

SUNBURST SCH. DIST. NO. 2 v. TEXACO, INC.: RETHINKING RESTORATION DAMAGES AS A
REMEDY FOR TORTIOUS INJURY TO LAND AND PROPERTY*

I. INTRODUCTION

When a defendant is found civilly liable for harming a plaintiff, the most important consideration is to provide an adequate and just remedy.¹ The fundamental purpose of tort law is to make the injured party whole.² Often, however, this is easier said than done. In actions for wrongful death or infliction of emotional distress, a remedy might not exist that would truly make the plaintiff whole. Likewise, it is difficult to make landowners whole after pollutants from adjoining land contaminate their own land. The cost required to remediate contamination can soar into the millions of dollars, but many courts will not award damages exceeding the land's lost market value, which might be only a few thousand dollars.³

The Montana Supreme Court's recent opinion in *Sunburst School Dist. No. 2 v. Texaco, Inc.* dramatically changed the way Montana courts will address damages awarded for tortious injury to land.⁴ Most significantly, plaintiffs in Montana are now permitted to recover restoration damages exceeding their land's lost market value when they have "personal reasons" for wanting their land restored.⁵ In *Sunburst*, the plaintiffs recovered \$15 million in restoration damages, which equals more than seven times the value of their land before the benzene contamination.⁶

The purpose of this note is to explain how restoration damages have evolved in Montana and other jurisdictions, and to explain what the *Sunburst* opinion might mean for future Montana

¹ Dan B. Dobbs, *Remedies: Damages – Equity – Restitution* 1 (West 1973).

² *Sunburst Sch. Dist. v. Texaco, Inc.*, 165 P.3d 1079, 1086 (Mont. 2007).

³ D. Alan Rudlin, *Toxic Tort Litigation* 47 (ABA 2007).

⁴ *Sunburst*, 165 P.3d 1079.

⁵ *Id.* at 1087.

⁶ *Id.* at 1090.

cases involving tortious injury to land and property. The note begins with a brief overview of how restoration damages were conceptualized in Montana prior to *Sunburst* and how courts in other jurisdictions have approached the issue. Then, the *Sunburst* opinion is discussed and analyzed. In the opinion, the majority adopts *Restatement (Second) of Torts* § 929, which provides a “personal reasons” exception for awarding restoration costs exceeding a land’s lost market value.⁷ The note presents an argument that, in terms of contamination to land, public reasons for seeking restoration could be as viable as personal ones. Moreover, to ensure the legitimacy of restoration damages, mechanisms should be enacted to ensure plaintiffs do not receive a windfall from restoration damages. The *Sunburst* opinion progressively and dramatically shifts how Montana courts conceive tortious injuries to land and property, but it might only be the tip of a much larger iceberg of change.

II. AN OVERVIEW OF RESTORATION DAMAGES IN TORT ACTIONS INVOLVING INJURY TO PROPERTY AND LAND

Under *Restatement (Second) of Torts* § 929, damages awarded for harm to land may include (a) the land’s diminution in value, (b) restoration costs, (c) lost use of the land, and (d) discomfort and annoyance.⁸ The most controversial of these are the first two, and courts will generally award either one or the other, but not both.⁹ A land’s *diminution in value* refers to its lost market value resulting from an injury.¹⁰ *Restoration costs*, on the other hand, are all costs necessary to restore land to its pre-injury state, which might greatly exceed its diminution in value.¹¹

⁷ *Id.* at 1087; *Restatement (Second) of Torts* § 929(1) (1979).

⁸ *Restatement (Second) of Torts* § 929(1).

⁹ Christopher E. Brown, Student Author, *Dump it Here, I Need the Money: Restoration Damages for Temporary Injury to Real Property Held for Personal Use*, 23 B.C. Env’tl. Aff. L. Rev. 699, 706–710 (1996).

¹⁰ *Restatement (Second) of Torts* § 929 cmt. a.

¹¹ *Id.* at cmt. b; *Sunburst*, 165 P.3d at 1086.

Determining the appropriate measure of damages for harm to land is controversial when restoration costs exceed the diminution in value.¹² When this is the case, courts and defendants are often concerned that a plaintiff will receive a windfall if excessive restoration costs are awarded.¹³ For instance, if a piece of land worth \$500,000 is contaminated with a pollutant, its diminution in value might be \$100,000, but restoration costs for cleanup could soar into the millions.¹⁴ The plaintiff might seek restoration damages in order to receive millions of dollars from the defendant but then may never actually restore the land. Courts in both Montana and other jurisdictions have addressed this tension, and there is a sharp divide in the approaches taken when awarding damages for tortious injuries to land.

A. *Restoration damages in Montana before Sunburst*

Prior to *Sunburst*, Montana had not adopted *Restatement (Second) of Torts* § 929, but had instead developed its own approach through a series of important Montana Supreme Court opinions. Most of those cases concerned injuries to houses or buildings rather than land. However, the law derived from those cases formed the foundation for the *Sunburst* opinion. One of the first and most important Montana cases to address the issue of restoration damages for tortious injury to land was *Spackman v. Ralph M. Parsons Co.*¹⁵ In *Spackman*, the owners of a motel, Morris and Veronica Spackman, sued a construction company that was digging a water pipe from Anaconda to Butte.¹⁶ As workers were digging, they broke a sewage pipe, which flooded the Spackmans' motel basement.¹⁷ Following the trial, a jury found for the Spackmans

¹² See generally Brown, *supra* n. 9, at 713; James R. Cox, *Reforming the Law Applicable to the Award of Restoration Damages as a Remedy for Environmental Torts*, 20 Pace Envtl. L. Rev. 777 (2003); Loyd J. Bourgeois, *Private Actions Seeking Remediation or Restoration Damages: Who Ensures the Cleanup Actually Occurs?*, 17 Tul. Envtl. L.J. 355 (2004); Allan Kanner, *Toxic Tort Litigation in a Regulatory World*, 41 Washburn L.J. 535 (2002).

