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Litigating the Myriad of Harms Caused by Diffused Surface Water

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Last year many parts of Kansas experienced the worst drought on record.¹ Consequently, much attention was given to shortages of water. A separate body of water law called “diffused surface water,” however, deals with water not generally useful for consumptive use purposes.

Indeed, in light of concerns over water shortages in Kansas,

...it is difficult for many to imagine circumstances, other than floods or natural disasters, under which the problem to be dealt with is the matter of overabundance of water.²

Yet the problems posed by diffused surface water create perhaps the largest flood of litigation in water law. This article seeks to classify diffused surface water and the problems posed by it, examine applicable legal theories and causes of action and conclude by examining some general practical and legal considerations one should make in litigating these types of cases.

Although the following cannot serve as an exhaustive discussion of the law in this area, it should serve as a practical guide to handling these types of cases from a plaintiff’s perspective.

Definition of Diffused Surface Water

Water can be classified into many categories including, but certainly not limited to, natural watercourses,³ artificial waterbodies⁴ and

groundwater.⁵ A number of complex and sometimes nonsensical legal approaches deal with various classifications of water.

Sometimes quite distinct rules exist and other times the rules overlap. At a fundamental level, surface water is distinguished from groundwater since groundwater rests or flows beneath the earth’s surface.⁶ Although a tendency prevails to lump all surface water together, a quite separate body of law has emerged to deal with diffused surface water.

Diffused surface water has been defined by Kansas cases as water that exists in an unconfined state.⁷ This may include:

[W]ater from rain, melting snow, springs or seepage, or detached from subsiding floods, that lies or flows on the surface of the earth but does not form a part of a watercourse or lake.⁸

The above definition may also include puddles or ponds formed by precipitation that have no outlet.⁹ This definition excludes, however, flood and overflow waters from lakes and streams.¹⁰

Confined surface water, in contrast, offers a more reliable water source and is generally seen as an asset rather than a liability.¹¹ A waterbody may also be subject to state or federal regulation depending on the nature of the waterbody.¹²

The term “watercourse” has significance in the later discussion in this article;¹³ the definition of a stream,

for instance, has recently been endorsed by the Kansas Supreme Court as “any watercourse that has a well-defined bed and banks” so long as a watershed of certain acreage exists above the point in question.¹⁴

The distinction is also important because many insurance policies exclude damage caused by “surface water,” which is generally interpreted to mean diffused surface water.¹⁵

Casting water onto one’s neighbor’s property can result in costly and catastrophic results including the destruction of buildings, death or bodily injury, the erosion of land, the obliteration of crops and other forms of injury.

Despite the detriments associated with diffused surface water, it should be noted that there may also be some benefits. Kansas farmers, for example, may value this source of water as a means to replenish livestock ponds.

Consequently, devoid of consumptive use principles,¹⁶ landowners are generally free to impound and use such waters.¹⁷ However, as water shortages persist, litigation over the *use* of diffused surface water may become commonplace. This article, however, only focuses on dealing with the problems posed by diffused surface water.

Legal Approaches Applicable to Diffused Surface Water

In General

The common enemy rule can really be characterized as a rule of non-liability because it allows landowners to take any action they see fit to avoid diffused surface water from entering their land.¹⁸ Water is viewed as a common enemy to be avoided.¹⁹ A pure application of this theory thus competes with the general principal that landowners should not manage their property in a manner that harms others.

Historically, early American jurisprudence adopted the common enemy rule under the mistaken belief that it was, in fact, also the common

law of England.²⁰ This rule is popular in cities because it provides insulation from litigation and, thus, encourages development.²¹

The civil law rule is really the antithesis to the common enemy rule and provides that water should be allowed to flow its natural course without human interference.²² Pursuant to a strict application of this theory, the upper landowner may not alter the natural drainage pattern nor increase the flow of water and the lower landowner must not take action to repel the water.²³ This rule discourages development because it undermines the predictability of how landowners may use their land.²⁴

In between these two theories exists the concept of reasonable use. Reasonable use has evolved out of the tort principle of reasonableness and allows courts to judge a landowner’s handling of diffused surface water based on all relevant circumstances.²⁵

