

Section 400

Drainage Law

401 INTRODUCTION

The materials contained in this chapter are not intended to be an exhaustive presentation of each area of law which is discussed. The purpose is to familiarize the design professional with these areas to enable them to better perform engineering duties and tasks. These materials should not be used in place of a consultation with an attorney and no liability is being assumed with respect to the use of these materials for such purpose.

An important lesson which has been learned in Southern Nevada is that water does not respect arbitrary jurisdictional boundaries. Water does not respect the various rights and liabilities of adjacent land owners as it flows through depressions, gulleys, and washes seeking ultimate terminus in Lake Mead. However, engineers are presented with the enormous task of attempting to control the drainage of water while at the same time maintaining the integrity of natural flow paths and existing legal relationships arising from land ownership. The goal of maintaining both natural flow paths and existing legal relationships is not easily achieved. However, this goal can be more easily achieved if the engineer is familiar with the basic legal framework against which legal relationships will be adjudicated.

This chapter discusses the historical evolution of water drainage law in Nevada. Unlike other states such as California and Colorado, there is not a great body of Nevada case law which discusses every identifiable issue with respect to water drainage law. There are many “gray” areas in Nevada law, but the engineer can avoid major legal obstacles by being more familiar with those cases which have been expressly decided by the Nevada Supreme Court. Relevant statutes will also be discussed.

402 HISTORICAL EVOLUTION OF SURFACE WATER DRAINAGE LAW

Prior to a specific discussion of Nevada law, it is important for the engineer to be aware of the development of the historical principles and theories involved in drainage law. There are three common early doctrines which were followed in the United States: The doctrines were the common enemy doctrine, civil law rule, and the rule of reasonable use. Each theory will be briefly examined prior to an in depth analysis of Nevada law.

402.1 The Common Enemy Doctrine

The common enemy doctrine is a harsh rule which is still followed in some states. The common enemy doctrine has not been specifically recognized by the Nevada Supreme Court.

Stated in its extreme form, the common enemy doctrine provides that as an incident to their right to use their own property as they please, each landowner has an unqualified right, by operations on their own land, to fight off surface waters as they see fit without being required to take into account the consequences to other land owners, who have the duty and right to protect themselves as best they can. See 93 ALR 3d 1193.

Surface water was thus regarded as a common enemy which each property owner could fight off or control by any means such as retention, diversion, repulsion or altered conveyance. Thus, there was no cause of action even if some injury occurred to the adjoining parcel.

All jurisdictions originally following this harsh rule have either modified the rule or adopted the civil law rule or reasonable use Rule 5 Water and Water Riights, Sections 450.6.451.2 (RE Clark ED. 1972).

As previously mentioned, the Nevada Supreme Court has not specifically recognized or adopted this theory.

402.2 Civil Law Rule

Courts later recognized the rule of water drainage law which is basically diametrically opposed to the common enemy doctrine. The civil law rule recognizes a natural servitude for natural drainage between adjoining lands, so that the lower owner must accept the surface water which naturally drains onto their land, but, on the other hand, the upper owner has no right to change the natural system of drainage to increase the burden on the lower parcel. This rule caused problems with allowing development because virtually almost any development has a tendency to increase the flow either in quantity or velocity. According to the civil law rule, if the quantity or velocity of water flow were increased, the natural flow on the downstream property would be changed and would be in violation of the civil law rule. Thus, with the evolution of drainage law the courts sought to modify the law to consider the competing interests of adjoining land owners and allocate the burden of risk attendant to development.

The civil law rule analyzes drainage problems in terms of property law concepts such as servitudes and easements. It did not consider tort law analysis of what is "reasonable".

The Nevada Supreme Court specifically recognized the civil law rule as early as 1885 in the case of Boyton v. Longlev, 19 Nev. 69,6 Pac. 437 (1885). This case will be discussed in detail in the analysis of Nevada Drainage Law.

402.3 Reasonable Use Rule

The rule of reasonable use was developed as an alternative between the civil law rule and the common enemy doctrine. The courts attempted to balance the hardships created in attempting to control surface waters and relevant factors in the relationship between the competing rights/liabilities of adjoining land owners. The rule was apparently developed to provide flexibility in avoiding harsh results which often occurred in applying both the common enemy doctrine and the civil law rule to various factual situations.

Under the reasonable use rule, a property owner can legally make reasonable use of their land, even though the flow of surface waters is altered and causes some harm to others. However, liability occurs when the property owners' harmful interference with the flow of surface water is "unreasonable". A balancing test is utilized to determine whether a landowners use of their property is unreasonable. The analysis involves three basic questions: (1) was there reasonable necessity for the property owner to alter the drainage to make use of their land? (2) was the alteration done in a reasonable manner? (3) does the utility of the actor's conduct reasonably outweigh the gravity of harm to others? See, Restatement Torts, 822-831,833 (1939).

The Nevada Supreme Court has recognized consideration of at least five factors in determining whether a property owner's conduct was reasonable. As one can see from this analysis, it becomes very difficult to predict how a jury would rule in relationship to any particular set of facts because the standard for determination is reasonableness, and each jury will have its own standard for determining reasonable conduct.

