1984

Surface Water and Nuisance Law: A Proposed Synthesis

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SURFACE WATER AND NUISANCE LAW: A PROPOSED SYNTHESIS

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This inquiry focuses upon an intersection of the immutable laws of nature with the changing laws of man. Nature always has decreed that surface water flow from higher ground to the land below. But the courts have adopted varying rules to allocate the burdens resulting from the flow. This article examines those rules and proposes that they be unified in Idaho.

Part I surveys the diverse rules of law applicable to surface water cases. It notes that surface water flooding may be analyzed under general rules of nuisance law or under certain narrower rules specifically relating to surface water. Part II urges that these sets of rules be integrated. It identifies the principles underlying the rules and undertakes to synthesize the rules by accommodating those principles.

I. THE DIVERSITY OF RULES

Surface water is both an ally and an enemy of land use. When water flows regularly in defined channels, it may be diverted and applied beneficially. But when the flow is irregular, or is not confined to definite channels, it may impose a burden upon the use of property. Surface water litigation usually arises when one landowner alters a natural drainage pattern and causes flooding of another's property. Depending upon the circumstances, the surface water invasion may be characterized as a nuisance or as a trespass.

> [N]uisance and trespass have common roots in property law, and occasionally it is difficult to distinguish between them. But where an invasion of property is merely incidental to the use of adjoining property, and does not physically interfere with possession of the property invaded, it generally has been classified

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as a nuisance rather than as a trespass.[1]

Thus, where a flow of surface water is altered specifically for the purpose of redirecting it from one's own property to that of a neighbor, effectively depriving the neighbor of the land flooded, the invasion has been termed a trespass.[2] In contrast, where flooding is simply incidental to another purpose for altering the flow, and the flooding diminishes the neighbor's use and enjoyment of his property rather than wholly depriving him of it, the invasion has been termed a nuisance.[3]

A. Nuisance and Surface Water Rules

Our focus here is upon the type of invasion that may be classified as a nuisance—an invasion of another's property which is incidental to an activity conducted on one's own property. As noted in the Second Restatement of Torts, where a landowner knows that such an invasion of a neighbor's property is resulting—or is substantially certain to result—from the landowner's activity, the invasion is treated as "intentional" and it may represent a nuisance.[4]

However, the law recognizes that nearly every land use has some impact upon its neighbors. Not all "intentional" invasions are treated as nuisances. Rather, an "intentional" invasion is deemed a nuisance only if the invasion is "unreasonable."[5] The traditional test of unreasonableness, articulated by the original Restatement of Torts, has been whether the gravity of the harm caused by the invasion exceeds the utility of the activity producing the invasion.[6] Recently, an alternate test has been added by the Second Restatement for determining liability in damages. That test is whether the harm caused by the activity is serious and the financial burden of compensating for this harm, and for similar harm to others, would not make continuation of the activity unfeasible.[7]

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1. Carpenter v. Double R. Cattle Co., ___ Idaho ___, 669 P.2d 643, 646 (Idaho Ct. App. 1983), *petition for review granted* (Nov. 10, 1983).

2. *E.g.*, Milbert v. Carl Carbon, Inc., 89 Idaho 471, 406 P.2d 113 (1965); Johnson v. Twin Falls Canal Co., 66 Idaho 660, 167 P.2d 834 (1946).

3. *See* Smith v. King Creek Grazing Ass'n, ___ Idaho ___, 671 P.2d 1107 (Idaho Ct. App. 1983).

4. RESTATEMENT (SECOND) OF TORTS § 825 (1977) [hereinafter cited as SECOND RESTATEMENT]. The SECOND RESTATEMENT also recognizes that a nuisance may arise from an unintended and negligently caused invasion. *See* SECOND RESTATEMENT § 822(b). However, the question of liability arising from an accidental change in surface water flow is outside the scope of this article.

