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DIFFUSED SURFACE WATER IN WYOMING: ASCERTAINING PROPERTY OWNERS' RIGHTS AND SETTLING DISPUTES

*William P. Elliott II**

Nothing in the world is as soft and yielding as water,
Yet nothing can better overcome the hard and strong,
For they can neither control nor do away with it.[1]

I. INTRODUCTION

Water rights and distribution are perennial topics in Wyoming. Most water disputes in the state involve applying the prior appropriation doctrine to determine landowners' rights to draw water from a defined watercourse.[2] The majority of these disputes never see the inside of a courtroom because Wyoming vests the State Board of Control (Board) with the authority to decide most water disputes.[3] Statutory law allows a party "aggrieved by the determination of the" Board to appeal the Board's decision to a district court.[4] However, very few water disputes make it even that far, let alone to the Wyoming Supreme Court.[5] This

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[1] LAO ZI, DAO DE JING ch. 78 (Peter A. Merel ed., Aleister Crowley et al. trans., version 2.07 1995), *available at* http://www.chinapage.com/gnl.

[2] *See* WYO. STAT. ANN. §§ 41-3-101 to -115 (2010).

[3] *See id.* §§ 41-4-101 to -331; *see also* Anne MacKinnon, *Historic and Future Challenges in Western Water Law: The Case of Wyoming*, 6 WYO. L. REV. 291, 301 (2006).

[4] WYO. STAT. ANN. § 41-4-401.

[5] MacKinnon, *supra* note 3, at 301 n.37 (citing Brian Shovers, *Diversions, Ditches, and District Courts: Montana's Struggle to Allocate Water*, MONT.—MAG. W. HIST., Spring 2005, at 7) ("From 1890–1902, Wyoming had reportedly settled 3,900 water rights cases with only five district court and three supreme court appeals.").

lack of court decisions should not be seen as a shortcoming of Wyoming's water law system. Indeed, Mr. Elwood Mead, the Territorial Engineer for Wyoming in 1888, whose job was to implement a system for determining water rights, felt it was important to keep the courts out of the process as much as possible.[6] Several years later Mead reported he appreciated how Wyoming had avoided the pervasive trap that "litigation went with irrigation, as fever with malaria."[7] The Wyoming Statutes successfully codified the prior appropriation doctrine with sufficient clarity while retaining the flexibility necessary to address the unique characteristics of almost every dispute.[8]

Wyoming's prior appropriation system should be commended for its continuing ability to settle most water disputes in a timely and predictable manner without court involvement. However, the prior appropriation system, which the state has stood by for over a century, has limitations. Specifically, it does not apply to diffused surface water. Diffused surface water is

> that which is diffused over the surface of the ground, derived from falling rains and melting snows, and continues to be such, and may be impounded by the owner of the land, until it reaches some well-defined channel in which it is accustomed to, and does, flow with other waters; or until it reaches some permanent lake or pond, and it then ceases to be surface water and becomes the water of the water course, or a lake or pond, as the case may be.[9]

In contrast to diffused surface water, the Wyoming Constitution states, "[t]he water of all natural streams, springs, lakes or other collections of still water, within the boundaries of the state, are hereby declared to be the property of the state."[10] In turn, the Wyoming Statutes that codify the prior appropriation doctrine refer to the "right to use the water of the state."[11] Thus, Wyoming's prior appropriation doctrine applies only to those waters listed in the Wyoming Constitution.[12] Prior appropriation does not control water disputes concerning diffused surface water

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[6] *Id.* at 301.

[7] ELWOOD MEAD, IRRIGATION INSTITUTIONS 247 (photo. reprint 1972) (1903).

[8] *See generally* WYO. STAT. ANN. §§ 41-3-101 to -115.

[9] State v. Hiber, 44 P.2d 1005, 1008 (Wyo. 1935).

[10] WYO. CONST. art. 8, § 1.

[11] WYO. STAT. ANN. § 41-3-101.

[12] *See* Binning v. Miller, 102 P.2d 54, 59–60 (Wyo. 1940); *see also* Ide v. United States, 263 U.S. 497, 505 (1924); Riggs Oil Co. v. Gray, 30 P.2d 145, 147 (Wyo. 1934).

because such water is not "the property of the state."[13] This article addresses the various doctrines courts apply to diffused surface water issues. This article then determines whether Wyoming would benefit by committing itself to one of these prevailing approaches.

Jurisdictions and commentators have grappled with diffused surface water issues for various reasons. For example, altering diffused surface water can negatively affect the recharge rate or water quality of underground aquifers.[14] Negatively affecting underground water aquifers can have a devastating result because ninety-nine percent of rural America gets its drinking water from groundwater aquifers and approximately twenty-five percent of all fresh water used in the United States comes from groundwater.[15] Of particular concern to many Wyoming landowners, changing the drainage of diffused surface water can negatively impact agricultural land.[16] In urban settings, shifting diffused surface water has damaged landowners' buildings and other improvements.[17] Thus, it is safe to say diffused surface water issues can affect nearly every person in Wyoming, directly or indirectly.

Before discussing the established doctrines, this article addresses commonly-used terminology. Diffused surface water is often referred to as simply "surface water."[18] Indeed, Wyoming case law has referred to it as such.[19] However, the Wyoming Statutes codifying the prior appropriation doctrine refer to water governed by the prior appropriation doctrine as "surface water" as well.[20] Consequently, to avoid any confusion, this article uses the more precise term of "diffused surface water," which is limited to that water arising primarily from precipitation.[21] Additionally, at least one Wyoming case has referred to the water at issue as "diffused surface water."[22]

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[13] *See* WYO. CONST. art. 8, § 1; *see also Hiber*, 44 P.2d at 1008 (describing how the classification of the water at issue, as either diffused surface water or natural stream water, governs the applicable analysis).

[14] Wendy B. Davis, *Reasonable Use Has Become the Common Enemy: An Overview of the Standards Applied to Diffused Surface Water and the Resulting Depletion of Aquifers*, 9 ALBANY L. ENVTL. OUTLOOK J. 1, 27–29 (2004).

[15] *Id.* at 2 & n.6.

[16] *See, e.g.*, Lee v. Brown, 357 P.2d 1106, 1107 (Wyo. 1960) (describing an occurrence where the construction of a dike by a landowner flooded and destroyed a neighbor's alfalfa crop).

[17] *See, e.g.*, Tompkins v. Byrtus, 267 P.2d 753, 754 (Wyo. 1954) (describing an occurrence where a landowners' dam caused diffused surface water to flood a neighbors' cabin).

[18] *See, e.g.*, Mullins v. Greer, 311 S.E.2d 110, 111–12 (Va. 1984); *see also* 1 CLESSON SELWYNE KINNEY, KINNEY ON IRRIGATION AND WATER RIGHTS § 654 (2d ed. 1912).

[19] *See, e.g.*, State v. Hiber, 44 P.2d 1005, 1008 (Wyo. 1935); *see also Lee*, 357 P.2d at 1108.

[20] *E.g.*, WYO. STAT. ANN. §§ 41-3-106(a), -115(b) (2010).

[21] *See Hiber*, 44 P.2d at 1008; *see also supra* note 9 and accompanying text.

[22] Bower v. Big Horn Canal Ass'n, 307 P.2d 593, 600 (Wyo. 1957).

