North Dakota Law Review

Volume 47 | Number 4 Article 1

1970

# Drainage Law in North Dakota: An Overview

Robert E. Beck

Bruce E. Bohlman

# DRAINAGE LAW IN NORTH DAKOTA: AN OVERVIEW*

By ROBERT E. BECK** AND BRUCE E. BOHLMAN***

## I. INTRODUCTION

Drainage law operates today in a social, philosophical, and scientific setting that may posit on the one hand some landowners seeking to drain every pothole on their land in order to make that land produce more crops, and on the other hand some people who wish to preserve every pothole in the effort to maintain the ecological balance that is necessary for man's survival.[1]

This article does not investigate the social, philosophical, and scientific questions concerning drainage versus wetlands preservation. Proceeding on the assumption that a decision to drain has

---

* Part III of this article is part of a study of North Dakota (and regional) water law sponsored by the Economic Research Service, United States Department of Agriculture. The study was completed June 30, 1968; two previous publications under the study are Beck & Newgren, *Irrigation in North Dakota Through Garrison Diversion: An Institutional Overview*, 44 N.D. L. REV. 465 (1968), and Bard & Beck, *An Institutional Overview of the North Dakota State Water Conservation Commission: Its Operation and Setting*, 46 N.D. L. REV. 31 (1969). The authors have assumed responsibility for bringing the study up-to-date for this publication. Opinions expressed by the authors are not necessarily those of the United States Department of Agriculture.

The authors wish to express their sincere thanks and appreciation to Mr. Alan K. Grinberg, Assistant Chief Engineer, North Dakota State Water Commission, for his contribution to this initial study, and to student assistant Dennis Schurman.

** Professor of Law and Director, Agricultural Law Research Program, University of North Daokta School of Law. LL.B. University of Minnesota; LL.M. New York University.

*** Member, North Dakota Bar. J.D. University of North Dakota.

1. *See generally* North Dakota Water Commission, North Dakota Interim State Water Resources Development Plan Appendix E. (1968) (Stanford Research Institute, The North Dakota Wetlands Problem).

Many interesting studies apparently could be made in North Dakota. Consider, for example, the remarks of the court in Barns v. Cass County, 59 N.D. 135, 145, 228 N.W. 839, 844 (1929), *rehearing denied* (1930):

> The history of drainage in this state is illuminating—not because of fraud or graft but because of misconception as to the value of drainage installation so far as agricultural lands are concerned. In many instances the assumed benefits never materialized. This, however, is not fraud. Miscalculation or erronous judgment is not involved. When the statute speaks of benefits, it means benefits calculated at the time of the construction of the drain, and the fact that subsequently the drain may prove to be of little or no value does not warrant the setting aside of the assessments. The fraud necessary to be proved in this case must be fraud in the inception of the proceedings or fraud in the apportionment of costs and the assessment of the benefits.

*See also* the remarks of Justice Robinson quoted in note 237, *infra*.

been made, it surveys the substantive and institutional law as it now exists in North Dakota in relation to drainage, and attempts to indicate some of the gaps that exist.

The article contains three major sections: (1) substantive law; (2) institutional law; and (3) concluding remarks. While the substantive law section deals with the common law relating to drainage of diffused surface waters, the institutional law section deals with the drainage projects and drainage boards under the North Dakota Century Code. The article does not deal with a relatively new entity, the water management district,[2] which also can undertake drainage projects. It must be recognized at the outset that, in some areas of the State, some projects may be handled under one entity and other projects under a different entity.

## II. SUBSTANTIVE DRAINAGE LAW

### A. Definitions and basic rules generally.

Substantive drainage law has related primarily to diffused surface waters,[3] although the laws relating to watercourses and lakes frequently are relevant. Further, in situations where water flows in a defined course but not in a "watercourse," many jurisdictions treat that water as if it were still diffused for drainage purposes, while others treat it as if it flowed in a watercourse.[4]

The classical division of the law relating to diffused surface waters is: (a) common enemy; (b) natural flow; and (c) reasonable use.[5]

The basic idea of the common enemy rule was to treat diffused surface water as a common enemy and allow each landowner to deal with it as he saw fit. The basic idea of the natural flow rule was that the upper landowner had a natural servitude over the lower landowner's land for natural flow drainage. The reasonable

---

2. N.D. CENT. CODE ch. 61-16 (Supp. 1969). For a brief history of the water management district, which dates back to 1935, *see* Bard & Beck, *An Institutional Overview of the North Dakota State Water Conservation Commission: Its Operation and Setting*, 46 N.D. L. REV. 31, 64 (1969).

3. Since watercourses and lakes are also surface waters, it is preferable to refer to those waters normally resulting from rain or melting snow, that spread over the ground with no defined channel or regular course as "diffused" surface waters. This is the definitional approach adopted in the new multi-volume treatise on water law: 1 WATERS AND WATER RIGHTS § 52.1 at 302 (Robert E. Clark ed. 1967).

4. *See* the material cited in the forthcoming chapter on drainage law in Waters and Water Rights (Robert E. Clark ed.). As to what may constitute a drainway or a watercourse, *see* Soules v. Northern Pac. Ry., 34 N.D. 7, 39-40, 157 N.W. 823, 833 (1916); Reichert v. Northern Pac. Ry., 39 N.D. 114, 142-43, 167 N.W. 127, 136 (1917); Henderson v. Hines, 48 N.D. 152, 158-59, 183 N.W. 531, 534 (1921). N.D. CENT. CODE § 61-01-06 (1960), provides:

> A watercourse entitled to the protection of the law is constituted if there is a sufficient natural and accustomed flow of water to form and maintain a distinct and a defined channel. It is not essential that the supply of water should be continuous or from a perennial living source. It is enough if the flow arises periodically from natural causes and reaches a plainly defined channel or a permanent character.

5. 1 WATER AND WATER RIGHTS § 52.1(A), at 303-08 (Robert E. Clark ed. 1967).

use test looks to what is a reasonable use of one's land under the particular circumstances.

B. *Jones v. Boeing Co.*[6]

In September of 1967, the North Dakota Supreme Court decided *Jones v. Boeing Co.* in which it said, "we adopt the reasonable use rule as expressed in the New Jersey case of *Armstrong v. Francis Corp. . . .*"[7] The court interpreted *Armstrong* to mean that "[t]he issue of reasonableness or unreasonableness becomes a question of fact to be determined in each case upon a consideration of all of the relevant circumstances, including such factors as the amount of harm caused, the foreseeability of the harm which results, the purpose or motive with which the possessor acted, and all other relevant matter."[8] Plaintiff's land had been damaged from a concentration of diffused surface water resulting from defendant's construction of a trailer court. Previously the water, according to one witness, "came off in a long area, possibly four to five hundred feet long."[9] The finding was that:

> The duty was upon the architect-engineer to exercise ordinary care for the protection of any person who foreseeably and with reasonable certainty may be injured by the failure to do so. . . . This duty was not met in this case and it was this failure to exercise ordinary care in the design and supervision of this project, even after being placed on notice of the danger of resulting flooding, which constituted negligence and unreasonable use on the part of the appellant.[10]

The Court made it clear that it believed this was not occasioning a change in North Dakota law:

> We believe the rule in the New Jersey case has been well stated and that it represents not so much a change in policy by this court as a clarification of the rationale followed in prior decisions and that the result reached is a similar one.[11]

C. The pre-*Jones v. Boeing Co.* cases.

The earliest North Dakota case, *Carroll v. Rye Township*,[12] decided in 1904, is one of several in North Dakota history[13] involving

---

6. Jones v. Boeing Co., 153 N.W.2d 897 (N.D. 1967), 44 N.D. L. REV. 567 (1968).
7. *Id* at 904. Armstrong v Francis Corp., 20 N.J. 320, 120 A.2d 4, 10 (1956).
8. 153 N.W.2d 897, 904 (N.D. 1967).
9. *Id.* at 902.
10. *Id.* at 904.
11. *Id.*
12. Carroll v. Rye Township, 13 N.D. 458, 101 N.W. 894 (1904). For a territorial predecessor of *Carroll, see* Hannaher v. St. Paul, M. & M. Ry., 5 Dak. 1, 37 N.W. 717 (1888).
13. *See also,* Davenport Township v. Leonard Township, 22 N.D. 152, 133 N.W. 56 (1911) (injunctive relief denied, ordinary highway improvements made without negligence).

actions against a township for damages allegedly resulting from flooding because of drains, ditches, roads, and dikes built and maintained by the township. In this case the North Dakota Supreme Court adopted Farnham's thesis concerning the scope of the natural flow rule, holding that it was applicable only where the flow of diffused surface water had reached a "definite channel."[14] Since the water here had not reached a definite channel, it was then unnecessary to decide whether the common enemy or natural flow rule applied. Since there was no negligence or malicious conduct involved, the township was held not responsible. The responsibility of townships was changed by statute in 1945:[15] "It is the intention of this act that in the construction of highways as herein provided, the natural flow and drainage of surface waters shall not be obstructed. . . ." In 1952 in *Viestenz v. Arthur Township*,[16] the North Dakota Supreme Court reversed a denial of injunctive relief to complainant, saying that this code provision imposed a mandatory duty. This mandatory duty approach was reaffirmed in 1965.[17] Thus the thrust of the drainage obligation of townships and other agencies as to road building and maintenance now has to be looked upon as statutory, rather than involving the common law approach. However, much of what the court said in the earlier cases may be applicable to other drainage problems. In *Carroll*, counsel had made the argument that:

> [E]ven though the surface water has not been diverted from a definite channel, or carried by artificial ditches through a natural watershed, yet the defendant should have so constructed its road that the surface water would not have flowed upon the premises in greater quantities, or in a different manner, from what it naturally was wont to flow, and that if, by the construction of its embankments, ditches, and culverts, though constructed in the usual and ordinary manner, larger quantities of surface water were permitted to accumulate, and were discharged upon plaintiff's land in an unusual manner, whereby they sustained injury, the defendant was liable in an action for damages for such injury.[18]

But he lost on the law.

---

14. 13 N.D. 458, 465, 101 N.W. 894, 896 (1904). *See* 3 FARNHAM, WATERS AND WATER RIGHTS § 889a, at 2587 (1904).

15. N.D. REV. CODE of 1943, § 24-0633 (1949 Supp.). It became § 24-0306 in 1953. N.D. CENT. CODE § 24-03-06 (1970).

16. Viestenz v. Arthur Township, 78 N.D. 1029, 54 N.W.2d 572 (1952), two justices dissenting on the basis that the trial court's evaluation of the facts should have been affirmed. For a later case in this matter, *see* Viestenz v. Arthur Township, 129 N.W.2d 33 (N.D. 1964), granting plaintiffs "an order enforcing the said mandatory injunction. . . ." *Id.* at 40.

17. Rynestad v. Clemetson, 133 N.W.2d 559 (N.D. 1965). *See also* Lemer v. Koble, 86 N.W.2d 44 (N.D. 1957) and Little v. Burleigh County, 82 N.W.2d 603 (N.D. 1957).

18. 13 N.D. 458, 465, 101 N.W. 894, 896 (1904).

*State v. Minneapolis, St. P. & S. S. M. Ry.*,[19] *Soules v. Northern Pac. Ry.*,[20] *Reichert v. Northern Pac. Ry.*,[21] *Boulger v. Northern Pac. Ry.*,[22] *Henderson v. Hines*,[23] and *Roder v. Krom*,[24] involved alleged obstructions to streams or other natural drainways. In three cases, *State*, *Soules*, and *Reichert*, the plaintiffs prevailed in whole or in part.[25] In two cases, *Boulger* and *Roder*, no causal effect between the obstruction and the flooding was shown, so defendants prevailed. In one case, *Henderson*, a verdict for plaintiff was reversed and a new trial was granted the defendant on negligence issues. Further, *State* allowed a Board of Drain Commissioners the use of *mandamus* to compel removal of unreasonable obstructions. What seemed to be the principle of these cases, prior to *Henderson*, was that natural drainways were to be kept open, and one who interfered therewith had a duty to provide a natural passage for all water that might reasonably be anticipated to drain there. This then gave rise to the frequent question whether there was an "extraordinary flood."[26] This was also true, the court said in *Soules*, under both the natural flow and the common enemy rules. But the whole point, at least of Farnham's study,[27] was that the natural flow rule applied only where there was a natural drainway. In other words, there was a servitude for a natural drainway, but none where there was no natural drainway. Then came *Henderson*, in which the court purported to reject the natural flow rule for natural drainways that do not constitute watercourses, saying, instead, that the matter was one of using one's property so as not to interfere unreasonably with property of another. But

19. State v. Minneapolis, St. P. & S. S. M. Ry., 28 N.D. 621, 150 N.W. 463 (1914), *on rehearing* (1915).

20 Soules v. Northern Pac. Ry., 34 N.D. 7, 157 N.W. 823 (1915).

21. Reichert v. Northern Pac. Ry., 39 N.D. 114, 167 N.W. 127 (1917), two justices dissenting on the basis that the evidence required a finding of extraordinary storm and flooding.

22. Boulger v. Northern Pac. Ry., 41 N.D. 316, 171 N.W. 632 (1918).

23. Henderson v. Hines, 48 N.D. 152, 183 N.W. 531 (1921), one judge concurring specially and two justices dissenting.

*See* N.D. CENT. CODE § 61-01-07 (1960):

> If any person, municipality, or corporation, without authority of law, willfully obstructs any ditch, drain, or watercourse, or diverts the water therein from its natural or artificial course, such person or corporation shall be liable to the party suffering injury from such obstruction or diversion for the full amount of the injury occasioned thereby, and in addition thereto, is guilty of a misdemeanor, and shall be punished by a fine of not more than one hundred dollars, or in lieu thereof, the offending party, if not a corporation, may be imprisoned in the county jail for a period of not more than three months.

24. Roder v. Krom, 150 N.W.2d 708 (N.D. 1967). *See also* McHenry County v. Brady, 37 N.D. 59, 163 N.W. 540 (1917), involving a Canadian-North Dakota problem.

25. In *State*, the judgment was reversed but with an order that judgment be entered on the modified basis approved by the Supreme Court. 28 N.D. 621, 649, 150 N.W. 463, 470 (1914).

26. And the burden on this issue is on the defendants. *See* 34 N.D. 27, 157 N.W. 823, 828, 830 ("unusual and extraordinary") (1916). 39 N.D. 114, 141-42, 167 N.W. 127, 135-36 (1917).