5. W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 87 (4th ed. 1971).

6. RESTATEMENT OF TORTS § 826 (1939).

7. SECOND RESTATEMENT § 826; *see generally Carpenter*, ___ Idaho ___, 669 P.2d

Surface water invasions incidental to intended uses of property clearly invite application of these nuisance tests. Indeed, the Second Restatement provides for surface water invasions to be examined under nuisance rules.[8] A leading case adopting the Second Restatement's treatment of "intentional" invasions deals with an invasion by surface water.[9]

But the courts generally have been slow to apply nuisance law in surface water cases. These cases have evolved rules of their own. As noted in one distinguished essay:

> In so far as fundamental principles are concerned, there would seem to be little or no difference between [surface water] cases and the cases in which harm is caused . . . through the media of fumes, noises, or vibrations. In each instance, one possessor of land sustains harm in the use and enjoyment of his land as a result, usually, of another's use and enjoyment of other land. The problem is one of reconciling conflicting uses of land, and the important question is whether circumstances exist which will justify a court in shifting the loss, or a part of it, from the person harmed to the person causing it.
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> Few courts, however, seem to have recognized this fact . . . . The general practice has been to make different categories according to the medium through which the harm is caused . . . and to adopt somewhat different principles of law in each category. Consequently, in most jurisdictions there is a separate and distinct 'law of surface waters' which in many respects differs markedly from the law applicable in the same jurisdictions as to water courses, subterranean waters, and private nuisances in general. Even with this segregation and isolation of the law governing interferences with the flow of surface waters, however, there is little uniformity in the principles of law adopted by the several jurisdictions in the United States with respect to such invasions. Three principal and widely divergent views have been developed—the so-called civil law rule, common enemy rule, and reasonable use rule . . . .[10]

These three rules of "surface water law" identified by Kinyon and McClure comprise a broad spectrum. At one end of

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8. *See* SECOND RESTATEMENT § 833.

9. Pendergrast v. Aiken, 293 N.C. 201, 236 S.E.2d 787 (1977).

10. Kinyon & McClure, *Interferences With Surface Waters*, 24 MINN. L. REV. 891, 891-93 (1940).

the spectrum is the "common enemy" rule which, in its pure form, treats surface water as a hazard common to all landowners. This rule accords to each owner an unqualified right to undertake, upon his own property, to fend off surface waters as he sees fit, without liability for the consequences to other landowners. The other landowners have a correlative right to protect themselves as best they can.[11]

The "common enemy" rule finds its doctrinal antithesis at the other end of the spectrum—the "civil law" rule. This rule, broadly stated, is that one property owner may not interfere with the natural flow of surface waters so as to cause an invasion of a neighboring owner's interest in the use and enjoyment of his land.[12] The rule recognizes a servitude for natural drainage of surface water. An owner of lower property must accept the burden of surface water which naturally drains upon his land. Conversely, the owner of high property cannot increase this burden by changing the natural system of drainage.[13]

The "reasonable use" rule occupies the center of the spectrum. It rejects the doctrinal elements of both the "common enemy" and "civil law" rules. Under the "reasonable use" rule, a landowner has neither an unqualified privilege to deal with surface water as he pleases, nor an unqualified duty to refrain from interfering with the natural flow to his neighbor's detriment. Rather, each landowner is entitled to make reasonable use of his land, even though it results in altering the flow of surface waters and causes some harm to his neighbor. Liability attaches only when the harm is unreasonable. The question of reasonableness is one of fact, to be determined in each case upon consideration of all the circumstances.[14] Thus, the "reasonable use" rule is not so much a rule, in the normative sense, as it is a pragmatic framework for balancing the competing interests of landowners in particular cases. It treats as relative those rights which are absolute under the "common enemy" or "civil law" rules. It weighs competing interests in a manner similar to the balancing process embodied in the nuisance law provisions of the First and Second Restatements.

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11. *See generally* Kinyon & McClure, *supra* note 10, at 898; Annot., 93 A.L.R.3d 1193, 1199 (1979).

