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Real Property Survey

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REAL PROPERTY SURVEY

I. OVERVIEW

In 1991, the Tenth Circuit Court of Appeals analyzed a variety of issues within the scope of Real Property law. In the landlord tenant context, the court considered whether the presence of a defaulting tenant was a sufficient measure of damages in a breach of contract claim[1] and whether a commercial tenant could be relieved from complying with a "clear and unambiguous" provision in a lease.[2] In the area of easements, the Tenth Circuit discussed when to balance the equities and public policies of a situation when granting an injunction.[3] Finally, in the sphere of eminent domain, the court discussed vestment of a property interest when federal approval is required.[4] This Article will examine these significant Tenth Circuit decisions.

II. A DEFAULTING LESSEE IS SUFFICIENT EVIDENCE TO SHOW DIMINUTION IN PROPERTY VALUE.

In *John A. Henry & Co. v. T.G. & Y. Stores Co.*,[5] the Tenth Circuit concluded that evidence by an appraiser[6] showing that a lessee's history of default would make the property harder to sell was a measure of damages sufficiently certain to support a claim for diminution in property value based on breach of contract.[7]

A. *Factual Background*

John Henry agreed to build, at his expense, a 60,000 square-foot building in exchange for a promise by T.G. & Y. to place one of its stores in the building. T.G. & Y. then entered into a twenty year lease that included a clause prohibiting it from halting rent payments.[8] Henry pledged the lease as security and borrowed approximately $1.5 million to construct the building.[9] T.G. & Y. first occupied the building in 1981 and continued to make timely lease payments through 1986 when McCrory Corp. purchased T.G. & Y..[10]

In an effort to scale down operations, McCrory closed 202 T.G. & Y. stores. McCrory subleased or assigned only 46 of the stores' leases and employed Sterik Company to dispose of the remaining lease obliga-

1. John A. Henry & Co. v. T.G. & Y. Stores Co., 941 F.2d 1068 (10th Cir. 1991).
2. Car-X Service Systems, Inc. v. Kidd-Heller, 927 F.2d 511 (10th Cir. 1991).
3. Mid-America Pipeline Co. v. Lario Enter., 942 F.2d 1519 (10th Cir. 1991).
4. Sangre De Cristo Dev. Co. v. United States, 932 F.2d 891 (10th Cir. 1991).
5. 941 F.2d 1068 (10th Cir. 1991).
6. *Id.* at 1071.
7. *Id.*
8. *Id.* at 1070.
9. *Id.*
10. *Id.*

tions.[11] Sterik attempted to terminate its lease with Henry by sending him a closure notice and offering a lump-sum cash payment.[12] When Sterik and Henry failed to reach an agreement, McCrory withheld March and April rent. Henry was forced to seek relief from his lender, Southland Insurance, because he was unable to pay the mortgage without McCrory's rental payments.[13] At McCrory's request, and in exchange for payment of the March and April rental payments, Henry discussed cancellation of the lease with Sterik. The parties were unable to reach an agreement, and McCrory withheld rent from July 1987 to March 1988.[14] Henry narrowly avoided foreclosure during that time but refused to capitulate to McCrory. Because of Henry's tenacity, McCrory resumed rental payments in March 1988 and paid back all of the past rent due.[15]

In his suit, Henry asserted that McCrory breached the lease agreement by withholding rental payments.[16] He claimed that the presence of a recalcitrant tenant diminished the value of the property, making it harder to sell.[17] McCrory argued damages for diminished property value should be based upon actual efforts to sell the property in the market place.[18] Further, evidence of a defaulting tenant alone was too speculative and indefinite to determine the amount of diminution in property value. McCrory urged that damages, if any, should not be based on an incompetent standard, therefore, Henry's claim for breach of contract should not be submitted to the jury. The jury decided the question of damages and ultimately found for Henry.[19]

B. *The Tenth Circuit Decision*

In an opinion by Judge Logan,[20] the Tenth Circuit rejected McCrory's argument. The court found that actually attempting to sell the property in the market place was not required to prove diminution in

