

WATER CODE
TITLE 2. WATER ADMINISTRATION
SUBTITLE B. WATER RIGHTS
CHAPTER 11. WATER RIGHTS

Sec. 11.086. OVERFLOW CAUSED BY DIVERSION OF WATER. (a) No person may divert or impound the natural flow of surface waters in this state, or permit a diversion or impounding by him to continue, in a manner that damages the property of another by the overflow of the water diverted or impounded.

(b) A person whose property is injured by an overflow of water caused by an unlawful diversion or impounding has remedies at law and in equity and may recover damages occasioned by the overflow.

<http://www.statutes.legis.state.tx.us/Docs/WA/pdf/WA.11.pdf>

- Diffused surface water, in its natural state, occurs after rainfall or snowmelt and flows across land from high elevations to lower elevations. This diffused water is often called stormwater, drainage water, or surface runoff.

Once the water flows into a clearly defined watercourse, it is claimed by the state and is subject to appropriation. On its way to the watercourse, drainage water often flows across privately owned lands. In such cases the water does not automatically become the property of the landowners, although they may capture and use it. Legal problems arise when a landowner interferes with the natural flow of drainage water by capturing and holding the flow or by diverting or increasing it. There are four general rules of law that apply when diffused surface water is captured or diverted:

Common Enemy Rule. One is called the "common enemy rule." Under this rule, drainage water is regarded as an enemy common to all landowners. The law allows every owner to take any measure to protect property, regardless of the consequences to other neighbors.

Modified Common Enemy rule. Landowners are not liable for diverting water unless they block a natural drainway, collect water and channel it, or fail to exercise due care.

Natural Flow or Civil Law Rule. This rule recognizes that each landowner is entitled to rely upon continuation of the natural flow. Under this rule a landowner who increases runoff, thereby causing flooding, is liable for damages.

Reasonable Flow. This rule allows landowners to divert or change drainage water, even to the extent of harming adjoining neighbors, so long as the diverter's actions are "reasonable" considering all circumstances.

Texas follows the natural flow or civil law rule *Jefferson County Drainage district No. 6 v. Lower Neches Valley Authority*, 876 S.W.2d 940 (Texas 1994). In a landowner who increases runoff, thereby causing flooding is liable for damages.

A neighbor is liable to you for damages he caused or causes because he's increasing the runoff and directing such towards your property.

If a neighbor is legally responsible for water damage you suffer, you may be entitled to any or all of the following:

- 1) Compensation for cost of repairs and replacements
- 2) Compensation for expenses such as having to stay at a motel
- 3) Reimbursement for medical expenses
- 4) Compensation for mental distress, if you have suffered an underlying physical injury punitive damages, if a neighbor acted maliciously.

<http://www.justanswer.com/real-estate-law/28d54-neighbor-blocking-stormwater-drain-off.html>

- “Civil Law” rule is otherwise known as the natural flow rule. This rule states that between owners of higher and lower land, the higher property landowner has a right or easement over the property of the lower property landowner, upon which a duty or servitude to receive the water is visited. The servitude on the lower property landowner extends only to those waters flowing onto them in their natural, diffused state. This duty on the lower landowner estate extends even if there is no natural outlet to relieve them from the waters of the dominant, upper landholder. The lower property landowner has the right to repel or obstruct water that is concentrated and/or diverted by the higher property onto them.”

<https://frederickcountymd.gov/DocumentCenter/Home/View/21821>

- The **civil law rule** (so named because it is derived from the civil law systems of France and Spain) is effectively the opposite of the common enemy doctrine. It holds that the owner of a lower parcel of land must accept the natural drainage from those parcels above his, and cannot alter the drainage pattern of his own land to increase the drainage flow onto parcels lower than his own. For this reason, this rule is sometimes referred to as the “*natural flow rule*”. Application of the civil law rule in its purest form would inhibit the development of land, since virtually every improvement on a parcel would alter the natural drainage. For this reason, this rule has been modified in those jurisdictions that use it, to permit reasonable changes in natural flow, often weighing the competing interests of neighboring landholders with the benefit of the development of the parcel.