The reasonable use rule does not utilize property law concepts of servitude and easement. It substitutes a tort analysis of "reasonable" conduct. The positive aspect of this rule is that it accommodates development and allows for alterations of surface flow if done in a responsible manner. The negative aspect of this rule is the uncertainty created by the vague standard regarding "reasonable" conduct. One engineer's "reasonable" design for handling surface waters may be perceived by a different engineer in a court of law as "unreasonable."

403 NEVADA DRAINAGE LAW

The Nevada Supreme Court initially adopted the civil law rule of drainage in 1885. The civil law rule was later changed when the Nevada Supreme Court adopted the reasonable use rule for surface water drainage in 1980. However,

it is important for the engineer to be familiar with both cases in order to understand the evolution of Nevada Drainage Law and its underlying public policy considerations.

403.1 Civil law Rule

In 1885 the Nevada Supreme Court was presented with a novel question. Can an upper land owner drain artificially collected waters onto their neighbor's lower parcel? This question had never been presented before because most property owners usually complained of lack of water rather than an excess of water.

In Bovton v. Longlev, 19 Nev. 69, 6 Pac. 437 (1885) an upper land owner used an irrigation ditch to collect water from the Truckee River and irrigate his farm. The irrigation water naturally flowed onto an adjacent parcel. The lower land owner sued to recover damages for his land and crops allegedly caused by the waste water.

The upper land owner made several arguments as follows: irrigation was necessary to cultivate his land, the lower land owed a servitude to the upper parcel to receive water which naturally flowed on to it, he had been irrigating his land for five years, and therefore, had obtained a prescriptive easement across the lower piece of land. The lower land owner argued there was not a natural right to discharge water from artificial sources.

In ruling in favor of the lower land owner, the Nevada Supreme Court noted as follows:

“...As to the flow of water caused by the fall of rain, the melting of snow, or natural drainage of the ground, the prevailing doctrine is that when two tracts of land are adjacent and one is lower than the other, the owner of the upper tract has an easement in the lower land to the extent of the water naturally flowing from the upper land to and upon the lower tract, and that damage that may be occasioned to the lower land thereby is damnum absque iniuria (injury without damage). Water seeks its level and naturally flows from a higher to a lower plane; hence the lower surface, or inferior heritage is doomed by nature to bear a servitude to the higher surface, or superior heritage, in this: that it must receive the water that naturally falls on and flows from the level. The proprietors of the lower land cannot complain of , this - this expression of the law only applies to waters which flow naturally from springs, from storms of rain or snow, or the natural moisture of

land. Wherever courts have had occasion to discuss this question they have generally declared that the servitude of the lower land cannot be augmented, or made more burdensome by the acts of industry of man.”

19 Nevada at 69, 72-73.

The court observed that in order to cultivate their respective lands, both parties had to obtain irrigation water by bringing it from points remote and distant from their lands. Without the “reasonable use” of the water, the lands were comparatively worthless.

The Nevada Supreme Court held that the upper land owner, while they have the unqualified right to make reasonable use of the water for irrigation, must use, manage, and control the water as to not injure an adjacent parcel. Central to the court’s holding is the concept that a land owner should not be permitted to make his land more valuable by an act which renders the land of a lower land owner less valuable. This policy consideration would later be utilized by the Nevada Supreme Court almost 95 years later when the reasonable use rule was adopted.

Thus, until the reasonable use rule was adopted in 1980, Nevada Drainage Law consisted of a property law analysis of natural easements for upper parcels to drain water over lower parcels.

403.2 Reasonable Use Rule

Approximately 95 years passed in Nevada before the Nevada Supreme Court was presented with the opportunity to change drainage law in Nevada. The court adopted the reasonable use rule in 1980 when presented with a modern factual situation which opened the door for Nevada to join the majority of jurisdictions in the western states by adopting the reasonable use rule. The case in which the reasonable use rule was adopted was controversial not only when it was decided, but remains somewhat controversial for all of the questions it does not answer.

The Nevada Supreme Court changed Nevada drainage law in County of Clark v. Powers, 96 Nev. 497, 611 P.2d 1072 (1980). Land owners had filed an action against the County and various developers because their activities allegedly had altered the drainage of surface waters in their area. The plaintiffs settled with the individual developers prior to trial, and proceeded to trial against the County and the County Flood Control District under theories of inverse condemnation, nuisance, and trespass. The trial court adopted the reasonable use rule and entered an award for the plaintiffs.

The Nevada Supreme Court found that during the 1950's and early 1960's, the plaintiffs had acquired their parcels and developed them for residential use. Prior to major development in the area, the land immediately west of the two plaintiffs' parcels was sufficiently porous to absorb and dissipate most rain waters. Heavy rains, however, would collect in the low surrounding areas and would follow the natural terrain entering the plaintiffs' properties at the approximate border between the two properties. These waters would flow, if at all, at a slow velocity and would be naturally dissipated and absorbed. Flooding was rare. The "ephemeral stream" on the plaintiffs' property paralleled a wash which ran to the south of the plaintiffs' parcel.

The court found that starting in 1967 the development of the lands west of the plaintiffs' parcel resulted in the alteration, diversion, channeling and acceleration of rain, nuisance, and flood waters on to respondents' properties. The court found the County had actively participated in the development of these lands, both by its own planning, design, engineering, and construction activities and by its adoption of the similar activities of various private developers as part of the County's Master Plan for the drainage and flood control of the area.