11. *Id.*
12. *Id.*
13. *Id.*
14. *Id.*
15. *Id.* at 1071.
16. *Id.* Henry also asserted that McCrory's actions tortiously interfered with his mortgage contract. The Oklahoma court had not yet recognized this particular claim. Relying on the RESTATEMENT (SECOND) OF TORTS § 766 A, cmt. b (1977), the Tenth Circuit sustained Henry's cause of action and found McCrory had indeed tortiously interfered with Henry's mortgage contract. *Id.* at 1072.
17. In support of his view, Henry offered the testimony of an experienced real estate appraiser who stated the property's value had been diminished by $223,000 to $280,000. *Id.* at 1071.
18. *Henry*, 941 F.2d at 1071 (citing *Great Western Motor Lines v. Cozard*, 417 P.2d 575, 578 (Okla. 1966) (Damages must be ascertainable "in some manner other than by mere speculation conjecture or surmise, and by reference to some definite standard."). *See also* OKLA. STAT. tit. 23, § 21 (1987) (damages must be clearly ascertainable in both their nature and origin).
19. The jury awarded Henry $100,000.00 actual and $2,000,000.00 punitive damages based on the contractual interference claim. *Id.*
20. Sitting as a member of a three judge panel comprised of Honorable Myron H. Bright, U.S. Court of Appeals for the Eighth Circuit, sitting by designation, and Judges Logan and Baldock.

property value.[21] Evidence need only show the extent of damages as a matter of "just and reasonable inference."[22] The real estate appraiser's opinion that the property value was diminished by McCrory's recalcitrance was "sufficiently certain in nature and origin" that the extent of damages could be "reasonably inferred."[23] Therefore, the breach of contract claim had properly gone before the jury.

C. *Conclusion*

It may appear that the testimony of one appraiser is too speculative a basis to determine the amount of damages to the value of the property. However, Oklahoma courts and the Tenth Circuit have previously held that testimonial evidence may be a sufficient means of determining damages when the appraiser is experienced and able to articulate how a defaulting tenant affects the value of leased property.[24] In *Hornwood v. Smith's Food King No. 1*,[25] the Nevada Supreme Court considered a fact situation similar to *Henry*. The Nevada Supreme Court found that the testimony of a leasing agent and developer was sufficient to determine the diminution in property value when an anchor tenant left.[26] *Henry*, signals no departure or expansion of existing Oklahoma or Tenth Circuit law.

III. A Commercial Tenant May Be Relieved from Strictly Complying with Unambiguous Terms of Renewal in a Lease.

In *Car-X Service Systems, Inc. v. Kidd-Heller*,[27] the Tenth Circuit found that where the balanced equities of a situation allow, a court may relieve a party from strict compliance with an unambiguous provision in a lease.

A. *Factual Background*

Olivette G. Kidd-Heller and Jacob Heller entered into a lease agreement with Mr. and Mrs. Tanquary on September 27, 1967 (Tanquary/Kidd-Heller Lease). The agreement allowed the Kidd-Hellers use and possession of a parcel of real estate for a ten-year period.[28] The lease also provided three five-year options which, if all were exercised, would have extended the lease to September 30, 1992.[29]

Car-X Service Systems entered into a lease agreement with Olivette

21. *Henry*, 941 F.2d at 1071 ("such direct and specific evidence is not required").
22. *Id.* (quoting Larrance Tank Corp. v. Burrough, 476 P.2d 346, 350 (Okla. 1970) (citations omitted)).
23. *Id.*
24. *See* General Fin. Corp. v. Dillon, 172 F.2d 924 (10th Cir. 1949); Chorn v. Williams, 99 P.2d 1036 (Okla. 1940); Firestone Tire & Rubber Co. v. Sheets, 62 P.2d 91 (Okla. 1936).
25. 772 P.2d 1284 (Nev. 1989).
26. *Id.* at 1286.
27. 927 F.2d 511 (10th Cir. 1991).
28. *Id.* at 512.
29. *Id.*

B. Kidd-Heller and Jacob Heller on March 31, 1977 (Kidd-Heller/Car-X Lease)[30] for use of the same subject property of the Tanquary/Kidd-Heller lease.[31] The Kidd-Heller/Car-X lease was for an initial five-year term with two five-year options,[32] and required Car-X to exercise its option to renew at least six months prior to the termination of the current term.[33] In addition, Car-X was required to keep liability and property damage insurance on the property and furnish Kidd-Heller with a certificate evidencing such coverage.[34]