12. Kinyon & McClure, *supra* note 10, at 893.

13. Annot., *supra* note 11, at 1207.

14. Kinyon & McClure, *supra* note 10, at 904-05.

B. The Idaho Experience

The Idaho Supreme Court has endorsed the "civil law" rule, implicitly rejecting the "common enemy" rule. However, the court has maintained an uneasy ambivalence toward the "reasonable use" rule, adverting occasionally to the general concept of reasonableness without specifically addressing the rule itself.

An early portent of the "civil law" rule appeared in *Teeter v. Nampa & Meridian Irrigation District*.[15] There, a canal company collected surface water from land above its canal and discharged it upon other land on the lower side of the canal. The lower landowner objected, claiming that the concentrated discharge caused his property greater injury than had the more dispersed natural flow. The Supreme Court, announcing a "just and equitable" resolution of the dispute, held that the canal company could not discharge the concentrated water except in a manner that would "not increase the dangers and damages over that caused by the flow of the waters in their natural course."[16]

Another harbinger of the "civil law" rule appeared in cases involving disputes between riparian landowners over alterations to natural watercourses. In such cases, the Supreme Court held that owners of riparian lands adjoining natural watercourses could not obstruct or divert the natural flow so as to damage other riparian properties.[17]

In *Loosli v. Heseman*,[18] the Supreme Court expressly approved the "civil law" rule. The court held that an upper landowner had an easement of drainage across the land of a lower proprietor, to the extent of water naturally flowing from the higher ground to the lower tract. However, this servitude could not be augmented by acts of the upper landowner. Notably, the surface water at issue in *Loosli* had flowed from the upper ground to the lower tract not through an established watercourse, but through an irregular swale. Thus, by adopting the "civil law" rule and applying it to surface water outside a watercourse, the Supreme Court broadened the rule of noninterference earlier applied to owners of riparian lands along watercourses.

However, after *Loosli* was decided, the riparian rule of noninterference underwent change. A reformulation of the rule, adverting to a concept of reasonableness, began to emerge. In *Poole v. Olaveson*,[19] our

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15. 19 Idaho 355, 114 P. 8 (1911).

16. *Id.* at 359, 114 P. at 9.

17. *E.g.*, Scott v. Watkins, 63 Idaho 506, 122 P.2d 220 (1942); Fischer v. Davis, 19 Idaho 493, 116 P. 412 (1911).

18. 66 Idaho 469, 162 P.2d 393 (1945).

19. 82 Idaho 496, 356 P.2d 61 (1960).

Supreme Court held that one landowner could discharge waste water into an artificially modified watercourse, crossing the lands of another, to an extent that was reasonable and noninjurious. The court employed similar language in *Smith v. Big Lost River Irrigation District*.[20] There the court said that a riparian owner who interfered with the natural flow in a watercourse, by diverting it to an artificial channel, was "liable for the exercise of reasonable care and diligence in so doing and [was] required to take such precautions as to prevent injury to others."[21]

However, the drift toward a standard of reasonableness was not evidenced in all surface water cases. In *Harper v. Johannesen*,[22] the Idaho Supreme Court reiterated the "civil law" rule and applied it without qualification to a riparian landowner dispute. In *Dayley v. City of Burley*,[23] the court again endorsed the "civil law" rule, contrasting it with the "common enemy" rule but saying nothing about the "reasonable use" rule. However, a majority of the court implicitly acknowledged—and a dissenting minority expressly cited—authority that even in cases governed by the "civil law" rule, an upper proprietor is entitled to alter the natural flow of surface water, by collecting and concentrating it, so long as it is carried across the lower proprietor's ground within the confines of a natural watercourse.[24] The majority of the *Dayley* court sustained a trial judge's finding that no natural watercourse existed in that case. Accordingly, the majority held that an upper proprietor, the City of Burley, was not entitled to collect surface water through its storm drainage system and to discharge it across privately owned lands below.[25] The dissenting opinion argued for a contrary result upon the premise that a natural watercourse did, in fact, exist.[26]

Dayley neither nourished nor expressly extinguished the nascent stirrings of reasonableness in earlier cases. It accorded continued vitality to the "civil law" rule; but it also suggested that application of the rule could turn upon the existence of a natural watercourse. This suggestion later was elevated into a holding by the Idaho Court of Appeals

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20. 83 Idaho 374, 364 P.2d 146 (1961).

