Illinois Drainage Laws: Rights and Responsibilities of Highway Authorities and Landowners Adjacent to Highways

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16. Abstract

This publication provides an extensive treatment of Illinois drainage law as it applies to local, county, and state highway authorities and adjacent landowners in both agricultural and urban environments. It focuses on court decisions, state and federal statutes, and administrative regulations relevant to drainage-related issues It discusses the judicial development and current status of the basic principle of drainage law in Illinois: that higher lands can be drained onto and across lower lands in most circumstances. The rule is qualified by a "reasonableness" requiremer which necessitates a thorough examination of the surrounding factual circumstances. It addresses relative responsibilities of highway authorities, drainage districts, sanitary districts, municipalities, and other public and private entities to construct and maintain bridges or culverts. Also discussed are the impacts of environmental laws and regulations on drainage, including a discussion of the judicially created law of nuisance; the Federal Clean Water Act; the National Environmental Policy Act; additional federal laws regarding wetlands, fish and wildlife, and endangered species; and the Illinois Soil Erosion and Sedimentation Control program. A brief discussion of the jurisdiction of Illinois courts in resolving drainage disputes, and the kinds of relief that may be granted by the courts or obtained outside of the courtroom is also included.

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CHAPTER I: INTRODUCTION

A. SCOPE, ORGANIZATION, AND USE OF THE PUBLICATION

This publication is intended to provide an extensive treatment of Illinois drainage law as it applies to local, county, and state highway authorities and adjacent landowners in both agricultural and urban environments. It focuses on court decisions, state and federal statutes, and administrative regulations pertinent to drainage-related issues and disputes that may arise in a variety of circumstances. For example, the construction, maintenance, and improvement of highways may affect the drainage of adjacent lands; similarly, urban development or the installation of drainage improvements on agricultural lands may affect highway drainage systems.

Chapter II, "The Law of Natural Drainage," discusses the judicial development and current status of the basic principle of Illinois drainage law: that higher lands can be drained onto and across lower lands in most circumstances. This basic principle is much easier to state than to apply, however, because it is qualified by a "reasonableness" limitation that requires thorough examination of the surrounding circumstances.

Chapter III discusses statutory drainage law. This law is not an alternative set of legal principles to be applied in lieu of the judicially developed law of natural drainage. Rather, statutory drainage law should be viewed as a complement to the law of natural drainage. Highway authorities, for example, are given a number of additional drainage-related rights and responsibilities through specific statutes. The same is true of drainage districts. In addition, specific statutes address situations such as landowners extending covered drains through the land of another to reach an outlet and the various rights of multiple landowners benefiting from a single mutual drain.

Chapter IV, "Bridges and Culverts," addresses the relative responsibilities of highway authorities, drainage districts, sanitary districts, municipalities, and other public and private entities to construct and maintain bridges or culverts. Unlike the previous two units,

Chapter IV focuses on the particularly narrow issue of who must install and maintain the bridge or culvert. The answer to this question is generally found in Illinois statutes.

The impact of environmental regulations on drainage improvements is discussed in Chapter V. The chapter begins with a discussion of the judicially created nuisance law and continues with discussions of the Federal Clean Water Act, the National Environmental Policy Act, and additional federal laws regarding wetlands, fish and wildlife, and endangered species. It also discusses the Illinois Soil Erosion and Sedimentation Control program, which may reduce sedimentation damage to drainage systems, and the role of the Division of Water Resources of the Illinois Department of Transportation in regulating construction in streams or watercourses.

Chapter VI, "Legal Remedies," briefly discusses the jurisdiction of Illinois courts in resolving drainage disputes aud the kinds of relief that may be granted by the courts or obtained outside of the courtroom. It is followed by a summary in Chapter VII.

For a better understanding of the material in this publication, mini-summaries appear throughout. Generally, they are located beneath each major heading within the text. The mini-summaries provide a quick overview of the conclusions reached in the detailed discussions that follow. They contain no citations and are essentially abbreviated statements of law, so the reader should review the complete text for further explanation. The detailed Table of Contents and the Glossary may also be of assistance to the reader.

B. BACKGROUND INFORMATION

This publication is based on research completed under the Illinois Cooperative Highway Research Program entitled "Revision of Highway Drainage Policy and Practice Manual" and a 1963 publication entitled *Illinois Highway and Agricultural Drainage Laws* (University of Illinois Engineering Experiment Station Circular No. 76). That publication was dated, however, by several significant court decisions, including the 1974 Illinois Supreme Court decision *Templeton v. Huss,* important legislative developments such as the outpouring of environmental legislation in the 1970s, and changes within the Illinois Department of Transportation. A new research project was called for, and this publication is a product of that effort.

CHAPTER II: THE LAW OF NATURAL DRAINAGE

A. INTRODUCTION AND SCOPE

This chapter discusses landowners' drainage rights and responsibilities when the natural drainage is away from the land in question, the dominant estate, or when the natural drainage is toward the land in question, the servient estate. The rights and responsibilities discussed herein apply to private individuals as well as to public entities such as highway authorities or municipalities. Public entities, however, may acquire additional drainage rights through the exercise of eminent domain powers, and both public and private entities may acquire additional drainage rights or responsibilities through agreements with other parties.

In this chapter, "natural drainage" includes all types of drainage that naturally occur between the dominant estate (higher land) and the servient estate (lower land). It also includes artificial drains that aid natural drainage and that are constructed within the premises of the dominant estate. The basis of these natural drainage rules is found in Illinois court cases. The varied principles of the cases to be discussed in this chapter establish the meaning of the drainage rule adopted by the Illinois legislature:

> Land may be drained in the general course of natural drainage by either open or covered drains. When such a drain is entirely upon the land of the owner constructing the drain, he shall not be liable in damages therefore.[1]

It must be remembered, however, that the law of drainage is easier to state than to apply, and that the law continues to evolve to meet the needs of a changing society.

The Illinois statutes also specify drainage rights, responsibilities, and procedures when several landowners act cooperatively to build mutual drains, where drainage districts or other special-purpose districts exist, and where a highway authority is involved. These considerations will be addressed in subsequent chapters.

B. THE BASIC PRINCIPLE OF NATURAL DRAINAGE

LANDOWNERS, INCLUDING HIGHWAY AUTHORITIES, HAVE A RIGHT TO DRAIN WATER AWAY AS IT WOULD IN A STATE OF NATURE. LOWER LANDOWNERS, INCLUDING HIGHWAY AUTHORITIES, HAVE A RESPONSIBILITY TO ACCEPT WATER FLOWING NATURALLY ONTO OR THROUGH THEIR LANDS AND HAVE NO RIGHT TO INTERFERE WITH SUCH NATURAL DRAINAGE.

1. Meaning, Rationale, and Applicability to Highway Authorities

Illinois has adopted a modified version of the "civil law rule" of drainage.[2] Under this rule, the right of drainage is governed by the law of nature as is apparent in the following statement of the Illinois Supreme Court:

> The right of the owner of the . . . [dominant estate] to drainage is based simply on the principle that nature has ordained such drainage, and it is but plain and natural justice that the individual ownership arising from social laws should be held in accordance with pre-existing laws and arrangements of nature. As water must flow, and some rule in regard to it must be established where land is held under artificial titles created by human law, there can clearly be no other rule at once so equitable and so easy of application as that which enforces natural laws. There is no surprise or hardship in this, for each successive owner takes with whatever advantages or inconveniences nature has stamped upon his land.[3]

The principles of natural drainage apply when one piece of land is at a higher elevation than the adjoining land, allowing water to flow from the higher (dominant) to the lower (servient) estate. Natural flow may originate with surface water derived from rain or snow falling upon the dominant field or with water in some natural watercourse fed by remote springs or rising in a spring on the dominant field.[4] Individuals hold their lands according to the natural conformation of the ground. The right of the dominant estate owner to drain on and over the servient estate is based on the principle that nature has ordained such drainage.[5]

In the absence of an agreement to the contrary or the acquisition of additional rights through the exercise of eminent domain or prescription, highway authorities have the same drainage rights and responsibilities as individuals. Thus, highway authorities have a right to route surface waters that fall or occur naturally on the highway through the natural and usual channels or outlets on and over lower lands. They may also construct ditches or drains to conduct surface

and impounded water on the highway right-of-way into a natural and usual channel or outlet.[6]

2. Applicability of Natural Drainage Rule to Diffused Surface Water

Application of the rule of natural drainage to diffused surface water as well as to water flowing continuously or intermittently in a fixed and determinate course has been much discussed. Despite mixed conclusions, it appears that Illinois should include diffused surface waters within its natural drainage rule.[7]

Farnham notes in his treatise on water and water rights[8] that some commentators thought that the civil law (natural drainage) rule did not apply unless the waters "have their course regulated from one ground to another."[9] This implies that water must be more than simply diffused over the ground, finding its way without definite course from higher to lower land. Later statements of the rule, however, were broader and omitted the regulated channel requisite. For example, Farnham noted that neither the French Civil Code of 1804 nor the early Louisiana Civil Code distinguished between surface water and diffused surface water.[10] He contended, however, that these later sources misstated the rule and that under the "true" civil law rule there is no duty to accept water flowing from higher land unless it flows in a regulated course. Farnham justifies his position by claiming that even though diffused water may flow from one piece of land to the adjoining piece, the flow at all points is uniform and the volume is not great; therefore the upper landowner is not injured if the lower owner obstructs the flow.[11]

An alternative view is that the rule of natural drainage can be applied to diffused water just as to other surface water. The civil law of drainage found in the French Civil Code of 1804[12] (or Code Napoleon) and the Louisiana Civil Code[13] state that an owner of lower land may not obstruct the natural flow of surface water. Neither code requires the flow to be in a regulated channel. Farnham concedes that the courts have actually followed these broad statements rather than the "true rule"[14] in attempting to adopt the civil law rule.

American jurisdictions adopting the natural drainage rule have stated it in its broad form, and Illinois is among these jurisdictions. Thus it may be argued that the Illinois rule allows the dominant landowner to have diffused surface water enter the servient estate with or without a discernible channel.

This argument is supported by *Gormley v. Sanford,*[15] the case adopting the natural drainage rule in Illinois. That is, the flow of

diffused water is just as much ordained by nature as is the flow of water in defined channels. Furthermore, there is no language in *Gormley* that directly or indirectly excludes diffused water from the natural drainage rule. Also, one of Farnham's principal justifications for positing that the lower landowner may obstruct diffused water is that diffused water causes no material injury. The upper owner is, therefore, not inconvenienced or injured by being forced to retain it.[16] When the obstruction of diffused water can be shown to injure the upper owner substantially, the justification for the Farnham position disappears.

The more pervasive argument seems to favor application of the drainage rule to diffused water. However, final determination of this question has yet to be made by the Illinois courts.

3. Criticisms of the Civil Law Rule and Comparison with the Common Enemy Rule

The civil law of drainage originated in Roman law, and the courts of Louisiana were the first to adopt the rule in this country.[17] Since that time, many jurisdictions have adopted some form of the rule. Other jurisdictions believed that the strict civil law rule constrained land development by preventing the owner of a dominant estate from artifically improving the natural drainage. Some of these jurisdictions adopted an alternative known as the "common enemy rule." Under this rule, water was regarded as a common enemy, and landowners had unlimited legal rights to fight this common enemy without regard to the consequences suffered by neighbors.[18]

Strict application of either the civil law rule or the common enemy rule often caused harsh and inequitable consequences. Thus, courts began to create exceptions to alleviate otherwise unjust results. One of these exceptions in Illinois is known as the "good husbandry exception."

C. THE GOOD HUSBANDRY EXCEPTION

IN THE INTERESTS OF GOOD HUSBANDRY, THE OWNERS OF DOMINANT ESTATES MAY CONSTRUCT OPEN OR COVERED DRAINS ON THEIR OWN LAND FOR AGRICULTURAL PURPOSES, EVEN THOUGH THE FLOW OF DRAINAGE WATER MAY BE INCREASED IN THE WATERCOURSES THAT CARRY THE WATERS FROM THE DOMINANT TO THE SERVIENT ESTATES. THE OWNERS OF THE DOMINANT ESTATES, HOWEVER, MUST DISCHARGE THE WATERS AT THE POINTS WHERE THE WATERS WOULD HAVE ENTERED THE SERVIENT ESTATES NATURALLY. AND THEY GENERALLY

MUST NOT CUT OR TILE THROUGH DIVIDES SO AS TO DISCHARGE UPON THE SERVIENT ESTATES WATERS THAT ORIGINATED FROM DIFFERENT WATERSHEDS. LARGE DRAINAGE IMPROVEMENTS MAY REQUIRE A PERMIT FROM THE ILLINOIS DEPARTMENT OF TRANSPORTATION AND THE CORPS OF ENGINEERS. THE AMOUNT AND MANNER OF WATER DISCHARGED UPON THE LOWER OWNER MAY BE SUBJECT TO A "REASONABLENESS" LIMITATION. THE APPLICATION OF THE GOOD HUSBANDRY EXCEPTION IN NONAGRICULTURAL SETTINGS IS DISCUSSED IN SECTION D ON PAGE 10.

1. Early Statement of the Rule

Early in the development of Illinois drainage law, courts recognized that most activities that make land more productive also accelerate flows. Developing agricultural land often required improving the drainage of a parcel, which consequently accelerated flows onto the servient estate. In order to improve agricultural lands, the Illinois Supreme Court developed a good husbandry exception in the case of *Peck v. Herrington*[19] using the following rationale:

> The ponds which Peck proposed to drain were merely the collection of surface water from rain and melting snow, which fell upon the land. Suppose Peck, instead of tile-draining the ponds, had filled them up with dirt. This would have caused the water which before accumulated in the ponds, to flow down the channel . . . upon the land of Herrington. It will not be pretended that in such a case he would have violated any rule of law. . . . If it be true that the water which would naturally accumulate in these ponds could be cast upon Herrington's land by filling them up, upon what principle can the owner of the dominant heritage be denied the right to do the same thing in another way? If the water which would naturally accumulate in those ponds can be turned upon Herrington's land by filling them up, we perceive no reason why the water may not be drawn off by tile-draining, if good husbandry required it.[20]

Simply stated, landowners may accelerate the movement of water on their own land for agricultural purposes as required by good husbandry. This rule has been interpreted to allow tiling, digging, construction of artificial ditches on one's land to carry off water more quickly, or straightening watercourses carrying water across one's land without liability.[21] The rule is further qualified in the following sections.

2. The Good Husbandry Qualification

As originally stated, the civil law modification allowing one to increase the discharge of drainage water into a servient estate was limited to the interests of good husbandry. But the Illinois courts

have failed to provide a concrete set of rules defining this term. One writer has suggested that the term should be broadly applied so that any legitimate farming operation would justify increasing the flow in natural drainage channels.[22] The courts seem to have adopted an even broader interpretation. For example, the right to increase the discharge of drainage water onto the servient estate has been extended to purely nonagricultural settings[23] that lack even the slightest good husbandry interests. The ensuing case law and the codification of the right to drain lands with open or covered drains[24] has probably mooted the question of good husbandry, except as it relates to the "reasonableness" requirement to be discussed below.

3. The Natural Watercourse/Point of Natural Discharge Qualification

The good husbandry exception arose in a case where the increased flow was delivered to the servient estate by a natural channel running from the dominant estate to the servient estate. As we will show below, the definition of such a natural channel or watercourse is well settled. But it is less clear if the presence of a natural watercourse between the dominant and servient estates is necessary to increase drainage. That is, the treatment of diffused surface water has not been settled by Illinois courts.

According to the ordinary meaning of the term, a watercourse must be a stream flowing in a particular direction and in a definite channel, usually discharging into some other stream or body of water.[25] A *natural* watercourse is one whose origin is the result of the forces of nature. Many natural watercourses have been widened, deepened, or straightened, and these alterations do not change the classification of the watercourse from natural to artificial.[26]

An *artificial* watercourse generally owes its origin to acts of man and includes drainage ditches, canals, and so forth. For purposes of this section, artificial watercourses will refer only to man-made channels on a single tract owned by one or more persons. Artificial watercourses extending through several tracts with different owners will be discussed in the following chapter.

Illinois courts have enlarged the basic definition of a natural watercourse when the term is applied to surface water drainage:

> If the conformation 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 . . . .[27]

The same court went on to explain that such a natural watercourse

can probably exist only where a ravine or depression extends from one tract onto the other so as to gather up the surface water falling upon the dominant tract and conduct it along a defined channel to a definite point of discharge upon the servient tract. The court also mentioned that it does not seem important that the force of the water flowing from one tract to the other has been insufficient to make a channel with definite and well-marked sides or banks. Therefore, if the surface water moves uniformly or habitually over a given course within reasonable limits as to width, the line of flow is a watercourse within the meaning of the law applicable to the discharge of surface water.[28]

Natural watercourses often require maintenance and improvement. Accordingly, the courts have held that a natural watercourse is not required to be used only in its natural state: it may be improved either by being deepened or widened by artificial means or by the construction of a subsurface drain along the course of its channel to carry the surface water off the land more effectively. Such improvements do not create a substantially new watercourse, nor do they amount to an abandonment of the natural watercourse.[29] Landowners may even change the direction of flow by artificial means on their own lands, provided the water is restored to its natural channel before it leaves the owner's property.[30]

Is the right to increase the discharge of surface water limited to circumstances where the water will be carried onto the servient estate by a natural watercourse from the dominant estate? Regrettably, the Illinois Supreme Court has not expressly considered this question, although the issue was considered by at least one nineteenth century appellate court. In *Wagner v. Chaney*[31] an upper owner artificially collected diffused water and conducted it onto the lower land through a tile drain. The court held that the case did not fall within the Illinois rule allowing an upper owner to collect water and discharge it onto the lower owner through the natural channel because the facts showed that there was no such channel. It should be noted, however, that under the "reasonable use" modification discussed below, a court might allow such a discharge where the damage to the lower owner was insignificant or nonexistent.

4. Different Watershed Limitations

The civil law of drainage adopted in Illinois assumes that water will not be diverted from one natural drainage basin to another. Thus, the owner of the dominant estate cannot dig through or otherwise remove a natural divide to discharge water onto the servient estate that would naturally not have reached it.[32] It appears, however, that

if a diversion was consistent with reasonable use, it might be allowed under the more flexible analysis of *Templeton v. Huss,*[33] the most significant Illinois drainage decision in more than half a century. This possibility will be addressed below under the "reasonableness" limitation.

5. Permits May Be Required

Clearly, drainage rights and responsibilities are important to the owners and occupants of the dominant and servient estates. In addition, the public interest may be important in some drainage matters, such as flood control, preservation of wildlife habitat, and water quality. Where the public interest is significantly involved, regulatory agencies may require a permit before certain drainage improvements can be initiated. Permit guidelines generally require the regulatory agency to weigh the private rights against the public interest. This issue will be discussed in Chapter V.

6. The Limitation of Reasonableness

Landowners have always had some limitations on the manner in which they utilized their natural drainage rights. Landowners could not accelerate water maliciously or in a manner that would create unreasonable risks of damage to another.[34] For example, a lower owner could get damages if a tile line was terminated next to the servient estate without properly boxing it to minimize erosion. The concept of "reasonableness" was to become even more important after the landmark 1974 Illinois Supreme Court case of *Templeton v. Huss.*[35]

Templeton involved a drainage problem created by urbanization, but the court's basic statement of the law can easily be applied to future agricultural drainage controversies. That basic statement was that increased flow had to be consistent with the "policy of reasonableness of use which led initially to the good husbandry exception."[36] For further insight into this limitation, let us consider a landowner's rights to improve drainage in nonagricultural applications.

D. CHANGING NATURAL DRAINAGE IN NONAGRICULTURAL LAND USES

IN NONAGRICULTURAL LAND USES AND ABSENT LOCAL ORDINANCES SPECIFYING STORM DRAINAGE AND DETENTION REQUIREMENTS, OWNERS OF DOMINANT ESTATES MAY DRAIN THEIR LANDS INTO PUBLIC DRAINS OR ONTO SERVIENT LANDS AS LONG AS THE INCREASED FLOW OF SURFACE WATERS IS CONSISTENT WITH THE POLICY OF REASONA-

BLENESS OF USE. IN SOME CASES, THE DRAINAGE IMPROVEMENT CONTEMPLATED FOR THE DOMINANT ESTATE WILL REQUIRE A PERMIT FROM THE ILLINOIS DEPARTMENT OF TRANSPORTATION AND THE CORPS OF ENGINEERS.

1. Extension of the Good Husbandry Rule to Nonagricultural Land Uses by Case Law

As the emphasis in Illinois shifted from agricultural to urban development, the good husbandry doctrine allowing artificial improvement of natural drainage was applied outside of agricultural development land uses.[37] Unfortunately, the good husbandry doctrine was not properly suited to urbanization. In interpreting the good husbandry doctrine, virtually any increase in the drainage burden upon the servient estate was upheld. Between 1884, the year the good husbandry doctrine was established, and 1974, the Illinois Supreme Court found not one single increase on the servient estate that was sufficient to permit recovery of damages. It appeared that the servient owner could be compensated only in situations in which the dominant owner diverted water from another watershed.[38]

Although this result is probably justified in most agricultural settings, urban development presents a more difficult problem. Urban lands tend to be of much greater value and tend to create more runoff. The increased value of a developed parcel often cannot offset the losses to other highly developed servient parcels. Also, the increased quantity of runoff from developed land is likely to damage servient land more than runoff from agricultural land. The good husbandry exception included no well-defined test for balancing the benefit of the developer against the burden on the servient estate.[39] In response to this defect in the good husbandry exception, the Illinois Supreme Court modified the Illinois natural drainage law in 1974. *Templeton v. Huss*,[40] the first significant modification since the nineteenth century, adopted a reasonable use requirement for the natural drainage rule.[41]

2. Adoption of the Reasonable Use Limitation

Templeton v. Huss[42] was the first case decided by the Illinois Supreme Court that discussed the extent to which drainage may be altered when land is developed for other than agricultural purposes.[43] In *Templeton*, the defendants owned the dominant estate, which they subdivided and developed. The plaintiff owned the servient estate, a parcel of farmland. Plaintiff alleged that in converting their parcel of farmland into a residential subdivision, the defendants had in-

creased both the amount and rate of surface water runoff flowing onto the plaintiff's land. This violated the natural drainage law. The trial court found that there had been no diversion from another watershed and for that reason entered judgment for the defendants.

