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DIFFUSED SURFACE WATER IN ARKANSAS: IS IT TIME FOR A NEW RULE?

J. W. Looney*

I. INTRODUCTION

Issues involving water have gained increased attention in Arkansas in recent years. The legislature has addressed matters of water use and control in every session since the drought of 1980. As a result, Arkansas has considerably revised the rules relating to the use of water from streams and groundwater management.¹ One area that has received less attention but may be no less important relates to the control of diffused surface water. Other than legislation providing for the organization and management of drainage and levee districts² and a few scattered enactments dealing with the obstruction of watercourses,³ it has been left to the courts to devise and to apply rules of liability for activities associated with diffused surface water. These controversies have been before the courts on a regular basis dating to the last century and became more common as development—both agricultural and urban—progressed in the state.

Arkansas has traditionally followed the riparian rights doctrine governing water rights. This doctrine, modified by statute in recent years,⁴ applies to water in watercourses, streams, and lakes. Separate rules govern the rights of landowners to deal with diffused surface water not yet in a watercourse. The statutory modifications of the riparian doctrine in Arkansas carefully exclude diffused surface water from regulation.⁵ Further,

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1. For a detailed review of these changes, see J. Looney, *An Update on Arkansas Water Law: Is the Riparian Doctrine Dead?* 43 ARK. L. REV. 573 (1990); J. Looney, *Enhancing the Role of Water Districts in Groundwater Management and Surface Water Utilization in Arkansas*, 48 ARK. L. REV. 643 (1995).

2. See e.g., Irrigation, Drainage, and Watershed Improvement District Act, ARK. CODE ANN. §§ 14-117-101 to -427 (Michie 1987 and Supp. 1995). See also Drainage and Levee Improvement Districts, ARK. CODE ANN. §§ 14-120-101 to -705 (Michie 1987 and Supp. 1995); Drainage Improvement Districts, ARK. CODE ANN. §§ 14-121-101 to -1009 (Michie 1987 and Supp. 1995); Municipal Drainage Improvement Districts, ARK. CODE ANN. §§ 14-122-101 to -211 (Michie 1987 and Supp. 1995); Levee Improvement Districts, ARK. CODE ANN. §§ 14-123-201 to -507 (Michie 1987 and Supp. 1995).

3. See *infra* text accompanying notes 68-72 and part B.3.

4. See *supra* note 2.

5. See ARK. CODE ANN. § 15-22-202(3) (Michie 1994).

legislation which establishes permit requirements for dam construction also excludes dams designed to capture diffused surface water.⁶

Thus it has been left to the Arkansas courts to develop rules determining which water is considered to be in a watercourse and to adopt rules dealing with diffused surface water. Issues related to these questions most often come up in the context of three activities. First, a landowner may be charged with responsibility for obstructing a watercourse through failure to keep it clear or through the installation of man-made obstructions, such as dams, which do not allow water to flow naturally. The landowner may defend by asserting that the obstruction is not in a watercourse. Second, a landowner may wish to collect and remove excess water from the land or establish a drainage system for removal of water. Third, a landowner may wish to prevent water from coming onto the property through the use of dikes, levees, or similar structures or by changing the normal flowage to prevent water from entering certain areas. In all such cases the extent to which the landowner may achieve the goals or incur liability is dependent on the answers to two basic questions which are the focus of this study, to wit: what is a watercourse and what rules apply to diffused surface water?

II. WHAT IS A WATERCOURSE?

A. Definition

The *Restatement (Second) of Torts* defines watercourse as: "a stream of water of natural origin, flowing constantly or recurrently on the surface of the earth in a reasonably definite natural channel."⁷ The term includes "springs, lakes or marshes in which a stream originates or through which it flows."⁸

The question of what is a watercourse could also be asked conversely: what is diffused surface water? The *Restatement (Second) of Torts* defines surface water as "[w]ater from rain, melting snow, springs or seepage that lies or flows on the surface of the earth but does not form a part of a watercourse or lake."⁹ Under this definition, it becomes necessary to determine first whether a watercourse exists in order to define diffused surface water.

The Arkansas courts have focused on this question in a variety of contexts dating to the last century. For example, in an 1880 case, the

6. See ARK. CODE ANN. § 15-22-210-214 (Michie 1994).

7. RESTATEMENT (SECOND) OF TORTS § 841(1) (1979).

8. *Id.* at § 841(2).

9. *Id.* at § 846.

Arkansas Supreme Court was called upon to determine liability of a railroad for constructing a solid road-bed embankment across a natural drain.¹⁰ The court noted that no evidence had shown an obstruction of surface water but that "Lye Branch was, by all the evidence, a stream with a defined bed, but sluggish."¹¹

One of the first expressions of a workable definition of watercourses came in 1916 in *Boone v. Wilson*,¹² a dispute involving the accumulations of "drift, mud, weeds and other matter" which diverted the flow of water onto the plaintiffs' land.¹³ They claimed this was an obstruction of a watercourse and that the defendant was responsible for the resulting damage.¹⁴ Although the court was not convinced that the drift was caused by any "act of commission or any failure" on the part of the defendants, the court had to determine whether the area in question constituted a watercourse to reach the final result.¹⁵ The court applied definitions of watercourse from an Idaho case and a California case. The Supreme Court of Idaho defined water course as:

[A] stream of water flowing in a definite channel, having a bed and sides or banks, and discharging itself into some other stream or body of water. The flow of water need not be constant, but must be more than mere surface drainage occasioned by extraordinary causes; there must be substantial indications of the existence of a stream, which is ordinarily a moving body of water.¹⁶

The California Supreme Court said:

A water course is defined to be a running stream of water; a natural stream, including rivers, creeks, runs, and rivulets. There must be a stream, usually flowing in a particular direction, though it need not flow continually. It may sometimes be dry. It must flow in a definite channel, having a bed or banks, and usually discharges itself into some other stream or body of water. It must be something more than a mere surface drainage over the entire face of the tract of land, occasioned by unusual freshets or other extraordinary causes.¹⁷

10. *St. Louis, I.M. & S. Ry. v. Morris*, 35 Ark. 622, 623 (1880).

11. *Id.* at 626.

12. 125 Ark. 364, 188 S.W. 1160 (1916).

13. *Id.* at 366, 188 S.W. at 1161.

14. *Id.*

15. *Id.* at 368-72, 188 S.W. at 1162-63.

16. *Id.* at 368, 188 S.W. at 1162 (quoting *Hutchinson v. Watson Slough Ditch Co.*, 101 P. 1059, 1061 (Idaho 1909)).

17. *Boone*, 125 Ark. at 368, 188 S.W. at 1162 (quoting *Sanguinetti v. Pock*, 69 P. 98, 100 (Cal. 1902)).