¹³ See e.g. *Poffenbarger v. Merit Energy Co.*, 972 So. 2d 792, 801–802 (Ala. 2007).

¹⁴ *Id.*

¹⁵ *Spackman v. Ralph M. Parsons Co.*, 414 P.2d 918 (Mont. 1966).

¹⁶ *Id.* at 919.

¹⁷ *Id.*

and awarded restoration damages exceeding both the damaged property's diminution in value and pre-injury market value.¹⁸

On appeal, the Montana Supreme Court considered the appropriateness of the jury's award and noted that such damages are frequently difficult to calculate.¹⁹ The Supreme Court maintained that the purpose of awarding damages is to put the injured party in "the same, or as nearly possible the same, condition as he enjoyed before the injury," but added that damages must ultimately be based on "good sense rather than mechanical application of [a] formula."²⁰ Because much of the Spackmans' damaged property was readily replaceable with used property, the Supreme Court held that only the diminution in value of the damaged property should have been awarded.²¹ Further, the court held that the total damages awarded to a plaintiff should not ordinarily exceed the property's market value.²² On these grounds, the court reversed and remanded the award.²³

A decisive fact in *Spackman* was that the damaged property was readily replaceable and had a clearly identifiable market value.²⁴ In terms of property that is neither readily replaceable nor has an easily identifiable market value, such as "clothing, luggage, heirlooms or portraits," the Montana Supreme Court held that the measure of damages can be based on what the property was worth to the owner, as long as it is not "fanciful or unreasonable."²⁵ This distinction became important nine years after *Spackman*, in *Bos v. Dolajak*.²⁶

¹⁸ *Id.* at 920–921.

¹⁹ *Id.* at 921.

²⁰ *Id.* at 921–922.

²¹ *Spackman*, 414 P.2d at 922.

²² *Id.* at 922–923.

²³ *Id.* at 924.

²⁴ *Id.* at 922.

²⁵ *Id.* at 923.

²⁶ *Bos v. Dolajak*, 534 P.2d 1258 (Mont. 1975).

In *Bos*, the Montana Supreme Court revisited the issue of restoration damages for injury to personal property when, as a result of the builder’s negligence, a windstorm damaged a landowner’s silo.²⁷ As in *Spackman*, the Supreme Court asserted the purpose of damages, to make the injured party whole.²⁸ However, the Court noted that awarding the property’s diminution in value to the plaintiff provides an unjust remedy when it fails to make the plaintiff whole.²⁹ The Supreme Court held that diminution in value was inappropriate in the case of the damaged silo because—unlike the damaged property in *Spackman*—the silo was not readily replaceable.³⁰ The silo did not have an established market value, and it was an integral part of the plaintiff’s dairy farm operation.³¹ As a result, the Supreme Court upheld a jury verdict of \$17,626.75 for lost use of the silo and the cost of a used replacement silo.³² The award was more than double the \$8,695.60 estimated diminution in value, but still less than the \$30,000-\$40,000 cost of a new silo.³³

In both *Spackman* and *Bos*, the Supreme Court held that restoration damages ordinarily may not exceed the damaged property’s diminution in value or pre-injury market value, but also cautioned that the rule was not “hard-and-fast.”³⁴ The Supreme Court attempted to add a degree of certainty to the issue fifteen years after *Bos* in *Burk Ranches, Inc. v. State*.³⁵ In *Burk Ranches*, the Supreme Court delved into a controversy involving an aging state-owned dam, used for irrigation by farmers and ranchers. The dam collapsed as a result of the State’s negligent

²⁷ *Id.* at 1259.

²⁸ *Id.* at 1260.

²⁹ *Id.* at 1261.

³⁰ *Id.*

³¹ *Id.*

³² *Bos*, 534 P.2d at 1260, 1262.

³³ *Id.* at 1259.

³⁴ *Id.* at 1261; *Spackman*, 414 P.2d at 921–922.

³⁵ *Burk Ranches, Inc. v. State*, 790 P.2d 443 (Mont. 1990).

maintenance.³⁶ Following the collapse, a downstream water user suffered outwash damage to his land and the loss of irrigation water.³⁷ Because the State did not intend to re-build the dam, a jury awarded the water user \$155,480 for the loss of future irrigation and \$55,000 for general damage resulting from the outwash.³⁸

On appeal, the Montana Supreme Court reversed the jury's award on the basis that the injury was permanent rather than temporary.³⁹ The Court reasoned that, by definition, permanent injuries to property cannot be restored.⁴⁰ Thus, the appropriate award for such injuries should be the property's diminution in value.⁴¹ The Supreme Court held that the water user's injuries were permanent for two reasons. First, because the State did not intend to re-build the dam, the loss of irrigation would indefinitely affect all subsequent owners of the property.⁴² Second, even if a new dam were built, the cost of doing so might greatly exceed the benefit gained from restoring irrigation to the water user.⁴³ Consequently, the Supreme Court held that when the cost of restoration greatly exceeds the diminution in value, the injury is presumptively permanent and the appropriate award is the diminution in value.⁴⁴ That presumption could be overcome, however, by statutory or common laws compelling restoration (e.g., environmental laws).⁴⁵

After *Burk Ranches* and before *Sunburst*, the rule in Montana with respect to restoration damages was that (1) restoration costs plus damages for loss of use should be awarded for temporary injuries to property (i.e., injuries that could be restored), and (2) diminution in value

³⁶ *Id.* at 444.

³⁷ *Id.* at 445.

³⁸ *Id.*

³⁹ *Id.* at 447–448.