On appeal, the Supreme Court addressed the legal issue of whether a dominant estate owner's liability for damage from increased surface runoff was limited to that caused by a diversion from another watershed. The court concluded it was not. After analyzing the development of Illinois drainage law, the court stated that "[i]nterference with natural drainage has been limited to that which was incidental to the reasonable development of the dominant estate for agricultural purposes."[44] However, the court recognized that natural drainage could be altered substantially by developments, presumably such as urbanization, that interfere with the natural seepage of water into the soil of the dominant estate. The court decided that the principle that had prevented unreasonable changes in lateral drainage should be applied to changes that unreasonably interfere with natural seepage:

> The question which must be confronted is whether the increased flow of surface waters from the land of the defendants to that of the plaintiff, regardless of whether it was caused by diversion from another watershed, the installation of septic tanks, the grading and paving of streets, or the construction of houses, basements and appurtenances, was beyond a range consistent with the policy of reasonableness of use which led initially to the good husbandry exception.[45]

While the decision uses the term "reasonable" on several occasions, commentators[46] have shown the court's meaning to be less than entirely clear.

3. Interpreting the Templeton Decision

The narrowest reading of the decision is simply that a servient estate is not limited to recovery only when the dominant estate diverts water from another watershed.[47] The broadest reading is that Illinois has now adopted the "reasonableness of use" doctrine and abandoned the civil law or natural drainage theory.[48] However, subsequent appellate court cases show that the Illinois courts are taking a middle ground in interpreting *Templeton* rather than either of these extremes.

It is apparent that Illinois is not completely abandoning the natural drainage rule. Appellate court cases decided after *Templeton* address the natural drainage rule and do not cite *Templeton* as abandoning the rule in Illinois.[49] Furthermore, the criteria of the good husbandry exception still appear to apply to agricultural situations.[50]

Courts citing *Templeton* as being consistent with the good husbandry exception in agricultural settings have not expressly indicated that *Templeton* altered it. If it has not, all the prior good husbandry case law still applies. The importance of this interpretation is that in an agricultural setting, diversion from another watershed or discharge other than at a natural drainage point may be essential for a servient landowner to recover.[51] Furthermore, the owner of a dominant estate may still have a virtually unlimited right to increase the drainage from agricultural land.[52]

In urban settings the appellate courts consider *Templeton* to require the dominant landowner to conform his or her alteration of natural drainage to a standard of reasonableness. The most important change to the existing drainage law is the limitation of the right to increase the flow upon the servient estate.[53] In addition, the dominant owner may divert drainage from another watershed if it is in keeping with the standard of reasonableness.[54] Unfortunately, "reasonableness" is not clear, although standards are increasingly incorporated in regulations governing storm drainage system design and runoff detention.

In one case discussing the standard of reasonableness when drainage is increased, the reasonableness of the increase in drainage was the sole inquiry.[55] Other cases, however, have indicated that the development of the dominant estate and the impact on the drainage should be considered in evaluating the reasonableness of use.[56] *Templeton* appears to embrace this latter interpretation. Due to the uncertainty of Illinois law, reference to other jurisdictions adopting the reasonable use theory may be helpful in determining the criteria to be applied in a reasonable use analysis.

The California Supreme Court adopted a comprehensive modification of the civil law rule preventing both the upper and the lower landowner from acting unreasonably and still being immune from all liability. Its rule adopts the broader reasonableness of use analysis apparently embraced by the court in *Templeton*. In its opinion, the California Supreme Court noted:

> The issue of reasonableness becomes a question of fact to be determined in each case upon a consideration of all the relevant circumstances, including such factors as the amount of harm caused, the foreseeability of the harm which results, the purpose or motive with which the possessor acted, and all other relevant matter .... It is properly a consideration in land development problems whether the utility of the possessor's use of his land outweighs the gravity of the harm which results from his alteration of the flow of surface waters. ... The gravity of harm is its seriousness from an objective viewpoint, while the utility of conduct is its meritoriousness from

> the same viewpoint.... If the weight is on the side of him who alters the natural watercourse, then he has acted reasonably and without liability; if the harm to the lower landowner is unreasonably severe, then the economic costs incident to the expulsion of surface waters must be borne by the upper owner whose development caused the damage.[57]

In any event, the owner of the servient estate has the burden of proving that the acts were inconsistent with reasonable use.[58] Reference to the existing case law is helpful in determining reasonable conduct.[59]

4. Permit Requirements

The public interest is important in nonagricultural drainage matters just as it is in agricultural drainage matters. Where the public interest is significantly involved, such as where the drainage activity will have impact on flood control, water quality, or wildlife habitat, regulatory agencies may require a permit for drainage improvement. Permit requirements generally command the regulatory agency to weigh drainage rights against the public interest. They will be discussed in Chapter V.

E. HIGHWAY DITCHES AND ADJACENT LAND DRAINAGE

THE PURPOSE OF HIGHWAY DITCHES AND SUBSURFACE DRAINS IS TO DRAIN EXCESS WATER OFF THE HIGHWAY RIGHT-OF-WAY. HIGHWAY AUTHORITIES ARE NOT OBLIGATED TO CONSTRUCT DITCHES AND SUBSURFACE DRAINS TO IMPROVE THE NATURAL DRAINAGE ON ADJACENT LANDS. HOWEVER, ABSENT THE ACQUISITION OF AN EASEMENT OF OBSTRUCTION BY AGREEMENT, PRESCRIPTION, OR CONDEMNATION, THE HIGHWAY AUTHORITY HAS NO RIGHT TO OBSTRUCT NATURAL DRAINAGE ACROSS ITS RIGHT-OF-WAY.

1. Highway Ditches and Tile as Outlets for Drainage Improvements on Adjacent Property

Adjacent landowners sometimes believe that highway authorities are obligated to drain adjacent lands and protect them from the overflow of water naturally thrown upon them. The court has held that highway authorities are not responsible for providing improved drainage to protect the adjacent landowner from the natural overflow of water.[60] Also, highway authorities cannot bind themselves by agreement to improve drainage for adjacent areas unless it is made

necessary by their acts. On the other hand, they cannot cause adjacent owners' lands to be overflowed more than they had been naturally.[61]

2. Obstructing Flow

Highway authorities have no more rights to obstruct natural drainage than do private individuals, except to the extent that such rights are obtained by condemnation and the payment of just compensation. Thus, the highway authorities are liable for damage caused by 1) failure to install adequate culverts or bridges to accommodate natural drainage across the highway right-of-way;[62] 2) by negligent installation of culverts or other structures that do not function properly;[63] or 3) by negligent maintenance of the improvements.[64]

Similarly, a highway authority has no more obligation or duty than a private individual to restrict flows to protect a servient estate. Thus, the highway authority may increase the drainage burden upon a servient estate, subject to a standard of reasonableness. In the same fashion, the highway authority has the right and is indeed obligated to pass on legally increased flows that cross its right-of-way.[65]

F. MAINTENANCE OF NATURAL DRAINS ACROSS SERVIENT LANDS

OWNERS OF SERVIENT ESTATES MAY NOT INTENTIONALLY OBSTRUCT WATERCOURSES FLOWING ACROSS THEIR LANDS, BUT THEY HAVE NO DUTY TO KEEP THEM CLEAR OF NATURALLY OCCURRING BRUSH, SILT, OR DEBRIS. OWNERS OF DOMINANT ESTATES, BECAUSE OF THEIR DRAINAGE EASEMENTS, HAVE RIGHTS TO GO UPON THE SERVIENT ESTATES AND MAKE REPAIRS AS LONG AS THEY DO NOT CAUSE UNNECESSARY INJURY TO THE SERVIENT ESTATE. ACCESS PERMITS ARE REQUIRED BEFORE DOING ANY WORK ON A HIGHWAY RIGHT-OF-WAY.

It is the right of the owner of a drainage easement to keep it in repair. But no obligation to make repairs is generally imposed upon those whose lands are placed in servitude.[66] Ordinarily, the owner of the easement has the right to go onto the servient estate to keep the drain in repair if the repair can be accomplished without unnecessary injury to the land. The Illinois Supreme Court has stated that:

> As a general proposition, whoever has an easement in or over another's land has the right to do all such things as are necessary to preserve the easement — that is, he may keep it in repair and has the right of access to make the necessary repairs. . . . It would seem, therefore, that the common law annexes to the easement of

> a drain in another's land the right to go upon such land and clean out or repair such drain without doing unnecessary injury to the land.[67]

The court has further mentioned that such an interpretation is consistent with fundamental concepts respecting property rights: property owners themselves are expected to protect those rights, while others are expected not to invade them.[68] This rule applies to all drainage easements, whether created by nature, by agreement, by condemnation, or by prescription.

This right of self-help probably does not extend to owners of dominant estates who have drainage easements across highway rights-of-way, because it will be difficult for these persons to make repairs in the right-of-way without endangering public use of the highway.[69] However, highway authorities will issue permits in many instances to allow private landowners to work in the highway right-of-way, for instance to repair cross-drainage structures.[70] And as discussed in the preceding section, if the highway authority's negligence causes obstruction, the landowner may sue for damages or an injunction.

G. ALTERING RIGHTS AND RESPONSIBILITIES OF NATURAL DRAINAGE THROUGH AGREEMENT, PRESCRIPTIVE EASEMENTS, AND EMINENT DOMAIN

RIGHTS AND RESPONSIBILITIES OF NATURAL DRAINAGE CAN BE ALTERED BY AGREEMENT BETWEEN THE PARTIES, THROUGH PRESCRIPTIVE EASEMENTS, AND, WHERE A GOVERNMENTAL ENTITY IS INVOLVED, THROUGH EXERCISE OF THE POWER OF EMINENT DOMAIN. IN ILLINOIS, THE TIME PERIOD NECESSARY TO ACQUIRE AN EASEMENT OF DRAINAGE OR OBSTRUCTION BY PRESCRIPTION IS TWENTY YEARS.

1. Agreements and Eminent Domain

Drainage rights, like other property rights, can be voluntarily transferred between parties and can be condemned by highway authorities or other governmental entities.[71] When such rights are condemned, just compensation must be paid.

2. Prescriptive Easements of Drainage or Obstruction

When a landowner is harmed by another owner and fails to enforce his rights, the harmful practice may itself become a right. For example, if an owner of higher ground fails to take action when the owner of lower land dams or obstructs the flow of surface water,

the lower landowner may acquire an easement to maintain the dam by what is known as prescriptive use. The period of use recognized in Illinois is twenty years. Likewise, the owner of lower land may acquire a right to have no surface water drain on his or her land from higher ground when the water has been diverted from the lower ground for the prescriptive period. By this same process, the higher landowner may acquire the right to change the place where his or her surface water enters lower ground or to maintain other artificial conditions not permitted under the rules of natural drainage.[72]

For a prescriptive easement to arise, the use must generally have been 1) adverse, 2) uninterrupted for a period of at least twenty years, or when land is used as a public highway, fifteen years,[73] 3) exclusive, 4) continuous, and 5) under a claim of right.[74] Acquisition of such a right is not easily determined. For example, consider a situation in which an underground drain is not visible. Its existence would not constitute a prescriptive easement unless the owner of the servient estate has actual or constructive notice of the subsurface drain.[75]

The scope of a prescriptive easement is limited to the dominant landowner's use of the property. Included within the scope of the easement are those actions necessary to protect that use. For example, it has been held that a drainage ditch essential to make a highway easement effective is included within a prescriptive highway easement, provided it is maintained and used by the public.[76]

Easements acquired by prescription may extend beyond the original parties that created them. For example, the owner of a dominant estate diverted water from its natural course by constructing an artificial channel. Water flowed through it continuously for more than twenty years. The court held that other proprietors who benefited thereby had an easement by prescription in the new watercourse and that the water could not be restored to its original course.[77] This rule applies even though the affected landowners are not contiguous.[78]

By the same process, a prescriptive easement of obstruction may be created that extinguishes the natural drainage easement of the dominant landowner. The following examples illustrate a drainage easement being extinguished.

1. A dominant landowner diverts drainage flow from servient land, and the servient landowner fills the old ditch and farms it for twenty years. In this instance, all the elements of adverse possession are met, and the easement of obstruction is established. The servient landowner is entitled to keep the ditch filled.
2. Same facts as above, but the servient farmer sells his land after fifteen years, and a new owner possesses it for ten years. In this

instance, the new servient owner would have satisfied the continuous twenty-year requirement. Illinois law allows the prescriptive period of prior owners and occupiers to be "tacked onto" the period of the new owner or occupier.[79]

3. Same basic facts as above, but the servient landowner does nothing to the ditch. In this instance, there is no action adverse to the dominant landowner's easement. Thus, there is no prescriptive easement of obstruction.

4. In this example, the dominant landowner builds an obstruction that reduces the maximum natural flow to the servient estate for a period of twenty years. The dominant landowner now proposes to remove the obstruction and permit the full natural flow.

   In this instance, the lower landowner would contend that while nature dictated an easement for all natural flows, the dominant landowner's action over the statutory period has reduced the quantity of water that may be conducted through the easement. To prevail under a prescription theory, the servient landowner would have to show action on his part adverse to the full natural easement.[80] An action such as farming up to the banks of the drain — where before an untillable flood plain existed — would probably not be sufficient. The act of farming is not inconsistent with the dominant landowner's right to pass off his drainage. In contrast, filling the ditch and replacing it with an underground tile sufficient to carry only the restricted flows would be physically inconsistent with the full extent of the drainage easement. This would possibly support a claim of prescription, provided the dominant landowner has knowledge of the filling and the installation of underground tile.

   Illinois courts, however, have rejected the notion that an underground sewer can create a prescriptive right unless the party who stands to surrender a prescriptive easement has actual or constructive knowledge of it.[81]

   The doctrine of equitable estoppel[82] probably would not apply either. *Shontz v. Metzger*[83] is the only Illinois case that considers the application of equitable estoppel in a drainage case. The decision holds that the doctrine of estoppel cannot be invoked against a dominant landowner to prevent him or her from removing a levee built by a servient estate owner that causes water to be cast back upon the dominant landowner's property.

5. Same facts as number 4 above, but now assume that the dominant landowner is a highway authority that has built an undersized

culvert and now wishes to increase its size to accommodate the full natural flow.

The analysis is the same as that in number 4. The servient landowner would not have a right to the diminished flows against a governmental agency under a prescription theory. As we will discuss below, rights of adverse possession or prescription cannot be obtained against a governmental entity.

In several instances, however, Illinois courts have permitted a claim of equitable estoppel to prevent the state from asserting a proprietary right. The decisive case, *Hickey v. Illinois Central R.R. Company,* shows that only rare circumstances will permit an estoppel holding against the state:

> Mere nonaction by governmental officers is not sufficient to work an estoppel and that before the doctrine can be invoked against the state or a municipality there must have been some positive acts by officials which may have induced the action of the adverse party under circumstances where it would be inequitable to permit the corporation to stultify itself by retracting what its officers had previously done.[84]

It is also clear that a municipality can be estopped only in extreme circumstances. Courts require an affirmative act and inducement of substantial reliance to make an equitable estoppel against a city.[85]

The reluctance of a court to apply equitable estoppel against a public entity, along with precedent established in *Shontz v. Metzger*[86] make it unlikely that the doctrine will be applied against a highway authority.

6. In this example, the dominant landowner constructs a culvert sufficient to accommodate the existing flows. However, twenty years pass and the natural flows have legally increased. The dominant landowner now constructs a larger culvert.

   In this instance, the analysis starts with the rule of natural drainage as applied by Illinois courts. Clearly, when natural flows are legally increased, the servient owner has a legal obligation to accept the flows. Thus, under these facts, because the flow has legally increased in the past twenty years, the dominant landowner is entitled to pass this water to the servient landowner by the construction of a larger culvert. Moreover, the drainage code imposes a legal duty on the highway authority to provide the larger culvert whenever needed.

3. Applicability of Prescriptive Easements to Governmental Entities

Individuals may not acquire rights by prescription from the state, counties, cities, towns, and other municipal corporations when public rights are at issue.[87] The courts have distinguished between public and private rights by holding that public rights or uses are those in which the public has an interest in common with the people. Private rights or uses are those enjoyed by inhabitants of a local district exclusively and in which the public has no interest.[88] Courts have specifically held that public highways are not subject to adverse possession by a private party.[89] This includes the drainage rights associated with highway lands.[90]

Although governmental bodies generally cannot lose rights to private parties by prescription, these bodies may nevertheless acquire rights by prescription. The courts have held that the continued and uninterrupted use of land as a highway for the statutory period is presumed to have been under a claim of right and can create a prescriptive right in favor of the public.[91]

NOTES

1. Ill. Rev. Stat. ch. 42, §2-1 (1983).
2. Templeton v. Huss, 57 Ill. 2d 134, 311 N.E.2d 141 (1974); Gormley v. Sanford, 52 Ill. 158 (1869); Gillham v. Madison Co. R.R., 49 Ill. 484 (1869).
3. Gormley v. Sanford, 52 Ill. 158, 162 (1869). It has also been stated that natural drainage is necessary to render land fit for the habitation and use of man. "The streams are the great natural sewers through which the surface waters escape to the sea, and the natural depressions in the land are the drains leading to the streams." People *ex rel.* Speck v. Peeler, 290 Ill. 451, 454, 125 N.E. 306, 308 (1919).
4. Groff v. Ankenbrandt, 124 Ill. 51, 56, 15 N.E. 40, 42 (1888).
5. Gormley v. Sanford, 52 Ill. 158 (1869); Baker v. Leka, 48 Ill. App. 353 (1892). *Gormley* went on to suggest that if adjacent lands are on the same level with no natural drainage from one to the other by a surface channel, neither proprietor's land will occupy the position of servient estate; accordingly there would be no right to cast water onto the adjoining land or to dig a ditch through adjoining land. The extent to which this statement holds true today is unclear, particularly where the natural movement of

water from one tract to another is diffused rather than confined to some perceptible channel. *See* City of Peru v. City of LaSalle, 119 Ill. App. 2d 211, 255 N.E.2d 502 (1970).

6. Graham v. Keene, 143 Ill. 425, 430, 32 N.E. 180, 181 (1892); Commissioners of Highways v. Whitsitt, 15 Ill. App. 318, 323 (1884).
7. This conclusion arises from the discussion in the text.
8. H.P. FARNHAM, THE LAW OF WATERS AND WATER RIGHTS (1904).
9. 3 H.P. FARNHAM, THE LAW OF WATERS AND WATER RIGHTS, §§882, 889a, 890, 891, (1904).
10. *Id.* §889a.
11. *Id.* §882.
12. *Id.* §889a.
13. La. Civ. Code Ann., art. 656 (West 1980).
14. FARNHAM, *supra* note 8, §889a. *See also* Johnson v. Marcum, 152 Ky 629, 153 S.W. 959 (1913); 5 CLARK, WATER AND WATER RIGHTS, §452.1 at 501, 502 (1972); Kinyon and McClure, *Interferences with Surface Waters,* 24 MINN. L. REV. 891, 926 n. 163 (1940).
15. Gormley v. Sanford, 52 Ill. 158 (1869).
16. FARNHAM, *supra* note 9, §890.
17. Orleans Navigation Co. v. Mayor of New Orleans, 1 La. [2 Martin (O.S.) 214] 73 (1812). *See* Kinyon and McClure, *Interferences with Surface Waters,* 24 MINN. L. REV. 891, 895 (1940).
18. *See* Butler v. Bruno, 115 R.I. 264, 341 A.2d 735 (1975).
19. Peck v. Herrington, 109 Ill. 611 (1884). The rule was uniformly followed in subsequent cases. *See, e.g.,* Adams v. Abel, 290 Ill. 496, 125 N.E. 320 (1919); Broadwell Special Drainage District v. Lawrence, 231 Ill. 86, 83 N.E. 104 (1907); Lambert v. Alcorn, 144 Ill. 313, 33 N.E. 53 (1893); Wilson v. Bondurant, 142 Ill. 645, 32 N.E. 498 (1892).
20. Peck v. Herrington, 109 Ill. 611, 619-20 (1884).
21. King v. Manning, 305 Ill. 31, 136 N.E. 730 (1922) (tiling); Fenton & Thompson R.R. v. Adams, 221 Ill. 201, 77 N.E. 531 (1906) (digging); Ribordy v. Murray, 70 Ill. App. 527 (1896), *aff'd,* 177 Ill. 134, 52 N.E. 325 (1898) (construction of artificial ditch); Montgomery v. Downey, 17 Ill. 2d 451, 162 N.E.2d 6 (1959) (straightening watercourses).
22. F.B. Leonard, Jr., *Common Law Drainage of Surface Waters* 8 (1916) (doctoral thesis, University of Illinois College of Law).

