Comments

THE ARIZONA LAW OF LIABILITY FOR THE DIVERSION OF DIFFUSED SURFACE WATERS

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The General Rules Governing Liability

Before one can understand the Arizona law applied by its courts in diffused surface water cases, it is first necessary to understand some general principles having country-wide application. There are two general types of surface waters — diffused surface waters and surface waters flowing in a well-defined watercourse. Diffused surface waters are those which are derived from falling rain or melting snow; they are diffused over the surface of the earth without flowing in any well-defined channel.[1] The essential characteristics of diffused surface waters are a short-lived flow that is not confined to the channel of a legal watercourse or concentrated in a lake or a pond.[2] The essential characteristics of a watercourse are a channel with well-defined bed and banks and a current of water; however, the water in such a channel need not flow the entire year.[3]

The critical question in a surface water case is whether the waters are diffused surface waters or whether they are part of a legal watercourse. The outcome of an action would vary according to whether the waters of a disputed channel were determined to be part of a legal watercourse or simply runoff of diffused surface waters.[4]

In the United States there are three basic rules of law applied to diffused surface waters: (1) the civil law rule, (2) the common enemy rule, and (3) the reasonable use rule. Under the civil law rule the owner of land of relatively higher elevation has the right to have diffused surface waters flowing naturally upon his premises pass through the natural channels of drainage onto or over a lower

[1] *E.g.*, Weinberg v. Northern Alaska Dev. Corp., 384 P.2d 450, 452 (Alaska 1963); County of Scotts Bluff v. Hartwig, 160 Neb. 823, 71 N.W.2d 507, 511 (1955); Morrissey v. Chicago, B. & Q.R.R., 38 Neb. 406, 415, 56 N.W. 946, 948 (1893); Stoner v. City of Dallas, 392 S.W.2d 910, 912 (Tex. Civ. App. 1965).

[2] Doney v. Beatty, 124 Mont. 41, 220 P.2d 77, 82 (1950).

[3] *E.g.*, Hutchinson v. Watson Slough Ditch Co., 16 Idaho 484, 101 Pac. 1059, 1060 (1909); King County v. Boeing Co., 62 Wash. 2d 545, 384 P.2d 122, 126 (1963); State v. Hiber, 48 Wyo. 172, 44 P.2d 1005 (1935).

[4] Shaffer, *Surface Water In Indiana*, 39 Ind. L.J. 69, 77 (1963).

tract of land.[5] When a person interferes with the *natural* flow of diffused surface waters and causes harm to a neighboring landowner, the person who causes the harm is subject to liability to the other.[6] The rule finds its basis in the law of natural drainage;[7] the lower landowner must accept the diffused surface waters which drain onto his land, but the upper landowner may not alter the natural system of drainage so as to increase the amount of water flowing to the lower land.[8]

Under the common enemy rule, sometimes referred to as the common law rule,[9] diffused surface waters are considered a common enemy, and, as long as his intentions are not malicious, a landowner has an unlimited legal privilege to interfere with the flow of diffused surface waters on his land as he sees fit, regardless of the harm which he may cause to neighboring land.[10] He may use any available means to prevent diffused surface waters from reaching his land,[11] and, by operations on his own land, he may fend off diffused surface waters without being required to take into account the consequences to other landowners who have a corresponding right to protect their own land as best they can.[12]

Both the civil law and the common law rules have been modified in varying degrees to prevent the harsh effects which would result from rigidly following these rules.[13] Under the common enemy rule, as modified, a possessor of land may not collect diffused surface waters into an *artificial* channel and pour them upon the land of another to his injury or, by *artificial* means, cause the water to flow upon the

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[5] Hammons v. Illinois Central R.R., 239 La. 742, 119 So.2d 846, 847 (1960); Levene v. City of Salem, 191 Ore. 182, 229 P.2d 255, 260 (1951).

[6] Kinyon & McClure, *Interferences With Surface Waters*, 24 MINN. L. REV. 891, 893 (1940). See generally 3 FARNHAM, WATERS AND WATER RIGHTS § 889a (1940); GOULD, WATERS § 266 (1883); SAX, WATER LAW — CASES AND COMMENTARY 220 (preliminary ed. 1965).

