

MUTUAL DRAINS



GORDON
ADLER
HAYES &
WASHBURN^{PC}

Anthony O. Crowell, Esq.

Crowell@gordonlegal.net

260-824-9377

www.gordonlegal.net

© 2025 – Gordon, Adler, Hayes & Washburn PC



What will we cover? Common Law and some Statutory Law on the following:

1. What is and is not a Mutual Drain.
2. Relative rights of landowners
3. Obligations of landowners
4. Obstructions in Mutual Drains
5. Two case studies:
Cornet v. Bamish (unpublished opinion);
Frazee v. Skees (2015 Ind. App.), 30 N.E.3d 22.

What is and is not a mutual drain?

The Indiana Legislature has defined a mutual drain in I.C. 36-9-27-2, as a drain that:

- is located on two or more tracts of land under different ownership; and
- **was established by mutual consent;** and
- was not established under or made subject to any drainage statute.
- What is not a requirement – that the drain benefit more than one property!

Common Law

Common Law (case law) doesn't really provide a different definition on a mutual drain, but expands on the statutory definition by drilling down and providing guidelines on the elements that establish a mutual drain, such as “what is consent?”.



Consent of Property Owners

1. **Verbal**
2. **Written**
3. **Inferred or implied**

Types of Consent (Cont.)

Verbal (handshake)— not a good idea. What happens when land changes ownership, how do you prove the verbal consent of the prior owner?

Types of Consent (Cont.)

Written – what is the minimum needed if you chose not to use an attorney?

- A written document;

- Some kind of description of the land affected by the mutual drain; Tax Parcel numbers, etc. and
- Names and signature of the parties.

Types of Consent (Cont.)

Inferred or implied – we will see this in our discussion of the Frazee case.

Why go to an attorney?

To be recorded.

Binds the tracts of land.

Binds the owners of the land.

Avoid misunderstandings.

Establish the mutual rights and obligations.

Basic information to avoid future conflict

Names of landowners as shown in vesting deeds.

Legal description of the tracts of lands subject to the mutual drain or attach copies of the vesting deeds.

General description and location of the mutual drain.

Use of the drain, can use be expanded, is it limited?

Maintenance/repairs/replacement obligations, rights and responsibilities.

Right of access for maintenance, repairs or replacement.

Sharing or not sharing in costs.

Signatures under a notary.



Binding on subsequent owners?

Written: If the agreement is written and recorded, it will be binding on any future owners of the land benefited and burdened by the drain.

Verbal: A verbal agreement regarding real estate is typically not binding on subsequent owners of that real estate. If a subsequent owner takes title with knowledge of the existence of the drain, there is support that the agreement for the drain is binding on the subsequent purchaser. If a buried tile, knowledge is not likely. How do you establish the relative rights and obligations of the landowners.

