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How to Make South Dakota Surface Water Drainage Law Hold Water

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HOW TO MAKE SOUTH DAKOTA SURFACE WATER DRAINAGE LAW HOLD WATER

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I. INTRODUCTION

Anyone caught in the riptide of a drainage issue could easily find themselves drowning in a complex area of law. Municipalities are even more susceptible to sinking due to the numerous and varied roles they hold relating to surface waters. Surface water is generally considered to be that which forms from "falling rains and melting snows" and which then flows over the ground surface until reaching some "well-defined channel."[1] Every South Dakota municipality is granted broad authority to implement a drainage system and issue regulations relating thereto.[2] Effective use of such authority leads to a reduced likelihood of flooding, which is felt directly by both the residents within the city and rural neighbors who share the same drainage basin.

This article will first identify quirks that spring from the evolution of South Dakota drainage law and its various doctrines, which are useful in understanding recent cases where the South Dakota Supreme Court has implemented its modern-day doctrinal dichotomy on drainage disputes. Next, this article will explain the unique hardship the dichotomy imposes on municipalities. Finally, this article will discuss how South Dakota can provide more uniformity and simplicity without sacrificing any substance.

II. SURVEYING SOUTH DAKOTA DRAINAGE LAW QUIRKS

A survey of South Dakota's drainage law reveals a number of interesting factoids and oddities. However, it is difficult to understand the significance of these unique characteristics without a bit of perspective. Historically, there have been two diametrically opposed approaches to drainage law: the common-enemy doctrine and the civil law rule.[3] The common-enemy doctrine "appears to have had its American inception in decisions of Massachusetts courts about 1850 or later, and the 'common enemy' phrase was apparently first used in [1875],"

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1. 18A MCQUILLIN MUN. CORP. *Surface water; Definitions* § 53:171 (3d ed. 2017).
2. S.D.C.L. § 9-45-5 (2004).
3. *See generally* Thompson v. Andrews, 165 N.W. 9 (S.D. 1917) (discussing the two approaches of the common-enemy doctrine and the civil law rule).

whereas the civil law rule, with its origins in "Roman law and the Code Napoleon," was first applied in the United States in 1812.[4]

While South Dakota has never recognized the common-enemy doctrine, the doctrine has comparative value and is essentially a recognition that surface water "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."[5] Therefore, "[i]f one in the lawful exercise of his right to control, manage or improve his own land, finds it necessary to protect it from surface water flowing from higher land, he may do so, and if damage thereby results to another, it is [damage without remedy]."[6] The South Dakota Supreme Court has long recognized the inequity of such a doctrine; unabashedly stating the common-enemy doctrine was "absolutely without basis in reason" and that its application:

> leaves surface waters a mere shuttlecock, to be cast back and forth in accord with the selfish interests of the upper and lower landowners, thus creating in each case a conflict which, as its logical result, resolves itself to the question whether the upper landowner is able to bring into being an irresistible force or the lower landowner can erect an unsurmountable and immovable barrier.[7]

These brazen statements show that South Dakota has a long, proven record of attempting to ease the inequities of drainage law. Although not the route chosen by South Dakota, many jurisdictions have elected to modify the extreme position of the traditional common-enemy doctrine in ways that mitigate its inherent injustice.[8]

In contrast to the common-enemy doctrine, the civil law rule "recognizes that the lower property is burdened with an easement under which the owner of the upper property may discharge surface waters over such lower property through such channels as nature has provided."[9] South Dakota, even prior to statehood, followed the civil law rule.[10] However, a strict interpretation of the civil law rule can just as easily lead to inequitable results and, like the common-enemy doctrine,

4. Keys v. Romley, 412 P.2d 529, 531-32 (Cal. 1966).

5. Fitzpatrick v. Okanogan Cty., 238 P.3d 1129, 1134 (Wash. 2010) (quoting Cass v. Dicks, 44 P. 113, 114 (Wash. 1896)).

6. *Id.* (quoting *Cass*, 44 P. at 114).

7. *Thompson*, 165 N.W. at 11-12.