In *Boone*, the watercourse in question was variously referred to as a "ditch," an "old branch," and an "old channel."¹⁸ It had apparently been dug out by a former owner for the purpose of straightening the channel.¹⁹ The court indicated that the fact that "the water took the course of this ditch instead of being confined in the former banks of the channel did not make it any the less a natural water course. It was still a natural water course though flowing, after the construction of this ditch, in artificial channels."²⁰

In *Leader v. Mathews*²¹ the court was called upon to apply the definition from *Boone* to a situation involving water in a "slough" across which the defendants had constructed a dam or levee. The dam was located in an area described as a "draw, slash, depression or swale" known as Raft Slough. Although no testifying witness could remember, the court found that the area was probably the channel or course of a stream at one time. However, now the area resembled a "long hole" or shallow "reservoir."²² The plaintiffs claimed it was a watercourse as defined in *Boone*.²³ Water sometimes flowed in the opposite direction toward a drainage ditch which crossed the slough, and the evidence showed that Raft Slough would not operate as a drainage canal unless additional ditches were cut for flow of the water.²⁴ A part of the bed of the depression was in cultivation.²⁵ Given all these facts, the court was not convinced that the slough met the definition of watercourse.²⁶

The matter of watercourse determination was before the court again in the 1950s. In *Turner v. Smith*²⁷ the defendant had constructed a rectangular reservoir some one and three-quarters of a mile long and a mile wide for duck hunting.²⁸ The levee around the reservoir was about three feet high, and the plaintiffs claimed it obstructed natural watercourses.²⁹ The court applied the definition of watercourse from *Boone* to find that at least two natural watercourses had been obstructed by the levee.³⁰ The north levee crossed Short Bayou which had a clearly visible channel at its point of

18. *Id.* at 369-70, 188 S.W. at 1162-63.

19. *Id.* at 369, 188 S.W. at 1163.

20. *Id.* at 370, 188 S.W. at 1163.

21. 192 Ark 1049, 1050, 95 S.W.2d 1138 (1936).

22. *Id.* at 1050-51, 95 S.W.2d at 1139.

23. *Id.* at 1050, 95 S.W.2d at 1138-39.

24. *Id.* at 1051, 95 S.W.2d at 1139.

25. *Leader*, 192 Ark. at 1053, 95 S.W.2d at 1140.

26. *Id.* at 1054, 95 S.W.2d at 1140.

27. 217 Ark. 441, 231 S.W.2d 110 (1950).

28. *Id.* at 442, 231 S.W.2d at 111.

29. *Id.* at 442-43, 231 S.W.2d at 111-12.

30. *Id.* at 443, 231 S.W.2d at 112.

entry.³¹ The bayou flattened in the nearly level timberland, but did “flow sluggishly” toward the southeast until it “reappeared” as a stream with well defined banks.³² Similarly, Fish Lake Bayou entered the property and temporarily “fingered out” to become a “marsh” or “scatters” before reappearing as a bayou.³³ The court said that “[t]he fact that these streams temporarily flattened out and flowed without well defined banks did not destroy their character as watercourses, nor did this fact deprive the appellees of their right to insist that the water’s flow be unimpeded.”³⁴ According to the court, a watercourse may “spread out and become sluggish” at intervals without being reduced to surface water.³⁵

In the 1953 case of *Stacy v. Walker*³⁶ the court addressed the question of whether a flowage area was a defined waterway.³⁷ The area involved was described as a slight depression into which rainfall flowed and then followed a natural contour which created a bog with no outlet when blocked by defendant’s levee.³⁸ The court applied the rule from *Leader v. Matthews* and indicated that water flowing into low places “do[es] not necessarily constitute a watercourse.”³⁹

In another 1953 case, an area contended to be a natural water course had been used for fourteen to fifteen years as a rice farm.⁴⁰ The plaintiffs’ witness described the area as a “sway” that was nearly flat.⁴¹ Drainage from higher land to the east converged to form a well-defined stream.⁴² However, when the stream reached the flat lands west of the ridge, it left its banks and spread over the flat lands.⁴³ It followed the lowest portions, eventually reaching the L’Anguille River after a well-defined channel reappeared.⁴⁴ The depression was some 100 to 400 feet wide and 5000 feet long.⁴⁵ The defendants had constructed a levee or dike which prevented any of the water from crossing their property.⁴⁶ The fact that the land had been

31. *Id.* at 444, 231 S.W.2d at 112. The channel was discernible on aerial photographs and described by witnesses. *Id.*

32. *Turner*, 217 Ark. at 444, 231 S.W.2d at 112.

33. *Id.*

34. *Id.* at 444, 231 S.W.2d at 112.

35. *Id.*

36. 222 Ark. 819, 262 S.W.2d 889 (1953).

37. *Id.* at 820, 262 S.W.2d at 889.

38. *Id.* at 822, 262 S.W.2d at 890.

39. *Id.* (citing *Leader v. Matthews*, 192 Ark. at 1053, 95 S.W.2d at 1140).

40. *Reddmann v. Reddmann*, 221 Ark. 727, 728, 732, 255 S.W.2d 668, 669-70 (1953).

41. *Id.* at 731, 255 S.W.2d at 669.

42. *Id.* at 731, 255 S.W.2d at 670.

43. *Id.*

44. *Id.*

45. *Id.*

46. *Id.* at 729-30, 255 S.W.2d at 669.

used for fourteen or fifteen years for rice production destroyed the notion that it was a natural water course.⁴⁷ Quoting the lower court, the Arkansas Supreme Court reiterated that "the most that can be said is that in the case of overflows, or excessive rains, the water naturally follows the contour of the land, and if unobstructed would recede over this "sway," as indicated by plaintiffs' witness."⁴⁸

In *Solomon v. Congleton*⁴⁹ the court applied the *Boone* definition of a watercourse to a slough, but the court first attempted to define slough.⁵⁰ Using a standard dictionary definition of slough, the court found Power Slough to be a natural drain.⁵¹ Citing *Turner v. Smith*, the court indicated that the fact that the slough may have intermittently flattened out and flowed without well-defined banks did not destroy its character as a watercourse.⁵² Finding the slough to be more like that in *Turner*, the court awarded the plaintiff injunctive relief but denied damages from the existence of the obstruction.⁵³

In a more recent review, the court in *Boyd v. Greene County*⁵⁴ refused to find the existence of a watercourse because the water involved was "mere surface drainage from neighboring rice fields and/or rainfall."⁵⁵ The plaintiffs argued that the source of water was immaterial and the fact that the water was mere surface drainage did not preclude a finding that a watercourse existed.⁵⁶ However, the court refused to adopt this view.⁵⁷

The court noted that the water followed the contour of the land in the vicinity and flowed onto the defendant's land because that was the low ground in the vicinity.⁵⁸ Particularly persuasive was the fact that the water never flowed in a definite channel with a bed and banks.⁵⁹ The court quoted

47. *Id.* at 732-33, 255 S.W.2d at 670.

48. *Id.* at 733, 255 S.W.2d at 670.

49. 245 Ark. 487, 432 S.W.2d 865 (1968).

50. *Id.* at 488-89, 432 S.W.2d at 866.

51. *Id.* at 489-90, 432 S.W.2d at 866. The court said slough means "[a] depression in a prairie, often dry, forming part of the natural-drainage system: sometimes deeply miry, [or] [a] stagnant swamp or reedy inlet, small bayou, water-channel, or pond in which water backs up, or which is filled by freshets." *Id.* at 489, 432 S.W.2d at 866 (quoting FUNK & WAGNALL'S NEW STANDARD DICTIONARY OF THE ENGLISH LANGUAGE (1961)).

52. *Id.* at 491, 432 S.W.2d at 867.