The first term of the Kidd-Heller/Car-X lease ended April 30, 1982. Car-X exercised its first option to renew February 26, 1982, two months before the lease ended, but four months later than the time by which Car-X was required to exercise its option.[35] Initially Kidd-Heller refused to recognize Car-X's belated exercise of its option to renew. Two months later, however, Kidd-Heller extended the lease for five years.[36]

In May of 1986, a dispute arose as to whether Car-X obtained the proper insurance on the property.[37] Kidd-Heller's attorney sent Car-X a letter on May 10, 1986, advising Car-X that the lease was being terminated;[38] Car-X would not be allowed to exercise its second option to extend. On February 19, 1987, Car-X received notice that the lease would be terminated as of April 30, 1987. In response, Car-X notified Kidd-Heller that it intended to exercise its option to renew the lease for the second five-year term.[39] Car-X brought suit in the District Court of Kansas seeking a temporary restraining order prohibiting Kidd-Heller from terminating its lease with Car-X.[40] Car-X also sought equitable relief from the lease provision that required exercise of the option to renew six months prior to the expiration of the current lease term.[41]

Kidd-Heller argued that under Kansas law, the district court could not relieve Car-X from complying with a clear and unambiguous provi-

30. *Id.* On April 7, 1977, Car-X also entered into a sublease agreement with its franchisee, Mufflers of Kansas City, Inc. The agreement made Mufflers subject to the terms and conditions of the Kidd-Heller/Car-X lease. *Id.*

31. *Id.* Only one provision in the Tanquary/Kidd-Heller lease, relating to alterations in the property, was specifically incorporated into the Kidd-Heller/Car-X lease.

32. *Id.*

33. Car-X had to furnish written notice and deliver such notice personally or send it via certified mail to Kidd-Heller. *Id.* at 512-13.

34. *Id.*

35. *Id.* Car-X explained that it had "inadvertently failed to extend the lease in a timely fashion." *Id.*

36. *Id.*

37. During 1985 and 1986, Car-X had in place the required insurance, but failed to provide a certificate of such coverage to Kidd-Heller. *Id.*

38. *Id.*

39. Car-X responded on June 3, 1986, by advising Kidd-Heller that it intended to continue the lease "until the last option term in 1992, and beyond." *Id.*

40. Mufflers, the sub-tenant, also joined this suit.

41. Car-X initially argued that the Kidd-Heller/Car-X lease ran concurrent with the Tanquary/Kidd-Heller lease. Based on this view, the five-year renewal period terminated on September 30, 1982 not April 30, 1982, therefore, Car-X had timely exercised its option to renew on March 19, 1987. However, this approach was abandoned during the course of the suit. *Car-X*, 927 F.2d at 514-15.

sion of a contract under the guise of equitable relief.[42] Kidd-Heller relied on the holding of *Gill Mortuary v. Sutoris, Inc.*[43] to argue that equitable relief was not proper. However, the district court determined that this was an appropriate case for equitable relief. The court relied heavily on the fact that Car-X gave notice of intent to renew before the leasehold term expired, and Kidd-Heller had in fact received such notice.[44] In addition, if the option to renew was declared lost, it would do great harm to Car-X, and allowing Car-X to remain a lessee for an additional five years would do comparatively little harm to Kidd-Heller.[45] Therefore, the court held that Car-X's exercise of its option did extend the lease term for another five years.

B. *The Tenth Circuit Decision*

The Tenth Circuit affirmed the district court's decision to grant equitable relief.[46] The court observed that in *Gill Mortuary*, that court refused to grant specific performance of two lease agreements. However, the *Gill Mortuary* court suggested that equitable relief may be appropriate in cases that presented facts different from those in *Gill Mortuary*.[47] The Tenth Circuit determined that *Car-X* was so distinguished from that case. *Gill Mortuary* involved a lease that expired before the lessee attempted to extend it, whereas, in the instant case, Car-X exercised its option to renew the lease in clear and unambiguous language when the current five-year term of the lease was still in force and effect.[48] Additionally, Kidd-Heller received notice of Car-X's intent to extend the lease, and Car-X's failure to timely extend was not intentional or willful.[49]

The Tenth Circuit agreed with the district court that the balanced equities of the situation warranted granting an equitable remedy. If the lease were forfeited, it would cause relatively great harm to Car-X, due to the amount of money it spent on alterations to the property itself[50] and the good-will and customer recognition it gained while conducting business on the premises.[51] In the alternative, Kidd-Heller would suffer relatively little harm if Car-X was allowed to continue its lease. The lease provided an increase in rental payment for the second five-year term.[52] Kidd-Heller had also taken no steps to lease the premises to another tenant.[53] The Tenth Circuit declined to disturb the district

