

## **2.4 State Drainage Law**

### **2.4.1 Origin of Law**

State drainage law is derived mainly from two sources: (1) common law and (2) statutory law.

### **2.4.2 Common Law**

Common law is that body of principles which developed from immemorial usage and custom and which receives judicial recognition and sanction through repeated application. These principles were developed without legislative action and are embodied in the decisions of the courts.

### **2.4.3 Statutory Law**

Statutory laws of drainage are enacted by legislatures to enlarge, modify, clarify, or change the common law applicable to particular drainage conditions. This type of law is derived from constitutions, statutes, ordinances and codes.

### **2.4.4 Precedence of Law**

In general, the common law rules of drainage predominate unless they have been enlarged or superseded by statutory law. In most instances where statutory provisions have been enacted, it is possible to determine the intent of the law. If, however, there is a lack of clarity in the statute, the point in question may have been litigated for clarification. In the absence of either clarity of the statute or litigation, a definitive statement of the law is not possible, although the factors that are likely to be controlling may be indicated. The designer has the responsibility to notify the Attorney General's Office if any portion of a project is expected to violate any accepted laws.

### **2.4.5 Classification Of Waters**

State drainage laws originating from common law, or court-made law, first classified the water that was being dealt with, after which the rule that was pertinent to the particular classification was applied to obtain a decision.

The first step in the evaluation of a drainage problem is to classify the water as surface water, stream water, flood water, or groundwater. These terms are defined below. Once the classification has been established, the rule that applies to the particular class of water determines responsibilities with respect to disposition of the water.

- Surface Waters - Surface waters are those waters which have been precipitated on the land from the sky or forced to the surface in springs, and which have then spread over the surface of the ground without being collected into a definite body or channel.
- Stream Waters - Stream waters are former surface or ground waters which have entered, and now flow in, a well-defined natural or man-made watercourse, together with other waters reaching the stream by direct precipitation or rising from springs in the bed or banks of the watercourse. A watercourse in the legal sense, refers to a definite channel with bed and banks within which water flows either continuously or intermittently.
- Flood Waters - Flood waters are former stream waters which have escaped from a watercourse (and its overflow channels) and flow or stand over adjoining lands. They remain flood waters

until they disappear from the surface by infiltration or evaporation, or return to a natural watercourse.

- Ground Waters - In legal considerations, ground waters are divided into two classes, percolating waters and underground streams. The term "percolating waters" generally includes all waters which pass through the ground beneath the surface of the earth without a definite channel. The general rule is that all underground waters are presumed to be percolating through undefined paths and to take them out of the percolating class, the existence and course of a permanent channel must be clearly shown. Underground streams are waters passing through the ground beneath the surface in permanent, distinct, well-defined channels.