4. **Public nuisance actions for contamination of public drinking water supplies.** Is there any reason why it might not be a public nuisance for a defendant to contaminate a public drinking water supply? There are not many reported cases, but there is no theoretical reason why such cases should not succeed. The damages can be quite substantial, with at least one reported settlement reaching almost $70 million. See South Tahoe Pub. Util. Dist. v. Atlantic Richfield Co., Cal. Super. Ct., S.F. County, NO. 999128, described at 34 BNA Envtl. Rep. 817 (Apr. 11, 2003).

The following public nuisance case is best known for its surprising remedy that is influenced by the usually disfavored affirmative defense of coming to the nuisance, but the environmental implications of its cause of action are likewise notable.

Spur Industries, Inc. v. Del Webb Development Company
Supreme Court of Arizona, 1972
108 Ariz. 178, 494 P.2d 700

CAMERON, J. The area in question is located in Maricopa County, Arizona, some 14 to 15 miles west of the urban area of Phoenix, on the Phoenix-Wickenburg Highway, also known as Grand Avenue. About two miles south of Grand Avenue is Olive Avenue which runs east and west. 111th Avenue runs north and south as does the Agua Fria River immediately to the west.

Farming started in this area about 1911. In 1929, with the completion of the Carl Pleasant Dam, gravity flow water became available to the property. By 1950, the only urban areas in the vicinity were the agriculturally related communities of Peoria, El Mirage, and Surprise located along Grand Avenue. Along 111th Avenue approximately one mile south of Grand Avenue and 1 1/2 miles north of Olive Avenue, the community of Youngtown was commenced in 1954. Youngtown is a retirement community appealing primarily to senior citizens.

In 1956, Spur's predecessors in interest, H. Marion Welborn and the Northside Hay Mill and Trading Company, developed feedlots about one-half mile south of Olive Avenue. The area is well suited for cattle feeding and in 1959, there were 25 cattle feeding pens or dairy operations within a 7 mile radius of the location.... In April and May of 1959, the Northside Hay Mill was feeding between 6,000 and 7,000 head of cattle and Welborn approximately 1,500 head on a combined area of 35 acres.

In May of 1959, Del Webb began to plan the development of an urban area to be known as Sun City. For this purpose, the Marinette and Santa Fe Ranches, some 20,000 acres of farmland, were purchased for $15,000,000 or $750.00 per acre. This price was considerably less than the price of land located near the urban area of Phoenix, and along with the success of Youngtown was a factor influencing the decision to purchase the property in question.

By September 1959, Del Webb had started construction of a golf course south of Grand Avenue and Spur's predecessors had started to level ground for more feedlot area. In 1960, Spur purchased the property...and began a rebuilding and expansion program extending both to the north and south of the original facilities. By 1962 Spur's expansion program was completed and had expanded from approximately 35 acres to 114 acres.

Accompanied by an extensive advertising campaign, homes were first offered by Del Webb in January 1960 and the first unit to be completed was south of Grand Avenue and approximately two and a half miles north of Spur. By May 2, 1960, there were 450 to 500 houses completed or under construction. At this time, Del Webb did not consider odors from the Spur feed pens a problem. [In 1963 Webb's staff knew of the potential conflict, but decided to