II. THE FOUR PREVAILING APPROACHES

Most jurisdictions around the country apply one of four standards to disputes involving diffused surface water. The four approaches include: (1) the common enemy rule, (2) the civil law rule, (3) the modified common enemy rule, and (4) the reasonable use rule.[23] Several courts and commentators add a fifth rule by including a modified civil law rule.[24] Other courts and commentators assert that there are only three rules and address the modified common enemy rule within the common enemy rule.[25] This article classifies the various theories into four rules in an effort to conform to Wyoming case law.[26] When discussing the civil law rule, this article addresses the several modifications that have caused some commentators to classify the exceptions as a separate, fifth rule.[27]

A. Common Enemy Rule

The common enemy rule is one of the original approaches to disputes involving diffused surface water and has been referred to as the "common law rule."[28] As the name implies, this approach treats diffused surface water as an enemy common to all landowners.[29] Consequently, property owners can take whatever steps they deem necessary to fight against that common enemy.[30] Further, a landowner is not liable for any damage that his or her fight against diffused surface water causes to neighboring property.[31] In turn, the neighboring property owner has every right to cast the diffused surface water back upon the first landowner.[32]

In its purest form, this approach prevents litigation because property owners will not be held liable for the consequences of their actions against diffused surface water.[33] Thus, the common enemy rule "would permit a landowner to

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[23] *See* Davis, *supra* note 14, at 8; *see also Lee*, 357 P.2d at 1108–09.

[24] *See, e.g.*, J.W. Looney, *Diffused Surface Water in Arkansas: Is It Time for a New Rule?*, 18 U. ARK. LITTLE ROCK L.J. 393, 404–07 (1996).

[25] *See, e.g.*, Heins Implement Co. v. Mo. Highway & Transp. Comm'n, 859 S.W.2d 681, 688 (Mo. 1993), *abrogated on other grounds by* Southers v. City of Farmington, 263 S.W.3d 603, 614 n.13 (Mo. 2008); *see also* PETER N. DAVIS, *Drainage*, *in* 59 WATERS AND WATER RIGHTS § 59.02(b) (Robert E. Beck & Amy K. Kelley eds., 3d ed. 2009) [hereinafter *Drainage*].

[26] *See, e.g.*, *Lee*, 357 P.2d at 1108–09.

[27] *See, e.g.*, Looney, *supra* note 24, at 406.

[28] *Lee*, 357 P.2d at 1108.

[29] Looney, *supra* note 24, at 404.

[30] *Id.*

[31] Davis, *supra* note 14, at 13 (citing Currens v. Sleek, 983 P.2d 626, 628–29 (Wash. 1999)).

[32] *Lee*, 357 P.2d at 1109.

[33] Davis, *supra* note 14, at 14.

construct dams, walls, levees, or ditches to prevent water from coming onto the property and would allow a property owner to fill, level, and drain property without responsibility for resulting damage to neighboring property."[34] However, because this rule allows almost limitless alteration to the land without fear of liability, it can encourage landscape "contests between neighbors that could lead to a breach of the peace."[35] Under this theory, the landowner with the higher embankment often won the landscape and courtroom battles against his or her neighbor because might "made right."[36] One treatise colorfully remarks that the common enemy rule "encourages hydraulic warfare."[37]

Originally, this approach was thought to derive from English common law.[38] Now though, most authorities accept that the English law on diffused surface water was still unsettled when this rule first appeared in the United States.[39] Some have speculated that, though not based on the English law for diffused surface water, the doctrine may still be grounded in English legal concepts originally designed to address seawater.[40] Regardless of its true foundation, the common enemy rule likely first appeared in the United States, though not by name, in the 1851 case of *Luther v. Winnisimmet*.[41] It appears that a New Jersey court first used the term "common enemy" in the 1875 case of *Town of Union v. Durkes*.[42]

The rationale underlying the common enemy rule rests in the idea that owning land gives rise to the owner's absolute right to take whatever action is necessary to utilize his or her property.[43] This doctrine held favor over the competing approaches in the nineteenth century because many jurisdictions believed it would best promote land development and economic growth.[44] However, all

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[34] Looney, *supra* note 24, at 404.

[35] Davis, *supra* note 14, at 14.

[36] Janet Fairchild, Annotation, *Modern Status of Rules Governing Interferences with Drainage of Surface Waters*, 93 A.L.R.3d 1193, § 2 (1979).

[37] *Drainage*, *supra* note 25, § 59.02(b)(2).

[38] Heins Implement Co. v. Mo. Highway & Transp. Comm'n, 859 S.W.2d 681, 688 (Mo. 1993), *abrogated on other grounds by* Southers v. City of Farmington, 263 S.W.3d 603, 614 n.13 (Mo. 2008).

[39] *Id.*; *see also* Stanley V. Kinyon & Robert C. McClure, *Interferences with Surface Waters*, 24 MINN. L. REV. 891, 899–901 (1940).

[40] *See* Looney, *supra* note 24, at 404.

[41] 63 Mass. (9 Cush.) 171, 1851 WL 4749 (1851); *see* Kinyon & McClure, *supra* note 39, at 902; Looney, *supra* note 24, at 404.

[42] 38 N.J.L. 21, 22, 1875 WL 6958, at *1 (Sup. Ct. 1875); *see* Butler v. Bruno, 341 A.2d 735, 737 (R.I. 1975); Davis, *supra* note 14, at 13; Looney, *supra* note 24, at 404.

[43] *See* Looney, *supra* note 24, at 404–05; *see also Heins Implement Co.*, 859 S.W.2d at 688–89.

[44] *Heins Implement Co.*, 859 S.W.2d at 689; *see* Fairchild, *supra* note 36, § 2.

jurisdictions that once followed the common enemy rule now favor one of the other approaches due to this rule's obvious harsh results.[45] Thus, over the last century, there has been a distinct exodus away from the pure common enemy rule in favor of holding neighboring landowners accountable for the harms they cause.

B. Modified Common Enemy Rule

Due to the pure common enemy rule's harsh results, jurisdictions began to read limitations or exceptions into the rule.[46] Eventually, the many exceptions to that doctrine, taken together, became an independent creature in its own right.[47] The altered version of the common enemy rule became known as the "modified common enemy" rule or the "modified common law" rule.[48] The following are the more prominent exceptions found in the modified common enemy rule:

A. Landowners may block the flow of diffused surface water, but are prohibited from inhibiting the flow of a watercourse or a natural drainway.
B. Landowners are prohibited from collecting water and channeling it onto land of a lower elevation or their neighbor's land.
C. Landowners who block the flow of diffused surface water must exercise due care "by acting in good faith and avoiding unnecessary damage to the property of others."[49]

While most courts using the modified common enemy rule apply their own specific limitations, all limitations largely encompass a few core principles.[50] For example, the Wyoming Supreme Court has described the primary limitation as "one must use his own land so as not unnecessarily or *negligently* to injure others."[51] Other commentators have summarized the modified common enemy rule as imposing liability where "the landowner acted *negligently* in actions taken to protect the property."[52] In this regard, the modified common enemy approach

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[45] *See* Davis, *supra* note 14, at 10, 13–14. Pennsylvania still applies the strict common enemy rule but only to land in urban areas. *Id.* at 10 (citing Fazio v. Fegley Oil Co., 714 A.2d 510, 512 (Pa. Commw. Ct. 1998)).

[46] *See* Davis, *supra* note 14, at 15; Looney, *supra* note 24, at 405; Fairchild, *supra* note 36, § 2.

[47] *See* Fairchild, *supra* note 36, § 4.

[48] *See* Lee v. Brown, 357 P.2d 1106, 1109 (Wyo. 1960).

[49] Davis, *supra* note 14, at 15 (footnotes omitted) (citing and quoting Currens v. Sleek, 983 P.2d 626, 629–30 (Wash. 1999)).

[50] *E.g.*, *Currens*, 983 P.2d at 630 (adopting the third exception).

[51] *Lee*, 357 P.2d at 1109 (emphasis added) (citing 93 C.J.S. *Waters* § 114a(2) (1956)).