53. *Id.* at 492, 432 S.W.2d at 867-68.

54. 7 Ark. App. 110, 644 S.W.2d 615 (1983).

55. *Id.* at 113, 644 S.W.2d at 617.

56. *Id.*

57. *Id.*

58. *Id.* at 115, 644 S.W.2d at 618.

59. *Id.* at 113, 644 S.W.2d at 617.

at length from an 1890 case, *St. Louis, Iron Mountain & Southern Railway Co. v. Ramsey*.⁶⁰

The banks of a river are those elevations of land which confine the waters when they rise out of the bed; and the bed is that soil so usually covered by water as to be distinguishable from the bank by the character of the soil, or vegetation, or both, produced by the common presence and action of flowing water. But neither the line of ordinary high-water mark, nor of ordinary low-water mark, nor of a middle stage of water, can be assumed as the line dividing the bed from the banks. This line is to be found by examining the bed and banks, and ascertaining where the presence and action of water are so common and usual, and so long continued in all ordinary years, as to mark upon the soil of the bed a character distinct from that of the banks, in respect to vegetation, as well as in respect to the nature of the soil itself. Whether this line between the bed and the banks will be found above or below, or at a middle stage of water, must depend upon the character of the stream. . . . But in all cases the bed of a river is a natural object, and is to be sought for, not merely by the application of any abstract rules, but as other natural objects are sought for and found, by the distinctive appearances they present; the banks being fast land, on which vegetation, appropriate to such land in the particular locality, grows wherever the bank is not too steep to permit such growth, and the bed being soil of a different character and having no vegetation, or only such as exists when commonly submerged by water.⁶¹

The court found this definition to be applicable to the determination of whether a watercourse existed.⁶²

B. Implications of a Finding of "Watercourse"

A number of implications flow from a decision that a particular area is a watercourse. First, all rules for allocation and use of water under the riparian rights system are applicable. This means, primarily, that the rights of the owner of land next to the watercourse to use the water or of others who use water from the watercourse will be determined by application of the riparian rights concept of "reasonable use." Second, the state has imposed permit requirements for dam construction in watercourses along with other statutory restrictions. Third, a number of prohibitions on what

60. 53 Ark. 314, 13 S.W. 931 (1890).

61. *Boyd*, 7 Ark. App. at 113-14, 644 S.W.2d at 617-18 (quoting *Ramsey*, 53 Ark. at 322-23, 13 S.W. at 933).

62. *Id.* at 114, 644 S.W.2d at 618.

can be done in damming, filling or otherwise preventing flow come into play. Particular statutes govern the responsibility of landowners in keeping watercourses open and free from obstructions. Both criminal and civil liability may be involved.

1. *Riparian Rights and Use of Water from Watercourses*

In 1955 Arkansas formally adopted the riparian rights concept of reasonable use in *Harris v. Brooks*.⁶³ The basic tenet of the riparian rights doctrine is that the right to use water from a stream or lake is restricted to those who are riparian to the water source. This right is restricted in volume to a reasonable amount with respect to the purposes for which the water is to be used on the riparian land. As stated by the Arkansas Supreme Court,

[w]hen one lawful use of water interferes with or detracts from another lawful use, then a question arises as to whether, under all the facts and circumstances of that particular case, the interfering use shall be declared unreasonable and as such enjoined, or whether a reasonable and equitable adjustment should be made, having due regard to the reasonable rights of each.⁶⁴

The concept of reasonableness is the essence of the riparian doctrine. However, this approach applies only to the use of water from streams and lakes and has not been used with regard to diffused surface water. Thus, a status determination of a particular flow of water as being a watercourse implicates the entire system of water allocation built around the riparian rights concept.

Arkansas has dealt with issues involving water shortages by enacting legislation aimed at modifying certain aspects of the riparian rights doctrine. For example, the Arkansas Soil and Water Conservation Commission (ASWCC) has statutory authority to allocate scarce water during periods of shortage.⁶⁵ The agency also operates a registration system for diversions of water from streams. The agency has adopted rules to implement this authority which detail the processes for registration of use and for allocation decisions.

These rules attempt to incorporate legislative intent as to which water is subject to registration for diversion and subject to allocation.⁶⁶ The rules

63. 255 Ark. 436, 283 S.W.2d 129 (1955).

64. *Id.* at 445, 283 S.W.2d at 134.

65. ARK. CODE ANN. §§ 15-22-205(3) to -217 (Michie 1994).

66. ARKANSAS SOIL & WATER CONSERVATION COMMISSION, RULES FOR THE UTILIZATION OF SURFACE WATER (1989) [hereinafter RULES].

exclude from the registration requirement diversions of diffused surface water.⁶⁷ They also exclude from the allocation process various categories of use, including water diverted from intermittent streams and diffused surface water.⁶⁸ Intermittent streams are those “whose flow is seasonal in nature and does not flow continuously.”⁶⁹ The exclusion is a practical one because such streams would likely contain no water during periods of shortage when the allocation rules come into play. These streams may have been excluded because they would not be considered watercourses under the riparian doctrine. However, the definition used would not definitely exclude such streams from the ordinary definition of watercourse.⁷⁰

The rules define diffused surface water somewhat differently than the statutes. The legislation establishing the allocation authority defined diffused surface water as that “occurring naturally on the surface of the ground other than in natural channels, lakes or ponds.”⁷¹ The rules expand that definition to include water on the surface of the ground “other than in natural or altered stream channels, lakes or ponds.”⁷² Under either definition, water that is not in streams is excluded from the registration and allocation rules. Both the legislation and rules define stream as excluding a “depression, swale, or gully, through which diffused water flows.”⁷³

2. Dam Permit Legislation

In 1957 the legislature adopted requirements making a permit necessary in order to construct or own a dam for any purpose.⁷⁴ This legislation established certain restrictions on the permit’s issuance directed toward safety and concern for downstream riparian owners whose water use could be adversely affected by the structure’s presence. The legislation further sought to protect fish and wildlife dependent on the sufficient flow of the water. Any impoundment must be only for “surplus” surface water and constructed in a manner that allows discharge of a quantity necessary to protect the rights of lower riparian owners, fish, and wildlife.⁷⁵

67. RULES, *supra* note 66, at 302.2(c).

68. RULES, *supra* note 66, at 307.2(e), (f).

69. RULES, *supra* note 66, at 301.3(u).

70. Once sufficient stream flow data is available, such streams may be defined by a statistical method. See RULES, *supra* note 66, notation accompanying 301.3(u).

71. ARK. CODE ANN. §15-22-202(3) (Michie 1994).

72. RULES, *supra* note 66, and accompanying text.

73. ARK CODE ANN. § 15-22-202(10) (Michie 1994); RULES, *supra* note 66, at 301.3 (jj).

74. ARK. CODE ANN. §§ 15-22-210 to -214 (Michie 1994).

75. *Id.* at § 15-22-210(1).

Excluded from the permit requirements are dams that impound less than fifty acre feet of water or are of a height less than twenty-five feet. Also exempt are dams built below the stream's ordinary high water mark.⁷⁶ Clearly, the legislative intent is to require permits only when construction is in a stream. Thus, the permit requirement would not apply to the typical farm pond which catches only diffused surface water. The height exclusion reinforces this interpretation.