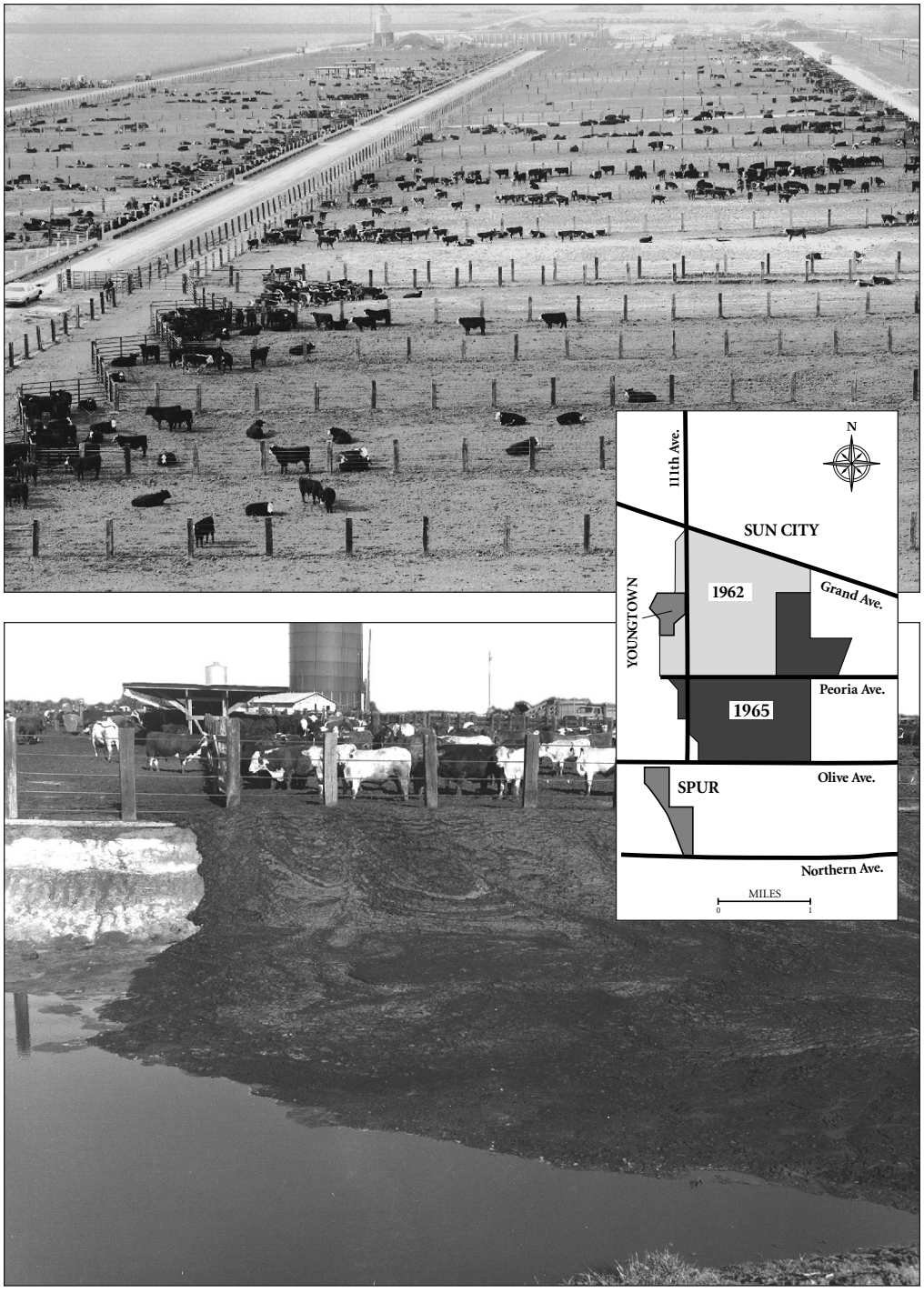

FIGURE 3-1

Inset map from Spur decision, 494 P.2d 702, and two views of feedlot operations like those involved in Spur. Rather than grazing, the cattle have feed and water brought to them. Densities sometimes reach 400+ per acre, with predictable liquid and solid waste and animal health consequences. Note the manure runoff in lower photograph; in some feedlots the wastes do not drain off but accumulate where the cattle stand. (Under a recent EPA regulation, concentrated animal feedlots can now be designated as regulated "point sources" under the CWA. 40 C.F.R. §122.1(b)(2).)

continue its southward development.] By December 1967, Del Webb's property had extended south to Olive Avenue and Spur was within 500 feet of Olive Avenue to the north.... Del Webb continued to develop in a southerly direction until sales resistance became so great that the parcels were difficult if not impossible to sell.... Del Webb filed its original complaint alleging that in excess of 1,300 lots in the southwest portion were unfit for development for sale as residential lots because of the operation of the Spur feedlot.

Del Webb's suit complained that the Spur feeding operation was a public nuisance because of the flies and the odor which were drifting or being blown by the prevailing south to north wind over the southern portion of Sun City. At the time of the suit, Spur was feeding between 20,000 and 30,000 head of cattle, and the facts amply support the finding of the trial court that the pens had become a nuisance to the people who resided in the southern part of Del Webb's development. The testimony indicated that cattle in a commercial feedlot will produce 35 to 40 pounds of wet manure per day, per head, or over a million pounds of wet manure per day for 30,000 head of cattle, and that despite the admittedly good feedlot management and good housekeeping practices by Spur, the resulting odor and flies produced an annoying if not unhealthy situation as far as the senior citizens of southern Sun City were concerned. There is no doubt that some of the citizens of Sun City were unable to enjoy the outdoor living which Del Webb had advertised and that Del Webb was faced with sales resistance from prospective purchasers as well as strong and persistent complaints from the people who had purchased homes in that area....