[52] Looney, *supra* note 24, at 405 (emphasis added).

uses an analysis similar to a tort action sounding in negligence.[53] For example, a Washington court held that a defendant is not liable for damage he or she causes by altering the flow of diffused surface water where the defendant exercised "due care by acting in good faith."[54] Similarly, an Arkansas court stated a landowner's right to change the flow of diffused surface water must be exercised with "due care so as not to inflict injury on a neighboring landowner 'beyond what may be fairly necessary.'" [55]

This small sample of cases demonstrates that, like the pure common enemy rule, the modified common enemy approach permits a landowner to alter the flow of diffused surface water. The modified common enemy rule, however, was the courts' attempt at minimizing the harshness and strictness of the pure common enemy rule.[56] Whereas the original common enemy rule never imposed liability upon a landowner for diverting diffused surface water, the modified common enemy rule began to impose liability where the defendant had acted maliciously, unreasonably, or negligently.[57] Notably, both approaches accept the idea that damage to a neighboring landowner may occur without redress. For example, a landowner who exercises due care while diverting or impounding surface water would not be liable under either theory.[58]

It can be difficult to ascertain exactly which states apply one of the four approaches because several jurisdictions have not adopted one of the prevailing labels and instead apply general principles that conform to one of the rules.[59] However, another commentator asserts that eleven states currently apply the modified common enemy rule.[60] As this relatively small number indicates, states have exceedingly abandoned all versions of the common enemy rule.[61]

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[53] *See* Davis, *supra* note 14, at 27.

[54] *Currens*, 983 P.2d at 630.

[55] Pirtle v. Opco, Inc., 601 S.W.2d 265, 266 (Ark. Ct. App. 1980).

[56] *See* Haferkamp v. City of Rock Hill, 316 S.W.2d 620, 625 (Mo. 1958); *see also* Looney, *supra* note 24, at 405.

[57] *See* Fairchild, *supra* note 36, § 4.

[58] *See, e.g.*, Morris v. McNicol, 519 P.2d 7, 10 (Wash. 1974) (stating that Washington's modified common enemy doctrine prevents liability "if the upland landowner's use is reasonable").

[59] *See, e.g.*, Peak v. Parks, 886 So. 2d 97, 103–04 (Ala. Civ. App. 2003) (requiring the plaintiffs to prove "wantonness" but never identifying the principle as the modified common enemy rule); Williamson v. City of Hays, 64 P.3d 364, 371–72 (Kan. 2003) (referring to the "common-enemy doctrine" while addressing the case as a cause of action for negligence).

[60] Davis, *supra* note 14, at 10–11.

[61] *See, e.g.*, Heins Implement Co. v. Mo. Highway & Transp. Comm'n, 859 S.W.2d 681, 690–91 (Mo. 1993) (abandoning the modified common enemy rule and adopting the reasonable use rule in its stead), *abrogated on other grounds by* Southers v. City of Farmington, 263 S.W.3d 603, 614 n.13 (Mo. 2008).

C. Civil Law Rule

The antithesis to the pure common enemy rule is the civil law rule, which is also referred to as the "natural flow doctrine."[62] In its strictest sense, the civil law rule is diametrically opposed to the common enemy rule and holds that diffused surface water must be allowed to follow its natural course without interference from human development.[63] The Wyoming Supreme Court has described the civil law rule in terms of easements and servitudes:

> [A]s between the owners of higher and lower ground, the upper proprietor has an easement to have surface water flow naturally from his land onto the land of the lower proprietor, which is subject to a corresponding servitude, and . . . the lower proprietor has no right to obstruct its flow and cast the water back on the land above.[64]

It is important to note that these easements and servitudes extend only to the location and amount of diffused surface water drainage that would *naturally* occur.[65] The upper landowner[66] has no right to increase or decrease the natural flow upon the lower landowner and, likewise, the lower landowner has no right to block any part of the natural drainage.[67] In direct contrast to the common enemy rule, stringent application of the civil law rule holds a landowner liable for *any* diversion that causes injury to another's land.[68]

The rationales underlying the civil law rule are to preserve the natural drainage pattern of diffused surface water and prevent disputes among neighbors.[69] For example, an Illinois court capably illustrated this justification in terms reminiscent of caveat emptor or "let the buyer beware":

> As water must flow, and some rule in regard to it must be established where land is held under the artificial titles created by human law, there can clearly be no other rule at once so equitable

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[62] Davis, *supra* note 14, at 6; Donald V. Dobbins, *Surface Water Drainage*, 36 NOTRE DAME LAW. 518, 518–19 (1961).

[63] *See* Fairchild, *supra* note 36, § 5; *see also Drainage*, *supra* note 25, § 59.02(b)(3).

[64] Lee v. Brown, 357 P.2d 1106, 1108 (Wyo. 1960) (citing 93 C.J.S. *Waters* § 114a(1) (1956)).

[65] *See* Dobbins, *supra* note 62, at 519.

[66] For purposes of this article, the land of an "upper landowner" sits at a higher elevation than that of a "lower landowner."

[67] Dobbins, *supra* note 62, at 518–19; Kinyon & McClure, *supra* note 39, at 894.

[68] Heins Implement Co. v. Mo. Highway & Transp. Comm'n, 859 S.W.2d 681, 688 (Mo. 1993), *abrogated on other grounds by* Southers v. City of Farmington, 263 S.W.3d 603, 614 n.13 (Mo. 2008).

[69] *Drainage*, *supra* note 25, § 59.02(b)(3).

> and so easy of application as that which enforces natural laws. There is no surprise or hardship in this, for each successive owner takes with whatever advantages or inconveniences nature has stamped upon his land.[70]

Some courts adopted the civil law doctrine, with its associated references to nature, as the gentler alternative to the harsh common enemy rule.[71]

It is widely accepted that the civil law rule is rooted in Roman law and traveled to France where it became part of the Napoleonic Code.[72] In 1812, Louisiana first applied the civil law rule in this country.[73] Louisiana continued to apply the civil law rule in subsequent cases, even before other American states adopted the doctrine.[74] In 1848, Pennsylvania became the first jurisdiction to apply the civil law rule outside of Louisiana.[75] A recent commentator asserts that fifteen states currently apply the civil law rule to disputes involving diffused surface water.[76]

As with the common enemy rule, courts grapple with applying a strict version of the civil law rule to water disputes.[77] In its pure form, the civil law rule carries a tendency to inhibit improvement of land because any improvement likely alters the natural drainage of diffused surface water.[78] Consequently, almost immediately, courts began to read exceptions or limitations into the civil law doctrine in an effort to avoid unjust results and allow landowners to improve their property.[79]

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[70] Gormley v. Sanford, 52 Ill. 158, 162, 1869 WL 5403, at *3 (1869).

[71] *See Heins Implement Co.*, 859 S.W.2d at 688.

[72] *See* Dobbins, *supra* note 62, at 518; *see also* Kinyon & McClure, *supra* note 39, at 894 n.8.

[73] Orleans Navigation Co. v. Mayor of New Orleans, 2 Mart. (o.s.) 214, 232–33, 1812 WL 814, at *8 (La. 1812); *see also* Kinyon & McClure, *supra* note 39, at 895. The fact that Louisiana first applied the civil law rule in this country makes sense because the Civil Code of Louisiana was based primarily upon the French Napoleonic Code. Kinyon & McClure, *supra* note 39, at 894 n.8.

[74] *See, e.g.*, Lattimore v. Davis, 14 La. 161, 164, 1839 WL 944, at *2 (1839); Martin v. Jett, 12 La. 501, 504–05, 1838 WL 881, at *2 (1838).

