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Toward a Unified Reasonable Use Approach to Water Drainage in Washington

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TOWARD A UNIFIED REASONABLE USE APPROACH TO WATER DRAINAGE IN WASHINGTON

Competition for scarce water resources has been the predominant concern in Washington water law, but this Comment focuses on the opposite problem—the disposal of unwanted water.[1] Water drainage has great significance as a problem which permeates land development. Almost any development of land is likely to alter the flow of water draining from the land to the possible harm of neighboring property.[2] While many aspects of drainage are now regulated through institutional bodies created by the state legislature and municipalities,[3] this Comment addresses the problems that arise between neighboring landowners when one alters the drainage of water to the consequent injury of the other.

This Comment considers the common law in Washington governing water drainage. In particular it analyzes the disparity between the standards of liability for diversion of diffuse surface and watercourse drainage. This Comment advocates a unified approach toward these two areas of water drainage by suggesting a balancing test of reasonableness for interference with water drainage.

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1. Commentators have noted that the major emphasis concerning diffuse surface water is on the disposal of such water rather than regulation of its consumptive use. Maloney & Plager, *Diffuse Surface Water: Scourge or Bounty?*, 8 NAT. RESOURCES J. 72, 72 (1968); *see also* Beck, *The Law of Drainage*, in 5 WATERS AND WATER RIGHTS § 450.2 (R.E. Clark ed. 1972 & Supp. 1978).

2. Sullivan, *Unreasonable Alteration of Surface Drainage*, 6 AM. JUR. PROOF OF FACTS (SECOND) 301, 306–07 (1975). *See* Keys v. Romley, 64 Cal. 2d 396, 412 P.2d 529, 533, 50 Cal. Rptr. 273, 277 (1966).

3. On public drainage enterprises, see generally Beck, *supra* note 1, § 459.

The Washington institutional drainage scheme includes authorization of the following public entities: drainage districts, WASH. REV. CODE § 85.06.010 (1981); improvement districts, *id.* § 85.08.020; diking districts, *id.* § 85.05.010; flood control districts, *id.* § 86.05.010; and state flood control zones, *id.* § 86.16.010. Drainage districts are empowered to acquire property, *id.* § 85.06.070, construct drainage works and ditches, *id.* § 85.06.180, and administer the completed projects, *id.* § 85.06.010.

Municipalities also implement drainage schemes and planning. For example, the Seattle Municipal Code includes provisions dealing with city storm sewers, SEATTLE. WASH.. MUNICIPAL CODE ch. 21.16 (1980), and on grading and drainage control, *id.* chs. 22.800 & 22.802. Seattle Municipal Code chapter 22.802 establishes a requirement that parties contemplating construction or grading must obtain approval of a drainage control plan to discharge water into public storm drains, sewers or by some other means.

Drainage schemes like those implemented in Washington are designed to promote the general public interest in water drainage but do not provide a legal remedy to individuals harmed by water drainage. *See also infra* note 84.

I. SURFACE WATER LAW DOCTRINES

Traditional legal analysis applies diverse rules to distinct types of water classified by its various manifestations.[4] The traditional classifications are diffuse surface water, watercourses, underground percolating water, and underground streams.[5] This Comment focuses primarily on diffuse surface water and watercourses.[6]

Diffuse surface water is produced by rain, melting snow, or springs and is vagrant across the surface of the earth with no definite course or channel.[7] The chief characteristic of diffuse surface water is its inability to maintain its existence and identity as a cohesive body of water.[8]

There are three divergent approaches in American jurisdictions to the problems created by alteration of diffuse surface water drainage by one landowner to the consequent harm of another landowner. These approaches are: (1) the common enemy rule, (2) the civil law rule, and (3) the reasonable use rule.

A. The Common Enemy Rule

Under the common enemy rule, landowners may regard diffuse surface water as the "common enemy" and may divert its flow from their land without liability for any consequential harm to neighboring property.[9] In

4. Piper & Thomas, *Hydrology and Water Law: What is Their Future Common Ground?*, in J. MACDONALD & J. BEUSCHER, WATER RIGHTS 1–7 (2d ed. 1973) (reprinted in edited form from WATER RESOURCES AND THE LAW (1958)).

5. *Id.* at 3. Subterranean waters are generally classified as either underground streams or diffuse percolating water. Clark, *Classes of Water and Character of Water Rights and Uses*, in 1 WATERS AND WATER RIGHTS § 52.2, at 322 (R.E. Clark ed. 1967); State v. Ponten, 77 Wn. 2d 463, 468, 463 P.2d 150, 153 (1969). An underground stream flows under the surface in a defined channel. Clark, *supra*, § 52.2, at 322; Evans v. City of Seattle, 182 Wash. 450, 453–54, 47 P.2d 984, 985 (1935). Percolating water seeps or filters through the soil without a defined channel. Clark, *supra*, § 52.2(B), at 326; *see also Evans*, 182 Wash. at 453–54, 47 P.2d at 985.

6. Underground waters are of relatively lesser importance in the area of drainage law than diffuse surface water and watercourses. Percolating waters and underground streams will be briefly addressed in the context of the rules governing their above-ground parallels in diffuse surface water, *see infra* note 11, and watercourses, *see infra* note 37, respectively.

7. King County v. Boeing Co., 62 Wn. 2d 545, 550, 384 P.2d 122, 126 (1963); Alexander v. Muenscher, 7 Wn. 2d 557, 559, 110 P.2d 625, 626 (1941); Clark, *supra* note 5, § 52.1(A), at 300–01.

8. 3 H. FARNHAM, THE LAW OF WATERS AND WATER RIGHTS § 878, at 2557 (1904).

9. Decisions approving the common enemy rule include Argyelan v. Haviland, 435 N.E.2d 973, 976–78 (Ind. 1982), and Johnson v. Whitten, 384 A.2d 698, 700–01 (Me. 1978). On the common enemy rule, see generally Beck, *supra* note 1, § 451 & Supp. 1978 at 106–07.

There is considerable dispute as to the origin of the doctrine and whether it represents the approach of the English common law. Kinyon & McClure, *Interferences With Surface Waters*, 24 MINN L. REV 891, 899–902 (1940); *see also* H. FARNHAM, *supra* note 8, §§ 889–889c, at 2585–99. Whether the common enemy rule is based on the common law theoretically may be of determinative impor-

its extreme form, the rule provides that, incident to the rights of land ownership, each landowner has an unqualified legal privilege to develop his or her land without regard for the drainage consequences to other landowners.[10] Washington courts have traditionally followed the common enemy rule, concluding that if damage results from obstruction of the flow of surface water, such damage is *damnum absque injuria*—injury without legal recourse.[11]

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tance in states, including Washington, which have adopted the common law by constitution or statute. *See* Walker v. New Mexico, 165 U.S. 593, 602–05 (1897) (holding that New Mexico's adoption of the common law included application of an approach to surface water law approximating the common enemy rule). Washington has adopted the common law, to the extent not inconsistent with the constitution and laws of the United States and Washington, as "the rule of decision" in state courts. WASH. REV. CODE § 4.04.010 (1981). Theoretically, then, the Washington approach to surface water drainage should be that which truly reflects the common law. But as the common enemy rule has long been applied in Washington, the true common law rule is today only of academic interest.

10. Keys v. Romley, 64 Cal. 2d 396, 412 P.2d 529, 531, 50 Cal. Rptr. 273, 275 (1966); Kinyon & McClure, *supra* note 9, at 898.

11. Cass v. Dicks, 14 Wash. 75, 78, 44 P. 113, 114 (1896). The common enemy rule was first adopted in 1896 in the decision of *Cass v. Dicks*. The court noted that several states followed the civil law rule holding the lower estate subject to an easement to receive the flow of surface water, *id.* at 78, 44 P. at 114, but rejected that approach in favor of what it perceived as the common law rule:

> By that law surface water, caused by the falling of rain or the melting of snow, and that escaping from running streams and rivers, is regarded as an outlaw and a common enemy against which anyone may defend himself, even though by so doing injury may result to others. The rule is based upon the principle that such water is a part of the land upon which it lies, or over which it temporarily flows, and that an owner of lands has a right to the free and unrestrained use of it, above, upon and beneath the surface.

Id.; see also King County v. Boeing Co., 62 Wn. 2d 545, 550, 384 P.2d 122, 126 (1963); Wood v. City of Tacoma, 66 Wash. 266, 271–72, 119 P. 859, 862 (1911).

Washington also applies the common enemy rule to diffuse underground percolating water where the only resulting damage is due to the diversion of such water. Bjorvatn v. Pacific Mechanical Constr., Inc., 77 Wn. 2d 563, 565–66, 464 P.2d 432, 434 (1970); State v. Ponten, 77 Wn. 2d 463, 468, 463 P.2d 150, 153 (1969). But where loss of underground water removes lateral or subjacent support from adjoining land, causing that land to sink, liability results. *Bjorvatn*, 77 Wn. 2d at 567, 464 P.2d at 434–35; *see also* Muskatell v. City of Seattle, 10 Wn. 2d 221, 235–38, 116 P.2d 363, 370–71 (1941).

While the primary emphasis of this Comment is on the disposal of water, note that conflicts concerning the use and appropriation of diffuse surface water likely will increase as competition for water resources increases. *See generally* Dolson, *Diffused Surface Water and Riparian Rights: Legal Doctrines in Conflict*, 1966 WIS. L. REV. 58; Comment, *The Ownership of Diffused Surface Waters in the West*, 20 STAN. L. REV. 1205 (1968). There is considerably less authority on the right to capture diffuse surface water, but jurisdictions which have addressed the issue generally agree the right belongs to those upon whose land it falls. Doney v. Beatty, 124 Mont. 41, 220 P.2d 77, 82 (1950); OKLA. STAT. ANN. tit. 60, § 60 (West 1971). The Washington courts have not expressly ruled on the subject, but the common enemy rule language in the *Cass v. Dicks* decision quoted above, 14 Wash. at 78, 44 P. at 114, is consistent with the majority rule approach that diffuse surface water may be appropriated by any landowner on whose land it flows.