23. *See, e.g.,* City of Peru v. City of LaSalle, 119 Ill. App. 2d 211, 255 N.E.2d 502 (1970). The court relies extensively on *Peck v. Herrington, (see supra* note 19), even though the drainage dispute is between two municipalities.
24. Ill. Rev. Stat. ch. 42, §2-1 (1903). The provision is quoted in the introduction to this chapter.
25. People v. Bridges, 142 Ill. 30, 31 N.E. 115 (1892).
26. RESTATEMENT OF TORTS, §841 (1939).
27. Lambert v. Alcorn, 144 Ill. 313, 33 N.E. 53 (1893).
28. Lambert v. Alcorn, 144 Ill. 313, 33 N.E. 53 (1893); *See* St. Louis Bridge Ry. Assn. v. Schultz, 226 Ill. 409, 80 N.E. 879 (1907); Commissioners of Highways v. Whitsitt, 15 Ill. App. 318 (1884). *See also* Annot., 81 A.L.R. 262 (1932).
29. Lambert v. Alcorn, 144 Ill. 313, 33 N.E. 53 (1893); 93 C.J.S. *Waters* §129 (1956).
30. Dettmer v. Illinois Terminal R.R., 287 Ill. 513, 123 N.E. 37 (1919); Fenton & Thompson R.R. v. Adams, 221 Ill. 201, 77 N.E. 531 (1906); Daum v. Cooper, 208 Ill. 391, 70 N.E. 339 (1904).
31. Wagner v. Chaney, 19 Ill. App. 546 (1896).
32. Elser v. Village of Gross Point, 223 Ill. 230, 79 N.E. 27 (1906); Graham v. Keene, 143 Ill. 425, 32 N.E. 180 (1892); Dayton v. Rutherford 128 Ill. 271, 21 N.E. 198 (1889).
33. Templeton v. Huss, 57 Ill. 2d 134, 311 N.E.2d 141 (1974).
34. Miller v. Mobile & Ohio R.R., 265 Ill. App. 414, 418 (1932); Annot., 59 A.L.R. 2d 432 (1958).
35. Templeton v. Huss, 57 Ill. 2d 134, 311 N.E.2d 141 (1974).
36. *Id.* at 141, 311 N.E.2d at 146.
37. *See, e.g.,* City of Peru v. City of LaSalle, 119 Ill. App. 2d 211, 255 N.E.2d 502 (1970). The court relies extensively on *Peck v. Herrington (see supra* note 19), even though the drainage dispute is between two municipalities.
38. Recent Decisions, *From Good Husbandry to Reasonable Use: Illinois Surface Water Drainage Law Evolves in Subdivision Case,* 52 CHI. KENT L. REV. 169, 171 (1975).
39. *Id.*
40. Templeton v. Huss, 57 Ill. 2d 134, 311 N.E.2d 141 (1974).
41. Delano v. Collins, 49 Ill. App. 3d 791, 364 N.E.2d 716 (1977).
42. Templeton v. Huss, 57 Ill. 2d 134, 311 N.E.2d 141 (1974).
43. Recent Decisions, 63 ILL. B.J. 466, 468 (1975).
44. Templeton v. Huss, 57 Ill. 2d 134, 141, 311 N.E.2d 141, 145 (1974).

45. *Id.* at 141, 311 N.E.2d at 146.
46. *See* Recent Decisions, *supra* note 43, at 468; Recent Decisions, *supra* note 38, at 176.
47. *Compare* Firestone v. Fritz, 119 Ill. App. 3d 685, 456 N.E.2d 904 (1983); *with* Starcevich v. City of Farmington, 110 Ill. App. 3d 1074, 443 N.E.2d 737 (1982).
48. Recent Decisions, *supra* note 38, at 181.
49. *See* Firestone v. Fritz, 119 Ill. App. 3d 685, 456 N.E.2d 904 (1983); Starcevich v. City of Farmington, 110 Ill. App. 3d 1074, 443 N.E.2d 737 (1982); Powell v. Village of Mt. Zion, 88 Ill. App. 3d 406, 410 N.E.2d 525 (1980); Freeland v. Dickson, 63 Ill. App. 3d 13, 379 N.E.2d 903 (1978); Delano v. Collins, 49 Ill. App. 3d 791, 364 N.E.2d 716 (1977); Bossler v. Countryside Gardens, Inc., 44 Ill. App. 3d 423, 358 N.E.2d 352 (1976).
50. *See* Callahan v. Rickey, 93 Ill. App. 3d 916, 418 N.E.2d 167 (1981); Ehrhart v. Reid, 73 Ill. App. 3d 824, 392 N.E.2d 435 (1979); Freeland v. Dickson, 63 Ill. App. 3d 13, 379 N.E.2d 903 (1978).
51. Recent Decisions, *supra* note 38, at 178.
52. *See* Templeton v. Huss, 57 Ill. 2d 134, 311 N.E.2d 141 (1974), discussing the holding of the lower court.
53. Callahan v. Rickey, 93 Ill. App. 3d 916, 919, 418 N.E.2d 167, 169 (1981); Delano v. Collins, 49 Ill. App. 3d 791, 794, 364 N.E.2d 716, 719 (1977).
54. Templeton v. Huss, 57 Ill. 2d 134, 141, 311 N.E.2d 141, 145-146 (1974).
55. Starcevich v. City of Farmington, 110 Ill. App. 3d 1074, 1080, 443 N.E.2d 737, 741 (1982).
56. Firestone v. Fritz, 119 Ill. App. 3d 685, 687, 456 N.E.2d 904, 906 (1983). "Interference with natural drainage is limited to that which is incidental to the reasonable development of the dominant estate." *See also* Delano v. Collins, 49 Ill. App. 3d 791, 794-795, 364 N.E.2d 716, 719-720 (1977).
57. Keys v. Romley, 64 Cal. 2d 396, 410, 50 Cal. Rptr. 273, 281, 412 P.2d 529, 537 (1966). Other references may also be helpful. *See* Armstrong v. Francis Corp., 20 N.J. 320, 330, 120 A.2d 4, 10 (1956); RESTATEMENT (SECOND) OF TORTS §§822-833 (1977); Recent Decisions, *From Good Husbandry to Reasonable Use: Illinois Surface Water Drainage Law Evolves in Subdivision Case,* 52 CHI. KENT L. REV. 169 (1975); Annot., 93 A.L.R. 3d 1193, 1203 (1979).
58. Starcevich v. City of Farmington, 110 Ill. App. 3d 1074, 1080, 443

N.E.2d 737, 741 (1982); Delano v. Collins, 49 Ill. App. 3d 791, 795, 364 N.E.2d 716, 720 (1977).

59. For example, see Freeland v. Dickson, 63 Ill. App. 3d 13, 379 N.E. 2d 903 (1978). In *Freeland* the court upheld the right of a dominant landowner to lower the elevation of his land, which fed into a highway culvert, provided the action to facilitate drainage was in the interest of good husbandry. [Citing *Templeton v. Huss*, 57 Ill. 2d 124, 311 N.E. 2d 141 (1974).] At the same time, however, the court rejected a mandatory injunction upon the servient landowner, forcing him to excavate the ditch on his property to aid the dominant landowner's drainage. The question of whether or not the dominant landowner could enter the drainage easement to deepen the channel was not addressed. Once it is held that the dominant landowner has the right to lower his or her lands to facilitate drainage, however, the better view would be to permit him or her to enter the servient estate to deepen a channel in order to establish the right to improved drainage.
60. Padfield v. Frey, 133 Ill. App. 232 (1907).
61. Johnson v. Rea, 12 Ill. App. 331 (1882).
62. *See, e.g.,* Vickroy v. State, 31 Ill. Ct. Cl. 489 (1977).
63. *See, e.g.,* Branding v. State, 31 Ill. Ct. Cl. 455 (1977). The Department of Transportation was found liable for $5,178.21 for crop damage caused by a drainage impairment resulting from an improperly installed culvert.
64. *See* Dugosh v. State, 31 Ill. Ct. Cl. 493 (1976). The case involved drainage under a canal, but the court compared it to highway situations.
65. A question yet to be addressed by the courts is the possible liability to which a highway authority may be subjected for enlarging a culvert to accommodate drainage illegally increased by some upstream owner. The better view would be to keep the highway authority free of liability in the absence of any malicious conduct on their part. This approach is preferred for several reasons. First, the natural drainage law permits a dominant landowner to pass waters that come upon his or her parcel; the only restrictions are on the individual landowner's conduct. Thus, passing on illegal flows that come upon an estate by others' conduct does not violate the natural drainage law. Second, no legal theory exists outside the natural drainage law that could cause the authority to be liable. The only possible action would be grounded in negligence. To support a cause of action in negligence a plaintiff must show 1) a duty, 2) a breach of the

duty, 3) proximate cause between the breach and the duty, and 4) actual damages. In this situation, a plaintiff would have to establish that because a highway authority constructed a culvert of limited size, the authority has assumed a duty not to increase its size to accommodate illegal flows. However, there is no logical reason why the mere construction of a highway and installation of a culvert would create such a duty. But for the unrelated construction of the road, the illegal drainage would reach the plaintiff's property anyway. Third, it would be an onerous burden for the highway authority to investigate the legality of the increased flows it accommodates. Not only would it add greatly to the costs of structures, it would delay installation of larger culverts, possibly damaging innocent dominant landowners to whom the highway authority would be liable if the increased flow were legal. Furthermore, such a duty could result in difficult "reasonableness" analysis as to when increased flows will damage the dominant estate if obstructed and the servient estate if passed. Finally, a damaged landowner will always have a cause of action against the party responsible for the illegally increased flows.

66. Savoie v. Town of Bourbonnais, 339 Ill. App. 551, 90 N.E.2d 645 (1950); Murtha v. O'Heron, 178 Ill. App. 347 (1913).
67. Wessels v. Colebank, 174 Ill. 618, 624-625, 51 N.E. 639, 641 (1898).
68. Savoie v. Town of Bourbonnais, 339 Ill. App. 551, 90 N.E.2d 645 (1950).
69. *See* Dugosh v. State, 31 Ill. Ct. Cl. 493 (1976).
70. Ill. Rev. Stat., ch. 121, §9-117 (1983). *See also* Grommes v. Town of Aurora, 37 Ill. App. 2d 1, 185 N.E.2d 3 (1962).
71. 5 CLARK, WATER AND WATER RIGHTS §§455, 459.5, 459.6 (1972 and Supp. 1978).
72. Montgomery v. Downey, 17 Ill. 2d 451, 162 N.E.2d 6 (1959); Saelens v. Pollentier, 7 Ill. 2d 556, 131 N.E.2d 479 (1956); Gough v. Goble, 2 Ill. 2d 577, 119 N.E.2d 252 (1954).
73. *See* Ill. Rev. Stat. ch. 121, §2-202 (1983). *See also* People *ex rel.* Carson v. Mateyka, 57 Ill. App. 3d 991, 998, 373 N.E.2d 471, 476 (1978).
74. Lang v. Dupuis, 382 Ill. 101, 107, 46 N.E.2d 21, 24 (1943).
75. Seefeldt v. City of Lincoln, 57 Ill. App. 3d 417, 373 N.E.2d 85 (1978); Murtha v. O'Heron, 178 Ill. App. 347, 354 (1913). *See* Annot., 55 A.L.R.2d 1144 (1957).
76. Commers v. Marion Cablevision, 64 Ill. 2d 97, 354 N.E.2d 353 (1976).

77. Broadwell Special Drainage District v. Lawrence, 231 Ill. 86, 83 N.E. 104 (1907).
78. Zerban v. Eidmann, 258 Ill. 486, 493, 101 N.E. 925, 928 (1913).
79. O'Connell v. Chicago Park District, 376 Ill. 550, 34 N.E.2d 836 (1941); Mitchell v. Chicago, Burlington, and Quincy Ry., 265 Ill. 300, 106 N.E. 833 (1914).
80. Cagle v. Valter, 20 Ill. 2d 589, 170 N.E.2d 593 (1961).
81. Seefeldt v. City of Lincoln, 57 Ill. App. 3d 417, 373 N.E.2d 85 (1978).
82. Paulik v. Village of Caseyville, 100 Ill. App. 3d 573, 427 N.E.2d 213 (1981).
83. Shontz v. Metzger, 186 Ill. App. 436 (1911).
84. Hickey v. Illinois Central R.R., 35 Ill. 2d 427, 448, 220 N.E.2d 415, 426 (1966); *cert. denied,* 386 U.S. 934 (1967); *reh'g denied,* 386 U.S. 1000 (1967).
85. Lake Shore Riding Academy, Inc. v. Daley, 38 Ill. App. 3d 1000, 350 N.E. 2d 17 (1976).
86. Shontz v. Metzger, 186 Ill. App. 436 (1911).
87. *In re* Bird's Estate, 410 Ill. 390, 102 N.E.2d 329 (1951); Clare v. Bell, 378 Ill. 128, 37 N.E.2d 812 (1941).
88. Savoie v. Town of Bourbonnais, 339 Ill. App. 551, 90 N.E.2d 645 (1950); Brown v. Trustees of Schools, 224 Ill. 184, 79 N.E. 579 (1906).
89. City of DeKalb v. Luney, 193 Ill. 185, 61 N.E. 1036 (1901).
90. Savoie v. Town of Bourbonnais, 339 Ill. App. 551, 90 N.E.2d 645 (1950).
91. Phillips v. Leininger, 280 Ill. 132, 117 N.E. 497 (1917).

CHAPTER III: STATUTORY DRAINAGE LAW

A. INTRODUCTION AND SCOPE

As the preceding discussion has shown, the concept of natural drainage is founded on the relative position of land. The discussion therefore was in terms of dominant and servient lands, rather than the nature of the landowner. Drainage statutes, however, frequently specify rights and duties of particular parties such as highway authorities, individual landowners, and drainage districts. Clarity therefore suggests that statutory drainage be discussed in the same terms.

With regard to highway authorities, the primary questions concern how they may acquire drainage rights, how the drainage of adjacent lands may interfere with the highway, and whether the highway authorities must maintain drainage facilities. In brief, the highway authorities may obtain drainage easements through eminent domain proceedings, through contracts expressly authorized by statute, or through contracts outside of statutory provision. Highway Code section 117[1] states that parties may not obstruct a highway without permission. This section forbids draining land that causes injury to the highway, except for drainage pursuant to the natural drainage laws. Finally, the Highway Code provides that the highway authority must maintain drainage facilities as well as the highway surface.[2]

The section dealing with drainage districts emphasizes statutory provisions affecting highways. It addresses issues such as whether a highway authority may be assessed by a drainage district, the extent to which a drainage district can use highway property, when a drainage district has eminent domain power, whether particular land can be annexed by a drainage district, and the ability of a district to increase stream flows. As we will show, drainage districts cannot assess highway authorities. Highway authorities appear to be able to grant permission to a drainage district to use highway lands, subject to abutting landowners' property rights. The Drainage Code apparently permits the exercise of the power of eminent domain against the highway

authority. It also appears that highway property can be annexed into a drainage district, although it cannot be assessed.

Questions concerning individual landowners are primarily covered in the sections addressing drainage districts and highway authorities. Additional code provisions limit interference with the lateral support of a highway and require that drains installed by a landowner be recorded. This chapter also discusses a landowner's right to extend a drain through another's land. While the Drainage Code authorizes such an action, there is some question as to the constitutionality of the provision. Finally, this chapter considers the construction of drains and levees for mutual benefit. The code provisions are applicable to both individuals and highway authorities, although highway authorities cannot be compelled to contribute to the expenses involved in a mutual drainage system. Drainage districts are excluded from membership in a mutual drainage system.

B. HIGHWAY AUTHORITIES

A HIGHWAY AUTHORITY IS SUBJECT TO THE NATURAL DRAINAGE LAW. THROUGH THE POWER OF EMINENT DOMAIN, HOWEVER, A HIGHWAY AUTHORITY MAY MODIFY ITS NATURAL DRAINAGE RIGHTS. IN ADDITION, A HIGHWAY AUTHORITY MAY CONTRACT WITH LANDOWNERS TO ALTER ITS DRAINAGE OBLIGATIONS. THE HIGHWAY CODE MAKES IT ILLEGAL TO OBSTRUCT OR INJURE A HIGHWAY AND REQUIRES A PERMIT TO DO ANY WORK IN A RIGHT-OF-WAY. IN GENERAL, A HIGHWAY AUTHORITY IS LIABLE FOR MAINTENANCE AND REPAIR OF DITCHES IN A RIGHT-OF-WAY THAT BENEFITS THE HIGHWAY.

1. Eminent Domain

The preceding chapter explained the applicability of the rules of natural drainage to Illinois highways. It pointed out that the drainage of highways across adjoining lands is governed by the same rules applying to private land, except where the highway authorities have acquired rights through eminent domain.[3] Generally, a landowner may only obtain an easement to drain his or her land outside of the course of natural drainage by deed or prescription. However, by statute highway authorities also may obtain drainage rights through the use of eminent domain.[4]

a. Acquisition of property. Highway Code sections 4-502, 5-802, and 6-802 each provide substantially as follows:

> When the [highway] authority deems it necessary to build, widen, alter, relocate or straighten any ditch, drain or watercourse in order

> to drain or protect any highway or highway structure it is authorized to construct, maintain or operate, it may acquire the necessary property, or such interest or right therein as may be required, by gift or purchase or, if the compensation or damages cannot be agreed upon, by the exercise of the right of eminent domain under the eminent domain laws of the state.[5]

(1) Constitutionality and procedure. Article I Section 15 of the 1970 Constitution qualifies the right of eminent domain for the state:

> Private property shall not be taken or damaged for public use without just compensation as provided by law. Such compensation shall be determined by a jury as provided by law.[6]

Procedurally, the statute seems to require that highway authorities attempt to acquire the desired property by gift or purchase before instituting eminent domain proceedings. Note the wording under the previously mentioned sections of the statute pertaining to the acquisition of property: ". . . by gift or purchase or, if the compensation or damages cannot be agreed upon, by the exercise of the right of eminent domain . . . ."[7] An earlier statute read, "[U]nless the owner of such land, or his agent, shall first consent to the cutting of such ditches, the commissioners shall apply to any justice of the peace . . . ."[8] This clause was interpreted to mean that the statutory method of acquiring the land must be preceded by an offer of just compensation to the owner and his or her refusal to accept that offer.[9] The present wording would probably be interpreted similarly.

(2) Determination of necessity. The statute provides that eminent domain proceedings may be exercised when the highway authority "deems it necessary." The question of necessity is determined by the highway authorities acting in their official capacity and is beyond the control and jurisdiction of the courts except for fraud or a clear purpose of oppression.[10] The exercise of discretion will be questioned by a court only when a citizen's private rights are improperly invaded.[11]

(3) Direction of flow. The statutory provision is in no way limited by the natural flow of water. The court has expressly stated that the provision is intended to enable highway authorities to convey water from the highway in a direction other than its natural course.[12] Thus, a highway authority can divert water as long as it has acquired the necessary easements from affected parties.

(4) Limitation of sewage. The right of eminent domain may not be used for the purpose of carrying off sewage deposited on the highway by the drains of an incorporated village. The statute does not contemplate such usage.[13]

(5) Limitation on subsequent negligence. When land is acquired

by eminent domain for highway purposes, certain injuries to the landowner are expected and included in the eminent domain award. However, condemnation by eminent domain is no bar to a suit by the landowner for subsequent injury. The injury may grow out of the negligence and lack of skill of the public authority in constructing drains in the highway.[14]

(6) Lands dedicated to public use. Illinois courts have taken the position that the authority to condemn lands already devoted to public use must be explicitly granted and will not be implied by a general grant of eminent domain power.[15]

Sections 4-502, 5-802, and 6-802 of the Highway Code offer no explicit grant of power to condemn property already devoted to public purposes, such as a drainage district's drains. However, in some situations, if the state legislature intends a highway authority to have the power to condemn lands previously devoted to a public use, the taking will be allowed.[16]

b. Entry on lands to make surveys. In order to make surveys to determine how much land must be taken for a highway project, including subsurface surveys, the highway authority may enter the lands or waters of another after giving written notice to the known owners or occupants. Only unavoidable damages to crops or trees incidental to a survey are permissible, and the highway authority must compensate the landowner for any of these damages.[17]

2. Contracts with Owners or Occupants of Adjoining Land

a. Contracts under statutory provisions

(1) Tile drains. Highway Code section 9-107 provides:

> Whenever the highway authorities are about to lay a tile along any public highway the highway authorities may contract with the owners or occupants of adjoining land to lay a larger tile than would be necessary to drain the highway, and permit connection therewith by such contracting parties to drain their lands.[18]

No cases actually apply this statute, although two cases mention it. In one the court pointed out that under the facts of the case, the highway authorities were not taking steps to tile-drain the highway; therefore, the provision did not apply to the question involved.[19] In the other case the adjoining owner had constructed a tile drain in the highway. The court found that the drain benefited the highway, implying that it was part of the highway drainage system and not merely a private drain. As such, the tile was permitted to remain in service and the highway authority was responsible for its maintenance.

As partial justification for allowing the tile to remain in the highway, the court cited the above statute and held that highway authorities "have a right to lay tile in the road and to make contracts with adjoining owners for that purpose."[20] Thus a loose interpretation of the statute aided the court in arriving at a desirable decision.

(2) Open ditches and drains. Highway Code section 9-113 applies to the construction of ditches or drains along a highway by any "public utility company, municipal corporation, or other public or private corporation, association, or person."[21] The section provides that such construction may only be undertaken after first obtaining the written consent of the appropriate highway authority. Consent is granted to terms and conditions that are consistent with the Highway Code and are deemed by the authority to be in the best public interest.

Section 9-113 also recognizes that many highways are constructed upon right-of-way easements obtained from abutting landowners. Construction of drainage facilities by parties other than the highway authority that do not benefit the highway are outside the scope of the highway authority's highway easement across the land of others.[22] To avoid a possible illegal taking of the abutting landowner's property, secton 9-113 provides that:

> The petitioner shall pay to the owners of property abutting upon the affected highways established as though by common law plat all damages the owners may sustain by reason of such use of the highway, such damage to be ascertained and paid in the manner provided by law for the exercise of the right of eminent domain.[23]

It is likely that section 9-113 can only be applied by public utility companies, municipal corporations, or other public or private corporations, associations, or people who independently possess the statutory right of eminent domain. That is, it is likely that a drainage district, which the legislature has vested with the power of eminent domain,[24] could use section 9-113 to construct a ditch in a highway easement. However, an individual landowner, such as a farmer wishing to drain his or her own land, may be prohibited from using the highway easement to do so.