Some states’ legislatures have codified the above rules, and most states have now adopted a hybrid approach incorporating various aspects of the three basic theories.²⁶ It should also be noted that regardless of the approach, one can generally drain diffused surface water into natural waterbodies, so long as the discharge does not result from an unreasonable use of the land, does not exceed the capacity of the watercourse or divert water that would not otherwise reach the watercourse.²⁷

The Kansas Approach

Early Kansas courts, also probably operating under the illusion that it was the common law, adopted the common enemy rule in seemingly its pure form.²⁸ The legislature subsequently modified this approach.²⁹

Presently, the Kansas Supreme Court has adopted a variation of the common enemy rule for cities.³⁰ Municipalities are not liable for an increased flow of surface water caused by natural development so long as the natural course of drainage is not altered.³¹

In clarifying how a nuisance would not exist even though the flow of surface

water increased, in *Baldwin v. City of Overland Park*,³² the Court wrote:

Whenever a structure is erected in a city, whether it be a house, driveway, sidewalk, street or whatever, the area for natural percolation of water is diminished and the flow of surface water is to that degree altered.³³

In addition to incorporating the concept of natural flow, the common enemy rule is arguably further tempered by the concepts of malice, negligence and reasonableness.³⁴

*Williamson v. City of Hays*³⁵ seemingly expanded the rule as it relates to cities. *Williamson* involved a situation where landowners complained that the city’s storm sewer drainage system discharged water at a greater velocity onto their property.³⁶ The landowners were not located within city limits although the city had an easement over their property for the storm sewer.³⁷

The Court concluded that by virtue of the easement, the lands in question did not exist “wholly outside the limits of any incorporated city.”³⁸ This holding is significant because it is quite common for a city to obtain easements or condemn properties miles outside of its identified limits, yet the court has signaled that the common enemy rule could still operate in these areas.

Endorsing the language of an earlier Kansas case, the Court also appeared to revert back to a more pure form of the common-enemy approach for cities.³⁹ With respect to handling diffused surface water issues for agricultural land and highways located wholly outside of incorporated cities, Kansas courts have apparently adopted a derivative of the civil law rule.⁴⁰

K.S.A. 24-105 applies the civil law rule to a situation where a landowner constructs a dam or levee.⁴¹ In *Clawson v. Garrison*,⁴² the court expanded this concept and wrote,

[A]s to agricultural lands outside the incorporated limits of a city, upper proprietors may not divert their surface waters by artificial means

onto the lands of lower proprietors nor accelerate by means of ditches or increase the drainage of their lands to the injury of lower owners.⁴³

The *Williamson* Court's reasoning leaves it unclear in many instances as to which rule will apply. For instance, an industrial plant may operate wholly outside an incorporated city, but the land is not utilized for agricultural purposes.⁴⁴

The case law makes it ambiguous regarding what rule will apply under these circumstances. The civil law rule arguably only applies to agricultural land and highways existing outside of incorporated cities.⁴⁵ The presumption is that the common enemy rule is still in force everywhere else.⁴⁶

Kansas has not yet adopted any specific factors to determine reasonableness as it relates to diffused surface water and little direct support exists for the assertion that Kansas law even incorporates this principle as an independent theory.⁴⁷ However, nationwide the concept of reasonableness has become a benchmark and may find favor in cases involving diffused surface water in Kansas.⁴⁸

Other courts have identified a range of varying factors in this context and some version of these common factors should likely be cited if the litigant decides to mount a challenge to reasonableness under Kansas law.⁴⁹

As a corollary to Kansas courts infusing tort principles into diffused surface water theories, lawsuits in this area are often couched in terms of well-recognized causes of action including negligence, nuisance, trespass, inverse condemnation and actions for injunctive relief.⁵⁰

A negligence claim could exist where it is shown that a duty existed not to harm other landowners or if the defendant's conduct changed the drainage in an unreasonable manner.⁵¹ Establishing a duty in a negligence case could be established by or exist independently of the duties implied by the Kansas versions of the civil law and/or common enemy rules.⁵²

Of course, comparative negligence principles apply with respect to the plaintiff's conduct and may limit or undermine any recovery.

