IN THE IOWA DISTRICT COURT IN AND FOR MUSCATINE COUNTY

LAURIE FREEMAN, SHARON MOCKMORE, BECCY BOYSEL, GARY D. BOYSEL, LINDA L. GOREHAM, GARY R. GOREHAM, KELCEY BRACKETT, and BOBBIE LYNN WEATHERMAN Plaintiffs, v. GRAIN PROCESSING CORPORATION, Defendant.	Case No. LACV021232 **RULING ON DEFENDANT'S MOTION FOR SUMMARY JUDGMENT AND PLAINTIFFS' CROSS-MOTION FOR PARTIAL SUMMARY JUDGMENT**

On December 29, 2017, Defendant Grain Processing Corporation ("GPC") filed its Motion for Summary Judgment. Plaintiffs, the *Freeman* Class, resisted and filed their own Cross-Motion for Partial Summary Judgment on February 19, 2018. In brief, GPC asserts that Plaintiffs' claims of nuisance, negligence, and trespass must fail as a matter of law because GPC has acquired a prescriptive easement to emit particulate matter onto the Plaintiffs' properties. Even if Plaintiffs can successfully prove the claims they allege, GPC contends that its prescriptive easement is a conclusive defense and bars a judgment of liability against it. Plaintiffs assert that GPC has failed to fulfill the elements of a prescriptive easement and, in any event, argue that prescriptive easements to emit particulate matter into the air, like the one claimed by GPC, are void as a matter of Iowa public policy. Accordingly, Plaintiffs seek partial summary judgment on GPC's affirmative defense and contend that GPC's claim of a prescriptive easement must fail as a matter of law.

A hearing was held on April 12, 2018 and the Court heard oral argument on the cross-motions for summary judgment. Plaintiffs were represented by Attorneys Sara Siskind, Scott Entin, and Matthew Owens. Attorney Mike Reck appeared on behalf of GPC. The Court, having

considered the written and oral arguments of counsel, and the applicable law, enters the following ruling on Defendant's Motion for Summary Judgment and Plaintiffs' Cross-Motion for Partial Summary Judgment:

Factual Background and Proceedings

A. Introduction.

GPC owns, operates, and maintains a "corn wet milling" facility in Muscatine, Iowa. According to Plaintiffs' Petition,

> wet milling is a production method and process that transforms corn kernels into products for commercial and industrial use. The plaintiffs allege the corn wet milling operation at GPC's facility creates hazardous by-products and harmful chemicals, many of which are released directly into the atmosphere. The plaintiffs allege these by-products include: particulate matter, volatile organic compounds including acetaldehyde and other aldehydes, sulfur dioxide, starch, and hydrochloric acid. They assert the polluting chemicals and particles are blown from the facility onto nearby properties. They note particulate matter is visible on properties, yards, and grounds and various chemical pollutants are also present. Compounding these adverse effects, according to the plaintiffs, GPC has used, continues to use, and has failed to replace its worn and outdated technology with available technology that would eliminate or drastically reduce the pollution. The plaintiffs assert these emissions have caused them to suffer persistent irritations, discomforts, annoyances, inconveniences, and put them at risk for serious health effects.

Freeman v. Grain Processing Corp., 848 N.W.2d 58, 63–64 (Iowa 2014) (*Freeman I*). To achieve class certification, Plaintiffs limited their claims to loss of use and enjoyment of property; they do not pursue damages for diminution in property value or personal injury. *Freeman v. Grain Processing Corp.*, 895 N.W.2d 105, 109 (Iowa 2017) (*Freeman II*).

GPC began operating its corn wet milling facility in Muscatine's "South End" neighborhood in 1943. GPC's Statement of Undisputed Facts ("SUF") ¶ 2. The plant initially

began its operations as an alcohol producer to respond to the federal government's growing need of synthetic rubber during World War II. GPC Reply App. 1–3, 109.[1]

After the war, the federal government determined that industrial plants like GPC's corn wet milling facility should be maintained. National Industrial Reserve Act of 1948, 62 Stat. 1225, 1226 § 4(2), 50 U.S.C.A. § 453. The United States formally granted GPC all of its existing rights in the facility it had maintained and operated during the war, including:

> tenements, hereditaments and appurtenances to any and all the above described premises, or in anywise appertaining thereto, all buildings, structures, improvements, fixtures, machinery, apparatus and equipment with accessories thereto, pipe lines (including but not limited to water and sewer lines), and all other property, personal and mixed, located on the premises described above, including and comprising Plancor 1684 (A-Iowa-401), also known as Muscatine Alcohol Plant, Muscatine, Iowa, and all rents, issues, income, profits and possession of all of said property.

GPC Reply App. 19 (1954 Deed, at 5). GPC's rights in the property remained subject to the National Industrial Reserve Act after the War, providing that the industrial facility be repossessed by the federal government in the event it was required by national security. GPC App. 20 (1954 Deed). This clause expired twenty years later in 1963. GPC's rights to own and operate its facility in Muscatine were publically filed with the Muscatine County Recorder in the Quit Claim Deed and Bill of Sale dated April 29, 1954 and recorded May 4, 1954 at Book 152 of Lots, Page 2604. GPC App. 17 (1954 Deed). GPC has continued to operate the plant ever since.

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[1] The United States originally owned title to the industrial facility that is now GPC's corn wet milling facility while it was operated as an alcohol plant by GPC. The federal government conveyed the underlying property to GPC in 1950 and the property containing the buildings and operational facilities in 1954. GPC App. 3 (National Register of Historic Places, at 4), 13–22 (1950 and 1954 Quit Claim Deeds). GPC submits that there are no records of claims being brought against the plant for inverse condemnation or nuisance arising out of the government's physical action on that land during the course of the federal government's ownership of the facility by the Reconstruction Finance Corporation and after its conveyance to GPC. *See* GPC's Reply Brief, at 3 n.2. The limitations period for actions brought against the United States for an unconstitutional taking based on a continuing process of physical events was six years, *see United States v. Dickinson*, 331 U.S. 745, 747 (1947), which expired in 1949 without any outstanding or unresolved claim against the facility.

B. History of GPC Emissions and Community Relations.

1. GPC's operation of its corn wet milling facility.

GPC's corn wet milling facility is adjacent to the residential landowners of the Plaintiff *Freeman* Class in the South End neighborhood. Over the years, *Freeman* Class members moved to the South End with GPC's operations already in existence. SUF ¶¶ 2–3. Since its original wartime purpose, GPC expanded its operational capacity and increased its production to meet a growing market demand. GPC's original facility was followed by the construction of a gluten plant, maltrin spray dryer, starch flash dryer, corn gluten feed dryers, and a feed loadout. Pls.' Statement of Additional Facts ("SAF") ¶ 14, App. 34–37.

Muscatine residents began enduring the smells of the emissions from GPC's operations around the 1950s, SUF ¶ 8, App. 70, and generally complained about GPC's emissions in the community as early as the 1960s. SUF ¶ 10, App. 227–28. Complaints ranged from the smell of the emissions to black soot and fly ash covering personal property. *See* GPC App. 68–75.

Publically, GPC acknowledged the deleterious impact its emissions had on the surrounding environment and the local Muscatine community. SAF ¶¶ 17–18, 25, 27–29, 30–31. GPC also communicated its concerns to the Muscatine community. For instance, GPC assured local community members in a 2011 press release that "the smoke, odor and haze issues that have concerned the Muscatine community will be nearly eliminated," SAF ¶ 25, while statements made to the press affirmed GPC's continuing commitment to be a "good corporate neighbor" and protect the environmental well-being of the surrounding area. SAF ¶¶ 27–28

Privately, GPC emphasized the importance of complying with state emissions standards and reducing the environmental impact its operations had on the surrounding area. *See* SAF ¶¶ 18–24. For instance, one former GPC Plant Manager opined that the odor and haze caused from

GPC's emissions would be "one of the most important, if not the most important issues facing the Muscatine operation," SAF ¶ 18, while others noted that the conditions in the South End neighborhood across the street from GPC were "completely unacceptable." SAF ¶ 24. Confronted with a government inquiry in 2008, GPC informed IDNR that it was "very concerned about these emissions and the impact on the adjacent neighborhood" caused by "blue haze" "blanketing the residential neighborhood across from the plant." SAF ¶ 30. Accordingly, many GPC officials called for improvements to "[a]ddress blue haze and reduce air emissions from existing dryers," SAF ¶ 20, "[a]chieve highly visible reductions in haze and odor in Muscatine and surrounding communities," SAF ¶ 19, and "[e]liminate 95+% of the BLUE HAZE, SMOKE, AND ODOR" in the South End of Muscatine. SAF ¶¶ 21–23.

In accordance with these public statements and private sentiments, GPC made efforts to reduce its emissions and the effects of its industrial operations. *See* SAF ¶¶ 19–23, App. 92–95, 104–06. As part of its efforts to update and modernize its industrial facility, GPC undertook a number of improvements in its plant throughout the decades and invested heavily in the development of its operations. The value of these investments totaled in the hundreds of millions of dollars: GPC updated its dryers and steep tanks in the 1960s; its steep tanks again along with the boilers and a protein plant in the 1970s; more updates to dryers, evaporators, and settler units in the 1980s; and additional emission monitoring systems and dryers in the 1990s. *See* GPC Reply App. 66 (Zitzow Decl. at ¶¶ 2–3).

2. Iowa Department of Natural Resources enforcement action.

In 2011, the Iowa Department of Natural Resources ("IDNR") instituted an enforcement action against GPC to compel compliance with Iowa environmental regulations. Leading up to the lawsuit, the IDNR had inquired about its emissions of particulate matter and a "bluish

colored haze that was leaving GPC's property and blanketing the residential neighborhood across from the plant." SAF ¶ 30, Pls.' App. 138–39. During the course of the investigation accompanying that case, GPC represented to the IDNR that it was "making the necessary change to have a minimal impact on the surrounding neighborhood as well as the community." SAF ¶ 30, Pls.' App. 141–42. A consent decree was filed with the Court on March 27, 2014. *See State of Iowa, ex rel. Iowa Dep't of Nat. Res. v. Grain Processing Corp.*, No. CVCV020979 (Iowa Dist. Ct. Mar. 27, 2014).

C. The *Freeman* Litigation.

The named Plaintiffs originally filed this action on April 23, 2012, in the Iowa District Court for Muscatine County, Iowa, alleging a putative class action on behalf of "[a]ll persons who resided within 1.5 [miles] of Grain Processing Corporation's corn wet milling plant in Muscatine, Iowa (excluding uninhabited and non-residential areas to the plant's south and east) during the period since April 24, 2007." Pet. ¶ 23; Pls.' Mot. to Amend Pet. ¶ 2(b).[2] Plaintiffs brought suit against GPC for common law private nuisance,[3] negligence, and trespass. SUF ¶ 7 (Appellants' Reply Br. at 26, *Freeman v. Grain Processing Corp*, 895 N.W.2d 105 (Iowa 2017), 2013 WL 8743219); *see also id.* ¶ 1 (Am. Pet. ¶ 12). Plaintiffs generally allege that GPC's

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[2] Plaintiffs amended their Petition on March 22, 2013 to reduce the scope of the proposed class area from a three-mile radius to 1.5 miles surrounding GPC's corn wet milling facility.

[3] Plaintiff's nuisance claim is brought under both the common law and the statutory framework for nuisance claims in Iowa, codified at Iowa Code chapter 657. Section 657.1 provides, in part:

> Whatever is injurious to health, indecent, or unreasonably offensive to the senses, or an obstruction to the free use of property, so as essentially to interfere unreasonably with the comfortable enjoyment of life or property, is a nuisance, and a civil action by ordinary proceedings may be brought to enjoin and abate the nuisance and to recover damages sustained on account of the nuisance.

Section 657.2(1) provides that the following constitutes a nuisance:

> The erecting, continuing, or using any building or other place for the exercise of any trade, employment, or manufacture, which, by occasioning noxious exhalations, unreasonably offensive smells, or other annoyances, becomes injurious and dangerous to the health, comfort, or property of individuals or the public.

operation of its corn wet milling facility results in the emission of polluting chemicals and particulate matter that is emitted from its facility onto nearby properties within the class area. Plaintiffs assert that GPC has operated its facility in a manner that unreasonably interferes with the use and enjoyment of their properties. Likewise, Plaintiffs assert that GPC has operated its facility negligently by failing to exercise reasonable care in its operations, causing or permitting hazardous substances to be released from its facility, and that Plaintiffs have been harmed by GPC's negligence. Finally, Plaintiffs assert that GPC's operations constitute a past and continuing trespass. According to Plaintiffs' Petition, "Plaintiffs seek damages to remediate their properties, and seek compensation for the loss of the use and enjoyment of their properties, among other damages. Due to the intentional, willful, and wanton nature of Defendant's conduct, Plaintiffs also seek punitive damages." Pet. ¶ 1.

GPC first sought summary judgment on December 20, 2012, seeking to dismiss Plaintiffs' claims as a matter of law by arguing Plaintiffs' common law nuisance, trespass, and negligence claims were preempted by state and federal environmental regulations. This Court granted GPC's motion for summary judgment on the basis that the Clean Air Act ("CAA") and Iowa Code chapter 455B (2011), Iowa's state-law statutory companion to the CAA, preempted Plaintiffs' causes of action. Plaintiffs appealed. On direct review, the Iowa Supreme Court reversed and remanded the district court's grant of summary judgment in favor of GPC, reinstating Plaintiffs' lawsuit in an order dated June 13, 2014. *See Freeman I*, 848 N.W.2d at 94. The Supreme Court held that the CAA did not preempt Plaintiffs' state law claims because, under the "cooperative federalism" doctrine, states are given authority to impose stricter standards on air pollution than those that might be imposed by the federal government under the CAA. The Court further held that Iowa Code chapter 455B did not impliedly repeal the

application of nuisance claims under Iowa Code chapter 657 to air pollution, or otherwise preempt Plaintiffs' claims under Iowa common law. The Supreme Court emphasized that, unlike the Iowa legislature's policy determination codified in chapter 455B of the Iowa Code, Plaintiffs common law claims "are based on specific harms to the use and enjoyment of real property that are different from the public interest generally in controlling air pollution." *Id.* at 89.

Plaintiffs moved to certify their lawsuit as a class action on April 20, 2015. This Court certified the *Freeman* Class in an order dated October 28, 2015. GPC appealed the district court's certification order. Again on direct review, the Iowa Supreme Court affirmed class certification of Plaintiffs' action on May 12, 2017. *See Freeman II*, 895 N.W.2d at 130. The Court found that the district court did not abuse its discretion in certifying the putative class. In so holding, the Supreme Court determined that evidence regarding GPC's operation of its facility and emissions during the relevant time period, its knowledge of the emissions, and the level that emissions interfere with a normal person in the Muscatine community's enjoyment of his or her property were questions common to the entire class of plaintiffs. The Court determined that representative proof of GPC's emissions would sufficient for Plaintiffs to attempt to establish reasonable inferences that other class members similarly suffered loss of use and enjoyment of their property. Importantly, Class Counsel for the Plaintiffs conceded priority of location to GPC, noting that the emissions from GPC's plant during the relevant time period were "open and notorious and horrific" and that "you had to be living under a rock not to know about the open and notorious pollution in this community." GPC's SUF ¶¶ 5–6, App. at 67 (S. Ct. Hearing Tr. at 25). The Supreme Court adopted Plaintiffs' admissions in ruling in their favor on the class certification question, holding that "GPC's priority of location is conceded, and common proof will be required on GPC's course of conduct, its emissions during the relevant time period, its

knowledge of emissions, and at what level emissions interfere with a normal person in the community's enjoyment of his or her property." *Freeman II*, 895 N.W.2d at 129.