Although they predate section 9-113, two cases have treated the situation of a highway authority granting a landowner permission to construct a ditch along a highway. In each case the highway authority gave the landowner permission to construct a ditch in the highway right-of-way solely to drain his or her own property. Both ditches were constructed in the highway right-of-way where it fronted on a second landowner's property. In other words, the ditch began on the land of the party who had received permission from the highway authority and ran into the highway property, alongside the land of

another. In each case the question was whether these ditches must be allowed to remain in the highway right-of-way.

In denying the right of the landowner to maintain the ditch, the court in the first case held that highway authorities cannot bind the public to furnish drainage for private lands. A mere license or permission for a private individual to dig a ditch along the highway, even though he or she acts and expends money upon such permission, is not a grant of a perpetual right for the individual to drain his or her land through this ditch. The authorities cannot grant away the use of the right-of-way of the public highway to a private person.[25] Section 9-113 now requires adequate consideration for an individual's use of a highway right-of-way.[26]

The second case reached a similar conclusion. This holding, however, was based on the rule that highway authorities own only an easement in the highway land, and the fee remains in the adjoining owner.[27] Highway authorities have no right to grant abutting landowners the privilege of digging a ditch along the highway fronting the property of another landowner: it would impose an additional burden and servitude on such land that is inconsistent with the limited rights of the public in the highway.[28] The case raises the notion that without the power of eminent domain, a party can only construct an open ditch along a highway by securing the permission of all contiguous landowners whose property is affected by the construction. Section 9-113(1) recognizes this notion, stating that no agreement with a highway authority is binding upon the owner of a fee.[29]

b. Contracts outside statutory provisions. Highway authorities are free to contract for any rights of drainage outside of these statutory provisions. For example, a highway authority may contract with a private landowner to have him or her dispose of highway runoff. An 1886 appellate court decision held that if a contract contemplated the lawful disposition of the water by the landowner, the highway authority would not be liable for subsequent unlawful disposition. The court based its decision on the fact that the highway authority was not in privity to the unlawful extension of the tile drain that caused the flooding.[30]

Under modern agency principles, this decision may no longer be persuasive. Rather, the trend today is towards greater liability for a principal due to the unlawful or negligent acts of his or her agent.[31] In addition, the current state constitution has abolished sovereign immunity, except as provided by law.[32] Thus, it appears likely that a highway authority could be liable for the unlawful actions of a landowner with whom it contracts.

3. Consultation with Local Agencies

Section 9-101.1 of the Highway Code provides:

> Whenever the proper highway authority is about to construct or improve the drainage structures of a State highway, county highways, or county unit district road, the highway authority shall meet and consult with the authorities of any municipality adjacent to or through which such highway or road runs. The purpose of such meetings is to work out an agreement with such municipality and all other interested agencies and units of local government as to the extent of such drainage construction or improvement.[33]

This provision appears to compel the highway authority to cooperate with local authorities to avoid duplication of efforts in providing drainage and to encourage more efficient use of funds. In addition, it may be intended to promote local input on projects that will impact on local concerns.[34]

4. Injuring or Obstructing Highways

a. Statutory provisions. Highway Code section 9-117 reads:

> If any person injures or obstructs a public highway by... plowing or digging any ditch ... or by turning a current of water so as to saturate, wash, or damage ... or by plowing in or across or on the slopes of the side gutters or ditches, or by placing any material in such ditches ... without the permission of the highway authority... he shall be guilty of a petty offense ....
>
> The highway authority... after having given 10 days notice ... may... fill up any ditch ... except ditches necessary to the drainage of an adjoining farm emptying into a ditch upon the highway....
>
> However, this section shall not apply to any person ... through or along whose land a public highway may pass, who shall desire to drain his land, and who shall give due notice to the proper highway authority of such intention, and who shall first secure from such highway authority written permission for any work, ditching, or excavating he proposes to do within the limits of the highway.[35]

b. Turning a current of water. "Turning a current of water so as to saturate, wash, or damage" is included as an offense under section 9-117 of the Highway Code. This provision is interpreted broadly by the courts. It has been held applicable to both narrow streams and diffused drainage.[36]

Furthermore, it would appear that this provision covers the various types of unlawful water diversions discussed under natural drainage in Chapter II.

c. Notice. The initial fine provided for in the statute is imposed for the obstruction itself. If the obstruction is allowed to continue,

an additional fine may be recovered. No notice is necessary to recover the initial penalty, whereas notice must be given before the subsequent fine may be imposed.[37]

d. Necessity for ditch. Ditches necessary to drain an adjoining farm and that empty into a ditch upon the highway are excluded from the category of obstructions. The court has held that a ditch allowing water from adjoining lands to flow naturally into a highway ditch is "necessary." Conversely, a ditch that diverts water from its natural course in order to reach the highway is not necessary and is not protected by the statute.[38]

The exclusion of necessary ditches from the definition of obstruction seems to pertain to both the highway authority's right to fill a ditch and to the imposition of the petty offense. Since the Drainage Code recognizes the right to natural drainage,[39] it would seem contrary to its intent to consider the exercise of that right a petty offense.

e. A ditch as an obstruction. The circumstances are not clear under which a ditch constructed in the highway right-of-way by an adjoining landowner without permission would constitute an obstruction. The confusion arises because the highway authorities often are not considered owners of the land within the highway. Often the public has an easement in the highway, and the fee remains in the adjoining owner who may exercise every right of ownership not inconsistent with the easement of the public.[40]

This is the general rule in Illinois. However, under the wording of the Illinois Highway Code and under the eminent domain laws of the state, it is possible for the highway authority to obtain the entire fee interest rather than a mere easement in any land taken. Note the language of two code sectons: "The Department, in its name, or any county may acquire the fee simple title, or such lesser interest as may be desired, to any land, rights, or other property necessary for the construction, maintenance, or operation of State highway. . .";[41] and ". . . it may acquire the necessary property or such interest or right therein as may be required . . . ."[42] If the entire fee is taken from the adjoining owner, the problems surrounding the landowner's rights will not exist when an easement alone is taken.

Uncertainty surrounds the rights of an adjoining owner who constructs a ditch in the highway right-of-way without permission but who still has the fee interest in the property. An early appellate decision held that "the digging of the ditch inside the limits of the highway is of itself an injury. It is a trespass unless the digging is by permission or under some legal right."[43] The landowner involved had

not secured permission, and a fine was therefore imposed. The fact that he was the fee owner was not discussed. The appellate court apparently did not feel that this was sufficient justification for his act; his ownership of the fee was not considered to be "some legal right."

On the other hand, the adjoining owner's title to the fee has been interpreted as giving him or her the right to use the highway land in any manner he or she wishes, including for the construction of a ditch. The easement of the highway must not be affected. The digging of the ditch in itself was not considered an obstruction. According to the court, a ditch becomes an obstruction only if it renders the highway less safe, useful, or convenient for the public. This is a question of fact to be determined by a jury.[44]

5. Maintenance and Repair

The Highway Code imposes upon the respective highway authorities the duty to construct, maintain, and repair the highways within the jurisdiction of each authority.[45] The sections imposing the duty of maintenance and repair do not expressly include drainage systems, but such systems are included in the definition of "highways" in the Highway Code.[46] An additional section lists the procedural steps for compelling highway commissioners to make road repairs.[47]

It is not clear whether these sections require the highway authority to maintain and repair drainage systems along the highway in two instances: when adjoining owners have connected a highway ditch under section 9-107 of the Highway Code[48] and when the adjoining landowners have constructed private drains with the permission of the highway authority upon land obtained under eminent domain provisions. When a drain is connected to an existing highway drain under section 9-107, the highway is still benefited by it. Thus it is likely the highway authority will be completely responsible for the maintenance costs. However, when a landowner retains the fee, obtains a permit, and constructs a ditch in the highway right-of-way for a private purpose, it is unlikely that the drain would fall within the statutory definition of "highway." In the case where the highway is not benefited by such a drain, the highway authority has no responsibility to maintain and repair it.

There is some question about whether a landowner may enter onto the highway right-of-way without a permit in order to repair a drainage system. If the system is for the sole benefit of the landowner, there may be no right to make repairs within the right-of-way. However, the highway authority maintains the power to grant permits

for all work within the right-of-way and at its discretion, it may permit the required maintenance.[49]

6. Recording Plats

Whenever a highway is laid out, widened, or altered in accordance with the Highway Code, the proper highway authority shall cause a plat to be made and recorded in the office of the recorder of deeds or in the office of the registrar of titles for the county.[50]

The Department of Transportation is authorized to take necessary actions to prevent injury to landowners by encroachments or by the erection of structures that may impede or obstruct the natural flow of streams in any manner. Any person planning to cause an encroachment or erect a bridge over a stream that drains one square mile in an urban area or ten square miles in a rural area must first file plans, profiles, and specifications with the Department of Transportation.[51] This statute could apply to highway authorities building retention ponds.

7. Willow Hedges as a Public Nuisance

> Where willow hedges or a line of willow trees have been planted along the margin of a highway, so as to render tiling impracticable, the highway authority having jurisdiction over such highway may contract with the owner for their destruction; and they shall be destroyed before tiling. The planting of such hedges or trees hereafter on the margin of highways is declared to be a public nuisance.[52]

8. Lateral Support and Deposit of Spoil

> It is unlawful for any person to excavate or remove . . . the lateral support within a distance of 10 feet plus one and one-half times the depth of any excavation adjacent to the established right-of-way of any public highway located outside the corporate limits of any municipality, except that if any of the excavated materials be of solid rock, the depth of such solid rock shall not be considered in computing the limit of excavation from such right-of-way line of such public highway.
>
> It is unlawful for any person to deposit spoil . . . in such a manner that the toe of such spoil will be nearer than 20 feet to any established right-of-way of any public highway located outside the corporate limits of any municipality.
>
> Whenever any person violates . . . the foregoing provisions . . . he shall be guilty of a petty offense.
>
> Where any such violaton occurs along any public highway the proper highway authority . . . is authorized to take the necessary steps as required by law to enter upon the property where such violation occurs and backfill . . . the unlawful excavation or remove . . . the unlawful spoil banks . . . .[53]

C. DRAINAGE DISTRICTS

THE ORGANIZATION OF DRAINAGE DISTRICTS IN ILLINOIS IS GOVERNED BY THE DRAINAGE CODE. HIGHWAY AUTHORITIES ARE EXEMPTED FROM ASSESSMENT BY DRAINAGE DISTRICTS. IN GENERAL, DRAINAGE DISTRICTS MAY USE HIGHWAY RIGHTS-OF-WAY, SUBJECT TO A PERMIT BY THE HIGHWAY AUTHORITY. IN ADDITION, DRAINAGE DISTRICTS MUST COMPENSATE ADJACENT LANDOWNERS WHOSE PROPERTY RIGHTS ARE INVADED. DRAINAGE DISTRICTS POSSESS THE POWER OF EMINENT DOMAIN AND PROBABLY CAN EXERCISE EMINENT DOMAIN AGAINST A HIGHWAY AUTHORITY. DRAINAGE IMPROVEMENTS IN STREAMS DRAINING MORE THAN ONE SQUARE MILE IN URBAN AREAS OR TEN SQUARE MILES IN RURAL AREAS MAY REQUIRE A PERMIT FROM THE DEPARTMENT OF TRANSPORTATION.

1. Structure

The organization and operation of drainage districts in Illinois are governed by the Drainage Code. This code completely revised the two existing drainage laws, which dated back to 1879 and 1885. Although most of the reported cases involve interpretations of the two earlier laws, the provisions of immediate interest to this report were substantially retained in the new code, and the implications of the various sections therefore remain unchanged.

It is not the purpose of this report to study the technical aspects of drainage district organization and operation, but instead to discuss the relationships and the relative rights aud duties that exist between the drainage districts and the respective highway authorities. For this reason all technicalities have been omitted, and only Drainage Code provisions of either definite or probable application to highways are included.[54] As a starting point, however, summaries are presented to indicate generally the basic principles governing drainage districts.

1. Drainage districts are authorized by the General Assembly but are not specifically created by it. Thus, the legislature creates the framework for a drainage district and gives it certain powers but leaves it up to local citizens to determine the need for such a district.
2. Drainage districts need not follow existing governmental lines for counties, townships, cities, or property lines but can be created on the basis of a natural drainage basin or a unified river network.
3. Drainage districts' powers relate solely to drainage and protection against overflow.

4. The procedure for organizing and governing the districts is usually the same, starting with a petition from a certain number of area residents to the circuit court, a general referendum, appointment of commissioners or trustees, and so forth.[55]
5. Drainage districts derive their powers from statute, and these statutes must be fulfilled to make their organization legal.[56]

2. Assessment of a Highway as a Drainage District Member

As originally enacted, section 5-2 of the Drainage Code specifically included public highways in the assessments of a drainage district.[57] In 1983, however, section 5-2 was amended to exclude public highways from assessment:

> Commissioners shall proceed to make out their assessment roll of benefits, damages, and compensation, and they shall include therein all land . . . within the district other than public highways, streets, and alleys . . . .[58]

This legislative action leaves no doubt that public highways were purposely excluded from assessment by drainage districts. Article 9 Section 6 of the Illinois Constitution provides that the property of state and units of local government can be exempted from taxes by statute.[59] Thus, despite the possibility that a highway authority might benefit from drainage district facilities, the legislature has acted within its constitutional authority by exempting public highways from being assessed by a drainage district.

3. Use of Highways by Drainage Districts

Drainage Code section 4-14 reads in part:

> The commissioners are empowered to . . . use any part of any public highway for the purposes of work to be done, provided such use will not permanently destroy or materially impair such public highway for public use. . . .[60]

The full extent to which the highway may be used is not clear from the statute. From the reported cases it appears that the statute permits cutting across a highway with a drainage district ditch. The implications of this will be discussed in Chapter IV, "Bridges and Culverts."

The right to use a public highway may or may not give a drainage district the right to drain into highway ditches and the right to construct a drain along the highway right-of-way. No cases interpret the above statutory language. As discussed earlier, section 9-113 of

the Highway Code requires permission from the highway authority before any construction is undertaken within the highway right-of-way.[61] The drainage district must obtain the permission of the highway authority and compensate any abutting landowners affected by the construction:

> While it is necessary to secure the consent of the commissioners of highways to lay within the highway a drain for drainage which is not primarily or exclusively for the benefit of the highway but which is for the use of the adjoining lands, the commissioners of highways do not possess the sole power and authority to grant a right-of-way for such improvement.
>
> Section 13 of Article 2 of the Constitution [Article 1, Section 15 of the 1970 Constitution] provides that private property shall not be taken or damaged for public use without just compensation.... The laying of this tile in the public highway was an additional burden and servitude upon the fee.[62]

It is not clear how a drainage district may proceed if the highway authority refuses to permit the use or construction of drains along a highway. As we will discuss in the next section, a drainage district may be able to invoke eminent domain to use or construct ditches.

4. Eminent Domain

The Drainage Code states that:

> Whenever the commissioners are unable to agree with any landowner... on the amount of compensation to be paid... then the commissioner may... acquire any such lands, easements, rights-of-way, properties, and interest, whether privately owned, publicly owned, or held for the use of the public, by the exercise of the right of eminent domain.[63]

No cases have been found in which a drainage district uses eminent domain against a highway authority. In *Department of Public Works and Buildings v. Ells*[64] the Supreme Court of Illinois stated that a general grant of the powers of eminent domain does not authorize the condemnation of property already devoted to public use. However, where the legislature explicitly authorizes condemnation of property dedicated to a public use, the court indicated that an eminent domain action would be permitted.[65]

In a 1976 decision, the Metropolitan Sanitary District was permitted to condemn highway property in order to obtain an easement of right-of-way for a water main.[66] The statutory authority came from ch. 42, section 337 of the Drainage Code: "[s]uch district shall have the power so to do and may acquire the necessary right-of-way over public property or such property held for public use...."[67] With this language the court permitted the use of eminent domain against a

highway authority. It is very similar to that found in section 4-17 of the Drainage Code discussed above. By analogy it would appear that a drainage district could successfully pursue eminent domain against a highway authority.

5. Annexation of Lands to Drainage Districts

Lands lying outside a drainage district may be annexed to the district in any one of three ways: (1) connection to the drains of a drainage district, (2) petition by commissioners, and (3) petition by landowners. The third method of annexation is not often litigated because it involves the express desire of the owners of land outside the drainage district. The first and second methods, however, have been the subject of controversy.

As previously discussed, the 1983 amendment of section 5-2 of the Drainage Code now exempts public highways from assessment by a drainage district.[68] This fact nullifies the principal reason why a drainage district would want to annex a highway authority property. However, because the statutory authority remains, some discussion of the mechanics of annexation is in order.

Regarding the first method, Drainage Code section 8-2 reads:

> Any owner of land which lies outside of a district, subdistrict or minor subdistrict but within the same natural drainage area, or involved in the same system of drainage as the lands within the district . . . may connect his land to any open ditch of the district . . . or, with the prior consent of the commissioners, to any covered drain of the district. . . . Any connection so made shall be subject to the conditions of section 12-1. When any such connection is made, the landowner involved shall be deemed to have consented to the annexation of such land to the district. . . .[69]

Regarding the second method, Drainage Code section 8-3 reads:

> When any land lying outside of a district has been connected to a district drain or has been or will be benefited or protected by any district work done or ordered to be done, the commissioners may petition the court to annex such land to the district.[70]

In summary, section 8-2 states that connection to a drainage district ditch by an outsider is deemed to be consent for annexation. Section 8-3 states that when connection or benefit can be shown by the drainage district, the drainage commissioners may petition the court for annexation.

When either connection or benefit is shown, the courts do not hesitate to annex the lands to the drainage district. Courts have held that a dominant estate may be annexed where the flow from the estate is directed into an artificial ditch constructed by a drainage

district. The mere fact that the owner of the dominant estate had a legal right to permit his or her waters to flow to the servient estate did not allow him or her to escape liability for connecting to the district's artificial drains.[71]

On the other hand, where the drainage district has not benefited the land and where no connection has been made, the courts just as readily refuse to annex the lands. Flow resulting from the natural course of drainage will not subject land to annexation. The connection must be through some form of artificial ditch or tile.[72]

An interesting problem that the courts may soon face is the right of a highway authority to increase the burden it places upon a drainage district that can no longer assess the highway authority.[73] In light of the Supreme Court's decision in *Templeton v. Huss,*[74] a highway authority may be justified in increasing the natural outflow due to reasonable development. Should the burden the highway authority places upon the district become unreasonable, the drainage district may look for damages under the principles of the natural drainage law discussed in Chapter II.

6. Miscellaneous Provisions

a. Rights of landowners within a district. Two sections of the Drainage Code deal with the rights of landowners within the district, that is, district members. Section 12-1 grants the right to use district drains:

> A landowner within any drainage district has the right to use the ditches and drains of the district as outlets for any drain, either open or covered, which he may desire to construct for the more complete drainage of his own land. . . .[75]

Section 12-2[76] is the result of a 1943 case that held that landowners within a drainage district relinquished some of their common law rights. In that case the court said that parties who unite to form a drainage district agree to adopt the drainage system provided by statute in lieu of the rights of common law.[77] To change this result, section 12-2 provides:

> Land included within a district shall continue to have the same rights of drainage, both common law and statutory, as land not within an organized drainage district, except insofar as the drainage system of the district may vary from or be inconsistent with natural drainage. The construction of a covered drain by a drainage district in the course of natural drainage or along the course of an open ditch shall not in itself be considered to be an abandonment of the natural drain or the open ditch.[78]

b. Landowners' use of the right-of-way. Drainage Code section 12-3 reads:

> The owner of any land over, through, or across which a district has acquired a right-of-way . . . may use the land occupied by such right-of-way in any manner not inconsistent with the paramount easement of the district. Any use of the right-of-way which will interfere with the operation of the drain or will increase the cost to the district of performing any of its work thereon is deemed to be inconsistent with the district's easement.[79]

c. Penalties. Additional Drainage Code sections provide penalties for: (1) injuring a drain, drainage structure, levee, or pumping plant;[80] (2) preventing entry by commissioners upon lands or rights-of-way;[81] and (3) preventing construction or repair of private drains.[82]

d. State permits. Any work in a stream draining more than one square mile in urban areas or ten square miles in rural areas requires a permit from the Department of Transportation.[83]

e. Cooperation and agreements with other districts and agencies. The Department of Transportation is authorized to enter into agreements with drainage districts and proper agencies to accomplish any of the purposes authorized in the Drainage Code. Such agreements shall cover contributions between the districts and agencies in executing the agreed work.[84]

D. INDIVIDUAL LANDOWNERS

INDIVIDUAL LANDOWNERS MAY CONTRACT WITH A HIGHWAY AUTHORITY TO HAVE THE AUTHORITY CONSTRUCT A DRAINAGE TILE IN THE HIGHWAY TO ACCOMMODATE THE LANDOWNERS' DRAINAGE IN ADDITION TO THAT OF THE HIGHWAY. AN INDIVIDUAL MAY OBTAIN PERMISSION TO OPERATE A DRAIN IN A HIGHWAY AUTHORITY'S RIGHT-OF-WAY. INJURING OR OBSTRUCTING HIGHWAYS IS PROHIBITED WITHOUT AUTHORITY APPROVAL.

