

Nebraska DRAINAGE LAW

Drainage can increase agricultural productivity. It can also lead to additional nutrient runoff and increased soil erosion downstream, which commonly leads to disputes between neighbors. The question then becomes:

How may landowners drain water from their land?

Contracts. Landowners can agree to different rights and duties than those established by law. This means you can enter a contract with your neighbors that will establish how each of you can manage the water on your land. It also means that if there is a conflict over drainage, one of the first things to check is the existence of a prior contract. These contracts should be recorded in the county recorder's office.

Easements. An easement is the right to use land owned by another for a specific limited purpose. Here, that purpose is the drainage of water across a neighbor's land. Easements can be created by

contract or simply by use over time.

A recorded drainage contract becomes an easement that "runs with the land," meaning that subsequent owners have to follow the terms of the agreement. Therefore, if you receive land, you have to abide by the terms of previously established drainage easements.

An easement that is created by use over a set amount of time is called an "Easement by Prescription." An easement by prescription is created when a drainage system is put in place and maintained for at least 10 years without a neighbor objecting

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to its existence. These easements have the same long-term consequences as contractual easements and bind subsequent owners of the land.

Drainage Districts. If there is no contract or easement regarding drainage, there are two sources of law that can govern drainage. First, the land drained may be part of a drainage district. Drainage Districts can contract for the construction of ditches and other means of drainage. The improvements of drainage districts are not subject to the same limitations as drainage by individual landowners, which is discussed below. Drainage districts supervisors consist of the county board members.

State Law. Nebraska's legislature and courts have established laws to promote the removal of water and agricultural productivity while protecting adjacent land and structures. There are several

Additional Resources

Drake Agricultural Law Center
www.law.drake.edu/agLaw
Phone: 515-271-2205

Farm Mediation Services:
www.agr.ne.gov/mediation/
index.html
Phone: 800-464-0258



✱ www.WFAN.org ✱

principles that govern how courts determine the rights and duties of individual landowners in relation to drainage.

Below are common questions relating to Nebraska Drainage Law.

Can you stop or dam up the water flowing from your neighbor's land?

It depends on how the water is classified. Nebraska law establishes two types of surface water:

1. *Diffused Surface Waters*, according to the Nebraska Supreme Court, “appear upon the surface of the ground in a diffused state, with no permanent source of supply or regular course, which ordinarily result from rainfall or melting snow.” This water, which lacks a distinct channel, may be repelled or dammed causing water to pool on the higher land. However, in damming the water, the lower landowner must use reasonable care to limit damage to the higher property.

2. “A *natural drainageway* is formed when diffused surface waters are channeled into a well-defined natural course, whether the course be ditch, swale, or draw” This type of water cannot be dammed or pushed back onto higher situated land. In addition, if a landowner creates a man-made ditch or drainageway that alters the natural drainageway, it is substituted for the natural drainage and subject to the same limitation.

Can you increase the flow of water onto adjacent land?

A landowner can drain water into a ditch or other drainageway, if that drainageway is completely within that landowner's property, even if it increases the flow downstream. This means a landowner can divert water from one area of their land to another, if the ditch into

which it empties is only on their land. If the drainageway into which the diverted water flows borders neighboring land, a landowner may be liable for damage caused by the diverted water.

Note: The law expressly allows the use of open or closed drains, which means tile drainage can be used to remove surface water.

How are disputes over drainage settled?

It depends on who brings the complaint.

If the higher situated owner is bringing the suit because the lower owner has dammed up the water, they must

prove they have a right to drain onto the adjacent land. Again, this right only exists where there is a channelled flow of water within a natural drainageway or a man-made drainageway substituted for the natural drainage; or if there is simply a contract or easement in place giving the higher owner the right to drain onto the neighboring land.

If the lower situated owner brings the suit, they must prove that their property will suffer, or has suffered, substantial damage from an increased flow of water into a shared ditch. Substantial damage simply means that there is some diminished market value.

The judge or jury can award money to pay for any damages

to the land and the judge can also issue an injunction. An injunction is an order requiring someone to do something or to refrain from doing something.

Mediation is also available. This provides an out-of-court solution that can save money and help build a more cooperative relationship between neighbors.

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