3. *Obstruction of Watercourses*

In addition to the authorization of construction of dams as outlined above and the careful attempt to assure that no lower owner would be affected by the presence of the dam, Arkansas has prohibited the obstruction of watercourses through legislation dating back to the nineteenth century. For example, the law prohibits the blocking of a river, creek, or other watercourse unless the "free and easy passage of all fish ascending or descending the watercourse"⁷⁷ is provided from March 1 to June 1 each year. Mills and manufacturers apparently must provide this passage throughout the year.⁷⁸ Dams or other obstructions must be kept open so as to allow a sufficient flow of water to maintain fish life below the obstruction.⁷⁹ In both cases a violation of the statute is a misdemeanor.

Three separate statutes make obstructing the flow of water with timber, tree trunks, or tree limbs a misdemeanor. One prohibits leaving these items in any "navigable stream, drainage ditch or stream bed of any drainage project."⁸⁰ Another extends this prohibition to any "ditch, drain, stream, or canal, whether natural or artificial" and includes not only timber and trees but also "material to be filled or thrown into" any of the above.⁸¹ The third statute simply outlaws the obstruction of a "natural drain" without defining what is intended and, interestingly, excludes Lee, Woodruff, Phillips, and Craighead counties.⁸²

In addition to the potential criminal liability for the obstruction of watercourses, civil liability may be imposed as well. In fact, in the broad obstruction statute referred to earlier, an "interested" person (including levee

76. *Id.* at § 15-22-214(b).

77. ARK. CODE ANN. § 15-44-110(a) (Michie 1994).

78. *Id.* at (a)(1).

79. *Id.* at § 5-72-107(a) (Michie 1993).

80. *Id.* at § 5-72-104.

81. *Id.* at § 5-72-105.

82. *Id.* § 5-72-106. This statute is inapplicable to a levee district's actions in constructing levees to protect property within its territory. See *St. Louis, I.M. & S. Ry. v. Board of Directors*, 103 Ark. 127, 145 S.W. 892 (1921).

and drainage districts) may remove the obstruction and sue the person causing the obstruction for the costs associated with removing it.⁸³

Aside from these statutory prohibitions, one who obstructs a watercourse can be liable for doing so under a nuisance theory. *Taylor v. Rudy*⁸⁴ is instructive on this point. In *Taylor* the defendant built dams on a non-navigable stream, which caused it to back up onto the plaintiff's property. The court upheld the granting of equitable relief in the form of a permanent injunction. Similarly, in a number of the cases reviewed above dealing with the definition of watercourse, the courts, upon finding that a watercourse existed, granted relief. For example, in *Turner v. Smith*⁸⁵ the construction of a levee enclosing a shallow reservoir obstructed a natural watercourse and damaged adjacent landowners' property. The court upheld an award of damages for crop destruction and a decree that openings should be cut in the banks to allow passage of water. Likewise, the court in *Solomon v. Congleton*⁸⁶ interpreted a chancellor's finding of a natural drain to be a finding that a watercourse existed and upheld a decree that required the removal of a levee. However, not all such actions have been successful. For example, in *Boone v. Wilson*⁸⁷ the accumulation of drift, mud, weeds and other matter in watercourses causing overflow was found not to have been caused by the defendant but rather "produced by the natural flow of the waters of the stream" and the defendant could not have prevented this obstruction except by an "unreasonable consumption of time and expenditure of money which was not required of him."⁸⁸

Although most of these cases dealt with the rights of others to be free of nuisance for the actions of one landowner in obstructing a watercourse, liability may, of course, also result from the interference with riparian rights. As indicated above in *Harris v. Brooks*, the test is one of reasonableness.⁸⁹

III. RULES OF LIABILITY FOR INTERFERENCE WITH DIFFUSED SURFACE WATER

When one landowner takes action to deal with diffused surface water, either to prevent it from coming onto lower lying land or to remove excess water from the land, neighboring property owners may complain of damage

83. ARK. CODE ANN. § 5-72-105(b) (Michie 1994).

84. 99 Ark. 128, 137 S.W. 574 (1911).

85. 217 Ark. 441, 231 S.W.2d 110 (1950).

86. 245 Ark. 487, 432 S.W.2d 865 (1968).

87. 125 Ark. 364, 188 S.W. 1160 (1916).

88. *Id.* at 372, 188 S.W. at 1163.

89. *See supra* note 63.

to their property. To determine the liability arising from such actions, courts have applied one of five rules. Actually, only three rules are involved, but two have been modified substantially so that the modified versions may now be considered separate rules. The traditional approaches were referred to as the "common enemy" rule and the "civil law" or "natural servitude" rule. Both are approaches growing out of concepts of the rights of property owners. Both have been subject to various exceptions or qualifications. These exceptions or variations may be considered separate rules and are usually referred to as the "modified common enemy" rule and the "modified civil law" rule. In addition, a growing number of courts apply a tort concept of "reasonable use" to determine liability.

A. Common Enemy Rule

In its pure formulation this property rule suggests that diffused surface water may be treated as a common enemy and that a property owner may take whatever steps necessary to protect against it. The concept has its greatest validity in guarding against floodwaters or waters from the sea. The rule has less justification when applied to situations involving mere drainage of surface water, but is still applied by some courts particularly in urban areas. Applied in its pure form the rule would permit a landowner to construct dams, walls, levees, or ditches to prevent water from coming onto the property and would allow a property owner to fill, level, and drain property without responsibility for resulting damage to neighboring property.

The origin of the concept is uncertain, but is sometimes attributed to concepts in English law dealing with water from the sea.⁹⁰ In its pure form it was first applied, although not by name, in the United States in *Luther v. Winnisimmet*,⁹¹ an 1851 Massachusetts case. The term common enemy was not used until 1875 in a New Jersey case.⁹² *Gannon v. Hargaedon*,⁹³ an 1865 Massachusetts case, set forth the standard rule in full.

As indicated, some courts continue to apply the rule in urban areas although it has been substantially modified in most agricultural areas. The justification for the rule arises from an absolutist concept of property rights

90. See Stanley V. Kinyon and Robert C. McClure, *Interferences With Surface Waters*, 24 MINN. L. REV. 891, 899 (1940) [hereinafter Kinyon and McClure].

91. 63 Mass. 171 (1851). See also Charles L. Snodgrass and Lawrence O. Davis, *The Law of Surface Water in Missouri*, 24 MO. L. REV. 137 (1959) (Part 1) and 24 MO. L. REV. 281 (1959) (Part 2) [hereinafter Snodgrass and Davis].

92. *Town of Union v. Dukes*, 38 N.J. 21 (1875) (cited in Snodgrass and Davis, *supra* note 91, at 150 n.72).

93. 92 Mass. 106 (1865) (cited in Snodgrass and Davis, *supra* note 91, at 150 n.73 and Kinyon and McClure, *supra* note 90).

that give rise to the idea that an owner may take whatever actions deemed necessary to utilize his or her property.

B. Civil Law or Natural Servitude Rule

In its pure form, the civil law or natural servitude rule is the exact opposite of the common enemy rule. The civil law rule suggests that a property owner may take no action to disturb the natural drainage of water and must accept water which comes onto the property as a servitude. This concept arises from an idea that "water flows as it is wont to flow" and should not be disturbed.