These subjects are substantially the same as those covered under "Highway Authorities" on page 28. This section views the subjects from the standpoint of the individual landowner, while the prior section took the standpoint of the highway authority with a full discussion of the statutory provisions.

1. Contracts with Highway Authorities

An adjoining landowner may contract with the highway authority so the authority will lay a larger drain tile than is necessary for the highway, thus allowing the landowner to connect to it.[85] The landowner must pay for the enlargement of the tile drain since it will carry off water from his or her land.[86] The landowner may or may not be liable

for an appropriate share of maintenance costs. Contracts other than on this issue between the highway authority and an adjoining landowner were dicussed earlier and are not included here.

2. Drainage into a Highway with Permission

A landowner through or along whose land a public highway passes and who desires to drain into the highway may do so if due notice is first given to the proper highway authority. Written permission must come from the authority for any work, ditching, or excavating within the limits of the highway.[87] Section 9-113 of the Highway Code[88] provides that a highway authority may consent to the use of a highway for an individual's drainage purposes. The individual must, however, secure the permission of contiguous landowners whose property is affected.

3. Injuring or Obstructing Highways

Highway Code section 9-117[89] provides for a penalty for any person who injures or obstructs a highway. However, if an adjoining landowner constructs a ditch in the highway without permission, the consequences are not clear. The act of construction alone may be considered an obstruction, and the landowner may be subjected to a penalty under the Highway Code.[90] On the other hand, the ditch may be considered an obstruction only if it renders the highway less safe, useful, and convenient to the public.[91]

Section 9-117 of the code also permits an adjoining landowner to commit certain acts without subjecting him or herself to the penalty for obstruction. The landowner may:

1. Drain into a ditch located across or along the highway following the course of natural drainage.[92]
2. Drain into a highway passing through or along his or her land if permission has been secured.[93]

4. Cutting or Damaging State Highways

No person may damage a highway under the authority of the Department of Transportation without a permit from the Department. Should a party engage in any activity damaging a highway, the person who obtained the permit must restore the highway to its original condition.[94]

5. Lateral Support and Deposit of Spoil

A landowner may not remove the lateral support within certain specified distances of the highway: ten feet plus one and one-half

times the depth of excavation. Nor may he or she place the spoil of any excavation within twenty feet of the highway right-of-way.[95]

6. Recording Tile Drains

Under section 2-13 of the Drainage Code, a county with 250,000 or more residents may require a person for whom a tile drain was installed to record a diagram of it with the county recorder. The diagram must indicate the location, size, and approximate depth of the tile.[96] While this statute clearly applies to individual landowners, a highway authority may not have to comply. A narrow reading of the word "person" in the statutory language may exclude a quasi-corporation such as a highway authority.

E. EXTENSION OF COVERED DRAINS THROUGH OTHERS' LAND

THE DRAINAGE CODE AUTHORIZES AN INDIVIDUAL LANDOWNER TO EXTEND A TILE THROUGH THE LAND OF ANOTHER LANDOWNER. HOWEVER, THIS PROVISION MAY NOT BE CONSTITUTIONAL UNDER THE CURRENT ILLINOIS CONSTITUTION.

1. Statutory Provisions

Sections 2-2 through 2-7 of the Drainage Code read:

> **a. Extension of covered drains through others' land.** When it is necessary for the owner of land which may be drained by a covered drain to extend such drain through the land of others in the general course of natural drainage in order to obtain a proper outlet and the owner of, or other party interested in, the land through which such extension is necessary refuses to consent to the extension . . . , the person desiring to construct the drain may file suit in the circuit court in the county in which such land lies against the owner . . . and summons shall issue . . . and proceedings shall be had thereon as in other civil actions in county courts.[97]
>
> **b. Bond.** At the time of commencing the action, the plaintiff shall file a bond in the penal sum of not less than $100 . . . conditioned upon the payment of all costs accruing in the action and . . . all damages which may be awarded to the defendant.[98]
>
> **c. Plat and profile.** At the time of commencing the action, the plaintiff shall also file a map or plat showing the land proposed to be drained, the land across which the drain is proposed to be constructed and the starting point, route, and outlet of the proposed drain and a profile showing the elevation of the flow line of the proposed drain and the elevation of the surface of the ground through which the drain is proposed to be constructed.[99]

d. Trial, finding of verdict, and judgment. If on the trial of the case, it is found that the proposed drain will be of ample capacity, will not materially damage the land of the defendant, and will empty into (a) a natural watercourse, (b) an artificial drain along a public highway, with the consent of the highway authorities, or (c) any other outlet which the plaintiff has the right to use, then the finding or verdict shall be for the plaintiff; and the defendants shall be allowed such actual damages only as will be sustained by entering upon the land and constructing the drain and thereafter keeping the same in repair. If it is not so found, then the finding or verdict of the jury shall be for the defendant . . . .[100]

e. Abandonment of proceedings. If, after obtaining such a judgment, the plaintiff elects . . . to abandon the proceedings, the court shall note such voluntary abandonment upon the docket. If the plaintiff fails to construct the drain within 2 years after obtaining such a judgment, the court, on motion of the defendant . . . shall note the failure to construct and resulting abandonment . . . . If the plaintiff abandons the proceedings, either voluntarily or by failure to construct the drain as set forth above, he shall not be permitted to commence another action against the defendant for the same purpose until after the expiration of 5 years from the rendition of the judgment.[101]

2. Constitutionality

Drainage Code sections 2-2 through 2-7 authorize the passing of a tile through the land of another. But they may not be constitutional under the 1970 Illinois State Constitution.[102] The 1870 Constitution, which was in force when these statutes were enacted, contained the following clause: "The General Assembly may pass laws permitting the owners of lands to construct drains, ditches, and levees for agricultural, sanitary, or mining purposes, across the lands of others . . . ."[103] The 1970 Constitution lacks this saving clause. For this reason a court would likely regard the statute as authorizing a private right of eminent domain. Such a private right is probably a violation of the due process clause[104] of the Illinois Constitution.[105] However, no decision has invalidated these provisions of the Drainage Code.

3. Bond and Plat

The plaintiff is required to file both a penal bond[106] and a plat[107] of the land to be drained and the land across which the drain is to be constructed. In the leading case, the transcript from the justice of the peace noted that the bond had been properly submitted. This recital, in the absence of any evidence to impeach it, was considered to comply with the statute. In addition, a crude and imperfect sketch of the land to be drained had been submitted to fulfill the plat

requirement. The court held that this imperfect sketch was a sufficient attempt to comply with the statute.[108]

4. Applicability

An individual may clearly be the plaintiff. But it is not clear whether the statute is restricted to use by individuals. The term "person" used in section 2-2,[109] if narrowly interpreted, may exclude such quasi-corporations as the highway authority. Furthermore, a highway authority would not likely be permitted to use this provision because it can use the right of eminent domain through the Highway Code.

The statute probably expects that the defendant will be an individual landowner. Nevertheless, could the highway authority ever be in that position? A landowner would not likely seek a judicial order to allow him or her to construct a covered drain beneath a highway, since the statute itself requires the highway authority's consent to connect to an artificial ditch along a public highway.[110] Once an authority refuses to grant permission, the court must honor the authority's discretion.

The wording of the statute does not outline the circumstances under which it may be used. First, its provisions are limited to situations where "it is necessary" to extend the drain. "Necessity" is not defined. Second, the drain must be "in the general course of natural drainage." The requirements of this clause are also left undefined.

F. DRAINS AND LEVEES FOR MUTUAL BENEFIT

THE DRAINAGE CODE PERMITS THE FORMATION OF MUTUAL DRAINAGE SYSTEMS. HOWEVER, BECAUSE HIGHWAY AUTHORITIES MAY NOT BE ASSESSED AS MEMBERS OF A MUTUAL DRAINAGE SYSTEM, THESE PROVISIONS APPLY ONLY BETWEEN PRIVATE LANDOWNERS AS A PRACTICAL MATTER.

1. Purpose

Sections 2-8 through 2-11[111] of the Illinois Drainage Code address the subject of drains and levees for the benefit of the members of a mutual drainage system. The purpose of these sections has been stated repeatedly by the courts:

> The statute referred to does not restrict or abridge the rights of drainage as they existed at common law. Its sole purpose and effect is to enlarge those rights.[112]

> That act was intended to enlarge the rights of drainage as between adjoining land holders and to protect drains continuous in their character and purpose for the mutual benefit of the land affected whenever they had been constructed by license or consent, though without written authority.[113]

These broad statements must be limited in at least one respect: when a mutual drainage system exists, a landowner may be restricted in the full use of his or her common law rights. In a 1907 appellate case, a landowner who was a member of a mutual drainage system attempted to use the common law right of the dominant owner to collect the surface water on his own land artificially and discharge it on the servient owner at the point of natural entry. In artificially collecting the water, the landowner cut across several tiles of the mutual system, preventing water from flowing normally through the tiles. In holding that this normally permissible improvement on one's own land was not permissible under these circumstances, the court said:

> [H]e has no right in doing so to disturb in any way the flow of water which would pass off his premises through an outlet provided by a mutual system of drainage.[114]

2. Parties

While the statute speaks in general terms of "owners of lands," court decisions have determined which landowners may become parties to a mutual drainage system. Clearly an individual landowner is included within the statute. Just as clearly, a drainage district is excluded:

> [T]he act was not designed and did not have any operation upon a drainage district or the ditches or drains therein. . . . The act of 1889 relates only to private and individual rights in ditches or drains constructed by mutual license, consent or agreement, and has no reference to the ditches or drains of an organized drainage district.[115]

The act has been applied to highway authorities on the assumption that they may become members of a mutual drainage system. Once a member, however, the highway authority may or may not be bound in the same manner as an individual. One case indicates that the highway is similarly bound:

> [T]he highway commissioners of the town of Oakwood have consented to the laying of this drain in the highway, and . . . they are bound thereby. Appellee is, therefore, protected in his right to drain the land through this small drain as it is now relocated in the highway. . . . Neither the public, through the highway commissioners, nor any private individual can interfere with this right.[116]

Another case, however, seems to indicate that the highway authority, although a member of a mutual drainage system, may change a system that an individual member would be prohibited from attempting. After finding that a mutual drainage system existed, the court commented:

> Even if public necessity and the security of the highway might authorize the highway commissioners to make changes, yet that could not be done till the necessity arose.[117]

Another question arises concerning application of the statute to the highway. The cases in which a highway has been found to be a member of a mutual drainage system have usually involved situations where the system carried water away from the highway.[118] There is at least one case, however, where the reverse was true.[119] The highway authority had granted permission to an adjoining landowner to connect with and discharge into the highway drain under the predecessor to Highway Code section 9-107.[120] The court found that mutual benefit existed and that a mutual drainage system had been established. The question raised is this: pursuant to Highway Code section 9-107, when the highway authority grants permission to an adjoining landowner to connect with the highway drain and when the connection benefits the highway, does a mutual system exist?

A third point concerning a highway authority's membership in a mutual drainage system involves the fact that a record is usually required as evidence of any official act of the highway authority.[121] The subject of mutual drains, however, is an exception to this requirement. When a party contested the fact that a mutual drainage system was not mentioned in the record of the acts of the highway authority, the court held:

> It is true, the commissioners act by virtue of their corporate authority, and their acts, in most instances, can be proved only by the record, but the act here under consideration was not required to be made a matter of record to render it valid.[122]

Finally, when a highway authority is found to be a member of a mutual drainage system, there appears to be no way to assess the highway authority. Section 3-27 of the Drainage Code provides that a continuing line of drainage constructed voluntarily by two or more parties will obligate the lands connected by the system for a just proportion of the costs. Furthermore, if the parties are unable to provide for repairs and the apportionment of costs, the landowners may petition to form a drainage district.[123] However, as discussed earlier,[124] section 5-2 of the Drainage Code explicitly exempts public highways from assessment.[125] It therefore appears that a highway

authority can be compelled to join a mutual drainage system, but there may be no way to apportion costs to the authority.

Because a highway authority cannot be assessed as a member of a mutual drainage system, further discussion of these sections is not relevant to this report. First, a highway authority would not have to enter voluntarily into a mutual drainage district because it can alter drainage by the power of eminent domain. Second, an individual landowner would not likely want to compel a highway authority to join a mutual district if it cannot be assessed. The Highway Code and the regulations promulgated under it permit entry into the highway right-of-way in order to maintain ditches.[126] The code also empowers the highway authority to permit private landowners to drain into highway ditches for limited terms. These provisions dispel any reason for a private landowner to compel a highway authority to join a mutual drainage system. Therefore, following the 1983 revision of section 5-2 of the Highway Code, any application of these sections to a highway authority is insignificant.

NOTES

1. Ill. Rev. Stat. ch. 121, §9-117 (1983).
2. Ill. Rev. Stat. ch. 121, §§4-410, 5-421, 6-201.7 (1983).
3. Young v. Commissioners of Highways, 134 Ill. 569, 25 N.E. 689 (1890); Commissioners of Highways v. Foster, 134 Ill. App. 520 (1907).
4. Simpson v. Wright, 21 Ill. App. 67 (1886).
5. In ch. 121, Ill. Rev. Stat. (1983), section 4-502 grants authority to the Department of Transportation, section 5-802 to the county, and section 6-802 to the township. The wording of the three is identical except that the proper authority appears where "highway authority" is used in the quotation. Sections 5-802 and 6-802 also include clauses providing for the acquisition of materials by eminent domain.
6. Ill. Const. art. I, §15.
7. Ill. Rev. Stat. ch. 121, §§4-502, 5-802, 6-802 (1983).
8. 1883 Ill. Laws 139.
9. Chaplin v. Highway Commissioners, 129 Ill. 651, 22 N.E. 484 (1889).
10. Baughman v. Heinselman, 180 Ill. 251, 54 N.E. 313 (1899).
11. Young v. Commissioners of Highways, 134 Ill. 569, 25 N.E. 689 (1890).

12. Baughman v. Heinselman, 180 Ill. 251, 54 N.E. 313 (1899).
13. Dierks v. Commissioners of Highways 142 Ill. 197, 31 N.E. 496 (1892).
14. Tearney v. Smith, 86 Ill. 391 (1877).
15. Metropolitan Sanitary District v. City of Des Plaines, 36 Ill. App. 3d 726, 344 N.E.2d 729 (1976).
16. People v. Illinois State Toll Highway Commission, 3 Ill. 2d 218, 120 N.E.2d 35 (1954). *But see* City of Moline v. Greene, 252 Ill. 475, 96 N.E. 911 (1912), which prohibited a city from condemning a library building to construct a public street.
17. In Ill. Rev. Stat., ch. 121, section 4-503 (as amended, 1985) grants authority to the department, section 5-803 to the county, and section 6-803 to the township. *But see* County of Kane v. Elmhurst National Bank, 111 Ill. App. 3d 292, 443 N.E. 2d 1149 (1982), which holds that drilling or boring is such a substantial interference that it constitutes an unconstitutional taking without the landowner's permission or a prior condemnation proceeding.
18. Ill. Rev. Stat. ch. 121, §9-107 (1983).
19. Davis v. Commissioners of Highways, 143 Ill. 9, 33 N.E. 58 (1892).
20. Dunn v. Youmans, 224 Ill. 34, 39, 79 N.E. 321, 323 (1906).
21. Ill. Rev. Stat. ch. 121, §9-113(a) (Supp. 1985).
22. Moore v. Gar Creek Drainage Dist., 266 Ill. 399, 107 N.E. 642 (1914); Murray v. Gibson, 21 Ill. App. 488 (1886); Johnson v. Rea, 12 Ill. App. 331 (1882).
23. Ill. Rev. Stat. ch. 121, §9-113(h) (Supp. 1985).
24. Ill. Rev. Stat. ch. 42, §4-17 (1983).
25. Johnson v. Rea, 12 Ill. App. 331 (1882). *See also* 1925 Ill. Ops. Att'y Gen. 31.
26. Ill. Rev. Stat. ch. 121, §9-113(d) (Supp. 1985).
27. Tacoma Safety Deposit Co. v. City of Chicago, 247 Ill. 192, 93 N.E. 153 (1910); Postal Tel. Cable Co. v. Eaton, 170 Ill. 513, 49 N.E. 365 (1897); Town of Palatine v. Kreuger, 121 Ill. 72, 12 N.E. 75 (1887); Town of Old Town v. Dooley, 81 Ill. 255 (1876).
28. Murray v. Gibson, 21 Ill. App. 488 (1886). *See also* Minnie Creek Drainage District v. Streeter, 327 Ill. 236, 158 N.E. 383 (1927).
29. Ill. Rev. Stat. ch. 121, §9-113(e) (Supp. 1985).
30. Davidson v. Sprague, 21 Ill. App. 611 (1886).
31. Blazer v. Highway Commissioner, 93 Ill. App. 2d 89, 235 N.E.2d 89 (1968).

32. Ill. Const. art. XIII, §4.
33. Ill. Rev. Stat. ch. 121, §9-101.1 (1983).
34. The situation is likely to arise where a highway authority wishes to take some action that conflicts with a local ordinance. The question is whether or not the highway authority can be forced to comply with the local ordinance. The Illinois Constitution vests broad power with the state and only enumerated powers with local bodies (Ill. Const. art. II, §2). The vast majority of local power is delegated by the legislature. In the case of a conflict between a local ordinance and the action of a state agency such as the Department of Transportation, the statute conferring local regulatory power must be compared to the powers of the state agency. The body that appears to have been granted superior authority by the legislature will control the conflict. In some cases executive orders by the governor or agency policy may compel state agencies to comply with local ordinances, regardless of their superior authority.
35. Ill. Rev. Stat. ch. 121, §9-117 (1983).
36. Town of Brown v. Barrett, 38 Ill. App. 248 (1890).
37. Seidschlag v. Town of Antioch, 207 Ill. 280, 69 N.E. 949 (1904); Township of Madison v. Gallagher, 159 Ill. 105, 42 N.E. 316 (1895).
38. Davis v. Commissioners of Highways, 143 Ill. 9, 33 N.E. 58 (1892).
39. Ill. Rev. Stat. ch. 42, §2-1 (1983).
40. Tacoma Safety Deposit Co. v. City of Chicago, 247 Ill. 192, 93 N.E. 153 (1910); Postal Tel. Cable Co. v. Eaton, 170 Ill. 513, 49 N.E. 365 (1897); Town of Palatine v. Kreuger, 121 Ill. 72, 12 N.E. 75 (1887); Town of Old Town v. Dooley, 81 Ill. 255 (1876).
41. Ill Rev. Stat. ch. 121, §4-501 (1983). Sections 5-801 and 6-801 are substantially the same.
42. Ill. Rev. Stat. ch. 121, §§4-502, 5-802, and 6-802 (1983).
43. Town of Canoe Creek v. McEniry, 23 Ill. App. 227, 230 (1886). *See also* Simpson v. Adkins, 386 Ill. 64, 53 N.E.2d 979 (1944); Boyd v. Town of Farm Ridge, 103 Ill. 408 (1882).
44. Nelson v. Fehd, 203 Ill. 120, 67 N.E. 828 (1903). *See also* Town of Hudson v. Carrithers, 201 Ill. App. 153 (1916).
45. In ch. 121, Ill. Rev. Stat. (1983), section 4-405 applies to the department, section 5-401 to the county, and section 6-201.7 to the township.
46. Ill. Rev. Stat. ch. 121, §2-202 (1983).
47. Ill. Rev. Stat. ch. 121, §6-401 (1983).

48. Ill. Rev. Stat. ch. 121, §9-107 (1983).
49. Ill. Rev. Stat. ch. 121, §9-117 (1983).
50. In ch. 121, Ill. Rev. Stat. (1983), section 4-214 applies to the department, section 5-101.8 to the county, and section 6-328 to the township.
51. Ill. Rev. Stat. ch. 19, §70 (1983).
52. Ill. Rev. Stat. ch. 121, §9-108 (1983).
53. Ill. Rev. Stat. ch. 121, §9-115 (1983).
54. In ch. 42, Ill. Rev. Stat. (1983), sections dealing either with technicalities or with subjects not of immediate concern in which highways or highway authorities are specifically mentioned include sections 3-6, 4-22, 5-2, 5-6, 5-18, and 6-4. Other code sections excluded involve other types of districts (sections 3-27, 3-28, and 3-31) and repair and maintenance (section 4-15).
55. Research report by J.E. Cribbet, Illinois Water Rights Law, 21 (1958). (Available through Water Resources Committee, Illinois State Chamber of Commerce, Chicago.)
56. H W. Hannah, Illinois Farm Drainage Law, 13 (University of Illinois College of Agriculture Cooperative Extension Service Circular 751, 1956).
57. Ill. Rev. Stat. ch. 42, §5-2 (1961, amended 1983).
58. Ill. Rev. Stat. ch. 42, §5-2 (1983).
59. Ill. Const. art. IX, §6.
60. Ill. Rev. Stat. ch. 42, §4-14 (1983).
61. Ill. Rev. Stat. ch. 121, §9-113 (1983). *See supra* p. 31.
62. Moore v. Gar Creek Drainage District, 266 Ill. 399, 107 N.E. 642 (1915).
63. Ill. Rev. Stat. ch. 42, §4-17 (1983).
64. Department of Public Works and Buildings v. Ells, 23 Ill. 2d 619, 179 N.E.2d 679 (1962).
65. Department of Public Works and Buildings v. Ells, 23 Ill. 2d 619, 179 N.E.2d 679 (1962).
66. Metropolitan Sanitary District v. City of Des Plaines, 36 Ill. App. 3d 726, 344 N.E.2d 769 (1976).
67. Ill. Rev. Stat. ch. 42, §337 (1983).
68. Ill. Rev. Stat. ch. 42, §5-2 (1983). *See supra* p. 38.
69. Ill. Rev. Stat. ch. 42, §8-2 (1983).
70. Ill. Rev. Stat. ch. 42, §8-3 (1983).
71. People *ex rel.* Caldwell v. Commissioners of Wildcat Drainage

District, 181 Ill. 177, 54 N.E. 923 (1899). *See also* Minnie Creek Drainage District v. Streeter, 327 Ill. 236, 158 N.E. 383 (1927); Gar Creek Drainage District v. Wagner, 256 Ill. 338, 100 N.E. 190 (1912).