⁴⁰ *Id.*

⁴¹ *Burk Ranches, Inc.*, 790 P.2d at 447–448.

⁴² *Id.* at 446.

⁴³ *Id.* at 447.

⁴⁴ *Id.*

⁴⁵ *Id.* at 445.

was the appropriate measure for permanent injuries to property.⁴⁶ However, the ability to restore a temporary injury had to be “actually possible” within the “reasonable capabilities” of the parties, rather than “theoretically possible.”⁴⁷ When the cost of restoration exceeded the diminution in value of the property, the injury was presumptively permanent, and the award was limited to the diminution in value of the property.⁴⁸ This pre-*Sunburst* rule followed the approach taken in many other jurisdictions; however, some jurisdictions have refused to cap the amount of restoration damages that may be awarded.

B. *Restoration damages in other jurisdictions*

Like pre-*Sunburst* Montana, when other jurisdictions decided between awarding damages for restoration or diminution in value, many based their decisions on (1) whether the harm was permanent or temporary,⁴⁹ (2) whether recovery should be capped at the diminution in value or the property’s pre-injury market value,⁵⁰ (3) whether the landowner expressed intent to restore the land,⁵¹ and (4) whether restoration costs were reasonable in comparison to the diminution in value.⁵² Other jurisdictions, though, have adopted *Restatement (Second) of Torts* § 929 to guide their decision-making.⁵³

Restatement (Second) of Torts § 929 presents the general rule for damages involving tortious injury to land:

(1) If one is entitled to a judgment for harm to land resulting from a past invasion and not amounting to a total destruction of value, the damages include compensation for:

⁴⁶ *Id.* at 447.

⁴⁷ *Burk Ranches, Inc.*, 790 P.2d at 447.

⁴⁸ *Id.*

⁴⁹ See e.g. *McNeil v. Burlington Resource Oil & Gas Co.*, 153 P.3d 46, 53–54 (N.M. App. 2006).

⁵⁰ See e.g. *Vaught v. A.O. Hardee & Sons, Inc.*, 623 S.E.2d 373, 378 (S.C. 2005).

⁵¹ See e.g. *Heninger v. Dunn*, 101 Cal. App. 3d 858, 865–866 (Cal. App. 1980).

⁵² See e.g. *Stackhouse v. Logangate Prop. Mgt.*, 872 N.E.2d 1294, 1304 (Ohio App. 2007).

⁵³ *Brown, supra* n. 9, at 706.

(a) the difference between the value of the land before the harm and the value after the harm, or at [the landowner's] election in an appropriate case, the cost of restoration that has been or may be reasonably incurred . . .⁵⁴

Comment b to this *Restatement* section identifies an important exception to this general rule:

[U]nless there is a reason personal to the owner for restoring the original condition, damages are measured only by the difference between the value of the land before and after the harm . . . [I]f a building such as a homestead is used for a purpose personal to the owner, the damages ordinarily include an amount for repairs, even though this might be greater than the entire value of the building.⁵⁵

Ordinarily, then, landowners are awarded the diminution in value of their land resulting from an injury. However, according to comment b, when a landowner has a “reason personal to the owner” (or “personal reasons”) for restoring the injured land to its original condition, damages may exceed the diminution in value and, perhaps, its pre-injury market value.⁵⁶

Many jurisdictions have followed the *Restatement* and comment b, but there has been little uniformity in its application.⁵⁷ This possibly occurs because the *Restatement* does not explicitly define circumstances in which a landowner would have personal reasons for restoring the injured land.⁵⁸ In the oft-cited *Weld Co. Bd. of Co. Commrs. v. Slovek*, the Colorado Supreme Court refused to adopt a bright-line test for determining whether it was appropriate to award restoration damages for a landowner's personal reasons.⁵⁹ In that case, the Sloveks sued county commissioners after the county cut an opening in a riverbank on its property that caused flooding on the Sloveks' adjoining land.⁶⁰ The flood destroyed the Sloveks' fishing pond, fencing, and several trees, depositing silt and debris throughout their land.⁶¹ The court held the

⁵⁴ *Restatement (Second) of Torts* § 929(1).

⁵⁵ *Id.* at § 929 cmt. b.

⁵⁶ *Id.*; *Weld Co. Bd. of Co. Commrs. v. Slovek*, 723 P.2d 1309, 1314 (Colo. 1986); *Roman Catholic Church v. La. Gas*, 618 So. 2d 874, 876 (La. 1993).

⁵⁷ Cox, *supra* n. 12, at 781.

⁵⁸ *Id.* at 782.

⁵⁹ *Slovek*, 723 P.2d at 1316.

⁶⁰ *Id.* at 1311.

⁶¹ *Id.*

Sloveks were permitted to recover restoration costs exceeding the diminution in value because of their personal reasons for wanting the land restored.⁶² However, the court commented that the determination of whether restoration damages should be awarded is “not susceptible to reduction to a set list and that no formula can be devised that will produce litmus-test certainty and yet retain the flexibility to produce fair results in all cases.”⁶³

In other jurisdictions, courts have gone further by holding that when landowners have personal reasons for restoring their tortiously injured land, restoration damages are the only appropriate remedy.⁶⁴ In *Roman Catholic Church v. La. Gas*, another frequently-cited case, the archdiocese of a Catholic church sued a gas company after a gas leak erupted and severely burned a low-income housing complex owned by the church.⁶⁵ The gas company admitted liability⁶⁶ but argued it should pay no more than the diminution in value of the complex.⁶⁷ The Louisiana Supreme Court disagreed and held that damages for diminution in value are inadequate when restoration costs exceed that diminution because landowners are forced either to sell their property or to pay for restoration out of their own pockets.⁶⁸

When a homeowner’s house or structure is injured, restoration damages might exceed the diminution in value by only a few thousand dollars.⁶⁹ On the other hand, when land is contaminated with oil, gas, or other pollutants as the result of a tortious act, the cost can be much larger. Contamination might only lower the land’s market value by several thousand dollars, but cleanup costs could rise into the millions.⁷⁰ In cases of contaminated land, then, the distinction

⁶² *Id.* at 1317.