The facts as determined at trial established various roads and intersections had been elevated, waters were collected and diverted from a grocery store site, and channeled those waters to a drainage pipe maintained by the County. Similarly, the streets, curbs, and gutters were specifically designed to divert and channel waters onto the plaintiffs' parcels which normally would have drained to the wash. The court held that the cumulative effect of the development activities was to increase and accelerate the flow of waters through the ephemeral stream between the plaintiffs' parcels, to divert waters normally draining into the wash onto the plaintiffs' properties, and to alter and divert the natural course of the ephemeral stream. The property was subjected to temporary but frequent and inevitable flooding.

The County argued that the civil law rule should be maintained. The Nevada Supreme Court felt that the question of which law to apply to surface water drainage entailed a judgment concerning the proper allocation of costs incident in the transformation of rural or semi-rural areas into urban and suburban communities. In making its judgment the court identified three central principles from prior decisions: one, the law of water rights must be flexible, taking notice of the varying needs of various localities; two, a land owner may make reasonable use of his land as long as he does not injure his neighbor; and three, a land owner should not be permitted to make his land more valuable at the expense of the estate of a lower land owner.

The court found that the civil law rule was ill suited to the complexities of urban growth and expansion, and found the reasonable use rule to be more predictable and suited to modern development. The court held that in effecting

a reasonable use of land for legitimate purpose, a land owner or user, acting in good faith, may drain surface waters and cast them on a neighbor's land if:

- a) The injurious flow of water is reasonably necessary for drainage;
- b) Reasonable care is taken to avoid unnecessary injury;
- c) The benefit to the drained land outweighs the gravity of harm inflicted upon the flooded land;
- d) The drainage is accompanied, where practicable, by the reasonable improvement and aiding of normal and natural systems of drainage in accordance with their reasonable caring capacity; and
- e) Where no natural systems of drainage are available, the drainage is accomplished by the use of a reasonable, artificial system of drainage.

The reasonable use rule was adopted by the court because it felt that the economic costs incident to the expulsion of surface waters in the transformation of rural and semi-rural areas into urban and suburban communities should not be borne solely by adjoining land owners. Rather, land owners, developers, and local officials, should take into account the costs of development of the community prior to the implementation of their plans. The court found that absent such prior planning, of reasonable use rule allows for a more equitable allocation of the incidental economic costs than did the civil law rule.

The County also argued it had statutory immunity for damages which were caused by "urbanization." The Nevada Supreme Court rejected the concept of limited sovereign immunity, and held as follows:

"we...chose to follow the view, adopted in a majority of jurisdictions, that a governmental entity's substantial involvement in the development of private lands which unreasonably injures the property of others is actionable." 96 Nev.a505.

The NRS which confer immunity from suit for discretionary acts of County employees, were not argued at the trial court level and therefore were specifically not considered on appeal. It remains an open question regarding the effect discretionary immunity might have played in this case. Similarly, the factual situation included both the acts of private developers and the County. It is therefore impossible to determine whether the court focused its decision regarding County liability on the fact that a County constructed and maintained drainage pipe was related to the plaintiffs' flood problems.

Although the Powers case changed Nevada law, it leaves many questions unanswered such as: (1) Is the governmental entity liable for mere approval of a private development; (2) What constitutes “substantial involvement” in the development of private land? (3) Is a governmental entity liable if it fails to detect design or construction deficiencies in a private design? and (4) Is a governmental entity liable for privately designed flood control improvements which are later dedicated to the entity? The Powers case is the controlling legal precedent in this State. Engineers should be aware of the balancing test set forth in the decision, as well as the underlying factual situation. The balancing test should be considered when an engineer is designing or approving alternate methods of handling water drainage. As previously mentioned, one engineer’s “reasonable” drainage approach could be a juror’s “unreasonable” diversion.

403.3 Surface Waters - Private Development

Engineers and developers working in the private sector are presented with similar liability exposure as governmental entities, but do not enjoy the same statutory protections. A brief discussion of each liability theory is important for the engineer to have a sense of the potential exposure he or she faces when proceeding with a design project.

403.3.1 Negligence

Negligence has been defined by Black’s Law Dictionary as “the omission to do something which a reasonable man, guided by those ordinary considerations which ordinarily regulate human affairs, would do, or the doing of something which a reasonable and prudent man would not do.”

Placing the negligence definition into an engineering context, the reasonable and prudent man standard becomes a reasonable professional and prudent professional standard. Thus, a professional engineer who fails to act within the standard of care of his engineering profession may be held liable for negligence. The applicable standard of care is established in court by expert testimony.

The concept of negligence is composed of the traditional elements of duty, breach of the duty, the breach resulting in the proximate cause of damage, or injury. Prosser, Torts 143 (4th Ed. 1971). Nevada courts and courts across the nation have broadly interpreted the duty element as a duty being owed to all persons who may foreseeably be affected by the work being performed.

