



Understanding Water Rights in Ohio – *Part I*

Legal conflicts over water are on the rise in Ohio. As a water-rich state, much of Ohio's water law historically has focused on the right to rid one's property of water. Drainage issues and lawsuits are frequent. But disputes over the right to own and use water have become more common in recent years, and we are fielding more and more questions about rights to water. In a series of articles, we'll provide an overview of water rights law in Ohio – including both the right to drain and the right to own and use water.



A number of conflicts around the state have centered on underground water and private property rights – does the property owner have a property right in the water beneath the land? As early as 1861, Ohio recognized a right of ownership in the groundwater beneath one's property. But the law allowed any property owner to have absolute ownership over all of the groundwater he or she could use, and provided no legal remedy if that use interfered with another property owner's water rights. It took over one hundred years for this law of "absolute ownership" to change. The Ohio Supreme Court revised the law in 1984 when it adopted the law of "reasonable use". The new law reiterated the right to use the water beneath one's land, but placed a duty on landowners to make a "reasonable use" of water and created a remedy for a landowner whose water rights were impaired by an "unreasonable use" of water by another property owner. The law of reasonable use still stands today.

Given a history that has favored private landowner rights in water, why are there now lawsuits over whether a landowner has a property right in underground water? Several recent cases decided by the Ohio Supreme Court focused on a distinction between the right to use water and actual ownership of water. In *McNamara v. Rittman*, private landowners were pitted against municipalities that were affecting underground water supplies. The landowners argued that the municipalities should compensate the private landowners for impacts they caused on private water supplies. The municipalities argued that a landowner's water rights do not include ownership of the water itself. Therefore, the government should not have to pay a landowner for water that he or she doesn't "own".

The Supreme Court of Ohio disagreed with the cities, reiterating previous law and stating that landowners do have a property interest in the groundwater under their land. The Court further declared that "the title to property *includes* the right to use the groundwater beneath that property... that right is one of the fundamental attributes of property ownership and an essential stick in the bundle of rights that is part of title to property." Governmental interference with one's groundwater, stated the Court, can amount to a constitutional "taking" of property that requires compensation to the landowner who has lost the property right.¹

¹ To read the entire *McNamara* decision, see: <http://www.sconet.state.oh.us/rod/newpdf/o/2005/2005-ohio-6433.pdf>

The *McNamara* case is a timely clarification of the parameters of private property rights in underground water, leaving no doubt that a landowner in Ohio holds a property right in the water under the land's surface. But precisely what amount of water is beneath a property at any given time? This complex issue was not addressed by the *McNamara* case. The legal answer to the question lies in the "reasonable use" doctrine mentioned above, which will be the topic of our second article on water rights in the next newsletter.

Understanding Water Rights in Ohio – *Part II*



In our prior issue, we explained the current status of Ohio case law addressing the rights property owners have in the water beneath their property. The Ohio Supreme Court stated in *McNamara v. Rittman* that "the title to property includes the right to use the groundwater beneath that property... that right is one of the fundamental attributes of property ownership and an essential stick in the bundle of rights..."

The Ohio Supreme Court's opinion clarifies what we have long practiced in Ohio—that property ownership includes the right to use the property's groundwater. But *how much* water may a landowner use? Quantifying the water right is difficult, and often is the source of conflict between different water users.

It is common for an aquifer to lie beneath many different parcels of land and to change over time, creating challenges for determining the extent of a landowner's water right. To address this problem, Ohio abides by the law of "reasonable use." This legal doctrine states that a landowner may withdraw ground water and use it for a beneficial purpose *unless* the withdrawal:

- unreasonably causes harm to another by lowering the water table or reducing artesian pressure
- exceeds the landowner's reasonable share of the annual supply or total store of ground water
- has a direct and substantial effect upon a watercourse or lake and unreasonably causes harm to a person entitled to use its water

The legal doctrine of reasonable use allows one water user to protect his or her water right by making a claim against the offending water user for violation of the reasonable use doctrine. A set of factors stated in the Ohio Revised Code helps us determine when one water user "unreasonably causes harm" to another, as provided in the doctrine. The factors of unreasonable harm include the purpose of the water use, its social and economic values, its suitability to the water source, the extent of harm it causes, whether adjustments could be made to prevent such harm, the protection of existing values and the justice of requiring one party to bear a loss due to another's water use.

