Indiana Farm Bureau®

Landowner Toolkit

Legal Considerations for Solving Drainage Problems

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Indiana drainage laws are a combination of statutory and common-law theories. They are complex; often a landowner may pursue several remedies at one time.

If a landowner's drainage problem concerns the rights and responsibilities of other neighboring landowners, the landowner should discuss the problem with his neighbor. Both parties may want to consult with attorneys to make sure their rights are adequately represented.

The purpose of this document is to provide a checklist for you of some of the legal remedies and theories you may use in solving a drainage problem. Please share this information with your attorney, who will have access to the statutes and court cases listed herein.

Before undertaking any drainage work, it is important to identify other environmental concerns present. The Indiana Department of Environmental Management, Natural Resource Conservation Service, Army Corp of Engineers and Indiana Department of Natural Resources may also have rules and regulations pertaining to your drainage problem.

1. Regulated drains

A *regulated drain* is an open drain, a tiled drain or a combination of the two. Ind. Code § 36-9-27-2. If a drain is regulated, contact your county surveyor on matters regarding construction, reconstruction, and maintenance of the existing or proposed drain. Ind. Code § 36-9-27-2.

The county surveyor classifies all regulated drains in the county as: in need of reconstruction, in need of periodic maintenance or that are to be vacated. Ind. Code § 36-9-27-34(a). If 10 percent of benefited landowners request the board to classify or reclassify a drain affecting their land, the board shall, after giving notice to all affected owners, conduct a hearing on the request and adopt a proper classification. Ind. Code § 36-9-27-35(c). The county surveyor will then submit a classification report to the board. Ind. Code § 36-9-27-35(a).

Upon approval of the classification report, the surveyor creates a long-range plan. This plan will also be submitted to the board for approval. Ind. Code §§ 36-9-27-36(a) and (b). Landowners affected by a regulated drain can request the board to advance the date of referral to the surveyor for a report, provided at least 10 percent of the owners make the request. Ind. Code § 36-9-27-36(d).

The drainage code provides a procedure for the board to act on the surveyor's maintenance and reconstruction reports, a discussion of which is beyond the scope of this article. Ind. Code §§ 36-9-27-40 and 52.

"When a regulated drain is obstructed or damaged by logs, trees, brush, unauthorized structures, trash, debris, excavating, filling, or pasturing livestock, or in any other way, the county surveyor shall immediately remove the obstruction and repair any damage." Ind. Code § 36-9-27-46(a).

If damage or an obstruction is caused by an owner of land, the surveyor shall provide notice requiring the owner to remove the obstruction and repair the damage within ten days; if the owner fails to act, the surveyor will perform the work using public funds. Ind. Code § 36-9-27-46(b). The board may, after a hearing with written notice, assess the costs back to the owner through the next annual assessment process against the land of the owner. Ind. Code § 36-9-27-46(c). If damage or an obstruction is caused by a person who enters upon the land under any contract, easement, or statute, the board can require the person to repair the damages and remove the obstruction. Ind. Code § 36-9-27-47(a).

2. Establishment of a new regulated drain

If a drain cannot be established in the best and cheapest manner without affecting surrounding landowners, then you may want to establish a new regulated drain. Ind. Code §§ 36-9-27-54 through 66 explains the procedure for establishing new regulated drains.

Ind. Code § 36-9-27-62 establishes a procedure for a county drainage board to assess the benefits and damages to a landowner affected by the establishment of a new regulated drain.

3. Obstruction of mutual drain or watercourse

Mutual drains are established by consenting property owners to drain two or more tracts of land under different ownership. Ind. Code § 36-9-27-2. A *natural surface watercourse* is an area of ground surface over which precipitation occasionally and temporarily flows in a definable direction and channel. Ind. Code § 36-9-27.4-3.

A person may file a petition with the county drainage board seeking removal of an obstruction from a mutual drain, natural surface watercourse, or stream located outside the person's property. Ind. Code § 36-9-27.4-9. The petition must include a general description of: (1) the tract of land owned by the petitioner, (2) explanation of the need for removal, explaining how removal of the obstruction will promote better drainage or alleviate an adverse effect from the obstruction on the petitioner's land, and (3) the site of the obstruction. Ind. Code § 36-9-27.4-10. The county surveyor will investigate the petition; upon finding an obstruction, the drainage board will hold a hearing to determine if removal requirements exist. Ind. Code §§ 36-9-27.4-12 through 14.