8. *See, e.g.*, Borgmann v. Florissant Dev. Co., 515 S.W.2d 189, 197 (Mo. Ct. App. 1974) (holding that a landowner may not artificially discharge surface water in increased or destructive quantities through artificial channels, drain surface water in a way that exceeds natural capacity of drainways, nor divert surface waters onto lands it would not normally drain); McCauley v. Phillips, 219 S.E.2d 854, 858 (Va. 1975) (holding that a "landowner may fend off [surface water], provided he does so reasonably and in good faith and not wantonly, unnecessarily or carelessly").

9. *Thompson*, 165 N.W. at 12.

10. *Id.*

has long been subject to corrective exceptions and provisos.[11] One of the most prominent qualifications is the "good-husbandry exception," which allows for surface waters to be channeled and accelerated off of a dominant estate and through well-defined channels of a servient estate.[12] South Dakota, which finds itself on the forefront of drainage law with great regularity, adopted this exception back in 1917 with a variant that states:

> the owner of dominant agricultural lands, situate and lying in the upper portion of a natural drainage water course or water basin has, in the course of and for the purposes of better husbandry, a legal easement right, by means of artificial drains or ditches constructed wholly upon his own land, to accelerate and hasten the flow of . . . surface waters . . . and to cast the same into and upon a servient estate lying lower down in the same natural drainage water course, at that point where nature, by means of ravines or depressions, has indicated that such surface waters should find a natural outlet; provided, however, that such surface waters should not be collected or permitted to collect, and then be cast upon the servient estate in unusual or unnatural quantities; and, provided, also, that the surface waters of one natural watershed or basin may not, by means of the cutting or removal of natural barriers, be cast into or upon lower lands lying in another and different natural drainage course or basin.[13]

This philosophy carried its way through South Dakota case law relatively unchanged all the way up to the present day.[14] Ultimately, the bottom line to the civil law rule in South Dakota is that natural drainage may be accomplished so long as there is not unreasonable injury to neighboring lands.[15]

But, the civil law rule only tells half the story of South Dakota's current drainage dogma as the rule only applies to rural surface water drainage.[16] As a counterpart in urban areas, the reasonable use rule applies instead of the civil law rule.[17] Again recognizing an inequity in drainage law, the South Dakota Supreme Court pointed out that a strict application of the civil law rule "would prevent the proper use, development, improvement, and enjoyment of considerable urban property."[18] The reasonable use rule generally stands for the idea that a property

11. *See, e.g.*, Teeter v. Nampa & Meridian Irrigation Dist., 114 P. 8, 9 (Idaho 1911) (holding an irrigation district may collect floodwaters and channel through a spillway but must be in "like manner and volume" as would flow naturally).

12. Templeton v. Huss, 311 N.E.2d 141, 144, 146 (Ill. 1974).

13. *Thompson*, 165 N.W. at 14.

14. *See generally* Surat Farms, L.L.C. v. Brule Cty. Bd. of Comm'rs, 2017 SD 52, 901 N.W.2d 365 (demonstrating a more recent case reflecting the same philosophies held by South Dakota from 1917).

15. Gross v. Conn. Mut. Life Ins. Co., 361 N.W.2d 259, 267 (S.D. 1985).

16. *Surat Farms,* 2017 SD 52, ¶ 15, 901 N.W.2d at 370.

17. *Id.*

18. Mulder v. Tague, 186 N.W.2d 884, 888 (S.D. 1971).

owner is entitled to make reasonable use of his or her land even if some harm is occasioned upon a neighboring landowner, and, while jurisdictions may vary greatly upon which factors to consider, the analysis is almost always focused on a balancing of relevant circumstances.[19]

In South Dakota, the reasonable use rule generates liability only when the landowner's "harmful interference with the flow of surface waters is unreasonable."[20] "There is no set formula for determining reasonableness," and it is to be determined "in light of all the circumstances."[21] Factors considered by courts include: (1) how each party uses the land and drainage water; (2) topography; (3) volume and direction of drainage; (4) consequences of drainage; (5) impact of artificial drainage changes such as grading, hard surfaces, and artificial drains; (6) alternatives available; and (7) avoidance of unnecessary injury.[22] These factors are not exclusive as others "may be relevant depending on the circumstances of the case."[23] As a result, there remains little functional difference between the civil law rule, with its qualifications, and the reasonable use rule. This drift is perhaps the most interesting aspect of South Dakota drainage law. It is almost as if one rule says "the glass is half full" and the other says "the glass is half empty" while either approach results in the same amount of water.