It is noted, however, that neither the citizens of Sun City nor Youngtown are represented in this lawsuit and the suit is solely between Del Webb Development Company and Spur Industries.... It is clear that as to the citizens of Sun City, the operation of Spur's feedlot was both a public and a private nuisance. They could have successfully maintained an action to abate the nuisance. Del Webb, having shown a special injury in the loss of sales, has standing to bring suit to enjoin the nuisance. The judgment of the trial court permanently enjoining the operation of the feedlot is affirmed.

A suit to enjoin a nuisance sounds in equity and the courts have long recognized a special responsibility to the public when acting as a court of equity: Courts of equity may, and frequently do, go much further both to give and withhold relief in furtherance of the public interest than they are accustomed to go when only private interests are involved. Accordingly, the granting or withholding of relief may properly be dependent upon considerations of public interest.... 27 Am. Jur. 2d, Equity, §104, 626.

In addition to protecting the public interest, however, courts of equity are concerned with protecting the operator of a lawful, albeit noxious, business from the result of a knowing and willful encroachment by others near his business.

In the so-called "coming to the nuisance" cases, the courts have held that the residential landowner may not have relief if he knowingly came into a neighborhood reserved for industrial or agricultural endeavors and has been damaged thereby:

> Plaintiffs chose to live in an area uncontrolled by zoning laws or restrictive covenants and remote from urban development. In such an area plaintiffs cannot complain that legitimate agricultural pursuits are being carried on in the vicinity, nor can plaintiffs, having chosen to build in an agricultural area, complain that the agricultural pursuits carried on in the area depreciate the value of their homes....

Were Webb the only party injured, we would feel justified in holding that the doctrine of "coming to the nuisance" would have been a bar to the relief asked by Webb, and, on the other hand, had Spur located the feedlot near the outskirts of a city and had the city grown toward the

feedlot, Spur would have to suffer the cost of abating the nuisance as to those people locating within the growth pattern of the expanding city....

There was no indication in the instant case at the time Spur and its predecessors located in western Maricopa County that a new city would spring up, full blown, alongside the feeding operations and that the developer of that city would ask the court to order Spur to move because of the new city. Spur is required to move not because of any wrongdoing on the part of Spur, but because of a proper and legitimate regard of the courts for the rights and interests of the public.

Del Webb, on the other hand, is entitled to the relief prayed for (a permanent injunction), not because Webb is blameless, but because of the damage to the people who have been encouraged to purchase homes in Sun City. It does not equitably or legally follow, however, that Webb, being entitled to the injunction, is then free of any liability to Spur if Webb has in fact been the cause of the damage Spur has sustained. It does not seem harsh to require a developer, who has taken advantage of the lesser land values in a rural area as well as the availability of large tracts of land on which to build and develop a new town or city in the area, to indemnify those who are forced to leave as a result.

Having brought people to the nuisance to the foreseeable detriment of Spur, Webb must indemnify Spur for a reasonable amount of the cost of moving or shutting down. It should be noted that this relief to Spur is limited to a case wherein a developer has, with foreseeability, brought into a previously agricultural or industrial area the population which makes necessary the granting of an injunction against a lawful business and for which the business has no adequate relief.

It is therefore the decision of this court that the matter be remanded to the trial court for a hearing upon the damages sustained by the defendant Spur as a reasonable and direct result of the granting of the permanent injunction. Since the result of the appeal may appear novel and both sides have obtained a measure of relief, it is ordered that each side will bear its own costs.

COMMENTARY & QUESTIONS

1. **The twist in *Spur*.** On remand, Webb settled, reportedly paying Spur more than $1 million in moving costs. In a subsequent case, the Arizona court also allowed Spur to sue for indemnity, so that Webb would have to reimburse the feedlot for tort damages Spur might have to pay to individual homeowners. Spur v. Superior Ct., 505 P.2d 1377 (Ariz. 1973). The unusual feature of the *Spur* case is not its public nuisance theory but its remedy, conditioning the injunction on plaintiff's payment of moving costs. Is this a case about comparative fault? The court seems to consider that it was the developer's fault that caused the conflict. Is Spur's nuisance therefore based on some kind of no-fault liability? What if the only suit for injunction and damages had been brought by homeowners, not by Webb? What if Webb lacked funds to pay Spur? Doesn't this get the court into judicial land use decisions, as noted below? On a larger scale, it is useful to note that agricultural pollution cases generally can be litigated only under common law theories because the farm lobbies' political strength has successfully inserted blanket exemptions for agriculture into all significant federal and state pollution statutes.

