Drainage in South Dakota: Wetlands, *Lucas*, Watersheds, and the 1985 Drainage Legislation

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Originally published in SOUTH DAKOTA LAW REVIEW
42 S. D. L. REV. 11 (1997)

DRAINAGE IN SOUTH DAKOTA: WETLANDS, *LUCAS*, WATERSHEDS, AND THE 1985 DRAINAGE LEGISLATION

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The authors are grateful for the aid of their colleague John F. Hagemann and the research of students Palma S. Repole and Ronald A. Parsons.

I. INTRODUCTION

Several events make it worthwhile to revisit South Dakota's common law of "diffused surface waters," or "drainage," as it is more commonly described. The first event occurred in 1985 when the South Dakota Legislature enacted what appeared to be a comprehensive revision of its system of drainage regulation. That enactment is far-ranging, and portions of it may put the legislative definitions of drainage rights and obligations at odds with those which have been developed by the State's common law courts in a line of consistent decisions tracing from statehood.

The second event is the 1992 decision of the Supreme Court of the United States in *Lucas v. South Carolina Coastal Council.*[1] *Lucas* involved an appeal from a South Carolina Supreme Court decision which held that a property owner who has been subjected to a regulation which diminishes the value of his property by one hundred percent does not suffer a taking if the purpose of the regulation is to prevent serious public harm and it is reasonably calculated to reduce the harm.[2] The Supreme Court of the United States reversed in an opinion delivered by Justice Scalia and joined by four other justices.[3] The Court held that prohibition of all beneficial use of land cannot be newly legislated without compensation "but must *inhere in the title itself,* in the restrictions that *background principles* of the State's law of *property and nuisance* already place upon land ownership."[4] Elaborating on this, the Court said:

> A law or decree with such an effect must, in other words, do no more than duplicate the result that could have been achieved in the courts — by adjacent landowners (or other uniquely affected persons) under the State's law of private nuisance, or by the State under its complementary power to abate nuisances that affect the public generally, or otherwise.[5]

The Court stated that the proper inquiry (at least in situations which involve a "total taking") is to analyze the degree of harm to public land and

1. 505 U.S. 1003 (1992).
2. *Id.* at 1009-10.
3. *Id.* at 1032. Justice Scalia's opinion was joined by Justices White, O'Connor, Thomas, and Chief Justice Rehnquist. *Id.* at 1005. Justice Kennedy filed a separate concurring opinion. *Id.* Justices Blackmun and Stevens each filed dissenting opinions. *Id.* Justice Souter filed a separate statement. *Id.*
4. *Id.* at 1029 (emphasis added).
5. *Id.*

resources or adjacent property with reference to state nuisance law.[6] "Where the State seeks to sustain regulation that deprives land of all economically beneficial use, we think it may resist compensation only if the logically antecedent inquiry into the nature of the owner's estate shows that the proscribed use interests were not part of his title to begin with."[7]

Lucas was initially received as friendly to property owners and as hard news for government regulation. This reception was due to the view that most controversial regulations address land uses which have not been previously viewed as nuisances.[8] *Lucas* goes further, however, when it talks of rights that "inhere in the title itself," and then specifies "property *and* nuisance."[9] If the "right" was not part of the landowner's title to begin with, there can be no claim of a property right. As summarized by Professor Sax:

> The Court in *Lucas* adopted a definitional/historical, rather than a functional, view of property. This characterization of property rights may very well lead in a direction the *Lucas* court did not intend to go. Simply stated, the *Lucas* rule says that government's right to constrain the use of property without paying compensation is limited by what it withheld from owners at the outset. Government cannot change the rules of the game after the game has started. To find the rules articulated when the game began, one is directed to historical definition.
>
> In the nuisance category, the Court's view is destined to lead to more compensation. The reason is that relatively few things were traditionally categorized as nuisances because there was relatively little governmental regulation of land. Property in water, however, is quite a different situation. Definitionally, property rights in water have been delineated in very limited terms.[10]

Controversies over regulation of private land ownership today frequently focus on wetlands, and especially on societal and governmental efforts to protect the remaining wetland resource from loss. Because many wetlands are found on privately owned land, such efforts sometimes lead landowners to claim that there is a "right" to drain or fill wetlands, and that limitation of that right is a "taking" under the *Lucas* analysis. It follows that the definition of the "right" to drain a wetland, as formulated by the common law of individual states, is a fundamental and relevant inquiry.

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6. *Id.* at 1027.

7. *Id.*

8. *See* Louise A. Halper, *Why the Nuisance Knot Can't Undo The Takings Muddle*, 28 IND. L. REV. 329 (1995).

9. *Lucas*, 505 U.S. at 1029.

10. Joseph L. Sax, *Rights That "Inhere in the Title Itself": The Impact of the Lucas Case on Western Water Law*, 26 LOY. L.A. L. REV. 943, 944 (1993). *See also* Fred P. Bosselman, *Limitations Inherent in the Title to Wetlands at Common Law*, 15 STAN. ENVTL. L.J. 247 (1996); John F. Hart, *Colonial Land Use Law and Its Significance for Modern Takings Doctrine*, 109 HARV. L. REV. 1252 (1996); William Michael Treanor, *The Original Understanding of the Takings Clause and the Political Process*, 95 COLUM. L. REV. 782 (1995); and Joseph L. Sax, *The Constitution, Property Rights and the Future of Water Law*, 61 U. COLO. L. REV. 257 (1990).

That definition is found frequently in the law of diffused surface water, or drainage, and is the subject of this paper.

Parts II, III, and IV are a casual walk through the case law which forms the substance of our common law rule. Part V is an effort to summarize some of the more important rights and limitations which emerge from the cases. Part VI provides a summary of the state legislature's effort at revision in 1985, along with some commentary and criticism.

II. THE BASIC APPROACHES

The law of water *rights* deals mostly with water that is found in rivers, lakes, or groundwater basins. Between these closely related and reasonably well understood categories we encounter the intermittent rainfall, melting snow, seepage, springs, or overflow water that may be separated from its stream source. These waters have not yet reached a clearly defined stream, lake, or aquifer. With them the relative clarity found in the law of water rights is obscured, and the law is difficult to administer. This is so despite the fact that there has been ample opportunity for judges, lawyers, and legislators to develop some predictable rules with which to control the game. Problems resulting from these "diffused surface" or "drainage" waters are as old as agriculture. Nonetheless, a drainage dispute among landowners can be more difficult to resolve in 1996 than in 1800.

Drainage may be the most commonly litigated water issue. From territorial days to the present an intricate corpus of drainage law has accumulated in South Dakota, as elsewhere.[11] This law combines judicial decision and legislation with the state constitution. In addition, it reflects American common law, agricultural custom, and formal as well as informal notions of property.

Although the law of land drainage has been developing for centuries, the fact is that the resulting legal system remains difficult to administer. The rules which have evolved are vague and rarely provide a clear basis upon which lawyers can clearly advise clients concerning future actions. Conflicts that cannot be resolved by negotiation are tried as tort or property claims. Drainage controversies frequently bring out deep and emotional responses, making negotiation an elusive option. All too frequently, parties choose inaction, an option which assures more complex physical, legal, and financial problems in the future.

Drainage law in South Dakota and most other rural states is a tangle. In this piece, it is likely that only a description of the illness will be provided, rather than a cure. "To make a superb inventory of Augean stables

11. For a detailed discussion of the principal South Dakota drainage cases, see *infra* notes 84-137 and accompanying text.

is not to cleanse them!"[12] The goal is to identify the issues that require change or clarification.

Before undertaking an examination of South Dakota doctrine, some general background may prove to be helpful. Problems of drainage law fit into three typical categories: (1) rights to capture and use diffuse surface water; (2) rights to avoid the accumulation of diffused surface water; and (3) rights of landowners to drain their property of unwanted surface waters, be they diffused or confined.[13]

Controversies over the right to *use* diffused surface water arise when landowners choose to put surface water to use rather than allow it to pass down to lower lands. The generally recognized rule is that landowners may capture or retain this water, and thus in that sense own it. These waters are not subject to water rights doctrines such as riparianism and prior appropriation, and therefore are not qualified by concepts of beneficial use or reasonableness. The principal outstanding issue in this category is whether a lower landowner may accede to rights by prescription. In addition, some states, including South Dakota, have elected to impose a special permit system on the use of certain diffused surface waters. In South Dakota this occurs with regard to what are known as "dry draws."[14]

Generally, categories two and three are the principal concern of drainage law and provide the focus for this article. With respect to these categories, several judicial approaches have achieved general recognition over time. These are introduced here for the background which they provide.

The earliest of these doctrines is the so-called "common enemy" rule, which has origins in the mid-nineteenth century. The "common enemy" rule has at one time or another been the rule in thirty jurisdictions.[15] According to this approach, a landowner may engage in any operations on his or her own land to fend off diffused surface water without regard to the impact upon other landowners. Similarly, other landowners have the same right to protect themselves as best they can.[16] As stated by a Massachusetts court in 1865:

> [T]he right of a party to the free and unfettered control of his own land above, upon and beneath the surface cannot be interfered with or restrained by any considerations of injury to others which may be occasioned by the flow of mere surface water in consequence of the lawful appropriation of land by its owner to a particular use or mode

12. Myres S. McDougal, *Future Interests Restated: Traditions Versus Clarification and Reform,* 55 HARV. L. REV. 1077, 1115 (1942).

13. WELLS A. HUTCHINS, SELECTED PROBLEMS IN WESTERN WATER LAW 3 (U.S.D.A. Misc. Pub. No. 418 (1942)). *See also* R.S. HARNSBERGER & N.W. THORSON, NEBRASKA WATER LAW AND ADMINISTRATION 155 (1984).

14. S.D.C.L. §§ 46-4-1 through 46-4-6 (1987).

15. HARNSBERGER & THORSON, *supra* note 13, at 157.

16. *Id.* For a discussion of the common enemy rule, *see* Keys v. Romley, 412 P.2d 529, 531-32 (Cal. 1966).

of enjoyment.[17]

The thinking which led to this theory is that since virtually all development results in the alteration of natural drainage patterns, the common enemy rule is essential to development.[18] The doctrine reflects notions of private property which prevailed at the mid-point of the last century.[19] Certainly, the foundation of the doctrine is the *ad coelum* maxim.[20] In its pure form, the rule was thought to encourage land development by thoroughly insulating developing landowners from liability. One theoretical rationalization, recognized by some, is that the pure common enemy rule minimized litigation because it "delineated with certainty the rights of adjoining landowners."[21]

The common enemy doctrine is followed in few jurisdictions, and those that claim it do so only nominally, qualifying it with a considerable list of exceptions and ameliorative sub-doctrines.[22] The doctrine in its pure form has been aptly described as "a withdrawal of law,"[23] and as being economically inefficient.[24] It is criticized for favoring the landowner who first improves land, leading to little more than a contest of speed or strength.[25] One description of the rule is that of "a neighborhood contest between pipes and dikes from which breach of the peace is often inevitable."[26] The idea that the common enemy doctrine encourages growth is seldom taken seriously today. Such an idea, after all, assumes that economic growth is facilitated by disorder, and that developers are not deterred by a fear that other developers might later injure their project while developing adjacent land.[27] One recent decision contains the following comment:

> It [the common enemy doctrine] is based on an exaggerated view of the notion of absolute ownership of land . . . . As a consequence of this short-sighted focus on "the due exercise of dominion over [one's] own soil," the doctrine completely ignores the fact that invasion by an unwanted and destructive volume of water might otherwise have been viewed as a classic trespass.
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> The enduring objection to the common enemy doctrine was aptly put by a member of this Court: "This is a mere reiteration of the doctrine

17. Clyde O. Martz, *Water Rights, in* VI-A AMER. LAW OF REAL PROPERTY 190 (Casner, ed. 1954) (citing Gannon v. Hargadon, 92 Mass. 106, 109 (1865)).

18. HARNSBERGER & THORSON, *supra* note 13, at 157.

19. *Id.*

20. Cujus est solum ejus est usque ad coelum (whose is the soil, his it is up to the sky).

21. D.H. Cole, *Liability Rules For Surface Water Drainage: A Simple Economic Analysis,* 12 GEO. MASON U.L. REV. 35, 38 (1990).

22. HENRY P. FARNHAM, III THE LAW OF WATERS AND WATER RIGHTS 2591-99 (1904).

23. HARNSBERGER & THORSON, *supra* note 13, at 158.

24. Cole, *supra* note 21, at 48-49.

25. Jeffrey T. Sveen, *Diffused Surface Water Law as Applied in South Dakota,* 23 S.D. L. REV. 763, 767 (1978).

26. Joseph W. Dellapenna, *The Legal Regulation of Diffused Surface Water,* 2 VILL. ENVTL. L.J. 285, 297-98 (1991) (citing R. Timothy Weston, *Gone With the Water — Drainage Rights and Storm Management in Pennsylvania,* 22 VILL. L. REV. 901, 902 (1977)).

27. *Id.* at 297.

> of '*sauve qui peut*,' or as popularly translated into our vernacular 'the devil take the hindmost.'"[28]

A second approach is referred to customarily as the civil law rule. This approach operates from a premise that landowners may not interfere with the natural flow of surface water. A lower estate is subject to a legal burden to accept surface water that naturally drains across it, although the owner of an upper estate can do nothing to increase the burden.[29] The civil law rule finds its origin in the maxim, "water runs and should run, as it is want to do by natural right."[30] Thus, in its pure form, the rule makes any diversion of surface water from its natural flow a tortious act, and is therefore diametrically opposed to the common enemy rule.[31] In its classic form the civil law rule has two sides. As stated by Farnham:

> Thus, he who has the *upper grounds* cannot change the course of the waters, either by turning it some other way, or rendering it more rapid, or making any other change in it to the prejudice of the owner of the lower grounds. Neither can he who has the lower estate do anything that may hinder his grounds from receiving the water which they ought to receive. . . .
>
> The owner of the *lower ground* is bound to receive from the higher ground the water which naturally flows down without the human hand contributing to its course. The owner of the lower ground is not permitted to make a dike to prevent such flow. The owner of the higher ground can do nothing to aggravate the servitude or easement of the lower ground.[32]

The civil law rule is restrictive and few states have been willing to pay its anti-developmental consequences; as a result, it is typically modified to admit exceptions. Such exceptions or modifications may include: (1) recognition of the upper landowners' right to accelerate the flow of diffused surface water into a natural watercourse as long as the capacity of the watercourse is not overtaxed; (2) permitting upper landowners to alter the flow of diffused surface waters provided the ultimate burden on the lower estates is not increased significantly; and (3) permitting upper landowners to reasonably modify the flow.[33] Where the damage to the lower landowners is slight, and alternative means of pursuing the development activity are few, the likelihood that the civil law rule will be qualified is greater.[34] In many states it may be said, generally, that the rule has moved toward a

28. Heins Implement Co. v. Missouri Highway & Transp. Comm'n, 859 S.W.2d 681, 688-89 (Mo. 1993) (citing Shane v. Kansas City, St. Joe & C.B. R.R. Co., 71 Mo. 237, 252 (1879)).

29. HARNSBERGER & THORSON, *supra* note 13, at 158.

30. agua currit et debet currere, ut solebat es juie naturae. *See also* Sveen, *supra* note 25, at 768.

31. *Id.* The author suggests that the title "civil law" rule is owing to an early Louisiana decision. *Id. See* Orleans Navigation Co. v. New Orleans, 2 Mart. (O.S.) 214 (La. 1812).

32. FARNHAM, *supra* note 22, at 2586-87 (emphasis added). Farnham traces his statement to the Code Napoleon.

33. HARNSBERGER & THORSON, *supra* note 13, at 159.

34. J.L. SAX ET AL., LEGAL CONTROL OF WATER RESOURCES: CASES AND MATERIALS 64 (2d ed. 1991).

"reasonable use" interpretation, whereunder a landowner has a privilege under some circumstances to alter the natural flow of surface water even though it causes the waters to flow in a different manner across downstream lands. Nonetheless, a landowner is not privileged, however, to discharge large concentrated flows of water across his neighbors property. Of course, the issue of reasonableness of a landowner's conduct becomes a question of fact to be determined upon a consideration of all the circumstances.[35]

There is at least one last problem encountered with the civil law rule. It is sometimes difficult to determine the exact course of the natural flow of diffused surface water "before the bulldozers arrived on the scene."[36] Determining the prior course of the natural flow is almost elementary, however, when compared to the problem of determining the amount and velocity of prior flows. Such difficulties in factual determinations are a basic aspect of drainage controversies.