[75] *See* Kauffman v. Griesemer, 26 Pa. 407, 415 n.a, 1856 WL 7105 at *7 (1856) (providing the decision in *Martin v. Riddle*).

[76] *See* Davis, *supra* note 14, at 11–12.

[77] *See, e.g.*, Ratcliffe v. Indian Hill Acres, Inc., 113 N.E.2d 30, 33–34 (Ohio Ct. App. 1952).

[78] *See* Keys v. Romley, 412 P.2d 529, 533 (Cal. 1966); Butler v. Bruno, 341 A.2d 735, 738 (R.I. 1975).

[79] *See, e.g.*, *Martin*, 12 La. at 505, 1838 WL 881, at *3 ("We are by no means disposed to give to the code such an interpretation as would, in effect, condemn to sterility the superior estate."); *see also Kauffman*, 26 Pa. at 413, 1856 WL 7105, at *6.

> It is not however to be understood . . . that because the flow of water must not be caused by the act of man, that therefore the proprietor who transmits water to the inferior heritage, is not permitted to do anything on his own land—that he is

The most prominent modification applies a "reasonableness of use" requirement to the conduct of a landowner who alters the natural drainage of the land.[80] Similar to the characteristics of the modified common enemy rule, California described this reasonableness requirement as prohibiting either proprietor, whether an upper landowner or a lower landowner, from acting "arbitrarily and unreasonably in his relations with other landowners."[81] That jurisdiction went on to explain as follows:

> If the actions of both the upper and lower landowners are reasonable, necessary, and generally in accord with the foregoing, then the injury must necessarily be borne by the upper landowner who changes a natural system of drainage, in accordance with our traditional civil law rule.[82]

Thus, under California's reasonableness requirement, an upper landowner who diverts natural drainage will be liable unless the lower landowner acts unreasonably.[83] It also holds the upper proprietor liable if he or she acts unreasonably.[84] If both landowners act reasonably, then the strict civil law rule controls and the upper landowner will be liable for changing the natural flow of the diffused surface water.

Another well-recognized exception to the civil law doctrine is known as the "natural watercourse" exception.[85] This exception allows an upper landowner to reroute diffused surface water to a naturally occurring watercourse.[86] These exceptions are just two of many which, taken together, have caused some courts and commentators to ascribe a separate "modified civil law rule" to the matrix of diffused surface water law.[87] The Wyoming Supreme Court, however, referred to

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> condemned to abandon it to perpetual sterility, or never vary the course of cultivation, simply because such acts would produce some change in the manner of discharging the water.

Kauffman, 26 Pa. at 413, 1856 WL 7105, at *6.

[80] *See, e.g.*, Dessen v. Jones, 551 N.E.2d 782, 786–87 (Ill. App. Ct. 1990); *Ratcliffe*, 113 N.E.2d at 34; *Bruno*, 341 A.2d at 739; Lee v. Brown, 357 P.2d 1106, 1108 (Wyo. 1960); Looney, *supra* note 24, at 406.

[81] *Keys*, 412 P.2d at 536.

[82] *Id.* at 537.

[83] *See id.* at 536–37.

[84] *See id.*

[85] Looney, *supra* note 24, at 406.

[86] *See, e.g.*, Pendergrast v. Aiken, 236 S.E.2d 787, 791–92 (N.C. 1977); *see also* Dobbins, *supra* note 62, at 521–22 (describing how the Illinois Legislature passed a statute in the 1800s that allowed landowners to redirect diffused surface water into a natural watercourse without liability).

[87] *See, e.g.*, *Pendergrast*, 236 S.E.2d at 795; Looney, *supra* note 24, at 406.

the "reasonableness of use" exception as part of the civil law rule as a whole, albeit more than fifty years ago.[88] For clarity and ease of discussion, later sections of this article will adopt the term "modified civil law rule" when referring to the body of exceptions that make up the fifth doctrine.

D. Reasonable Use Rule

Somewhere in between the strict common enemy doctrine (which never finds liability) and the strict civil law doctrine (which almost always finds liability) rests the reasonable use rule.[89] This principle begins from the basis that a landowner may alter the drainage of diffused surface water on his or her land because every landowner is legally privileged to make reasonable use of his or her land.[90] Liability for the landowner's actions is determined by weighing the reasonableness of the landowner's actions against the reasonableness of the harm incurred by his or her neighbor.[91] Under this doctrine, a court will not hold a defendant liable where his or her actions were reasonably necessary to develop his or her property and the harm incurred by the plaintiff is not overly onerous.[92] In greater detail, the civil law rule has been helpfully described as follows:

> The issue of reasonableness or unreasonableness becomes a question of fact to be determined in each case upon a consideration of all the relevant circumstances, including such factors as the amount of harm caused, the foreseeability of the harm which results, the purpose or motive with which the possessor acted, and all other relevant matter. It is, of course, true that society has a great interest that land shall be developed for the greater good. It is therefore properly a consideration in these cases whether the utility of the possessor's use of his land outweighs the gravity of the harm which results from his alteration of the flow of surface waters.[93]

In its balancing, a court may consider other relevant factors, including: (1) whether the defendant's land is appropriately suitable for its intended use, (2) whether it is impractical to prevent the diffused surface water invasion, and (3) societal

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[88] Lee v. Brown, 357 P.2d 1106, 1108 (Wyo. 1960).

[89] Heins Implement Co. v. Mo. Highway & Transp. Comm'n, 859 S.W.2d 681, 689 (Mo. 1993), *abrogated on other grounds by* Southers v. City of Farmington, 263 S.W.3d 603, 614 n.13 (Mo. 2008).

[90] *See* Kinyon & McClure, *supra* note 39, at 904.

[91] *See* Davis, *supra* note 14, at 20; Kinyon & McClure, *supra* note 39, at 904–05; Looney, *supra* note 24, at 406–07.

[92] *See* Dobbins, *supra* note 62, at 520 (quoting Armstrong v. Francis Corp., 120 A.2d 4, 10 (N.J. 1956)).

[93] *Armstrong*, 120 A.2d at 10 (citations omitted).

standards of decency.[94] These factors demonstrate that the reasonable use rule sets forth minimal specific rights or impediments for landowners and instead requires each case to be determined based on its unique facts.[95] Courts and commentators have compared the reasonable use analysis to that of a nuisance action.[96]

The reasonable use rule appears to have first surfaced in 1862 in the New Hampshire case of *Bassett v. Salisbury Manufacturing Co*.[97] There, the New Hampshire Supreme Court soundly rejected both the common enemy rule and the civil law rule before holding that "[t]he maxim, '*Sic utere*,' . . . therefore applies, and, as in many other cases, restricts each to a reasonable exercise of his own right, a reasonable use of his own property, in view of the similar rights of others."[98] Until the 1940s, only New Hampshire and Minnesota had adopted the reasonable use rule.[99] However, in 1940, Stanley Kinyon and Robert McClure published their oft-cited article, *Interferences with Surface Waters*, in the *Minnesota Law Review*.[100] There, Kinyon and McClure "whole-heartedly" advocated for the reasonable use approach.[101] Since the 1950s, a growing number of jurisdictions have turned toward the reasonable use rule.[102] Kinyon and McClure's article is often credited for the rising prominence of the reasonable use standard.[103] Regardless of the reasons for the migration toward the reasonable use rule over the last sixty years, it is now the dominant approach in the nation, with approximately twenty-one jurisdictions applying it.[104]

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[94] Dobbins, *supra* note 62, at 520 (citing RESTATEMENT OF TORTS §§ 827–829 (1939)).

[95] Heins Implement Co. v. Mo. Highway & Transp. Comm'n, 859 S.W.2d 681, 689 (Mo. 1993), *abrogated on other grounds by* Southers v. City of Farmington, 263 S.W.3d 603, 614 n.13 (Mo. 2008).