The adoption of the rule in the United States is traced to early cases in Louisiana.⁹⁴ Because Louisiana generally followed civil law, the rule was, perhaps inappropriately, denominated as the civil law rule. Other courts followed the Louisiana approach without actually recognizing the rule as a civil law concept. The first court to do so outside Louisiana was *Martin v. Riddle*,⁹⁵ in an 1848 Pennsylvania case. In its pure form, the civil law rule may not, in fact, represent the actual state of the civil law as later adopted in Louisiana.⁹⁶

C. Modified Common Enemy Rule

The pure common enemy rule was not long retained by many courts because of the harshness of the result. In fact, a number of courts indicated they were adopting the common enemy concept, but immediately modified it by adding qualifications that would impose liability if the landowner acted negligently in actions taken to protect the property or in ridding the property of excess water that resulted in harm to neighboring property. This modification permitted courts to evaluate the property owner's actions to determine if they caused "unnecessary harm." Certainly, the collection and discharge of the water onto neighboring property through artificial means might be considered negligent, and, if it caused unnecessary harm, liability would be imposed. Acceleration of water flow by artificial means, such as ditches, would also appear to violate the principle.

94. *Orleans Nav. Co. v. Mayor of New Orleans*, 2 Mart. 214 (La. 1812), followed by *Martin v. Jett*, 12 La. 501 (1838) and *Lattimore v. Davis*, 14 La. 161 (1939) (cited in *Snodgrass and Davis*, *supra* note 91, at 148 n.57).

95. 26 Pa. 415 (1848) (cited in *Kinyon and McClure*, *supra*, note 90, at 895 n.12).

96. See 2 WATERS AND WATER RIGHTS, § 10.01(b)(2), at 37 (Robert E. Beck, ed., 2d ed. 1991)).

D. Modified Civil Law Rule

The civil law rule in its pure form would inhibit development and improvement of land. In urban areas particularly, this rigid rule would have led to unjust results because it placed the entire liability on one owner. As a result, a number of courts stated allegiance to the civil law rule, but modified it by applying a reasonableness test to the conduct of the one who altered a natural drainage system. This was sometimes done by recognizing specific exceptions to the rule. For example, the so-called "natural watercourse" exception allowed an upper landowner to alter the natural water flow, so long as it remained in the natural drainage system when it passed to a lower landowner. An upper landowner could collect the water at one point and increase the flow, provided the flow was into a natural watercourse. "Unreasonable injury" would have to result in order for liability to be imposed. The lower landowner was also subject to a reasonableness test for any actions undertaken to obstruct the water flow coming onto the lower property.

E. Reasonable Use Rule

As courts began to graft limitations onto the two basic property oriented rules, the outcomes in cases seemed to be indistinguishable. As stated by one court:

This convergence of the two theories has been aptly described as creating a situation in which "the civil-law owner may *never* drain his land *except* by following the natural drainage, but the common-enemy owner may *always* drain his land except that he may not use artificial channels. The civil-law owner may *never* obstruct the natural flow of surface waters *unless* he acts reasonably, while the common-enemy owner may always obstruct the flow *if* he acts reasonably."⁹⁷

The effect of the modifications was to bring tort-type concepts into the analysis and to depart from the rigid application of the property oriented rules.⁹⁸ However, some courts chose to adopt a third rule instead of using tort concepts to overlay the property rules. This rule embraces the concept of reasonable use. The reasonable use rule determines liability by consideration of all relevant circumstances. Liability is determined by the reason-

97. *Butler v. Bruno*, 341 A.2d 735, 739 (R.I. 1975) (quoting Frank E. Maloney and Sheldon J. Plager, *Diffused Surface Water: Scourge or Bounty?* 8 NAT. RESOURCES J. 72 (1968)).

98. *Id.* at 739.

ableness of the property owner's actions who altered the surface water flow. That is, the consequential harm to another's use and enjoyment of his property is evaluated to see if the result of the alterer's activity was unreasonable. This is, of course, not unlike the tort of nuisance. In fact, the *Restatement (Second) of Torts* endorses the reasonable use test and specifically recognizes it as a form of nuisance.⁹⁹ The same rules of liability are involved as for any invasion of the right to the use and enjoyment of property. The activity may be either the backing up of surface water or the increase in flow; if the interference is unreasonable, liability is imposed.

One commentator has summarized the factors that courts have considered in determining whether alteration of natural drainage is reasonable as follows:

- (1) The injury to neighboring land;
- (2) The benefit to the drained land;
- (3) The burden on either party in ameliorating the injury;
- (4) The extent of change to the drainage system;
- (5) The necessity for changing the drainage system;
- (6) The motive for changing the drainage system;
- (7) The foreseeability of impact on neighboring lands;
- (8) Justice and other social values;
- (9) The location of the lands;
- (10) The extent and intended effect of any public authorization; and
- (11) The protection of existing values.¹⁰⁰

The reasonable use rule was first mentioned in *Sweet v. Cutts*,¹⁰¹ an 1870 New Hampshire case. Since then it has emerged as the dominant approach in determining liability, in part because of its flexibility.¹⁰² Its flexibility is both its greatest strength and a major weakness. In a frequently cited opinion of the Rhode Island court in which the majority adopted the reasonable use rule, the dissenting justice criticized the need for a factual determination in each case. He said, "[b]ecause I believe that the proposed factual test is no 'rule' at all and that it fails to provide a landowner any reasonably certain standards governing the use of his land, I respectfully

99. RESTATEMENT (SECOND) OF TORTS § 833 (1965).

100. 2 WATERS AND WATER RIGHTS, *supra* note 96, § 10.03(b)(3) at 47-48. The factors are arranged according to the number of states where one or more of the factors have been mentioned.

101. 50 N.H. 439 (1870) (cited in Snodgrass and Davis, *supra* note 91 at 152 n.82).

102. See 2 WATERS AND WATER RIGHTS, *supra* note 96, § 10.03(b)(3) at 44-45.

dissent.”¹⁰³ The majority anticipated this criticism and indicated that the property-based rules, as modified, failed to afford any more predictability than the reasonable use rule.¹⁰⁴

IV. WHAT RULES APPLY TO DIFFUSED SURFACE WATER IN ARKANSAS?

In Arkansas, the liability of a landowner in dealing with the flow of water across lands was clearly addressed for the first time in *Little Rock and Fort Smith Railway Co. v. Chapman*,¹⁰⁵ an 1882 case involving the construction of an elevated embankment and roadway which caused water to stand on the premises of the plaintiff. The Arkansas court had addressed a related issue two years earlier in *St. L.I.M. & S. Railway Co. v. Willis*,¹⁰⁶ approving jury instructions that referred to obstruction of the natural flow and injury by overflowing as a basis for liability when it resulted from failure to construct a road-bed in a skillful and careful manner. However, the *Willis* court did not deal with any specific rules regarding liability.