A third general legal approach is referred to as the "reasonable use rule."[37] The rule is distinguished from the other two rules because it does not claim to recognize any specific rights or privileges with respect to surface waters. Each case is determined on its facts. Whereas the common enemy and civil law regimes are based in property law, the reasonable use doctrine is based in tort.[38] The Supreme Court of Missouri summarizes the rule this way:

> Perhaps the rule can be stated most simply to impose a duty upon any landowner in the use of his or her land not to needlessly or negligently injure by surface water adjoining lands owned by others, or in the breach thereof to pay for the resulting damages. The greatest virtue of the reasonable use standard is its ability to adapt to any set of circumstances while remaining firmly focused on the equities of the situation.
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> Some have suggested that the reasonable use rule might be too unpredictable for users of land to follow or for courts to administer. However, those fears have not materialized. Today, the overwhelming majority of American jurisdictions have either adopted the reasonable use rule outright, or have overlaid a reasonableness requirement upon the existing civil law or common enemy jurisprudence — which, in practical effect, may be a distinction without a difference.[39]

In other words, the reasonable use rule attempts to resolve diffused surface water conflicts according to tort rules of nuisance.[40]

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

36. *Heins*, 859 S.W.2d at 688 (quoting Butler v. Bruno, 341 A.2d 735, 738 (R.I. 1975)).

37. FARNHAM, *supra* note 22, at 2610-11 (providing a description of the early roots of the reasonable use rule).

38. *Heins*, 859 S.W.2d at 689.

39. *Id.* at 690.

40. The seminal writing on this is S.V. Kinyon & R.C. McClure, *Interference with Surface Waters*, 24 MINN. L. REV. 904 (1940). *See also* Sveen, *supra* note 13, at 770-73; WELLS A.

The American Law Institute has adopted the reasonable use rule.[41] Section 833 of the Restatement (Second) of Torts states that "[a]n invasion of one's interest in the use and enjoyment of land resulting from another's interference with the flow of surface water may constitute a nuisance . . . ."[42] The Restatement defines private nuisance in section 822:

> One is subject to liability for a private nuisance if, but only if, his conduct is a legal cause of an invasion of another's interest in the private use and enjoyment of land, and the invasion is either
>
> (a) intentional and unreasonable, or
>
> (b) unintentional and otherwise actionable under the rules controlling liability for negligent or reckless conduct, or for abnormally dangerous conditions or activities.[43]

Thus, the first step in the analysis is whether the conduct complained of is intentional. An act that causes an invasion is intentional if the actor acts for the purpose of causing it or knows that it is resulting from or is substantially certain to result from the actor's conduct.[44] If it is determined that an act is intentional, the next determination is whether the act is also unreasonable. The Restatement defines unreasonableness in section 826:

> An intentional invasion of another's interest in the use and enjoyment of land is unreasonable if
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> (a) the gravity of the harm outweighs the utility of the actor's conduct, or
>
> (b) the harm caused by the conduct is serious and the financial burden of compensating for this and similar harm to others would not make the continuation of the conduct not feasible.[45]

In a drainage case, intent will always be present since the actor creates a condition knowing that harm to another is substantially certain to follow. Therefore, the only question to be resolved is that of reasonableness. In balancing of the gravity of the harm versus the utility of the actor's conduct, the Restatement finds that an action is unreasonable if the harm resulting from the invasion is severe and greater than the other should be required to bear without compensation.[46] An act is also unreasonable if the actor has practical means available with which to avoid or mitigate the harm without undue hardship,[47] or if the conduct is much less well suited to the locality than is the use interfered with.[48] Significantly, the Restatement

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HUTCHINS, II WATER RIGHTS LAWS IN THE NINETEEN WESTERN STATES 555-56 (H.H. Ellis & J.P. DeBraal, eds., 1974).

41. RESTATEMENT (SECOND) OF TORTS [hereinafter Rest. 2d] § 833 (1979).

42. *Id.* *Surface water* is defined in the Restatement as "water from rain, melting snow, springs or seepage, or detached from subsiding floods, that lies or flows on the surface of the earth but does not form a part of a watercourse or lake." *Id.* § 846.

43. *Id.* § 822.

44. *Id.* § 825.

45. *Id.* § 826

46. *Id.* § 829A.

47. *Id.* § 830.

48. *Id.* § 831. Conduct is also unreasonable if the actor's conduct is "(a) for the sole purpose of causing harm to the other; or (b) contrary to common standards of decency." *Id.* § 829.

is explicit in declaring that pollution of surface water may constitute a nuisance.[49] If intent is lacking, then the conduct is a source of liability only if it was reckless, negligent, or subject to strict liability.[50]

As already indicated, individual states have developed a variety of hybrid rules, frequently mixing property and tort concepts.[51] Although each state's rule will have its unique characteristics, there is movement in favor of the reasonable use (tort) approach.[52]

III. DEFINING "SURFACE WATER" AND "WATERCOURSE"

The laws governing water and water rights generate many unusual legal categories and definitions which are frequently artificial and inconsistent. Some, for example, serve to identify the ownership of riverbeds; others serve to define the rights of the public to recreate on the water's surface. Some define constitutional authority while others define the regulation of water quality. This process of categorization is familiar stuff to property lawyers. In this outline we are necessarily interested in two such categories: "watercourse" and "surface water." Legal "watercourses" (streams and lakes) traditionally identify the waters governed by state water *rights* law, be it prior appropriation, riparian, or statutory administration. When water rights law applies, it governs whether, how, and where a proposed water *use* — such as irrigation, municipal and industrial supply, mining, or recreation — is allocated access to a supply of water. In contrast, legal "diffused surface waters" are outside the state water rights system and result in a separate set of liability and use rules which are the subject of this paper. They are usually subject to a greater degree of control by individual landowners and operators. When "diffused surface waters" enter a "watercourse" they become, at some point, public waters subject to sharing with other users by way of water rights law.[53]

The distinction between waters in a watercourse and diffused surface waters can be stated in legal terms easily enough. Diffused surface water is the " . . . run-off of precipitation before that run-off enters well defined streams and lakes."[54] The Restatement readily defines surface water to mean water "from rain, melting snow, springs or seepage, or detached from subsiding floods, that lies or flows on the surface of the earth but does not form a part of a watercourse or lake."[55] With similar ease it defines watercourse to mean "a stream of water of natural origin, flowing constantly or

49. *Id.* § 832.
50. *Id.* § 822.
51. *See, e.g.,* HARNSBERGER & THORSON, *supra* note 13, at 159-70 (describing Nebraska's hybrid rule). *See also* Nichol v. Yocum, 113 N.W.2d 195 (Neb. 1962) (applying the rule).
52. *See* Carol Rose, *Crystals and Mud in Property Law,* 40 STAN. L. REV. 577 (1988).
53. A.D. TARLOCK, LAW OF WATER RIGHTS AND RESOURCES 3-20 (1988) (noting that a person who discharges water into a "watercourse" must be attentive to permit requirements under the federal Clean Water Act).
54. SAX, *supra* note 34, at 63.
55. Rest. 2d § 846.

recurrently on the surface of the earth in a reasonably definite natural channel."[56] In 1971, Hutchins wrote with confidence:

> [O]n the whole, despite some variations, little change has apparently occurred in prevailing judicial concepts of what is basically necessary to constitute a watercourse. There is substantial agreement among the high courts as to the essential elements of a watercourse . . . (1) a definite stream of water, (2) flowing in a definite natural *channel,* and (3) originating from a definite *source or sources* of supply.[57]

In reality, however, there are numerous situations in which these tidy legal definitions provide little assistance. There are physical settings in which an area of land and water shares characteristics of both a watercourse and diffused surface water.[58] Correct categorization rests "upon their local and proprietary characteristics and depends upon the facts of each case."[59] As one recent commentator put it:

> In troublesome cases, determining whether surface water is diffused or is in a defined waterbody leaves considerable discretion in the court or with the jury, especially as expert witnesses are not necessary to establish the nature of the water. The difficulty of providing a precise and consistently applied definition reflects both the varied topography of waterbodies and the varied needs for water in different states.[60]

South Dakota decisions follow this pattern of easy legal definition and close case-by-case fact determination. A "watercourse" is one thing for drainage law, and another for water rights law.[61]

In *Thompson v. Andrews*[62] the Supreme Court of South Dakota expressly adopted a definition developed by Illinois courts:

> If the conformation of the land is such as to give to the surface water flowing from one tract to the other a fixed and determinate course, so as to uniformly discharge it upon the servient tract at a fixed and definite point, the course thus uniformly followed by the water in its flow is a water course within the meaning of the rule applicable to that subject. Doubtless such water course can exist only where there is a ravine, swale, or depression of greater or less depth, and ex-

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56. *Id.* § 841.

57. HUTCHINS, *supra* note 13, at 28-31. *See also* FARNHAM, *supra* note 22, at 2556-57. Professor Farnham states:

> [A] watercourse is a stream of water of such well-defined existence as to make its flow valuable to the owners of land along its course. . . . But, when water appears upon the surface in a diffused state, with no permanent source or supply or regular course, and then disappears by percolation or evaporation, its flow is valuable to no one, and it must be regarded as surface water and dealt with as such. . . . The chief characteristic of surface water is its inability to maintain its identity and existence as a water body.

Id.

58. TARLOCK, *supra* note 53, at 3-20.

59. Martz, *supra* note 17, at 185.

60. Dellapenna, *supra* note 26, at 290.

61. Quinn v. Chicago, Minn. & St. Paul Ry. Co., 120 N.W. 884 (S.D. 1909).

62. 165 N.W. 9 (S.D. 1917). In *Thompson,* the court stated, "The term 'watercourse' has come to have two distinct meanings; the one when referring to that watercourse in and to which riparian rights may attach, and the other when referring to that water course through which an upper landowner may discharge waters from the land." *Id.* at 11.

> tending from one tract onto the other, and so situated as to gather up the surface water falling upon the dominant tract and to conduct it along a defined course to a definite point of discharge upon the servient tract. But it does not seem to be important that the force of the water flowing from one tract to the other has not been sufficient to wear out a channel or canal having definite and well-marked sides or banks. That depends upon the nature of the soil and the force and rapidity of the flow. If the surface water in fact uniformly or habitually flows off over a given course, having reasonable limits as to width, the line of its flow is, within the meaning of the law applicable to the discharge of surface water, a water course.[63]

In *Thompson,* the upper landowner's slough was contained by a natural embankment. On the lower end there was a natural ditch which carried overflow waters off the property, while keeping slough water on the upper property at a depth of two feet. When the natural ditch was deepened by the upper landowner, a controversy arose. The court held, among other things, that the "natural swale or depression" leading to the lower land was a watercourse for purposes of applying diffused surface water rules.[64]

In *Johnson v. Metropolitan Life Insurance Co.,*[65] the facts were similar to those in *Thompson* in that the upper landowner facilitated the flow of waters over a natural embankment. The overflow waters then followed a "natural depression or watercourse" which ran through the plaintiff's land. In other words, in the case of an overflow of the slough on defendant's land, the water naturally flowed down a predictable depression. The court stated, "A natural watercourse is defined [when] . . . the surface water in fact uniformly or habitually flows off over a given course, having reasonable limits as to width, [and] the line of its flow is within the meaning of the law applicable to the discharge of surface water . . . ."[66]

Of course, if water is flowing in a "definite stream," the law of diffused surface water does not apply. In *Benson v. Cook,*[67] the South Dakota Supreme Court opined, "The term 'definite stream' implies the presence or existence of running water, with some permanent source of supply, running along a fixed channel . . . . [I]t must be something more than just a wash or runoff caused by melting snow or a heavy rain."[68] In *Gross v. Connecticut Mutual Life Insurance Co.,*[69] the court relied on section 846 of the Restatement (Second) of Torts and stated that "[s]urface waters comprehend waters from rains, springs, or melting snows which lie or flow on the surface of the earth but which do not form part of a watercourse or lake."[70] It also

63. *Id.* (quoting Lambert v. Alcorn, 33 N.E. 53 (Ill. 1893)).
64. *Id.*
65. 22 N.W.2d 737 (S.D. 1946).
66. *Id.* at 740. The court in *Johnson* purported to follow a state statute which has since been repealed and which the court found fully reflected the existing judicial rule. *Id.*
67. 201 N.W. 526 (S.D. 1924).
68. *Id.* at 528. *See also* William A. Garton, *South Dakota's System of Water Management and Its Relation to Land Use and Economic Development,* 21 S.D. L. REV. 1, 15 (1976).
69. 361 N.W.2d 259 (S.D. 1985).
70. *Id.* at 266.

stated that in order to invoke the protection of the rules of diffused surface water liability, "the waters must be drained into a watercourse or into any natural depression whereby the water will be carried into some natural watercourse."[71]

In 1985 the South Dakota Legislature enacted revisions to state drainage law, the details of which are described and analyzed later in the article. The legislation offered the following definition of "natural water course":

> [A] fixed and determinate route by which water naturally flows from one parcel of real property to another due to the conformation of the land and by which water is discharged upon the land receiving the water. It is not necessary that the force of the flow of water be sufficient to form a channel having a well-defined bed or banks.[72]

While there is no legislative history to support the statement, it is clear that this definition is substantially equivalent to the definitions developed by the court in *Johnson* and its progeny. Similarly, the definition also leaves many difficult questions unanswered, some of which will now be mentioned.

One particular issue is that of identifying the point at which diffused surface water changes its character and becomes part of a definite stream or lake. In *Terry v. Heppner,*[73] the plaintiff objected to the defendant's damming of a small stream of water and impounding and collecting the water so as to deprive the plaintiff of the flow of water to which he had been accustomed. It was admitted at trial that the "source of the waters of Plum Creek [was] mere surface water arising from the natural drainage of melting snow, rain, etc., over a considerable area."[74] Among other things, the court addressed the question of whether the water in this case had lost its character or identity as surface water so as to give the lower landowner rights to its use under prevailing water rights doctrine. The court held for the defendants, and in its opinion observed:

> At what time water, originating as surface water, by reaching and flowing in a definite channel or natural drainway, ceases to become mere surface water, and takes on the characteristics of a definite stream, is a nice question upon which the authorities are not in harmony. . . . However, . . . it has been established as the law of this state . . . that water originating as surface water and finding its way to and flowing down a natural channel or drainway with a bed and banks . . . flowing only for comparatively brief periods of time after the melting of snow or falling of rain, retains its character as mere surface water.[75]

Here we have case-by-case fact determinations. As Hutchins notes, we are speaking of "a legal, not a physical metamorphosis,"[76] and "while this di-

71. *Id.* at 267.
72. S.D.C.L. § 46A-10A-1(15) (1987).
73. 239 N.W. 759 (S.D. 1931).
74. *Id.*
75. *Id.* at 760.
76. HUTCHINS, *supra* note 13, at 536.

viding point may be difficult to define physically, its meaning in law is definite."[77]

Another problem area is that of artificial watercourses. The Restatement (Second) of Torts excludes artificial waterways from its definition of watercourse, but recognizes that many natural watercourses have in one way or another been altered by human acts and do not thereby automatically lose their status.[78] Some degree of alteration by humans is thought to be inevitable. Again, however, the facts will determine each case.

In *Anderson v. Drake,*[79] the South Dakota Supreme Court addressed the question of whether surface water, once gathered in an artificially constructed well or basin, loses its status as surface water. The court answered this question in the affirmative, stating, "[N]o person can have a right to convert water, which was not surface water, into surface water, and then, as against third parties, claim the right to handle such water as though it had originally been surface water."[80] Thus, because the gathered water was no longer surface water, it could not be disposed of according to the laws of diffused surface water. In *Gross,*[81] an irrigation pond was filled with water from a variety of sources, including flowing artesian wells, feedlot runoff, and a feedlot settling pond. Breaching of the dam flooded plaintiffs' lower land. The court relied on the Restatement and determined:

> Surface waters comprehend waters from rains, springs, or melting snows which lie or flow on the surface of the earth but which do not form part of a watercourse or lake. *The term does not comprehend waters impounded in artificial ponds, tanks, or water mains.* The chief characteristic of surface water is its inability to maintain its identity and existence as a water body. . . .
> *The water had lost the characteristics of surface water by being contained and stored in the irrigation pond.*[82]

A more difficult factual problem is to find that point between a clearly artificial structure, such as that in *Gross,* and a completely natural runoff area. In other words, *how much* human manipulation will be tolerated before waters lose characteristics of surface water? South Dakota cases are inconsistent on this, a point which will be developed in the discussion found in Section IV.

Another important question is whether waters will retain their character as surface water when their flow is directed into a watershed that is different from that into which they would flow in nature. In *dictum,* the Supreme Court of South Dakota has said that the right to drain water does *not* extend to draining into a different watershed.[83] The underlying issue is

77. *Id.* at 536-37.
78. Rest. 2d § 841, Cmts. g & h.
79. 123 N.W. 673 (S.D. 1909).
80. *Id.* at 674.
81. 361 N.W.2d at 259.
82. *Id.* at 266-67 (citing FARNHAM, *supra* note 22, at 2557) (emphasis added).
83. *Thompson,* 165 N.W. at 12.

the same, however, as with human manipulation of the flow. This issue deals with the extent to which the rules of surface water will apply to flows that go outside of natural outlets or natural channels, exceed the capacity of natural outlets or channels, or move in directions where they would not in nature be inclined to flow.

