

2024 DRAINAGE SCHOOL

DRAINAGE AND COMMON LAW

I. **Introduction.** What we will cover.

A. **Common Law vs. Statutory Drainage Law**

B. **Common Enemy Doctrine.**

C. **Obstructions in drains.**

D. **Roadside ditches and extent of ROW**

E. **Inverse Condemnation - Ind. Dep't of Nat. Res. V. Houin (2022 Ind. App.), 191 N.E.3d 241; 2022 Ind. App. LEXIS 193.**

II. **Common Law vs. Indiana Drainage Law.**

Relief for drainage issues may be sought under Common Law theories or under the Indiana Drainage Law (IC 36-9-27). Cornett v. Bamish, 2009 Ind. App. Unpub. LEXIS 1932.

In Bamish, Bamish laid a 40' pipe through an abandoned RR ROW to discharge his surface water into a legal drain (the Harris Ditch) on the other side of the RR ROW berm on Cornett's property. Cornett claimed a trespass had occurred. Because the pipe emptied into a legal drain and not onto Cornett's property, the Court granted no relief. The Court noted that Cornett did not bring an action under the Indiana Drainage Law and, therefore, had waived any arguments under that Law. Interesting fact, the RR ROW had been abandoned so an argument could have been made that Bamish and Cornett owned to the center of the old RR ROW, depending on how the RR ROW was originally established.¹ The Harris Ditch was on Cornett's property, but stopping the pipe so that the water drained directly into the Harris Ditch, a public legal drain, did not violate the Common Enemy Doctrine. [*This is an unpublished Memorandum Decision which cannot be cited as authority.*]

Today, we will focus our discussion on Indiana Common Law.

III. **Common Enemy Doctrine vs. Channeling** – What is the Common Enemy Doctrine?

A. **General Rule:** Surface water is an enemy to all, and a property owner can address surface water as the owner sees fit.

“... each landowner has an unqualified right, by operations on his own land, to fend off surface waters as he sees fit without being required to take into account the consequences to other landowners who also have the duty and right to protect themselves as best they can.” Black's Law Dictionary 5th Ed. (*yes, I am that old*)

¹ Studying how Rail Roads are established and how they are abandoned is a seminar topic in and of itself.

Indiana Supreme Court:

“In its most simplistic and pure form the rule known as the ‘common enemy doctrine,’ declares that surface water which does not flow in defined channels is a common enemy and that each landowner may deal with it in such manner as best suits his own convenience. Such sanctioned dealings include walling it out, walling it in and diverting or accelerating its flow by any means whatever.” Argyelan v. Haviland, 435 N.E.2d 973, 975 (Ind. 1982).

B. Exception: a property owner cannot collect surface water, concentrate the surface water, and channel the surface water onto an adjoining property.

“The only limitation on the common enemy doctrine that has thus far been recognized is [**14] that ‘one may not collect or concentrate surface water and cast it, in a body, upon his neighbor.’” Bulldog Battery Corp. v. Pica Invs., 736 N.E.2d 333, 339, 2000 Ind. App. LEXIS 1586, *13-14 citing Argyelan, 435 N.E.2d 973 at 976.

“[T]he fact that ‘water was once impounded or channeled [via downspouts] can be of no moment if it is diffused to a general flow at the point of entering the adjoining land.’” Bulldog Battery Corp. v. Pica Invs., 736 N.E.2d 333, 340, 2000 Ind. App. LEXIS 1586, *16 citing Argyelan, 435 N.E.2d 973 at 976.

Real life example – Residential development and adjoining farmland.

C. Possible solutions to Common Enemy Doctrine:

1. *Stopping Short.* Terminate the collection and channeling within sufficient distance from the adjoining property line to allow the surface water to flow naturally across the property line to the neighboring property. See Argyelan.
2. *Dams*, etc. Consider using a dam structure to shield your property from water flowing naturally from an adjoining property.
3. *Storm Water Nuisance law:* IC 36-9-28.7 [may request an investigation by the applicable unit of government into a storm water nuisance for possible relief, although this statute does not provide any mechanism for relief other than the report and offering information for an alternative dispute resolution process.]
4. *Private Drains* – A drain on a single landowner’s property established by:
 - (i) Use; or
 - (ii) Agreement.
5. *Mutual Drains* – a mutual drain crosses property owned by different persons and can be established by:

- (i) Use; or
- (ii) Agreement.

6. *Legal Drains* – legal drains are established, controlled and maintained by the County Drainage Board.