Another typical claim is nuisance.⁵³ A nuisance is usually associated with an annoyance or use of property in an offensive manner.⁵⁴ A private nuisance relates to unlawful interference with another's use or enjoyment of land.⁵⁵ An intentional nuisance exists when a "defendant . . . specifically intend[s] to damage the plaintiff or act in such a way to make it 'substantially certain' damage will occur."⁵⁶ A nuisance action against a municipality for diffused surface waters is only actionable if the municipality created or maintained the nuisance.⁵⁷

A trespass is an intentional tort established by showing "defendant intends to have the foreign-matter intrude upon the land, or where the defendant's act is done with knowledge that it will to a substantial certainty result in the entry of foreign matter."⁵⁸

Recent Kansas cases have suggested that trespass actions against cities will likely be difficult to prove using the common enemy rule as a framework.⁵⁹ In fact, a municipality may increase the force, "flow and velocity of . . . surface water" discharged onto another's property so long as it does not "disturb the natural drainage of water, nor . . . shed water on a neighbor's property that would not otherwise have gone there."⁶⁰

Another common approach when a landowner has experienced or is about to experience harm from diffused surface water is to seek injunctive relief.⁶¹ Injunctive relief is not appropriate where an adequate remedy exists at law, and where changes occur to the flow of surface water, recovery of damages may be appropriate.⁶²

As another cautionary note, the plaintiff may be required to ultimately post a bond and this amount could be extensive.⁶³ Where the landowner seeks to force the removal of a structure or mandate the restoration of the land, a mandatory action may be sought.

This remedy is often disfavored.⁶⁴ Because of the need to weigh the

hardships, the litigant may consider the reasonableness factors identified above in making a determination of the merit of injunctive relief.⁶⁵

A final cause of action is inverse condemnation.⁶⁶ A derivative of the takings clause of the United States Constitution, an inverse condemnation action may lie where "private property has actually been taken for public use without formal condemnation proceedings."⁶⁷

In further contrast to condemnation actions, the landowner must initiate the action against the governmental entity.⁶⁸ This has become a fairly common cause of action against governmental entities for harmful activity concerning unwanted water. Unfortunately, it is very difficult to prove because Kansas courts have required "a permanent taking" and not merely "intermittent or periodic" events of flooding.⁶⁹

However, in *Estate of Kirkpatrick v. The City of Olathe*,⁷⁰ although not a diffused surface water case, the Kansas Supreme Court signaled that an inverse condemnation claim may now be easier to prove.⁷¹ This cause of action may also be appealing to plaintiff's lawyers because a successful case may merit the award of attorney fees.⁷²

Considerations in Diffused Surface Water Cases

The following should serve as some basic legal and practical considerations that a practitioner should make in litigating diffused surface water cases. Again, this is far from an exhaustive list.

Actionable Harm and Defenses

The first step in evaluating a diffused surface water case is determining the nature of the pertinent events allegedly causing the injury and obtaining any relevant history from the client. Using the above principles, the lawyer should attempt to quickly determine if actionable harm even exists. Knowing which theory applies is significant because of the differing burdens of proof.⁷³

In addition to the many defense considerations identified in this article,

it merits additionally noting that a governmental entity may be able to rely on the blanket of protections offered by the Kansas Tort Claims Act.⁷⁴ When applicable, the plaintiff's lawyer must factor in this immunity and the specific rules governing lawsuits against governmental entities.

Statute of Limitations

As with any plaintiff case, upon analyzing if an actionable injury occurred, the next step is ascertaining the applicable statute of limitations period and when it runs. Regarding the pertinent limitations period, this depends primarily on the type of injury and the nature of the legal theories advanced.⁷⁵ For most causes of action, the relevant limitations period is two years.⁷⁶ However, for inverse condemnation actions against governmental authorities, it appears that the limitations period is actually 15 years.⁷⁷

Determining when the limitations period commences can be particularly difficult and reconciling law in this area can seem nonsensical and often leads to harsh results. One must assess if the injury was temporary or permanent in nature.⁷⁸ If the injury was merely temporary, a new cause of action can accrue with each new injury until the injury becomes permanent.⁷⁹ The linchpin of a temporary cause of action is whether the cause of injury is abatable by the defendant or the injury "may and will be terminated."⁸⁰

