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Gregory S. Sergienko
Concordia University School of Law, gsergienko@cu-portland.edu

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PROPERTY LAW AND CLIMATE CHANGE

By Gregory Sergienko

This article discusses the issue of rules for acquiring property rights in natural resources, land use controls (such as restrictive covenants) and how they can impede the progress of environmentally friendly power sources when such sources are considered aesthetically offensive, and how property law should deal with uses of land that are inefficient and contribute to global warming.

Property rights in natural resources. Property law has been slow to recognize rights in the sun and the movement of air and water because property law has traditionally focused on entitlements to tangible things. This failing is important because in-stream hydropower and that doctrine and apply it retroactively to bar claims. Moreover, unless individuals from whom the easements would be exacted failed to act in the future, developments could be made economically infeasible after they were established. A famous case, Prah v. Maretti, 321 N.W.2d 182 (Wis. 1982), holds that buildings affecting a neighbor’s solar panels might constitute a nuisance. Despite this authority, nuisance law provides an inadequate basis for analysis. Nuisance law addresses harm caused by dissimilar uses, such as the stockyard that harms the homeowner. Nuisance law does not address similar attempts to harvest the same resource. Because easements and nuisance law are inadequate, the use of the

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wind turbines are promising tools for producing electricity. The traditional rules for appropriating property do not address things as fluid as the motion of water, air, and photons, so closely relevant precedent is scant. From a property owner’s perspective there needs to be a new property right in the form of a negative easement that would prohibit another person from using her property to interfere with another property owner’s access to the movement of water or air, or to photons. However, American courts have not recognized negative prescriptive easements. It would unfairly surprise people to generate motion of air and water should be treated as involving a claim to property based on taking and using something previously unowned and unused. Although the courts addressing this right use different rules, the rules embody several common underlying principles. First, all courts recognize the general principle that society benefits from capturing a resource for productive use. Second, the courts recognize the need for predictability. Third, the courts recognize that the first person to have the ability to appropriate a resource physically may nonetheless have rights inferior to those of someone whose ability to appropriate comes later. Fourth, in many cases involving appropriation, courts and legislatures recognize that overly intense efforts to extract a resource can be duplicative and can waste the resource, thereby leading to social harm.

Of course, adapting existing rules to address global warming means choosing from a variety of conflicting rules. The water rules, which are particularly relevant to appropriating streams of air or water or sunlight, differ among jurisdictions. In many western states, prior appropriators have nearly absolute priority for beneficial uses. Rules elsewhere require that appropriation be reasonable and limited to riparian uses. Although a rule limiting the location of the consumption does not make sense in this context, a rule of reasonable appropriation is better suited to power from the sun and from moving air and water.

There is no developed law of air rights to parallel that of water rights.

Nonetheless, the problems of traceability argue even more strongly for a rule of reasonable use rather than one of absolute priority. Fields of wind turbines seem generally to be based on the developers’ obtaining agreements with upwind landowners not to obstruct the wind. Recognizing air rights would reduce the ability of holdout landowners to block development or to extort disproportionate payments.

Aesthetic values and global warming. A second concern in dealing with global warming is aesthetic values. Environmentally benign forms of power, designed to harvest natural flow where it exists, can raise aesthetic issues. In the large-scale appropriation of natural resources, these concerns are especially important in the area of wind power. Modern wind-power turbines are hundreds of feet off the ground, have lights and large rotating
blades that cast long shadows, and seem quite out of place in rural or arboreal landscapes.

Aesthetic objections also have been the basis for many prohibitions of the small-scale appropriation of natural resources. For example, clotheslines are frequently prohibited by restrictive covenants or similar rules in homeowners’ associations and apartment complexes. Although line drying cannot solve all our energy needs, it is an efficient way of solving a part of the problem. Both clotheslines and turbines raise aesthetic issues, but the legal analysis in these cases would differ. The analysis of objections to wind turbines could depend on view rights or nuisance. Enforcement of objections to clotheslines is based on restrictive covenants or rules governing the power of homeowners’ associations. Wind turbines present a more complex set of environmental and aesthetics issues. The residences on which clothes are being dried are the product of drastic human reshaping of the land, so there is no question about intruding into nature; by contrast, wind turbines could be placed in a variety of environments.

Anti-environmental behavior and the limits of property law remedies. Looking out over a downtown or an apartment complex will reveal numerous examples where small changes would both save money and reduce greenhouse gas (GHG) emissions. Dark roofs increase heat absorption. In most climates, this requires cooling that discharges hot air, in turn burdening neighboring landowners and generating GHGs because most electricity in this country comes from burning coal. Incandescent bulbs consume excess electricity and generate heat that must be removed, again by generating GHGs and pushing hot air at one’s neighbors.

Nuisance law suggests that this conduct, because unreasonable, might violate a neighbor's rights. Nuisance law requires showing that unreasonable conduct harmed a plaintiff's use and enjoyment of her land. In this case, the effect on neighbors is small but material. A residential block that adopted light-colored roofs in place of the existing dark ones could be one degree Celsius cooler than unchanged neighborhoods. The cumulative cooling effect and energy savings across a region might be significant. Although nuisance law provides a doctrinal way of addressing such interference, using nuisance law to enforce relatively small claims would be intolerably expensive.

When property wealth was an excellent approximation of overall wealth, a property tax functioned reasonably well as a wealth tax. Now that property is no longer a major component of wealth, that assumption is unrealistic. The poor fit of real property ownership to ability to pay allows us to reinvent the property tax as a means to address other concerns. A further disadvantage of the property tax is that it provides a disincentive to engage in activities that fight global warming and increase property values. An easy fix to the property tax simply would be to exclude from the base of the property tax the value of changes that make property more energy efficient.

Reconceiving the property tax as a general tool for addressing global warming would be a more ambitious project, but not without precedent. Proposals for a “carbon tax” on GHG emissions replace an income tax with taxes based on harm to the environment. Modifying the property tax in this way would replace another incomplete tax on wealth with one providing appropriate incentives. Increasingly accurate recognition of the benefits of preserving natural systems provides us with a more accurate basis for assessing the harm associated with different land uses. Taxing based on contribution to global warming would be a part of that.