The Washington Water Code of 1917 declares that all waters belong to the public and are thus subject to appropriation by the public permit system. WASH. REV. CODE § 90.03.010 (1981). But Washington case authority indicates that a flowing watercourse is necessary for the application of the

Under the common enemy rule, the upper landowner may augment the natural diffuse surface water drainage flow and cast a greater volume of water onto the lower land,[12] may divert water onto other lands that would not normally receive it,[13] and may discharge water at a different point than that from which it would normally flow.[14] The upper landowner may raise the level of the land or make the surface of the land impervious to water without regard for the effect upon surface water flow.[15] Similarly, the lower landowner may prevent the flow of surface water onto his or her property by damming it back upon the upper landowner.[16] This privilege, however, does not extend to damming or obstructing a watercourse or a well-defined natural drain.[17]

There is one major exception to the common enemy rule in Washington. The collection of large quantities of surface water and subsequent discharge of it in a concentrated body upon the land of others to their injury is prohibited.[18] However, water may be concentrated in an artifi-

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prior appropriation doctrine, *see* Pays v. Roseburg, 123 Wash. 82, 84–85, 211 P. 750, 751 (1923), and that diffuse surface water is not of the character subject to appropriation, Dickey v. Maddux, 48 Wash. 411, 413–14, 93 P. 1090, 1091 (1908) (diffuse water such as that in a bog or marsh is not subject to appropriation law).

The rule regarding appropriation and use of diffuse surface water is closely tied to the common enemy rule. Both are grounded on the primacy of real property ownership, including the right to use or dispose of the water that flows thereon. Thus it may be anticipated that a shift in the law regarding the disposal of surface water would also include a shift in the approach to the use of such waters in Washington.

12. Maloney & Plager, *supra* note 1, at 82.

13. *Id.* at 83.

14. *Id.*

15. *Id.* at 85–88.

16. *Id.* at 92–93.

One commentator, Professor Beck, has mistakenly asserted that Washington has adopted an unusual modification of the common enemy rule that landowners may repel surface water at the boundary of their land, but water on their land may be diverted only into a watercourse or drainage channel. Beck, *supra* note 1, § 451.2(B), at 492. Washington case law does limit the ability of landowners to divert surface water from their land by requiring that the diversion be done so as not to collect and discharge water in a body, as the cases cited by Beck state. Colella v. King County, 72 Wn. 2d 386, 390, 433 P.2d 154, 157 (1967) (collection and discharge of surface water prohibited), *aff'd*, 75 Wn. 2d 953, 451 P.2d 667 (1969); Tope v. King County, 189 Wash. 463, 471, 65 P.2d 1283, 1287 (1937) (collection and discharge of surface water prohibited). But there is Washington authority granting both upper and lower landowners the general privilege to alter the flow of diffuse surface water or to raise the level of the land or build embankments. *See* Whiteside v. Benton County, 114 Wash. 463, 467, 195 P. 519, 520 (1921) (upper landowner may not dispose of water by means of an artificial ditch, but may raise the level of the road or build embankments even if such acts would also result in flooding); Wood v. City of Tacoma, 66 Wash. 266, 270, 119 P. 859, 861 (1911) (alteration of water flow from upper lands by lower landowner would not create liability despite flooding unless it was discharged in a concentrated body).

17. Maloney & Plager, *supra* note 1, at 93. *See infra* notes 36–40 and accompanying text.

18. Whiteside v. Benton County, 114 Wash. 463, 466–67, 195 P. 519, 520 (1921); Peters v. Lewis, 28 Wash. 366, 369, 68 P. 869, 870–71 (1902); *see also* Wilber Dev. Corp. v. Rowland

cial course within the landowner's property provided it is not discharged onto neighboring land in a concentrated volume but is returned to diffused form at the property line.[19]

B. The Civil Law Rule

The antithesis of the common enemy rule is the civil law rule. The civil law rule establishes a natural easement or servitude for drainage of surface water in its natural course and manner.[20] Under the civil law rule,

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Constr., Inc., 83 Wn. 2d 871, 874, 523 P.2d 186, 188 (1974). Most common enemy rule jurisdictions have adopted this qualification of the rule. Kinyon & McClure, *supra* note 9, at 916–17.

Another prevalent modification to the common enemy rule has been the requirement of "due care." *E.g.*, Young v. Moore, 241 Mo. App. 436, 236 S.W.2d 740, 744 (1951); Nichol v. Yocum, 173 Neb. 298, 113 N.W.2d 195, 199 (1962). The "due care" modification does not prohibit any particular alteration in the flow of surface water but prohibits alterations from being made wantonly or carelessly so as to cause unnecessary injury. Ballard v. Ace Wrecking Co., 289 A.2d 888, 889–90 (D.C. 1971) (deflection of surface water must be result of ordinary use of land and done with such care as to not injure neighbors needlessly). *See generally* Beck, *supra* note 1, § 451.2(C).

There is some vague language in an early Washington case indicating that a landowner in developing the land or fending off diffuse waters may be liable for doing so negligently. Wood v. City of Tacoma, 66 Wash. 266, 273–74, 119 P. 859, 862–63 (1911). No other Washington decision has referred to such a rule, however, so presumably Washington has not adopted a due care modification of the common enemy rule.

But while a landowner has no primary obligation to furnish drainage for surface water, if a municipal corporation or an individual does undertake the performance of that discretionary duty, there is then an affirmative duty to exercise reasonable care to maintain the original efficiency of the drainage system. Colella v. King County, 72 Wn. 2d 386, 390–91, 433 P.2d 154, 157 (1967), *aff'd*, 75 Wn. 2d 953, 451 P.2d 667 (1969); Ronkosky v. City of Tacoma, 71 Wash. 148, 153–54, 128 P. 2, 4 (1912); *see also* Sado v. City of Spokane, 22 Wn. App. 298, 301, 588 P.2d 1231, 1233 (1979).

Note also that the common enemy rule does not afford immunity for personal injury caused by unsafe conditions on property within the defendant's control, such as streets required by the county or city to be maintained in safe condition. Kelly v. Gifford, 63 Wn. 2d 221, 223, 386 P.2d 415, 416 (1963) (county liable for failure to keep highway free of unsafe surface waters allegedly causing automobile accident); *see also* Owens v. City of Seattle, 49 Wn. 2d 187, 190–91, 299 P.2d 560, 562 (1956).

19. *See* Wood v. City of Tacoma, 66 Wash. 266, 273, 119 P. 859, 862 (1911).

While a landowner may not collect and discharge surface water onto lower lands, water may be drained by artificial means into a natural watercourse or natural drain provided the waters would naturally flow there and the capacity of the stream is not overtaxed. Strickland v. City of Seattle, 62 Wn. 2d 912, 916–17, 385 P.2d 33, 36 (1963); Laurelon Terrace, Inc. v. City of Seattle, 40 Wn. 2d 883, 892–93, 246 P.2d 1113, 1119 (1952); Trigg v. Timmerman, 90 Wash. 678, 682, 156 P. 846, 847–48 (1916).

Most common enemy rule jurisdictions are in accord with this rule. North Dakota v. Minnesota, 263 U.S. 365, 372 (1923); Sheffet v. County of Los Angeles, 3 Cal. App. 3d 720, 740–41, 84 Cal. Rptr. 11, 24 (1970); Maloney & Plager, *supra* note 1, at 89.

20. *E.g.*, Parish of East Baton Rouge v. Pourciau, 387 So. 2d 645, 647–48 (La. Ct. App. 1980); Dayley v. City of Burley, 96 Idaho 101, 524 P.2d 1073, 1075 (1974). *See generally* Beck, *supra* note 1, § 452.

The rule appears to have its origins in Roman law, E. WARE, ROMAN WATER LAW §§ 109–27 (1905) (translated from the Pandects of Justinian), and the Napoleonic Code, H. FARNHAM, *supra* note 8, § 889a, at 2586–87. Its premise lies in the Latin phrase: *Aqua currit, et debet curere, ut*

landowners take the land as they find it with both the natural advantages and disadvantages of the geographical location.[21] If one chooses to alter the natural drainage pattern, he or she must bear the costs of the change in the status quo.

The civil law rule prohibits the upper landowner from diverting or augmenting the natural drainage of surface water.[22] Nor may the upper landowner raise the level of the land or make the surface of the earth impervious to water if this would alter the natural flow of the surface water to the injury of another.[23] However, the upper landowner is allowed to drain surface water into a natural drain or watercourse provided such waters would naturally flow there and the watercourse is not filled beyond capacity.[24] Similarly, lower landowners hold their land subject to a drainage servitude and are liable for obstructing the flow of surface water from above if doing so results in flooding back upon upper landowners.[25]

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solebat ex jure naturae (water runs, and should run, as it is wont to do by natural right). Dobbins, *Surface Water Drainage*, 36 NOTRE DAME LAW 518, 518 (1961); *see also* 3 KENT, COMMENTARIES ON AMERICAN LAW 682 (14th ed. 1896).

21. Gormley v. Sanford, 52 Ill. 158, 162 (1869); Blue v. Wenz, 54 Ohio St. 247, 43 N.E. 493, 496 (1896) (Ohio now follows the reasonable use rule adopted in McGlashan v. Spade Rockledge Terrace Condo Dev. Corp., 62 Ohio St. 2d 55, 402 N.E.2d 1196 (1980)).

22. Maloney & Plager, *supra* note 1, at 82.

A modification of the strict civil law rule allows the landowner to increase slightly the volume or rate of the natural flow provided the water enters the lower servient land in its natural direction and manner without injury. Hankins v. Borland, 163 Colo. 575, 431 P.2d 1007, 1010 (1967) (modified civil law rule permits upper owner to alter drainage flow "provided the water is not sent down in a manner or quantity to do more harm than formerly"); Schmitt v. Kirkpatrick, 245 Iowa 971, 63 N.W.2d 228, 233 (1954) (strict civil law rule modified with the "emphasis now placed upon the injury or potential injury rather than upon additional water cast upon the servient lands").