In contrast, if a court deems an injury permanent in nature, then the limitations period begins to toll upon the occurrence of the actionable event and no subsequent litigation may be brought upon the conclusion of the applicable limitations period.⁸¹ Permanent damages stem from a lasting and non-abatable cause of injury and refer to an entire award of damages for "past, present and prospective."⁸²

In assessing whether an injury is permanent or temporary, Kansas courts appear to look at three factors: "(1) the nature of the causative structure, (2) the nature of the damages, and (3)

the ability to determine or estimate damages."⁸³ Additionally, the statute of limitations may not begin to run until the injured knew or reasonably should have known of the source of the harm or the permanency of the harm.⁸⁴

Determining the Existence of Natural Watercourses

It is imperative to identify the natural watercourses that exist in the area and the existing and historical drainage pattern. As noted above, this is important because actions that simply help to divert water that would have naturally flowed into a given drainage structure acts as a defense to a legal claim in this area.

Significantly, courts have held that an artificial structure or diversion can become part of the natural watercourse upon a sufficient passage of time.⁸⁵ Thus, over the years, a landowner may even have a duty to maintain an artificial structure to ensure the natural flow of water.⁸⁶

Importance of Expert Witness

In order to prevail in a diffused surface water case, it is absolutely crucial to obtain appropriate expert witnesses.⁸⁷ In fact, the failure to hire an expert witness could prove to be fatal to winning the case.⁸⁸ The plaintiff's lawyer should hire an expert that can determine the drainage pattern of the land. Usually, this should be a licensed engineer/hydrologist with proper credentials.

This same expert — or even a more specialized expert in certain

cases — will then need to opine that the plaintiff's injury was caused by the defendant's conduct and not by another source. This should include an analysis of exactly how the injury occurred.

Hiring an expert quickly is important because — like an automobile accident case — evidence or features of the land relevant to a proper evaluation may quickly disappear. Experts should also be hired to determine the extent of the damage. This may include appraisers or contractors providing estimates of damage to structures.

An expert with a Ph.D. in crop science, agronomy or horticulture may help to assess damage to crops and other plants. A certified Kansas arborist may further help to determine damage to trees.

Kansas State University has even developed guidelines that may aid in calculating many forms of agricultural-related damages. Although obtaining an expert is a must, selecting a qualified expert is extremely important as well because the case may crumble based on unsubstantiated "expert" assertions.⁸⁹

Inspecting the Scene

To truly obtain a handle on the facts of the case, there is no substitute for inspecting the land(s) subject to the litigation. A trained lawyer may even identify aspects of the scene relevant to the case that others will miss. A picture is worth a thousand words and the lawyer should immediately begin to take relevant photographs.

Additionally, clients usually



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appreciate their lawyers being willing “to strap on their rubber boots” and wade firsthand through the nature of the problems caused by the water.

Interviewing Witnesses

Interviewing all applicable witnesses can be crucial. One should visit with other neighboring landowners and determine predecessors in title. A prior landowner may identify, for instance, that the event complained of has occurred multiple times in the past or that significant runoff was common even prior to the defendant’s conduct.

Friends and family members of the parties may also supply valuable information. Interviewing witnesses is important in assessing a case because your opponent will likely do the same and there is nothing worse than an unexpected and harmful witness emerging after exhausting significant litigation time and costs.

Evidentiary Considerations

There are many sources of evidence that aid in developing these types of cases. A host of state and federal governmental agencies have records that might be obtained including the United States Geological Survey, the Kansas Department of Transportation and the Kansas Division of Water Resources.

Local county and city departments such as planning and zoning, road and bridge, and register of deeds contain valuable resources. Along with zoning records, past deeds can indicate when construction occurred and the previous ownership of land. A lawyer should also look for any past surveys conducted concerning the impacted properties. These may indicate how the drainage pattern has changed.

Multiple other documents may aid in the development of the case and should be sought through discovery including aerial and other photos, a topographical map of the larger drainage system, weather records, receipts, valuations and other evidence of damages, correspondence concerning the subject matter of the dispute, diaries and handwritten notes, and other general

documents often targeted in discovery that might be relevant.

