Landowner's Right to Fight Surface Water: The Apprehension of the Common Enemy Doctrine in Indiana

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LANDOWNER'S RIGHT TO FIGHT SURFACE WATER: 
THE APPLICATION OF THE COMMON ENEMY 
DOCTRINE IN INDIANA

INTRODUCTION

Draining and disposing of surface water⁴ often leads to one landowner surrendering the use and enjoyment of his land as a result of another protecting the use and enjoyment of his land.² Questions of liability for damages caused by the diversion of surface water are governed by three distinct doctrines.³ The three rules, developed in the early nineteenth century,⁴ are the civil law rule, the common enemy rule, and the reasonable use rule. The civil law rule states that a landowner who interferes with the natural flow of surface waters is liable for any injury to other landowners.⁵ The common enemy rule states that each landowner has an unlimited right to fight surface water as he sees fit, without liability for the harm he may cause others.⁶ Pursuant to the rule of reasonable use, a landowner is liable when he interferes with the flow of surface water only if his actions are unreasonable.⁷ These rules control which landowner ultimately bears the cost of any damages sustained in ridding the land of surface water.

Recently, the Indiana Supreme Court in Argyelan v. Haviland⁸ chose to "expressly disapprove" the application of the rule of reasonable use⁹ and re-affirm the common enemy doctrine as the law governing surface water.¹⁰ The rationale upon which the court based

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1. A commonly accepted definition of surface water in Indiana refers to water from "falling rains or melting snows which is diffused over the surface of the ground or which temporarily flows upon or over the surface as the natural elevations and depressions of the land may guide it but which has no definite banks or channel." Kramer v. Roger, ___ Ind. App. ___, ___, 441 N.E.2d 700, 707 (1982).
3. For a discussion regarding the three rules and their subsequent modifications see Annot. 93 A.L.R.3d 1193 (1979).
4. Kinyon and McClure, supra note 2, at 895, 899, and 905.
5. The civil law rule is documented as commencing in Orleans Navigation Co. v. New Orleans, 2 Martin 214 (La. 1812) and Martin v. Riddle, 26 Pa. 415 (1848).
6. Kinyon and McClure, supra note 2, at 898-99. The first case to adopt the common enemy rule was Luther v. Winnisimmet Co., 63 Mass. 171 (1851).
7. The reasonable use rule was first adopted in Swett v. Cutts, 50 N.H. 439 (1870).
8. ___ Ind. ___, 435 N.E.2d 973 (1982).
9. Id. at ___, 435 N.E.2d at 978.
10. Id. at ___, 435 N.E.2d at 976.
its conclusion is illusory and, as pointed out by Justice Hunter in his dissenting opinion, offensive to our system of jurisprudence. The use of the common enemy doctrine, which remains as that originally set forth in 1878, is a harsh rule requiring no balancing of interests and frequently leading to unjust results. The single modification to the rule, which states that a landowner has no right to collect surface water in a channel and cast it in a body upon another's land, is rendered virtually meaningless by the court in Argyelan, leaving the status of the law in Indiana truly archaic in form.16

This note will demonstrate, through analysis of both Indiana precedent and the present position taken by the Indiana Supreme Court, the need to denounce the common enemy rule. The inherent injustice of the court's decision in Argyelan mandates re-examination of surface water law by either the judiciary or the legislature. To

11. See infra notes 138-43 and accompanying text.
12. Argyelan, ____ Ind. at ___, 435 N.E.2d at 978.
13. The court cites Taylor v. Fickas, 64 Ind. 167, 173 (1878), as reflecting the current status of the law in Indiana. The common enemy doctrine is stated as follows:

   The right of an owner of land to occupy and improve it in such manner and for such purposes as he may see fit, either by changing the surface or the erection of buildings or other structures thereon, is not restricted or modified by the fact that his own land is so situated with reference to that of adjoining owner that an alteration in the mode of its improvement or occupation in any portion of it will cause water, which may accumulate thereon by rains and snows falling on its surface, or flowing onto it over the surface of adjacent lots, either to stand in unusual quantities on other adjacent lands, or pass into or over the same in greater quantities or in other directions than they were accustomed to flow. The obstruction of surface water or an alteration in the flow of it affords no cause of action in behalf of a person who may suffer loss or detriment therefrom against one who does not act inconsistent with the due exercise of dominion over his own soil.

   Id. at ___, 435 N.E.2d at 976-77.

15. ____ Ind. ___, 435 N.E.2d 973. In Connor v. Woodfill, 126 Ind. 85, 87, 25 N.E. 876, 877 (1890), the court held that the appellees were trespassing whenever they shed water, through downspouts from their own building so as to throw it upon appellant's lot. The court in Argyelan held that if the water entered the adjacent property "diffused to a general flow" there is no liability. ____ Ind. at ___, 435 N.E.2d at 976. Therefore, one may collect water in an artificial channel and cast it upon another so long as the water is "diffused" before reaching the adjacent property. The court in distinguishing the "character" of the flow as being determinative of liability, rendered their own modification meaningless: A primary purpose of the collection and discharge modification is to avoid flooding due to downspouts, yet after Argyelan, one need only build a small curb to disperse the water before it flows onto and damages adjacent property. Id. at ___. 435 N.E.2d at 976.
16. See infra notes 144-48 and accompanying text.
lay a proper foundation for this conclusion, it is necessary to briefly discuss and evaluate the three rules governing surface water disputes. The history of surface water law in Indiana is traced to establish the foundation upon which it was formed and the policies prevalent at the time. Analysis of three recent Indiana decisions demonstrates the necessity for a current and adaptable standard by which surface water disputes may be equitably resolved. Examination of surrounding jurisdictions also illustrates that Indiana should re-examine its continued application of the common enemy doctrine in light of current trends in land development. Finally, the note will recommend adoption of those alternatives best suited to meet the demands of a changing society.

**PRINCIPLE RULES GOVERNING SURFACE WATER DISPUTES**

There are predominately three rules governing surface water law in the United States. From these rules, various recognized modifications have evolved. It is from these rules and their subsequent modifications that viable alternatives to surface water disputes are derived. Application of the rules and their modifications to the hypothetical situation which follows will lay the necessary foundation for discussion of subsequent issues. The effects of each rule on the rights of property owners differ and a review of these differences will aid in evaluating the strengths and weaknesses inherent in the rules and their modification.

Fred Farmer purchased a lot (hereinafter referred to as Lot F) in 1950 for agricultural purposes. Lot F is located on the outskirts of a rural community, and is situated so as to naturally drain surface water due south onto the adjoining, lower lots. Two lots lie due south of Lot F and are directly affected by the drainage. These two lots (hereinafter referred to as Lot C and Lot R) are level with each other, yet lower than Lot F. In 1960, Ron Resident purchased Lot R and built his home upon it. In 1970, Con Commercial purchased Lot C, lying directly between Lot F and Lot R. Due to the continuing expansion of the nearby community, Con was granted a permit to construct a commercial building on Lot C. Con then proceeded to raise the level of his lot with fill dirt, pave the entire surface, and con-

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18. For a discussion of the various modifications, see generally Annot. 93 A.L.R.3d 1193 (1979); Maloney and Plager, *Diffused Surface Water: Scourge or Bounty?*, 8 NAT. RESOURCES J. 72 (1968); Kinyon and McClure, *supra* note 2.
Fred Farmer could not use sections of his property for agricultural purposes until the surface water was drained from it. After being elevated to a higher level, Lot C impeded the drainage of water from Lot F and deterred Fred's efforts to farm. Additionally, Ron Resident experienced flooding in his basement and yard after Con altered the surface of his lot since Lot C increased the amount of surface water draining onto Lot R and Ron could not afford to develop a means of obstructing the extra water. Meanwhile Con, retaining both the use and enjoyment of his property, prospered from his commercial enterprise. In times of rain and snow, surface water disputes inevitably arise between the owners of the three lots. The outcome of these disputes is determined by the specific surface water rule applied. An application of the various rules to this hypothetical illustrates the effect of each doctrine on the rights and liabilities of the property owners involved.

Civil Law Rule

The civil law rule finds its origin in the maxim, *aqua currit et debet currere, ut solet es juié naturae.* In its purest form, the rule makes any diversion of surface water from its natural flow a tortious act. Therefore, if strictly construed, the civil law rule makes mere plowing of Lot F an illegal diversion of surface water. Clearly, strict application of the civil law rule will impede both the physical and economic development of Lot F. However, in actual application, the civil law rule subjects Fred Farmer to liability for interference with the natural flow of water if it causes an invasion of another's interest in the use and enjoyment of his land. There is, in effect, a servitude between Lots F and C: Con must accept the surface water which naturally drains onto his land, and Fred can do nothing to change

19. This hypothetical situation was created to aid in explaining the types of situations arising in surface water disputes. Of primary concern here are the basic inequities resulting from the application of an inflexible rule, particularly in light of expanding urbanization. Although the probability of encountering three adjoining lots of this nature, agricultural, commercial, and residential is slight, the individual problems discussed in the hypothetical do occur frequently. Furthermore, the portion of the hypothetical dealing with Lots C and R is very similar to the fact situation of *Argyelan, ___ Ind. at ___,* 435 N.E.2d at 974-75.

20. "Water runs and should run, as it is wont to do by natural right." *Kauffman v. Griesemer,* 26 Pa. 407, 413 (1856).

the natural flow of water from his land. Also, under rigid application of this rule, Lot C cannot be elevated so as to turn waters back onto Lot F, and Fred is liable for any interference with the natural flow of water onto Lot C. Assuming Lot C naturally drains onto Lot R, application of the civil law rule will preclude Con from altering the surface of his property, while Ron is forced to accept any natural surface water runoff from Lot C. Consequently, owners of the higher, or dominant estate are limited in development, while owners of the lower, or servient estate are required to tolerate surface water drainage.23

To facilitate development and avoid the inequities imposed upon landowners by the civil law rule, a reasonable use modification to the rule has been developed.24 Imposition of liability upon the parties involved is determined by the reasonableness of their conduct. Therefore, if Fred plows Lot F and thereby alters the natural flow of drainage to the detriment of Lot C, the court will determine liability through a balancing of the relevant factors.25 If damage to Lot C is minimal and Fred has no alternative method of disposal, a court will probably find his conduct to be reasonable.26 Accordingly, Fred is not prohibited from improving his land, though he must pay the economic cost of this improvement.27 If, on the other hand, the court finds Fred's conduct to be unreasonable, resulting in material injury to Lot C, Fred will be liable for damages.28 The reasonable use modification to the

23. "Upper owner" and "lower owner" depends upon the elevation of the land and the path of drainage. The upper owner connotes one who has higher property and thereby a natural drainage downward onto another's land. When applying the civil law rule, this is referred to as the dominant estate. The lower owner connotes the owner upon whose property water drains. When applying the civil law rule, this is referred to as the servient estate.
25. Factors weighed in ascertaining the reasonableness of a party's conduct are: the gravity of the harm; the utility of the actor's conduct; the foreseeability of the harm; and the motive of the actor. See Keys v Romley, 64 Cal. 2d 396, 410, 412 P.2d 529, 537, 50 Cal. Rptr. 273, 281 (1966); RESTATEMENT (SECOND) OF TORTS § 822-31 (1939).
27. Note that application of the reasonable use modification to the civil law rule in the situation where Lot C drains naturally onto Lot R results in an equitable result because under this analysis a residential owner is not forced to bear the cost of another's private, commercial gain.
civil law rule is more flexible than the civil law rule as Fred is permitted to improve his land while Con is not forced to pay for that improvement through loss of the use and enjoyment of his own land.