[7] Dobbins, *Surface Water Drainage*, 36 NOTRE DAME LAW. 518 (1961).

[8] Keys v. Romley, 64 Adv. Cal. 413, 412 P.2d 529, 532, 50 Cal. Rptr. 273, 276 (1966). See generally BURBY, REAL PROPERTY § 21 (3rd ed. 1965).

[9] Miller v. Letzerich, 121 Tex. 248, 49 S.W.2d 404 (1932), reviews the history of the common enemy rule and concludes that this rule was not part of the common law. The common enemy rule actually originated in Massachusetts and was erroneously given the name "common law rule" by the New Jersey courts.

[10] Haferkamp v. City of Rock Hill, 316 S.W.2d 620, 625 (Mo. 1958). See generally 3 FARNHAM, WATERS AND WATER RIGHTS § 889c (1904); GOULD, WATERS § 267 (1883); SAX, WATER LAW — CASES AND COMMENTARY 220 (preliminary ed. 1965).

[11] BURBY, REAL PROPERTY § 21 (3rd ed. 1965).

[12] Haferkamp v. City of Rock Hill, 316 S.W.2d 620, 625 (Mo. 1958); Tillinger v. Frisbie, 138 Mont. 60, 353 P.2d 645, 646 (1960). See generally Annot., 59 A.L.R.2d 421 (1958).

[13] See Kinyon & McClure, *supra* note 6, at 913.

lands of another where it would not ordinarily go.[14] In most jurisdictions following the civil law rule, a landowner is now privileged to make minor alterations in the natural flow of diffused surface waters where alteration is necessary for the normal use and improvement of his land, even though the alterations cause the surface waters to flow onto adjoining land in an unnatural manner.[15]

The reasonable use rule has been accepted in an increasing number of American jurisdictions.[16] Under this rule, the possessor of land is not unqualifiedly privileged to deal with diffused surface waters, nor is he absolutely prohibited from interfering with natural diffused surface water drainage.[17] A landowner, acting in good faith in effecting a reasonable use of his land, may drain his land of diffused surface waters and cast them upon the land of another (1) if there is a reasonable necessity for the drainage, (2) if reasonable care is taken to avoid unnecessary injury to other land, (3) if the benefit accruing to the land drained outweighs the gravity of the harm to the other land, and (4) if a reasonable and feasible drainage system is adopted utilizing the natural drainage system where possible.[18]

Whether a watercourse exists is often a fact question.[19] Where there is no conflict as to the facts, the question is one of law from the evidence;[20] a conflict of evidence presents a jury question,[21] or it may be a mixed question of law and fact.[22] However, when the court or jury finds that the waters in question are part of a legal watercourse, the rules applicable to diffused surface waters no longer apply. In this country every riparian owner, *i.e.*, one who owns land abutting a watercourse, is entitled to have the watercourse flow in its normal channel without any obstruction of the channel or detention of the waters that will cause injury to him.[23] However, a landowner may

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[14] Lynn v. Rainey, 400 P.2d 805, 813-814 (Okla. 1965). This is also the rule in jurisdictions following the civil law rule, Rynestad v. Clemetson, 133 N.W.2d 559 (N.D. 1965).

[15] Kinyon & McClure, *supra* note 6, at 920.

[16] BURBY, REAL PROPERTY § 21 (3rd ed. 1965).

[17] Kinyon & McClure, *supra* note 6, at 904. See generally Armstrong v. Francis Corp., 20 N.J. 320, 120 A.2d 4 (1956).

[18] Enderson v. Kelehan, 226 Minn. 163, 32 N.W.2d 286, 289 (1948). See generally note, 18 MD. L. REV. 61 (1958).

[19] Costello v. Bowen, 80 Cal. App. 2d 621, 182 P.2d 615, 619 (Dist. Ct. App. 1947); State v. Hiber, 48 Wyo. 172, 44 P.2d 1005, 1008 (1935).

