

2.5 State Water Rules

2.5.1 Basic Concepts

Two major rules have been developed by the courts regarding the disposition of surface waters. One is known as the civil law rule of natural drainage. The other is referred to as the common enemy doctrine. Modification of both rules has tended to bring them somewhat closer together, and in some cases the original rule has been replaced by a compromise rule known as the reasonable use rule.

Much of the law regarding stream waters is founded on a common law maxim that states "water runs and ought to run as it is by natural law accustomed to run." Thus, as a general rule, any interference with the flow of a natural watercourse to the injury or damage of another will result in liability. This interference may involve augmentation, obstruction and detention, or diversion of a stream. However, there are qualifications.

In common law, flood waters are treated as a "common enemy" of all people, lands and property attacked or threatened by them.

In ground water law, the "English Rule," which is analogous to the common enemy rule in surface water law, is based on the doctrine of absolute ownership of water beneath the property by the landowner.

2.5.2 Surface Waters

The civil law rule is based upon the perpetuation of natural drainage. The rule places a natural easement or servitude upon the lower land for the drainage of surface water in its natural course and the natural flow of the water cannot be obstructed by the servient owner to the detriment of the dominant owner. The owner of upper lands has an easement over lower lands for drainage of surface waters. These natural drainage conditions can be altered by an upper proprietor provided the water is not directed in such a manner or quantity to do more harm than formerly.

Under the common enemy doctrine, surface water is regarded as a common enemy which each property owner may fight off or control as they will or is able, either by retention, diversion, repulsion, or altered transmission. Thus, there is not cause of action even if some injury occurs causing damage. In most jurisdictions, this doctrine has been subject to a limitation that one must use their land so as not to unreasonably or unnecessarily damage the property of others.

Under the reasonable use rule, each property owner can legally make reasonable use of their land, even though the flow of surface waters is altered thereby and causes some harm to others. However, liability attaches when their harmful interference with the flow of surface water is "unreasonable." Whether a landowner's use is unreasonable is determined by a nuisance-type balancing test. The analysis involves several questions.

- Was there reasonable necessity for the actor to alter the drainage to make use of their land?
- Was the alteration done in a reasonable manner?
- Does the utility of the actor's conduct reasonably outweigh the gravity of harm to others?

2.5.3 Stream Waters

Where natural watercourses are unquestioned in fact and in permanence and stability, there is little difficulty in application of the reasonable use rule. Highways cross channels on bridges or culverts, usually with some constriction of the width of the channel and obstruction by substructure

within the channel; both cause backwater upstream and acceleration of flow downstream. The changes in regime must be so small as to be tolerable by adjoining owners, or there may be liability of any injuries or damages suffered.

Surface waters from highways are often discharged into the most convenient watercourse. The right is unquestioned if those waters were naturally tributary to the watercourse and unchallenged if the watercourse has adequate capacity. However, if all or part of the surface waters have been diverted from another watershed to a small watercourse, any lower owner may complain and recover for ensuing damage.

2.5.4 Flood Waters

Considering flood waters as a common enemy permits all affected landowners including owners of highways, to act in any reasonable way to protect themselves and their property from the common enemy. They may obstruct its flow from entering their land, backing or diverting water onto lands of another without penalty, by gravity or pumping, by diverting dikes or ditches, or by any other reasonable means.

Again, the test of "reasonableness" has frequently been applied, and liability can result where unnecessary damage is caused. Ordinarily, the highway designer should make provision for overflow in areas where it is foreseeable that it will occur. There is a definite risk of liability if such waters are impounded on an upper owner or, worse yet, are diverted into an area where they would not otherwise have gone. Merely to label waters as "flood waters" does not mean that they can be disregarded.

The "English Rule" has been modified by the "Reasonable Use Rule" which states in essence that each landowner is restricted to a reasonable exercise of their own right and a reasonable use of their property in view of the similar right of their neighbors.

The key word is "reasonable." While this may be interpreted somewhat differently from case to case, it can generally be taken to mean that a landowner can utilize subsurface water on their property for the benefit of agriculture, manufacturing, irrigation, etc. pursuant to the reasonable development of their property although such action may interfere with the underground waters of neighboring proprietors. However, it does generally preclude the withdrawal of underground waters for distribution or sale for uses not connected with any beneficial ownership or enjoyment of the land from whence they were taken.

A further interpretation of "reasonable" in relation to highway construction would view the excavation of a deep "cut section" that intercepts or diverts underground water to the detriment of adjacent property owners as unreasonable. There are also cases where highway construction has permitted the introduction of surface contamination into subsurface waters and thus incurred liability for resulting damages.