Owing to the harshness of the civil law rule and its possible inhibition of land development, some jurisdictions have made it applicable only in rural areas, adopting instead a reasonable use or common enemy approach for urban areas. *E.g.*, Mitchell v. Mackin, 376 So. 2d 684, 686–89 (Ala. 1979) (civil law rule applies in agrarian areas, common enemy rule in cities and towns, and a liberal modified civil law rule is applied "sparingly" to residential developments in rural areas); Mulder v. Tague, 85 S.D. 544, 186 N.W.2d 884, 888 (1971) (civil law rule restricted to rural areas, reasonable use rule adopted for urban areas). On civil law modifications in urban areas, see generally Comment, *The Application of Surface Water Rules in Urban Areas*, 42 MO. L. REV 76, 78–85 (1977).

Several jurisdictions, moving in the direction of the reasonable use rule, have adopted a reasonable use modification of the civil law rule qualifying the strict natural drainage servitude. *E.g.*, Klutey v. Commonwealth, 428 S.W.2d 766, 769–70 (Ky. 1967) (lower owner is subject to servitude to accept drainage from upper owner but extent to which either landowner may vary this natural drainage is a question of reasonableness); Beane v. Prince George's County, 20 Md. App. 383, 315 A.2d 777, 783 (1974) (civil law rule places a natural servitude for natural flow of surface water but the flexible reasonable use rule applies where strict application of the civil law rule would result in hardship to either party).

23. Maloney & Plager, *supra* note 1, at 85–88.

24. *Id.* at 89.

25. *Id.* at 92

C. *The Reasonable Use Rule*

The reasonable use rule[26] allows landowners to make a reasonable use of their land, even though the flow of surface waters is altered and causes some harm to others. Liability arises only when the landowner's harmful interference with the flow of diffuse surface waters is unreasonable. In each case, reasonableness is determined by balancing the gravity of the harm caused against the utility of the conduct.[27]

II. WATERCOURSE DRAINAGE IN WASHINGTON

A natural watercourse is water flowing in a definite channel with a de-

26. Some confusion may be engendered by the use of the term "reasonable use" applied both to riparian water use rights and surface water disposal.

A reasonable use rule applies to conflicting claims to use of water flowing in watercourses as part of the riparian rights doctrine in Washington. Riparian rights is a property law doctrine, Nesalhous v. Walker, 45 Wash. 621, 624, 88 P. 1032, 1033 (1907), granting rights to use of water incident to ownership of land adjoining a stream, Rigney v. Tacoma Light & Water Co., 9 Wash. 576, 582–83, 38 P. 147, 149 (1894). Under the riparian rights doctrine, each riparian owner is entitled to the steady and natural flow of the stream subject to the reasonable use of its water by other riparian owners. Sumner Lumber & Shingle Co. v. Pacific Coast Power Co., 72 Wash. 631, 640–41, 131 P. 220, 224 (1913).

The riparian rights doctrine is still recognized in Washington but exists in conjunction with the prior appropriation doctrine established in the Washington Water Code of 1917. WASH. REV. CODE ch. 90.03 (1981). Appropriations law involves a permit system granting rights to use of water to the prior appropriator who secures those rights through permit procedures. *Id.* The waters of streams in excess of that which can be beneficially used presently or prospectively within a reasonable time by riparian landowners are subject to appropriation for use on non-riparian lands. Brown v. Chase, 125 Wash. 542, 553, 217 P. 23, 26–27 (1923); Proctor v. Sim, 134 Wash. 606, 619, 236 P. 114, 118 (1925) (applying rule to non-navigable lakes).

On riparian rights and prior appropriation law in Washington, see generally Corker & Roe, *Washington's New Water Rights Law—Improvements Needed,* 44 WASH. L. REV. 85 (1968); Johnson, *Riparian and Public Rights to Lakes and Streams,* 35 WASH. L. REV. 580 (1960); Morris, *Washington Water Rights—A Sketch,* 31 WASH. L. REV. 243 (1956); and Horowitz, *Riparian and Appropriation Rights to Use of Water in Washington,* 7 WASH. L. REV. 197 (1932).

But there is a vital distinction in water law between the law of *water rights* governing conflicts to the use of water resources, and the law of *water drainage* governing invasions in the use and enjoyment of land by the medium of water. RESTATEMENT (SECOND) OF TORTS, ch. 41, topic 5 scope note (1979); *see also* J. SAX, WATER LAW, PLANNING & POLICY 493 (1968). The "reasonable use" rule as applied to surface water drainage falls in the latter category of water drainage law. The riparian "reasonable use" rule falls in the former category of water rights law. The distinction between the term "reasonable use" as applied in the very separate contexts of riparian water rights and water drainage should be recognized while reading this Comment. *See also* note 62.

27. Kinyon & McClure, *supra* note 9, at 904. On the reasonable use rule, see generally Beck, *supra* note 1, § 453 & Supp. 1978 at 108–09.

Court decisions adopting the reasonable use rule include: Weinberg v. Northern Alaska Dev. Corp., 384 P.2d 450, 452 (Alaska 1963); Keys v. Romley, 64 Cal. 2d 396, 412 P.2d 529, 536–37, 50 Cal. Rptr. 273, 280–81 (1966); Armstrong v. Francis Corp., 20 N.J. 320, 120 A.2d 4, 10 (1956); Pendergrast v. Aiken, 293 N.C. 201, 236 S.E.2d 787, 796 (1977).

The factors of the reasonable use rule are discussed in detail in Part V*B infra*.

fined bed and banks,[28] even if the flow is only intermittent.[29] However, the flow must be more than mere surface drainage, such as water that flows in a depression only when rain falls or snow melts.[30] Under the law of natural watercourses, the channel in which the water flows must be natural and not man-made, although an artificially altered watercourse may become "natural" due to its long existence or longtime acquiescence of riparian owners.[31]

Where diffuse surface waters flow together to form a reasonably well-defined channel, the water loses its character as diffused and becomes a natural watercourse.[32] While the point of transition from diffuse surface water to watercourse may be gradual and difficult to ascertain,[33] the legal ramifications of this transition are considerable, with sharply contrasting rules applying.

While the common enemy rule absolves a landowner from liability for harmful interference with surface water flow, a quite different, strict liability standard applies to injurious diversion or obstruction of a watercourse or natural drain.[34] It is permissible to incidentally hasten or in-

28. King County v. Boeing Co., 62 Wn. 2d 545, 550, 384 P.2d 122, 126 (1963); Clark, *supra* note 5, § 52.1(B), at 308–09. *See generally* Morris, *supra* note 26, at 245–46 (definition of a watercourse in Washington).

29. Harmon v. Gould, 1 Wn. 2d 1, 8–9, 94 P.2d 749, 753 (1939); Ronkosky v. City of Tacoma, 71 Wash. 148, 149, 128 P. 2, 2 (1912).

30. Thorpe v. City of Spokane, 78 Wash. 488, 489, 139 P. 221, 222 (1914); Clark, *supra* note 5, § 52.1(B), at 308–09.

31. *See* Wilber v. Western Properties, 14 Wn. App. 169, 172, 540 P.2d 470, 473 (1975); Buxel v. King County, 60 Wn. 2d 404, 408, 374 P.2d 250, 252 (1962).

32. Alexander v. Muenscher, 7 Wn. 2d 557, 559–60, 110 P.2d 625, 626 (1941); Clark, *supra* note 5, § 52.1(B), at 310.

33. 2 W. HUTCHINS, WATER RIGHTS LAW IN THE NINETEEN WESTERN STATES 536 (1974).

34. Another distinction arising in water law is between water in a channel that flows continuously so as to constitute a "watercourse" and a "natural drain" or "drainage channel" in which water flows only with rain or snow runoff but remains dry in other seasons. Davis, *Introduction to Water Law of the Eastern States*, in 7 WATERS AND WATER RIGHTS § 602.1(A) (R.E. Clark ed. 1967); H. FARNHAM, *supra* note 8, § 889d, at 2599–2607; *see also* King County v. Boeing Co., 62 Wn. 2d 545, 550, 384 P.2d 122, 126 (1963). This distinction is significant as riparian rights will attach to a natural watercourse but not to surface water flowing in a natural drain. Davis, *supra*, § 602.1(A); *see also* Doney v. Beatty, 124 Mont. 41, 220 P.2d 77, 82 (1950); King County v. Boeing Co., 62 Wn. 2d 545, 550, 384 P.2d 122, 126 (1963). *But see* Chicago, R.I. & P. Ry. v. Groves, 20 Okla. 101, 93 P. 755, 760–61 (1908).

However, it is nearly universally agreed that water flowing in a well-defined channel or depression is subject to the rule that watercourses cannot be obstructed to the harm of others. Davidson v. Mathis, 180 Ind. App. 524, 389 N.E.2d 364, 365–67 (1979) (a natural drainage ravine which filled with rain runoff was termed a legal watercourse rather than "mere" surface water); Johnson v. Whitten, 384 A.2d 698, 701 (Me. 1978) (calling well-defined flow a watercourse). Thus, for purposes of disposal of water in drainage law, a drainage channel formed by nature is governed by the same rule as watercourses. Nichol v. Yocum, 173 Neb. 298, 113 N.W.2d 195, 200 (1962) (stating that natural drainways, whether viewed as a riparian watercourse or not, could not be obstructed); Wilber v. Western Properties, 14 Wn. App. 169, 172–74, 540 P.2d 470, 473–74 (1975) (unlawful obstruction

crease the flow of a river or stream with surface water drainage provided the surface waters were naturally flowing in that direction and the capacity of the stream is not overtaxed.[35] But obstruction or diversion of a watercourse to the injury of another is prohibited.[36] Where riparian owners interfere with the course of a stream and escaping waters cause damage to other landowners, they will be held strictly liable.[37]

This strict liability rule has been applied in Washington both to instances in which the obstruction has caused flooding upstream[38] and to situations in which a dam or jam broke and caused flooding downstream.[39] Strict liability also exists for diversion or "straightening" of

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of a drainage ditch which had become a natural channel through antiquity); Miller v. Eastern Ry. & Lumber Co., 84 Wash. 31, 33, 35–36, 146 P. 171, 172–73, 173–74 (1915) (unlawful obstruction of a watercourse). *See generally* H. FARNHAM, *supra* note 8, § 889d, at 2599–2607. For this reason, courts are often less than clear in distinguishing between drains and watercourses. *See* Ronkosky v. City of Tacoma, 71 Wash. 148, 149, 153, 128 P. 2, 2, 4 (1912) (court terms water flow a "natural watercourse" but the description of a gulch carrying only small amounts of water in summer and a large volume during the rainy season would appear to fit that of a natural drain).

