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WATERS AND WATER COURSES — TORTS — OWNERS OF PROPERTY DAMAGED BY UNLAWFUL DITCHING OR UNREASONABLE DISCHARGE OF WATERS MAY OBTAIN RELIEF BY STATUTE OR BY THE TORT CONCEPT OF REASONABLE USE

Between 1967 and 1974 landowners in LaMoure County severally and in some instances jointly constructed a series of drainage ditches from the numerous natural ponds, sloughs, and depressions on their land.[1] The landowners' ditching caused water to deposit in a natural depression on plaintiff Young's land.[2] Section 61-01-22 of the North Dakota Century Code required a permit to drain a pond, slough, or lake that comprised a total watershed of eighty acres or more.[3] Young brought an action and alleged that the landowners drained ponds and sloughs in violation

1. Young v. Hamilton, 332 N.W.2d 237, 239 (N.D. 1983). The landowners named defendants were Ella Hamilton, Charles Hamilton, Oliver Schweigert, Sebastian Wald, Leo Wald, Allan Wald, Patrick Wald, and the May Overby estate. 332 N.W.2d at 239 n. 1.

2. *Id.* at 239. Young owned and farmed a quarter section of land in LaMoure County, North Dakota that had a natural depression in the north-east corner. The depression on Young's land was lower than the depressions on the defendants' lands. *Id.*

3. N.D. CENT. CODE § 61-01-22 (1960) (current version at N.D. CENT. CODE § 61-16.1-41 (Supp. 1983)). Section 61-01-22 of the North Dakota Century Code in effect at the time of the actions in *Young* stated in pertinent part as follows:

> Any person, public or private corporation, proposing to drain waters from a pond, slough or lake, which impounds waters gathered therein and drained from an area comprising eighty acres or more into a natural watercourse, as defined by section 61-01-06, or into a draw or natural drainway, before constructing a ditch or facility for the purpose of such drainage shall submit to the state water conservation commission an application for a permit to do so.

Id. Section 61-01-22 was repealed in 1981. Act of Mar. 26, 1981, N.D. Sess. Laws 1713. The current version appears at § 61-16.1-41 of the North Dakota Century Code. N.D.CENT. CODE § 61-16.1-41 (Supp. 1983). The current version retains the basic concept that a permit is required to drain a pond, slough, or lake if the combined water shed is greater than eighty acres. *See id.*

of section 61-01-22 of the North Dakota Century Code and that the resultant drainage was unnatural and unreasonable.[4] Young further alleged that the landowners' actions damaged crops and farmland and decreased the value of his farming operations.[5] Young requested $20,000 actual damages and $100,000 exemplary damages. Young also sought an order enjoining the landowners from discharging drainage waters on and across his land and requiring the landowners to fill existing ditches or provide a suitable alternative outlet.[6] The LaMoure County District Court entered judgment in favor of the landowners and Young appealed.[7] The Supreme Court of North Dakota reversed and remanded and *held* that whether to apply the North Dakota Century Code or the reasonable use rule[8] depends on the circumstances of the facts at hand.[9] The court also found that under the reasonable use rule, Young's inequitable conduct did not totally bar recovery and Young's mitigation of harm to his land did not preclude further consideration.[10] *Young v. Hamilton,* 332 N.W.2d 237 (N.D. 1983).

Three doctrines of surface water law can apply to drainage situations.[11] The oldest of the three doctrines is the civil law rule, which first appeared in a common law jurisdiction in 1848.[12] The civil law rule states that the owner of the highland or dominant estate has a natural easement or servitude in the low lying or servient estate.[13] The easement allows the owner of the dominant estate to discharge all natural waters flowing or accumulating upon

4. 332 N.W.2d at 239. The court's initial consideration was whether § 61-01-22 of the North Dakota Century Code applied to the fact situation in *Young. Id.* at 240.

5. *Id.* at 239. Young contended that if the drainage continued, large portions of his land would become useless for agriculture. *Id.*

6. *Id.* The alternative outlet that Young requested would have provided for drainage over the east Overby land and into a creek. *Id.*

7. *Id.* at 240.