IV. JUDICIAL DEVELOPMENT OF THE RULES GOVERNING LIABILITY FOR SURFACE WATER DRAINAGE—DEFINING THE RIGHT

A. INTRODUCTION

The most common water disputes litigated in South Dakota involve issues of drainage and diffused surface water. Approximately thirty-five appellate decisions have been reported. The doctrine which has emerged may be described as the civil law rule with reasonable use overtones. Stated another way, it appears to be somewhere between tort and property. In this section, the principal cases found along this evolutionary path are briefed.

The earliest case shows the court tempted by the common enemy rule, yet unwilling to accept its obvious consequences. *Quinn v. Chicago, Minneapolis & St. Paul Railway Co.*,[84] was a suit in negligence for damages. The defendant railroad had constructed an embankment which crossed an area draining land owned by the plaintiff, resulting in the flooding of the upper land. An award of damages was affirmed. The court first used language of the common enemy doctrine, modified by an outer limit defined in negligence. It then referred by name to the civil law rule, defined in this way:

> Every proprietor may lawfully improve his property by doing what is reasonably necessary for that purpose, and, unless guilty of some act of negligence in the manner of its execution, will not be answerable to an adjoining proprietor, although he may thereby cause the surface waters to flow on the premises of the latter to his damage.[85]

This decision is not cited in subsequent cases.

B. *BOLL V. OSTROOT*[86]

The plaintiff owned agricultural land adjacent to and below that of the defendant. A shallow slough on defendant's land formed a distinct 250-acre natural basin which gathered the drainage from two sections of land. There was a ridge on defendant's land between the slough and the boundary. There was no natural watercourse from the defendant's land extending over the plaintiff's land. Defendant dug a ditch through the ridge on his land. This ditch drained the slough and cast the water onto plain-

84. 120 N.W. at 884.
85. *Id.* at 887 (citing Association v. Peterson, 60 N.W. 373 (Neb. 1894).
86. 127 N.W. 577 (S.D. 1910).

tiff's land.[87]

The Supreme Court of South Dakota affirmed the trial court's entry of an injunction in favor of the plaintiff, holding that "[t]he owner of land on which there is a slough or reservoir of surface water cannot lawfully discharge it through an artificial channel upon the land of another to his injury."[88] The court cited Farnham for the following support:

> A landowner is not permitted to use the land of his neighbor to relieve his own land of a burden naturally resting upon it. Therefore, he cannot, in case the surface is such as to collect and hold water in ponds and marshes, dispose of it by simply turning it upon the property of his neighbor. . . . And under no circumstances can the water be removed by draining it in a direction in which it would not naturally run.[89]

C. *THOMPSON V. ANDREWS*[90]

This is usually referred to as the landmark case in South Dakota drainage law.[91] The defendant upper landowner had agricultural land on which there was a low flat area of about 100 acres. This area held water which gathered naturally from defendant's surrounding ground. The lower side of the 100 acre low flat area was surrounded by a natural earthen bank. At the lower side of this tract or basin there was a *natural ditch* through the bank. This ditch was some two feet in depth, but even so the basin held about two feet of water before it would begin to overflow into the natural ditch. Defendant deepened the natural ditch, thus allowing the entire upper basin to drain. The lower end of this ditch opened into a natural swale or depression, through which the waters eventually flowed onto the lands of the plaintiff. The trial court found specifically that the water would not otherwise have reached plaintiff's land. The plaintiff's legal assertion was that defendant had no legal right to deepen the ditch and allow waters to flow out. Hence, the decision addressed the question of *what* waters an upper landowner may discharge into a natural watercourse leading to the lands of a lower owner.

In ruling for the defendant, the Supreme Court of South Dakota held that lower landowners are burdened with an easement under which the owner of upper land may discharge surface waters over such lower land through such channels as nature has provided.[92] The court summarized its ruling in the following words:

> We hold the rule to be that the owner of dominant agricultural lands, situate and lying in the upper portion of a natural drainage water

87. *Id.* at 579. The tile drain did not run all the way to plaintiff's land, but close enough to direct the water in that direction. *Id.*

88. *Id.* at 578.

89. *Id.* at 578-79 (citing FARNHAM, *supra* note 22, at 2623).

90. 165 N.W. 9 (S.D. 1917).

91. HAROLD H. DEERING, JR., A REVIEW OF SOUTH DAKOTA DRAINAGE LAW 6 (undated).

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

> course or water basin has, in the course of and for the purposes of better husbandry, a legal easement right, by means of artificial drains or ditches constructed wholly upon his own land, to accelerate and hasten the flow of waters that are surface waters under the rule herein laid down, and to cast the same into and upon a servient estate lying lower down in *the same natural drainage* water course, at that point where nature, by means of ravines or depressions, has indicated that such surface waters should find a *natural outlet*; provided, however, that such surface waters should not be collected or permitted to collect, and then be cast upon the servient estate in unusual or unnatural quantities; and, provided, also, that the surface waters of one natural watershed or basin may not, by means of the cutting or removal of natural barriers, be cast into or upon lower lands lying in another and different natural drainage course or basin.[93]

Furthermore, the court added that the dominant estate's easement must be "reasonable [and] consonant with good neighborliness."[94] In later decisions, the court refers to the *Thompson* decision as establishing the reasonableness doctrine in South Dakota.[95]

In *Boll*,[96] there was a slough on defendant's land but no natural watercourse extending from the defendant's land over the land of the plaintiff, and the court held in favor of the plaintiff.[97] The court in *Thompson* distinguished *Boll* on this ground. The rule which emerged therefore appears to be that there is *no* right of "an upper landowner to cut through the rim of a basin and thus carry water therefrom to a drainage channel where there was no natural outlet from such basin to such channel."[98]

Thompson recognized the "civil law" rule:

> The law of this state and of the territory from which this state was created has been at all times based on the rule of the civil law, which is also the rule of the English common law . . . that rule which recognizes that the lower property is burdened with an easement under which the owner of the upper property may discharge surface waters over such lower property through such channels as nature has provided. . . . It follows that to attempt by legislation to increase such an easement and the consequent burden beyond that existing under the common law of this state would have been an interference with the *vested rights of the owners of every servient estate* within this state — a taking of the property of each of such owners. Such a taking of property, unless it were for a public purpose, accompanied by "just com-

93. *Id.* at 14 (emphasis added). The court adopted the definition of watercourse found in the *Quinn* decision, which holds that "surface waters" can be drained into "the general course of natural drainage." *Quinn*, 120 N.W. at 887.

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

95. *See, e.g.*, Feistner v. Swenson, 368 N.W.2d 621, 623 (S.D. 1985). In *dictum*, the *Thompson* court also stated that the so-called easement of drainage does not extend to draining into a different watershed or basin. *Thompson*, 165 N.W. at 9.

96. 127 N.W. at 577.

97. *Id.* at 578.

98. *Thompson*, 165 N.W. at 12 (emphasis added).

pensation as determined by a jury" could find no support in law.[99]

This statement says that any attempt to cut down the servient estate (by increasing the burden) will meet with the same constitutional objections that apply when the dominant estate is cut back. That is, both the dominant and servient estate are specific property interests and may not be limited by legislation other than ordinary police power incursions. As mentioned in Part II of this article,[100] the civil law rule is too simple in its description. The tough issues are in its application, when courts are compelled to decide cases in the "grey areas" and search for the limits of the rule. In *Thompson,* the court appears to have adopted a "reasonable use" interpretation of the civil law rule, confining the dominant estate to drainage which is reasonable under the circumstances and "consonant with good neighborliness." The court also recognizes that the rule applies only to drainage into the natural channels — the "natural drainage."[101]

D. *VENNER V. OLSON*[102]

Here, "Wooley Lake" was entirely on defendant's land and was a distinct and natural drainage basin for approximately two sections of land. A natural barrier or ridge occurred on the south side of the lake, and there was no evidence that water had *ever* flowed out of the lake. Defendants constructed a tile drain wholly on their own land and drained the Lake's water onto plaintiff's ground, where it had the effect of creating marsh land.[103] There was no depression, defined bank, or channel of any type. At trial, an engineer testified that the tile drain crossed "high, dry, smooth upland."[104]

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99. *Id.* (emphasis added). *See also* Young v. Huffman, 90 N.W.2d 401 (S.D. 1958). In *Young,* Justice Roberts, citing *Thompson,* states:

> In this jurisdiction as applied to rural lands we have adopted what is known as the civil law rule. This rule places a natural easement or servitude upon the lower land for the drainage of surface water in its natural course and the natural flow of the water cannot be obstructed by the servient owner to the detriment of the dominant owner.

Id. at 402. In *Thompson,* the court referred to a then existing statute, stating that the civil law rule existed *before* the statute was enacted. *Thompson,* 165 N.W. at 12. The court stated that "we should and do hold that by Section 22 the then existing law was in no manner changed, and that such section applies to such waters only as could be drained prior to its enactment." *Id.* The court goes on to point out that similar statutes adopted in other Midwestern states have also been held by courts there "to be but statutory declarations of the prior common laws of such states." *Id.*

100. *See supra* notes 11-52 and accompanying text.

101. *See* MARTZ, *supra* note 17, at 191. The civil law rule, even where excepted by reasonable use and other modifications, is generally understood to recognize an easement only over lands and watercourses where the water would flow naturally. *Id.* Martz states that "[w]ater may not, however, be deflected upon lands that are not naturally servient to it." *Id.* In fact, the civil law rule is frequently referred to as the "natural servitude" rule. *See, e.g.,* Dellapenna, *supra* note 26, at 302 (stating that "[t]he natural servitude rule posits that each landowner has a legal right to drain the land *as it would drain naturally,* and is also burdened with the obligation to receive the *natural* drainage of adjoining lands"). *See also* HARNSBERGER & THORSON, *supra* note 13, at 158 (referring to the rule as the "natural-flow" rule and emphasizing that the obligation of the servient estate is to the water which flows naturally, or through natural channels).

102. 168 N.W. 740 (S.D. 1918). The reported decision includes a detailed diagram. *Id.* at 741.

103. *Id.*

104. *Id.*

The Supreme Court of South Dakota held for the plaintiffs, awarding damages and issuing an injunction. In doing so, the court relied on *Boll,* and distinguished *Thompson.* This decision thus follows closely what was then an emerging rule of *no* right of an upper landowner to cut through the rim of a closed basin and thus carry water therefrom to a drainage channel where there was no natural outlet from such basin to a channel.[105]

E. *JOHNSON V. METROPOLITAN LIFE INSURANCE CO.*[106]

The natural drainage in this case ran from defendant's land to that of plaintiffs. The upper land of defendants had two sloughs. The higher of these two contained approximately three acres, and the lower contained approximately nine. These two sloughs or depressions were dry or wet depending on the season and time of year. The defendant ran a tile drain from the upper slough to the lower, and through the natural barrier which contained water in the lower slough. The discharged water "followed a natural depression or watercourse" until it ran *through* plaintiff's land.[107] The court held that the defendant had the right to drain its slough under the rule in *Thompson*:

> Surface waters in the main only become bothersome to the dominant tenement if they accumulate on the land. In general they will only accumulate if there is a depression on the land and if such depression ordinarily has no barrier at the lower end there would be no depression and no accumulation. It follows, therefore, that if there can be any right of drainage from the dominant estate to the servient estate there must be a cutting or ditching of the barrier. To deny this right is to deny the right to care for surface waters and the right of drainage and it seems as though it would give to the servient estate the absolute right to compel the dominant estate to preserve every depression or pond or slough as nature made it as a protection to the servient estate which would be a nullification of the ordinary right of drainage and the statute. This cannot be the rule. . . .
>
> It would seem as though the defendant came clearly within the right herein given. It would seem as though the only limitation would be that he could not drain his pond and create another pond on the lower owner because then he would not be draining it into any natural watercourse or into any natural depression whereby the water will be carried into some natural watercourse.[108]

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105. *Id.* In a later decision, the court commented on the *Venner* case, stating:
> Injunction was granted holding that the drainage of Wooley Lake *would throw the waters thereof into another and different drainage basin.* So far as is disclosed by the decision Wooley Lake was a permanent lake, at least sufficiently so that survey meander lines were used. Apparently also there was no watercourse across the lower land or any natural depression from which the waters would be discharged into any natural watercourse and marsh land was created on the lower land indicating that the water was not discharged over it but on it.

Johnson, 22 N.W.2d at 740 (emphasis added).

106. 22 N.W.2d at 737.

107. *Id.* at 738.

108. *Id.* at 739.

Thompson and *Johnson* must be read together. In each case an upper slough was surrounded by a bank or natural rim, and the action complained of was the *cut* of the natural bank resulting in the draining of the upper slough. In each case the drainage water moved through a natural watercourse capable of carrying the water *through* the plaintiff's land on its way to some flowing stream or river. In *Thompson,* the court refused the requested injunction. In *Johnson,* the court instructed that a verdict be entered in favor of the defendant.

F. *LaFleur v. Kolda*[109]

This decision was reported on the same day as *Johnson.* Kolda Pond straddled the boundary between two private tracts, and a state highway went around the pond's edge. An improved highway was constructed which bisected the pond and, as part of this improvement, drainage ditches were constructed. In its natural state there was no break in Kolda Pond and water could escape only by percolation or seepage. After the highway improvement, however, the water was drained off onto the plaintiffs' ponds, which had no outlet. The size of the ponds was thereby increased and the plaintiffs suffered damages.

The Supreme Court of South Dakota reversed the trial court, ruling that this type of drainage is unlawful. The court held that the right of drainage of surface water does *not* permit the owner of the upper dominant property to drain a land-locked basin located on his property into a land-locked basin on the servient property. The reason for the holding is that those who settled the land took it subject to the burdens imposed by nature. Thus, the lower owner:

> Cannot complain if his basin is filled by natural drainage from upper land. And we think it is not unsound to reason that the settler on lower land must have anticipated and understood that the watercourse across his land must carry an added burden of water as an incident of the improvement and reasonable use of the upper property. But such reasoning, in our opinion, supplies no support for a rule which permits the upper owner to transfer the burden imposed by nature on his land to that of the lower owner. To artificially drain a land-locked basin on the upper estate to a like basin on the lower estate is to relieve the upper estate of a burden at the expense of the lower estate. Such a rule could not have been anticipated by either the settler of the upper or the lower estate. It is unjust and unsound.[110]

Can *Johnson* and *Kolda,* decided on the same day, be reconciled satisfactorily? Only if we observe that in *Johnson* the natural watercourse was *through* the plaintiff's land, whereas in *Kolda* the water emptied into a land-locked slough on plaintiffs' land. This distinction is made clearer by

109. 22 N.W.2d 741 (S.D. 1946).
110. *Id.* at 744.

the *Kolda* repudiation of *Mishler v. Peterson,*[111] a case where the court upheld drainage from one land-locked basin into another.

G. *RAE V. KUHNS*[112]

The upper landowner constructed tile drains on his own land and thereby cast the water from certain ponds onto the lands of the lower landowner. Findings at trial were that the drainage moved the water in a direction other than that of the natural drainage. That is, after the tile drains were installed, the surface waters moved in a new direction and did not follow the natural watercourse. The court ruled for the lower landowners, holding that drainage is acceptable only along its natural course, and that the law does not permit an artificial course except under statutory drainage proceedings. The court also rejected the assertion that the damage to the lower landowner was trifling where the drainage cut a dry run through a forty-acre field, making it impossible to farm the field as one unit.

H. *GROSS V. CONNECTICUT MUTUAL LIFE INSURANCE CO.*[113]

Here the defendants owned an irrigation pond which became unsafe. As a result the defendants decided to empty the pond by breaching the dam. The pond waters came from a variety of sources, including runoff from a feedlot. Some water came from two flowing artesian wells located in the feedlot, and some came from a feedlot settling pond. Breaching of the dam flooded lands belonging to the several plaintiffs. One plaintiff had a quarter-section of land flooded. This quarter section, which included buildings and an airstrip, remained flooded through a winter, causing loss of winter pasture as well as subsequent hay crops due to weeds. The trial court found that the water was foul and polluted by feedlot waste, debris, and sediment. A second plaintiff suffered similar injury and also lost use of a domestic well. The trial court granted damages and denied an injunction on the ground that there was no risk of ongoing or future harm. Affirming, the Supreme Court of South Dakota restated the rule of *Thompson* and *Johnson,* interpreting those cases to hold that the rule allows the discharge of surface waters "over" and not "on" the land of another. The court also specified that the servitude is limited to such drainage as can be accomplished *without unreasonable injury to a neighbor's land.*[114] The defendants violated this rule when they collected waters and cast them down in a quantity. Thus, the court held that one limit on the drainage servitude is the reasonableness of the activity; for this point, the court relied on the 1917 decision in *Thompson.*

Defendants argued that in breaching the dam they were exercising their right under the civil law rule; that the water in the pond was "surface

111. 166 N.W. 640 (S.D. 1918).
112. 184 N.W. 280 (S.D. 1921).
113. 361 N.W.2d at 259.
114. *Id.* at 267 (citing *Thompson,* 165 N.W. at 13).

water" and that they drained it through a natural watercourse. To this, the court responded:

> Surface waters comprehend waters from rains, springs, or melting snows which lie or flow on the surface of the earth but which do not form part of a watercourse or lake. The term does not comprehend waters impounded in artificial ponds, tanks, or water mains. The chief characteristic of surface water is its inability to maintain its identity and existence as a water body. . . .
> The water had lost the characteristics of surface water by being contained and stored in the irrigation pond.[115]

Defendants also argued that since they had discharged their water into a natural watercourse, they were within the protection of the servitude. The court responded:

> The property of plaintiffs was literally inundated by this water, covering up to 75 acres of Dean Nelson's land and completely flooding John Gross' pasture. Though there is a natural waterway by way of a creek on these lands, it cannot be said that the entire property constituted a natural drainage area.[116]

I. FEISTNER V. SWENSON[117]

Plaintiff's land lay below that of the defendant. Plaintiff asserted that the defendant ditched, channeled, filled his land, and cut through a township road, diverting water from its natural watercourse to the ultimate damage of plaintiff's land. In other words, the plaintiff contended that the water did not flow across his land via any watercourse, but rather remained on his land and prevented him from using it for any purpose. Defendant denied generally, and asserted specifically that the water was not diverted from its natural course. The trial court granted the defendant's motion for summary judgment. The Supreme Court of South Dakota reversed. Summary judgment was deemed inappropriate because the record indicated a genuine issue of material fact regarding whether defendant drained water into a natural watercourse[118] and, if so, whether the drainage was reasonable.

