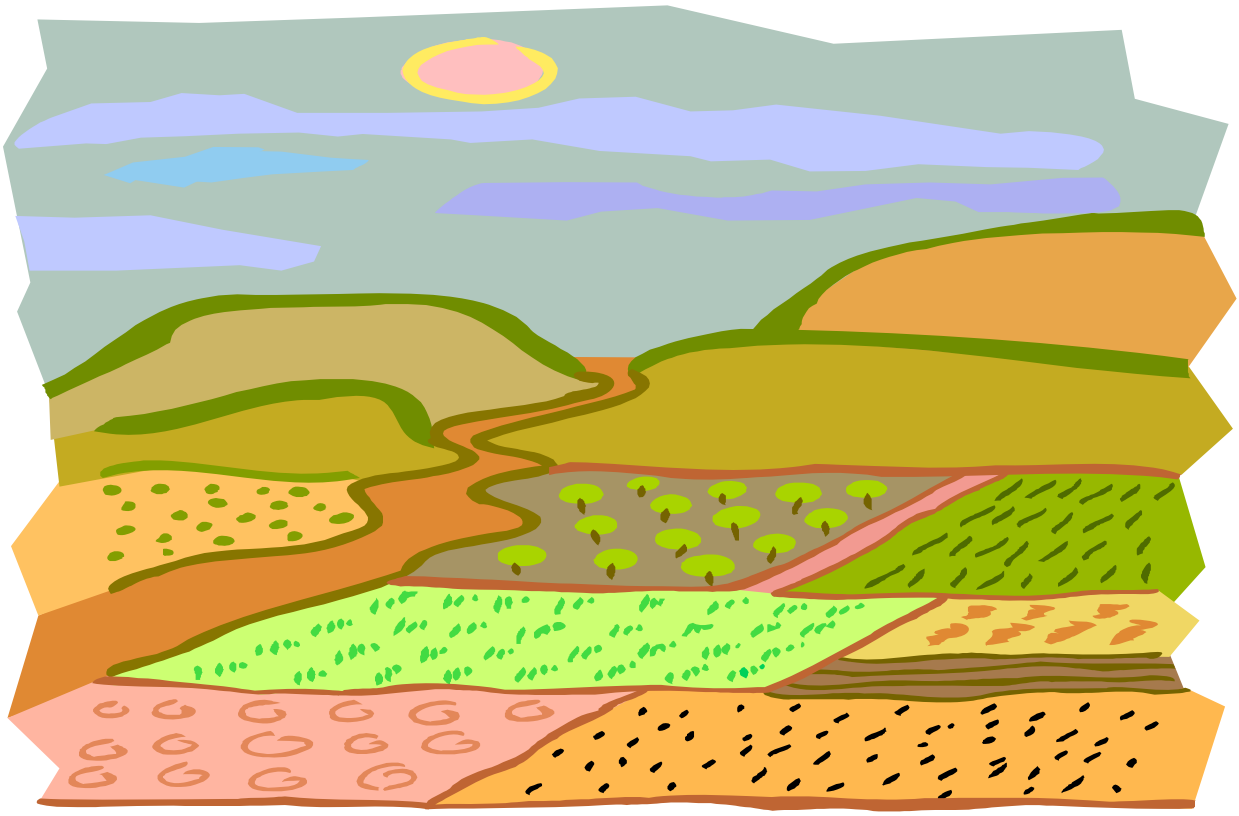
A REVIEW OF SOUTH DAKOTA DRAINAGE LAW

(Revised 2005)



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INTRODUCTION

Periodically even a semiarid state like South Dakota suffers from an overabundance of diffused surface water. The result is that not only are the potholes, sloughs, ponds, and swamps that dot the countryside filled by spring runoff or the occasional downpour, often they are filled to overflowing. The resulting floods and standing water impedes our largely agricultural economy. It is a problem our farm community has wrestled with for years.

However, the drainage activity that represents the possibility of enhanced productivity for one person, almost always has an adverse impact on nearby lands. Drainage law has attempted to reconcile this conflict by balancing the benefit gained from draining the land against the harm to other lands.

Historically, South Dakota drainage law has developed on two levels, one judicial and one legislative. Judicially, drainage law has developed through the resolution of disputes between landowners on a case-by-case basis, with the court system wrestling with the circumstances under which one person may legally drain surface water from his land onto the land of another.

Legislatively, a drainage scheme has existed since the early 1900's which dealt not only with permissible drainage, but also with the process of constructing, maintaining, and repairing drainage works. The statutes also included a special assessment system to fund such drainage activity. The statutory system operated through the board of county commissioners.

In 1985, the Legislature concluded that the statutory system was outdated and inadequate; the statutory drainage law was rewritten. Control of virtually all aspects of drainage was placed with the county. In addition, the new statutory scheme significantly broadened the scope of the drainage powers available to county government.

The material that follows is intended to provide county commissioners and other interested persons with a general understanding of drainage law in South Dakota. Initially, there is a brief review of many of the drainage cases decided by the South Dakota Supreme Court to show how that Court has resolved particular factual disputes. Next, there is an examination of the various provisions of the statutory drainage scheme that became effective on July 1, 1985, with the hope that some insight will be provided as to how those statutes fit together. Finally, brief mention is made of some of the pertinent federal considerations which impact on county drainage concerns.

I. CASE LAW

Essential to an understanding of the drainage statutes is a general understanding of the drainage cases which preceded the 1985 legislation. That is true because the Legislature incorporated the philosophy of those drainage cases into the new drainage statutes. Specifically, SDCL 46A-10A-20 is a legislative adoption of the drainage rules which have developed from the South Dakota drainage cases discussed below. It is SDCL 46A-10A-20 which contains the guidelines which must be followed by a county

in exercising its drainage powers. Therefore it is important to be familiar with the cases which resulted in those guidelines.

In reviewing the summary of drainage cases that follows, it is necessary to remember what type of water is involved in the cases--diffused surface water (runoff). Second, it is important to establish the setting in which the drainage laws apply--usually, an artificial enhancement or blockage of the flow of water along a natural watercourse. Third, it is important to identify the types of activity which typically generate a controversy. These activities fall into three broad categories:

a) Trying to capture diffused surface water;

b) Trying to avoid diffused surface water by obstructing or altering a natural watercourse; or

c) Trying to dispose of unwanted diffused surface water.

The following is a brief chronological discussion of the South Dakota Supreme Court cases which have considered factual disputes in each of these three broad categories.

In Quinn v. Chicago, Milwaukee, & St. Paul Railway Co., 23 S.D. 126, 120 N.W. 884 (1909), a railroad company put in its road bed without a culvert or other opening, resulting in water backing up on an adjacent landowner's property. The surface water had always drained off the land before the embankment was put in. The Court held the rule to be that a lower landowner cannot obstruct an obvious drainage channel formed by nature which carries water from higher to lower ground. In reaching its result of awarding damages to the upper landowner, the Court had to determine whether a "watercourse" existed. Although the channel in question did not

have a well-defined bed or banks, the Court found it could not be obstructed:

> If the confirmation of the land is such as to give to the surface water flowing from one tract to the other a fixed and determinate course, so as to uniformly discharge it upon the servient tract at a fixed and definite point, the course thus uniformly followed by the water in its flow is a watercourse. . . .

120 N.W. at 886.

In Anderson v. Drake, 24 S.D. 216, 123 N.W. 673 (1909), a landowner put in a well, and dug a small basin close to the well, connecting the well to the basin with a ditch. Before the ditch was constructed, the well did not flow. After the ditch was constructed water always ran out of this basin, down a draw and onto the plaintiff's land where it collected in a swale. Before the well was ditched into the basin, the swale could be farmed; after the well was ditched, the swale was unfit for farming. Although the well water eventually reached the plaintiff's swale by means of a natural drainage, the Court pointed out that the water would not have reached the natural drainage except for the ditch. The Court held that there was no right to drain the well water. The Court compared this situation to an attempt to drain a permanent body of water which had no natural drainage. However, the main basis for the Court's refusal to allow the drainage to continue was that the water involved (well water) was not surface water. Because it was not surface water there was "no right whatever by artificial means to discharge the same upon the land of other parties to their damage." 123 N.W. at 675.

Bailey v. Chicago, St. Paul, Minneapolis & Omaha Railroad Co., 25 S.D. 200, 126 N.W. 268 (1910) is another case in which a

railroad embankment backed up water, in this instance onto urban property. Here, although the City of Sioux Falls had installed three tile drains in the embankment, the drainage was inadequate to handle heavy rains. Water accumulated in open ditches along the right-of-way for an area three quarters of a mile long and from 400 to 500 feet wide. The runoff had no adequate means of escape. The accumulation flooded plaintiff's lots damaging houses, buildings, and gardens. The Court stopped the railroad and the City from accumulating the water, and awarded damages.

> The precise wrong or tort here involved is the collecting of surface waters by these means, and in negligently permitting and refusing to construct a proper and sufficient escape therefor, and thereby accumulating such surface water upon plaintiff's [Bailey's] property. It is a tortious and actionable wrong to collect surface water and discharge the same in unusual and unnatural quantities upon the lands of another.

126 N.W. at 270.

In Boll v. Ostroot, 25 S.D. 513, 127 N.W. 577 (1910), the question was whether Ostroot, the owner of an upland slough, could drain that water across Boll's lands into a lake which was also on Boll's land. To accomplish the drainage, Ostroot put in 40 rods of tile drain and dug a 12-foot-deep ditch in a ridge that separated the slough from the lake. Boll sought to stop the completion of the ditch and the Court agreed. The key point in the case is that there was no natural watercourse by which the water could flow from the slough onto Boll's lands. Only the construction of an artificial ditch through the ridge would drain the slough. The Court held:

> [T]he defendant had no legal right to relieve his own premises of surface water by constructing an artificial

> ditch or drain to carry it off onto the land of the plaintiff to the plaintiff's material damage.

127 N.W. at 580.

The landmark case in South Dakota drainage law is Thompson v. Andrews, 165 N.W. 9 (S.D. 1917). On Andrew's land there was a slough which in wet years accumulated runoff; in dry years it was tillable. There was a natural bank at the lower end of the slough, but there was a 2-foot-deep natural ditch in that bank. Even with that ditch, however, the slough held about 2 feet of water over a 100 acre tract. To drain the slough and make it consistently tillable, Andrews deepened the natural ditch sufficiently to drain the slough. The ditch did not extend beyond his land, but it opened into a natural swale or depression and eventually flowed across Thompson's land. Although the ditch was dug in 1894, it was not until the wet year of 1913 that Thompson sought to stop drainage of the slough through the ditch. In resolving the dispute, the Court set forth the basic philosophy for drainage of agricultural land in South Dakota. The Court's own summary of the rules adopted is as follows:

> We hold the rule to be that the owner of dominant agricultural lands, situate and lying in the upper portion of a natural drainage water course or water basin has, in the course of and for the purposes of better husbandry, a legal easement right, by means of artificial drains or ditches constructed wholly upon his own land, to accelerate and hasten the flow of waters that are surface waters under the rule herein laid down, and to cast the same into and upon a servient estate lying lower down in the same natural drainage water course, at that point where nature, by means of ravines or depressions, has indicated that such surface waters should find a natural outlet; provided, however, that such surface waters should not be collected or permitted to collect, and then be cast upon the servient estate in unusual or unnatural quantities; and, provided, also, that the surface waters of one natural water shed or

> basin may not, by means of the cutting or removal of natural barriers be cast into or upon lower lands lying in another and different natural drainage course or basin.

165 N.W. at 14.

The Court relied on the definition of watercourse it had adopted in the Quinn case and took care to point out that the Boll case was different, because in Boll there was no natural outlet from the slough to the drainage channel.

The Court had an opportunity to reaffirm the distinction between Boll and Thompson in Veener v. Olson, 168 N.W. 740 (S.D. 1918). Olson and other defendants owned upland property on which Wooley Lake was located. They constructed a drain through the natural barrier on the south end of the lake; no water had ever overflowed the lake at any time. The drain tile followed no depression, well-defined bank, or channel of any watercourse, and the resulting drainage was into a different drainage basin. The Court held that Boll applied and Thompson did not and prohibited use of the drain tile.

In Lee v. Gulbraa, 180 N.W. 946 (S.D. 1921), Gulbraa, the owner of an upland slough, dug a 6- to 8-foot-deep ditch through a natural embankment to drain his slough onto Lee's land. This drainage was collected in another slough on Lee's land. There was no natural watercourse between the two sloughs, and the water could not escape from Lee's slough. The Court on a 3 to 2 vote held that Gulbraa should not have cut through the natural embankment and prohibited use of the ditch.

In Rae v. Kuhns, 184 N.W. 280 (S.D. 1921), Kuhns used drain tile to drain ponds C and E into pond B and then drained B and D

into depression A. Ponds B, C, D, and E, and the drain tile were on Kuhns' land; depression A was on Rae's property. The Court determined that none of the ponds would have naturally drained into depression A; only by putting the drain tile through a "well defined ridge" between pond B and the depression was Kuhns able to drain onto Rae's land. The Court ordered Kuhns to stop the drainage.

It is not only the disposal of unwanted surface water that creates disputes. Often the right to capture that water is also litigated. In Benson v. Cook, 201 N.W. 526 (S.D. 1924), Benson sought to compel Cook to remove a dam he had constructed which prevented water from running down Ash coulee to Benson's land. Benson wanted to capture the water in his own dam and use it for irrigation. The only water in the draw was from melting snow and rainfall. Benson argued that under the water rights statutes Cook could not impede the natural flow of a definite stream. The Court took the opportunity to distinguish a stream from a watercourse.

> The term "definite stream" implies a presence or existence of running water, with some permanent source of supply, running along a fixed channel, not meaning, of course, that a stream or river may not run dry during a dry season without losing its character as a river; but it must be something more than just a wash or runoff caused by melting snow or a heavy rain.

