

## Chapter Five – Drainage Law

One of the realities of living in Iowa is our abundant rainfall making it possible for us to farm and produce crops. But anyone who owns land knows that too much (or too little) water can pose a problem. Questions about what landowners can do to drain the water from their land – and how those actions might impact neighboring landowners who live downhill – provide a rich and varied body of legal issues collectively known as drainage law. This chapter considers the basic laws on drainage and focuses on what Iowa landowners should know about the topic.

I own a farm and am having problems with a neighbor concerning the amount of water coming off his land across my fields and the damage it is doing. I have complained but he said I don't have any legal right to stop the rain!

It is true, you may not be able to stop the rain, but Iowa law does establish a set of rules to apply when drainage disputes arise between neighboring landowners, as they often do. The rules are fairly straightforward and easy to understand, but the Iowa courts have resolved dozens of disputes applying and refining the rules.

Here are some of the key drainage principles to understand.

First, running water is a fact of life and nature - after it rains water is going to be pulled by gravity and run downhill collecting in lower areas. The places where water collects and drains may be watercourses or ditches and eventually they will drain into a river, stream or lake. Because water runs downhill and will seek a way to get there drainage law is based on elevation. Property located uphill from you, such as your neighbor's field, is referred to as the dominant estate, and your property at a lower elevation is known as the servient estate. Under Iowa law the **first rule** if drainage is the dominant estate has the right (also called a servitude) to drain surface water onto the servient estate in the natural course of drainage. The **second rule** of drainage is the dominant estate can collect the surface water on the land and remove it in the natural course of drainage onto the servient estate. The **third rule** of drainage is the servient estate has a duty or obligation to accept the water. This means the servient estate can't block the flow of surface water in the natural course of drainage or build a dike to force the water back onto the neighbor's land. That approach to drainage known as the common enemy approach was the historic Iowa law and is still in use in some states. Obviously, this approach can lead to more disputes and neighbors building ever higher dikes. Instead Iowa enacted legislation on drainage and we now follow what is known as the modified drainage approach.

Does this mean if I am downhill, my neighbor can collect and drain water on my land and there is nothing I can do?

Not exactly, the neighbor's actions cannot be unreasonable. For example, they can't collect the water and direct it onto your land in places or in amounts that wouldn't occur naturally, this is the **fourth rule** of Iowa drainage law. The Iowa courts view is the "natural flow" doctrine is subject to a requirement to use ordinary care in not damaging the neighbor's property.

Over the decades, the Iowa courts have resolved dozens of cases involving drainage disputes between neighbors and the cases established what I refer to as the Rules of Drainage Law. We have already discussed the first four of the rules. Some of the other rules are more complex and deal with unique facts, but here are some of the other key rules of Iowa drainage law landowners should consider:

The **fifth rule** of drainage is the owner of the dominant estate may collect and divert the flow of surface water around rather than across the land, as long as the amount sent onto the servient estate is not increased, the water is not from land that would not normally drain in that direction, and the water does not drain onto land that would not normally receive drainage.

The **sixth rule** is the dominant estate can obtain expanded drainage rights either by an easement resulting from an express agreement or by a prescriptive easement resulting from having used the drainage for a required period of time.

The **seventh rule** is a corollary to this, the dominant estate can lose the right to expanded drainage either through an agreement or do to abandonment or what the courts call estoppel – meaning the failure to take action for a required period evidencing something is not important. This means if the servient estate owner builds a dike and forces water back on the dominant estate – and the dike is allowed to exist for a 10 years or more this can mean the servient estate no longer is required to accept the natural flow of drainage. Remember I said some of these rules are complicated!

The **eighth rule** of drainage is that no distinction is made between surface waters (such as rainfall) and natural watercourses, the focus is on the natural flow of the water.

The **ninth rule** is the plaintiff in a drainage case – the one claiming damages carries the burden of proof. This means the dominant estate would need to prove the drainage had been impeded or the servient estate would need to show the land was damaged by drainage beyond what natural flow would have caused.