D. Cross-Motions for Summary Judgment.

1. GPC's Motion for Summary Judgment.

GPC again moved for summary judgment on December 29, 2017. While GPC maintains that it has not negligently operated its facility and disputes Plaintiffs' assertions that its emissions constitute a nuisance or trespass, it insists that the present case must be decided in the company's favor before reaching the question of its own liability. Regardless of the merits of Plaintiffs' allegations, GPC asserts that it has acquired a prescriptive easement to continue emitting odor and particulate matter onto Plaintiffs' properties throughout the class area through the decades of GPC's operation of its facility in Muscatine. GPC thus seeks summary judgment on its affirmative defense, asking the Court to declare that under Iowa law it possesses a prescriptive easement that defeats Plaintiffs' claims of nuisance, trespass, and negligence as a matter of law.

GPC particularly relies on concessions made by Plaintiffs when seeking class certification and their admissions before the Iowa Supreme Court in *Freeman II*. To avoid an individualized inquiry of Plaintiffs' knowledge of the invasion of their property rights and varying degrees of their damages, Plaintiffs conceded that all class members knew about GPC's pollution when they arrived in the South End and that GPC's air emissions in Muscatine were "open and notorious." Plaintiffs likewise conceded that "priority of location favored GPC as to all class members." *Freeman II*, 895 N.W.2d at 121; *see also id.* at 129. Thus, GPC asserts that the ten-year prescriptive period began to accrue at the inception of the facility's current operation in 1943. Because, as a matter of law based on Plaintiffs' binding judicial admissions, members of the *Freeman* Class knew of an open and notorious nuisance when they moved in to their

residences and its emissions persisted in a continuous manner, GPC asserts that its prescriptive easement came into existence during the mid-1950s. Tacking the period for which the original owners had knowledge of GPC's emissions to those who arrived later during the late 1940s, '50s, and '60s, GPC claims that its emissions have continually run for the ten-year prescriptive period as to all class members.

Because the Plaintiffs conceded that GPC's emissions were open and known to class members, GPC submits that these concessions have also established that its use of the Plaintiffs' property satisfies the hostile and claim of right elements of its prescriptive easement. GPC's emissions of particulate matter onto Plaintiffs' properties are presumptively hostile and under claim of right, GPC claims, precisely because GPC had operated its plant for so many years over complaints by members of the Muscatine community. GPC urges that, in addition, it has invested millions of dollars into the maintenance, modernization, and improvement of its corn wet milling facility over the decades of its operations, and these investments were made in reliance on its continued ability to emit while operating its business. Further, in the face of complaints by class area residents as early as the 1960s, GPC points out that it continued to operate in Muscatine and emit into the atmosphere, demonstrating that it acted under a claim of right. Throughout the decades of its business operations, GPC argues that Plaintiffs have failed to enforce their legal rights or establish that such use was done with the permission of the resident class members to defeat GPC's claim of right.

Finally, GPC argues that Plaintiffs expressly conceded notice of GPC's emissions onto residents' properties, class-wide. GPC submits that Plaintiffs acknowledged to the Supreme Court that "the nuisance was open and notorious and horrific" and "these people knew about it when they moved in" to establish commonality of fact and law for purposes of class certification.

See GPC App. 68 (S. Ct. Hearing Tr. at 27). Thus, GPC argues that the *Freeman* Class is charged with notice of its adverse use of their properties through its air emissions and, in effect, its claim of right. These concessions and undisputed facts, GPC argues, defeats Plaintiffs claims as a matter of law.

2. Plaintiffs' Resistance and Cross-Motion for Summary Judgment.

The *Freeman* Class resisted GPC's motion and filed a cross-motion for partial summary judgment on February 19, 2018. Plaintiffs first argue that GPC's claim of a prescriptive easement should be rejected outright. Plaintiffs cite a wide array of case law from other states refusing to grant prescriptive easements that perpetuate air pollution as being void as a matter of public policy. Plaintiffs urge that, consistent with principles contained in the Third Restatement of Property, the acquisition of prescriptive rights to emit particulate matter into the air and onto neighboring residential properties is unprecedented in Iowa, inconsistent with Iowa public policy, and void as a matter of law. In essence, Plaintiffs submit that the prescriptive rights claimed by GPC are incompatible with private property rights in Iowa and urge the Court to reject the company's bid to seek a legal endorsement of a perpetual right to emit particulate matter onto the properties of *Freeman* class members.

Plaintiffs also assert that GPC asks for a prescriptive easement with indefinite boundaries. Plaintiffs contend that while the Iowa Supreme Court has yet to apply the rule requiring an easement to be identified by definite boundaries to those acquired by prescription, the rule should apply to this case as an additional basis to reject GPC's proposed easement.

Plaintiffs stand by their admission that GPC's emissions were "open and notorious" within the meaning of Iowa law on prescriptive easements. However, Plaintiffs argue that this is of no consequence. While GPC's emissions were indeed "open and notorious," Plaintiffs contend

that GPC did not act under a "claim of right" for the prescriptive period. First, Plaintiffs argue that GPC never actually claimed any right, publically or privately, to emit particulate matter onto Plaintiffs' properties. Plaintiffs assert that GPC, as the party claiming prescriptive rights, has the burden to prove elements of a prescriptive easement strictly and without presumption. Rather, Plaintiffs argue that case law regarding prescriptive easements in Iowa consistently requires express declaration or unequivocal conduct evidencing a claim of right. Plaintiffs contend that even if there is enough evidence to find that GPC operated under some claim of right, GPC has failed to set forth proof fulfilling the statutory requirement that Plaintiffs had "express notice" of that claimed right to emit onto residents' properties within the class area.

At the heart of their argument, Plaintiffs contend that GPC cannot prove it operated under a claim of right because evidence of GPC's "use" of the Plaintiffs' property—its emissions—is inadmissible in and of itself to establish any claim of right under section 564.1 of the Iowa Code. Plaintiffs argue that this requirement of evidence independent of GPC's emissions is also required for GPC to affirmatively prove the "express notice" requirement of its purported claim of right. GPC, Plaintiffs allege, presents no evidence independent of its emissions and use of resident class members' properties to show that it ever acted under a claim of right; all evidence submitted by GPC, Plaintiffs argue, is silent about whether GPC claimed an actual property right. Because GPC may not rely on presumption, Plaintiffs submit that there is no such evidence to support GPC's claim.

Plaintiffs rely heavily on a single nineteenth century case by the Iowa Supreme Court, *Churchill v. Burlington Water Co*, 62 N.W.646 (1895), to support their position. *Churchill* is the only Iowa Supreme Court case to address prescriptive rights in the context of industrial air emissions of soot, smoke, and particulate matter. Plaintiffs point to *Churchill*, arguing that there

the Supreme Court long ago considered and rejected the very arguments made by GPC in the present case over a century earlier. According to the Plaintiffs, all subsequent cases by the Iowa Supreme Court following *Churchill* have required unequivocal manifestation of a claim of right, rejecting mere use, alone, as insufficient to prove the acquisition of a prescriptive easement. Thus, Plaintiffs seek partial summary judgment rejecting GPC's prescriptive easement defense as a matter of law.

Applicable Law and Analysis

At the heart of this matter are complex issues of property law jurisprudence and consequential questions of public policy in Iowa. Indeed, the dispute at hand reflects a fundamental divergence between the parties about status of Iowa property rights, nuisance law, and the doctrine of prescriptive easements in environmental torts. The parties not only disagree about which side should triumph under prevailing legal principles; they dispute what the universe of Iowa case law on prescriptive easements *means*.

The positions of the parties in their cross-motions for summary judgment, accompanied by the facts both parties agree are undisputed, present three primary issues that both GPC and the Plaintiff *Freeman* Class insist should be resolved by this Court as a matter of law.[4] First, does the rule currently recognized under Iowa law requiring ordinary easements to have definite and identifiable boundaries extend to those acquired by prescription, precluding the acquisition of a property right to pass industrial byproduct through varying airwaves over adjacent homes? Second, is the ability of an industrial facility to discharge emissions of soot, smoke, and

[4] During oral argument at the April 12, 2018 hearing and in written statements filed with the Court on April 20, 2018, counsel both GPC and Plaintiffs agreed there were no material facts in dispute and stated that the pending cross-motions for summary judgment can be decided on their merits as a matter of law. Plaintiffs informed the Court that, to the extent that there exist facts that are contested, Plaintiffs assert they are not material to the disposition of the present cross-motions as such facts do not prove the crucial elements of "claim of right" and "express notice" of GPC's prescriptive easement defense. *See* GPC's Response to Court's Request, at 1 ¶¶ 2, 5. Pls.' Response to Court's Question (Corrected), at 2–3 & n.2.

particulate matter onto neighboring residential land in perpetuity a property right that can be acquired by prescriptive means; or is such an interest in the land of another incompatible with Iowa law? And third, what does Iowa law on prescriptive easements require of a local business that has, for decades, operated openly and visibly as an industrial facility to demonstrate a "claim of right" to discharge particulate matter through the air and onto neighboring properties—in other words, has GPC fulfilled the requirements of a "claim of right" to establish a prescriptive easement under Iowa law?

The Court answers the first two questions in the negative. Iowa case law suggests that the right to emit industrial byproduct onto adjacent property is one that can be acquired by prescription. Boundaries of an easement may be sufficiently definite and identifiable to the extent of the easement-holder's use and enjoyment of that interest in the land—the prescriptive easement sought by GPC in this case is the scope of its emissions over the servient owners' land that Plaintiffs allege constitutes trespass and nuisance. Furthermore, even under commonly-accepted principles of nuisance law, such a right may be void as a matter of public policy only where the invasion constitutes a *public* nuisance, not merely a *private* one. As to the final question, the Court finds that Iowa law requires that a claimant make some affirmative assertion of the right they claim in the disputed property through express declaration or unequivocal conduct of that right—that the claimant actually *claim* the *right* in the property they purport to hold an interest in. After a careful review of the record and hard look at Iowa law on prescriptive easements, the Court holds that GPC has not advanced sufficient evidence of such claim of right.

The Court begins by laying out the legal landscape of Iowa law on prescriptive easements to form the backdrop by which discussion of the parties' arguments can be placed into context. Because both parties insist that the facts are undisputed and the Court should rule as a matter of

law, the Court will consider the legal questions common to both motions contemporaneously. After examining the applicable legal principles and an overview of Iowa case law, the Court will analyze each issue in turn.

I. Summary Judgement Standard.

Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Iowa R. Civ. P. 1.981(3); *Linn v. Montgomery*, 903 N.W.2d 337, 342 (Iowa 2017). The moving party bears the burden of proving an absence of disputed fact and affirmatively demonstrating that it is entitled to judgment as a matter of law. *Hallett Const. Co. v. Meister*, 713 N.W.2d 225, 229 (Iowa 2006). In ruling on a motion for summary judgment, the facts must be viewed in a light most favorable to the non-moving party. Iowa R. Civ. P. 1. 981(5); *Hlubek v. Pelecky*, 701 N.W.2d 93, 95 (Iowa 2005). However, speculation and mere allegations are not material facts. *Hlubek*, 701 N.W.2d at 95–96.

Where the uncontroverted facts could not lead to a verdict for the nonmoving party on a particular issue, there is no "genuine issue for trial" and judgment as a matter of law on that matter is proper. *Bitner v. Ottumwa Cmty. Sch. Dist.*, 549 N.W.2d 295, 300 (Iowa 1996); *see also Bradshaw v. Cedar Rapids Airport Comm'n*, 903 N.W.2d 355, 360 (Iowa 2017) ("If the summary judgment record shows that the resisting party has no evidence to factually support an outcome determinative element of that party's claim, the moving party will prevail on summary judgment." (internal quotations omitted)). "It is axiomatic that the determination of whether a party is entitled to judgment as a matter of law is a legal question, not a matter of factual resolution." *Bellach v. IMT Ins. Co.*, 573 N.W.2d 903, 905 (Iowa 1998). Indeed, summary

disposition of a case is appropriate "when the record reveals only the legal consequences of undisputed facts are in issue." *Homan v. Branstad*, 887 N.W.2d 153, 164 (Iowa 2016) (citing *City of Fairfield v. Harper Drilling Co.*, 692 N.W.2d 681, 683 (Iowa 2005)); *see also Wallace v. Des Moines Indep. Sch. Dist. Bd. of Directors*, 754 N.W.2d 854, 857 (Iowa 2008) ("A matter may be resolved on summary judgment if the record reveals only a conflict concerning the legal consequences of undisputed facts."). Even where factual disputes exist, summary judgment may nevertheless be appropriate if those in dispute are not material to the resolution of the case and the uncontroverted facts establish that the moving party is entitled to judgment in its favor. *See Linn*, 903 N.W.2d at 345–47.

The filing of cross-motions for summary judgment does not change the application of the Iowa Rules of Civil Procedure. "The well-settled rule is that cross-motions for summary judgment do not warrant the court in granting summary judgment unless one of the moving parties is entitled to judgment as a matter of law upon facts that are not genuinely disputed." *Tip Top Distrib. Co. v. Ins. Plan Sav. & Loan Ass'n of Mt. Pleasant*, 197 N.W.2d 565, 568 (Iowa 1972) (quoting 6 Moore, *Federal Practice* § 56.13, at 2247 (1965)); *see also Meridian Mfg., Inc. v. C&B Mfg., Inc.*, No. C15-4238-LTS, 2017 WL 4873068, at *3 (N.D. Iowa Oct. 27, 2017) (quoting 10A Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, *Federal Practice and Procedure* § 2720 (3d ed. 1998)). Thus, the Court will apply ordinary principles of civil procedure to evaluate the merits of both motions.

II. Overview of Iowa Property Law on Prescriptive Easements.

A. Introduction and General Principles of Law.

An easement by prescription is an interest in the land of another which the easement-holder has the right to use and enjoy for a specific purpose, acquired through the process of

adverse possession. Prescriptive easements, like title gained by virtue of adverse possession, are not particularly favored under Iowa law. *See* 17A David M. Erickson & Christopher Talcott, *Iowa Practice Series—Real Estate Law and Practice* § 10:4 (2017–18 ed.) ("As with adverse possession, under the traditional doctrine of easement by prescription, the facts relied upon must be strictly proved, with no equities in favor of the claimant."). "[A]n easement by prescription is created when a person uses another's land under a claim of right or color of title, openly, notoriously, continuously, and hostilely for ten years of more." *Johnson v. Kaster*, 637 N.W.2d 174, 178 (2001) (citing *Collins Trust v. Allamakee Cty. Bd. of Supervisors*, 599 N.W.2d 460, 463 (Iowa 1999)). The elements of a prescriptive easement "must be strictly proved. They cannot be presumed." *Brede v. Koop*, 706 N.W.2d 824, 828 (Iowa 2005) (quoting *Simonsen v. Todd*, 154 N.W.2d 730, 736 (Iowa 1967)). Claims of prescriptive easements are ultimately fact-sensitive inquiries and are considered on a case-by-case basis. *Johnson*, 637 N.W.2d at 179.