7. *County Drainage Board*. This is a statutory process beyond the topic of this presentation.

D. Houin². Houin is an inverse condemnation case. Houin alleged inverse condemnation by DNR’s failure to properly maintain a Dam which caused flooding of Houin’s farmland. One defense claimed by DNR was that of the common enemy doctrine. DNR argued that surface water is an enemy common to all and one property owner cannot be responsible for damage to another property caused by surface water. The Court rejected this argument. The Court determined that the common enemy doctrine was not available to DNR because DNR was not a property owner in this specific case.

E. Caveat. These considerations do not apply to a natural watercourse, the jurisdiction of which will fall to one or more governmental entities.

IV. **Obstructions in drains & Frazee.**

A. County Drainage Board. Under IC 36-9-27.4 (Drainage Obstruction Act), a remedy is provided for a person who needs relief for an obstruction in a drain or natural watercourse when the obstruction is not located on the person’s property and the owner of the property on which the obstruction is located refuses to remove the obstruction.

1. A petition may be filed with the County Drainage Board (“Board”).
2. County Surveyor must investigate the obstruction and file a report with the Board.
3. Board must conduct a hearing after notice.
4. If an obstruction is found to exist, the Board must determine if the obstruction was caused intentionally.

(i) If one of the respondents is found to have intentionally caused the obstruction, the Board shall order the respondent to remove the obstruction or order the Surveyor to remove the obstruction, at the respondent’s expense.

(ii) The Board may file an action to recover the cost to remove the obstruction and recover attorneys’ fees. IC 36-9-27.4-22.

² Ind. Dep’t of Nat. Res. V. Houin (2022 Ind. App.), 191 N.E.3d 241; 2022 Ind. App. LEXIS 193.

5. If the obstruction to a drain is not intentional, then the Board can allow the petitioner, the respondent, the surveyor or any or all of them to remove the obstruction. The cost to remove the obstruction is to be apportioned among the parcels of land benefited by the drain, based on the percentage of the total length of the drain is contained on each of the parcels benefited by the drain.

B. Common law. A property owner is not required to pursue a remedy under the Drainage Law to have an obstruction removed before seeking relief in the courts. The Drainage Law created an alternative forum to the common law remedy to resolve obstruction issues. Romine v. Gagle (2003 Ind. App), 782 N.E.2d 369.

“Our research leads us to conclude that the Drainage Obstruction Act adds to the substantive common-law primarily in that it permits complaining parties to seek redress for a dispute, not only in state superior and circuit courts, but also before the appropriate county drainage board. Viewed against this historical backdrop, it appears that the Drainage Obstruction Act did not so much change the common law as it created an alternative forum for deciding such disputes.” Id. At 379.

Possible outcomes at common law:

- One possible outcome favors the builder of the obstruction – the Common Enemy Doctrine is followed because the water is surface water.
- One possible outcome favors the party complaining of the obstruction – because the water is a natural watercourse or a pond.

The Drainage Obstruction Act addresses only the second of these two possible outcomes.

1. Natural Watercourse. – may use common law or the Drainage Obstruction Act for relief.
2. Pond. – may use common law or the Drainage Obstruction Act for relief.
3. Surface Water. – common enemy doctrine applies and the Drainage Obstruction Act does not apply.

C. Frazee (Mutual Drain). A mutual drain is established by the following three elements³:

1. *Different property ownership* – the drain is located on two (2) or more tracts of land that are under different ownership.

³ IC 39-9-27-2.

2. *Consent of the property owners* – the owners of the properties in question must consent to the creation of the drain. Consent can be inferred when considering the following factors:

(i) The drain was installed as one continuous system.

(ii) The drain has existed for a significant period of time beyond which the original installers of the drain are no longer available to shed light on the creation of the drain.

(iii) More than one parcel of land is benefited by the existence of the drain.

“It is reasonable to conclude that a nonregulated, subsurface drain that predates the current, diverse ownership of the serviced parcels was, when placed, either (1) a mutual drain established by the mutual consent of all affected owners or (2) a private drain on a common estate. If the drain was originally created as a private drain on a once-common estate, it converted to a mutual drain when the land was subdivided.”

Fraze v. Skees (2015 Ind. App.), 30 N.E.3d 22, at 35, citing Johnson v. Kosciusko County Drainage Bd. Elaine Wood, 594 N.E.2d 798, at 803, 1992 Ind. App. LEXIS 960.

3. *Creation of the drain* – the drain was not created under or made subject to any specific statute.