[20] Falcon v. Boyer, 157 Iowa 745, 142 N.W. 427, 429 (1913).

[21] See Tierney v. Yakima County, 136 Wash. 481, 239 Pac. 248 (1925).

[22] Kislinski v. Gilboy, 19 Pa. Super. 453, 455 (1902).

[23] *E.g.*, Mogle v. Moore, 16 Cal. 2d 1, 104 P.2d 785 (1940); Horn v. Seeger, 167 Kan. 532, 207 P.2d 953 (1949); Mader v. Mettenbrink, 159 Neb. 118, 65 N.W.2d 334 (1954). Generally, every riparian has the right to make a reasonable use of the waters of a stream flowing through his land unless his use would be contrary to the general law of the jurisdiction. See 93 C.J.S. *Waters* § 10 (1956).

change the course of a stream flowing through his land, provided he returns the flow to its natural channel before it reaches the land of a lower riparian owner.[24]

Floodwaters belong in a special category of surface waters: those which flow above the highest line of the ordinary flow of the stream.[25] Ordinarily, floodwaters are regarded as part of the waters of the stream from which they have overflowed and are governed by the same rules applicable to the diversion of a natural watercourse.[26] When the floodwaters have become dispersed over adjoining land and are entirely severed from the mainstream with little possibility of the waters returning to the stream, the floodwaters have been regarded as diffused surface waters.[27] However, in some jurisdictions all floodwaters are considered to be diffused surface waters, whether or not they will eventually return to the natural channel of the stream.[28]

A riparian owner generally has the right to protect his lands from floodwaters, as long as he does not unreasonably injure other riparian owners,[29] but it has also been held in some jurisdictions that escaped floodwaters are a common enemy against which every man may protect himself, regardless of the effect on other lands.[30]

The Arizona Law

There has been some confusion among courts and writers as to which rule the Arizona courts follow in determining liability for interfering with the natural flow of diffused surface waters. Arizona has been listed as a jurisdiction following the civil law rule;[31] it has also been listed as a jurisdiction following the common enemy rule,[32] and at least one author has been unable to reconcile the cases and has listed it as a jurisdiction following both rules.[33] The purpose of this comment is to examine the Arizona law, point out and explain the sources causing the confusion, and determine exactly which rule Arizona does follow.

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[24] *E.g.*, 56 Am. Jur. *Waters* § 14 (1947); Archer v. City of Los Angeles, 19 Cal. 2d 19, 119 P.2d 1 (1941).

[25] Texas Co. v. Burkett, 117 Tex. 16, 296 S.W. 273 (1927).

[26] See Bahm v. Raikes, 160 Neb. 503, 70 N.W.2d 507 (1955).

[27] 3 Tiffany, Real Property § 743 (3rd ed. 1939).

[28] City of Hardin v. Norborne Land Drainage Dist., 360 Mo. 1112, 232 S.W.2d 921 (1950); Keener v. Sharp, 341 Mo. 1192, 111 S.W.2d 118 (1937).

[29] C.J.S. *Waters* § 19b (1956).

[30] Clement v. State Reclamation Board, 35 Cal. 2d 628, 220 P.2d 897, 901-902 (1950); Le Brun v. Richards, 210 Cal. 308, 291 Pac. 825 (1930).

[31] Keys v. Romley, 64 Adv. Cal. 413, 412 P.2d 529, 532 at footnote 3, 50 Cal. Rptr. 273, 276 at footnote 3 (1966).

[32] Kinyon & McClure, *supra* note 6, at 902.

[33] Annot., 59 A.L.R.2d 421, 425 (1958).