8. The reasonable use rule provides that a landowner may use his property for drainage so long as his use does not injure the rights of others. Jones v. Boeing Co., 153 N.W.2d 897, 903 (N.D. 1967).

9. 332 N.W.2d at 241-42. A finding of fact was necessary before the court could apply either § 61-01-22 or reasonable use guidelines. *Id.* at 241. Statutory law requiring a permit is utilized if the drainage area is greater than eighty acres. Reasonable use guidelines are utilized in instances not covered by statute. *Id.* at 241.

10. *Id.* at 243. The court stated that mitigation of harm may affect the amount of damages or type of relief a party may recover, but it did not totally preclude recovery. *Id.* at 243-44.

11. Comment, *The Flow of Surface Water Law in Connecticut,* 14 CONN. L. REV. 601 (1981-82). Three prevailing doctrines exist in surface water cases: the common enemy rule, the civil law rule, and the reasonable use rule. All three doctrines developed in the nineteenth century when nonagricultural land development was increasing. *Id.* at 607. For a discussion of the three surface water doctrines, see Note, *Surface Water Drainage,* 36 NOTRE DAME LAW. 518 (1960-61); Hands, Kinyon, & McClure, *Interferences with Surface Waters,* 24 MINN. L. REV. 891 (1940). For a discussion of jurisdictions' applying the three doctrines, see Annot., 93 A.L.R. 3d 1193 (Supp. 1983).

12. Comment, *supra* note 11, at 607. The first common law jurisdiction to apply the civil law rule was Pennsylvania. *See* Martin v. Riddle, 26 Pa. 415 (1848). Louisiana, however, applied the civil law rule earlier. *See* Orleans Navigation Co. v. New Orleans, 2 Mart. (n.s.) 214 (1812). Louisiana's law is based primarily on the Napoleonic Code. Comment, *supra* note 11, at 607.

13. Nininger v. Norwood, 72 Ala. 277 (1882). In *Nininger* the plaintiff sought to abate the defendant's embankment and ditches, which caused flooding of the plaintiff's lands. *Id.* at 278. The

his land onto the land of the servient owner.[14] If the dominant landowner altered the natural flow of water, however, he would be liable for all damage caused to the lower servient estate.[15] Nineteen jurisdictions currently apply some form of the civil law rule concerning surface water.[16] The rationale of the civil law rule is that both parties acquired the property with full knowledge that water flows and rises in nature and that the lower estate is accordingly burdened.[17] The civil law rule, however, has been criticized for its inflexibility.[18]

Eleven jurisdictions subscribe to some form of the common enemy rule of surface water.[19] Dean Prosser states the common enemy rule as follows: "[A] landowner may deal with surface water as he sees fit regardless of the effect upon adjoining land."[20] Under

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civil law surface water doctrine does not allow interference or obstruction by the servient owner; any interference subjects the servient estate to liability. The common law surface water doctrine, however, allows the owner of the servient or lower estate to lawfully obstruct or hinder the natural flow of water. *Id.* at 283.

14. *Id.* at 284.

15. Jones v. Boeing Co., 153 N.W.2d 897 (N.D. 1969) (any artificial alternation or acceleration of surface waters would make the dominant estate liable).