The court observed that the drainage rights of a dominant landowner must be exercised reasonably even when surface water is discharged into a natural watercourse. For this proposition, the court cited *Thompson,*

115. *Id.* at 266-67 (citing FARNHAM, *supra* note 22, at 2557). The court emphasized that whether waters are of such a nature as to be treated as "surface waters" is in each case a question of fact to be determined from the evidence. *Id.* at 266 (citing *Thompson,* 165 N.W. at 13).

116. *Id.* at 267.

117. 368 N.W.2d 621 (S.D. 1985).

118. *Id.* On the definition of natural watercourse the court followed the *then* prevailing statutory definition at S.D.C.L. § 46A-10-31 (1967 & Supp. 1983), now found at S.D.C.L. § 96A-10A-70, subject to amending language at S.D.C.L. § 46A-10A-1 (15) (1987). *Id.* The court claimed that it was following the decision in *Johnson,* where the court said, "If the surface water in fact uniformly or habitually flows off over a given course, having reasonable limits as to width, the line of its flow is within the meaning of the law applicable to the discharge of surface water, a watercourse." *Johnson,* 22 N.W.2d at 740.

which "[s]et forth the reasonableness doctrine."[119] The Court also cited *Gross* for the statement that drainage allowed in conjunction with the natural easement right set forth in *Thompson* is conditioned upon the requirements that such drainage be accomplished without unreasonable injury to neighboring lands.[120] Reasonableness, of course, is a question of fact.

J. *Lee v. Schultz I*[121]

This case was filed in private nuisance. Defendant drained a forty-four acre slough into a thirty acre slough, then into a five acre slough. The three sloughs were all located on defendant's land, from whence the water flowed onto plaintiff's land. There a ninety acre slough accumulated, rendering the land untillable. The thirty acre slough was landlocked and drained only after the plaintiff cut a ditch leading from it. In an earlier adjudication the defendant prevailed because the trial court found that *at that time* the water followed a natural watercourse and did not collect on plaintiff's land.

By the time of this suit, heavier rainfalls had caused a large collection of water to form on the plaintiff's land. In this second suit, the trial judge held that the issue was *res judicata* and that the issue of whether the drainage was proper could not be relitigated. The resulting judgement for the defendant was reversed by the Supreme Court of South Dakota, which held that the issue was not *res judicata,* and that drainage which was proper at one time may become unreasonable.

The court's rationale was based in the problem area often referred to as "anticipatory nuisance." In such situations, courts struggle with the problem of whether to enjoin a nuisance-to-be.[122] The argument is that a threat of a nuisance in the future may not support immediate injunctive relief, but at the same time should not preclude the possibility of relief once the anticipated injury becomes a reality. Thus, the court ruled that no damage was shown in the first litigation but that now "circumstances have changed." The court stated:

> Granted the trial court had confirmed Schultz' right to maintain the ditch as an act of good husbandry under the civil law rule. As noted, this rule has limitations and Lees now claim that Schultz has exceeded them. The first blast has now occurred, a considerable portion of Lees [sic] land is inundated. They are entitled to seek injunctive relief.[123]

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119. *Feistner*, 368 N.W.2d at 623.
120. *Id.* at 623 (citing *Thompson,* 165 N.W.2d at 13).
121. 374 N.W.2d 87 (S.D. 1985).
122. *See generally,* WILLIAM H. RODGERS, JR., 1 ENVIRONMENTAL LAW: AIR AND WATER 56 (1986 & Supp. 1995).
123. *Lee* I, 374 N.W.2d at 91. A dissent was filed by Chief Justice Fosheim. *Id. See also* Deering, *supra* note 91, at 25. Deering offers the following:

> [O]ne has to wonder, however, just how it can ever be determined with predictability whether a certain drainage activity is permissible, if the result varies with the amount of annual rainfall. The case is troublesome not for the drainage rule adopted (that you can't

K. *WINTERTON v. ELVERSON*[124]

Plaintiff and Defendant owned lands separated only by a county road. Prior to 1975, the defendant's land would drain surface water into a natural waterway onto and over plaintiff's lower land after a heavy rain or during spring runoff. This drainage was sporadic and did not prevent the lower landowner from farming his land. The rate of flow kept the water moving across the lower landowner's farm so that it did not accumulate or stand for more than a short period of time.

In 1975, the upper landowner installed a tile drainage system in his land "to enhance its productivity and to reduce erosion."[125] The system drained only surface water and discharged it into the natural drainage waterway. The new tile system caused a continuous and even flow of surface water to drain at a much slower rate onto the lower land. The water remained on the lower land rather than flowing over or through it. As a result, four acres remained wet and untillable and another seven acres suffered reduced productivity and weed infestation.

In awarding injunctive relief and damages to the plaintiff, the trial court found that the upper landowner had increased the *natural burden* to the lower landowner "by changing the nature of the natural drainage." It granted damages for lost production and enjoined the upper landowner from maintaining and using the drainage system. In its memorandum opinion, the trial court observed:

> Here, the defendant has increased the natural burden to the plaintiff's land by changing the manner of the natural drainage to the plaintiff's detriment. What used to be an occasional but forceful discharge of surface waters is now a regulated but continuous flow. What used to flow through the plaintiff's land or accumulate for short periods of time and then percolate or evaporate, no longer does so.[126]

The upper landowner appealed, claiming that: (1) the trial court misapplied the law to the facts; (2) the evidence was insufficient to support the drainage award; and (3) injunctive relief and prejudgment interest were improperly granted. In its essence, defendant's argument was based in reasonableness — that the prevention of the inundation of plaintiff's land following spring thaws or heavy rains, and the reduction of erosion on both lands, leaves no question of the reasonableness of the tile installation.[127]

In a unanimous decision, the Supreme Court of South Dakota affirmed. In an opinion written by Justice Sabers, the court stated the issue

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drain from one landlocked area to another), but because it removes the predictability of what is, or is not, proper drainage.

Id. The response to this must be that this problem is always present in an anticipatory nuisance doctrine.

124. 389 N.W.2d 633 (S.D. 1986).

125. *Id.* at 634.

126. Winterton v. Elverson, CIV 83-1331, Circuit Court of the Second Judicial Circuit, Minnehaha County, S.D. (March 8, 1984).

127. Brief for Appellant at 7, Winterton v. Elverson, 389 N.W.2d 633 (S.D. 1986) (No. 15048) [hereinafter Appellant's Brief].

as "whether a dominant landowner is liable in damages to a servient landowner for discharging surface waters into a natural watercourse all on his own land, where the volume remains the same, and only the manner of flow is changed from occasional and forceful to regulated and continuous."[128] The court acknowledged the civil law rule as recognizing that "lower agricultural property is burdened with an easement under which the dominant, or upper, property owner may discharge surface water over the servient estate through natural watercourses."[129] The court was emphatic, however, in restating its qualification to the civil law rule, which is that the drainage "must be accomplished *without unreasonable injury* to the servient estate. Thus, the upper owner *may not transfer the burdens imposed by nature* on his land to that of the lower owner."[130]

L. *LEE V. SCHULTZ II*[131]

This case reports the appeal from the lower court's judgement following remand.[132] At trial, the court used an advisory jury, which it instructed as follows:

> You are further instructed that the legal easement right of drainage has limitations even though the waters of the basin in question are surface waters and there is a legal burden upon servient lands to receive such waters through the natural watercourse crossing such lands, such burden and the accompanying easement is one that is *reasonable,* or, as previously instructed, one consonant with good neighborliness.
> Under the claim of an easement, *a party cannot rightfully turn upon the servient estate large volumes of water, out of all proportion to the capacity of the watercourse, and thus cause serious damage to the servient estate.*[133]

The supreme court held that this instruction was erroneous in that, when carefully read:

> This incorrect test permits a dominant landowner far too much leeway in damaging the servient estate. This paragraph permits a party to turn upon the servient estate large volumes of water, out of all proportion to the capacity of the water course, as long as it does not produce *serious* damage to the servient estate. Read another way, it permits a party to turn upon the servient estate less than large volumes of water, out of all proportion to the capacity of the water course, even if it causes serious damage to the servient estate. Read the third way, it permits a party to turn upon the servient estate large volumes of water, causing serious damage to the servient estate, as long as it is in proportion to the capacity of the water course. This is

128. *Winterton,* 389 N.W.2d at 635.
129. *Id.* The existence of a natural watercourse was not in issue. *Id.*
130. *Id.* (emphasis added).
131. 425 N.W.2d 380 (S.D. 1988).
132. For a summary of the decision in *Lee* I, see *supra* notes 121-23 and accompanying text.
133. *Lee* II, 425 N.W.2d at 381 (emphasis in original).

> not reasonableness, good neighborliness or the test in South Dakota.[134]

The court then reiterated the correct rule in South Dakota as it was set out in *Winterton*. In concluding its opinion, the court said:

> [T]hose purchasing or acquiring land should expect and be required to accept it subject to burdens of natural drainage, but at the same time, the upper landowner should not be able to increase the natural burden of the lower estate. In view of the numerous ways that damage can result to a servient estate it is especially important for courts to maintain a watchful eye on instructions relating to reasonableness and good neighborliness. This trial court did not and it was reversible error.[135]

M. *Miller v. County of Davison*[136]

One portion of this decision contributes to the law of drainage of surface waters. Adjacent to Mitchell, South Dakota, was a large slough which contained two low areas separated by a "collar," or ridge. This collar prevented water from flowing from one area to the other except during times of high water. Each of the two plaintiffs owned land south of the slough. In 1984 and 1987, there was a substantial accumulation of water in the slough. In order to protect commercial property, Davison County dug a ditch through the "collar" permitting the water to flow into a highway ditch, through a road culvert, and onto plaintiff's lands, where it stood and rendered some cropland untillable. The court held that the drainage was unlawful and granted an injunction, stating:

> Davison County's actions of breaking the collar around the northern part of the slough, ditching the water to the right-of-way of the interstate, and casting unusual and unnatural quantities of water on [plaintiff's] land are clearly prohibited by drainage law and our decisions.[137]

N. The Statutory Background

Since 1909, South Dakota legislation has included a provision which defines the right to drain along the lines of the civil law rule. The original legislation remains a part of the state code, although the form has been slightly revised.[138] The 1909 language stated:

> Closed or blind drains may be used whenever the same may be found practicable.
>
> Owners of land may drain the same in the general course of natural drainage, by constructing open or covered drains, discharging the

134. *Id.* at 382 (emphasis in original).

135. *Id.* at 383 (citing *Winterton*, 389 N.W.2d at 633; *Thompson*, 165 N.W. at 11; *LaFleur*, 27 N.W.2d at 741; *Gross*, 361 N.W.2d at 259).

136. 452 N.W.2d 119 (S.D. 1990).

137. *Id.* at 122 (citing *Thompson*, 165 N.W. at 9; *Feistner*, 368 N.W.2d at 621; *Winterton*, 389 N.W.2d at 633).

138. The lineage is: 1907 S.D. Laws, Ch. 134, § 22; 1909 S.D. Laws, Ch. 102, § 11; S.D. Code § 61.1031 (1939); S.D.C.L. § 46A-10-31 (1967 & Supp. 1983); S.D.C.L. § 46A-10A-70 (1987).

> same into any natural water course, or into any natural depression, whereby the water will be carried into some natural water course, or into some drain on the public highway with the consent of the board having supervision of such highway, and when such drainage is wholly upon the owner's land he shall not be liable in damages therefor to any person or persons or corporation. Nothing in this section shall in any manner, be construed to affect the rights or liabilities of proprietors in respect to running waters or streams.[139]

In the usual process of case interpretation, the existence of a relevant statute is of fundamental significance. In the evolution of South Dakota's civil law rule, however, this has not been the case. In *Thompson*, the court, referring to the statute just quoted, concluded that the civil law rule existed *before* the statute was enacted, and that "we should and do hold that by section 22 the then existing law was in no manner changed, and that such section applies to such waters only as could be drained prior to its enactment."[140] The court said further:

> [T]he lands of this state were acquired subject to the law of easements for drainage of waters; that an easement is property within the meaning of our constitutional provision declaring that no person shall be deprived of his property without due process in clear. It follows that to attempt by legislation to increase such an easement and the consequent burden beyond that existing under the common law of this state would have been an interference with the vested rights of the owners of every servient estate within this state — a taking of the property of each of such owners.[141]

The court goes on to indicate that similar statutes adopted in other midwestern states have also been held by courts "to be but statutory declarations of the prior common laws of such states."[142] Subsequent cases follow *Thompson* and view the statute as being merely declarative of the general rule and as demanding interpretation on a case-by-case basis.[143]

O. Trespass or Nuisance? Property or Tort?

The South Dakota cases do not make clear whether an action based upon invasion of the drainage easement lies in trespass or private nuisance. In fact, with the exception of *Lee* I and II, which were pleaded specifically in private nuisance, the cases make no mention of the point. Even in the *Lee* decisions, the court avoided discussion of any possible distinction between actions in trespass and nuisance or, stated otherwise, between property and tort.

Because South Dakota's judicial decisions, fortified by express legislation, are firmly rooted in the civil law rule, analysis begins with the *two*

139. 1909 S.D. Laws, Ch. 102, § 11.
140. *Thompson*, 165 N.W. at 12.
141. *Id.*
142. *Id.*
143. *See, e.g., Gross*, 361 N.W.2d at 259; *Winterton*, 389 N.W.2d at 633. *Gross* and *Winterton* cite the statute with approval as stating the general rule.

property estates so clearly established. First, there is the dominant estate, with its limited easement to drain across neighboring lands. Second, there is the servient estate, with its limited obligation to accept passing drainage waters. Is invasion of either of these estates to be treated as a trespass or a nuisance? Is there a meaningful difference?

At the outset the distinction is found in the nature of the invasion. In general, trespass and nuisance are separate torts for the protection of different interests invaded—trespass protecting the possessor's interest in exclusive possession of property, and nuisance protecting the interest in use and enjoyment.[144] The Restatement (Second) of Torts defines trespass as occurring when one intentionally "[e]nters land in the possession of the other, or causes a thing or a third person to do so."[145] Trespass is thus an "intrusion which invades the possessor's protected interest in exclusive possession, whether that intrusion is by visible or invisible pieces of matter or by energy which can be measured only by the mathematical language of the physicist."[146]

In contrast, the elements of a *prima facie* case of private nuisance, *assuming it is brought as an intentional tort,* merely require that plaintiffs prove that "(1) they have suffered substantial unreasonable interference with property use, (2) the interference was caused by defendant's use of its land, and (3) the defendant acted intentionally."[147]

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144. Borland v. Sanders Lead Company, Inc., 369 So. 2d 523, 528-29 (Ala. 1979).

145. Rest. 2d § 158. The editors of the Restatement use the following examples:

Causing entry of a thing. The actor, without himself entering the land, may invade another's interest in its exclusive possession by throwing, propelling, or placing a thing either on or beneath the surface of the land or in the air space above it. Thus, in the absence of the possessor's consent or other privilege to do so, it is an actionable trespass to throw rubbish on another's land, even though he himself uses it as a dump heap, or to fire projectiles or to fly an advertising kite or balloon through the air above it, even though no harm is done to the land or to the possessor's enjoyment of it. In order that there may be a trespass under the rule stated in this Section, it is not necessary that the foreign matter should be thrown directly and immediately upon the other's land. It is enough that an act is done with knowledge that it will to a substantial certainty result in the entry of the foreign matter. Thus one who so piles sand close to his boundary that by force of gravity alone it slides down onto his neighbor's land, or who so builds an embankment that during ordinary rainfalls the dirt from it is washed upon adjacent lands, becomes a trespasser on the other's land.