27. *See generally* 3 FARNHAM, WATERS AND WATER RIGHTS §§ 889, 889a, 889b, 889c, 889d (1904).

negligence in the construction of a culvert in a natural drainway may constitute such interference. And the earlier North Dakota cases are relevant on this point. So the question is whether there was any change in result, or one merely of focus or emphasis. And so after *Henderson,* the rule in obstruction cases seemed to be, for all except watercourses, the rule of reason as expressed in the *sic utere* maxim (use your property so as not to injure another's property). The *Henderson* approach was seemingly reaffirmed in 1967 in *Roder,* involving a drainway that had been substituted by agreement for a natural drainway.

But so far, except for *Carroll,* the cases have dealt essentially only with obstructing flow. In *Froemke v. Parker,*[28] plaintiff sued to enjoin defendant from draining a slough through a natural drainway over plaintiff's land, and he prevailed. The slough which had existed for 35 years was not now "diffused surface water," even though it may have been formed from diffused surface water. It was of no concern to the court how difficult it might otherwise be to dispose of the water or whether there was any negligent construction and so on. This approach was reaffirmed and extended in *Rynestad v. Clemetson*[29] in 1965, the court saying that an upper landowner had no right to increase materially the quantity or the volume of surface water discharged on the lower estate, or to discharge it in a different manner than it usually or ordinarily would have gone in the natural course of discharge. In *Rynestad* the court said: "The owner of the lower, or servient, estate must receive surface water from the upper, or dominant, estate, in its natural flow." It is not entirely clear what the court meant. Did "surface water" refer to surface water in natural watercourses? To surface water not in a natural drainway or watercourse? To surface water in natural drainways or watercourses? Since 1904 the court had rejected any such natural flow rule regarding surface water not in a natural drainway or watercourse. And since 1921, with respect to surface water in natural drainways and watercourses, it seemingly had replaced the natural flow rule by a rule of reason. Anyway, the foregoing quoted statement was not necessary to the decision of this case. For the case seemingly involved surface waters that, but for the ditching, would not have reached the natural drainway that overflowed and caused the damage. Otherwise these waters would have evaporated, been absorbed into the soil, or flowed into potholes or sloughs on plaintiff's land. The principle followed is that, essentially, the natural drainway had been surcharged and made to exceed its natural capacity,

28. Froemke v. Parker, 41 N.D. 408, 171 N.W. 284 (1919). (For an earlier issue on appeal, *see* Froemke v. Parker, 39 N.D. 628, 169 N.W. 80 (1918).
29. 133 N.W.2d 559, 563 (N.D. 1965).

and this cannot be done to the injury of another. Injunctive relief was granted. Recovery of damages, seemingly on a similar basis, had been allowed earlier in *Campbell v. Russell*,[30] although the facts are not entirely clear. Recovery was denied plaintiff in *Lemer v. Koble*,[31] on the basis that the evidence did not show that defendant's draining of a pothole in any way injured the plaintiff.

D. Critique of North Dakota law.

Generally a landowner must so use, or not use, his land as not to unreasonably interfere with or injure that of another. This is the basic *sic utere* or nuisance principle.[32] Nuisance actions may be based on either negligent or intentional conduct. The facts that give rise to a nuisance may also give rise to trespass. The question for North Dakota, as for other States, is whether anything more than this basic principle concerning land use governs drainage problems. The answer given generally in *Jones* is "No, that is it."

There are two aspects to the problem. In one case, "X" drains his water onto someone else's land. In the second case, "X" uses his land in such a way as to impede the flow of water from someone else's land. Are these two instances to be treated the same?

In 1904, in *Carroll*, the court took the view that disposition of diffused surface waters was not subject to any rule other than the basic *sic utere* rule and that collection and discharge of such waters would not constitute *per se* unreasonable conduct. In 1919, in *Froemke*, however, in dealing with disposition of slough or pothole waters, and as such no longer considered by the court as diffused water, the court seemed to develop a rule that such disposition could not be made under any circumstances where there was damage to someone else. Perhaps one could harmonize this case with *Carroll* by saying that such conduct is *per se* unreasonable. In *Froemke*, the water was drained into a natural drainway; if it is unreasonable to drain slough water into a drainway it, *a fortiorari*, would be unreasonable to cast it where there was no drainway. The *Froemke* decision was extended in 1965, in *Rynestad*, to cover diffused surface water that would not have reached the natural drainway but would have emptied into potholes or sloughs. *Jones* involved diffused surface water that would have drained onto plaintiff's land naturally, although not into a drainway. This water the defendant collected and discharged, and it is to this fact situation that the court applies the rule of reason, the rule originally suggested in *Carroll*. The question remains whether the *Froemke* and

30. Campbell v. Russell, 132 N.W.2d 705 (N.D. 1965).
31. 86 N.W.2d 44 (N.D. 1957).
32. For a general discussion of nuisance, *see* W. PROSSER, TORTS 592-633 (3d ed. 1964).

*Rynestad* fact situations will continue to have their own special rule—whether the court will say that only the rule of reason is to apply in that fact situation, and the conduct is *per se* unreasonable or is not *per se* unreasonable. It seems clear that had the *Froemke* and *Rynestad* rules been applied to the *Jones* facts, a defendant would have no chance of avoiding enjoinment once it was shown that his conduct contributed to the injury; the *Jones* approach gives him a chance.

While the early cases dealing with obstructions placed in natural drainways other than watercourses seemed to hold that upper landowners had a natural flow servitude through these drainways, the court in *Henderson,* in 1921, brought this area into line with the *sic utere* approach rejecting any automatic natural flow servitude.

According to the *Jones* court, the rule of reason gives "flexbility"; but, likewise, it gives uncertainty. The client says to the lawyer: "Can I drain?" The lawyer says: "Well it depends on the circumstances." The client says: "Here are the circumstances." The lawyer says, "But I do not know how a jury or a court will weigh those circumstances." The client insists: "Can I drain?"

However, the uncertainty criticism is also true of the other extant approaches to drainage problems.[33] Where the common enemy or natural flow theory is followed, each is so riddled with exceptions that they are little clearer than a "reasonable use" test and of course each of these exceptions had been decided on an *ad hoc* basis.

What affirmative solution can the client seek? (a) He might be able to reach an agreement with all who might be affected. (b) He might establish a legal drain. (c) He might get a declaratory judgment. (d) He might take the risk of litigation and adverse decision.

There are, however, some "knowns" that can be taken into account under the "rule of reason" approach. The first question to ask is whether defendant's actions have contributed to plaintiff's injury or threatened injury. If not, there is no cause of action. If they have contributed, then further questions may be asked.

---

33. See the forthcoming Chapter on Drainage Law, prepared by Professor Beck, in WATER AND WATER RIGHTS (Robert E. Clark ed.), for a thorough, recent discussion of drainage law in the United States.

There are statutory restrictions on private drainage too. *See, e.g.,* N.D. CENT. CODE § 61-15-08 (Supp. 1969):

> Any person without written consent of the state engineer who shall drain or cause to be drained, or who shall attempt to drain any lake or pond which shall have been meandered and its metes and bounds established by the government of the United States in the survey of public lands, shall be guilty of a misdemeanor and shall be punished by imprisonment in the county jail for not more than ninety days, or by a fine of not more than five hundreds dollars, or by both such fine and imprisonment.

Was there a reasonable necessity for the person draining to alter the drainage in order to be able to make use of his land? Was the construction of the alteration done in a reasonable manner? Does the utility of the conduct of the person draining reasonably outweigh the gravity of the harm to others? These are the basic questions that have to be considered in any drainage case in North Dakota henceforth.

## III. INSTITUTIONAL DRAINAGE LAW

### A. DRAINAGE PROJECTS, DRAINAGE DISTRICTS, AND THE COUNTY BOARD OF DRAIN COMMISSIONERS

#### 1. CURRENT STATUS AND PRACTICE

##### a. Introduction

Part III of this article will set forth the steps necessary to establish, maintain, and dissolve a drainage district. While the North Dakota Century Code makes no clear distinction between a drainage district and a drainage project,[34] it is reasonable to conclude that a drainage district comprises the lands within a county that are benefited by a drainage project.[35] Moreover, although this part of the article will discuss the establishment of a drainage district under the direction of the county Board of Drain Commissioners, a drainage project can be handled by other means.[36] These alternative means are important insofar as they raise a substantial issue regarding the necessity of continuing the system of county drain boards in light of the duplication of functions now encountered between the county drain boards and, particularly, the water management districts.[37]

The North Dakota statutes define a drain as including any natural watercourse, opened or to be opened and improved, for

34. *Compare* N.D. CENT. CODE § 61-21-10 (1960) *with* N.D. CENT. CODE § 61-21-65 (Supp. 1969).

35. *See* N.D. CENT. CODE § 61-21-10 (1960). If it can be argued that the legislature intended that the entire county be considered as a single drainage district, such an intent is made highly improbable by N.D. CENT. CODE § 61-21-56 (Supp. 1969). Section 61-21-65 provides a procedure whereby one *or more* drainage districts within the county may be merged with a water management district organized under N.D. CENT. CODE ch. 61-16 (1960). The number of drainage districts within any county, therefore, should be equivalent to the number of drains established by the Board of Drain Commissioners. This conclusion is also sustained by comments made by Mr. Henry Shane, Chairman of the Grand Forks County Board of Drain Commissioners, to Bruce Bohlman in a personal interview conducted on June 7, 1968 (hereinafter referred to and cited as the Shane interview).

36. The most notable of the alternative means is contained in N.D. CENT. CODE ch. 61-16 (1960), dealing with the establishment and operation of a water management district. The role of water management districts in the drainage function will be discussed at a later point in this paper. Another alternative, albeit more difficult to obtain and broader in scope than drainage, is assistance from the Federal Government under the Watershed Protection and Flood Conservation Act, 68 Stat. 666 (1954), *as amended*, 16 U.S.C. §§ 1001-1009 (1964). This act will also be discussed at a later point.

37. The water management districts have all powers " . . . conferred by statutes upon a board of county drain commissioners. . . ." N.D. CENT. CODE § 61-16-11 (11) (Supp. 1969).

drainage purposes, and artificial drains of all kinds ". . . including dikes and appurtenant works. . . ."[38] Projects for draining slough and other low lands may be established under the police power of the State when such draining is ". . . conducive to the public health, convenience, or welfare."[39]

b. The Board of Drain Commissioners

Within each county, a board of three drain commissioners, appointed by the Board of County Commissioners,[40] is authorized to carry out drainage projects. The Board of Drain Commissioners (hereinafter referred to as the "Board") may be appointed by a majority vote of the Board of County Commissioners either on the commissioners' own motion or in response to the petition of an interested person.[41] Board members are appointed to staggered three year terms.[42]

To qualify for the Board, one must be a resident of the county[43] and cannot hold any other state or county office except that of a commissioner of a water management district.[44] As a protection against conflict of interests, a Board member is disqualified from acting as a Board member in those matters in which he has a personal or financial interest.[45] In the event of such disqualification, an alternate commissioner is appointed by the county commissioners to act, but only in those matters in which the disqualified member is precluded from acting.[46] The Board of County

---

38 .N.D. CENT. CODE § 61-21-01 (1) (1960).

39. N.D. CENT. CODE §§ 61-21-02, 61-21-10 (1960).

40. N.D. CENT. CODE § 61-21-03 (Supp. 1969). In the absence of a board of drain commissioners, the board of county commissioners would presumably fulfill the same function. The appointment of a board of drain commissioners is not mandatory.

In Walstad v. Dawson, 64 N.D. 333, 252 N.W. 64, 66-67 (1934) the court stated that a county drain board " . . . is a quasi corporation—a department of the county.... It is an agency of the state through which the state itself functions."

Moreover, the board is not capable of being sued in contract for the payment of drain obligations. Reed v. Heglie, 19 N.D. 801, 124 N.W. 1127 (1910). Nor can they be sued for failure to maintain a drain. 1942 OP. N.D. ATT'Y. GEN. 46. Mandamus would be the proper remedy to bring in such instances.

As of 1970 there were Drain Boards in Barnes, Cass, Eddy, Grand Forks, Sargent, Stutsman, and Traill Counties. Formerly existing Boards have been combined with Water Management Districts in Bottineau, LaMoure, Pembina, Richland and Walsh Counties. Records of the North Dakota State Water Commission.

41. N.D. CENT. CODE § 61-21-03 (Supp. 1969).

42. *Id.* The terms of the commissioners are staggered so that one member's term shall expire every year.

43. *Id.*

44. N.D. CENT. CODE § 61-21-04 (Supp. 1969). The statute would preclude a drain commissioner from holding the office of a county commissioner. But the statutory prohibition would not seem to prevent the county commissioners from fulfilling the functions of a drain board in the absence of a drain board in the county. N.D. CENT. CODE § 61-21-03 (1960) implies that the county commissioners are not obligated to appoint a drain board, but *may* do so upon their own motion or on the petition of any interested person. The legislature surely did not intend the statute to prevent the county commissioners from carrying out the same duties that they can delegate to others. Moreover, if there is no drain board, § 61-21-04 has nothing upon which to operate.

45. N.D. CENT. CODE § 61-21-04 (Supp. 1969). In State v. Fisk, 15 N.D. 219, 107 N.W. 191 (1906), the court considered the situation of a commissioner that owned land to be benefited by the drain.

46. N.D. CENT. CODE § 61-21-04 (Supp. 1969). Apparently, the statute also allows an

Commissioners may remove any or all Board members and must appoint successors to those members who have been removed or whose terms have expired.[47]

Once the Board has been appointed, the individual members must file with the county auditor, within ten days, an oath to faithfully perform their duties, and, concurrently, execute and file in the same office a bond in the amount of two thousand dollars.[48]

When all members have qualified for office, a chairman must be elected by the members of the Board. The chairman thus elected serves in such capacity for one year.[49] Business may then be transacted;[50] two members of the Board constitute a quorum for such purposes.[51] Thereafter,the Board must make an annual report to the county commissioners. The report must cover all drains, in whatever stage of construction, with a detailed accounting of all funds handled during the year.[52]

c. Establishment of a Drain.

