Reasonable Use Rule in Surface Water Law, The

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Comments

The Reasonable Use Rule in Surface Water Law

I. INTRODUCTION

"Surface water" is a term used to describe water that occurs "on the surface of the earth in places other than definite streams or lakes or ponds." The primary sources of surface water are falling rain and melting snow, but it may originate from any source. Disputes involving surface waters are most likely to occur between adjoining landowners where one parcel of land is on a higher plane. Either the upper landowner participates in an activity to naturally or artificially increase the flow onto the lower landowner's property thereby causing damage, or the lower landowner diverts the natural flow of the water by backing up the water on the upper landowner's property. These types of disputes are occurring increasingly in urban areas where pavement and other structures increase the flow of surface water and developers have not adequately anticipated the runoff.

Much has been written about surface water law. This Comment is not

2. Id.; see also Frank E. Maloney & Sheldon J. Plager, Diffused Surface Water: Scourge or Bounty, 8 NAT. RESOURCES J. 72, 72 (1968) ("[r]ain is by far the greatest source of surface water . . . [h]eavy but seasonal rainfall frequently results in periodic overabundance of surface waters which overtax natural and artificial drainage systems as well as the capacity of the soil to absorb water").
4. E.g., M.H. Siegfried Real Estate v. City of Independence, 649 S.W.2d 893 (Mo. 1983) (en banc).
5. Bridges, supra note 1, at 76.
meant to explore some new aspect of surface water law, as there is seemingly no area left untouched by scholars. Instead, this Comment is meant to update the status of surface water law in each of the fifty states and the District of Columbia. It will also touch upon the current approach of Missouri concerning surface water law. This Comment is not a comprehensive guide to the intricacies of surface water law. Instead, it will provide the practitioner with a status report of the law as it appears today and with an explanation of the trends in this area of the law.7

II. BACKGROUND

Generally, jurisdictions treat surface water disputes according to one of three principles: (1) the civil law rule; (2) the common enemy rule; and (3) the reasonable use rule. The first two rules are grounded in property law. They have been substantially modified since their inception. The basic premise of all three views is discussed below. Each view stems from different public policy concerns and each was adopted according to the prevalent views of the respective jurisdiction.

A. The Civil Law Rule

The civil law rule holds that "a person who interferes with the natural flow of surface waters so as to cause an invasion of another's interest in the use and enjoyment of his land is subject to liability to the other."8 The civil law is based on a theory of servitude. Upper owners have no right to alter the

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7. Surface water law should not be confused with riparian water rights. See generally Roberts v. Hooker, 610 S.W.2d 321 (Mo. Ct. App. 1980) (the law distinguishes a watercourse from surface water by separate definitions and separate consequences); Pendergrast v. Aiken, 236 S.E.2d 787, 794 (N.C. 1977) (comparison of surface water law to development of riparian rights); Kinyon & McClure, supra note 6, at 892 ("in most jurisdictions there is a separate and distinct law of surface water which in many respects differs markedly from the law applicable in the same jurisdictions to watercourses, subterranean waters, and private nuisances in general").

8. Kinyon & McClure, supra note 6, at 893.
natural system of drainage to the detriment of lower owners. Likewise, lower owners must accept the water that drains onto their land.9

The civil law rule was originally adopted from the civil codes of foreign nations. It was based on the natural law maxim of *aqua currit ut debet currere ut currere sole bat* (i.e., water runs and ought to run, as it used to run).10 Commentators have suggested that the real reason for the adoption of this rule is the idea that "the least harmful way to dispose of surface waters is to enforce the natural laws of drainage."11 The rule is justified by the concept that "those purchasing or acquiring land should expect and be required to accept it subject to the burdens of natural drainage."12 This approach tends to place the cost of repair and damages on landowners who improve their property because the development often changes the natural drainage system.13 Opponents criticize this rule for inhibiting growth and discouraging land development, although there is some debate over whether it actually has discouraged developers.14

Courts adopting the civil law rule have made modifications or qualifications to the rule so as not to discourage development.15 Many courts have adopted a "reasonable use" modification to the civil law rule. The leading case on the reasonable use modification is *Keys v. Romley.*16 In *Keys,* the California Supreme Court adopted the reasonable use modification to the civil law rule.17 The court recognized the harshness of the original civil law rule: "[N]o rule can be applied by a court of justice with utter disregard for the peculiar facts and circumstances of the parties and the properties involved."18 Therefore, neither upper nor lower landowners are allowed to act arbitrarily

9. Bridges, supra note 1, at 78.
11. Bridges, supra note 1, at 79 (citing Kinyon & McClure, supra note 6, at 895).
13. Bridges, supra note 1, at 79.
14. Id. at 80.
15. Id. at 796 n.26. Because many jurisdictions are especially concerned about discouraging development in urban areas, some have simply rejected the civil law for urban areas while adopting it for rural areas.
16. 412 P.2d 529 (Cal. 1966); see also Mark Downs, Inc. v. McCormick Properties, Inc., 441 A.2d 1119, 1126 (Md. Ct. App. 1982) (reasonableness of use modification to civil law rule adopted to ameliorate the harshness of the traditional rule—"a balance of benefit and harm is struck in hardship cases, to make sure that the owner of the servient estate is not unreasonably denied use of his property"). For a more detailed discussion, see Bridges, supra note 1, at 80-81; Maloney & Plager, supra note 2, at 79-81.
17. Keys, 412 P.2d at 537.
18. Id. at 536.
or unreasonably and still be immune from liability. This modification also creates a duty on any person threatened with injury by surface waters to take reasonable precautions to avoid or reduce any actual or potential injury.

For jurisdictions adopting a reasonable use modification, the general civil law rule can be stated as follows:

[T]he upper owner may improve and enhance the natural drainage of his land so long as he acts reasonably and does not divert the flow, and that the lower owner is subject to an easement for such flow as the upper owner is allowed to cast upon him.