Conclusion

Litigating diffused surface water cases can be complex but rewarding. The information in this article should help to provide an understanding of the nature of diffused surface water, outline some of the applicable theories and identify some considerations the practitioner should make in handling these cases.

As society’s needs evolve, the law in this area will also likely change its course and flow in a new direction. ▲

ENDNOTES

- 1 *Farmers Face Losses During Record-breaking Drought Season*, USA TODAY, July 30, 2011, at B1.
- 2 See James B. Wadley, *Diffused Surface Water*, 6-50 THOMPSON ON REAL PROPERTY § 50.20 (Thomas ed., 2011).
- 3 See *infra* notes 13, 14, 85, 86 and accompanying text (discussing watercourses).
- 4 Artificial waterbodies are treated differently under the law than natural sources of water.
- 5 See *infra* note 6 and accompanying text (defining groundwater). For an excellent history and overview of water law in Kansas, see John C. Peck, *The Kansas Water Appropriation Act: A Fifty-Year Perspective*, 43 KAN. L. REV. 735 (Winter 1995). A discussion of this extensive topic is beyond the limited scope of this article.
- 6 See THE RESTATEMENT (SECOND) OF TORTS § 845 (2011). Groundwater has also been defined as follows: “Water that exists in the interstices of rocks is called *subsurface water*...; that part of subsurface water in interstices completely saturated with water is called groundwater.” GEORGE GOULD, DOUGLAS GRANT & GREGORY WEBER, WATER LAW 325 (2005) (Emphasis in original) (Citations omitted).
- 7 *Dougan v. Rossville Drainage Dist.*, 243 Kan. 315, 757 P.2d 272 (1988); *Clawson v. Garrison*, 3 Kan. App. 2d 188, 592 P.2d 117 (1979).
- 8 RESTATEMENT (SECOND) OF TORTS § 846 (2011).
- 9 See Wadley, *supra* note 2.
- 10 See Kan. Stat. Ann. § 24-126 (requiring permitting for improvements designed to

repel floodwaters from streams); Wadley, *supra* note 2; see also *Parker v. City of Atchison*, 58 Kan. 29, 48 P. 631 (1897) (regarding interference with the flow of a stream).

- 11 Wadley, *supra* note 2; *Diffused Surface Water*, 2-10 WATERS AND WATER RIGHTS § 10.03 (LexisNexis/Mathew Bender 2012).
- 12 An example of federal regulation is the National Pollution Discharge Elimination System of the Clean Water Act. Kansas has adopted an intricate statutory system concerning water regulated by the state.
- 13 See *Gibbs v. Williams*, 25 Kan. 214, 220 (1881) (providing an early definition of a watercourse).
- 14 K.A.R. § 5-40-1(zz); *Frank v. Kansas Department of Agriculture*, 40 Kan. App. 2d 1024, 1029, 198 P.3d 195 (Ct. App. 2008).
- 15 *Diffused Surface Water*, *supra* note 11.
- 16 *But see* Kan. Stat. Ann. § 42-353 (suggesting a consumptive benefit by allowing “proprietor of any lands which have become saturated by seepage waters flowing out of any ditch, canal, reservoir or conduit ... [to] apply the same to domestic, agricultural, manufacturing or other purposes in his pleasure”). Arguably, however, the waters referenced in this statute may not even fall into a category of diffused surface water as noted in this article.
- 17 See, e.g., Kan. Stat. Ann. § 42-313; See also Kan. Stat. Ann. § 82a-728 (referencing impoundments of water under a certain size). This has often been identified as a rule of capture. *Diffused Surface Water*, *supra* note 11.
- 18 Wadley, *supra* note 2.
- 19 One commentator characterized this theory as “a neighborhood contest between pipes and dikes from which ‘breach of the peace is often inevitable.’” R. Timothy Weston, *Gone with the Water: Drainage Rights and Storm Water Management in Pennsylvania*, 22 VILL. L. REV. 901, 902 (1977).
- 20 Wadley, *supra* note 2; *Diffused Surface Water*, *supra* note 11. Most courts have now abandoned or modified the pure application of the common enemy rule.
- 21 Wadley, *supra* note 2.
- 22 *Id.*
- 23 *Id.*
- 24 *Id.*
- 25 *Id.*
- 26 *Diffused Surface Water*, *supra* note 11.