In order for the engineer to determine if he faces potential negligence exposure, it is helpful to analyze the project and its relation to the engineering activities which are being performed. The engineer should attempt to determine what the standard of care in his profession is in relationship to the particular engineering task being performed and then make a realistic

evaluation as to whether or not the services he has rendered would meet that standard. For example, using the Rational Method for a watershed in excess of 100 acres, rather than the HEC-1 computer model required by this MANUAL, may fall below the standard of care and could result in potential liability. The engineer should always strive to use the best information available and also strive to use methods which are state of the art and widely accepted by the engineering profession.

Complying with legally required procedures (i.e., contained in this MANUAL) have been held by the courts to be a minimum standard of care.

Unfortunately, an engineer cannot always be guaranteed that by merely following the computer models and design procedures contained in this MANUAL he will be insulated from negligence liability. It is possible that in a particular area of design the engineer's standard of care could require a higher standard of engineering activities. However, following the requirements of this MANUAL will go a long way toward establishing that an engineer has met the accepted standard of care.

403.3.2 Breach of Express/Implied Warranty

The liability theory can be based on either an implied warranty or an express warranty. Under this particular theory of liability an engineer does not face the same exposure as a developer who actually sells a finished product.

The courts have generally held that an implied warranty normally requires privity of contract between the person bringing the action and the party who allegedly breached the implied warranty. An implied warranty only goes to the product and may not be imputed to one who has provided services as opposed to the product. Thus, a private engineer who has designed plans does not face the same liability exposure as a developer who has sold a completed product.

403.3.3 Fraud/Misrepresentation

Fraud is a much less commonly-pled liability theory because it is much harder to prove. The Court requires "clear and convincing" evidence that fraudulent conduct has occurred.

Fraud in the general sense is deemed to be any conduct which is calculated to deceive another person or entity and results in damage.

The essential elements required to sustain fraud action are the representations made as a statement of fact (not genuine) which was untrue and known to be untrue by the party making it, or else recklessly made; that the statement was made with intent to deceive and for the purpose of inducing the other party to

act upon it, and the person did in fact rely on it and was induced to act to his detriment. AmJur.2d, Fraud & Deceit, Sections 2, 12.

An example of fraudulent conduct would be an engineer or developer telling a potential home purchaser that the home was not located in a floodplain when the engineer/developer knew for a fact that the statement was false. If the purchaser relies on that representation and purchases a home in the subdivision, then a potential case of fraud exists.

403.3.4 Trespass

Trespass is an injury to possession. It is an intrusion which invades a person's protected interest in exclusive possession. A trespass action requires active conduct on the part of the wrongdoer. Liability can be imposed for intentional, negligent or ultrahazardous activity. The only "intent" required is that the act constituting the trespass is voluntarily done. An act may constitute a trespass despite the fact that its consequences were unintended. 75 AmJur.2d, Trespass, Section 8.

In general, one is subject to liability for trespass to real property if one intentionally enters land in the possession of another or causes a thing or force to do so. A landowner who sets in motion a force which, in the usual course of events, will damage the property of another is guilty of trespass on such property. **Burt v. Beautiful Savior Lutheran Church, 809** P.2d 1064 (Colo.Ap. 1990).

Nevada has defined trespass as an injury to an estate, or use thereof, by one who is a stranger to the title of the injured property. **Price v. Ward,** 25Nev.20358Pac.849 (1899).

An example of this liability theory would be damage to real property caused by waters escaping from a drainage channel or damaging a subdivision as a result of an improperly designed drainage system. The damage occurs when the water flows on the person's property and in turn damages the real property, personal property and possessory interest of the landowner. Such damage easily occurs once water begins to flow onto a property and into the front door of someone's home. The landowner need not prove that the engineer or developer intentionally flooded the property, but merely that the act of designing and constructing the flood control improvement were done voluntarily. As previously noted, the liability for trespass can be based on negligent conduct.

Flooding of a person's property because of improper construction of highway embankments constitutes trespass. **Viestenz v. Arthur** TP, 54 N.W.2d.572 (ND 1952). Where the defendant's affirmative act results in the flooding of the plaintiff's land and the destruction of crops, the defendant has constituted

trespass. **Western Union Tel. Co. v. Bush**, 89 S.W. 2d 723 (Ark. 1935). However, floods resulting solely from a severe storm do not constitute trespass. **Hughes v. Kim's County**, 714 P.2d 316, (Wash. Ap. 1986).

Pursuant to the trespass liability theory, damages generally constitute the difference in value of the land both before and after the act. Damages can also include the loss of use of the land, discomfort and annoyance to the property owner, cost of repair, and lost crops.

A warning sign for dual use facilities is shown in **Figure 401** and shall be posted not more than 200 feet on each side of the facility, upon or near the boundary. Warning signs shall be mounted on a metal fence post, and shall be painted with fluorescent orange paint. **Figure 402** depicts a warning sign for flood channels.

403.3.5 Nuisance

The "nuisance" liability theory applies to that class of wrongs that is covered by the unreasonable, unwarrantable, or unlawful use by a person of his property, or from his improper, indecent or unlawful conduct, which operates as an obstruction or injury to the right of another or to the public, and producing such material annoyance, inconvenience, discomfort or hurt that the law will presume consequential damage. **Bliss v. Gravson, 24 Nev.422, 56 Pac.231** (1899).