35. *See supra* note 19.

36. *E.g.*, Solomon v. Congleton, 245 Ark. 487, 432 S.W.2d 865, 866 (1968); Myhr v. Vlahakis, 348 Mass. 795, 205 N.E.2d 219, 219–20 (1965); Wilber v. Western Properties, 14 Wn. App. 169, 173–74, 540 P.2d 470, 474 (1975). *See generally* Beck, *supra* note 1, § 451.2(E).

37. Wilber v. Western Properties, 14 Wn. App. 169, 173–74, 540 P.2d 470, 474 (1975) (stating the duty not to obstruct natural channels was "akin to a duty of strict liability"). *See also* Markiewicz v. Salt River Valley Water Users' Ass'n, 118 Ariz. 329, 576 P.2d 517, 523 (Ariz. Ct. App. 1978) (court recognized general rule of strict liability for diversion of a natural watercourse but held rule inapplicable to a canal diverted from river so long ago as to now be a permanent natural feature of the land); Amish v. Walnut Creek Dev., Inc., 631 S.W.2d 866, 871, 877 (Mo. Ct. App. 1982) (strict liability for obstruction of a natural watercourse causing overflow); H. COULSON & U. FORBES, LAW OF WATERS AND OF LAND DRAINAGE 143–44 (5th ed. 1933).

This rule of strict liability follows the common law as stated in Chicago, R.I. & P. Ry. v. Groves, 20 Okla. 101, 93 P. 755, 759 (1908):

> Wherever the common law prevails, every proprietor upon water flowing in a definite channel so as to constitute a water course has the right to insist that the water shall continue to run as it has been accustomed, and that no one can change or obstruct its course injuriously to him without being liable to damages.

See also Johnson v. Whitten, 384 A.2d 698, 701 (Me. 1978).

This liability rule would likely apply to underground streams as well, since subterranean streams flowing in a known and defined channel are governed by the same rules that apply to a watercourse above ground. *See* State v. Ponten, 77 Wn. 2d 463, 468, 463 P.2d 150, 153 (1969); Evans v. City of Seattle, 182 Wash. 450, 452–53, 47 P.2d 984, 985 (1935).

However, this rule of strict liability applies only to *natural* watercourses, while a standard of negligence applies to artificial channels, such as irrigation ditches, *see* Holland v. Columbia Irrigation Dist., 75 Wn. 2d 302, 305, 450 P.2d 488, 490 (1969).

38. Wilber v. Western Properties, 14 Wn. App. 169, 173–74, 540 P.2d 470, 474 (1975) (obstruction of drainage ditch caused backed-up water and flooding); Dahlgren v. Chicago, M. & P.S. Ry., 85 Wash. 395, 406, 148 P. 567, 571 (1915) (obstruction of watercourse caused backup flow flooding); Miller v. Eastern Ry. & Lumber Co., 84 Wash. 31, 33, 35–36, 146 P. 171, 172–73, 173–74 (1915) (obstruction of stream caused backup flow flooding plaintiff's land).

39. Johnson v. Sultan Ry. & Timber Co., 145 Wash. 106, 108–10, 258 P. 1033, 1034–35 (1927) (log jam in stream backed up water and then broke, flooding downstream).

stream flow which erodes the property along the river.[40] The only defenses to this standard of strict liability for harmful interference with a watercourse are (1) where the alteration does not actually interfere with riparian rights,[41] or (2) where the flooding damage is primarily attributable to an act of God, such as an unprecedented flood, rather than the obstruction.[42]

III. CLASH OF DRAINAGE DOCTRINES

A. *Transition Between Surface Waters and Watercourses*

Legal doctrines governing the obstruction of water drainage diverge sharply according to the classification of the water. A rule of strict liability governs harmful interference with a watercourse, while a rule of immunity from liability applies to harmful diversions of diffuse surface

40. Conger v. Pierce County, 116 Wash. 27, 33, 41, 198 P. 377, 379, 382 (1921) (remanding for jury trial on allegations that county, in straightening and improving stream to prevent flooding damage to public property, caused stream to deflect and erode plaintiff's property, damaging buildings).

41. For example, in DeRuwe v. Morrison, 28 Wn. 2d 797, 806, 184 P.2d 273, 278 (1947), the owners of the lower portion of a lake, alleged to be a natural watercourse, drained off the lake through a ditch. The owner of the upper portion of the lake did not object as he in fact desired an uncovered lake bottom for agricultural purposes. *Id.* When the lower owner dammed the artificial drainage ditch to restore the lake to its natural level, the upper owner could not complain of the obstruction of the lake as a watercourse so long as the water was not raised above the original level of the lake. *Id.* at 808–09, 184 P.2d at 279–80.

A channel which formerly flowed with water but now has been bypassed or abandoned may cease to be a natural watercourse and thus the rule governing its obstruction would likely be that of diffuse surface water rather than that of watercourses. *See* King County v. Boeing Co., 62 Wn. 2d 545, 549–50, 384 P.2d 122, 125–26 (1963).

42. In Anderson v. Rucker Bros., 107 Wash. 595, 183 P. 70 (1919), the defendant had diverted water from two streams to a dam to create a pond for a logging and lumber business. The court held that one constructing and maintaining a dam is not strictly liable for flooding but is required only to exercise reasonable care to anticipate such flooding as a prudent person could reasonably expect. *Id.* at 598–99, 183 P. at 72. But on rehearing en banc, 107 Wash. 605, 186 P. 293 (1919), the court clarified that the strict liability duty, that a dam owner must "maintain his dam at his peril and as an insurer," was excused only in the situation of an unprecedented flood or an act of God. *Id.* at 604–06, 186 P. at 294. *See also* Nielson v. King County, 72 Wn. 2d 720, 725, 435 P.2d 664, 668 (1967) (county not liable for flooding of stream allegedly obstructed by culverts where cause was act of God by debris from landslide); Maplewood Farm Co. v. City of Seattle, 88 Wash. 634, 153 P. 1061 (1915) (jury properly instructed that city was not liable for failure of dam if event resulted from an act of God, an unusual and unprecedented event proceeding from natural causes which could not be reasonably anticipated or guarded against in the exercise of ordinary care).

The term "act of God" was earlier defined in Washington case law as "some inevitable accident which cannot be prevented by human care, skill, or foresight." Kuhnis v. Lewis River Boom & Logging Co., 51 Wash. 196, 199–200, 98 P. 655, 656 (1908); *see also* Wells v. City of Vancouver, 77 Wn. 2d 800, 803, 467 P.2d 292, 295 (1970) (upholding jury instruction defining "act of God"); Sado v. City of Spokane, 22 Wn. App. 298, 303, 588 P.2d 1231, 1234 (1979).

water. The disparity between these standards of liability is starkly illustrated where the categories overlap.

The crucial issue for the determination of the governing drainage doctrine in Washington is the distinction between a watercourse or natural drain and diffuse surface water.[43] Whether waters have drawn together sufficiently to form a watercourse[44] or have spread apart sufficiently to lose the character of a watercourse and become diffuse[45] is a question of fact based on the circumstances of each case.[46] Washington case authority indicates the flow must be fairly substantial to distinguish a watercourse or natural drain from diffuse surface water.[47]

Judicial treatment of flood waters illustrates how the characterization of water as diffuse or channeled determines whether an obstruction will be liberally permitted or strictly prohibited.[48] Early Washington cases can be interpreted as treating flood waters analogously to surface waters and thus applying the common enemy rule to efforts to ward off flood waters.[49] However, the Washington court later held that flood waters within a defined flood channel cannot be diverted out of the channel without liability for any damages caused.[50] Not until the flood waters have escaped the flood channel forever and spread out over the land are they to be characterized as diffuse and vagrant surface waters.[51] The court has also held

43. The definition of diffuse surface water was discussed *supra* in the text accompanying notes 7–8, of watercourses *supra* in the text accompanying notes 28–33, and of natural drains *supra* in the text accompanying note 34.

44. *E.g.*, Thorpe v. City of Spokane, 78 Wash. 488, 489–90, 139 P. 221, 222 (1914) (although water flowed in a channel, it was still found to be diffused over the entire face of the land and not regular enough to qualify for the rules of watercourse or natural drain drainage).

45. *See infra* notes 48–53 and accompanying text.

46. *See* Tierney v. Yakima County, 136 Wash. 481, 484, 239 P. 248, 249 (1925) (holding that whether or not a watercourse exists is a question of fact for the jury).

47. *Compare* Ronkosky v. City of Tacoma, 71 Wash. 148, 149–53, 128 P. 2, 2–4 (1912) (a deep gulch carrying a small amount of water in the summer and a large volume in the rainy season was held to be a natural watercourse for which liability existed for negligent obstruction) *with* Sneddon v. Edwards, 53 Wn. 2d 820, 822, 335 P.2d 587, 588 (1959) (a gully 200 feet long, six or seven feet deep, and 18 to 20 feet wide carrying 50 gallons of water per hour during a period of heavy rains was held not to be a natural watercourse). The facts of these two cases indicate that even a natural drain must have fairly substantially defined existence, as the considerable gully in *Sneddon* was held not to be a natural drain or watercourse, while the gulch in *Ronkosky* was so large that obstruction of it caused a flood pond 45 feet deep. *Ronkosky*, 71 Wash. at 150, 128 P. at 3.

48. On flood waters, see generally Clark, *supra* note 5, § 52.1(C).

49. *See* Morton v. Hines, 112 Wash. 612, 617, 192 P. 1016, 1018 (1920); Harvey v. Northern Pac. Ry., 63 Wash. 669, 676–77, 116 P. 464, 467 (1911). However, the flood waters involved in these two cases would likely be termed surface water even under the present authority, as the water was scattered over an area of low land and had left the natural channel of the stream. *See Morton*, 112 Wash. at 614–15, 616–17, 192 P. at 1017, 1017; *Harvey*, 63 Wash. at 673, 116 P. at 466.