- 27 Kan. Stat. Ann. § 24-106; Wadley, *supra* note 2.
- 28 See, e.g., *Missouri Pac. Rly. Co. v. Keys*, 55 Kan. 205, 217, 40 P. 275 (1895) (regarding diffused surface water as “an outlaw, against which any landowner affected may fight”).
- 29 For background on these legislative changes, please see Robert W. Coykendall, *Too Much of a Good Thing: Kansas Law on Unwanted Water*, 66 J. KAN. BAR ASS’N 24, 25 (1997).
- 30 *Williamson v. City of Hays*, 275 Kan. 300, 64 P.3d 364 (2003) (noting that “the common-law rule (common-enemy doctrine) is still in effect with respect to lands inside city limits”); *Baldwin v. The City of Overland Park*, 205 Kan. 1, 468 P.2d 168 (1970).
- 31 *Baldwin*, 205 Kan. at 8; *Duncan v. City of Arkansas City*, 35 Kan. App. 2d 44, 128 P.3d 417 (Ct. App. 2006) (“A city has no duty to provide drainage to take care of surface waters, and ordinarily its failure to protect citizens from surface water is not actionable.”).
- 32 205 Kan. at 1.
- 33 *Id.* at 8.
- 34 See *Diffused Surface Water*, *supra* note 11 (identifying the trend toward reasonable use across the United States). *Moore v. Associated Metal & Supply Co.*, 263 Kan. 226, 948 P.2d 652 (1997) infused the theory of negligence into Kansas law in this area. Although really no direct support exists for the assertion that the concepts of malice and reasonableness hold weight under Kansas law, given the right facts, arguments related to these concepts may be persuasive given the overwhelming national trend.
- 35 275 Kan. at 300.
- 36 *Id.* at 301-302.
- 37 *Id.* at 304.
- 38 *Id.* at 306 (quoting Kan. Stat. Ann. § 24-105).
- 39 *Id.* (“In cities where the common-law is still in force, the ‘landowner has the right to use and improve his own land for the purpose for which similar land is ordinarily used; and he may build upon it, or raise or lower its surface, even though the effect may be to prevent surface water, which before flowed upon it, from going upon it, or to draw from adjoining land surface water which would otherwise remain there, or to shed surface water over land on which it would not otherwise go.”) (quoting *Liston v. Scott*, 108 Kan. 180, 183-84, 194 Pac. 642 (1921)).
- 40 See, e.g., Kan. Stat. Ann. § 24-105. Originally, the civil law rule was seen as prohibiting any interference with the natural flow. See *Murphy v. Fairmount Township*, 89 Kan. 760, 133 P. 169 (1913).
- 41 In relevant part, Kan. Stat. Ann. section 24-105 reads: “It shall be unlawful for a landowner or proprietor to construct or maintain a dam or levee which has the effect of obstructing or collecting and discharging with increased force and volume the flow of surface water to the damage of the adjacent owner or proprietor.”
- 42 3 Kan. App. 2d at 188.
- 43 *Id.* at 203; see also *Bower v. O’Malley*, 2008 Kan. App. Unpub. LEXIS 797, at *5, 192 P.3d 1130 (Ct. App. Oct. 3, 2008) (reapplying the rule adopted in *Clawson*).
- 44 See *Williamson*, 275 Kan. at 304-306 (suggesting limits to geographic scope of civil law rule).
- 45 A strict reading of *Clawson* further makes it unclear if the civil law rule *only* applies to agricultural lands absent the applicability of Kan. Stat. Ann. section 24-105. See 3 Kan. App. 2d at 203.
- 46 Wadley, *supra* note 2.
- 47 See Coykendall, *supra* note 29, at 28 (“It would appear that virtually any change in the flow of water that causes substantial injury to another landowner could give rise to a tort claim.”). As indicated, many cases involving diffused surface water are couched in terms of tort principles and some indication exists that the concept of reasonableness should be addressed in a lawsuit under Kansas law.
- 48 *C.f. Diffused Surface Water*, *supra* note 11; see also Coykendall, *supra* note 29, at 27 (noting the “definite tension” between tort theories and traditional surface water principles).
- 49 These factors include: 1) the benefit to the drained land, 2) the injury to neighboring lands, 3) the extent of the alteration of the drainage system, 4) the burden on either party of remedying the injury, 5) the necessity of changing the drainage system, 6) the defendant’s motive, 7) the foreseeability of injury to other landowners, 8) justice and the general welfare, 9) the location of the impacted lands, 10) the existence of public authorization and 11) the protection of existing values. *Diffused Surface Water*, *supra* note 11.
- 50 See Coykendall, *supra* note 29 (providing a discussion of these more common causes of