201 N.W. at 528.

The Court observed: "While there cannot be a running stream without a water course, nothing is more common than a water course without a stream." 201 N.W. at 528. Although the draw was a watercourse, it was not a stream. It had no permanent source of

water supply nor any permanent flow. The water retained its character as surface water and therefore Cook could capture and use it on his own land. Benson, as a lower owner, had no right to have surface water flow onto his land.

Terry v. Heppner, 239 N.W. 759 (S.D. 1931) involved the damming of Plum Creek. The chief difference from the Benson case is that here the lower owner, Terry, had constructed two dams on the creek before Heppner, the upland owner, constructed his dam. Again, water in the creek was surface water from natural drainage--i.e., rain and melting snow. No one disputed that the creek was a watercourse; relying on Benson, the Court decided it was not a stream. As to surface water, the Court held:

> There is no right on the part of a lower proprietor to have surface water flow to his land from upper property. A landowner is entitled to use surface water as he pleases so long (and so long only) as it continues in fact to come upon his premises. He may drain or divert the same or he may capture, impound, and use it in such fashion as he will, provided only that he does not thereby create a nuisance or unlawfully dam back or cast the waters upon the land of another.

239 N.W. at 759-60. Compare SDCL 46-4-2.

Municipalities are also prevented from causing water to collect on private property. In Nelson v. City of Sioux Falls, 292 N.W. 868 (S.D. 1940), the city graded an intersection higher than its natural level, preventing the drainage of Nelson's lot as it had done before; the storm sewer was of insufficient capacity to carry away the surface water. The Court held:

> A municipal corporation cannot, without rendering itself liable for the resulting damage, exercise its right to grade or otherwise improve streets so as to collect surface water upon private property.

292 N.W. at 869.

In Johnson v. Metropolitan Life Insurance Co., 22 N.W.2d 737 (S.D. 1946), the Court once again considered the subject of draining sloughs. The insurance company had drained two sloughs along a natural watercourse. The drain tile was placed in the lower slough at the point where water overflowed when the water level was high. The drain water then followed the natural watercourse, across lands owned by other persons, to a highway located between the lands of the parties, and then onto Johnson's land. The Court reviewed most of the South Dakota drainage cases, and held that the drainage was proper. The Court summarized the drainage rules as follows:

1. That the owner of dominant lands situated or lying in the upper portion of the natural drainage water course or basin has in the course of and for the purpose of better husbandry, a legal easement right by means of artificial drains or ditches constructed wholly upon his own land or upon land of others where permission has been secured, the right to drain surface waters which would accumulate in depressions, basins, ponds or sloughs, on his land.

2. To do so he may construct ditches or artificial drains either covered or uncovered.

3. He may cut barriers or ridges at the lower end of such temporary ponds, depression, basins or sloughs in order to so drain, provided, that such water then follows the course it would follow in case of an overflow over such barriers or ridges.

4. In doing so he must not permit an accumulation of water on his land and then cast such accumulated surface waters in unusual or unnatural quantities on the servient estate.

5. A natural watercourse is defined as: "If the surface water in fact uniformly or habitually flows off over a given course, having reasonable limits as to width, the line of its flow is within the meaning of the law applicable to the discharge of surface water, a watercourse."

> 6. Such waters must be drained into a natural watercourse or into any natural depression whereby the water will be carried into some natural watercourse.

22 N.W.2d at 740-41.

On the same day, the Court decided the case of LaFleur v. Kolda, 22 N.W.2d 741 (S.D. 1946). There, Yankton County, in the course of highway construction through Kolda's pond, installed drainage ditches three to three and one-half feet deep and drained the pond. In its natural state there was no break in the rim of the pond. The ditches were cut in the rim at a point where water had escaped only by seepage. The ditches followed the natural drainage into a pond owned by Fantle and went through that basin into a pond owned by LaFleur and Mueller, known as the Mueller pond. The Mueller pond had no outlet. The Court held that drainage by a county for highway purposes is governed by the same rules as drainage of agricultural land by an upland farmer.

> [O]ne who acquires lands, over which a water course passes through which upper lands normally dry can be drained in accordance with "the general course of natural drainage," should be held to have acquired same knowing that good neighborliness and the common welfare required him to permit of the drainage of such upper lands through such water course conditioned only that such drainage be accomplished without unreasonable injury to his land.

22 N.W.2d at 743 (quoting Thompson).

However, the Court held that this rule did not justify allowing an upland owner to transfer a burden placed on his land by nature to the lower owner.

> To artificially drain a land-locked basin on the upper estate to a like basin on the lower estate is to relieve the upper estate of a burden at the expense of the lower estate. Such a rule could not have been anticipated by

> either the settler of the upper or the lower estate. It is unjust and unsound.

22 N.W.2d at 744.

In Faris v. Moore, 26 N.W.2d 130 (S.D. 1947,) the railroad company constructed a grade, but did not complete the track. The embankment remained the way it was constructed for some 35 years and while it did so Faris had no water problems. Water would usually flow along a depression caused by excavating the embankment, but at times some of the water followed a natural course towards Moore's buildings. Moore took out part of the embankment to construct a dam across the ravine which ran by his buildings. He put a culvert in the dam, but the culvert changed the natural drainage. The result was that the water in the ravine then flowed down the embankment, across the highway and onto Faris' land. The Court ordered Moore to restore the railroad embankment and remove the dam.

> [D]efendant [Moore] did not purport to drain in the course of the natural drainage when he constructed his dams across the ravine. He diverted the water from its natural course to an unnatural course and eventually upon the lands of the plaintiff. We think it clear that defendant had no right to construct the dams across the draw and divert the water in the manner disclosed by this record.

26 N.W.2d at 131.

Kougl v. Curry, 44 N.W.2d 114 (S.D. 1950) demonstrates that the easement to drain surface water from upper lands to lower lands by use of natural channels may be lost. Kougl and Curry owned adjoining lands. Although the lands were relatively level, there was a slight grade that allowed water to drain from Kougl's land to Curry's land. However, in 1915 a drainage district was

formed and in 1916, to facilitate drainage into a nearby river, an embankment was placed between the two lands, with ditches on both sides. Those ditches emptied into a larger drainage ditch. The embankment existed as originally constructed until 1944, at which time Kougl breached the embankment to rid his land of water impounded there. Curry promptly reclosed the embankment. Kougl sued to force Curry to remove the embankment and restore the natural drainage. The Court held that because the barrier had been in existence for 20 years, the upland owner could not force the lower landowner to remove it. The "assumed natural servitude" to drain had been lost.

> "An easement is extinguished by a use of the servient tenement by the possessor of it which would be privileged if, and only if, the easement did not exist, provided (a) the use is adverse as to the owner of the easement and (b) the adverse use is, for the period of prescription, continuous and uninterrupted." The period of prescription in this jurisdiction is twenty years.

44 N.W.2d at 116.

In Bogue v. Clay County, 60 N.W.2d 218 (S.D. 1953), the county made road improvements in 1949. The construction caused water to collect in the ditch and then spread out over Bogue's land. The water did not follow a natural watercourse in doing so, and it did not do so prior to the road improvements being made. The water sat on Bogue's land until it soaked in or evaporated.

The Court found:

> [The county] artificially collected and drained onto [Bogue's] land surface water from the upper lands of its own right-of-way and of other owners and discharged it in unusual and unnatural quantities, not into a natural watercourse, but at a point where it spread onto [Bogue's] land and did not flow over it in the course of natural drainage but remained there until much of it disappeared only through percolation and evaporation and

> some of which would never have reached [Bogue's] land except for the artificial interception. This method of draining surface waters violates principles well established in this jurisdiction and which apply with equal force to drainage by a county for highway purposes and to drainage of agricultural land.

60 N.W.2d at 222.

The County argued that when it originally condemned land for constructing the road and right-of-way and paid compensation therefor, it was relieved from having to pay for any further damages caused by the subsequent road work. The Court disagreed:

> To hold that the right to flood large areas of adjoining land is a right acquired in the purchase or condemnation of highway right-of-way would be to require an unnecessary acquisition of property and make the cost of highways needlessly excessive.

60 N.W 2d at 224.

In Bruha v. Bochek, 74 N.W.2d 313 (S.D. 1955), Bochek, using artificial ditches, drained four basins or ponds, all located on his land. To do so he cut through natural barriers which impounded the ponds. Two of the ponds were drained directly onto Bruha's land and two were drained into a common slough which was a landlocked basin. None of the four ponds had natural outlets; nor was the drainage into a natural watercourse. Accordingly, the Court enjoined the drainage.

The Court turned its attention to urban drainage in Young v. Huffman, 90 N.W.2d 401 (S.D. 1958), and pointed out that the rule might be different when it concerned drainage in an urban rather than a rural area. The Court stated that it was not necessary to decide that point in this case, however. Young owned Block 14; adjoining that Block on the south was Block 19 owned by the Huffmans; and adjoining the Huffman Block on the east was Block 20

owned by Windham; Windham was not involved in the litigation. The natural watercourse was from Block 14, into Block 20, and then into Block 19. Prior to 1951, Windham put an embankment across the watercourse to impound water. The Huffmans then hauled in dirt and leveled their land for residential changes. Young sued, claiming the alteration of Block 19 caused surface water to collect on her land which damaged her house. The Court ruled that Young was not entitled to damages because she did not prove that the flooding was caused by Huffman's activities; it could have been caused by Windham's embankments.

In a case similar to LaFleur, the Court held a county liable for causing flooding by construction and maintenance of roads. In Heezen v. Aurora County, 157 N.W.2d 26 (S.D. 1968), the county road and ditch system diverted surface water into a lake; absent the road the water would not have drained into that lake. In 1962 heavy rainfall and the ditch system caused the lake to overflow, when it otherwise would not have. The Court found the county liable:

> The actions of the defendant county in causing the land of these plaintiffs to be flooded by diverting water from another watershed resulted in the taking and damaging of private property for public use for which they were entitled to be compensated. This is in accord with our holdings that such flooding of land is compensable under eminent domain provisions. . . . This rule is not pertinent when the owner of dominant land drains surface waters from his land into a natural watercourse.

157 N.W.2d at 30.

In Mulder v. Tague, 186 N.W.2d 884 (S.D. 1971), the Court answered the question raised in Young and adopted a rule for urban drainage that was different than the rule for rural drainage.

> Following the modern trend of authorities we expressly adopt the "reasonable use" rule relative to the drainage of surface waters in urban areas of this state. Under this rule each owner "is legally privileged to make a reasonable use of his land, even though the flow of surface waters is altered thereby and causes some harm to others, but incurs liability when his harmful interference with the flow of surface waters in unreasonable."

186 N.W.2d at 889.

The factual situation in the case shows the number of variables that can enter into a drainage case. Mulder's house was built in 1948 and was one of the first houses in that area in Sioux Falls. The yard was below the grade of 33rd Street. Mulder bought the house in 1963. Tague owned the adjoining property on the west. Surface water from a 75-block area drained into 33rd Street, across Mulder's property, then to the back of Tague's property and finally to 35th Street. Originally there was a six-foot drop in elevation from 33rd Street south to 35th Street. However, in 1962, 35th Street was brought to grade and the difference in elevation was reduced to two feet. As houses were built south of Mulder's property, fill was brought in to bring the lots to grade. In 1963 Tague and another neighbor filled the rear part of their lots to a height of 14 inches, and put in a garden. Despite being told by the city engineer that the fill would block drainage and cause water to back up, nothing was done to reopen the drainage. One night over four inches of rain fell during a five-hour period. The area between 33rd and 35th Street became a lake. The storm sewers in the area could not handle the water and in the middle of the two-block area the sewer actually acted like a geyser adding even more water. Mulder's basement filled with

water; Tague's basement caved in. After the storm, the fill material was removed from the drainage.

The Court refused to award Mulder damages because of all the various factors that contributed to the problem. However, the Court did enjoin Tague from putting fill back into the drainage area. The Court refused to apply the drainage rule applicable to agricultural lands in this urban setting:

> As any change in grade, level, or topography might affect natural drainage, the civil law rule cannot reasonably be strictly applied in urban areas. To do so would prevent the proper use, development, improvement and enjoyment of considerable urban property. Also, the reason for the rule disappears in areas where adequate artificial drains and storm sewers are provided.

186 N.W.2d at 888.

Gross v. Connecticut Mutual Life Insurance Co., 361 N.W.2d 259 (S.D. 1985) was a case involving the breaching of an irrigation pond used in a feedlot operation. The pond was adjacent to the feedlot and the water in the pond came from a variety of sources. Some was runoff from the feedlot; some came from two flowing artesian wells located in the feedlot; and some came from drainage from a feedlot settling pond. Because of fears that the irrigation pond was structurally unsafe and might break if more water entered into the pond, the pond was breached. The resulting flow flooded portions of two quarters owned by Gross below the dam.

The Supreme Court upheld the trial court's award of damages for the flooding. The Court noted that the trial judge had actually looked at the drainage area. The Court ruled that the water from the irrigation pond was not surface water.

> "Surface waters comprehend waters from rains, springs, or melting snows which lie or flow on the surface of the earth but which do not form part of a watercourse or lake." . . . The term does not comprehend waters impounded in artificial ponds, tanks, or water mains. . . . "The chief characteristic of surface water is its inability to maintain its identity and existence as a water body."

361 N.W.2d at 266 (citations omitted).

Since the water was contained and stored in an irrigation pond, and because some of it came from wells, it had lost its character as surface water. The Court went on to say:

> Whether the waters are of a nature to be treated as "surface waters" for the purposes of drainage must, in each case, be a question of fact to be determined from the evidence.

361 N.W.2d at 266.

The Court found, however, that even if the water was surface water, the discharge from the pond was not restricted to a natural watercourse. Although there was a natural waterway below the dam (a creek), the discharge from the dam covered seventy-five acres at one point, and completely flooded a pasture. "[I]t cannot be said that the entire property constituted a natural drainage area." 361 N.W.2d at 267. The drainage rule applicable to agricultural lands contemplates a discrete channel, course or system of drainage, not widespread flooding or inundation of lower lands. Finally, the Court held: "Defendants had no right, in law, to accumulate this water and discharge it upon their neighbors, to the absolute detriment of their neighbors." 361 N.W.2d at 267.

