintiff's land, the defendant remains liable for a continuing tort."\textsuperscript{88} For example, in \textit{Arcade Water Dist. v. United States},\textsuperscript{89} Arcade sued the United States under the FTCA for contamination of its water well by a military laundry.\textsuperscript{90} Although the laundry was closed in 1973, contaminants continued to enter Arcade's well ten years later.\textsuperscript{91} The Ninth Circuit determined that "the most salient allegation was that contamination continued to leach into Arcade's well."\textsuperscript{92}

According to the Restatement (Second) of Torts, an actor's failure to remove a thing tortiously placed on another's land is considered a "continuing trespass" for the duration of the time the thing is wrongfully on the land.\textsuperscript{93} Liability for the continuing trespass remains until the thing placed on or underneath the land is removed.\textsuperscript{94} Many jurisdictions, have adopted the Restatement definition of continuing trespass in environmental contamination suits

\textsuperscript{86} \textit{Id.} at 973 (focusing on continuing damages not conduct).
\textsuperscript{87} \textit{See In re Hoery,} 64 P.3d at 219, n.8 (noting classifications are "unhelpful to our analysis" because "it is difficult to determine whether the toxic pollution plume is the cause of Hoery's alleged harm or the harm itself").
\textsuperscript{88} \textit{Id.} at 221.
\textsuperscript{89} 940 F.2d 1265 (9th Cir. 1991).
\textsuperscript{90} \textit{See id.} at 1266 (explaining facts).
\textsuperscript{91} \textit{Id.} (noting continued leaching of chemicals).
\textsuperscript{92} \textit{See In re Hoery,} 64 P.3d 214, 221 (Colo. 2003) (recounting Ninth Circuit's reasoning in \textit{Arcade}).
\textsuperscript{93} \textit{Restatement (Second) of Torts} § 161 cmt. b.(1977) The full text is as follows:
The actor's failure to remove from land in the possession of another a structure, chattel, or other thing which he has tortiously erected or placed on the land constitutes a continuing trespass for the entire time during which the thing is wrongfully on the land and... confers on the possessor of the land an option to maintain a succession of actions based on the theory of continuing trespass or to treat the continuance of the thing on the land as an aggravation of the original trespass.
\textit{Id.}
on the condition that the injury is reasonably abatable.\textsuperscript{95} Whether an injury is reasonably abatable is a question of fact.\textsuperscript{96}

Courts have embraced the abatement test because it promotes public policy.\textsuperscript{97} In \textit{Jacques v. Pioneer Plastics, Inc.},\textsuperscript{98} the Maine Supreme Court concluded that application of the abatement test in toxic tort cases "encourages abatement by the responsible party, an important public policy consideration."\textsuperscript{99} Further, it noted: "if we were to exclude from [the abatement] test environmental contamination cases the effect would be to grant defendants the equivalent of an easement, thereby reducing significantly the chances that the hazardous materials would be cleaned up."\textsuperscript{100}

C. Colorado Case Law

In 1894, Colorado first recognized continuing tort claims in \textit{In Consol. Home Supply Ditch Co. v. Hamlin}.\textsuperscript{101} This principle was firmly reestablished thirteen years later in \textit{Wright v. Ulrich}.\textsuperscript{102} In \textit{Wright},