In *Chapman* the court analyzed in some detail the conflicting rules for dealing with surface water, a matter which the court said had not been settled in the state. The court then proceeded to adopt a modified version of the common enemy rule, which the court repeatedly referred to as the “common law” rule.¹⁰⁷

In rejecting the possible applicability of the civil law rule, the court indicated that it did not feel authorized to depart from common law rules of decision except to the extent that changes, modifications, or qualifications “must legitimately have resulted from the application of old principles to new conditions, or the refusal to apply them to conditions to which they are not applicable.”¹⁰⁸ The court then quoted the reception statute: “By statute the common law of England, as it existed prior to the fourth year of James I, is made the rule of decision in this State, so far as the same is of a general nature and applicable to our condition.”¹⁰⁹

The court then analyzed the approach in other states and concluded that the common enemy doctrine “clothed with qualifications” was the better rule because the decisions finding an unqualified right to deal with surface waters did not “commend themselves to our sense of justice”¹¹⁰ nor seem to

103. *Butler*, *supra* note 97, at 741 (Joslin, J., dissenting).

104. *Butler*, *supra* note 97, at 741 (Joslin, J., dissenting).

105. 39 Ark. 463 (1882).

106. 35 Ark. 626 (1880).

107. *Chapman*, 39 Ark. at 474.

108. *Id.*

109. *Id.*

110. *Id.* at 480.

be in accordance with "the maxim of law so often quoted, and which is but a paraphrase of the golden rule of the Christian,"¹¹¹ apparently referring to the maxim, *sic utere tuo ut alienum non loedas*.¹¹²

While adopting a modification of the unqualified right, the court suggested the test was whether in making improvements the owner acted "in good faith" and "with no purpose of abridging or interfering with any of their neighbor's rights."¹¹³ If the improvements "necessarily do damage" to the neighboring land, the maxim is not infringed.¹¹⁴

When applied to the facts, the court felt the railroad had constructed the roadbed with insufficient drains. The resulting damage was "unnecessary, and was not the result of a fair and proper exercise of its franchise."¹¹⁵ The court said, "It was not reasonable that it should render so much property useless, when it might so easily have prevented it without detriment to its operations."¹¹⁶ *Chapman* has been cited, almost without exception, in later cases as the basis for the adoption of a modified common enemy rule in Arkansas.

Later Arkansas courts applied the *Chapman* approach to a variety of situations. For example, in *Baker v. Allen*¹¹⁷ the court applied the *Chapman* analysis to find that a levee established across a "slight, but broad, depression" along which surface water drained from lands of upper owners would not be grounds for damages if it was the "only practical method of protecting" the lands.¹¹⁸ Similarly, *Jackson v. Keller*¹¹⁹ involved a lower proprietor who constructed a dam or levee across low "swaggy" places to protect his property from water he claimed the upper proprietor collected in drainage ditches and sent to the lower land at a greater volume than the natural drainage system provided.¹²⁰ The court indicated that the upper proprietor had no right to concentrate the water and "throw it by ditches with greater force and volume than it otherwise would have gone."¹²¹ And,

111. *Id.*

112. *Chapman*, 39 Ark. at 476. The phrase means to use your property so as not to injure the rights of another. *Id.*

113. *Id.* at 480.

114. *Id.* (quoting from a note that had been written about *Sweet v. Cutts*, *supra* note 101, that, interestingly enough, adopted the reasonable use test, not a modified version of the common enemy doctrine).

115. *Id.* at 481.

116. *Id.*

117. 66 Ark. 271, 50 S.W. 511 (1899).

118. *Id.* at 276, 50 S.W. at 512-13 (suggesting that the obstruction must be unnecessary for liability to be imposed).

119. 95 Ark. 242, 129 S.W. 296 (1910).

120. *Id.* at 242-43, 129 S.W. at 296.

121. *Id.* at 245, 129 S.W. at 297.

while the lower proprietor had a duty to control the water that came upon his land in natural flow by ditches instead of by the embankment, if he "could have done so at reasonable expense" and if the ditches "could have been made as effectual" as the embankment, he was not liable for doing so as the "only practical method of protecting his land."¹²² The court did not cite *Chapman* as authority but did cite *Baker*.¹²³

Some uncertainty regarding the application of the *Chapman* rule when dealing with floodwaters, as opposed to usual runoff from rainfall, arose in *McCoy v. Board of Directors of Plum Bayou Levee District*.¹²⁴ In *McCoy*, the court dealt with the question of whether a levee could be constructed across "depressions, swales, and low places" so as to prevent floodwater from a river from entering lowlands.¹²⁵ The court also considered whether the landowners between the levee and the river should be compensated for any damages resulting from the higher level of water caused by the levee.¹²⁶ The court declined to identify the floodwater as surface water but said it was treated as a common enemy which could be defended against without liability "unless injury is unnecessarily inflicted upon another, which by reasonable effort and expense could be avoided."¹²⁷ In addition to *Chapman*, the court cited with approval cases from Mississippi,¹²⁸ California,¹²⁹ and Iowa,¹³⁰ which suggested that floodwater should not be treated the same as surface water and that an unqualified common enemy approach would be appropriate.¹³¹ However, in *Leader v. Mathews*¹³² the court suggested that floodwaters could be "overflow" waters or "surface water."¹³³ The *Leader* court held that the common enemy rule gave the owner the right to protect against floodwaters in either case unless the owner "unnecessarily injure[d] or damage[d] another for his own protection."¹³⁴

122. *Id.*

123. *Id.* (citing *Baker v. Allen*, 66 Ark. 271, 50 S.W. 511 (1899). See *supra* text accompanying notes 117-18 for consideration of *Baker*. See also *Brasko v. Prislovsky*, 207 Ark. 1034, 183 S.W.2d 925 (1944); *Honey v. Bertig Co.*, 202 Ark. 370, 150 S.W.2d 214 (1941) and *Leader v. Mathews*, 192 Ark. 1049, 95 S.W.2d 1138 (1936).

124. 95 Ark. 345, 129 S.W. 1097 (1910).

125. *Id.* at 349, 129 S.W. at 1099.

126. *Id.*

127. *Id.*

128. *Kansas City, M. & B. R.R. v. Smith*, 17 So. 78 (Miss. 1895).

129. *Lamb v. Reclamation Dist.*, 14 P. 625 (Cal. 1887).

130. *Hoard v. Des Moines*, 17 N.W. 527 (Iowa 1883).

131. *McCoy*, 95 Ark. at 349-52, 129 S.W. at 1099.

132. 192 Ark. 1049, 95 S.W.2d 1138 (1936).

133. *Id.* at 1053, 95 S.W.2d at 1140.

134. *Id.* at 1140. See also *Brasko v. Prislovsky*, 207 Ark. 1034, 183 S.W.2d 925 (1944) and *Honey v. Bertig Co.*, 202 Ark. 370, 150 S.W.2d 214 (1941).