Here's how the reasonable use doctrine would be applied to a water conflict. Imagine that a farmer has been pumping groundwater to irrigate a crop. A school is built nearby, and the school begins pumping

groundwater. The farmer believes his groundwater supply is diminished because of the school's water use. To obtain legal relief for this interference, the farmer must bring a legal cause of action and show that the school is "unreasonably causing harm" to his water use. If a court were to hear this case, the court would determine the reasonableness of the school's water use by examining the purpose and value of the use, impacts of the use on the water supply, the extent of harm caused to the farmer by the school's new water use, whether the school could alter its use to prevent harm to the farmer, the fairness of allowing the school to affect the farmer's irrigation needs, and the suitability of the use to the aquifer. The court may also examine the reasonability of the farmer's water use. In the end, the court must decide whether the school is causing unreasonable harm to the farmer.²

Understanding Water Rights in Ohio

Part III: Ohio Drainage Law



In previous issues of *Law Notes*, we discussed how Ohio law defines water rights and affects the use of ground water. In this issue, we turn our focus to another component of water law of importance to agriculture – the right to drain water away from one's land. What right does a landowner have to send surface water onto neighboring lands? For example, may a property owner install a culvert that forces additional surface water onto a neighbor's property?

At one time, Ohio landowners possessed an unbridled legal right to rid their property of surface water, regardless of any damage the water caused to other lands. That law has changed over the years, and Ohio now abides by a law of "reasonable use." The reasonable use doctrine allows a landowner to drain surface water from the property, but only to the point that it is "reasonable." If the drainage becomes unreasonable, the landowner could be liable for the resulting harm.

The Ohio Supreme Court established the reasonable use doctrine in 1980 in a case that involved a drainage dispute. The case of *McGlashan v. Spade Rockledge* involved a large construction project that changed the drainage patterns on a property. A heavy rainfall occurred before the new drainage system had been installed, causing a significant increase in the amount of surface water flowing onto surrounding properties. Flooding of nearby homes occurred, as well as property damage caused by vegetation, rocks and other debris carried off the property. The Supreme Court decided that fairness required Ohio to adopt the law followed in many other states—the law of reasonable use. The court explained the new law as follows:

² For more information on Ohio's reasonable use doctrine, see the Ohio Supreme Court Case of *Cline v American Aggregates*, (1984), 15 Ohio St.3d 384, available at <http://aede.ag.ohio-state.edu/programs/aglaw/topics.htm> and the Ohio Revised Code Section 1521.17 available at <http://66.161.141.185/orc/1521.17>

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

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

An important element of the reasonable use doctrine is defining which uses are “reasonable” and “unreasonable.” The determination is made on a case-by-case basis, using guidelines that balance the gravity of the harm caused against the need and usefulness of the drainage alteration. Factors to consider include the extent of harm caused the fairness of requiring the victim to endure the harm, the suitability and social value of the drainage use and of the harmed property, and the practicality of avoiding the harm. Where a surface drainage change has little social value, is not suited to the area, causes extensive harm to a property use that is suitable for the area, and could be easily remedied to avoid the harm, then such a drainage use would likely be deemed “unreasonable” or in violation of Ohio’s reasonable use law.

For a harmed landowner to receive the protection of the reasonable use doctrine, he or she must prove in court that the other party is violating the law of reasonable use. If successful, the harmed party can receive compensation for damages caused by the drainage interference and can also ask the court to order the offending property owner to cease the drainage use.

In 2003, the Ohio legislature passed a “drainage mitigation law” aimed at preventing drainage interferences caused by new development. The law allows counties, through their building codes, to require a new construction project to avoid negative impacts on existing drainage. The county may withhold a building permit until potential adverse drainage effects of the new construction have been adequately addressed. To date, a handful of counties have employed this new law. While the reasonable use law forces a harmed party to bear the burden of proving another’s drainage use to be unreasonable, a county drainage mitigation regulation should prevent a drainage conflicts between property owners from coming to fruition. For more on drainage mitigation, see Ohio Revised Code Section 307.37.

FROM: *Law Notes, Summer 2007* (Part I), *Fall 2007* (Part II), and *Spring 2008* (Part III), the OSU Agricultural & Resource Law Program (<http://aede.osu.edu/programs/aglaw/index.htm>).