[96] *See* Butler v. Bruno, 341 A.2d 735, 740 (R.I. 1975); *see also* Davis, *supra* note 14, at 21.

[97] 43 N.H. 569, 1862 WL 1466 (1862); *see* Kinyon & McClure, *supra* note 39, at 908 (stating that the reasonable use rule first appeared in *Bassett*).

[98] *Bassett*, 43 N.H. at 577, 1862 WL 1466, at *7. *Bassett* actually addressed a landowner's interference with the flow of subterranean percolating waters, but the reasonable use rule was applied in the later New Hampshire case of *Swett v. Cutts*, 50 N.H. 439, 1870 WL 6751 (1870), which involved interference with the natural drainage of diffused surface water. Additionally, the New Hampshire court likely was referring to the Latin maxim, "*sic utere tuo ut alienum non laedas*," which is loosely translated as "use your property so as not to injure that of another." *See Heins Implement Co.*, 859 S.W.2d at 688.

[99] Kinyon & McClure, *supra* note 39, at 908.

[100] *Id.* at 891–939.

[101] *Id.* at 935.

[102] *See* Pendergrast v. Aiken, 236 S.E.2d 787, 793 (N.C. 1977); *see also* Butler v. Bruno, 341 A.2d 735, 741 & n.7 (R.I. 1975).

[103] *See* Davis, *supra* note 14, at 20.

[104] *See id.* at 9–10; *see also Drainage*, *supra* note 25, § 59.02(b)(7).

The rationale underlying the reasonable use approach is obvious: it serves as a middle ground between the extremes of the common enemy rule and the civil law rule.[105] It suggests a moderate alternative to the apparent rigidity of the other rules.[106] More than a century ago, New Hampshire aptly criticized the former approaches in the following manner:

> The frequent hardship and practical injustice of applying one of these formulas strictly and exclusively has in some cases apparently resulted in the application of the other, and two opposing rules have thus been evolved in different jurisdictions from the inherent injustice of both.[107]

The reasonable use approach attempts to relieve the inequities and restrictions that appeared when courts strictly applied one of the other standards.[108]

In sum, there are at least three and as many as five prevailing approaches to diffused surface water issues, depending upon how a court or commentator classifies them. While many jurisdictions abandoned one approach in favor of another, the vast majority of all jurisdictions have implemented one of these doctrines.[109] Wyoming is one of the few to have never adopted one of the prevailing approaches, explicitly finding it unnecessary to do so more than fifty years ago.[110] Wyoming courts, however, have faced issues involving diffused surface water.[111] Thus, from a survey of Wyoming's relevant cases, we can determine what standards the Wyoming Supreme Court has applied in the past and what Wyoming landowners can anticipate with regard to their diffused surface water problems.

III. WYOMING CASE LAW

A survey of Wyoming case law can help determine which prevailing approach most closely fits the principles previously set forth by the Wyoming Supreme Court and aids in defining the various rights and responsibilities of Wyoming landowners.

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[105] *See* Keys v. Romley, 412 P.2d 529, 533 (Cal. 1966).

[106] *See id.*; *see also Pendergrast*, 236 S.E.2d at 792–93 (quoting Bassett v. Salisbury Mfg. Co., 43 N.H. 569, 573, 577, 1862 WL 1466, at *5, *7 (1862)).

[107] City of Franklin v. Durgee, 51 A. 911, 912 (N.H. 1901).

[108] *See* Dobbins, *supra* note 62, at 520.

[109] *See* Davis, *supra* note 14, at 9–12 (listing forty-nine out of fifty-one jurisdictions, including the District of Columbia, that follow one of the four approaches outlined here).

[110] Lee v. Brown, 357 P.2d 1106, 1109 (Wyo. 1960) ("In view of the facts herein, we do not think that it is necessary in this case to determine what rule in regard to surface water should be adopted in this state or to what extent it should be applied under particular circumstances.").

[111] *See, e.g.*, *id.*; State v. Hiber, 44 P.2d 1005 (Wyo. 1935).

A. Ladd v. Redle

As early as 1904, Wyoming refused to apply the strict common enemy rule to water drainage:

> It is a well-settled proposition of law that one may do as he will upon his own ground, provided it is not to the injury of others. And there can be no question that a proprietor may fill in and raise the level of his ground, or erect embankments or dikes upon it, to protect his premises from overflow; but he has no right to cast the water upon the ground of another, to his injury. And if he does so, he is liable in damages.[112]

It is important to note that *Ladd v. Redle* did not involve "diffused surface water," as defined earlier in this article but instead concerned stream water that had been diverted from a natural watercourse.[113] However, the Wyoming Supreme Court indicated its unwillingness to adopt the strict common enemy rule through its application of the above-quoted principle.[114] Instead, in *Ladd*, the Wyoming Supreme Court suggested that a landowner faces liability for injuriously diverting water onto the land of a neighbor.[115]

Additionally, the principle applied in *Ladd* indicates a landowner can make improvements to his or her land that alter the natural flow of water. Specifically, the court noted a landowner "may fill in and raise the level of his ground, or erect embankments or dikes upon it, to protect his premises from overflow."[116] This phrase in *Ladd* seems to negate the strict civil law rule because it acknowledges that a landowner in Wyoming may alter the natural flow of water. Thus, more than a century ago, the Wyoming Supreme Court indicated Wyoming would not adhere to the pure common enemy doctrine or the pure civil law doctrine but something more moderate. Consequently, according to *Ladd*, Wyoming landowners have the right to improve their property but are not immune from liability for injuries they cause their neighbors.

B. State v. Hiber

Next, in 1935, the court faced a case where the defendant built a dam to capture the water from a draw that ran through his land.[117] The primary issue in *Hiber* involved determining whether the draw constituted a natural watercourse

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[112] Ladd v. Redle, 75 P. 691, 692 (Wyo. 1904).

[113] *Id.* at 691–92.

[114] *See id.*

[115] *Id.* at 692.

[116] *Id.*

[117] State v. Hiber, 44 P.2d 1005, 1006 (Wyo. 1935).

or diffused surface water.[118] If the draw were a natural watercourse, then the prior appropriation doctrine would apply.[119] In contrast, if the draw were diffused surface water, then one of the approaches discussed earlier would apply.[120] The trial court held that the draw was diffused surface water and, consequently, the defendant had the right to impound the draw water on his property.[121] The Wyoming Supreme Court agreed and determined that the draw was diffused surface water rather than a natural watercourse because, among other factors, it was dry most of the time and had no clearly defined banks.[122]

In its decision, the court briefly discussed the common enemy rule and the civil law rule.[123] After summarizing the basic principles of each rule, the court indicated that neither rule could apply unless the water at issue was surface water.[124] Unfortunately, after finding that the water in question constituted diffused surface water, the court never expressly applied either standard, asserting instead:

> [T]he case may be said to resolve itself into the question as to whether or not the defendant has the right to impound water coming from melting snows and heavy rains, which fall onto his lands and on a small adjoining area, and which drain into a depression on defendant's lands. We think he has that right under the circumstances disclosed herein . . . .[125]

While the Wyoming Supreme Court did not apply one of the standards regarding diffused surface water in *Hiber*, its decision is nonetheless informative. Specifically, the Wyoming Supreme Court's determination that the defendant could capture the diffused surface water contradicts the strict civil law rule because it allowed the defendant to alter the natural flow of water on his property. By building the dam and impounding the diffused surface water, the defendant changed the natural drainage and deprived lower landowners of the diffused surface water.[126] Thus, in *Hiber*, the Wyoming Supreme Court affirmed the defendant's actions that were in conflict with the strict civil law doctrine in a case directly involving diffused surface water.