\begin{itemize}
  \item \textsuperscript{95} See Dana L. Eismeier, Esq., \textit{Continuing Trespass And Nuisance}, Presented at October 2002 Colorado Municipal League Conference, available at: http://www.burnsfigawill.com/articles/Eismeier/continuointtrespass.htm (last visited Aug. 3, 2003); MacAyeal, supra note 7, at 619 (noting some courts indicate doctrine only applies when source of injury is abatable or remediable).
  \item \textsuperscript{96} See, e.g., Jacques v. Pioneer Plastics, Inc., 676 A.2d 504 (Me. 1996) (upholding abatability test and concluding feasibility of remediation was factual issue).
  \item \textsuperscript{97} See, e.g., Jacques, 676 A.2d at 504 (explaining public policy rationale).
  \item \textsuperscript{98} 676 A.2d 504 (Me. 1996). The subject of the court's inquiry was the dumping of hazardous materials at a former lagoon dump site partially situated on plaintiff's property. \textit{Id.} Because there was an issue of fact as to whether the contaminants were abatable, summary judgment was inappropriate. \textit{Id.} at 507.
  \item \textsuperscript{99} \textit{Id.} at 508.
  \item \textsuperscript{100} \textit{Id.}
  \item \textsuperscript{101} 40 P. 582 (Colo. 1894).
  \item \textsuperscript{102} \textit{Wright v. Ulrich}, 91 P. 43 (Colo. 1907) (recognizing continuing nuisance under Colorado law).
\end{itemize}
the plaintiff brought suit to restrain the defendant from operating a
slaughterhouse adjacent to the plaintiff’s residence.103 After con-
cluding that the noises and smells emanating from the defendant’s
property were a nuisance, the Colorado Supreme Court held the
defendant was liable for damages until he abated the nuisance by
removing the slaughterhouse.104 Wright reasoned that the plain-
tiff’s claim was not barred by the statute of limitations because “the
continuing of a trespass or nuisance from day to day is considered
in law a several trespass on each day.”105

Two years later, the Supreme Court of Colorado clarified the
elements of a continuing tort by distinguishing it from a permanent
tort claim in Middelkamp v. Bessemer Irrigating Ditch Co.106 In Mid-
delkamp, the Colorado Supreme Court held that the defendant’s ir-
rigation ditch was a permanent improvement and, therefore,
distinguishable from the abatable nuisance in Wright.107

Middelkamp set forth two reasons for distinguishing an irriga-
tion ditch from a slaughterhouse.108 First, unlike a slaughterhouse,
irrigation ditches are designed to be permanent and to seep
water.109 Second, when irrigation ditches are lawfully constructed,
they represent “a class of enterprises . . . vital to the future develop-
ment and prosperity of our state[.]”110

The Colorado Supreme Court applied Middelcamp’s concept of
permanent torts to the construction and maintenance of railway
lines in Denver & Santa Fe Ry. Co. v. Hannegan.111 The Colorado
Supreme Court explained that “[s]imilar to the context of irriga-

103. See id. at 43 (setting forth facts of case).
104. See id. at 44 (holding nuisance was continuing tort) (citing Consol.
Home Supply Ditch Co. v. Hamlin, 40 P. 582 (Colo. App. 1894)).
106. 103 P. 280 (Colo. 1909).
107. See id. at 284 (distinguishing Wright on abatement grounds).
108. See id. at 285 (explaining rationale).
109. Id. at 282 (describing permanent nature of irrigation ditch).
110. Id. at 284 (enumerating irrigation ditch’s social/economic benefits).
111. 127 P. 343, 345 (Colo. 1908) (applying permanent tort concept to rail-
ways). The plaintiff lived alongside the railway line and sued for continuing tres-
pass. Id. at 344. The court reasoned that, because both the permanent nature of the
railway line and legal authority necessary to build, the plaintiffs could only
recover for permanent interference with their land. Id. at 345. Accordingly, the
court held the statute of limitations began to run when the railroad first began to
occupy the street. See id.
tion ditches, defendants who lawfully constructed and maintained railway lines represented an enterprise that was vital to the future development of the state."112 Nearly two decades later, in Wilmore v. Chain O'Mines, Inc.,113 the Colorado Supreme Court applied the continuing nuisance doctrine where the defendant had discharged pollution into a creek used for irrigation.114

In summary, Colorado courts have recognized the distinction between continuing and permanent torts for nearly a century.115 One key distinguishing factor is whether the trespass or nuisance is outweighed by a larger economic or social benefit.116 While the Colorado Supreme Court had recognized the concepts of continuing and permanent torts, "[it had] not addressed an environmental contamination case where the contamination remains and continues to migrate onto the plaintiff's property, but where the cause of the contamination has ceased."117 Thus, the Colorado courts had not previously addressed the particular facts and issues presented in the present case.118