1) *Petition.* The first step in establishing a drain is the submission of a written petition to the Board.[53] The petition must state the starting and ending points of the proposed drain and the general course it will take.[54] If the proposed drain is to be built within a city, the petition must be signed by a ". . . sufficient number of the property owners of such city . . . to satisfy the board that there is a public demand for such drain."[55] Specifically, "[t]he petition shall be signed by at least six property owners *or* a majority of the landowners within proposed district whose property will be drained by the proposed drain."[56] (Emphasis added)

---

alternative commissioner to act if a member, not disqualified by a conflict of interests, will nevertheless be unable to act because of his absence from an entire meeting.

47. N.D. CENT. CODE § 61-21-03 (Supp. 1969). There is no requirement in the statute that a Board member be removed only for cause.

48. N.D. CENT. CODE § 61-21-07 (1960).

49. *Id.*

50. In the case of Lee v. Thorenson, 65 N.W.2d 675, 679 (N.D. 1954), the North Dakota Supreme Court held that Board members were duly qualified even though the oath and bond had not been filed within ten days as required by the statute as long as no function of the office had yet been performed. The court stated that it was essential, however, that the oath and bond be properly filed before any business is transacted by the Board.

51. N.D. CENT. CODE § 61-21-07 (1960).

52. N.D. CENT. CODE § 61-21-06 (1960). A Board member is liable on his bond for any misapplication of funds handled by him as a Board member.

53. N.D. CENT. CODE § 61-21-10 (1960).

54. *Id.*

55. *Id.* In the case of Stoltze v. Sheridan, 28 N.D. 194, 148 N.W. 1 (1914), the court held that a petition signed by 10 city property owners out of a total of 223 property owners was insufficient to show a public demand for a drain.

56. N.D. CENT. CODE § 61-21-10 (1960). An ambiguity arises in the statute in that if the proposed drain is to be constructed in a city, property owners in sufficient numbers to show a public demand must sign the petition. What a "sufficient number" constitutes is not clear. Perhaps the next sentence of the statute, stating that the petition must be

2) *Bond.* It is the Board's duty to require the petitioners to file a bond with the petition.[57] If the petition is denied, the proceeds of the bond are used to pay the administrative expenses of the Board and the cost of surveys.[58]

3) *Inspection.* The Board has a personal duty to inspect the line of the proposed drain after receipt of the petition and, if it considers that further proceedings are justified, a resolution is so adopted and the services of a surveyor or engineer are engaged to perform the technical services needed.[59]

4) *Documents.* After adoption of the resolution authorizing further proceedings, the engineer or surveyor prepares the following documents:[60]

(a) profiles of the area;
(b) specifications of the proposed drain;
(c) cost estimates in sufficient detail to allow the Board to determine the probable share to be assessed against each landowner to be benefited by the proposed drain; and
(d) a map or plan of the lands (showing the regular subdivisions) to be drained.[61]

---

signed by at least six property owners or a majority of landowners within the proposed drainage district, is meant to imply that at least six property owners must sign if the drain is to be located in a city (obtaining the signature of a majority of the landowners might be a burdensome requirement) and, if the drain is to be built on agricultural land, a majority of the owners must petition (this would be a reasonable requirement in view of the relatively fewer number of owners involved.) The statute, however, does not make this distinction, and one can only surmise as to the legislature's intent.

As a practical matter, at least in Grand Forks County, the Board requires that the petition be signed by at least six property owners, regardless of the drain's proposed location. Shane interview, *supra* note 35. It is likely that in sparsely populated counties, a petition could be signed by less than six agricultural landowners and still represent a majority of the landowners in the proposed drainage district. In the case of State v. Morrison, 24 N.D. 568, 140 N.W. 707 (1913), the court held that if the drain affected more than one township, the petition must be signed by persons from each of the townships involved. Before the Board acquires jurisdiction to levy an assessment on a township, therefore, the petition must first be signed by representatives from each of the townships to be assessed.

57. N.D. CENT. CODE § 61-21-11 (1960).

58. *Id.* One Board requires that the bond be in the amount of $80.00 for each mile the proposed drain is to run. This amount has been found to adequately cover all expenses of the Board in surveying the route of the drain and in conducting the various hearings and meetings involved. Shane interview, *supra* note 35. It was learned at the interview, however, that the cost to the Board of surveying and other site investigation is negligible, since the surveying and other technical services of the U.S. Soil Conservation Service are available for this purpose and no charge for that agency's services is made under the provisions of 16 U.S.C. § 590(a) (1964). Whether the $80.00 per mile bond requirement is reasonable in view of Federal assistance is beyond the scope of this paper.

59. N.D. CENT. CODE § 61-21-12 (1960). The practice of the Grand Forks County Board is to use the services of the U. S. Soil Conservation Service for surveying, designing, and estimating the cost of the proposed drain. Shane interview, *supra* note 35. It appears that such services could also be obtained from the North Dakota State Water Commission. *See* N.D. CENT. CODE § 61-02-14(1) (Supp. 1969).

60. N.D. CENT. CODE § 61-21-12 (1960).

61. *Id.* If the Board determines (presumably through the advice of the engineer) that the original routing of the drain as contained in the petition is not the best location, the line of the drain may be changed by the Board. They may also extend the location of the outlet as originally set forth in the petition if the length of the line does not give

The above documents are then submitted to the Board in the form of a report.

5) *Hearing Set.* After receipt of the engineer's or surveyor's report, the Board must fix a date and place for a public hearing on the petition.[62] No later than ten days before the hearing, the Board must determine and file with the County Auditor a list containing the description of each parcel of land benefited by the proposed drain, the percentage assessment of the cost to be made against each parcel, and the approximate assessment in dollars as obtained by multiplying the total estimated cost of establishing the drain by the percentage assessment.[63]

6) *Notice.* Notice of the hearing must be published by the Board in the official county newspaper at least once no later than ten days before the hearing is to be held.[64] Moreover, the Board must conduct a search of the records in the Register of Deeds office to determine the name of the owner of each affected parcel of land, and mail such record owner a notice of the hearing.[65] An affidavit of mailing must be completed by the person mailing the notices and filed with the County Auditor.[66]

The notice of public hearing must contain the following information:[67]

(a) a notice of filing with the County Auditor of the list of affected parcels and proposed assessments;

(b) a copy of the petition;

(c) the time and place of the hearing;

(d) the beginning and ending points and the course of

---

enough fall to sufficiently drain the lands affected. These changes, if made, should be indicated on the engineer's or surveyor's map or plan, and such map or plan must then be filed in the County Auditor's office for public inspection.

If necessary, the drain may be routed along or across a public road or highway to the extent that no damage will be done to said road or highway. If it is necessary to run the drain across a road or highway, the State, county, or township agency responsible for maintenance of the road or highway must make and keep in repair any necessary culverts or bridges. N.D. CENT. CODE § 61-21-31 (1960).

The North Dakota Supreme Court has held that the failure of the surveyor to file his report with the County Auditor was not such an irregularity in the proceedings as to preclude establishment of the drain, without any accompanying proof of actual prejudice. Edwards v. Cass County, 23 N.D. 555, 137 N.W. 580 (1912).

62. N.D. CENT. CODE § 61-21-13 (Supp. 1969). The public hearing must be held in a place that is in the vicinity of the proposed drain and convenient for a majority of landowners affected by the proposed drain.

63. *Id.* It would, of course, be impossible to fix an exact figure at this time, since the Board thus far has only a cost estimate from the engineer or surveyor from which to work.

64. *Id.*

65. *Id.* The statute does not specify how far in advance such individual notices must be mailed. Besides being sent to owners whose lands may be assessed, notices must also be mailed to those owners whose land may be subject to condemnation for right-of-way purposes.

66. *Id.*

67. *Id.*

the drain as finally determined by the engineer and the Board;[68] and

(e) the time and place for filing votes for and against the drain.[69]

7) *The Hearing.* When the hearing time arrives, the Board must have a prepared list of affected landowners[70] for the purpose of limiting voting rights to those listed.[71] Any affected landowner may appear at the hearing, register his votes, express his opinion regarding the proposed drain, and offer any evidence relative thereto.[72]

The Board must inform those present of the estimated total cost of the drain, and specify the share that each landowner will be assessed or the amount of his land that will be condemned, as the case may be.[73] Moreover, the Board must set a time, not less than ten days after the hearing, to file any votes for or against the drain that were not filed with the Board at the hearing.[74]

8) *Voting.* In an attempt to equalize liability for the cost of the proposed drain and the right to object to its construction, a weighted vote is used. A landowner is permitted to register one vote for every dollar of the proposed assessment against him, or one vote for each dollar of the assessed valuation of his land that is to be condemned for right-of-way purposes.[75]

---

68. *See* Froemke v. Parker, 41 N.D. 408, 171 N.W. 284 (1919).

69. The board may not allow less than 10 days from the date of hearing for votes to be filed, N.D. CENT. CODE § 61-21-13 (Supp. 1969). For convenience, the Board must include a form of ballot to be used for registering votes.

70. An "affected landowner" is defined as one whose land is subject to assessment or condemnation. N.D. CENT. CODE § 61-21-01(5) (Supp. 1969).

71. N.D. CENT. CODE § 61-21-14 (Supp. 1969). Moreover, the Board must make a record of affected landowners present at the hearing.

72. N.D. CENT. CODE § 61-21-13 (Supp. 1969).

73. N.D. CENT. CODE § 61-21-14 (Supp. 1969).

74. *Id.*

75. N.D. CENT. CODE § 61-21-16 (Supp. 1969). The weighted voting method has not been used until recently. Under N.D. REV. CODE of 1943 § 61-2115 (1944), for example, the statute provided:

> If a majority of the landowners whose land is subject to assessment for the construction of the proposed drain petition the board to have further proceedings discontinued, the board, by resolution, shall order further proceedings discontinued.

In 1945, the North Dakota Attorney General rendered an opinion which stated that the phrase, "majority of landowners," could not be construed to mean majority of acres benefited rather than majority of persons benefited. The Attorney General recognized that irrigation districts conducted voting on the basis of acres, rather than persons, in order to obtain a fair relation of voting rights to liability [*See* N.D. REV. CODE of 1943 § 61-0503 (1944)], but that the legislature had apparently not provided similar voting rights for drainage districts. The Attorney General went on to state that "[i]t may be that an amendment of section 61-2115 would be advisable. That, however, is a matter which the legislature must determine." 1945 OP. N.D. ATT'Y GEN. 74, 75.

The statute was amended by N.D. Sess. Laws, ch. 349 (1949) to provide for 1 vote for every landowner plus 1 vote for every $100.00 in assessment. Later amendments (N.D. Sess. Laws ch. 383, § 1 (1961); N.D. Sess. Laws ch. 448, § 5 (1965)), further increased voting rights to their present form in N.D. CENT. CODE § 61-21-16 (Supp. 1969).

The North Dakota Attorney General has also advised that, under a land sale contract, the purchaser, rather than the seller, is entitled to vote as owner. The Attorney General recommended, however, that the notice of hearing on the petition for establishment of the drain be mailed to the seller, as legal owner, as well as to the buyer, as equitable owner. 1952 OP. N.D. ATT'Y GEN. 55, 56.

The ballot sent with the notice of hearing is not an exclusive means of registering votes.[76] Also acceptable is a telegram or any other form of writing sufficient to indicate the voter's intent to approve or disapprove establishment of the drain.[77] After the date set by the Board for filing of votes, however, no more votes will be counted and no voter may withdraw his vote after such date.[78] If a voter wishes to withdraw his vote before the deadline, he may do so but only in writing.[79]

9) *Decision.* After the date set for recording votes has passed, the Board must immediately count the votes and, if fifty percent or more of the votes so cast are against establishing the drain, a resolution must be adopted by the Board discontinuing the proceedings and denying the petition.[80] If more than fifty percent of the votes filed indicate approval, and the Board determines that the project will not cost more than the anticipated benefits of the drain, the Board must prepare an order establishing the drain.[81] The Board must then publish a notice of the order establishing or denying the drain in a newspaper of general circulation in the county.[82] The notice must contain a copy of the order and a statement to the effect that the affected landowners' rights to appeal the order to the district court will expire thirty days after the date of publication in the newspaper.[83]

10) *Appeal.* Even if an affected landowner makes a timely appeal from the order of the Board, the jurisdiction of the district court may well be limited to determining the following questions:[84]

---

76. *See* N.D. CENT. CODE § 61-21-13 (Supp. 1969); N.D. CENT. CODE § 61-21-15 (Supp. 1969).

77. N.D. CENT. CODE § 61-21-14 (Supp. 1969). An agent may cast the votes, if he has a written power of attorney. N.D. CENT. CODE § 61-21-16 (Supp. 1969).

78. N.D. CENT. CODE § 61-21-14 (Supp. 1969).

79. *Id.*

80. *Id.;* N.D. CENT. CODE § 61-21-15 (Supp. 1969). If the petition is denied, the petitioners are liable on their bond, or the Board may proceed against the petitioners jointly and severally for the costs and expenses of the proceedings. N.D. CENT. CODE § 61-21-15 (Supp. 1969).

81. N.D. CENT. CODE § 61-21-15 (Supp. 1969). The order must accurately describe the drain and indicate a name by which it can be recorded and indexed.

82. N.D. CENT. CODE § 61-21-17 (1960).

83. *Id*; N.D. CENT. CODE § 61-21-18 (Supp. 1969).

84. N.D. CENT. CODE § 61-21-18 (Supp. 1969). The power of the courts to review the Board's actions has always been quite restricted. The early case of Erickson v. Cass County, 11 N.D. 494, 92 N.W. 841 (1902), held that the courts had no power to review the questions of whether specific lands were benefited by the drain or whether assessable lands were omitted from the assessment.

In State v. Fisk, 15 N.D. 219, 107 N.W. 191 (1906), the court stated that the Board, by assessing benefits, functioned in a judicial capacity but that its decision was final in the absence of fraud, if the assessment was made in strict accordance with the statute. To the same effect, *see* Alstad v. Sim, 15 N.D. 629, 109 N.W. 66 (1906), and Bergen Township v. Nelson County, 33 N.D. 247, 156 N.W. 559 (1915). In Barnes v. Cass County, 59 N.D. 135, 228 N.W. 839 (1929), the court held that the fraud necessary to upset the making of an assessment is fraud *ab initio* or fraud in the apportionment of costs and the assessment of benefits. *But see* Chester v. Einarson, 76 N.D. 205, 34 N.W.2d 418 (1948). In that case the court held that the statute, N.D. REV. CODE of 1943 § 61-6117 (1944) [which is very similar to N.D. CENT. CODE § 61-21-18 (Supp. 1969)], stated only that the court, on appeal, *may* try the questions as to whether there was suf-

(1) whether there was sufficient cause for making the original petition for establishing the drain;

(2) whether the drain will cost more than the benefits to be obtained; and

(3) whether the majority of votes filed according to the weighted system were against establishing the drain.