This case centers on the "claim of right" element. "[A] claim of right requires evidence showing an easement is claimed as a right." *Brede*, 706 N.W.2d at 828 (quoting *Collins Trust*, 599 N.W.2d at 464). Similarly, the "hostility" element refers to conduct or declarations "that show the declarant or actor claims a right to use the land," irrespective of the rights of the true owner. *Id.*[5]

Traditionally, "[a] claim of right must be shown by evidence *independent of the use of the easement*." *Brede*, 706 N.W.2d at 828 (emphasis added); *accord Johnson*, 637 N.W.2d at 178–79; *Collins Trust*, 599 N.W.2d at 464. A claim of right must be supported by such conduct that manifests the "type of possession that would characterize an owner's use." *Johnson*, 637 N.W.2d at 179. Moreover, the true owner is required to have "express notice" of any claim of right to the

[5] "The requirements of hostility and claim of right are closely related." *Brede*, 706 N.W.2d at 828. "Evidence tending to show hostility and claim of right to satisfy the requirements of a prescriptive easement is of a similar nature." *Johnson*, 637 N.W.2d at 178.

owner's property, not just notice of the claimant's adverse use of the land. *Brede*, 706 N.W.2d at 828 (citing *Phillips v. Griffin*, 98 N.W.2d 822, 825 (Iowa 1959)). Indeed, this rule is prescribed by the Iowa Legislature and codified in Iowa statutory law. Iowa Code section 564.1, in full, provides:

> In all actions hereafter brought, in which title to any easement in real estate shall be claimed by virtue of adverse possession thereof for the period of ten years, the use of the same shall not be admitted as evidence that the party claimed the easement as the party's right, but the fact of adverse possession shall be established by evidence distinct from and independent of its use, and that the party against whom the claim is made had express notice thereof; and these provisions shall apply to public as well as private claims.

Iowa Code § 564.1.[6] Notice of the claimant's claim of right to use the disputed property "may be actual or established by 'known facts of such [a] nature as to impose a duty to make inquiry which would reveal [the] existence of an easement." *Brede*, 706 N.W.2d at 828 (quoting *Anderson v. Yearous*, 249 N.W.2d 855, 861 (Iowa 1977)).

In rare, limited circumstances, Iowa courts have relaxed the traditional requirements for proving the existence of a prescriptive easement where "the party claiming the easement has expended substantial amounts of labor or money in reliance upon the servient owner's consent or his oral agreement to the use." *Simonsen*, 154 N.W.2d at 733. A party claiming an easement by prescription may establish their prescriptive rights under a "relaxed standard"

> in those instances in which the original entry upon the lands of another is under an oral agreement or express consent of the servient owner and the party claiming

[6] Prescriptive rights are "based on the principle of estoppel" and are "similar to the concept of adverse possession." *Collins Trust*, 599 N.W.2d at 463. "In fact, [courts] apply the principles of adverse possession to establish a prescriptive easement and use adverse possession to describe an easement by prescription." *Id.* at 464. Because prescriptive easements are simply rights to use property obtained by virtue of adverse possession, cases analyzing adverse possession are applicable in the discussion of Iowa law surrounding the elements of establishing prescriptive easements. *See Johnson*, 637 N.W.2d at 178 ("We consider principles of adverse possession when determining whether an easement by prescription has been created."). However, "the concepts of adverse possession and easement by prescription are not one and the same." *Id.* It is important to note that Iowa Code section 564.1 requires proof of a hostile "claim of right" independent of use to establish a prescriptive easement, but not to establish title by virtue of true adverse possession. *See Larman v. State*, 552 N.W.2d 158, 162 (Iowa 1996).

> the easement expends substantial money or labor to promote the claimed use in reliance upon the consent or as consideration for the agreement.

Id.; *accord Brede*, 706 N.W.2d at 828. Thus, this "relaxed standard" is often justified as a matter of equity, premised on "the theory of a valid executed oral agreement or on the principle of estoppel." *Simonsen*, 154 N.W.2d at 733.

B. Iowa Case Law on Prescriptive Easements Under the Traditional Test.

Those cases in which the Iowa Supreme Court has applied traditional principles of adverse possession to analyze claims of prescriptive easements represent hornbook property law. Cases under the "traditional test" most commonly involve shared driveways or other disputed strips of land used for ingress and egress. Under this standard application of the prescriptive easement doctrine, courts have found the claim of right element to be fulfilled where there was some direct confrontation between the parties over the right to use the disputed land or where the claimant exhibited owner-like conduct evidencing that the claimant asserted a right to use the owner's land.

For instance, in *Phillips v. Griffin*, the Court rejected a claim by a homeowner that she had acquired a prescriptive easement over a portion of her neighbor's driveway where the parties had veered a foot or two onto the other's driveway, despite decades of shared use. 98 N.W.2d 822, 825–26 (1959). The Court held that the claimant had failed to present evidence other than her use of the neighbor's driveway, and that this failed to satisfy a "claim of right." Based on the uncontroverted testimony of the parties, the question of whether the plaintiff had a "right" to use the strip of land was an issue that "never came up" because the parties had always "assumed" the shared nature of the driveway. *Id.*

In *Schwenker v. Sagers*, the Court found that the claimants had acquired a prescriptive easement over a disputed strip of farmland that the claimant had used for keeping, feeding, and

watering livestock. 230 N.W.2d 525, 528 (Iowa 1975). The claimants had "treated the strip as if they had bought it" along with their own adjoining pasture and built a road gate so that the pasture and strip "became one common ground" they regularly used for twenty years. *Id.* The Court found that the true owner had express notice of the claim of right because decades prior to the lawsuit, the claimants had confronted the owner and asserted their right to use the contested strip of land for their cattle, refusing to cooperate when the owner threatened to put a gate across the strip to block their access to it. *Id.*

In *Mensch v. Netty*, the Court refused to grant any prescriptive rights in an expanded portion of a shared driveway that the claimant had occasionally used in addition to the expressly-recorded easement. 408 N.W.2d 383, 387 (Iowa 1987). The claim was denied because "there was no showing that plaintiff claimed the right to use these additional four feet as a matter of right or under any color of title." *Id.* The claimant's use of the expanded area outside the express easement had been at most permissive until denied by the owner. *Id.*

Larman v. State, 552 N.W.2d at 158 (Iowa 1996) and *Collins Trust v. Allamakee County Board of Supervisors*, 599 N.W.2d at 462 both involved claims of prescriptive easements by public entities. In *Larman*, the Court held that the State had not established a prescriptive easement for public recreational use over lake-frontage where the county's routine maintenance and improvements to the adjacent land was merely consistent with its express roadway easement and did not present a claim adverse to the rights of the true owners. 552 N.W.2d at 162. Had the county or State done something more, like "ke[pt] the shoreline clear of trees or vegetation" or "built docks or other facilities to aid access to the lake," the Court noted it might have demonstrated a claim of right. *Id.* Further, the State failed to prove the owners had express notice of the State's purported claim to the land because although the owners had knowledge of the

public's *use* of their lots to access the lakefront, they did not have express notice of the county's claim to the property as a matter of right. *Id.*

By contrast, in *Collins Trust* the Court found that the county had acquired a prescriptive easement in a private road maintained by a county entity where the county "annually maintained the road for several decades" and "installed and maintained a culvert in the curve of the road to promote drainage." 599 N.W.2d at 462, 464–65. Such improvements established hostility and claim of right because they evidenced "more than mere use, but was conduct which an owner of land would perform." *Id.* at 465. The Court also found that the owner had express notice of the county's claim of right: The owners were aware of the county's maintenance on the road, and "[t]he public expenditure of funds to maintain and repair the curve in the road over the years was known to [the owner] and were acts of such a nature to support the publics claim of ownership" because "public bodies have no authority, and are not frequently known, to devote public money to roads they do not own." *Id.*

In *Johnson v. Kaster*, the Court found the claimant had acquired a prescriptive easement over the owner's property where the claimant's mobile home extended over his property line into the owner's by several feet in a way that was open and visible to the owner. The claimant cleared and maintained the land, tore down a house, used and relocated a garage, and mowed the lawn. 637 N.W.2d at 178–79. For over thirty years the claimants and their predecessors in title had been the only ones to use or maintain the disputed land in "a type of possession which would characterize an owner's use," and long believed they owned it for this reason. *Id.* at 180. The Court found that the true owners had express notice of the claim of right because such owner-like maintenance of the disputed property was "open, visible, and sufficient to put a person of

ordinary prudence on notice of the fact the disputed property was held exclusively by [the claimants] or their predecessors in title." *Id.* at 181.

Finally, in *Brede v. Koop*, the Court denied an easement to use a neighbor's driveway claimed by prescription. 706 N.W.2d at 828. There, the claimants believed that they had purchased the right to use the driveway that crossed over the owner's land to access their house and had observed their predecessors in interest openly doing so. *Id.* at 827, 829. However, the Court found that "[a]lthough the [claimants] assert they always thought they had a *right* to use the driveway, as opposed to mere permission to use it, there is no evidence this claim of right was ever made known to [the true owners or their predecessors in title]." *Id.* at 829 (emphasis in original). The evidence showed that the use of the driveway by both the claimants and their predecessors in title had been very clearly permissive. *Id.* The claimant did not actually assert any right to the owner until the owner instructed the claimant to stop using the driveway at a time well within the prescriptive period. *Id.* Further, the claimant's expenditure of money and labor to maintain the driveway by adding gravel and rock to it was not evidence that established any claim of right, nor was it sufficient to place the true owner on inquiry notice of the claimant's purported claim of right to satisfy the express notice requirement, because such acts "simply ensured that the driveway would be passable and hence, useable." *Id.* (citing *Hicks v. Franklin Cty. Auditor*, 514 N.W.2d 431, 441 (Iowa 1994) (holding that, as a matter of law, the claimants' work filling in a ditch on the disputed land so they could farm it was not sufficient to establish a prescriptive easement because such acts were not independent of their use of the land)). The Court expressly distinguished its ruling in *Collins Trust*, noting that there it was the expenditure

of public funds on a private road that uniquely gave express notice of the county's claim of right. *Id.* at 829–30.[7]

C. The *Simonsen* "Relaxed Standard."

The "relaxed standard" by which some cases have analyzed the acquisition of prescriptive rights was first formally recognized by the Iowa Supreme Court in *Simonsen v. Todd*, 154 N.W.2d at 736. In *Simonsen*, the Court noted a pattern of Iowa cases applying a modified standard, relaxed from the traditional requirements, to claims of prescriptive easements where "original entry upon the lands of another is under an oral agreement or express consent of the servient owner and the party claiming the easement expends substantial money or labor to promote the claimed use in reliance upon the consent or as consideration for the agreement." 154 N.W.2d at 736 (citing cases). In *Simonsen*, however, the prescriptive easement was denied because there was no evidence of consideration to form a valid oral agreement and the claimant had spent no money or labor in reliance on the owner's original permission to use the contested roadway. *Id.* The claim failed under the traditional test, too, because evidence of the claimant's mere use of the roadway was insufficient to demonstrate a claim of right adverse to the interests of the owner. *Id.* at 737.

One case examined by the *Simonsen* Court as cognizant of this "relaxed standard" is *McKeon v. Brammer*. There, the Court granted the claimant's assertion of a prescriptive easement of an underground drainage ditch where evidence demonstrated a "gentlemen's agreement" between the claimant's predecessor in interest and the landowner nearly thirty years prior to the lawsuit to attach a drainage tile line on the claimant's land to one running through the

[7] The Court also rejected the claimants' argument that they that had acquired a prescriptive easement under the "relaxed standard" because there was no evidence that the claimants' maintenance of the driveway "was in consideration for an oral agreement with [the owner] or was detrimental conduct in reliance upon [the owner's] express consent." *Id.* at 830.

owner's property. 29 N.W.2d 515, 520 (Iowa 1947). The Court found that the claimant had laid the drain on his own land in reliance on the original owner's consent to attach it to the owner's own line use it to drain runoff from his property. *Id.*

In *Loughman v. Couchman*, the Iowa Supreme Court held that the claimants had acquired a prescriptive easement in a septic tank that carried sewage through the property of an adjacent landowner's farmland in a "4-inch tile to a surface outlet in an open field on the adjoining farm." 47 N.W.2d 152, 153 (Iowa 1951). The original owner of the farmland had "orally consented to the construction and use of the drain," and the claimants used this underground sewage line to drain waste from their property into an open outlet on the owner's farm for nearly thirty years. *Id.* When a new owner came to occupy the farmland, he objected and blocked the drain, causing sewer water to back up into the neighbor's basement. *Id.* The Court found that the claimants had constructed both the drain and their home on their land "doubtless in reliance upon their right to use the drain." *Id.* at 154. The Court also held that the originally permissive use done under the original owner became adverse when the new owner bought the land and the owner had notice of the claimants' right to use it because they had gone onto the owner's land for over thirty years to clean and maintain the outlet. *Id.*

In *Anderson v. Yearous*, the Court found the existence of a prescriptive easement where the parties' predecessors-in-title had constructed a drainage ditch in the 1940s to carry surface water from hills north of a neighbor's property along their property line with the adjoining landowner, channeling the water across the owner's property and into a river. 249 N.W.2d at 857. When the servient land changed hands, the new owner erected an "earthen levee" in 1963 along the boundary between the two properties specifically in order to stop the flow of water across their land; the levee resulted in flooding of the claimants' property and caused crop

damage. *Id.* The evidence before the Court demonstrated that the claimants' predecessors in interest spent money and labor digging the ditch across their property solely in reliance on the original servient landowner's consent to channel the surface water across the servient property into the river. *Id.* at 863.

D. *Churchill v. Burlington Water Co.*

The only Iowa case to discuss prescriptive rights in the context of industrial air emissions is *Churchill v. Burlington Water Co.*, 94 Iowa 89, 62 N.W. 646 (Iowa 1895). In facts strikingly similar to those of this case, the plaintiff-homeowner in *Churchill* sued an adjacent industrial facility for nuisance, alleging that the defendant was negligent in its operation and caused large quantities of smoke and soot to be emitted from the smokestacks of its plant and onto the plaintiff's property. 62 N.W. at 646. The homeowner alleged that the air emissions rendered the air on his property "impure and unwholesome," interfering with his "comfortable enjoyment of life and his property." *Id.* The homeowner submitted their arguments to the Iowa District Court:

> [D]efendant has operated water works near to and situate lower than plaintiff's dwelling; that defendant has burned and continues to burn soft coal and causes dense volumes of smoke and soot to be discharged into the air at the top of its chimney near plaintiff's dwelling, and, when the wind is in a certain direction, it is carried to and upon plaintiff's premises, deposited in and on his house, furniture, carpets, curtains, clothing, . . . and on the persons of plaintiff and his family to his inconvenience, annoyance and damage, and renders the air impure, unpleasant and unwholesome and interferes with the comfortable enjoyment of life and property to plaintiff's damage.