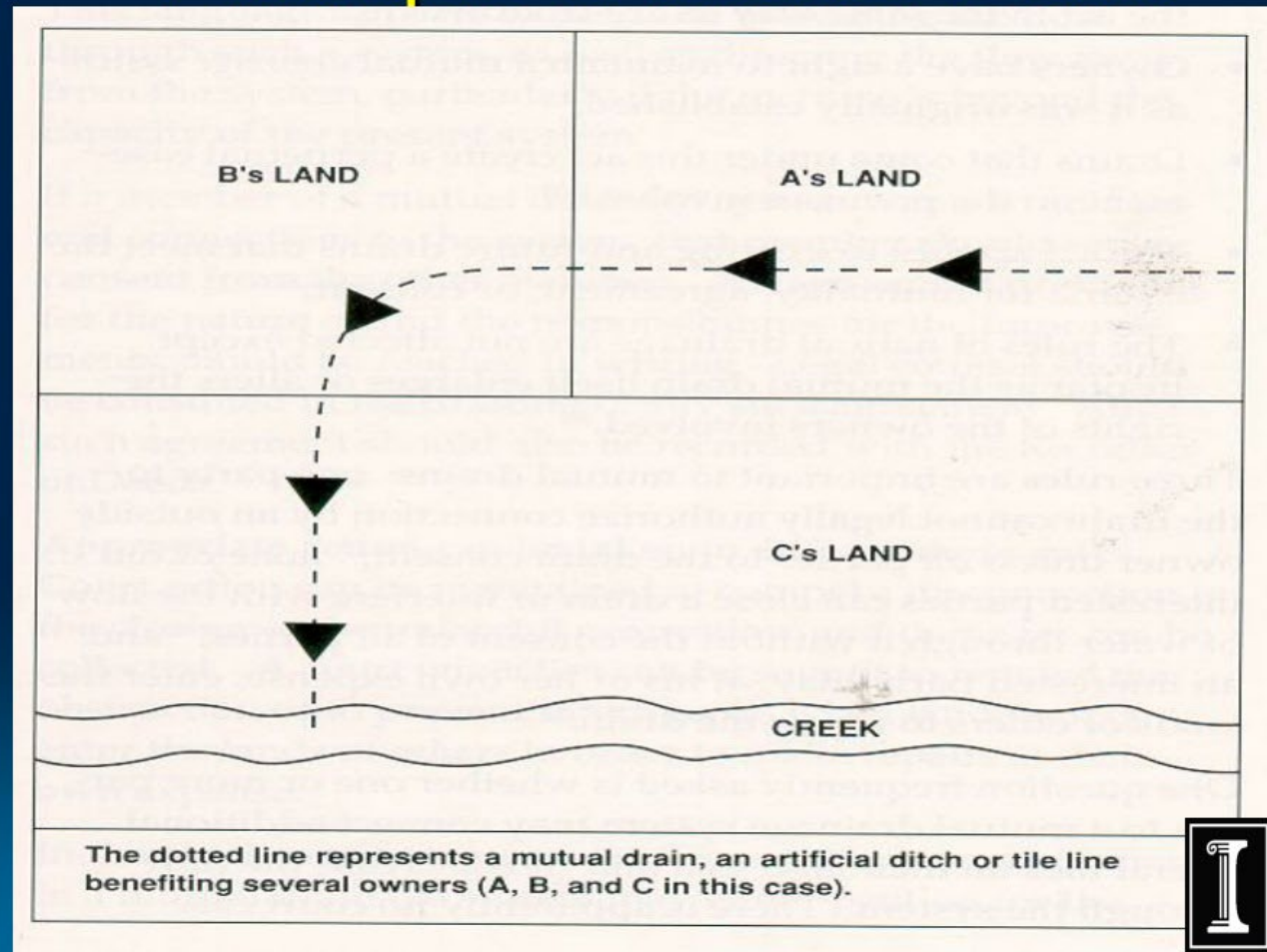
Inferred or implied consent

- How is inferred or implied consent established?

Subdivision of land

One method is if a drain exists on land that is later subdivided so that the drain is located on more than one tract without common ownership, a mutual drain is created.

Example of Mutual Drain



What is not a mutual drain? (One or more elements missing)

Drain only located
on one tract of land.

Drain located on
more than one tract,
but the same owner.

There is no
agreement or
consent from the
adjoining landowner.

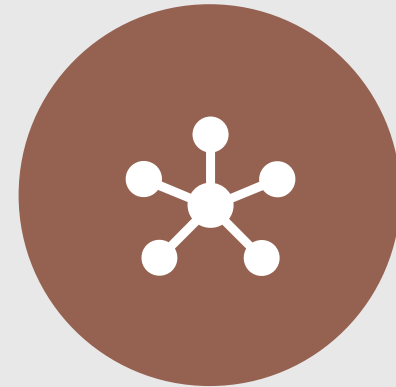
Types of mutual drains



BURIED TILE



OPEN DITCH



COMBINATION

Obligations of landowners

In most cases, the owner of the land over which the drain is located and needs cleared, repaired or replaced, is the responsible party.

- Clear obstructions (IC 3-9-27.4-4)
- Repair
- Replacement

But this is not always the case. The obligation may depend on the nature of the obstruction or the repair, how the obstruction came to be, or the applicable reasons for the need to repair or replace the drain.

Obstructions in mutual drains or natural surface watercourse

County Drainage Board. Under IC 36-9-27.4 (Drainage Obstruction Act – Mutual Drains), a remedy is provided for a person who needs relief for an obstruction in a mutual drain or natural surface 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.

