

Professor Schraff
CAPITAL UNIVERSITY LAW SCHOOL
NATURAL RESOURCES LAW
FALL SEMESTER, 1996
FINAL EXAMINATION

You have two (2) hours to complete this exam. Each of the two questions in the exam is worth fifty percent (50%) of your final grade. Answer each part of each question. Good Luck!

Question No. 1. Capital University has decided to join a consortium of universities planning to build a large telescope and observatory on Mount Graham, which is located within the Coronado National Forest, in southeastern Arizona. Because of the elevation of Mount Graham (10,500 feet above sea level) and the extreme purity of the air in this area of Arizona, the atmospheric conditions for an observatory are ideal and cannot be duplicated elsewhere in the continental United States. The University of Arizona (and its Physics and Astronomy Department) is the lead institution for this project, which consists of more than fifty universities and research institutions. The project will involve the construction of two telescopes (a large "state of the art" binocular telescope and a smaller research telescope), along with four support buildings and an access road.

The University of Arizona approaches the Forest Service and requests permission to construct the planned observatory. The National Aeronautics and Space Administration (NASA) sends a letter to the Forest Service strongly supporting the construction of the observatory because of the potential value of the observatory to future manned space missions by NASA. The Forest Service, recognizing the significant scientific value of the observatory, expedites the request of the University of Arizona and grants a "Special Use Permit" allowing the consortium to move forward with the construction. The University then begins to clear an area on Mount Graham for construction of the observatory.

A. The area around Mount Graham contains the last remaining habitat of the Arizona Grey Wolf, which has been identified by the United States Fish and Wildlife Service as a "threatened" species. Attorneys for the Sierra Club and the National Wildlife Federation send correspondence to the University of Arizona and the Forest Service claiming that the Forest Service's issuance of the Special Use Permit for the construction of the observatory "...violates federal environmental laws." Both the Sierra Club and the National Wildlife Federation threaten legal action if the Forest Service does not immediately revoke the Special Use Permit and prevent any additional disturbance of Mount Graham. The University of Arizona and Capital University retain you to advise them regarding this situation. They request a legal memorandum from you identifying any environmental laws, which might apply to the observatory project. Please prepare this memorandum.

B. While inspecting the observatory site with other members of the consortium, Dr. Steven Bahls, a professor of Astronomy at Capital University, decides to hike through a portion of the surrounding forest area on Mount Graham. He chooses a hiking trail maintained by the National Forest Service for use by recreational hikers. While hiking along the trail, he is struck by a large, rotten branch which falls from a Lodgepole Pine tree, and which has been weakened from a violent storm a few weeks earlier. Professor Bahls suffers a broken shoulder and a concussion which results in recurring "dizzy spells."

A Forest Service regulation provides that: National Forests in accordance with the following plan: ... (43) in the Coronado National Forest: (1) fell all trees likely to fall on a hiking trail; and (2) prune dead or dangerous branches overhanging a trail. These activities should be conducted no more frequently than once in any calendar year.

The accident occurs on December 19, 1996, and the records of the Forest Service indicate that the Forest Service personnel have not cut any trees or branches during calendar year 1996 along the hiking trail where Professor Bahls was injured. Professor Bahls asks you whether he can bring a lawsuit against the Forest Service for failing to remove the rotten branch before it fell and struck him. Please advise Professor Bahls whether he can maintain an action against the Forest Service.

C. While visiting the Mount Graham site with Professor Bahls, Professor Lance Tipples, the dean of the University of Arizona Department of Physics and Astronomy, accidentally runs over and kills an Arizona Red Squirrel, which has been designated by the U.S. Fish and Wildlife Service as an "endangered species." The dead squirrel is brought to the Forest Service District Office by Allan Redfeather, a lawyer and Apache Indian, who witnessed the act, and who complains that Apache religious rights, under the First Amendment, have been violated by Professor Tipples, since the Apache Indians believe that red squirrels are the reincarnated ancestors of the Apache Indians. At a meeting with Redfeather, Forest Service representatives and the U.S. Attorney, Tipples states that he never saw the red squirrel before he "squashed that critter," and says that, because he did not see the squirrel and "never meant to hit the damned thing," he lacked the requisite "mens rea" to violate Apache religious rights. Tipples claims that he violated no law, But the U.S. Attorney disagrees with Tipples' claim. Tipples asks you if he has any liability.

What do you tell him?

Question No. 2. The City of Hilliard is undergoing rapid development, with several properties, which previously were used for farmland now being converted into large residential real estate developments. Both single-family homes and apartment complexes are under development in several locations within the City. Elise De Longyard, a socially prominent Hilliard businesswoman, owns a 15 acre parcel of property in Hilliard, where she has built her home. The rear of her property contains a small stream which is a tributary to the Scioto River. The Scioto River abuts the rear of Ms. De Longyard's 15 acre property.

Recently, the City of Hilliard has constructed a new underground storm sewer across property which the City has acquired by eminent domain, and which borders on Ms. De Longyard's property. The adjacent property is undeveloped and also is contiguous to the Scioto River. The City has constructed the storm sewer across this property in order to collect increased stormwater from rapidly developing portions of the City. The storm sewer empties into the small, tributary stream just before the stream crosses from the City's property onto the De Longyard property.

While the City is constructing the storm sewer, Ms. De Longyard begins to notice that the quality of water from her well has changed. The well water was once clear and tasty, but now seems to be cloudy, and sometimes has a sour taste. The well is an artesian well, but has lost virtually all of its pressure since the City initiated construction of its storm sewer. Shortly after the City completes construction of the storm sewer, Ms. De Longyard returns home one evening after a heavy storm to find the garden and patio in the back of her house under two inches of water. She walks to the rear of her property and finds

that the small, tributary stream has overflowed its banks and backed up onto her garden and patio. The rapid current in the stream also is eroding the banks of the stream, causing mud to be carried along with the stormwater.

Throughout the summer of 1996, Ms. De Longyard's garden and patio are inundated with water after three summer storms. Ms. De Longyard is unable to use her patio and garden for entertaining guests and business clients. She consults with a civil engineer, who tells her it will cost at least \$35,000 to repair the water damage to her patio and garden, and to construct berms in the back of her property which will prevent future flooding. He also advises Ms. De Longyard that he suspects that her well problems were caused by the City's construction activities.

Ms. De Longyard contacts the City of Hilliard. She speaks to the Law Director for the City. While he tells Ms. De Longyard that he sympathizes with her problem, he also tells her that the City has a right to discharge stormwater through its storm sewer and into the intermittent stream under the doctrine of "riparian rights," and that any flooding from storms or other damage to the property is due to an "act of God" --- not the actions of the City. The Law Director further notes that the City designed its sewer to avoid flooding in the stream during all but the most severe storms, and that the City has no control over particularly heavy downpours. Because of the economic benefits of increasing the City tax base and allowing new residential development, the Law Director tells Ms. De Longyard that the City has "no choice" but to develop the storm sewer in order to drain these rapidly developing areas.

Ms. De Longyard comes to you, as her attorney, and asks whether she has any chance of recovering damages from the City. What should you tell her?