The term "nuisance" is incapable of an exact and exhaustive definition which will fit all cases because the factual situations are seldom alike. Nevertheless, "nuisance" has been defined as a distinct civil wrong, and is used to describe the wrongful invasion of a legal right or interest. "Nuisance" includes everything that endangers life, health, or obstructs the reasonable and comfortable use of property. 58 AmJur.2d, Nuisance, Section 1.

Nuisance and trespass are analogous in some respects. However, there is a distinction between them, the difference being that trespass is an invasion of the person's interest in the exclusive possession of his land (as by entry on it) while a nuisance is an interference with the use and enjoyment of the land, and doesn't require interference with the possession. The requisites that an interference be substantial and unreasonable, in order to constitute a nuisance, have been said to distinguish an action for nuisance from that of trespass. In this regard, an action for trespass can be maintained without a showing of damage because it is the unauthorized entry upon the land that creates the trespass and the presumed damage.

A claim of nuisance is more than a claim of negligence. Negligent acts do not in themselves constitute a nuisance; rather, negligence is merely one type of conduct upon which liability for nuisance may be based.

This liability theory primarily involves the annoyance and inconvenience which people experience once their property has been flooded. The flood clean-up process and associated odors, filth, and insect infestation would fall within this theory. In many ways, this theory closely tracks claims for emotional distress and can provide dramatic testimony for a jury. Even something as minor as increased flow in an irrigation ditch has been deemed a nuisance in Nevada. Thomas v. Blaisdell, 25 Nev.223, 58 Pac.903 (1899).

403.3.6 Strict Liability

Nevada has recognized that an end user of a “product” has established a cause of action in strict liability against a manufacturer or distributor when “his injury is caused by a defect in the product, and the user proves that such defect existed when the product left the hands of the defendant.” Shoshone Coca-Cola Bottling v. Dolinski, 82 Nev. 439, 443, 420, P.2d 855, 858 (1966).

California has applied the strict liability theory to the sale of homes and defective lots. The Nevada Supreme Court noted in Ellev v. Steven, 104 Nev.Adv.Op. 62, N.2 (1988) that courts are divided about whether a home is a product under strict liability theory. In that case of Nevada Supreme Court was presented with this issue but was able to decide the case without ruling on the applicability of the strict liability theory. As the law currently stands in Nevada, the strict liability theory does not apply to homes. However, this theory could be extended to a situation where a “product” is sold by someone in the regular course of its business.

403.3.7 Punitive Damages

The above liability theories can support both an award of compensatory damages and punitive damages. Compensatory damages are to compensate a person for specific damages such as property repair or replacement costs. However, the private developer faces a possible award of punitive damages which can be unrelated to the actual damages suffered by the land owner.

NRS 42.010 provides as follows:

“In an action for the breach of an obligation not arising from contract, where the defendant: (1) has been guilty of oppression, fraud or malice, expressly implied; or (2) caused an injury by the operation of a motor vehicle in violation of NRS 484.379 or 484.3795 after willfully consuming or using alcohol or another substance, knowing that he would thereafter operate the motor vehicle.

The plaintiff, in addition to actual damages, may recover damages for the sake of example and by way of punishing the defendant.”

The concept of punitive damages rests upon a presumed public policy to punish a wrongdoer for his act and to deter others from acting in similar fashion. The punitive damage allowance should be in an amount that will promote the public interest without financially annihilating the defendant. Nevada Cement Companv v. Lemler, 89 Nev. 447,514 P.2d 1180 (1973).

Since the purpose of punitive damages is to punish and deter culpable conduct, the award lies in the discretion of the court or jury and need not bear a fixed relationship to the compensatory damages awarded. Randano v. Turk, 86 Nev. 123, 466 P.2d 218 (1970).

The “malice” contemplated in NRS 42.010 is malice in fact and which the malice is established. Malice in fact sufficient to support an award of damages may be established by a showing that the wrongful conduct was willful, intentional and done in reckless disregard of its possible results. Nevada Credit Rating Bureau Inc. v. Williams, 88 Nev. 601, 503 P.2d 9 (1972).

In Village Development Companv v. Filice, 90 Nev. 305 P.2d 83 (1974), the Nevada Supreme Court was presented with a case involving a claim for damages arising from the destruction of a home constructed in an undisclosed floodplain and the subsequent claim for punitive damages. The lot purchaser brought an action to recover damages from the developer of a lot which was situated in an undisclosed floodplain of a mountain stream. The District Court awarded compensatory and punitive damages and the developer appealed. The Nevada Supreme Court found the developer was aware that a stream which crossed the plaintiff’s lot usually was quite narrow but varied radically under various storm conditions of given return frequencies. Despite knowledge of the developer’s officers regarding the extent of the floodplain, the developer did not impose any building restriction other than requiring that building plans be submitted to an architectural control committee. Knowing of the flood hazard, the developer assumed the plaintiff would build on the highest possible site on the lot, but never advised the lot purchasers of its thoughts regarding a proper building site. In short, the court found that the corporation’s highest management personnel failed to warn of the danger although they well knew the plaintiffs were planning to build in the floodplain. Plans were submitted to the architectural control committee and approved without warning.