- File a petition with the County Drainage Board (“Board”).
- County Surveyor must investigate the obstruction and file a report with the Board.
- Board must give notice and conduct a hearing.

Obstructions in mutual drains or natural surface watercourse (continued)

- If an obstruction is found to exist, the Board must determine if the obstruction was caused intentionally.
 - If a respondent 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.
 - The Board may file an action to recover the cost to remove the obstruction and recover **attorneys' fees**. IC 36-9-27.4-22.

Obstructions in mutual drains or natural surface watercourse (continued)

- 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 as contained on each of the parcels benefited by the drain.

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 (emphasis added).

Obstructions

Possible Outcomes at common law

Natural Surface Watercourse

- not really part of a mutual drain, but it is possible a mutual drain may “connect” to a NSW; may use common law or the Drainage Obstruction Act for relief of the obstruction.

Pond

- if a pond is part of the mutual drain, you may use the agreement, common law or the Drainage Obstruction Act for relief.

Mutual Drain

- may use common law, the Drainage Obstruction Act, or the agreement that established the mutual drain to clear an obstruction.

Surface Water not in a defined channel

- common enemy doctrine applies to allow an obstruction; the Drainage Obstruction Act does not apply.

Cornett v. Bamish, 2009 Ind. App. Unpub.
Lexis 1932 (2009)

Case Study

Rights of
landowners
benefited by
the existence
of the mutual
drain. Cornet
v. Bamish

Cornett involved a petition by Bamish to the drainage board to allow a connection of a field tile to a legal drain, the Harris Ditch. An abandoned RR ROW separated Cornett's property from Bamish's property. The dividing property line was the center of the RR ROW. The legal drain, an open ditch, was on Cornett's side of the RR ROW. Bamish installed a 14" tile through the RR berm directly into the Harris Ditch. One of the co-owners of the Cornett property, Leland Cornett, observed Bamish installing the tile and assisted Bamish in repairing other existing tiles that crossed the RR ROW and emptied into the Harris Ditch. Christopher Cornett sent Bamish a letter demanding the pipe be removed claiming trespass.

Cornet v. Bamish, unpublished memorandum decision; 2009 Ind. App. Unpup. Lexis 1932.

Take Aways

The drain was created by mutual consent (verbal and by actions of acquiescence) and crossed more than one property owned by different individuals; therefore, a mutual drain.

The owner of the property who benefits from the mutual drain may enter upon the adjoining property to maintain the drain.

Remedies under the Act are not exclusive of common law remedies; either or both may be pursued.