In 1940, Stanley Kinyon and Robert McClure compiled a list of all the jurisdictions adopting the civil law rule. Each jurisdiction had its own qualifications and modifications, which are beyond the scope of this Comment and will not be discussed. The following eighteen jurisdictions were listed as adopting the civil law rule: Alabama, California, Colorado, Georgia, Illinois, Iowa, Kansas, Kentucky, Louisiana, Maryland, Michigan, Missouri, New York, Ohio, Oregon, Pennsylvania, South Carolina, and Virginia.

\[ \text{References:} \\
land,\textsuperscript{32} Michigan,\textsuperscript{33} Nevada,\textsuperscript{34} North Carolina,\textsuperscript{35} Ohio,\textsuperscript{36} Pennsylvania,\textsuperscript{37} South Dakota,\textsuperscript{38} Tennessee,\textsuperscript{39} and Texas.\textsuperscript{40}

Modern approaches in several states have caused some attrition in the ranks of the civil law rule. This change is explored in Section III below.

\textbf{B. The Common Enemy Rule}

Traditionally, the common enemy rule could be stated as giving a possessor of land "an unlimited and unrestricted legal privilege to deal with the surface water on his land as he pleases, regardless of the harm which he may thereby cause to others."\textsuperscript{41} The basis of this rule is found in the maxim \textit{cujus est solum, ejus est usque ad coelum et ad inferos} (i.e., whose is the soil, his is even to the skies and to the depths below).\textsuperscript{42}

Commentators have attributed the adoption of the common enemy rule to three public policies. First, the traditional concept of ownership dictated that landowners should be able to do as they please with their land.\textsuperscript{43} Second, courts adopting the rule thought it represented the English common law.\textsuperscript{44} The third and most relied upon public policy for the common enemy rule is the notion that the rule favors land improvement and development.\textsuperscript{45} By absolving the developer of liability for any damage caused by the diffusion of surface waters, new construction would be encouraged. This policy has

\begin{itemize}
  \item[33.] Crane v. Valley Land Co., 169 N.W. 18 (Mich. 1918).
  \item[34.] Bynton v. Longley, 6 P. 437 (Nev. 1885).
  \item[35.] Winchester v. Byers, 145 S.E. 774 (N.C. 1928); Proter v. Durham, 74 N.C. 767 (1876).
  \item[37.] Martin v. Riddle, 26 Pa. 415 (1848); Kauffman v. Griesemer, 26 Pa. 407 (1856).
  \item[38.] Thompson v. Andrews, 165 N.W. 9 (S.D. 1917).
  \item[39.] Davis v. Louisville & N.R.R. Co., 244 S.W. 483 (Tenn. 1922).
  \item[40.] Calhoun v. Baize, 114 S.W.2d 634 (Tex. Ct. App. 1938); Roby v. Hawthorne, 77 S.W.2d 923 (Tex. Ct. App. 1934).
  \item[41.] Kinyon & McClure, supra note 6, at 898.
  \item[43.] Kinyon & McClure, supra note 6, at 898-89 n.35.
  \item[44.] \textit{Id.} at 899. For a discussion of English cases involving the common enemy rule see \textit{id.} at 899-90. \textit{See also} Davis, supra note 6, at 150 (term "common enemy" is of English origin).
  \item[45.] \textit{Id.}
\end{itemize}
been especially persuasive in urban areas where development and growth has been promoted.46

The rule in its original form was particularly harsh to lower landowners who were forced to receive damaging surface water without any type of compensation for the injury to their land. Indeed, the burden and costs of development caused by the diversion of surface waters were placed on innocent lower landowners. Because of the potential harshness of these results, a substantial number of jurisdictions have modified the common enemy rule.

Two major modifications to the rule are worth noting. The first has been labeled the "collection and discharge" modification.47 It prohibits landowners from collecting surface water in a body and discharging it on adjoining landowners to their injury.48

The second modification has been labeled the "due care" modification.49 With this modification, "the court's determination is limited to whether a landowner used 'due care' or 'reasonable care' or was 'without negligence' in improving his land."50 This rule does not completely alleviate the harshness of the original rule. In a 'due care' jurisdiction, if dominant landowners divert surface water flow to the injury of their neighbors, they will only be liable to the servient landowners if they were negligent or if they did not act with due care. If the dominant landowners were not negligent, the servient landowners will still be forced to bear the costs of the damage and thus the costs of development.51

The distinction between the civil law rule and common enemy rule has been summarized as follows:

The basic premise of the civil law rule is that neither landowner may interfere with the natural flow of surface waters, and upon the owner who

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46. Bridges, supra note 1, at 85. Some civil law jurisdictions have even adopted the common enemy rule for urban areas. Id. E.g., Dekl v. Vann, 182 So. 2d 885 (Ala. 1966) (applies civil law to rural areas, but common enemy rule to cities, towns, and villages).

47. Bridges, supra note 1, at 87.

48. Id.; see Davis, supra note 6, at 151 (original common enemy rule allowed such action by dominant owner, "but the injustice of it was too apparent to be acceptable in later cases").

49. Bridges, supra note 1, at 87.

50. Id. at 88 (citations omitted). This modification is not to be confused with the reasonable use rule to be discussed infra at notes 75-87 and accompanying text. The reasonable use rule is a balancing test between the utility of the actor's conduct and the gravity of harm caused by the alteration of surface water flow. Bridges, supra note 1, at 88.