Common Enemy Doctrine

While the civil law rule protects the right to natural drainage, the common enemy doctrine promotes the right of each landowner to fight surface water any way possible. The common enemy doctrine is based on the concept of absolute ownership of property. This unmitigated respect for ownership rights in property originates in the maxim *cujis est solum ejus est usque ad coelum.*

Predicated on the theory that surface water is a nuisance, this doctrine bestows upon the owner of property an unconditional and unlimited right to dispose of surface water on his property as he sees fit, despite any harm he may thereby cause to another. A law based on the maxim that a landowner may use his own land for any lawful purpose without due regard for adjoining landowners may, as one might expect, lead to unjust results.

Evaluating the effect on this doctrine on Ron, the residential owner of the lot with the lowest elevation, demonstrates the potential inequities of the rule. Alterations to the surface of Lot C, necessitated by its transformation to commercial property, are sanctioned under the common enemy rule. Altering the natural surface of Lot C will eliminate ground absorption and thereby increase the flow of surface water onto Lot R. This is permitted even though the increased flow may destroy Ron's ability to use and enjoy his property. Ron, on the other hand, acquires the unqualified right to fight the surface water flowing onto his lot from Lot C. Therefore, Con is encouraged to develop his property, and Ron is burdened with

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29. "Whose is the soil, his it is up to the sky." Black's Law Dictionary 341 (5th ed. 1979).
31. Kinyon and McClure, supra note 2, at 898.
32. This attitude is reflected by the court's opinion in Argylelan, where the court stated that "Under the common enemy doctrine, it is not unlawful to accelerate or increase the flow of surface water by limiting or eliminating ground absorption or changing the grade of the land." 435 N.E.2d at 976.
33. One rationale given for this seemingly unjust result is that owners of lots in cities and towns purchase and retain their property with the manifest condition that natural or existing surface is likely to be altered by the progress of municipal development. Comment, Real Property - Surface Waters - Property Owner Cannot Discharge Surface Waters in Manner Injurious to Property to Neighbor, 24 Notre Dame Law 599 (1949) [hereinafter cited as Comment, Discharge Injurious to Neighbor].
the surface water to the extent it cannot be diverted from his land. Though the common enemy doctrine was originally adopted for the purpose of encouraging development of land,\textsuperscript{34} harsh results led to modifications of the rule.

Modifications of the common enemy doctrine fall within two major categories\textsuperscript{35} generally referred to as the "collection and discharge" modification and the "due care" modification.\textsuperscript{36} The collection and discharge modifications restricts the reach of the common enemy rule by denying a landowner the right to collect surface water by artificial means and discharge it upon adjoining lands in large quantities or in a concentrated flow.\textsuperscript{37} The modification does not apply if such discharge is through a natural drainway.\textsuperscript{38} Therefore, Con Commercial may not collect surface water in volume and discharge it in a concentrated flow upon Lot R.\textsuperscript{39} However, Con may legally divert water onto Lot R if it enters the property in a "diffused" state.\textsuperscript{40} Imposition of liability is conditioned upon the manner in which the water enters adjoining property and a technical interpretation of the language used to define the limitation. Assessing liability under the

34. Kinyon and McClure, \textit{supra} note 2, at 898-99, cite three reasons justifying the initial adoption by courts of the common enemy rule. One reason is premised on the notion that a landowner should be able to do as he pleases with his land. Other courts adopted the rule because they were of the opinion that it represented English "common law." Still others adopted it because they believed it to be consistent with public policy favoring the improvement and development of land.

35. For a discussion of all the modifications see generally Annot. 93 A.L.R.3d 1193 (1979); Kinyon and McClure; \textit{supra} note 2; Note, \textit{Rules in Urban Areas, supra} note 26.


37. Kinyon and McClure, \textit{supra} note 2, at 913.

38. Surface water law and watercourse law are difficult to distinguish because surface water loses its identify as such when it reaches a natural watercourse. Gwinn v. Myers, 234 Ind. 560, 561-62, 129 N.E.2d 225, 226-27 (1955). Watercourse law is a topic in itself and will be addressed only briefly throughout the text and footnotes when it is necessary to clarify an issue involving surface water.

39. The major purpose for the modification, at least in an urban setting, is to protect a landowner from one who uses sewers, gutters, or downspouts to collect surface water and then discharges it in volume upon the land of another. This modification does not impose liability for damming surface water or for a change in the course or an increase in the flow of surface water which results in injury to another. Note, \textit{Rules in Urban Areas, supra} note 26, at 85.

40. Indiana courts have interpreted the issue of liability as depending upon the character of the flow as it enters adjoining property. Thus, if water is diffused to a general flow at the point of entering the land, it is irrelevant that it was once impounded or channeled. Argyelan, ____ Ind. at ___. 435 N.E.2d at 976. Diffused is defined as meaning to pour out or spread freely; to spread thinly; to spread out over the surface of the ground. \textit{WEBSTER'S NEW COLLEGIATE DICTIONARY} 315 (6th ed. 1979).
due care modification, however, requires examination of entirely different criteria.

The imposition of liability under the due care modification depends upon a finding by the court that a landowner is negligent in making improvements on his land. Consequently, if Con uses reasonable care to avoid unnecessary injury to Ron's property, he is not subject to liability. Absent negligence on the part of Con, the common enemy doctrine is applied and Ron must bear the cost of the damage caused to his property by the improvements of Lot C. Alternatively, if Ron is able to construct a viable impediment to dispel the water draining from Lot C, he is then subject to the negligence standard. It is apparent that the modifications mitigate the harshness of the common enemy doctrine, but their protective function is extremely limited by the policy of the underlying rule. As the common enemy doctrine is premised on a right to use property despite the harm which may result to surrounding property, the benefit derived from the modifications is limited.

Rule of Reasonable Use

Greater protection may be afforded to landowners involved in surface water disputes by adoption of a rule which provides for review of the totality of circumstances, in consideration of the natural rights of all. Under the reasonable use rule, a landowner has the legal right to make reasonable use of his land, even if the flow of surface water is altered and causes certain harm to others. Liability is imposed, however, when this diversion of surface water is unreasonably harm-

41. Note, Rules in Urban Areas, supra note 26, at 88.
42. In determining negligence, the courts usually do not consider the utility of the actor's conduct and the gravity of the harm caused by such conduct. This is the difference between the due care modification of the common enemy doctrine, and the reasonable use modification to the common enemy doctrine. A majority of courts utilizing the due care modification require a finding of good faith improvement of property resulting in neither unnecessary nor needless injury to the adjoining landowner. See generally Kinyon and McClure, supra note 2, at 928-31 and the footnotes therein. See also Note, Rules in Urban Areas, supra note 26, at 76.
43. A major disadvantage of modifications to either the civil law rule or common enemy rule is that when a particular act does not violate a modification, the underlying rule is itself applied to the situation. Therefore, the basic themes of each rule continue to affect the property rights of the parties involved.
44. If the rule of reasonable use were to be based on a property maxim, it would be sic utere tuo it alienum non laedus; meaning, "Use your property in such a manner as not to injury that of another." BLACK'S LAW DICTIONARY 1238 (5th ed. 1979).
ful. The rule of reasonable use favors neither the upper landowner nor the lower landowner. Rather than assigning specific rights or privileges to a particular party, the question of liability is determined upon an evaluation of the facts and circumstances of each case and in accordance with principles of "fairness and common sense." Whether factors exist which justify shifting loss from the person harmed to the one who causes the harm can be determined by application of this rule to each individual case. The rule of reasonable use is premised upon tort concepts, and therefore is not easily distinguished from modifications evolving from the common enemy and civil law rules. Potential liability depends on the type of invasion involved. Liability for an unintentional invasion is limited to conduct found to be negligent or reckless, whereas liability for an intentional invasion depends on whether the actors' conduct is unreasonable.

In applying the rule of reasonable use to the hypothetical situation, it is possible that a court will view Con's invasion of Lot R as an intentional act. The court will then consider whether the utility of Con's conduct outweighs the gravity of the harm it causes to Lot

46. Kinyon and McClure, supra note 2, at 905.
47. Courts following this rule generally adopt Restatement (Second) of Torts § 822-36 (1939).
48. It is often difficult to distinguish the rule of reasonable use from the reasonable use modification of the civil law rule and the due care modification of the common enemy rule. It may be helpful first to distinguish the due care modification from the reasonable use modification. This distinction was stated ingeniously by Maloney and Plager:

"The civil law owner may never drain his land except by following the natural drainage, but the common enemy owner may always drain his land except that he may not use artificial channels. The civil law owner may never obstruct the natural flow of surface water unless he acts reasonably, while the common enemy owner may always obstruct the flow if he acts reasonably."

Maloney and Plager, supra note 18, at 79. The difference between the modifications and reasonable use rule itself appears to be two-fold. First, when a modification is applied and negligence is absent, the courts will apply the underlying rule, eg. either the civil law rule or the common enemy rule. Idealistically, there is no application of either rule when the rule of reasonable use is applied and the court finds neither unreasonable conduct nor negligent conduct. Second, it is alleged that the modifications require malice or negligence, and therefore favor "foreseeability of harm," whereas the rule of reasonable use, similar to the law of nuisance focuses on the results of the action, eg. the consequent interference with another's use and enjoyment of his land. See generally Butler v. Bruno, 115 R.I. 264, 341 A.2d 735, 93 A.L.R.3d 1183 (1975); Note, Surface Water Flooding in Urban Areas: Rights and Remedies Under the Common-Enemy Doctrine, 12 Tulsa L.J. 574 (1977) [hereinafter cited Note, Flooding in Urban Areas].

49. Restatement (Second) of Torts § 833, comment b at 146 (1939).
R. Though a similar result may be reached by applying one of the rules previously discussed, application of the rule of reasonable use permits review of all relevant factors and thereby heightens the probability of an equitable outcome. Though advocates of the common enemy and civil law rules condemn this rule because it reduces predictability, its flexibility is justified in light of the rapid advancements in modern land development.

The common enemy, civil law, and reasonable use rules originated at approximately the same time and by the mid 1800's, most states found it necessary to select one rule to govern surface water disputes. This selection was limited primarily to either the common enemy or the civil law rule. Though the rule of reasonable use existed at this time, it was not considered an acceptable alternative, and was adopted by only New Hampshire. Indiana was among those states which chose to adopt the common enemy doctrine. Since that time, however, the rule of reasonable use has gained acceptance and notoriety among both commentators and members of the judiciary, resulting in its adoption in several jurisdictions. Recently, the Indiana Supreme Court

50. Here the court is allowed to weigh all relevant factors as they are set forth in RESTATEMENT (SECOND) OF TORTS at § 827-28. Section 827 lists the gravity of harm factors involved. The following factors are listed as important: (a) extent of the harm involved; (b) character of the harm involved; (c) the social value which the law attaches to the type of use or enjoyment invaded; (d) the suitability of the particular use or enjoyment invaded to the character of the locality; and (e) the burden on the person harmed of avoiding the harm. Section 828 lists the utility of conduct factors involved. The following factors are listed as important: (a) the social value which the law attaches to the primary purpose of the conduct; (b) the suitability of the conduct to the character of the locality; (c) whether it is impracticable to prevent or avoid the invasion, if the activity is maintained; (d) whether it is impracticable to maintain the activity if it is required to bear the cost of compensating for the invasion. Thus, the courts will be more likely to reach the issue of whether or not it is equitable for a residential owner to pay for commercial development from which he will derive no benefit, and from which the developer has a substantial private interest.