Few reported Arizona cases refer to or categorize diffused surface waters in the technical sense described above. The first of these cases was *City of Tucson v. Dunseath.*[34] In that case a landowner, in improving a city lot, had constructed a ditch to carry away diffused surface waters and prevent them from flowing onto his lot. Subsequently the city filled in this ditch and prevented the water from flowing as it had been accustomed to flowing; as a result, the plaintiff's premises were flooded. Although the city was held liable for the damages because it had allowed the water to form a pool and then had released it in a great quantity upon plaintiff's land, the court did recognize the *common enemy rule* and quoted with approval a passage from *Walker v. New Mexico S.P.R.R. Co.*:

> One is under no obligation to receive from the other the flow of any surface water, but may, in the ordinary prosecution of his business and in the improvement of his premises, by embankments or otherwise, prevent any portion of surface water coming from such upper premises.[35]

This unmodified version of the common enemy rule was followed in two more diffused surface water cases.[36] However, in *Maricopa County Municipal Water Conservation Dist. No. 1 v. Warford,*[37] the court applied a modified version of the common enemy rule. In that case, the defendant collected diffused surface waters and channeled them into a natural watercourse; he also constructed a diversion channel from the watercourse so that the water eventually flowed onto and damaged the land of the plaintiff. In holding for the plaintiff the court said: "A land owner has no right to collect surface water in an artificial channel and discharge it in large quantities upon the land of a lower owner to his damage."[38] It should be noted that this is also the

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[34] 15 Ariz. 355, 139 Pac. 177 (1914).

[35] 165 U.S. 593 (1897), quoted in 15 Ariz. 355 at 359, 139 Pac. 177 at 178.

[36] City of Globe v. Moreno, 23 Ariz. 124, 202 Pac. 230 (1921) (Defendant, City, had graded a street raising the surface thereof where it abutted on plaintiff's property so that her property, which before the grading was slightly higher than the street, became, after the grading, about four feet below the level of the street. The defendant failed to provide a drain to allow diffused surface water to flow under the street thereby causing the property of the plaintiff to become flooded. The court held that the diffused surface water was a common enemy which defendant was under no duty to provide a drain for.); Gibson v. Duncan, 17 Ariz. 329, 152 Pac. 856 (1915) (Plaintiff and defendant owned adjoining lots. The natural slope of the ground was such that the diffused surface waters ran from plaintiff's lot onto and over defendant's lot. Defendant constructed a barrier that arrested and pooled the diffused surface water and threw it back onto plaintiff's lot. Plaintiff sued for the resulting injuries and the court held that defendant had the right to prevent any portion of the diffused surface waters from coming onto his lot from the upper premises.)

[37] 69 Ariz. 1, 206 P.2d 1168 (1949).

[38] Maricopa County Municipal Water Conservation Dist. No. 1 v. Warford, 69 Ariz. 1, 11, 206 P.2d 1168, 1174 (1949).

rule in jurisdictions following the civil law.[39] However, this rule has also come to be a recognized exception to the strict application of the common enemy rule and may correctly be referred to as merely a modification of the common enemy rule.[40]

Although in the majority of cases involving waters flowing in arroyos or washes the waters have been considered to be part of a natural watercourse, much of the confusion in the Arizona law has been produced by a few cases *involving surface waters flowing in natural arroyos or washes* in which the courts have applied the rules applicable to diffused surface waters. Waters flowing in natural washes could be considered part of a watercourse under the definition of a stream used by the Arizona Supreme Court,[41] but that court has not consistently applied the definition. For example, in *Kroeger v. Twin Buttes R.R. Co.*,[42] waters flowing in two natural washes were considered to be merely diffused surface waters, and the modified common enemy rule was applied in determining liability for injury caused by a diversion of these waters. The *Kroeger* case was followed by two more cases in which arroyos and washes were not considered natural watercourses, and the modified common enemy rule was applied.[43]

The most recent case following the doctrine that a natural wash is not a watercourse has caused no little confusion in Arizona law. In *Vantex Land & Development Co. v. Schnepf*,[44] defendants and plaintiff owned adjoining parcels of land which were traversed by a dry wash. The contours of this wash were somewhat obliterated by farming operations, and the owners of the land, following the channel of the old

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[39] Rynestad v. Clemetson, 133 N.W.2d 559 (N.D. 1965).

[40] Lynn v. Rainey, 400 P.2d 805, 813-814 (Okla. 1965).