51. Bridges, supra note 1, at 88.
does so would go the burden of proving that his interference falls within one of the recognized exceptions. Under the common enemy rule, a landowner starts with the unqualified right to do as he pleases and it is for the injured neighbor to show that his conduct falls within one of the modifications to that rule.52

In their 1940 article, Kinyon and McClure listed twenty-two jurisdictions adopting the common enemy rule. Each of these jurisdictions has adopted modifications and qualifications that are beyond the scope of this Comment:

Arizona,53 Arkansas,54 Connecticut,55 District of Columbia,56 Indiana,57 Maine,58 Massachusetts,59 Mississippi,60 Missouri,61 Montana,62 Nebraska,63 New Jersey,64 New Mexico,65 New York,66 North Dakota,67 Oklahoma,68 Rhode Island,69 South Carolina,70 Virginia,71 Washington,72 West Virginia,73 and Wisconsin.74

52. Maloney & Plager, supra note 2, at 79.
55. Tide Water Oil Sales Corp. v. Shimelman, 158 A. 229 (Conn. 1932).
60. Columbus & G. Ry. v. Taylor, 115 So. 200 (Miss. 1928).
61. Tackett v. Linnenbrink, 112 S.W.2d 160 (Mo. Ct. App. 1938); Place v. Union Township, 66 S.W.2d 584 (Mo. Ct. App. 1936).
As with the civil law rule, the common enemy rule has lost support since the 1940’s. The shift away from this approach is explored in Section III below.

C. Reasonable Use Rule

The reasonable use rule states that each landowner "is legally privileged to make a reasonable use of his land, even though the flow of surface waters is altered thereby and causes harm to others." 75 Liability is only incurred when the interference with the surface water is unreasonable. 76 Under this rule, a new maxim controls: sic utere tuo ut alienum non laedus (i.e., use your property in such manner as not to injure that of another). 77 The reasonable use rule differs significantly from the civil law rule and the common enemy rule in several respects. The earlier rules were based solely on property principles of servitude and absolute ownership; the reasonable use rule is based on tort principles. 78 Indeed, the reasonable use rule has been adopted by the American Law Institute in the Restatement (Second) of Torts. 79 This rule also differs from the others because it is applied on a case-by-case basis, while the other rules are applied the same way in every case, regardless of the outcome.

This rule of reasonable use differs from the other two rules in that it does not purport to lay down any specific rights or privileges with respect to surface water, but leaves the whole matter to be determined upon the facts of each case in accordance with general principles of fairness and common sense. 80

Several courts have a reasonable use test whereby defendants’ actions of draining their land of surface waters and casting them on the land of another is deemed reasonable if (1) there is a reasonable necessity for such drainage; (2) if reasonable care is taken to avoid unnecessary injury to the land receiving the burden; (3) if the utility or benefit accruing to the land drained reasonably outweighs the gravity of the harm resulting to the land receiving

75. Kinyon & McClure, supra note 6, at 904.
76. Id.
78. Maloney & Plager, supra note 2, at 79.
79. RESTATEMENT (SECOND) OF TORTS §§ 821A-833 (1979). Section 833 reads: "An invasion of one’s interest in the use and enjoyment of land resulting from another’s interference with the flow of surface water may constitute a nuisance under the rules stated in §§ 821A-831." Id.
80. Kinyon & McClure, supra note 6, at 905.
the burden; and (4) if, where practicable, it is accomplished by reasonably improving and aiding the normal and natural system of drainage according to its reasonable carrying capacity, or if, in the absence of practicable natural drainage, a reasonable and feasible artificial drainage system is adopted.  

The reasonable use rule is a balancing test between the utility of the actor's conduct and the gravity of harm caused by the diversion of surface waters.  

One of the earliest cases adopting the rule stated that the circumstances a court should consider to determine reasonableness include "the nature and importance of the improvements sought to be made, the extent of the interference with the water, and the amount of injury done to the other landowners as compared with the value of such improvements."  

By 1940, only two jurisdictions had adopted the reasonable use rule: New Hampshire  and Minnesota.  Why such a sound and desirable rule had not been more accepted is unclear, especially considering that it had been around almost as long as the other two rules.  Kinyon and McClure attributed the lack of acceptance to confusion and misinterpretation of the rule and its role in the area of surface water law.  As seen in the next section, this "confusion" no longer exists, and many jurisdictions have now wholeheartedly embraced the reasonable use rule.

III. STATUS OF SURFACE WATER LAW TODAY

As stated above, in their 1940 article Kinyon and McClure reported that eighteen jurisdictions had adopted some form of the civil law rule, twenty-two had adopted some form of the common enemy rule, and two had adopted the reasonable use rule.  These numbers have changed significantly over the last fifty years.

Today, seventeen jurisdictions still follow the civil law rule.  Only thirteen jurisdictions still follow some form of the common enemy rule.

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81. Klutey v. Commonwealth, 428 S.W.2d 766, 770 (Ky. 1968); Quist v. Kroening, 410 N.W.2d 5, 6-7 (Minn. Ct. App. 1987); Martin v. Weckerly, 364 N.W.2d 93, 95 (N.D. 1983); see also Dudley v. Beckey, 567 A.2d 573, 575 (N.H. 1989) (in determining reasonableness, court should consider (1) the extent of the alternation of natural or existing runoff patterns; (2) the importance and nature of the land and its use; and (3) the foreseeability and magnitude of any damages).

82. Bridges, supra note 1, at 88.

83. Swett v. Cutts, 50 N.H. 439, 446 (1870).


86. Kinyon & McClure, supra note 6, at 912.

87. Id.
Instead of two jurisdictions following the reasonable use rule, today twenty jurisdictions have adopted the reasonable use rule.

The following jurisdictions still follow the civil law rule: Alabama,\textsuperscript{88} Colorado,\textsuperscript{89} Georgia,\textsuperscript{90} Idaho,\textsuperscript{91} Illinois,\textsuperscript{92} Iowa,\textsuperscript{93} Kansas,\textsuperscript{94}

\textsuperscript{88} Robichaux v. A & B Dev. Co., 551 So. 2d 1017 (Ala. 1989); Street v. Tackett, 494 So. 2d 13 (Ala. 1986) (civil law rule modified by reasonable use concept where surface water flows from upper landowner in an incorporated area to property of lower landowner in unincorporated area); Dekle v. Vann, 182 So. 2d 885 (Ala. 1966) (applies civil law to rural areas, but applies common enemy rule as to cities, towns, and village lots).