The **tenth rule** is the formation of a drainage district, as discussed in more detail later in this chapter, does not change the ability of a dominant estate owner to exercise the right to drain water onto a servient estate.

So you just got a law school lesson on drainage law perhaps more than you wanted! Here are several key points to recognize.

- Landowners can enter agreements concerning drainage and the agreements, if recorded can bind future owners,
- If drainage happens in a certain form for a period of time (usually 10 years) it can create what is known as a prescriptive easement to continue,
- If you are downhill you may have a duty to keep a watercourse from filling in or being impeded. The court may order you to clean it out so water doesn't back up on the neighbor, or grant the neighbor access to complete the maintenance.

You mentioned drainage districts – how do I know if my land is located in one and if so, what does this mean?

Iowa's constitution and laws were amended early last century to allow drainage district to be formed so land could be drained for farming. Several thousand of the districts were created and much of the land in north central Iowa is located in a drainage district. They are not commonly found in the hillier parts of the state – although levee districts, which operate under the same laws, may have been created for land in river bottoms subject to flooding.

To learn if your land is within a drainage district, there are several steps to follow. First, ask the current owner or seller as they should be aware if this is true. This is important to know in part

because the drainage district officials have the power to levy assessments on any land located in the district to pay for the maintenance of the drainage ditches.

The second step would be to tour the property and look for the existence of drainage ditches or underground drain tiles. Because the rain that falls on your property has to drain somewhere – you should be able to determine the direction of the natural drainage and if it is being used. For example, does the water drain into a stream or into an “artificial” or constructed drain or ditch. If it is the latter, there is a good chance a drainage district exists or did at one time, because someone had to have paid to construct the drainage.

The third way to check is to visit the county recorders office to check the land records and inquire if any drainage district includes your land.

#### If my land is in a drainage district, what is the effect?

It means your drainage is the result of an artificial drainage system created and maintained by the district. Because this process of maintaining this drainage will incur expenses – such as periodically cleaning the ditches so they drain - the law gives the drainage district officials two important powers. First, they can enter onto any land in the district (subject to its jurisdiction) for purposes of cleaning or maintain the drainage. Second, the district has the authority to levy assessments against the properties benefitted by the drainage in proportion to the benefits the landowner receives. As you might imagine there have been many court cases involving disputes over how much the drainage districts can assess the landowners. But the key to recognize is drainage districts do have this power that is why you need to know if your land is located in one.

#### Who runs the drainage districts?

Iowa law provides for how the affairs of a drainage district are administered. First the landowners who petitioned for creation of the district (remember most of were created almost 100 years ago) can form a board of trustees who are charged with the power to run the district. Landowners within the district vote for the trustees and can serve as trustees. Because drainage districts are concentrated in the counties of North Central Iowa, it means much of the land is within a district and in each county dozens of districts of varying sizes may exist. For this reason, Iowa law creates a second method for administering drainage districts, this is through the elected county board of supervisors. Under this option, the county board serves in the capacity as the trustees for each of the districts in the county which choose this form of management. When making decisions for a drainage district, such as ordering maintenance of a ditch, the supervisors are acting as the drainage district trustees – not as the county supervisors.

This form of drainage district management has been in the news recently because of the water pollution lawsuit filed by the Des Moines Water Works against drainage districts in Sac, Buna Vista and Hancock counties. The suit is against the drainage districts and against the members of the boards of supervisors in those counties, but in their capacity as the trustees for the nine drainage districts being sued. The lawsuit may result in more clarity as to what the role of drainage trustee means for the supervisors.

Two important points to recognize about drainage districts if you own land located in one. First, once the district is created, Iowa law §468.27 has the effect of giving the district a “permanent easement” for right of ways for drainage district ditches and for “tile lines.” Second, the law provides this section operates on “constructive notice” to all persons including you as the

landowner – the drainage district has the right to install and maintain drainage and has the right to come on the land and cross on to adjoining land to so.

### Right to Tile

I just inherited some farmland from my parents and my farm manager is advising that it needs to be tiled. I am curious if Iowa law places any restrictions on tiling or if it protects the rights of landowners to tile their land?

