

WATER RIGHTS IN OHIO

Paul L. Wright
Attorney

Water law rights and responsibilities are important to Ohio agriculture and will likely become more so. It is not uncommon to have periods of excessive rainfall and flooding followed by weeks of little or no rainfall. The two most important topics associated with the law of water rights are the right to use water and drainage.

Nearly one-fourth of Ohio's population has private water supplies, primarily from wells. In addition, experts estimate that 31,700 acres were ready to be irrigated by Ohio landowners in 1984 in the event of dry weather; this was an increase of 1,500 acres over 1983. These estimates were based on purchases of irrigation equipment each year. Thus, the right to use water is of increasing importance to Ohioans.

The disposal of excess water involves economic as well as environmental considerations. Drainage improvements are necessary on nearly 60% of Ohio's cropland. It is estimated that 60 million feet of tile was installed in 1980 alone, and that tile is installed in approximately 80,000 acres each year in Ohio. The right to use water is discussed first in this article followed by drainage law.

Right to Use

Water is used so routinely that it is taken for granted, thus, the laws governing water use in Ohio are often misunderstood or overlooked completely. The right to use water will become increasingly important as commercial uses increase and irrigated acres continue to expand.

The laws governing water rights in Ohio are quite complex and broad in scope; they attempt to adjust the competing demands of various individuals and entities as fairly and as reasonably as possible. Water rights affect farmers and homeowners as well as the general public, and the use of water by one may adversely affect another.

Water rights in Ohio and in most Eastern states are determined by case law, some of which is very old. The standards applied to determine the lawful use of water in Ohio depend upon the source of the water.

There are four sources of water which have been defined by Ohio case law, and each is a separate body of law. The four classifications are:

1. Surface streams which flow in permanent, well-defined channels;
2. Surface waters, however originating, which pass over the land without any distinct channel;
3. Underground streams; and
4. Underground or percolating water.

Streams in Well-Defined Channels

The Supreme Court of Ohio in East Bay Sporting Club v. Miller, 118 Ohio St. 360, defined a natural stream 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 need not be constant, but it must be more than surface drainage; there must be substantial indications of the existence of a stream, which is ordinarily a moving body of water.” This definition could include rivers and even lakes or ponds if they flow into or feed another body of water.

The civil law doctrine of riparian rights is the basic stream law in Ohio. Under this doctrine the right to use stream water is part of the ownership of the land through which the stream passes. A person owning land along a stream may take whatever quantity of water he/she needs for domestic use, but other uses must be reasonable.

Thus, a landowner may take any amount of water necessary for drinking, cooking, bathing and other domestic uses, but commercial uses of water must be reasonable. A reasonable use may become unreasonable due to changes in circumstances such as the weather or the development of new water needs by downstream owners. A landowner does not own the water itself, rather he/she has the right to its use and is required to return the water to the channel when it leaves his/her lands. Water is not to be diverted into another watershed.

Under this doctrine, it is apparent that upstream landowners have advantages. A downstream landowner who questions the reasonableness of upstream use, however, may file suit to determine the issue. This is the only means available to determine the specific right in exact terms, but few such cases have been brought to court. If it is found that the upstream use is in fact unreasonable, the court may stop or decrease such use.

Surface Water Not In Defined Channels

This kind of surface water refers to water diffusing over the ground and derived from falling rain and melting snow. It continues to be such until it reaches a well-defined channel and flows with other waters where it becomes the running water of a stream. Water which is collected in a swamp or a pond is also classified as surface water if there is no apparent outlet into a watercourse. If the pond feeds a watercourse, however, the civil law doctrine of stream water applies.

There are few cases dealing with the use of surface water. The rule which has been applied to surface water in Ohio is the rule of absolute ownership which means that diffused surface water may be taken and used freely by the landowner to the exclusion of any lower property owner.

Surface water belongs to the owner who captures it and retains it and he/she may divert it for any use, domestic or commercial, regardless of the consequences to

neighbors. The reasonable use rule which is applied to the commercial use of stream water has not been applied to surface water.

This rule may be changed by the new Ohio position adopted by the Ohio Supreme Court in December 1984 for underground water. Until a case is litigated, surface water rights in Ohio are unclear. But in the absence of a new court ruling, the absolute ownership principle still applies.