If the court determines that there was not sufficient cause for making the original petition, or that the cost of the proposed drain will exceed the benefits, or that more than fifty percent of the votes filed were against establishing the drain, the petition must be denied and the proceedings discontinued.[85]

11) *Assessment.* After the Board makes an order establishing the drain it must proceed with construction, providing such order is not disturbed on an appeal to the district court. As a preliminary, the Board must determine what percentage of the cost of acquiring rights-of-way[86] and of constructing and maintaining the drain will be assessed against each benefited lot, piece, parcel, or interest in land.[87] If certain land is already assessed in an existing drainage district, such land cannot be assessed in the new drainage district unless it can be shown that the land will receive a specific benefit from the new district alone.[88] In assessing the percentage of cost, the Board may consider all relevant

---

ficient cause for making the petition for the establishment of the drain, and whether one proposed drain would cost more than the benefits to be derived therefrom. That statutory language, according to the court, did not preclude review of any action taken by the Board leading to the order establishing the drain.

It is the authors' opinion that by reading N.D. CENT. CODE §§ 61-21-15 and 61-21-18 (Supp. 1969) together, the *Einarson* decision has questionable validity. Although § 61-21-18 states that the court may try the questions as to whether there was sufficient cause for the petition, whether the drain will cost more than the benefits to be derived, and whether the majority objected to the drain, § 61-21-15 states that the petition will be denied only if one of those questions are not determined in favor of establishing the drain. It would therefore seem reasonable that the legislature intended that the district court's review be limited to the 3 questions listed in the statute, notwithstanding the use of the permissive term, "may." *Cf.* Braaten v. Brenna, 63 N.W.2d 302 (N.D. 1954).

85. N.D. CENT. CODE § 61-21-15 (Supp. 1969). *See,* however, N.D. CENT. CODE § 61-21-41 (1960) giving the Board authority to establish a new drain in all cases where the drain has been enjoined, vacated, set aside, declared void, or voluntarily abandoned by the Board.

86. N.D. CENT. CODE § 61-21-19 (Supp. 1969). *See* N.D. CENT. CODE ch. 32-15 (1960) for eminent domain provisions. If a landowner will not convey land needed for a right of way, the Board may acquire the land by eminent domain proceedings. The Board may issue warrants to pay the cost of acquiring such land under eminent domain proceedings, negotiate the warrants at no less than par value, and deposit the proceeds into the court for the owner's benefit. The warrants must be paid out of a fund specifically established for the particular drain. Any surplus of funds remaining from the proceeds of sale of the warrants, after paying the owner the assessed damages under eminent domain proceedings, must be credited to the fund specifically established for the drain. N.D. CENT. CODE § 61-21-19 (Supp. 1969). The award under eminent domain proceedings cannot be offset by the benefits assessed against the land. Heskin v. Herbrandson, 21 N.D. 232, 130 N.W. 836 (1911).

87. N.D. CENT. CODE § 61-21-20 (1960).

88. *Id.*

information regarding the extent of benefits each unit of land will receive.[89]

12) *Assessment Hearing* The percentage assessments having been made, the Board must hold a hearing to allow owners of assessed land to contest the assessments.[90] It must give ten days notice in advance of the hearing by publishing a notice in a county newspaper of general circulation and by mailing a notice to each affected landowner as shown by the records contained in the Register of Deed's office.[91]

The Board must receive all complaints regarding the percentage assessments and either confirm or correct the percentage as required.[92] If affected landowners having a majority of the total number of votes, based on the weighted method, are of the opinion that the percentage assessments were made unfairly or that the drain is improperly located or designed, they have the right to appeal to the State Engineer for a review of the percentage assessments and the location and design of the drain.[93]

13) *Assessment Appeal.* Upon perfecting such an appeal within ten days from the date of the hearing, the State Engineer, after making due investigation, may correct any percentage assessment that he deems inequitable or may change the location or design of the drain if improperly located or designed by the Board. The State Engineer may also entertain an appeal from any landowner who claims that his land will not benefit from the drain. The State Engineer then is required only to determine whether

---

89. *Id.* The statute lists the following factors to consider:
   a) present drainage facilities under any drainage district;
   b) potential utility of the proposed drain to the land;
   c) whether any lands will be benefited or harmed by any change in the existing flow and course of drainage water by reason of the construction of the drain; and
   d) any other matter pertinent to the question of benefits.

A railroad was assessed for benefits received under a drain project in the case of Northern Pac. Ry. v. Richland County, 28 N.D. 172, 148 N.W. 545 (1914). The court stated that:

> If they are in fact of any benefit to the railroad, and this is conceded by the record in the case at bar (in other words, if they tend to make the track and roadbed more secure or in extreme cases to prevent the loss of health to passengers and employees incident to miasmal swamps), they benefit the railroad as a whole and the state as a whole. We are not inclined to hold with the appellants that the only measure of benefits is an increased selling price. . . .
>
> *Id.* at 547.

90. N.D. CENT. CODE § 61-21-21 (1960).
91. *Id.*
92. N.D. CENT. CODE § 61-21-22 (Supp. 1969).
93. *Id.* It should be emphasized that the statute in this instance requires a majority of all of the votes which could be cast before an appeal may be taken. This should be compared with the provisions of N.D. CENT. CODE § 61-21-14, 61-21-15 (Supp. 1969), which state that only a majority of the votes *filed* is required to defeat or approve a petition for the establishment of a drain. It is possible that the legislature intended to restrict the review procedures after the drainage district has become relatively well established, and to discourage frivolous appeals by only a small number of affected landowners, thus avoiding needless administrative expenses.

or not the landowner will, in fact, receive any benefit. The decision of the State Engineer on all of these matters is final.[94]

14) *Assessments Recorded.* After the making of any changes in the percentage assessments at the hearing or on the appeal to the State Engineer, the Board is required to record such assessments in the permanent records of the drain and in the County Auditor's book of drain assessments.[95] The Board must also prepare a finding that the benefits to all of the land involved will exceed the total costs of the project.[96]

15) *Contract Letting.* The Board, after recording the assessments, can proceed with the letting of a contract for the construction of the drain. At least ten days notice of the time and place of the awarding of the contract is required before the award is made. The notice must be published at least once in a newspaper of general circulation in the county.[97]

The Board must award the contract to the lowest and "best" bidder.[98] If there are equal bids, a bidding landowner assessed for the construction of the drain is to be preferred over another bidder who is not so assessed.[99] This assumes, however, that the bidders are equal not only in price but also in capability.[100]

16) *Monetary Assessment.* With the awarding of the contract, the Board finalizes what the project will cost. It can then apply the previously determined percentage assessments to the project cost to determine the monetary assessment. The Board must make these arithmetical calculations and file a list of the assess-

---

94. N.D. CENT. CODE § 61-21-22 (Supp. 1969).

95. N.D. CENT. CODE § 61-21-23 (1960). Drain assessments must include all labor and materials expended on the drain plus all anticipated expenses, interest charges, and a reasonable charge for establishment of a reserve fund from which tax delinquent property may be purchased by the Board. N.D. CENT. CODE § 61-21-52 (1960). The power of the Board to make special assessments was upheld in Soliah v. Cormack, 17 N.D. 393, 117 N.W. 125 (1908), *aff'd sub nom.* Soliah v. Heskin, 222 U.S. 522 (1912). The power was challenged on the ground that the levy by the Board violated §§ 13 and 25 of the State constitution and the Fourteenth Amendment to the United States Constitution. The North Dakota Supreme Court held that § 25 of the State constituion prohibiting delegations of legislative power was not violated. The court conceded that a general tax can only be levied by an elected official, but that a special assessment was not strictly a tax but an adjunct of the State's police power in ordering local improvement. The court further held that § 13 of the State constitution regarding the prohibition against taking of property without due process of law and the Fourteenth Amendment to the United States Constitution were not violated, as due process of law was provided for by the drainage statute.

96. N.D. CENT. CODE § 61-21-22 (Supp. 1969).

97. N.D. CENT. CODE § 61-21-24 (Supp. 1969).

98. N.D. CENT. CODE § 61-21-25 (1960). The statute also places the duty on the Board of reserving the right to reject any and all bids. The statute further allows the Board to postpone the awarding of contracts. It appears that the only positive requirement contained in the statute relates to the duty of the Board to award a contract only to the lowest and "best" bidder if, indeed, a contract is awarded at all.

99. *Id.*

100. If the contractor fails to complete the contract within the prescribed time, including any extensions, the Board may re-award the contract to another contractor for completion of the project and charge any excess costs to the defaulting contractor. N.D. CENT. CODE § 61-21-26 (1960).

ments in the County Auditor's office.[101] Thereafter, the County Treasurer must collect the drain taxes and credit the amounts collected to the particular drain fund involved.[102]

d. Financing the Drainage District.

1) *Specific Fund.* The Board must establish a specific account of fund for each drainage district in the county.[103] The payment of all proper costs incurred by the drainage district must be made from that fund and only upon the order of the Board.[104]

2) *Warrants.* To effect payment, the Board issues warrants[105] against the fund. The warrants must be signed by the chairman and one other member of the Board.[106] Warrants may be issued at any time after the order establishing the drain has become final and after costs have been incurred.[107] When issued as a demand instrument to the payee (for example, the contractor who constructed the drain) the warrant is much like a check or draft on an ordinary bank account. The warrant must state on its face the purpose for which it is issued and the applicable drain fund to be charged.[108]

The payee of a demand warrant can receive payment by presenting the warrant to the County Treasurer, who makes payment from the fund stated on the warrant. If the Treasurer finds that there are not sufficient monies in the fund, he must register the unpaid warrant. Thereafter, it draws interest at the rate of five

---

101. N.D. CENT. CODE § 61-21-27 (1960). The total cost of establishing the drain, on which the assessments are based, includes the cost of acquiring rights of way, the contract price for the actual construction of the drain, and costs of building any bridges or culverts as are necessary in the Board's judgment to provide ready passage between pieces of a landowner's property that are separated by the drain. Moreover, a certain share of the cost may be borne by the drainage district if a bridge or culvert is built on a public highway. N.D. CENT. CODE § 61-21-32 (1960).

N.D. CENT. CODE § 61-21-52 (1960) states that:

> Drain costs and drain assessments shall include all expenditures for work and materials for the drain, including anticipated expenses, interest charges and a reasonable charge for the establishment of a reserve fund with which the board may from time to time purchase tax delinquent property affected by the drain.

In Erickson v. Cass County, 11 N.D. 494, 92 N.W. 841 (1902), the court listed the following miscellaneous cost items which were properly included: bridges, attorneys' fees, interest, incidental expenses, publishing of notices, clerks' fees, office rent, furniture, printing, books, and supplies.

102. N.D. CENT. CODE § 61-21-28 (1960).
103. N.D. CENT. CODE § 61-21-06 (1960).
104. N.D. CENT. CODE § 61-21-29 (1960).
105. A warrant is defined in N.D. CENT. CODE § 21-01-01(2) (1960) as follows:

> The term warrant . . . shall mean an order drawn by the proper taxing district officials on the treasurer of said taxing district, the warrant or order to be so drawn that when signed by the treasurer in an appropriate place it becomes a check on the taxing district depository. No warrant upon the treasurer shall be delivered or mailed to the payee or his agent or representative until such warrant has been signed by the treasurer and entered on the treasurer's books as a check drawn on a bank depository.

106. N.D. CENT. CODE §§ 61-21-19, 61-21-50 (1960).
107. N.D. CENT. CODE § 61-21-50 (1960).
108 *Id.*

percent per annum until paid.[109] Probably few demand warrants are paid during the early life of a drainage district, since assessment collections would presumably be negligible then. For this very reason, the Board may issue warrants with future maturities.[110] In effect, the Board can issue the equivalent of a postdated check or a promissory note in anticipation of future assessment collections. A warrant so issued bears interest at a rate not to exceed five percent per annum.[111] Interest coupons, payable annually or semi-annually, may be attached to the warrants; the date on which the principal is payable must be stated on the face of the warrant, along with a clear designation of the drain fund to be charged.[112]

If the Board desires, it may also use the deferred payment warrants as a means of obtaining funds. The warrants may be sold at no less than their par value, and the proceeds thus received are placed in the proper drain fund.[113] The interest rate of five percent per annum might or might not be attractive; no information is available as to the extent of drain warrant purchases by private investors. The Board of County Commissioners is authorized to purchase drain warrants with the proviso that the warrants be funded by a bond issue within six months from the date of purchase.[114]

3) *Bonds.* Within one hundred eighty days after filing the drain assessments, the Board must determine the number and amount of warrants that are unpaid and initiate proceedings to have such unpaid warrants funded by a bond issue.[115] The Board may also issue bonds to finance drain obligations that are not covered by warrants, but only after a firm contract for the construction of the drain has been awarded or after the work has been completed.[116]

The first step in the proceedings to initiate a bond issue is the Board's adoption of a preliminary resolution.[117] The resolution

---

109. *Id.*
110. *Id.*
111. *Id.*
112. *Id.*
113. *Id.*
114. N.D. CENT. CODE § 61-21-29 (1960). The purpose of the provision allowing the Board of County Commissioners to buy drainage warrants is stated in the comment to § 29 of the N.D. Sess. Laws ch. 347, § 61-21-29 (1955) drafted by the North Dakota Legislative Research Committee, as contained in the *Report on Drainage Laws to the Thirty-Fourth Legislative Assembly*:

> The purpose of this authority in the hands of the county commissioners is to provide the drainage board with funds for current expenses prior to the time tax levies begin coming in and prior to the time of the sale of their bonds. It can be used only upon resolution of the board of county commissioners and presumably would be used only when the county had surplus funds to be invested in this type of investment for a period of up to six months.