72. People *ex rel.* Wilcox v. Barber, 265 Ill. 316, 106 N.E. 798 (1914).
73. Ill. Rev. Stat. ch. 42, §5-2 (1983).
74. Templeton v. Huss, 57 Ill. 2d 134, 311 N.E.2d 141 (1974).
75. Ill. Rev. Stat. ch. 42, §12-1 (1983).
76. Ill. Rev. Stat. ch. 42, §12-2 (1983).
77. Turley v. Arnold, 384 Ill. 158, 51 N.E.2d 176 (1943).
78. Ill. Rev. Stat. ch. 42, §12-2 (1983).
79. Ill. Rev. Stat. ch. 42, §12-3 (1983).
80. Ill. Rev. Stat. ch. 42, §12-7 (1983).
81. Ill. Rev. Stat. ch. 42, §12-8 (1983).
82. Ill. Rev. Stat. ch. 42, §12-9 (1983).
83. Ill. Rev. Stat. ch. 19, §78 (1985).
84. Ill. Rev. Stat. ch. 42, §482 (1983).
85. Ill. Rev. Stat. ch. 121, §9-107 (1983).
86. Davis v. Commissioners of Highways, 143 Ill. 9, 33 N.E. 58 (1982).
87. Ill. Rev. Stat. ch. 121, §9-117 (1983).
88. Ill. Rev. Stat. ch. 121, §9-113 (Suppl. 1985).
89. Ill. Rev. Stat. ch. 121, §9-117 (1983).
90. Ill. Rev. Stat. ch. 121, §9-117 (1983).
91. Nelson v. Fehd, 203 Ill. 120, 67 N.E. 828 (1903). *See also* Town of Hudson v. Carrithers, 201 Ill. App. 153 (1916).
92. Davis v. Commissioners of Highways, 143 Ill. 9, 33 N.E. 58 (1892).
93. Ill. Rev. Stat. ch. 121, §9-117 (1983).
94. Ill. Rev. Stat. ch. 121, §4-209 (1983).
95. Ill. Rev. Stat. ch. 121, §9-115 (1983).
96. Ill. Rev. Stat. ch. 42, §2-13 (1983).
97. Ill. Rev. Stat. ch. 42, §2-2 (1983).
98. Ill. Rev. Stat. ch. 42, §2-3 (1983).
99. Ill. Rev. Stat. ch. 42, §2-4 (1983).
100. Ill. Rev. Stat. ch. 42, §2-5 (1983).
101. Ill. Rev. Stat. ch. 42, §2-7 (1983).

102. Advising Farmers, Vol. II, §24.18 (Ill. Inst. for CLE, 1983, Supp. 1985).
103. Ill. Const. art. IV, §31 (1870, repealed 1970).
104. Ill. Const. art. I, §2.
105. Advising Farmers, Vol. II, §24.18 (Ill. Inst. for CLE, 1983, Supp. 1985).
106. Ill. Rev. Stat. ch. 42, §2-3 (1983).
107. Ill. Rev. Stat. ch. 42, §2-4 (1983).
108. Chronic v. Pugh, 136 Ill. 539, 27 N.E. 415 (1891).
109. Ill. Rev. Stat. ch. 42, §2-2 (1983).
110. Ill. Rev. Stat. ch. 42, §2-5 (1983).
111. Ill. Rev. Stat. ch. 42, §§2-8 through 2-11 (1983).
112. Wilson v. Bondurant, 142 Ill. 645, 649, 32 N.E. 498, 499 (1892). *See also* Knudson v. Neal, 320 Ill. 136, 150 N.E. 626 (1926); King v. Manning, 305 Ill. 31, 136 N.E. 730 (1922); Adams v. Abel, 290 Ill. 496, 125 N.E. 320 (1919); Cox v. Deverick, 272 Ill. 46, 111 N.E. 560 (1916); Helm v. Richmond, 72 Ill. App. 516 (1897).
113. Johnson v. Cunningham, 56 Ill. App. 593, 595 (1895).
114. Mackey v. Wrench, 134 Ill. App. 587, 590 (1907).
115. Snyder v. Baker, 221 Ill. 608, 614, 77 N.E. 1117, 1119-20 (1906).
116. Dunn v. Youmans, 224 Ill. 34, 39-40, 79 N.E. 321, 323 (1906).
117. Daum v. Cooper, 103 Ill. App. 4, 10 (1902), *aff'd,* 200 Ill. 538, 65 N.E. 1071 (1903).
118. Town of Crooked Creek v. King, 252 Ill. 126, 96 N.E. 905 (1911).
119. Dunn v. Youmans, 224 Ill. 34, 79 N.E. 321 (1906).
120. 1883 Ill. Laws 138.
121. Chaplin v. Highway Commissioners, 129 Ill. 651, 22 N.E. 484 (1889).
122. Town of Crooked Creek v. King, 252 Ill. 126, 133, 96 N.E. 905, 907 (1911).
123. Ill. Rev. Stat. ch. 42, §3-27 (1983).
124. Ill. Rev. Stat. ch. 42, §5-2 (1983). *See supra* p. 38.
125. Ill. Rev. Stat. ch. 42, §5-2 (1983).
126. Ill. Rev. Stat. ch. 121, §9-117 (1983).

CHAPTER IV: BRIDGES AND CULVERTS

A. INTRODUCTION AND SCOPE

This section addresses principal issues involving bridges and culverts. Who pays for construction, who is responsible for maintenance, who is liable for faulty construction and maintenance, and what is required to secure a construction permit from the Department of Transportation are all considered. Insight will come from relevant statutory, common law, and regulatory sources.

As we will show below, the legislature has explicitly stated who must pay for both construction and maintenance of bridges and culverts in most rural areas. Section 12-4 of the Drainage Code dictates that the highway authority is responsible for the construction and maintenance of any bridge or culvert crossing a natural channel, and the drainage district is responsible for the construction and maintenance of a bridge or culvert required for a new channel to cross an existing highway.[1] In urban areas, the law is more complex.[2]

B. CONSTRUCTION AND MAINTENANCE IN RURAL AREAS

WHEN A HIGHWAY CROSSES A NATURAL DRAIN OR A DITCH CONSTRUCTED IN THE COURSE OF NATURAL DRAINAGE, THE HIGHWAY AUTHORITY MUST CONSTRUCT AND MAINTAIN A BRIDGE OR CULVERT WITH SUFFICIENT CAPACITY TO SERVE THE DRAINAGE NEEDS OF THE PUBLIC FOR ALL FUTURE TIME. HOWEVER, IF A DRAINAGE DISTRICT INCREASES THE CAPACITY OF THE NATURAL DRAIN OR DITCH OR CHANGES ITS ALIGNMENT AND THIS ACTION THREATENS THE BRIDGE CROSSING THE IMPROVED NATURAL DRAIN OR DITCH, THE DRAINAGE DISTRICT IS LIABLE TO THE HIGHWAY AUTHORITY FOR THE COST OF PROTECTING THE BRIDGE. WHEN A DRAINAGE DISTRICT DRAIN CROSSES AN EXISTING HIGHWAY OTHER THAN IN THE COURSE OF NATURAL

DRAINAGE, THE DRAINAGE DISTRICT IS LIABLE FOR THE CONSTRUCTION, REPAIR, AND MAINTENANCE COSTS.

1. Provisions Prior to Enactment of the Drainage Code

The Farm Drainage Act of 1885[3] made highway authorities liable for all costs incurred in the construction of bridges or culverts required to preserve roadways.[4] A 1907 decision declared this act unconstitutional because it enabled the authority of one local government to impose a debt on the residents of a municipal corporation without its consent.[5] Subsequent cases maintained a distinction between natural and artificial ditches, making a drainage district liable for the costs of a bridge or culvert crossing an artificial ditch.[6] Finally, in *People ex rel. Burow v. Block,* the Illinois Supreme Court removed any distinction between natural and artificial ditches. The court declared it unconstitutional to require the highway authority to pay to replace a bridge that is part of an existing highway when the bridge is removed by a drainage district.[7]

2. Provisions Contained in the Drainage Code

Whether the drain or ditch does or does not lie in the course of natural drainage remains an important consideration under contemporary Illinois statutes. Section 12-4 of the 1955 Drainage Code, as amended in 1967, outlines the responsibility for the construction and rebuilding of bridges across artificial and natural watercourses. This section provides:

> Whenever a drainage district drain crosses an existing air-strip or airplane landing field . . . or an existing public highway or an existing railroad other than in the course of natural drainage, the drainage district is liable to the highway authority or the railroad, or the political subdivision or municipality which owns the air-strip or airplane landing field, for the cost of constructing any bridge or culvert made necessary by such crossing and shall thereafter be liable to the highway authority or railroad, or the political subdivision or municipality which owns the air-strip or airplane landing field, for the cost of repairing and maintaining such a bridge or culvert.
>
> Whenever a natural drain or a ditch constructed in the course of natural drainage crosses a public highway or a railroad, or an air-strip or airplane landing field, the highway authority or the railroad, or the political subdivision or municipality which owns the air-strip or airplane landing field, shall construct and thereafter keep in repair and maintain a bridge or culvert of sufficient length, depth, height above the bed of the drain or ditch, and capacity to subserve the needs of the public with respect to the drainage of the

> lands within the natural watershed of such drain or ditch, not only as such needs exist at the time of construction, but for all future time. . . .
>
> If a drainage district by deepening, widening or straightening a natural drain or by changing the established grade, width, or alignment of a ditch, removes or threatens to remove the support from under any abutment, pier, wingwall or other supporting member of a highway or railroad bridge, or an air-strip or airplane landing field, the drainage district is liable to the highway authority or railroad, or the political subdivision or municipality which owns the air-strip or airplane landing field, for the cost of protecting or underpinning such abutment, pier, wingwall or other supporting member. The amount of such liability may be fixed and determined by agreement between the drainage commissioners and the highway authority or railroad, or the political subdivision or municipality which owns the air-strip or airplane landing field, or by the allowance of damages in the assessment proceeding or, if there is no assessment proceeding, then by separate action at law. Nothing contained in this paragraph shall be construed as relieving the highway authority or railroad, or the political subdivision or municipality which owns the air-strip or airplane landing field, from its obligation to construct and maintain adequate bridges or culverts over natural drains or over ditches constructed in the course of natural drainage hereinabove provided in the second paragraph of this section.[8]

Where highways cross drains constructed in the course of natural drainage, the statute is similar to the Farm Drainage Act and Levee Act, even though those acts were declared unconstitutional in certain circumstances. The code specifically states that any highway authority generally must construct and maintain bridges whenever a natural drain or a ditch constructed in the original natural drainage crosses a public highway.

No cases decided under section 12-4 specifically address the duty of the highway authority to restore a bridge over a natural watercourse when a drainage district has removed or destroyed it in the course of its work. A statutory interpretation suggests that the drainage district is responsible: the language of the first sentence of section 12-4 eliminates the constitutional objections found in earlier cases by making the district responsible for restoring a bridge when it has made such construction necessary. An interpretation suggesting highway authority responsibility is contained in the second paragraph: it requires the highway authority to anticipate drainage needs in a particular area "for all time" and to construct its bridges according to those needs. For reasons described below, this second interpretation is preferred.

Support for this interpretation is found in the natural drainage law as modified by *Templeton v. Huss.*[9] *Templeton* permits the dom-

inant landowner to increase drainage beyond the natural flow, provided the increase is necessary for the reasonable development of the landowner's property. It is, therefore, appropriate to require the highway authority to construct a bridge or culvert of sufficient capacity to accommodate such increased drainage within a basin. While there are no cases on point involving a highway, the case of *Kankakee & Seneca R. R. Co. v. Horan*[10] involved a railroad that constructed a culvert of insufficient size. The court decided that in building a culvert, the railroad was bound to anticipate and provide for any legal increase in the flows.

It is also logical to require a highway authority to design a bridge to accommodate future volumes of flow and at the same time to require the drainage district to protect the abutments and other supporting structures. In building a bridge, the engineers must design the supporting structures in accordance with flow velocities, quantities, flow line, and other design criteria. This site-specific design is necessary to avoid excessive erosion of the banks and foundation of the abutments. Perhaps it is a reasonable compromise to compel the highway authority to design the bridges and culverts for adequate quantity and to require the drainage district to protect the supporting members if they decide to alter the flow line.

3. Maintenance Prior to Enactment of the Drainage Code

The Illinois courts developed the general rule that the highway authority is responsible for the maintenance of bridges or culverts if the damage to them is a result of public use.[11] The rationale of the Illinois Supreme Court was that the state Constitution prevents drainage commissioners from levying taxes to fulfill an obligation of the highway districts.[12] Implicit in several cases[13] and emphasized in the background discussion contained in one of them[14] is the rule that if the damage is caused by the work of the drainage commissioners, they will be responsible for the necessary repairs.

4. Maintenance Under the Drainage Code

The Drainage Code states that the drainage commissioners must pay for maintaining highway bridges spanning ditches not in the course of natural drainage: "Whenever a drainage district drain crosses . . . an existing public highway. . . other than in the course of natural drainage, the drainage district is liable to the highway authority. . . for the cost of repairing and maintaining such a bridge or culvert."[15] No decisions have been reported under this provision. The

act is apparently prospective in nature,[16] suggesting that bridges that do not span the course of natural drainage and were constructed prior to January 1, 1956, would be maintained pursuant to the rule as it was developed by the courts.

As to the maintenance and repair of bridges aud culverts constructed in the course of natural drainage, the new statute dictates that the obligation will remain with the highway authority. Even despite an agreement between a highway authority and a drainage district that the drainage district will be responsible for repairs, the authority will be liable for the maintenance of a bridge over a natural watercourse. In a case involving a sanitary district, the Illinois Supreme Court concluded that a contract by ordinance that circumvents the common law and infringes upon the spirit of state law is invalid and unenforceable.[17] Where such an agreement conflicts with state law, the state law prevails.

C. CONSTRUCTION AND MAINTENANCE IN URBAN AREAS

IN URBAN AREAS, THE ISSUE OF LIABILITY FOR COSTS OF CONSTRUCTION AND MAINTENANCE FOCUSES UPON MUNICIPAL CORPORATIONS INSTEAD OF DRAINAGE DISTRICTS EXERCISING STORM DRAINAGE POWERS. MUNICIPAL CORPORATIONS MUST PAY FOR CONSTRUCTION OF BRIDGES OVER ARTIFICIAL CHANNELS AND FOR REPLACING BRIDGES DESTROYED BY DEEPENING OR WIDENING NATURAL CHANNELS. EITHER THE HIGHWAY AUTHORITY OR THE MUNICIPALITY WITHIN WHOSE JURISDICTION THE STREET OR HIGHWAY LIES IS RESPONSIBLE FOR MAINTENANCE.

In urban areas, responsibility for bridge construction and maintenance is shifted from the highway authorities and drainage districts to highway authorities and municipal corporations exercising storm drainage powers. While drainage districts are created to serve agricultural purposes, urban areas are better served by municipalities or special districts for storm drainage and sanitation.[18] Five separate acts authorize the establishment of sanitary districts: the Sanitary Districts Act of 1907,[19] the North Shore Sanitary District Act,[20] the Sanitary District Act of 1917,[21] the Sanitary District Act of 1936,[22] and the Chicago Sanitary District Act.[23]

D. PRIVATE BRIDGES AND CULVERTS

WHEN OPEN DRAINS CONSTRUCTED BY DRAINAGE DISTRICTS CUT OFF PRIVATE LANDS FROM PUBLIC HIGHWAYS, THE DRAINAGE DISTRICT

MUST PROVIDE ACCESS ACROSS THE DITCH OR, IN SOME CASES, COMPENSATE THE LANDOWNER FOR CONSTRUCTION OF A BRIDGE OR CULVERT. WHERE NEW HIGHWAY DITCHES CONSTRUCTED ALONGSIDE A HIGHWAY AS PART OF THE HIGHWAY DRAINAGE SYSTEM DEPRIVE AN ADJACENT LANDOWNER OF ACCESS TO THE HIGHWAY, THE HIGHWAY AUTHORITY MUST INSTALL ADEQUATE CULVERTS OR OTHER CROSSINGS.

Whenever an open drain "crosses any [privately owned] enclosed tract or parcel of land in such a manner that a portion thereof is landlocked and has no access from any public highway other than by a bridge or passageway over the ditch,"[24] the primary responsibility to provide access rests with the drainage district. That duty was imposed by the Farm Drainage Act of 1885. Although it has not been altered since, the procedure has changed. Depending upon when the ditch was constructed, when the district was organized, and whether the ditch is part of a natural drain, a bridge may be constructed or the landowner may be compensated for the cost of construction.[25] The district must realize that the duty to construct a bridge or culvert extends beyond the initial construction. When an existing ditch is deepened or widened and a new bridge or culvert becomes necessary, the district is also responsible for the cost.[26]

Highway authorities must restore a landowner's access to a public highway when the highway authority constructs a ditch destroying the access. Section 9-105 of the Highway Code provides in part:

> In constructing a public highway, if a ditch is made at the junction of highways, or at the entrance of gates or other openings of adjoining premises, the highway authorities shall construct good and sufficient culverts or other convenient crossings.[27]

Only one case has been decided on this point. In *Taylor v. Reed*[28] the court enforced the dictate of the statute and ordered the highway commissioners to construct culverts wherever highway drains had deprived the plaintiff of his usual access. It should be noted, however, that a court will probably require a drainage district to build culverts if it built the drains along the highway.[29]

NOTES

1. Ill. Rev. Stat. ch. 42, §12-4 (1983).
2. The complexity arises due in part to the numerous Drainage Code sections under which a sanitary district may be formed, as opposed to a drainage district, and in part to the lack of provisions concerning maintenance authority.

3. The current Drainage Code, adopted in 1955, was preceded by the 1885 Code and amendments thereto.
4. 1885 Ill. Laws 90.
5. Morgan v. Schusselle, 228 Ill. 106, 81 N.E. 814 (1907).
6. People *ex rel.* Parmenter v. Fenton and Thomson R.R., 252 Ill. 372, 96 N.E. 864 (1911); Duncan v. Fitch, 186 Ill. App. 514 (1914).
7. People *ex rel.* Burow v. Block, 276 Ill. 286, 114 N.E. 527 (1916). As in *Morgan v. Schusselle* 228 Ill. 106, 81 N.E. 814 (1907), the court held that the imposition of an obligation upon a municipal corporation without its residents' consent was unconstitutional.
8. Ill. Rev. Stat. ch. 42, §12-4 (1983).
9. Templeton v. Huss, 57 Ill. 2d 134, 311 N.E.2d 141 (1974). For further discussion of the *Templeton* decision, see Chapter III.
10. Kankakee and Seneca R.R. v. Horan, 131 Ill. 288, 23 N.E. 621 (1890).
11. City of Chicago v. Sanitary District, 404 Ill. 315, 89 N.E.2d 35 (1949); People *ex rel.* Smith v. Board of Supervisors, 314 Ill. 256, 145 N.E. 337 (1924); People *ex rel.* Speck v. Peeler, 290 Ill. 451, 125 N.E. 306 (1919); People *ex rel.* Kurtz v. Meyer, 251 Ill. App. 475 (1928); Staley v. Commissioners of Highways, 214 Ill. App. 403 (1919).
12. People *ex rel.* Speck v. Peeler, 290 Ill. 451, 125 N.E. 306 (1919).
13. City of Chicago v. Sanitary District, 404 Ill. 315, 89 N.E.2d 35 (1949); People *ex rel.* Smith v. Board of Supervisors, 314 Ill. 256, 145 N.E. 337 (1924); People *ex rel.* Speck v. Peeler, 290 Ill. 451, 125 N.E. 306 (1919); People *ex rel.* Kurtz v. Meyer, 251 Ill. App. 475 (1928); Staley v. Commissioners of Highways, 214 Ill. App. 403 (1919).
14. People *ex rel.* Smith v. Board of Supervisors, 314 Ill. 256, 145 N.E. 337 (1924).
15. Ill. Rev. Stat. ch. 42, §12-4 (1983).
16. *See* City of Chicago v. Sanitary District, 404 Ill. 315, 89 N.E.2d 35 (1949); Metropolitan Sanitary District v. Village of Romeoville, 87 Ill. App. 3d 58, 409 N.E.2d 131 (1980).
17. Metropolitan Sanitary District v. Village of Romeoville, 87 Ill. App. 3d 58, 409 N.E.2d 131 (1980).
18. People *ex rel.* Wies v. Bowman, 247 Ill. 276, 93 N.E. 244 (1910).
19. Ill. Rev. Stat. ch. 42, §§247-276 (1983).
20. Ill. Rev. Stat. ch. 42, §§276.99-298a (1983).
21. Ill. Rev. Stat. ch. 42, §§298.99-319j (1983).

22. Ill. Rev. Stat. ch. 42, §§411.99-447.2 (1983).
23. Ill. Rev. Stat. ch. 42, §§320-382.62 (1983, West Supp. 1984).
24. Ill. Rev. Stat. ch. 42, §12-5 (1983).
25. Ill. Rev. Stat. ch. 42, §12-5 (1983).
26. Advising Farmers, Vol. II, §24.26 (Ill. Inst. for CLE, 1983, Supp. 1985).
27. Ill. Rev. Stat. ch. 121, §9-105 (1983).
28. Taylor v. Reed, 206 Ill. App. 479 (1917).
29. Morgan v. Schusselle, 228 Ill. 106, 81 N.E. 814 (1907).