51. Indicative of the argument is the following statement:

"If the true common law rule or the civil law rule were followed it would do away with much litigation. Confusion comes when the courts take the 'middle road' theory and try to settle each case on its own merits and consequently leave the law in a state of confusion."

Comment, Common Law Rights as to Surface Waters, 21 NOTRE DAME LAW, 364, 366 (1946).

52. Kinyon and McClure, supra note 2, at 891.
55. Indiana expressly adopted the common enemy doctrine in Taylor, 64 Ind. 167.
56. See Weinberg v. Northern Alaska Dev. Corp., 384 P.2d 450 (Alaska 1963);

http://scholar.valpo.edu/vulr/vol18/iss2/7
declined to adopt the rule of reasonable use, choosing instead to reaffirm its decision to apply the common enemy doctrine to surface water disputes. This decision was based in large part upon the doctrine of stare decisis.

**EFFECT OF STARE DECISIS ON INDIANA'S SURFACE WATER LAW**

*Stare Decisis* stands for the principle that once a court has developed a rule of law to be applied to a certain factual situation, it will adhere to that principle and apply it to all future cases where facts are substantially the same, regardless of whether the parties and property are the same. It is imperative to evaluate past decisions to determine: (1) what influenced the formation of law, (2) the underlying policy and purpose of the law, and (3) whether the law remains viable and beneficial in a modern society. Evaluation of these factors is necessary before a decision to depart from *stare decisis* can be made.

Tracing the development of surface water law in Indiana reveals weaknesses in the common enemy doctrine which become more prevalent with current changes in policy and trends in land development. Several factors are relevant to a discussion of the development and ultimate adoption of the right to fight doctrine. Expansion of railroads and municipalities and their effect on early land development played a primary role in the formation of surface water law. Similarly, the evolution of surface water law was affected by the conflicting language used to define the common enemy rule and the interpretation given the collection and discharge modification. A review


57. *Argyelan*, ___ Ind. at ___, 435 N.E.2d at 978.


59. *See infra* notes 122, 132, 133 and accompanying text.
of the early case law illustrates the weaknesses of the common enemy doctrine. These deficiencies evidence the need for departure from stare decisis.

Evolution of the Common Enemy Doctrine

Indiana surface water law began developing in the early nineteenth century. Primarily two categories of cases dominated the early formation and application of the common enemy rule. Generally, litigation in the early years involved either municipal corporations or railroads. Municipalities were developing streets for transportation purposes and railroad companies were constructing embankments across the countryside on which to lay railroad tracks. The land development served as a catalyst for surface water disputes arising between big business and private property owners. These conflicts and the manner in which the courts chose to deal with them played a significant role in the formation of surface water law. The regulation of property rights for both private and public use is a basis for the initial adoption of the common enemy rule.

a. Municipalities and Railroads

The common enemy rule applies to both municipalities and

60. Between 1860 and 1930 most of Indiana’s surface water disputes involved either a municipal corporation or a railroad company. There are very few cases involving farmers, and after 1930 a majority of the litigation is centered on construction companies and private property owners.

61. Patoka Twp. v. Hopkins, 131 Ind. 142, 30 N.E. 896 (1892); Davis v. Crawfordsville, 119 Ind. 121 N.E. 449 (1889); Reed v. Cheney, 111 Ind. 387, 12 N.E. 717 (1887); City of North Vernon v. Voegler, 103 Ind. 314 (1885); Weis v. City of Madison, 75 Ind. 241 (1881).


63. This notion is reflected in an Indiana case wherein the court stated, “We adopt the following language from a case cited herein: ‘The elements being for general and public use, and the benefit appropriated to individuals by occupancy, this occupancy must be regulated and guarded with a view to individual rights of all who have an interest in their enjoyment.’” Taylor, 64 Ind. at 174.
private property owners\textsuperscript{64} and the Indiana Supreme Court agreed that municipal corporations have a legal right to make improvements. Actions of a municipal corporation are limited by the collection and discharge modification to the common enemy rule. Subjecting municipal corporations to the modifications was intended to encourage care on the part of the municipality so as to avoid injury to private property and to give proper relief if injury occurred.\textsuperscript{65} Furthermore, the corporations may not be subject to liability for ensuing damages so long as reasonable care is used.\textsuperscript{66} The underlying rationale which allows a municipal corporation to improve its streets is that the improvement is for public use and benefit. Moreover, since the party whose property is harmed by reason of such general improvement shares in the general benefit they should not be heard to complain.\textsuperscript{67}

The early cases addressing the right of municipal corporations to develop public streets are significant because development was a matter of necessity and, in the interest of progress, it benefited the general public. The presence of both necessity and public benefit

\textsuperscript{64} One of the first cases in which the court announced application of the common enemy doctrine to a municipal corporation was \textit{Weis}, 75 Ind. at 246-47. In that case a municipal corporation improved its streets by constructing drains and culverts and by so doing increased the flow of water onto the plaintiff's lot. The court held for the municipal corporation stating that actions of a municipal corporations are limited only by the collection and discharge modification to the common enemy rule. \textit{Id.} at 253.

\textsuperscript{65} In \textit{Weis}, 75 Ind. at 252, the court cites with approval the great Judge Dillon and adopts his rationale as the one prevailing in the state. Judge Dillon said that:

\begin{quote}
When water is gathered into one channel and cast upon plaintiff's land and causes a positive and direct invasion of plaintiff's private property, to his damage, water which would not otherwise have flowed or found its way there, the corporation is liable. \textit{If property applied} (emphasis added) the exception, founded on sound principle, will have a salutory effect in inducing care on part of a municipality to avoid injuries to private property and will give redress to the sufferer if such injuries are inflicted. \textit{Id.}
\end{quote}

Unfortunately, recent case law indicates that the modification is being improperly applied in Indiana.

\textsuperscript{66} \textit{Id.} at 250. The same general rule was stated differently in \textit{Davis}, 119 Ind. at 1-2, 21 N.E. at 449-50, where the court said that a municipal corporation is not liable for "consequential damages" caused by grading and improvement of its streets unless it is negligently done. It is clear from the case that \textit{any} damage occurring from an act authorized by law will be labeled as consequential injury and not direct injury. This is significant as the court will impose liability and assess damages only when the act of the municipal corporation causes \textit{direct injury}. \textit{Weis}, 75 Ind. at 250 (Emphasis added) Note also that the "reasonable care" language does seem to give the municipal corporation a slightly different standard than it does to the private property owner.

\textsuperscript{67} \textit{Pittsburgh C. C. \\ & St. L. Ry.} 51 Ind. App. at 317, 97 N.E. at 355.
minimized the harshness of permitting a municipality to divert surface water at the expense of the residential owner.

In addition to municipal activities, necessity and public benefit are also noticeably present in surface water disputes involving railroad companies. A railroad possesses the right to protect its right of way from surface water which would otherwise flow upon it from adjoining lands as long as it does not interfere with any natural or prescriptive watercourse. Therefore, a railroad has the right to improve and change its roadbed and raise and lower the grade if such change will improve its efficiency. Like municipal corporations, the common enemy rule governs harmful diversion of surface water resulting from the development of railroads so improvements can be made without liability to adjoining landowners.

The rationale behind the railroad's right to make improvements without liability for diversion of surface water is, in part, based upon economics. An Indiana court explained that such improvements do not constitute additional burdens not included in compensation previously paid to the private owners for the railroad's right of way. Therefore, the injured property owner has already been paid for any damages occurring from diversion of surface water caused by the construction of railroads. Application of the common enemy doctrine under such circumstances is not inequitable. Absent necessity, public benefit, or economic reimbursement, however, the rule is inequitable. While this early case law indicates an intent to avoid unjust application of the common enemy doctrine, principles of reasonable use of property have been omitted from subsequent Indiana surface water decisions.

b. Problems with Semantics

One of the first cases in Indiana involving water law established

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68. Jean, 9 Ind. App. 15, 36 N.E. 159. "When surface water begins to flow in a definite direction and there is a regular channel formed with well defined banks and bottom and water flows therein, not necessarily continually, but for time immemorial and for a substantial period each year, it is a water course." Id. See also infra note 94 and accompanying text.

69. Pittsburgh C. C. & St. L. Ry., 51 Ind. at 317, 97 N.E. at 355.

70. The common enemy doctrine was first applied to a lawsuit involving a railroad in Cairo & Vincennes R.R. 73 Ind. 278. Therein the court said that the railroad could lawfully build an embankment which stopped the drainage of surface water from plaintiff's property even though the result was the flooding of his property. Id. at 283..

71. Pittsburgh C. C. & St. L. Ry., 51 Ind. at 317, 97 N.E. at 355.

72. Trustee of the Wabash and Erie Canal v. Spears, 16 Ind. 441, 442 (1861). This case involved water law in general and not surface water law exclusively. The
the general proposition that an individual may use his own property as he desires, so long as he is reasonably careful that such use shall not injure others. It is clear that a property owner was not liable for indirect damages occurring from the legitimate use of his land. The court did, however, recognize a duty on the part of a landowner to exercise reasonable care in the use and enjoyment of his property. Language advocating reasonable use of property is found in Taylor v. Fickas, the first Indiana case encouraging adoption of the common enemy rule. The language favoring equitable application of the rule in that case is conspicuously omitted in later cases which cite Taylor as controlling authority. The omitted language indicates an intent to apply a rule of law while still giving due regard for others' rights in property. The omission of the language has led to the creation of a right to fight surface water, pursuant to the common enemy doctrine, without adequate regard for the rights of others.

Before adoption of the common enemy rule, Indiana courts recognized that diversion of surface water from the land of another by excavation of one's own land or the backing of water upon another's land by means of dams were injuries for which an action lay at common law. At that time, damages for injuries to health and personal comfort caused by another's use of land were based upon nuisance law. Adoption of the common enemy rule diminished the use of nuisance law in surface water disputes because it conferred upon a property owner an unlimited right to divert surface water from his land. In defining nuisance, the Indiana Supreme Court stated that

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73. See id. at 442.
74. Taylor, 64 Ind. 167.
75. There are several indications in Taylor that the court did not condone strict application of the common enemy doctrine. First, the court in Taylor said the maxim, sic utere tuo it alienun non loedus meant no more than that everyone must so enjoy his property according to his legal right. The legal right to substantially damage another's property evolved after Taylor. The court acknowledged that it is impossible to use your own property without causing injury to another in slight degree, showing no intent to condone substantial injury. Finally, the court said that the aforementioned maxim "must be taken and construed with an eye to the natural rights of all." Id. at 174.
76. See supra note 13 and accompanying text.
77. Trustees of the Wabash and Erie Canal, 16 Ind. at 443.
unless an act was in violation of a right, despite the inconvenience, annoyance, discomfort, injury, or damage resulting therefrom, the act is not a nuisance and the party injured thereby is without remedy.\textsuperscript{78} Throughout these decisions the notion evolved that although it is not a nuisance to do what the law authorizes, it may be tortious to do the authorized act in a negligent manner.\textsuperscript{79} Under this rationale a nuisance action will lie only when there has been a violation of the collection and discharge modification of the common enemy rule.\textsuperscript{80} Therefore, in Indiana, each property owner has a legal right to fight surface water as long as it is not collected in volume and discharged onto the property below. In giving each landowner the right to fight surface water, Indiana has, in effect, legalized a nuisance. Courts acknowledge that much error exists in the expression that a landowner has the right to fight surface water as best he can.\textsuperscript{81} Analysis of past and present application of the common enemy doctrine indicates there is more truth than error involved because of the limited protection provided pursuant to the common enemy doctrine and its modification.