115. N.D. CENT. CODE § 61-21-50 (1960).
116. N.D. CENT. CODE § 61-21-53 (1960).
117. *Id.* The resolution must include:
   a) The maximum amount of drain bonds proposed to be issued;
   b) the maximum interest rate;

must be published once a week for three successive weeks in a legal newspaper of general circulation in the county.[118] Moreover, the published resolution must include a statement to the effect that after thirty days from the date of first printing, no action can be instituted and no defense or counterclaim will be sanctioned by the State courts attacking the validity of warrants to be funded by the bond issue or the validity of the assessments made in connection with such warrants. The Board must also include in the published notice a recitation that a complete list of the warrants to be funded by the bond issue has been filed in the office of the County Auditor.[120]

Not less than thirty days from the date of the first publication of the notice, and assuming that no action is instituted attacking the validity of the warrants to be funded or the assessments made in connection with said warrants, the Board may proceed to issue the bonds.[121] If the bonds are issued to fund the warrants, the bonds may be exchanged for the warrants with the proviso that the "average annual net rate of interest" on the exchanged bonds, with a maximum interest rate of six percent per annum, will not exceed that which could have been obtained from the warrants, with a maximum interest rate of five percent per annum.[122]

The Board may purchase the unpaid warrants with the proceeds of the bonds. The warrants thus purchased are not cancelled but must be retained by the Board as assets of the drainage district.[123] Thereafter, the Board must make regular payments on the warrants from the applicable drain fund. Payments thus made on the warrants are credited to the fund from which the bonds are payable, and are applied to service the bonds and pay interest as it becomes due.[124]

While drainage district bonds are eligible investments for State trust funds,[125] no information was obtained for this report regarding the amounts, if any, of such bonds held in the portfolios of State trust funds. To retire the bonds, the Board must establish a sinking fund for each drainage project under which bonds have been issued.[126]

---

c) designation of the calendar years in which such bonds will mature;
d) the complete name of the drain for which such bonds are to be issued; and
e) the purpose or purposes for which the proceeds of the bonds will be used, including the total amount of drain warrants to be bought with such proceeds.

118. N.D. CENT. CODE § 61-21-53 (1960).
119. *Id.*
120. *Id.*
121. *Id.*
122. *Id.*
123. *Id.*
124. *Id.*
125. *Id.*
126. N.D. CENT. CODE § 61-21-54 (1960). The fund consists of:
a) all drain assessments made for the bonds;
b) all unpaid warrants funded by the bond issue and held by the Board as assets of the drainage district;

4) *Annual Report.* In June of each year, the Board must make a statement or report of the financial condition of each drainage district, and file the same with the County Auditor before July 1st.[127]

5) *Insufficient Funds.* If the Board discovers that any district does not have funds or assessment receivables equal to all of its obligations,[128] the Board must be reasonably assured that the transfer of money from the general fund or from the general property tax will be sufficient to meet the obligations of the district. To this end, the transfer or tax can be so computed that, along with cash on hand and expected revenues, funds will be available to pay one hundred ten percent of the obligations.[129] This would be helpful if the Board is unable to collect the full amount of drain assessments.

At the end of the thirteen month period, the Board must return any surplus funds to the county general fund, up to the amount of the transfer or tax imposed. Certificates of indebtedness may be issued by the Board to evidence the transfer of funds or tax receipts to the drainage district.[130]

6) *Collection of Assessments.* Whether warrants or bonds or both are used to effect payment of drainage obligations, the primary problem facing the Board is the realization of the drain assessments with which to pay the warrants and bonds. The State law provides that assessments may be paid by the owner of the affected land at any time after such assessments have been filed with the County Auditor.[131] The assessments generally draw interest from the date of filing until paid, at the same rate payable on the warrants and/or bonds issued in anticipation of collection of the assessments.[132]

The assessments constitute a special tax on the land, and confer a lien thereon until paid.[133] The lien imposed takes precedence over all other liens except general tax liens, which are equal in priority.[134] The statute provides that any subsequent purchaser

---

c) all accrued interest received on sale of bonds;
d) all proceeds of bonds sold but not actually expended for the drain;
e) the reserve fund established by the original assessment, for purchase of tax delinquent lands affected by the drain [*See* N.D. CENT. CODE § 61-21-52 (1960)];
f) all general tax levies for payment of obligations of the drain; and
g) any other monies appropriated to the sinking fund.

127. N.D. CENT. CODE § 61-21-55 (1960).
128. *Id.*
129. *Id.*
130. *Id.* The statute apparently does not require that all of the funds received from the county be repaid, but rather is concerned only with any funds remaining after the 13 month period.
131. N.D. CENT. CODE § 61-21-51 (1960).
132. *Id.* If the resolution of the Board authorizing issuance of bonds is published before the assessments are filed, interest shall accrue from the date of first publication.
133. N.D. CENT. CODE § 61-21-52 (1960).
134. *Id.*

of the encumbered land is given notice of the lien by the terms of the statute.[135]

If the owner fails to pay the assessment, or any further assessment if the original assessment was not sufficient to pay the costs of the drain,[136] the land can be sold to satisfy the assessment.[137]

If the Board determines that the individual assessments are so large that payment in a lump sum would be unduly burdensome, the assessments can be divided into more reasonable equal annual payments extending over not more than fifteen years.[138]

7) *Reassessment.* Any time the Board discovers that any tract of land not originally assessed is being benefited by the drain, proceedings must be commenced, after due notice and with subsequent appeal rights to the owners of the affected lands, to reassess all of the land involved.[139] The lands not originally assessed but found to be benefited must bear their proportionate share of the construction cost yet unpaid as well as future maintenance expenses, according to the benefits received.[140]

Reassessments to reflect changes in benefits received by affected landowners may be made by the Board at any time after the drain has been in existence for one year, and they must hear and consider a request for reassessment upon the petition of any affected landowner. After notice of the hearings on such reassessment has been published by newspaper and by mailing copies to affected landowners, the Board must proceed to reassess benefits in the same manner as the original assessment was made. The Board need not conduct reassessment proceedings more often than once in a ten year period, and is precluded from reducing assessments when there are insufficient funds available to pay the obligations of the drainage district.[142]

---

135. *Id.*

136. N.D. CENT. CODE § 61-21-30 (1960). The Board, however, would have to determine in the first instance that the ultimate cost of the drain would not exceed the benefits.

137. N.D. CENT. CODE § 61-21-52 (1960). If lands are sold to enforce the payment of delinquent drain assessments, the statute requires that the provisions contained in ch. 57-24 of the Code, concerning sale of land for delinquent taxes, be followed. If the property is sold for delinquent drain assessments alone, and no bids are received, the County Auditor must issue a "certificate of sale for taxes" to the Board (*see* N.D. CENT. CODE § 57-24-20 (1960) for the form of the certificate.).

If the property to be sold is encumbered by delinquent general taxes as well as drain assessments, § 61-21-52 requires that the property be advertised and sold for the total amount of both the taxes and drain assessments. When the sale is made, the County Auditor issues only one certificate of sale for taxes to the purchaser. If there are no bids received, the County Auditor must sell the property to the county and issue the certificate of sale for taxes in the county's name. The Board may purchase any unassigned certificates held by the county, and "[i]f no redemption is made, the affected property shall pass absolutely to the board on expiration and termination of the time for redemption and may thereafter be sold by the board at public sale."

138. N.D. CENT. CODE § 61-21-52 (1960).

139. N.D. CENT. CODE § 61-21-62 (Supp. 1969).

140. *Id.*

141. N.D. CENT. CODE § 61-21-44 (1960).

142. *Id.*

8) *Landowner Suits.* If an affected landowner brings a suit to enjoin the levying of an assessment or its collection, the courts may not grant the injunction or declare the assessment void because of:[143]

(1) errors by the Board in locating and establishing the drain;

(2) errors or informalities in the record of the proceedings establishing the drain; or

(3) a defect in the conveyance of lands used for right-of-way purposes or in the condemnation proceedings followed to acquire such lands.

Upon application of either party to the action, the court must appoint a person or persons to examine the lands or make a survey, or both. At a final hearing, after submission of the examiner's or surveyor's report, the court, using its equitable powers, can make an order confirming the assessment or denying any part of it, and order restitution of an invalid assessment paid under protest.[144]

e. Maintenance of the Drain

The Board, after having established the drain, has continuing responsibilities that are extremely important to the successful management of the drainage district. The most important of these post-construction responsibilities is the duty to keep the drain open and in repair.[145] If fifty-one percent of the votes of all affected landowners, as determined by the weighted method, are registered

143. N.D. CENT. CODE § 61-21-40 (1960). The right of an affected landowner to bring suit would seem to be limited by the provisions of N.D. CENT. CODE § 61-21-22 (Supp. 1969); N.D. CENT. CODE § 61-21-53 (1960).

In Alstad v. Sim, 15 N.D. 629, 109 N.W. 66, 69 (1906), the court stated that:

> A court of equity will not extend its extraordinary remedy of injunction to prevent the collection of assessments for benefits imposed to pay the cost of constructing drains, when the parties seeking such relief have been actively or impliedly consenting parties to its construction and to the proceedings which led to the assessments, whether such assessments are legally valid or not [the court quoting from Erickson v. Cass County, 11 N.D. 494, 92 N.W. 841 (1902)].

The Court thus held that laches prevented the plaintiffs from succeeding since they had done nothing until the work had been accomplished on the drain. There were numerous irregularities in the proceedings establishing the drain and, had the plaintiff brought a more timely action, the court might have granted the injunction against collection of the assessment since the cumulative effect of the irregularities appeared quite serious.

It is interesting to note that N.D. CENT. CODE § 40-26-07 (1968), dealing with special assessments made by municipalities for improvements, provides for a 6-month period after the assessment has been approved, during which time any actions must be brought against the assessment or be barred. The drainage law has no similar statute of limitation, but, as is indicated in Alstad v. Sim, *supra,* the courts effectively use the equitable doctrine of laches to accomplish the same result.

144. N.D. CENT. CODE § 61-21-40 (1960).

145. N.D. CENT. CODE § 61-21-42 (1960).

on a petition to clean or repair the drain, the Board must comply with the petition to the extent that funds are available.[146]

The Board must also notify landowners and their tenants to remove obstructions to the drain caused by the negligence of the landowner or his tenant.[147] The notice must inform the alleged negligent party of (1) the exact nature of the obstruction, (2) the Board's opinion as to causation, (3) a date not sooner than thirty days from the date of the notice, by which time the obstruction must be removed and after which the Board will take unilateral action to remove the obstruction and assess the cost against the land involved, and (4) the right to demand a hearing on the matter within fifteen days from the date the notice was mailed.[148] If the landowner demands a hearing, the Board must set a hearing date within fifteen days from the date the demand is received. If the landowner wishes, he may appeal the Board's action to the district court or he may appeal directly to the district court without demanding a hearing before the Board.[149]

On normal maintenance functions, if the total value of the repairs does not exceed two thousand dollars per annum, the Board can have the work performed on a day work basis or can award a contract without advertising; otherwise, it must follow the contracting procedures required for drain construction.[150]

f. Financing Maintenance of the Drain

To finance maintenance, the Board must assess the affected lands for the cost involved in the same proportion that the original or any subsequent reassessments were levied for construction of the drain.[151]

The maximum maintenance levy for any year is fifty cents per acre for agricultural land.[152] If funds are needed for maintenance, the land receiving the most benefits when the drain was established can be assessed the full fifty cents per acre; all other agricultural lands in the district are assessed in the proportion that their original assessments bear to the original assessment of the land bearing

146. *Id.*
147. N.D. CENT. CODE § 61-21-43.1 (Supp. 1969). If an emergency exists, the Board may immediately apply for an injunction prohibiting the landowner from maintaining the obstruction.
148. *Id.*
149. *Id.* The appeal is governed by N.D. CENT. CODE §§ 61-16-36 through 61-16-39 (1960) dealing with conservation and flood control districts.
150. N.D. CENT. CODE § 61-21-45 (Supp. 1969).
151. N.D. CENT. CODE § 61-21-43 (1960). If no original assessment was made, the Board must proceed to establish the assessments, using the same procedure as when determining assessments for the establishment of a drain.
If the drainage fund has funds left over from the construction of the drain over and above the amount required to retire all outstanding obligations incurred in the construction phase, such funds may be used for maintenance and no special levy is required. 1947 OP. N.D. ATT'Y GEN. 86.
152. N.D. CENT. CODE § 61-21-46 (Supp. 1969).

the full fifty cents per acre.[153] Nonagricultural property is assessed a yearly sum in a ratio that the original assessment of such land bears to the assessment made on agricultural land drawing the maximum maintenance levy.[154]

If the maintenance work is of such magnitude that the maximum levy of fifty cents per acre will not be sufficient to pay the costs thereof, the Board may accumulate a fund not to exceed the amount that would be obtained by levying the maximum amount for a two year period.[155] If the costs of maintenance will exceed the maximum levy for a two year period, the Board must obtain approval by majority vote, under the weighted method, of the landowners before any work can be undertaken.[156]

g. Lateral Drains

In addition to the post-construction duty of maintaining the drain, the Board has another function that is important to the development of the drainage district—the establishment of lateral drains.[157]

One or more landowners may petition the Board for construction of a lateral drain, at which time they must also submit a bond for the payment of all construction costs.[158]If improvements in

---

153. *Id.* Reading N.D. CENT. CODE §§ 61-21-43 (1960) and 61-21-46 (Supp. 1969) together, the assessment computation can be stated in the following example taken from 1947 OP. N.D. ATT'Y GEN. 85, 86 interpreting similar provisions:

> . . . Assuming that the amount apportioned against a tract of land described as the northwest quarter of section 1, township ——, within the drainage district, originally was $320.00, or $2.00 per acre, and assuming that this amount was the maximum sum apportioned to any quarter within the district; when such drain is cleaned or repaired, said quarter would be assessed at fifty cents per acre or $80.00, if the maximum amount of fifty cents is required. In other words, the maximum assessment permitted under Chapter 329 against section 1 for cleaning and repairing such drain would be 25 percent of the original cost.
>
> Now, regardless of what the amounts apportioned to other lands may be, applying 25 percent to the benefits originally apportioned to such lands will give the amount which should be apportioned thereto for cleaning and repairing the drain, provided the maximum amount of fifty cents per acre is levied. Thus, if $275.00 was originally apportioned to the said northeast quarter of section 1, the amount apportioned under the fifty cents per acre levy would be 25 percent of $275.00, or $68.75; or if the amount originally apportioned to the southwest quarter of section 1 was $200.00, the amount apportioned under the fifty cents per acre levy would be $50.00. If the maximum levy assessed by the county board is, for example, 25 cents per acre, then the amount apportioned to the said northwest quarter of section 1 in the illustration used would be $40.00, or 12.5 percent. By applying 12.5 percent to each assessment originally apportioned, the total assessment apportioned to each quarter section would be readily ascertained.