[41] Southern Pacific Co. v. Proebstel, 61 Ariz. 412, 418, 150 P.2d 81, 83 (1944): "A stream is a watercourse having a source and terminus, banks and channel, through which waters flow, at least periodically. . . ."

[42] 14 Ariz. 269, 127 Pac. 735 (1912). The same case had been before the territorial supreme court and was reported in 13 Ariz. 348, 114 Pac. 553 (1911). The territorial supreme court had held that the waters of an arroyo were part of a legal watercourse, but they granted a motion for rehearing of the case. By the time of rehearing Arizona had been granted statehood, and, since it was not apparent on what grounds the motion for rehearing had been granted by the territorial court, the state supreme court considered the case as though the rehearing had been granted generally upon the merits and as though it had never been considered and decided before. On rehearing the court did not discuss whether or not the waters of an arroyo were to be considered part of a natural watercourse, and it is apparent that the waters were considered to be diffused surface waters and the court applied the rules applicable to diffused surface waters.

[43] Maricopa County Municipal Water Conservation Dist. No. 1 v. Roosevelt Irrigation Dist., 39 Ariz. 357, 6 P.2d 898 (1932); Roosevelt Irrigation Dist. v. Beardsley Land & Inv. Co., 36 Ariz. 65, 282 Pac. 937 (1929). Both of these cases arose out of the same fact situation. The waters in question flowed through washes, gullies and arroyos, and the court considered the waters to be merely diffused surface waters.

[44] 82 Ariz. 54, 308 P.2d 254 (1957).

wash, bulldozed a drainage ditch to take care of the excess waters created by seepage of irrigation waters. This waste water flowed through the ditch and over defendants' land. In 1954 the state issued a permit to the plaintiff to appropriate the waters of the wash. Thereafter, the defendants intercepted the water and prevented it from flowing to plaintiff's land. The issue before the court was whether the defendants were legally obliged to allow the waste waters to flow over their land.

In reaching a decision, the court reasoned that rules applicable to the drainage of natural diffused surface waters could not be applied in this case, because the waters involved were *artificially created* waste waters. The court concluded that the defendants were under no obligation to allow the water to flow across their land for the benefit of the plaintiff; however, the court did say that, as a general rule of diffused surface water drainage:

> Whatever servitude, *if any,* with which the lower land is burdened in favor of the higher land is limited to such water as naturally flows and the owner of the dominant estate may not artificially increase this burden to the detriment of the owner of the lower estate.[45] (Emphasis supplied.)

This statement, which embodies elements of the civil law rule, could be read as meaning that Arizona has now adopted the civil law rule as the law in this state, rather than continuing to follow the common enemy rule. However, several reasons may be put forth to rebut this conclusion. First, the statement in this case was mere dictum. The court was not dealing with *natural* diffused surface waters, but rather was concerned with artificially created waste waters, and the court makes it clear that its decision rests upon this distinction. Secondly, the court was not attempting to lay down a general rule of law to be followed in all cases, making it entirely clear that nothing in the opinion should be construed as an announcement of any principles which may have a bearing upon rights concerning the flow of *natural* diffused surface waters.[46] It would seem to follow that this case neither changed the existing Arizona law nor aligned Arizona with those jurisdictions following the civil law rule.

In the majority of cases arising in Arizona involving waters flowing in washes or arroyos, the waters have been considered part of a legal watercourse, and the rules applicable to liability for diversion of a

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[45] Vantex Land & Dev. Co. v. Schnepf, 82 Ariz. 54, 56, 308 P.2d 254, 256 (1957).

[46] Vantex Land & Dev. Co. v. Schnepf, *supra* note 45, at 57, 308 P.2d at 257: "Nothing herein should be considered as announcing any principles that might have a bearing upon the rights concerning the flow of natural surface waters."

watercourse have been applied.[47] The most important of these is the recent case of *Diedrich v. Farnsworth.*[48] This case arose out of an extremely difficult fact situation, and the court was faced with the problem of determining whether diffused surface water law or watercourse law was applicable. The court concluded that the defendant could not be held liable for any damages suffered by the plaintiff, whose claim for relief arose out of the diversion by the defendant of a natural watercourse, which in this case was a natural wash, since the defendant had changed the course of the wash only on his own land and had returned the water to its natural course before it left his land.