Recently, the Indiana Supreme Court stated that the common enemy doctrine has been clearly defined and applied without confusion by lower courts since 1878.\textsuperscript{82} However, the language utilized by the courts in defining the rule, coupled with the difficulty in determining when water constitutes “surface” water, indicates an area of perpetual confusion.\textsuperscript{83} The common enemy rule was first stated as giving landowners the right to “fence and cultivate” their fields without being liable for slight and temporary damages resulting therefrom.\textsuperscript{84} Two years later the court, citing to the civil law rule, restricted the right of an upper owner to divert surface water as re-

\textsuperscript{78} Benthal v. Seifert, 77 Ind. 302, 306 (1881).
\textsuperscript{79} City of North Vernon, 103 Ind. at 327.
\textsuperscript{80} See supra notes 14, 15, 39, 40 and accompanying text.
\textsuperscript{81} In Patoka Twp., 131 Ind. 142, 30 N.E. 896, the court stated “Surface water is a common enemy which the landowner may fight off his land as best he may. While there is some truth in the statement, there is much error.” \textit{Id.} The court was referring to the fact that a landowner cannot collect surface water and discharge it in a concentrated flow onto the lands below.
\textsuperscript{82} Argyelan, ___ Ind. at ___, 435 N.E.2d at 977.
\textsuperscript{83} A good indication of the ongoing confusion surrounding the distinction between surface water and a natural watercourse is the statement made by Justice Moran in Evansville M. C. & N. Ry. 67 Ind. App. 121, 114 N.E. 649: “In view of the innumerable decisions and want of harmony of the courts as to the character of water that should be regarded as of a natural watercourse or flood waters of a stream, an attempt to clarify the same would lead to endless confusion.” \textit{Id.} at 132, 114 N.E. at 653. See also infra notes 94-99 and accompanying text.
\textsuperscript{84} Taylor, 64 Ind. at 176.
quired by good husbandry, but did not determine the right of the lower property owner. After acknowledging the inconsistency between existing formulas and conceding the difficulty in formulating a general rule applicable to varying circumstances, the court expressly adopted the common enemy rule. Unfortunately, this marked the beginning rather than the end of confusion and injustice brought about by the application of the "right to fight" doctrine.

The definition presently cited with approval by Indiana courts states that a landowner may do whatever is necessary to keep surface water from flowing across his property. However, once the water is on his property, he must either keep it within his boundaries or allow it to drain naturally from his property onto the land of another, unless within the limits of his land he can turn it into a natural watercourse. This definition suggests that a property owner can divert surface water to protect his property from injury and resembles a hybrid of the common enemy and civil law rules. Although the rule defines the right to divert surface water in terms of serving a protective function, "mere" surface water is legally diverted for countless reasons. In labeling the water as "merely" surface water the court is advocating injury without remedy in surface water disputes. Compensation for injury to property is denied when mere surface water is a casual factor, but a different result is probable where a watercourse is involved.

85. Templeton v. Voshloe, 72 Ind. 134 (1880). Note also the use of good husbandry language as it is very similar to a reasonable care limitation on the use of land.
86. Cairo, 73 Ind. 278.
87. The landowner is limited by the following: (1) the act must be done within or upon the boundaries of his own land; (2) he cannot interfere with a natural or prescriptive watercourse; and (3) he may erect levees to ward off surface water that are of reasonable height. Thompson v. Dyar, 126 Ind. App. 70, 74, 130 N.E.2d 52, 54 (1955).
88. Cairo, 73 Ind. at 283-84.
89. For one explanation for the rule enunciated in Cairo see, e.g., Shaffer, supra note 30, at 88.
90. See generally, Dunn, 63 Ind. App. 553, 114 N.E. 888; Clay, 164 Ind. 439, 73 N.E. 904; and Jean, 9 Ind. App. 56, 36 N.E. 159.
91. In addressing surface water, the court precedes the term with the adjective "mere" indicating to the author that the court believes surface water is neither capable of substantial injury, nor deserving of much attention. Mere is defined as "nothing more than" or "simply". See language in New York C. & St. L. R., 12 Ind. App. at 374, 40 N.E. at 543; Clay, 164 Ind. at 440, 73 N.E. at 905.
92. The characterization of surface water as being "merely" surface water is based on the distinction between surface water and a natural watercourse. See infra notes 1 and 68 and accompanying text. The common enemy doctrine governs surface water disputes while the rule governing watercourse is as follows:

Every riparian owner is entitled to have the watercourse continue
Before the common enemy rule can be applied consistently and fairly to surface water disputes, the court must develop an intelligible definition of surface water. In Indiana, surface water is governed by the common enemy doctrine, while water flowing in a natural watercourse is governed by a rule of reasonable use. Therefore, proper characterization of the water determines which standard will apply. The definition of surface water is an issue of considerable controversy and has been approached from several perspectives. Indiana precedent indicates a myriad of definitions varying from the complicated to the elementary. The major areas of controversy center on flood waters, small or erratic channels, over-run from tile to flow through or along his lands in its accustomed channel and natural volume, without any injurious obstructions or detention of the waters by other owners, except as may be occasioned by the reasonable use of such waters by other riparian owners.


93. Id.

94. A direct cite from Evansville Mt. C. & N. Ry. is indicative of the state of the law in 1916:

After collecting the authorities on this subject it was held in Vandalia, that flood waters flowing without the ordinary channel under some circumstances should be classed as part of a stream rather than surface water, and waters overflowing the natural channel flowing down the course of a stream in a uniform current with it, and at such regular intervals as to form what is known as a high-water channel should be classed as waters of a stream rather than as in part surface water, and that under some circumstances a stream is classed as a natural water course in the absence of a well-defined channel as the term is usually understood, as where the water in its course spreads over a considerable breadth of land.


95. The court took a simpler approach in Ramsey v. Ketchem, 73 Ind. App. 200, 127 N.E. 204 (1920). After citing various possible definitions for surface water, the appellate court concluded that the lower court doubtlessly interpreted the term in its ordinary sense; that is, water collected on the surface of the ground.

96. In Jean, 9 Ind. App. 56, 36 N.E. 159, the court held that overflow from a river in time of high water is surface water. By 1916, the court in Evansville Mt. C. & N. Ry., 67 Ind. App. at 137, 114 N.E. at 654, acknowledged the "endless confusion" surrounding prior attempts to classify surface water and after a general overview of the conflicting holdings adopted the rule that flood waters which leave the channel of a stream and spread to adjacent lands running in different directions becomes surface water. In Mitchell v. Bain, 142 Ind. 604, 614, 42 N.E. 230, 233 (1895), the court stated that a stream does not cease to be a watercourse because it spreads out for a distance without a defined channel. Therefore, in certain instances, surface water must reach a natural watercourse and then overflow to be immune from the common enemy doctrine.

97. In New York C. & St. L. Ry., 12 Ind. App. at 374, 40 N.E. at 543, the court stated that channels leading off the Yellow River were "mere surface water drains" as a watercourse must be a living stream confined in a channel. In New Jersey
drainways, and more recently, treated water expelled from an aeration system. Although several tests exist to aid in determining what constitutes surface water, uniform characterization of water remains a disputed issue.

When a stream overflows its banks, the issue becomes whether that water is characterized as flood water or surface water. The determination is ultimately based upon the length of time the water remains outside the channel, the continuity and direction of the current and the probability of its return to the original stream. It is difficult to characterize water flowing within a bed and banks because frequently it does not meet the requirement for a watercourse. The issue becomes confused further when the banks are man-made rather than a product of erosion, or, when the water draining through the channel is surface water as opposed to spring fed water. Confusion also arises when a ditch is substituted with tile drainage and its banks are later obliterated. Characterizing water which either flows on

I. & I. Ry., 168 Ind. at 211, 80 N.E. at 423, the court said that a drainage ditch fed by no spring water or watercourse and used and construed solely for expediting surface drainage is mere surface water. While the court in Watts, 191 Ind. at 44, 129 N.E. at 320, said that water running over land outside and apart from any natural or artificial watercourse is surface water. And in Thompson, 126 Ind. App. at 74, 130 N.E.2d at 54, the court stated that damming a flood channel to a watercourse falls entirely within the common enemy doctrine because the damming had no effect on the flow of water in the natural watercourse.

98. In Capes v. Barger, 123 Ind. App. 212, 216, 109 N.E.2d 725, 727 (1953), the court said that when tile is laid in a natural watercourse and filled over, obliterating the banks, it still remains a watercourse, and when it overflows, the overflow does not become surface water against which a landowner can protect himself. But, when the rainfall is so abundant that it all cannot be carried off by the tile drain or the land, the surplus is surface water. Similarly, the court in Gwinn, 234 Ind. at 567, 129 N.E.2d at 228, held that water flowing in a surface channel over a line of tile is a natural watercourse because it was a natural watercourse before it was tiled and filled in.

99. The court in Kramer v. Roger, ___ Ind. App. ___, 441 N.E.2d 700 (1982), held that effluent discharge from an aeration system was surface water, to which Judge Ratliff dissented, stating that:

Surface water, under all accepted definitions, is water derived from totally natural sources, such as falling rains or melting snows, which is diffused over the surface of the ground and which temporarily flows upon the ground along the natural contours of the surface of the land, following no defined course or channel.

Id. at 707.

100. See generally Shaffer, supra note 30, at 79-81.
102. See supra note 97 and accompanying text.
103. See supra note 98 and accompanying text.
top of the tile drain where the banks used to be or which is excess water incapable of flowing in the drain, is difficult. Finally, with the development of aerator systems, the question arises whether water must be derived from a totally natural source to constitute surface water. Consequently, the definition of surface water is in part conjecture and there is a presumption in favor of characterizing water as "merely" surface water. Given the ambiguity in defining what constitutes surface water, it is an additional inequity to place the burden of proof on the party alleging otherwise.

The fallibility of the common enemy rule is increased through interpretation and subsequent application of the collection and discharge modification.

c. Interpretation of Collection and Discharge Modification

In general, the collection and discharge modification to the common enemy rule states that a landowner cannot collect surface water in an artificial channel and cast it in a body upon another's land. Violation of the collection and discharge modification results in "direct" injury for which liability is inferred. The extent to which the modification mitigates the harshness of the common enemy doctrine is not ascertainable by a reading of early case law. However, the case law reflects optimism that by adopting the collection and discharge modification, damage to property arising from unreasonable diversion of surface water will be deterred. In response to judicial concern over landowners "profiting from their own wrongs," the initial interpretation permitted viable use of the modification in surface water disputes. When properly interpreted, the doctrine has proven effective in arduous cases and practical when applied to simple downspout

104. See supra note 99 and accompanying text.
105. The court in Ramsey, 73 Ind. App. at 204, 127 N.E. at 206, stated that the plaintiff, complaining of an adjoining landowner constructing a dam at the edge of his property and throwing waters within a ditch back onto the plaintiff's property, had the burden of proving that the water was not surface water.
106. Weis, 75 Ind. at 248-49.
107. Id. See supra note 66 and accompanying text.
108. Weis, 75 Ind. at 248-49. See supra note 65 and accompanying text.
109. In Gaskill v. Barnett, 52 Ind. App. 654, 657, 101 N.E. 40, 43 (1913), wagon wheels wore trenches in the ground through which water was running into a ditch, across a depression and onto appellee's land. The court said that even if the appellant had a prescriptive right to drain surface water into a channel on appellee's land, such right would not authorize him to wrongfully accumulate additional water and pour the same onto appellee's land. Therefore, the appellant violated the collection and discharge modification by the mere passage of water through the wagon tracks, onto appellee's land. The court stated that to permit the appellant to continue such acts would be to allow him to profit from his own wrong.
110. An "arduous" case refers to a case in which there has been an extreme
drainage. Despite the potential for effectiveness, problems arising from interpretation and application have rendered the modification ineffective.