III. CONVERGING STREAMS OF THOUGHT

The civil law rule and the reasonable use rule have become strikingly similar in South Dakota. These similarities are shown in the following three cases. First, *First Lady* discusses both the reasonable use rule and civil law rule.[24] Second, *Strong* exemplifies the application of the reasonable use rule.[25] Finally, *Surat Farms* fully utilizes the civil law rule.[26]

19. *See, e.g.*, DeSanctis v. Lynn Water & Sewer Comm'n, 666 N.E.2d 1292, 1296 (Mass. 1996) (relying on all relevant circumstances to determine liability for private nuisance under the reasonable use doctrine, including: amount of harm caused, foreseeability of harm, and motive of the actor) (internal citation omitted); Evers v. Willaby, 444 N.W.2d 856, 859 (Minn. Ct. App. 1989) (demonstrating additional factors another jurisdiction considered, including: necessity for drainage, methods to avoid unnecessary harm, benefit to drained land outweigh harm to inundated land, and ability to drain through natural drain improvements or artificial channels); Wisconsin v. Deetz, 224 N.W.2d 407, 415 (Wis. 1974) (considering the factors of whether the gravity of harm outweighs the utility of an actor's conduct, extent of harm, character of harm, social value attached to type of use, fit of type of use compared to the locality, and burden on the person harmed to avoid the harm).

20. Strong v. Atlas Hydraulics, Inc., 2014 SD 69, ¶ 22, 855 N.W.2d 133, 142 (citation omitted).

21. First Lady, L.L.C. v. JMF Properties, L.L.C., 2004 SD 69, ¶ 12, 681 N.W.2d 94, 99.

22. *Id.*

23. *Id.*

24. *Id.* ¶¶ 6-8, 681 N.W.2d at 96-98.

25. *Strong*, 2014 SD 69, ¶ 22, 855 N.W.2d at 142.

26. Surat Farms, L.L.C. v. Brule Cty. Bd. of Comm'rs, 2017 SD 52, ¶ 14, 901 N.W.2d 365, 370.

A. *FIRST LADY, L.L.C. V. JMF PROPERTIES, L.L.C.*

The Black Hills have served as a backdrop to a number of drainage issues, but a dispute arising in Keystone, South Dakota, between the First Lady Motel (Motel) and its neighboring property owner (Tramway), holds an important place in drainage jurisprudence.[27] Both properties sat at the base of a small mountain, but Tramway's property extended up and behind the Motel.[28] While Tramway had been in place for several decades, the Motel and its additions were built in the 1990s.[29] The Motel construction required excavation of part of the mountain, and a steep retaining wall was added at the rear of the property.[30] Dirt was also piled onto the Tramway property near a jeep trail that went up the mountain.[31] In 2000, Tramway began making improvements to the property along its boundary with the Motel.[32] The Motel claimed that the changes were causing water and silt to come over the retaining wall onto its property.[33]

The Motel filed a lawsuit, and the trial court concluded that Tramway's "actions in diverting water and drainage from its property unto and upon [Motel's] property constitute[d] a nuisance. . ." and that the nuisance must be abated.[34] On appeal to the South Dakota Supreme Court, the court first addressed the action being pursued as a nuisance.[35] It determined that such a cause of action was proper but that the Motel, as plaintiff, had the burden of proving that there was some duty Tramway failed to meet.[36] The court further determined that such a duty, under South Dakota drainage law, would have to arise under either the civil law rule or reasonable use rule.[37] While the case was ultimately reversed and remanded because there was no clear application of either the civil law rule or reasonable use rule, the court did not make a decision as to which rule should apply.[38] Doing so may seem innocuous, but it highlights both the difficulty in determining which rule should apply and how similarly a case can be handled under both.