In Feistner v. Swenson, 368 N.W.2d 621 (S.D. 1985), the Court sent a drainage case back for trial because there were issues of

fact as to whether there was a natural watercourse and whether the drainage was reasonable. Although the Court did not finally resolve the case, it did indicate the nature of the disputes which had to be settled. Feistner argued that Swenson had ditched, channeled, and filled his land and had cut through a township road all of which diverted the water from its natural course and caused the water to collect on Feistner's land. Swenson responded he had simply drained the surface water into a natural watercourse which crossed Feistner's land and that he had merely cleaned out a culvert that already existed in the township road. He claimed the water on Feistner's land came from the flooding of Sand Creek, not from his drainage. Swenson produced expert testimony that there was a natural channel over Feistner's land, and that the water came from Sand Creek. However, the Court pointed out that photos of Feistner's land showed it was flat, and once covered with water, it looked more like a slough than a natural watercourse. Further, the Court said that there was a factual dispute as to whether Swenson's conduct was reasonable, implying that while cutting through a road to release water dammed up behind it might be unreasonable conduct, simply cleaning out a culvert might be reasonable. Finally, there was a question as to whether the effect on Feistner's land was unreasonable. Therefore the Supreme Court sent the case back to the trial judge for trial.

Lee v. Schultz, 374 N.W.2d 87 (S.D. 1985) further reflects the factual difficulties that can be encountered in drainage cases. The evidence was that Schultz drained a forty-four acre slough into a thirty-acre slough and then into a five-acre slough.

All of these sloughs were on his land. The thirty-acre slough was landlocked, having no natural drainage outlet. Schultz cut a 4- to 8-foot-deep ditch in the embankment of the thirty-acre slough to get it to drain into the five-acre slough. Water from the five-acre slough drained across the road onto Lee's land. What happened to the surface water once it reached Lee's land was the issue in contention.

Lee had taken this problem to court shortly after the ditch was constructed, seeking to stop the drainage at that time as being "unnatural." However, the trial court ruled that the water from the five-acre slough followed a natural watercourse across Lee's land, and that therefore the drainage was proper. That decision was not appealed by Lee.

Two years later, Lee again sought to stop the drainage, arguing this time that the water drained did not in fact run across his land; instead, it collected there and formed a slough of some ninety acres. The trial judge was of the opinion that his prior finding that the drainage ditch was proper was binding upon him and that the issue could not be relitigated. The Supreme Court disagreed, holding essentially that drainage which is proper in some instances may become unreasonable, and therefore improper in others. At the time of the first action the water levels were evidently such that no unreasonable damage resulted to Lee. However, at the time of the second action there was evidently more water because it did collect on Lee's land.

Thus, the Supreme Court held that a second legal proceeding was permissible. The matter went back to the circuit court where

a determination was made once again in favor of Schultz. Lee once again appealed. The Supreme Court held that the trial court had incorrectly set forth the rule of law with respect to drainage. Although the circuit court's determination had appeared to be consistent with previous Supreme Court decisions, it was closely scrutinized and held to be unfair to Lee. Specifically, the Court held that a party cannot turn large volumes of water onto a neighbor's property or cause volumes of water out of proportion to the drainage involved to flow to the neighbor's land or cause serious damage to such neighbors. The significance is that not all three factors were required (as the trial court had held) in order to find that unreasonable drainage had occurred. Lee v. Schultz, 425 N.W.2d 380 (S.D. 1988).

The Court also ruled against an upland owner in Winterton v. Elverson, 389 N.W.2d 633 (S.D. 1986). The upland owner, Elverson, had installed a tile drainage system in 1975. Before 1975, surface water drained onto Winterton's land after heavy rain or snow melt through a natural waterway. The runoff was sporadic and the water did not accumulate for more than a short time.

After the tile was installed, the runoff still came down the same natural waterway; further, the volume of the water was not increased. However, the flow from the tile was continuous and at a slower rate than existed before 1975. As a result, the water accumulated and made several acres untillable. The Court ordered the drainage stopped because the Court felt that Elverson was draining surface water in "unnatural or unusual quantities." By reducing the flow, the surface waters no longer ran over the lower

property; rather, the water sat on that property. Thus the Court upheld the trial court's determination that the natural burden on the lower land was unreasonably increased.

One thing is clear from these cases: there are no standard answers to drainage questions. The Supreme Court cases demonstrate that each case is factually unique; the result depends on the facts determined in each case according to the natural conditions present.

These cases have been provided to give an indication of how our Court has applied drainage rules to a variety of factual settings, with the hope that the summary will be helpful to a county government in carrying out its drainage responsibilities in rural areas. These cases are also important because their philosophy has been carried forward into the drainage statutes and specifically into SDCL §§ 46A-10A-20 and 46A-10A-70. Hendrickson v. Wagners, Inc., 1999 S.D. 74, 598 N.W.2d 507; Winterton v. Elverson, 389 N.W.2d 633 (S.D. 1986).

For a more detailed discussion of many of the cases discussed above and a review of some of the drainage cases from other jurisdictions, see Comment Diffused Surface Water Law As Applied In South Dakota, 23 S.D. L. Rev. 763 (1978). Also, for a general source material reflecting a wide variety of drainage cases in different jurisdictions across the nation, see Annotation, Drainage of Surface Waters--Interference, 93 A.L.R.3d 1193 (1979). Finally, for related South Dakota cases which demonstrate how closely tied drainage law is to other water rights issues, see

Reetz v. Baukol, 287 N.W.2d 108 (S.D. 1980) and Romey v. Landers, 392 N.W.2d 415 (S.D. 1986).

II. STATUTORY PROVISIONS

Historically, South Dakota drainage statutes dealt almost exclusively with constructing, maintaining and repairing drainage projects. Drainage projects were initiated by filing a petition with the board of county commissioners, which had the authority to assist in construction of the project and to levy special assessments to pay for the project and for future maintenance. Drainage districts were authorized to operate those projects in the place of the county. No local unit of government, however, was responsible for resolving drainage disputes. That was left to the judicial system. Further, no local entity had responsibility for long-range planning for drainage matters.

SDCL ch. 46A-10A reflects the recent legislative determination that drainage matters should be addressed at a local level. Specifically, the legislation made drainage the responsibility of the county commissioners. Chapter 46A-10A provides county commissioners with a wide array of powers and duties with reference to drainage. Some of those are optional in nature; others are mandatory. Some deal with broad planning powers; others with specific dispute resolution. What follows is a discussion of some of the more important general concepts included in the drainage statutes, together with an explanation of several individual sections critical to county implementation of those statutes.

A. SDCL 46A-10A-20

Of primary importance in understanding the statutory drainage scheme is SDCL 46A-10A-20. This provision is in large part a codification of the drainage rules arising from the court cases discussed above. Virtually all county drainage activities of a substantive nature must comply with this section. SDCL 46A-10A-20 furnishes the backdrop against which the balance of SDCL ch. 46A-10A must be examined. SDCL 46A-10A-20 provides:

> Official controls instituted by a board may include specific ordinances, resolutions, orders, regulations or other such legal controls pertaining to other elements incorporated in a drainage plan, project or area or establishing standards and procedures to be employed toward drainage management. Any such ordinances, resolutions, regulations or controls shall embody the basic principle that any rural land which drains onto other rural land has a right to continue such drainage if:
>
> (1) The land receiving the drainage remains rural in character;
> (2) The land being drained is used in a reasonable manner;
> (3) The drainage creates no unreasonable hardship or injury to the owner of the land receiving the drainage;
> (4) The drainage is natural and occurs by means of a natural water course or established water course;
> (5) The owner of the land being drained does not substantially alter on a permanent basis the course of flow, the amount of flow or the time of flow from that which would occur; and
> (6) No other feasible alternative drainage system is available that will produce less harm without substantially greater cost to the owner of the land being drained.
>
> Such provisions do not necessarily apply within municipalities, but if a municipality drains water onto rural lands lying outside the boundaries of the municipality, the municipality is subject to the above provisions, if adopted by the board.

B. DRAINAGE PLANNING

South Dakota statutes, for the first time, afford county government the opportunity to do some long-term planning in the drainage area, should that be deemed desirable by the county commissioners. The drainage planning statutes are modeled after the county planning and zoning statutes (SDCL ch. 11-2) and are for the most part optional in nature; they permit a county to adopt a comprehensive drainage plan for the entire county, to do nothing by way of planning at all, or to do virtually anything in between those two extremes. The broad spectrum of permissible activity is a recognition of the diversity of conditions statewide in terms of climate and topography. It allows counties with no drainage problems to essentially ignore the planning mechanisms, and affords counties with serious problems the opportunity to coordinate drainage on a broad scale with a view towards efficient land use with a minimum of individual disputes.

If a county is interested in doing some form of drainage planning, there are a number of tools available. These tools are referred to as official controls. SDCL 46A-10A-1(16). Which of those tools are employed by the county is dependent to a large extent on the degree of control the county wishes to exert over drainage matters. The official controls are statutorily described in very general terms to provide for flexibility. However, the official controls utilized to implement planning must be consistent with the purposes set forth in SDCL 46A-10A-17 and must be within the legal guidelines set forth in SDCL 46A-10A-20.

Thus, in the planning process, a county may by specific ordinance, resolution, order, regulation, or some other method, establish areas where "drainage of land for agricultural, residential, industrial and commercial, soil and water conservation, and additional uses may be encouraged, regulated or prohibited." SDCL 46A-10A-18. Drainage maps can be adopted which show existing drains, roads and highways, culverts, wetlands, sloughs, and other conditions related to drainage showing their "alignments, gradients, dimensions and other pertinent features." SDCL 46A-10A-19. Even bare bones planning could enable future drainage projects, or future projects which impact on drainage, to proceed in a more orderly fashion, allowing all concerned to anticipate and perhaps avoid or alleviate areas of potential dispute.

1. Procedure for adopting plan.

Whatever the extent of control ultimately deemed necessary by the county, adoption of a drainage plan requires compliance with certain procedural steps. After a plan has been formulated, the county auditor is directed to publish a notice of hearing on the plan once a week for two consecutive weeks in a newspaper of general circulation in the area. The notice is to state the time and place of the hearing and must include a statement that all interested persons may appear and testify at the hearing. SDCL 46A-10A-22.

Based on the testimony presented at the hearing, the board of county commissioners may adjust or amend the plan as it deems necessary. The plan may be adopted upon a finding by a majority

of the board members that it "is feasible and conducive to public welfare and necessary or practicable for draining land in the county." SDCL 46A-10A-23. If the board adopts the plan, it is filed with the county auditor, and a summary of the plan, after review by the state's attorney, is published once in the county's official newspaper. SDCL 46A-10A-25. The plan becomes effective twenty days after publication. The summary, as published, must contain a statement that the public may view the entire plan at the county auditor's office during normal business hours. SDCL 46A-10A-24.

During the twenty-day period after publication, the plan may be referred to a vote of the people at the next primary or general election held more than sixty days after the plan is filed. The plan is submitted to a vote if a petition is filed which is signed by five percent of the voters, based on the total number of votes cast for governor in the county at the last gubernatorial election. If such a petition is filed, the effective date of the plan is suspended until after the vote. However, no drainage inconsistent with the plan may be undertaken between the time the plan is adopted and the time of the vote. If the voters, by a majority, reject the plan, the county may revise the plan by following the same process originally used in adopting the plan. The revised plan is also subject to referendum.

Once a drainage plan is effective, it controls all further drainage in the county. Thereafter, board approval is necessary to undertake drainage activities covered by the plan whether those activities are new drainage construction or rehabilitation of

existing drainage. The county is also empowered to provide for the enforcement of its drainage plan, together with other drainage ordinances, regulations, etc., and may "impose enforcement duties on any officer, department, agency or employee of the county." SDCL 46A-10A-33.

2. Amending a plan.

The plan may be amended, supplemented, or modified by the board itself; if the board refuses or fails to consider changes, amendments can be initiated by a petition signed by 30 percent of the landowners in the area requesting the changes. SDCL 46A-10A-37. Furthermore, individual landowners can seek changes in drainage restrictions on their lands by filing a petition for hearing with the board and by notifying "directly affected adjoining landowners" and "directly affected third parties holding drainage interests" by registered or certified mail of the petitioned for change one week prior to the hearing on the petition. SDCL 46A-10A-38.

A hearing must be held within 45 days after receiving either type of petition, and any affected person may testify at such hearing. SDCL 46A-10A-39. If changes are made by the board as a result of the hearing, the changes are implemented in the same manner as the original plan was adopted; the changes are also subject to referendum. SDCL 46A-10A-40.

3. Effect of a plan.

Assuming a drainage plan of some type is instituted, or that certain controls are established by an ordinance, regulation or order, the board is empowered to adopt regulations "to regulate

and control, reduce the number or extent of or bring about the gradual elimination of nonconforming drains and drainage schemes." SDCL 46A-10A-36.

A drainage plan does not have any effect on municipalities in the county, unless a municipality, by contract, agrees to joint county-municipal drainage activities (SDCL §§ 46A-10A-10, 46A-10A-12, 46A-10A-13) or unless a municipality asks to be included in, and thereafter adopts the plan. SDCL §§ 46A-10A-41, 46A-10A-42. Indeed, SDCL 46A-10A-20, which sets out the guidelines for the entire chapter, specifically provides that its "provisions do not necessarily apply within municipalities . . . ."

Finally, nothing in statute requires county drainage planning within any particular time frame. It may well be that certain counties do not deem it necessary to do planning right away, if at all. Nothing would prevent planning activities at some future date. It is also possible to do very general planning at this stage, with future specificity provided as the need arises. The statutes in this regard are intentionally broad to provide the flexibility required to contend with the broad spectrum of climate, topography, and available local funding in South Dakota. SDCL 46A-10A-43 does provide, however, that "[a]ny county drainage plan shall include functioning drainage districts, vested rights described in § 46A-10A-31, the drainage plans or projects of a unit of local government and existing coordinated drainage areas formed pursuant to § 46A-10A-47."