A close examination of the language used to define the collection and discharge modification exposes the ambiguity arising from the various interpretations given it by the courts. The courts are confronted with the troublesome task of uniform interpretation since the meaning given to the various phrases of the collection and discharge modification varies with the underlying fact situation. The outcome in each situation may be based entirely upon semantics.

diversion of surface water so that water usually flowing away from property is reversed and begins to flow onto the property. Therefore, when surface water is collected and discharged into a channel, thereby reversing the flow of water, so that if floods the same property that it used to drain, the collection and discharge modification mandates liability for damages. See generally Baltimore & O. S. W. R., 34 Ind. App. 330, 72 N.E. 661; Patoka Twp. 131 Ind. 142, 30 N.E. 896; Reed v. Chaney, 111 Ind. 387, 12 N.E. 717 (1887).

111. The court in Connor v. Woodfill, 126 Ind. 85, 25 N.E. 876 (1890), found that water flowing through the downspouts of a church and onto adjoining residential property, constituted a trespass for which the church was held liable. Imposing liability for flooding of property caused by water collected within downspouts and cast upon adjoining property has been cited as being the major function of the collection and discharge modification in Note, Rules in Urban Areas, supra note 26 at 91.

112. The collection and discharge modification has been worded in the following ways:

(a) A municipal corporation cannot collect surface water in an artificial channel and pour it onto the land of another. Davis, 119 Ind. 1, 21 N.E. 449 (emphasis added).
(b) Appellees are trespassors whenever they shed water from their building so as to throw it upon appellant’s lot. Connor, 126 Ind. 85, 25 N.E. 876 (emphasis added).
(c) A landowner cannot wrongfully accumulate additional water and pour the same on adjoining land. Gaskill, 52 Ind. App. at 661, 101 N.E. at 43 (emphasis added).
(d) There is no right to collect surface water in a volume and discharge it on the lands of another. Hunter, 93 Ind. App. at 513, 176 N.E. at 712 (emphasis added).
(e) If an upper landowner alters the natural condition of land so as to change the course of water or concentrate it at a particular point or by artificial means, increase its volume, he is liable. Central Indiana Coal Co. v. Goodman, 111 Ind. App. 480, 485 39 N.E.2d 484, 487 (1942) (emphasis added).
(f) Landowner cannot collect a surplus of surface water on a railroad right-of-way and discharge it in a body on adjoining land. Pittsburgh C. C. & St. L. Ry., 51 Ind. App. at 323, 97 N.E. at 356 (emphasis added).

113. See supra note 112 and accompanying text.

114. The problem with semantics has been cited by at least one commentator as another valid point in favor of a state adopting the rule of reasonable use. See
yet the case law offers no clear guide as to what meaning will be given the various terms. The rule is therefore subject to numerous interpretations, resulting in the minimization of its predictability.

Minimization of predictability, however, is not the sole reason for deterioration of the collection and discharge modification. A once viable rule may be rendered meaningless if the court either applies the rule in a perfunctory manner without due regard for changing circumstances or destroys the fundamental premise of the rule by creating exceptions to the rule. The Indiana courts are guilty of violating both of the above,115 and as a result, the present viability of the collection and discharge modification is questionable. Application of the rule without due regard for changing circumstances has played a substantial role in subsequent inequitable decisions.

Recently, in Gene B. Glick Co. v. Marion Construction Corp.,116 the Indiana Court of Appeals recited the common enemy rule and applied its modification in the same manner as it was first applied in the early nineteenth century.117 The court said that "the upper owner may make such drains on his land as are required by good husbandry and proper improvement of the surface of the ground."118 Reiterating the collection and discharge modification, the court stated that the upper owner cannot by drains or ditches concentrate surface water and discharge it onto a lower landowner in places where it never flowed before.119 Obviously the right to improve one's land carries with it different connotations now than it did in the early nineteenth century. "Improvements" then entailed farming one's ground, building a railroad track or grading city streets.120 "Improvement" today is like-

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115. The court in Gene B. Glick Co. v. Marion Constr. Corp., 165 Ind. App. 72, 331 N.E.2d 26 (1975) reh. denied 333 N.E.2d 140, violated the first of these two rules, and the court in Argyelan, ___ Ind. ___, 435 N.E. 2d 973 violated the other. See supra note 15 and accompanying text. It should be noted that had it not been for the court's endorsement in Glick of finding no liability for an increase in the quantity of surface water discharged onto an adjoining lot, the inequitable decision in Argyelan may not have occurred. The landowner ultimately should not be permitted to so alter his land nor to escape liability through the exception to the modification enunciated in Argyelan. See infra notes 138, 145 and accompanying text.


117. In Glick the court reiterated the common enemy doctrine as it was set forth in Templeton, 72 Ind. 134.

118. This portion is taken verbatim from Templeton. Glick, 165 Ind. App. at 77, 331 N.E.2d at 31.

119. This too is a mere re-iteration of the rule in Templeton. Id.

120. See supra notes 61, 62, 84 and accompanying text.
ly to encompass raising a lot, cementing the surface and constructing a commercial building.121 This failure to recognize a change in land development techniques resulted in the rule that:

A landowner may improve his land by changing the surface and causing water to accumulate thereon, to stand in unusual quantities on adjacent land, or to pass into or over it in greater quantities or in other directions; and he may elevate or depress his land to change the flow.122

This rule of law imposes very little restraint on a landowner and leaves even less upon which to base the collection and discharge modification. This fact, combined with the recent exception to the rule enunciated by the Indiana Supreme Court in Argyelan renders the present status of surface water law in Indiana offensive to prevailing jurisprudence.123

**Indiana’s Current Posture on Surface Water**

Rigid adherence to precedent may lead to injustice in a particular case and may also unduly restrict proper development of the law.124 Proceeding on the premise that common law is judge-made law125 and that the courts have a responsibility to change such law “where strict adherence creates harsh and unjust results,”126 the appellate court of the third district in Rounds v. Hoelscher127 recently adopted the rule of reasonable use. The appellate court’s adoption of the reasonable use rule stemmed from a belief that Indiana has been applying competing rules to surface water disputes in that the common enemy doc-

121. See generally Note, Rules in Urban Areas, supra note 26.  
123. The law as it stands after Glick and Argyelan is that a commercial owner may improve his property at the expense of the residential owner. In Cloverleaf Farms, Inc. v. Surratt, 169 Ind. App. 554, 555, 349 N.E.2d 731, 732 (1976), a construction company was permitted to raise its land, thereby causing surface water which had previously flowed across its own land to stand on that of the adjoining residential owner so long as it did not “collect surface water in a body and then discharge it onto another’s land.” The court said the residential owner could dam against the water so as not to incur damage. The feasibility of the lower owner damming and the rationale that the burden should be placed on him is troublesome.  
125. Id.  
trine is applied to the lower owner and the civil law rule to the upper owner. The result is that a landowner is free from liability to an upper owner for damming back surface water, as the common enemy rule advocates the "right to fight" surface water. However, an upper owner is liable to a lower owner for the unnatural channeling of water if it flows around the dam, as the upper owner is governed by the collection and discharge modification. Thus liability is predicated upon the owner's "posture on the hill," and not by an evaluation of all factors.

The court of appeals, in stating that an owner has no absolute right to improve his land at the expense of his neighbor was following what appears to be the original intent of the initial framers of Indiana's surface water laws. It is conceded that the appellate court disregarded stare decisis in concluding that liability should be based on the reasonableness of the conduct involved. It is also true that the appellate court is bound by prior decisions of the Indiana Supreme Court until precedent is changed either by the Indiana Supreme Court or by legislative enactment. Alternatively, it must also be acknowledged that a court should not "close its eyes to change or disregard reality." For if the court does so, and consequently perpetuates a rule founded on an antiquated notion, it is precedent alone which is honored.

A triology of recent Indiana decisions supports the conclusion that Indiana has chosen precedent over an obvious need for change.

128. See supra notes 79-89 and accompanying text.
130. Id. at 1315.
131. The court announced the new rule that every landowner has the right to reasonably use his own property so as not to cause unnecessary injury to another in light of all surrounding circumstances. Listing seven factors relevant to the determination of reasonableness, and applying them to this situation the court found for the defendants. The seven factors listed by the court as relevant are: (1) the improvements being the cause in fact of the injury; (2) the nature and importance of the improvements; (3) the relative value of the harm compared to the improvements; (4) the foreseeability or remoteness of the injury; (5) the extent of the interference with the surface water; (6) the availability of mutual solutions to the water drainage problems; and (7) the negligence or willful misconduct by a party acting to control surface water. Id.
132. See supra notes 72-76 and accompanying text.
136. The trilogy of cases which are indicative of Indiana's current position on
It is important to understand the facts and holdings of *Argyelan v. Haviland*, *Rounds v. Hoelscher*, and *Gilmer v. Board of Marshall County*, as their interplay with one another demonstrates an unwillingness on the part of the Indiana Supreme Court to address timely issues.

Recently, a case came before the Indiana Supreme Court that exposed apparent weaknesses in the common enemy rule. The *Argyelan* case was brought before the court in April of 1981. The Havilands, the plaintiffs in the case, were residential owners, and the Argyelans, the defendants, purchased a lot near the residential property of the plaintiffs. The defendants requested that their property be zoned commercial, the lot was raised three feet, and was black-topped, thereby substantially increasing the surface water flow onto the plaintiffs' property. The defendants also built a retaining wall on their property, thereby diffusing the surface water collected in their downspouts before it was "thrown" onto the adjoining, residential property. In the suit brought by the Havilands against the Argyelans the trial court found for the plaintiffs. The court of appeals, however, found for the commercial owner on the ground that the acts by the defendants did not fall within the collection and discharge modification to the common enemy rule. The loss to the residential owners of the use and enjoyment of their property was labeled as merely "incidental" and therefore without remedy. The plaintiffs petitioned for transfer to the Supreme Court.

While the petition for transfer was pending, both *Rounds* and *Gilmer* came before the appellate court of the third district. The defendants in *Rounds*, the Hoelschers, purchased a lot for residential purposes and due to drainage problems, the lot was raised to street level and a cement curb was installed, both of which stopped the flow of surface water into and across their lot. Ten years later, the plaintiffs, the Rounds, purchased an adjacent lot. Between the lots and located on the plaintiffs' property, a swale existed upon which water stood. The plaintiffs extended their basement to the area beneath the swale and standing water. Later, the basement collapsed and the plaintiffs sought relief. The trial court found for the defendants and the plaintiffs appealed alleging a misapplication of the common enemy rule. The court of appeals affirmed the trial court's decision, but based the affirmation upon the rule of reasonable use.