Consider the following excerpts from *First Lady*:

> Although many of this state's drainage cases have been decided under the civil law rule; most of those cases involved agricultural

27. *First Lady, L.L.C.*, 2004 SD 69, ¶ 1, 681 N.W.2d at 95.
28. *Id.* ¶ 2, 681 N.W.2d at 95-96.
29. *Id.*
30. *Id.*
31. *Id.*
32. *Id.* ¶ 3, 681 N.W.2d at 96.
33. *Id.*
34. *Id.* ¶ 4, 681 N.W.2d at 96.
35. *Id.* ¶ 9, 681 N.W.2d at 98.
36. *Id.*
37. *Id.*
38. *Id.* ¶¶ 13-14, 681 N.W.2d at 99-100.

> property. The application of the civil law rule to urban drainage issues proved too rigid.[39]
>
> For urban drainage of surface water, this Court has adopted the "reasonable use" rule.[40]

These three sentences show a clear distinction that the reasonable use rule, not the civil law rule, is to apply to "urban drainage"—a dichotomy confirmed in both *Strong* and *Surat Farms*—or at least the plain language would suggest a clear distinction based on the property being urban or rural. However, just one paragraph later in *First Lady*, the court also stated that the principal distinction on whether the civil law rule or reasonable use rule applies is "whether the surface water flows by 'the general course of natural drainage' . . . or whether the surface water flows as a result of an altered drainage course."[41] These four corners of the Punnett Square may pair logically with rural communities using natural drainage channels and urban communities using artificial drainage channels a majority of the time, but rural artificial drainage and natural urban drainage are too commonplace to be ignored, thereby putting these two lines from *First Lady* into an apparent conflict.

While *First Lady* may have added some confusion as to which rule should apply, it also pointed out that the distinction between the rules is not all that relevant, at least in terms of nuisance actions, as under both rules the upstream property owner is "legally privileged to drain its property subject to a test of reasonableness."[42] The real difference between the two rules comes in the breadth of the reasonableness analysis. Under the civil law rule, it appears that a plaintiff must merely "show unreasonable harm to its property" in order for the rule to trigger liability.[43] On the other hand, the reasonable use rule's analysis considers "all the circumstances" and includes a review of the factors discussed in Part II *supra* at a minimum.[44] This would seemingly leave several critical factors of the reasonable use rule out of the civil law rule unreasonable harm test; notably: (1) available alternatives, (2) volume and direction of drainage, (3) topography, and (4) respective uses of land and drainage water by the parties.[45] Consequences of drainage, effects of artificial changes in drainage, and avoidance of unnecessary injury run more parallel with an inquiry into unreasonable harm.[46] Alternatively, as the court has never explicitly discussed the bounds of the unreasonable harm test, it is possible that the unreasonable harm test is not so limited as it would

39. *Id.* ¶ 7, 681 N.W.2d at 97 (internal citation omitted).
40. *Id.* ¶ 8, 681 N.W.2d at 98.
41. *Id.* ¶ 9, 681 N.W.2d at 98 (quoting S.D.C.L. § 46A-10A-70 (2004 & Supp. 2017)).
42. *Id.* ¶ 11, 681 N.W.2d at 99.
43. *Id.* ¶ 10, 681 N.W.2d at 99.
44. *Id.* ¶ 12, 681 N.W.2d at 99. *See also supra* note 19 (surveying various courts' application of relevant circumstances).
45. *Id.* ¶ 12, 681 N.W.2d at 99.
46. *Id.*

appear, and a consideration of "all the circumstances" is appropriate under both the civil law rule and reasonable use rule. In that case, the distinction between the civil law rule and reasonable use rule is further eroded.