C. COORDINATED DRAINAGE AREAS

If county officials choose not to adopt a comprehensive drainage plan for the county, if the county has undertaken a very general approach to planning, or if the county is involved in a long-term process for adopting such a plan, more localized planning efforts may be undertaken by either the county or by affected individual landowners. Such localized planning units are called coordinate drainage areas.

1. Purpose of a coordinated area.

Coordinated drainage areas are primarily covered in SDCL §§ 46A-10A-47 through 46A-10A-55. However, you have to look at SDCL 46A-10A-1(4) to discover the legislative philosophy behind creating such areas. Coordinated drainage areas are intended "to provide a planned network or method of natural or manmade drainage, or both, to benefit all parcels of real property involved." A coordinated drainage area is intended to function for a smaller area in a manner similar to a comprehensive drainage plan at a countywide level.

Coordinated drainage areas can exist with or without a comprehensive drainage plan. If such a plan does exist, or if other official controls are in place, the coordinated drainage area must be consistent with the plan or the controls. Such areas can be established by the county "to carry out county drainage goals" (SDCL 46A-10A-18) or by a petitioning process initiated by the affected landowners.

The statutes contain no limits as to the shape, size, or quantity of land, or numbers of landowners involved to justify

creation of a coordinated drainage area, although the clear implication is that more than one landowner must be involved. Such an area may cover a large portion of a county or may include no more than a few tracts of land, the owners of which desire to band together to solve common drainage problems. Smaller coordinated drainage areas probably would occur at the request of the affected landowners and could become part of a larger county drainage plan if one is ever adopted. Alternatively, such coordinated areas might grow in number and size over a period of years until they interlock to form a plan that becomes virtually countywide; this offers a county the potential to form a comprehensive drainage plan on a step-by-step basis, rather than entering into a major undertaking as a single program. However, the greatest potential for a coordinated drainage area is that it is available as a means of resolving the problems of a few landowners in a county that otherwise faces no drainage dilemmas.

2. Creating a coordinated area.

a. By county action.

If a coordinated drainage area is established by the county itself pursuant to SDCL 46A-10A-18, and without a landowner petition, it appears that such an area should be established by ordinance or resolution. Such ordinance or resolution would be subject to referendum under general county statutes. SDCL §§ 7-18A-15 to 7-18A-24, inclusive.

b. By landowner petition.

If a coordinated drainage area is initiated by the affected landowners, they must file a petition signed by not less than

25 percent of the landowners residing in the area proposed for coordinated drainage. The petition must be verified by one or more of the applicants; the verification is in the form of an affidavit stating that the circulator personally witnessed the signatures and believes them to be genuine. Before the petition can be filed, however, the applicants must first obtain an accurate survey and map of the territory to be included in the drainage area, showing the boundaries and the area involved. The accuracy of the survey and map has to be verified in affidavit form by a licensed surveyor. The survey and map must then be made available for inspection at a convenient public office for a period of not less than 20 days. The public office is to be designated by the county auditor, and is to be "within the area." There is no guidance provided as to what is or is not a public office, or what is meant by the phrase "within the area." However, it would seem that some common sense is in order because municipal areas are not eligible for inclusion in a coordinated area, and one would suspect that public offices could be hard to find outside of municipalities. Perhaps an ordinance or resolution defining these terms would be advisable.

The petition, survey, and map are then filed with the county auditor, who presents them to the board for consideration at its next meeting. If the petition satisfies the statutory requirements, the county enters an order declaring the area to be a coordinated drainage area, when and if approved by the voters involved. In the same order, the county should include a notice of election to the landowners residing in the area; the notice

should set forth the date, time, and polling places for the election. (Note that landowners are defined by SDCL 46A-10A-1(11).) The election must be held within one month and the notice of election must be published in an official newspaper at least 10 days prior to the election. Polling hours are 8 a.m. to 7 p.m. A majority vote of those voting is required to establish the area; if a majority rejects the area, no new vote is permitted for two years. Election officials are to be appointed by the county and the county is to pay the election costs. If the petition is signed by the majority of the affected landowners in the area, no election is required. The board is authorized to spend county funds to pay "necessary costs" of petitions, surveys, maps, and applications in support of the formation process. SDCL 46A-10A-55.

D. DRAINAGE PROJECTS

By constitutional amendment adopted in 1906, drainage of agricultural land was declared a public purpose. The Legislature was empowered to provide for drainage districts and to vest construction and repair powers on counties, townships, and municipalities. Funding of drainage activities by special assessment was also authorized. S.D. Const. art. XXI, § 6. County governments have been statutorily authorized to construct drainage projects and repair existing drainage works for some 80 years.

Drainage projects are covered in SDCL §§ 46A-10A-57 to 46A-10A-97. For the most part, those sections do not represent a substantive change from the drainage statutes which have existed

since about 1907. An attempt has been made to modernize some of the concepts and to some extent standardize the mechanics of the process.

Construction of drainage projects may be instituted either by the county undertaking a project on its own initiative (SDCL §§ 46A-10A-75, 46A-10A-77) or by acting pursuant to a landowner petition (SDCL 46A-10A-58). Maintenance and improvement of existing drainage works may also be undertaken by the county on its own motion (SDCL 46A-10A-82) or pursuant to landowner petition (SDCL 46A-10A-83).

1. Landowner petitions.

Petitions for the construction of a drainage project must be signed by a majority of the resident landowners likely to be affected by the proposed drainage. It should be noted that not all landowners are eligible to sign the petition; the statute speaks in terms of resident landowners for determining both who may sign a petition and how many signatures are required. (A legitimate question arises as to whether the state or other political subdivisions qualify as "resident landowners.")

The petition must include:

a) An explanation of why the project is necessary;

b) A description of the route, either by the exact course or by identifying the initial points, terminus, and general course;

c) A general statement of the territory likely to be affected; and,

d) An assessment of the impact (environmental or otherwise) on any public property or right in the territory likely to be affected.

The petition is to be filed with the board; if it meets statutory requirements as to content and number of signatures, the board files it with the county auditor. The auditor is to send a copy to the Department of Environment and Natural Resources. The board must act on the petition within 30 days of filing. SDCL 46A-10A-60.

If the board deems it necessary, it may hire an engineer to do a "survey" and "report" on the project. The survey and report should contain the fairly detailed information specified in SDCL 46A-10A-61, including estimates of probable cost. The purpose is to assist the board in determining the feasibility of the project and/or the need for modification of the project. The survey, report, maps, and plans are to be filed with the county auditor, with a copy sent to the Department of Environment and Natural Resources. The petition and report are also to be open to public inspection and copying once they are filed.

2. Hearing on petition.

Once the survey and report are filed, the county auditor is to set a time and place for a public hearing on the petition and publish notice of the same. If no survey or report is deemed necessary by the board, the auditor should set the time and place and publish notice shortly after the petition is filed pursuant to SDCL 46A-10A-61. Notice is to be published once a week for two consecutive weeks and is to include:

a) The time and place of the hearing;

b) A legal description of each tract of land affected by the proposed project;

c) The names of all landowners of such land;

d) The names of "all directly affected third parties holding drainage interests";

e) A statement that all persons affected by the proposed drainage can appear at the hearing and give testimony; and,

f) A statement that all persons deeming themselves damaged by the project, or claiming damages for lands taken for the project should present their claims at the hearing.

After the hearing, and after making such amendments and modifications to the project as the testimony and report warrant (SDCL 46A-10A-63), the board may establish the project if it determines that "the proposed project, or any variation thereof, is feasible and conducive to public welfare and necessary or practicable for draining land." SDCL 46A-10A-65. Establishment of the project is by resolution; the board must also name the project, and the county auditor must keep a book for the recording and indexing of project proceedings. SDCL 46A-10A-69.

3. Determining project damages.

If a project is established, the county will be faced with the task of calculating damages for each tract of land or other property taken for the project. Once the county makes a determination of damages, it must provide notice to each of the affected landowners, and schedule a hearing on the damages question. SDCL 46A-10A-68 deals with this process and provides that the board is to receive evidence on the question of damages and just compensation at that hearing. Any affected person may testify and present evidence on those issues at the hearing. The board's decision on damages is final unless it is appealed to circuit court. That appeal must be taken in 20 days. See SDCL

46A-10A-35; compare SDCL 7-8-29. The circuit court is to hear the appeal as a condemnation action. See generally SDCL ch. 21-35.

The entire damages process is covered in one section of the statutes. Although that section has existed in similar form since about 1905, it leaves a large number of things unsaid. A county would be well served by formalizing the notice and hearing process by way of an ordinance. For example, the notice should not only state what the determination of damages was, it should also set a time and place for hearing, inform the person damaged of his right to testify and present witnesses, and of the right to appeal the board's decision. A notice to landowners damaged which is provided by publication is probably not sufficient. Some form of personal notice would be required. Although it is probably not legally applicable, SDCL 1-26-17 could serve as a useful guide in drafting a notice. It would be advisable to send the notice at least by certified mail, return receipt requested. Compare SDCL 46A-10A-56. Also, for purposes of complying with due process, the notice must be served far enough in advance of the hearing to provide the opportunity for a meaningful hearing, i.e., a reasonable opportunity to prepare.

The statute provides that the board is to receive evidence on the damages question. However, it is also the county's burden to go forward with evidence on the amount of damages. Therefore, it seems advisable, and perhaps essential from a constitutional standpoint, to separate the fact-finding function of the board at the hearing to determine damages from the adversarial function of the county in making the prehearing determination of what

constitutes just compensation. What that means in practical terms is that the county commissioners are going to have to stay out of the initial determination of project damage; that determination will have to be made by whatever county "staff" the commissioners decide to utilize, i.e., director of equalization. The commissioners will then have to rely on evidence from the county "staff" and from other persons as presented at the hearing in deciding what is just compensation for project damages.

In reality, the process will differ little from the equalization of real property taxes, except perhaps be a little more formal. For example, the county assessor or an appraiser hired by the county would initially determine damages caused by the project, much as they would for a county road project. Notice would then be sent to the affected landowner informing him of the initial determination of damages and scheduling a hearing. The board then acts as a judge at such a hearing, receiving evidence on damages from both sides and issuing a final decision.

It would be prudent to make the final decision in writing and make sure that the final decision is served upon the parties. It also seems advisable to have a trained appraiser make the initial determination of damages for the "staff" and to have that appraiser testify at the hearing before the board.

4. County construction powers.

The county has the same powers with reference to construction of and contracting for drainage projects as it does for other facilities. SDCL 46A-10A-77. Construed broadly, that statute could authorize issuance of county bonds or a collection of an

annual tax to accumulate funds for drainage projects. Compare SDCL chs. 7-24, 7-25. Construction includes not only initial establishment of drainage works, but also maintaining, relocating, extending, deepening, widening, and regulating existing drainage; straightening, cleaning out, deepening, and otherwise regulating channels of creeks and streams (but see SDCL §§ 46-5-1.1, 46A-10A-8, 46A-10A-70); constructing, maintaining, remodeling and repairing levees, dikes and barriers for the purpose of drainage. SDCL 46A-10A-78.

5. Construction contracts.

SDCL 46A-10A-75 provides that the county can construct drainage or let contracts for drainage construction. The statutes do not speak in great detail as to what situations make it permissible for a county to construct its own drainage projects. Specific mention of construction by the county is made in SDCL 46A-10A-84. Rather, the statutes speak in terms of letting contracts for construction, differentiating only as to when competitive bidding is or is not required.

SDCL 46A-10A-75 provides, as a general proposition, that construction contracts are to be let by competitive bid. The contract may be for an entire project, or any portion thereof, and materials and labor may be contracted for separately. Advertisements for bids should probably be published once a week for two consecutive weeks in accordance with SDCL 5-18-3. Plans and specifications are to be filed with the county auditor. The board is to accept the lowest responsible and capable bid, but has the right to reject all bids. The county also has the right to simply

"hire the necessary labor and purchase the necessary material without letting contracts" if the board determines it can do all or any of the project for less money than the lowest bid submitted. SDCL 46A-10A-75 includes a preference provision: "If a responsible and capable landowner affected by the project submits one of several low bids, he shall be given contract preference." If the board lets a contract, a 100 percent performance bond is required.

6. Maintenance, repair, and improvements.

The "construction" statutes also include the concepts of maintenance, repair, and improvement. Maintenance of projects constructed under the provisions of the new drainage laws is subject to the control of the county, unless otherwise provided. SDCL 46A-10A-80. Maintenance of existing projects is also the responsibility of the county, if improvements are made in an existing project. SDCL 46A-10A-81.

Furthermore, the board must take on the responsibility of maintaining "private" drains in certain circumstances. Drains that were created by three or more landowners and voluntarily maintained at least ten years before 1985 may turn the maintenance responsibility over to the board. SDCL 46A-10A-43.1. The board must provide for maintenance, improvement, and repair if landowners comply with the procedure set out in SDCL 46A-10A-43.1 through SDCL 46A-10A-43.4 and, significantly, agree that they will be subject to assessments by the board.

Finally, the board has jurisdiction to maintain a drainage project to its "original efficiency or capacity" without notice "[a]t any time and on its own motion." SDCL 46A-10A-82.

The term "maintenance" appears to include the term "repair" under the statutes. Thus, repair of drainage works is a type of maintenance. SDCL 46A-10A-84 provides that if repairs will cost less than $10,000 and the board projects a potential savings by not receiving bids, the repairs can be done with county labor and equipment. Further, in repairing closed drains (SDCL 46A-10A-1(2)), construction of a new closed drain is considered a repair if the board finds it is more economical than repairing the existing drain. SDCL 46A-10A-85.