As you know, installing underground drainage tile has made it possible to farm much of Iowa more productively. It is estimated over 10 million acres of Iowa farmland has been tiled. From a legal perspective installing tile is unregulated and you do not need to obtain permission from anyone to install tile. In Iowa tiling is treated as a part of drainage law.

There are several provisions in Iowa law making reference to tiling. For example, §455B 210 (?) in the law on water use notes certain rights are preserved including the right of any person “to drain land by use of tile....”

The Iowa Constitution was amended in 1908 to include a paragraph in Article I §18 authorizing the creation of drainage districts and related actions. It includes a provision authorizing the Legislature to pass laws “permitting the owners of land to construct drains, ditches and levees for agricultural...purposes across the lands of others....”

I am interested in installing drain tile on my farm, but in order to have an outlet to a nearby stream, I need to run the tile across my neighbors land, can I do that?

Yes, the Iowa Code in §468.600 contains a series of provisions referred to as individual drainage rights. Section 468.600 is title “Drainage through lands of others – application”, and it sets out a process for landowners who desire to install tile across the land of another to file an application with the county auditor describing the land the intended project. The Iowa law sets out a detailed procedure for providing notice to others for a hearing by the board of supervisors for a determination, for the right to appeal, and for payments of any costs and damage. Of course if the neighbors agree to the project there is no need to use this contested case procedure.

### Land Records and Drainage

One of the key issues involved in any land transaction, such as purchasing or selling land, is the information disclosed or obtained by the parties – what you get to know. Clearly, the buyer will want to know as much as possible and the seller will want to disclose as much information as is required by the law – but perhaps no more. Finding out information about drainage issues should be part of this examination.

If the landowners use the law to establish a system of drainage can they make the agreement part of their land records?

Yes, Iowa law in §468.623 (1) provides that, “Any person who has provided a system of drainage on land owned by the person may have the same made a matter of record in the office of the county recorder.” The law provides such a recording is required for any drainage system constructed after July 1, 1969; however my inquiries lead me to believe this rule is not commonly known or followed in the state. The drainage records to be created may include the owners name, a description of the tracts of land drained, when the system was established, the

kind and brand of tile use, who installed it and the cost. Section 468.427 provides the drainage records are not to be construed as an essential part of the land title but may be set out by abstractors as part of the record title.

So what should I do when it comes to looking for or creating drainage records.

It is possible drainage records for a farm have been filed with county officials. The records may be in the county auditor's office but more likely might be filed with the county recorder under §468.623. Drainage records are the type of things a potential buyer should search for and discover. An argument can be made such records are a "material fact" a seller should have a duty to disclose but the Iowa courts have not ruled this is required.

Here are some basic rules to keep in mind about creating records of drainage done on your land.

1. You should check your own records to uncover any maps of where tile was installed and when so this information is available. It is possible the local SWCD office or NRCS may have some of these records, so check with them.
2. You should check with the county recorder and see if any drainage records have ever been filed on your land.
3. Similarly, you should check the county auditor for any drainage agreements filed there.
4. If your land is in a formal drainage district, these records may exist with the district trustees, who may be the county supervisors.
5. If you are installing new drainage you should create records for it. Section 468.623 (1) of the Code appears to require the records of new drainage to be filed with the county recorder even though this is not a common practice in the state. Regardless, there is nothing to be lost by filing such records.
6. If you decide to see part of a farm which splits a field you should consider including language in the agreement protecting the right of the two owners to connect to or establish necessary drainage between the tracts.

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So what information should be obtained?

Clearly the legal description of the land and the identity of the owner – or person selling it are key issues to determine. This basic information as well as who else might have a legal interest in the land will be discovered and revealed in the process of examining or abstracting the legal records for the land. But there is other information for example how the size of the property is being described. There are many ways farmland may be described in a sales listing or at a land auction for example, tillable acres, farmable acres, FSA acres, taxable acres, measured or deeded acres. These calculations might all differ slightly even for the same property because they are from different sources and are measuring different things. The key is to obtain as much information as possible and to be sure you understand exactly what you are buying. This can help avoid later disputes over claims the property wasn't as large as described.