https://en.wikipedia.org/wiki/Drainage_law

- Like the common enemy rule, **the natural flow theory** had its origins in ancient Roman property rules, but the theories are antithetical. Where the common enemy rule insulated improving landowners from liability, the natural flow theory imposed liability for any harmful diversion. Based on the maxim aqua currit, et debet curere, ut solebat es juenaturae (water runs, and it should run, as it is used to run naturally), the natural flow theory creates a servitude requiring landowners to accept waters naturally flowing from higher lands. The lower-landowner cannot divert those waters at the higher-landowner's expense, but neither can the higher-landowner increase the burden on the servient estate by increasing the flow or changing its course. The courts of Louisiana imported the natural flow theory from the civil law of France in 1812. But, the theory did not win wide acceptance in the United States until the second half of the nineteenth century. By 1940 eighteen states purported to employ the civil law rule exclusively. Like the common enemy rule, the natural flow theory had the benefit of predictability-landowners' rights were delineated with certainty. And, the natural flow theory sensibly paralleled existing rules applying to watercourses. It also had the benefit of fairness; courts early on recognized that the natural flow rule was more equitable than the common enemy rule because it imposed all improvement costs on the improving landowner. In addition, they recognized that application of this rule preserved agricultural lands. By the turn of the century, however, commentators and courts in many jurisdictions increasingly condemned the rule for hindering land development. Courts also criticized the civil law rule because of the evidentiary burden it presented; it was no simple matter to determine the course and amount of flow before diversion in order to determine the extent of the damages. Many courts relied on these criticisms in modifying the natural flow theory. Their modifications effectively limited access to the courts by insulating improving landowners from liability for certain types or degrees of flow alteration. For example, some jurisdictions allowed landowners to increase surface water flows without liability, so long as they used natural drainageways. Many states began to employ a balancing test under which an improving landowner would be held liable only for negligent or unreasonable changes in surface water flows. In an even more drastic measure to spur development, some states replaced the natural flow theory with the common enemy doctrine or reasonable use rule for disputes arising in urban areas. The California Supreme Court in the case of *Keys v. Romley*, developed a unique modification of the natural flow theory that obligated the neighbor, as well as the improving landowner, to act reasonably. Specifically, the neighbor must "take reasonable precautions to avoid or reduce any actual or potential injury. But, this does not necessarily mean that neighboring landowners must incur costs to prevent harm; the facts of the case suggest that the court was primarily concerned with neighboring landowners who aggravate their losses, e.g., by removing existing barriers that would have prevented harm. In cases where both parties act reasonably, the improving landowner remains liable just as under the pure natural flow theory. Despite the criticisms and modifications, the natural flow theory has not incurred the same dramatic decline evidenced by the common enemy rule since 1940. Fourteen states continue to exclusively employ some form of the natural flow theory. They include Colorado, Georgia, Idaho, Illinois, Iowa, Louisiana, Michigan, New Mexico, Oregon, Pennsylvania, Tennessee, Texas, Vermont, and West Virginia. Three other states, Alabama, Kansas, and South Dakota, employ the natural flow theory to resolve surface water disputes arising in rural areas.

<http://www.repository.law.indiana.edu/cgi/viewcontent.cgi?article=1863&context=facpub>

- Two alternatives to the common enemy doctrine are now applied to surface water in all but a few states. A highly restrictive “civil-law” rule has been adopted in a few states. The rule requires that the owner of lower land accept the surface water naturally draining onto his land but the upper owner may do nothing to increase the flow. See *Butler v. Bruno*, 341 A.2d 735 (R.I., 1975). The rule is that “a person who interferes with the natural flow of surface water so as to cause an invasion of another’s interests in the use and enjoyment of his land is subject to liability to the others.” *Id.* at 737. See also S.V. Kinyon and R.C. McClure, “Interferences with Surface Waters,” 24 *Minn. L. Rev.* 891 (1940). Like the common enemy doctrine, however, this civil-law rule has been somewhat modified in most states so that landowners may, to some extent, increase flows as long as they do so in good faith and “non-negligently.”

http://www.floods.org/NoAdverseImpact/NAI_AND_THE_COURTS.pdf