Pls.' Ex. A, at 2–4 (Abstract of Record, Amended Petition at Law, at 2–3).

The defendant industrial facility answered, denying liability and asserting that it had lawful authority to emit onto the plaintiff's property as the homeowner alleged. The industrial facility advanced two affirmative defenses. First, the company argued that it was authorized by city ordinance, consistent with legislative authority, to build and operate its plant as it had and

that such permission to operate necessarily "carried with it the right to exercise all such incidental powers as were requisite to the efficacious and beneficent exercise and enjoyment of the right granted," the burning of coal and emission of smoke and soot onto the plaintiff's property being necessary to its operation. The industrial facility argued that it had a right to emit based on its license granted by the city to operate:

> [U]nder the laws of Iowa and an ordinance of the city of Burlington, . . . [the defendant] built its works for the purpose of supplying the people of Burlington with water from the Mississippi river; . . . that said works were built and adapted to the use of soft coal in producing the necessary heat for the purpose, and . . . during all of said time the premises were occupied by him and his immediate grantors without objection and with knowledge that defendant claim said right to use soft coal on said premises so far as such use was necessary for its works, and to set free the residuum arising there-from which was necessary to keep the works in operation . . . .

Pls.' Ex. A, at 8–9 (Abstract of Record, Amended Answer at 7–8). Second, the company claimed it had acquired "a prescriptive right to discharge its smoke and soot as it did by over 10 years' adverse uses [sic]." *Id.* Concerning the residents' claims,

> so far as the plaintiff's premises have been invaded, the same has been done for more than ten years . . . and defendant has claimed said right and uninterruptedly enjoyed same with full knowledge and acquiescence of plaintiff and without objection for more than ten years . . . wherefore defendant has acquired a prescriptive right to same and plaintiff is estopped and has no right or cause of action.

Id.

The District Court rejected the industrial facility's affirmative defenses and entered judgment in favor of the homeowner. *See id.* at 37–40 (Abstract of Record, District Court Ruling at 36–39). On appeal, the Iowa Supreme Court affirmed. *Churchill*, 62 N.W.2d at 647. The Supreme Court held that the city's grant of authority to the company to operate its industrial plant for public benefit did not entirely immunize it from nuisance liability. *Id.* at 646–47. Though the plant's emissions could not constitute a *public* nuisance when done within the proper

limits of the publically-granted power, the Court reasoned that such pollution of neighboring land could nevertheless establish a *private* nuisance and "the legislative grant would be no protection." *Id.*

The Supreme Court next recognized that "the right to discharge soot and smoke upon the premises of another is an easement" that could be acquired by prescription and determined that the prescriptive right to emit soot and smoke onto the homeowner's land claimed by the company fell within the predecessor to Iowa Code section 564.1. *Id.* at 647. However, the Supreme Court affirmed the findings of the District Court that the company had failed to present sufficient evidence affirmatively establishing its claim of right to do so. First, the Court noted that the emissions of the industrial facility had "materially increased" in the years immediately preceding the date in which suit was brought. Thus, the company had not claimed the right to emit onto the resident's premises "in the same manner as fully as during the period complained of." *Id.* More fundamentally, the Court concluded that "the plaintiff had no express notice that defendant claimed a right to have said smoke and soot pass over his premises" to begin with. *Id.*[8] Even if the claimed easement was not one contemplated by the section 564.1 predecessor statute, the Court held the industrial facility failed to sustain its burden of proof because the evidence showed that the neighboring homeowner did not begin to sustain injury from the company's emissions until five years prior to the lawsuit, well within the prescriptive period. *Id.*

[8] In response to the defendant's claim of a prescriptive easement, the plaintiff also urged that "[t]he nuisance complained of is shown to be a public one and there can be no prescription." Pls.' Ex. A, at 9. However, the Supreme Court did not rule on this ground nor pontificate on the plaintiff's argument on this point.

III. Analysis.

A. Whether GPC's Claimed Prescriptive Easement is Void for a Lack of Definite Boundaries.

To begin, the Court will first examine whether the prescriptive rights sought by GPC are sufficiently circumscribed to fulfill the requirements of an easement under Iowa law. Plaintiffs argue that GPC cannot obtain a prescriptive easement to continue its industrial emissions onto Plaintiffs' property because GPC has not identified definite boundaries of the easement it claims it has acquired. Due to variations in emissions and wind patterns altering their path of travel through the air currents and onto Plaintiffs' properties, Plaintiffs assert that GPC's invasion of Plaintiffs land is too inconsistent and varying to precisely define the prescriptive easement GPC now claims. Such rights sought in Plaintiffs' land, Plaintiffs argue, are not known, definite, and certain. Plaintiffs concede that Iowa has only recognized the rule requiring definite boundaries under the "easement by acquiescence" theory. *See Mensch*, 408 N.W.2d at 387 (analyzing claims of easements y acquiescence under Iowa Code section 650.14). Plaintiffs contend, however, that courts across the country have recognized this principle in the context of prescriptive easements, and this Court should too.

The Court cannot agree that emissions variations bars GPC's prescriptive easement. Iowa law has long provided that definite boundaries are not necessarily required to establish an easement, even one acquired by prescription, unless needed to locate or identify the scope of the easement. The Iowa Supreme Court has recognized that even "[i]f an easement is not specifically defined, the rule is that the easement need only be such as is reasonably necessary and convenient for the purpose for which it was created. We think the same rule applies irrespective of the method by which the easement was created." *Flynn v. Michigan-Wisconsin Pipeline Co.*, 161 N.W.2d 56, 61 (Iowa 1968). This would include the creation of easements by prescription.

Indeed, this rule is consistent with the very nature of acquiring an easement by prescription. Analyzing claims of prescriptive easements and determining their scope necessarily depends on the nature of the use by the party claiming the prescriptive rights. *Mensch*, 408 N.W.2d at 287 (denying prescriptive easement where the claimant had not consistently used the disputed strip or asserted a right in that land); *see also Nat'l Props. Corp. v. Polk Cty.*, 386 N.W.2d 98, 105 (Iowa 1986) ("The extent of the easement is measured by the use under which it was acquired."); *Gilmore v. New Beck Levee Dist., Harrison Cty.*, 212 N.W.2d 477, 480 (Iowa 1973) ("The extent of a prescriptive easement is determined by the user under which it was acquired. Any greater or different use is unauthorized without acquisition of new rights.").

While GPC is not able to describe the specific air currents it employs to emit onto Plaintiffs' property, the Court understands GPC to be claiming the right to emit onto the entirety of Plaintiffs' residential real estate. Put another way, the boundaries of the prescriptive easement sought by GPC is the boundaries of the Plaintiffs' land itself. Even if not describable by metes and bounds, this is defined with reasonable certainty for purposes of the rights GPC seeks and the enjoyment of its use. *See Flynn*, 161 N.W.2d at 61 (noting the "general rule of law that such easements include such width as it reasonably necessary to the enjoyment of the easement"). Here, Plaintiffs claimed an invasion of and unreasonable interference with their property. GPC responded that they have acquired an easement by prescription over, in essence, the entire area that the Plaintiffs allege constitutes trespass and nuisance. Thus, the scope of the prescriptive easement claimed by GPC is the scope of the Plaintiffs' trespass and nuisance claims. For purposes of this lawsuit, the scope of the proposed easement is the entirety of the class area.[9]

[9] Plaintiffs are correct that in every prescriptive easement case decided since *Churchill*, the boundary of the easement sought has been defined. But also in every case the boundaries were defined by the scope necessary for the use and enjoyment of the easement in question. Even *Chuchill* implicitly recognized the application of this rule to the context of air pollution. *See Churchill*, 62 N.W. at 647 ("We think the right to discharge soot and smoke upon

This case is readily distinguishable from those extra-jurisdictional cases denying prescriptive rights where the claimant herded cattle over the owners' land in different, meandering paths and failed to "establish a right of way over a particular path by prescription, *Baxter v. Craney*, 16 P.3d 263, 270 (Idaho 2000), or where the claimant failed to advance "evidence demonstrating that a specific and defined path to drive trucks across the disputed land." *Custom Warehouse v. Lenertz*, 975 F. Supp. 1240, 1247 (E.D. Mo. 1997). In each of the above-mentioned cases, the claimant's failure to provide sufficient evidence of the claimant's use and enjoyment of the land made it difficult, if not impossible, to locate and identify the easement claimed. Such is not the case here. As explained above, GPC has no trouble pointing to the boundaries of its proposed prescriptive easement in the face of Plaintiffs' allegations.[10]

Moreover, the principle requiring that the scope of property rights claimed in the land of another be identifiable and ascertainable is applied differently in analyzing easements acquired by acquiescence versus those acquired by prescription. First, Iowa law imposes a statutory requirement of a "definite and certain" boundary line for the former, but not for the latter. Iowa

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the premises of another is an easement, and within the contemplation of [section 564.1]."); *cf. Drayton v. City of Lincoln City*, 260 P.3d 642, 646 n.5 (Or. Ct. App. 2011) ("We reject without discussion defendant's sixth assignment of error, in which they assert that the prescriptive easement [to deposit airborne dust] had no legal description and is incapable of limitation.").

[10] Specifically, this not a case where the nature of the claimant's enjoyment of the disputed property was so variable and unclear such that the invasion itself was problematic to define. *Cf. Stone v. Perkins*, 795 N.E.2d 583, 584 (Mass. Ct. App. 2003) (reversing the district court's finding of a prescriptive easement because the claimant could not identify the specific path he claimed to have obtained a right to walk over his neighbor's property); *Silverstein v. Byers*, 845 P.2d 839, 843 (N.M. Ct. App. 1992) (holding that "[w]hether the deviation [in use] breaks the continues use is a fact question" and "will depend on the topography and other particular facts and circumstances," and that, based on the nature of the canyon crossing, a substantial deviation of one-quarter mile did not defeat the claimant's prescriptive easement); *Horman v. Hutchison*, 817 S.W.2d 944, 949 (Mo. Ct. App. 1991) (holding that a prescriptive easement was not established by the claimant's predecessors in title because the record did not reflect that the long-used trail was in the same location as the disputed roadway claimed as an easement); *Vigeant v. Donel Realty Tr.*, 540 A.2d 1243, 1244–45 (N.H. 1988) (finding that the record did not supply sufficient evidence of whether the "line of use created by the [disputed] paved road" was the same line of use at the beginning the prescriptive period); *Bogner v. Villiger*, 796 N.E.2d 679, 685 (Ill. App. Ct. 2003) (finding the claimant had not fulfilled the "continuous use" requirement of a prescriptive easement because the current irrigation system route had been in existence for less than ten years and "the previous irrigation system used a totally separate and distinct path from the one at issue in this litigation").

Code § 650.14 ("If it is found that the *boundaries* and *corners* alleged to have been recognized and acquiesced in for ten years have been so recognized and acquiesced in, such recognized *boundaries* and *corners* shall be permanently established.") (emphasis added). Second, the nature of acquiring each type of easement is fundamentally different. By definition, easements by acquiescence are those boundaries that have been "mutually acquiesced." If there is no true boundary definitively marked, then the boundaries necessarily could not have been mutually acquiesced because there has been no meeting of the minds and that claimed easement fails for failing to fulfill that element of proof. *Mensch*, 408 N.W.2d at 386. By contrast, an easement by prescription occurs by the continual adverse use of property by the claimant and is defined by that claimant's use and enjoyment of that land. Only where the claimant's use is so sporadic or inconsistent, or the claimant cannot demonstrate he or she claimed a right to a particular use, does a prescriptive easement fail because such use cannot demonstrate that it was used continuously for the prescriptive period.[11]

In conclusion, the Court holds that the prescriptive easement sought by GPC is not void for a lack of definite boundaries. The scope of the rights GPC seeks is identifiable through the nature of GPC's historic use of the disputed property, namely, its air emissions through the air above and onto the surface of Plaintiffs' land.

[11] The purpose of the rule requiring boundaries of a prescriptive easement is to provide notice of the claimant's open and notorious use. *See Mensch*, 408 N.W.2d at 387; Rest. 3d Prop.: Servitudes § 2.17 cmt. h ("To meet the open-or-notorious requirement, a use must generally be substantial and reasonably definite so that the landowner should be aware that an adverse use is being made.") cmt. g reporter's note ("To serve the notice function, a use must ordinarily be reasonably definite. How definite the location of a particular use must be to meet the open or notorious requirement depends on the type of use and the nature of the servient estate."). As discussed above, this purpose is satisfied here—there is no problem identifying the easement GPC claims to have acquired by prescription because GPC has asserted the right to emit over all of the air and surface area of Plaintiffs' properties.

B. Whether Prescriptive Easements to Maintain a Nuisance By Discharge of Particulate Matter by Air Emissions are Void Under Iowa Public Policy.

Plaintiffs next urge that, consistent with case law of other jurisdictions and the Third Restatement of Property, GPC's claim of a prescriptive easement to emit particulate matter into the air and pollute neighboring properties is incompatible with Iowa public policy and void as a matter of law. *See* Rest. (Third) Prop.: Servitudes § 2.17 cmt. d (Am. Law Inst. 2000). Accordingly, Plaintiffs contend that GPC's prescriptive easement affirmative defense should be rejected outright. However, the Court declines Plaintiffs' invitation to craft public policy from the bench and categorically dismiss GPC's claim of a prescriptive easement. Plaintiffs point to no case law from other jurisdictions that have expressly adopted this comment to § 2.17 of the Third Restatement. Furthermore, even if this Court were to follow other states that have generally ruled along lines consistent with the principles advanced by the Third Restatement and agree that Iowa public policy is aligned with comment d of this section, Plaintiffs' argument is foreclosed by their own admissions because they pursue a *private* nuisance claim; adopting legal principles in § 2.17 comment d would only bar claims for prescriptive easements that create *public* nuisances. In any event, the express language of the Iowa Supreme Court's decision in *Churchill* contradicts Plaintiffs' position that such prescriptive rights to produce air emissions are against Iowa public policy.

1. Introduction.

As a general matter, the policy of prescriptive easements is to reward efficient use of real property and encourage utility in land usage:

> Prescription doctrine rewards the long-time user of property and penalizes the property owner who sleeps on his or her rights. In its positive aspect, the rationale for prescription is that it rewards the person who has made productive use of the land, it fulfills expectations fostered by long use, and it conforms titles to actual use of the property. The doctrine protects the expectations of purchasers and

> creditors who act on the basis of the apparent ownerships suggested by the actual uses of the land.
>
> In its negative aspect, prescription is supported by the rationale that underlies statutes of limitation. Barring claims after passage of time encourages assertion of claims when evidence is more likely to be available and brings closure to legal disputes.

Rest. (Third) Prop.: Servitudes § 2.17 cmt. c.

Plaintiffs point to comment d of this same section of the Third Restatement, noting that § 2.17 also promotes legal principles that bar the acquisition of prescriptive rights to pollute neighboring properties under certain circumstances:

> If the use is illegal or against public policy, the servitude is invalid under the principles stated in § 3.1. Servitudes for uses that create nuisances are particularly likely to violate public policy.