21. *Id.* at 381, 364 P.2d at 150.

22. 84 Idaho 278, 371 P.2d 842 (1962).

23. 96 Idaho 101, 524 P.2d 1073 (1974).

24. *Id.* at 104-05, 524 P.2d at 1076-77. *See Teeter*, 19 Idaho 355, 114 P. 8; Youngblood v. City of Los Angeles, 160 Cal. App. 2d 481, 325 P.2d 587 (1958); Wellman v. Kelley, 197 Or. 553, 252 P.2d 816 (1953).

25. *Dayley*, 96 Idaho at 104, 524 P.2d at 1076.

26. *Id.* at 104-05, 524 P.2d at 1076-77 (McQuade, J., dissenting).

in *Smith v. King Creek Grazing Association.*[27] There the court held that a lower landowner was not entitled to injunctive relief from a water flow enhanced by acts of the upper proprietor, so long as the increased flow was contained within a natural watercourse.[28]

The *Smith* court also recognized that narrow preoccupation with incremental modifications to the "civil law" rule might be supplanted by a broader view of surface water controversies. The court specifically noted that "[a]n invasion of surface water upon one's land, caused by alteration of the natural flow on another's land, may constitute a form of nuisance."[29] However, the court left for another day the task of integrating nuisance law with surface water law.

II. THE PROPOSED SYNTHESIS

Dean Edward Levi has written:

> The problem for the law is: When will it be just to treat different cases as though they were the same? A working legal system must therefore be willing to pick out key similarities and to reason from them to the justice of applying a common classification.[30]

The rules of surface water law and of nuisance law remain separate in Idaho. A "common classification" has not yet been achieved. But the gap may be narrowing. As noted, the Court of Appeals has recognized that surface water invasions may be a form of nuisance, and the Second Restatement so classifies them. Our Supreme Court occasionally has softened its formulation of the "civil law" rule by references to reasonableness—a concept that resides at the heart of nuisance law. Moreover, even where reasonableness is not specifically mentioned, an element of flexibility has been injected into the "civil law" rule by the corollary that an upper landowner may alter the natural flow so long as it remains within a natural watercourse.

This exception to strict application of the "civil law" rule illustrates a general trend in other states toward modification of the rule.[31] Some states have grafted reasonable use exceptions to the "civil law" rule.[32] Others have adopted the "reasonable use" rule explicitly. For

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27. ___ Idaho ___, 671 P.2d 1107 (Idaho Ct. App. 1983).
28. *Id.* at ___, 671 P.2d at 1112.
29. *Id.* at ___, 671 P.2d at 1109.
30. E. Levi, *An Introduction to Legal Reasoning*, 15 U. CHI. L. REV. 501, 502 (1948) (subsequently republished as a book under the same title).
31. Kinyon & McClure, *supra* note 10.
32. See cases cited in Annot., *supra* note 11, at 1198, 1211-16.

example, the State of Nevada, which had adopted the "civil law" rule in a decision quoted at length by our Supreme Court in *Loosli*, recently embraced the "reasonable use" doctrine.[33] The trend toward adopting the "reasonable use" rule, or toward modifying the "civil law" rule to include an element of reasonableness, is a response to criticism leveled at the "civil law" rule. The rule, with its emphasis upon preserving the natural flow of surface water, has been perceived as unduly restrictive upon development of property and too inflexible to deal with the complexities of urban growth.[34]

Basic economy theory offers a useful perspective on these criticisms. As the Court of Appeals noted in *Carpenter v. Double R. Cattle Co.*,[35] economic theory focuses upon two objectives: "efficiency" and "distributive justice." Efficiency refers to the aggregate surplus of benefits over costs of economic activity. Distributive justice refers to the allocation of these benefits and costs according to the values of society.