16. The following apply some form of the civil law rule: Alabama (*see* Dekle v. Vann, 279 Ala. 153, 182 So.2d 885 (1966)); Arizona (*see* Vantex Land & Dev. v. Schneps, 82 Ariz. 54, 308 P.2d 254 (1957)); Colorado (*see* Engelwood v. Linkenheil, 146 Colo. 493, 362 P.2d 186 (1961)); Florida (*see* Kroger Properties, Inc. v. Allen, 314 So.2d 792 (Fla. 1975)); Georgia (*see* McMillen Rev. Corp. v. Bull, 228 Ga. 826, 188 S.E.2d 491 (1972)); Idaho (*see* Dayley v. Burley, 96 Idaho 101, 524 P.2d 1073 (1974)); Illinois (*see* Templeton v. Huss, 57 Ill. App. 2d 134, 311 N.E.2d 141 (1974)); Iowa (*see* Braverman v. Eicher, 238 N.W.2d 331 (Iowa 1976)); Kansas (*see* Baldwin v. Overland Park, 205 Kan. 1, 468 P.2d 168 (1970)); Louisiana (*see* Poole v. Guste, 261 La. 1110, 262 So.2d 339 (1972)); Michigan (*see* Allen v. Morris Bldg. Co., 360 Mich. 214, 103 N.W.2d 491 (1960)); Mississippi (*see* Alabama Great S. Ry. Co. v. Broach, 238 Miss. 618, 119 So. 2d 923 (1960)); New Mexico (*see* Martinez v. Cook, 56 N.M. 343, 244 P.2d 134 (1952)); Oregon (*see* Kahl v. Texaco, Inc., 281 Or. 337, 574 P.2d 650 (1978)); Pennsylvania (*see* Westbury Realty Corp. v. Lancaster Shopping Center, Inc. 396 Pa. 383, 152 A.2d 669 (1959)); Tennessee (*see* Butts v. South Fulton, 565 S.W.2d 879 (Tenn. Ct. App. 1977)); Texas (*see* Carter v. Lee, 502 S.W.2d 925 (Texas 1973)); Vermont (*see* Scanlan v. Hopkins, 128 Vt. 626, 270 A.2d 352 (1970)); West Virginia (*see* Tierncy v. Earl, 153 W. Va. 790, 172 S.E.2d 558 (1970)).

17. Nininger v. Norwood, 72 Ala. 277, 284 (1882). *See also* Kauffman v. Griesemer, 26 Pa. 407 (1856). In *Kauffman* the court explained the rationale of the civil law rule as follows:

> Almost the whole law of watercourses is founded on the maxim of the common law "Agua currit, et debet currere." Because water is descendible by nature, the owner of a dominant or superior heritage has an easement in the servient or inferior tenement for the discharge of all waters which by nature rise in or flow or fall upon the superior.

Id. at 412.

18. *See* Hands, Kinyon, & McClure, *supra* note 11. The civil law rule, if strictly applied, is inflexible since liability ensues if a landowner modifies the natural drainage of land in any way. *Id.* at 913. The commentators believe that many courts have developed modifications of the civil law rule and the common enemy rule that are as arbitrary and inflexible as the rules themselves. *Id.*

19. The following jurisdictions apply some form of the common enemy rule: Arkansas (*see* Smith v. Cruthis, 255 Ark. 217, 499 S.W.2d 852 (1973)); District of Columbia (*see* Ballard v. Ace Wrecking Co., 289 A.2d 888 (App. D.C. 1972)); Maine (*see* Johnson v. Whitten, 384 A.2d 698 (Me. 1978)); Missouri (*see* Minton v. Steakley, 466 S.W.2d 441 (Mo. Ct. App. 1971)); Montana (*see* Tillinger v. Frisbie, 138 Mont. 60, 353 P.2d 645 (1969)); Nebraska (*see* Paasch v. Brown, 190 Neb. 421, 208 N.W.2d 695 (1973)); New York (*see* Treadwell v. Waldeier, 34 Misc. 2d 339, 228 N.Y.S. 2d 390, (1962)); Oklahoma (*see* Conkin v. Ruth, 581 P.2d 923 (Okl. Ct. App. 1976)); South Carolina (*see* Morris v. Townsend, 262 S.C. 628, 172 S.E.2d 819 (1970)); Virginia (*see* McCayley v. Phillips, 216 Va. 450, 219 S.E.2d 854 (1975)); Washington (*see* Wilber Dev. Corp. v. Les Rowland Constr., Inc., 83 Wash. 2d 871, 523 P.2d 186 (1974)).