Underground Streams

Underground streams which are clearly defined, and known to exist are governed by the same standards as surface streams. Thus, the civil law doctrine of riparian rights applies, allowing unlimited use for domestic purposes and requiring a reasonable use for other purposes.

The problem arises in establishing that an underground stream exists, as opposed to water merely percolating under the ground. An underground stream has the same characteristics as an aboveground stream (defined previously). This can be important since the use of underground water (percolating water) is treated by the law much differently than stream water.

Underground Water

Underground water is presumed to be percolating unless it is proved that an underground stream exists. This seldom happens, therefore, the rule governing underground water is usually applicable.

Percolating water has been defined as subsurface waters which, without any permanent, distinct or definite channel, percolate in small veins and ooze or filter from the lands of one owner onto those of another. Subsurface waters which flow in channels are also treated as percolating if the courses are unknown or unascertainable.

In *Cline v. American Aggregates*, the reasonable use doctrine for underground water was adopted by the Ohio Supreme Court. The December 1984 decision overruled Ohio's position of absolute ownership which had been in place since 1861. The Court found the reasonable use doctrine to be much more equitable in the resolution of groundwater conflicts.

The reasonable use doctrine for ground water recognizes that a landowner has the "privilege" to use the water beneath one's land; the doctrine also recognizes that a landowner can remove an excess of water to the detriment of his neighbors and provides a remedy for those landowners who are injured by an unreasonable use of the percolating or groundwater.

Generally the reasonableness of the use of ground water is affected by nine different factors:

1. the purpose of the use
2. the suitability of the use to the watershed as a whole
3. the economic value
4. the social value
5. the extent and amount of the harm it causes
6. the practicality of avoiding the harm
7. the practicality of adjusting the quantity of water
8. the protection of existing values of water uses (land, investments and enterprises)
9. the justice of requiring the user causing harm to bear the loss

Drainage Laws

The right to remove excess water is economically more important to many Ohio landowners than the right to use water, especially in the spring and during other periods of heavy rainfall. Ohio drainage law applies to both surface drainage and to tile installed in the ground.

Landowners should acquaint themselves with Ohio's drainage laws since when a dispute arises concerning drainage, the only ways to get the matter settled are through negotiation, a statutory change or a court suit.

There are three basic doctrines for determining legal rights and responsibilities when disposing of excess water. These doctrines are the common enemy rule, the civil law rule and the reasonable use rule.

The Common Enemy Doctrine and the Civil Law Rule

Ohio courts have adopted two opposing doctrines in resolving disputes concerning the disposal of excess water. The first is the *common enemy doctrine* which gives a landowner the unqualified right to dispose of water as he/she sees fit without regard to the consequences to adjoining landowners. Contrarily, the *civil law rule* requires the lower landowner to accept the natural water flow, but prevents the upper landowner from doing anything to change the natural drainage and, thus, increase the burden on the lower landowner.

The states which neighbor Ohio have chosen to apply one doctrine or the other. Ohio, however, uses both doctrines; the civil law rule has been applied to rural areas while the common enemy doctrine has been adopted for urban areas. It seemed logical in the past that the common enemy doctrine (unqualified right) should govern urban areas since it is reasonable to expect the residents of a city to change the natural drainage. Due to the great amount of building, grading and construction which has occurred in recent years, courts have adopted modifications and exceptions to both rules to reach just results regardless of which rule is applied.

Reasonable Use Doctrine

The problems encountered with civil and common enemy doctrines have left the courts to apply a new rule which provides flexibility and practicality to drainage law; this is called the “reasonable use” doctrine.

The reasonable use doctrine states that a landowner is not unqualifiedly privileged to deal with surface water as he/she sees fit, nor is he/she absolutely prohibited from interfering with the natural flow of surface waters to the detriment of others. A possessor of land is legally privileged to make a reasonable use of his/her land even though the flow of water is altered, thereby causing harm to others. Liability is incurred only when the harmful interference with the flow of the surface water is unreasonable.

The reasonableness of the use is determined by weighing the gravity of the harm against the utility of the upper landowner’s conduct. Several factors go into this balance.