The most important aspect of the *Diedrich* case was the holding by the court that the waters of the wash were part of a watercourse. The court reviewed the Arizona law on the question and also looked to New Mexico law. Inconsistencies in the Arizona decisions could not be completely reconciled, and the court relied heavily upon a New Mexico case. In *Martinez v. Cook*[49] the New Mexico Supreme Court held that all arroyos in New Mexico were to be considered natural watercourses, even though they only carried water during seasonal rainy periods. The New Mexico court reasoned that the eastern states' definition of a watercourse, requiring that water flow in the channel the majority of the time, is not well-suited to a state like New Mexico, which has many arroyos that flow only during the rainy season. The Arizona Court of Appeals, in the *Diedrich* case, considered the *Martinez* case to be a well-reasoned opinion and followed the decision, regarding it as being applicable to the facts before the Arizona court. However, the court did

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[47] Southern Pacific Co. v. Smith, 83 F.2d 451 (9th Cir. 1936); Gillespie Land & Irrigation Co. v. Gonzalez, 93 Ariz. 152, 379 P.2d 135 (1963) (The court considered a wash to be a natural watercourse and held that a landowner could not divert the waters of the wash in such a manner that these waters, combined with floodwaters, would cause damage to his neighbor.); City of Tucson v. Koerber, 82 Ariz. 347, 313 P.2d 411 (1957) (Arroyo held to be a natural watercourse); Schlecht v. Schiel, 76 Ariz. 214, 262 P.2d 252 (1953) (The court held that Powder House Wash was a natural stream bed and said that no matter what one may do with surface waters or floodwaters, he may not cast the natural flow of a stream onto the land of another.); City of Tucson v. Apache Motors, 74 Ariz. 98, 245 P.2d 255 (1952) (Arroyo considered to be a natural watercourse); City of Tucson v. O'Rielly Motor Co., 64 Ariz. 240, 168 P.2d 245 (1946) (Blocking of an arroyo held to be obstruction of a natural watercourse); City of Globe v. Shute, 22 Ariz. 280, 196 Pac. 1024 (1921) (The court found no difficulty in holding that a ravine or wash is a natural stream or watercourse, where the rains or snows falling on the adjacent hills run down the ravine or wash in a well-defined channel at irregular intervals.); Arizona Eastern R.R. v. Moore, 18 Ariz. 528, 163 Pac. 607 (1917) (Defendant was held liable for damages resulting from its failure to provide sufficient waterways for passage of usual floodwaters when it constructed a railroad bridge over Agua Fria River.)

[48] 3 Ariz. App. 264, 413 P.2d 774 (1966).

[49] 56 N.M. 343, 244 P.2d 134 (1952). The New Mexico Supreme Court expressly disapproved of the holding in Walker v. New Mexico S.P.R.R., 165 U.S. 593 (1897), in which it had been held that an arroyo in New Mexico was merely the carrier of diffused surface waters and not a legal watercourse.

not make it clear whether Arizona would in the future consider *all* washes or arroyos to be legal watercourses. This question still remains unanswered, and it is not possible to determine, prior to litigation, whether the waters flowing in a natural wash will be considered to be part of a watercourse, or whether they will be categorized as diffused surface waters.

Another source of misunderstanding in Arizona law is *Southern Pacific Co. v. Proebstel.*[50] That case actually involved the question of liability for the diversion of floodwaters. Defendant had constructed a dike to protect its railroad bank from damage by overflowing waters of Coyote Wash. During a period of heavy rainfall water overflowed the banks of the wash, and defendant's dike intercepted the floodwaters and cast them back into the main channel. As a result, the volume of flow of the wash was increased, causing it to overflow and damage the land of the plaintiff. The court held that floodwaters escaping from a stream were not diffused surface waters and did not lose their character as floodwaters while flowing wildly over the country, and that floodwaters were a common enemy against which every landowner had a right to protect himself.

