

Farm Management

Water can cause legal issues for landowners



Country Counsel

By ROBERT MOORE

OHIO is blessed with an abundance of freshwater. An abundance of legal issues related to water also exists. A general understanding of water-related laws, like in the discussion below, often can help eliminate water-related disputes before they start.

Who owns the river?

A common legal question relates to ownership along and into watercourses (rivers and streams). In Ohio, the water belongs to all the people of the state, while the property owner adjoining the watercourse owns the actual ground to the middle of the river. Therefore, canoeing down a river is not trespassing. However, as soon as the canoeist touches the riverbed, he or she is technically trespassing. Obviously, this is rarely, if ever, enforced as trespassing.

The issue that does arise is when canoeists, swimmers or fishermen encroach upon the banks of the river. This is clearly trespassing, and those people using the river should take caution before entering the bank of a landowner. More importantly, persons using waterways should respect the landowner's property by not damaging it or leaving debris behind. The vast majority of landowners along waterways have no issues with limited use of their riverbeds or banks by recreational users provided the users simply respect their property.



Key Points

- Understanding water laws can help landowners prevent conflicts.
- In Ohio, a landowner owns the land out to the middle of a river or stream.
- Property owners do have ownership interest in the water under their land.

Can I irrigate out of a river?

Generally, irrigating out of a river is legal. Ohio law applies the reasonable-use standard to this matter. A farmer can use river water to irrigate provided that enough water remains in the river so as to not unreasonably affect the use by downstream property owners. In large rivers, this is rarely a problem. Irrigating out of smaller streams could have a serious impact on water flow.

If in doubt, check with the Ohio Department of Natural Resources or some other source that may have data on the water flow of the watercourse. Compare the water flow to your expected withdrawal to get an idea of the irrigation's impact on the watercourse.

What happens to property lines when a river changes course?

Rivers and streams often determine the property boundary between neighbors. A problem arises when the river or stream changes course. Does the property boundary stay with the old river course or the new river course? It depends. If the change in course is over time and due to naturally occurring conditions (accretion), the property boundary moves with the watercourse. Property owners may gain or lose land as the watercourse moves.

If the change in course is "directly perceptible or measurably visible" (avulsion), the property boundaries do not change. Avulsion occurs in situations such as where a large portion of a bank is washed away by a flood.

Interestingly, the law does not address whether the boundaries of a county or township change with a change in a watercourse.

What caused the fish kill?

Fish kills in ponds are common but often misunderstood. Pond owners sometimes blame pesticides being used on surrounding crop ground as the reason for a fish kill. However, fish kills in ponds usually are the result of the fish suffocating from a lack of oxygen due to a water layer inversion or warm water temperatures. A rule of thumb is that if big fish die first, the fish kill is likely due to suffocation. Big fish need more oxygen. If small fish die first, it may be a pesticide issue. Small fish have less tolerance to pesticide poisoning.

A farmer who is confronted with a fish kill problem should first try to address the matter with the pond owner. Ohio State University Extension has an excellent fact sheet explaining the causes of a fish kill. If the pond owner is unsatisfied with the farmer's explanation or the fish kill may have been the result of pesticides, the farmer should make sure all spray records are in order. Not only are the spray records required by the Ohio Department of Agriculture, but they also provide excellent evidence to hopefully refute the accusation. Farmers should be sure to not make any statements that may incriminate them should the matter go to litigation.

Do I own the water under my property?

In the past, Ohio law did not give landowners any rights in the water under their land. A landowner was not held liable if his activities on his land caused the aquifer under the adjoining landowner's property to dry up. A landowner could essentially use all the water he wanted without regard to the effect on adjoining landowners.

In 1990, the law was changed to a reasonable-use standard that allowed a property owner the reasonable use of the water within the aquifer. In 2005, the law was further augmented by the Ohio Supreme Court when it declared that property owners had actual ownership rights in the water. Therefore, property owners do have an ownership interest in the water under their property, but the next problem becomes determining how much water there is and its value.

*Moore is an attorney with Wright Law Co. LPA
614-791-9112
rmoore@wright-law.net*

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