Frazee v. Skees, 30 N.E.3d. 22 (Ind. Ct. App. 2015), gives the court the ability to apportion costs similar to the process used for mutual drains found in Ind. Code § 36-9-27.4-20. Frazee discusses the consent requirement for mutual nonregulated subsurface drains that predate the current, diverse ownership of the parcels. The court held that despite neither party offering evidence as to the original owner's consent, the consent requirement was still met because the court could assume that (1) the mutual drain was established by the mutual consent of all affected landowners, or (2) the drain was originally constructed as a private drain on a common estate because of the contiguous nature of the system. Frazee, 30 N.E.3d at 35. Under Johnson v. Kosciusko County Drainage Bd., 594 N.E.2d 798 (Ind. Ct. App. 1992), a private drain on a common estate automatically converts into a mutual drain when the land is subdivided.

4. Increased flowage in a watercourse

An upper landowner may construct ditches and channels on his land to carry and drain surface water to an existing watercourse. However, he may not change the course of the water, or collect or concentrate the surface water and cast it on the lands of the lower owner, causing damage. Glick v. Marion Constr. Corp., 331 N.E.2d 26, 31 (Ind. Ct. App. 1975).

Similarly, a lower landowner may not cause water to back up onto the property of an upper landowner. Gasway v. Lalen, 526 N.E.2d 1199, 1201 (Ind. Ct. App. 1988).

5. Surface water and the common enemy rule

If surface water causes the drainage problem, Indiana's "common enemy rule" may apply. First, you must determine whether the water in question is diffused surface water.

Surface water includes "[w]ater from falling rains or melting snows which is diffused over the surface of the ground or which temporarily flows upon or over the surface . . . but which has no definite banks or channel." Trowbridge v. Torabi, 693 N.E.2d 622, 626-27 (Ind. Ct. App. 1998) (quoting Capes v. Barger, 109 N.E.2d 725, 726 (Ind. Ct. App. 1953)).

The common enemy rule states, "surface water which does not flow in defined channels is a common enemy and…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). Under this rule, you may "accelerate or increase the flow of surface water by limiting or eliminating ground absorption or changing the grade of the land." Argyelan, 435 N.E.2d at 976.

6. Limitations to the common enemy rule

If a neighbor is diverting surface water onto your land you should know the limitations to the common enemy rule. Importantly, this rule only applies to landowners making

improvements to their own land, not upon a neighbor's land. Harlan Bakeries, Inc. v. Muncy, 835 N.E.2d 1018, 1033 (Ind. Ct. App. 2005).

The Indiana Supreme Court has also recognized an exception to the common enemy rule: "one may not collect or concentrate surface water and cast it, in a body, upon his neighbor." Argyelan, 435 N.E.2d at 976. The court also noted that "malicious or wanton" use of drainage rights would likely be impermissible as well. Id.

7. Criticism of the common enemy rule

The common enemy rule has come under some criticism. In Rounds v. Hoelscher, 428 N.E.2d 1308, 1315 (Ind. Ct. App. 1981), the court attempted to adopt the "reasonable use rule" rather than the common enemy rule. Justice Hunter's dissenting opinion in Argyelan, 435 N.E.2d at 978, and dissent in Gilmer v. Bd. of Comm'r of Marshall Cty., 439 N.E.2d 1355 (Ind. 1982), also advocate the reasonable use rule, which is used in other jurisdictions.

However, the Indiana Supreme Court rejected this new rule and reaffirmed the use of the common enemy doctrine in Argyelan, 435 N.E.2d at 977; *see also* N.G. Hatton Trust v. Young, 97 N.E.3d 282 (Ind. Ct. App. 2018) (reaffirming the common enemy doctrine).

8. Nuisance action

The common enemy rule is often used as an affirmative defense to a nuisance action. Ind. Code § 32-30-6-6 defines a nuisance as whatever is: (1) injurious to health; (2) indecent; (3) offensive to the senses; or (4) an obstruction to the free use of property; as it interferes with the enjoyment of property.

Nuisance has generally been applied only to ponds and natural watercourses. However, in Luhnow v. Horn, the court noted that the surface water common enemy rule could be used "regardless of whether the plaintiff asserts his claims as an action for negligence, trespass, or nuisance." 760 N.E.2d 621, 631 (Ind. Ct. App. 2001).

9. Artificial impoundments of water

A landowner "who creates an artificial impoundment of water on his land will be liable to his neighbor if he permits it to escape and the neighbor is thereby injured." Gumz v. Bejes, 321 N.E.2d 851, 857 (Ind. Ct. App. 1975).

10. Drainage easement by written contract

If a tiled or open drain in need of repair serves your farm and neighboring land, you may want to check the recorder's office to see if a written drainage easement or covenant exists to assign responsibility for drain maintenance.

A covenant that imposes an affirmative burden may run with the land and bind successors if:

(1) the original covenantors intend it to run,
(2) the covenant touches and concerns the land, and
(3) there is privity of estate between subsequent grantees of the original covenantor and covenantee.

Moseley v. Bishop, 470 N.E.2d 773, 776 (Ind. Ct. App. 1984).

11. Drainage easement by implication

If a common owner of your land and your neighbor's land established a drain, you may have an implied drainage easement. This might give you the right to maintain the drain located on the neighbor's property.