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[118] *Id.*

[119] *Id.*

[120] *Id.*; *see also supra* notes 23–108 and accompanying text.

[121] *Hiber*, 44 P.2d at 1008.

[122] *See id.* at 1010–11.

[123] *Id.* at 1008.

[124] *Id.*

[125] *Id.* at 1011.

[126] *Id.* at 1008–09 ("As in Nevada, so in this state, it is seldom that any landowner has occasion to complain of too much water. 'The cry is, usually, not for less but for more.'" (quoting Boynton v. Longley, 6 P. 437, 438 (Nev. 1885))).

C. Lee v. Brown

In 1960, the Wyoming Supreme Court entertained a case where the trial court had applied the civil law rule to a dispute concerning diffused surface water.[127] There, the defendants constructed a dike parallel to the boundary line of plaintiffs' land.[128] The plaintiffs asserted the defendants' dike caused diffused surface water to accumulate and flood the plaintiffs' land.[129] Applying the civil law rule as instructed by the trial court, a jury returned a verdict for the plaintiffs for damages of $3,224.[130] After the jury awarded damages to the plaintiffs, the trial court issued an injunction against the defendants, enjoining them from maintaining their dike.[131]

After briefly summarizing the civil law rule, including the "reasonableness of use" exception thereto, the common enemy rule, and the modified common enemy rule, the Wyoming Supreme Court found it unnecessary to apply any of the prevailing approaches.[132] Specifically, the court found that the only issue on appeal concerned the injunction issued by the trial court, not the jury's prior award of damages.[133] Though involving diffused surface water, *Lee* is largely unhelpful to the analysis save to confirm that, at least as of 1960, Wyoming had not adopted any of the prevailing approaches to diffused surface water issues.[134]

D. Moreno LLC v. Fall Creek Properties, LLC

A Wyoming district court recently addressed an issue where a property developer caused increased diffused surface water to drain upon adjacent land.[135] There, the developer raised the elevation of its land, which rested in a natural depression, to match the elevation of a nearby public street.[136] Consequently, this increase in elevation caused more diffused surface water to drain onto the now-lower adjacent land, inhibiting the adjacent property owner's development of its own land.[137] In its written decision, the Second Judicial District Court of Wyoming discussed *Hiber* and *Ladd* in determining it could eliminate the

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[127] Lee v. Brown, 357 P.2d 1106, 1108 (Wyo. 1960).

[128] *Id.* at 1107.

[129] *Id.*

[130] *Id.* at 1108.

[131] *Id.* at 1108, 1110.

[132] *Id.* at 1108–09.

[133] *Id.* at 1108–10.

[134] *See id.* at 1109.

[135] Decision Letter at 3, Moreno LLC v. Fall Creek Props., LLC, Civ. Action No. 2009-31331 (2d Jud. Dist. Ct., Albany Cnty., Wyo. Sep. 13, 2010).

[136] *Id.* at 2–3.

[137] *Id.* at 3.

strict civil law rule and the strict common enemy rule from its consideration.[138] The district court then applied both the modified common enemy rule and the reasonable use rule in concluding that the landowners of the elevated property were liable for the increased burden upon the lower landowner.[139] Ultimately, the district court issued an injunction requiring the upper landowners to maintain an appropriate drainage channel that would direct diffused surface water away from the lower landowner.[140]

The district court's decision in *Moreno LLC* evidences the unsettled nature of the law of diffused surface water in Wyoming. The district court applied multiple approaches to the problem after it was unable to identify a single, dispositive rule.[141] The parties in that case did not appeal the decision to the Wyoming Supreme Court.[142] Interestingly, the fact the district court arrived at the same conclusion after applying two different rules is not an anomaly and will be discussed further in this article.[143]

The foregoing summary of prior case law demonstrates that Wyoming has never adopted one of the prevailing rules with regard to diffused surface water drainage. However, from this brief survey, we can determine which approach Wyoming might apply in the future. That determination can help us to ascertain what rights and responsibilities Wyoming landowners currently possess.

IV. WHICH PREVAILING APPROACH FITS WYOMING?

First, *Ladd* and *Hiber* indicate that Wyoming landowners have a right to improve their land and, thereby, alter the natural drainage of diffused surface water.[144] Further, *Hiber* suggests that a landowner may impound diffused surface water before it drains from his or her property.[145] Taken together, these principles suggest that a Wyoming landowner can change the natural flow of diffused surface water and decrease the amount of water that would reach a lower neighbor, contradicting the strict civil law rule.[146] Thus, as the district court did in *Moreno LLC*, the pure civil law rule should be eliminated from consideration.

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[138] *Id.* at 6–8.

[139] *Id.* at 9–11.

[140] *Id.* at 11–12.

[141] *See id.* at 8–9.

[142] *See generally id.* The district court entered permanent injunctions on November 15, 2010. As of December 30, 2010, a notice of appeal had not been filed with the clerk of the district court. *See also* WYO. R. APP. P. 2.01(a) (requiring a notice of appeal to be filed with the clerk of the trial court within thirty days from entry of the appealable order).

[143] *See infra* notes 160–69 and accompanying text.

[144] *See supra* Part III.A–B.

[145] State v. Hiber, 44 P.2d 1005, 1011 (Wyo. 1935).

[146] *See supra* notes 116–26 and accompanying text.

Second, *Ladd* also demonstrates Wyoming's rejection of the strict common enemy rule. *Ladd* expressly provided that an upper landowner who casts water onto a lower landowner is liable for injuries suffered by the lower proprietor.[147] However, under strict application, the common enemy rule never finds an upper landowner liable for his or her actions in dealing with diffused surface water.[148] Therefore, the pure common enemy rule also should be eliminated from discussion.

With the elimination of the two rules at opposite ends of the spectrum, we find that Wyoming is likely to join the majority of other jurisdictions and adopt a moderate approach, attempting to balance the concerns of those involved.[149] In exchange, however, Wyoming must sacrifice predictability. The common enemy rule is predictable because it keeps litigation to a minimum and clearly delineates the wide latitude held by all landowners.[150] The civil law rule is predictable because it informs all landowners of their limited rights.[151] In contrast, the remaining, more moderate approaches forego predictability in favor of flexibility.[152] The modified common enemy rule and the reasonable use rule (along with the modified civil law rule) attempt to balance the rights of all landowners in light of the circumstances of each case.[153] Consequently, under any of the remaining approaches, the outcome of a case is fact-intensive.

The remaining approaches share many similarities, with the largest one being their inclusion of "due care" or "non-negligence" as a factor in determining liability.[154] For example, both Washington and Arkansas apply the modified common enemy rule and require a landowner to exercise "due care" in altering the drainage of diffused surface water.[155] In this regard, the modified common enemy rule uses an analysis similar to that used in the tort of negligence.[156]

Similarly, the most prominent exception to the strict civil law rule prohibits landowners from acting "arbitrarily and unreasonably in his relations with other

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[147] Ladd v. Redle, 75 P. 691, 692 (Wyo. 1904).

[148] *See supra* notes 31–34 and accompanying text.

[149] Butler v. Bruno, 341 A.2d 735, 741 (R.I. 1975) ("[A]s we enter the last quarter of the 20th century, no jurisdiction follows the strict requirements of either the common-enemy or the civil-law rule.").

[150] *Id.* at 737.

[151] *Id.* at 738.

[152] *Id.* at 741.

[153] *See, e.g.*, Looney, *supra* note 24, at 404–07.

[154] *See Butler*, 341 A.2d at 739 & n.3.