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- 51 *Williamson*, 275 Kan. at 311-312 (noting that “the installation and construction of the streets and storm sewers were in conformity with generally recognized and prevailing standards”).
- 52 *See Id.*; Coykendall, *supra* note 29.
- 53 The common law theories concerning diffused surface water actually did not apply to pollution caused by water runoff and these problems were typically addressed through a theory of nuisance. *Diffused Surface Water*, *supra* note 11.
- 54 *Smith v. Kan. Gas Serv. Co.*, 285 Kan. 33, 47, 169 P.3d 1052 (2007) (quoting *Vickridge Homeowners Ass’n, Inc. v. Catholic Diocese of Wichita*, 212 Kan. 348, 354, 510 P.2d 1296 (1973)).
- 55 *Id.*
- 56 *Sandifer Motors, Inc. v. City of Roeland Park*, 6 Kan. App. 2d 308, 318, 628 P.2d 239 (Ct. App. 1981).
- 57 *Davis v. City of Lawrence*, 1990 Kan. App. LEXIS 687, at * 11, 797 P.2d 892 (Ct. App. Sept. 14, 1990) (holding that with the expansion of the city the old “sewer is merely inadequate to handle the flow of the water” and a nuisance did not exist).
- 58 *Williamson*, 275 Kan. at 308.
- 59 *Id.* at 308-311.
- 60 *Id.* at 310-311.
- 61 For a discussion of injunctive relief as it relates to diffused surface water see the parallel cases of *O’Malley*, 2008 Kan. App. Unpub. LEXIS 797, at *1 and *Bower v. Cooseman*, 2008 Kan. App. Unpub. LEXIS 592, at *1, 185 P.3d 972 (Ct. App. June 20, 2008).
- 62 Mark S. Dennison, *Proof of Landowner’s Unreasonable Interference With Surface Water*, 87 AM. JUR. TRIALS 423 § 24 (2008); *see also Gowing v. McCandless*, 219 Kan. 140, 547 P.2d 338 (1976).
- 63 *See Kan. Stat. Ann. § 60-905.*
- 64 *See e.g., Clawson*, 3 Kan. App. 2d at 202 (involving the requested removal of a dike). It has been held that a landowner may not enjoin the “routine maintenance” of a waterway or ditch, which may involve the removal of trees and silt and changing the course of the waterway. *See O’Malley*, 2008 Kan. App. Unpub. LEXIS 797, at *1; *Cooseman*, 2008 Kan. App. Unpub. LEXIS 592, at *1. It was also noted that a minor increase in the volume of water cast onto a neighbor’s property might not be actionable even if the civil law rule applies. *Cooseman*, 2008 Kan. App. Unpub. LEXIS 592, at *6, 22, 30.
- 65 *See supra* note 43 and accompanying text. In particular, a court will examine the nature of the plaintiff’s conduct and ensure that the plaintiff has not engaged in problematic or inequitable conduct. *See Clawson*, 3 Kan. App. 2d at 202.
- 66 *See Nicole M. Zomberg, Flooding of Private Property by the Construction of a Public Improvement: Isn’t It Time for Kansas to Call It What It Really Is—a Compensable Taking?*, 38 WASHBURN L.J. 209 (Fall 1998).
- 67 *Estate of Kirkpatrick v. The City of Olathe*, 289 Kan. 554, 215 P.3d 561 (2009); *Deisher v. Kansas DOT*, 264 Kan. 762, 772, 958 P.2d 656 (1998).
- 68 *Deisher*, 264 Kan. at 771-772.
- 69 *See, e.g., Bowen v. The City of Kansas City*, 231 Kan. 450, 455, 646 P.2d 484 (1982).
- 70 289 Kan. at 554.