Improvements "which differ from repairs" are defined in SDCL 46A-10A-86, and quite obviously go beyond what is ordinarily thought of as maintenance. When improvements are proposed, the board may "appoint" an engineer to conduct a survey of the proposed improvements. If the estimated cost of such improvements does not exceed $10,000, the work can be done without notice. However, the project would have to be submitted for competitive bids if it is over $5,000. SDCL 46A-10A-75; SDCL 5-18-3. If the improvements are estimated to cost more than $10,000, a hearing must be held, at which the board will consider the feasibility of the improvements. Notice of the hearing is to be by publication once a week for two consecutive weeks. The notice should contain the same information that is required for a drainage project in SDCL 46A-10A-62, i.e., description of land and third parties directly affected by the proposed improvements. After the

hearing, the board can "take action as it considers desirable" including the reclassification of benefits because of the improvements. SDCL 46A-10A-87.

7. Petitions for maintenance and repair.

If the board fails to make necessary repairs or improvements, fails to maintain a project, or otherwise fails to act as provided in SDCL §§ 46A-10A-81 to 46A-10A-88, a landowner petition can be filed to require the board to take such actions. The petition must be filed with the county auditor and must be signed by a majority of the landowners affected or likely to be affected by the proposed repairs or improvements. It does not appear that the signers of this petition need to be resident landowners. The petition should describe what action the landowners are requesting that the board take. If the petition complies with SDCL 46A-10A-83, the board must take the action requested.

Petitions for maintenance, repair, and improvement of "private" drains may also be filed under SDCL 46A-10A-43.1. These petitions may be filed if three or more landowners have voluntarily established a legal drain and maintained it for at least ten years before 1985. Here, sixty percent of the affected landowners must sign petitions describing the drain and agreeing to maintenance and assessment by the board. SDCL 46A-10A-43.2. Further procedure is set forth in SDCL 46A-10A-43.1 through SDCL 46A-10A-43.4.

8. Establishing a drainage project.

When a drainage project is established, the board should enter a resolution, which includes among other things, a legal

description of each tract of land either in the project or affected by the proceedings establishing the project. SDCL 46A-11-1 directs the county auditor to file the resolution with the register of deeds, and further directs the register of deeds to record the resolution against each tract described. The recorded resolution is constructive notice of the establishment of the project.

E. ASSESSMENTS

Although the statutes mention several different types of funding sources for drainage activities, it seems pretty clear that the primary source of funds is the special assessment. The assessment system for drainage matters has been in existence, in large part, since 1905. The 1985 drainage law revision represents modernization of language in existing law on assessments rather than the introduction of new concepts. The finance statutes, SDCL ch. 46A-11, generally follow the legislative philosophy reflected in other "water" legislation in the recent past, that those benefited by a project should pay for the project.

1. What is an assessment?

Special assessments may be utilized to pay for project construction costs, including damages (SDCL §§ 46A-10A-66, 46A-11-2, 46A-11-5); for additional construction (SDCL §§ 46A-10A-79, 46A-11-9); and for maintenance and repairs (SDCL §§ 46A-10A-80, 46A-10A-88). In multi-county situations, assessments may even extend beyond county lines. SDCL 46A-10A-89. The system for apportioning, equalizing, and collecting those assessments is set out in some detail in SDCL ch. 46A-11. There

are a number of cases interpreting the former versions of these statutes. See Appendix A, attached hereto. However, before reviewing what the statutes provide with reference to the mechanics of assessments, it is important to understand what a special assessment is.

At the heart of the special assessment system is the theory that the property assessed is receiving some special benefit from an improvement which differs from the benefit that the general public enjoys. The amount of the assessment is determined by the cost of the improvement; that cost is apportioned according to the value of the benefit conferred on the property. Perhaps an assessment can best be understood by comparing it to a tax:

> [T]he terms "tax" and "taxation" and the term "special assessments" have a well understood meaning by courts and the public generally. Taxes and taxation are understood to mean the taxes imposed by the government for state, county, city, or township purposes, and to provide funds for general expenses of the particular community or district for which the taxes are levied. Special assessments are understood to refer to money raised or levied for some local municipal purpose to which the funds so collected are to be specifically applied in making the local improvements. The assessment is not laid upon a whole community, but only on a small and defined part thereof; and, while a tax is levied upon all property of a state, county, city, or town without any reference to special benefits to the individuals taxed, special assessments are presumed to be made on account of special benefits to the property assessed, conferred by the improvements for which the special tax is levied.

City of Brookings v. Associated Developers, Inc., 280 N.W.2d 97 (S.D. 1979). See also Hawley v. City of Hot Springs, 276 N.W.2d 704 (S.D. 1979); Ruel v. Rapid City, 167 N.W.2d 541 (S.D. 1969); Winona & St. Paul Railway Co. v. City of Watertown, 44 N.W. 1072 (S.D. 1890).

The drainage statutes address "benefits" in a rather general way at SDCL 46A-11-3, which states in part:

> Benefits shall accrue directly by construction of the project or indirectly by virtue of the project operating as an outlet for connection drains that may be subsequently constructed. Indirect benefits including those due to improved public welfare, may be assessed against any county or political subdivision affected as a whole, at the option of the board.

SDCL 46A-11-2 directs that the benefits determined for each tract of land "shall be in the form of a ratio or percentage in comparison to the average tract of land found most likely to receive average benefit." See also SDCL 46A-10A-61.

Determination of the benefit accruing to a particular piece of property is not something that can be accomplished with mathematical certainty. Nor can benefit be determined solely in terms of increase in market value or current use. The State Supreme Court has endorsed an approach which determines benefits accruing for the property in light of highest and best future use of the property that can reasonably be expected. The Court has recognized that of necessity there is opinion involved in the process, and that some degree of estimation or approximation is to be expected. See Hawley v. City of Hot Springs, 276 N.W.2d 704 (S.D. 1979). This is true because some improvements, like drains, may not only enhance the value of lands, but also may improve the sanitation and health of the area residents. As the Court has recognized, the benefits derived from improvements are frequently difficult to quantify. It will probably be equally as difficult to identify the "average tract of land."

Our Supreme Court has further stated that in the area of special assessments, statutes are to be strictly construed in favor of the property owner. However, there is a presumption that the local official's findings made regarding the benefits conferred are correct; that presumption of correctness can be overcome only by "strong, direct, clear and positive proof." City of Brookings, 280 N.W.2d at 97; Hawley, 276 N.W.2d at 704. It is against this backdrop that the assessment system must be viewed.

2. Equalizing benefits.

Once a drainage project is established the board is to determine the proportion of benefits among the lands affected by the project. The board then sets the time and place to equalize those benefits and provides notice of equalization. The notice is published once a week for two consecutive weeks prior to the equalization hearing. The notice must:

a) Describe each tract of land affected by the proposed project;

b) State the names of the owners as they appear in the tax records;

c) List the proportion of benefits fixed for each tract of property; and

d) Notify all such owners of the opportunity to show cause at the specified time and place why the proportion of benefits should not be fixed as stated.

See SDCL 46A-11-2.

The equalization hearing process should be similar to the process utilized in hearing real property tax equalization matters. After the hearing, the board should equalize and fix the proportion of the benefits, SDCL 46A-11-4, and make an assessment

against each tract of property affected, in proportion to those benefits. SDCL 46A-11-5.

3. Notice of assessment.

Once that assessment has been made, the board must provide notice that the assessment roll will be filed with the county treasurer. Notice of the assessment roll is by publication at least once a week for two consecutive weeks in an official newspaper in the county. According to SDCL 46A-11-6 the notice must contain:

a) A legal description of the property assessed;

b) The name of the owner of the property as it appears in the assessment;

c) The amount of each assessment, including the amount assessed against the county, and any city, town, township, or railroad company; and

d) The date on which the assessment will become delinquent, plus any penalty for late payment, and the date from which interest will be charged.

4. Payment of assessments.

SDCL 46A-11-6 provides for filing of the assessment thirty days after the board takes action pursuant to 46A-11-5. The publication of the notice of assessment must occur before that filing. The county auditor is to certify a copy of the assessment and file it with the county treasurer. The assessment is due when that certified copy is filed. At that point the assessment becomes a lien which attaches to the property assessed, except in the case of lands owned by the United States or by the State. Landowners have thirty days to pay the assessment; thereafter a five percent penalty applies and the assessment bears interest at

the category D rate. Currently that rate is 1¼ percent per month. SDCL 54-3-16(4).

During the thirty days after the assessment is made, but prior to filing, the owner of land which is being assessed may enter into an agreement with the board to pay the assessment with interest as fixed by the board, in ten annual installments. The agreement is to be filed with the county auditor. The first installment is payable within ten days after the filing of the assessment roll with the county treasurer. Annual payments are due thereafter on the anniversary date of the assessment, and must include interest on the outstanding principal balance. Installments are delinquent thirty days after the due date; a penalty of five percent attaches when the installment becomes delinquent. SDCL §§ 46A-10A-13, 46A-10A-14.

Assessments may be enforced by the county treasurer in much the same manner as real property taxes. Such property, however, may not be sold at the annual tax sale unless the assessment was delinquent on or before August 1 of the year in which the sale is held. A treasurer's deed for drainage assessments must state that the title is subject to claims which the State or any political subdivision may have against the title for annual taxes. SDCL 46A-11-19.

Assessments may, as a general proposition, be made against state property (SDCL 46A-11-16); property in other counties (SDCL 46A-11-20); and units of local government including a county, city, town, or township (SDCL §§ 46A-11-17, 46A-11-18). Although each unit of government has slightly different procedures to

follow when paying the assessment, it must still pay assessments to the extent government lands are benefited.

It is clear that assessments in many instances, serve to repay the cost of a drainage project over the long term. The question arises as to the source of the funds to get the project done initially. Those funds can be obtained by the sale of the assessment certificates pursuant to SDCL 46A-11-8; by issuing assessment certificates to project contractors pursuant to SDCL 46A-11-11; or by issuing drainage bonds pursuant to SDCL 46A-11-23. Both assessment certificates and bonds can be issued without an election at such rates as may be negotiated by the board. Both are secured by the assessments. The other option would be to borrow the funds, or receive a grant, from either the federal or state government. Presumably, loans would be secured by the assessments.

F. DRAINAGE COMMISSIONS

1. Creation of commissions.

Many of the drainage matters discussed above may, at the option of the county commissioners, be performed by a drainage commission. A drainage commission consists of three or more members appointed by the county commissioners for a term set by the board. The terms of the initial members are staggered. There is no upper limit on the number of members, but the number is required to be uneven. One of the members must be a county commissioner.

A drainage commission must meet at least once every six months. A commission cannot conduct official business unless all

memberships have been filled and at least a majority of the members are present. The members get such compensation and expenses as are determined by the county commissioners. Members can be removed for cause by the county commissioners after a hearing. Vacancies on the commission must be filled by the county commissioners within thirty days.

2. Duties of commission.

The duties of the drainage commission would include:

a) Preparing a drainage plan -- the actual adoption of the plan by the board;

b) Instituting official controls -- the actual adoption of "official controls" is by the board;

c) Approving new drainage under a drainage plan -- the decision is subject to review by the board;

d) Adopting and administering a permit system -- an "official control" which is actually adopted by the board;

e) Deciding challenges to vested rights filings -- the decisions are subject to appeal to the board;

f) Serving as a board of resolution -- the decisions are subject to appeal to the board;

g) Reviewing applications to establish a coordinated drainage area, and conducting an election to establish such an area -- the board actually sets the polling places, does the ballots, and forms the area if the vote is favorable;

h) Discussing and making recommendations on drainage projects -- the board does everything else with reference to projects; and

i) Maintaining drains once constructed or improving existing drains.

Most of the topics discussed above with reference to the county commissioners are treated elsewhere in this booklet, at least in terms of what the county commissioners may or must do

with reference to each. County commissioners have the authority to do everything that a drainage commission can do; however, a drainage commission's powers are not as extensive as those of the county commissioners.

In those instances where the county commissioners have designated themselves as the drainage commission, that designation amounts to a recognition that there will not be a separate drainage commission. It is a declaration that the board of county commissioners will exercise its statutory authority over drainage matters rather than delegating some of those matters to a separate commission. It does not mean that the county commissioners can exercise only those powers granted to drainage commissions. The practical effect is to add drainage to the list of other matters and duties considered by the county commissioners at their meetings.

3. Correspondence file.

A unique law enacted in 1987 requires each member of a board or county drainage commission to maintain a file containing any correspondence relating to drainage control (including complaints, requests for information or assistance). Each item of correspondence is to be marked with the date of receipt and kept for at least two years.

G. BOARD OF RESOLUTION

The 1985 Legislature provided a mechanism for the resolution of private drainage disputes by allowing drainage commissions to adjudicate those disputes, or by allowing the county commissioners to resolve the matters themselves, if they desire to do so.

However, SDCL 46A-10A-34 was not mandatory; the board of county commissioners could refuse to hear private disputes at all, leaving those matters for the courts to resolve. This was changed in 1986, when the Legislature acted to make resolution of private disputes mandatory, if the private individuals so desired.

1. Discretion to hear disputes.

For several years SDCL 46A-10A-34 required that county commissioners either appoint a drainage commission to resolve private drainage disputes or handle those private disputes themselves. See AGR 86-32.

Since 1997, county commissioners have had discretion to appoint drainage commissions, constitute themselves as a drainage commission for this purpose, or decline to handle such private disputes altogether. If the county has not provided for resolution of private drainage disputes, the parties must proceed directly to court.

The board of resolution, if one is appointed, also has the authority to grant special exceptions and variances to official drainage controls. The resolution of these matters is to be accomplished in accordance with SDCL 46A-10A-20.

2. Developing a hearing procedure.

This provision essentially allows either the board or a drainage commission to perform a quasi-judicial function. However, there is little guidance in the statute as to how the adjudicatory function is to be performed. In performing that function, it is clear that it is the property rights of various individuals that are at stake. Therefore, it is not

constitutionally permissible to make the decision making process too informal.