[155] *See* Currens v. Sleek, 983 P.2d 626, 630 (Wash. 1999); Pirtle v. Opco, Inc., 601 S.W.2d 265, 266 (Ark. Ct. App. 1980).

[156] *See* Lee v. Brown, 357 P.2d 1106, 1109 (Wyo. 1960).

landowners."[157] This reasonableness requirement that courts began attaching to the strict civil law rule came to be called the "reasonableness of use" exception.[158] Some courts applying the civil law rule have even gone so far as to require landowners to exercise "reasonable and ordinary care" in changing surface water drainage and found that a party breached such a "duty."[159] Thus, courts have used an analysis similar to that used in the tort of negligence when applying the civil law rule's "reasonableness" requirement.

The strict common enemy rule and strict civil law rule found their basis in rigid property law formulations.[160] A Rhode Island court commented on these unyielding property law bases in a rather disapproving manner:

> Both the common-enemy and the civil-law rules are encrusted with the verbiage that is usually associated with the law of real property. When they are used, one hears such terms as easements, the dominant estate, the servient estate, and servitudes, and the classicist has the opportunity to try his hand at translating such ponderous Latin phrases as *cujus est solum, ejus est usque ad coelum et ad infernos* or *aqua currit, et debet currere ut currere solebat*.[161]

Essentially, in various attempts to lessen the harshness of the strict rules, courts began overlaying these strict property law formulations with tort principles, most commonly negligence and nuisance.[162] Jurisdictions applying the common enemy rule or the civil law rule soon began to temper the severity of these doctrines by attempting to require all landowners to act reasonably under the circumstances.

Instead of attempting to superimpose tort values upon property law principles to mitigate the unyielding nature of the underlying property law principles, the reasonable use rule finds its basis in tort law and abandons the concepts of servitudes and absolute ownership.[163] The reasonable use rule examines the facts of each case, weighs the benefits against the detriments of each landowner, and

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[157] Keys v. Romley, 412 P.2d 529, 536 (Cal. 1966).

[158] *Lee*, 357 P.2d at 1108; *see also supra* notes 79–84 and accompanying text.

[159] *See, e.g.*, Burgess v. Salmon River Canal Co., 805 P.2d 1223, 1230 (Idaho 1991).

[160] *See* Butler v. Bruno, 341 A.2d 735, 738–39 (R.I. 1975); *see also* Kinyon & McClure, *supra* note 39, at 936.

[161] *Butler*, 341 A.2d at 738 (footnotes omitted). The Rhode Island court translated the first Latin phrase as "To whomever the soil belongs, he owns also to the sky and to the depths," which refers to the strict common enemy doctrine. *See id.* at 738 n.1. The court translated the second Latin phrase as "Water runs, and ought to run as it is accustomed to run," which refers to the strict civil law doctrine. *See id.* at 738 n.2.

[162] *Id.* at 739; *see also supra* notes 154–59 and accompanying text.

[163] *Butler*, 341 A.2d at 739; *see also* Kinyon & McClure, *supra* note 39, at 936–39.

holds a landowner liable only when his or her harmful interference with diffused surface water is unreasonable.[164] Essentially, the reasonable use rule starts at the point to which the modified common enemy rule and modified civil law rule have evolved in that all three now incorporate tort principles. Indeed, at least one court has referred to the modified common enemy rule and the reasonable use rule as a "distinction without a difference."[165] The reasonable use analysis is very similar to the analysis for the tort of nuisance.[166]

Because the modified common enemy rule, the modified civil law rule, and the reasonable use rule all involve analyses similar to those applied to the tort principles of negligence and nuisance, it should not be surprising that courts have achieved very similar results in cases involving similar facts when reportedly applying one of these different approaches.[167] In commenting upon the modifications and exceptions read into the common enemy rule and the civil law rule over the years, one court stated, "[T]he two doctrines have been laboriously drifting towards confluence—and, not coincidentally, toward the third doctrine [reasonable use] of surface water use."[168] For more than fifty years, courts and commentators have asserted the common enemy rule and the civil law rule have been modified to the point that there is no difference between them and the reasonable use rule, that these three rules are, for all intents and purposes, now one.[169] While this view is not universally held, it demonstrates the growing simplicity and uniformity that has evolved over the last 150 years.

At this time, it seems that if Wyoming ever officially adopts one of the prevailing approaches, it should be the reasonable use rule. More jurisdictions now apply the reasonable use rule than one of the other approaches.[170] That trend is likely to continue in light of the fact that the civil law rule and the common enemy rule have grown increasingly similar to the reasonable use rule.[171] The primary benefit of the common enemy rule and the civil law rule is predictability, but the modifications thereto have reduced this predictability and made case

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[164] *See* Kinyon & McClure, *supra* note 39, at 904–05.

[165] Heins Implement Co. v. Mo. Highway & Transp. Comm'n, 859 S.W.2d 681, 690 (Mo. 1993), *abrogated on other grounds by* Southers v. City of Farmington, 263 S.W.3d 603, 614 n.13 (Mo. 2008).

[166] RESTATEMENT (SECOND) OF TORTS § 833 (1979). The *Restatement (Second) of Torts* endorses the reasonable use test as a form of nuisance.

[167] *See* Kinyon & McClure, *supra* note 39, at 934–35 (stating that, in general, under the common enemy analysis and the civil law analysis, "the actual decisions under both rules are harmonious"); *see also Heins Implement Co.*, 859 S.W.2d at 689.

[168] *Heins Implement Co.*, 859 S.W.2d at 689.

[169] *See* Dobbins, *supra* note 62, at 525.

[170] *See* Davis, *supra* note 14, at 9–12.

[171] *See supra* notes 154–69 and accompanying text.

outcomes far more fact-dependent.[172] Thus, the primary benefit associated with the common enemy rule and the civil law rule has been lost in their modified versions.

To be certain, the reasonable use rule does not provide clear answers to diffused surface water questions, and the approach has its own detractors.[173] However, it is in accord with other long-standing legal principles such as negligence and nuisance.[174] In that regard, Wyoming may be at the forefront of this issue by having refused to adopt one of the prevailing methods. Specifically, as early as 1954, the Wyoming Supreme Court affirmed cases involving diffused surface water decided at the trial court level based on negligence theories.[175] Indeed, since at least 1940, commentators have asserted that issues involving diffused surface water are tort issues, not property law issues:

> There is no question, however, that one's liability for interfering with surface waters, when incurred, is a tort liability. An unjustified invasion of a possessor's interest in the use and enjoyment of his land through the medium of surface waters, or any other type of waters, is as much a tort as a trespass or a private nuisance produced by smoke or smells. Nevertheless, the courts and writers seldom analyze the problems in terms of tortious conduct, causation or other tort concepts.[176]

Wyoming, it turns out, was one of the earlier jurisdictions to analyze the problems in terms of tortious conduct.[177]

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[172] *See* Butler v. Bruno, 341 A.2d 735, 741 (R.I. 1975) ("With the numerous judicial exceptions and modifications that have been appended through the years to the two original concepts, we fail to see how the modern versions of either afford more predictability than the rule of reasonable use.").

[173] *See, e.g.*, *id.* (Joslin, J., dissenting) (stating the reasonable use rule "is no 'rule' at all and that it fails to provide a landowner any reasonably certain standards governing the use of his land").

[174] *See supra* notes 154–62 and accompanying text.

[175] *See* Tompkins v. Byrtus, 267 P.2d 753, 754 (Wyo. 1954). There, the plaintiffs alleged that the defendants' newly constructed dam had flooded the plaintiffs' cabin. The plaintiffs sued for damages, asserting that the flooding was caused by defendants' negligence. The defendants countered that the plaintiffs were negligent by failing to provide necessary drainage for their own property. The jury found the plaintiffs negligent and returned a verdict in the defendants' favor. *See also* Davis, *supra* note 14, at 12 ("Wyoming has not yet adopted any of the standard rules, relying instead on negligence theories.").