50. Sund v. Keating, 43 Wn. 2d 36, 44–45, 259 P.2d 1113, 1118 (1953).

51. *Id. See* Note, *Floodwaters and the Common Enemy Doctrine*—Sund v. Keating, 29 WASH. L. REV. 157 (1954).

that where diking to confine flood waters within the river channel caused the waters to rise so high as to damage a bridge, liability would result for interference with the natural flow of the stream.[52] Thus the rule of strict liability for interference or obstruction of a watercourse was extended to flood waters flowing within some defined river channel or flood channel.[53]

B. Morris v. McNicol

The decision of *Morris v. McNicol*[54] has been interpreted as representing a significant shift in the Washington court's perception of drainage law. Instead, the case illustrates the confusion caused by classifying drainage waters into two distinct categories with sharply divergent standards of liability.

In *Morris v. McNicol,* the plaintiff alleged abnormal flooding on his property due to accumulation of sand and gravel in a creek running through his property. Grading and removal of soil and vegetation from the defendants' lands upstream allegedly caused the accumulation through erosion.[55] The trial court granted defendants' motion for summary judgment holding that they owed no duty to the plaintiff under the doctrine of *damnum absque injuria* as applied to surface water.[56] The Washington Supreme Court reversed, stating that the doctrine of *damnum absque injuria,* which "permits the landowner to protect his land against surface waters . . . without regard to the effect . . . to surrounding landowners," "applies only if the upland landowner's use is reasonable."[57] The court concluded that such reasonableness was a question of material fact which could not be resolved by a summary judgment proceeding.[58]

52. Marshland Flood Control District of Snohomish County v. Great Northern Ry., 71 Wn. 2d 365, 369–70, 428 P.2d 531, 533–34 (1967); Note, *Liability For Diking Floodwaters: Rejection Of The "Common Enemy" Doctrine*—Marshland Flood Control District of Snohomish County v. Great Northern Ry., 44 WASH. L. REV. 516 (1969). *See also* Wilber v. Western Properties, 14 Wn. App. 169, 171, 173–74, 540 P.2d 470, 473, 474 (1975).

53. Marshland Flood Control District of Snohomish County v. Great Northern Ry., 71 Wn. 2d 365, 369–70, 428 P.2d 531, 533–34 (1967); Wilber v. Western Properties, 14 Wn. App. 169, 171, 173–74, 540 P.2d 470, 473, 474 (1975).

54. 83 Wn. 2d 491, 519 P.2d 7 (1974).

55. *Id.* at 492–93, 519 P.2d at 9.

56. *Id.* at 493–94, 519 P.2d at 9–10. The defendants also moved for summary judgment on the grounds that their improvement of their land was not the proximate cause of the plaintiff's injury, that defendants' liability was several and plaintiff could not prove the amount of damages attributable to each defendant, and that the plaintiff's cause of action was barred by the statute of limitations. *Id.* at 493–94, 519 P.2d at 9–10.

57. *Id.* at 495, 519 P.2d at 10–11.

58. *Id.* The court also reversed the summary judgment, holding that a material fact question existed as to the proximate cause of the plaintiff's injury, *id.* at 495–96, 519 P.2d at 11, and as to

This holding has been cited by several courts in other jurisdictions as adopting either a reasonable use rule or a modification approaching the reasonable use rule for diffuse surface water drainage in Washington.[59] The facts in the *Morris* case, however, involved overflow caused by filling a stream and, thus, could be subject to the law governing watercourses, rather than surface water.[60] The court ambiguously refers to riparian rights and duties regarding watercourses in the same paragraph in which it discusses surface water.[61] But the *Morris* case is a drainage law case involving flooding of unwanted water, while the law of riparian rights and duties applies in the very distinct context of conflict over the use of water resources. Thus it is likely that the court's reference to a duty of "reasonable use," previously applied only to define the rights of riparian landowners to use of riparian water, was mistaken.[62] As Professor Beck concludes: "[I]t would require a substantial stretch of the imagina-

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whether the percentage of contribution by each defendant to the injury could be apportioned, *id.* at 495–96, 519 P.2d at 11. The court held that the statute of limitations operated to cut off recovery only for the period prior to the two-year limit, but not to bar the cause of action entirely, and that the cause of action did not arise until the damage was evident. *Id.* at 497, 519 P.2d at 11.

59. Argyelan v. Haviland, 435 N.E.2d 973, 986 (Ind. 1982) (Hunter, J., dissenting); Pendergrast v. Aiken, 293 N.C. 201, 236 S.E.2d 787, 793 (1977); Chudzinski v. City of Sylvania, 53 Ohio App. 2d 151, 372 N.E.2d 611, 615 n.3 (1976); State v. Deetz, 66 Wis. 2d 1, 224 N.W.2d 407, 414 n.3 (1974); *see also* RESTATEMENT (SECOND) OF TORTS, APPENDIX, reporter's notes to § 833, at 536 (1982); Comment, *supra* note 22, at 96 n.142.

60. *See* Morris v. McNicol, 83 Wn. 2d at 492–93, 519 P.2d at 9; Beck, *supra* note 1, § 456.2, at 122 n.54 (Supp. 1978); Annot., 93 A.L.R.3d 1193, 1207 n.35 (1979).

61. Morris v. McNicol, 83 Wn. 2d at 495, 519 P.2d at 10–11.

62. In McEvoy v. Taylor, 56 Wash. 357, 105 P. 851 (1909), the decision which the *Morris* court cites for the proposition that Washington applies a reasonable use rule, 83 Wn. 2d at 395, 519 P.2d at 10, the court held that the upstream riparian owner could not be enjoined from using a pond for geese and livestock despite incidental pollution of the stream for the lower riparian owner. Such use of the pond was proper and reasonable and any damage thereby was *damnum absque injuria*. *McEvoy*, 56 Wash. at 358, 105 P. at 852. Professor Beck apparently believes that *Morris*, like *McEvoy*, was really a case of pollution with one riparian landowner suing another riparian landowner as to the use of riparian waters. Thus the *Morris* case, he argues, is properly governed by the reasonable use rule as applied to a conflict over the consumptive use of watercourse water. Beck, *supra* note 1, § 456.2, at 122 n.54 (Supp. 1978).

However, *McEvoy* is a riparian rights case while *Morris* involves drainage of water. A reasonable use rule does indeed apply to situations, such as the *McEvoy* case, in which the dispute is over the actual use of water in the stream. *See supra* note 26. But the *Morris* case falls under the separate category of water drainage law where the conflict is not over use of water resources but rather disposal of unwanted water. *See supra* note 26. When the dispute concerns obstruction of the stream with resulting flooding of land, as the court indicated was the case in *Morris*, 83 Wn. 2d at 492–93, 519 P.2d at 9, a strict liability standard has been followed. *See supra* notes 34–42 and accompanying text. Thus even if the *Morris* decision was interpreted as applying to watercourse water drainage, rather than diffuse surface water, its holding would reflect a shift in the law from strict liability to a reasonable use rule. It is unlikely the court intended such a change in the law.

tion to construe Morris as adopting such a rule [reasonable use] or modification."[63]

It could be argued, although unconvincingly, that the *Morris* court knew exactly what it was doing when it indiscriminately mixed references to surface water law, obstruction of watercourses, and the reasonable use rule governing water use rights. The court may have seen this as a calculated means to cautiously move all areas of water law toward a common governing rule of reasonableness. While this Comment advocates such a rule with respect to drainage law,[64] it is probably asking too much to read that into the ambiguous language of the *Morris* decision. It is difficult to believe, in reading the decision, that the court secretly intended to steer Washington toward a unified reasonable use rule. At the very least, the *Morris* decision is not the definitive statement one would expect when a jurisdiction switches from one rule to another.[65] The *Morris* decision's language serves only to "muddy the waters," and a final resolution of the state of the law in Washington must await clarification in a future case.

The *Morris* decision appears best described as a situation in which the two diverse drainage standards of liability converged to confuse the attorneys, and apparently the court, and create an ambiguous result.[66] The

63. Beck, *supra* note 1, § 456.2, at 123 n.62a (Supp. 1978).

Two Washington decisions have dealt with the question of surface water drainage since the *Morris* decision. Wilber Dev. Corp. v. Rowland Constr., Inc., 83 Wn. 2d 871, 523 P.2d 186 (1974); Burton v. Douglas County, 14 Wn. App. 151, 539 P.2d 97 (1975). Neither decision, nor the briefs submitted to the courts, cited *Morris* nor indicated any recognition of a change in the law governing diffuse surface water drainage. However, the issue was not directly raised, as both cases could be disposed of under the prohibition against collection and discharge of water in a body. *See Wilber Dev. Corp.*, 83 Wn. 2d at 874, 523 P.2d at 188; *Burton*, 14 Wn. App. at 154, 539 P.2d at 100. This prohibition rule is followed under all three of the doctrines governing surface water. While neither decision named the rule it was applying, the background language appears to be that of the common enemy rule, and both decisions cite to traditional common enemy rule authority. *See Wilber Dev. Corp.*, 83 Wn. 2d at 874–75, 523 P.2d at 188; *Burton*, 14 Wn. App. at 154–55, 539 P.2d at 100.

64. *See infra* Part IV.

65. Beck, *supra* note 1, § 456.2, at 122 n.54 (Supp. 1978).

66. Analysis of the briefs submitted to the *Morris* court sheds some light on the source of the vague language in that decision. The appellant (plaintiff) did raise the reasonable use theory citing a New Jersey decision, Armstrong v. Francis Corp., 20 N.J. 320, 120 A.2d 4 (1956), often cited for the adoption of the reasonable use rule for surface water drainage. Brief for Appellant at 25–28, *Morris*. The respondents (defendants) argued strongly that the water involved in the case was diffuse surface water and therefore the common enemy rule controlled. Brief for Respondents at 13–16. Thus the *Morris* court should have been aware of the significance of using the volatile term "reasonable use" in the context of surface water.

Unfortunately the appellant failed to clearly distinguish the rules with application to surface water and to obstruction of watercourses, Brief for Appellant at 24, 29–31, and confused the rules governing competition to use of water under the riparian rights doctrine (improperly citing *McEvoy v. Taylor*, *see supra* note 62) with that governing obstruction and diversion of watercourses, Brief for Appellant at 29–31. *See supra* note 26. It is apparent that the *Morris* court closely followed the argument presented in the appellant's brief and this, in part, accounts for the ambiguous and confused holding in the *Morris* decision.

decision is less valuable in establishing a new rule in Washington than as an illustration of the need for a reassessment of drainage law doctrines.