Each of these objectives is affected by "externalities"—costs of economic activity not borne by the economic enterprise that generates them. When one property owner enhances the use of his land by altering a surface water flow to the detriment of his neighbor, he has "externalized" a cost of his economic activity. This externalizing of burdens, without compensation, prevents our market system from reflecting the true cost of products or services provided by the enterprise. It distorts price signals that critically affect decisions in the market. This distortion, in turn, affects the goals of efficiency and distributive justice. Resources cannot be allocated efficiently in a market economy unless prices reflect true costs. Similarly, the benefits and costs of economic activity cannot be distributed in congruence with societal values unless the benefits are explicitly identified to the correlative costs. Thus, both efficiency and distributive justice demand control of externalities.

However, these goals have different implications for the legal principles by which such control should be exercised. In surface water cases, efficiency disfavors the "civil law" rule[36] where the rule would preclude development of higher land at the expense of lower ground, even if the benefit to the higher proprietor exceeded the costs to the lower proprietor. Ideally, this inefficient result could be overcome by bargaining and voluntary transfers between the parties, by which the

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33. County of Clark v. Powers, 96 Nev. 497, 611 P.2d 1072 (1980).

34. Annot., *supra* note 11, at 1197; County of Clark v. Powers, 96 Nev. at 503, 611 P.2d at 1076.

35. ___ Idaho ___, 669 P.2d 643.

36. *See supra* text accompanying notes 12-13.

upper proprietor would compensate the lower proprietor.[37] However, the real world is not free from impediments to exchange. For various reasons, including human obstinacy, neighbors do not always act in their rational, economic self-interest. In many cases voluntary transfers do not occur. Lawsuits are filed instead. A standard of reasonableness, with its balancing approach, provides the closest judicial eqivalent to efficient allocation of resources through voluntary transfers.

However, our economic system is concerned not only with efficiency but also with distributive justice. The "civil law" rule embodies important societal values. The "civil law" rule is based upon a principle expressed in the ancient maxim *aqua currit et debet currere, ut currere solebat*—water flows and should be allowed to flow, in its natural channel. This principle is anchored by philosophical and pragmatic values. Philosophically, it reflects a view that man's best interests are served by retaining nature's system of watersheds. Pragmatically, it promotes stability in land use arrangements, and minimizes surprise, by conforming man-made law as closely as possible to the enduring law of nature. It permits each landowner to ascertain the burdens of natural water drainage in the watershed serving his area, and to act accordingly. "[E]ach successive owner takes with whatever advantages or inconveniences nature has stamped upon his land."[38] A standard of reasonableness affords no such protection to watersheds, nor such predictability to land use patterns.

In case law, the growing convergence of the "civil law" rule with a standard of reasonableness has occurred without explicit judicial recognition of the tension between efficiency and distributive justice. Efficiency has ruled the day. To achieve efficiency, the courts have established the trend toward reasonable flexibility in the "civil law" rule. In so doing they have gravitated, perhaps unknowingly, toward the general balancing test of nuisance liability—weighing the benefits derived against the burdens imposed by altering the natural flow of surface waters.

But the "civil law" rule embraces values which are too important—and too deeply rooted in decades of Idaho decisions in surface water cases—to be wholly discarded in the pursuit of efficiency. If a standard of reasonableness ultimately is adopted for greater efficiency, it should retain—so far as possible—the principles underlying the "civil law" rule which preserve natural flows and watercourses, and which minimize disruptions in land use arrangements.