The court held that there was ample evidence to support a jury instruction regarding negligence and that the resulting award under that theory was proper. After carefully reviewing the record the court found that although there was ample evidence of negligence and unconscionable irresponsibility, there was insufficient evidence to support a finding of “oppression, fraud or malice

express or implied.” The court noted it had previously sustained punitive damage awards when the evidence showed the wrong was willful. Here, the evidence was insufficient to meet the requirement that more must be shown than malice in law, and that there should be substantial evidence of malice in fact.

The above case indicated how the private developer can face punitive damage exposure. Although in the case above the developer escaped punitive damage exposure, it could easily have faced punitive exposure if representations had been made to the purchaser such as the property was not located in the floodplain, or that flooding was not likely in that area. If an area is located in a floodplain that fact should be fully disclosed to the purchaser and proper engineering procedures consistent with the standard of care should be followed.

403.4 Surface Waters - Governmental Entity Liability

The liability of a governmental entity with respect to surface waters is treated differently in some respects than the liability of a private developer even though the same liability theories can be asserted. The State legislature has conferred various statutory defenses, immunities, and damage limitation in view of the burden regarding land development which has been placed upon the governmental entities. Governmental entity tort liability is controlled by Chapter 41 of the NRS which was adopted in 1965.

403.4.1 Sovereign Immunity

The principle of sovereign immunity can be traced back to ancient times in England when a person could not sue the King. This concept has carried through the common law and has appeared in statutory provisions in most states. NRS 41.031 contains a waiver of sovereign immunity which is expressly limited by several other statutes containing specific defenses. The purpose of the limited waiver of sovereign immunity is to compensate the victims of governmental negligence in circumstances like those in which victims of private negligence would be compensated. Harriaan v. City of Reno, 86 Nev. 678, 475 P.2d 94 (1970).

The legislative intent in enacting NRS 41.031 was to waive the immunity of governmental units and agencies from liability for injuries caused by their negligent conduct, thus putting them on equal footing with private persons committing torts. Jimenez v. State, 98 Nev. 204, 644 P.2d 1023 (1982).

In close cases where the issue of whether the allegations of conduct fall within the parameters of a waiver of sovereign immunity, courts must favor a waiver of immunity; only when it is concluded that a discretionary act alone is involved

will the court find immunity. Haablom v. State Director of Motor Vehicles. 93 Nev. 599. 571 P.2d 1172 (1977).

NRS 41.031 initially provided for a special claims procedure when a person wanted to sue the State. However, the Nevada Supreme Court eliminated this requirement in 1973.

403.4.2 NRS 41.032 - Discretionary Immunity

NRS 41.032 provides that no action may be brought under the limited waiver of immunity statute or against an officer or employee of the State or any of its agencies or political subdivisions which is based upon the following:

- a. An act or omission of an officer or employee, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulations is valid, if the statute or regulation has not been declared invalid by a court of competent jurisdiction; or
- b. Based upon the exercise of performance or the failure to exercise or perform a discretionary function or duty on the part of the State or any of its agencies or political subdivisions or any officer or employee of any of these, whether or not the discretion involved is abused.

The discretionary function immunity initially was a very strong defense for governmental agencies. However, over the years various interpretations of the statute by the Nevada Supreme Court have eroded its effectiveness.

The Nevada Supreme Court has analyzed discretionary immunity in terms of the type of functions the governmental entity is performing at the time. The governmental (discretionary) function is the initial decision to act. A discretionary function can be categorized as a decision to build a freeway, flood control channel, or parking structure. Once the discretionary decision to act has been made, then the governmental entity shifts into the operational function which usually involves construction and design. The governmental entity is obligated to use due care when acting in the operational function area.

The discretionary immunity cases can generally be divided into the following areas: road/street, police protection, and miscellaneous. One case from each area will briefly be discussed to give the engineer a sense of the analysis which is engaged in by the Supreme Court.

In the case of State v. Webster, 88 Nev. 690, 504 P.2d 1316 (1972) horses wandered onto a frontage road and then onto a newly constructed controlled access freeway near Carson City. An accident later resulted when a car struck the horses. The plaintiffs sued the State on the theory that the State was negligent for not providing a fence to keep animals off the freeway. The Nevada Supreme Court held that the governmental (discretionary) function was the decision to build a controlled access freeway, rather than continuing an old two lane highway. Once the discretionary decision regarding construction was made, the State was obligated to use due care to make the freeway meet standards of reasonable safety. The court held the State was negligent for failing to install a cattle guard.

In Parker v. Mineral County, 102 Nev.Ad.Op. 131 (1986) a person cutting firewood saw another person lying on the side of a rural road who apparently needed help. After the person on the ground has refused assistance, the firewood cutter reported the incident to a Sheriff's deputy who said they would take care of the situation. No one responded to the report and the person by the side of the road later died of exposure. The police department was sued for failure to respond to the call. The Nevada Supreme Court, in upholding a ruling in favor of Mineral County Sheriff's Department, held that personal deliberation, decision and judgment are requirement of a discretionary act. In deciding not to respond to the call the County officials exercised their personal judgment as to how their limited resources should be utilized to best promote the public good. Such a decision could not be second guessed by the court.