⁶³ *Id.* at 1316.

⁶⁴ *Roman Catholic Church*, 618 So. 2d at 877.

⁶⁵ *Id.*

⁶⁶ *Id.* at 875.

⁶⁷ *Id.* at 876.

⁶⁸ *Id.* at 877.

⁶⁹ See e.g. *Chandler v. Madsen*, 642 P.2d 1028, 1030–1031 (Mont. 1982).

⁷⁰ See e.g. *Poffenbarger*, 972 So. 2d at 801.

between damages for restoration and diminution in value is particularly salient. In such instances, courts in other jurisdictions have primarily based their measurement of damages on two factors: (1) the distinction between temporary and permanent injuries (as Montana did before *Sunburst*), and (2) whether the plaintiff has personal reasons for restoring the land.

Courts in other jurisdictions that base their measurement of damages on the distinction between temporary and permanent injuries have tended to award damages only for diminution in value.⁷¹ The distinction has led to this conclusion for two reasons. First, some courts have presumed that contamination is a permanent injury.⁷² Consequently, and consistent with Montana's analysis in *Burk Ranches*, damages for diminution in value are the most appropriate remedy because, by definition, the contamination cannot be remediated or restored.⁷³ Second, even if the contamination was temporary, restoration damages exceeding the diminution in value would prove inappropriate because "the plaintiff's loss would put the plaintiff in a better position than he or she had been in before the injury, which is never the purpose of compensatory damages."⁷⁴

In contrast, courts willing to recognize a landowner's personal reasons for restoring contaminated property have been willing to award restoration costs exceeding the diminution of the land's value.⁷⁵ In *Felton Oil Co. v. Gee*, a landowner sued the owner of a nearby underground storage tank after the tank began leaking diesel into the property.⁷⁶ The landowner argued that the appropriate measure of damages was the cost required to restore the land to its

⁷¹ See e.g. *McNeil*, 153 P.3d at 53–54.

⁷² *Id.*

⁷³ *Id.*

⁷⁴ *Id.*

⁷⁵ See generally *Mailman's Steam Carpet Cleaning Corp. v. Lizotte*, 616 N.E.2d 85 (Mass. 1993); *Felton Oil Co. v. Gee*, 182 S.W.3d 72 (Ark. 2004); *Corbello v. Iowa Prod.*, 850 So. 2d 686 (La. 2003).

⁷⁶ *Felton Oil*, 182 S.W.3d at 74.

pre-injury state.⁷⁷ In delivering its opinion, the Arkansas Supreme Court relied heavily on *Restatement (Second) of Torts* § 929 comment b and held that since the landowners lived on the contaminated site and often had family members visit them, they had personal reasons for restoring their land.⁷⁸ Thus, the landowners were reasonably justified in receiving restoration damages that totaled more than nine times the diminution of the land's value.⁷⁹ At the same time *Felton Oil* was being litigated in Arkansas, Montana courts faced, for the first time, a similar, but larger scale issue that came to a head in *Sunburst*.

III. *SUNBURST SCH. DIST. NO. 2 v. TEXACO, INC.*

A. *Facts*

From 1928 to 1961, Texaco operated an oil refinery in the town of Sunburst, Montana.⁸⁰ According to employees of Texaco, gasoline at the refinery leaked into the ground for many years from pipes, overflowing tanks, and spills from train cars.⁸¹ Evidence of a nineteen-acre contamination plume underneath Sunburst was not discovered until 1955 when escaping fumes caused a nearby house to explode.⁸²

Over the next few years, Texaco attempted to remediate the contamination and pumped out over 182,000 gallons from beneath Sunburst, but left as much as 1,000,000 gallons behind when the refinery closed in 1961.⁸³ Twenty years later in 1981, Texaco notified the Environmental Protection Agency (EPA) that the refinery site and ground beneath Sunburst

⁷⁷ *Id.* at 78–79.

⁷⁸ *Id.* at 80.

⁷⁹ *Id.*

⁸⁰ Br. of Apps. at 5, *Sunburst Sch. Dist. v. Texaco, Inc.*, 165 P.3d 1079 (Mont. 2007).

⁸¹ Br. of Respts./Cross-Apps. at 5, *Sunburst Sch. Dist. v. Texaco, Inc.*, 165 P.3d 1079 (Mont. 2007).

⁸² *Id.* at 4.

⁸³ *Id.*; Br. of Apps., *supra* n. 80, at 5.

might still be contaminated.⁸⁴ In 1985, EPA contractors conducted a site investigation and found high levels of contamination in the soil and surface water around the refinery.⁸⁵

Following the EPA's investigation, the Montana Department of Environmental Quality (DEQ) assumed control over the site pursuant to Montana's Comprehensive Environmental Cleanup Responsibility Act (CECRA)—the state's superfund law.⁸⁶ Given the remaining contamination on the site, Texaco entered a consent order with DEQ in 1989 to further investigate the contamination and to implement appropriate remediation.⁸⁷ In 1995, however, DEQ found that Texaco continued to violate Montana's benzene regulations for groundwater.⁸⁸

Four years later, Texaco entered an investigative work plan with DEQ to analyze the breadth of the contamination and to evaluate remediation alternatives.⁸⁹ Between 1999 and 2003, Texaco proposed alternatives, and DEQ released the proposals for public comment.⁹⁰ Texaco's preferred alternative for remediation was "monitored natural attenuation," which involved monitoring the contamination and allowing the benzene to degrade naturally over the course of the next 20 to 100 years.⁹¹ The cost of this approach would have been approximately \$1 million dollars.⁹²

Many residents of Sunburst were dissatisfied with the lack of progress Texaco and DEQ had made in more than 15 years of investigation.⁹³ In 2001, as Texaco proposed its alternative for remediation, 82 property owners in the town (collectively "Sunburst"), led by a science

⁸⁴ *Sunburst*, 165 P.3d at 1083.