ILLUSTRATIONS:

3. A intentionally throws a pail of water against a wall of B's house. A is a trespasser.

4. A intentionally drives a stray horse from his pasture into the pasture of his neighbor, B. A is a trespasser.

5. A erects a dam across a stream, thereby intentionally causing the water to back up and flood the land of B, an upper riparian proprietor. A is a trespasser.

6. A, on a public lake, intentionally discharges his shotgun over a point of land in B's possession, near the surface. The shot falls into the water on the other side. A is a trespasser.

Id. at Cmt. i.

146. Martin v. Reynolds Metal Co., 342 P.2d 790 (Or. 1959).

147. ZYGMENT J. B. PLATER ET AL., ENVIRONMENTAL LAW AND POLICY: NATURE, LAW, AND SOCIETY 112 (1992). *See also* Rest. 2d §§ 822 & 825. § 825 of the Restatement reads, "An invasion of another's interest in the use and enjoyment of land or an interference with the public right, is intentional if the actor (a) acts for the purpose of causing it, or (b) knows that it is resulting or is substantially certain to result from his conduct." *Id.* at 825.

A trespassory intrusion does not require that actual damages be shown; nominal damages may be awarded, and an intrusion may also support punitive damages. Trespass cannot be based on mere negligence. On the other hand:

> The statute of limitations for trespass . . . often extends back further in time than nuisance . . . damages are available for all consequential injuries throughout the actual chain of causation, not only those foreseeable; and trespass actions seem to encourage the grant of injunctions by emphasizing the fact of an unconsented invasion, penetration, or incursion onto private property.[148]

In general, possessory interests in things are protected by property rules, whereas interests in avoiding harmful externalities are most often protected by liability (tort) rules.[149]

Since most of the South Dakota drainage cases involve the invasion of a clearly defined servient estate by excess waters and damages resulting from the placement of that water on the land of the servient estate owner, it follows that the action is one in trespass. This conclusion is fortified by the fact that the state follows the civil law rule, which it defines in terms of the property characteristics of estates in land.

But the distinction has potential consequences. The law of property rights exists to define and protect private expectations in specific land or things.[150] The protection of property rights serves the economic function of providing incentives to use resources efficiently.[151] As one commentator observes, "[t]hose who are working with natural resources must be confident that they can enjoy the fruits of that labor; otherwise, their incentive to direct natural resources to their most economically valuable end will necessarily decrease."[152]

Tort law can support property rights by providing strict protection of property rights.[153] On the other hand, tort law can undermine property rights by recognizing inroads by "reasonable" societal demands, such as more intense land development.[154]

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148. PLATER, ET AL., *supra* note 147, at 134.

149. For a scholarly discussion of these two fundamental ways of protecting property rights, the leading articles are: Louis Kaplow & Steven Shavell, *Property Rules Versus Liability Rules: An Economic Analysis,* 109 HARV. L. REV. 713 (1996); Guido Calabresi & A. Douglas Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral,* 85 HARV. L. REV. 1089 (1972).

150. Richard J. Lazarus, *Shifting Paradigms of Tort and Property in the Transportation of Natural Resources Law, in* NATURAL RESOURCES POLICY AND LAW: TRENDS AND DIRECTIONS 195 (L.J. MacDonnell & S.F. Bates 1993).

151. *Id.*

152. *Id.*

153. *Id.*

154. *Id.* Lazarus notes:

> Tort doctrine can, as in the traditional model of natural resources, play a cooperating role with property and contract. But, within tort, lie the theoretical seeds of the undoing of the traditional property model. Where the property model seeks to delegate decision making to private parties and to market forces, tort seeks to impose societal values and norms on private parties. Where the property model promotes notions of clear rules, boundaries, and absolute entitlement, tort perceives conflict marked by ambiguity, uncer-

V. APPLICATION OF THE RULE IN SPECIFIC CASES

A. When Water Spreads (Through But Not On)

Although the South Dakota version of the civil law rule countenances drainage by a dominant over a servient estate, there are real limits. One of the clearest of these is the "through but not on" rule. Exercise of the dominant easement is proper only if the water released moves through a naturally existing watercourse and there is no accumulation on the land of the servient estate. In *Gross,* the Court reminds that the rule is "over" but not "on" and that the servitude is limited to such drainage as can be accomplished without unreasonable injury to a neighbor's land.[155] In *Winterton,* the court emphasized that the upper owner may not transfer the burdens imposed by nature on his land to that of the lower owner.[156]

B. When Rate or Nature of Flow Changes

The South Dakota rule also recognizes that changes in rate and nature of a flow may also be reason to find that a dominant easement is exceeding its limits. Waters cannot be "collected or permitted to collect, and then be cast upon the servient estate in unusual or unnatural quantities . . . ."[157] In *Gross,* which involved the breaching of a dam and inundation of the lower estate, the court held that when waters are impounded in any way they lose their legal status as "surface water." Such waters are not under the protection of the civil law rule, and thus may not be released under the legal authority of a dominant estate. In *Winterton,* the facts were a change in the manner of the natural drainage. The court stated, "What used to be an occasional, but forceful drainage of surface waters is now a regulated, but continuous flow."[158] Holding for the servient estate, the court stated that drainage must not transfer the upper owner's natural burden to the lower owner.

C. The Capacity of the Watercourse As A Limiting Factor

(1) Capacity of the Watercourse.

The ability of the receiving watercourse to carry drainage water is an essential and inevitable component of the rules of surface water drainage.

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tainty, and competing interests that require accommodation and compromise for their resolution . . . . Within the common law context, however, tort principles have clearly become more significant. They have rendered private property rights in natural resources far less absolute. Tort standards have increasingly invaded property definitions. The scope of some common law property rights, such as those in water, are defined in terms of the "reasonableness" of their uses, with the courts increasingly willing to put some force in those terms. The courts' reasonableness inquiry, moreover, considers more than the potential advantages of the proposed use viewed in isolation; it takes account of the societal advantages of other alternative dispositions of the resource.

Id.

155. *Gross,* 361 N.W.2d at 267 (citing *Thompson,* 165 N.W. at 13).
156. *Winterton,* 389 N.W.2d at 635. This point is reaffirmed in *Lee* II, 425 N.W.2d at 380.
157. *Thompson,* 165 N.W. at 14.
158. *Winterton,* 389 N.W.2d at 636.

A dominant estate considering expansion of drainage must inquire as to whether the receiving watercourse is at capacity. If so, will any and all new drainage exceed the limit of the servient estate's obligation to accept drainage?

The answer is found, first, in the "Through But Not On" rule which is so securely defined by South Dakota courts. In *Johnson* and *Thompson*—the decisions which form the foundation of the South Dakota rule—the court had before it drainage water moving through a natural watercourse capable of carrying the water. In contrast, in each case where the drainage water has been flowing outside of the natural watercourse, the court has held for the servient estate. This limitation is generally recognized in other jurisdictions as well.[159]

(2) Capacity of the Receiving Stream, River, or Lake.

A further potential limitation on the rights of upper landowners to introduce drainage water is the issue of the capacity of the receiving stream, river, or lake. The legal situation is different because the problem implicates the use of riparian principles in addition to those of drainage law. Although there is no body of cases on the point, it seems reasonable to expect that courts in prior appropriation states will refer to riparian analysis in situations where no water rights are at issue. At least one South Dakota decision contains *dicta* indicating that South Dakota's adoption of prior appropriation merely *modified* the pre-existing riparian rules.[160]

As with the issue of capacity of the surface watercourse, a number of questions arise. If a development will so augment drainage flows into a receiving stream, river, or lake that its capacity is exceeded, is there legal liability? If so, what legal principles apply?

Carriage of drainage water is an appropriate use of a river or stream by a riparian owner, and a river's value includes its ability to carry off excess drainage water. But this general observation raises two additional questions. First, is the riparian right to use a stream or river as a drain limited to riparian landowners? Second, what is the legal doctrine which applies as among competing riparian owners?

As to the first question there is little authority. The problem is that a person may own land well away from the banks of a river or stream and may desire to drain the land. The proposed drainage will ultimately de-

159. *See* Kennedy v. Moog, Inc., 264 N.Y.S. 2d 606, 613 (N.Y. S. Ct. 1965) (stating "Nor may one owner, by artificial means, concentrate and discharge into the stream surface or other waters *in quantities beyond the natural capacity* of the stream to the damage of other owners"). *See also* Kueffer v. Brown, 879 S.W.2d 658 (Mo. Ct. App. 1994); Martin v. Weckerly, 364 N.W.2d 93 (N.D. 1985); Patterson v. City of Bellevue, 681 P.2d 266 (Wash. Ct. App. 1984); Coomer v. Chicago & North Western Transp. Co., 414 N.E.2d 865 (Ill. App. Ct. 1980); Rynestad v. Clementon, 133 N.W.2d 559 (N.D. 1965); Strickland v. City of Seattle, 385 P.2d 33 (Wash. 1963); Ambrosio v. Perl-Mack Construction Co., Inc., 351 P.2d 803 (Colo. 1960); Laurelon Terrace v. City of Seattle, 246 P.2d 1113 (Wash. 1952); People ex rel. Speck v. Peeler, 125 N.E. 306 (Ill. 1919); Callan v. G.M. Cypher, 70 So. 841 (Fla. 1916); Trigg v. Timmermann, 156 P. 846 (Wash. 1916).

160. Belle Fourche Irrig. Dist. v. Smiley, 176 N.W.2d 239, 245 (S.D. 1970).

pend upon the carriage capacity of the receiving stream or river. But the upland developer is not a riparian owner, and thus is not able to exercise riparian rights. Does this mean that the drainage can proceed free of legal limitation, even if it causes the receiving stream or river to exceed its capacity, resulting in harm to the riparian landowners downstream? Does the riparian owner have an action against the upland developer?

Second, it is clear that among competing riparian landowners, riparian doctrine will apply. In most jurisdictions the riparian reasonable use rule will apply. As Judge Posner said in a recent decision, "[i]t is a case of shared use of the river, and the issue between [the drainage developer] and the other riparian owners is whether [the drainage developer] is in effect taking for itself more than a reasonable share of the river's value."[161] As to what is reasonable in these circumstances, it is a recognized riparian principle that channel capacity is a limiting factor upon the use of the stream. Exemplary is *Dougan v. Rossville Drainage District,*[162] where the plaintiff was a lower riparian farm owner who sought damages from the drainage district for floods that caused permanent damage and loss of crops. The Kansas Court of Appeals summarized the applicable rule:

> It is clear that the defendant Rossville Drainage District, if a private person, would be liable under the law of Kansas for damages caused by flooding of land of a lower riparian landowner . . . . Kansas has adopted the rule of law that an upper proprietor of land may not gather and divert surface water from its natural course of flowage and thereby exceed the carrying capacity of the natural watercourse in which the surface water is deposited if that action causes damages of a serious and sensible nature to a lower landowner.[163]

D. When Pollutants and Debris Are Added to Drainage.

The South Dakota decision in *Gross* is indirectly instructive on the question of whether principles of surface water drainage law are relevant to problems arising from the introduction of pollutants to drainage water.[164] In *Gross,* an irrigation pond was filled with water from a variety of sources, including flowing artesian wells, feedlot runoff, and a feedlot settling pond. The pond's dam was intentionally breached. The trial court awarded dam-

161. Okaw Drainage Dist. of Champaign and Douglas County, Illinois v. Nat'l Distillers and Chemical Corp., 882 F.2d 1241, 1246 (7th. Cir. 1989).

162. 575 P.2d 1316 (Kan. Ct. App. 1978).

163. *Id.* at 1316. Cases supporting the concept of limits based on channel capacity include: Johnson v. Bd of County Comm'rs of Pratt County, 913 P.2d 119 (Kan. 1996); Smicklas v. Spitz, 846 P.2d 362 (Okla. 1993); Fiedler v. Coen, 505 A.2d 286 (Pa. Super. Ct. 1986); Dudley Special Road Dist. of Stoddard County v. Harrison, 517 S.W.2d 170 (Mo. Ct. App. 1974); Howe v. DiPierro Manuf. Co., Inc., 294 N.E.2d 495 (Mass. App. Ct. 1973); Baldwin v. City of Overland Park, 468 P.2d 168 (Kan. 1970); Simon v. Neises, 395 P.2d 308 (Kan. 1964); Sinclair Prairie Oil Co. v. Fleming, 225 P.2d 348 (Okla. 1949); Archer v. City of Los Angeles, 119 P.2d 1 (Cal. 1941); Smith v. Orben, 182 A. 153 (N.J. 1935); Belcastro v. Norris, 261 Mass. 174, 158 N.E. 535 (1927); San Gabriel Valley Country Club v. Los Angeles County, 188 P. 554 (Cal. 1920). For a case sounding in negligence, *see* Skaggs v. City of Cape Girardeau, 472 S.W.2d 870 (Mo. App. 1971).

164. *Gross,* 361 N.W.2d at 262.

ages "for temporary and permanent injury to their land" and "for the pollution and contamination of their domestic water well."[165]

The Supreme Court of South Dakota affirmed the judgment. The court did so based on a conclusion of law that the waters were not surface waters and were not discharged into a natural watercourse.[166] This means that the discharges were not privileged by drainage law, and that the defendants were not privileged to drain in this way pursuant to their dominant easement. This leads to the question of identifying the activities which the court concluded were beyond the protection of existing drainage law. Without doubt, the case holds that a dominant easement holder lacks any right to back up waters in ponds, tanks, or other devices and discharge them in quantity upon a servient estate.[167] The case also holds that a dominant easement holder lacks any right to drain into an artificial water course.[168] Does it also hold that the discharge of polluted effluent is not a part of the privilege attributable to the dominant estate? A tentative "yes" may be offered simply because the court awarded damages based upon the effects of pollution on the lower estate.

In practical fact, the problem is important. Drainage is a principal means for moving pollutants downstream. Noxious weed seeds are transported easily downstream, causing considerable injury where they come to rest. Grass herbicides can move downhill and destroy grass waterways, pasture, and hay. In an era when the livestock industry is increasingly concentrated, and manure is therefore concentrated, the threat to drains and receiving waterways is apparent. As in *Gross,* the threat to water supplies, directly by way of well contamination, or less directly by way of infiltration into the groundwater, is equally apparent. Another pressing problem is the sedimentation of drains, fields, and ditches, as well as receiving streams and lakes, which results from improvident drainage practices. *Gross* stands for the proposition that the dominant drainage estate does *not* extend to the drainage of waters which carry harmful pollutants.

It should be noted in passing that at common law this issue typically

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165. *Id.* at 262. The court summarized:
> The trial court found that the water was foul and polluted from feedlot waste. This feedlot effluent had a foul odor, a reddish-green color, and contained a great deal of debris and sediment. . . . It appears that [plaintiff] Nelson lost his efforts of summer fallowing and lost, for years, as effective a hay crop and crop (sic) because of the noxious weed seeds implanted in the soil arising from the flooding. . . . With respect to the [plaintiff] Grosses, flood waters and foul effluent also covered their lands, froze during the winter, and remained there from October 1979 until May, 1980. Not only did the Grosses complain of foul sedimentation by the effluent, but diverse objects also flooded upon their land consisting of many vaccine bottles, old jugs, posts, manure, and other debris, much of which remained on their lands after the flooding waters had dissipated. The Grosses had a domestic water well on this flooded property and they testified that the foul and obnoxious effluent and sedimentation, with a strong offensive odor and brackish yellow water, filtered into their drinking water.

Id. at 363.

166. *Id.* at 266.

167. *Id.* at 267.

168. *Id.*

falls within the trespass, nuisance, and riparian rights causes of action. Private nuisance is a substantial and unreasonable interference with the use and enjoyment of all interest in land. The interference may be intentional, or it may be the result of negligent or reckless conduct.[169] As a result, *Gross* is unique as a decision which addresses water pollution under the guise of drainage law; the decision thus adds an important contemporary circumstance to the drainage law process.