In Esmeralda Counts v. Grogan, 94 Nev. 923 (1978) the Nevada Supreme Court held that the decision to grant, revoke, or withhold a liquor license is a discretionary act.

403.4.3 **NRS 41.033 - Failure to Inspect**

NRS 41.033 provides that an action may not be brought against the State under the waiver of sovereign immunity or against an officer or an employee of the State based upon the following:

- a. Failure to inspect any building, structure, or vehicle, or to inspect the construction of any street, public highway or other public work to determine any hazards, deficiencies or other matters, whether or not there is a duty to inspect; and
- b. Failure to discover such hazard, deficiency or other matter, whether or not an inspection is made.

An initial reading of this statute would seem to confirm broad protection for the governmental entity. However, subsequent interpretations of this statute by the Nevada Supreme Court eroded its effectiveness.

The protection provided by this statute can only be obtained if the government entity does not have actual notice of a hazard or dangerous condition. For instance, in Crucil v. Carson City, 95 Nev. 583, 600 P.2d 216 (1979) it was held that where the City allegedly had knowledge of a downed stop sign in an intersection and failed to act reasonable after discovering it, that NRS 41.033 did not provide immunity against such suit.

The State's protection under NRS 41.033 can also be altered by contract. In 1975 the City of North Las Vegas was sued when a person was electrocuted while working on a billboard and touched a high voltage line. Approximately 20 years before the accident the City had signed a franchise agreement with Nevada Power in which the City agreed to inspect the power lines in return for a certain percentage of the gross revenues attributable to the citizens of North Las Vegas. The court held the agreement imposed a contractual duty to inspect the power lines which superseded any protection provided by NRS 41.033.

In Butler v. Bogdanovich, 101 Nev. 499 (1985) a person built a home that was inspected and approved by the County. Several years later the plaintiffs purchased the home and found approximately 25 substantial building code violations and sued the County. The Nevada Supreme Court held that if the County had knowledge of the defects, the County owed a duty to the plaintiffs to take action as a result of the discovery of the deficiencies. The court held sovereign immunity would not bar actions based upon a public entity's failure to act reasonably after learning of a hazard. This case highlights the effect of actual notice eliminating certain sovereign immunity defenses.

403.4.4 **Limitation of Tort Damage Awards**

NRS 41.035 generally provides two important limitations on the types of damage claims which can be awarded against a governmental entity.

The first limitation on damages awards limits a person's recovery in tort against a governmental entity to a maximum of \$50,000. The stated damage limitation applies to an individual for each cause of action which may be asserted against the State, regardless of how many actions he or she may have even if more than one action arose from a single event. State v. Webster, 88 Nev. 690, 504 P.2d 1316 (1972).

The second important damage limitation prevents an award of punitive damages against the State. This is a very important distinction between governmental and private liability. A private developer may be held liable in punitive damages which can range far in excess of any compensatory

damages which are awarded to a plaintiff, while a governmental entity is protected from such damages. However, government entities can be sued in inverse condemnation while a private developer is protected from such an action.

403.4.5 Inverse Condemnation - Eminent Domain

The subject of Eminent Domain is extremely complex. However, a brief overview of this area is necessary for the engineer.

Article 1, Section 8 of the Nevada State Constitution provides in pertinent part that private property shall not be taken for public use without just compensation having been first made or secured, except in cases of war, riot, fire or great public peril, in which case compensation will be made later. Private property cannot be taken for a private use and can only be taken for a public use by a specific act of the governmental entity.

Eminent domain and inverse condemnation are basically the same concept but from a different perspective. If a governmental entity needs to obtain land for the construction of a flood control project, then the land is obtained by filing an eminent domain proceeding in which the land is condemned and the land owner is paid "just compensation" for the land. If a land owner claims that the property has been taken for a public use without just compensation being first made, then an inverse condemnation action is filed by the land owner seeking compensation from the governmental entity for the land.

Chapter 37 of the NRS governs eminent domain actions. Specifically, NRS 37.010(3) and (5) provides that the right of eminent domain may be exercised for the public purpose of "draining any County" or "for draining and reclaiming lands." Thus, obtaining property for flood control purposes has been specifically recognized by State statutes. Chapter 37 contains the statutes governing the acquisition and valuation process.

Chapters 340 and 342 of the NRS also contain additional information regarding eminent domain procedures and acquisition of real property. Of particular interest is NRS 342.280 which provides that no public body shall intentionally make it necessary for an owner to institute legal proceedings to prove the fact of the taking of his real property.

The courts have generally upheld the concept that drainage improvements are public purposes. A public drainage ditch has been held to be for a public purpose under eminent domain, and therefore required compensation for private property taken or damaged in the construction thereof. Eminent domain, 26 AmJur.2d Section 44. The courts quite generally have come to consider drainage district acts with favor as being for public purpose, whether exercised for the benefit of public health or for the reclamation or utilization of lands for agricultural purposes.

The Nevada Supreme Court specifically recognized the inverse condemnation theory in County of Clark v. Powers, supra. In that case the plaintiffs' properties were repeatedly flooded as a result of development activities of upstream developers. The court found the property no longer had a practical use other than as a flood control channel. The court noted in a footnote on page 501 of the decision as follows:

“It has long been established that a taking occurs where real estate is actively invaded by superinduced additions of water...so as to effectively destroy or impair its usefulness” Pumpelly v. Green Bay Company, 80 U.S. (13 Wall.) 166, 181, (1871), and the result is no different when property is subjected to intermittent, but inevitable flooding which causes substantial injury, United States v. Cress, 243 U.S. 316, 328 (1917).