Although *First Lady* was reversed and remanded for the trial court to make a determination on which rule applied, conducting those actions here further demonstrates the similarity of the two rules. If it was determined that the civil law rule applied, and the focus became whether the Motel suffered unreasonable harm, it is unclear from the record how that inquiry may end as the facts indicate only that "heavy rains caused water and silt to run down the hill towards the Motel property and to come over the retaining wall and onto the Motel parking lot."[47] The severity and extent of this runoff would likely be the determinative factor on whether the harm suffered was unreasonable and, therefore, in violation of the civil law rule. But, would that factor also be determinative under the reasonable use rule?

A quick review of the reasonable use rule factors would seem to indicate that the result would be the same. The respective uses of land and drainage water do not appear to weigh strongly in favor of either party as both made legitimate use of the land and simply wished to get rid of drainage water. Topography again seems to do little more than acknowledge that water will flow from high ground to low, which is from Tramway to Motel, and that the slope will make the flow somewhat speedier than normal. The same could be said for volume and direction of drainage. Certainly, alternatives to Tramway's chosen method were available but would have come at significantly greater expense. However, the record was full of information regarding the effects of artificial changes in drainage and the extent Tramway went to in order to avoid unnecessary injury to Motel. This leaves only the consequences of drainage, which is most in line with whether unreasonable harm was caused, as the remaining factor and, like above, the severity and extent of the runoff would almost certainly have been the determinative factor.

B. *STRONG V. ATLAS HYDRAULICS, INC.*

Again framed as a nuisance action with the additional request of an injunction, *Strong* represents the gold standard in applying the reasonable use rule.[48] Sherri Strong (Strong) eventually filed a lawsuit against Atlas Hydraulics, Inc. (Atlas) after an addition to Atlas's neighboring facility caused water to collect and flow towards Strong's garage.[49] Strong testified that the flooding became so severe that she was forced to open the rear and front doors of her garage in an effort to have the water pass through instead of pouring into her basement through the windows.[50] In fact, the evidence tended to show that "nearly all of the

47. *Id.* ¶ 3, 681 N.W.2d at 96.
48. Strong v. Atlas Hydraulics, Inc., 2014 SD 69, ¶ 1, 855 N.W.2d 133, 136.
49. *Id.* ¶ 3, 855 N.W.2d at 137.
50. *Id.*

[surface] water from Atlas's property . . . flowed onto Strong's property."[51] The city engineer for the City of Brandon even conducted a survey of the property in 2009 and made suggestions to Atlas of how to remedy the problem.[52] Atlas declined to take any action to remedy the drainage situation through 2013, more than five years after Strong confronted Atlas about the problem, until the circuit court issued both preliminary and permanent injunctions prohibiting Atlas from discharging water onto Strong's property in a manner that would harm Strong's property and residence.[53]

On appeal to the South Dakota Supreme Court, the court first stated that urban drainage of surface water falls under the reasonable use rule and that the upstream landowner becomes liable "when his harmful interference with the flow of surface waters is unreasonable."[54] The court enumerated the reasonable use factors and, based on the somewhat egregious facts above, found that Atlas's use was unreasonable.[55] The court relied primarily on the consequences of artificial drainage, changes to the volume and direction of drainage, topography, and elevation—all of which combined to create a veritable river through Strong's garage.[56] Availability of alternatives and a failure to avoid unnecessary injury were also noted as the record was clear about Atlas's inaction and indifference.[57]

As with *First Lady*, it is likely that the result in *Strong* would have been the same had the unreasonable harm test of the civil law rule been applied instead of the reasonable use rule. While the record does not explicitly describe the drainage prior to the addition, after Atlas built the addition, it flowed through Strong's property. It is fair to assume that even if some water did naturally drain through Strong's property prior to the addition being built, it did so to a trivial extent compared to after the addition. As such, the deleterious effects felt after the addition were exponentially greater than those felt before the addition. The sheer volume of water flowing through Strong's property, causing it to flow into basement windows and through her garage, demonstrates the severity of harm inflicted upon Strong. Ultimately, it would be difficult for any court or jury to determine that Strong did not suffer unreasonable harm due to Atlas, and thus, the result would likely remain the same under either the civil law rule or reasonable use rule.