IV. NARRATIVE ANALYSIS

In In re Hoery, the Colorado Supreme Court considered several elements while determining whether the ground water pollution was a continuing tort.119 First, the court surveyed the torts of trespass and nuisance.120 Second, it distinguished between continuing and permanent torts using two key factors: (1) whether the contamination was remediable or abatable; and (2) whether the pollution was socially or economically beneficial.121 Third, the court weighed public policy considerations.122 After applying this analytical framework, the court determined the ongoing presence and continued

112. In re Hoery, 64 P.3d 214, 220 (Colo. 2003) (explaining benefit to state was characteristic shared by irrigation ditches and railroads).
113. 44 P.2d 1024 (Colo. 1935).
114. Id. at 1028 (holding pollution discharged into creek constituted continuing nuisance).
115. See In re Hoery, 64 P.3d at 218 (noting Colorado courts recognized claims for continuing torts since Wright in 1907).
116. See id. at 219 (recognizing social/economic benefit rationale).
117. See id. at 221.
118. See id. (acknowledging facts and issue created matter of first impression).
119. See generally In re Hoery, 64 P.3d 214 (Colo. 2003).
120. See id. at 217 (explaining elements of trespass and nuisance). For a further discussion of the court's review of trespass and nuisance, see infra notes 124-28 and accompanying text.
121. See id. For a full discussion of the court's review of continuing and permanent torts, see infra notes 129-32 and accompanying text.
122. See id. at 219.
migration of TCE into Hoery's groundwater and soil was a continuing tort.123

A. Trespass and Nuisance

The Colorado Supreme Court began its analysis by describing the underlying torts of trespass and nuisance.124 In doing so, it relied on both case law and the Restatement (Second) of Torts.125 Trespass is defined as "a physical intrusion upon the property of another without the proper permission from the person legally entitled to possession of that property."126 This intrusion may occur when the actor places "a thing either on or beneath the surface of the land."127 Private nuisance is "a substantial invasion of an individual's interest in the enjoyment and use of her property."128

B. Continuing and Permanent Torts

The court then addressed the distinction between permanent and continuing torts.129 It explained:

Colorado law recognizes the concepts of continuing trespass and nuisance for those property invasions where a defendant fails to stop or remove continuing, harmful physical conditions that are wrongfully placed on a plaintiff's land. The only exception is a factual situation - such as an irrigation ditch or a railway line - where the prop-

123. See id. at 222 (concluding torts were continuing).
124. See In re Hoery, 64 P.3d at 217 (reviewing elements of trespass and nuisance).
125. See id. at 218 (setting forth basis for reasoning).
126. Id. at 217 (citing Public Serv. Co. of Colorado, 27 P.3d 371, 389 (Colo. 2001)). The court explained, "[a] landowner who sets in motion a force which, in the usual course of events, will damage property of another is guilty of a trespass on such property." See id. at 217 (citing Miller v. Carnation Co., 516 P.2d 661, 664 (Colo. App. 1973)).
127. Restatement (Second) of Torts § 158(a) cmt. i (1965). According to the Second Restatement of Torts: "[i]t is enough that an act is done with knowledge that it will to a substantial certainty result in the entry of the foreign matter." See id.
128. See In re Hoery, 64 P.3d at 218 (defining private nuisance) (citing Public Serv. Co. of Colorado v. Van Wyk, 27 P.3d at 391). Public nuisance is distinguishable from private nuisance as it covers the invasion of rights common all members of the public. See Restatement (Second) of Torts § 834 cmt. b. Here, the court addressed only private nuisance. In re Hoery, 64 P.3d at 218 n.5. Further, according to the Restatement, harmful indirect or physical conditions created by the defendant may also constitute a nuisance. Restatement (Second) of Torts § 834 cmt. b.
129. See In re Hoery, 64 P.3d at 218-20 (distinguishing continuing and permanent torts).
property invasion will and should continue indefinitely because defendants, with lawful authority, constructed a socially beneficial structure intended to be permanent.¹³⁰

The court carefully distinguished the present case from Middelcamp, noting “[t]he record . . . indicates that the contamination is not permanent – that is, it is remediable or abatable.”¹³¹ Further, unlike the irrigation ditch in Middelcamp or the railroad in Hannegan, the continued migration and ongoing presence of TCE confers no social or economic benefit to the state.¹³²

C. Certified Questions

Next, the court turned to the certified questions before it:

(1) Does the continued migration of toxic chemicals from defendant's property to plaintiff's property, allegedly caused by chemical releases by the defendant, constitute continuing trespass and/or nuisance under Colorado law?