Still, the *Morris* decision does provide an indication that the Washington court, presumably aware of the facts and consequences in that particular case, is instinctively attracted by a standard of reasonableness in the area of water drainage law. It is to be hoped that future decisions will confirm that inclination.

IV. A UNIFIED REASONABLE USE APPROACH TO DRAINAGE LAW

A. *A Unified Approach to Water Drainage*

The distinction between diffuse surface water and watercourses for the application of diverse drainage law doctrines has proven artificial in reality[67] and confusing in practice. It is difficult to posit a justification for this artificial distinction in the area of drainage law. The actions, purposes, and consequences of obstructing drainage are the same whether the water falls into a legal class as diffuse water or as a watercourse. The ambiguous result of the *Morris v. McNicol* decision reflects the confusion engendered with two divergent standards of liability dependent on categories of water. It is instead appropriate to apply a single legal approach to water drainage rather than preserving diverse rules dependent on artificial legal classifications of water.

At least one jurisdiction has adopted a unified approach to water drainage. In *Pendergrast v. Aiken,*[68] the North Carolina court stated that that jurisdiction makes no distinction between diffuse surface water and de-

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The appellant also argued that the common enemy rule did not apply as the damages in the *Morris* case resulted from the defendants negligently allowing erosion of debris into a creek, not from attempts to protect their property from surface water. Brief for Appellant at 15–16, 24–25; Reply Brief for Appellant at 1–2. However the common enemy rule applies regardless of the purpose for which the drainage pattern of the land is altered, or whether the intent was actually to influence water flow. The rule allows the landowner to make any improvement or alteration of the land with impunity as to the effect, direct or indirect, on surface water drainage. *See supra* text accompanying note 8; Brief for Respondents at 13–16 (citing H. FARNHAM, *supra* note 8, § 890, at 2614–19).

67. These legal classifications of water fail to account for the continuity of all water in its various manifestations as a cycle from sky to earth and back again.

> The term "hydrologic cycle" is applied to the march of events marking the progress of a particle of water from the atmosphere through various environments upon or under the earth's surface and back to the atmosphere again. The continuity of the cycle is a basic hydrologic principle; because of that continuity, the distinctions between water in the several phases of the hydrologic cycle (precipitation, soil water, ground water, surface water) are only transient at many places and times.

Piper & Thomas, *supra* note 4, at 2; *see also* F. TRELEASE, CASES AND MATERIALS ON WATER LAW: RESOURCE USE AND ENVIRONMENTAL PROTECTION 50–57 (2d ed. 1974).

68. 293 N.C. 201, 236 S.E.2d 787 (1977).

fined watercourses: "Such technical distinctions have unnecessarily complicated the analysis of drainage problems, masking the truly critical issues."[69] Instead the court applied a reasonable use rule as a nuisance law approach to drainage of all surface waters including diffuse surface waters, watercourses, and overflow waters from the ocean.[70] In rejecting the distinction between diffuse surface water and watercourses, the court quoted an early Illinois case:

> "What difference does it make, in principle, whether the water comes directly upon the field from the clouds above, or has fallen upon remote hills, and comes thence in a running stream upon the surface, or rises in a spring upon the upper field and flows upon the lower."[71]

The unified approach suggested would apply the equitable rule of reasonableness to all problems involving obstruction, diversion, or interference with the flow of drainage waters.[72] It would eliminate distinctions in Washington drainage law between diffuse surface water and water flowing in a definite channel[73] and would avoid the artificial attempts to characterize overflow from watercourses as diffuse surface water or as still part of the stream.[74]

B. A Reasonable Use Approach to Water Drainage

Under the reasonable use approach, possessors of land may make reasonable use of land, even though the flow of surface (or other) water is altered and thereby causes some harm to others, but they incur liability when the harmful interference with the flow of such waters is unreason-

69. *Id.* at 790.

70. *Id.* at 790, 796. *See also* Ellison v. City of San Buenaventura, 60 Cal. App. 3d 453, 458, 131 Cal. Rptr. 433, 436 (1976) (assuming for purposes of argument, but not expressly holding, that reasonable use rule applies to both surface waters and natural watercourses). *But see* G & A Contractors, Inc. v. Alaska Greenhouses, Inc., 517 P.2d 1379, 1383–84 (Alaska 1974) (limiting reasonable use rule to surface waters and retaining strict liability rule for alteration of watercourses, and quoting Chicago, R.I. & P. Ry. v. Groves, 20 Okla. 101, 93 P. 755, 759 (1908), *see supra* note 36, as to common law rule).

71. Pendergrast v. Aiken, 293 N.C. 201, 236 S.E.2d 787, 790 (1977) (quoting Gormley v. Sanford, 52 Ill. 158, 162 (1869)).

72. In Roberts v. Hocker, 610 S.W.2d 321, 327 n.5 (Mo. Ct. App. 1980), the court responded to an argument to unify different classes of water into one standard of reasonable use by saying that the rules applying to watercourses and surface water differ because watercourses are a resource of beneficial use to be distributed, while competition as to surface water goes to the riddance of such water. This, however, ignores the different contexts of watercourses as a water resource in terms of riparian rights and as an instrument of harm to land through flooding. *See supra* notes 26 & 62. In the flooding or drainage context, there is no reason to distinguish between watercourses and surface water as to standards of liability.

73. *See supra* Part IIIA.

74. *See supra* Part IIIA.

able.[75] The reasonable use rule is a rule of tort law, not of property law, that does not grant or deny property rights. Instead the rule determines the liability of conduct in the manner of nuisance law, reconciling conflicting uses of land.[76] The reasonable use rule, applied to the invasion of unwanted water, involves the same balancing of interests as is used in nuisance cases concerning invasions of land by smoke, dust, or vibrations.[77]

From a position of both equity and rationality, the reasonable use rule is preferable to the extreme results imposed by the common enemy and civil law rules. The common enemy rule encourages landowners to engage in "contests of hydraulic engineering in which might makes right."[78] As each landowner is privileged to make alterations in the flow of surface water, the rule requires each landowner to rely on his or her own exertions for protection of real property.[79] The common enemy rule may have been appropriate in a frontier environment where it allowed the unhindered development of land, but it is an anachronistic "rule of the jungle"[80] in our populous modern society. Civil law jurisdictions suffer from the opposite extreme, with landowners prevented from making even reasonable use of their property if it alters the flow of drainage waters. The rule, if taken literally, has the effect of inhibiting land development, since any development would likely have some effect on the pattern of surface water drainage.[81]

In contrast, the reasonable use rule permits an equitable allocation of the cost of improvement to land and alterations in surface water drainage. It requires owners improving land to take into consideration the true cost to the community of disruptions in drainage patterns and the feasibility of establishing drainage systems.[82] The reasonable use rule does not derogate from private property rights but rather protects the respective property rights of all parties in the use and enjoyment of their land.[83]

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75. Pendergrast v. Aiken, 293 N.C. 201, 236 S.E.2d 787, 796 (1977); Armstrong v. Francis Corp., 20 N.J. 320, 120 A.2d 4, 8 (1956); Kinyon & McClure, *supra* note 9, at 904.

76. Dobbins, *supra* note 20, at 526; Kinyon & McClure, *supra* note 9, at 891–92.

77. Kinyon & McClure, *supra* note 9, at 892 & n.2.

78. Maloney & Plager, *supra* note 1, at 78.

79. Cass v. Dicks, 14 Wash. 75, 81-82, 44 P. 113, 115 (1896) (common enemy rule requires each landowner to rely on his or her own exertions for protection).

80. Argyelan v. Haviland, 435 N.E.2d 973, 978 (Ind. 1982) (Hunter, J., dissenting).

81. *See supra* note 2 and accompanying text.

82. Armstrong v. Francis Corp., 20 N.J. 320, 120 A.2d 4, 10 (1956); Butler v. Bruno, 115 R.I. 264, 341 A.2d 735, 741 (1975).

83. In Sinai v. Louisville, N.O. & T. Ry., 71 Miss. 552, 14 So. 87, 88 (1893), a case involving obstruction and disposal of water, the court stated:

> Each proprietor has the right to the use and possession of his own soil; each has equality of proprietary rights; and upon each are imposed in organized society, regulated by law, resting on

The reasonable use rule has been criticized as reducing the element of certainty promoted by the common enemy or civil law rules.[84] However, with the numerous and ambiguous qualifications of the civil law and common enemy rules, it is questionable whether those rules still provide a uniform and predictable result.[85] Further, while the common enemy rule may provide a certain result in litigation, it increases uncertainty in practical experience. Each landowner is left to the uncertain mercy of his or her neighbors, who may or may not choose to alter the flow of drainage waters. But most importantly, the reasonable use rule focuses on the fairness to the individuals involved in a particular case. The uncertainty involved is inherent in the flexible test of weighing competing interests applied in every nuisance litigation.[86] Sometimes predictability in litigation should bow to equity and justice in result. An individual's right to the use and enjoyment of land is too fundamental to be sacrificed for the sake of certainty in legal doctrine.

The conclusion is that the property law-based rules of the common enemy and civil law approaches have proved rigid and unsuccessful as a vehicle to properly resolve drainage problems.[87] The common enemy rule

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mutual concession, reciprocal duties and correlative obligations. No one, natural or artificial, has the absolute dominion and unlimited control of his own lands.

84. Dobbins, *supra* note 20, at 526.

Some commentators have gone further to suggest that predictability and the interests of the community could best be protected by comprehensive administrative control of developments affecting water drainage. *See* Beck, *supra* note 1, § 457.5, at 581; Comment, *The Flow of Surface Water Law in Connecticut*, 14 CONN L. REV 601, 625–28 (1982). However, governmental action may be better directed toward providing an area-wide drainage system in urban areas and through building code regulations requiring drainage systems in new developments. Comprehensive administrative control would still require a case-by-case analysis of each individual situation, tremendous government expense and expenses for landowners in complying with the regulations, and high potential for court challenges to administrative decisions.