In *Gilmer*, the defendant built a dike to stop flooding of his farm, which in turn caused flooding to the road. The road commissioner requested, and the trial court granted, an injunction forcing the defendant to remove the levee on the grounds that repelling surface water...
created a nuisance. Defendant's petition to dissolve the injunction was denied. The appellate court reversed and remanded with instructions that the trial court utilize the rule of reasonable use.

Subsequently, the supreme court granted the Havilands' petition for transfer in Argyelan, and apparently irrevocably bound by stare decisis, rejected the rule of reasonable use. The supreme court reversed the holding of the trial court and vacated the ruling of the court of appeals, rejecting their analysis, but nonetheless finding for the commercial owner. Shortly thereafter, the Gilmer defendant filed a petition for transfer which was denied by the supreme court. Granting the transfer would have provided the court with an opportunity to re-examine the holding in Argyelan and was a perfect opportunity for the court to address the potential applicability of Indiana's nuisance statutes in surface water disputes. The court's refusal to address either the rule of reasonable use, nuisance law, or a possible due care modification to the common enemy rule in spite of both the opportunity and necessity, reflects a stubborn adherence to stare decisis.

The facts of Argyelan epitomized a prevalent problem area in surface water law. The supreme court in Argyelan found no liability on the part of a private commercial owner for damage done to an adjoining residential owner. Although the commercial owner altered his property so as to increase both the rate and flow of water onto the residential lot, the resultant flooding did not amount to a violation of the collection and discharge modification. The reasons given

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137. The facts in Argyelan are identical to the hypothetical. Unlike surrounding states, see infra notes 156-58, 162-65 and accompanying text, the Indiana courts have expressly legalized severe alteration of a property's natural surface. See supra notes 116-19 and accompanying text.

138. The appellate court in Argyelan listed three elements necessary before the collection and discharge modification is applied: (1) collecting surface water; (2) discharging it; (3) in a concentrated flow. Ind. App. at 1318 (1981), pet. denied 439 N.E.2d 1358 (1982). The court goes on to distinguish Connor, 126 Ind. 85, 25 N.E. 876, the only other downspout case in Indiana. In Connor, water was collected into gutters and discharged in a concentrated fashion by downspouts onto adjoining land. The court there-in found trespass and subsequent liability. The appellate court distinguished Connor on various grounds. First the court said all three elements were present in Connor and the court in Connor merely used the word "throw" in place of the third requirement that the water enter the property in concentrated flow. This violation is labeled by the court as a "positive wrong," something lacking in the Argyelan case. In Argyelan, the water was not cast, thrown or poured so as to violate the collection and discharge
by the court for the continued application of the common enemy doctrine in light of the inequities here involved are insignificant and easily refuted. Consequently, the opinion in Argyelan is subject to criticism, as it reflects a refusal by the court to address the important issues confronting it by strict adherence to the common enemy doctrine.

There is a general omission of the relevant facts in the majority opinion of Argyelan as well as a failure to discuss current changes. The retaining wall, constructed by the defendant caused the water to diffuse before entering and flooding the plaintiff's property. The court then rationalizes that because the water was not concentrated, the wrong was not actionable. Argyelan adds support to the argument that cases turn on mere semantics. See supra notes 112-14 and accompanying text. It appears that though water flowing over a retaining wall “diffuses” the water, and may not amount to a “cast” or “throw” it is surely a “pour,” since pour is defined as flowing in a “stream.” This leads directly back to the initial problem of semantics to determine what will constitute a stream. The important issue however, is that the damage which resulted from the overflow was both substantial and unnecessary regardless of its label.

139. The courts elaborate reasoning for the continued application of the common enemy rule in spite of the particularly inequitable situation before the court included the following: “Though the common enemy doctrine inflicts hardships, it is as fair to one as the other.” Argyelan, ____ Ind. at ___, 435 N.E.2d at 977. “It has worked satisfactorily since it was adopted and it is well understood.” Id. “Someone must be given the advantage in surface water problems and if it must be someone, it may as well be the owner at the top of the hill.” Id. “The rule of reasonable use is flexible, but unpredictable, and the fact that a majority of states have adopted the rule is not proof that their way is better.” Id. at ___, 435 N.E.2d at 976.

140. First, the court contradicts itself in saying the rule is as fair to one as another and then conceding that the upper owner has the advantage over the lower. Examination of the case law discloses two consistent losers, the lower owner and the private property owner. It is also obvious that the common enemy rule is neither well understood nor satisfactorily applied. It is difficult to ascertain what rule is being applied, there is no clear definition of surface water, and the collection and discharge modification is ambiguous. The case law has been in a constant state of confusion since 1861. The common enemy doctrine has the potential for being both inflexible and unpredictable. Surely, the adoption of the rule of reasonable use by twenty jurisdictions further indicates its viability. If nothing else, it is a clear indication of dissatisfaction with both the common enemy and civil law doctrines.

141. The plaintiffs purchased their lot in 1948 and invested much time, money and effort into improving the property and maintaining the yard. In 1970 the defendant purchased his lot for commercial purposes. Prior to the alteration of the surface, the plaintiffs experienced no flooding. Furthermore, as the plaintiff's owned their property for twenty-two years, the discharge of surface water onto their lot amounted to an interference with a prior and existing use of property. Because of the eventual flooding over $7,500.00 worth of damages occurred. Antiques stored within the garage were damaged, the garage floor cracked from uneven settling, water rot occurred around the base of the garage, the floor of the utility shed was ruined, the driveway eroded, and the plaintiffs lost the use and enjoyment of their yard. Nonetheless, the damages were labeled merely incidental and liability denied.
affecting surface water law. It is apparent from the facts that a residential owner shared in the expense of another's commercial gain, while there is no reciprocal “public benefit” to either the plaintiff or the public in general. Subsidizing such private commercial gain appears violative of public policy. Nor does the court recognize changes which have transpired in land development since the formation of Indiana surface water laws. Such a failure is detrimental considering that over sixty-five percent (65%) of Indiana’s population is presently residing in urban areas.\(^\text{142}\) 

An equitable resolution of surface water disputes is dependent upon inquiry into all relevant facts.\(^\text{143}\) Nonetheless the Indiana Supreme Court is unwilling to fully address the issues of this particular case or the merits of the rule of reasonable use. By foregoing the opportunity to consider any facts beyond who is the “upper owner” and by refusing to acknowledge that progress may necessitate a change in law, the court is doing the public a disservice. The court's failure to recognize the need for change, coupled with its recent interpretation of the collection and discharge modification, reflects forbearance of equity for predictability.

The Indiana Supreme Court also declined in \textit{Argyelan} to adopt the due care modification to the common enemy rule,\(^\text{144}\) and in fact interpreted the collection and discharge modification so as to strip it of viability.\(^\text{145}\) The true irony is that Indiana courts were more likely and more willing to find a violation of the collection and discharge modification in earlier cases. Water flowing through downspouts\(^\text{146}\) and water pouring into trenches made from wagon wheels\(^\text{147}\) were found

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  \item 143. See generally Comment, \textit{Discharge Injurious to Neighbor}, \textit{supra} note 34.
  \item 144. The court stated that "although Indiana would not permit a malicious or wanton employment of one's drainage rights under the common enemy doctrine, it appears that the only limitation upon such rights that we have this far judicially recognized is that one may not collect or concentrate surface water and cast it, in a body, upon his neighbor." \textit{Argyelan}, ___ \textit{Ind. at} ___, 435 N.E.2d at 976.
  \item 145. Defendants, the owner of the commercial lot, had their roof, downspouts and general grade of the land all sloping towards the plaintiff's property. They collected the surface water into gutters and directed it through downspouts towards the plaintiff's home. After the water poured out of the downspout, yet before it entered the plaintiff's property, the water was diffused by flowing over a small retaining wall. The court rationalized that, "[t]he distinction lies in the character of the flow as it entered the adjoining property. That water was once impounded or channeled can be of no moment if it is diffused to a general flow at the point of entering adjoining land." \textit{Id}.
  \item 146. See \textit{supra} note 111 and accompanying text.
  \item 147. See \textit{supra} note 109 and accompanying text.
\end{itemize}
to constitute a violation, resulting in liability. Now, continuous flooding caused by the alteration of the surface so as to eliminate absorption and increase both the rate and quantity of the flow has been expressly approved. By limiting their inquiry to who is the upper owner and by narrowing the reach of the collection and discharge modification, the law is reduced to "might makes right." The Argyelan decision reveals the fact that the common enemy rule has outlived its usefulness and no longer comports with the realities of modern society. This fact has been recognized by other courts in Indiana.

The Indiana courts continue to apply the common enemy doctrine to surface water disputes, but its continued application is not without opposition. The appellate court in the third district has expressed its dissatisfaction with the common enemy doctrine, and advocates adoption of the rule of reasonable use. The appellate court of the first district reluctantly applied the common enemy rule to an ongoing surface water dispute in a residential area. Apparently, two districts believe equity demands departure from stare decisis. If equity demands departure from the common law, then the law should be changed. Several states, other than Indiana, have made this determination. A survey of geographically similarly situated states indicates

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148. Citing from Hunter's dissent, Argyelan, ___ Ind. at ___, 435 N.E.2d at 978. Hunter states that "the race belongs to the person who is last in time, elevates his land the highest and paves the greater portion of his lot surface." Id.

149. Weaknesses of the common enemy rule certainly outnumber its strengths. The common enemy rule does resort to "might makes right." Application of the rule prohibits a decision based upon all relevant issues. If the collection and discharge modification is not violated, the injury is labeled "incidental" and relief is denied. The determination of ultimate liability is based upon semantics. The upper owner is given the advantage, and the lower owner is protected by only the right to dam, which is not feasible in a majority of cases. A private owner is likely to pay for another's commercial gain, and the law encourages developers to forego any attempt to predict and prepare for possible drainage problems. Indiana has, in fact, legalized a very harmful nuisance.

150. See supra notes 136, 144 and infra note 199 and accompanying text.

151. See supra note 150 and accompanying text. Note also that two of the five justices on the Indiana Supreme Court advocate abandoning the common enemy rule.

152. The court in Rounds adopted the rule of reasonable use with only one justice dissenting.

153. Kramer v. Rager, ___ Ind. App., ___, 441 N.E.2d 700, 706 (1982). The majority applied the common enemy rule but noted that the record in that case revealed a continuing dispute among the landowners over drainage of surface water. Citing Justice Hunter's dissent in Argyelan with approval, the court stated that the very problem in Kramer was cited by Hunter as a major criticism of the common enemy doctrine. The problem is one arising from attempts to either drain water on adjacent property or to prevent drainage and cause water to pool.
a movement away from strict adherence to either the common enemy rule or the civil law rule.\textsuperscript{154} After an evaluation of issues similar to those which the Indiana Supreme Court failed to address in\textit{Argyelan}, courts in neighboring states have opted to modify or totally reject archaic application of surface water principles.