It would seem prudent to adopt ordinances which will ensure that due process requirements are met. This would include developing a system of notice requirements, and a hearing procedure that provides a reasonable opportunity for a meaningful hearing. As was true with the hearing process for determining damages, SDCL 1-26-17 could serve as a useful guide in promulgating a notice and hearing process. Since individual property rights are involved, personal service of notice is the most advisable course to take.

It is also important to keep in mind that the board of resolution acts basically as a judge in resolving private disputes. Therefore, a decision should be reached based on the evidence presented at the hearing. The board of resolution should not, for example, talk to one side of a dispute without giving the other side the opportunity to be present. The better procedure would be to record the hearing in some fashion and make a written decision; the final decision should be served on all parties.

3. Appeal of board decisions.

If a drainage commission decides a private dispute, its decision may be appealed to the board of county commissioners. A board's decision is appealable to circuit court. The appeal time, as with appeals from other county actions, is twenty days after the decision being appealed is made. SDCL 46A-10A-35 preserves to the landowners the option of taking a drainage dispute directly to circuit court, totally bypassing the board of resolution.

4. Intercounty cooperation.

SDCL 46A-10A-34.1 allows a board of county commissioners or drainage commission in one county to serve as a board of adjudication in another county. (Note that a board of adjudication is the same thing as a board of resolution.) A written agreement is required which sets forth the jurisdiction of such a board. A joint powers agreement (SDCL ch. 1-24) might also be used to allow a board of resolution to serve in several counties.

5. Exempting certain disputes.

Finally, it should be noted that SDCL 46A-10A-34 allows the board of county commissioners to designate certain types of drainage disputes which will not be heard by a board of resolution. The statute does not specify what criteria the board should follow in determining which disputes will be resolved by the county and which will be left to the court system. While it is left to the board of county commissioners to adopt its own system, that system of making distinctions, to be legally supportable, cannot be arbitrary in nature. Those landowners who are similarly situated should receive similar treatment. Also, there should be some reasonable, rational reason for distinguishing between types of disputes. Again, it is probably advisable to adopt either an ordinance or resolution which specifies what those distinctions are.

The authority to grant variances and exceptions from official controls is very similar to the power of the county with reference to zoning and planning matters. A similar system could be adopted

to review requests from landowners, and to ensure that interested persons are afforded an opportunity to present their views.

H. VESTED RIGHTS

A key provision of the drainage law from an individual landowner's standpoint is SDCL 46A-10A-31, which requires that certain drainage rights must be recorded in order to remain a vested property right. The South Dakota Supreme Court has held that the lower property is burdened with an easement which permits the owner of upper property to discharge surface water over the lower property through such channels as nature has provided. That easement is property under the Constitution and is entitled to the protection of the due process clause. It is a vested property right, the taking of which requires just compensation. See Thompson v. Andrews, 165 N.W. 9 (S.D. 1917). A recognition of these principles led to the adoption of SDCL 46A-10A-31.

The drainage statutes provide county government with a wide array of authority over drainage matters. In many instances the exercise of that authority might impact on vested rights. It is obviously better for county officials to have some idea of what rights a particular action will impact before it takes action, rather than unwittingly condemning property. SDCL 46A-10A-31 assists county officials in identifying the number and nature of vested rights which exist in a county. Secondarily, it allows those persons or entities with construction projects which could disrupt drainage to determine the impact of those projects.

SDCL 46A-10A-31 provides that any natural drainage lawfully acquired prior to July 1, 1985, is automatically vested. No

recordation is necessary in order for a natural drain (defined in SDCL 46A-10A-1(14)) to continue to be a vested property right. The statute goes on to provide that other drainage rights may also remain vested, but only if the owner recorded such drainage rights within seven years of July 1, 1985. Thus recording was required for natural drainage with manmade modifications (i.e. ditches or drainage tile) or drainage which is entirely manmade. This might include an "established watercourse," as defined in SDCL 46A-10A-1(9); closed or blind drains, as defined in SDCL 46A-10A-1(2); and some "private drains," as defined in SDCL 46A-10A-1(18).

It should be noted, however, that counties, townships, and municipalities were not required to record their natural drainage rights or highways rights-of-way, and drainage districts were not required to record their drainage rights. SDCL §§ 46A-10A-31, 46A-10A-31.2; AGR 95-4; AGR 91-14.

Although vested right statutes were designed to allow affected landowners to directly appeal the filing of vested rights before courts, the board, or the drainage commission, the time to do so appears to have expired. The statute speaks in terms of pre-July 1, 1988, drainage, challenged within two years of filing. The filing deadline was July 1, 1992.

Yet, if a person files under this law and the filing is recorded, it may still be attacked in court when a drainage dispute arises. A filing based on drainage that was not legal before filing is not cured by the filing process. Sherburn v.

Patterson Farms, Inc., 1999 S.D. 47, 593 N.W.2d 414. Such filings may be voided by the courts. Id.

In order to determine whether a vested drainage right was filed for a particular area, the county register of deeds should be contacted.

I. OFFICIAL CONTROLS

County regulation of drainage matters may be accomplished by way of "official controls," defined in SDCL 46A-10A-1(16) as "any ordinance, order, regulation, map or procedure adopted by a board to regulate drainage." Specific forms of "official controls" include maps of drains, highways and roads, culverts, wetlands, sloughs, and other natural and/or manmade features relating to drainage "showing their alignments, gradients, dimensions and other pertinent features." SDCL 46A-10A-19. Further, SDCL 46A-10A-20 indicates "official controls" may include "specific ordinances, resolutions, orders, regulations or such other legal controls pertaining to other elements incorporated in a drainage plan, project or area or establishing standards and procedures to be employed toward drainage management."

1. Purpose of official controls.

Among the stated purposes for "official controls" are:

a. "[E]stablishment of drainage projects or coordinated drainage areas within which drainage of land for agricultural, residential, industrial and commercial, soil and water conservation and additional uses may be encouraged, regulated or prohibited." SDCL 46A-10A-18.

b. "[T]o control individual drainage construction or rehabilitation or such drainage methods by groups of landowners within the county." SDCL 46A-10A-46.

c. "[I]n order to protect the public general welfare, [the board] may adopt as an emergency measure a temporary drainage map, temporary drainage ordinances or other temporary official controls, the purpose for which shall be to regulate drainage and related matters as constitutes the emergency." SDCL 46A-10A-15.

d. "[T]o regulate and control, reduce the number or extent of or bring about the gradual elimination of nonconforming drains or drainage schemes." SDCL 46A-10A-36.

e. To establish procedures for the board of resolution. SDCL 46A-10A-34.

f. To implement a drainage plan. SDCL 46A-10A-23.

2. Drainage permit system.

Potentially, the most significant "official control" is the drainage permit system authorized in SDCL 46A-10A-30. A permit system may be adopted at the discretion of the county commissioners. If a permit system is adopted, it must be consistent with the guidelines set forth in SDCL 46A-10A-20. It may be utilized with or in the absence of a drainage plan. The permit system may only be prospective in nature; however, any drainage right which must be recorded under SDCL 46A-10A-31 would need a permit to continue, if the landowner fails to record that

right. Natural drainage rights and recorded drainage rights would not need a permit to continue.

Permitted drainage which is enlarged, rerouted or otherwise modified requires a new permit. It is not clear whether vested drainage rights under SDCL 46A-10A-31 must get a permit if that drainage is enlarged, rerouted or otherwise modified after a permit system is adopted. An argument can be made by analogy to SDCL 46A-10A-28 that a permit would be required. Perhaps an ordinance clearly stating whether a permit is required would be the best approach.

It would seem that ordinances are advisable in developing a permit system. A large amount of discretion is provided to the board in determining the substance of that system. The board is allowed to charge up to $100 for obtaining the drainage permit. Beyond that limitation and the guidelines found in SDCL 46A-10A-20, however, the county is allowed to formulate its own application process, review procedure, acreage limitations, watershed limitations, hearing procedure, appeals process, or other standards and procedures in structuring a permit system.

If a permit system is implemented, draining without a permit (or without a vested right) constitutes a Class 1 misdemeanor which is punishable by a maximum of a $1,000 fine, one year in county jail, or both. Further, a civil penalty of $1,000 per day for each day of violation may be assessed by a court. It appears, however, that the criminal sanctions and civil penalty only apply for draining without a permit. For violating the terms and conditions of a permit, or violating the ordinances which

constitute the permit system, it is likely that SDCL 7-18A-2 controls ($200 fine and/or 30 days in county jail, maximum). See also SDCL §§ 7-18A-32 through 7-18A-35.

3. Enforcement of official controls.

The Legislature specifically provided that the county could enforce its official controls, by imposing enforcement duties on "any officer, department, agency or employee of the county." SDCL 46A-10A-33. It is also provided that one of the remedies available to the county in the event of a "violation or a threatened violation" of an official control is an injunction proceeding "to prevent, restrain, correct or abate such violation or threatened violation." SDCL 46A-10A-44. The state's attorney is to bring such actions. See also SDCL §§ 7-16-8, 7-16-18.

Certified copies of all official controls are to be filed with the register of deeds by the county auditor. SDCL 46A-10A-27. Logically, the pertinent provisions of SDCL ch. 7-18A should also be observed.

J. OTHER POLITICAL SUBDIVISIONS

Although the primary responsibility for the drainage of agricultural lands rests with the county, other political subdivisions also have powers relating to drainage. This section reviews those provisions of the drainage statutes which attempt to avoid the potential for conflicting regulation between adjacent counties, between the county and its municipalities, and between the county and those other political subdivisions which occupy the same geographic location as the county. The drainage relation-

ships between the county and the state and between the county and the federal government are dealt with in later sections.

1. Cooperation in drainage matters.

Initially, the statutes urge cooperation between the county and other political subdivisions. SDCL 46A-10A-10 provides that any unit of local government (SDCL 46A-10A-1(21)) can enter into a joint powers agreement with the county in an effort to promote cooperation and avoid overlapping or conflicting jurisdiction. SDCL 46A-10A-12 provides that a municipality may contract with a county for drainage expertise and services; SDCL 46A-10A-13 goes on to authorize contracts for joint county-municipal drainage activities. Upon request a county may prepare a drainage plan for a municipality, and may prepare official controls to apply within municipal boundaries. However, such plan and official controls are not binding unless actually adopted by the city's governing body or unless a contract has been executed pursuant to SDCL §§ 46A-10A-12 and 46A-10A-13. See SDCL 46A-10A-41.

Similarly, joint drainage efforts among or between counties is specifically encouraged. SDCL 46A-10A-9 provides:

> The boards or commissions of two or more counties may cooperate on drainage. Expenses incurred in connection with joint efforts, including contracted services, shall be shared equitably per agreement among the counties involved. Promotion of regional drainage projects, coordinated drainage areas and drainage patterns or schemes, including passage of compatible ordinances and resolutions in adjoining counties, is the primary but not exclusive objective of joint efforts.

If cooperative action between counties is necessary and joint drainage efforts (undertaken in good faith) fail, the State Water Management Board may become involved. SDCL §§ 46A-10A-9.1 and

46A-10A-9.2. The State's involvement in such matters is largely to facilitate cooperation between the counties, rather than to issue orders or make factual determinations on drainage issues. A 1986 statute also allows a board and/or commission from one county to serve as a board of resolution for any other county. SDCL 46A-10A-34.1.

2. Exemption of certain subdivisions.

Absent that cooperation, SDCL 46A-10A-8 provides with reference to certain political subdivisions:

> This chapter and chapter 46A-11 do not limit or affect the laws of this state relating to organization and maintenance of irrigation districts, water user districts, water project districts, water development districts, conservation districts or watershed districts, nor does it infringe upon or establish any rights superior to any existing water rights.

Likewise, SDCL 46A-10A-42 provides with reference to cities:

> Nothing in this chapter other than the voluntary provisions of § 46A-10A-12 may be construed to prevent or modify the powers of an incorporated municipality from exercising drainage jurisdiction within the corporate limits and from exercising jointly with the county board or drainage commission the drainage authority outside of the corporate limits.

See also SDCL ch. 9-48; SDCL §§ 9-32-9, 9-35-8; 46A-10A-20; Mulder v. Tague, 186 N.W.2d 884 (S.D. 1971); and 1919-20 AGR 57.

3. Intercounty drainage.

It is readily apparent that joint drainage projects or intercounty projects are permissible; it is even clear that one county may collect assessments for lands in another county assuming a benefit to those lands. SDCL §§ 46A-10A-80, 46A-10A-81, 46A-10A-83, 46A-10A-89, 46A-11-20. The same is true in cities and townships. SDCL §§ 46A-11-17, 46A-11-18. When

drainage activities undertaken by one county create drainage problems for an adjacent county, the counties are encouraged to reach mutually acceptable resolutions. SDCL 46A-10A-9.2. The South Dakota Water Management Board and the Chief Engineer are to assist in voluntary dispute resolution. SDCL §§ 46A-10A-9.1, 46A-10A-9.2. If voluntary dispute resolution is not successful, the Chief Engineer can recommend ways to resolve the matter to the Water Management Board. That Board then holds a hearing, and may order the counties to take certain actions or adopt official controls to resolve the problem. The action required by the Water Management Board may last up to one year. The Board's order must be consistent with SDCL 46A-10A-20. SDCL 46A-10A-9.3 to SDCL 46A-10A-9.5. If the dispute is not resolved by the Water Management Board, or if the dispute is never brought to that Board, the judicial branch may have to resolve intercounty disputes.

4. Drainage powers of other subdivisions.

SDCL 46A-10A-8, on the other hand, appears to allow certain water-related districts to regulate their own drainage, at least as a matter of regulatory jurisdiction. However, the drainage power granted to those political subdivisions is very general in nature; accordingly, SDCL 46A-10A-70 probably establishes the substantive rule for individual drainage even in those districts. Likewise, the standards in SDCL 46A-10A-20 would probably apply because they reflect the pertinent judicial criteria.