E. Draining A Closed Slough, Lake, or Wetland

Among the most common methods of augmenting drainage is that which occurs when the upper landowner drains an existing natural slough, either by cutting a hole in the edge of the surrounding land or by installing some form of drainage tile or pipe system. Is such drainage permissible? The court in *Johnson* clearly says yes, but then establishes specific limits. One limitation is that the drainage cannot be artificial; that is, it must move through "such channels as nature has provided," moving down a natural outlet.[170] Second, the drainage cannot simply transfer a burden to lower land, which occurs when drainage comes to rest or spreads on lower ground. This of course, is another application of the "through but not on" rule. Third, the drainage cannot move water from one watershed to another. As the court said in *Thompson,* "The surface waters of one natural watershed or basin may not, by means of the cutting or removal of natural barriers, be cast into or upon lower lands lying in another and different natural drainage course or basin."[171] Fourth, the drainage must be accomplished *without unreasonable injury* to the servient estate.[172] In addition, the court stated in *Winterton* that "the upper owner may not transfer the burdens imposed by nature on his land to that of the lower owner." In view of the numerous ways that damage can result to a servient estate, it is especially important for courts to "maintain a watchful eye on restrictions relating to reasonableness and good neighborliness."[173] Lastly, as indicated in the preceding quote, the court goes beyond reasonableness and adds the important qualification of good husbandry and good neighborliness. In *Thompson,* the court was emphatic in stating that the right of the dominant estate to drain is restricted to "the course of and for the purposes of better husbandry,"[174] and that all drainage, to be privileged, must be "reasonable [and] consonant with good neighborliness."[175] In *Lee* II the court reaffirmed this standard, instructing trial courts to "maintain a watchful eye on instructions relating to reasonableness and good

169. Rest. 2d § 822.
170. *Johnson*, 22 N.W.2d at 740.
171. *Thompson,* 165 N.W. at 14.
172. *Winterton,* 389 N.W.2d at 635.
173. *Lee* II, 425 N.W.2d at 383.
174. *Thompson,* 165 N.W. at 14.
175. *Id.* at 13.

neighborliness."[176]

It is thus clear, at least in general, that there is no absolute right to drain a slough or wetland and that in fact the common law of South Dakota imposes significant limitations on such land use changes. This recognition achieves a fundamental significance in the context of the *Lucas* decision.

F. The Status of Road and Highway Ditches In Drainage Law

South Dakota statutes establish that public roads and highways are not generally available to carry off drainage water. The depressions along most state, county, and township roads are not drains. Rather, they are "borrow" areas, and serve only in the construction and maintenance of the road bed.

S.D.C.L. section 31-19 provides that condemnation of highway land is for right-of-way and borrow. Nothing is said of either private or public drainage.[177] S.D.C.L. section 46A-10A-70 specifies that owners may drain "in the general course of natural drainage" by draining "into a *drain* on a public highway, *conditioned on consent of the board having supervision of the highway.*"[178] The word "drain" in this section calls out for definition. Clearly, a "drain" on a public highway is not the same as a "borrow" area. So, unless a drain has been specifically created on a public highway,[179] there is no right to put water into a highway borrow area. And even where a drain has been created in conjunction with a public highway, no private landowner may drain into it without first receiving consent of the supervising board.

The statute chapter titled "Highway Drainage Ditches"[180] specifies a procedure by which a public road official may create a drain in conjunction with a road. This type of statutory drain, however, may only be created for the purpose of allowing the road to proceed unimpeded by surrounding wet terrain. Nothing in the statute suggests that such a ditch is available to drain private lands. In other words, a drain in conjunction with a public highway or road is a specific exception, *not* the rule.[181]

In 1985, the legislature amended drainage law in numerous ways. In

176. *See Lee* II, 425 N.W.2d at 383. Although the court has not had many occasions to refine a definition of reasonableness and good neighborliness, attention is drawn to *Lee v. Gulbraa,* 180 N.W. 946 (1921). In that case, the defendant drained several hundred acres into a much smaller slough from which the waters could not escape. *Id.* The result was inundation of a small farm. *Id.* The injury which the lower landowner was suffering would in most cases be deemed unreasonable as well as a clear breach of the "through but not on" rule. *Id.*

177. *See Bogue,* 60 N.W.2d at 224. In *Bogue,* the court stated, "To hold that the right to flood large areas of adjoining land is a right acquired in the purchase or condemnation of highway right-of-way would be to require an unnecessary acquisition of property and make the cost of highways needlessly excessive." *Id.*

178. S.D.C.L. § 46A-10A-70 (emphasis added).

179. *See* S.D.C.L. § 31-21 (1987).

180. *Id.*

181. *See LaFluer,* 22 N.W.2d at 741. The facts in *LaFleur* support this interpretation, at least indirectly. *Id.* There the county *specifically* built drainage ditches when the highway it was constructing passed through a wet and boggy area. *Id.*

one amendment it stated that "[s]ubject to any official controls pursuant to this . . . [Act] . . . drains may be laid along, within the limits of or across any public highway. "[182] In a parallel amendment, the language reads, "No open ditch may be constructed within the limits of any public highway unless the topography makes such construction advisable."[183] Some may argue that these amendments abrogate section 46A-10A-70. That argument must fail. Because the three sections can easily be read and applied in a complementary manner, no further interpretation is required. While drains along a highway may be built, they must first have permission of the relevant supervisory board. Although that solution may suffice, it is probably not what the legislature had in mind. The two amendatory sentences appear in the original bill as part of the sections in which county commissions are authorized to create "drainage projects." These are the successor to the old drainage districts. An essential part of the power of the county commissions to create and approve drainage projects is the power to include roads and other public works in the drainage scheme. The two new sections are not some sweeping new authorization allowing drains on public roads, but instead merely authorize a necessary ingredient of any public drainage scheme.

If a state or municipality does use the public highways and roads as drains, or allows them to be so used, it is potentially liable for resulting damage under both "takings" and common law drainage analysis.[184] In *Nelson v. City of Sioux Falls,*[185] a city was sued for damages by the owner of a residence whose lot and house basement were flooded when the city caused a street to be graded higher than its natural level, thus diverting surface water towards plaintiff's property, where it was impounded. Apparently applying common law drainage principles, the Supreme Court of South Dakota affirmed an award for the plaintiff. In doing so, the court opined that "[a] municipal corporation cannot, without rendering itself liable for the resulting drainage, exercise its right to grade or otherwise improve streets so as to collect surface water upon private property."[186] In *LaFleur*, the drainage which was objected to by the plaintiffs was transported in part along an improved highway. In applying drainage principles, the court observed that the presence of a public highway made no difference in the way in which the rules are applied.[187]

The issue in *Bogue v. Clay County*[188] involved county road improvements upon University Road as it runs north out of Vermillion. The road

182. S.D.C.L. § 46A-10A-71 (1987).
183. S.D.C.L. § 46A-10A-72 (1987).
184. Whether a state or municipality is liable if it merely acquiesces in the use of highways as drains is a separate question, although it would seem that if the necessary prior knowledge is proven, there is liability.
185. 292 N.W. 868 (S.D. 1940)
186. *Id.* at 869.
187. *LaFleur,* 22 N.W.2d at 743.
188. 60 N.W.2d 218 (S.D. 1953).

crosses the Vermillion River bottom, rises at the bluff, and proceeds north. The road ditch to the north of the river bottom delivered water to the bluffs where it was discharged to find its own way to the river. In the bottom, the water spread out and came to rest on plaintiff's ground. The following year the water sat on the field and no crops were grown. The drainage water did not follow a natural watercourse, and plaintiff's land had not been flooded prior to the time when the road improvements were made. The trial court awarded the plaintiff an injunction barring the county from further water discharges and damages resulting from the lost production. The Supreme Court of South Dakota affirmed, stating:

> [The County] artificially collected and drained onto respondent's land surface water from the upper lands of its own right-of-way and of other owners and discharged it in unusual and unnatural quantities, not into a natural watercourse, but at a point where it spread onto respondent's land and did not flow over it in the course of natural drainage but remained there until much of it disappeared only through percolation and evaporation and some of which would never have reached respondent's land except for the artificial interception. This method of drawing surface waters violates principles well established in this jurisdiction and which apply with equal force to drainage by a county for highway purposes and to drainage of agricultural land.[189]

Heezen v. Aurora County[190] was an action for damages and injunction. The county road and ditch system diverted surface water into Crystal Lake. Absent the road the water could not have drained into that lake. In 1962 heavy rainfall and the ditch system caused the lake to overflow. The county was held liable for causing flooding by construction and maintenance of roads. The court stated:

> The [trial] court concluded that the actions of the defendant county in causing the land of these plaintiffs to be flooded by diverting water from another watershed resulted in the taking and damaging of private property for public use for which they were entitled to be compensated. This is in accord with our holding that such flooding of land is compensable under eminent domain provisions. . . . This rule is not pertinent when the owner of dominant land drains surface water from his land into a natural watercourse.[191]

G. The Urban Exception

To this point, it is established that South Dakota's civil law rule of drainage is based principally in property law. The point is emphasized by the fact that the Supreme Court of South Dakota has carved out a specific exception for urban drainage. In *Mulder v. Tague,*[192] the court adopted a

189. *Id.* at 222.
190. 157 N.W.2d 26 (S.D. 1968).
191. *Id.* at 31 (citing *Bogue,* 60 N.W. at 218; and *LaFleur,* 22 N.W.2d at 741).
192. 186 N.W.2d 884 (S.D. 1971).

negligence (tort) rule to apply in urban areas. In the case of urban property, the court reasoned, changes and alterations in the surface are essential to the enjoyment of property. Thus, the owner may make changes in the surface of a city or town lot essential to its enjoyment regardless of the effect on the flow of surface waters provided he or she is not negligent in doing so. The court opined:

> As any change in grade, level, or topography might affect natural drainage, the civil law rule cannot reasonably be strictly applied in urban areas. To do so would prevent the proper use, development, improvement, and enjoyment of considerable urban property. Also the reason for the rule disappears in areas where adequate artificial drains and storm sewers are provided.[193]

VI. THE 1985 DRAINAGE LEGISLATION (HB 1154)

A. Introduction and Background

In 1985, the South Dakota Legislature enacted a lengthy statute in which it sought to revise and amend drainage law.[194] This statute was doubtlessly enacted in response to several years of abundant rains which had the effect of creating disputes among private landowners. As enacted, the statute is a confusing and disjointed mixture of new authority and revised definitions. This section is an attempt to sort through HB 1154 and summarize its meaning and effect. In general, the enactment can be described as an enlargement of the discretionary powers of boards of county commissioners to address drainage issues in the respective counties. Because the new law rests naturally upon the property footings of the state common law of drainage, there is an inevitable connection which this summary will attempt to highlight.

B. Discretionary Police Power Authority

(1) The Zoning Analogy

A major portion of HB 1154 delegates discretionary authority to individual county commissions to adopt drainage regulation, pursuant to the State's police power. The scheme of this authority resembles closely the long established delegation of authority to counties and cities to adopt local comprehensive land use controls,[195] usually in the form of Euclidean zoning[196] or subdivision controls.[197]

It will be recalled that a municipality which aspires to adopt and implement land use controls begins by preparing a comprehensive land use

193. *Id.* at 888. The decision was forecast in dicta in *Young* 90 N.W.2d at 402 (1958). *See also* Sveen, *supra* note 25, at 784-85.
194. 1985 S.D. Laws 603.
195. *See* S.D.C.L. § 11-4 (1995).
196. *See* Village of Euclid, Ohio v. Amber Realty Co., 272 U.S. 365 (1926).
197. *See* S.D.C.L. § 11-3 (1995).

plan.[198] The plan must cover all real property in the municipality, although it does not bind any particular parcel to a specified use. Rather, it serves to establish that the police power will not be applied on an *ad hoc* basis and will be used to achieve even application of legitimate police power objectives.[199] Once a municipality has adopted a comprehensive land use *plan,* it may then proceed to enact a specific zoning or subdivision control statute. It is the latter which binds individual parcels of land to particular uses.[200]

Local planning and zoning laws are also required to establish a system of fair procedures in order to assure that the regulatory system has the necessary flexibility and satisfies fundamental constitutional principles of equal protection and due process. Thus, zoning and subdivision control ordinances establish some sort of administrative board empowered to hear appeals from specific landowners. Such administrative boards are typically authorized to grant variances in cases of undue hardship, thus assuring flexibility and fairness.[201]

(2) Drainage Plan

Tracking this familiar pattern, HB 1154 authorizes county commissions to adopt a *drainage plan* for the entire county.[202] Creation and adoption is purely discretionary. The plan is defined as "a document which may illustrate by maps, charts and other descriptive matter the *policies* of the board to interrelate all man-made and natural systems and activities relating to drainage under its jurisdiction."[203] To maintain order during the period of drainage plan preparation, a board may adopt an emergency (temporary) drainage map or ordinance.[204]

HB 1154 states that the drainage plan and any regulatory controls which follow and implement it are "for the purpose of enhancing and promoting physical, economic and environmental management of the county; protecting the tax base; encouraging land utilization that will facilitate economical and adequate productivity of all types of land; lessening governmental expenditure; and conserving and developing natural resources."[205] This sweeping provision is essential because it establishes the legitimate police power justification of the State in authorizing a comprehensive system of local drainage controls.

198. S.D.C.L. § 11-4-3 (1995). *See also* A MODEL LAND DEVELOPMENT CODE § 3-102 (American Law Institute 1975).

199. *See generally,* Fasano v. Board of County Commissioners of Washington County, 507 P.2d 23 (Or. 1973).

200. S.D.C.L. § 11-4-1 (1995).

201. S.D.C.L. § 11-4-13 (1995).

202. S.D.C.L. § 46A-10A-16 (1987); 1985 S.D. Laws 603, § 16.

203. S.D.C.L. § 46A-10A-1(7) (1987); 1985 S.D. Laws 603, § 2(6) (emphasis added).

204. S.D.C.L. § 46A-10A-15 (1987); 1985 S.D. Laws 603, § 15. Compare S.D.C.L. § 11-4-3.1 (1995) (dealing with temporary *zoning* controls).

205. S.D.C.L. § 46A-10A-17 (1987); 1985 S.D. Laws 603, § 17. Compare S.D.C.L. § 11-4-1 (1995) (setting forth the purposes of *zoning* regulations).

(3) Regulations

Either as part of the process of adopting a drainage plan or in a separate subsequent enactment, the county commissions are authorized to adopt specific drainage regulations, referred to in HB 1154 as "official controls."

The scope of official controls is broad in both manner and kind.[206] The statutory definition is "any ordinance, order, regulation, map or procedure adopted by a board to regulate drainage."[207] Of course, "official controls" of drainage are analogous in every way to zoning ordinances, just as "drainage plans" are in every way analogous to "comprehensive land use plans." Sections 18 through 20 in HB 1154 provide the additional details of official controls and have the effect of assuring the broadest possible definition. In other words, county commissions have broad discretion in fashioning "official controls." The regulations may include the equivalent of a nonconforming use, assuring the gradual elimination of drains which are inconsistent with the drainage plan.[208]

(4) Administrative Procedures and Review

Administrative procedures are authorized, but it is unclear whether they are required. A "drainage commission" may be appointed by a county commission.[209] Such a commission may be directed to serve as a board of adjudication.[210] The statute specifies that if a drainage commission *is* serving as a board of adjudication, the county commission may authorize it "in individual cases [to] make . . . special exceptions or variances" to drainage regulations.[211]

Curiously, the statute defines neither "special exception" nor "variance," nor does it authorize their use in the absence of a drainage commission. Of course, special exception and variances are terms which carry specific meaning in the context of zoning.[212] HB 1154 does provide that an individual landowner "may petition a board *or* commission to change the drainage restrictions on all or any part of his property."[213] The problem here is that if the petition is directly to a county commission, the request is for a change in the drainage ordinance itself is a legislative act and not therefore subject to judicial review. If on the other hand, the decision is by a drainage commission, it is administrative in character and subject to judicial review under the state administrative procedure act.

206. S.D.C.L. § 46A-10A-21 (1987); 1985 S.D. Laws 603, § 21.
207. S.D.C.L. § 46A-10A-1(16) (1987); 1985 S.D. Laws 603, § 2.
208. S.D.C.L. § 46A-10A-36 (1987); 1985 S.D. Laws 603, § 36.
209. S.D.C.L. § 46A-10A-2 (1987); 1985 S.D. Laws 603, § 3.
210. S.D.C.L. § 46A-10A-34 (1987); 1985 S.D. Laws 603, § 34.
211. *Id.*
212. S.D.C.L. § 11-4-13.
213. S.D.C.L. § 46A-10A-38 (1987); 1985 S.D. Laws 603, § 38 (emphasis added).

(5) Permits

Issuance of permits is implicit in the broad and sweeping delegation of police power authority in HB 1154. Nonetheless, specific permit-granting authority is provided.[214]

(6) Informal Resolution of Disputes Among Private Landowners: A Drainage Court?

The provisions of HB 1154 described to this point involve the regulation by government of drainage practices. However, the statute also takes up situations involving drainage disputes among private landowners. These are of course, the cases which are always governed by the common law drainage rules, and have been traditionally within the jurisdiction of state circuit courts.

In one section, HB 1154 authorizes drainage commissions (*if* they have been created by county commissions) to "reach decisions in individual drainage disputes between landowners . . . ."[215] Decisions of such a commission are appealable to the county commissions and from there to circuit court.[216]

No specific procedures in the statute appear to govern this adjudication process. It is reasonable to conclude that the function is not mandatory and is a responsibility which a county commission may choose to assume in its discretion. A more difficult problem is whether a county commission can make *ad hoc* and case-by-case determinations whether to involve itself in individual drainage disputes between landowners,[217] or in the alternative, adopt a rule providing an equal opportunity to all landowners involved in disputes.