A. The gravity of harm involves:

The extent and character of the locality, and the burden on the **person harmed of avoiding the harm.**

B. The utility of conduct includes:

The social value attached to the conduct, the suitability of the conduct to the nature of the locality, and the practicality of avoiding the invasion of the other landowner.

Stated more simply, the reasonableness of the use in a case must be determined as a question of fact under all of the attendant circumstances. It is apparent that the outcome resulting from this balance of harm and utility may not be clear in every case, thus, it seems that the reasonable use doctrine has added fairness as well as uncertainty to drainage law.

Increased Runoff

There are many drainage law cases in which a person or some entity engages in an activity that increases the runoff of water onto the property of others. In one case, a development corporation began to clear and grade land in a city for the construction of condominiums. Heavy rains increased the runoff from the cleared land, carrying mud, rocks and other debris and flooding the basements of lower landowners. The Ohio Supreme Court applied the reasonable use doctrine and found the development corporation liable to the lower landowners for damages. The court weighed the foreseeability of the mudslides and the flooding as well as the gravity of the harm against the utility of the development and the practicality of providing for adequate drainage prior to clearing and grading.

Overflowing Water Course

Much of the legal controversy concerning drainage arises when damage is caused by a water course overflowing onto the lower landowner's property. The majority of Ohio cases hold that the upper landowner is not liable if the overflow is from a natural water course. **Liability has been incurred, however, when water was collected by artificial drainage, (such as tile) and discharged into a water course in excess quantities even if the action was reasonable.** It would seem, however, that the more modern reasonable use rule would require an examination of the reasonableness of the conduct and a balancing of the relevant factors as discussed previously.

In 1964, the Ohio Supreme Court, using a modified civil law rule, held that upland owners may place flowing surface waters in a natural water course at any rate desired, so long as no additional waters from outside the watershed are included in such flow. The decision was modified in 1976 by a case involving the installation of city storm sewers which increased the flow and acceleration of a natural stream causing four parcels of land to flood with greater frequency. The Ohio Supreme Court stated that this action resulted in a taking of property by eminent domain and ordered the city to compensate the landowners since the damage was foreseeable. Since the city was a public body, the law of "eminent domain" applied. Eminent domain gives a state or a city the power to take private property for public use, but the United States Constitution limits the power to taking for a public purpose and prohibits the exercise of the power without just compensation to the owners of the property which is taken.

In this case, the city, a public body, caused damage to the lower property owners and it was decided that there was a taking of the property. It would be interesting to see how the court would resolve the issue if the city were instead a private property owner. Possibly the court would order the upper property owner to pay the lower owner for damages incurred; such a ruling follows the court guidelines in the 1980 McGlashan case.

The court decisions on water drainage have evolved mainly from urban settings which established the reasonable use doctrine. Ohio courts have not yet resolved the issue of whether the reasonable use doctrine will be applied to cases involving rural areas where the civil law doctrine has been the standard. The writers, however, feel that the reasonable use guidelines can be applied to the rural setting as well as the urban.

Reconstruction of Existing Drains

Drainage law also comes into the picture when subsurface drains that were constructed by mutual agreement need maintenance or reconstruction. The problem is illustrated by the case where an upper property owner wanted to replace 5 inch tile with 6 inch tile. The 5 inch tile crossed 250 feet of a lower property owner's land. There was no recorded easement and the original tile line had been in place for over 50 years. The Ohio Court of Appeals refused to allow the tile to be enlarged because there was no showing that the enlargement would be a public benefit. The upper landowner did have

the right, however, to repair and to maintain the present size (5 inch), at the location where it crossed the neighbor's property.

The court also found that a prescriptive easement was created since the tile had been in place for over 21 years. A prescriptive easement is a right to use another's property which is not inconsistent with the owner's rights and which is acquired by a use that is open, notorious, adverse, and continuous for the statutory period (21 years in Ohio). The owner of the easement is not permitted to increase the usage of the easement, however.