C. *SURAT FARMS, L.L.C. V. BRULE COUNTY BOARD OF COMMISSIONERS*

Although there are unique procedural aspects in the background of *Surat Farms*, at its core it was a dispute between an upstream landowner, Delany, and a

51. *Id.* ¶ 4, 855 N.W.2d at 137.
52. *Id.* ¶ 6, 855 N.W.2d at 137.
53. *Id.* ¶ 8, 855 N.W.2d at 137-38.
54. *Id.* ¶ 22, 855 N.W.2d at 142 (citation omitted).
55. *Id.* ¶ 23, 855 N.W.2d at 142.
56. *Id.*
57. *Id.*

downstream landowner, Surat.[58] The dispute originated on relatively flat farmland in rural Brule County.[59] In 2014, Delany began to notice water seeping into his basement and was unsure of what was causing the problem.[60] Delany hired an engineering firm to survey the drainage channel.[61] It was discovered that Surat had a drain tile inlet near where the channel entered the property that was allegedly inhibiting the flow and causing the water to backup.[62] The Brule County Board of Commissioners (Board) held a hearing relating to the dispute and found that Surat's installation of the drain tile, and its inlet in the channel, altered the natural flow of the water and led to the backup of water onto Delany's property.[63] The Board instructed Surat to restore the natural flow of water.[64] Surat appealed to circuit court, where a de novo review resulted in the Board's decision being affirmed in all respects.[65] Surat then appealed to the South Dakota Supreme Court.[66]

After a brief discussion on the procedural posture and standard of review, the South Dakota Supreme Court reviewed the case on its merits.[67] Perhaps resolving the ambiguity discussed above in *First Lady*, the court was quick in its unambiguous assertion that the reasonable use rule applies in urban disputes whereas the civil law rule applies in rural disputes.[68] Depending on whether the issue focuses on the water issued from upstream or the water blocked from downstream, the civil law rule analysis will center on (1) whether the upstream owner "reasonably discharge[s]" surface water via natural[69] watercourses through the downstream property or (2) whether "a lower property owner . . . interfere[d] with the natural flow of surface water to the detriment of an upper property owner."[70] In *Surat Farms*, the dispute required focusing on the second portion of the rule as it involved the backup of water due to downstream alterations on the surface.[71]

The court acknowledged that there was a factual conflict in the record.[72] Surat introduced evidence claiming that the elevation at the inlet pre-existed the installation, that the land was restored to its pre-installation elevation, and aerial photographs prior to the installation showed pooling of water directly upstream

58. Surat Farms, L.L.C. v. Brule Cty. Bd. of Comm'rs, 2017 SD 52, ¶ 1, 901 N.W.2d 365, 367.
59. *Id.* ¶ 2, 901 N.W.2d at 367.
60. *Id.* ¶ 4, 901 N.W.2d at 367.
61. *Id.* ¶ 5, 901 N.W.2d at 367.
62. *Id.*
63. *Id.* ¶ 6, 901 N.W.2d at 368.
64. *Id.*
65. *Id.* ¶ 7, 901 N.W.2d at 368.
66. *Id.* ¶¶ 7-8, 901 N.W.2d at 368.
67. *Id.* ¶ 13, 901 N.W.2d at 369-70.
68. *Id.* ¶ 15, 901 N.W.2d at 370.
69. If indeed the watercourse must be natural, then perhaps *Surat Farms* does not resolve the *First Lady* dilemma of what rules apply to artificial, rural drainage or natural, urban drainage.
70. *Id.* ¶ 14, 901 N.W.2d at 370 (citation omitted).
71. *Id.* ¶ 15, 901 N.W.2d at 370.
72. *Id.* ¶ 18, 901 N.W.2d at 370.

from the inlet's location.[73] However, the court pointed out that the aerial photographs could also be interpreted to show that the inlet was causing damming, that a contour map prepared by the drain tile installer was not conclusive and of questionable accuracy, and that the testimony of the drain tile installer relating to restoring the land to its previous condition was unconvincing.[74] The South Dakota Supreme Court held that the circuit court had an adequate basis in evidence to reach its decision and did not clearly err in finding that the watercourse was impermissibly altered.[75]