A charitable observer may conclude that in this section the legislature sought to establish dispute resolution alternatives to private litigation in the common law courts. This goal may be admirable, at least in the abstract, but the effort at implementation is hardly feasible. Essentially, the statute invites county commissions to establish a drainage court at their expense and without specific backup from state government. Bold and innocent is the commission which accepts such a charge. This is particularly so in light of the fact that the circuit courts have the identical obligation and are backed by more than one hundred years of experience.

C. New types of Drainage Organization

HB 1154 apparently intends to encourage county commissions to become active and principal initiators of coordinated drainage works. Prior to 1985, the independent special drainage district was the device available

214. S.D.C.L. § 46A-10A-30 (1987); 1985 S.D. Laws 603, § 30.
215. S.D.C.L. § 46A-10A-34; 1985 S.D. Laws 603, § 34.
216. *Id.*
217. *Id.*

for this purpose. After 1985, only *active* drainage districts continue to enjoy legal recognition.[218] Into this gap the statute identifies "drainage projects,"[219] "drainage methods,"[220] "coordinated drainage areas,"[221] and "drainage schemes."[222] The statute provides neither guidance as to how we are to distinguish among these categories nor why each exists. It is also difficult to determine how and why the legislature chose to make the distinctions. It is clear, however, that "drainage projects"[223] and "coordinated drainage areas" are the more important.

(1) Coordinated Drainage Area

The statute defines coordinated drainage area as "a defined geographic area containing one or more parcels of real property and established . . . by a board [county commission] or commission [drainage commission] to provide a planned network or method of natural or man-made drainage, or both, to *benefit all parcels* of real property involved."[224]

"Official controls," that is, police power regulation, may be used to establish a coordinated drainage area.[225] The statute describes a process whereunder individuals may petition to have an area created. This process provides for final area creation only after landowner assent is expressed in both petition and election.[226]

Thus, there is a conflict within the statute on the point of creation of a coordinated drainage area. Section 18, which stands alone, appears to authorize a county commission to create a coordinated drainage area on its own motion; that is, to *impose* the area on landowners. In conflict is the process of S.D.C.L. sections 47-50, which provide for creation of an area only after election.[227] Of course, it is this latter process which more closely resembles the old drainage districts.

The definition of a coordinated drainage area also raises a problem. As mentioned above, an area must "*benefit all parcels of real property involved.*"[228] This may be an impossible condition. The typical drainage area or district *necessarily* includes lands which will *benefit* from drainage works as well as lands which will be *burdened* by such works. To fashion a district with only benefited lands is in many cases factually unlikely and certainly destined to fail in its purpose.

218. S.D.C.L. § 46A-10A-43 (1987); 1985 S.D. Laws 603, § 43.
219. *Id.*
220. *Id.*
221. *Id.*
222. S.D.C.L. § 46A-10A-1(8) (1987); 1985 S.D. Laws 603, § 2.
223. S.D.C.L. §§ 46A-10A-43 through 46A-10A-58 (1987); 1985 S.D. Laws 603, §§ 43-58.
224. S.D.C.L. § 46A-10A-1(4) (1987); 1985 S.D. Laws 603, § 2 (emphasis added).
225. S.D.C.L. § 46A-10A-18 (1987); 1985 S.D. Laws 603, § 18.
226. S.D.C.L. §§ 46A-10A-47 through 46A-10A-50 (1987); 1985 S.D. Laws 603, §§ 47-50.
227. *Id.*
228. S.D.C.L. § 46A-10A-1(4) (1987); 1985 S.D. Laws 603, § 2 (emphasis added).

(2) Drainage Projects

HB 1154 also sets out a category known as "drainage project." Presumably, these are projects smaller than coordinated drainage areas.

Drainage projects are initiated upon petition of at least four landowners to the county commission. The petition must explain the necessity for the project and define it accurately. In response, the county commission has a duty to act on all such petitions within thirty days. A hearing is required and the standard is whether the project is feasible and conducive to public welfare and necessary or practicable for draining land.[229]

A drainage project can include lands that are benefited as well as burdened by a proposed project and is not subject to election. Thus, whereas a "coordinated drainage area" may include *only* benefited lands, and is subject to approval by public vote, the "drainage project" may include both benefited and burdened land, may be created without election, and therefore can be imposed upon nonconsenting landowners. The result is that it is unlikely that the "coordinated drainage area" will ever be used. In contrast, the "drainage project" appears to be the true legal successor to the traditional special drainage district.

(3) Existing Drainage Districts

The statute provides that special drainage districts existing in 1985 which have been active within three years (including the assessment of property within three years prior) "shall be allowed to continue in that status."[230] This means that any drainage district that was inactive in the years 1982 through 1985 no longer is a legal entity. If it is to function, it must be re-created as either a drainage project or a coordinated drainage area.

For drainage districts that continue to function as such, the interesting question is that of identifying the statutory laws that govern their operation. The 1985 legislation repealed most of the laws governing the operation of drainage districts while at the same time preserving the right of some of these districts to continue to operate. No new law was enacted to govern such surviving districts. So, if one represents such a district, to what law do you refer in advising the board? Arguably, the old statutes![231]

(4) Other Special Districts With Drainage Responsibility

In the late 1980's, the South Dakota Legislature also authorized the creation of additional special districts with drainage responsibilities. So-called "water project districts" and "water development districts," with their own taxing authority, have drainage jurisdiction. HB 1154 makes no

229. S.D.C.L. §§ 46A-10A-58 through 46A-10A-66 (1987); 1985 S.D. Laws 603, §§ 58-66. *See also* S.D.C.L. § 46A-11 (dealing with the assessment of costs against included landowners).

230. S.D.C.L. § 46A-10A-43; 1985 S.D. Laws 603, § 43.

231. So hold on to your outdated volumes of the Code!

effort to rationalize the obvious potential conflict with these new districts or with other special districts such as watershed and conservation districts.[232]

(5) Those Other Categories

As mentioned, HB 1154 also refers to "drainage schemes" and "drainage methods." "Drainage methods" are referred to only once as a separate category.[233] "Drainage scheme" is defined as "a plan or system by which water is drained from one or more parcels of real property onto one or more parcels of real property,"[234] and is nowhere else referred to in the statute. Both ought most probably to be treated as verbiage.

(6) Inter-County and Inter-Municipal Cooperation

HB 1154 sensibly encourages cooperation among counties and municipalities.[235] It is sensible because few will disagree with the observation that water and drainage problems will be best addressed along watershed lines. Because county and municipal boundaries ignore the existence of watershed boundaries, effective problem solving will require cooperative governments. Thus, county commissions may cooperate on drainage projects, enter into joint powers agreements, and any municipality may join in. State public or school lands are subject to drainage laws as well. Intrastate drainage projects are expressly recognized.

D. Legislative Alteration of Common Law Property Definitions

(1) Introduction

At the time of enactment of HB 1154, the South Dakota courts, in a consistent series of decisions beginning in early statehood and continuing to the late 1980's, developed an articulate definition of the rights and responsibilities of private landowners with regard to drainage of surface water. Because those rules reflect the experience of generations, and define important property interests, they provide the baseline from which HB 1154 is evaluated. Early statutes did exist to define the law of diffused surface water, but the Supreme Court of South Dakota has held consistently that these served only to restate the common law principles which existed prior to the earliest legislation.[236]

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232. *See* John H. Davidson, *South Dakota's Special Water Districts—An Introduction*, 36 S.D. L. Rev. 499 (1991).

233. S.D.C.L. § 46A-10A-43; 1985 S.D. Laws 603, § 43.

234. S.D.C.L. § 46A-10A-1(8); 1985 S.D. Laws 603, § 2.

235. S.D.C.L. §§ 46A-10A-9 through 46A-10A-12 (1987); 1985 S.D. Laws 603, §§ 9-12.

236. *See Thompson*, 165 N.W. at 12. In *Thompson*, the court stated:

> The law of this state and of the territory from which this state was created has been at all times based on the rule of the civil law, which is also the rule of the English common law—that rule which recognizes that the lower property is burdened with an easement under which the owner of the upper property may discharge surface waters over such

HB 1154 intersects the established common law property rules in several places. In some ways the effect of the intersection is benign, reflecting and building upon existing principles. In other ways, HB 1154 conflicts with pre-existing property rules. The concern is that legislative change of established property rules may be subject to attack on the ground that property rights are taken or damaged without due process of law.[237]

(2) General Recognition of Existing Civil Law Rule.

HB 1154 first provides definitions of both "dominant estate"[238] and "servient estate."[239] In this, it appears to recognize and reaffirm the civil law rule of surface water drainage as developed in the decisions of the Supreme Court of South Dakota.

(3) Police Power Regulation Subject to Existing Drainage Rights

In Section 20 of HB 1154 the legislature delegates to county commissions the authority to impose police power (regulatory) controls upon land drainage. It then conditions this delegation by stating that any police power regulation "shall embody the basic principle that any rural land which drains onto other rural land has a *right* to continue such drainage *if*"[240] the following six elements are met:

(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.[241]

These elements are important and require further scrutiny. Legislation which restricts or redefines judicial property rules may encounter takings

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> lower property through such channels as nature has provided. . . . It follows that to attempt by legislation to increase such an easement and the consequent burden beyond that existing under the common law of this state would have been an *interference with the vested rights of the owners of every servient estate* within this state—a taking of the property of each of such owners.

Id. (emphasis added).

237. *See Lucas,* 505 U.S. at 1003.

238. "'Dominant Estate,' any parcel of real property, usually at a higher elevation, which holds a common law or statutory legal right to drain water onto other real property." S.D.C.L. § 46A-10A-1(5) (1987); 1985 S.D. Laws 603, § 2.

239. "'Servient Estate,' any parcel of real property, usually at a lower elevation, which is subject to a legal right allowing a dominant estate to drain water onto it." S.D.C.L. § 46A-10A-1(20) (1987); 1985 S.D. Laws 603, § 2.

240. S.D.C.L. § 46A-10A-20 (1987); 1985 S.D. Laws 603, § 20.

241. *Id.*

and due process objections. To the extent that the section definition is consistent with such judicial rules, it is benign. Where it conflicts, the legislature may be found to have violated established property rules and expectations as well as broadly accepted notions of fairness.

Parts (1) through (3) of section 20 are consistent with the common law property rule. Part (4), however, varies from the common law rule in a significant way. It attempts to recognize drainage from an "established water course," a term which is defined to include "*man-made*" drainage.[242] In other words, this section purports to substantially increase the burden born by the common law servient drainage estate by obligating it to receive drainage water from artificial drains. The common law property rules do not countenance such a sweeping expansion of the servient estate's obligation.

Part (5) is consistent with the common law rule. Part (6) in contrast, undertakes a radical change in the property rule. This section states that "[n]o other feasible alternative drainage system is available that will produce less harm without substantially greater cost to the owner of the land being drained."[243] This appears to introduce something resembling economic cost-benefit analysis into the definition of an established property right. In this, it is without precedent and would extend the South Dakota rule well beyond even the most liberal applications of the reasonable use rule, to say nothing of the State's better defined and structured civil law rule. It allows the owner of the dominant estate to argue, "Yes, it is true that due to limits in my property estate, I am unable to pursue a desired project. But, no matter; I should be allowed to proceed *no matter how great the increased burden on the servient estate,* so long as I can demonstrate the absence of a feasible alternative." It is difficult to imagine a more sweeping intrusion upon existing property rights and expectations.

How so? First, it ignores the marketplace. Reliable and clearly defined property interests encourage voluntary transfers by private negotiation. For example, the owner of a dominant drainage estate who hopes to undertake a project or land use that will increase drainage in excess of the servient estate's obligation will enter into negotiation with the servient estate owner. If the price of purchasing the enhanced drainage right will allow the proposed new land use to be undertaken profitably, the deal will be struck. If not, the dominant estate owner will seek alternative land uses. In this way, clearly defined property rights contribute to the operation of the marketplace and to increased efficiency. HB 1154 ignores this by allowing our hypothetical dominant estate owner to refuse to negotiate with the servient estate owner. Instead, he or she can simply argue "no feasible alternative" and proceed with the proposed new land use, no matter how

242. S.D.C.L. § 46A-10A-1(9) (1987); 1985 S.D. Laws 603, § 2.
243. S.D.C.L. § 46A-10A-20(6) (1987).

inefficient it may be and regardless of the degree of burden it imposes on the servient estate.

More importantly, the servient estate—so clearly defined in our common law—is rendered nearly valueless because it is no longer limited in the scope of its obligation. The servient estate becomes an uncertain one indeed, for there is no way to limit drainage. This will discourage economic development on the servient estate.

The legislative purpose in enacting section 20 is elusive at best. If the intent is to codify the existing judicial rule—or a revised rule—of surface water drainage, the legislature simply got it wrong. As just described, Parts (4) and (5) of section 20 reduce the servient estate by subjecting it to artificial drainage as well as the "no other feasible alternative" concept. This approach makes the servient estate almost totally valueless. It certainly discourages all significant economic development on burdened lands. In direct effect it would be a near total transfer of value from the servient to the dominant estate.

If the intent is not to codify the legislature's unique interpretation of the existing rule, the purpose then is even more elusive. In fact, it can support none. An undated paper published by the South Dakota Office of Attorney General concludes, without documentation, that section 20 is "in large part a codification of the drainage rules arising from the court cases . . . ."[244] At best, section 20 is an *attempt* at codification which fails due to misreading of the judicial decisions.

(4) Police Power Regulation is Authorized to Prohibit New Drainage

Continuing the analysis of section 20, which enables police power regulation of "rural drainage," the statute purports to protect *existing* legal drainage only. It does not protect drainage which is lawful according to the rules developed by the Supreme Court of South Dakota but which has not yet been initiated. Drainage by the dominant estate cannot be made subject to a "use it or lose it" rule.[245] Instead, the dominant easement remains appurtenant to a parcel of land until such time as the owner decides to embark upon some useful project of economic or social development. At such time the right may be exercised. In this is its value. To remove this aspect of the dominant estate is to remove the largest part, if not all, of its value. Worse, it may send a message to landowner's to *drain now,* no matter how uneconomic, improvident, or messy the project undertaken. This is bad policy.

(5) "Vested Drainage Rights"—The Substantive Rule

HB 1154 states:

Any drainage right *lawfully acquired* by the owner or owners of *either*

244. DEERING, *supra* note 91, at 27.
245. S.D.C.L. § 46A-10A-20; 1985 S.D. Laws 603, §20.

> *a dominant or servient estate* prior [to the effective date of this Act] is deemed *vested,* provided the right is recorded with the appropriate county register of deeds within [three years of the effective date of this Act].[246]

Earlier, "vested right" is defined as "a right of water drainage from one parcel of property to another which is settled or accrued to the property on the basis of state law."[247] What is the purpose of this? What did the legislature intend? Who is bound by these filings? What is the effect of nonfiling? The questions that arise are numerous and the legislature leaves us to speculate as to purpose and intent. The next few paragraphs offer some of that speculation.

What did the legislature have in mind? One possibility is that it intended a drainage analogue to the "mineral lapse" statutes litigated before the Supreme Court of the United States in *Texaco v. Short*[248] and *United States v. Locke.*[249] In *Short*, state legislation was enacted requiring that all severed mineral estates be recorded at risk of lapsing or merging into the surface estate. The mineral industry brought unsuccessful due process and takings challenges, the Court holding that recordation of real estate interests is a reasonable restriction on property ownership. This does not, however, appear to be what the South Dakota Legislature had in mind since it imposed no penalty on failure to record. That is, a recorded "drainage right" is "vested," but an unrecorded right presumably retains its validity. For a recordation statute to be effective, it is essential that all real estate interests of a category be obligated to record. That not being the case here, the legislature must have had some other purpose. Moreover, in the case of the mineral lapse statutes, the legislation merely requires recordation, while leaving to the courts the measure of the property interest itself.

Did the South Dakota Legislature intend to create a system whereunder private disputes among landowners might be reduced due to the additional "certainty" brought about by voluntary filing? It is possible to imagine this, since the legislature convened after several years of flooding and perceived contention among landowners. If this is the case, is it effective? Further questions arise.

How can an estate be "vested" if it is effectively outside the chain-of-title of affected landowners? Section 31 authorizes recordation with the register of deeds. If unchallenged the recorded interest will "become vested." But vested against whom? Against what properties and estates? A drainage may extend over any number of survey sections and ownership interests before it finds its way into a stream or river. The "vested" drainage filing will not appear in the chain-of-title; that is, it will not be indexed against each estate up and down the drain. Yet, it appears that the legisla-

246. S.D.C.L. § 46A-10A-31 (1987); 1985 S.D. Laws 603, § 31 (emphasis added).
247. S.D.C.L. § 46A-10A-1(22) (1987); 1985 S.D. Laws 603, § 2.
248. 454 U.S. 516 (1982).
249. 471 U.S. 84 (1985).

ture will have each estate be bound for all time despite the absence of record notice. At the least this creates great insecurity in our system of rural land titles.