Thus, private property which is subject to intermittent but inevitable flooding can be “taken” as a result of governmental flood control projects. However, each of the cases is highly dependent upon its factual situation. Inverse condemnation liability extends to “just compensation” for the highest and best use of the property. The previously mentioned \$50,000 damage limitation applies only to tort actions and does not apply to inverse condemnation actions. Additionally, the sovereign immunity defenses such as discretionary immunity and failure to inspect immunity are not available to the governmental entity because the right to just compensation for private property taken for a public use cannot be abridged or impaired by statute. Alper v. Clark County, 93 Nev. 569, 571 P.2d 810 (1977) cert. denied, 436 U.S. 905, 98 S.Ct. 2235, 56 L.Ed. 2d 402 (1978).

WARNING SIGN - DUAL USE FACILITY



24"

30"

3"

1 1/2"

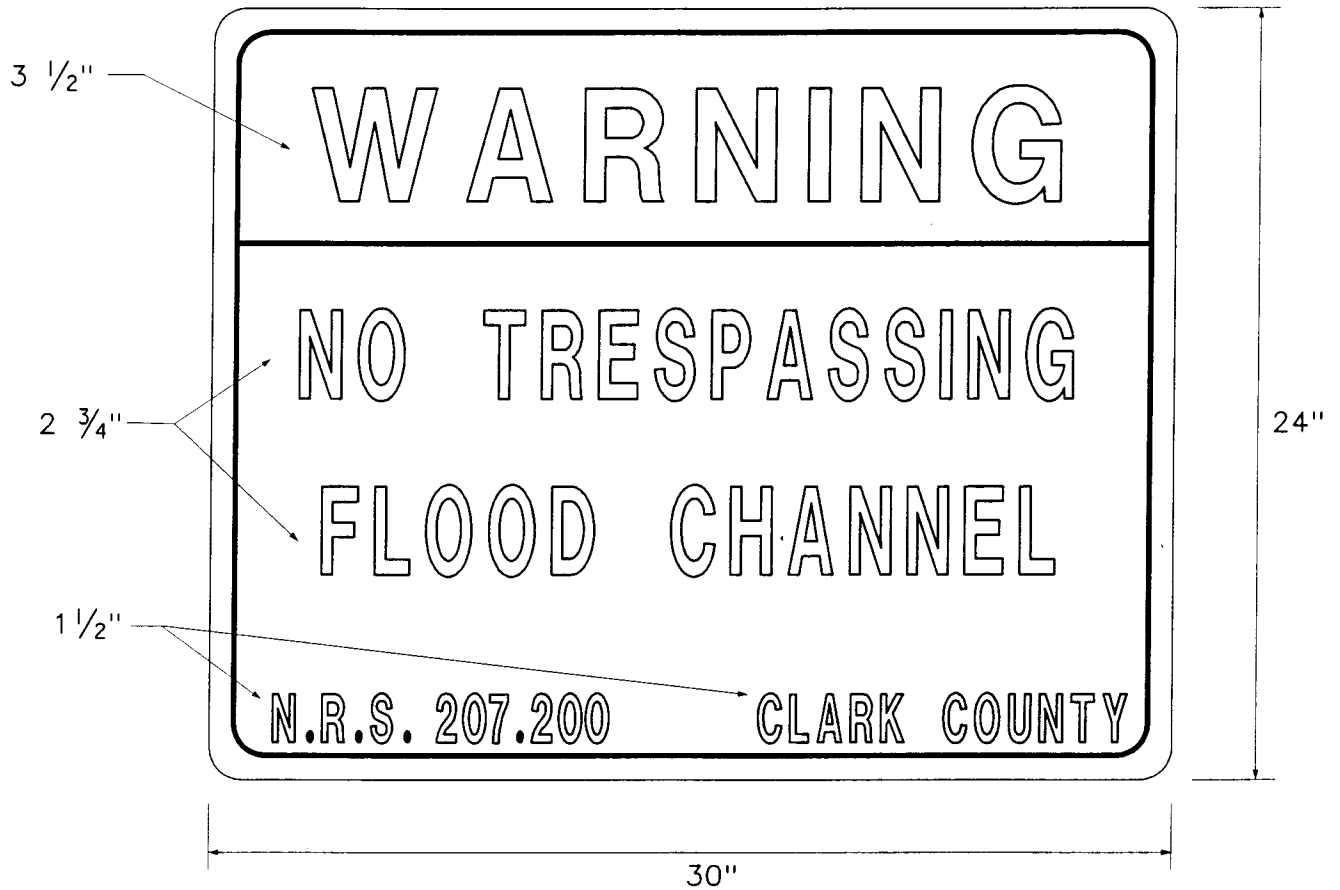
REFERENCE:

Revision

Date

FIGURE 401

WARNING SIGN - FLOOD CHANNEL



Revision	Date

REFERENCE:

FIGURE 402