20. W. PROSSER, LAW OF TORTS § 88, n.20, at 582 (4th ed. 1971).

the common enemy rule a landowner can artificially alter or concentrate the flow of water without liability.[21] The theory supporting the common enemy rule is that an adjoining landowner's right to discharge surface waters cannot have legal existence except from a legal grant, express or implied.[22]

The common enemy rule encourages the full use and exploitation of land.[23] A major flaw with the rule, however, is that it forces adjoining landowners to bear the burden of surface water expulsion rather than the landowners who undertake the improvement projects.[24]

Courts are reluctant to strictly apply the civil law rule or the common enemy rule when it would cause an inequitable result. Thus, a hybrid law developed that is labeled the reasonable use doctrine.[25] The Minnesota Supreme Court in *Sheehan v. Flynn*[26] defined the reasonable use doctrine as follows: "This is a reasonable doctrine, that takes into consideration all the circumstances of each case. It gives each man the common law right to improve and enjoy his own property to its fullest extent, but limited by the requirement that he use reasonable care in disposing of surface water."[27]

In the past the reasonable use rule was often considered only a modification of the common law rule, but over time it attained a distinct and independent status.[28] Most modern reasonable use

21. Jones v. Boeing Co., 153 N.W.2d 896 (N.D. 1967). In *Jones* the court cited a common enemy doctrine case, which stated that the defendant landowner could artificially alter his property and suffer no liability. *Id.* at 903 (citing Lemer v. Koble, 86 N.W.2d 44 (N.D. 1957)).

22. Bowlsby v. Speer, 31 N.J.L. 351, 352-53 (1865). In *Bowlsby* the defendant's pond overflowed on to the plaintiff's land, and flooded the plaintiff's cellar. *Id.* at 352. The *Bowlsby* court stated that the plaintiff could claim no legal right in the mere natural flow of surface water and that neither its retention, diversion, repulsion, or altered transmission was an actionable injury even though damage ensued. *Id.* at 352-53.

23. *Id.* at 353.

24. Armstrong v. Francis Corp., 20 N.J. 320, 120 A.2d 4, 9 (1956). In *Armstrong* a building contractor artificially gathered and discharged surface waters into a natural stream bordering the plaintiff's property. The discharge caused erosion to the plaintiff's land and threatened the plaintiff's house, which was situated on the bank of the stream. *Id.* at ____, 120 A.2d at 6. The court stated that social progress and the common well being are better served by a just and right balancing of the competing interests. Those who benefit and profit by the projects rather than the adjoining landowners should pay the costs. *Id.* at ____, 120 A.2d at 10. The common enemy rule also encourages self-help by the servient estate owner to stop the flow of water. *See* King v. Cade, 205 Okla. 666, 240-P.2d 88 (1957) (defendants built dam to stop water flow).

25. *See* Armstrong v. Francis Corp., 20 N.J. 320, ____, 120 A.2d 4, 9 (1956). The development of reasonable use in many jurisdictions occurred when courts qualified the existing civil law rule or common law rule because it was unjust. *Id.*

26. 59 Minn. 436, 61 N.W. 462 (1894). In *Sheehan* the defendant drained a depression on his land into a lake bordering the plaintiff's land, thus raising the water level of the lake and submerging some of the plaintiff's agricultural land. Sheehan v. Flynn, 59 Minn. 436, ____, 61 N.W. 462, 462 (1894).

27. *Id.* at ____, 61 N.W. at 463.

28. *See* Enderson v. Kelehan, 226 Minn. 163, 32 N.W.2d 286 (1948). In *Enderson* the defendant drained several depressions on his land into a slough. The water then flowed onto the plaintiff's pasture land and flooded 27 acres. *Id.* at ____, 32 N.W.2d at 288. The court stated that the reasonable use rule had been inaccurately characterized as a modification of the common law rule, but that it now has an independent status. *Id.* at ____, 32 N.W.2d at 289.

cases set forth well defined guidelines that courts can use to determine the reasonableness of the surface water discharge.[29] Reasonableness guidelines often include determining whether reasonable necessity requires the drainage and balancing the burden against the benefit of the drainage.[30] In addition, the issue of reasonableness of the drainage becomes a question of fact that a court will determine after considering all relevant factors in the case.[31]