⁸⁵ *Id.*

⁸⁶ Br. of Apps., *supra* n. 80, at 5; Mont. Code Ann. §§ 75-10-701 to 75-10-728 (2007).

⁸⁷ Br. of Apps., *supra* n. 80, at 6.

⁸⁸ *Sunburst*, 165 P.3d at 1084.

⁸⁹ *Id.*

⁹⁰ *Id.*

⁹¹ Br. of Respts./Cross-Apps., *supra* n. 81, at 11.

⁹² *Sunburst*, 165 P.3d at 1084.

⁹³ Br. of Respts./Cross-Apps., *supra* n. 81, at 14.

teacher at Sunburst Elementary School, filed a lawsuit against Texaco.⁹⁴ As a result of the contamination, Sunburst alleged “trespass, strict liability for abnormally dangerous activities, public nuisance, violation of the [state] constitutional right to a clean and healthful environment, wrongful occupation of property, and constructive fraud.”⁹⁵ They sought restoration damages in order to remediate the contamination underneath their land.⁹⁶

Following a three-week jury trial, Sunburst was awarded \$15 million dollars in restoration damages—more than seven times the combined pre-contamination market value of the properties.⁹⁷ Sunburst requested the damages as a lump sum, rather than split among the plaintiffs, since they intended to use the award as a single expense for restoration.⁹⁸ Following the jury’s verdict, Texaco appealed the district court’s decision to the Montana Supreme Court.⁹⁹

B. *Majority holding*

In a four-to-three majority opinion authored by Justice Morris, the Montana Supreme Court affirmed the district court’s \$15 million dollars award of restoration damages to Sunburst.¹⁰⁰ Several issues were addressed, but all justices joined or concurred with the majority’s opinion as it related to the award of restoration damages.¹⁰¹

Recalling its decision in *Burk Ranches*, the majority held that restoration costs may be awarded when an injury is temporary or, if it is presumptively permanent, when statutory or

⁹⁴ Br. of Apps., *supra* n. 80, at 2.

⁹⁵ *Sunburst*, 165 P.3d at 1084–1085.

⁹⁶ *Id.* at 1085.

⁹⁷ *Id.* at 1089.

⁹⁸ *Id.* at 1085.

⁹⁹ *Id.* at 1083.

¹⁰⁰ *Id.* at 1098.

¹⁰¹ *Sunburst*, 165 P.3d at 1093. The Supreme Court addressed a number of issues beyond restoration damages, including the admissibility of DEQ’s role as evidence, whether CERCA precluded a common law action, the award of punitive damages, the viability of a constitutional tort argument, and award of attorney fees. As an example, one of the other interesting holdings of *Sunburst* is that the availability of restoration damages for contamination makes moot the constitutional tort argument that a plaintiff should be permitted to recover restoration damages pursuant to Mont. Const. art. II, § 3, which provides a right to a “clean and healthful environment.” *Id.* This holding was recently upheld in *Shammel v. Canyon Resources Corp.*, 167 P.3d 886 (Mont. 2007). For the sake of brevity, those issues fall beyond the scope of this note.

common law compels it.¹⁰² The majority turned to *Roman Catholic*, commenting that “if a plaintiff wants to use the damaged property, instead of selling it, restoration of the property constitutes the only remedy that affords a plaintiff full compensation.”¹⁰³ The majority then joined other jurisdictions by adopting *Restatement (Second) of Torts* § 929, including comment b, and by holding that restoration damages must be available—even in excess of the property’s market value—when plaintiffs have personal reasons for seeking restoration.¹⁰⁴

Based on testimony at trial, the majority concluded that the plaintiffs’ motivations for seeking restoration damages (i.e., to enjoy and live in their homes) were compelling personal reasons.¹⁰⁵ At least one of the principal plaintiffs—the Sunburst school district—had reasons for seeking restoration that were not personal at all but were entirely public in nature (i.e., to ensure the safety of its students).¹⁰⁶ Nevertheless, the majority held the school district’s collateral benefit did not negate the award of restoration damages because it would be impossible to remediate the contamination on the private landowners’ land without also remediating the school district’s land.¹⁰⁷

The majority seemed unconcerned with the windfall the plaintiffs would receive if they failed to remediate the contamination.¹⁰⁸ Uncontroverted evidence demonstrating that the plaintiffs would use the award for restoration sufficiently justified restoration damages.¹⁰⁹ In particular, the majority noted that Sunburst’s request for a lump sum, rather than a split award among the various landowners, illustrated the genuineness of the town’s intentions.¹¹⁰

¹⁰² *Sunburst*, 165 P.3d at 1086.

¹⁰³ *Id.* at 1087.

¹⁰⁴ *Id.* at 1088.

¹⁰⁵ *Id.*

¹⁰⁶ *Id.*

¹⁰⁷ *Id.*

¹⁰⁸ *Sunburst*, 165 P.3d at 1088.

¹⁰⁹ *Id.* at 1089.