\textsuperscript{89} Hankins v. Borland, 431 P.2d 1007 (Colo. 1967) (natural drainage conditions may be altered by an upper proprietor provided the water is not sent down in a manner or quantity to do more harm than formerly); Howard v. Cactus Hill Ranch Co., 529 P.2d 660 (Colo. Ct. App. 1974).

\textsuperscript{90} Morris v. Cummings, 116 S.E.2d 592 (Ga. 1960); Gill v. First Christian Church, 117 S.E.2d 164 (Ga. 1960) (modified by collect and discharge modification—there is no right to concentrate and collect water and thus cause it to be discharged upon the land of a lower proprietor in greater quantities or in a different manner than if it ran down by law of gravitation).

\textsuperscript{91} Loosli v. Heseman, 162 P.2d 393 (Idaho 1945); Merrill v. Penrod, 704 P.2d 950 (Idaho Ct. App. 1985) (qualified by reasonable use concept—upper landowner, while having the undoubted right to make a reasonable use of the water for irrigation, must so use, manage, and control it as not to injure his neighbor’s land).

\textsuperscript{92} Dessen v. Jones, 551 N.E.2d 782 (Ill. App. Ct. 1990) (two exceptions to civil law rule: (1) railroad exception and (2) good husbandry exception permitting owner of dominated agricultural land to increase or alter the flow of surface water upon a servient estate if this is required for proper husbandry of the dominant land); Mileur v. McBride, 498 N.E.2d 581 (Ill. App. Ct. 1986) (no reasonable use exception in cases of urban land).

\textsuperscript{93} O’Toole v. Hathaway, 461 N.W.2d 161 (Iowa 1990) (qualification—“an overriding requirement [is] that one must exercise ordinary care in the use of his property so as not to injure the rights of neighboring landowners”); Oak Leaf Country Club v. Wilson, 257 N.W.2d 739 (Iowa 1977).

\textsuperscript{94} Goering v. Schrag, 207 P.2d 391 (Kan. 1949); Clawson v. Garrison, 592 P.2d 117 (Kan. Ct. App. 1979); see also KAN. STAT. ANN. § 24-105 (1986) (“[i]t shall be unlawful for a landowner or proprietor to construct or maintain a dam or levee which has the effect of obstructing or collecting and discharging with increased force and volume the flow of surface water to the damage of the adjacent owner or proprietor”).
95. Thigpen v. Moss, 504 So. 2d 664, 666 (La. Ct. App. 1987) ("[O]wner of the dominant estate may cut ditches and canals which concentrate and speed natural flow of surface waters...[but] are not entitled to concentrate flow of surface waters so as to flow on the lower lands of defendants at point which would not be their natural destination and thereby increase the volume of water which would be natural flow run over defendants' servient estate and thus render the servitude estate more burdensome.").


97. Schmidt v. Eger, 289 N.W.2d 851, 886 (Mich. Ct. App. 1980) ("the owner of the dominant estate may not require the owner of the servient estate to accept a greater runoff by increasing or concentrating the flow").

98. Budagher v. Amrep Corp., 637 P.2d 547 (N.M. 1981) ("landowner does not have the right to collect surface water in an artificial channel and discharge it upon his neighbor's lands to his injury, in a different manner or in a greater volume or at a greater rate than it would have flowed naturally"); Gutierrez v. Rio Rancho Estates, Inc., 605 P.2d 1154 (N.M. 1980).


100. LaForm v. Bethlehem Township, 499 A.2d 1373 (Pa. Super. Ct. 1985) (upper landowners only liable for effect of surface water where they (1) diverted the water from its natural channel by artificial means, or (2) unreasonably or unnecessarily increased the quantity or changed the quality of water discharged on their neighbors); Ridgeway Court v. Landon Courts, 442 A.2d 246 (Pa. Super. Ct. 1982).

101. Gross v. Connecticut Life Ins. Co., 361 N.W.2d 259 (S.D. 1985) (modification—cannot collect surface water or permit it to be collected and then be cast upon the servient estate in unusual or unnatural quantities).

102. Blackwell v. Butler, 582 S.W.2d 760 (Tenn. Ct. App. 1978) ("any substantial or essential interference with the flow, if wrongful, whether attended with actual damage or not, is an actionable nuisance").


104. Powers v. Judd, 553 A.2d 139 (Vt. 1988) ("upper property owner cannot artificially increase the natural flow of water to a lower property owner or change its manner of flow by discharging it onto the lower land at a different place from its natural discharge").

105. Boyd v. Greene County, 644 S.W.2d 615, 616-17 (Ark. Ct. App. 1983) ("[w]here no watercourse exists, Arkansas has adopted the common law rule that a landowner is justified in defending against surface runoff without incurring liability for damages unless injury is unnecessarily inflicted upon another which, by reasonable effort and expense, could have been avoided").
ouri, Montana, Nebraska, New York, Oklahoma, South Carolina, Virginia, and Washington.

106. Bahman v. Estes Homes, 710 P.2d 1087, 1090 (Ariz. Ct. App. 1985) (quoting Gillespie Land & Irrigation Co. v. Gonzales, 379 P.2d 135, 145 (Ariz. 1963)) (modification—landowners may not divert the natural waters of a stream in such a manner that these waters cause damage to their neighbor, and landowners have no right to collect surface runoff water from artificial channels and cause it to erode or flow to neighboring homeowners’ lands).

107. Ballard v. Ace Wrecking Co., 289 A.2d 888 (D.C. 1972) (reasonable use modification—landowners must exercise right in good faith and with such care as not to injure needlessly the property of adjacent owners).


110. Looney v. Hindman 649 S.W.2d 207 (Mo. 1983) (en banc) (modified by "due care" and "collect and discharge" modification).

111. State ex rel v. Fecam, 752 P.2d 182, 184 (Mont. 1988) (emphasis added) (landowners not liable for vagrant surface water that crosses their land and goes onto their neighbor’s land, but landowners are "limited to reasonable care in avoiding damage to adjoining property").