2. **The "right-to-farm" debate.** Common law nuisance claims have long provided a method for many rural and suburban residents to end the noise, odor, and annoyance that accompanies animal production. For farms that use manure and other odiferous fertilizers and for animal producers, injunctive relief granted in favor of their neighbors

often means that they can no longer use existing barns and equipment, creating considerable hardship for members of the farming community. Agricultural interest groups have been able to obtain anti-nuisance "right-to-farm" legislation in roughly 40 states. Do these right-to-farm laws derogate neighbors' common law nuisance rights to such a degree that their enforcement may be considered a taking of property? In Anti-Nuisance Legislation, 30 Envtl. L. Rep. 10253 (2000), Terence Centner analyzes cases including Bormann v. Koussuth County Bd. of Sup'rs, 584 N.W.2d 309 (Iowa 1998), where the Iowa Supreme Court held that a county board's approval of an "agricultural area" that triggered nuisance immunity resulted in condemnation by nuisance of neighbors' property without just compensation, thus making the board's action unconstitutional. This question echoes issues that are seen in the "permit defense" setting later in this chapter.

3. **The tactical advantages of public nuisance.** What advantages did Webb get from suing in public nuisance? Part of Webb's strategy was to get around the coming-to-the-nuisance defense. Did the development company also get a broader basis for nuisance claims than it would have under private nuisance, even class action private nuisance? The court unhesitatingly balanced the overall public interest against Spur. Note, moreover, that there was no proof of personal injury or property damage in *Spur*. The court said that "the odor and flies produced an annoying if not unhealthy situation," and seemed to focus on the aesthetics and quality of life of the community of Sun City. Would Oscar Boomer have gained from filing his case in public nuisance? Aesthetic nuisance litigation, applied to billboards, junkyards, and the like, is typically based on public nuisance.

Public nuisance also opens up otherwise impossible liability claims, such as predecessor liability for land contamination. In most states, a buyer has no action against a seller who has sold property that turns out to be spoiled or hazardous. Caveat emptor. In several cases of contaminated land, however, the courts, though refusing to allow private nuisance claims because the parties did not own different parcels, allowed public nuisance claims. In Nashua Corp. v. Norton Co., 45 BNA Env't Rep. Cas. 1013 (N.D.N.Y. 1997),[9] public nuisance applied because groundwater pollution from the parcel threatened the general public. The plaintiff's response costs and alleged stigma damages qualified as special damages.

4. **A widening role for environmental public nuisance?** Public nuisance traditionally has been applied against actions that injure life or health; offend the senses; violate principles of decency; obstruct free passage or use of highways, navigable streams, public parks, and beaches; and otherwise disrupt public rights. These definitions obviously possess great potential to expand with contemporary sensibilities to incorporate a wide range of environmental values. How far into novel environmental settings can public nuisance be extended? The aesthetic enjoyment of low-tech visitors to a Walden Pond, a desert park, or a wilderness river can be disturbed by just a few individuals with boom boxes or all-terrain vehicles. Are these public nuisances? Is smoking in public

9. Plaintiff also filed under CERCLA's and RCRA's private cleanup remedies, but the nuisance claims were filed in order to recover "stigma" damages, unrecoverable under statutory causes of action.

becoming litigatable as public nuisance? Destruction of historic monuments? Could public nuisance injunctions, if the facts had been known, have blocked the importation of alien species such as gypsy moths, poisonous walking catfish, carp, and starlings into the United States? Can public nuisance be used where consequences are potentially disastrous but probabilities are uncertain, as with genetic engineering experimentation with recombinant DNA outside the laboratory? For an ancient doctrine, the flexibility and scope of public nuisance give it remarkable evolutionary potential.

5. **Public nuisance/private plaintiffs.** Public nuisance, deriving from criminal law, is in the first instance supposed to be litigated by public prosecutors, but local and state governments often are not enthusiastic about litigation and are sometimes themselves the defendants in public nuisance actions. Private plaintiffs thus have played a major role in the expansion of public nuisance. Standing of private parties, however, traditionally has posed a procedural barrier: In order to sue in public nuisance, private plaintiffs have to show "special injury" different in kind, and not just in degree, from the public as a whole. In *Spur*, for example, Webb's "sales resistance" is special injury. A homeowner in the neighborhood might or might not be granted special injury standing. A disgusted county resident with no health or property damage traditionally would have no hope of suing in public nuisance. Isn't it somewhat paradoxical that in order to represent public values in public nuisance, which offers wide attractions to environmental plaintiffs, potential public nuisance plaintiffs must prove that they are substantially different from the public? Recent amendments to the Restatement (Second) of Torts §421c attempt to extend standing in public nuisance, for injunctive relief only, to any person "having standing to sue as a representative of the general public, as a citizen in a citizen suit, or class representative in a class action." Many courts have continued to follow the old special injury rule, although a number of states hold that any bodily injury is per se special. Note that public nuisance actions usually seek equitable relief only; private plaintiffs typically cannot recover public nuisance damages (unless special damages as in the *Nashua Corp.* case above), and public plaintiffs normally do not seek damages.