Id. cmt. d; *see also id.* § 3.1 ("A servitude created as provided in Chapter 2 [i.e. a prescriptive easement] is valid unless it is illegal or unconstitutional or violates public policy."). Plaintiffs point to one illustration in § 2.17, analogizing to the facts of common drainage cases and positing that GPC's emissions pose the exact type of harm to Plaintiffs as the true owners to their residential property:

> O, the owner of Blackacre, dumped effluent from a cannery into a stream that ran through Blackacre and then onto Whiteacre for more than 20 years without interruption and without consent of the owner of Whiteacre. The effluent made the water in the stream on Whiteacre unfit for household consumption or recreational purposes, and caused extensive damage to fish. The prescriptive period is 15 years. Although O's use met the requirements of this section to create a servitude by prescription, these facts would justify the conclusion that the servitude is invalid as against public policy under the rule stated in § 3.1.

Rest. (Third) Prop.: Servitudes § 2.17 cmt. d, illus. 7.[12] Consistent with the legal principles advocated by the Third Restatement, Plaintiffs argue that the right to emit industrial byproduct

[12] The Reporter's Note to § 2.17 cmt. d provides that this Illustration is based on a private nuisance case decided by the Connecticut Supreme Court in the early 20th century. *See Lawton v. Herrick*, 83 Conn. 417, 76 A. 986 (1910).

onto neighboring property is not one that a party should be able to acquire by prescription in Iowa. Plaintiffs urge the Court to adopt the Third Restatement's approach to prescriptive rights and rule that Iowa law bars GPC from obtaining the prescriptive rights it seeks.

2. Legal principles of other states.

Some states have indeed ruled that industrial facilities that emit contaminants into the air and water cannot acquire a prescriptive easement where their emissions create a public nuisance. *See, e.g.*, *Morris v. Andros*, 815 N.E.2d 1147, 1154 (Ohio Ct. App. 2004) (rejecting the defendant's claimed easement by prescription to discharge septic waste onto adjacent property and holding such rights were "unobtainable as a matter of law" in Ohio where the discharge violated local environmental ordinances prohibiting septic discharge without a permit); *Hillman v. Town of Greenwhich*, 587 A.2d 99, 105 (Conn. 1991) (holding that "[t]he claim of such a [prescriptive] right in another's land is unnatural and unreasonable, and is not sanctioned by law" where water drainage onto neighboring property caused erosion and silt deposits); *Patrick v. Sharon Steel Corp.*, 549 F. Supp. 1259, 1266–67 (N.D. W. Va. 1982) ("The effect, then, of allowing [the steel company] a prescriptive easement over Plaintiffs' land would be to hold that because its emissions exceeded the State regulations to such a large degree, and the accompanying invasion of surrounding property was so complete, [the steel company] is now immune from civil liability resulting from its unlawful emissions. This Court believes that the West Virginia Supreme Court would recognize this result as being completely foreign to justice and contrary to all principles of fairness and common sense."); *Smejkal v. Empire Lite–Rock, Inc.*, 547 P.2d 1363, 1368 (Or. 1976) ("As a general rule, one cannot acquire a prescriptive right to maintain a public nuisance no matter how long it has continued. But an easement by prescription can be acquired for a private nuisance."); *Dolata v. Berthelet Fuel & Supply Co.*, 36

N.W.2d 97, 100 (Wis. 1949) (rejecting the defendant manufacturing company's prescriptive easement defense where the handling of coal by the defendant caused coal dust and soot to be blown onto the nearby residential homes because "[t]he defense of prescription does not lie, either to a public prosecution or a private action, to abate a common nuisance"). However, it is widely recognized that even where prescriptive rights may not be acquired when the emissions create a *public* nuisance, nothing prohibits the acquisition of a prescriptive easement to estop landowners from challenging emissions on the basis of *private* nuisance.

In *Smejkal v. Empire Lite-Rock, Inc.*, for instance, a neighboring landowner brought a civil action against operators of a nearby rock-processing plant for injuries the landowner alleged were caused by the air contaminants emanating from a nearby processing plant. 547 P.2d at 1364. The landowner argued that the emissions from the plant exceeded permissible emissions levels established by the state regulatory authority. *Id.* The processing plant conceded that its operations might constitute a public nuisance, but contended that it had obtained a prescriptive easement across the landowner's property to maintain its emissions insofar as it constituted a private nuisance. *Id.* at 1365. The Supreme Court of Oregon rejected the industrial polluter's argument, holding that "the strong public policy of this state requires a finding that no prescriptive right to pollute against a private landowner can be acquired if such pollution is also a public nuisance." *Id.* at 1368. The Court's reasoning was largely based on the principle that a statute of limitations cannot run against the public interest. *Id.* at 1366. The Court noted, however, that its case law provided that if the alleged nuisance affected only the plaintiff-landowner bringing suit in pursuit of a private nuisance claim, the limitations period inherent in the doctrine of adverse possession would still run against that owner's private claim. *Id.*

The Court is aware of only a few states, and Plaintiffs have not directed the Court to any others, that have cited directly to § 2.17 or § 3.1 of the Third Restatement for the proposition that a servitude will be upheld "unless it is illegal or unconstitutional or in violation of public policy." *See La Cholla Hills Homeowners' Ass'n v. Foard*, No. 2CA-CV 2007-0015, 2007 WL 5556994, at *2 (Ariz. Ct. App. Oct. 9, 2007) (citing the Third Restatement and holding that a restrictive covenant in a homeowner association's Covenants, Conditions and Restrictions policy is valid unless "illegal, unconstitutional, or in violation of public policy."). At least one other has declined to consider the issue as not properly preserved on appeal. *1515–1519 Lakeview Blvd. Condominium Ass'n v. Apt. Sales Corp.*, 43 P.3d 1233, 1238 (Wash. 2002) (en banc). The Court is unaware of any case that has explicitly adopted § 2.17 of the Third Restatement of Property: Servitudes concerning prescriptive easements for air pollution and emissions of particulate matter, let alone one that has applied this section against the party claiming prescriptive rights where the landowner has alleged only a *private* nuisance.

3. Iowa public policy and prescriptive easements for air emissions.

In this state, the Iowa Supreme Court has recognized and adopted principles of the Third Restatement of Property in past cases involving contracts and written agreements. *See Dutrac Cmty. Credit Union v. Radiology Grp. Real Estate, L.C.*, 891 N.W.2d 210, 218 (Iowa 2017) (favorably citing the Restatement (Third) of Property: Servitudes § 7.10(1) to analyze petitions to modify to terminate restrictive covenants); *Gray v. Osborn*, 739 N.W.2d 855, 861 (Iowa 2007) (relying on the Restatement (Third) Property: Servitudes § 2.2 cmt. d for the proposition that "[i]n determining the existence of an easement, the intention of the parties is of paramount importance"). To an extent, the Court has also looked to the Third Restatement of Property to analyze easement law in Iowa. *See Nichols v. City of Evansdale*, 687 N.W.2d 562, 568 (Iowa

2004) (considering without deciding to formally adopt the exception of underground utilities from the apparent prior use requirement in an easement by necessity under the Restatement (Third) of Property: Servitudes § 2.12); *Skow v. Goforth*, 618 N.W.2d 275, 279–80 (Iowa 2000) (applying the rationale of the Restatement (Third) of Property: Servitudes § 4.9 cmt. c for a policy of productive land use and ability of servient landowners to improve their land).[13] In each case where the Supreme Court has done so, however, there has been clearly-defined Iowa law consistent with the proposition advanced by that section of the Third Restatement at issue.

Regarding adverse possession, Iowa law has long allowed dominant landowners to acquire prescriptive rights over watercourses and drainage rights. *E.g. Anderson*, 249 N.W.2d at 862; *Gilmore*, 212 N.W.2d at 479 ("It is well established a drainage easement may be acquired by prescription."); *see also Maisel v. Gelhaus*, 416 N.W.2d 81, 87 (Iowa Ct. App. 1987). However, Illustration 7 of § 2.17 is not necessarily inconsistent with Iowa law. Unlike the average drainage case, this illustration posits that the invasion by the runoff was so damaging to the servient landowner as to render the water of the stream "unfit for household consumption or recreational purposes." Rest. (Third) Prop.: Servitudes § 2.17 cmt. c, illus. 7. Thus, it might be said that the policy inherent in this provision of the Third Restatement is compatible with underlying Iowa environmental policy governing standards for industrial emissions to regulate the public health. *See generally* Iowa Code §§ 455B.133 (2018) (imposing duties on the Iowa Department of Natural Resources to "develop comprehensive plans and programs for the

[13] The Iowa Court of Appeals has likewise relied on the Restatement (Third) of Property: Servitudes only in a handful of cases. *See West Lakes Props., L.C. v. Greenspon Prop. Mgmt., Inc.*, No. 16-1463, 2017 WL 4317297, at *2 & n.1 (Iowa Ct. App. Sept. 27, 2017) (favorably citing Restatement (Third) of Property: Servitudes §§ 1.1, 3.4 cmt. b); *Franklin v. Johnston*, No. 15-2047, 2017 WL 1086205, at *6–7 (Iowa Ct. App. Mar. 22, 2017) (citing with approval the Restatement (Third) of Property: Servitudes § 3.4); *JP Morgan Chase Bank v. Nichols*, No. 12-0301, 2013 WL 85779, at *2–3 (Iowa Ct. App. Jan. 9, 2013) (citing with authority Restatement (Third) Property: Servitudes §§ 2.15 cmt. e; 4.3(1)); *but see Gibson v. Hatfield*, No. 09-1918, 2010 WL 5394445, at *7–8 (Iowa Ct. App. Dec. 22, 2010) (declining to adopt the Restatement (Third) of Property: Servitudes § 2.12, noting it would not compel a different result than under the current framework of Iowa law regarding implied easements).

abatement, control, and prevention of air pollution in this state"), 455B.173 (imposing duties on the Iowa Department of Natural Resources to "develop comprehensive plans and programs for the prevention, control and abatement of water pollution"); Iowa Admin. Code r. 567-23.1, 567-23.3 (imposing standards for the industrial emission of particulate matter). This conclusion tends to support the notion that those emissions that constitute a *public* nuisance may be void as a matter of public policy by virtue of violating Iowa environmental law.

However, it is not clear that Iowa law, as it currently stands, supports adopting § 2.17 cmt. d—at least not as it applies in this case. The Iowa Supreme Court's decision in *Churchill* outright acknowledged that "the right to discharge soot and smoke upon the premises of another is an easement, and within the contemplation of the statute." *Churchill*, 62 N.W.2d at 647. This principle was implicitly affirmed over a century later, though in a case unrelated to industrial air emissions. *Borman v. Bd. of Supervisors in & for Kossuth Cty*, 584 N.W.2d 309, 315–16 (Iowa 1998) ("*Churchill*'s holding that the right to maintain a nuisance is an easement and its definition of an easement are consistent with the Restatement of Property."). At the very least, *Churchill* and *Borman* support the notion that the acquisition of prescriptive rights by an industrial polluter to emit particulate matter into the air, creating a *private* nuisance, is not itself contrary to Iowa public policy. *See Riter v. Keokuk Electro-Metals Co.*, 82 N.W.2d 151, 158 (Iowa 1957) ("Many authorities point out that the right of a person to pure air may be surrendered in part by his election to live in a city where the atmosphere is impregnated with smoke, soot and other impurities."). The scant yet controlling Iowa law on this subject is therefore contrary to Plaintiffs' position.[14]

[14] The role of this Court is to defer to existing legal principals. *See Healy v. Carr*, 449 N.W.2d 883, 883 (Iowa Ct. App. 1989) (noting the Supreme Court's admonition in *State v. Eichler*, 83 N.W.2d 576, 578 (Iowa 1957) that "[i]f our previous holdings are to be overruled, we [the Supreme Court] should ordinarily prefer to do it ourselves"). Indeed, as GPC points out, prescriptive rights are inherently a nuisance and trespass upon the property rights of the

But even if this Court were to adopt the Third Restatement and agree that public policy precludes an industrial facility from acquiring prescriptive rights to create a public nuisance by emitting particulate matter onto neighboring properties, Plaintiffs have limited their action to *private* nuisance and waived any public nuisance cause of action. Plaintiffs expressly disclaimed any individualized issues that would be necessary to establish special damages in a suit for public nuisance. In their effort to achieve class certification, Plaintiffs avowed to the Iowa Supreme Court that "Plaintiffs' claims could not be more clearly 'private' in character under Iowa law." GPC's SUF ¶ 7, App. 65–69 (Appellants' Reply Br. at 26, *Freeman v. Grain Processing Corp*, 895 N.W.2d 105 (Iowa 2017), 2013 WL 8743219); *see also id.* ¶ 1. In order for Plaintiffs to prove that public policy bars GPC from acquiring prescriptive rights under the principles of the Third Restatement, Plaintiffs would have to demonstrate that GPC's emissions also constituted a *public* nuisance where Plaintiffs have alleged only a private one. This they cannot do. Plaintiffs' representations to the Iowa Supreme Court regarding the nature of their claims has become "the law of the case." *State v. Ragland*, 812 N.W.2d 654, 658 (Iowa 2012). Thus, the Court cannot agree that a prescriptive easement to discharge industrial air emissions violates Iowa public policy and is void as a matter of law.

C. Whether GPC Acted Under a "Claim of Right" to Emit Particulate Matter and Pollute Plaintiffs' Property.

With these preliminary questions disposed of, the Court will move on to address the fighting issue in this case: Whether GPC has acquired an easement by prescription over Plaintiffs' land through the company's history of "open and notorious" discharge of industrial air emissions and accompanying conduct during its decades of operation in the Muscatine

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true owner. *See Easement*, Black's Law Dictionary (10th ed. 2014) ("the primary recognized easements are . . . (6) a right to do some act that would otherwise amount to a nuisance.").

community. The parties agree that Plaintiffs conceded the open and notorious elements of a prescriptive easement in this case's most recent trip to the Iowa Supreme Court. The parties also agree that GPC has operated its facility continuously in an adverse nature to Plaintiffs' interests for the prescriptive period. The only issue that remains is whether or not GPC has demonstrated that it acted under a claim of right, and whether the Plaintiff *Freeman* Class had express notice of such claim of right. After a careful review the record and a hard look at the current state of Iowa property law on prescriptive easements, the Court concludes that GPC has not met its burden of proof. Even in a light most favorable to GPC, there is insufficient evidence from which a reasonable jury could conclude that GPC ever asserted a *right* to emit particulate matter onto Plaintiffs' land. Nor was GPC's conduct accompanying its emissions of such a character as to place Plaintiffs on "express notice" of any interest claimed in their residential properties.

1. Introduction: judicial estoppel and the law of the case.

The present controversy boils down to a fundamental disagreement between GPC and the Plaintiff *Freeman* Class about what Iowa case law requires in order to fulfill the claim of right element of a prescriptive easement in the context of industrial air pollution. Iowa law has never expressly provided an answer to this issue, with only one case addressing the subject over 120 years ago. *See Churchill v. Burlington Water Co.*, 94 Iowa 89, 62 N.W. 646 (Iowa 1895).