42. *Id.* at 515.
43. 485 P.2d 1377 (Kan. 1971).
44. *Id.* at 516.
45. *Id.* at 516-17.
46. *Car-X*, 927 F.2d at 516.
47. *Id.* at 516 (citing *Gill Mortuary*, 485 P.2d at 1380).
48. *Id.*
49. *See supra* note 35 and accompanying text.
50. Both Car-X and Mufflers expended in excess of $10,000 for alterations and improvements to the property. *Car-X*, 927 F.2d at 512.
51. *Id.* at 516-17.
52. The lease provided for an increase of $100.00 per month in the rental payment for the second five year term. *Id.* at 513.
53. *Id.* at 517.

court's holding.

C. *Conclusion*

Courts will generally give contractual language its plain meaning[54] and not read any other rights or obligations into an agreement. Often times in the commercial context, however, situations arise requiring equitable relief so a lease will not be forfeited due to oversight.[55] In its decision, the Tenth Circuit initially stressed the presence of two factors: (1) Car-X had exercised its option to extend before the lease expired; and (2) Car-X did not willfully or intentionally fail to renew the lease.[56] The court then examined the equities of the situation and concluded that Car-X should be relieved from strictly complying with the renewal provision in the lease. Absent a showing of these two factors, however, the court will not relieve a party from complying with a contractual provision under the guise of equitable relief.

IV. Before Granting a Mandatory Injunction, the Court Need Not Consider Equities or Public Policy if an Easement is Clearly Defined, Legally Protected and the Encroaching Party Is Not Innocent.

In *Mid-America Pipeline Co. v. Lario Enterprises, Inc.*,[57] the Tenth Circuit found that an easement owner was entitled to a mandatory injunction. The district court erred in balancing the equities between the parties where the easement rights were clearly defined and legally protected and the encroaching party acted with knowledge of the easement.

A. *Factual Background*

Mid-America Pipeline Co. (Mid-America) purchased and duly recorded certain easements across undeveloped farmland in 1960.[58] The easements granted Mid-America:

> the right to clear and keep clear all trees, undergrowth and other obstructions from the . . . right of way, and Grantor agrees not to build, construct or create any buildings or other structures on the herein granted right of way that will interfere with the normal operation and maintenance of the said line or lines.[59]

Mid-America installed two high-pressure liquid gas pipelines

54. Arthur L. Corbin, Corbin on Contracts § 535 (3rd ed. 1963).

55. For a general discussion of this matter, see Circumstances Excusing Lessee's Failure to Give Timely Notice or Exercise of Option to Renew or Extend Lease 27 A.L.R. 4th 266 (1984). *See also* Linn Corp. v. LaSalle Nat'l Bank, 424 N.E.2d 676, 678-79 (Ill. App. 3d 1981); Wharf Restaurant, Inc. v. Port of Seattle, 605 P.2d 334, 340-41 (Wash. App. 1979).

56. *Car-X*, 927 F.2d at 516.

57. 942 F.2d 1519 (10th Cir. 1991).

58. *Id.* at 1522.

59. *Id.* The easement in its entirety is reprinted in Mid-America Pipeline v. Lario Enterprises, Inc., 716 F. Supp. 511, 513-514 (D.Kan. 1989).

through the easements that were buried thirty to forty-eight inches below ground.[60] In the summer of 1988, Mid-America learned of Lario Enterprises', Inc. (Lario) plans to build an asphalt race track on the property through which Mid-America had its easements. Mid-America promptly notified Lario of its easement rights, objected to the construction and sought a preliminary injunction in the district court of Kansas.[61]

The district court first concluded that the asphalt tracks interfered with the "normal operation and maintenance" of the pipelines under the language of the easement.[62] Therefore, the tracks violated Mid-America's easement rights.[63] However, the district court denied the injunction based on three factors: (1) Mid-America had an adequate remedy in condemnation or damages; (2) an injunction would place an undue hardship on the defendants because the tracks were already substantially constructed; and (3) risk to the public due to Mid-America's hindered ability to inspect the pipes, in light of the history of the pipes' safe operation.[64] Mid-America appealed to the Tenth Circuit.