(2) Does the continued presence of those chemicals on plaintiff's property constitute continuing trespass and/or nuisance under Colorado law?¹³³

Acknowledging it had never addressed these questions, the court examined cases from other jurisdictions that addressed these issues.¹³⁴ The court found the Ninth Circuit Court of Appeals’ reasoning in Arcade Water Dist. v. United States¹³⁵ particularly instructive because the facts were analogous.¹³⁶ Further, it found the Ninth

¹³⁰ Id. at 220.
¹³¹ Id. at 222-23.
¹³² See id. at 223 (distinguishing contamination from ditches).
¹³³ See id. at 220 (stating certified questions) (emphasis added).
¹³⁴ See In re Hoery, 64 P.3d at 221 (consulting reasoning of other jurisdictions).
¹³⁵ 940 F.2d 1265 (9th Cir. 1991) (addressing applicability of continuing nuisance doctrine to ongoing leaching of chemical onto plaintiff's property).
¹³⁶ See In re Hoery, 64 P.3d at 221 (recognizing Arcade as analogous). In Arcade, the plaintiff operated a public water supplying agency. Arcade, 940 F.2d at 1266. Defendant, the United States, operated an Army laundry facility at Camp Kohler Annex, McClellan Air Force Base from 1941 until 1973. See id. During those thirty-two years, the United States discharged chemical residues into the ground. See id. These chemicals leached into "Well 31," which was owned and operated by Arcade, and located approximately 2,000 feet from the laundry. See id. Although the United States stopped discharging chemicals in 1973, subsequent tests revealed continuous and ongoing leaching. Id. In 1984, Arcade sued the United States under the FTCA, alleging continuing nuisance. Id. at 1266-67. The district court dismissed the complaint as time-barred. See id. at 1267. On appeal,
Circuit's analysis in *Arcade* "persuasive and consistent" with Colorado precedent and the continuing tort doctrine.\(^{137}\) The Ninth Circuit explained: when characterizing a nuisance as continuing or permanent, the relevant question is whether the contaminants continue to leach into the plaintiff's property.\(^{138}\) Applying this test, the Colorado Supreme Court determined the continued migration and continued presence of toxic chemicals constituted continuing torts under Colorado law.\(^{139}\)

The court provided two grounds for its decision: (1) TCE's ongoing presence on Hoery's property which was unabated by the United States; and (2) TCE continued to migrate onto Hoery's property unabated by the United States.\(^{140}\) One's failure to act may be the basis for tortious conduct; accordingly, the court found the United States' failure to remedy the pollution constituted a continuing tort.\(^{141}\) Following *Arcade*’s reasoning, the court explained that "it is immaterial whether the United States continues to release toxic pollutants from Lowry."\(^{142}\)

In summary, the court noted five reasons for reaching its conclusion. First, the TCE pollution is an ongoing presence and migrates continuously onto Hoery's property.\(^{143}\) Second, the daily migration and presence of TCE on Hoery's property constitute the continuing tort.\(^{144}\) Third, the undisputed record shows that the contamination is not permanent because it is abatable and remediable.\(^{145}\) Fourth, the pollution is neither socially nor economically beneficial.\(^{146}\) Finally, public policy favors termination of the con-

the Ninth Circuit reversed and held that "the fact that the laundry [was] no longer operating [was] not material." *Id.* at 1268.

\(^{137}\) *See In re Hoery*, 64 P.3d at 221 (adopting Ninth Circuit's analysis).

\(^{138}\) *See Arcade*, 940 F.2d at 1268 (Reasoning, "the most salient allegation is that contamination continues to leach into Arcade's Well 31... [I]t is this leaching of contaminants, not the operation of the laundry, that is relevant in characterizing the nuisance.").