154. N.D. CENT. CODE § 61-21-46 (Supp. 1969). The example on agricultural lands in note 153, *supra,* would apply to illustrate the determination of assessments on nonagricultural lands.

155. N.D. CENT. CODE § 61-21-46 (Supp. 1969).

156. *Id.*

157. N.D. CENT. CODE § 61-21-39 (Supp. 1969). A lateral drain is defined as " . . . a drain constructed after the establishment of the original drain or drainage system and which flows into such original drain or drainage systems from outside the limits of the original drain. . . ." N.D. CENT. CODE § 61-21-01 (4) (Supp. 1969). The Board's determination as to whether the drain is a lateral or new drain is conclusive.

158. N.D. CENT. CODE § 61-21-39 (Supp. 1969). The statute requires that the same procedures be used as when establishing an original drain. This apparently means that if

the original drain are necessary for the establishment of the lateral drain, the cost of such improvements must be assessed to the petitioners and collected in the same manner as other drain assessments, unless the improvements made in whole or in part to the original drain are also beneficial to the other landowners. In this case, the cost of the improvement which is beneficial to others may be assessed to such benefited landowners.[159] The petitioners must also pay a fair share of the cost of establishing the original drain according to the benefits received as a result of connecting the lateral drain to the original drain.[160]

After the petitioners have paid their assessment, the lateral drain may be constructed by the petitioners at their own expense.[161]

The Board must assure itself that anyone constructing a lateral drain that connects with the original drain complies with the procedures specified. If a lateral drain has been constructed without complying with the statute, the Board is authorized to fill in or otherwise block the lateral drain and charge the costs to the landowner, or bring an action in the district court to enjoin the establishment or maintenance of the lateral drain.[162]

h. Dissolution of the Drainage District and Merger With a Water Management District

As a drainage district is established, so may it be dissolved. If landowners with fifty-one percent of the possible votes, according to the weighted method, petition the Board for dissolution of the district, the Board must conduct a public hearing to determine if, in fact, the required percentage of votes favors dissolution.[163] If the Board so finds and the district has no outstanding obligations, the district must be dissolved, and a record of the Board's finding to this effect must be made and published in a newspaper of general circulation in the county.[164] All collected assessments not spent must be returned to the affected landowners in the same

---

the majority of landowners vote against the establishment of the lateral drain, the petition must be denied. *Cf.* N.D. CENT. CODE § 61-21-39 (2) (Supp. 1969).

159. N.D. CENT. CODE § 61-21-39 (Supp. 1969).

160. N.D. CENT. CODE § 61-21-39 (1) (Supp. 1969). The money so received must be credited to the proper drain fund. There would presumably be many instances where the original drain had already been paid for at the time the petition was made for a lateral drain. Notwithstanding this, it seems fair that the petitioners should still pay a share of the construction costs since they are benefiting from the original drain. The money so received could well be used for maintenance of the original drain.

161. *Id.* If the petitioner(s) fail to construct the lateral drain, the board must commence proceedings to have the drain constructed. In such an event, the petitioners would presumably forfeit their bond.

162. N.D. CENT. CODE § 61-21-39(3) (1960). A penalty of $100.00 or 30 days in the county jail, or both, may be imposed on anyone violating the statute. N.D. CENT. CODE § 61-21-39(4) (1960).

163. N.D. CENT. CODE § 61-21-56 (Supp. 1969).

164. *Id. See* N.D. CENT. CODE § 61-21-66 (Supp. 1969) requiring that sufficient funds must be maintained and assessments continued if there are any outstanding obligations.

proportions as they were assessed for establishment of the drain.[165] Once dissolved, the district cannot be revived unless it is reestablished in the same manner that a new drainage district is created.[166]

The existence of a drainage district can also be terminated, subject to settlement of its outstanding obligations,[167] by consolidating with a water management district.[168] The consolidation can be effected by one of three methods:[169]

1) a resolution by the Board of County Commissioners;
2) a resolution by the Board of Drain Commissioners; or
3) a petition filed with the Board of County Commissioners containing the signatures of landowners in the district holding at least fifteen percent of the votes as detrmined by the weighted method.

If the petition or resolution for consolidation is made, the Board of County Commissioners must set a date for a public hearing on the resolution or petition, publish the notice by newspaper, and mail copies of the notice to all affected landowners within the drainage district.[170]

At the hearing, if a majority of the weighted votes are cast against the continuance of the proceedings, the proceedings must be discontinued; but if the majority of weighted votes cast approve the consolidation, the Board of County Commissioners must file a petition[171] with the State Water Commission for the drainage district to be included in a water management district.[172] If that petition is approved, the Board of County Commissioners must adopt a resolution dissolving the drainage district and transferring the property of the drainage district to the water management district.[173]

In order that drainage districts may be efficiently merged with water management districts, the legislature recently enacted a statute giving the Board of Commissioners of a water management district all of the powers enjoyed by the Board of Drain Commissioners.[174]

---

165. N.D. CENT. CODE § 61-21-56 (Supp. 1969).
166. *Id.*
167. N.D. CENT. CODE § 61-21-66 (Supp. 1969).
168. N.D. CENT. CODE § 61-21-65 (Supp. 1969). A water management district can be created under the provisions of N.D. CENT. CODE ch. 61-16 (1960). These districts are not discussed in this article, but will be discussed in a subsequent article.
169. N.D. CENT. CODE § 61-21-65 (Supp. 1969).
170. *Id.*
171. The petition is governed by N.D. CENT. CODE § 61-16-02 (1960).
172. N.D. CENT. CODE § 61-21-65 (Supp. 1969).
173. *Id.*
174. N.D. Sess. Laws ch. 473, § 1 (1967); N.D. CENT. CODE § 61-16-11(11) (Supp. 1969). In a telephone interview with Mr. Milo W. Hoisveen, Chief Engineer for the North Dakota State Water Commission, on June 7, 1968, Mr. Hoisveen indicated to Mr. Bohlman that there was indeed a duplication of functions now existing between water management and drainage districts, but that apparently there were no immediate plans to abolish drainage districts in favor of water management districts.

A water management district, of course, is much wider in its scope of operations

The system of water management districts may well be a more efficient means of handling drainage problems than the various county drainage districts. For here the State Water Commission, a central organ, can presumably coordinate and influence the operations of the various districts to provide an integrated drainage network for the state. The various county drainage districts have no central organ to coordinate and influence their activities.[175] More important, however, is the fact that the water management districts provide for total water resource planning, of which drainage is only a part. The water management districts are concerned with all aspects of water control and development. They would consider a drainage project, for example, in light of all the possible consequences that may result, such as possible flooding in other areas. The county drain boards have no similar responsibility for total water resource planning to guide their actions.

On the other hand, the State Water Commission appears to provide substantial financial support to drainage districts, whether or not they are merged into a water management district:

> The Commission drainage program is devoted primarily to the construction of floodways that serve large areas subject to water damage. This program was initiated in 1943 when the Legislature appropriated funds to the Commission to assist in its implementation. . . .
>
> Funds appropriated to the Commission for drainage work are allocated to the various drainage projects that qualify for State assistance in accordance with their rules and regulations. State assistance to counties for this work is generally 40% of the qualified construction costs. The Commission will only cooperate in the construction of legal drains which are constructed under the sponsorship of some legal entity, such as the board of drain commissioners. . . . The local share of the drain costs are paid by special assessments levied on the property benefitted by the improvement.[176]

---

than a drainage district. A water management district encompasses such functions, in addition to drainage, as water conservation, flood control, and watershed improvement. N.D. CENT. CODE § 61-16-01(4) (Supp. 1969).

175. This is not to say that county drainage districts are restricted to only 1-county projects. The code allows the drain boards of 2 or more counties to jointly establish drains. N.D. CENT. CODE § 61-21-33 (1960). When such an action is taken the procedure for establishing and maintaining the drain is the same as when establishing a drain in only 1 county, N.D. CENT. CODE § 61-21-34 (1960).

In the case of Northern Pac. Ry. v. Sargent County, 43 N.D. 156, 164, 174 N.W. 811, 813-814 (1919), the court commented that:

> The law which permits drain commissioners of two or more counties to cooperate in the construction of an inter-county drain does not destroy the unity of action by the drain commissioners of one county when proceeding with relation to that portion of the project situated in such county. The cooperation is joint, but the action of each of the counties concerned is the individual action of such county.

176. [1964-1966] N.D. STATE WATER COMM'N BIENNIAL REP. 13, 14.
The Report lists the following drainage projects of the State Water Commission:

But the probabilities weigh in favor of the county drain boards being phased out in favor of water management districts over the coming years. This has happened to some extent already:

> There are at present, forty-three water management districts in thirty-seven separate counties. Of this number, five have taken over the duties of the drainage boards. In Richland County the water management district has formally taken

| SWC No. | Project | County | Drainage Area (Sq. Mi.) | Scope of Work |
|---|---|---|---|---|
| 416 | Devils Lake Basin | Ramsey Benson and Towner | 4,170.0 | Engineering and investigation, Sweetwater-Dry Lake Flood Control and Lake Restoration Project No. 1 |
| 463 | Rush Lake | Cavalier | 315.0 | Engineering, investigation |
| 1062 | Zahn-International Drain | Bottineau | 44.0 | Investigations |
| 1074 | Cass County Drain No. 19 | Cass | 9.25 | Investigation, engineering, hydraulic improvement (reconstruction) |
| 1075 | Cass County Drain No. 21 | Cass | 36.0 | Investigation, engineering—extension 5.73 miles |
| 1076 | Cass County Drain No. 22 | Cass | 12.0 | Investigation, engineering |
| 1084 | Cass County Drain No. 32 | Cass | 10.5 | Investigation, engineering, and reconstruction |
| 1111 | Grand Forks Drain No. 12 | Grand Forks | 93.0 | Reconstruction |
| 1119 | Grand Forks Drain No. 30 | Grand Forks | 6.0 | Reconstruction |
| 1133 | Pembina County Drainage—General | Pembina | 54.7 | Investigations (Auger Coulee-Rhineland International Drainage Problems) |
| 1135 | Pembina County Drain No. 4-18 | Pembina | 31.0 | Investigation, reconstruction |
| 1141 | Pembina County Drain No. 13 | Pembina | 37.0 | Investigation, engineering (repair of drop structure) |
| 1144 | Pembina County Drain No. 18 | Pembina | 31.5 | Reconstruction |
| 1153 | Pembina County Drain No. 34 | Pembina | 25.0 | Reconstruction |
| 1188 | Richland County Drain No. 26 | Richland | 11.5 | Reconstruction |
| 1197 | Richland County Drain No. 39 | Richland | 24.9 | Reconstruction |
| 1199 | Richland County Drain No. 55 | Richland | 15.6 | Reconstruction |
| 1207 | Richland County Drain No. 65 | Richland | 38.0 | Reconstruction |
| 1230 | Traill County Drain No. 8 | Traill | 20.0 | Construction, reconstruction, investigation |
| 1256 | Walsh County Drain No. 25 | Walsh | 4.1 | Investigation |
| 1320 | Willow Creek-Park River Watershed | Pembina | 123.0 | Investigation |
| 1328 | Cass County Drain No. 23 | Cass | 18.0 | Engineering, investigation |
| 1353 | Grand Forks County Drain No. 3 | Grand Forks | 5.0 | Reconstruction |
| 1354 | Traill County Drain No. 39 | Traill | 4.0 | Reconstruction |
| 1359 | Barnes County Drain No. 2 | Barnes | 15.0 | Engineering, investigation |
| 1367 | Auger Coulee Improvement | Pembina | 47.0 | Investigation |
| 1368 | St. Thomas-Lodema Watershed | Pembina | 106.0 | Engineering, investigation |
| 1369 | Bathgate-Hamilton Watershed I | Pembina | 57.0 | Engineering, investigation |
| 1401 | International Boundary Drain | Pembina | 13.3 | Engineering, investigation |
| 1412 | Traill County Drain No. 40 | Traill | 3.0 | Engineering, investigation |
| 1415 | Richland County Drain No. 66 | Richland | 11.3 | Engineering, investigation |
| 1417 | Traill County Drain No. 44 | Traill | 8.0 | Engineering, investigation |
| 1419 | Walsh County Drain No. 8 | Walsh | 11.0 | Engineering, investigation |
| 1420 | Traill County Drain No. 9 | Traill [not listed] | | Engineering, investigation |
| 1438 | Mulberry Creek Drain | Cavalier [not listed] | | Engineering, investigation |
| 1439 | Cypress Creek Drain | Cavalier [not listed] | | Engineering, investigation |
| 1443 | Richland County Drain No. 47 | Richland | 18.2 | Engineering, investigation |

*Id.* at 21, 22. An Inventory of Legal Drains in North Dakota appearing in Appendix C to NOTRH DAKOTA STATE WATER COMMISSION, NORTH DAKOTA INTERIM STATE WATER RESOURCES DEVELOPMENT PLAN (1968), contains a listing of 233 legal drains. Three of these are in the James River Subbasin, nine in the Souris River Subbasin, fifty-one in the Wild Rice River Subbasin, sixteen in the Sheyenne River Subbasin, thirteen in the Elm River Subbasin, twelve in the Goose River Subbasin, four in the Turtle River Subbasin, eight in the Forest River Subbasin, seventeen in the Park River Subbasin, twenty three in the Pembina River Subbasin, and seventy seven in the Red River Mainstem. It is not clear, of course, under the auspices of which local authority they were constructed.