While the court did not explicitly state that it applied the unreasonable harm test in deciding *Surat Farms*, establishing "detriment" to an upper property owner is similar to the requirement that the harm suffered by a lower property owner must be unreasonable.[76] The result would likely have remained the same in *Surat Farms* had the reasonable use rule applied instead of the civil law rule. Here, Delany was simply passing the surface water through his property, but Surat was using the water for irrigation by funneling it through drain tile. Neither of these uses is problematic in concept. The volume, direction of drainage, and topography indicated that the watercourse had little change in elevation through the properties, meaning that the water would be susceptible to pooling. There were also alternatives available, such as lowering the inlet height or changing its location that could have been implemented at little to no cost. Additionally, it appears that there was no attempt to avoid unnecessary injury. The impact of the artificial drainage changes and consequences of drainage both weighed heavily against Surat as the evidence tended to show significant damming of surface water behind the inlet, causing water to flood the basement of Delany's home. Once more, the result would be the same under either the civil law rule or the reasonable use rule.

D. THE CURRENT FLOWCHART

As no further change in the South Dakota Supreme Court's drainage law analysis can be guaranteed or expected, the following guide is meant to help navigate the treacherous waters of drainage law as it currently exists. In South Dakota, one must determine which rule to apply: the civil law rule or reasonable use rule. Based on *Surat Farms*, if the drainage issue arises in a rural setting, then the civil law rule will apply.[77] Conversely, if the drainage issue arises in an urban setting, then the reasonable use rule will apply.[78]

If the civil law rule applies, one must then determine whether the aggrieved party is upstream or downstream. If the aggrieved party is upstream, the analysis must focus on whether the downstream owner interfered with the natural flow of

73. *Id.* ¶ 16, 901 N.W.2d at 370.
74. *Id.* ¶ 17, 901 N.W.2d at 370.
75. *Id.* ¶ 18, 901 N.W.2d at 370-71.
76. *Id.* ¶ 14, 901 N.W.2d at 370.
77. *Id.* ¶ 15, 901 N.W.2d at 370.
78. *Id.*

surface water to the detriment of the upper owner.[79] And although not explicitly stated in case law, it is likely that the detriment suffered by the upstream owner must be unreasonable. However, if the aggrieved party is downstream, the analysis must focus on whether the upstream owner reasonably discharged surface water through natural watercourses through the downstream owner's property, and whether the downstream owner suffered unreasonable harm.[80] In practice, always be proactive on rural drainage and have your client ensure that any changes do not cause unreasonable harm either upstream or downstream.

If the reasonable use rule applies, the analysis will focus on whether a given landowner's harmful interference with the flow of surface waters is unreasonable, which includes evaluating the factors outlined in Part II.[81] If the factors tip the scale towards the harmful interference being unreasonable, then the alteration at issue is not acceptable and liability arises. If the scale tips the other way, the alteration is acceptable and no liability arises. Under the reasonable use rule, first have your client try to avoid any harmful interference with the flow of surface waters. But, given that any alteration could be viewed as causing harmful interference from somebody's perspective, the reasonable use rule factors must be considered when developing every drainage project to ensure that any surface water flow changes are reasonable.

IV. JUST AROUND THE RIVER BEND FROM CLARITY

South Dakota drainage law seems to be drifting towards a fusion of the reasonable use rule and the civil law rule. As discussed above, the convergence of the civil law rule and the reasonable use rule results in a puzzling dichotomy, and its continued existence can create very real problems for municipalities. To understand why, consider some of the many hats a municipality may find itself wearing when it comes to drainage: regulator, quasi-judge, upstream discharger, and downstream recipient. Each of these roles presents its own unique challenges, and trying to do all at the same time is a bit unwieldy.