\textbf{SURVEY OF SURFACE WATER LAW IN NEIGHBORING STATES}

States similarly situated as Indiana have also been confronted with the surface water dilemma. A brief examination of their present status in regard to surface water laws is helpful in determining the viability of alternatives available to Indiana. The states selected for analysis were chosen merely because of their proximity to Indiana. Analysis of the law in Illinois, Ohio, Michigan and Wisconsin is representative of the manner in which other jurisdictions have chosen to deal with surface water laws.

\textit{Surface Water Law in Illinois}

Generally, Illinois adopts a modified version of the civil law rule.\textsuperscript{155} Unlike Indiana, the early case law supports the principle that if a person does a lawful act which damages the property of another, the party causing the damage is liable to make reparation commensurate to the injury.\textsuperscript{156} The supreme court in Illinois chose to reject the common enemy rule because it ignored the maxim, \textit{sic utere tuo, ut alienum non laedes}.\textsuperscript{157} The Illinois judiciary regards this maxim as the very foundation of good morals and as necessary to the preservation of peace.\textsuperscript{158}

In Illinois the farmer played the primary role in the development of surface water law, which explains the wording adopted by the courts in their good husbandry modification to the civil law rule.\textsuperscript{159} Pursuant to the good husbandry modification, the owner of the dominant (upper) estate does not have an unlimited right to increase the rate or amount of surface water runoff flowing onto the servient (lower) estate. The interference with natural drainage is limited to that which is incidental to the reasonable development of the dominant estate for agricultural purpose.\textsuperscript{160} Therefore, though the servient

\footnotesize{154. See infra notes 155, 177, 185 and accompanying texts.  
156. Stout v. McAdams, 3 Ill. 67, 69 (1839).  
157. "Use your own property in such a manner as not to injure that of another."  
estate must accept water "cast" upon it from the dominant estate, the dominant estate cannot (1) increase the flow of water onto the servient lands, (2) interfere with rights of surface water drainage, or (3) collect water in an artificial channel and cast it upon the servient estate.\(^\text{161}\)

Illinois has not been confronted with the problem of the dominant estate substantially altering its surface so as to interfere with drainage through obstruction of natural seepage. The court in dicta has stated however, that "the same principle that prevents unreasonable changes in natural lateral drainage flow should also apply to interferences with drainage through natural seepage."\(^\text{162}\) The determining factor, whether the increased flow be caused by diversion from another water shed, paving of streets, or construction of houses, is whether the act is within the policy of reasonableness which initially led to the good husbandry exception.\(^\text{163}\)

Illinois provides additional protection for its residents against harsh results in surface water disputes. Though good husbandry was cited as a controlling factor under Indiana law,\(^\text{164}\) the two states approach the issue differently. First, Illinois provides greater protection by permitting the lower courts to determine the reasonableness of certain questionable conduct. Secondly, Illinois permits recovery when the lawful act results in injury. Finally, there are more restrictions placed upon the upper landowner in Illinois than are present in Indiana. Had Argyelan been tried in an Illinois court, it is obvious the outcome would be substantially different.

**Michigan's Answer to Surface Water Disputes**

Like Illinois, Michigan law provides that one owning property higher in elevation has a right to discharge drainage water onto the lower lying land.\(^\text{165}\) There are however limitations placed on the actions of the dominant owner. These limitations are a mixture of the good faith modification to the civil law rule and the collection and discharge modification to the civil law rule.\(^\text{166}\) An upper landowner is liable for

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\(^{162}\) Templeton, 57 Ill. 2d at 139, 311 N.E.2d at 145.

\(^{163}\) Id. at 139, 311 N.E.2d at 146.

\(^{164}\) Gene B. Glick, 165 Ind. App. at 77, 331 N.E.2d at 31.


\(^{166}\) The "good faith" modification may be compared to the "due care" modification to the common enemy rule. See supra note 48.
intentionally grading and building downspouts which cause waters to flow in excess of the natural flowage and which formerly were absorbed on their own premises, if such water is channeled and concentrated onto the adjoining property. The good faith modification was set forth in a case involving land development where the court stated that the upper owner has the right to fill holes and avoid accumulation of water in the course of good faith improvement of his land. The owner of the dominant estate has no right, however, to cast additional waters onto the servient estate in such a way as to cause damage. Eight years later, the court qualified this statement by adding that the owner of the dominant estate may not, by changing conditions on his land, put a heavier burden on the servient estate by increasing and concentrating the volume and velocity of surface water drainage.

Analysis of both Michigan and Illinois case law is helpful in understanding the apparent confusion in Indiana as to which rule is actually being applied. The Indiana appellate court in Rounds stated that Indiana is applying both the common enemy and civil law rule to surface water disputes. The court’s analysis in Rounds is valid because Indiana subjects the upper owner to the collection and discharge modification, similar to those state utilizing the civil law rule. Yet, Indiana allows the lower owner to dam, which is permitted neither in Illinois nor Michigan. In theory, it seems that the lower owner is provided with more protection under Indiana law. But in fact, the lower owner is punished if he is unable to dam and liability is denied based upon a theory similar to contributory negligence. Because the lower owner is permitted to dam, and thereby “fight” surface water, the upper owner’s right to divert surface water is not strictly limited. The lower owner ultimately loses because often damming is prohibited by economic deficiency or is prohibited because of the lay of the land. Indiana case law permits developers to alter

169. Id. at 348, 192 N.W.2d at 674.
171. See supra notes 127-29 and accompanying text.
172. The language of the court in Weis v. City of Madison, 75 Ind. 241, 257 (1881) resembles the language of contributory negligence. There it was held that a municipality could bring its streets up to grade thereby flooding those lots below street level. The court continued by stating that the flooding of the lower lot would not have occurred had the lot been raised. Therefore, the lower owner was “punished” for not avoiding the flood water and in the end the theory of “might makes right” was applied.
the condition of the land so as to place a greater burden on the servient estate by increasing the volume and velocity of surface water drainage.\textsuperscript{173} Michigan and Illinois, on the other hand, limit the rights of the upper owner when such alterations will affect lateral drainage or drainage by natural seepage.

**Surface Water Law in Ohio**

Through the years Ohio has utilized each of the three rules without stubborn adherence to any one rule and with the best interests of its citizens in mind. Initially, the state of Ohio adopted the civil law rule to govern its surface water disputes.\textsuperscript{174} As urbanization increased, the courts retained the use of the civil law rule for rural areas and adopted the reasonable use modification to the common enemy doctrine for urban lots.\textsuperscript{175} This modification, as applied in Ohio, allowed a lower owner to divert the natural flow of surface water by raising his land so long as he proceeded in a reasonable manner.\textsuperscript{176} Eventually, the Ohio Supreme Court approved the limited application of the rule of reasonable use, as set out in the Restatement of Torts, to surface water disputes arising in an urban setting.\textsuperscript{177} Four years thereafter, the court acknowledged the confused state of surface water law in Ohio\textsuperscript{178} and chose to abandon the reasonable use modification

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\item \textsuperscript{173} The court in Glick, 165 Ind. App. at 77, 331 N.E.2d at 31, acknowledges that there is a marked increase in the *rate* of runoff for any plat of land when hard surfaces are placed thereon. Therefore, paving increases both the rate and quantity of surface water runoff. The courts in Glick and Argyelan clearly condone such extreme alterations of the surface of one's property without subsequent liability.
\item \textsuperscript{174} The civil law rule was first enunciated in Butler v. Peck, 16 Ohio 334, 342-43 (1865).
\item \textsuperscript{175} Lunsford v. Stewart, 95 Ohio App. 383, 120 N.E.2d 136 (1953).
\item \textsuperscript{176} Id. Note that the civil law rule was applied prior to the adoption of the modified version of the common enemy doctrine. Pursuant to the civil law rule, the lower owner had to accept the drainage of surface water and could not elevate his land to divert its natural flow.
\item \textsuperscript{177} Chudinsky v. City of Sylvania, 53 Ohio App. 2d 151, 155, 372 N.E.2d 611, 615-16 (1976). The court stated that:

\begin{quote}
The reasonable use rule and the rule codified in the *Restatement of Torts* concerning non-trespassing invasions of a person's interest in the use and enjoyment of his land resulting from another's interference with the flow of surface water should be applied in determining whether a municipality and private property owner are liable in damages for their actions which caused increase and acceleration in flow of surface waters beyond capacity of a natural watercourse.
\end{quote}

\textit{Id.}
\item \textsuperscript{178} The court stated that the present state of surface water law in Ohio is decidedly unclear, as it is in several other states. The court went further to state
\end{itemize}
to the common enemy rule for the more flexible rule of reasonable use. Therefore, Ohio presently applies the rule of reasonable use to all surface water disputes and no longer limits its application to disputes arising in an urban setting.

The rationale used by the Ohio court included several significant issues which the Indiana Supreme Court failed to address in Argyelan. The Ohio court acknowledged the recent trend to abandon the common enemy doctrine because it no longer comports with the realities of a modern society. Use of tort concepts, as distinguished from property concepts, allows for a clearer determination of whether liability for damage resulting from an interference with surface water should be borne by the one causing it. The court specifically stated that there is no reason why the economic cost incident to the diversion of surface water in the development of property should be borne by adjoining landowners rather than by those who engage in such projects for profit. The court reasoned that as the upper court is in a position to avoid the harm threatened to the servient estate and may do so at relatively small expense, it is only reasonable that the offending owner bear that burden. Therefore, unlike Indiana, Ohio chose the more flexible tort concepts over the rigid, but predictable, property law concepts.

Wisconsin Water Law

Wisconsin, like Ohio, has also chosen flexible tort law over adherence to the common enemy rule. Recently the Wisconsin Supreme Court adopted the rule of reasonable use. Confronted with a particularly inequitable situation, the court noted that only the


179. It appears from McGloshan that the court will now apply the rule of reasonable use both in rural and urban settings, as the court said: “Since we believe such an analysis is more likely to provide both flexibility and certainty than any other property based doctrines, this court therefore adopts a reasonable use rule to be used in resolving surface water controversies.” Id.

180. Chudinsky, 53 Ohio App. 2d at 155, 372 N.E.2d at 615.


182. Id.

183. State v. Deetz, 66 Wis. 2d 1, 224 N.W.2d 407 (1974).

184. The facts in Deetz are as follows: the defendants purchased property upon a bluff overlooking Lake Wisconsin, upon which they began development of a residential subdivision. Prior to development the bluff was used for pasture and because of

http://scholar.valpo.edu/vulr/vol18/iss2/7
common enemy rule stood in the way of the state's efforts to secure an injunction against further damage to one of the state's natural resources. The court condemned the draconian application of the common enemy rule in the past, deciding to over-rule the doctrine as it had outlived its usefulness. The Wisconsin courts thus adopted the rule of reasonable use and the Restatement of Torts to govern all future surface water disputes. As the adoption of the rule is prospective only, the court was forced to apply the common enemy doctrine to a dispute arising prior to the adoption of the reasonable use rule. Application of the common enemy doctrine in that dispute mandated a finding of no liability, and the court expressed no great enthusiasm for enforcing the inequitable result dictated by the archaic law.

Wisconsin prompted by the many inequities which accompany application of the common enemy rule, chose to discard it for a more flexible rule. Therefore, as "the attitudes of men shape the attitudes of judges," the Wisconsin judiciary acted in the best interest of its residents by abandoning the common enemy rule. This brief examination of Wisconsin's surface water law, and the laws of Indiana's other neighboring states, emphasizes the need for Indiana to modify its common law and offers an example to Indiana of the alternatives available.