B. *The Legal Background*

The Restatement (Second) of Torts § 936 applies a seven-part test to determine the appropriate circumstances for granting a mandatory injunction.[65] The test primarily focuses on the adequacy of the legal remedy, the relative hardship of the parties and the interest of the public.[66] When the district court action was brought by Mid-America, the appropriate test for granting a mandatory injunction had not yet been determined by the Kansas courts.[67]

Before Mid-America appealed the instant case, the Kansas Supreme Court decided *Mid-America Pipeline Co. v. Wietharn*.[68] In *Wietharn*, the Kansas Supreme Court set forth three requirements that a party seeking injunctive relief must meet: (1) reasonable probability of injury exists; (2) no adequate remedy at law; and (3) clear entitlement to

60. *Mid-America*, 942 F.2d at 1522 (quoting *Mid-America*, 716 F. Supp. at 513).
61. *Id.* (quoting *Mid-America*, 716 F. Supp. at 514).
62. The plan for construction of the race track and surrounding facilities is set forth in *Mid-America*, 716 F. Supp. at 514.
63. *Mid-America*, 716 F. Supp. at 515.
64. *Id.* at 513.
65. RESTATEMENT (SECOND) OF TORTS § 936 (1981) provides in pertinent part:
(1) The appropriateness of the remedy of injunction against a tort depends upon a comparative appraisal of all of the factors in the case, including the following primary factors:
(a) the nature of the interest to be protected,
(b) the relative adequacy to the plaintiff of injunction and of other remedies,
(c) any unreasonable delay by the plaintiff in bringing suit,
(d) any related misconduct on the part of the plaintiff, (e) the relative hardship likely to result to defendant if an injunction is granted and to plaintiff if it is denied,
(f) the interests of third persons and of the public, and
(g) the practicability of framing and enforcing the order or judgment.
66. *Id.*
67. *Mid-America*, 716 F. Supp at 511.
68. 787 P.2d 716 (Kan. 1990).

a mandatory injunction.[69] Unlike § 936 of the Restatement (Second) of Torts, under *Wietharn* the court should not balance the equities of a situation nor consider the public interest[70] where the encroaching party acted with knowledge of the easement and was, therefore, not "innocent."[71]

C. *The Tenth Circuit Decision*

The Tenth Circuit concluded that the district court's reliance on the seven part test in § 936 of the Restatement was misplaced.[72] Applying the criteria set forth under *Wietharn*, the Tenth Circuit determined that Mid-America was entitled to an injunction. The court first found that Lario acted with knowledge of Mid-America's easement. Mid-America's rights under the easement were clearly defined and properly protected by law.[73] Under the easement, Mid-America had the right to freedom from "buildings or other structures on the . . . right of way that [would] interfere with the normal operation and maintenance" of pipelines.[74] Lario argued it innocently believed the race track was not a "building or structure" contemplated by the easement. Lario constructed the track, ignorant of the fact they were abridging the easement and, therefore, innocently encroached upon Mid-America's rights.[75]

The Tenth Circuit disagreed with Lario's position. The court found that despite its professional belief the race track would not interfere with Mid-America's easement, Lario did not proceed with construction without knowledge or warning of Mid-America's property rights.[76] Lario was not innocent and, therefore, not entitled to a balancing of equities under *Wietharn*.

The Tenth Circuit then considered the first prong of the *Wietharn* test: Whether there was a reasonable probability that Mid-America was injured by construction of the race track.[77] Focusing on the intent of the parties,[78] the court initially found the asphalt race track was a prohibited "structure" under the easement.[79] The court agreed with Lario that the term was ambiguous. However, at the time the easements were executed, Lario was using the property for pasture and agricultural purposes. Mid-America also plotted the pipelines to avoid developed property.[80] Therefore, the court found that the race track was

69. *Id.* at 719-20.
70. *Id.*
71. *Wietharn*, 787 P.2d at 725.
72. *Mid-America*, 942 F.2d at 1524.
73. *Id.*
74. *Id.* at 1522.
75. *Id.* at 1525.
76. *Mid-America*, 942 F.2d at 1525 (quoting *Papanikolas Brothers v. Sugarhouse Shopping Center*, 535 P.2d 1256, 1259 (Utah 1975)).
77. *Id.*
78. *Id.* at 1526.
79. *Id.*
80. *Id.*

within what the parties intended the term "structure" to include.[81]

The Tenth Circuit then found the asphalt race track[82] interfered with the "normal operation and maintenance"[83] of Mid-America's pipelines. The race track impaired Mid-America's ability to detect leaks in their lines and would increase the expense of repairing the lines.[84] Citing *Aladdin Petroleum Corp. v. Gold Crown Properties*,[85] the Tenth Circuit concluded that this level of interference was material enough to interfere with Mid-America's enjoyment of the easement.[86] Such interference constituted actionable injury under the first prong of *Wietharn*.