In *Dent v. Alexander*¹³⁵ the court addressed an issue involving not the damming or preventing of flow but rather the diversion of flow that was alleged to be accelerated onto the plaintiff's property in an unnatural channel.¹³⁶ To determine any resulting liability, the court did not concern itself with whether the upper landowner had accelerated the flow of water onto the lower landowner's property. Rather, the court considered only whether any damage resulted from the upper landowner's actions.¹³⁷ To establish this test, the court relied on a Utah case, *Bohn v. Salt Lake City*.¹³⁸ There, the Utah Supreme Court said:

A landowner incurs no liability by reason of the fact that surface water falling or running onto his land flows thence to the property of others in its natural manner. But he may not use or improve his land in such a way as to increase the total volume of surface water which flows from it to adjacent property, or as to discharge it or any part of it upon such property in a manner different in volume or course from its natural flow, to the substantial damage of the owner of that property.¹³⁹

The right of a landowner to fill to prevent the flow of surface water outside urban areas was reaffirmed in *Timmons v. Clayton*.¹⁴⁰ The court qualified this right by requiring that the lower proprietor, in constructing the levee, "acts in good faith and is free of negligence."¹⁴¹ However, the court seemed to regard the same right in an urban area to be close to absolute.¹⁴² The court cited with approval the earlier case of *Levy v. Nash*,¹⁴³ which held that an owner has a right to fill lower property, to elevate it, to construct ditches or otherwise "to protect it against the surface water from an adjoining lot" as a "necessary incident to the ownership of such property."¹⁴⁴ According to the court, to find contrary would "operate against the advancement and progress of cities and towns . . . against public policy."¹⁴⁵ *Levy* did not qualify the right to deal with surface water in urban areas.

135. 218 Ark. 277, 235 S.W.2d 953 (1951).

136. *Id.* at 278, 235 S.W.2d at 953.

137. *Id.* at 281, 235 S.W.2d at 955.

138. 8 P.2d 591 (Utah 1932).

139. *Id.* at 280, 235 S.W.2d at 954-55. See also *Lee-Phillips Drainage Dist. v. Beaver Bayou Drainage Dist.*, 226 Ark. 105, 289 S.W.2d 192 (1956); *Stacy v. Walker*, 222 Ark. 819, 262 S.W.2d 889 (1953) and *Reddman v. Reddman*, 221 Ark. 727, 255 S.W.2d 668 (1953).

140. 222 Ark. 327, 259 S.W.2d 501 (1953).

141. *Id.* at 331, 259 S.W.2d at 503.

142. *Id.* at 330-31, 259 S.W.2d at 503.

143. 87 Ark. 41, 112 S.W. 173 (1908).

144. *Timmons*, 222 Ark. at 331, 259 S.W.2d at 503 (quoting *Levy*, 87 Ark. at 44, 112 S.W. at 174).

145. *Id.*

However, the court in *Timmons* seemed to suggest that the test whether the landowner was acting negligently or in bad faith, should apply to activities in rural settings¹⁴⁶ and, apparently, left the *Levy* approach intact for urban lands.

The court has had rare occasions to apply the liability rule in recent years. Each time it is mentioned the court reaffirms the original *Chapman* concept. In *Solomon v. Congleton*¹⁴⁷ the court recognized a lower proprietor's right to fend off surface water.¹⁴⁸ In *Smith v. Cruthis*¹⁴⁹ the court cited *Solomon* and held that parties dealing with surface water could "build flumes and levees on their own lands to fend off surface waters."¹⁵⁰ More recently, in *Pirtle v. Opco, Inc.*,¹⁵¹ the court restated the *Chapman* rule and indicated that the right must be exercised with "due care so as not to inflict injury on a neighboring landowner 'beyond what may be fairly necessary.'"¹⁵² In *Pirtle*, apparently for the first time, the court imposed liability because the defendant "went beyond what would be considered fairly necessary in preventing surface waters from coming on to his property."¹⁵³ The court was influenced by the defendant's own testimony that he was not concerned about the effect of his actions on the neighboring property.¹⁵⁴ In *Chism v. Tipton*¹⁵⁵ the court applied a "disproportionate prejudice to another" test and permitted a levee to be maintained across an area which was not found to be a natural stream or watercourse.¹⁵⁶ Most recently, in *Boyd v. Greene County*,¹⁵⁷ the court reviewed the nineteenth-century cases which adopted the common law rule, as modified, and held that if no watercourse existed, the *Chapman* rule applied.¹⁵⁸

146. *Id.* at 330-31, 259 S.W.2d at 503. Although the land in *Timmons* was inside city limits, it did not appear to be of an urban nature.

147. 245 Ark. 487, 432 S.W.2d 865 (1968).

148. *Id.* at 490, 432 S.W.2d at 866.

149. 255 Ark. 217, 499 S.W.2d 852 (1973).

150. *Id.* at 222, 499 S.W.2d at 856.

151. 269 Ark. 862, 601 S.W.2d 265 (Ct. App. 1980).

152. *Id.* at 864, 601 S.W.2d at 266.

153. *Id.* at 865, 601 S.W.2d at 266-67.

154. *Id.* at 864, 601 S.W.2d at 267.

155. 269 Ark. 907, 601 S.W.2d 254 (Ct. App. 1980).

156. *Id.* at 911, 601 S.W.2d at 256.

157. 7 Ark. App. 110, 644 S.W.2d 615 (1983).

158. *Id.* at 112-15, 644 S.W.2d at 616-17.

V. THE ADOPTION OF A NEW RULE IN MISSOURI

In 1884 Missouri adopted a modified common enemy rule, just two years after the Arkansas decision in *Chapman*. In the original decision, *Abbott v. Kansas City, St. Joseph & Council Bluffs Railroad*,¹⁵⁹ the Missouri court suggested that "reasonable care and prudence" were necessary in dealing with surface water—either guarding against it or diverting it from the premises.¹⁶⁰ Subsequent decisions continued to apply mitigating exceptions but by 1990 the Missouri Court of Appeals conceded that the precedents "cannot be reconciled."¹⁶¹ It was suggested that upper landowners must exercise some degree of care in discharging water to lower lands.¹⁶² Lower landowners, however, could block the flow coming onto their property unless they blocked a natural drainway.¹⁶³ In 1993 the Missouri Supreme Court was confronted with a situation not clearly addressed by either line of cases. In *Heins Implement Co. v. Missouri Highway & Transportation Commission* (MHTC),¹⁶⁴ landowners sued MHTC after a highway bypass project caused flooding on their property.¹⁶⁵ A culvert had been constructed to handle normal drainage, but in periods of heavy rain the bypass acted as a dam, pooling water on the land of the plaintiffs.¹⁶⁶

MHTC claimed that its action involved neither "the collection and discharge of surface waters, nor the blocking of a natural drainway."¹⁶⁷ MHTC argued that prior cases imposed a duty only on upper landowners who discharged collected waters and not on lower landowners who "merely dammed surface water to keep it away from their own property."¹⁶⁸

The Missouri court reviewed the history of the civil law rule and the common enemy rule and their modifications and concluded:

Predictably, neither of these rigid doctrines has proved workable in the real world. In short order each was encrusted with a myriad of mitigating

159. 83 Mo. 271 (1884).

160. *Id.* at 280-81.

161. See *Brown v. H & D Duenne Farms, Inc.*, 799 S.W.2d 621, 628 (Mo. Ct. App. 1990).

162. See *Hansen v. Gary Naugle Const. Co.*, 801 S.W.2d 71 (Mo. 1990) (holding that upper landowners may discharge onto lower landowners if the discharge is through a natural drain, the flow does not exceed the capacity of the natural drain, and the upper landowner acts without negligence); *Looney v. Hindman*, 649 S.W.2d 207 (Mo. 1983) (holding upper landowners to substantial restrictions in discharging water onto lower landowners).