[176] Kinyon & McClure, *supra* note 39, at 936; *see also* Pendergrast v. Aiken, 236 S.E.2d 787, 796 (N.C. 1977) ("Analytically, a cause of action for unreasonable interference with the flow of surface water causing substantial damage is a private nuisance action . . . .").

[177] *See Tompkins*, 267 P.2d at 754; s*ee also* Davis, *supra* note 14, at 12.

In sum, in light of national trends and previous case law, Wyoming is most likely to apply the reasonable use rule to issues involving diffused surface water. Alternatively, it may continue to apply the stand-alone tort principles of negligence or private nuisance and entirely avoid adopting one of the prevailing rules.[178] Fortunately for Wyoming landowners, these principles are very similar or the same.[179] Thus, by analyzing these principles, a matrix can be created that ascertains the fundamental rights held by Wyoming landowners.

V. DETERMINING WYOMING LANDOWNERS' RIGHTS AND DUTIES

Regardless of whether Wyoming chooses to apply the reasonable use rule or general nuisance or negligence theories, Wyoming landowners' rights, responsibilities, and privileges are fairly well-defined. From the previous section's analysis of *Ladd* and *Hiber*, it is clear that Wyoming landowners possess the right to improve their property.[180] That right must include an inherent right to alter the contour of the land, by raising or lowering the elevation, and thereby changing the natural drainage of diffused surface water.[181] *Hiber* goes so far as to suggest that a Wyoming landowner can impound diffused surface water, thereby depriving his or her lower neighbor of any water that would drain onto the adjacent property.[182]

Ladd, however, also shows us that these rights are not limitless. While a Wyoming landowner can modify the natural drainage of his or her property, he or she cannot direct diffused surface water upon the land of his or her adjacent neighbor if it causes unnecessary injury.[183]

In determining whether a landowner is liable for injury caused to adjacent property from changing the movement of diffused surface water, the question of reasonableness is likely to drive the discussion. For example, if a Wyoming court applied the reasonable use rule, then the trier of fact would resolve the issue of reasonableness by weighing the benefit to the actor's land against the harm that results from altering the diffused surface water drainage.[184] This balancing

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[178] *See supra* notes 174–77 and accompanying text.

[179] *See supra* notes 160–74 and accompanying text.

[180] Ladd v. Redle, 75 P. 691, 692 (Wyo. 1904) ("[O]ne may do as he will upon his own ground . . . .").

[181] *See id.* ("[A] proprietor may fill in and raise the level of his ground, or erect embankments or dikes upon it . . . .").

[182] State v. Hiber, 44 P.2d 1005, 1011 (Wyo. 1935) (stating the defendant had "the right to impound water coming from melting snows and heavy rains, which fall onto his lands").

[183] *Ladd*, 75 P. at 692 (providing that a landowner "has no right to cast the water upon the ground of another, to his injury").

[184] *See* Armstrong v. Francis Corp., 120 A.2d 4, 10 (N.J. 1956).

test would include considering the following: (1) whether the altered drainage is reasonably necessary, (2) whether the actor has attempted to avoid unnecessary injury to the other's land, and (3) the feasibility of improving the land's natural drainage or installing artificial drainage.[185] Thus, under the reasonable use rule, Wyoming landowners have a greater likelihood of avoiding liability if their drainage alterations provide great utility to their land while causing only minimal injury to their neighbors.

Similarly, if a Wyoming court applied the tort of negligence to a case involving injury from diffused surface water alteration, the question of reasonableness again controls. The Wyoming Supreme Court (along with most other jurisdictions) has held that all persons hold a general duty of reasonable care when undertaking any endeavor.[186] Applying this principle, a Wyoming landowner always has a duty to exercise reasonable care when changing the drainage of diffused surface water. When altering diffused surface water drainage, Wyoming landowners can limit liability under the tort of negligence by exercising reasonable care in light of all the surrounding circumstances.[187] Thus, in the context of negligence, Wyoming landowners have a greater likelihood of avoiding liability if their drainage alterations are "reasonable" in that the alterations provide great utility to their land while causing only minimal injury to their neighbors.

Finally, if a Wyoming court applied the tort of nuisance to a case involving injury from diffused surface water alteration, the issue of reasonableness again rears its head. Under the Restatement (Second) of Torts, an invasion of a person's interest in the use and enjoyment of his or her land that results from changing the flow of diffused surface water may amount to a nuisance.[188] As the reader has doubtlessly predicted by now, the focus of a nuisance analysis is reasonableness. An actor who diverts the diffused surface water to the injury of his or her neighbor is liable when the alteration is intentional and unreasonable.[189] Likewise, a landowner's alteration is unreasonable when the gravity of the harm outweighs the utility of the actor's conduct.[190] Thus, within the context of nuisance, Wyoming landowners can reduce their exposure to liability if their drainage alterations are "reasonable" in that the alterations provide great utility to their land while causing only minimal injury to their neighbors.

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[185] *See* Davis, *supra* note 14, at 21 (citing Butler v. Bruno, 341 A.2d 735, 740 (R.I. 1975)).

[186] *See* Andersen v. Two Dot Ranch, Inc., 49 P.3d 1011, 1015 n.4 (Wyo. 2002); *see also* Vassos v. Roussalis, 625 P.2d 768, 772 (Wyo. 1981) ("The standard is fixed as that which is required of a reasonable person in light of all the circumstances.").

[187] *See Vassos*, 625 P.2d at 772 (stating that a person is required to act reasonably in light of all the circumstances).

[188] RESTATEMENT (SECOND) OF TORTS § 833 (1979).

[189] *Id.* § 822.

[190] *Id.* § 826.

In sum, regardless of the approach applied by a court, Wyoming landowners are required to act in a reasonable manner when changing the drainage of diffused surface water. Reasonableness under any of the potential analyses will be weighed by comparing the benefit of the landowner's alteration to the harm suffered by adjacent property owners.

VI. CONCLUSION

Wyoming remains one of only a few states to have never expressly adopted one of the prevailing approaches regarding diffused surface water. Prior case law, though, suggests Wyoming will not apply the strict common enemy doctrine or the strict civil law doctrine. That leaves the modified common enemy rule, the modified civil law rule, and the reasonable use rule as possibly controlling diffused surface water disputes. The remaining approaches have evolved over the last century to align, in large part, with the tort actions of negligence and nuisance. Consequently, in modern times, Wyoming likely stands to benefit little from officially adopting one of the prevailing approaches. Case law from Wyoming and commentary from around the nation suggest that the torts of negligence and nuisance can adequately resolve the issues. Thus, it may be simpler for Wyoming to apply these ever-present tort principles to diffused surface water issues in the future.

Despite Wyoming courts' reluctance to affirmatively abide by a single doctrine, existing law provides Wyoming landowners with sufficient notice of their rights and obligations in the context of diffused surface water drainage. Regardless of which remaining analysis a Wyoming court applies, the concept of reasonableness will likely control the outcome. As with every other endeavor they undertake, Wyoming landowners are required to exercise due care when interfering with the drainage of diffused surface water on their land. A Wyoming landowner exposes himself or herself to liability for any injury caused by unreasonable intrusion upon the land of another through diffused surface water. In contrast, Wyoming landowners can limit their exposure to liability by acting "reasonably" under the surrounding circumstances when altering the drainage of diffused surface water. A court is likely to find a landowner acted reasonably under the circumstances when the landowner's alterations provide great utility to their land while minimizing injury to their neighbors' land as much as possible.