112. Gruber v. County of Dawson, 439 N.W.2d 446, 453 (Neb. 1989) ("surface waters may be dammed, diverted, or otherwise repelled by an adjoining landowner without liability if it is necessary and done without negligence"); Barry v. Wittmersehouse, 327 N.W.2d 33 (Neb. 1982) (surface water is common enemy, and no liability for defending yourself against its encroachment provided that landowner exercises ordinary care and he so used his property as not to unnecessarily and negligently injure another).

113. Grosso v. Long Island Lighting Co., 424 N.Y.S.2d 979, 982 (Co. Ct. 1980) ("each landowner has absolute right to cast off surface waters as he sees fit, provided improvements are made in good faith to fit the property for some rational use for which it is adapted, and that water is not drained onto the other’s property by pipes, drains or channels").


115. Irwin v. Michelin Tire Corp., 341 S.E.2d 783 (S.C. 1986) (two exceptions to common enemy rule: (1) if it involves creation of nuisance, or (2) it relates to the collection and discharge of surface water in a concentrated form upon one’s neighbor); Suddeth v. Knight, 314 S.E.2d 11 (S.C. Ct. App. 1984) (sets forth the exception regarding nuisance).

116. Mullins v. Greer, 311 S.E.2d 110, 112 (Va. 1984) (landowner can fight off surface water as best he can "provided he does so reasonably and in good faith and not wantonly, unnecessarily or carelessly").

The jurisdictions that have adopted the reasonable use rule are Alaska, California, Connecticut, Delaware, Florida, Hawaii, Kentucky, Massachusetts, Minnesota, Mississippi, Nevada, New Hampshire, New Jersey, North Carolina, North Dakota, Ohio, Rhode Island, Utah, West Virginia, and Wisconsin.

There is one state that has not yet decided which of the three possible rules of surface water it should adopt. That state is Wyoming.

Since the Kinyon and McClure article in 1940, there has been a significant increase in the number of jurisdictions adopting the reasonable use


123. Rodrigues v. State, 472 P.2d 509, 516 (Haw. 1970) ("our decisions so closely approach the reasonable use rule that it is incumbent upon us to adopt it").


131. Pendergrast v. Aiken, 236 S.E.2d 787 (N.C. 1977) (applies to surface water drainage problems that are to be resolved under a nuisance theory).


137. Crest Chevrolet-Oldsmobile-Cadillac, Inc. v. Willemsen, 384 N.W.2d 692 (Wis. 1986); State v. Deetz, 224 N.W.2d 407 (Wis. 1974).

138. Lee v. Brown, 357 P.2d 1106 (Wyo. 1960) (lower court adopted civil law rule, but Wyoming Supreme Court declined to address what rule of surface water law the state should adopt).
rule. Instead of being a small minority, reasonable use jurisdictions have become the majority. Eight of the jurisdictions listed in the article as following the common enemy rule have switched to the reasonable use rule. Of the jurisdictions listed as following the civil law rule, five have switched to the reasonable use rule. The remaining jurisdictions adopting the reasonable use rule were not included in the 1940 survey.

Why are jurisdictions moving away from the common enemy and civil law rules to the reasonable use rule? The best way to discover why courts have moved toward the reasonable use rule is to analyze the reasons given by the courts. Because the primary exodus has been from the common enemy rule, the following discussion will focus on why the courts have rejected the common enemy rule in favor of the reasonable use rule.

As stated above, the reasonable use rule introduced the tort principle of reasonableness to surface water law. This rule has served as a middle ground to the harsher results produced by the civil law rule and the common enemy rule. The primary reason the courts have turned to the reasonable use rule is flexibility. The need for flexibility has increased as courts have realized that problems associated with surface waters are as varied and unique as the land that is involved. Because the reasonableness of a landowner's

139. Cf. Kinyon & McClure, supra note 6, at 908 (where only two jurisdictions had adopted the reasonable use rule).

140. Those jurisdictions are Connecticut, Massachusetts, Mississippi, New Jersey, North Dakota, Rhode Island, West Virginia, and Wisconsin. Id. at 902-04; see supra notes 120, 125, 127, 130, 132, 134, 136 and accompanying text.

141. Those jurisdictions are California, Kentucky, Nevada, North Carolina, and Ohio. Kinyon & McClure, supra note 6, at 896-97; see supra notes 119, 124, 128, 131, 133 and accompanying text.

142. Those jurisdictions are Alaska, Delaware, Florida, Hawaii, and Utah. See Kinyon & McClure, supra note 6.

143. The movement in some states from one of these traditional rules to the reasonable use rule has been described as an evolution. Bridges, supra note 1, at 94. Kinyon and McClure described the process in Minnesota as: "First, the unqualified common enemy rule; then specific exceptions; then the 'qualified' common enemy rule; and finally, the gradual adoption of the reasonable use principle as the sole test." Id. at 94-95 (quoting Kinyon and Mcclure, supra note 6, at 935).


145. Argyelan, 435 N.E.2d at 987 (citing Rounds v. Hoelscher, 428 N.E.2d 1308, 1312 (Ind. Ct. App. 1981)) (modern surface water disputes are extremely fact sensitive and require certain amount of flexibility (Hunter, J., dissenting)).
actions are determined by a variety of factors on a case-by-case basis, 146 courts are better able to address the unique aspects of each situation.