GPC answers this question by asserting that its "open and notorious" emissions were known to the Plaintiffs and its continued operation evidences that the company operated under a claim of right. According to GPC, the company's hostile use of the Plaintiff's land and its accompanying conduct was, first, open and visible to the Plaintiff *Freeman* Class and, second, of a character that demonstrated GPC believed itself to operating under a claim of right. In essence, GPC insists that a "claim of right" is an internal belief held by the party claiming the prescriptive

easement, and the "express notice" requirement merely requires external conduct of such a character that conveys that internal belief. By contrast, Plaintiffs assert that Iowa Code section 564.1 demands that GPC's "claim of right" itself must be expressly noticed to the true landowner, proven by evidence independent of and distinct from GPC's emissions. Plaintiffs insist that GPC must show Plaintiffs had express notice not only of GPC's emissions, but that GPC claimed an interest in Plaintiffs' land and a right to emit onto their properties.

GPC bases its Motion for Summary Judgment on Plaintiffs' admissions in *Freeman II* that GPC's air emissions were "open and notorious and horrific." GPC SUF ¶¶ 4–6, App. 67–68; *Freeman II*, 895 N.W.2d at 121, 129. This concession has indeed become "the law of the case." *Ragland*, 812 N.W.2d at 658 ("The law of the case doctrine represents the practice of courts to refuse to reconsider what has once been decided." (internal quotations omitted)); *see also Winnebago Indus., Inc. v. Haverly*, 727 N.W.2d 567, 573 (Iowa 2006) ("[T]he doctrine [of judicial estoppel] prohibits a party who has successfully and unequivocally asserted a position in one proceeding from asserting an inconsistent position in a subsequent proceeding." (quoting *Wilson v. Liberty Mut. Grp.*, 666 N.W.2d 163, 166 (Iowa 2003))). Because Plaintiffs conceded that GPC's emissions onto Plaintiffs' properties were open and notorious, GPC argues that Plaintiffs are estopped from denying that GPC claimed a right to do so and that Plaintiffs knew about this invasion of their property rights. In other words, GPC claims that Plaintiffs' concessions that all *Freeman* class members knew about an "open and notorious and horrific" air emissions decides this case against them as a matter of law because it establishes GPC's claim of right was also "open and notorious." GPC also contends that the company's continued emissions over objections in the community demonstrates GPC's claim of right and such "owner-like conduct" was sufficient to provide Plaintiffs with notice of its claim. Along these lines, GPC

asserts that its claim of right may be presumed from the hundreds of millions of dollars invested in its industrial plant and in the surrounding Muscatine community.

Plaintiffs agree they conceded GPC's pollution was "open and notorious." However, Plaintiffs contend this admission at most concedes GPC's *use* of Plaintiffs' properties was open and notorious. It does not, Plaintiffs argue, also concede that GPC's "claim of right" was open and notorious such that it provided express notice of any right GPC asserted to emit onto Plaintiffs' properties, as is required under section 564.1 of the Iowa Code. GPC's continued emissions, Plaintiffs contend, constitute "mere use"—insufficient, even inadmissible, to establish GPC's claim of right.

Plaintiffs further argue that GPC has presented no evidence that its improvements, accompanying conduct, or communications reflect any claim of right independent of its emissions. At the least, Plaintiffs contend this was not sufficient to place *Freeman* Class members on express notice of any asserted property right in their land. As to GPC's argument that the Court may presume the company's claim of right through its investments in improvements to its corn wet milling facility, assert that GPC must strictly prove its claim of right by independent and distinct evidence, not by presumption.

At issue is whether the evidence submitted to the Court is legally sufficient to establish that the Plaintiff *Freeman* Class had express notice of a right claimed by GPC to emit particulate matter onto their neighboring residential land. The Court will first address GPC's "claim of right." The Court will then discuss the express notice requirement.

2. Hostility and Claim of Right.

As laid out above, the concepts of hostility and claim of right are closely related. Iowa Courts have generally applied one of two standards when evaluating claims of prescriptive

easements. Traditionally, "a claim of right requires evidence showing an easement is claimed as a right," *Collins Trust*, 599 N.W.2d at 464, and "must be strictly proved." *Simonsen*, 154 N.W.2d at 736. Courts occasionally apply a lesser standard, relaxed from the traditional requirements, to estop an owner from denying the existence of the claimant's interest where the claimant has detrimentally relied on the owner's consent or permission to use the land. *See Loughman*, 47 N.W.2d at 153; *Anderson*, 249 N.W.2d at 857. The Court will examine GPC's claim of right under each of the prescriptive easement standards in turn.

a. The "traditional test."

"Hostility does not impute ill-will, but refers to declarations or acts revealing a claim of exclusive right to the land." *Collins Trust*, 499 N.W.2d at 464 (citing 3 Am.Jur.2d *Adverse Possession* § 50, at 143 (1986)). Compatible with the element of hostility, a claim of right is exactly what it says: that the party seeking to establish the prescriptive easement claimed the ability to use the owner's property as a matter of right, rather than the claimant's use being merely permissive in nature. *Id.* ("A claim of right requires evidence showing an easement is claimed as a right."); *Larman*, 552 N.W.2d at 162 (distinguishing *Hicks*, 514 N.W.2d at 441 (holding that evidence of the county's knowledge of the landowners' *use* of the county's drainage easement was not evidence independent of their use in the land to demonstrate a claim of right and satisfy section 564.1) from *Schwenker*, 230 N.W.2d at 528 (finding that the claimant had demonstrated a claim of right to use the disputed land because the claimant had informed the true owner's attorney that he "had a right to the use of the [land]")).

The Iowa Supreme Court has long held that for a party to obtain any sort of right in the property of another by adverse possession,

> there must be some claim of right or title or interest in or to the property by which the possessor, in good faith, supposes he has a right to the property, and under

> which he continues in possession, and which, when held openly for the requisite length of time, with the intention of holding against the true owner and all others and adversely, will ripen into a title.

Goulding v. Shonquist, 159 Iowa 647, 647, 141 N.W.2d 24, 25 (Iowa 1913). Indeed, contemporary commentators on Iowa property law agree that

> [i]n this state a claim of right, that is, an unequivocal claim to the property, which affords the ground for claimant taking and continuing to hold possession in his own right as against the whole world, is sufficient as a basis for the running of the statute of limitations. Thus, there are two distinct aspects of the claim of right requirement: (1) an assertion or manifestation of intent to claim exclusive ownership of the land, and (2) a good faith basis for making that assertion.

Erickson & Talcott, *supra*, § 11:6 (internal citations and quotations omitted). This principle applies with equal force to easements acquired by prescription.

First and foremost, GPC's argument that Plaintiffs' knowledge of GPC's emissions satisfies the proof required to show a claim of right flies in the face of the plain text of Iowa Code 564.1 firmly directing that evidence of use "shall not be admitted" to establish a claim of right. The evidence that GPC "claimed a right" in Plaintiffs properties by virtue of its continued emissions is not evidence that is sufficient to fulfill the requirements set out by Iowa Code section 564.1. *See Larman*, 552 N.W.2d at 162 ("The record also shows the [claimant]'s predecessors in title knew of the public's use of the property. This evidence is also insufficient because, again, it is not independent of the State's use of the land."); *Mensch*, 408 N.W.2d at 387 (denying the claimant's bid for a prescriptive easement because "[t]here is no showing that plaintiff claimed the right to use these additional four feet as a matter of right or under any color of title").

Along these same lines, GPC points to its continued emissions over objections from the Muscatine community, claiming this establishes proof of that the company operated under a claim of right. For instance, GPC cites testimony from one named *Freeman* class member that

odors from GPC were "horrible" in the 1950s. *See* GPC App. 70. This testimony never establishes that GPC ever claimed a right to create such emissions, however; as discussed above, such testimony merely describes the nature of GPC's emissions, or its use, of the Plaintiffs' properties. Regarding evidence of other "objections" that it ignored and continued to emit over, GPC has not confirmed that these objections actually came from *Freeman* class members themselves. *See* GPC App. 227. And even when from purported class members, nothing in the record indicates that these objections were aimed at any legal interest in Plaintiffs' property or that GPC responded that it had a right to continue emitting onto Plaintiffs' land. *Id.* at 227–28.

GPC also puts forth a small number of complaints made directly to GPC. *See* GPC Reply App. 68–75. For instance, in one complaint submitted on GPC's website sometime in 2010 an individual identified as Zoie Stafford (suspected to be Kimberlee Whitaker) commented:

> I WOULD LIKE YOU GUYS TO STOP POLLUTING!!! THE AIR IN MUSCATINE IS DISGUSTING BECAUSE OF YOU!!! CLEAN UP THE AIR AND CLEAN UP YOUR ACT!!

Later that month internal emails show that GPC personnel received a phone call from this same individual who "expressed her displeasure at the odor she attributes to GPC." Ms. Whitaker also submitted a complaint in her own name where she complained of the smell from GPC's facility and admonished GPC for having "no social responsibility at all for ruining the quality of life for this town." Finally, Ms. Whitaker accused GPC of acting like "the citizens of this town [] can just live with it."

In a similar vein, GPC advances deposition testimony from Muscatine residents and *Freeman* class members, arguing that statements made by these representative individuals demonstrate that the public perceived its business conduct to be owner-like and establishes that GPC operated under a claim of right. GPC Reply App. 52–53, 57, 63, 64. GPC points to

deponents who stated that they had not given GPC permission to emit and agreed, when asked, that GPC "seem[ed] to act like they have a right to emit" because no changes had been made to its emissions over the years. Accordingly, GPC contends that its continued emissions, in the face of these expressed sentiments, demonstrate that it was operating under claim of right because it acted as though it had a right to do so.

This testimony, however, merely describes complaints about GPC's emissions into the Muscatine area at large, not onto the Plaintiffs' property specifically. Moreover, this same testimony simply tends to show GPC was dismissive of the general complaints lodged by community members, not that GPC asserted a right in Plaintiffs' property. The specific complaints lodged with GPC similarly speak only to the company's air emissions in general and their effect on the entire community; they do not address any invasion of Plaintiffs' property rights or even their land specifically. In short, neither the testimony nor specific complaints address the ability to emit soot, smoke, or particulate matter onto Plaintiffs' private property through air emissions as a matter of right.

Nor do GPC's responses themselves indicate an assertion of the ability to do so as of right. Rather, GPC's responses to all of the complaints lodged by Ms. Whitaker in 2010 were those of a good corporate neighbor: accommodating and cooperative. For example, GPC's proposed response to one online comment is notably lacking any assertion of a property right, let alone one to emit particulate matter specifically onto Plaintiffs' properties:

> Dear Ms. Stafford,
>
> We received your email from the GPC website. The quality of air in Muscatine is also important to us. We are in the first year of a multi-year upgrade to our facility that will improve the air quality substantially in Muscatine. Since you were not specific on your concerns, it is difficult for us to address them directly. However, GPC wants everyone in Muscatine to have a good air quality and we are doing our part to make it happen.

Thank you for voicing your concerns,

Janet Sichterman, Grain Processing Corporation

GPC Reply App. 70. In fact, GPC officials discussing the company's response suggested emphasizing "that [GPC] is doing something, without being specific, to address her concerns." *Id.* GPC's response to Ms. Whitaker's own online complaint was the same, suggesting that GPC's official position should be to inform her that "[w]e believe your specific concerns will be addressed with this upgrade." GPC Reply App. 68. And GPC's proposed reply to "Ms. Stafford's" phone complaint that same month was merely to "t[ell] here [sic] we are in the process of making improvements." Though well within ten years of the initiation of Plaintiffs' lawsuit, such representative evidence of GPC's responses even to *direct* complaints about its emissions is a far cry from asserting any property right.

In fact, a look into GPC's representations to the community and inner dialogue within the company exposes a different picture of GPC's "claim of right" altogether. Many internal communications between GPC officials suggest the opposite of a right—that GPC instead found its air emissions and their effects on its neighbors to be "completely unacceptable." Pls.' SAF ¶ 24, App. 92. The sentiment reflected in these private communications certainly does not resemble a company that believed it had a property right in its neighbors' land. In fact, it was GPC's stated goal to reduce the effect of its emissions and "[a]chieve highly visible reduction in haze and odor in Muscatine and surrounding communities." Pls.' SAF ¶ 19, App. 92.

GPC's public declarations also tell a different story of the company's air emissions. At the very least, they suggest GPC officials regretted the company's emissions rather than asserted the right to emit onto its neighbors' land; at most, they outright acknowledge lacking any right to pollute their community. *See* Pls.' SAF ¶ 25, App. 118 (assuring the public that "the smoke, odor

and haze issues that have concerned the Muscatine community will be nearly eliminated"); *Id.* ¶¶ 27–28, App. 129 (declaring that "[i]n 2015, the smell will be gone, the haze will be gone . . . We're saying it clearly" and informing a public town hall in Muscatine that "[w]e [GPC] are doing our part," adding that "I wish we could change the past"), 131–35 (reporting that improvements to GPC's facility would enable it to reduce emissions by 72 percent). Specifically identifying the effect its emissions have on the Plaintiff *Freeman* Class, GPC even informed the IDNR that it was "very concerned about these emissions and the impact on the adjacent neighborhood" and that it was "making the necessary changes to have a minimal impact on the surrounding neighborhood as well as the community." Pls.' SAF ¶ 30, App. 136–37, 141. As explained above, GPC's responses to local complaints similarly demonstrates more of a deflection of guilt, not an assertion of a right. *See, e.g.*, GPC Reply App 70 (suggesting that GPC respond to complaints "with a few sentences addressing their issue in some neutral way" and "say that we are doing something, without being specific, to address her concerns"; ultimately informing the complainant that "GPC wants everyone in Muscatine to have a good air quality and we are doing our part to make it happen").

In contrast to the facts in the undisputed record of this case, Iowa courts have generally concluded that claimants acquire prescriptive rights not only where the claimant continued the adverse use over objection by the owner, but where there was evidence of an explicit assertion of the claimant's right to do so and an express objection to that right specifically by the true owner. In *Ferrari v. Meeks*, for instance, trial testimony described "quite a controversy concerning this [disputed] road" between the parties concerning the claimant's right to use it. 181 N.W.2d 201, 204 (Iowa 1970). Similarly, in *Schwenker*, the claimants informed the landowner's attorney that they had the right to use the disputed strip of land in response to a letter from the attorney

threatening to bar their access to it. 230 N.W.2d at 528.[15] But where the right "never came up," there could be no claim of right under section 564.1 because no right was ever actually claimed. *Phillips*, 98 N.W.2d at 825–26.

Indeed, long ago the Iowa Supreme Court recognized the principle that a "claim of right" meant just that—the party asserting title or use by prescription must have *claimed* a *right* to an interest in the disputed land in question. Placed in epistemological terms, the Court philosophized on the nature of a "claim of right" and the adverse possession doctrine in Iowa:

> The term *belief* implies an assent of the mind to the alleged fact, and is not supported by knowledge. One may believe a proposition without making it known, or without possessing any knowledge upon the subject. It is, or may be, a passive condition of the mind, prompting in neither action nor declaration. The term *claim* implies an active assertion of right—the demand for its recognition. This assertion and demand need not be made in words; the party may speak by his acts in their support, as by the payment of taxes, erection of improvements, etc. One may *believe* that he has a right to land without asserting or demanding it. . . . [T]he intention, the *quo animo* of the possessor, must be shown. This cannot be done by mere proof of possession: it must be shown to exist under certain conditions, to be qualified by the existence of a claim of right; for the adjective characteristics of a thing cannot be shown by proof of the mere existence of the thing itself.