6. **Judicial zoning under public nuisance?** Given the Arizona court's holding in *Spur*, would it have issued an injunction against Webb's southward development if Spur had timely brought such an action in 1962? The court clearly considered the natural and appropriate use for the area to be agricultural rather than urban. In a number of fascinating cases, courts have issued injunctions against, for instance, funeral parlors and gas stations in unzoned residential areas, judicially recognizing their primarily residential character. Powell v. Taylor, 263 S.W.2d 906 (Ark. 1954) (funeral parlor); State v. Feezell, 400 S.W.2d 716 (Tenn. 1966) (crematorium). In Harrison v. Indiana Auto Shredders, 528 F.2d 1102 (7th Cir. 1975), however, the court permitted a noisy, smelly, gas-and-dust emitting automobile shredding and recycling operation to locate in a low-income neighborhood, merely awarding damages, evidently classifying the neighborhood as less deserving of equitable protection. In Bove v. Donner-Hanna Coke Corp., 258 N.Y.S. 229, 233 (1932), the court denied even damages to a woman whose home was polluted by installation of a smelly coke oven, saying that "it is true that...when the plaintiff built her house, the land on which these coke ovens now stand

was a hickory grove. But...this region was never fitted for a residential district; for years it has been peculiarly adapted for factory sites." Recognizing the environmental potential for incorporating evolving public sensibilities into public nuisance, do you nevertheless feel uncomfortable with the role that judges can play in dictating appropriate uses for particular parcels of land?

Section 3. **ADAPTING TRESPASS, THE MOST TRADITIONAL OF TORTS**

Borland v. Sanders Lead Company

Supreme Court of Alabama, 1979
369 So. 2d 523

JONES, J. This appeal involves the right of a property owner, in an action for trespass, to recover damages for pollution of his property.... J. H. Borland, Sr., and Sarah M. Borland, Appellants, own approximately 159 acres of land, located just south of Troy, Alabama, on Henderson Road. On this property, Appellants raise cattle, grow several different crops, and have a large pecan orchard.

In 1968, the Appellee, Sanders Lead Company, started an operation for the recovery of lead from used automobile batteries...just east of the Borlands' property.... The Appellee's smelter was placed on the west edge of their property, that part nearest to the Appellants' property. The smelter is used to reduce the plates from used automobile batteries. It is alleged by Appellants that the smelting process results in the emission of lead particulates and sulfoxide gases....

Appellee installed a filter system, commonly known as a "bag house," to intercept these lead particulates which otherwise would be emitted into the atmosphere. The "bag house" is a building containing fiber bags. The smoke emitting from the furnace is passed through two cooling systems before passing through the "bag house" so that the fiber bags will not catch fire. If properly installed and used, an efficient "bag house" will recover over 99 percent of the lead emitted. On two occasions, the cooling system at Appellee's smeltering plant has failed to function properly, resulting in the "bag house's" catching fire on both occasions.... Appellants allege that, because of the problems with the "bag house," their property has been damaged by a dangerous accumulation of lead particulates and sulfoxide deposits on their property....

The trial Court was under the mistaken impression that compliance with the Alabama Air Pollution Control Act shielded the Defendant from liability for damages caused by pollutants emitting from its smelter. This is not the law in this State.... Furthermore, the trial Court incorrectly applied the law of this State in concluding that, because there was evidence showing that the Plaintiffs' farm had increased in value as industrial property, due to its proximity to the lead plant, Plaintiffs could not recover of the Defendant. Such a rule, in effect, would permit private condemnation, which, unquestionably, is impermissible...[and] overlooks the fact that the appreciation factor is totally unrelated to the wrongful acts complained of....

Alabama law clearly provides an appropriate remedy for Plaintiffs who have been directly injured by the deleterious effects of pollutants created by another party's acts.... A trespass need not be inflicted directly on another's realty, but may be committed by discharging foreign polluting matter at a point beyond the boundary of such realty.... Restatement, 2d, Torts, §158 recites:

> In order that there may be a trespass under the rule stated in this Section, it is not necessary that the foreign matter should be thrown directly and immediately upon the other's land. It is enough that an act is done with knowledge that it will to a substantial certainty result in entry of foreign matters.