Of course, in the legal arena, the opponent of flexibility is predictability. Courts still clinging to the common enemy and civil law rules cite lack of predictability as the primary reason for not adopting the reasonable use rule. They take comfort in the predictability of the earlier rules. 147 These courts have expressed the fear that adopting the reasonable use rule will result "in confusion and more litigation due to the uncertainty of the parties as to their rights." 148

Jurisdictions adopting the reasonable use rule have addressed the concern of lack of predictability. Rejecting the civil law rule in favor of the reasonable use rule, the Nevada Supreme Court was not convinced by the predictability argument:

Our review of the case law and literature reveals that the natural flow rule does not provide more predictable results than the reasonable use rule. In addition, we refuse to elevate an abstraction, such as 'predictability,' into a judicial pardon for unreasonable conduct. 149

Courts also have recognized that all of the modifications and qualifications of the common enemy and civil law rules have diminished the predictability of those rules. 150

One of the most often cited principles behind the common enemy rule is that it encourages the development of land by allowing developers to alter the flow of surface water without incurring liability. 151 Originally, this theory was supported by the agrarian view that landowners should be able to do

146. See supra note 80 and accompanying text.
147. See Mitchell v. Mackin, 376 So. 2d 684, 688-89 (Ala. 1979); Argyelan, 435 N.E.2d at 976
148. Mitchell, 376 So. 2d at 688.
149. County of Clark v. Powers, 611 P.2d 1072, 1076 (Nev. 1980) (citation omitted); see also Westland Skating Center, Inc. v. Gus Machado Buick, Inc., 542 So. 2d 959, 963 (Fla. 1989) ("Predictability should not be achieved at the expense of justice.").
150. Butler v. Bruno, 341 A.2d 735, 741 (R.I. 1975) ("[w]ith the numerous judicial exceptions and modifications that have been appended through the years ... we fail to see how the modern versions of either afford more predictability than the rule of reasonable use"); Pendergrast v. Aiden, 236 S.E.2d 787, 796 (N.C. 1977) ("the adoption of exceptions, most of which incorporate some element of reasonable use, has resulted in uncertainty of the law and reduced predictability which is the chief virtue of the civil law rule").
151. See supra notes 45-46 and accompanying text.
whatever they wished with their property. In Argyelan v. Haviland, the majority of the Indiana Supreme Court refused to abandon the common enemy rule, but a strong dissent by Judge Hunter explained why the history of land development has led other jurisdictions to adopt the reasonable use rule:

[T]he technological ability to pave massive areas of ground surface was not developed until after the inception of the common enemy doctrine; similarly, the ability to radically alter natural drainage patterns and ground surfaces has followed from the creation of massive earth moving machines. Together with these developments, as well as refinements in the construction industry and changes in our shopping patterns, the last years have yielded an urban landscape dotted with giant commercial structures and vast shopping malls and plazas. The paved parking areas necessary to serve the customers of these various business enterprises lie in tight geographical juxtaposition with high density residential housing. Major quantities of surface water from falling rain and melting snow, once absorbed into the ground are now repelled from vast roofs and parking lots and seek lower ground via unnatural drainage patterns.

As Judge Hunter pointed out, we no longer live in an agrarian society. Urbanization has changed the landscape of America and the old view of landowner dominance to the view that landowners must take responsibility for harm caused to others. This new point of view is reflected in the current belief that adjoining landowners should not solely bear the costs of economic development. Landowners, developers, and local officials are now required to account and plan for these costs as part of their construction costs.

With the terrain of modern cities and towns and the accepted view that landowners should act reasonably so as not to injure their neighbors, both the common enemy and the civil law rules are outdated principles by which to resolve surface water disputes. The civil law rule is outdated because, as suggested above, disputes involving surface water today often result from the unnatural drainage of surface water. The natural flow of water now is

153. 435 N.E.2d 973 (Ind. 1982).
154. Id. at 987; see also County of Clark v. Powers, 611 P.2d 1072, 1076 (Nev. 1980) (under reasonable use rule "growth and urbanization are not unduly restricted, but merely tempered with elements of order, planning, and reasonableness").
155. County of Clark, 611 P.2d at 1076.
156. Id.
usually difficult, if not impossible, to determine. The common enemy rule is outdated in that the development it sought to encourage has been accompanied by the potential of "self-help engineering contests in which the winner [is] the person who most effectively turn[s] the excess water upon his neighbor's land." 158

Consequently, one of the advantages to the reasonable use rule frequently cited by courts is its ability to adapt to changing socio-economic circumstances without the need for modifications and qualification. 159 In the influential case of Armstrong v. Francis Corp., 160 then Judge Brennan of the New Jersey Supreme Court noted that "[s]ocial progress and the common well being are in actuality better served by a just and right balancing of the competing interest according to the general principles of fairness and common sense which attend the application of the rule of reason." 161

Other reasons listed by courts adopting the rule include: (1) it can be applied effectively and fairly in any factual setting, 162 (2) it obviates the necessity of difficult evidentiary determinations as to whether the natural flow has been altered by man; 163 (3) it reaches the same results as the qualifications to the other rules, 164 and (4) no rational distinction exists requiring courts to exclude surface water from the realm of nuisance principles. 165

Sometimes the developmental process of the most equitable rule of law is slower than the social progress that makes such a rule necessary. This is the case in the area of surface water law. Courts have recognized the harshness and inequities resulting from the civil law and common enemy rules. They have even attempted to mitigate this harshness with modifications such as reasonableness or due care. These modifications, however, still do not provide the flexibility that is needed to produce fair results in this fact-sensitive area of the law. As more courts slowly move toward the reasonable use rule, perhaps the fear of change will dissipate and additional courts will discover a more satisfactory approach in the reasonable use rule.

159. Pendergrast v. Aiken, 236 S.E.2d 787, 796 (N.C. 1977) (reasonable use rule has capacity to accommodate changing social needs without occasioning the unpredictable disruption associated with exceptions to the civil law rule).
160. 120 A.2d 4, 10 (N.J. 1956).
161. Id.
162. Pendergrast, 236 S.E.2d at 796-97.
163. Id.
165. Argyelan, 435 N.E.2d at 989 (Hunter, J., dissenting).
IV. MISSOURI SURFACE WATER LAW

In 1884, Missouri adopted the common enemy rule as the law of surface water in Missouri. The case of McCormick v. Kansas City, St. J. & C.B.R.R., has been recognized as the leading Missouri case on the common enemy rule. The Missouri Supreme Court stated the general rule in Missouri as follows:

[Persons may so occupy and improve their land, and use it for such purposes as they may see fit, either by grading or filling up low places, or by erecting buildings thereon, or by making any other . . . profitable or desirable enjoyment; and it makes no difference that the effect of such improvement is to change the flow of the surface water accumulating or falling on the surrounding country, so as to either increase or diminish the quantity of such water, which had previously flowed upon the land of the adjoining proprietors to their inconvenience or injury.]