The most often quoted modern definition of reasonable use is in *Armstrong v. Francis Corp.*,[32] which states the rule as follows: "[E]ach possessor is legally privileged to make a reasonable use of his land, even though the flow of surface waters is altered thereby and causes some harm to others, but incurs liability when his harmful interference is unreasonable."[33] Unlike the civil law rule or the common enemy rule, the reasonable use rule takes into account natural drainage as well as artificially altered drainage, as long as both are a reasonable use.[34] Presently, twenty-one jurisdictions have adopted some form of the reasonable use rule.[35]

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29. Armstrong v. Francis Corp., 20 N.J. 320, 120 A.2d 4 (1956). Relevant factors listed by the *Armstrong* court concerning the amount of harm caused included foreseeability of the harm and purpose or motive. *Id.* at ____, 120 A.2d at 10. Other jurisdictions, such as Minnesota, outline guidelines courts may consider in deciding reasonableness. The Minnesota Supreme Court in *Enderson v. Kelehan* outlined the following four guidelines to determine reasonableness of the drainage:

> (a) There is a reasonable necessity for such drainage;
> (b) If reasonable care be taken to avoid unnecessary injury to the land receiving the burden;
> (c) If the utility or benefit accruing to the land drained reasonably outweighs the gravity of the harm resulting to the land receiving the burden; and
> (d) If, where practicable, it is accomplished by reasonably improving and aiding the normal and natural system of drainage according to its reasonable carrying capacity, or if, in the absence of a practicable natural drain, a reasonable and feasible artificial drainage system is adopted.

Enderson, 226 Minn. at ____, 32 N.W.2d at 289 (footnote omitted).

30. *Enderson*, 226 Minn. at ____, 32 N.W.2d at 289.

31. *Id.* The *Enderson* court stated that the reasonable use rule cannot be reduced to formulaic principles, but must remain flexible. Each case must be judged on its own unique facts. *Id.*

32. 20 N.J. 320, 120 A.2d 4 (1956). In *Armstrong* a building contractor drained surface and percolating waters from his land. The drainage eroded the banks of a stream and threatened the plaintiffs' house, which was situated near the stream. Armstrong v. Francis corp., 20 N.J. 320, ____, 120 A.2d 4, 6 (1956).

33. *Id.* at ____, 120 A.2d at 8. Prior to *Armstrong* only Minnesota and New Hampshire classified surface water liability as a tort liability. *Id. See* Bassett v. Salisbury Mfg. Co., 43 N.H. 569 (1862); Sheehan v. Flynn, 59 Minn. 436, 61 N.W. 462 (1894).

34. *Armstrong*, 20 N.J. at ____, 120 A.2d at 9-10.

35. The following states have adopted some form of the reasonable use rule: Alaska (*see* Weinberg v. Northern Alaska Dev. Corp., 384 P.2d 450 (Alaska 1963)); California. (*see* Ellison v. San Buenaventura, 50 Cal. App. 3d 453, 131 Cal. Rptr. 433 (1976)); Connecticut (*see* Page Motor Co. v. Baker, 182 Conn. 484, 438 A.2d 739 (1980)); Delaware (*see* Weldin Farms, Inc. v. Glassman, 414 A.2d 500 (Del. 1980)); Georgia (*see* Uniroyal, Inc. v. Hood, 588 F.2d 454 (5th Cir. 1979)); Hawaii (*see* Rodrigues v. State, 52 Hawaii 156, 472 P.2d 509 (1970)); Indiana (*see* Rounds v. Hoelscher, 428 N.E.2d 1308 (Ind. 1981)); Kentucky (*see* Dept. of Highways v. S & M Land Co., 503 S.W.2d 495 (Ky. 1972)); Maryland (*see* Mark Downs, Inc. v. McCormick Properties, Inc. 51 Md. App. 171, 441 A.2d 1119 (1982)); Massachusetts (*see* Tucker v. Badoian, 1978 Mass. Adv. Sh. 3207, 384 N.E.2d 1195 (1978)); Minnesota (*see* Pell v. Nelson, 294 Minn. 363, 201 N.W.2d 136