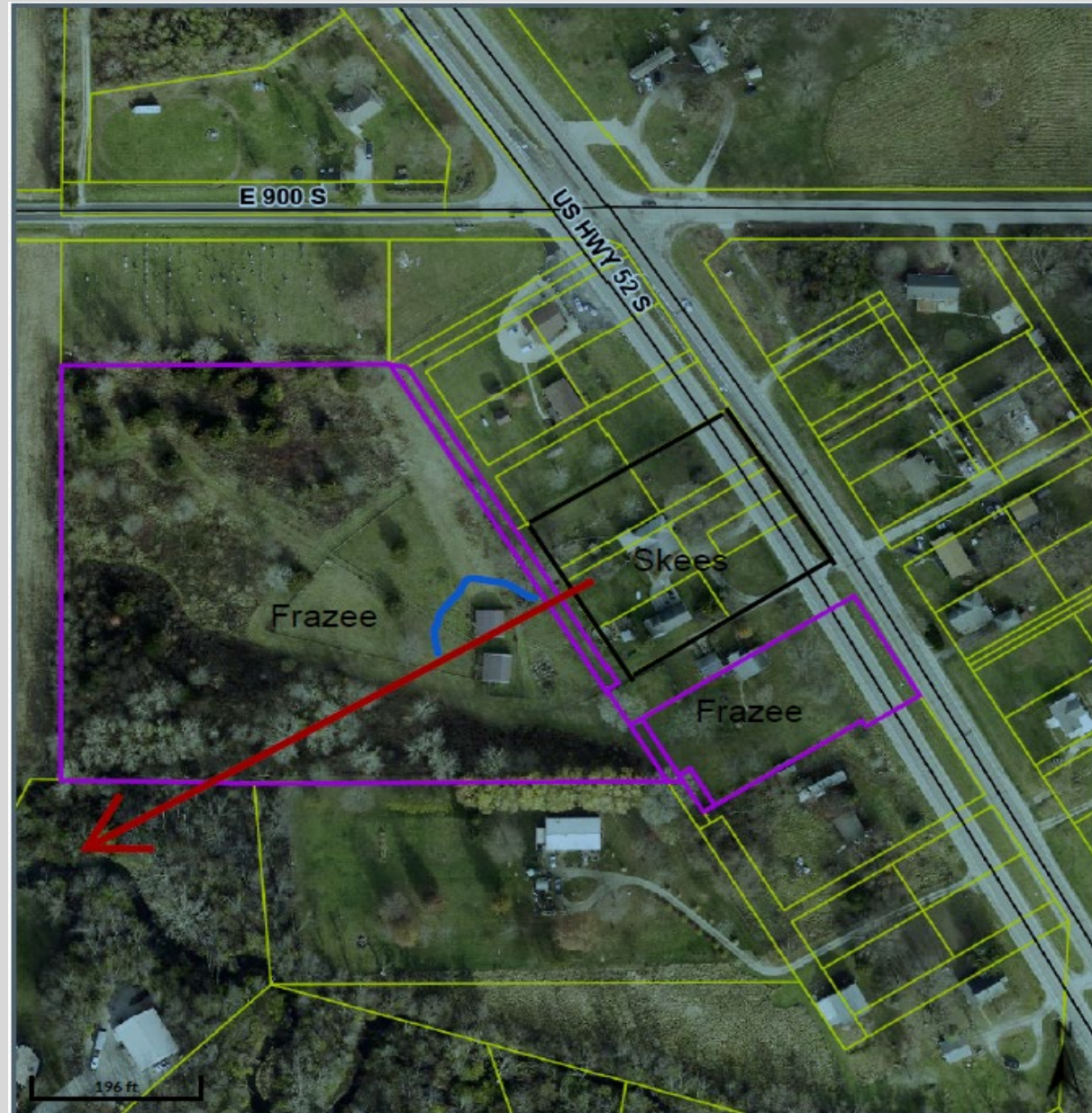
Observation: just because land is drained by a private or a mutual drain, does not mean that the land is not subject to reconstruction assessments if the land is in the watershed of the regulated drain or the private or mutual drain empties into the regulated drain, as in Cornett.

Crowel v. Marshall County Drainage Bd., 971 N.E.2d 638 (Ind. Sup. Ct. 2012); Ind. Code 36-9-27-16(b).

Frazee v. Skees, 30 N.E.3d 22 (Ind. Ct. App. 2015)

Case Study

Frazee



Frazee

This case is a good study for mutual drains, and what to do and what NOT to do. The Court determined a mutual drain is established by the follow elements:

1. *Different property ownership* – the drain is located on two (2) or more tracts of land that are under different ownership.
2. *No statute* – the drain was not created under or made subject to any specific statute.
3. *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.

Frazee

Consent of the property owners (cont.)

“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.”

Frazee 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.

Frazee

Repairs to a Mutual Drain.

Frazee also offered some guidance on this question. The Frazee 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 upper end of the watershed 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.

Expansion of use

What are the terms of the agreement?

Does the expanded use increase the burden on the adjoining land?

Option to convert to a regulated drain.

Conversion to regulated drain

See the Act for the steps necessary to convert a private drain or a mutual drain to a regulated drain.

Common Enemy Doctrine versus Channeled or Concentrated

◦ 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 \(Ind. 1982\).](#)

Common Enemy Doctrine versus Channeled or Concentrated, continued

- 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.](#)

Common Enemy Doctrine versus Channeled or Concentrated, continued

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



QUESTIONS



G &A



GORDON
ADLER
HAYES &
WASHBURN^{PC}



BLUFFTON | FORT WAYNE |
HUNTINGTON | ROCHESTER

260-824-9377

Crowell@gordonlegal.net