For example, in what is likely a familiar scenario throughout the state, consider a situation where a new housing development is to be constructed near the city limits with a concerned neighboring property owner. Most cities will have an ordinance in place concerning drainage. The ordinance will likely address whether a drainage plan is required and what needs to be included in such a plan, such as a detention pond. The water from that pond may then enter a city storm sewer system according to certain conditions and rates. Once in the storm sewer, the city will need to ensure that storm water flows efficiently out of the city and quite possibly over the land of another downstream owner. In this one common hypothetical, the city must (1) ensure it has a sound drainage ordinance in place,

79. *Id.* ¶ 11, 901 N.W.2d at 369.

80. *Id.* ¶ 14, 901 N.W.2d at 370.

81. *See supra* Part II (discussing factors under the reasonable use test to determine if the interference of water flow was unreasonable).

(2) establish that the developer complies with the ordinance, (3) confirm that the proposed drainage plan will be effective, (4) construct a storm sewer that will accommodate the proposed discharge and also that of future expansion, and (5) find a way to reasonably remove all of that water from the city. Because of these expansive and varied roles, a city could concurrently find itself being subject to the civil law rule with one part of a drainage system, but also the reasonable use rule with other parts of the same system.

While a city having a drainage ordinance in place is likely to reduce headaches in the long term, the very task of crafting such an ordinance becomes guesswork when there is no clarity as to which rule should apply to the system as a whole. With both rules essentially boiling down to some test of reasonableness, the continued dichotomy disproportionately detriments municipalities while adding undue complexity to a difficult area of law seemingly solely in place to preserve historical distinction. At their cores, both the civil law rule and reasonable use rule seek to allow a dominant estate to drain surface water over a servient estate as long as the drainage does not cause unreasonable harm. It should make little difference whether that drainage is accomplished through natural or artificial channels or whether the property is urban or rural when part of either applicable test is to determine reasonableness.

Unifying these rules paradoxically does not seem to be an option; not because they are incompatible, but because they have reached a point of such similarity that any movement by one towards the other essentially results in adopting the other rule. Without revealing which refers to the civil law rule and which refers to the reasonable use rule, try to distinguish between the following two rule statements. First, "Drainage allowed . . . is 'conditioned only that such drainage be accomplished without unreasonable injury to [one's neighbor's] land.'"[82] Second, "The landowner, however, becomes liable 'when his harmful interference with the flow of surface waters is unreasonable.'"[83] On these statements alone, without taking into account the underlying mechanisms of the rules, any difference is nearly imperceptible.[84] Unreasonable harm, unreasonable injury, unreasonable interference—all are merely restatements of the same concern.

So, if the only way to have uniformity moving forward is to have one rule continue in effect, then it must be the rule which is better equipped to safeguard the delicate balance of the preservation preferred under the civil law rule and the development preferred under the reasonable use rule. Due to its intrinsic flexibility, the reasonable use rule should be given the honor of ferrying all of South Dakota into the future. While this may require amending South Dakota Codified Law section 46A-10A-70, and other laws based thereon, adopting the reasonable use rule for all of South Dakota drainage disputes should be the

82. Gross v. Conn. Mut. Life Ins. Co., 361 N.W.2d 259, 267 (S.D. 1985) (quoting Thompson v. Andrews, 165 N.W. 9, 13 (S.D. 1917)).

83. Strong v. Atlas Hydraulics, Inc., 2014 S.D. 69, ¶ 22, 855 N.W.2d 133, 142 (quoting Mulder v. Tague, 186 N.W.2d 884, 889 (S.D. 1971)).

84. For any still wondering, the first quote refers to the civil law rule and the second refers to the reasonable use rule.

preferred long-term solution to provide uniformity and simplicity.[85] The civil law rule, its mechanisms, and decisions applying it need not be forgotten, but instead become factors and comparators of what will or will not be reasonable under the future reasonable use rule. All of the maxims can function together in a single effort to determine reasonableness instead of having arbitrary applicability based on natural or artificial drainage and urban or rural property. A single rule aids municipalities in their efforts to implement effective plans that cover all of the various drainage systems currently subject to different rules. The ultimate result is better drainage for everyone; upstream or down.

85. *See* S.D.C.L. § 46A-10A-70 (2004 & Supp. 2017) (describing the permissible drainage of land).