\(^{139}\) *See In re Hoery*, 64 P.3d at 222 (concluding continued migration and ongoing presence are continuing torts).

\(^{140}\) *See id.* (setting forth basis for decision).

\(^{141}\) *See id.* (determining defendant's liability).

\(^{142}\) *Id.*

\(^{143}\) *See id.* (holding, "these property invasions by way of trespass and nuisance are continuing").

\(^{144}\) *See In re Hoery*, 64 P.3d at 222 (rejecting defendant's argument that tortious conduct ceased when defendant stopped releasing TCE into ground).

\(^{145}\) *See id.* at 222-23. "[T]he record at this stage in the litigation indicates that the contamination is not permanent -- that is it is remediable or abatable." *Id.* The court noted it was not addressing the factual determination of whether the continued migration and ongoing presence could be abated. *See id.* at 223 n.12.

\(^{146}\) *See id.* at 222-23 (distinguishing irrigation ditch cases). The court emphasized that it found the irrigation ditches to be permanent because they were
tinued migration and ongoing presence of TCE in Hoery's property.\textsuperscript{147}

D. Dissenting Opinion

In his lengthy dissent, Justice Kourlis attacked several underpinnings of the majority's holding and reasoning.\textsuperscript{148} Initially, he acknowledged the historical difficulty of distinguishing between permanent and continuing torts and identified two problems inherent in making the distinction.\textsuperscript{149} First, he argued it is difficult to determine when the injury becomes actionable.\textsuperscript{150} Second, it remains difficult to "determine when and how the injury is quantified."\textsuperscript{151}

Moreover, Justice Kourlis disagreed with the theory upon which the majority distinguished between continuing and permanent torts.\textsuperscript{152} He outlined three theories of how permanent and continuous torts are distinguishable.\textsuperscript{153} The first emphasizes the nature of the conduct.\textsuperscript{154} The second emphasizes the nature of the lawfully constructed and intended to be permanent; whereas "[t]he record does not indicate that the continued migration or ongoing presence of toxic pollution plumes underneath Hoery's residential property will or should continue indefinitely." \textit{See id.} at 222.

\textsuperscript{147} \textit{See id.} at 223 (finding "that public policy favors the discontinuance of both the continuing migration and the ongoing presence of toxic chemicals into Hoery's property and irrigation well"). Additionally, the court reasoned that, "[u]nder Colorado law, a tortfeasor's liability for continuing trespass and nuisance creates a new cause of action each day the property invasion continues. Hence, the alleged tortfeasor has an incentive to stop the property invasion and remove the cause of damage." \textit{Id.}

\textsuperscript{148} \textit{See id.} at 223-29 (Kourlis, J., dissenting) (disagreeing with court's reasoning and decision).

\textsuperscript{149} \textit{See In re Hoery}, 64 P.3d at 224 (Kourlis, J., dissenting) (asserting, "[t]wo problems are inherent in the concept" of differentiating between continuing and permanent trespass).

\textsuperscript{150} \textit{See id.} (Kourlis, J., dissenting) (identifying first problem to be when injury becomes actionable). This is important because it determines when the statute of limitations begins to run. \textit{See generally} MacAyeal, \textit{supra} note 7, at 590-92 (summarizing operation and purposes of statutes of limitations).

\textsuperscript{151} \textit{In re Hoery}, 64 P.3d at 224 (Kourlis, J., dissenting).

\textsuperscript{152} \textit{See id.} at 224-26 (Kourlis, J., dissenting) (proposing different theory more appropriate).

\textsuperscript{153} \textit{See id.} at 224-25 (Kourlis, J., dissenting) (outlining three theories).

\textsuperscript{154} \textit{See id.} at 224 (Kourlis, J., dissenting) (stating that "[t]he first theory focuses on the nature of the conduct that caused the tort and labels as continuous only torts that result from ongoing actions by the tortfeasor").
injury. Justice Kourlis argued the
first approach is most appropriate and in accord with Colorado law.