Courts' reasons for adoption of the reasonable use rule include the rule's inherent flexibility.[36] The reasonable use rule is flexible since the issue of reasonableness becomes a question of fact determined in each case upon a consideration of all relevant considerations.[37] Moreover, the reasonable use rule allows the party benefiting from the drainage to pay the cost of the economic development of the land: hence, the reasonable use rule is also equitable.[38]

The development of the reasonable use rule in North Dakota originated in 1967 in *Jones v. Boeing Co.*[39] Prior to *Jones,* North Dakota had both the civil law rule and common enemy rule as precedent.[40] In *Jones,* however, the North Dakota Supreme Court rejected the civil law rule and the common enemy rule as inflexible and harsh, and adopted the reasonable use rule as expressed by the New Jersey Supreme Court.[41] In *Armstrong v. Francis Corp.*[42] the New Jersey Supreme Court adopted the view set forth in two Minnesota cases.[43] The Minnesota precedent makes reasonableness a question of fact determined in each case upon consideration of all relevant factors.[44] One of the key elements of North Dakota reasonable use law is, therefore, that reasonableness is a question of fact determined from all relevant circumstances.

In 1971 the North Dakota Supreme Court in *Jacobsen v.*

(1962)); Nevada (*see* County of Clark v. Powers, 611 P.2d 1062 (Nev. 1980)); New Hampshire (*see* Micucci v. White Mountain Trust Co., 114 N.H. 436, 321 A.2d 573 (1974)); New Jersey (*see* Armstrong v. Francis Corp., 20 N.J. 320, 120 A.2d 4 (1956)); North Carolina (*see* Wilkinson v. Charles Investment Co., 58 N.C. App. 213, 268 S.E.2d 263 (1980)); North Dakota, (*see* Jones v. Boeing Co., 153 N.W.2d 897 (N.D. 1967)); Ohio (*see* McGlashan v. Spade Rockledge Terrace Condo Dev. Corp., 62 Ohio St.2d 55, 402 N.E.2d 1196 (1980)); Rhode Island, (*see* Butler v. Bruno, 115 R.I. 264, 341 A.2d 735 (1975)); South Dakota (*see* Mulder v. Tague, 85 S.D. 544, 186 N.W.2d 884 (1971)); Texas (*see* Houston v. Renault, Inc., 431 S.W.2d 322 (Tex. 1968)); Utah (*see* Sanford v. University of Utah, 26 Utah 2d 285, 488 P.2d 741 (1971)); Wisconsin (*see* Getka v. Lader, 71 Wis. 2d 237, 238 N.W.2d 87 (1976)).

36. Armstrong v. Francis Corp., 20 N.J. 320, 120 A.2d 4 (1956).

37. *See* Jones v. Boeing Co., 153 N.W.2d 897 (N.D. 1967). The North Dakota Supreme Court in *Jones* stated that social progress was better served by general principles of fairness and common sense that attended the application of the rule of reason. *Id.* at 904.

38. *Id.*

39. 153 N.W.2d 897 (N.D. 1967). In *Jones* the defendant constructed a trailer park that concentrated the flow of surface waters over the plaintiff's land. Jones v. Boeing Co., 153 N.W.2d 897, 903 (N.D. 1967).

40. *Id.* at 903. *See* Henderson v. Hines, 48 N.D. 152, 162, 183 N.W. 531, 535 (1921) (established the common enemy rule that existed prior to adoption of the reasonable use rule); Rynestad v. Clemetson, 133 N.W.2d 559, 565 (N.D. 1965) (established the basic civil law rule of surface water that existed in North Dakota prior to 1967).