While certain governmental actions can alleviate drainage problems in an area, a private nuisance litigation approach is still necessary to deal with individual problems. *See* Comment, *Nuisance as a Modern Mode of Land Use Control*, 46 WASH L. REV 47, 52–53 (1970) (stating that as the trend in zoning and land use controls is toward flexible restrictions based on public interest and less on protection of individual interests, private nuisance law is an important modern mode of land use control to secure remedies appropriate to an individual situation) [hereinafter cited as Comment, *Nuisance as Land Use Control*].

85. Kinyon & McClure, *supra* note 9, at 934–35; Comment, *supra* note 22, at 98.

86. Riblet v. Spokane-Portland Cement Co., 41 Wn. 2d 249, 254, 248 P.2d 380, 382 (1952) (court stated that the standard of reasonableness in nuisance law "[a]dmittedly . . . is a flexible one").

87. Pendergrast v. Aiken, 293 N.C. 201, 236 S.E.2d 787, 793 (1977).

> Treating the matter as a question of tort liability, attention is focused on such practical and concrete problems as "the necessity of actual damage," "the reasonable or unreasonable character of the defendant's conduct in view of all the circumstances," and "the relative value of the interests involved," rather than on the limitations and qualifications of a categorical "right" or "servitude" presupposedly assumed and ill-defined.

Kinyon & McClure, *supra* note 9, at 939.

in Washington should be abandoned in favor of an equitable and rational tort law approach—the reasonable use rule.[88]

If the *Morris v. McNicol* decision[89] is given any credence at all, it manifests the court's attraction to a standard of reasonableness in a fact situation that could be viewed as involving either interference with surface water drainage or obstruction of a watercourse.[90] It is to be hoped that the Washington courts will continue to move in the direction of a unified reasonable use rule governing the drainage of water in this state.

V. APPLICATION OF THE REASONABLE USE RULE

A cause of action for unreasonable interference with water drainage under the reasonable use rule could be brought under the tort theories of trespass, negligence, or nuisance, or under a sui generis cause of action for unreasonable interference with drainage.

A. Tort Theories

Modern trespass doctrine protects a landowner's interest in exclusive possession of real property.[91] The *Restatement (Second) of Torts* includes in an action of trespass the failure to remove from another's land a thing which one is under a duty to remove.[92] The *Restatement* section on surface water clearly contemplates that interference with surface water drainage resulting in flooding may constitute a trespass.[93] An action could also

88. McGlashan v. Spade Rockledge Terrace Condo Dev. Corp., 62 Ohio St. 2d 55, 402 N.E.2d 1196, 1200 (1980); Kinyon & McClure, *supra* note 9, at 936–39.

89. 83 Wn. 2d 491, 519 P.2d 7 (1974).

90. *See supra* Part III*B*.

91. Highline School Dist. No. 401 v. Port of City of Seattle, 87 Wn. 2d 6, 18, 548 P.2d 1085, 1093 (1976); W. PROSSER, THE LAW OF TORTS § 13, at 68 (4th ed. 1971).

92. RESTATEMENT (SECOND) OF TORTS § 158(c) (1964).

93. *See* RESTATEMENT (SECOND) OF TORTS § 833 illustration 1 (1977) (discussing interference with surface water drainage and referring to the trespass liability of § 158). An illustration in the *Restatement* section on trespass also labels as a trespass backing up water onto another's land by a dam without consent. RESTATEMENT (SECOND) OF TORTS § 161 illustration 1 (1964).

On trespass as a theory of action for interference with surface water drainage, see generally Maloney & Plager, *supra* note 1, at 97–98.

The Washington courts now recognize the existence of a negligent trespass action following the *Restatement* approach which abandons the distinction between the doctrines of trespass and case at common law and instead designates all negligent intrusions of foreign matter onto land as a trespass. Songstad v. Municipality of Metropolitan Seattle, 2 Wn. App. 680, 687, 472 P.2d 574, 579 (1970) (citing RESTATEMENT (SECOND) OF TORTS § 165 (1965)).

In most situations, the merits of an action would be reached under either a trespass or negligence theory where a negligent trespass is alleged. *Songstad*, 2 Wn. App. at 688–89, 472 P.2d at 580. An action in trespass may be preferential to one in negligence or nuisance, however, in order to gain the advantage of the three-year statute of limitations for trespass, WASH. REV. CODE § 4.16.080(1)

be maintained in negligence for altering the drainage of surface water in a negligent manner or developing land in a negligent manner.[94] Finally, the tort theory of nuisance best approximates the reasonable use rule by requiring a balancing of reasonable uses of land[95] and thus would be the most appropriate traditional tort vehicle for a reasonable use action in water drainage litigation.

B. Elements of a Reasonable Use Rule

The reasonable use rule as applied to interference with water drainage may better be seen as a sui generis cause of action closely approximating nuisance. The fundamental inquiry is reasonableness as a question of fact to be determined in each particular case upon a consideration of all relevant circumstances.[96]

(1981), rather than the general two-year limitation under which negligence or nuisance would fall. *id.* § 4.16.130; *see also* Riblet v. Spokane-Portland Cement Co., 41 Wn. 2d 249, 258, 248 P.2d 380, 384 (1952). Note also that for continuing injuries, the statute of limitations will not bar recovery but will limit recovery to damages occurring during the preceding statutory period. *See* Weller v. Snoqualmie Falls Lumber Co., 155 Wash. 526, 531–32, 285 P. 446, 448 (1930); Morris v. McNicol, 83 Wn. 2d 491, 497, 519 P.2d 7, 11 (1974).

94. The test for a negligence action is (1) the existence of a duty of reasonable care (which would be imposed by the reasonable use rule), (2) a breach of that duty, (3) a resulting injury, and (4) a proximate cause between the claimed breach and the resulting injury. Hansen v. Washington Natural Gas, 95 Wn. 2d 773, 776, 632 P.2d 504, 505 (1981); LaPlante v. State, 85 Wn. 2d 154, 159, 531 P.2d 299, 302 (1975).

On negligence as a theory of action for interference with water drainage, see generally Maloney & Plager, *supra* note 1, at 98.

95. Armstrong v. Francis Corp., 20 N.J. 320, 120 A.2d 4, 10 (1956).

Nuisance is defined in Washington as unreasonable and substantial interference with the rights of others to use and enjoy their land. Riblet v. Spokane-Portland Cement Co., 41 Wn. 2d 249, 254, 248 P.2d 380, 382 (1952); WASH REV CODE § 7.48.010 (1981). On the law of nuisance in Washington, see generally Comment, *Nuisance as Land Use Control*, *supra* note 84.

On nuisance as a theory of action for interference with water drainage, see generally Maloney & Plager, *supra* note 1, at 98–99.

96. Armstrong v. Francis Corp., 20 N.J. 320, 120 A.2d 4, 10 (1956); Pendergrast v. Aiken, 293 N.C. 201, 236 S.E.2d 787, 797 (1977).

A cause of action for unreasonable interference with the flow of surface water arises where the conduct of the landowner making the alteration in flow is either (1) intentional and unreasonable, or (2) negligent, reckless or in the course of abnormally dangerous activity. RESTATEMENT (SECOND) OF TORTS § 833 (1979) (on unreasonable interference with the flow of surface waters) & § 822 (on private nuisance in general). This position has been adopted in several decisions, including Pendergrast v. Aiken, 293 N.C. 201, 236 S.E.2d 787, 796–97 (1977) and State v. Deetz, 66 Wis. 2d 1, 224 N W.2d 407, 415–16 (1974).

An intentional nuisance, under this rule, exists where the defendant has created or continued the condition causing the interference with water drainage with full knowledge that the harm to the plaintiff's land is substantially certain to follow. W. PROSSER, *supra* note 91, § 87, at 574; Pendergrast v. Aiken, 293 N.C. 201, 236 S.E.2d 787, 797 (1977). Liability for interference with water drainage may also "arise from negligence as, for example, where the defendant negligently permits otherwise

The reasonable use rule involves four basic considerations: (1) the necessity of the change in the drainage system to the defendant's purpose in improving the land, (2) the manner in which the defendant chooses to make the change, (3) the utility of the defendant's use of the land as contrasted and balanced with the gravity of the injury caused to the lands of others, and (4) the plaintiff's conduct with respect to his or her own land as to the duty to take reasonable precautions to guard against or minimize damage.[97]

1. Necessity of Alteration in Drainage

The first basic consideration of the reasonable use rule is whether the alteration in drainage is necessary for the defendant's purpose in making that particular use of the land.[98] This would include consideration of whether that use of the land could still have been made using another method or scheme of development which would cause less disruption to the natural drainage pattern.

2. Reasonableness of the Manner of Alteration

The second consideration is whether reasonable care has been taken to avoid unnecessary injury to the land receiving the water.[99] The court should consider whether it was feasible to accomplish the alteration in drainage by reasonably improving the normal or natural system of drainage, or, if such is not feasible, whether a reasonable artificial drainage system has been installed.[100] It should also consider whether the harm would not have resulted but for the negligence of the landowner in the design, construction, or maintenance of the drainage facilities he or she

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adequate culverts replacing natural drainways to become obstructed." Pendergrast v. Aiken, 293 N.C. 201, 236 S.E.2d 787, 797 (1977).

Regardless of which category the defendant's actions fall into, as noted by the North Carolina court, "the reasonable use rule explicitly, as in the case of intentional acts, or implicitly, as in the case of negligent acts, requires a finding that the conduct of the defendant was unreasonable." *Id.* at 797.

97. Sullivan, *supra* note 2, at 307–08.

98. Weinberg v. Northern Alaska Dev. Corp., 384 P.2d 450, 452 (Alaska 1963); Butler v. Bruno, 115 R.I. 264, 341 A.2d 735, 740 (1975).

99. Butler v. Bruno, 115 R.I. 264, 341 A.2d 735, 740 (1975); *see also* Keys v. Romley, 64 Cal. 2d 396, 412 P.2d 529, 537, 50 Cal. Rptr. 273, 281 (1966).

Note also that a flowage easement for drainage may be obtained by a landowner by grant or prescription by adverse use in the same manner as any other easement. *See generally* Beck, *supra* note 1, § 455.

