

A Legal View: Upper Land Owners Must be Reasonable in Diverting Surface Water.

by Craig B. Forry, Esq.

Q: With the recent fire in the hills where I reside, and the rains that have caused severe mud slides that appear to be heading my way, how can I protect my property and not get sued by the lower owners?

A: In California, water that is diffused over the surface of the land and resulting from rain, snow, or springs is known as "surface water". The mud flows from burn areas are caused by heavy rains on the denuded slopes, and the resulting surface water carries mud and debris downhill. Surface water is different from water flowing in a fixed channel such as a river or stream, or the extraordinary overflow of rivers or streams that is termed "flood water".

One of the three basic rules that courts follow in the United States in considering ground water cases is termed the "common enemy doctrine", and it holds that each landowner has an unqualified right as the owner of his land to fend off surface waters without being required to consider the consequences of water diversion methods to other landowners. In other words, every owner for himself. This doctrine was followed in Hawaii, Washington, North Dakota, New York, and Massachusetts, among other states.

The second rule is termed the "civil law rule". This rule is 180 degrees opposite the common enemy doctrine, and places responsibilities on both the upper and lower owners to not resist surface water. The civil law rule holds that the lower owner must accept the surface water that drains onto his land (e.g., he cannot build a dam), but the upper owner cannot alter the natural system of drainage so as to increase the burden (e.g., he cannot construct artificial channels that funnel and thereby increase the flow). This rule was followed in Texas, Arizona, North Dakota, New Mexico, and Louisiana, among other states.

The third rule is termed the "rule of reasonable use". Because of the extreme nature of the other two rules, some states have evolved a rule that determines the rights of the owners by an assessment of all the relevant factors, and bases a decision on whether the respective owners acted reasonably under the circumstances. First adopted in New Hampshire, this rule treats the rights of the upper and lower owners equal, and is based on the principal that the enjoyment of land is dependent upon the actions of surrounding landowners, and an owner's rights must be exercised with reference to the other owners.

Prior to 1966, California court followed the civil law rule in both urban and rural areas. In the case of *Keys v. Romley*, the California Supreme Court decided that reasonableness of conduct should be determined under tort law, rather than real property concepts. Because it is incumbent upon every person to use reasonable care to avoid injury to adjacent owners, a failure to exercise "reasonable care" may create liability for the upper owner. The lower owner remains responsible to take "reasonable precautions" to avoid or reduce actual or potential damage.

The difficulty in applying the *Keys* rule is determining what constitutes reasonable care or conduct. This is where the opinions of the owners clash because each sees the problem from their perspective and how high on the hill they find themselves relative to the other. Reasonable care is a question of fact for a jury or judge acting as the trier of fact and all of the relevant circumstances must be considered, such as amount of harm caused, the foreseeability of the harm that results, and the purpose or motive with which the defendant acted.

In 1994, the California Supreme Court applied the *Keys* rule of reasonableness in finding that a public entity can be held liable in tort or inverse condemnation actions like a private owner because neither may disregard the interests of downstream property owners. This explains the hesitation of the governmental authorities in addressing the recent mud slides in the La Canada Flintridge area. If the government takes action, it may be subject to a legal action depending upon results that are difficult to predict.

In a more recent decision, the California Court of Appeal clarified that traditional negligence principles do not apply where a discharge of surface water causes damage. Liability under three out of the four possible scenarios depends upon which of the owners is unreasonable. First, if the upper owner is reasonable, and the lower owner is unreasonable, the upper owner prevails. Second, if the upper owner is unreasonable, and lower owner is reasonable, the lower owner prevails. Third, if both the upper and lower owners are reasonable, but the lower owner is damaged, the lower owner prevails. No mention was made about the fourth possible scenario of both the upper and lower owners being unreasonable.

After considering these legal principles, it is apparent that taking no action is the preferred course of conduct because liability for diverting surface water flows (pun intended) from conduct that is ultimately found to be unreasonable. However, even if the upper owner acts reasonably in trying to protect his property, he can still be liable if the lower owner acts reasonably and incurs damage. If the upper owner has not changed the historical flow of surface water in any manner, then it is unlikely that a successful action can be brought based on a claim that the upper owner did not do something that the lower owner claims should have been done to prevent damage.

In those situations where the potential of harm to the upper owner requires the upper owner to take action (e.g., sandbagging a garage or building a wall to restrict the flow of water and mud onto the property), care must be taken to act reasonably. Following the advice of professionals such as a licensed civil engineer, geotechnical engineer, and/or a general contractor, will appear more reasonable than trying to go it alone. Communications with lower owners regarding mutual ways to protect each other's land, and if possible, written agreements waiving liability for any preventive measures, should always be considered. In summary, when doing nothing is not an alternative, extreme care must be exercised in trying to protect property from surface water.

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