The Tenth Circuit found that Mid-America also met the second prong of *Wietharn* because it had no adequate remedy at law. In *Wietharn*, the court granted a mandatory injunction ordering the removal of four buildings constructed over another one of Mid-America's pipeline easements.[87] Similar to the buildings, the Tenth Circuit found the asphalt race track created a continuing violation that did not cease with the completion of the track.[88] Therefore, damages would inadequately remedy the violation.[89]

With little guidance as to what constituted "clear entitlement" under the third prong of the *Wietharn* test,[90] the Tenth Circuit looked to the similarity of the facts in *Wietharn* and *Mid-America*. In *Wietharn*, the Kansas Supreme Court found "clear entitlement" to an injunction. According to the Tenth Circuit, the facts in the two cases were alike, therefore, the Tenth Circuit found that Mid-America was "clearly entitled" to injunctive relief as well.[91]

D. *Conclusion*

Courts are reluctant to require the destruction of buildings or structures after substantial construction. Courts regard such destruction as wasteful. Even if the structure encroaches upon the property rights of

81. Applying similar logic, the Tenth Circuit found that the "fences, concrete barriers, and additional cover" were also "structures" under the easement. *Id.* The Tenth Circuit rejected the argument that "structure" is synonymous with "building." *Id.* at 1527.

82. The court found that the concrete barriers and fences, while "structures" under the easement, did not "materially interfere" with Mid-America's easement rights, primarily because they were moveable. *Id.*

83. *Id.*

84. *Mid-America*, 716 F. Supp at 514.

85. 561 P.2d 818 (Kan. 1977).

86. *Mid-America*, 942 F.2d at 1527.

87. *Wietharn*, 787 P.2d at 725.

88. *Id.*

89. *Mid-America*, 942 F.2d at 1528. Lario also argued that Mid-America had the remedy of reverse condemnation because Lario had deeded the property to the City of Topeka with an agreement that it would be reconveyed after twenty-three years. The Tenth Circuit dismissed this by stating that it was speculative whether the construction would constitute a "taking" entitling Mid-America to compensation. Even if it was found to be a taking, reverse condemnation was a vehicle whereby a party was entitled to money damages which the court concluded would be inadequate to remedy the easement violation here. *Id.*

90. *Id.* at 1529.

91. *Id.* at 1529-30.

another, equity favors keeping the structure intact. However, after *Mid-America*, a party claiming violation of easement rights may preclude the court from considering the equities of a situation by proving their rights are clearly defined and legally secured.

It may appear that the Tenth Circuit's holding in *Kidd-Heller* is contradictory to the instant case. Both cases involve unambiguous provisions in contracts granting property rights. In *Kidd-Heller*, though, the Tenth Circuit weighed the equities of the situation and relieved Car-X from strict compliance with the renewal provision in the lease. The cases can be reconciled, in so far as the court, in both cases, initially looked at the innocence of the violating parties and the property rights. In *Car-X*, the court found the lessee acted innocently and before the underlying lease expired. Additionally, the lessor's actions arguably showed that strict compliance with the renewal provision was not essential.[92] Therefore, the court found the facts of *Car-X* warranted examination of the equities. In *Mid-America*, however, the court found the easement rights were clear and legally protected. The violating party, Lario, acted with knowledge of the easement and, therefore, was not innocent. The court found no circumstances that warranted a consideration of the equities in this case.

The decision in *Mid-America* upholds the principles of reliability and certainty in the law. Mid-America performed its obligation to legally secure its property rights. The Tenth Circuit did not allow Lario to benefit from violating those rights merely because it would be wasteful and costly to destroy the encroaching structure. The holding reflects Lario's mistake, regardless of the expense and destruction. This decision sends a message to contractors to be wary of the rights they infringe upon. Contractors should be discouraged from taking a chance and building on another's property, in the hope equity will side with them after the construction is complete.

