

Brief Summary of Drainage Law

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The "Civil Rule"

In South Dakota law the "civil rule of drainage" applies. The "civil rule" is similar to other states and was developed over the course of years through court cases. Under this rule, the person draining diffused surface water from one parcel of agricultural land to another cannot cause "unreasonable injury" to neighboring land (like creating new ponds or rendering property unusable when it was previously useable in similar years). This rule permits not only natural drainage, but also discharge of water to lower property through manmade drains like tile and open channels, so long as the water generally follows the path that it would naturally flow and carries water to an established watercourse, natural pond, or into a drain along a public highway (with the consent of the body maintaining the highway). Courts resolved disputes by looking at each case in light of these general considerations.

The 1985 Changes

In 1985, the drainage "civil rule" was summarized in state statutes. The following provision applies to all agricultural drainage:

46A-10A-70. Permissible drainage of land. Subject to any official controls pursuant to this chapter and chapter 46A-11, owners of land may drain the land in the general course of natural drainage by constructing open or covered drains and discharging the water into any natural watercourse, into any established watercourse or into any natural depression whereby the water will be carried into a natural watercourse, into an established watercourse or into a drain on a public highway, conditioned on consent of the board having supervision of the

highway. If such drainage is wholly upon an owner's land, he is not liable in damages to any person. Nothing in this section affects the rights or liabilities of landowners in respect to running waters or streams.

The 1985 law also granted counties significant authority, including the ability to develop a comprehensive drainage plan, to develop county sponsored projects, to undertake a permit system, and to resolve disputes between landowners. SDCL ch. 46A-10A. In response to this law, some counties have required permits for agricultural drainage. Counties have authority, but are not required to, convene boards to conduct judicial type hearings to resolve drainage disputes.

The "civil rule" including SDCL 46-10A-20, provides guidelines for counties, but additional guidelines are in SDCL 46A-10A-70 which provides as follows:

SDCL 46A-10A-20. Legal controls. Official controls instituted by a board may include specific ordinances, resolutions, orders, regulations, or other such legal controls pertaining to other elements incorporated in a drainage plan, project, or area or establishing standards and procedures to be employed toward drainage management. Any such ordinances, resolutions, regulations, or controls shall embody the basic principle that any rural land which drains onto other rural land has a right to continue such drainage if:

- (1) The land receiving the drainage remains rural in character;
- (2) The land being drained is used in a reasonable manner;
- (3) The drainage creates no unreasonable hardship or injury to the owner of the land receiving the drainage;
- (4) The drainage is natural and occurs by means of a natural water course or established water course;
- (5) The owner of the land being drained does not substantially alter on a permanent basis the course of flow, the amount of flow, or the time of flow from that which would occur; and

(6) No other feasible alternative drainage system is available that will produce less harm without substantially greater cost to the owner of the land being drained.

Such provisions do not necessarily apply within municipalities, but if a municipality drains water onto rural lands lying outside the boundaries of the municipality, the municipality is subject to the above provisions, if adopted by the board.

The foregoing county authority is discretionary. In other words counties are not required to resolve drainage disputes among private parties or to plan and install drainage projects, but they may do so.

County Roads.

Counties have a nondiscretionary duty to address water flows as they apply to county highways. In maintaining county roads, the counties must "reasonably accommodate the area's natural drainage." *Linda S. Sorenson Revocable Trust, et.al v. Sommervold*, 2005 S.D. 33, 94 N.W.2d 266. This nondiscretionary authority may be enforced by the Courts. *Matters v. Custer County*, 538 N.W.2d 533, 535 (S.D. 1995). This duty applies not only to the flows of diffused surface water through agricultural lands, but also to water flows in general including river channels and the like.

The specific manner in which a county deals with water flows is discretionary and courts generally cannot compel performance in any particular manner and are to determine only whether the method reasonably accommodates natural drainage.

Townships.

Like counties, township roads must accommodate water flows. The South Dakota Supreme Court has held that because "a road may alter the natural flow of surface water, townships are obliged to reasonably accommodate the area's natural drainage." *Knodel v. Kassel Tp.*, 1998 S.D. 73, ¶ 14, 581 N.W.2d 504, 509. The duty was explained more fully as follows:

It is the duty of highway authorities to place openings in highway grades so as to permit surface water to escape in its natural course from the higher to the lower lands. An injunction will lie to restrain highway officials from so improving a highway as to divert water from its course of natural drainage and

cause it to flow upon [a property owner's] land in an unusual and unnatural manner.

This duty applies not only to the flows of diffused surface water through agricultural lands, but also to water flows in general including river channels and the like.

Townships can be required, through court action, to maintain roads (and provide for water flows), but courts "may not dictate the details" since the particular method is up to the discretion of the township. *Willoughby v. Grim*, 1998 S.D. 68, ¶¶ 10-11, 581 N.W.2d 165, 168-169. For example, in *Willoughby*, the landowners lived at the end of a gravel township highway. After it rained, the road would turn into gumbo, and mud would fill the ditches, plug culverts, and make the road nearly impassable. The trial court issued a writ ordering the township to remedy the problem in certain specific ways. The state Supreme Court held that the trial court was correct in requiring the township to fix the issue, but incorrect in ordering how the road should be repaired.

Further, if a road does not reasonably accommodate the area's natural flows, the township could arguably be responsible to pay monetary damages for property that is damaged.

In addition, SDCL ch.31-14 addresses criteria for installation and maintenance of culverts and bridges. This includes annual culvert inspections (SDCL 31-14-33). When the culverts or bridges involve an opening of more than sixteen square feet, the County is to be involved. SDCL 31-14-27; South Dakota Attorney General Opinion 90-20.