Justice Kourlis reviewed the development of trespass law in Colorado and noted that equitable relief was typically awarded in continuous trespass cases. He explained that "[t]he same characteristics that render an injury difficult to quantify, also serve to support a conclusion that the injury cannot be adequately redressed at law." Accordingly, Justice Kourlis averred injunctive relief is more appropriate than damages in continuing tort cases because damages require "forecasting of injury" and are "impossible to speculate." Further, he cautioned that awarding damages might result in a windfall for the plaintiff if the plaintiff's award exceeds the actual loss of property value.

Justice Kourlis decried the majority's focus on "the nature of the injuries" instead of the "character of [the trespasser's] actions." He contended that this focus "divorce[d] the plaintiff's claim from the Law of Torts and the principles that it serves." Further, he argued that the majority's opinion raises difficult questions. In particular, he cited difficulty pinpointing when the statute of limitations may begin to accrue.

155. See id. at 225 (Kourlis, J., dissenting) (stating that "[t]he second theory looks . . . to the nature of the injury caused by the tort and concludes that a tort is continuous when the damages are not capable of final assessment at the time the action is filed").

156. See In re Hoery, 64 P.3d at 225 (Kourlis, J., dissenting) (noting some cases distinguish between continuing and permanent torts from "result-oriented stance").

157. See id. at 224 (Kourlis, J., dissenting) (stating that "[j]n my view, the theory that concentrates on the nature of the conduct of the tortfeasor is the one that comports best with general tort law and with concepts of predictability and deterrence").

158. See id. at 226-27 (Kourlis, J., dissenting) (recalling history of equitable relief for continuing trespass in Colorado).

159. Id. at 226 (Kourlis, J., dissenting). Justice Kourlis cited Wright and Wilmore as cases where injunctive relief was granted to remedy continuing nuisance. Id. at 226-27 (Kourlis, J., dissenting).

160. Id. at 226 (Kourlis, J., dissenting) (arguing damage awards for continuing tort is inappropriate because "impossible to speculate" future damages).

161. See In re Hoery, 64 P.3d at 227 (Kourlis, J., dissenting) (warning where restoration costs considered in damages calculation plaintiff may receive windfall).

162. Id. at 223 (Kourlis, J., dissenting).

163. Id.

164. See id. at 228-29 (Kourlis, J., dissenting).

165. See id. at 228 (Kourlis, J., dissenting).
that it would be more appropriate for the legislature to carve out an exception to the statute of limitations in toxic tort cases.166

Finally, Justice Kourlis disagreed with the court's public policy balancing test.167 He emphasized the importance of statutes of limitation in environmental cases.168 Justice Kourlis proposed the benefits of statutes of limitation outweigh policy concerns because they promote early discovery and remediation.169

V. CRITICAL ANALYSIS

In In re Hoery, the Colorado Supreme Court held ongoing migration and ongoing presence of a chemical pollutant constituted a continuing tort under Colorado law.170 Further, it concluded that failure to abate and remove the pollution constituted tortious conduct.171 By endorsing the continuing tort doctrine, the court’s decision should increase compliance with environmental laws and encourage the remedial goals of environmental legislation.172

The court’s rationale is public policy-laden, providing strong support for its conclusions.173 The majority notes that the underlying principle of tort law is "to encourage socially beneficial conduct and deter wrongful conduct."174 Classifying environmental pollution as a continuing tort provides the alleged tortfeasor with a strong incentive to abate the invasion and remove the toxic pollutants.175 Under the continuing tort doctrine, potential tortfeasors will be less likely to “run the risk of violating the law, with the hope

166. See In re Hoery, 64 P.3d at 228 (Kourlis, J., dissenting) (offering alternatives approaches).

167. See id. at 229 (Kourlis, J., dissenting). “It seems to me that resting a tort law distinction on the question of whether public policy would champion the defendant or the plaintiff is unwise.” Id.