163. *Happy v. Kenton*, 247 S.W.2d 698, 701 (Mo. 1952).

164. 859 S.W.2d 681 (Mo. 1993).

165. *Heins Implement Co.*, 859 S.W.2d at 684.

166. *Id.*

167. *Id.* at 687.

168. *Id.*

exceptions, in some cases harsh and capricious and in most cases confusing and unpredictable. Perhaps the most telling fact is that courts applying these ostensibly opposite rules often reach similar results.¹⁶⁹

The court then reviewed the reasonable use rule and its dual nature as a distinct property law concept and as a tort, a form of nuisance.¹⁷⁰ Because reasonableness is a question of fact, the "thrust and elements" were the same regardless of how the rule was viewed.¹⁷¹ The court concluded that "the common enemy doctrine, even as modified, has outlived its usefulness in our state." Therefore, the court adopted the reasonable use rule "as the one most likely to promote the optimum development and enjoyment of land, while ensuring that their true costs are equitably distributed among the competing interests at hand."¹⁷²

The court was persuaded that the reasonable use rule's "harsh origins and labyrinth of exceptions" were unduly complicated and confusing.¹⁷³ Furthermore, the reasonable use rule was consistent with not only "the most basic tenets of our law" but with concepts governing the rights of users of water generally.¹⁷⁴ The court applied the newly adopted rule to the facts in *Heins Implement* and suggested that unreasonable diversion of surface water, by design or mistake, would be actionable.¹⁷⁵

VI. THE LESSON FOR ARKANSAS

The Missouri decision provides a cogent argument for adopting the reasonable use approach—one that should be considered by the Arkansas courts if the opportunity presents itself, as it surely will. One of the major advantages of the reasonable use approach is that it allows each case to be determined on its facts. The Missouri court explained that courts could then make decisions, "in accordance with general principles of fairness and common sense."¹⁷⁶ Such a rule does not specify rigid rights and privileges with respect to surface water, but rather allows analysis as a form of nuisance. The *Restatement (Second) of Torts* states that: "[a]n invasion of one's interest in the use and enjoyment of land resulting from another's

169. *Id.* at 689.

170. *Id.*

171. *Id.*

172. *Id.* at 690-91.

173. *Id.*

174. *Id.* at 691.

175. *Id.*

176. *Id.* at 689.

interference with the flow of surface water may constitute a nuisance."¹⁷⁷ Under the *Restatement*, liability may be imposed if conduct is either (1) intentional and unreasonable or (2) negligent, reckless, or in the course of an abnormally dangerous activity.¹⁷⁸

In Arkansas, this approach has some appeal because of the potential divergence of approaches in using the common enemy rule in agricultural situations (modified) and urban areas (possibly unmodified). Also, it is unclear which rule actually applies to fending off floodwaters as opposed to fending off usual runoff from rainfall. The reasonable use rule would be applicable in all situations. These subtle distinctions, if they do exist, would be of no consequence.

The adoption of a reasonable use rule would bring Arkansas's law into accord with the law in an emerging number of states that have adopted the reasonable use rule outright.¹⁷⁹ One logical reason for the movement toward the reasonable use rule is mentioned in the Missouri case. Such a move would bring into one classification all water-related rules.¹⁸⁰ Because the reasonable use test is used to judge the actions of one taking water from a stream or lake or from underground wells and is also the test applied to determine liability for interfering with flow in a watercourse, it seems appropriate to evaluate actions dealing with diffused surface water using the same test. Further, the application of nuisance theory is a concept quite familiar to the courts. As stated by the Missouri court, "[r]easonableness is the vital principle of the common law."¹⁸¹

As indicated earlier, another convincing reason exists as to why it might be appropriate for Arkansas to adopt a new rule. The original rule in *Chapman* was adopted under a faulty premise. The court in *Chapman* emphasized the necessity of following the common law, even citing the reception statute and asserting that it could not logically depart from the common law as expressed in English decisions. The rule that the court says it was not authorized to depart from, however, was not necessarily the

177. RESTATEMENT (SECOND) OF TORTS § 833 (1979).

178. *Id.* § 822.

179. *Heins Implement Co.*, 859 S.W.2d at 689 n.13 (citing cases from various jurisdictions such as Alaska, Connecticut, Florida, Hawaii, Kentucky, Massachusetts, Minnesota, Mississippi, Nevada, New Hampshire, New Jersey, North Carolina, North Dakota, Ohio, Rhode Island, Utah, West Virginia, Wisconsin (and now, Missouri) as following the reasonable use approach. Arkansas, Oklahoma, South Carolina and Virginia are cited as having modified the common enemy doctrine by adding a reasonableness requirement. Apparently, California, Illinois, Idaho, Iowa, and Maryland have added a reasonableness requirement to the civil law rule. Other states either follow one of the traditional rules, unmodified, or have introduced other combinations).

180. *Id.* at 691.

181. *Id.* at 691 (quoting *City of Franklin v. Durgee*, 51 A. 911, 913 (1901)).

common law rule or at least not the English common law rule. Evidence exists to suggest that, if anything, the English common law rule was akin to the civil law doctrine. The common enemy doctrine, referred to in *Chapman* as the common law rule was based on a strong view of the rights associated with absolute ownership of land. The English rule, to the extent that it was settled, may have favored the civil law approach.¹⁸² As pointed out by the Missouri court in *Heins Implement*, the English law of surface waters was unsettled at the time the common enemy doctrine appeared in American jurisprudence.¹⁸³ Apparently, the common enemy doctrine appeared in this country in a series of Massachusetts cases beginning in 1851.¹⁸⁴ The term common enemy is of English origin and referred to legal attitudes towards the sea.¹⁸⁵ However, authority exists which suggests that the English courts had in no way adopted the rule to apply to surface drainage.¹⁸⁶

Perhaps this is of some importance in states like Arkansas, which adopted the common law by a reception statute.¹⁸⁷ Of course, the fact that the modified common enemy rule has been followed for more than 100 years makes it, nevertheless, the rule for decision. But, a modern court might be less inclined to cling to the original *Chapman* approach if it knew the decision was based on a faulty premise.

182. See Frank E. Maloney and Sheldon J. Plager, *Diffused Surface Water: Scourge or Bounty?* *supra* note 97, at 78 (citing H. FARNHAM, *WATERS AND WATER RIGHTS* § 889(a) (1914)).

183. *Heins Implement Co.*, 859 S.W.2d at 688.

184. See Charles F. Bridges, Note, *The Application of Surface Water Rules in Urban Areas*, 42 MO. L. REV. 76, 78 n.19 (1977) (citing *Luther v. Winnisimmet Co.*, 63 Mass. 171 (1851); *Flagg v. Worcester*, 79 Mass. 601 (1860); *Gannon v. Hargadon*, 92 Mass. 106 (1865)).

185. *Id.* (citing *King v. Commissioners of Sewers*, 8 B & C 356, 108 Eng. Rep. 1075 (K.B. 1828)).

186. *Kinyon & McClure*, *supra* note 90, at 899-902.

187. See Gregory C. Sisk, Note, *Toward a Unified Reasonable Use Approach to Water Drainage in Washington*, 59 WASH. L. REV. 61, 62-63 n.9 (1983).