A listing of relevant drainage powers held by particular political subdivisions include:

a. Irrigation districts -- SDCL §§ 46A-6-5 to 46A-6-7, inclusive; §§ 46A-7A-156, 46A-7A-157.

b. Watershed districts -- SDCL §§ 46A-14-4, 46A-14-44, 46A-14-46, 46A-14-91.

c. Water project districts -- SDCL §§ 46A-18-38, 46A-18-64.

d. Water user districts -- SDCL §§ 46A-9-2, 46A-9-69 to 46A-9-72, inclusive.

e. Water development districts -- SDCL 46A-3-7 (by way of definition in 46A-2-4(5)).

f. Conservation districts -- SDCL §§ 38-8-50, 38-8-64; SDCL ch. 38-8A.

g. Municipalities -- SDCL §§ 9-40-1, 9-42-2, 9-47-1, 9-48-2. See also City of Winner v. Bechtold Investments, 488 N.W.2d 416 (S.D. 1992) (concerning condemnation for construction and maintenance of municipal drainage project).

This listing is not intended to be exclusive, but rather is intended to provide county government with some idea of where to begin looking if one of those types of districts exists in the

county. It should be noted that although not listed in SDCL 46A-10A-8, sanitary districts also have drainage powers. See SDCL §§ 34A-5-26, 34A-5-30.

In addition to dealing with drainage matters, political subdivisions have authority to deal with the closely related areas of flooding and obstruction of waterways. A list of statutes pertaining to these issues is attached as Appendix B.

5. Drainage districts.

Two other types of entities must be considered. SDCL 46A-10A-8, as amended in 1986, provides: "The provisions of this chapter may affect drainage districts only as outlined under provisions of § 46A-10A-43." That statute provides as follows:

> Any drainage district established under the laws of this state that has functioned in its capacity as a drainage district within three years prior to July 1, 1985 or that has assessed real property in its capacity as a drainage district within three years prior to July 1, 1985 shall be allowed to continue in that status. However, the landowners in such existing drainage district may choose by majority vote at a general election under the general election laws of this state to dissolve in order to join one or more drainage projects or drainage methods or to become or join a coordinated drainage area. Any county drainage plan shall include functioning drainage districts, vested rights described in § 46A-10A-31, the drainage plans or projects of a unit of local government and existing coordinated drainage areas formed pursuant to § 46A-10A-47.

SDCL 46A-10A-43.

Drainage districts were established pursuant to SDCL ch. 46A-12. That chapter was repealed in 1985, but existing, functioning drainage districts were allowed to continue at their discretion. To be entitled to continue in existence, drainage districts must have functioned in the three years prior to July 1,

1985, or had to have levied an assessment during that three-year period. Those districts which did not qualify were abolished by operation of law with the repeal of SDCL ch. 46A-12.

For those which are still in existence, and which chose not to dissolve to join a project or coordinated drainage area, the statutes regarding such operations are now in SDCL 46A-10A-98, et seq. See also SDCL 46A-10A-43 and AGR 95-4 (interpreting previous law).

6. Coordinated drainage areas.

The second type of entity that must be considered is the coordinated drainage area. Those types of areas are discussed in general above, at least to the extent of how to establish one. A coordinated drainage area is:

> a defined geographic area containing one or more parcels of real property and established under the provisions of this chapter and chapter 46A-11 by a board or commission to provide a planned network or method of natural or manmade drainage, or both, to benefit all parcels of real property involved.

SDCL 46A-10A-1(4). Such an area may not be formed if to do so is inconsistent with an existing drainage plan or other official controls. However, existing coordinated areas must be considered in adopting a drainage plan.

While the reasons for forming such an area, either by way of the petition process or by direct action of the county, are fairly straightforward, it is not at all clear how a coordinated drainage area functions once it is established. Several possibilities emerge. For an area created by the county pursuant to SDCL 46A-10A-18, it is plausible to argue that the commissioners can by

ordinance assign duties and either establish a local governing board or serve as that board themselves. In that setting, a coordinated area is really an official control; its powers and duties must be consistent with SDCL 46A-10A-20.

When an area is formed through the petition process, however, it is more difficult to imply that the power to set duties and establish a governing body lies with the county, especially if a drainage plan has not been formulated. The most defensible argument implies that power from SDCL 46A-10A-33. See also SDCL 46A-10A-46. It also seems possible to argue that the petitioners could make their proposed governing structure one of the things spelled out in their application. It might also be possible for the county to suggest particular governing structures by the manner in which the petition format is adopted. Whatever means is used, it seems prudent to establish how the coordinated drainage area relates to the county, either by official control, agreement, or perhaps most preferably, by legislation.

7. Interstate drainage districts.

Finally, it is important to recognize that there is at least one other type of entity with powers over drainage--interstate drainage districts. As the name implies, such districts can be created where a drainage basin extends across state lines. Interstate drainage districts are governed by SDCL ch. 46A-13. A discussion of that chapter and those districts is beyond the scope of this booklet; however, those border counties with interstate drainage basins should bear that alternative in mind should the need arise.

8. Drainage in municipalities.

Drainage within municipalities has historically been subject to a different set of laws than in rural settings. The statutory provisions in SDCL ch. 46A-10A generally do not apply. Municipal drainage law is not covered at length in this book, but some general observations are made here.

The standard for resolving disputes between private parties within municipalities is the "reasonable use" rule. First Lady, LLC v. JMF Properties, LLC, 2004 S.D. 69, 681 N.W.2d 94. Under this rule, the landowner "is legally privileged to make a reasonable use of his land, even though the flow of surface water is altered thereby and causes some harm to others. Id. (citing Mulder v. Tague, 85 S.D. 544, 186 N.W.2d 884 (1971)). The Mulder case is described more fully in the summary of cases in Section I of this book.

Sometimes the drainage disputes are caused by the municipality itself in carrying out its statutory powers. For example, municipalities have a duty to undertake road construction and other municipal improvements in a manner that prevents undue drainage on private property. Nelson v. City of Sioux Falls, 292 N.W. 868 (S.D. 1940).

Municipalities also have authority to install storm water projects, subject to approval by the South Dakota Department of Environment and Natural Resources. Further, cities have authority to make stream channel improvements inside and outside city boundaries (SDCL 9-36-11 and SDCL 9-36-16) and control flooding

and drainage (SDCL 9-40-1, SDCL 9-47-1, and SDCL 9-48-1). These projects may also require approval by the DENR.

As noted elsewhere in this book, private parties may not obtain prescriptive rights against municipalities for drainage matters. Steiner v. Marshall County, 1997 S.D. 109, 568 N.W.2d 627.

K. RELATIONSHIP TO THE STATE

The interrelation between a county and the state in drainage matters can be discussed in three broad categories:

a) The impact of county drainage activities on state lands;

b) State regulatory authority which impacts on drainage; and

c) Assistance available from the state.

1. Impact on State lands.

State lands, as a general proposition, are subject to drainage laws. SDCL 46A-10A-56. Accordingly, state-owned property, if benefited by a drainage project, would be subject to the special assessment. SDCL 46A-11-16. Those lands might also be subject to the condemnation and easement provisions and would be entitled to damages occasioned by a project. SDCL §§ 46A-10A-67, 46A-10A-68. State lands would be subject to a drainage plan and could be part of a coordinated drainage area.

As a landowner, the state should be entitled to basically the same rights as other landowners, including the right to vote in elections, to sign petitions, and the right to be notified of and testify at the various hearings. The state has the same right to appeal as other owners, but no bond is required of the state.

SDCL 46A-10A-95. SDCL 46A-10A-56 provides that when notice is required, the state is to be notified by serving the Commissioner of School and Public Lands personally, by serving someone at his office, or by registered or certified mail. The Commissioner serves basically as a notice clearinghouse if the state lands at issue are not within his control; it is the Commissioner's responsibility to transfer the notice to the appropriate state agency, for example, to the Department of Game, Fish and Parks, the Department of Transportation, the Board of Regents, or the Board of Charities and Corrections. Notice of hearing must be served on the Commissioner at least 30 days before the hearing. It should be noted that service of this notice is required even though the notice is also published.

State lands may also be impacted more indirectly as well. SDCL 46A-10A-71 provides that drains may be laid along, within the limits of, or across any public highway. SDCL 46A-10A-70 also provides that owners of land may drain into a drain on a public highway "conditioned on consent of the board having supervision of the highway." However, open ditches along a public highway are not permissible, "unless the topography makes such construction advisable." SDCL 46A-10A-72. If a highway is constructed along or across a drain, it is the duty of the board responsible for the highway to keep the drain clear and free of obstructions. SDCL 46A-10A-71. It should be noted that this applies not only to state highways, but to county and township roads as well. SDCL 46A-10A-76 might also raise the probability of future maintenance costs for culverts and bridges which were initially installed at

landowner expense. See also SDCL ch. 31-21 on highway drainage ditches; Schmidt v. Norbeck, 189 N.W. 524 (S.D. 1922).

2. State regulatory authority.

There are provisions in the drainage chapters which specifically exempt certain state regulatory authorities and interests from the operation of the county drainage statutes. SDCL 46A-10A-8 provides:

> The provisions of this chapter and chapter 46A-11 did not abrogate or limit the rights, powers, duties and functions of the state water management board with reference to water rights, flood control, outlet elevations for public lakes, or ordinary high and low water marks on public lakes, but are supplementary thereto.

Further, SDCL 46A-10A-93, inserted at the request of the Department of Transportation, provides as follows:

> Drainage rights established by state and federal funds in state financed public improvements only may be altered or affected by the board of county commissioners or drainage commission after approval and concurrence by official action of the state agency administering such state or federal funds.

It is debatable whether this statute excuses such rights from the vested rights filing requirement in SDCL 46A-10A-31. However, this statute will involve some state agencies in drainage activities.

There are also certain state regulatory activities which apply to county drainage activities even though those regulations are not listed in the drainage chapter. Primary among those not listed in SDCL 46A-10A-8 are the powers of the state Water Management Board and the Secretary of the Department of Environment and Natural Resources in the water pollution/water

quality area. See generally SDCL ch. 34A-2. Other pollution/environmental statutes on solid waste and hazardous waste might also be implicated. SDCL chs. 34A-6, 34A-11. Those statutes, together with the statutes regulating mining activities and oil and gas development are administered through the Board of Minerals and Environment; related drainage activities could involve that Board.

It is also possible that the Department of Game, Fish and Parks may get involved in drainage questions because of its interest in wetlands, wildlife production areas, and the Endangered Species Act. A more extenuated set of circumstances could also involve the Department of Agriculture through the weed and pest control statutes. Finally, the Conservation Commission could also be involved in soil erosion matters.

3. Assistance from the State.

State assistance to county governments is statutorily covered in very general terms. SDCL 46A-10A-7 provides:

> Any unit of state government may offer such technical assistance as it is able to any board or commission requesting such assistance. However, such technical assistance may not include granting a permit, settling a dispute, accepting a plan, establishing a coordinated drainage area or performing any other decision function relegated to boards or commissions under the provisions of this chapter and chapter 46A-11. A unit of state government providing technical assistance may require reasonable reimbursement for its expenses. The provisions of this section do not prohibit the water management board from taking action or providing assistance pursuant to the provisions of this section and §§ 6A-10A-9.1 to 46A-10A-9.5, inclusive.

The South Dakota Water Management Board and the Chief Engineer within the Department of Environment and Natural Resources may

also assist in intercounty drainage activities. SDCL 46A-10A-9.1, 46A-10A-9.2.

The Department of Environment and Natural Resources is also specifically authorized to assist the county with drainage projects, as its assigned duties permit. SDCL 46A-10A-64. Presently, drainage is not one of the Department's assigned duties, except as it might otherwise relate to high and low water marks, water rights, project construction, or water quality.

Finally, a county is authorized to enter into grant agreements with both state and federal agencies on drainage matters. SDCL 46A-10A-11 provides:

> Any county engaging in a drainage program may receive grants-in-aid from or enter into agreements with any department or agency of the government of the United States or the state to arrange for the receipt of federal or state funds in the interest of furthering a drainage program.

It is possible that on the state level such funding would be permissible under the consolidated water facilities construction program (see SDCL §§ 46A-1-64, 46A-1-79) or under financial assistance made available by or through the conservation districts. See, e.g., SDCL 38-8-64.

L. THE FEDERAL GOVERNMENT

Except for SDCL §§ 46A-10A-11, 46A-10A-93, and 46A-11-7, state intrastate drainage statutes make no direct reference to the federal government. However, the federal government is directly involved in drainage matters, both as a landowner and through its regulatory powers. It is beyond the scope of this effort to delve into either the status of the United States as a landowner or as

an implementer of policies which impact state drainage laws. Rather, an attempt follows simply to alert the county to some of the federal agencies and programs which could be involved.

1. Status as a landowner.

Drainage is primarily a local matter and has developed at that level. However, the federal government is clearly a landowner as defined in SDCL 46A-10A-1(11) and would have the same rights in drainage matters as other landowners. It is not clear, however, that the federal government is subject to the same obligations, duties, and restrictions as other landowners. Also, while the federal government is probably subject to natural drainage easement, a prescriptive easement probably could not be obtained against the United States. Nor does it seem likely that federal lands are subject to condemnation for drainage projects. It is certainly an open question what the impact of the drainage plan would be on federal property. Furthermore, although SDCL 46A-11-7 implies that the United States is subject to a special assessment, it is debatable whether that assessment is enforceable absent voluntary payment by the United States.

Besides its status as a landowner, federal agencies also hold easements. Easements, purchased or obtained through foreclosures of federal loans, include perpetual restrictions on the use of the land. Wildlife easements acquired by the United States Fish and Wildlife Service generally prohibit drainage. The United States easements are a legally enforceable interest in the land. Schoenrock v. Tappe, 419 N.W.2d 197 (S.D. 1988) (failure to disclose wetlands easement constitutes title defect). However,

certain federal agencies and programs could significantly impact county drainage activities. Often that impact could be negative, at least when considered in light of what the county and/or individual landowners are trying to accomplish from a drainage standpoint.

Federal activities which could impact on local drainage include preservation of wetlands, prevention of water pollution, and encouragement of soil and water conservation. The federal impact is not only embodied in direct regulatory action, but also assumes the form of federal financial incentives.