¹¹⁰ *Id.*

Citing *Slovek*, the majority conceded that the reasonableness of restoration damages is generally evaluated against the land’s pre-injury market value.¹¹¹ However, it also noted that capping restoration damages would only sanction a tortfeasor’s private right of eminent domain.¹¹² A polluter could freely contaminate surrounding property and rest assured that its liability would be limited to the market value of the property, irrespective of restoration costs.¹¹³ Surrounding landowners, in turn, would be forced to either live with the exposure to toxic chemicals or leave their land.¹¹⁴ Consequently, when a plaintiff has personal reasons for seeking restoration, restoration damages should be awarded to the extent necessary to completely restore the land—no more and no less.¹¹⁵

C. Concurring opinion

Chief Justice Gray singularly wrote a concurring opinion, in which she challenged the majority’s basis for affirming the restoration damages.¹¹⁶ Specifically, Chief Justice Gray disagreed with the majority’s adoption of the personal use exception for restoration damages from *Restatement (Second) of Torts* § 929 and comment b.¹¹⁷ Chief Justice Gray contended that the Court was free to award restoration damages without adopting the *Restatement* because Montana’s case law, embodied in *Bos* and *Burk Ranches*, did not preclude such an award.¹¹⁸

Moreover, the Chief Justice argued that the record was insufficient to justify restoration damages on the basis of the plaintiffs’ personal reasons.¹¹⁹ Only six of the eighty-two plaintiffs testified at trial, and the list of plaintiffs included “the partnership Sonnemaker Farms, estates of

¹¹¹ *Id.* at 1089–1090.

¹¹² *Id.* at 1090.

¹¹³ *Id.*

¹¹⁴ *Sunburst*, 165 P.3d at 1090.

¹¹⁵ *Id.* at 1088.

¹¹⁶ *Id.* at 1105–1106 (Gray, C.J., concurring).

¹¹⁷ *Id.*

¹¹⁸ *Id.* at 1108.

¹¹⁹ *Id.* at 1106.

deceased property owners, people whose listed addresses are not in Sunburst, and the school district.”¹²⁰ At least two of the six plaintiffs testifying indicated they had considered selling their property or were considering it at the time.¹²¹ Chief Justice Gray reasoned that by awarding restoration damages to all plaintiffs on the basis of personal reasons – when only a few had indicated such a motivation for seeking restoration damages – the majority had applied the personal reasons exception far too broadly.¹²²

Ultimately, Chief Justice Gray concurred with the majority in awarding restoration costs to the Sunburst plaintiffs.¹²³ She reached this conclusion by highlighting Texaco’s failure to provide evidence at trial that the contamination was permanent.¹²⁴ Had Texaco offered such evidence, it would have been in a position to argue, pursuant to *Burk Ranches*, that the damages should have been limited to the surrounding properties’ diminution in value.¹²⁵ But Texaco failed to make that argument. Given the flexibility that Montana courts have in awarding restoration damages, Chief Justice Gray maintained the district court was free to assume the contamination was temporary and to award restoration damages exceeding both the diminution in value and pre-contamination market value of the properties.¹²⁶

V. ANALYSIS

A. *Contamination as a temporary or permanent injury*

In delivering its opinion, the majority initially appeared to ground its analysis of restoration damages on the distinction between a temporary injury and one that was

¹²⁰ *Sunburst*, 165 P.3d at 1106.

¹²¹ *Id.*

¹²² *Id.*

¹²³ *Id.* at 1109.

¹²⁴ *Id.*

¹²⁵ *Id.*

¹²⁶ *Sunburst*, 165 P.3d at 1108–1109.

presumptively permanent, due to costs.¹²⁷ Ultimately, the presumptive permanence of the contamination and whether there existed statutory or common law theories to overcome that presumption had no bearing on the majority’s decision to uphold the restoration damages. Instead, the majority turned to comment b of the *Restatement (Second) of Torts* § 929.¹²⁸ By doing so, the majority suggested that when a plaintiff landowner has personal reasons for restoring his land, restoration damages may be awarded irrespective of whether the injury is temporary or presumptively permanent.¹²⁹ The only threshold question is whether restoration is more than a mere “theoretical possibility.”¹³⁰

Within the context of contaminated land, the irrelevance of the temporary/permanent dichotomy is logical. All contamination is “temporary” in so far that it will eventually degrade into benign substances (even if it takes millennia to do so).¹³¹ Even Texaco, which would have benefited by arguing that the contamination beneath Sunburst was permanent, maintained the benzene would eventually break down into innocuous agents.¹³² Had Texaco argued the contamination was permanent, and not temporary or presumptively permanent, it would have only paid the diminution in value of the aggregate properties. Because it had to concede the contamination was temporary, Texaco became subject to the personal reasons exception in comment b of *Restatement (Second) of Torts* § 929.

In contexts other than contaminated land, the temporary/permanent distinction still appears both relevant and valid after *Sunburst*. If a plaintiff landowner seeks restoration damages exceeding the injured land’s market value, those damages will not be awarded if

¹²⁷ *Id.* at 1086–1087 (majority).

¹²⁸ *Id.*

¹²⁹ *Id.*

¹³⁰ *Id.*

¹³¹ Cox, *supra* n. 12, at 785.

¹³² Br. of Apps., *supra* n. 80, at 10–11 (recall that Texaco argued letting the benzene break down naturally was its preferred alternative for remediation—i.e., “monitored natural attenuation.” The very fact that it proposed this alternative might have been what prevented it from arguing the contamination was permanent.)

restoration is impossible. Recalling *Burk Ranches*, the Montana Supreme Court refused to award a landowner damages for his lost access to irrigation after a state-owned dam negligently collapsed.¹³³ The landowner was limited to recovering damages for the diminution in his land's value because the dam was not going to be rebuilt, which made restoration impossible and the injury permanent.¹³⁴ In that instance the temporary/permanent distinction was useful precisely because that injury—unlike contamination to the land—was theoretically either temporary (i.e., the dam would be rebuilt) or permanent (i.e., the dam would not be rebuilt). Under *Sunburst*, though, it is an open question whether the landowner might have compelled the county to rebuild the dam if he had personal reasons for wanting it rebuilt or restored.¹³⁵

B. *The scope of the “personal reasons” exception*

The most profound aspect of the majority opinion is its adoption of the personal reasons exception for awarding restoration damages. As discussed above, restoration damages ordinarily may not exceed the pre-injury market value of land and the land's diminution in value in some jurisdictions. When a landowner has personal reasons for seeking restoration, though, restoration damages are virtually unbound. Under *Restatement (Second) of Torts* § 929 comment b:

If...the cost of replacing the land in its original condition is disproportionate to the diminution in the value of the land caused by the trespass, *unless there is a reason personal to the owner for restoring the original condition*, damages are measured only by the difference between the value of the land before and after the harm.¹³⁶

¹³³ *Burk Ranches, Inc.*, 790 P.2d at 444.