- 71 *Id.* at 568. *Kirkpatrick* involved a situation where a roundabout built by the city altered the flow of the groundwater and flooded the property owner’s basement. *Id.* at 563-64, 571. Interestingly, the case distinguishes *Bowen* as not involving an inverse condemnation claim. *Id.* at 571 (“First, we note that *Bowen* involved an action for nuisance—not for inverse condemnation—where different principles govern recovery.”). The Court was incorrect in this distinction as *Bowen* clearly addressed both claims of nuisance and inverse condemnation. *See Bowen*, 231 Kan. at 455. The *Kirkpatrick* Court further stressed that recovery should not be limited to only permanent takings as suggested in *Bowen*—thus perhaps adding to the optimism that an inverse condemnation claim may be successful in a diffused surface water case. *See Kirkpatrick*, 289 Kan. at 571.
- 72 *Id.* at 574.
- 73 For instance, if the common enemy rule applies it is presumed initially that one may deal with the water freely whereas if the civil law rule applies it is presumed that the landowner cannot alter the drainage pattern.
- 74 *See Kan. Stat. Ann. § 75-6104(m); Duncan*, 35 Kan. App. 2d at 50-51; *Zomberg, infra* note 66.
- 75 *See Zomberg, supra* note 66 (providing a discussion of limitations periods related to surface water cases in general).
- 76 Kan. Stat. Ann. § 60-513.
- 77 *Hiji v. City of Garnett*, 248 Kan. 1, 9, 804 P.2d 950 (1991).
- 78 *See Zomberg, supra* note 66 (comparing cases in this area).
- 79 *Gowing*, 219 Kan. at 143-44.
- 80 *Isnard v. City of Coffeyville*, 260 Kan. 2, 9, 917 P.2d 882 (1996).
- 81 Because the cause of permanent damages may be difficult to readily identify and the application of the distinction can often lead to unforgiving consequences, at least one commentator has suggested that litigation is actually encouraged. *See Zomberg, supra* note 66, at 224.
- 82 *Isnard*, 260 Kan. at 8.
- 83 *Id.* at 9.
- 84 *See Kan. Stat. Ann. § 60-513; Thierer v. Board of County Commissioners*, 212 Kan. 571, 512 P.2d 343 (1973).
- 85 *Baldwin*, 259 Kan. at 316. The *Baldwin* Court did not articulate how this can occur, but presumably through a theory of prescriptive easement. Coykendall, *supra* note 29, at 29.
- 86 *Wadley, supra* note 2.
- 87 *See James Lockhart, Cause of Action for Damage Caused by Change of Flow of Surface Water*, 16 CAUSES OF ACTION 675 § 29 (2008).
- 88 *See, e.g., Davis v. City of Melbane*, 132 N.C. App. 500, 512 S.E.2d 450 (N.C. 1999) (holding that where landowners were attempting to prove damages resulting from increased flooding caused by city, their testimony was not enough and expert testimony was required); *see also Williamson*, 275 Kan. at 308-312 (denying plaintiff landowners’ claims that the city’s sewer drainage system discharged water onto their land at a higher velocity because landowners failed to provide scientific or quantifiable evidence to support their claims); *Cooseman*, 2008 Kan. App. Unpub. LEXIS 592, at *10, 23-25 (noting that plaintiff failed to both establish evidence of damages and provided insufficient expert testimony in action against a defendant for reconstructing a waterway).
- 89 *See Duncan*, 35 Kan. App. 2d at 51 (identifying contradictory nature of expert opinion); *Cooseman*, 2008 Kan. App. Unpub. LEXIS 592, at *10, 23-25 (determining that expert’s opinions lacked a proper foundation and basis and thus were not persuasive).