CHAPTER V: DRAINAGE AND THE ENVIRONMENT

A. INTRODUCTION AND SCOPE

Until the late 1960s highway authorities and private landowners encountered few environmental constraints in their pursuit of improved drainage. Both parties were essentially free to pass runoff onto servient estates without concern for any effects on quality. It was only when poor water quality unreasonably affected the servient owners' use and enjoyment of their lands that the common law nuisance action became available to the servient owners. While much legislation now covers polluted drainage waters, the traditional nuisance action remains the primary method for aggrieved landowners to affect a remedy. As a result, this private action will be discussed in some length.

The environmental movement of the 1960s and 1970s led to an explosion of federal legislation to improve the quality of the environment. The Clean Water Act of 1977 and the National Environmental Policy Act of 1969 are the most important pieces of federal environmental legislation affecting highway drainage. When, how, and to whom these acts apply will be addressed. In addition, other federal legislation that may affect highway drainage will be examined. The Illinois General Assembly has not legislated extensively in the areas of highway drainage and the environment, but relevant legislation and agency regulations will be reviewed.

Compliance with environmental legislation is not discussed in detail in this chapter. Rather, the aim is to make highway authorities aware of the environmental laws that may affect highway drainage and to direct authorities to the proper provisions.

B. NUISANCE

LANDOWNERS MAY BRING PRIVATE NUISANCE ACTIONS WHEN THEY SUFFER AN UNREASONABLE INVASION OF THE USE AND ENJOYMENT OF

THEIR PROPERTY. PUBLIC NUISANCE ACTIONS MAY BE BROUGHT BY A PUBLIC OFFICIAL AGAINST ANY ACTION THAT THREATENS THE PUBLIC HEALTH, SAFETY, OR WELFARE. FEDERAL WATER QUALITY LEGISLATION HAS CREATED A STATUTORY NUISANCE ACTION THAT MAY BE MORE FAR-REACHING THAN COMMON LAW NUISANCE ACTIONS. WHERE A NUISANCE IS FOUND TO EXIST, THE COURT MAY ENJOIN THE CONDUCT CREATING THE NUISANCE, OR IT MAY REQUIRE THE PARTY CREATING THE NUISANCE TO PAY DAMAGES.

Wherever there is natural or artificial drainage or water collected for any purpose, problems of contamination and pollution may arise. Until the passage of legislation in the late 1960s, the common law nuisance action was a landowner's only remedy for interference in the use and enjoyment of the land. Despite today's wide variety of water pollution control legislation, including statutory nuisance, it is generally limited to controlling point sources.[1] Thus, the common law nuisance action is still important.

1. Common Law Nuisance

A nuisance may be defined as an action that unreasonably interferes with the rights of others to enjoy their property. The perpetrator of the nuisance is normally subject to court injunction requiring abatement of the nuisance. Any harmed party may request this type of remedy. An individual or a public official may seek relief in the courts, but the relief is granted subject to different considerations, depending upon whether the nuisance is private or public.

a. Private nuisance. A private nuisance is a nontrespatory invasion of another's interest in the use and enjoyment of his or her land.[2] The threshold question in a private nuisance case is whether some property right held by the plaintiff is abridged.[3] The wrong must arise from unreasonable, unwarranted, or unlawful use of the defendant's property that produces such material annoyance, inconvenience, discomfort, or hurt that the law will presume consequent damage.[4] Unreasonable use of one's property is determined by balancing the following factors according to the facts of each individual case:

1. The extent of the harm involved;
2. The character of the harm involved;
3. The social value that the law attaches to the type of use or enjoyment invaded;
4. The suitability of the particular use or enjoyment invaded to the character of the locality; and
5. The burden on the person harmed to avoid the harm.[5]

The injury must be substantial with no other adequate remedy available at law. A court will not take cognizance of mere annoyances,[6] nor will it intervene where the harm is doubtful.[7] To constitute a prospective nuisance, a substantial invasion of the plaintiff's property must at least be threatened. That is, an injunction will be issued only where it is "highly probable" that an activity will lead to a nuisance.[8]

If the above requirements are present, a private person may sue to enjoin a nuisance created by a governmental authority. Illinois courts have restrained a town from discharging sewage onto a farmer's land[9] and awarded damages when a city altered the drainage of a street to flow onto a plaintiff's land.[10] Thus, if a highway authority allowed a drain to become clogged, turn stagnant, and emit foul odors that hampered a landowner in the use of his or her property, a court could order the authority to abate the condition.

b. Public nuisance. An action to enjoin a nuisance may be brought by a public official when the damage or threat of damage is to the public health, safety, or welfare. Such actions are instituted for the general benefit of a community, and private property rights need not be involved.[11]

In *Kenilworth Sanitarium v. Village of Kenilworth*[12] the plaintiff village sought an injunction to prevent the sanitarium from emptying its sewage into a drainage ditch that flowed into the municipal water supply. The threat of disease forced the court to order an injunction. The court stated that a watercourse used solely to drain away surface waters cannot be changed into a sewer without the consent of all the servient owners. Even if the servient owners should consent, equitable jurisdiction would be granted if there was an ensuing threat to the public health.

The language of the court in *Stead v. Fortner* states the law of public nuisance quite explicitly:

> The public authorities have a right to institute the suit where the general public welfare demands it. . . . The maintenance of the public health, morals, safety and welfare is on a plane above mere pecuniary damage . . . and to say that a court of equity may not enjoin a public nuisance because property rights are not involved would be to say that the State is unable to enforce the law or protect its citizens from public wrongs.[13]

Stead vs. Fortner arose from the operation of several unlicensed taverns in the town of Shelbyville, where an unlicensed dram shop was statutorily defined as a public nuisance.[14] Such a definition removes the plaintiff's burden of proof. When a condition is statutorily defined as a public nuisance, an injunction can be obtained if the

alleged offense simply comes within the terms of the statute. Consequently, certain acts of pollution declared public nuisances under section 221(2) of the Nuisance Code[15] do not require a showing of harm. The section reads: "It is a public nuisance: . . . [t]o throw or deposit any offal or other offensive matter, or the carcass of any dead animal in any watercourse, lake, pond, spring, well, or common sewer, street, or public highway." In addition to imposing criminal liability, the language would probably subject a person to an injunction for intentional acts such as draining toilets into a public storm sewer or piping barnyard wastes directly into a highway drain. The acts committed must be shown to be of the type that the legislature defined; once that is accomplished, an injunction would be appropriate.

The magnitude of injury is the key factor in requests for court intervention. Unless section 165(2) of the Nuisance Code can be applied to the situation, the pollution must be sufficient to harm or threaten to harm a private individual's use and enjoyment of his or her property. In the case of a public nuisance, it must be serious enough to threaten the general public health, safety, or welfare.

2. Statutory Nuisance

The nuisance laws are in many ways incorporated into the Illinois Environmental Protection Act,[16] which grants remedies that are based upon or virtually identical to traditional nuisance theory.[17] The Act provides in section 12(a) that no person shall do anything that tends to "cause water pollution in Illinois" or "violate regulations or standards adopted."[18] The statutory nuisance is found in the first segment of the provision. Section 3(nn) of the Act defines water pollution as " . . . likely to create a nuisance or render such waters harmful or detrimental or injurious to public health, safety, or welfare . . . ."[19] The reference to nuisance in sections 3(nn) and 12(a) makes a statutory action possible against the discharge of all polluted water, and this action exists whether or not the discharge complies with the Pollution Control Board's regulations.[20] Section 49(e) makes it clear that compliance with the regulations is only a prima facie defense to an action and does not preclude a possible common law nuisance action.[21]

As we will show, this statutory nuisance action is subject to the limitations of the Clean Water Act. That is, the source of the pollution must be a point-source discharge into the waters of the State of Illinois.[22] Thus statutory nuisance is a narrower action than common law private nuisance. On the other hand, it is broader in other ways.

One way in which statutory nuisance is broader is that the scope of protected interests extends beyond property rights.[23] For example,

Section 11(a)[24] extends a pollution nuisance action to anything that "offends the senses," independent of land ownership.[25]

Have these statutory provisions become a complete substitute for court actions based upon common law nuisance? In *Wilsonville v. SCA Services* the Illinois Supreme Court permitted a common law nuisance action without considering alternative statutory relief.[26] In contrast, at the federal level, the U.S. Supreme Court has ruled that federal common law nuisance was entirely preempted by the Federal Water Pollution Control Act.[27] As one commentator stated, "Arguments that any state law may be similarly affected are reserved for speculation." However, the *Wilsonville* case would appear to be the dispositive in Illinois until the U.S. Supreme Court expressly overrules it. Thus, the common law nuisance action is available in addition to statutory relief in Illinois.

C. THE FEDERAL CLEAN WATER ACT

THE FEDERAL CLEAN WATER ACT IS DESIGNED TO REGULATE ALL POINT-SOURCE DISCHARGES INTO THE WATERS OF THE UNITED STATES. UNLESS EXEMPTED, A DISCHARGE IS REQUIRED TO BE AUTHORIZED BY A NATIONAL POLLUTANT DISCHARGE ELIMINATION SYSTEM PERMIT. PERMITS ARE ALSO REQUIRED FOR THE DISCHARGE OF DREDGED AND FILL MATERIALS INTO THE WATERS OF THE UNITED STATES AND ON WETLANDS.

The goal of the Clean Water Act (CWA) is the preservation of water quality. The scope of the Act is broadly stated:

> Except as in compliance with this section and sections 1312, 1316, 1317, 1328, 1342, and 1344 of this title, the discharge of any pollutant by any person shall be unlawful.[28]

"Person" is defined as "an individual, corporation, partnership, association, state, municipality, commission, or political subdivision of a State or any interstate body."[29] This definition clearly encompasses highway authorities.

The Act defines "discharge of pollutant" as "any addition of any pollutant to navigable waters from any point source."[30] A pollutant is defined as "dredged spoil, solid waste, incinerator residue, sewage, garbage, sewage sludge, munitions, chemical wastes, biological materials, radioactive materials, heat, wrecked or discarded equipment, rock, sand, cellar dirt, and industrial, municipal, and agricultural waste discharged into water."[31] This list encompasses many of the contaminants associated with highway drainage. Navigable waters refers to "the waters of the United States, including territorial seas."[32]

For purposes of the Act, this definition includes almost every waterway into which a discharge occurs.[33]

Point-source pollution is intended to encompass all concentrated pollutant sources except those from diffused surface runoff.[34] Point source is defined as:

> any discernible, confined, and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation . . . .[35]

Only return flow from irrigated agriculture is excluded. From this definition it appears that unchecked road surface runoff is not covered under the CWA. However, once the runoff is collected, channelled, and discharged into navigable water, the CWA does appear to apply.[36]

For the purpose of highway drainage, two provisions of the Clean Water Act are of interest. First, section 1342 establishes the National Pollutant Discharge Elimination System (NPDES) permit requirement[37] and second, section 1344 requires permits for dredge and fill operations.[38]

1. National Pollutant Discharge Elimination System Permits

NPDES permits are designed to allow point-source discharges into the "waters of the United States." The permit program is administered by the United States Environmental Protection Agency, but the act provides that it can be delegated to a state once the state promulgates regulatory guidelines.[39] The State of Illinois was delegated the authority to administer the NPDES permit program through the Illinois Environmental Protection Agency (IEPA) following the adoption of amendments to the water pollution regulations.[40]

The threshold question under the guidelines is whether highway drainage systems constitute a point source of pollution. While there is no relevant Illinois case law, the statutes indicate that in most instances drainage systems should be covered by an NPDES permit. A Washington state court decision supports this conclusion.

In an urban setting, *Pederson v. Washington State Department of Transportation*[41] found an NPDES permit was required from the Washington Department of Ecology when the state highway department altered a highway drainage system. In nonurban settings, it is not clear when a permit will be required. However, in light of the possible effects of pollution on "the waters of the United States," the Illinois Environmental Protection Agency should be consulted in most circumstances.

United States Environmental Protection Agency regulations empower the administrator to issue general permits to cover discharges corresponding to existing geographic or political areas.[42] State highway systems are specifically included in the permissible geographic or political boundaries,[43] and separate storm water point sources are specifically noted as appropriate general permit holders.[44] In Illinois, the state Environmental Protection Agency is authorized by the state legislature to issue general NPDES permits.[45] Issuance of a general permit for nonurban separate storm sewers by the IEPA could ease the NPDES permit compliance burden for the state highway authority.

2. Permits for Dredged or Fill Material

The CWA describes a pollutant as dredged spoil, solid waste, biological materials, rock, sand, cellar dirt, and agricultural waste discharged into water. Thus, virtually any deposition of fill constitutes a point source of pollution.[46]

The CWA authorizes the Army Corps of Engineers to issue permits for the discharge of dredged and fill materials into the navigable waters of the United States.[47] Such permits are commonly referred to as "404 permits" because the Corps' authority is under section 404 of the CWA as codified in 33 U.S.C. §1344.

Section 1344(f)(1) lists activities not subject to the permit requirement, and the focus is primarily on normal agricultural and silvicultural activities.[48] In addition, the Secretary of the Army may issue general permits for activities with only minimal individual and cumulative environmental impacts. These narrowly defined activities are subject to certain mandatory conditions.[49] Section 1344(f)(2) demonstrates the sweeping scope of the 404 permit requirement:

> Any discharge of dredged or fill material into the navigable waters incidental to any activity having as its purpose bringing an area of the navigable waters into a use to which it was not previously subject, where the flow or circulation of navigable waters may be impaired or the reach of such waters reduced, shall be required to have a permit under this section.[50]

Corps regulations broadly define the terms "dredged material," "discharge of dredged material," "fill material," and "discharge of fill material."[51] Almost as broad as the Corps' regulations defining "dredge" and "fill" operations are their regulations describing navigable waters under the CWA [Section 1362(7)]: "the waters of the United States, including the territorial seas." The Corps regulations expand the provision to incorporate wetlands.[52]

A 1984 Sixth Circuit case sheds light on the current definition

of wetlands contained in Corps regulations.[53] The case adopts a two-prong test for a "wetland" based upon the type of vegetation present.

The Corps has established nationwide permits for the discharge of dredge and fill materials into the following waters:

1. Nontidal rivers, streams, and their lakes and impoundments, including adjacent wetlands that are located above the headwaters; and
2. Other nontidal waters of the United States that are not part of a surface tributary system to interstate waters or navigable waters of the United States.

The following mandatory conditions must be satisfied when performing work under the preceding authorizations:

1. The discharge may not be located in the proximity of a public water supply intake.
2. The discharge may not destroy a threatened or endangered species as identified by the Endangered Species Act or destroy or adversely modify the critical habitat of such species.
3. The discharge must consist of suitable materials free from toxic pollutants in toxic amounts.
4. The fill created by the discharge must be properly maintained to prevent erosion and other nonpoint sources of pollution.
5. The discharge may not occur in a component of the National Wild and Scenic River System.
6. The best management practices listed in 33 CFR 306.6 must be followed to the maximum extent practicable.[54]

The Federal Highway Administration regulations contain provisions entitled "Erosion and Sediment Control on Highway Projects."[55] Their purpose is to prescribe policies and procedures to control erosion, abate water pollution, and prevent sediment deposition connected with federally funded highway projects.[56] The regulations dictate that all reasonable steps should be taken to ensure that the project design minimizes erosion.[57] In particular, the regulations call for the construction and maintenance of permanent erosion and sedimentation control structures. Futhermore, temporary erosion control devices are to be employed during construction. Finally, pollutants used during construction or operation and materials from sediment traps are to be handled so as to prevent them from being washed into any watercourse by runoff or high water.[58]

Sometimes fill activity by adjoining landowners increases the amount of drainage water reaching a highway. Or the fill alters the natural drainage pattern, creating an unnatural burden on highway

drainage systems. When the fill is not on lands considered wetlands or in waters of the United States, in a public body of water, or in the floodway of a stream, neither the Corps of Engineers nor the Illinois Department of Transportation requires a permit. Controversies resulting from this type of fill activity are settled under general drainage or nuisance principles.

D. THE NATIONAL ENVIRONMENTAL POLICY ACT

UNDER THE NATIONAL ENVIRONMENTAL POLICY ACT, FEDERAL AGENCIES ARE REQUIRED TO PREPARE AN ENVIRONMENTAL IMPACT STATEMENT BEFORE ANY MAJOR ACTION THAT SIGNIFICANTLY AFFECTS THE QUALITY OF THE HUMAN ENVIRONMENT. THE ENVIRONMENTAL IMPACT STATEMENT MUST BE APPROVED BEFORE SIGNIFICANT DESIGN ACTIVITIES OR PROPERTY ACQUISITIONS OCCUR. IT MAY BE PREPARED BY STATE OR LOCAL AGENCIES RECEIVING FEDERAL FUNDING, BUT THE FEDERAL AGENCY ADMINISTERING THE FUNDS BEARS THE ULTIMATE RESPONSIBILITY FOR ITS SCOPE. UNDER CERTAIN CIRCUMSTANCES, A LESS COMPREHENSIVE ENVIRONMENTAL REPORT MAY BE PERMISSIBLE.

The Congressional purposes behind the National Environmental Policy Act (NEPA) are:

> To declare a national policy which will encourage productive and enjoyable harmony between man and his environment; to promote efforts which will prevent or eliminate damage to the environment and biosphere and stimulate the health and welfare of man; to enrich the understanding of the ecological systems and natural resources important to the Nation . . . .[59]

The primary tool for achieving these policy goals is the environmental impact statement required under section 102(2)(C) of the NEPA.[60] This discussion will consider whether and when an environmental impact statement (EIS) is required and who is responsible for compiling the document. We will also discuss other environmental documents that may be required. In addressing these questions, we will emphasize the U.S. Department of Transportation regulations implementing the NEPA because this agency oversees federally funded Illinois highways and related drainage projects.[61]

1. Need for an Environmental Impact Statement

The EIS required by section 107 is the source of considerable litigation by special interest groups seeking to protect the environ-

ment. The threshold question in such litigation is whether a proposed action is a "major" federal action "significantly affecting the quality of the human environment." Preparation of an EIS thus depends on showing that an undertaking is (1) major, (2) that it significantly affects the quality of the human environment, and (3) that it is federal.[62]

a. "Major actions" and "significant effects." Both terms are very difficult to quantify, but one rule of thumb is that close cases are resolved in favor of requiring the EIS.[63] In general, the greater the threat of injury, the greater the likelihood of coverage. One authority listed several other relevant factors, including:

1. The extent to which the action will cause adverse environmental effects beyond those created by existing uses or by prior practice;
2. Whether more than one agency concurs in the conclusion that effects will be insignificant;
3. Whether the action is consistent with local zoning requirements; and
4. The scope and size of the project and the extent of investment in it.[64]

b. Federal actions. A narrow reading of the NEPA would interpret the term "federal actions" to mean only those actions conceived, carried out, and managed by the federal government. However, case law has interpreted the term broadly and soon established that federal sanctioning of prior state or local activity can constitute a "federal action."[65] Federal Highway Administration regulations consider all their actions involving federal funds and requiring federal approval to be federal administrative actions.[66] This regulation appears to cover any project constructed with Federal Highway Administration funds.

2. When is the EIS Required?

One of the primary purposes of the NEPA is to require consideration of environmental impacts and alternatives "before project momentum is irresistible, before options are closed, and before agency commitments are set in concrete."[67] Language in the NEPA makes it clear that an EIS must be present in every agency "recommendation or report on proposals."[68] To assure compliance with the NEPA, the Federal Highway Administration (FHWA) regulations suggest that:

> Applicants intending to apply for funds should notify the Administration at the time that a particular project concept is identified.[69]

At the applicant's request, the Administration must advise him or her of the class of action, related applicable environmental laws and requirements, and specific studies normally required in the EIS.[70]

Under no circumstances should significant design activities, property acquisitions, or construction begin until either an EIS is approved or the activity is found to be excluded from the EIS requirement.[71]

3. Who is Required to Prepare the EIS?

Section 102(2)(C) of the NEPA[72] calls for a "detailed statement by the responsible official." In general, courts require that federal officials provide "significant," "active," and "extensive" involvement in the preparation process.[73] Section 102(2)(D),[74] however, notes that the EIS prepared for any major federal action funded under a grant to a state will not be deemed insufficient solely because it was prepared by a state agency or official if the "agency or official has statewide jurisdiction and has the responsibility for such action." The responsible federal official is to provide guidance, individually evaluate the EIS, and solicit views of other federal agencies in drafting the EIS.

Under the Federal Highway Administration regulations, the Administration must prepare the EIS in cooperation with the applicant.[75] If the applicant is a state highway agency, state department of transportation, or a local unit of government acting through a state agency, the applicant may prepare the EIS, provided it complies with section 102(2)(D) of the NEPA. However, regardless of the role the applicant may assume, the Federal Highway Administration is responsible for the decisions made on the scope of the appropriate environmental document.