41. 153 N.W.2d at 904. The court stated that the adoption of the reasonable use rule was not a change in policy; rather, it was a clarification of the rationale followed in prior decisions. *Id.*

42. 20 N.J. 320, 120 A.2d 4 (1956). In *Armstrong* a building contractor drained surface and percolating waters thereby eroding the banks of a stream threatening plaintiff's house situated near the stream. Armstrong v. Francis Corp., 20 N.J. 320, 120 A.2d 4 (1948).

43. *Id.* at ____, 120 A.2d at 10. *See* Enderson v. Kelehan, 226 Minn. 163, 32 N.W.2d 286 (1948) (reasonable use is a question of fact), Sheehan v. Flynn, 59 Minn. 436, 61 N.W. 462 (1894) (reasonable use determined by all relevant circumstances).

44. Armstrong v. Francis Corp., 20 N.J. 320, ____, 120 A.2d 4, 10 (1948).

Pedersen[45] affirmed the reasonable use rule of *Jones* and expanded the rule to include reasonable use guidelines.[46] In addition, the North Dakota Supreme Court stated that section 61-01-22 of the North Dakota Century Code applies when the drainage is from a pond, slough, or lake with a drainage area greater than eighty acres.[47]

The direct confrontation between the reasonable use rule and the North Dakota Century Code first appeared in *Barr v. Barnes County Board of County Commissioners*.[48] In *Barr* the defendant drained an area greater than eighty acres around Goose Lake without a permit.[49] Hence, the defendants were liable for damages attributable to drainage of a lake with a watershed greater than eighty acres under section 61-01-22 of the North Dakota Century Code even though the drainage would have been permissible under the reasonable use rule set forth in *Jacobsen v. Pedersen*.[50] The reason for section 61-01-22, which prohibits drainage without permits, was to prevent what occurred in *Barr:* the draining of a lake without thoroughly investigating the effects of drainage.[51]

In *Young v. Hamilton*[52] the North Dakota Supreme Court's initial consideration was whether section 61-01-22 of the North Dakota Century Code or the reasonable use rule applied to the fact situation.[53] The trial court, however, failed to find whether defendants drained a pond, slough, or lake with a watershed greater than eighty acres. The North Dakota Supreme Court thus concluded that a finding of fact was necessary to determine the

45. 190 N.W.2d 1 (N.D. 1971). In *Jacobsen* the defendants streamlined the natural drainage on their property in accordance with reasonable use, but were enjoined from draining lakes without a permit. Jacobsen v. Pedersen, 190 N.W.2d 1 (N.D. 1971).

46. *Id.* at 1. North Dakota has adopted the same reasonableness guidelines as Minnesota. *Id.* at 6. See *supra* note 29 for an outline of the reasonable use guidelines.

47. *Id.* at 7. *See* N.D. CENT. CODE § 61-01-22 (1960) (current version at N.D. CENT. CODE § 61-16.1-41 (Supp. 1983)). The North Dakota Legislature amended § 61-01-22 in 1975 and 1977, and repealed it in 1981. *See* Act of Mar. 26, 1981, N.D. Sess. Laws 1713 (repeal of § 61-01-22); Act of April 21, 1977, N.D. Sess. Laws 1203 (amendment of § 61-01-22); Act of Mar. 27, 1975, N.D. Sess. Laws 1488 (amendment of § 61-01-22). Section 61-16.1-41 provides:

> Any person draining, or causing to be drained, water of a pond, slough, or lake, or any series thereof, which drains an area comprising eighty acres . . . or more, without first securing a permit to do so, as provided by this section, shall be liable for all damage sustained by any person caused by such draining, and shall be guilty of an infraction . . . .

N.D. CENT. CODE § 61-16.1-41 (Supp. 1983).

48. 194 N.W.2d 744 (N.D. 1972). In *Barr* the defendant constructed a drainage ditch without a permit in violation of § 61-01-22 of the North Dakota Century Code, causing 203 acres of the plaintiff's agricultural land to flood. Barr v. Barnes County Bd. of County Comm'rs, 194 N.W.2d 744, 746 (N.D. 1972).

49. *Id.* at 749.