V. FEDERAL APPROVAL OF A LEASE MUST BE VALID UNDER THE APPLICABLE CODE SECTION OR THE LESSEE'S INTEREST DOES NOT VEST FOR PURPOSES OF THE FIFTH AMENDMENT TAKINGS CLAUSE.

In *Sangre De Cristo Development v. United States*,[93] the Department of the Interior (Department) failed initially to validly approve a lease under the National Environmental Policy Act (NEPA).[94] As a result, the Tenth Circuit found that Sangre De Cristo Development (Sangre) did not have a vested property interest in the lease. Sangre, therefore, did not have standing to assert a claim under the Fifth Amendment Takings Clause[95] when the lease was later rescinded by the Department.

92. *See supra* notes 36, 37 and accompanying text.
93. 932 F.2d 891 (10th Cir. 1991).
94. 42 U.S.C. § 4321.
95. U.S. CONST. amend. V.

A. *Factual Background*

Sangre negotiated a lease with the Tesuque Indian Pueblo to develop approximately 5000 acres of Pueblo land for a world-class golf course and residential community.[96] The Department approved the lease,[97] and Sangre began selling residential lots on the leased land. Shortly thereafter, two environmental groups filed suit against the United States seeking to enjoin construction. They claimed the Department's approval was invalid because it did not undertake an Environmental Impact Statement[98] (EIS) prior to approval.[99] The New Mexico District Court denied the request for injunctive relief on the grounds that no EIS was required.[100] The Tenth Circuit reversed,[101] holding that the Secretary's approval of the lease triggered the need for an EIS.[102]

While the EIS was being prepared, the Pueblo, under new leadership, formally requested that the Department void the lease.[103] One year and three months later, the Department announced it would rescind its approval of the lease based upon environmental considerations and the Pueblo's opposition.[104] Sangre thereafter went into bankruptcy and the trustee brought a civil action on behalf of the estate. The Trustee claimed, *inter alia*,[105] that when the Department rescinded its approval of the lease, this action constituted a taking under the Fifth Amendment,[106] thereby entitling Sangre to recover just compensation.

B. *Legal Background*

The Takings Clause of the Fifth Amendment, which prohibits the taking of property for public use without just compensation, is directed at an act by government that attempts to authorize the seizure or destruction of property against the owner's will.[107] A two step analysis is

96. *Sangre De Cristo*, 932 F.2d at 893.

97. Because Sangre was leasing Indian lands to develop for public recreational use, under 25 U.S.C. § 415(a) (1970) approval of the lease by the Secretary of the Department of the Interior was required.

98. NEPA, 42 U.S.C. §§ 4321 - 4375. For a general discussion on the purpose and process of undertaking an Environmental Impact Statement, see JAN LAITOS, NATURAL RESOURCES LAW 95-111 (1985).

99. *Sangre De Cristo*, 932 F.2d at 893.

100. *Id.*

101. *Id.*

102. The Tenth Circuit concluded the Secretary of the Interior's approval of the lease would have "significantly affected the quality of the human environment," therefore, approval was a "major federal action." NEPA 42 U.S.C. § 4332 (2)(C); Davis v. Morton, 469 F.2d 593, 597 (10th Cir. 1972). For a discussion of what constitutes "major federal action," see generally FREDERICK ANDERSON, NEPA IN THE COURTS: AN ANALYSIS OF THE NATIONAL EVIRONMENTAL POLICY ACT 89-105 (1973).

103. *Sangre De Cristo*, 932 F.2d at 893.

104. *Id.*

105. Sangre De Cristo asserted several breach of contract and breach of trust claims that the Tenth Circuit addressed separately.

106. U.S. CONST. amend. V.

107. JULIUS L. SACHMAN, 2 NICHOLS' THE LAW OF EMINENT DOMAIN § 6.01 (rev. 3rd ed. 1990).

used to determine whether a "taking" has occurred.[108] The asserting party must prove: (1) at the time the taking occurred, the party had a vested interest in the subject property;[109] and (2) the government's action constituted a taking under the Fifth Amendment.[110]

C. *The Tenth Circuit Decision*

The Tenth Circuit held that Sangre did not possess a vested interest in the lease when the Department rescinded its approval.[111] The first prong under the Fifth Amendment "takings" test was not met, therefore, the court did not address the second.[112]

Sangre argued the effect of requiring an EIS, after the Department approved the lease only enjoined the project from continuing until Sangre completed the EIS.[113] It did not affect the Department's approval.