Did the legislature intend to impose inquiry notice obligations upon all purchasers of land that receives *any* amount of drainage? In other words, is the title searcher now obligated to obtain U.S. Geological Survey maps, identify all up-gradient properties, and search the titles to each? If so, the cost and complexity of land titles must necessarily increase by a large measure. Adding to the complexity is the obvious fact that many drains have the poor judgment to cross county boundaries. Is a down-gradient landowner in one county bound by a filing made miles up the drain, in a separate county? This will require multi-county title searches and again increase the cost and complexity of title searches.

Compounding the problem is the issue of public advertisement as a device for limiting land titles. This "vested right" statute requires *no personal service,* even as against immediately adjacent landowners. The only notice provided is publication in a newspaper of record. Advertising is sometimes employed to satisfy the constitutional due process notice requirement where the affected parties cannot be located. Here, however, the affected parties are known and readily identifiable. Divestment of a valuable property estate ought not occur in such a casual manner, and there is an open question of whether procedural due process is provided. Apart from the constitutional issue, there is the issue of simple fairness.

Due process in this context is flexible, but the Supreme Court of the United States has provided clear guidance in at least three recent decisions. In *Mullane v. Central Hanover Bank and Trust Co.*,[250] the Court affirmed the rule that state action affecting property must generally be accompanied by notice, stating that "[a]n elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections."[251] The principles involved require balancing the "interest of the State" and "the individual interest sought to be protected by the Fourteenth Amendment."[252] Whether a particular method of notice is reasonable depends upon the circumstances.

In *Mennonite Board of Missions v. Adams,*[253] a mortgagee of property that had been sold and on which the redemption period had run complained that the state's failure to provide it with actual notice of these proceedings violated due process. The Court agreed, opining, "[a]ctual notice is a minimum constitutional precondition to a proceeding which will adversely affect the liberty or property interests of any party, whether unlet-

250. 339 U.S. 306 (1950).
251. *Id.* at 314.
252. *Id.*
253. 462 U.S. 791 (1983).

tered or well versed in commercial practice, if its name and address are reasonably ascertainable."[254] Because the tax sale had "immediately and drastically" diminished the value of the mortgagee's interest, and because the mortgagee could have been identified through "reasonably diligent efforts," due process required that the mortgagee be given actual notice.[255]

In *Tulsa Professional Collection Services, Inc. v. Pope,*[256] the appellant held an unsecured claim against a decedent's estate for an unpaid bill. The Court again held that due process requires *actual notice* to reasonably ascertainable creditors of the estate. The Court added:

> Actual notice need not be inefficient or burdensome. We have repeatedly recognized that mail service is an inexpensive and efficient mechanism that is reasonably calculated to provide actual notice. In addition, Mullane disavowed any intent to require "impracticable and extended searches . . . in the name of due process." As the Court indicated in Mennonite, all that the executor or executrix need do is make "reasonably diligent efforts" to uncover the identities of creditors. For creditors who are not "reasonably ascertainable," publication notice can suffice.[257]

Earlier in the opinion the Court reflected:

> In assessing the propriety of actual notice in this context consideration should be given to the practicalities of the situation and the effect that requiring actual notice may have on important state interests. As the Court noted in Mullane, "[c]hance alone brings to the attention of even a local resident an advertisement in small type inserted in the back pages of a newspaper."[258]

The Supreme Court of South Dakota has followed *Mullane* and its progeny. In an action to foreclose a mortgage lien, constructive service of a summons by publication satisfies the requirements of due process *if all reasonable means have been used to discover a defendant's whereabouts.*[259] The court has stated:

> [I]t is not necessary that all possible or conceivable means should be used to ascertain the whereabouts of a defendant, still it is necessary that the affidavit show that all reasonable means have been used to discover the whereabouts of a defendant, to the end that he may receive actual notice of the pendency of the suit against him. This is what is meant by the term "due diligence."[260]

In *Fortier v. City of Spearfish,*[261] the court had an opportunity to develop the issue of defining adequate notice when private property is affected.[262] The court held that a landowner did not have a due process right

254. *Id.* at 800.
255. *Id.* at 798.
256. 485 U.S. 478 (1988).
257. *Id.* at 490.
258. *Id.* at 489.
259. Cone v. Ballard, 5 N.W.2d 46, 48 (S.D. 1942).
260. *Id.* at 48.
261. 433 N.W.2d 228 (S.D. 1988).
262. *Id.* at 230.

to personal notice of proposed comprehensive zoning and flood plain ordinances and that notice by publication afforded due process for proposed enactments or changes in zoning ordinances.[263] The notice, however, was sufficient because it served to notify the *general* public of a *general* comprehensive zoning plan which could only be adopted after a public hearing at which all affected persons were entitled to be heard. In so holding, the court discussed *Mullane*, stating:

> In *Mullane,* the United States Supreme Court held that notice by publication is constitutionally insufficient in matters affecting private property where the owners of the property are known or should be known. This holding was confined to specific facts, and in reaching it, the court employed a balancing test. The court held that personal notice was required to notify the beneficiaries of a trust when their names and addresses were readily ascertainable. In determining the type of constitutionally sufficient notice, the court balanced the interests of the state and the individual interests sought to be protected by the Fourteenth Amendment. The United States Supreme Court recently restated this test when it held, "The focus is on the reasonableness of the balance, and, as *Mullane* itself made clear, whether a particular method of notice is reasonable depends upon the particular circumstances." We hold that notice by publication is adequate and affords due process for proposed enactments or changes in the zoning ordinances that affected Fortier.[264]

Continuing, the Supreme Court of South Dakota stated:

> Public hearings for zoning enactments differ considerably from the cases where the United States Supreme Court has held notice by publication is insufficient. The cases where the court has held personal notice necessary involved small numbers of people—the beneficiaries of a trust, lienholders of property, and creditors of an estate. In contrast, the enactment of a flood control ordinance involves a larger number of people, in this case, an entire community. A more important consideration is the nature of the right affected. For proposed zoning enactments, citizens have the right to appear before a municipal body, voice their views and participate in the decision making process. Notice by publication serves to sufficiently inform those who desire to appear before a zoning hearing.[265]

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263. *Id.* at 229.

264. *Id.* at 230 (emphasis added).

265. *Id.* (emphasis added). *See also* Wortelboer v. Benzie County, 537 N.W.2d 603 (Mich. App. 1995). In *Wortelboer,* the Court of Appeals of Michigan held that property owners of land along a lake were not entitled to receive actual notice of a petition to change the levels of the lake, even though the change in water level resulted in extensive damage to their property in the form of erosion and flooding. *Id.* at 608. "Due process is satisfied when interested parties are given notice through a method that is reasonably calculated under the circumstances to apprise them of proceedings that may directly and adversely affect their legally protected interests and afford them an opportunity to respond." *Id.* Applying the test of *Mullane,* the court held that notice by publication in this instance was sufficient to satisfy the due process requirement because under the circumstances, it was not reasonably possible or practicable to provide more adequate notice. *Id.*

A California Court of Appeals has drawn the distinction between acts which are "quasi-legislative" and those which are "quasi-judicial," holding that due process requirements only ap-

In *Fortier*, the court developed an important distinction in the *Mullane* line. Notice of public matters is different from the notice to which a property owner is entitled when government action threatens specific private title. Thus, for example, a general zoning ordinance was involved in *Fortier*. In such a situation the government can hardly be expected to give actual notice to every citizen whose interests may in some way be affected by the ordinance.[266] It is to private estates that the *Mullane* bill is directed, and it is private estates that HB 1154 affects.

HB 1154 involves a small number of property owners whose names are readily ascertainable and who are threatened with the loss of valuable property. A dominant landowner is aware or should be aware, at a minimum, of the owners of the nearby servient estate on which he causes drainage to occur. And yet the statute requires no personal notice and prescribes only notice by publication, even for adjacent landowners. The Supreme Court of South Dakota has granted greater protection to the property rights of a camper to her campsite, holding that the Game, Fish, and Parks Commission is required as a matter of due process to grant cabin owners a hearing before termination of cabin site permits within a state park![267]

"State action" is a necessary consideration in the due process argument. An individual is entitled to due process of law before his life, liberty, or property is taken away by the *government*.[268] In considering the argument that the self-help repossession provisions given to creditors in S.D.C.L. section 57A-9-503 violated due process, the Supreme Court of South Dakota stated that "there was no state action involved in the self-help remedy taken by Bank. This argument was raised with great frequency in the past, but has been roundly discredited by dozens of courts."[269] In the case of HB 1154, however, the State has done much more than merely authorize the reclaiming of property by one who holds a security interest. The drainage legislation in fact establishes a system by

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ply to the latter. Beck Development Co., Inc. v. Southern Pacific Transp. Co., 52 Cal. Rptr. 2d 518 (Cal. Ct. App. 1996). In *Beck*, the court held that in the case of an administrative agency, "quasi-legislative" acts, which are not subject to procedural due process requirements, involve the adoption of rules of general application on the basis of broad public policy, while "quasi-judicial" acts, to which due process requirements apply regardless of the guise they may take, involve the determination and application of facts peculiar to an individual case; when a quasi-judicial action is to be taken, procedures must be available to provide, at a minimum, notice and an opportunity for a hearing. *Id.* at 537.

266. For further example, see Application of Christensen, 417 N.W.2d 607 (Minn. 1987). In *Christensen*, the Supreme Court of Minnesota held that a statute which provides for published notice of inventory and mapping of a state's wetlands and public waters is constitutionally valid on its face, and was adequate to protect the due process rights of an applicant for a permit to drain wetland located on his farm. *Id.* at 609. The court stated, "[W]hen a municipal governing body is taking action which will affect an open class of individuals, interests, or situations, that governing body is acting in a legislative capacity, and any rights of procedural due process in such proceedings are minimal." *Id.* at 611.

267. Moulton v. State, 412 N.W.2d 487 (S.D. 1987).

268. Deuter v. South Dakota Highway Patrol, 330 N.W.2d 533 (S.D. 1983). *See also Pope*, 485 U.S. at 486 (discussing the state action requirement).

269. First National Bank of Black Hills, Sturgis v. Beug, 400 N.W.2d 893, 895 (S.D. 1987).

which the rightful owner of a property interest may be divested of that interest without constitutionally sufficient notice. More importantly, it has given county government a positive role—via publication—in the process of divestment. "The due process clause requires, at a minimum, that deprivation of life, liberty, or property *by adjudication* be preceded by notice and opportunity for hearing appropriate to the nature of the case."[270] Is not an action pursuant to HB 1154 a permanent and final adjudication of a property right? The statute provides, in part:

> Any drainage begun prior to July 1, 1988, and challenged by an affected landowner in a court of law or before a board or commission within two years of July 1, 1988, may not become vested until and unless a final decision has been reached in favor of such drainage. Any commission decision may be appealed to the board within twenty days. Any board decision may be appealed to the circuit court of the county wherein the dispute arose within twenty days. Any circuit court decision may be appealed in the same manner as any other circuit court decision. If such final decision has been reached, including final decision on any appeal, the owner of the drainage right shall record the final decision within thirty days in order for the right to become vested.[271]

Thus, adjudication is the product of a challenge by the landowner. If a landowner does not receive constitutionally adequate notice that a challenge is necessary to protect his rights, no such adjudication is possible. The landowner has been deprived of property by the *denial* of any adjudication, precisely because it was *not* "preceded by notice and opportunity for hearing appropriate to the nature of the case."[272]

The case of *Frawley Ranches, Inc. v. Lasher*[273] is informative. The owner of a ranch appealed from the county board of commissioners' grant of a right-of-way across his ranch to another landowner's isolated tract and award of $1,800 in compensation. The Supreme Court of South Dakota held that the easement was intended to be *public*; that is, there was state action and the ranch owner had no cause for a complaint of lack of due process as a result of the board's actions in view of the fact that the owner was afforded a full hearing and trial de novo before a circuit court.[274] Nevertheless, state statutes required that the rancher be personally served written notice. In essence, HB 1154 purports to do the same, but without providing for any hearing unless a landowner challenges an easement he likely was never made aware would exist. It would be as if the rancher in *Lasher* was never personally served notice that his property rights were to be adjusted, but the rights were extinguished.

South Dakota has strict rules regarding notice by publication to parties

270. Northwest South Dakota Production Credit Ass'n v. Dale, 361 N.W.2d 275, 278 (S.D. 1985) (quoting Boddie v. Connecticut, 401 U.S. 371 (1971) (emphasis added)).
271. S.D.C.L. § 46A-10A-31.
272. *Dale*, 361 N.W.2d at 278.
273. 270 N.W.2d 366 (S.D. 1978).
274. *Id.* at 366.

affected by litigation. For example, before constructive service of process by publication under S.D.C.L. section 15-9-7 may be ordered, the party instituting litigation must exhaust all reasonable means available in an effort to locate interested parties to the litigation.[275] South Dakota should require at least as much of those who seek to extinguish the property rights of their neighbors in what may ultimately become a scheme for avoiding litigation of the respective rights of landowners both to drain and be free from unnatural or unreasonable drainage.

S.D.C.L. sections 31-21-1 through 31-21-4, which give a county or municipality the right to construct highway drainage ditches, and to prescribe personal notice to be given by the township board of supervisors or the board of county commissioners to landowners for the opening of a highway drainage ditch. Notice by publication is permitted *only* if personal service is unsuccessful because the owner of land does not reside in the county and no occupant resides upon the land. The only distinction between these statutes and section 46A-10A-31 is that rather than a condemnation by the county, it is a private landowner who is permitted to effectively condemn a neighbor's land by means which can only be called "stealth" in nature. When one considers that any disputes regarding such actions by private landowners are to be adjudicated by the county or a circuit court of law, the distinction becomes meaningless.

In conclusion, the statute also creates confusion when it refers to vesting of drainage rights by recording, but prefaces the phrase by providing that "[a]ny natural drainage right *lawfully acquired* by the owner or owners . . . is deemed vested."[276] What did the legislature intend when it used the phrase "lawfully acquired?" It appears that the only sensible interpretation is one that holds that if under common law the dominant landowner did not have the right to pursue the drainage he or she now has in mind, then such a right has not been acquired by mere recordation. In other words, recordation will only be effective to vest drainage rights which satisfy the requirements of the civil law rule as laid out in the decisions of the Supreme Court of South Dakota. Any other interpretation requires that the words "lawfully acquired" be ignored altogether. Because the legislature is presumed to use words and phrases intentionally, such a result is necessary.

A last possibility is interesting. An undated report from the Office of the Attorney General says this about "vested rights:"

> The drainage statutes provide county government with a wide array of authority over drainage matters. In many instances the exercise of that authority might impact on vested rights. It is obviously better for county officials to have some idea of what rights a particular action will impact before it takes action, rather than unwittingly condemning property. S.D.C.L. 46A-10A-31 assists county officials in identifying

275. United National Bank v. Searles, 331 N.W.2d 288, 292 (S.D. 1983).
276. S.D.C.L. § 46A-10A-31 (emphasis added).

> the number and nature of vested rights which exist in a county. Secondarily, it allows those persons or entities with construction projects which would disrupt drainage to determine the impact of those projects.[277]

This interpretation is the only one that is consistent with survival of the civil law servient estate as defined by the Supreme Court of South Dakota. It is also a rational explanation of a legislative provision which is otherwise difficult to fathom. It is an interpretation which allows for continuation of the servient drainage estate.

VII. CONCLUSION

The title of this article makes reference to wetlands, *Lucas,* watersheds, and the 1985 drainage legislation. The article itself focuses on the development of South Dakota drainage law. Are the topics, in fact, connected?

The wetlands and *Lucas* connection is clear. Landowners in South Dakota take title to wetlands property subject to and limited by the rules of drainage. These rules provide the landowner in turn with a dominant easement which supports wetlands drainage *in some* circumstances. The circumstances, as we have seen, are limited, and there is no universal right to drain wetlands. Borrowing the language of *Lucas,* there are restrictions which "inhere in the title itself" which are part of the "background principles" which "the State's law of property and nuisance already place upon land ownership."[278] A landowner who, as the result of local, state, or federal regulation, is restricted in a drainage project, can claim a "taking" only if the drainage is privileged under the state common law. As we have seen, this dominant estate is subject to limitations which can be significant. Symmetrically, we have seen that the servient estate is stronger than is normally realized and if exercised can restrict drainage.

The common law of drainage is also relevant in efforts to salvage and protect riverine watersheds. An overriding threat to such watersheds is the steadily increasing flood levels which result from drainage of wetlands in the surrounding uplands. Unless such incremental increases in flooding can be halted or reduced, stabilization in the watersheds will be an elusive objective. Analysis here has demonstrated, however, that there are limits to any obligation of the watercourse to accept additional drainage water.

Lastly, this article has argued that the 1985 drainage legislation is a cure far worse than the disease and requires comprehensive revision, if not full repeal.

277. DEERING, *supra* note 91, at 61.
278. *Lucas*, 505 U.S. at 1029.