Finally, townships have authority to create highway drainage ditches on private property if necessary to maintain roads. SDCL ch. 31-21. A petition and hearing are required and landowners must be compensated for the opening of a ditch through their land if any damages occur. *Id.* Once the ditch is constructed by the township, persons obstructing the ditches may be liable for double the damages. SDCL 31-21-12.

Cities and Towns.

For urban drainage among private landowners, the "reasonable use" rule applies. This rule was developed over the course of years through court determinations. Under this "reasonable use" rule, a business or landowner may make reasonable use of property, even though the flow of water is altered and causes some harm to others. The landowner is liable to others "when his harmful interference with the flow of surface waters is

unreasonable." Factors to look at in deciding whether the flow is "unreasonable" are (1) the respective uses of land and drainage water;(2)topography;(3) volume and direction of drainage;(4) consequences of drainage;(5) effects of the changes such as grading, hard surfaces, and artificial drains;(6) alternatives; and(7) avoidance of unnecessary injury.

Drainage disputes between private landowners may implicate city ordinances or may be resolved in the courts.

State Authority.

If the effectiveness of county drainage activity or official controls depends on cooperative action by two or more counties and they are unable to agree, the matter may be taken before the South Dakota Water Management Board for dispute resolution. 46A-10A-9.1. The proper place to make such inquiries is with the Water Rights Program in the DENR, the part of state government that provides services to the Board.

The Water Rights Program may also be of some assistance to counties in general advisory role, depending on staff availability. SDCL 46A-10A-64. The State may charge a fee for that service. The Water Rights program does not,however, have direct authority over county drainage matters. For example, they are not able to handle drainage disputes between landowners even if the county is unable to resolve the dispute or even if the landowner believes the county has erred. In such cases, landowners wanting to further their case would need to proceed in court against their neighbor.

On the other hand, the Water Rights Program does have authority over excess water flows in defined bodies of water, like creeks, rivers and lakes. It is illegal to build levees, dikes, dams or otherwise obstruct the stage, level, or flow of such waters without a permit. SDCL 46-5-1.1.

The Water Rights Program processes permit applications for flood control projects and those applications are ultimately brought before the Water Management Board. Examples of recent state authorized flood control projects are the structures at Brown's Valley and the upgrade in levees in Sioux Falls. Flood control permits are issued only if 1)the project will reduce the damage from flooding or erosion in the area proposed to be benefited, 2)the project will not increase the likelihood or severity of flood damages in areas other than the project area or the area proposed to be benefited, 3)the project will not endanger human life or property and 4)the project will not impair

existing water rights, except to the extent that such rights are extinguished or compensated through agreement or eminent domain. SDCL 46-5-47; SDCL 46-2A-11. Temporary permits are allowed for emergency situations and would last for one season or less. SDCL 46-5-48.

South Dakota's dam safety requirements are also administered by the Water Rights Program.

The State also issues permits for irrigation projects and other beneficial uses of water, including storage of water in dams for such uses.

Federal Authority.

Regardless of whether landowners obtain state or county permits, they may also need to deal with federal authorities. USDA Swampbuster provisions prohibit farmers from draining highly erodible land unless the drainage occurred prior to 1985 and the land continues to be used in agriculture. A farmer's USDA benefits could be withheld for violations.

The Army Corps of Engineers and/or EPA may also be involved if the activity involves placement of soil or other material in waterways under federal jurisdiction.

A major aspect of the Corps Regulatory program is determining which areas qualify for protection as wetlands. In reaching these decisions, the Corps uses its 1987 Wetland Delineation Manual (available on its website). In making decisions on permits, District commanders must consider "all factors in the public interest," including economic development and environmental protection. Numerous relatively minor activities in wetlands are covered by regional or nationwide general permits, allowing the regulatory staff to concentrate on more complex cases. The current nationwide permits will expire in 2012.

The EPA also has authority. The Corps and EPA have a joint system where the Corps initially determines if the federal government has jurisdiction and issues any required permits for putting fill in waterways, but the EPA has authority over pollution. Both agencies have authority to impose heavy fines for violations of their regulations.

References:

A Review of Drainage Law, Harold Deering Jr. and Diane Best (Office of Attorney General 2005)(Available on the South Dakota Department of Agriculture website. www.sdda.sd.gov)

South Dakota Codified Laws-County Drainage

<http://legis.state.sd.us/statutes/TitleList.aspx>

Click on Title 46A for a list of water management laws. Then click on chapter 10A to view state laws on county drainage.

South Dakota Codified Laws-Water Rights Program

<http://legis.state.sd.us/statutes/TitleList.aspx>

Click on Title 46 for a list of water rights laws. Then click on chapter 2A or chapter 5 to view the laws discussed above.

South Dakota Administrative Rules-Dam Safety

<http://legis.state.sd.us/rules/DisplayRule.aspx?Rule=74:02>

USDA Swampbuster Q&A

<http://www.nrcs.usda.gov/programs/compliance/WC-files/SWAMP-Q&As-2005.pdf>

Corps of Engineers Regulatory Program

http://www.usace.army.mil/CECW/Pages/ww_reg_permit.aspx

Corps of Engineers Nationwide Permits

72 FR 11092 or

<http://www.spn.usace.army.mil/regulatory/nwp.html#NWPlist>

EPA/Corps Jurisdiction Over Wetlands

http://www.epa.gov/owow_keep/wetlands/guidance/CWAwaters.html