4. *Repairs to a Mutual Drain.* Fraze also offered some guidance on this question. The Fraze Court adopted the logic expressed by the Indiana Supreme Court’s analysis in Crowel v. Marshall County Drainage Board, 971 N.E.2d 638 (Ind. 2012) to address the allocation of repair costs for a mutual Drain. Crowel challenged a reconstruction or repair assessment against his land because his land was at the high end of the watershed that was served by the regulated drain. Crowel claimed his land was not benefited by the drain since his land had never flooded. The Supreme Court determined that his land was part of the watershed served by the drain and, therefore, did benefit from the drain.

“[A] parcel of land at the high end of a watershed that has adequate drainage due to natural surface-water runoff can be benefited by the reconstruction of a regulated drain at the lower end of the watershed.” Id. at 646.

“Thus, we hold that, at the least, the tracts of land under which a mutual drain is located benefit from the existence of that drain. Thus, a landowner is not necessarily responsible for the total cost of repairs made to the portions of the drain underlying that landowner's property, provided that other landowners receive a benefit from those repairs. And a trial court may exercise its equitable authority to apportion the costs of a needed repair among the owners of the land under which the mutual drain

lies. In apportioning costs, the trial court could consider, but is not limited to, the factors delineated by the legislature in Indiana Code Section 36-9-27-112.”

Fraze v. Skees, 30 N.E.3d at 45. The Fraze trial court assessed all of Fraze’s expenses with respect to the mutual drain to Fraze, evidently because it was Fraze’s actions which necessitated the repairs to the mutual drain.

V. Contel & Roadside ditches.⁴

- A. Where is the edge of the ROW.
- B. Right of utility to use ROW without compensation to property owner.

Contel of Ind. V. Coulson (Ind. App. 1995), 659 NE2d 224. Action in trespass by landowner against telephone company that installed lines adjacent to state highway (SR 63) on landowner’s property. SR 63 was formerly a county road before being taken over by the State. Adjoining property owners to a County Road own to the center of the Road. Contel had obtained a permit from INDOT to install the telephone lines in the ROW. The permit, however, did not state the width of the ROW. Since the State (County) had acquired the ROW by use and not by grant or condemnation, the width of the ROW was limited to the paved traveled portion and did not extend to the adjoining land necessary for periodic maintenance, the berm or shoulder. Contel further argued that the State’s periodic use of the adjoining land for maintenance purposes established the width of the ROW. The Court rejected this argument and found that the rights of the State to use the adjoining land for maintenance of the road was based on an implied license of necessity, not an easement. The Court sent the case back to the trial court to determine if the utility had acquired an easement by prescription. While not part of the Court’s holding on the facts of the case, the Court did state the legal premise that when a fee is already subject to an easement for roadway purposes, a utility may use the public right of way without the consent of the servient estate holder. It is not an additional burden on the fee.

VI. Inverse Condemnation by flooding.

A. Houin. As stated earlier, Houin involved a claim of inverse condemnation. The high-water level of a lake was established by a previous Court order. The property owners, both Houin and the lake property owners, were to work together to maintain the established high-water level of the lake, a different level in different seasons. After several years, the lake property owners told DNR they did not want to continue to maintain the water level, so DNR took control. DNR failed to follow the Court ordered high-water level, which resulted in Houin’s farmland flooding, silt buildup in the field tile and a reduction in crop yields. Houin claimed damages under several theories, but was successful on the claim of inverse condemnation and nuisance.

One defense offered by DNR was the common enemy doctrine. The flooding was the result of water in a lake being allowed to rise too high, which increased the water table for the

⁴ See 2023 Farm Bureau Land Use School presentation supplied with these materials.

area and resulted in the flooding of farmland. The Court determined that the common enemy doctrine was not available to DNR because DNR was not a property owner in this case.

Above, I provided different sources for the definition of the common enemy doctrine. Each source included a scenario between two landowners. It would have been interesting if the lake property owners were the culprit in this case and allowed the lake level to rise too high. Could they have claimed the common enemy doctrine as a defense?

The analysis may have well included the source of the water that actually flooded Houin's farmland, did it come from the waters overflowing the dam from the lake, or did it come from saturated soil due to the high-water table in the area? How far from the lake overflow was Houin's farmland? Was the overflow of sufficient distance to allow the water to flow naturally across the land?

Initially, Houin attempted to obtain a contempt remedy, but because DNR was not a party to the court order, DNR could not be held in contempt. This would have been a likely remedy if the control of the Lake had remained with the lake property owners.

VII. Questions?