The following synthesis is proposed. In accord with the Second

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37. *See* Coase, *The Problem of Social Cost*, 3 J. L. & ECON. 1 (1960).
38. Gormley v. Sanford, 52 Ill. 158, 162 (1869).

Restatement, an "intentional" invasion by surface water should be deemed a nuisance, for which an injunction may issue and damages may be recovered, if the harm created by the invasion of surface water exceeds the utility of the activity causing the invasion. Alternatively, if the harm is determined to be serious, but does not outweigh the utility of the activity, the invasion still should be deemed a nuisance, for the purpose of damage liability, if compensating for this harm and for similar harm to others would not render the activity unfeasible. However, in recognition of the principles underlying the "civil law" rule, the trier of fact should consider the source of invasion. If the invasion is entirely attributable to a natural flow of surface water, the law recognizes no harm. Similarly, if the invasion is attributed to an altered flow of surface water, but the flow is contained within a natural watercourse, no harm should be deemed to exist.

Only if the invasion is attributed to an altered flow, which is not entirely confined by a natural watercourse, should harm be recognized. In those cases the gravity of the harm should be weighed against the utility of the activity producing the invasion. In this balancing process, the values placed by the "civil law" rule upon natural flows and watercourses should be reflected among the factors to be considered in measuring harm and utility. Lists of such facts appear in sections 827 and 828 of the Second Restatement. These sections refer, in part, to the social values of the use invaded and of the activity producing the invasion. Thus, the social value of the use invaded should be deemed enhanced if it strives to preserve a natural flow of surface water. Conversely, the social value of the activity producing the invasion should be deemed diminished if it disrupts a significant natural watercourse or system of watercourses.[39]

The implications of this proposed synthesis may be illustrated by a retrospective look at the *Smith* and *Dayley* decisions. In *Smith*, it will be recalled that the Idaho Court of Appeals held an upper landowner entitled to alter the natural flow of surface water reaching another's land below, so long as the altered flow could be contained within a natural watercourse. The synthesis suggested here would reach the same result. A court applying the synthesis would not reach the task of weighing the lower landowner's asserted harm against the utility of the upper landowner's activities, because no harm would be deemed to arise from an altered flow of surface water contained within

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39. If any "intentional" invasion were produced by malicious conduct, were avoidable, produced severe harm, or arose from conduct unsuited to the locality, then the tests proposed here would be modified in accord with Sections 829-31 of the SECOND RESTATEMENT, which govern those special situations.

a natural watercourse.

In *Dayley* a majority of the Idaho Supreme Court held that no watercourse existed and, therefore, the City of Burley as the upper proprietor was not entitled to collect surface water through its storm sewer system and cause it to drain upon other lands below. A court applying the synthesis suggested here would not necessarily have reached this result. Rather, having determined that no watercourse existed, the court would weigh the harm suffered by the lower proprietors against the utility ascribed to the City of Burley's activity. If the utility outweighed the harm, there would be no liability under the first of the Second Restatement's two tests of nuisance represented by an "intentional" invasion. The court then would inquire whether the harm, although exceeded by the utility, nevertheless was serious and whether compensating for this harm and for similar harm to others would render the activity unfeasible. Under this second test, if the court determined that the harm was serious and that compensation was feasible, the lower proprietors might receive compensation in damages although they would not be entitled to injunctive relief.[40]

The author makes no claim that the proposed synthesis is perfect. Adherents to the "civil law" rule as well as advocates of a standard of reasonableness may be discomforted by it. Detractors from the Second Restatement's twofold test of nuisance liability also might oppose it. However, the proposed synthesis is intended to be a point of beginning—not necessarily the destination—of a dialogue among scholars, the bench and the bar, concerning the relationship between surface water law and nuisance law. The two no longer should be treated as wholly separate. The time has come to recognize the conceptual unity of law governing invasions by surface water.

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40. For a similar application of the SECOND RESTATEMENT'S tests of nuisance liability, *See Pendergrast*, 293 N.C. 201, 236 S.E.2d 787.