50. *Id.*

51. *Id.* Section 61-01-22 of the North Dakota Century Code was enacted to prevent drainage without a permit. Obtaining a permit would require a thorough investigation of the effect the drainage would have downstream. *Id.*

52. 332 N.W.2d 237 (N.D. 1983).

53. Young v. Hamilton, 332 N.W.2d 237 (N.D. 1983).

applicable law.[54] Once the court made a finding of fact, it could utilize the appropriate statutory law or reasonable use rule to determine the outcome.[55]

In addition, the supreme court noted that the trial court found that the plaintiff constructed dams on his land and thus reduced the gravity of the harm.[56] The trial court denied Young relief because his self-help measures were not legal under section 61-01-07.[57] Stated simply, section 61-01-07 provides that a person may not illegally obstruct any ditch, drain, or watercourse that diverts water from its natural or artificial source.[58] Moreover, the trial court stated that Young's self-help measures in building dams also precluded recovery under the reasonable use rule.[59] The North Dakota Supreme Court stated that the statements of the trial court were based on an erroneous conception of the reasonable use doctrine.[60] The court also noted that reasonable use should not be confused with negligence or contributory negligence; rather, reasonable use contemplates drainage that is not done negligently or unreasonably.[61] However, self-help measures may mitigate or reduce the amount of damages a plaintiff is allowed to recover.[62]

The major emphasis of *Young v. Hamilton* is to clarify existing case law concerning the reasonable use rule, and to stress that a finding of fact concerning all relevant circumstances of the case is necessary before a determination of which law to apply can be made.[63] In addition, *Young v. Hamilton* indicates that self-help will

54. *Id.* at 241. The trial court's opinion stressed that Young's inequitable actions of damming drainage waters precluded recovery under § 61-01-22 and the reasonable use rule. *Id.*

55. *Id.* at 240.

56. *Id.* at 242. The trial court concluded that Young's self-help actions completely mitigated any harm caused by defendants' ditching. *Id.*

57. *Id.* at 241. The trial court's memorandum opinion stated as follows:

> Plaintiff alleges defendants have been guilty of violation of Sec. 61-01-22 N.D.C.C. by reason of their draining without the necessary easements or permits. This is a case of the pot calling the kettle black as plaintiff himself violated Sec. 61-01-07 of the Code by plugging the culvert under the Medberry Road and by building his two dams . . . .

332 N.W.2d at 241.

58. *See* N.D. CENT. CODE § 61-01-07 (Supp. 1983). Section 61-01-07 states in pertinent part as follows: "If any person illegally obstructs any ditch, drain, or watercourse, or diverts the water therein from its natural or artificial course, he shall be liable to the party suffering injury from the obstruction or diversion for the full amount of the damage done . . . ." *Id.*

59. 332 N.W.2d at 242-43. The supreme court stated that the trial court unduly relied upon the equitable principle that one seeking equity must do equity. *Id.* at 243.

60. *Id.* at 243. The supreme court noted that the New Jersey Supreme Court refused to strictly apply a rule casting the burden on each lowland proprietor to protect his own land or a rule strictly subjecting an upper landowner to liability for interfering with the natural surface flow; rather the New Jersey court adopted the reasonable use rule because of its flexibility in requiring the consideration of all relevant circumstances. *Id. See* Armstrong v. Francis Corp., 20 N.J. 320, 120 A.2d 4 (1956).

61. *Young*, 332 N.W.2d at 243. The court rejected the principle that inequitable conduct would barr recovery under the reasonable use doctrine. *Id.*

62. *Id.*

63. *Id.* at 244. The court suggested that a determination of the status of the landscape before drainage should be made by the trial court to resolve which principle of law should apply. *Id.*

not preclude recovery under the reasonable use rule.[64]

One question left unanswered is whether the North Dakota Supreme Court, by allowing the lowland proprietor to utilize self-help measure has, therefore, modified the reasonable use rule.[65]

JAMES G. GOLEMBECK

64. *Id.* at 243.
65. See *supra* note 21 for discussion of self-help, a major flaw with the common enemy rule.