¹³⁴ *Id.* at 447.

¹³⁵ The landowner's success seems unlikely, however, since his land would not be restored.

¹³⁶ Emphasis added.

If a landowner has a personal reason for restoring injured land, there is no requirement that the award be proportional to the diminution in value. Restoration costs are only bound when the plaintiff has no personal reason for restoring the land.

The Sunburst plaintiffs benefited greatly from articulating personal reasons for wanting the contamination cleaned up—for example, to “enjoy and live in their homes.”¹³⁷ Chief Justice Gray’s concurrence raises poignant issues concerning the scope of the personal reasons exception.¹³⁸ How many personal reasons are sufficient? How many plaintiffs with personal reasons are necessary? And, are those reasons merely “window dressing” for the public policy justification of restoration damages?

As Chief Justice Gray noted, only six of the eighty-two plaintiffs testified at trial, and two of those either had considered or were considering selling their property.¹³⁹ Moreover, it appeared that many plaintiffs, including the Sunburst school district, had no personal interest in their land at all, but rather had a public or business interest.¹⁴⁰ For instance, from the school district’s perspective, there was likely an interest in ensuring the safety of its students (i.e., a public interest).¹⁴¹ Had those plaintiffs sued Texaco individually, they could not have recovered restoration damages under the personal reasons exception; instead, their damages would have been limited to their land’s diminution in value. Because at least some plaintiffs had personal reasons for seeking restoration, businesses and the school district were allowed to collaterally benefit.

¹³⁷ *Sunburst*, 165 P.3d at 1088.

¹³⁸ *See id.* at 1105–1106 (Gray, C.J., concurring)

¹³⁹ *Id.* at 1106.

¹⁴⁰ *Id.*

¹⁴¹ The school district did not explicitly identify this interest, but it is an inferable rationale for their joining in the lawsuit. *Br. of Respts./Cross-Apps.*, *supra* n. 81, at 25–26.

If public institutions are permitted to benefit collaterally from the personal reasons exception, they might argue it would be logically consistent to recognize public reasons for seeking restoration damages as well. Further, permitting a public institution to collaterally benefit from the personal reasons exception—and not applying the rule if the institution was the sole plaintiff—might result in increased litigation, higher court costs, and perhaps wider spread contamination.

Suppose, for instance, the events underlying *Sunburst* were identically replayed in the future. Should the school become aware of contamination beneath its land and wish to recover restoration costs by suing the polluter, it must first persuade an adjoining private landowner—whose land is also contaminated and who has personal reasons for seeking restoration—to join the lawsuit. If the adjoining landowner’s contamination cannot be remediated without remediating the school’s contamination, the merits of the lawsuit would be identical with or without the adjoining landowner. But, because the adjoining landowner must join the lawsuit for the school to recover restoration costs exceeding the diminution in value, litigation time and expense increase. Moreover, it is reasonable to expect that a public institution might delay filing the lawsuit to allow the spread of contamination to an adjoining landowner who can provide the personal reasons “silver bullet.”

Landowners might also argue that public reasons for seeking restoration damages should be recognized in the same way as personal reasons because the benefits of restoration can never be limited to a single party.¹⁴² To allow for restoration costs exceeding diminution in value only when there are personal reasons for restoration implies that restoration is exclusively a personal benefit. For instance, a landowner might want contamination remediated because she lives on

¹⁴² For a detailed discussion of the public-policy issues applicable to restoration damages for contamination, see Cox *Supra* n. 12, at 778–780.

that land and is concerned for her personal safety. Even if the contamination is limited only to her property, she will not be the only beneficiary of restoration. Other people will someday own that land and benefit.¹⁴³ Moreover, the surrounding community will benefit from cleaner air and groundwater. Thus, at least in the case of contamination, it is somewhat of a misnomer to classify a reason for seeking restoration damages as purely “personal.” In reality, it is likely impossible to separate personal and public reasons for seeking restoration damages.

Broadening the scope of the personal reasons exception to include public reasons would not undermine the ideal of the rule of law. Rather than “legislating from the bench,” an acknowledgement of public reasons for seeking restoration is a development of the principled precedent that injured landowners should be made whole in tort actions.¹⁴⁴ Landowners—whether public or private—can have both public and personal reasons for wanting their injured land restored. And, as the Montana Supreme Court has held, restoration is likely to be the only way to make a landowner whole.¹⁴⁵

C. *Calming the fear of a plaintiff's windfall from restoration damages*

Like defendants and some courts in similar lawsuits, Texaco maintained that restoration damages exceeding both the contaminated land’s diminution in value and its market value were inappropriate because the Sunburst plaintiffs might receive a windfall.¹⁴⁶ After all, *Restatement (Second) of Torts* § 929 does not explicitly require awarded restoration damages to be spent on restoration. It is conceivable that the Sunburst plaintiffs could have sold their contaminated land without restoring it and reaped a seven-fold profit from the restoration damages award.

¹⁴³ Cox refers to this as “intergenerational equity.” Cox, *supra* n. 12, at 780.