To have a drainage easement implied by law, the servitude must be "(1) obvious, (2) permanent, (3) in use at the time the ownership in the land is severed, and (4) reasonably necessary . . . not merely convenient or beneficial." Hartwig v. Brademas, 424 N.E.2d 122, 124 (Ind. Ct. App. 1981).

12. Drainage easement by prescription

It is also possible to acquire a drainage easement by prescription. Powell v. Dawson, 469 N.E.2d 1179, 1181 (Ind. Ct. App. 1984).

"A prescriptive easement is established by actual, open, notorious, continuous, uninterrupted, adverse use for twenty years [Ind. Code § 32-23-1-1] under claim of right, or by continuous adverse use with knowledge and acquiescence of the servient owner." Powell, 469 N.E.2d at 1181.

13. Drainage across railroads

Railroads sometimes present drainage problems for adjoining landowners. The general powers of railroad corporations include: constructing a road upon or across a stream of water, watercourse, highway, railroad, or canal but not to interfere with any free use of the same. The corporation shall restore the stream or watercourse, road or highway thus intersected to its former state, or in a sufficient manner that does not impair its usefulness or injure its franchises. Ind. Code § 8-4-1-14(a)(5).

This section provides an action against a railroad for obstructing or damaging a drainage ditch or watercourse. *See* West Ind. Code Ann. § 8-4-1-14, notes 16-21.

14. Drainage and public roads

Drainage issues are often caused by poorly maintained and constructed ditches and culverts along and under public roads, which collect and cast water upon adjoining farmland. The common enemy rule and its limitations also apply to government entities. The Indiana Supreme Court has stated "[a] public corporation has no more right to collect water in an artificial channel, and cause it to flow upon the land of another in a greatly increased quantity, than has a private land owner." Patoka Tp. v. Hopkins, 30 N.E. 896, 896 (Ind. 1892).

Further, while a landowner may protect himself from flooding and surface water when dealing with problems near a public road, he may not divert water in such a way that interferes with the public's use and enjoyment of the road. Shelbyville & B. Turnpike Co. v. Green, 99 Ind. 205, 208 (1884).

15. Indiana Tort Claims Act

When drainage problems are caused by public roads or regulated drains, concerns over the responsibility of a government entity may arise. Government entities may be liable for the torts committed by its agencies and employees. The Indiana Tort Claims Act grants immunity from tort liability for certain discretionary acts and establishes special procedural requirements if negligence or another tort is claimed. Ind. Code §§ 34-13-3-1 through section 25.

Although the Tort Claims Act provides immunity from tort liability for losses occurring from authorized entry onto property, due care must be taken to avoid damaging crops, fences, and other structures located around a regulated drain. Ind. Code § 36-9-27-33(c). For example, in Town of Linden v. Birge, the Indiana Supreme Court reasoned that the Tort Claims Act did not protect the town after the town's poor reconstruction of a drain on the landowner's property caused repeated flooding, resulting in crop damage. 204 N.E.3d 229 (Ind. 2023). Further, even if a government entity is granted immunity from tort liability, the government action may be compensable as a constitutional taking.

16. Takings of land

Under the Indiana Constitution, Article I, Section 21, "No person's property shall be taken by law, without just compensation." Courts have held that a state statute, such as the Tort Claims Act, may not be used to trump constitutional rights. Moore Real Estate, Inc. v. Porter Cty. Drainage Bd., 578 N.E.2d 380, 381 (Ind. Ct. App. 1991). Because the Tort Claims Act is limited to tort actions, it does not grant immunity for takings theories.

Generally, "the establishment of a regulated drain without compensation does not qualify as an unconstitutional taking of property." Mattingly v. Warrick County Drainage Bd., 743 N.E.2d 1245, 1251 (Ind. Ct. App. 2001) (citing Johnson, 594 N.E.2d at 804-05). However, in Van Keppel v. Jasper Cty. Drainage Bd., 556 N.E.2d 333, 336 (Ind. Ct. App. 1990), a landowner suffered damage to his property when the banks of a ditch had to be reconstructed. The court stated that a landowner can use an inverse condemnation action if an interest in land was taken for public use without just

compensation. If a trial court finds that a taking has occurred, it will appoint an assessor to calculate damages. Id. Furthermore, in Birge, the Court held that government-induced floods are to be analyzed as a per se taking. A flood-related takings claim will be a per se taking "if the flooding is continuous or 'intermittent but inevitably recurring,' and the invasion is 'substantial.'" 204 N.E.3d at 235; *see also* Indiana Department of Natural Resources v. Houin, 191 N.E.3d 241, 250 (Ind. Ct. App. 2022) (finding a taking where government-induced flooding significantly interfered with the free use, enjoyment, or interest of the owner's farmland).