The harshness of this rule is so obvious that the same court that delivered it tempered it by adding "[b]ut persons exercising this right to improve and ameliorate the condition of their own land, must exercise it in a careful and prudent way." This language established the "due care" modification in Missouri surface water law.

Missouri also adopted the "collection and discharge" modification. Missouri courts have distinguished, however, the collection and discharge of surface water via a natural drainway and the collection and discharge via an artificial drainway. A landowner is permitted to collect and discharge.


167. 57 Mo. 433 (1874).

168. Davis, supra note 6, at 159.

169. Id. at 159-60 (quoting McCormick, 57 Mo. at 447).

170. Id. at 160.

171. See Roberts v. Hocker, 610 S.W.2d 321 (Mo. Ct. App. 1980) (diversion of surface water only allowed upon an exercise of due care and prudence); cf. Missouri Land Co. v. Liberty Township, 510 S.W.2d 473, 4767 n.3 & 4 (Mo. 1974) (en banc); Camden Special Road Dist. of Ray County v. Taylor, 495 S.W.2d 93, 98 (Mo. Ct. App. 1973) (the proviso "reasonable care and prudence" does not in any way modify or limit the basic and inherent right constituting the heart and core of the common enemy doctrine, that a landowner may ward off surface water even though it damages his neighbor); Bridges, supra note 1, at 89.

172. Bridges, supra note 1, at 90.

173. Haferkamp v. City of Rock Hill, 316 S.W.2d 620, 627 (Mo. 1958); see also
surface water in a concentrated flow provided the flow is discharged into a natural drainage channel and the owner acts without negligence and does not exceed the natural capacity of the drainway to the detriment of her neighbor.\textsuperscript{174}

To simplify this complex area, the Missouri Supreme Court in \textit{Looney v. Hindman},\textsuperscript{175} recited three general situations in which an upper landowner would be liable for the discharge of surface water onto his lower neighbor's property: "1) the collection of surface water into an artificial channel or the volume and discharge of it is increased in destructive quantities upon the servient property to its damage; 2) the draining off of surface waters in such a manner as to exceed the natural capacity of the drainways; and 3) the discharge of surface waters onto adjacent lands to which it would not naturally drain."\textsuperscript{176}

It has been generally accepted in Missouri that a lower landowner will not be liable when obstructing the flow of surface water "even though the effect on the upper landowner would be highly predictable."\textsuperscript{177} Missouri courts have not even inquired into the reasonableness of the lower landowner's conduct.\textsuperscript{178} The construction of dams and dikes by lower landowners has been approved as a defense against the onslaught of surface water.\textsuperscript{179}

Despite the national trend to the reasonable use doctrine, Missouri continues to hold fast to the modified common enemy doctrine,\textsuperscript{180} even

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\textsuperscript{174} \textit{Haferkamp}, v. Wright, 760 S.W.2d 474, 484-85 (Mo. Ct. App. 1988); Pollock v. Rose, 708 S.W.2d 218, 219 (Mo. Ct. App. 1986) (landowners not protected by common enemy doctrine if they unnecessarily collect water and discharge it at one place creating damage to their neighbors); Schifferdecker v. Willis, 621 S.W.2d 65, 67 (Mo. Ct. App. 1981) (defending landowners may not unnecessarily collect water and discharge it at one place causing damage to their neighbors); Borgman v. Florissant Dev. Co., 515 S.W.2d 189, 194 (Mo. Ct. App. 1974) (conduct privileged where defendant collected and discharged surface water into a natural drainway without exceeding the natural capacity of the drainway); Polich v. Hermann, 219 S.W.2d 849, 855 (Mo. Ct. App. 1949) (landowners cannot collect surface water into an artificial channel or volume and discharge it to the injury of their neighbors).

\textsuperscript{175} Wells v. State Highway Comm'n, 503 S.W.2d 689, 691-92 (Mo. 1973); \textit{Haferkamp}, 316 S.W.2d at 625-26; \textit{Roberts}, 610 S.W.2d at 327.

\textsuperscript{176} 649 S.W.2d 207 (Mo. 1983) (en banc).

\textsuperscript{177} Id. at 211; see also Concannon v. Hanley Dev. Corp., 769 S.W.2d 183, 186-87 (Mo. Ct. App. 1989) (citing \textit{Looney}, 649 S.W.2d at 207).

\textsuperscript{178} M.H. Siegfried Real Estate v. City of Independence, 649 S.W.2d 893, 896-97 (Mo. 1983) (en banc); see Thomas v. Estate of Ducat, 769 S.W.2d 819, 822 (Mo. Ct. App. 1989).

\textsuperscript{179} M.H. Siegfried Real Estate, 649 S.W.2d at 897.

\textsuperscript{180} Schifferdecker v. Willis, 621 S.W.2d 65, 76 (Mo. Ct. App. 1981).

\textit{M.H. Siegfried Real Estate}, 649 S.W.2d at 898.
though at least one appellate court has advocated the reasonable use rule. In 
Roberts v. Hocker,\textsuperscript{181} the appellants appealed from a judgment in favor of 
neighboring landowners. The lower court found that the neighboring 
landowners were not negligent and did not exceed the natural capacity of the 
stream when they diverted surface water onto appellant's land through 
artificial tubes, thereby causing damage to the appellant's land.\textsuperscript{182} The 
appellants urged the court of appeals to adopt the reasonable use approach, 
reasoning that this approach was already used to define riparian rights to 
watercourses, subterranean streams, and underground percolating waters.\textsuperscript{183} 
The court of appeals rejected this argument by distinguishing surface water 
law as pertaining to the "riddance" of water, while riparian rights go to the 
"use of water."\textsuperscript{184}