¹⁴⁴ *Sunburst*, 165 P.3d at 1086 (majority).

¹⁴⁵ *Id.* at 1087.

¹⁴⁶ Br. of Apps., *supra* n. 80, at 30.

The evidence, however, convinced the Montana Supreme Court that the Sunburst plaintiffs would actually use the restoration damages for restoration.¹⁴⁷ Courts in future cases might not be as convinced. But when the evidence suggests that plaintiffs might not use restoration damages for restoration, a court may put mechanisms in place to ensure the award is appropriately used. Judicially or administratively sanctioned measures that ensure cleanup occurs will preserve the integrity of restoration damages, irrespective of whether plaintiffs manifest a legitimate intent to use restoration damages for restoration. As the Sunburst plaintiffs proposed, one option is to invite the court to issue an order establishing a constructive trust that would administer the cleanup expenses.¹⁴⁸ Although the trial court found such an order unnecessary, other jurisdictions have adopted this approach.¹⁴⁹ According to *Restatement of Restitution* § 160, a constructive trust may be created “[w]here a person holding title to property is subject to an equitable duty to convey it to another on the ground that he would be unjustly enriched if he were permitted to retain it.”¹⁵⁰ At its most basic level, such a trust requires a creator (i.e., the court), a beneficiary, a trustee, and trust property (i.e., the restoration damages).¹⁵¹ The beneficiaries of the trust could be both the plaintiffs and future property owners, or just the general public if the trust was also construed as a charitable trust.¹⁵² In terms of a trustee, the court would be at liberty to appoint a “professional mediator, scientist, governmental entity [e.g., DEQ], landowner or other trusted designee.”¹⁵³

Legal scholars have advanced a number of other mechanisms beyond the creation of a trust. Mary Balhoff, for instance, argues that a potentially effective approach is to enact

¹⁴⁷ *Sunburst*, 165 P.3d at 1089.

¹⁴⁸ Br. of Respts./Cross-Apps., *supra* n. 81, at 27.

¹⁴⁹ See e.g. *In re Harvard Indus., Inc.*, 138 B.R. 10, 14 (Bankr. D. Del. 1992).

¹⁵⁰ *Restatement of Restitution* § 160 (1937).

¹⁵¹ Peter Manus, *To a Candidate in Search of an Environmental Theme: Promote the Public Trust*, 19 Stan. Envtl. L.J. 315, 323–324 (2000).

¹⁵² See Cox, *supra* n. 12, at 803.

¹⁵³ *Id.* at 808.

legislation requiring the payment of restoration damages into the registry of the court.¹⁵⁴ The court would then pay for the cleanup out of the registry as expenses arise. Alternatively, Bourgeois contends that administrative agencies, such as Montana’s DEQ, should provide oversight of the restoration and its costs, rather than the courts.¹⁵⁵ Through what he terms a form of “quasi-primary jurisdiction,” a state may enact legislation assigning an administrative agency the power to resolve a claim and to oversee cleanup.¹⁵⁶ Some states, including Wisconsin,¹⁵⁷ Mississippi,¹⁵⁸ and Oklahoma,¹⁵⁹ have adopted this approach.¹⁶⁰

The Montana Supreme Court attempted to calm the fears that the Sunburst plaintiffs would receive a windfall by highlighting the evidence demonstrating they would actually use the restoration damages for restoration.¹⁶¹ When such evidence in the future is less convincing, courts might wish to consider additional mechanisms designed to ensure that restoration costs are appropriately used. By doing so, courts will reinforce the legitimacy of restoration damages that exceed a property’s market value or diminution in value.

VI. CONCLUSION

The Montana Supreme Court recognized in *Sunburst* that landowners who have a personal interest in their land are only made whole when their land is fully restored.¹⁶² This conclusion rests on the proposition that landowners might have more than a monetary interest in their land. In particular, their interest is often defined by and expressed through the tapestry of personal connections they share with their land. Merely awarding a land’s diminution in value

¹⁵⁴ Mary Beth Balhoff, Student Author, *Corbello v. Iowa Production and the Implications of Restoration Damages in Louisiana: Drilling Holes in Deep Pockets for Thirty-Three Million Dollars*, 65 La. L. Rev. 271, 299 (2004).

¹⁵⁵ Bourgeois, *supra* n. 12, at 368.

¹⁵⁶ *Id.*

¹⁵⁷ *Nischke v. Farmers & Merchants Bank & Trust*, 522 N.W.2d 542 (Wis. App. 1994).

¹⁵⁸ Miss. Code Ann. § 53-1-17(1) (West 1999).

¹⁵⁹ Okla. Stat. Ann. tit. 52, §§ 318.09–318.9 (West 1991).

¹⁶⁰ Bourgeois, *supra* n. 12, at 369.

¹⁶¹ *Sunburst*, 165 P.3d at 1089.

¹⁶² *Id.* at 1088.

resulting from an injury to that land, such as pollutant contamination, does not remedy the harm to these connections. In that respect, the Montana Supreme Court's adoption of *Restatement (Second) of Torts* § 929, including the personal reasons exception, is an affirmative step towards a more harmonized conception of damages for tortious injury to land.

As the jurisprudence of restoration damages develops in Montana, two unresolved issues in *Sunburst* will likely need to be addressed. First, the scope of the personal reasons exception must be clarified. If public institutions are permitted to collaterally benefit from the exception and if the distinction between personal and public reasons for restoration is clouded, then there is a compelling argument that public reasons should be acknowledged just like personal ones. Second, to ensure that plaintiffs do not look to restoration damages for a windfall, mechanisms might need to be put in place that guarantee restoration damages will actually be used for restoration. These and other issues will surely arise as Montana courts develop the law of restoration damages, but the course should inevitably lead to a more just approach to tort actions involving injury to land.