> control of all drains and drainage work within the county. In Walsh County the drain board resigned and the water management district has filled the gap. In Pembina County the county commissioners have appointed the same people to the two boards. This board operated as the Pembina County Water Management District and Drainage Board. In Bottineau and Wells County there were older drainage boards which apparently became defunct, as no drainage work had been done for a number of years. In these two counties the water management districts have taken on the responsibilities of the drainage board and are currently caring for the maintenance of the drains.[177]

i. Drainage Projects under the Federal Watershed Protection and Flood Prevention Act

Under the Watershed Protection and Flood Prevention Act,[178] drainage facilities can also be established as a part of a multiple-purpose watershed project.[179] In North Dakota, the water management districts can sponsor an application that has first been approved at the State level by the State soil conservation committee.[180]

It would seem highly unlikely that the Federal act would be utilized as a means of establishing individual drainage projects, since the act applies to watershed development as a whole. It is important to keep in mind, however, that a plan could be developed whereby drainage facilities could be included under that portion of the plan entitled "agricultural water management."[181] The drainage function under agricultural water management is described as follows:

> The drainage measures must provide for more efficient land use on existing farms and ranches. Present drainage systems may be improved. Or new drainage systems may be provided for areas now used for crops or grazing. The measures include all parts of a group drainage system, such as open ditch or tile, drops, checks, flumes, control gates, manholes, and pumping plants.[182]

The advantage of applying for a multiple-purpose watershed project is that the drainage system for an entire watershed could be established, or existing drains improved, if the plan was approved. Needless to say, the plan would have to be drawn very carefully in order to provide a comprehensive system of drains for the

177. Letter from Alan Grindberg, Ass't. Chief Engineer, N.D. State Water Commission, to Bruce Bohlman, June 11, 1968.
178. 68 Stat. 666 (1954), *as amended*, 16 U.S.C. §§ 1001-1009 (1964).
179. *See* U.S. DEP'T. OF AGRICULTURE, MULTIPLE-PURPOSE WATERSHED PROJECTS UUDER PUBLIC LAW 566 (1963).
180. *Id.* at 13.
181. *Id.* at 5.
182. *Id.*

entire watershed. Arguably, such a system of coordinated drains is superior to a system based on what each individual county drain board can accompilsh, acting alone, and concerned only with providing drains in the local county area. The extent to which the act has been utilized to establish comprehensive drainage systems has not been ascertained, but the mere fact that Federal aid is available is but another indication that our water and soil resources are of national concern and no longer the exclusive domain of such local agencies as the county Board of Drain Commissioners.

## 2. HISTORICAL DEVELOPMENT

It is helpful in understanding statute law to know something of its history as this explains at least in part how the law came into being. But history is also helpful by showing approaches that have been tried before and found not to work. Further, the simple indication that change has taken place warrants an awareness that some of the court decisions that a researcher finds may deal with outdated statutory provisions. With these several purposes in mind, a special subpart on history is used rather than integration of the material into other parts of the article.

North Dakota's comprehensive drainage district law has existed since 1883,[183] thus predating statehood. Moreover, there have been only ten legislative sessions up to the present time where no drainage laws have been enacted.[184] This extensive legislative activity has necessitated periodic revisions of the laws into workable compilations for use by the county commissioners and later the county drain board commissioners, the governmental bodies charged with the responsibility of administering the law. A perusal of the major revisions indicates a basic conclusion, one perhaps common to all public functions and the agencies responsible for carrying out these functions: although the drainage laws have been changed often over the years and a great deal of administrative complexity has been introduced, the basic methods of establishing a drain project remain much the same today as those first set up in 1883. The legislature has only detailed what the early administrators implied from the first laws. In the 1880's, administrative expediency prevailed over legislative action as a means of clarifying ambiguous provisions. As time passed, however, the legislature was increasingly called upon to specifically define and set forth the exact nature of the powers and duties of those responsible for drainage projects. The result is somewhat analogous to the Internal Revenue Code of the Federal Government, with its myriad of exceptions and

183. LAWS OF DAKOTA, ch. 75 (1883).
184. A search by Mr. Bohlman of the territorial and session laws indicates that drain-

cross-referrals. Hopefully, the present drainage law is comprehensible to the various boards of drain commissioners. If not, it is possible that principle of expedience might again prevail and that the law will be administered as it was in the beginning.

Under this first comprehensive drainage act, enacted in 1883,[185] the Board of County Commissioners and the township supervisors were designated as the bodies responsible for construction of a drain upon the petition of one or more landowners.[186] A bond was also required of the petitioner(s) for the payment of expenses should the drain petition be denied.[187]

Upon the filing of a petition, the Board of County Commissioners appointed three disinterested resident landowners of the county as "viewers." The viewers, along with a surveyor, made a survey of the proposed drain site, estimated the cost of the drain, determined the amount that each affected tract of land would be benefited, made a set of specifications, and ascertained the names of landowners affected by the drain.[188]

After the viewers filed their report, an interested person could file a remonstrance against establishment of the drain, and the Board of County Commissioners would then appoint three additional disinterested resident landowners as "reviewers."[189] The reviewers would either confirm or deny the findings of the viewers and the Board of County Commissioners would then enter an order establishing or denying the drain, based on the reviewers' report.[190]

After the Board of County Commissioners ordered the establishment of a drain, the viewers, or reviewers, also determined the amount to be assessed each benefited landowner and the damages to be paid those landowners whose land had to be used for right-of-way purposes.[191] Any person affected by the action taken could appeal to the district court on the questions of whether the drain was conducive to the public health, convenience, or welfare; whether the route chosen was the most practicable; whether the assessments set were made in accordance with benefits to be received; or whether the damages under condemnation proceedings were fair.[192]

After the construction of the drain, the landowners possessing land through which the drain ran were responsible for keeping it open and free of obstructions.[193] The township supervisors were

age laws were enacted in all sessions of the legislature with the exceptions of 1889, 1891, 1897, 1909, 1913, 1923, 1929, 1931, 1939, and 1941.

185. LAWS OF DAKOTA, ch. 75 (1883).
186. *Id.* § 2.
187. *Id.*
188. *Id.*
189. *Id.* § 11.
190. *Id.* § 15.
191. *Id.* § 16.
192. *Id.* § 17.
193. *Id.* § 22.

responsible for raising revenues to pay for maintenance and repair.[194]

If ten or more landowners in any town petitioned for a drain, the project could be financed by a bond issue upon approval by a majority of legal voters casting votes at the meeting called for that purpose.[195] This method of financing the drain was apparently open only to a township board of supervisors, the Board of County Commissioners having no similar authority.

The 1883 act did not, however, provide for a vote of all affected landowners to approve or disapprove establishment of the drain. Further, there was no provision for dissolution of the drain once it was established.

The second comprehensive drainage act was enacted in 1893.[196] The *ad hoc* system of "viewers" and "reviewers" was abolished in favor of the establishment of the present-day Board of Drain Commissioners. The petition for construction of a drain now was to be submitted to the drain board and had to be signed by at least five landowners, instead of only one, as required under the 1883 act.[197]

In *Martin v. Tyler*,[198] the North Dakota Supreme Court held that one section of the 1883 drainage law was unconstitutional as violative of the North Dakota constitutional requirement of paying cash for land acquired under eminent domain proceedings.[199] The act allowed payment in the form of warrants, which are the equivalent of a claim or check against a fund. However, such warrants do not constitute money *per se*; rather, they constitute security for the later payment of money. Another section of the act was held unconstitutional on the ground that by issuing twenty year bonds to finance the construction of the drainage project, the county was lending its credit for an unauthorized purpose in violation of section 185 of the North Dakota Constitution.[200]

The entire act then was held a nullity since the unconstitutional provisions could not be stricken without rendering the whole act

---

194. *Id.* § 23. No mention is made of the duties, if any, of the Board of County Commissioners.

195. LAWS OF DAKOTA, ch. 76 (1883).

196. N.D. Sess. Laws ch. 55 (1893).

197. *Id.* § 5.

198. Martin v. Tyler, 4 N.D. 278, 60 N.W. 392 (1894), *rehearing denied* Oct. 13, 1894.

199. *Id.* at 399. The North Dakota Constitution, as then existing, provided as follows:

> Private property shall not be taken or damaged for public use without just compensation having been first made to, or paid into court for the owner, and no right of way shall be appropriated to the use of any corporation, other than municipal, until full compensation therefor be first made in money or ascertained and paid into court for the owner, irrespective of any benefit from any improvement proposed by such corporation, which compensation shall be ascertained by a jury, unless a jury be waived.

N.D. CONST., § 14, art. I (1889).

200. N.D. CONST. § 185, art. XII (1889).

useless, especially in view of the fact that the eminent domain provisions could no longer be enforced.[201]

In response to *Martin v. Tyler,* the legislature enacted another comprehensive drainage law in 1895.[202] One section of the 1895 act provided that after assessment of the amount of damages to be paid for the acquisition of land under eminent domain procedures, the county drain commissioners would negotiate warrants to pay the same and deposit the money realized into court for the benefit of the affected landowner. The section was challenged in *Redmon v. Chacey,*[203] again on the basis of the constitutional section prohibiting the counties from loaning their credit. The North Dakota Supreme Court, however, upheld the act since the warrants were not issued by the county but rather by the autonomous Board of Drain Commissioners. Hence the county was not involved and was in no way obligated under the warrants. Moreover, even though the county could still issue bonds,[204] the court held that the county was not lending its credit since the statute specifically stated that the county was not obligated on the bonds, and the bondholder could look only to the drainage fund for payment.[205]

The 1895 act failed, as did the 1883 act, to provide for an initial vote by affected landowners before the drain could be established. However, it did specify that the petition to establish the drain had to be signed by a:

> [S]ufficient number of the citizens of such municipality . . . to satisfy the drain commissioners that there is a public demand for such drain. If the chief purposes of such drain is the drainage of agricultural, meadow, grazing or other lands, the drain commissioners shall require that the petition be signed by the owners . . . as in the aggregate will, in the event of the construction of the drain, be liable to assessment for a major portion of the cost thereof . . . .[206]

The county commissioners, rather than the township supervisors, now were charged with the duty of maintaining the drain after it was established, and the costs of such maintenance were assessable against the affected landowners in the same proportion as they were assessed for construction of the drain.[207]

So the 1895 act, other than failing to provide for specific voting,

---

201. Martin v. Tyler, 4 N.D. 278, 60 N.W. 392, 399 (1894).
202. N.D. Sess Laws ch. 51 (1895).
203. Redmon v. Chacey, 7 N.D. 231, 73 N.W. 1081 (1898).
204. *See* N.D. Sess. Laws ch. 51, § 31 (1898).
205. Redmon v. Chacey, 7 N.D. 231, 73 N.W. 1081, 1082 (1898).
206. N.D. Sess. Laws ch. 51, § 4 (1895). It might be argued that the section required a majority of landowners, or at least that number of landowners subject to at least 50% of the assessments, to sign the petition.
207. *Id.* § 24.

lateral drains, and dissolution provisions, is very similar to the current drainage law chapter of the North Dakota Century Code.

Until 1911 the drainage law was amended only slightly. In 1911, the legislature gave the drain board the authority to levy an additional assessment if the original assessment was insufficient to pay the costs of establishing the drain.[208] Also in that year, provisions for establishing a lateral drain were enacted.[209]

In 1915, the legislature passed a statute allowing townships to establish drains as separate projects under the township supervisors.[210] The statute was in force until 1963, when the legislature repealed it[211] because no drain projects had been carried out pursuant to its terms.[212]

Another system of drainage agencies, namely reclamation districts, was created by the legislature in 1953.[213] Reclamation districts were to drain surface waters where it was not considered feasible to do so by the county Board of Drain Commissioners. This additional agency within the county, established to carry out drainage functions whenever it was not "feasible" for one drain board to do so, could undoubtedly have caused numerous conflicts as to jurisdiction over drains, and the legislature repealed the authorizing legislation in 1963.[214]

Many drainage statutes were enacted from 1917 to 1953 and a major revision of the numerous statutes became necessary. In 1955, the North Dakota Legislative Research Committee authorized a study of the law and noted the following:

> The resolution directing a study of drainage laws was a result of the numerous bills that are introduced at every session to amend the laws of the State . . . relating to drainage districts and their operation. The number of bills that have been introduced on this subject at every session is indicative of the fact that the laws governing the operation of drainage districts have grown obsolete, making it very difficult for the drainage districts to function properly and carry out the responsibilities placed upon them by statute. In addition, the large number of amendments made to the chapter on drainage over the years has resulted in many conflicts of law and ambiguities, and in many instances has made the drainage law almost unintelligible.[215]

The result of the study was the enactment of a major revision

208. N.D. Sess. Laws ch. 124 (1911).
209. *Id.* ch. 125.
210. N.D. Sess. Laws ch. 124 (1915) [*see* N.D. CENT. CODE ch. 61-22 (1960)].
211. N.D. Sess. Laws ch. 421, § 22 (1963).
212. 1963 REPORT OF THE NORTH DAKOTA LEGISLATURE RESEARCH COMMITTEE 54.
213. N.D. Sess. Laws ch. 348 (1953) [*see* N.D. CENT. CODE ch. 61-25 (1960)].
214. N.D. Sess. Laws ch. 421, § 22 (1963).
215. 1955 REPORT OF THE NORTH DAKOTA LEGISLATIVE RESEARCH COMMITTEE 22.

in 1955 which constitutes the basic act in use today. There have been amendments since 1955, and perhaps a further overhaul of the law will be necessary within a few years. But this may well depend on the continued use of the Board of Drain Commissioners as the organization responsible for drainage projects. But even if the water management districts assume all of the responsibilities of the drain boards,[216] there still must be statutory guidelines for the establishment of drain projects, and these are contained in the drainage laws rather than the water management laws.

## B. CITY JOINT USE OF DRAINS

The North Dakota legislature has provided that drainage projects may serve a multi-purpose function, and has established a procedure whereby the governing body of any city or the commissioners of a water management district may apply to the Board of Drain Commissioners to use a drain as a source of water supply.

The application must contain a plan that presents the specific details of the proposed joint use, including the following:[217]

(1) any proposed extension of the drain;
(2) changes required in the drain;
(3) connecting canals;
(4) mains or other means by which the water will be conducted in, to, or from the drain; and
(5) an offer of a specific sum of money as payment for the proportionate share of the cost of the existing drain,[218] and an amount or percentage for future maintenance.