168. See id. at 229 (Kourlis, J., dissenting).

169. See id. (Kourlis, J., dissenting) (proposing statutes of limitation encourages early discovery and remediation).

170. See id. at 216 (finding tort to be continuing).

171. See In re Hoery, 64 P.3d at 216 (holding that United States failure to abate was tortious conduct).

172. See generally MacAyeal, supra note 7, at 711 (concluding both discovery rule and continuing tort doctrine are consistent with goals of statute of limitations and environmental legislation); Boston & Madden, supra note 46, at 557. “Because CERCLA concentrates on liability and compensation, it becomes complementary to the law of toxic torts.” Id.

173. See In re Hoery, 64 P.3d at 219, 223 (explaining importance of public policy consideration); see generally MacAyeal, supra note 7, at 711-12 (suggesting doctrine encourages timely remediation and abatement).

174. See id. at 223 (citing Denver Publ’g Co. v. Bueno, 54 P.3d 893, 897-98 (Colo. 2002)).

175. See id. at 223 (explaining incentive to tortfeasor for abatement).
that the statute of limitations will expire before . . . EPA discovers the violation."\(^{176}\)

In the present case, Hoery bought his home one year before Lowry was designated a Superfund site.\(^{177}\) Despite preliminary remediation steps, TCE continued to migrate into and contaminate the nearby groundwater and soil.\(^{178}\) As a result, homeowners probably suffered a loss of property value.\(^{179}\) Because CERCLA precludes recovery of economic damages, the only available recourse for homeowners is through a tort action in the state courts.\(^{180}\)

The Colorado Supreme Court’s decision follows the established majority rule: "the damages or injury . . . must be continuing, as opposed to the tortious conduct."\(^{181}\) The Restatement supports this view by focusing on the continuing harm resulting from the actor’s failure to remove the harmful thing.\(^{182}\) Thus, the dissent’s vehement cry, that the court has "divorce[d] the plaintiff’s claim from the Law of Torts and the principle it serves," appears unfounded.\(^{183}\)

The dissent overemphasizes the tension between the statute of limitations and the continuing tort doctrine.\(^{184}\) The primary goal of the statute of limitations period is to discourage slow-paced lawsuits based on stale evidence.\(^{185}\) By nature, many environmental

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176. MacAyeal, supra note 7, at 711-12 (suggesting continuing tort doctrine promotes abatement by tortfeasor).


178. See In re Hoery, 64 P.3d at 216 (Stating that "TCE remains on Hoery’s property and enters his groundwater and soil on a daily basis, unabated by the United States").

179. See generally Property Values, supra note 5 (discussing correlation between diminution in property value and close proximity to Superfund site).

180. See Hyson, supra note 2, at 191 n.16 (recognizing plaintiffs may seek damages under state law); Glickman, supra note 3, at 852 (explaining that "[r]ecovery of damages not covered by CERCLA must be pursued in state court").

181. Id. (stating majority rule).

182. E.g. Boston & Madden, supra note 46, at 24-25 (setting forth portions of Restatement which support view “that proof of continuing harm suffices to establish a continuing trespass”). For the full text of § 161 cmt. b, see supra note 93. Section 161(1) states: “A trespass may be committed by the continued presence on the land of a structure, chattel, or other thing which the actor has tortiously placed there, whether or not the actor has the ability to remove it.” Restatement (Second) of Torts § 161(1) (1965) (emphasis added).


184. See generally id. (Kourlis, J., dissenting) (emphasizing tension between statute of limitations and continuing tort doctrine).

185. See MacAyeal, supra note 7, at 711 (stating one goal of limitations period is avoiding stale evidence problem).
violations occur over an extended period of time so stale evidence is not an issue in these cases.\textsuperscript{186} Accordingly, it does not, as the dissent suggests, undermine the purpose of the statutes of limitation.\textsuperscript{187}

In conclusion, the abatement test and public policy both support the continuing tort doctrine.\textsuperscript{188} By upholding the continuing tort doctrine, courts encourage compliance with environmental standards.\textsuperscript{189} The Colorado Supreme Court’s decision in \textit{Hoery} follows established precedent, comports with the underlying purpose of statutes of limitation, and furthers important public policy goals.