Dams

Another example of when drainage controversies arise is when a landowner backs water up onto neighboring property. One Ohio case involved the situation where a lower landowner diverted the natural flow of surface water by raising the level of his property and building structures thereon. The court applied a modified common enemy rule holding that as long as the lower landowner acted in a reasonable manner, he would not be liable for damages when the water backed up onto another person's property. However, in many cases where drainage law was involved, the courts have stated that mere acceleration of the flow of water is not actionable, but acceleration combined with diversion of the flow is actionable.

According to Ohio Jurisprudence, a landowner may erect a dam to direct the water from a stream to any point on his land if the water is returned to its natural channel. However, the owner of a dam on a stream is liable for damages caused to other property owners along the stream by the ordinary and expected floods of the season.

In one case, a lower landowner was deprived of the natural flow of the stream when an upper landowner erected a dam. The court ordered the dam to be torn down stating that the dam amounted to an unreasonable use of the water because the dam was built to provide the upper landowner with a pond which was used for recreational purposes. The increase in the evaporation of water was considered in determining whether the use of the water was reasonable.

An Ohio case involved the erection of a dam by a lower landowner to protect his property from a back up of water when a city built drains that increased the burden of water on the lower lands. The court held that the building of the dam could not be stopped.

The courts considering the issue of dams have reached many different results. It seems that when the common enemy rule was applied, lower landowners were generally entitled to protect themselves against water flowing from upper lands, at least where the upper landowner was not unnecessarily damaged. The application of the civil law rule, however, often prohibits the construction of a dam by a lower landowner since the lower owner is required to accept the natural flow of water from upper lands. Dams have also been held to constitute a nuisance by some courts.

An Ohio Statute states that no dam over ten feet in height may be constructed in a water course for the purpose of storing, conserving or retarding water or for any other purpose unless the person or governmental agency desiring such construction has a construction permit for such dam issued by the chief of the division of water. Also, Ohio Revised Code Section 1533.59 restricts the placing of any obstruction to the natural transit of fish in any waters over which the state has jurisdiction.

Summary

It is apparent from the foregoing that the present state of the law in Ohio regarding both drainage and surface water rights is decidedly unclear. The inflexible common enemy and civil law doctrines are difficult to apply to varying circumstances. The result has been a trend toward the adoption of a reasonable use approach, but the rules applied to these cases and the results reached may vary according to jurisdiction.

Drainage Improvements

The removal of excess water has been a source of dispute among landowners, and Ohio courts have developed complex legal doctrines to settle drainage controversies. Unfortunately, the process of settling such issues in court is costly and time consuming, and sometimes the results reached are not satisfactory to the parties.

Some of these drainage problems can be solved by individual landowners on their own property, but others may require the work of two or more landowners to provide an adequate drainage outlet. Thus, owners may by mutual agreement cooperate to provide drainage improvements or rely on the petition procedure set forth in state statutes.

The improvements possible under the state statutes by mutual agreement or through the petition procedure include:

- The location, construction, reconstruction, reconditioning, widening, straightening, alternating, boxing, tilling, filling, walling, arching, or any change in the course, location or terminus of any ditch, drain, watercourse or floodway.
- The deepening, widening, straightening, or any change in the course, location, or terminus of a river, creek, or run.
- A levee, or any wall, embankment, jetty, dike, dam, sluice, revetment, reservoir, holding basin, control gate, breakwater, or other structure for the protection of lands from any stream, lake, or pond, or for the protection of any outlet, or for the storage or control of water. The removal of obstructions such as silt bars, log jams, debris, and drift from any ditch, drain, watercourse, floodway, river, creek, or run.
- The vacating of a ditch or drain.

Improvements may be planned, financed, and constructed using the petition procedure or the mutual agreement procedure. In either case permanent maintenance is provided.

The area affected by an improvement may include all or a part of one or more counties.