Grube v. Wells, 34 Iowa 148, 151 (Iowa 1871) (emphasis in original). In other words, to argue that a claim of right is established by the claimant's use or possession of the disputed land itself represents "a very narrow circle" of reasoning—under that argument, "[t]he lawful possession is proved by the claim of right, which, in turn, is established by the possession." *Id.* To hold

[15] Unreported cases by the Iowa Court of Appeals are a mixed bag—several decisions clearly support the analysis of this Court and are analogs to cases decided by the Supreme Court. *See, e.g.*, *Wescott v. Malli*, 2014 WL 955171 (Iowa Ct. App. Mar. 12, 2014); *Elliot v. Jasper*, No. 10-0949, 2011 WL 649677 (Iowa Ct. App. Feb. 23, 2011); *Croell Redi-Mix, Inc. v. Baltes*, No. 08-0379, 2009 WL 778760 (Iowa Ct. App. Mar. 26, 2009); *Simon v. Dubuque Cty. Bd. of Supervisors*, No. 07-0020, 2007 WL 2376736 (Iowa Ct. App. 2007). While some other decisions might suggest the opposite result, these cases often fail to even cite Iowa Code section 564.1, let alone engage in a complete analysis of the statute's requirements and Supreme Court case law interpreting it. *See, e.g.*, *Roudybush v. Lewis*, No. 13-1168, 2014 WL 2600372 (Iowa Ct. App. June 11, 2014); *Ravenwood, L.L.C. v. Kevin Koethe, 8450/10, L.L.C.*, No. 10-1828, 2011 WL 5387337 (Iowa Ct. App. Nov. 9, 2011); *Townsend v. Nickell*, No. 08-1058, 2009 WL 928697 (Iowa Ct. App. Apr. 8, 2009).

otherwise would allow a party to assume a claim of right rather than strictly prove it as required by Iowa law.

The culmination of Iowa case law on prescriptive easements instructs that a party claiming a prescriptive easement over the lands of a neighbor must have actually asserted that right by word or deed. From the late nineteenth century to present times, the common thread throughout Iowa Supreme Court jurisprudence is that there must be evidence showing that an easement by prescription is actually outwardly asserted as matter of right. *Compare Brede*, 706 N.W.2d at 829 (finding that the claimant failed to present evidence of their claim of right because "[a]lthough the Koops assert they always thought they had a *right* to use the driveway, as opposed to mere permission to use it, there is no evidence this claim of right was ever made known to Fink or the Bredes prior to [the initiation of the lawsuit]) *and Phillips*, 98 N.W.2d at 825–26 (rejecting a homeowner's claimed prescriptive easement where the claimant had never asserted a right to use the disputed property because the issue of whether the homeowner had such a right was an question that "never came up") *with Schwenker*, 230 N.W.2d at 528 (finding a claim of right where claimants had "treated the strip as if they had bought it" along with their own adjoining pasture and had confronted the true owner's neighbor asserting their right to use the contested strip of land for their cattle). *See also Johnson*, 637 N.W.2d at 178–79 (finding a prescriptive easement where the claimant cleared and maintained the land, tore down a house, used and relocated a garage, and mowed the lawn); *Collins Trust*, 599 N.W.2d at 464 (finding the existence of a claim of right under the unique circumstances of using county money to maintain a roadway because "the public expenditure of funds to maintain and repair the curve in the road over the years was known to Collins Trust and were acts of such a nature to support the public's claim of ownership"); *Ferrari*, 181 N.W.2d at 204–05 (finding substantial evidence that

the use was adverse and under claim of right due to "quite a controversy concerning [the disputed] road"). Indeed, under traditional prescriptive easement analysis, the Supreme Court has consistently required either an express declaration claiming a right to use disputed property of the true owner, *e.g. Schwenker*, 230 N.W.2d at 528; *Ferrari*, 181 N.W.2d at 204, or unequivocal owner-like conduct (independent of use) of such a character as to manifest the same assertion of a right. *E.g. Johnson*, 637 N.W.2d at 179–80; *Collins Trust*, 599 N.W.2d at 464–65.

GPC has evidenced neither. Based on the evidence reviewed above, whether GPC had the *right* to emit particulate matter on the Plaintiffs' land "never came up." *See Phillips*, 98 N.W.2d at 825–26. The representative evidence offered by GPC in this case therefore falls short of fulfilling the traditional standard. GPC presents no evidence that ever actually "claimed a right" to do so, nor that any objections—even those attributable to *Freeman* class members—were aimed at any such claim of right rather than the general pollution in the Muscatine community at large. To the contrary, the record shows that it is highly doubtful that GPC even operated *internally* on a claim of right, regarding its emissions as a problem to be fixed rather than a right to maintain. To be sure, GPC very well may have *believed* it had the right to discharge particulate matter onto Plaintiffs' land, though even on that proposition the evidence suggests otherwise; but such belief does not amount to an assertion of a *claim*. Even in a light most favorable to the company, GPC's proffered evidence contains no reference to the property right GPC claims, and even less indication that members of the *Freeman* Class took GPC to be asserting a challenge to their property rights.

For the same reasons, GPC's citation to a pair of letters exchanged late in 2008 between IDNR officials and GPC plant managers fails to establish a claim of right. The letters discuss an investigation into GPC's compliance with regulatory emission requirements apparently prompted

by an unspecified complaint about "various Air Quality issues, and a wastewater discharge into the Mississippi River." GPC App. 514–17. GPC's response was directed to IDNR personnel, not to Plaintiffs; it cannot be maintained that this letter to a state regulatory agency asserted any *private* right to emit onto nearby private neighbors' properties when the contents of the letters concerned reporting obligations and permit exceedances under IDNR regulations. But even to IDNR, GPC's response does not assert any right to the private property of its neighbors nor to continue emitting onto their land. *See* GPC App. 514–15 (addressing IDNR's concerns about coal boilers and opacity equipment and GPC's quarterly reporting obligations).[16]

GPC also points to the improvements it made to its facilities over the years and the millions of dollars it spent renovating its facilities between 2006 and 2011 as evidencing a claim of right. *See, e.g.*, GPC App. 229–31 (Review of GPC Capital Projects). Cases analyzing expenditures of money and labor in the drainage context support GPC's position that expenditures made to improve one's own land can support a claim of right to use the property of another. But just because evidence of such improvements *can* support a claim of right does not mean that they are necessarily *sufficient* to do so. Significantly, those cases have done so either in the context of the relaxed standard where the party has expended money or labor in reliance on the true owner's prior consent, *e.g. Anderson*, 249 N.W.2d at 863; *Loughman*, 47 N.W.2d at 154, or owner-like conduct over the disputed land itself. *See Johnson*, 637 N.W.2d at 178–79; *Collins Trust*, 599 N.W.2d at 464–65. However, improvements that merely facilitate adverse use are generally not sufficiently independent of the use itself to demonstrate a claim of right under section 564.1. In *Brede*, the claimants' maintenance of the disputed driveway was rejected as a

[16] In any event, these letters are dated 2008, within four years of the date Plaintiffs filed their lawsuit against GPC. As such, any "claim of right" originating from these letters would have been answered by the Plaintiffs' lawsuit before the prescriptive period expired.

claim of right because it "simply ensured that the driveway would be passable and hence, usable." 706 N.W.2d at 829; *see also Hicks*, 514 N.W.2d at 441 (concluding that filling a ditch on the disputed property merely facilitated the claimants' farming the land was not evidence of a claim of right independent of their adverse use and could not support a prescriptive easement as a matter of law). And in *Larman*, the county's routine maintenance and improvements to the adjacent land was merely consistent with its existing roadway easement and did not present a claim adverse to the rights of the true owners. In other words, the improvements in those cases did not constitute evidence of a claim of right independent of the claimants' use to support a prescriptive easement because it merely facilitated the use itself. Here, GPC's improvements similarly only facilitate its continued emissions—its use of Plaintiffs' land.

Finally, GPC points to its deeds from the federal government as granting it all the necessary rights required to operate its facility. *See* GPC Reply App. 13, 17. However, GPC's arguments on this point were considered and rejected in *Churchill*. *See Churchill*, 62 N.W. at 647 (rejecting the company's claimed prescriptive easement despite its investments and incidental authority to operate its facility under city charter because "[t]here was no requirement as to the character or manner of construction of defendant's chimney, or its location or height" and the company could not presume "from a mere grant of power to erect, maintain, and operate water-works, that either the legislature or city council intended to legalize the erection and maintenance of a nuisance").

It is true, as GPC asserts, that some states allow for a presumption of hostile use under a claim of right when another's property is used openly and continuously with the owner's knowledge. *See* Romualdo P. Eclavea et al., 28A C.J.S. *Easements*, § 43, at 243 & n.8 (March

2018).[17] However, Iowa case law is clear that to establish a prescriptive easement, "[t]he facts relied upon to establish a prescriptive easement 'must be strictly proved. They cannot be presumed.'" *Brede*, 706 N.W.2d at 828 (quoting *Simonsen*, 154 N.W.2d at 736)). And the right to operate, generally, does not constitute the right to maintain a toxic nuisance on the property of one's neighbor. *See Churchill*, 62 N.W. at 646–47.

Indeed, Iowa law imposes very particular requirements to "presume" a claim of right from a party's conduct attending their use of the land of another. The Court will next examine GPC's claim of a prescriptive easement under the "relaxed standard" below.

b. The *Simonsen* "relaxed standard" and "presuming" claim of right.

GPC argues that its claim of right can also be presumed in large part because it invested an estimated $500 million in improving its facility's infrastructure: GPC updated its dryers and steep tanks in the 1960s; its steep tanks again along with the boilers and a protein plant in the 1970s; more updates to dryers, evaporators, and settler units in the 1980s; and additional emission monitoring systems and dryers in the 1990s. *See* GPC Reply App. 66 (Zitzow Decl. ¶¶ 2–3). GPC claims that its decisions to invest in environmental improvements to its facility were carefully considered. These improvements throughout the decades, GPC asserts, were pursued in reliance of GPC's purported right to continue its air emissions of industrial byproduct. Without

[17] *See also, e.g.*, *Hoffman v. United Iron & Metal Co., Inc.*, 671 A.2d 55, 65–66 (Md. Ct. Spec. App. 1996) (holding that evidence of an industrial polluter's emissions onto the property of the neighboring landowners constituted sufficient proof of the industrial company's claim of right). Significantly, Maryland does not have a statutory equivalent to Iowa Code section 564.1 requiring that a claim of right be established by evidence independent of the adverse use itself. Other extra-jurisdictional cases relied on by GPC that address prescriptive rights in the air emissions context similarly do not appear to have a statutory or judicial equivalent to section 564.1. *See, e.g.*, *Masid v. First State Bank*, 329 N.W.2d 560, 563 (Neb. 1933); *Vill. of Fairview v. Franklin Maple Creek Pioneer Irrigation Co.*,79 P.2d 531,533 (Idaho 1938) ("Where one, however, has used a right of way for twenty years, unexplained, it is but fair to presume the user is under a claim of right, unless it appears to have been by permission." (internal quotations omitted)). As such, section 564.1 reflects a specific determination by the Iowa Legislature that claims of prescriptive rights in Iowa are more strictly construed and require more proof than the adverse use itself.

the right to emit industrial byproduct, GPC states it would have taken its business elsewhere where it would be allowed to emit, uninhibited. *See* GPC Reply App. 101–04.

Under Iowa law, a more relaxed version of the traditional test for prescriptive easements applies "only in those situations in which the party claiming the easement has expended substantial amounts of labor or money in reliance upon the servient owner's consent or his oral agreement to the use." *Simonsen*, 154 N.W.2d at 733–36. This relaxed standard is an exception to the rule that claim of right in a prescriptive easement must be strictly proved. *Brede*, 706 N.W.2d at 828. These rare instances are justified as a matter of equity; they are "determined either on the theory of a valid executed oral agreement or on the principle of estoppel." *Simonsen*, 154 N.W.2d at 733. Nearly every case applying this relaxed standard is a drainage case where the easement was based on affirmative consent of or specific agreement with the servient owner. *Id.* at 733–35; *see also* Erickson & Talcott, *supra*, § 10.5 & n.4.

Indeed, in every case applying the *Simonsen* relaxed standard to find that the claimant had acquired prescriptive rights to the property of the true owner, the reviewing court had been presented evidence of express consent or oral agreement between the parties—the claimant was able to point to a particular conversation he or she had with the owner, some instance where the owner agreed or acquiesced to the claimant's use of their land, or through the overt mutual conduct and discussions by the parties themselves. *See Anderson*, 240 N.W.2d at 863; *Loughman*, 47 N.W.2d at 153; *see also Maisel v. Gelhaus*, 416 N.W.2d 81, 87 (Iowa Ct. App. 1987) (finding a prescriptive right in the flow of the waterway separating the parties' properties because the neighbor and the servient landowner's predecessor-in-interest "had orally agreed that [the neighbor] could straighten out the ditch . . . so as to reclaim unusable farmland" and alter the course of the water flow; "[a]s a result of this agreement, [the neighbor] spent money and labor

in the construction of the ditch to avert part of the natural flow of water"). In no case reviewed by the Court has such consent or oral agreement been implied or presumed to the servient landowner. In fact, where evidence of any such consent or agreement was lacking, because it did not exist, Iowa courts have refused to apply the relaxed standard. *Simonsen*, 154 N.W.2d at 736 (declining to apply the relaxed rule because "[t]here was no showing of any consideration for any oral contract or any detrimental conduct in reliance on that consent"); *Brede*, 706 N.W.2d at 830 (declining to apply the relaxed requirements recognized in *Simonsen* because, even assuming the claimants expended substantial amounts of labor or money to maintain or improve their use of the disputed roadway, "there was no proof" that original entry onto the land was done under oral agreement or express consent by the servient owner). The Court sees no reason why the same standard applied to drainage ditches and shared driveways—requiring evidence of express consent or valid oral agreement—should not apply in the context of air emissions.

Here, the Court is not persuaded here that GPC invested in its facility based on some oral agreement with Plaintiffs or was detrimental conduct in reliance of Plaintiffs' express consent. Even if GPC's use of Plaintiffs' land could be characterized as "permissive"—a position that GPC's other arguments strongly contradict—"[p]ermissive use may ripen into a prescriptive easement, . . . 'only [where] the party claiming the easement has expended substantial amounts of labor or money in reliance upon the servient owner's consent or his oral agreement to the use.'"*Larman*, 552 N.W.2d at 161 (quoting *Simonsen*, 154 N.W.2d at 733). As in *Simonsen*, 154 N.W.2d at 736, and *Brede*, 706 N.W.2d at 830, GPC has presented no evidence of a validly executed oral agreement supported by consideration or expressly-given consent upon which the company's substantial sums of expenditures could be based.[18] Even considering GPC's evidence

[18] GPC's Senior Vice President of Operations did not attest that GPC invested in modernizing and improving its Muscatine plant because members of the *Freeman* Class had expressly given their consent for GPC to deposit

of projects to update and modernize its corn wet milling facility, GPC cannot be said to have done so "in reliance upon the servient owner's consent or his oral agreement to the use" precisely because there is no evidence of such consent or agreement.