2. Regulatory jurisdiction.

Federal involvement in drainage issues includes at least two regulatory schemes. First, water pollution issues are governed primarily by Section 208 of the Federal Water Pollution Control Act of 1972, as amended (Clean Water Act). See 33 U.S.C. §§ 1251-1376; 33 U.S.C. § 1288. Closely related is Section 404 regulatory authority. 33 U.S.C. § 1344. Section 208 deals with nonpoint source water pollution control; regulatory jurisdiction would lie with the Division of Water Quality, Department of Environment and Natural Resources, State of South Dakota and the Environmental Protection Agency. Section 404 involves dredge and fill permits from the Corps of Engineers and deals to a large extent with the preservation of wetlands. In some instances drainage would be prohibited without a 404 permit from the Corps. The United States Fish and Wildlife Service, Department of the Interior, is also deeply involved in the wetlands preservation issue.

Second, federal programs administered by the USDA operate as disincentives for wetlands drainage. A portion of the 1985 Food Security Act ("Swampbuster") provides that the USDA is to withhold federal benefits administered by USDA if certain wetlands are converted to farmland for commodity crops. 16 U.S.C. §§ 3801-3845. A significant question with respect to wetland drainage in this context is whether the drainage was commenced or completed before December 23, 1985, when the Act became effective. Wetland conversions occurring before that date are considered exempt. Von Eye v. USDA, 887 F.Supp. 1287 (1995), 7 C.F.R. § 12.5(b). See also Turrini, Swampbuster: A Report from the Front, 24 Ind. L. Rev. 1507 (1991); Lamunyon, Wetlands and the Swampbuster Provisions: The Delineation Procedures, Options, and Alternatives for the American Farmer, 73 Neb. L. Rev. 163 (1994). Questions regarding this issue should be addressed to the NRCS.

3. Federal financial incentives.

Federal financial incentives which could have an impact include the cost-sharing provisions under Section 208 (33 U.S.C. § 1288(j)(1)) administered by the United States Department of Agriculture. There are also several programs available through the Soil Conservation Service, such as the Watershed Protection and Flood Prevention Program (16 U.S.C. § 1001-1009); the Resource Conservation and Development Program (7 U.S.C. § 1010-1011); the Great Plans Conservation Program (16 U.S.C. § 590(p)); and other conservation programs. See generally 16 U.S.C. § 590a-590q. The Agricultural Stabilization Conservation Service has two programs which relate directly to drainage: The Rural Environmental

Conservation Program (16 U.S.C. §§ 590g(a) and 1501-1510) and the Water Bank Program (16 U.S.C. §§ 1301-1311).

Many of these programs, and indeed the very presence of federally owned property in the county, very often conflict with local drainage activities. As a general rule, where a direct conflict exists, federal law prevails. The foregoing is offered simply to remind local officials working with drainage issues that a larger picture must be considered. It is probably advisable to identify probable areas of federal involvement up front so that a workable solution can be found, or at least so that time, money and effort will not be needlessly wasted.

M. PERMISSIBLE DRAINAGE

As stated earlier, the rights of an individual to drain his land onto the lands of another came to be defined primarily through case law. Thompson v. Andrews, 165 N.W. 9 (S.D. 1917). That case law has by-in-large concentrated on one statute in developing the limits of permissible drainage. That statute, which dates from 1905, was carried forward to SDCL 46A-10A-70, which provides:

> Subject to any official controls pursuant to this chapter and chapter 46A-11, owners of land may drain the land in the general course of natural drainage by constructing open or covered drains and discharging the water into any natural watercourse, into any established watercourse or into any natural depression whereby the water will be carried into a natural watercourse, into an established watercourse or into a drain on a public highway, conditioned on consent of the board having supervision of the highway. If such drainage is wholly upon an owner's land, he is not liable in damages to any person. Nothing in this section affects the rights or liabilities of landowners in respect to running waters or streams.

The South Dakota Supreme Court has held that the statute has the same effect as its predecessor, SDCL 46A-10-31. Winterton v. Elverson, 389 N.W.2d 633 (S.D. 1986). Thus, those cases discussed earlier continue to have relevance to the county in carrying out drainage activities, especially in resolving private drainage disputes.

Further, the cases determining whether particular types of drainage are permissible are incorporated into SDCL 46A-10A-20. Hendrickson v. Wagners, Inc., 1999 S.D. 74, 598 N.W.2d 507

N. MISCELLANEOUS PROVISIONS

1. Prescriptive rights.

Also carried forward from the pre-1985 case law is the concept that drainage rights can be gained or lost by way of prescription. See Miller v. Davison County, 452 N.W.2d 119 (S.D. 1990); Kougl v. Curry, 44 N.W.2d 114 (S.D. 1950). SDCL 46A-10A-67 provides in part that: "An easement for a drainage right may be acquired by the existence of a drainage ditch for a period of at least twenty consecutive years." The prescriptive rights doctrine can become particularly important with the vested rights filing because it could permit a person with a drainage system which might not fit within the drainage rules to get a vested right because the drainage has existed for 20 or more years. It could also prohibit the vesting of a drainage right which has been obstructed for a similar period of time. However, commissioners must bear in mind that more than the passage of time is important in determining the existence of a prescriptive right. The adverse nature of the use must also be considered. Such adverse use must

be open, notorious, and inconsistent with the other landowner's rights. The use must also be continuous and uninterrupted. See Heezen v. Aurora County, 157 N.W.2d 26 (S.D. 1968); Bogue v. Clay County, 60 N.W.2d 218 (S.D. 1953).

The 20-year period for acquiring prescriptive rights does not necessarily begin when the project is constructed. It begins when water flows are affected. Steiner v. Marshall County, 1997 S.D. 109, 568 N.W.2d 627 (construction changes completed in 1961 did not burden neighboring property until 1995); Sherburn v. Patterson Farms, Inc., 1999 S.D. 47, 593 N.W.2d 414 (dike did not cause flooding on neighboring property until 1993; therefore, the period to examine began in 1993).

The South Dakota Supreme Court has made it clear that prescriptive rights cannot be claimed against governmental entities. Steiner v. Marshall County, 1997 S.D. 109, 568 N.W.2d 627. This includes the state, counties, and cities. Id.

2. Mandamus/Injunctions.

The language found in SDCL 46A-10A-45 was borrowed directly from SDCL 11-2-35, county planning and zoning laws. SDCL 46A-10A-45 provides:

> A taxpayer of a county may institute mandamus proceedings in circuit court to compel performance by the proper official or officials of any nondiscretionary duty required by this chapter and by any ordinance adopted thereunder.

Although no similar provision existed in pre-1985 drainage statutes, SDCL 46A-10A-45 does not represent a change in the law. County officials have long been subject to writs of mandamus to compel nondiscretionary acts. See SDCL 21-29-1. Indeed, the

right to seek mandamus is a remedy based in our state Constitution. S.D. Const. art. X, § 5.

Hopefully, the foregoing discussion has differentiated between drainage matters which are nondiscretionary and those which are discretionary. It is the failure or refusal to carry out nondiscretionary duties which would subject the board to a mandamus action. Mandamus will not lie when the act is discretionary in nature. See, e.g., State ex rel. Schilling v. Menzie, 97 N.W. 745 (S.D. 1903); State ex rel. Peterson v. Scott, 227 N.W. 572 (S.D. 1929).

For example, the county has a duty to maintain culverts so as to permit surface water to escape in its natural course. This duty is nondiscretionary and may be compelled by mandamus. Sorensen Revocable Trust, et al. v. Sommervold, et al., 2005 S.D. 33, 694 N.W.2d 266. However, a mandamus does not lie to have the culvert installed in a particular location. Id. Installing culverts requires discretion as to the size, location, and elevation. Id.

Counties and townships may also be subject to injunctive relief to restrain officials from diverting water in an unusual and unnatural manner. This situation may arise in the context of the county's duty to maintain roads and ensure that culverts permit water to escape. See, for example, Knodel v. Kassel Township, 1998 S.D. 73, 581 N.W.2d. 504.

County decisions on bridge replacement may also be subject to appeal. Gregoire v. Iverson, 1996 S.D. 77, 551 N.W.2d 568. Such

appeals must be taken within 20 days after publication of a board decision. SDCL 7-8-29.

3. County support.

Finally, several statutes give county commissioners wide-ranging powers to enable them to carry out their drainage functions. SDCL 46A-10A-6 authorizes the county to hire an engineer, a hydrologist, or such other staff as it deems necessary to carry out drainage functions. The county may also contract for the services of "engineering consultants" or other specialists as well. The county is not, however, required to hire engineers or consultants to assist private landowners in individual disputes. AGR 95-4. The board is further empowered to provide "the funds, equipment and accommodations necessary for such drainage activity as the county undertakes." SDCL 46A-10A-14.

County government is given broad power to develop a regulatory scheme for drainage (SDCL 46A-10A-20) and to enforce that regulatory scheme. SDCL §§ 46A-10A-33, 46A-10A-36. It is permissible to spend county funds to assist the establishment of coordinated drainage areas (SDCL 46A-10A-55) and for the county to exercise its construction powers for drainage projects. SDCL §§ 46A-10A-76, 46A-10A-77, 46A-10A-84. See also SDCL 46A-10A-66. Finally, the county has viable financing tools through the special assessment system, including the power to issue assessment bonds. The extent to which these powers are exercised is left to the discretion of the respective boards of county commissioners or their constituents.

CONCLUSION

As the foregoing should demonstrate, the new drainage statutes were not intended to be an end; rather, those statutes provide a means to an end. The Legislature has decided that the end should be the product of local input and decision making. The mechanism has been provided. It is up to each county to decide how to employ that mechanism.

Hopefully the foregoing has provided a little insight as to how the conglomeration of statutes fits together into a system. It is important to bear in mind this is only one person's opinion as to how it does so. The statutes provide a wide variety of powers to county governments to enable them to grapple with drainage issues. How and when to do so remains a local decision.

Drainage Book.hhd(dh)

APPENDICES

APPENDIX A

Drainage Assessment Cases

Baruth v. Board of Commissioner, Sanborn County, 209 N.W. 341 (S.D. 1926)

Brookings County v. Sayre, 220 N.W. 918 (S.D. 1928)

Chicago, Milwaukee, St. Paul and Pacific Railway Co., 276 U.S. 567 (1928)

In Re Clear Lake Township, 203 N.W. 207 (S.D. 1925)

In Re Turkey Valley Drain Ditch, 212 N.W. 48 (S.D. 1927), aff'd, 214 N.W. 842

In Re Yankton-Clay County Drainage Ditch, 141 N.W. 393 (S.D. 1913)

Johnson v. Peterson, 288 Fed. 735 (8th Cir. 1923)

Kamrar v. Sanborn County, 253 N.W. 496 (S.D. 1934)

Kruse v. State, 38 N.W.2d 925 (S.D. 1949)

Lake County v. Orland Township, 239 N.W. 853 (S.D. 1931), aff'd, 240 N.W. 861

Lee v. Clark Implement Co., 141 N.W. 986 (S.D. 1913)

Risty v. Chicago, R.I. & P. Ry. Co., 270 U.S. 378 (1927)

Sanborn County v. Estabrook, 207 N.W. 164 (S.D. 1926)

Schaller v. Ericson, 207 N.W. 459 (S.D. 1926)

State ex rel. Curtis v. Pound, 150 N.W. 287 (S.D. 1914)

State v. Day County, 266 N.W. 726 (S.D. 1936)

State v. Risty, 213 N.W. 952 (S.D. 1927)

Union Central Life Ins. Co. v. Hoilien, 244 N.W. 116 (S.D. 1932)

Woods Bros. Constr. Co. v. Yankton County, 21 F.2d 267 (8th Cir. 1927)

APPENDIX B

Statutes Pertaining to Flooding and Obstruction of Watercourses:

SDCL 7-18-4 and 7-18-5: County authority to enter into joint powers and to control or prevent flooding within its boundaries.

SDCL 8-2-9: Townships public nuisance authority within 4 miles of municipalities of 50,000 or more next to large municipalities.

SDCL 9-36-11: Municipal authority to make stream channel improvements inside and outside city boundaries. (Outside the boundaries requires a joint powers under SDCL 9-36-16.) See also SDCL ch. 1-24.

SDCL 9-40-1, SDCL 9-47-1, SDCL 9-48-2: Municipal authority to acquire, establish, equip, maintain, operate, extend or improve any system for the control of floods and drainage (SDCL 9-40-1 and 9-48-2 allow up to the ten-mile limit; SDCL 9-47-1 does not; however, authority extended outside the boundaries may require a joint powers agreement anyway under SDCL 9-36-16) (if draining or bridging is involved outside a town (city of less than 500), then a municipal vote is required under SDCL 9-42-2).

SDCL 21-10-1: Provides that unlawfully obstructing or rendering dangerous for passage any lake, navigable river, or basin is a nuisance. Cities and counties have authority to abate nuisances if they are public nuisances.

SDCL ch. 31-21: Highway drainage ditches; obstruction is a misdemeanor under SDCL 31-21-3.

SDCL 31-13-1: Township authority to arrange for construction, repair, and maintenance of all secondary roads within the township. Townships may take actions to protect road within the right-of-way but do not have general authority over flood control actions involving private property.

SDCL 46-5-1.1: Navigable waters of the state cannot be obstructed, tampered with or interfered with in a manner that changes the stage, level or flow. (Civil penalties, Class 2 misdemeanor, injunction.)

SDCL 46-5-2: Restricts damming of nonnavigable waters.

SDCL 46-5-47 and 46-5-48: Allows for emergency flood control measures on watercourses for protection of life and property; requires permits for ongoing non-immediate flood control measure.

SDCL ch. 46A-14: Provides for the creation of watershed districts and allows for flood control and other needs for public health and welfare--associated with local conservation districts--has authority to tax and make assessments for flood improvements.

SDCL ch. 46A-13: Allows for the creation of interstate drainage districts.