100. Butler v. Bruno, 115 R.I. 264, 341 A.2d 735, 740 (1975).

The availability of a connection to a public sewer or drainage system should be a strong factor in the reasonableness of the developer's conduct.

did provide.[101] Because negligence is part of this consideration, liability should depend upon the foreseeability of the resulting harm.[102]

The purpose or motive with which the landowner acted in altering the flow of drainage water should be considered as an element of basic good faith.[103] An alteration in drainage flow solely for the purpose of harassing one's neighbors, for example, would be per se unreasonable.

3. *Balancing of Conflicting Uses of Land*

The third consideration analyzes whether the benefits accruing to the land on which the water drainage has been altered reasonably outweigh the resulting harm.[104] This involves a balancing of the uses of both the altered land and the injured land including the suitability of the location for the competing uses[105] and the social value which the law attaches to the competing types of uses.[106]

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101. Weinberg v. Northern Alaska Dev. Corp., 384 P.2d 450, 452–53 (Alaska 1963); Jones v. Boeing Co., 153 N.W 2d 897, 903–05 (N.D. 1967); *see also* City of Houston v. Renault, Inc., 431 S.W.2d 322, 325–26 (Texas 1968).

The reasonable use rule would still prohibit the artificial collection and discharge of water in a body upon neighboring properties, *see supra* note 18 and accompanying text, unless such water was discharged into a natural drain or watercourse but not beyond its natural capacity, *see supra* note 19

102. Armstrong v. Francis Corp., 20 N.J. 320, 120 A.2d 4, 10 (1956); Keys v. Romley, 64 Cal. 2d 396, 412 P.2d 529, 537, 50 Cal. Rptr. 273, 281 (1966).

It would be appropriate to include subsequent notice of the harm under the factor of foreseeability so that if a totally unforeseeable shift in drainage and resulting injury occurs, the continuation of the shift may be viewed as unreasonable although the original conduct causing it was not.

103. Armstrong v. Francis Corp., 20 N.J. 320, 120 A.2d 4, 10 (1956), Jones v. Boeing Co., 153 N W.2d 897, 904 (N.D. 1967).

104. Butler v. Bruno, 115 R.I. 264, 341 A.2d 735, 740 (1975).

An analysis of the injury resulting from the alteration should be made considering both the degree and character of the harm caused to neighboring land. State v. Deetz, 66 Wis. 2d 1, 224 N.W.2d 407, 415 (1974); Jones v. Boeing Co., 153 N.W.2d 897, 904 (N.D. 1967).

105. Pendergrast v. Aiken, 293 N.C. 201, 236 S.E.2d 787, 797 (1977); State v. Deetz, 66 Wis. 2d 1, 224 N.W.2d 407, 415–16 (1974).

106. Pendergrast v. Aiken, 293 N.C. 201, 236 S.E.2d 787, 797 (1977); State v. Deetz, 66 Wis. 2d 1, 224 N.W.2d 407, 415–16 (1974).

In elements, such as this, involving an assessment of "public policy" or "social values," the danger arises that such values will be determined according to the personal preferences of an individual judge. In the interests of judicial restraint, the discretion of the judge could best be restrained by requiring justification of public policy choices through reference to a sharply defined public policy evidenced by some governmental declaration. *Cf.* Lilly v. Commissioner, 343 U.S. 90, 97 (1952) (stating a deduction for business expenses will be disallowed on the basis of public policy only if the expense payments were contrary to "national or state policies evidenced by some governmental declaration of them").

If the Washington legislature or courts desired to maintain one of the "philosophical underpinnings of the common enemy rule," State v. Deetz, 66 Wis. 2d 1, 224 N.W.2d 407, 417 (1974), the court could adopt the reasonable use rule subject to a general policy preference for land development. While there is some doubt that the common enemy rule really does promote general improvement of

The court should also consider the effect, if any, that the diversion of the drainage water has upon streams and watercourses. Run-off waters comprise an important source of watercourses and a significant alteration in the diffuse surface water flow may swell or deplete watercourses upon which many depend for water resources.[107]

4. *Duty of Plaintiff*

The plaintiff has a duty to take reasonable precautions to avoid potential harm and to take reasonable actions to minimize the actual consequences of an injury.[108] Comparative negligence[109] may be a desirable approach to fairly allocate damages from unreasonable interference with water drainage according to the respective culpability of the parties.

C. *Damages, Abatement, and Injunction*

With a tort theory of recovery for injury to land, the damage award depends on whether the injury to the land is temporary or permanent. If the injury to the property is permanent, the applicable measure of damages is the difference between the market values of the property immediately before and after the damage.[110] If the injury is temporary and the property can be restored to its original condition at a reasonable cost, the measure of damages is the cost of restoration and, in a proper case, the

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land, *see* Comment, *supra* note 22, at 91–93, there is no doubt that such a policy preference was part of the original foundation of that rule.

The Wisconsin court, which formerly followed the common enemy rule, preserved a policy favoring the development of land when adopting the reasonable use rule. State v. Deetz, 66 Wis. 2d 1, 224 N.W.2d 407, 417 (1974). This underlying policy preference could be established by creating a rebuttable presumption that the alteration in drainage is reasonable.

107. *See generally* Dolson, *supra* note 11, at 58.

108. State v. Deetz, 66 Wis. 2d 1, 224 N.W.2d 407, 415 (1974); Keys v. Romley, 64 Cal. 2d 396, 412 P.2d 529, 537, 50 Cal. Rptr. 273, 281 (1966).

Contributory negligence is conduct on the part of the plaintiff falling below the standard of care to which he or she is required to conform for his or her own protection that contributes as a legal cause to the harm suffered. W. PROSSER, *supra* note 91, § 65, at 416–17. The doctrine of unavoidable consequences imposes an affirmative duty on injured parties to protect themselves against consequences of such injury by reasonable conduct to reduce the degree of harm. *Id.* § 65, at 422–23.

109. The statute on contributory fault in Washington provides that "any contributory fault chargeable to the claimant diminishes proportionately the amount awarded as compensatory damages for an injury attributable to the claimant's contributory fault." WASH. REV. CODE § 4.22.005 (1981). Washington statutes also provide for a right of contribution among liable persons based on "the comparative fault of each such person." *Id.* § 4.22.040; *see also* Comment, *Contribution Among Tort-Feasors in Washington: The 1981 Tort Reform Act*, 57 WASH. L. REV. 479 (1982). On comparative negligence, see generally PROSSER, *supra* note 91, § 67, at 433–39.

110. Colella v. King County, 72 Wn. 2d 386, 393, 433 P.2d 154, 158 (1967), *aff'd*, 75 Wn. 2d 953, 451 P.2d 667 (1969).

loss of use or income from the property for a reasonable period of time pending restoration.[111] Recovery is also available for consequential injuries such as emotional distress, discomfort, and sickness resulting from the nuisance.[112]

Washington statutes provide that existing private or public nuisances may be abated by order of the superior court.[113] Injunctive relief may be preferable as a preventive remedy before the harmful interference with water drainage has occurred.[114] A public nuisance, affecting a considerable number of persons in life or use of property, constitutes a criminal offense in Washington,[115] and thus criminal sanctions would also be available.[116]

VI. CONCLUSION

Washington has traditionally applied both the common enemy doctrine allowing diversion of diffuse surface water drainage with impunity and a strict liability standard prohibiting injurious obstruction or diversion of watercourses and natural drains. However, the *Morris v. McNicol* decision[117] may represent a tentative step toward a reasonableness doctrine applied consistently and uniformly to all drainage water however characterized. This doctrine would provide recovery to landowners suffering from an unreasonable invasion of excessive water depriving them of the free use and enjoyment of their property. A reasonable use doctrine

111. *Id.*: Olson v. King County, 71 Wn. 2d 279, 293, 428 P.2d 562, 572 (1967).

112. Riblet v. Spokane-Portland Cement Co., 45 Wn. 2d 346, 353, 274 P.2d 574, 578 (1954); Freeman v. Intalco Aluminum Corp., 15 Wn. App. 677, 682–83, 552 P.2d 214, 217 (1976).

113. WASH REV CODE § 7.48.020 (1981) (warrant for abatement of a private nuisance); §§ 7.48.250–.260 (abatement of a public nuisance); § 9.66.040 (abatement of a public nuisance).

On abatement of nuisance in Washington, see generally Comment, *Nuisance as Land Use Control*, *supra* note 84, at 75–76, 109.

114. In Washington, statutes provide for injunctions against private nuisance. WASH REV CODE §§ 7.48.010–.020 (1981); *see* Matthewson v. Primeau, 64 Wn. 2d 929, 935–36, 395 P.2d 183, 187 (1964) (once a nuisance is shown, question arises as to whether any relief is available, whether conduct should be enjoined, or whether payment of damages is adequate compensation). On equitable remedies for a private nuisance in Washington, see generally Comment, *Nuisance as Land Use Control*, *supra* note 84, at 76–84.

Courts have also granted injunctions against public nuisances when appropriate under laws of equity. Ingersoll v. Rousseau, 35 Wash. 92, 95–96, 76 P. 513, 515 (1904) (equity jurisdiction to prevent threatened public nuisances is grounded on inadequacy of legal remedies); *see also* Harris v. Skirving, 41 Wn. 2d 200, 201–02, 248 P.2d 408, 409–10 (1952). On equitable remedies for a public nuisance in Washington, see generally Comment, *Nuisance as Land Use Control*, *supra* note 84, at 109–10.

On injunction in general as a remedy for interference with water drainage, see generally Maloney & Plager, *supra* note 1, at 99.

115. WASH REV CODE §§ 9.66.010, .030 (1981).

116. *See generally* Comment, *Nuisance as Land Use Control*, *supra* note 84, at 107–09.

117. 83 Wn. 2d 491, 519 P.2d 7 (1974).

would balance the reasonableness of the defendant's conduct and use of land against the results of the harmful interference with the flow of both diffuse and channeled waters.

Future cases will undoubtedly arise giving the Washington courts the opportunity to expressly place this state among those jurisdictions adhering to a reasonable and equitable approach to the problem of water drainage. In the meantime, it would be appropriate for the Washington legislature to adopt this approach and thereby give democratic consent to the reversal of traditional doctrines in favor of a unified standard of reasonableness for water drainage law in Washington.

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