VI. \textbf{IMPACT}

Overall, this decision illuminates one possible avenue by which homeowners and other private plaintiffs may recover economic damages precluded by CERCLA.\textsuperscript{190} If other courts choose to follow Colorado’s approach, they too will endorse compliance with current environmental laws and promote remediation of toxic contamination.\textsuperscript{191} By increasing compliance with environmental laws, courts help secure environmental protection which protects and promotes the public interest.\textsuperscript{192}

\begin{itemize}
\item \textsuperscript{186} See \textit{id.} at 711 (explaining many environmental violations are continuous, therefore, stale evidence problem generally not relevant concern).
\item \textsuperscript{187} See \textit{In re Hoery}, 64 P.3d at 229 (Kourlis, J., dissenting) (concluding decision “undermines operation of statutes of limitation”).
\item \textsuperscript{188} See MacAyeal, supra note 7, at 711 (explaining public policy promoted by doctrine); cf. Dan B. Dobbs, \textit{The LAW OF TORTS} § 57, at 117-18 (2000) (identifying factors favoring continuing classification). According to Dobbs, the six factors are:  
\begin{enumerate}
\item the invasion can in fact be terminated or abated; 
\item the cost of termination is not wasteful or oppressive; 
\item no privilege or public policy favors a continuation of the invasion; 
\item incentive to abate the invasion can be provided by permitting repeated suits for damages as they accrue; 
\item and (5) the plaintiff prefers temporary damages; 
\item overall, it is not just to permit the defendant to acquire the permanent right to invade the plaintiff’s interests in land by paying market price for that right against the plaintiff’s wishes.
\end{enumerate}
\textit{Id.}

\item \textsuperscript{189} See generally MacAyeal, supra note 7, at 711 (explaining how continuing tort doctrine encourages compliance with environmental law).
\item \textsuperscript{190} See \textit{In re Hoery}, 64 P.3d at 227 (Kourlis, J., dissenting) (recognizing outcome of court’s decision will permit plaintiffs to recover economic damages); \textit{Hyson}, supra note 2, at 191 n.16 (stating economic damages not recoverable under CERCLA).
\item \textsuperscript{191} See generally MacAyeal, supra note 7, at 711 (concluding continuing tort doctrine encourages compliance with environmental laws leading directly to environmental protection).
\item \textsuperscript{192} See, e.g., MacAyeal, supra note 7, at 711-12 (endorsing proposition that environmental protection is good public policy).
\end{itemize}
Congress enacted CERCLA, in part, to ensure that those responsible for environmental contamination bear the cost of cleaning it up.\textsuperscript{193} It rejected a comprehensive liability scheme that would enable private plaintiffs to recover for economic injuries.\textsuperscript{194} While Congress concluded that CERCLA should not be used to ensure private recovery, CERCLA's underlying policy is: polluters must be held accountable for their actions.\textsuperscript{195} In the same spirit, polluters should be required to reimburse private plaintiffs for the diminution in property value resulting from polluter's contamination.

Due to the large number of Superfund sites in the continental United States, Hoery's situation is not unique.\textsuperscript{196} If courts in other jurisdictions follow \textit{In re Hoery}, it is likely that similar claims will be filed across the country.\textsuperscript{197} The continuing tort doctrine furthers the remedial goals of environmental protection statutes and promotes compliance.\textsuperscript{198} Therefore, courts should adopt the continuing tort doctrine in civil environmental liability cases to compensate homeowners for loss of property value and to encourage environmental protection.\textsuperscript{199}

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\textsuperscript{193} See Hyson, \textit{supra} note 2, at 15 (outlining basic purposes of CERCLA).
\textsuperscript{194} See \textit{id}. at 191 (recounting CERCLA's legislative history).
\textsuperscript{195} See \textit{id}. at 15 (underscoring congressional intent).
\textsuperscript{196} See \textit{supra} notes 3-5 and accompanying text.
\textsuperscript{197} See Richtel, \textit{supra} note 4 (reporting 1,499 Superfund sites nationwide in January 2003).
\textsuperscript{198} MacAyeal, \textit{supra} note 7, at 590 (arguing application of continuing tort doctrine will further remedial goals of environmental protection statutes).
\textsuperscript{199} \textit{Id}.