Basic Steps of the Ohio Drainage Law Petition Procedure

1. A petition is filed by a landowner or a public body with the clerk of the board of county commissioners.
2. A \$500.00 bond is filed with the petition and is paid by the person filing the petition.
3. The proposed improvement is viewed by the county commissioners, the county engineer and other interested people.
4. The first hearing is held. The county engineer files his preliminary reports and his opinion about the feasibility of the project and any affected landowner may also offer evidence for or against the proposal. The petition will either be granted or dismissed.
5. If the petition is granted, the county engineer makes surveys, plans and specifications for the improvements; prepares a schedule of assessments of benefits and damages and files this information with the commissioners.
6. The final hearing is held whereby the commissioners consider all of the evidence offered, including schedules and reports of the county engineer. After the hearing, the petition will either be granted or dismissed. (If the petition is dismissed, all costs may be assessed to the benefiting landowners or paid out of county funds. The petitioners may appeal the dismissal to the court of common pleas by posting a \$500 bond. If the petition is granted, opposing parties may also appeal.)
7. **If the petition is granted, the county engineer will let the contracts for construction and receive bids at the time fixed, if no appeal has been taken to the court.**
8. Upon completion of the contract, the assessments are adjusted pro rata from the estimated to the final cost. These assessments plus estimated maintenance costs for one year are levied on each parcel of land.
9. The improvement is maintained by the county with funds obtained by an annual assessment upon the benefited landowners.
10. The commissioners will review and update the assessment schedule every 6 years. Any owner may apply for a reduction in his/her maintenance assessment due to work he/she proposes on a public ditch.

11. If cleaning or repair of an improvement becomes necessary due to the negligent acts or omissions of any owner, the commissioners may add to the maintenance assessment to rectify the damage.

By following these steps, an improvement is constructed and maintained with funds obtained from the benefiting landowners. A similar procedure for constructing conservation improvement projects, including drainage, through soil and water conservation districts is provided in Ohio Revised Code Section 1515.01 – 1515.30.

Summary

This article has dealt with three topics covered by Ohio water law; the right to use water, drainage law, and drainage improvements.

The lawful right to use water is determined by the classification of the water source which includes: surface streams, surface waters, underground streams and percolating water.

Use of stream water, surface or underground, is governed by the civil law doctrine of riparian rights. This doctrine states that an owner of land **bordering or over a stream** may use any amount of water for domestic purposes but is limited to a reasonable quantity for all other uses. Uses of water which are considered to be reasonable vary by jurisdiction, therefore, it is important to do some investigating before using water for commercial purposes, especially if neighboring landowners could be affected.

Lower landowners have the right to receive stream water from higher lands substantially undiminished in quantity and uncorrupted in quality. The Ohio Supreme Court held as early as 1831 that surface streams are the gift of Province for the benefit of all lands through which they flow.

Uses of surface water may be governed by the absolute ownership doctrine. This means that such water belongs to the landowner who captures and retains it and that he/she may divert it for any use, domestic or commercial, regardless of the consequences to neighbors. The Supreme Court decision in *Cline v. American Aggregates*, which applies a reasonable use rule to percolating water, might be extended to surface water at some point in the future.

The use of ground water is governed by an Ohio Supreme Court case decided in 1984. A reasonable use standard was adopted which overrules the absolute ownership which had been in effect since 1861.

Many legal controversies in Ohio arise when excess water is drained from the land. This is because of spring rainfalls and other periods of heavy rain which predominate the Eastern part of the nation. Early Ohio court decisions adopted two doctrines to settle drainage disputes. The common enemy doctrine was applied to urban area cases, giving landowners the unqualified right to dispose of excess water. The civil

law rule applied to rural areas and prevented the upper landowners from increasing the burden on the lower landowner by changing the natural drainage. The trend in Ohio today is for the courts to avoid applying either doctrine in a pure sense; rather, the courts now apply the reasonable use rule in drainage law cases. This rule is being utilized since it is flexible, and softens the harsh effects of the common enemy and civil law rules. The reasonable use rule involves a balancing by the court of all of the important factors in light of the circumstances of each case. It is important to note, however, that the law is clearly unsettled in the area of drainage disputes; the standards applied and the results reached may vary by jurisdiction and the facts and circumstances of each case.

Ohio statutes provide procedures whereby landowners may implement drainage improvements. These procedures are administered by the board of commissioners in each county to provide for the better utilization of Ohio's soil and water resources.

The laws which govern water rights in Ohio are complex and uncertain in many areas. It is wise in many instances to consult a qualified attorney before using water commercially or constructing a drainage improvement, especially if neighbors will be affected.