The court of appeals went on to note that the modified common enemy 
rule does take reasonableness into account through the "due care" and 
"collection and discharge" qualification.\textsuperscript{185} The court, however, recognized 
that these modifications may no longer be sufficient. "We may well agree that 
the reality of modern urban life requires that an even more considerate rule of 
reason apply so that the basis of liability [at least as to urban areas] becomes 
whether the benefit of the improvement to one landowner outweighs the harm 
resultant to another."\textsuperscript{186}

Despite this type of advocacy by at least one court of appeals, the 
Missouri Supreme Court has clearly expressed its intention to maintain the 
modified common enemy rule as the law of Missouri. In M.H. Siegfried Real 
Estate v. City of Independence,\textsuperscript{187} the Missouri Supreme Court addressed the 
issue of whether a lower landowner can back up surface water onto an upper 
landowner's property. The court held that a lower landowner may have 
almost unlimited freedom in backing up water, while an upper landowner is 
bound by the substantial restrictions of the modified common enemy rule.\textsuperscript{188} 
While noting that such a holding creates an anomaly, the court held fast to the 
common enemy rule: "[W]e do not perceive any general trend in Missouri or 
elsewhere toward abandonment of the 'common enemy' rule in favor of some 
other concept such as a 'reasonable use' doctrine."\textsuperscript{189} The court, however, 
had not been asked by the parties to reevaluate the state of the law in this area

181. 610 S.W.2d 321 (Mo. Ct. App. 1980).
182. Id. at 325
183. Id. at 327 n.5.
184. Id.
185. Id. at 328 n.5.
186. Id.
187. 649 S.W.2d 893 (Mo. 1983) (en banc).
188. Id. at 898.
189. Id.
and it noted that this case would not have been appropriate for such an undertaking. The statement quoted above indicates that any reevaluation would most likely result in the modified common enemy rule remaining the law of Missouri.

A recent Missouri case concerning surface water law is Hansen v. Gary Naugle Construction Co. This case involved the issue of whether the modified common enemy rule applies to actions against land developers founded on nuisance and trespass. The plaintiffs sued the defendant (Naugle) for damages sustained as a result of an increase in the volume and velocity of surface water runoff following Naugle’s development of land lying uphill from plaintiff’s property. Testimony confirmed that the development of the upper land by Naugle caused the velocity and volume of storm water runoff to increase by “three times from that which was normally discharged over the plaintiffs’ land by virtue of the natural drainway patterns.” The trial court found in favor of the plaintiffs on a "trespass and/or nuisance" theory and awarded each plaintiff $5,800. The Court of Appeals for the Western District reversed the trial court.

The Missouri Supreme Court affirmed the court of appeals and found for the defendant. In reaching its conclusion, the court first noted that trespass and nuisance are among the recognized exceptions to the common enemy doctrine. The court rejected the trespass action, reasoning that trespass requires some element of intent. "[A] trespass action will lie only where the defendant undertakes some alteration of the natural drainage patterns for the purpose of altering those patterns." There is no trespass when the upper landowner discharges the water where it would have gone naturally. Because the trial court did not find that the defendant discharged water outside the natural drainway on the plaintiff’s property, the action for trespass did not lie.

The court likewise rejected the plaintiff’s nuisance theory. Nuisance is founded on an "unreasonable, unusual or unnatural land use that substantially

190. Id.
191. 801 S.W.2d 71 (Mo. 1990) (en banc).
192. Id.
193. Id. at 72, 73.
194. Id. at 73.
195. Id.
196. Id.
197. Id. at 74 (citing Hawkins v. Burlington Northern, 514 S.W.2d 593, 600 (Mo. 1974) (en banc)).
198. Id.
199. Id. at 74-75.
200. Id. at 75.
imparts the right of the owners of the lower tenement to enjoy their property peacefully.\textsuperscript{201} In Missouri, however, it is not an "unreasonable use" to undertake development of higher land, unless the effect of the development becomes unreasonable because the "upper landowner discharges water outside the natural drainway or discharges surface water onto the natural drainway in excess of the capacity of that drainway."\textsuperscript{202} Again, because the trial court did not find that the discharge was outside the natural drainway, the common enemy rule defeated the plaintiff's nuisance cause of action.\textsuperscript{203}

The Missouri Supreme Court stated its holding as follows: "A developer may collect surface water [on its property] in artificial drains and precipitate it into a natural drainway channel thereon . . . even though in doing so they might increase and accelerate the flow of the surface water in its natural canal into the land of the plaintiffs."\textsuperscript{204} The court stated that it saw no need to alter this rule.\textsuperscript{205}

This case is an excellent example of the harshness of the common enemy rule and the inadequacies of its exceptions. The trial court found that the defendant had collected surface water and discharged it in "destructive and increased quantities" resulting in injury to the adjoining landowners.\textsuperscript{206} Yet, the plaintiffs were not allowed to recover because the defendant had not exceeded the capacity of the natural drainway. Under this rule, developers will be able to take advantage of lower landowners and save themselves substantial construction costs by developing land where there is a natural drainway and by making sure that their alteration of the land does not cause the flow of surface water to exceed the capacity of the drainway. Significant damage to the innocent lower landowner could still occur and the upper landowner would bear no responsibility. Under Hansen, it appears the upper landowner could increase the volume and velocity of the flow by at least three times its original capacity and avoid liability, even though damage to the lower landowner occurs.

V. Conclusion

If Missouri were to adopt the reasonable use rule, inequitable results against lower landowners could be avoided. Each landowner would be held

\textsuperscript{201} Id. at 74 (citing Frank v. Environmental Sanitation Management, Inc., 687 S.W.2d 876, 880 (Mo. 1985) (en banc)).
\textsuperscript{202} Id. at 75.
\textsuperscript{203} Id.
\textsuperscript{204} Id. (quoting Haferkamp v. City of Rock Hill, 316 S.W.2d 620, 627 (Mo. 1958)).
\textsuperscript{205} Id.
\textsuperscript{206} Id.
to a standard of reasonable use. Landowners would still be able to develop land, but they would have to take responsibility for their actions. Is this such a bad idea?

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