

## Surface Water Drainage Rights

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Surface water drainage is undoubtedly important to agricultural landowners. Long ago, Ohio law prohibited landowners from interfering with the natural flow of surface water from property. Over time, our courts recognized that some alterations of surface water drainage were necessary to develop land. But how much change in drainage is too much? In this bulletin, we explain the legal doctrine that addresses the right to affect surface water drainage—the doctrine of “reasonable use.”

### The “reasonable use” doctrine for surface water

At one time, the law treated surface water as a “common enemy” to Ohio landowners. Owners had an unbridled legal right to rid their property of the surface water enemy, regardless of any damage the water caused to other lands. The landowner that received the surface water then had the same right to send it on to other landowners. That law has changed over the years, and Ohio now abides by the doctrine of “reasonable use” of surface waters. The reasonable use doctrine allows a landowner to drain surface water from the property, but only to the point that the drainage is reasonable. If the drainage becomes unreasonable, the landowner could be liable for resulting harm to another property.

The Ohio Supreme Court established the reasonable use doctrine in 1980 in a case that involved a drainage dispute. The case of *McGlashan v. Spade Rockledge* involved a large construction project that changed the drainage patterns on a property. A heavy rainfall occurred before the new drainage

system had been installed, causing a significant increase in the amount of surface water flowing onto surrounding properties. Flooding of nearby homes occurred, as well as property damage caused by vegetation, rocks and other debris carried off the property. The Supreme Court decided that fairness required Ohio to adopt the law already in place in many other states—the doctrine of reasonable use.

The Supreme Court explained the reasonable use doctrine as follows:

“A possessor of land is not unqualifiedly privileged to deal with surface water as he pleases, nor is he absolutely prohibited from interfering with the natural flow of surface waters to the detriment of others. Each possessor is legally privileged to make a reasonable use of his land, even though the flow of surface waters is altered thereby and causes some harm to others. He incurs liability only when his harmful interference with the flow of surface water is unreasonable.” *McGlashan v. Spade Rockledge Corp.*, 62 Ohio St. 2d 55 (1980).

The effect of the new law was to establish guidelines on the acceptability of a change in surface water drainage. If a land use or drainage change causes unreasonable harm to another, then that alteration may not be legally acceptable and the property owner who made the change can be held liable for its damage. Simply stated, a landowner’s effect on of surface water drainage must be reasonable and may not unreasonably interfere with another property.

### What’s reasonable or unreasonable?

An important element of the reasonable use doctrine is defining which land and drainage uses are reasonable and which unreasonably interfere with

other properties. The determination of reasonableness is made on a case-by-case basis by a court or jury, using guidelines from the Restatement of Torts that balance the gravity of the harm caused against the need and usefulness of the land use and drainage alteration. Factors for determining “reasonableness” include:

- *Utility of the use.* What are the purpose, suitability, economic values and social values of the land use or drainage use that is affecting other surface water drainage?
- *Gravity of the harm.* How serious and detrimental is the harm caused by the drainage to other properties?
- *Practicality of avoiding harm.* How practical is it to provide an alternative land or drainage use that would result in less harm to other properties?
- *Justice.* How unfair is it to require other landowners to bear the losses caused by the drainage interference?

The intended result of the application of these factors is that when a land or drainage use has little utility, is not suited to the area, causes extensive harm to other properties and could be practically remedied to avoid such harm, then such a use would likely be deemed “unreasonable” and in violation of Ohio’s reasonable use doctrine for surface water drainage.

### **Remedies for drainage harm**

If one landowner is causing unreasonable harm to another property because of surface water drainage, the preferred remedy would be for the landowners to agree upon a way to prevent or reduce the extent of the harm. Alternatively, landowners have the option of working with the county Soil and Water Conservation District or county engineer’s office to file a petition for a drainage improvement project that would accommodate the drainage need. Landowners within the area benefitted by the project would pay for the drainage improvements through property assessments.

Sometimes a landowner refuses to address a drainage problem, however. In such cases, the

affected landowner has the option of pursuing a negligence cause of action. “Negligence” is a legal claim that allows a party to prove that he or she is suffering an injury because a party is violating a legal duty. For drainage, the legal duty at issue is the duty to abide by the reasonable use doctrine for surface water drainage. A violation of the duty to drain surface water reasonably that causes harm to another can be deemed “negligence” by a judge or jury. The negligent party would then be legally liable for the damages resulting from the negligent acts.

If damages from the drainage use are extensive, the assistance of an attorney may be necessary. A common strategy for an attorney to use would be to send a “demand letter” to the person who is causing the drainage problem. The attorney would explain the legal duty of reasonable use, assert how the party is violating the duty of reasonable use, and make a demand for resolution of the drainage problem. A demand letter can be an effective method for urging the offending party to take action. If such action does not occur, the next step would be to file a negligence claim.

Note that if the estimated damages from a drainage use are \$6,000 or less, a party may choose to file a claim in the small claims division of the county court. Small claims court is a simpler forum for resolving minor disputes quickly and inexpensively, and parties often represent themselves without involving attorneys. Check with the county court for more information about the local small claims court.

### **Where to find Ohio laws**

Find Ohio court cases on the doctrine of reasonable use on the Ohio Supreme Court’s website at <https://www.supremecourt.ohio.gov/ROD/docs/>.

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