The court went even further, however, and said that no one has the right to obstruct the flow of diffused surface waters onto his land. This is a principle of the civil law and is the source of some confusion. Taken out of context the court's statement could be construed as a commitment to the civil law rule for liability for diversion of diffused surface waters. However, a careful reading of the case does not lead one to this conclusion. Although the court makes some observations that the waters of a wash are sometimes considered to be merely diffused surface waters and not part of a watercourse, the opinion as a whole makes it clear that the court considered the wash in this case to be a natural stream. Therefore, it follows that the waters escaping from the wash were not diffused surface waters, and diffused surface water law was not applicable. In fact, the court recognized that the waters were floodwaters, not diffused surface waters, and stated its holding in terms of liability for the diversion of floodwaters. Consequently, it cannot be said that the court held that the civil law rule, as applied to diffused surface waters, is to be followed in Arizona. The statement in this case was dictum and did not change the existing law which commits Arizona to the common enemy rule.

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[50] 61 Ariz. 412, 150 P.2d 81 (1944).

CONCLUSION

From the foregoing discussion it can be seen that Arizona continues to follow the basic tenets of the common enemy rule in determining liability for the diversion of diffused surface waters. However, much confusion has arisen because of the unsettled controversy as to whether the waters of a wash or an arroyo are to be considered diffused surface waters or part of a natural watercourse. How far the court meant to go in *Diedrich v. Farnsworth*[51] in holding that a wash is a natural watercourse is not explicit in the opinion, and it must be remembered that this decision was handed down by the court of appeals. The area of confusion would be minimized if the state supreme court were to hold, or the legislature were to enact a statute, that a wash or arroyo is a legal watercourse. Such a holding or statute would make it easier to determine in advance of litigation the rights of adjoining landowners to alter the natural surface configuration of their land. Attorneys would then be able to advise with more certainty if a proposed change in the surface of the land would result in changing the flow of a natural watercourse, or whether it would result in changing the flow of diffused surface waters.

Arizona water law would also be improved by giving more attention to *tort* principles in resolving disputes over diffused surface water damage; traditional *property* concepts no longer serve adequately. Analogies from the trespass and private nuisance situations[52] may be more helpful, even though the problems have been assumed to be entirely within the area of property law and legal relations of the parties have been stated in terms of property concepts such as rights, privileges, servitudes and natural easements.[53]

If the diffused surface water law problems were treated as questions of tort liability, attention could be focused more clearly on such practical problems as the reasonableness of a defendant's conduct and the relative value of the interests involved, rather than on limitations of a "right" or a "servitude," which are both abstract and often ill-defined terms.[54]

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[51] 3 Ariz. App. 264, 413 P.2d 774 (1966).

[52] See Kinyon & McClure, *Interferences With Surface Waters*, 24 MINN. L. REV. 891, 936 (1940).

[53] See Keys v. Romley, 64 Adv. Cal. 413, 412 P.2d 529, 536, 50 Cal. Rptr. 273, 280 (1966). California now follows a modified version of the civil law rule. Under the California rule, liability is to be determined on the basis of tort concepts rather than on the basis of property concepts traditionally followed in determining liability in cases involving diffused surface waters.

[54] See Kinyon & McClure, *supra* note 48, at 939.

A reading of *Diedrich v. Farnsworth*[55] should convince even the skeptical that the reasonable use rule, which applies tort as well as property law principles, is to be preferred to the older common enemy and civil law rules. The facts in *Diedrich* presented a genuine issue as to whether diffused surface water law or watercourse law was applicable. The reasonableness of defendant's conduct could not have been considered if the court had attempted to apply diffused surface water principles as found in the Arizona cases. The court avoided this question by holding that watercourse law was applicable. In the future this sterile logic of classification can be obviated by adopting the reasonable use rule, either by judicial decision or by statute, preferably the latter.

[55] 3 Ariz. App. 264, 413 P.2d 774 (1966).