After receiving the application, the Board must arrange for a public hearing, following the same procedures required for a hearing on a petition for establishing a drain.[219] At the time and place of the hearing, the Board must receive all opinions and evidence favoring or disfavoring the proposed joint use of the drain and the necessary modifications incident thereto.[220]

Following the hearing, assuming that the application is not denied, the Board may enter into a joint use agreement with the

---

216. *See* notes 167-177, *supra*, and the accompanying text.
217. N.D. CENT. CODE § 61-26-01 (Supp. 1969).
218. Presumably the proportionate share would amount to the benefits received under joint use of the drain.
219. N.D. CENT. CODE § 61-26-02 (Supp. 1969). *See* N.D. CENT. CODE § 61-21-13 (Supp. 1969) for procedures on calling a hearing on the petition for establishment of a drain.
220. N.D. CENT. CODE § 61-26-02 (Supp. 1969). The statute is not clear as to whether a vote of affected landowners approving or disapproving the application is required. However, since the procedures governing the notice of hearing on the petition for establishment of a drain [*see* N.D. CENT. CODE § 61-21-13 (Supp. 1969)] provide for voting, it is likely that the application could be denied by a vote of affected landowners, based on the weighted method [*see* N.D. CENT. CODE § 61-21-16 (Supp. 1969)].

city or water management district.[221] The agreement must specifically cover the extent and nature of the use of the drain, any conditions attached thereto, the amount to be paid by the city or water management district as its share of the original cost of the drain, and the percentage or amount to be contributed for future maintenance costs.[222]

The money received by the Board under the agreement must be credited to the specific drain fund involved.[223] If the Board determines that the amount received for the city's or water management district's share of the cost of establishing the original drain will not be needed for future maintenance, it may choose to distribute such funds to the record owners of lands originally assessed for the drain in the same proportion that such lands were assessed.[224] The Board may prescribe an application form for use by affected landowners in requesting reimbursement; after processing the applications, the Board may make payment by issuing warrants against the drain fund involved.[225]

## C. NORTH DAKOTA INSTITUTIONAL DRAINAGE CASES

The early decisions of the North Dakota courts dealt mainly with the constitutionality of the drainage law. *Martin v. Tyler*[226] and *Redmon v. Chacey*[227] have already been discussed.[228] With the exception of *Martin*, no other decision has sustained constitutional attacks against the drainage law. In *Erickson v. Cass County*,[229] the court upheld the bonding provisions against a fourteenth amendment due process attack, whereby assessments under the statute were to be deferred over the life of the bonds. The appellant in *May v. Cass County*,[230] a companion case to the *Erickson* decision, unsuccessfully contended that county commissioners cannot constitutionally be authorized to issue bonds against a drainage district. The court dismissed the argument after finding no such constitutional restriction.

In *Soliah v. Board of Drain Commissioners*,[231] the court rejected

---

221. N.D. CENT. CODE § 61-26-02 (Supp. 1969).
222. *Id.*
223. N.D. CENT. CODE § 61-26-03 (1960).
224. *Id.* The record owners referred to in the statute are those who own at the time the city or water management district makes the payment.
If the original drain was not yet paid for, however, it goes without saying that the Board would not make a distribution as provided by the statute until such time as the costs of establishing the drain had been paid, and then only to the extent that any funds were left over.
225. *Id.*
226. 4 N.D. 278, 60 N.W. 392 (1894), *rehearing denied* Oct. 13, 1894.
227. 7 N.D. 231, 73 N.W. 1081 (1898).
228. *See* text relating to notes 198-205, *supra.*
229. 11 N.D. 494, 92 N.W. 841 (1902).
230. 12 N.D. 137, 96 N.W. 292 (1903).
231. May v. Cass County, 17 N.D. 393, 117 N.W. 125 (1908), *aff'd sub nom.* Soliah v. Heskin, 222 U.S. 522 (1912).

the argument that the drainage law was an unconstitutional delegation of legislative power to the Board of Drain Commissioners. Moreover, the court also refused to find that the drainage law was defective under due process requirements of the State and United States Constitutions. Four years later, in 1912, the court similarly rejected another due process attack in the case of *Hackney v. Elliott*.[232] Since that time, there has not been another serious challenge as to the constitutionality of the drainage law.

Other cases interpreting the drainage law have dealt with a variety of subjects. Under the condemnation provisions of the law, two cases are notable. In *Ross v. Prante*,[233] the court held that although the jury assesses the damages under such proceedings, the Board of Drain Commissioners, and not the jury, has the authority to determine the amount of benefits to be assessed against other property of the landowner whose land is also being condemned for a drain right of way. This is so, even though that portion of the drainage law authorizing condemnation of lands provided that *all* of the issues involved in the action must be submitted to the jury. According to the court, the question of benefits was not an issue in determining damages under condemnation proceedings. For instance, in *Heskin v. Herbrandson*,[234] the court held that the amount of benefits to be received from a drain must not be deducted from the damage award. To some extent, the court relied on their decision in *Ross*. The court emphasized again that the determination of damages and the assessment of benefits were separate issues and must be treated as such.

The largest body of case law has undoubtedly dealt with the jurisdiction of the Board of Drain Commissioners to assess benefits and establish the drain, and the right of appeal by affected landowners subsequent to assessment and establishment. Most of the cases do not indicate a lack of the right to appeal the Board's decisions (since such a right is provided by statute), but only that the plaintiffs' claims for relief were barred by laches (undue affected landowner who objects to the order of the Board establishing the drain or its assessments in connection therewith must bring his action promptly, and before the Board has either completed delay).[235] To summarize these cases, it can well be said that an the drain or incurred substantial obligations under the project. Proof of fraud on the part of the Board would perhaps be the

232. Huckney v. Elliott, 23 N.D. 373, 137 N.W. 433 (1912).

233. Ross v. Prante, 17 N.D. 266, 115 N.W. 833 (1908).

234. 21 N.D. 232, 130 N.W. 836 (1911).

235. *E.g.*, Barnes v. Cass County, 59 N.D. 135, 228 N.W. 839 (1929); Northern Pac. Ry. v. Sargent County, 43 N.D. 156, 174 NW. 811 (1919); Alstad v. Sim, 15 N.D. 629, 109 N.W. 66 (1906).

only means of overcoming the defense of laches.[236] The legislature has vested the drain board with broad quasi-judicial powers in order that benefits may be assessed by the Board rather than by a court of law. This is undoubtedly desirable from the standpoint of qualifications. The drain board has greater experience and expertise in such matters than a court of law. The conclusiveness of the Board's actions, however, has been under constant attack,[237] but, as previously noted, plaintiffs have had little to complain about in light of their own delays in seeking court review to the extent it is available.

What questions may the court consider on appeal from an order by the Board establishing the drain? The statute indicates that the court may try the questions as to whether, in the first instance, there was sufficient cause for making the petition, whether the drain will cost more than the benefits expected, and whether the majority of votes cast were against establishing the drain.[238] One case has indicated that the statutory language is permissive rather than restrictive and that, consequently, the courts may determine other questions relating to the Board's actions as well.[239] The case stands alone as authority for this proposition, however, and its validity can be questioned, especially in light of other statutory requirements.[240]

As far as drainage projects in two or more counties or those

---

236. *See also* Bergen Township v. Nelson County, 33 N.D. 247, 156 N.W. 559 (1915); and Turnquist v. Cass County Drain Commissioners, 11 N.D. 514, 92 N.W. 852 (1902).

237. And there is a variety of opinion as to just how conclusive the Board's actions should be. Consider, for example, the view of Justice Robinson dissenting in McHenry County v. Brady, 37 N.D. 59, 84-85, 163 N.W. 549-50 (1917):

> It is high time for the Supreme judicial tribunal of this state to reconsider its errors and to place its decisions on a higher and better plane. In this State the drainage statutes have been used to promote graft and jobbery, with big fees and expenses for drain commissioners and their attorneys. The drainage laws and decisions have given a rich reward to jobbery and oppressive litigation. In 11 N.D. reports, there are decisions in 14 drainage cases arising in Cass county, and in each case the sum total of the drainage assessment was twice the benefits. In each case the legal fight was a mere sham; it was a game with loaded dice. In the Erickson case, 11 N.D. 494, 92 N.W. 841, the total cost was $42,000, including $13,000 for attorney's fees and commissioners' fees and junketing trips around the country. Bridges costing $500 or $600 were built for no possible use only to make costs; bridges that have lain there to rot without any possibility of using them. This Erickson Case has been a blind leader of the blind. It has no support in reason or in the cases cited to sustain it. It is directly contrary to the cases which are cited to sustain it.
>
> As the drainage law was construed in the Erickson Case it is not constitutional. It puts the citizen completely at the mercy of the drain commissioners, permitting them to fix the total amount of the assessment against lands, including the charges of themselves and their attorneys and friends, without giving any notice to the owner of the land. Under the law of the land a person must have a fair hearing and a fair opportunity to contest the sum total of all costs and plunder that drain commissioners may charge against his land, and not merely a bootless opportunity to contest the rate or per cent of the amount. The one may be clearly right, and the other clearly outrageous.

238. N.D. CENT. CODE § 61-21-18 (Supp. 1969). *See* Braaten v. Brenna, 63 N.W.2d 302 (N.D. 1954).

239. Chester v. Einarson, 76 N.D. 205, 34 N.W.2d 418 (1948).

240. *See* N.D. CENT. CODE § 61-21-15 (Supp. 1969).

that extend into Canada are concerned, the court has held that an intercounty drain may be established on the basis of intracounty petitions since the cooperation between county drain boards is joint, but their actions are the individual actions of each county involved.[241] Moreover, if the drain is to extend into Canada, the Board may establish an outlet there and have excavation and other work performed in that country.[242] The Canadian-American resolution adopted to that effect did not invade the treaty-making power of the United States Government.[243]

Other cases have considered miscellaneous procedural aspects of the drainange law. The case of *Sim v. Rosholt*[244] held that the jurisdiction of the Board could not be ousted by petitioners who attempted to remove their names from the petition for establishment of the drain after the Board had passed upon the sufficiency of the petition, filed it, and proceeded to act thereunder.

The court held in *Edwards v. Cass County*[245] that the failure of the surveyor to file his report with the County Auditor was not such an irregularity as would defeat the Board's action in establishing a drain. The report was available at the office of the drain board and the plaintiff was not prejudiced by the surveyor's failure to file. Other defects not affecting the Board's jurisdiction were that the notice of preliminary hearing on the establishment of the drain did not contain the names of the signers of the petition, one of the notices was not posted along the line of the drain, and a deed to the right of way was not filed with the County Auditor in advance of the apportionment of specific benefits by percentages.[246]

The *Edwards* case emphasizes, however, that the notice provisions are mandatory. Such a minor noncompliance as existed in the instant case would not defeat the Board's action, but the case suggests that substantial compliance with the notice provisions must be had in order to satisfy the due process requirements.

In the early case of *State v. Nikkelson*[247] the court stated that, in the absence of an authorizing statute, interest could not be collected on delinquent drain assessments. If interest was paid voluntarily, the money belonged to the drain fund and not to the county.

If the drain is to run through more than one township, the petition for establishing the drain must be signed by representa-

241. Northern Pac. Ry. v. Sargent County, 43 N.D. 156, 174 N.W. 811 (1919).
242. Freeman v. Trimble, 21 N.D. 1, 129 N.W. 83 (1910), two justices dissenting.
243. McHenry County v. Brady, 37 N.D. 59, 163 N.W. 540 (1917).
244. Sim v. Roshult, 16 N.D. 77, 112 N.W. 50 (1907).
245. Edwards v. Cass County, 23 N.D. 555, 137 N.W. 580 (1912).
246. *Id.*
247. State v. Nikkelson, 24 N.D. 175, 139 N.W. 525 (1912).

tives from each township.[248] Moreover, the Board's determination that a sufficient number of landowners have signed the petition is not conclusive, and the court may review the Board's action in this respect.[249]

The Board can assess a railroad for benefits received, and enforce the collection of the assessment by foreclosing the lien created thereby over the railroad's objection that to do so would be an unlawful interference with interstate commerce.[250] Further, a railroad can be enjoined from maintaining an obstruction in the form of bridge pilings over a drainage ditch.[251]

Even if a drain is abandoned, the Board must pay the costs incurred before abandonment.[252] If it were otherwise, an engineer, surveyor, or contractor would perform needed services at a considerable risk that such services would not be paid for in the event the drain should later be abandoned. To pay all lawful charges incurred prior to abandonment, a levy may be imposed on landowners who were to have benefited by the abandoned drain.[253]

In *Lee v. Thorenson*,[254] the court stated that the Board was properly qualified even though the individual Board members did not file the oath within the time required by statute. The important fact was that the Board did not take any action until the oaths were filed. Therefore, the court held that the Board was properly constituted.

In summary, one can say that the decisions rendered are not entirely reliable since, in all instances, the applicable statutory provisions must be carefully compared. Many of the decisions are based on statutes that have been subsequently revised in scope and meaning. Hence, those decisions have little value today. The latest drainage decision of the court is dated 1954.[255] Since that time, there have been extensive statutory changes, including the comprehensive revision of the drainage law in 1955.

## IV. CONCLUDING REMARKS

This article has explored in some measure the North Dakota common law relating to drainage and a portion of the institutional law. The institutional law discussion has focused on Drain Board

248. State *ex rel.* Bale v. Morrison, 24 N.D. 568, 140 N.W. 707 (1913).
249. Stoltze v. Sheridan, 28 N.D. 194, 148 N.W. 1 (1914).
250. Northern Pac. Ry. v. Richland County, 28 N.D. 172, 148 N.W. 545 (1914).
251. *See* State v. Minneapolis, St. P. & S. S. M. Ry., 28 N.D. 621, 150 N.W. 463 (1914).
252. Walstad v. Dawson, 64 N.D. 333, 252 N.W. 64 (1934).
253. *Id.*
254. Lee v. Thorenson, 65 N.W.2d 675 (N.D. 1954).
255. The more recent case of Brenna v. Hjelle, 161 N.W.2d 356 (N.D. 1968), deals with the obligation of the state highway department to pay for culverts and bridges necessary when drains go through highways, under N.D. CENT. CODE § 61-21-32 (1960), in view of the existence of Article 56 of the Amendments to the North Dakota Constitution. That question is beyond the scope of this article.

projects, while recognizing that other local authorities may also sponsor drainage projects. It has not explored in any depth the role of the State Water Commission in drainage. No particular issue has been explored in great depth; the purpose of this article was to present enough material to get a reasonable overview of the area. After the survey of Water Management District law is concluded, in depth research can be done on selected topics; for example, what should be the role of the State Water Commission, should the work of the individual districts be coordinated?

The flexible common law and the institutional approach work hand in hand. The risk of liability for private drainage projects that may harm another's land may well force more would-be drainers to explore the institutional approach to draining. Perhaps the institution could get several differing parties to agree on how drainage should be carried out without having to exercise its drainage powers by serving as a mediator.