GPC's claim of a prescriptive easement must therefore succeed or fail on the traditional requirements imposed by Iowa property law. Because the Court concludes that it satisfies neither, GPC has failed to advance evidence sufficient under Iowa law to prove it operated under a claim of right for the prescriptive period.

3. Express notice.

Express notice of the claimant's claim of right is especially important to fulfill the policy purpose of adverse possession:

> These requirements ensure the landowner knows another's use of the property is claimed as a right hostile to the landowner's interest in the land. Otherwise, the landowner may incorrectly assume the other's use results merely from the landowner's willingness to accommodate the other's desire or need to use the land.

Larman, 552 N.W.2d at 162. Notice of a party's claim of right "must be actual or 'from known facts of such nature as to impose a duty to make inquiry which would reveal the existence of an easement." *Johnson*, 637 N.W.2d at 180 (quoting *Collins Trust*, 599 N.W.2d at 465; *Anderson*, 249 N.W.2d at 861). Inquiry notice can satisfy the express notice requirement where the facts and circumstances surrounding the claimant's adverse use of the disputed property evidences owner-like conduct that would have imposed a duty to make such investigation as a reasonably diligent and prudent person would make under like circumstances. *See Id.* at 179–81; *Collins Trust*, 599 N.W.2d at 464–65. Crucially, however, the true owner must be put on notice of facts

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soot, smoke, and other particulate matter onto their properties and homes; nor does GPC's affiant refer to any validly-executed written or oral agreement with members of the Plaintiff *Freeman* Class upon which it based its investments and improvements. *See* GPC Reply App. 66, Zitzow Decl. ¶¶ 1, 5. Rather, GPC simply maintains that it had a "right to emit," emanating from the federal government. *Churchill* makes clear this does not provide the basis for a prescriptive easement as a complete bar to liability in a private nuisance claim. *See Churchill*, 62 N.W. at 647.

sufficient to alert him or her to the claimant's claim of right, not merely the claimant's use of the owner's property. *See* Erickson & Talcott, *supra*, § 10:4 n.17 ("Note that the owner must have notice of the claim of right not just of the land's use." (citing *Brede*, 706 N.W.2d at 828)); *Ferarri*, 181 N.W.2d at 204–05 ("[T]he party against whom claim is made must have express notice before 10 year[s] adverse possession; not alone of the use, but of the claim of right to use against objections and protest of [the] owner.").

GPC asserts that Plaintiffs' admissions before the Iowa Supreme Court that "the nuisance was open and notorious and horrific" and "these people knew about it when they moved in" precludes Plaintiffs from genuinely disputing that the *Freeman* Class was on notice of GPC's claim of right. But Plaintiffs' knowledge of GPC's emissions—that is, of GPC's *use* of Plaintiffs' properties—is far different from the *Freeman* class members' knowledge of GPC's purported claim of right. Indeed, in each case where the Court found the claimant had acquired a prescriptive easement, there had been some concrete basis upon which the claimant could show express notice of the claimant's claim of right, not merely notice of the adverse use of the land. For example, in addition to finding money and labor spent in reliance on the owner's consent, the *Loughman* Court found that the neighboring homeowner routinely entered the contested farmland to perform work to maintain the sewage drain that dumped onto the true owner's property. 47 N.W.2d at 155. In *Anderson* the owner's predecessors-in-interest had made explicit statements in and out of court noting the adverse nature of the drainage ditch through the property and his displeasure about it, even though he had given his express consent to its construction. 249 N.W.2d at 860–61. In *Schwenker*, the claimants actually confronted the true owner of the disputed land when they "advised [his attorney] they had a right to the use of the strip, specifically to the water, and refused to cooperate" with the owner's demands. 230 N.W.2d

at 528. The Court in *Collins Trust* found that the owners had actual knowledge of the county's maintenance of the disputed roadway and use of public funds to achieve this end was of such a character as to alert them to the right claimed by the county. 599 N.W.2d at 465. And in *Johnson* the claimant had for years routinely performed maintenance and repair work surrounding his intrusion onto the disputed land with full knowledge by the true owners, since the claimant was the only person for years to treat the property as his own. 637 N.W.2d at 180–81. But where claimants could show nothing more than open and notorious use of the disputed land itself, *Brede*, 706 N.W.2d at 828; *Larman*, 552 N.W.2d at 162, or the question of who had a right to use the disputed driveway "never came up" *Phillips*, 98 N.W.2d at 826; *Mensch*, 408 N.W.2d at 387, the Court has rejected the claimant's bid for prescriptive rights. Thus, in every case analyzing the express notice requirement outside the context of air emissions, section 564.1 required that both the party's claim of right and express notice of their claim be demonstrated by *something more* than simply the "open and notorious" property invasion itself. Because evidence of air emissions themselves were insufficient to place a neighboring homeowner on express notice of any claim of right by the adjacent industrial facility to support a prescriptive easement, *see Churchill*, 62 N.W. at 647, the Court similarly concludes that notice of GPC's air emissions is inadequate to place the *Freeman* Class on express notice of any right the company may have claimed.

But even if GPC's continued emissions could satisfy the evidentiary burden to prove a claim of right to continue emitting industrial byproduct onto Plaintiffs' properties, such use cannot be said to be of a character to place residential landowners of the *Freeman* Class on notice—actual or constructive—that such invasion was the result of one particular industrial facility that was asserting an actual property right in their land. First and foremost, the nature of this sort of airborne invasion of private property is not nearly as apparent or obvious as other

prescriptive easement cases, such as standing water flowing over a field or the repeated use of a private road. *Compare Johnson*, 637 N.W.2d at 180–81, *and Collins Trust*, 599 N.W.2d at 465, *with Brede*, 706 N.W.2d at 829–30; *Larman*, 552 N.W.2d at 161–62. Owners of residential property, ordinary citizens like the Plaintiff *Freeman* class members, have no feasible way to determine whether the particulate matter deposited on their property was deposited by the claimant—GPC—or another nearby industrial plant—such as Muscatine Power & Water.

For instance, GPC further points to an August 1996 letter from IDNR to a Mr. Etter concerning a complaint he lodged about "soot and fly ash" in his neighborhood, *see* GPC Reply App. 65, and an IDNR investigative report about a complaint lodged by a Paul Martin in May that same year. *See* GPC Reply App. 92–93. GPC argues that this exact type of inquiry that a reasonable person would have undertaken in response to the company's continued emissions after complaints like this one. The Court is doubtful. IDNR informed Mr. Etter that the source of the airborne matter was likely from his proximity to "several coal-fired boilers at the Grain Processing Corporation and the Muscatine Power and Water electrical generating station." *Id.* However, IDNR also informed Mr. Etter that both facilities were within their air quality emission limits. The same goes for Mr. Martin's complaint. The IDNR investigation revealed that neither facility was out of compliance with state regulatory requirements, air quality construction permits, or "Department rules." While each resident could pursue this matter individually, IDNR stated it would take no action on their behalf. But how can such a report be "of such [a] nature as to impose a duty to make inquiry which would reveal existence of an *easement*"? Such an inquiry would only tend to implicate GPC as a particular facility—as noted by the IDNR, the discharge of particulate matter could have been caused by the emissions of either industrial

company, GPC or Muscatine Power & Water. Such an inquiry would not have revealed any claim of *right* by GPC, only GPC's role in the alleged nuisance.

Moreover, what common person think to inquire as to whether a local business like GPC was claiming a property interest in his or her home, despite being told that the company was in compliance with applicable state environmental regulations? Notably, neither of these complaints were voiced to GPC but to a state agency; and significantly, GPC puts on no evidence that it ever responded in any way to assert that it had a right to discharge the complained-of deposit of soot and fly ash onto nearby homes, independent of its continued emissions. In fact, as discussed above, when certain class members *did* inquire directly to GPC they were met with a response that can hardly be said to assert any *right* to emit onto the Plaintiffs' land. *See* GPC Reply App. 67–75.

And where else could Plaintiffs have looked to discover GPC's purported claim of right? Nothing on their own record of title would show any *right* for GPC to emit onto their properties. Nor could GPC's internal deliberations or public statements provide Plaintiffs with "express notice" of any claim of right to emit onto their properties—even if it could be said that such statements indicate the belief of a right to continue emitting onto Plaintiffs' land, albeit in lesser amounts, and the refusal to cease doing so, these statements do not provide the basis of asserting a right to Plaintiffs property that is accessible to and understandable by the common person to constitute "express notice." Even viewed in a light most favorable to GPC, GPC's deliberations and declarations cannot be stretched so far as to provide the *Freeman* Class with express notice of any claim of right to their private property.

This dilemma is perhaps why the Iowa Legislature codified the requirement that a party's claim of right, and express notice of that claim, must be strictly proved independent of evidence

of the contested use itself. Unlike the driveway cases, *e.g. Johnson*, 637 N.W.2d at 178, *Collins Trust*, 599 N.W.2d at 465, or drainage cases, *e.g. Anderson*, 249 N.W.2d at 860, *Loughman*, 47 N.W.2d at 154–55, the common person would not think that their corporate neighbor across the street was asserting a *right* to their property by virtue of its operations and emissions into the air—that their personal property rights in their homes were at risk. Section 564.1, requiring express notice of a party's claim of right to an easement by prescription, reflects a policy determination by the Legislature to discourage the acquisition of prescriptive rights by providing formal notice to the true owner of the disputed property. *Cf. Brede*, 706 N.W.2d at 828; *Larman*, 552 N.W.2d at 162; *Phillips*, 98 N.W.2d at 826.[19]

GPC again points to its deeds from the U.S. government in 1950 and 1954 as evidence of express notice of its claim of right to the *Freeman* Class. GPC argues that every person is presumed to know the law and that the publically-accessible records in the county recording office showed throughout the decades that GPC possessed the necessary rights to continue its emissions pursuant to its government mandate. While every person may well be presumed to know the law, however, not every person is presumed to practice real estate law. To be sure, "[t]he purpose of the recording act is [only] to notify *subsequent purchasers* and incumbrancers of the rights [the recorded] instruments are intended to secure." *Freedom Fin. Bank v. Estate of Boesen*, 805 N.W.2d 802, 809 (Iowa 2011) (emphasis added). Recorded instruments are not intended to inform homeowners of the nature or quality of their neighbors' title. The common person cannot possibly be presumed to discover the existence of GPC's deeds, understand the cited language, and analyze the effect of a series of federal deeds from the 1950s to a nearby

[19] As explained in note 19, *supra*, compared to cases of other states without a statutory equivalent to section 564.1, *e.g.*, *Hoffman v. United Iron & Metal Co., Inc.*, 671 A.2d at 65–66, the character of a nuisance caused by air emissions does not face the same burden of proof as it does under Iowa law.

industrial facility—let alone determine how the words in that foreign deed might affect their property rights in their own homes. Moreover, even if the deeds from the federal government granted GPC the right to emit particulate matter into the air, and onto neighboring residential properties, this right *possessed* does not automatically equate to a right *expressly claimed* to the *Freeman* landowners. *See Churchill*, 62 N.W. at 646 (holding that even where authorized by city ordinance, the right granted and the company's emissions, in themselves, failed to provide express notice of the facility's claim of right).

GPC's improvements in its industrial facility also cannot be said to evidence owner-like conduct that is so "open, visible, and sufficient to put a person of ordinary prudence on notice of the fact the disputed property was held exclusively by [GPC] or [its] predecessors in title." *Cf. Johnson*, 637 N.W.2d at 181. As discussed above, evidence of improvements have typically been found to satisfy the *Simonsen* relaxed standard as proof of expenditures in reliance of consent or agreement. Such is not the case here. Here, again, the very issues confronting GPC's claim of a prescriptive easement to emit particulate matter onto Plaintiffs' properties have been considered and rejected by the Iowa Supreme Court in *Churchill*. *See Churchill*, 62 N.W.at 647.

In sum, the Court concludes that GPC has not presented enough evidence to satisfy its burden of proof to establish that Plaintiffs were put on express notice of any right claimed by GPC to emit soot, smoke, or particulate matter onto their properties.[20]

[20] GPC argues that a judgment in its favor does not leave Plaintiffs lacking remedy because it is still subject to regulatory actions by the EPA and IDNR. While residents have lost their ability to seek damages nearly seventy-five years after GPC began operating its plant, GPC submits, Muscatine community members have not been deprived of their ability to pursue environmental change through state or federal action. This argument, however, largely restates GPC's argument against state and federal preemption of Plaintiffs' claims that was expressly rejected by the Iowa Supreme Court in *Freeman I*. 848 N.W.2d at 84 ("[S]tate common law and nuisance actions have a different purpose than the regulatory regime established by the CAA. The purpose of state nuisance and common law actions is to protect the use and enjoyment of specific property, not to achieve a general regulatory purpose.").

RULING

In conclusion, the Court holds that the prescriptive easement sought by GPC is not void for a lack of definite boundaries. The scope of the rights GPC seeks is identifiable through the nature of GPC's historic use of the disputed property, namely, its air emissions through the air above and onto the surface of the Plaintiffs' land. Furthermore, the Court declines to rule that the prescriptive rights sought by GPC are void as a matter of public policy. Even if this Court were to follow the principles of § 2.17 comment d of the Third Restatement of Property: Servitudes, Plaintiffs' position is foreclosed by their own admissions and the express language of the Iowa Supreme Court's decision in *Churchill*.

However, the Court concludes that GPC has failed to sustain its burden of proof to demonstrate that it is entitled to summary judgment on its prescriptive easement defense. After a careful review of the record and a hard look at the current state of Iowa law on prescriptive easements, the Court concludes that GPC has not advanced sufficient evidence by which a jury could find at trial that it has acquired a prescriptive easement over the residential properties of the *Freeman* Class; thus, GPC's affirmative defense must fail. Even in light most favorable to the company, GPC has not demonstrated that the company claimed a right to emit onto the properties of the Plaintiff *Freeman* Class, or that such right was evidenced independent of is emissions onto the disputed properties as required by Iowa Code section 564.1. Even if such claim of right could be found in the record, GPC has not advanced adequate evidence that its conduct placed Plaintiffs on express notice of such claim of right within the meaning of Iowa case law. The Court believes that the doctrine of prescriptive easements must be applied no differently in the context of industrial air emissions and particulate matter discharge, and that application of these principles to GPC's emissions fails to satisfy its burden of proof as a matter

of law. Accordingly, Plaintiffs are entitled to judgment as a matter of law on GPC's prescriptive easement defense.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that Defendant, Grain Processing Corporation's Motion for Summary Judgment is DENIED and Plaintiffs, the *Freeman* Class's Cross-Motion for Partial Summary Judgment is GRANTED.

State of Iowa Courts

Type: OTHER ORDER

Case Number	**Case Title**
LACV021232	FREEMAN LAURIE ET AT VS GRAIN PROCESSING CORPORATION

So Ordered

John Telleen, District Court Judge,
Seventh Judicial District of Iowa