VIABLE ALTERNATIVES AVAILABLE TO CHANGE THE STATUS OF INDIANA SURFACE WATER LAW

Correctly understood and judicially applied, the law should protect a property owner's right to the reasonable use and enjoyment of his property. The prevailing surface water law in Indiana does not provide this protection to its residents. There are several alternatives to remedy the situation presently facing Indiana pro-

natural seepage, no surface water ran down the bluff. As soon as development began, erosion and runoff increased to the point of destroying the navigability of the lake due to the formation of sand deltas. Application of the common enemy doctrine legalized the destruction of the land and lake below by the "man at the top of the hill." 186 Id. at 4-5, 224 N.W.2d at 410-11.

185. Id. at 5, 224 N.W.2d at 411.
186. Ironically, the court in Deetz condemned the past application of the common enemy rule in a situation very much like Argyelan. Id. at 6, 224, N.W.2d at 412.
187. Getka v. Lader, 71 Wis. 2d 237, 238 N.W.2d 87 (1976).
188. Id. at 242, 238 N.W.2d at 92.
189. Shaffer, supra note 30, at 75.
190. Kinyon and McClure, supra note 2, at 907.
191. Alternatives available include but are not limited to the following: (1) adoption of the rule of reasonable use, see infra notes 203-205 and accompanying text; (2) utilization of nuisance law, see infra notes 198-201 and accompanying text; (3) adopt
property owners, although only three of these appear to provide the measure of protection Indiana residents deserve. Each alternative offers a solution to the inequitable situations arising from the continued application of the common enemy doctrine in its present form. A change or modification of Indiana common law needs to be effected immediately. Perhaps the most convenient change, though not the most effective, would be the adoption of a reasonable use modification to the common enemy doctrine.

Modification of Prevailing Surface Water Law

Currently, Indiana residents have the right to fight surface water. The upper owner may divert the natural flow of surface water and the lower owner may dam against the water draining onto his property. The right to fight is limited only by the collection and discharge modification. This modification forbids the upper owner to collect water in a body and cast it onto a lower lot, but it fails to adequately protect the rights of Indiana's property owners. Adoption of the reasonable use modification to the common enemy doctrine will provide added protection against inequitable results in surface water disputes. Modifying the common enemy doctrine with a reasonable use modification will impose liability upon a landowner who maliciously or negligently diverts the flow of surface water to the detriment of an adjoining landowner. Adoption of both the collection and discharge modification and the reasonable use modification will place limitations on the actions of the upper owner and the lower owner. The upper owner may always drain surface water from his land except that he may never collect it in a channel and cast it onto the adjoining land. The lower owner may always obstruct the flow of water onto his land, as long as he acts reasonably. Adoption of the reasonable use modification will offer Indiana's property owner more protection than is currently being provided under the common enemy rule. It is

the reasonable use modification to the common enemy doctrine, see infra notes 192-95 and accompanying text; (4) adopt a reasonable use modification to the civil law rule, see supra notes 23-27, 48 and accompanying text; (5) parol license, requiring a license or contract before diversion of surface water is permitted is a viable alternative under certain circumstances. In that case valuable consideration is given for the right to drain surface water onto another's property. See generally Ferguson v. Spencer, 127 Ind. 66, 25 N.E. 1035 (1890); (6) trespass, a physical invasion of one's property by wrongfully diverted surface waters could result in a trespass. See generally Connor, 126 Ind. 85, 25 N.E. 876.

193. See supra note 48 and accompanying text.
194. See supra note 48 and accompanying text.
debatable, however, whether adoption of this modification will offer sufficient protection.

The reasonable use modification to the common enemy rule is a solution to surface water disputes in urban areas. Nevertheless, adoption of this modification also has its drawbacks: absent negligence or malice, the common enemy rule is automatically invoked. Therefore, it is quite possible that in some cases the court will be forced to strictly apply the common enemy doctrine, despite an inequitable outcome. Furthermore, such a modification would afford more protection to the upper owner than the lower, but it is the latter who is most likely to be injured and thus deserves protection. The upper owner is allowed to divert surface water if he does so reasonably, and the lower owner is allowed to dam against that surface water if he does so in a non-negligent manner. Unfortunately, this does not benefit a lower owner who is not able to dam. This fact coupled with the conduct of developers already found by the courts to be reasonable, strip this alternative of its potential effectiveness.

Treatment of Surface Water as a Nuisance

Application of nuisance law to surface water disputes is another alternative to the common enemy doctrine. The present law in Indiana legalizes the diversion of surface water except as limited by the collection and discharge modification. Because it is not a nuisance to do that which the law authorizes, rarely will a cause of action be supported on a theory of nuisance. There exists, however, a nuisance statute which could easily apply to surface water disputes.

197. See supra notes 119-20 and accompanying text.
198. City of North Vernon v. Voegler, 103 Ind. 314, 327 (1885).
199. The court did find a nuisance when a violation of the collection discharge modification occurred in Patoka Twp. v. Hopkins, 131 Ind. 142, 30 N.E. 896 (1892); and Reed v. Cheney, 111 Ind. 387, 12 N.E. 717 (1887). In Smith v. Atkinson, 133 Ind. App. 430, 180 N.E.2d 542 (1962), the court considered as a "well reasoned brief" one based upon the theory that a landowner could alter the natural condition of his land so as to concentrate and increase the discharge of surface water by artificial means onto adjoining property and thereby create a nuisance. There was not, however, enough evidence to uphold a theory of nuisance based on the increase in the flow of surface water. Since that time, the court in both Glick and Argyelan have allowed rather severe alterations in the natural condition of a property's surface without finding a nuisance or liability. The court in Argyelan, as is pointed out by the dissent in Gilmer, refused to address the potential application of the nuisance statute as providing a theory upon which to affirm the trial court's finding. See supra note 137.
The nuisance statute states that "whatever is injurious to health, or indecent, or offensive to the senses, or an obstruction to the free use of property, so as essentially to interfere with the comfortable enjoyment of life or property, is a nuisance and the subject of an action." Consequently, if it were not for the judicially created common enemy rule, many surface water disputes could be governed by this nuisance statute. Surface water, considered a "nuisance" under the common enemy rule, is ironically excluded from the purview of nuisance law. Inclusion of surface water law within the ambit of the nuisance statute would allow a cause of action in those instances where the common enemy doctrine provides none.

**Rule of Reasonable Use**

The most obvious, and certainly the most effective choice available to the courts for protection of a property owner is the adoption of the rule of reasonable use. The rule of reasonable use permits a case by case analysis according to what is just and reasonable under the circumstances. Application of this rule protects the rights of both the upper and lower owner to reasonable use and enjoyment of their property. Each owner is able to dispose of unwanted surface water subject to the principle "sic utere tuo ut alienum non laedas."

Application of the rule of reasonable use is simplified by consecutive incorporation of specific sections of the Restatement of Torts. Adoption of the principles set forth in the Restatement injects predictability in the application of the reasonable use rule. Standards used to judge the reasonableness of certain conduct are clearly


201. In *Gilmer* the dissent notes that the court in *Argyelan* authorized a landlord to alter his property in a manner which causes surface water to stand in "unusual quantities" upon adjacent property. The dissent goes on to reason that this leaves the trial court facing two conflicting rules, one of legislative origin (nuisance law) and one of judicial origin (common enemy rule). *Gilmer* ___ Ind. at ___. 439 N.E.2d at 1358.

202. In *Butler*, 115 R.I. 264, 341 A.2d 735 (1976); Annot. 93 A.L.R.3d 1183, 1190, n.6, the court recognizes that the invasion of one's property by surface water can be a nuisance, no different from an invasion by noise, noxious vapor, or the like. Indiana has acknowledged that injury to health or senses is not the sole basis of the nuisance statute. *Yeager & Sullivan, Inc. v. O'Neill*, 163 Ind. App. 466, 324 N.E.2d 846 (1975).

203. "Use your own property in such a manner as not to injure that of another." Comment, *Discharge Injurious to Neighbor*, supra note 34, at 284.

204. Most states which adopt the rule of reasonable use adopt *RESTATEMENT OF TORTS (SECOND)* § 822-33.
set forth in the Restatement. Upon its initial adoption, the rule may provide little predictability as to the outcome in a particular instance. Over time, however, the rule will afford both the flexibility and predictability necessary for proper resolution of surface water disputes. Predictability can be acquired by either legislative enactment or as a result of a series of judicial decisions while flexibility is inherent in the rule itself. The rule of reasonable use permits a just balancing of the competing interests of property owners. Therefore, both common well-being and social progress are better served by utilization of the rule of reasonable use. Though three viable alternatives exist which would improve the present status of Indiana surface water law, neither the judicial branch nor the legislative branch have taken the initial step to promote change.

An acknowledged function of both the judiciary and the legislature includes the power to abrogate or modify common law rights and remedies. Therefore, either branch is capable of initiating the adoption of a viable alternative to continued application of the common enemy rule in Indiana. The Indiana Supreme Court recently declined to adopt any of the three alternatives discussed previously, though an opportunity existed for such modification. In fact, the judicial branch has suggested that if a change is to occur, it must be initiated by the legislative branch. Regardless of which branch provides the impetus for change in Indiana surface water law, the time for such change is now.

CONCLUSION

Diverting surface water is a necessity in a developing society. Damages inevitably arise, however, when surface water is diverted from the land of one property owner onto the land of another. The manner in which damages will be assessed and liability ascertained depends primarily upon the surface water law applied. Analysis of

205. Restatement of Torts (Second) § 826, comment d, 243. For example, predictability may be enhanced by establishing a rule of law stating that certain types of interference with residential use of land in a residential neighborhood constitute an unreasonable invasion when the interference is caused by a business enterprise.


207. See supra notes 136, 144, 199 and accompanying text.

208. See generally Rounds Ind. App. at ___, 428 N.E.2d at 1318; Argyelan, Ind. at ___, 435 N.E.2d at 977; in which those justices adverse to change, state that it is for the legislature to establish procedures for change and that the courts cannot be a barometer for public opinion.
the three basic doctrines governing surface water disputes, the common enemy rule, the civil law rule and the rule of reasonable use, reveals that each rule has its own strengths and weaknesses. It is alleged by several commentators that, despite the strengths inherent in both the civil law and common enemy doctrines, the rule of reasonable use is most adoptable to a modern society. The reasonable use rule is favored because all relevant factors involved in surface water disputes are considered by the courts, thereby minimizing the probability of an exceptionally inequitable judgment.

Indiana decided to utilize the common enemy doctrine in surface water disputes as early as 1878. Therefore, Indiana residents have the "right to fight" surface water by using any available means, limited only by the fact that an upper owner may not collect water in a body and cast it onto the property below. This single modification does not adequately protect Indiana residents from inequitable judgments arising from strict application of the common enemy doctrine. Foregoing a timely opportunity to adopt the rule of reasonable use as the law governing surface water disputes in Indiana, the supreme court recently elected to continue utilization of the common enemy doctrine. This decision was made in spite of the fact that application of the common enemy rule frequently mandates unjust results. The Indiana Supreme Court has chosen to ignore the trend in surrounding states to abandon rigid property concepts for a more flexible approach to drainage problems arising from modern land development. This rigid adherence by the judiciary to archaic principles of surface water law is a signal for the legislature to initiate change. Therefore, the legislative branch should select an alternative approach to surface water disputes. It is in the best interest of Indiana residents that the alternative selected be the rule of reasonable use.

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