The Tenth Circuit declined to accept Sangre's view. The court interpreted NEPA to require an EIS before the Department had the authority to approve the lease between Sangre and the Pueblo.[114] Further, agents of a regulatory agency must act within the bounds of their congressionally delegated authority.[115] The court held it was outside the bounds of the Department's authority to approve the lease before the EIS was completed.[116] Because the EIS was not completed prior to approval, the lease was invalid. The Tenth Circuit concluded that because Sangre had no vested property interest in the lease when the Department rescinded its approval, Sangre did not meet the first prong of the Fifth Amendment "takings" test.[117]

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108. In re Consolidated Atmospheric Testing Litigation, 820 F.2d 982, 988 (9th Cir. 1987), *cert. denied*, 485 U.S. 905 (1988).

109. For instance, it has been held that even though a cause of action is considered to be a species of property, a plaintiff has no vested right in any tort claim for damages under state law. Ducharme v. Merrill-National Labs, 574 F.2d 1307, 1309 (5th Cir. 1978), *cert. denied*, 439 U.S. 1002 (1978).

110. In other words, courts consider the nature and extent of the governmental invasion in the second prong of the test. *In re Consolidated* at 989. For instance, a court concluded that the governmental action did not amount to a "taking" since it did not abrogate the personal injury claims of the plaintiff. The government merely subjected the plaintiff's claims to the tort claims procedure under 28 U.S.C. § 2680, which had the practical effect of allowing the defendant to shield himself from liability based on certain exceptions under 28 U.S.C. § 2680. *Id.* at 984.

111. *Sangre De Cristo*, 932 F.2d at 894.

112. *See supra* notes 108-111 and accompanying text.

113. *Id.*

114. *See supra* note 104 and accompanying text.

115. Gray v. Johnson, 395 F.2d 533, 537 (10th Cir. 1957), *cert. denied*, 392 U.S. 906 (1968). *See* Davis v. Morton, 469 F.2d at 594 (Department of the Interior was without authority to grant a lease where no environmental impact study was conducted prior to approval of the lease). *See also* Federal Crop Insurance Corp. v. Merrill, 332 U.S. 380, 384 (1947) (holding that the government is not bound when its agent enters into an agreement that falls outside the agent's congressionally delegated authority).

116. *Sangre De Cristo*, 932 F.2d at 894-895. The one who is seeking the approval of the agency assumes the risk that the agency is acting within its authority. *Gray*, 395 F.2d at 537.

117. *Sangre De Cristo*, 932 F.2d at 895.

D. *Conclusion*

The Tenth Circuit is the first circuit to address the specific issues presented in *Sangre*. If the grant or sale of property rights requires federal approval, after *Sangre*, it is uncertain when those rights will vest. It is clear that the steps an agency takes, or should have taken, before it gives its approval, are pivotal to determining when property rights vest. However, the Tenth Circuit provided no guidance on how to ensure that the proper steps are being taken by an agency. *Sangre* places a heavy burden upon those entering property transactions requiring federal consent. Those acquiring property rights must carefully scrutinize the degree of federal approval required, and anticipate what further measures may be necessary to make the approval valid.

VI. CONCLUSION

The cases decided this term primarily involved landlords and commercial tenants. The Tenth Circuit decisions appear to show no consistent pattern of deference to either property owners or lessors. In *Mid-America*, *Sangre* and *Henry*, the court's approach focused on a literal intepretation of the property owner's rights. The court was unswayed by the equities of these cases that supported the lessors. The court engaged in a seemingly opposite analysis in *Car-X*. There the court concluded that equity warranted relieving the commercial tenant from a clear provision in his lease.

The analysis of these decisions may vary, but their outcomes reflect the same message. The Tenth Circuit strikes a balance between maintaining the integrity of express property rights and the equities of a situation that demand those rights be overlooked. In following the Tenth Circuit, courts should first scutinize express property rights, the owner's authority to grant rights to others and the violating party's innocence. If these factors are unclear, only then should a court focus on the equities of a case.

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