4. Other Environmental Documents

All agencies have procedures for dispensing with EIS requirements when the action is neither major nor entails "significant effects."[76] The FHWA regulations describe three classes of action that require different levels of documentation under the NEPA process.[77]

a. Class I (EIS). These actions may significantly affect the environment and require an EIS.

b. Class II (categorical exclusions). These actions do not individually or cumulatively have any significant effect on the environment and do not require either an EIS or an environmental assessment. The statute lists 29 actions as categorical exclusions, and most of them pertain to studies of various kinds. Also included are "reconstruction or modification of an existing bridge structure on essentially the same alignment or location and rehabilitation or widening of a road by less than one lane." The regulations qualify the categorical exclusions in the following manners:

1. Proposed categorical exclusions must be approved by the FHWA.
2. The FHWA may determine that extraordinary circumstances require an EIS. Situations likely to require an EIS include:
   a. Significant impacts on the environment,
   b. Substantial controversy on environmental grounds, and
   c. Inconsistencies with any federal, state, or local law or administrative decision relating to the environment.[78]

c. Class III (environmental assessments). This class encompasses actions in which the significance of the environmental impact is not known. All actions other than Class I or Class II are Class III. An environmental assessment must be prepared whenever a proposal is outside the categorical exclusions, and the need for an EIS is unclear. The objective of an environmental assessment (EA) is to determine which aspects of the proposed actions might have environmental impact; to identify measures and alternatives that might mitigate adverse environmental impacts; and to identify other environmental review and consultation requirements that should be prepared concurrently with the environmental assessment.[79]

Following submission of an EA to the FHWA, hearings are held to determine whether an EIS is required and whether a finding of no significant impact will exempt the applicant from the EIS requirement.

As a final note, practitioners should be aware that courts interpreting the NEPA have recognized supplemental environmental criteria when agencies are seeking to comply with federal permit requirements.[80] *Sierra Club v. Army Corps of Engineers*[81] illustrates this point. Here the appellate court ruled that although the Federal Highway Administration and the Corps acted as leads in preparing an EIS, the Corps was still required to investigate and issue a section 404 permit[82] for a landfill operation associated with the construction of an interstate highway adjacent to a river. Thus, merely compiling an EIS does not exclude an agency from complying with other statutory permit requirements.

E. ADDITIONAL FEDERAL LAWS

SEVERAL FEDERAL STATUTES REQUIRE PERMITS FOR CONSTRUCTION IN NAVIGABLE WATERS. TWO EXECUTIVE ORDERS ALSO HAVE BEEN ISSUED TO PROTECT WETLANDS AND FLOODPLAINS. IN ADDITION, CONGRESS HAS ADDRESSED THESE SPECIAL CONCERNS WITH THE FISH AND WILDLIFE COORDINATION ACT AND THE ENDANGERED SPECIES ACT.

The Clean Water Act (CWA) and the National Environmental Protection Act (NEPA) are the broadest pieces of federal legislation affecting highway drainage. Federal laws yet to be discussed should be interpreted under or in conjunction with the NEPA or the CWA. For efficient reference, the executive orders, statutes, and regulations are grouped in three ways: 1) those pertaining to wetlands, 2) those pertaining to fish and wildlife conservation, and 3) those pertaining to preservation of endangered species.

1. Wetlands

In addition to a section 404 permit required under the Clean Water Act,[83] the Rivers and Harbors Act of 1899[84] requires a permit from the Army Corps of Engineers whenever a party elects to "excavate or fill, or in any manner to alter or modify the course, location, condition, or capacity of any port, roadsteads, haven, harbor, canal, lake, harbor of refuge, . . . or of the channel of any navigable water of the United States. . . ."[85] For the purpose of the Rivers and Harbors Act, the term "navigable waters" is defined more narrowly than under the Clean Water Act:

> The term 'navigable waters of the United States' means those waters of the United States that are subject to the ebb and flow of the tide shoreward to the mean high water mark, and/or . . . have been used in the past, or may be susceptible to use to transport interstate or foreign commerce.[86]

In *United States v. Weisman*[87] a Florida District Court found that by placing road fill across tidal creeks located below the mean high water line without a permit, the defendant violated section 10 of the Rivers and Harbors Act of 1899. Under the Act, a Corps permit is required for any bridge, dam, causeway, or dike in any navigable waters.[88] Where section 10 and section 404 both apply, the Corps will process a joint permit.

Executive Order 11990,[89] "Protection of Wetlands," calls on each agency of the federal government to provide leadership in wetlands protection. The Order is implemented under the NEPA. Wetland construction must be avoided unless there is no practical alternative. If none is possible, all practicable measures must be taken to minimize harm to the wetland. Illinois highway projects accepting federal aid must comply with the Order.[90] Somewhat related is Executive Order 11988,[91] which calls for consideration of alternatives to minimize development and impact on the natural beneficial values of floodplains.[92]

2. Fish and Wildlife

The Fish and Wildlife Coordination Act covers any federal action involving the alteration of any stream or other body of water for any purpose, including drainage. Any public or private agency under federal permit or license that wishes to alter a stream or body of water must consider wildlife conservation and consult with the United States Fish and Wildlife Service, Department of the Interior, and the head of the state fish and game agency.[93] Case law indicates that the Act must be considered virtually any time an environmental document is prepared for a drainage-related project.[94]

3. Endangered Species

The Endangered Species Act[95] is intended to preserve threatened and endangered species. Each federal agency must ensure that no activity funded or carried out by the agency will harm endangered species, and no funds may be committed to a project before compliance with this Act is shown.[96] The agency is to consult with the Secretary of the Interior if any prospective action will be conducted where an endangered or threatened species may be present. The biological assessment required under this Act may be undertaken as part of the EIS compliance.[97]

F. ILLINOIS SOIL EROSION AND SEDIMENTATION CONTROL

THE ILLINOIS DEPARTMENT OF AGRICULTURE HAS ADOPTED GUIDELINES FOR EROSION AND SEDIMENT CONTROL. SOIL AND WATER CONSERVATION DISTRICTS ARE TO IMPLEMENT THOSE GUIDELINES, ALTHOUGH THE AUTHORIZING ACT INCLUDES NO ENFORCEMENT MECHANISM.

The Illinois Department of Agriculture has adopted guidelines for erosion and sediment control pursuant to the Illinois Soil and Water Conservation Districts Act.[98] These state guidelines were adopted in 1980[99] and will require landowners and occupiers to comply with phased-in, increasingly stringent soil loss limits. Individual soil and water conservation districts have adopted similar guidelines that are at least as stringent as the state guidelines. They provide a mechanism to encourage landowners to reduce erosion. When erosion is reduced, drainage ditches and tile and other drainage structures are less likely to be damaged by siltation.

The soil loss guidelines are based upon the "T" value, which is

"the average annual tons per acre soil loss a given soil may experience and still maintain its productivity over an extended period of time. Both physical and economic factors are considered."[100] For most Illinois soils, the "T" value will be between two and five tons of soil loss per acre per year. These soil losses are estimated using the Universal Soil Loss Equation. The goal of the guidelines is to reduce soil loss from every acre to its "T"value or less by the year 2000. Hence, the slogan "T by 2000." Although some soil and water conservation districts may have adopted more stringent soil loss limits or a more stringent timetable, state guidelines expect "T by 2000" to be reached according to the following timetable:

- Effective January 1, 1983, to January 1, 1988, all land subject to this program shall not be considered out of compliance with the state program if the long-term annual soil losses are kept at or below four "T" value.
- Effective January 1, 1988, no soil erosion losses on gently sloping land, not exceeding 5 percent slope, shall exceed "T" value, provided this can be accomplished through conservation tillage. All other land subject to this program shall be considered in compliance with the state program if the long-term annual soil losses are kept at or below double "T" during the period January 1, 1988, to January 1, 1994.
- Effective January 1, 1994, to January 1, 2000, all land subject to this program shall be considered in compliance with the state program if the long-term annual soil losses are kept at or below one and one-half "T" value.
- Effective January 1, 2000, and thereafter, all land subject to the Act shall meet "T" value.[101]

The guidelines anticipate that "T" value will be attained by the adoption or installation of such practices or structures as conservation tillage systems, grassed waterways, terraces, or the seeding of permanent vegetative cover. State cost-sharing moneys may be available to landowners to help defray the costs of these practices or structures.

The enforcement mechanism for guaranteeing compliance with the guidelines is based on education and financial incentives. The regulations enable any person to file a complaint who believes a serious erosion and sediment problem exists.[102] The complaint is generally filed with the soil and water conservation district in which the problem land is located[103] and should contain the following information:

1. The name and address of the person or persons filing the complaint;

2. The date on which the alleged violation was observed;
3. The location by legal description or metes and bounds of the land being damaged by sediment;
4. The description of the nature and extent of the damage occurring;
5. The names and addresses of landowners and occupiers, if known, and the location by legal description or by metes and bounds of land believed to be the source of the excessive sediment; and
6. The signature of the person or persons filing the complaint and the date filed.

Upon receiving a complaint, the soil and water conservation district must notify the landowner involved, conduct an investigation, determine whether a violation of the guidelines exists, and if it does, give the landowner or occupier a Notice of Violation. The soil and water conservation district must attempt to gain compliance with the guidelines. If it fails, however, the Illinois Soil and Water Conservation District Act does not provide for fines or other enforcement tools, except as may exist under other legislation, such as the Illinois Environmental Protection Act and its water pollution rules and regulations.

Highway authorities should be aware of the soil loss control program previously described because some township road commissioners have successfully filed complaints. Although the current program lacks a vigorous enforcement mechanism, soil and water conservation district personnel have gained voluntary compliance from individual landowners. Similarly, if erosion from the highway authority property is causing sedimentation problems for adjacent landowners, they might benefit from district contacts with the highway authority.

G. STATE PERMITS

HIGHWAY AUTHORITIES, DRAINAGE DISTRICTS, OR INDIVIDUALS CONSTRUCTING IN ILLINOIS STREAMS OR FLOODWAYS DRAINING MORE THAN ONE SQUARE MILE IN URBAN AREAS OR TEN SQUARE MILES IN RURAL AREAS REQUIRE A PERMIT FROM THE ILLINOIS DEPARTMENT OF TRANSPORTATION, DIVISION OF WATER RESOURCES.

Illinois statutes require Department of Transportation approval of construction in any stream or floodway draining more than 640 acres in an urban area or 6,400 acres in a rural area.[104] Specifically exempted from the law are "field tile systems, tile outlet structures, terraces, water and sediment control basins, grade stabilization struc-

tures, and grassed waterways that do not obstruct flood flows."[105] In addition, most maintenance and repair of existing structures is excluded. The law applies to any person, corporation, unit of local government, or state agency.

The permit application is to include the name of the applicant, site location, description of the project, statement of purpose, list of potentially affected properties, and a discussion of the impact of the project. Generally, construction will be approved if it does not "adversely affect" any public body of water, obstruct navigability, result in actual or potential flood damage, or adversely affect certain natural conditions.

The Department of Transportation, Corps of Engineers, Illinois EPA, U.S. Fish and Wildlife Service, and Department of Conservation have developed a joint permit application form. This multi-part form simultaneously starts processing of the IDOT and Corps permits, fish and wildlife and endangered species review, and water quality certification. Many types of minor work are now covered by nationwide permits from the Corps of Engineers and comparable statewide permits from the IDOT.

NOTES

1. *See* RODGERS, HANDBOOK ON ENVIRONMENTAL LAW 379 (1977).
2. Great Atlantic & Pacific Tea Co. v. LaSalle National Bank, 77 Ill. App. 3d 478, 485, 395 N.E.2d 1193, 1198 (1979), citing RESTATEMENT (SECOND) OF TORTS, §821D (1979).
3. Environmental Law, §6.69 at 6-87 (Ill. Inst. for CLE, 1983).
4. Merriam v. McConnell, 31 Ill. App. 2d 241, 175 N.E.2d 293 (1961).
5. Great Atlantic & Pacific Tea Co. v. LaSalle National Bank, 77 Ill. App. 3d 478, 485, 395 N.E.2d 1193, 1198-99 (1979), citing RESTATEMENT (SECOND) OF TORTS, §827 (1979).
6. City of Kankakee v. New York Central R. R., 387 Ill. 109, 55 N.E.2d 87 (1944); Crane v. Village of Roselle, 236 Ill. 97, 86 N.E. 181 (1908).
7. Roloson v. Barnett, 243 Ill. 130, 90 N.E. 228 (1909).
8. Village of Wilsonville v. SCA Services, Inc., 86 Ill. 2d 1, 426 N.E.2d 824 (1981).
9. Dierks v. Commissioners of Highways, 142 Ill. 197, 31 N.E. 496 (1892).
10. Nevins v. City of Peoria, 41 Ill. 502 (1866).

11. Stead v. Fortner, 255 Ill. 468, 99 N.E. 680 (1912).
12. Kenilworth Sanitarium v. Village of Kenilworth, 220 Ill. 264, 77 N.E. 226 (1906).
13. Stead v. Fortner, 255 Ill. 468, 478, 99 N.E. 680, 684 (1912).
14. 1907 Ill. Laws 302.
15. Ill. Rev. Stat. ch. 100 1/2, §26(2) (1983).
16. Ill. Rev. Stat. ch. 111 1/2, §§1001 *et seq.* (1983).
17. Environmental Law §6.68 (Ill. Inst. for CLE, 1983).
18. Ill. Rev. Stat. ch. 111 1/2, §1012(a) (1983).
19. Ill. Rev. Stat. ch. 111 1/2, §1003(nn) (1983).
20. Environmental Law §6.68 (Ill. Inst. for CLE, 1983).
21. Ill. Rev. Stat. ch. 111 1/2, §1049(e) (1983).
22. Ill. Rev. Stat. ch. 111 1/2, §1011(b) (1983). For further explanation of these terms *see infra,* section C at p. 67.
23. EPA v. City of Monmouth, 3 P.C.B. 345 (1972), *rev'd. on the grounds,* City of Monmouth v. Pollution Control Board, 57 Ill. 2d 482, 313 N.E. 2d 161 (1974).
24. Ill. Rev. Stat. ch. 111 1/2, §1011(a)(1) (1983).
25. *See* Environmental Law, §6.68 at 6-85 (Ill. Inst. for CLE, 1983).
26. Village of Wilsonville v. SCA Services, Inc., 86 Ill. 2d 1, 426 N.E. 2d 824 (1981).
27. City of Milwaukee v. Illinois, 451 U.S. 304 (1981); Middlesex County Sewerage Authority v. National Sea Clammers Assn., 453 U.S. 1 (1981).
28. 33 U.S.C. §1311(a) (1982).
29. 33 U.S.C. §1362(5) (1982).
30. 33 U.S.C. §1362(12) (1982).
31. 33 U.S.C. §1362(6) (1982).
32. 33 U.S.C. §1362(7) (1982).
33. Environmental Law, §6.3 at 6-10 (Ill. Inst. for CLE, 1983), citing United States v. Ashland Oil and Transportation Co., 364 F. Supp. 349 (W.D.Ky. 1973), *aff'd,* 504 F.2d 1317 (6th Cir. 1974), and United States v. Holland, 373 F. Supp. 665 (M.D.Fla. 1974).
34. Environmental Law, §6.3 at 6-10 (Ill. Inst. for CLE, 1983).
35. 33 U.S.C. §1362(14) (1982).
36. *See* Pedersen v. Washington State Department of Transportation, 25 Wash. App. 781, 611 P.2d 1293 (1980), requiring an NPDES permit for construction of an urban highway runoff collection and discharge system. *See also* ILLINOIS DEPARTMENT OF TRANS-

PORTATION WATER QUALITY MANUAL p. 4-2, suggesting reference to the appropriate district Federal Highway Administration office for case by case consideration.

37. 33 U.S.C. §1342 (1982).
38. 33 U.S.C. §1344 (1982).
39. 33 U.S.C. §1342(b) (1982).
40. 6 Ill. Admin. Reg. 7818 (1982). The Illinois Environmental Protection Agency is authorized to administer the NPDES program in Illinois by the Environmental Protection Act, Ill. Rev. Stat., ch. 111 1/2, §39(b) (1983).
41. Pedersen v. Washington State Department of Transportation, 25 Wash. App. 781, 611 P.2d 1293 (1980).
42. 40 C.F.R. §122.28(a)(1) (1985).
43. 40 C.F.R. §122.28(a)(1)(iv) (1985).
44. 40 C.F.R. §122.28(a)(2)(i) (1985).
45. Illinois Environmental Protection Act., Ill. Rev. Stat. ch. 111 1/2, §39(b) (1983).
46. United States v. Weisman, 489 F. Supp. 1331 (M.D. Fla. 1980); United States v. Robinson, 570 F. Supp. 1157 (M.D. Fla. 1983).
47. 33 U.S.C. §1344(a) (1982).
48. 33 U.S.C. §1344(f)(1) (1982).
49. 33 U.S.C. §1344(e) (1982). *See* 33 C.F.R., §330.5 (1985).
50. 33 U.S.C. §1344(f)(2) (1982).
51. 33 C.F.R. §323.2(i-l) (1985).
52. 33 C.F.R. §323.2(a), (c) (1985).
53. United States v. Riverside Bayview Homes, Inc., 729 F.2d 391, 396 (6th Cir. 1984).
54. 33 C.F.R. §330.4 (1985).
55. 23 C.F.R. §650.201-.209 (1985).
56. 23 C.F.R. §650.201 (1985).
57. 23 C.F.R. §650.207(b) (1985).
58. 23 C.F.R. §650.209 (1985).
59. 42 U.S.C. §4321 (1982).
60. 42 U.S.C. §4332(2)(c) (1982).
61. *See* 23 C.F.R. §771.101 (1985). Chapter VI of the ILLINOIS DEPARTMENT OF TRANSPORTATION LOCATION AND ENVIRONMENTAL MANUAL contains a detailed description of how the Illinois Department of Transportation implements NEPA.
62. RODGERS, HANDBOOK ON ENVIRONMENTAL LAW 750 (1977).

63. RODGERS, HANDBOOK ON ENVIRONMENTAL LAW 752-753 (1977).
64. RODGERS, HANDBOOK ON ENVIRONMENTAL LAW 753 (1977).
65. RODGERS, HANDBOOK ON ENVIRONMENTAL LAW 761-762 (1977).
66. 23 C.F.R. §771.07 (1985).
67. RODGERS, HANDBOOK ON ENVIRONMENTAL LAW 767 (1977).
68. 42 U.S.C. §4332(2)(C) (1982).
69. 23 C.F.R. §771.111(a) (1985).
70. 23 C.F.R. §771.111(a) (1985).
71. 23 C.F.R. §771.113(a) (1985).
72. 42 U.S.C. §(2)(C) (1982).
73. RODGERS, HANDBOOK ON ENVIRONMENTAL LAW 778-779 (1977).
74. 42 U.S.C. §4332(2)(D) (1982).
75. 23 C.F.R. §771.109(c) (1985).
76. RODGERS, HANDBOOK ON ENVIRONMENTAL LAW 755 (1977).
77. 23 C.F.R. §771.115 (1985).
78. 23 C.F.R. §771.117 (1985).
79. 23 C.F.R. §771.119 (1985).
80. *See* RODGERS, HANDBOOK ON ENVIRONMENTAL LAW 769 (1977).
81. Sierra Club v. United States Army Corps of Engineers, 701 F.2d 1011 (2d Cir. 1983).
82. 33 U.S.C. §1344 (1982).
83. 33 U.S.C. §1344 (1982).
84. 33 U.S.C. §§401 *et seq.* (1982).
85. 33 U.S.C. §403 (1982).
86. 33 C.F.R. §322.2(a) (1985). For a more complete definition see 33 C.F.R., section 329 (1985).
87. United States v. Weisman, 489 F. Supp. 1331 (M.D. Fla. 1980).
88. 33 U.S.C., §401 (1982).
89. Exec. Order No. 11990, 3 C.F.R. 121 (1978), *reprinted in* 42 U.S.C., §4321 app., 513-514 (1982).
90. A detailed discussion of E.O. 11990 appears in the ILLINOIS DEPARTMENT OF TRANSPORTATION WATER QUALITY MANUAL, pages 2 to 17.
91. Exec. Order No. 11988, 3 C.F.R. 117 (1978), *reprinted in* 42 U.S.C., §4321 app., 512-513 (1982).
92. A detailed discussion of E.O. 11988 appears in the ILLINOIS DEPARTMENT OF TRANSPORTATION WATER QUALITY MANUAL, pages 2 to 20.

93. 16 U.S.C. §662 (1982).
94. *See* Environmental Defense Fund, Inc. v. Froehlke, 473 F.2d 346 (8th Cir. 1972); State of Missouri *ex rel.* Ashcroft v. Department of the Army, Corps of Engineers, 526 F. Supp. 660 (W.D. Mo. 1980), *aff'd,* 672 F.2d 1297 (8th Cir. 1982).
95. 16 U.S.C. §§1531 *et seq.* (1982). 50 C.F.R., sections 17.1 *et seq.* provide a list of endangered species compiled by the Secretary of the Interior.
96. 16 U.S.C. §1536(d) (1982).
97. Illinois has several statutes designed to protect endangered species, but none of them are particularly relevant to highway authorities. They are: Ill. Rev. Stat. chapter 8, sections 331 *et seq.* (1983); Ill. Rev. Stat. chapter 105, sections 701 *et seq.* (1983); and Ill. Rev. Stat. chapter 56, section 3.11 (1983).
98. Ill. Rev. Stat. ch. 96 1/2, §§7101 *et seq.* (1983).
99. Rules and Regulations Relating to the Soil and Water Conservation Districts Act. 4 Ill. Admin. Reg. 88 (May 2, 1980).
100. *Id.* Rule 3.1(I) at 93.
101. *Id.* Rule 4.1 at 94.
102. *Id.* Rule 12.1 at 109.
103. *Id.* Rule 12.1 at 109.
104. Ill. Rev. Stat. ch. 19, §78 (1983).
105. 92 Ill. Adm. Code 700.

CHAPTER VI: LEGAL REMEDIES

A. INTRODUCTION AND SCOPE

The body of substantive law governing drainage in Illinois has been thoroughly reviewed in preceding sections of this study. If some aspect of this law is violated, the question arises as to the proper legal remedy for the injury. This chapter will discuss the remedies applicable to the drainage laws. However, this brief review of legal remedies is superficial and will illustrate only a few of the issues involved in seeking legal remedies.

Individuals and highway authorities must conform to the natural drainage laws.[1] Actions for damages against state authorities must be brought in the Court of Claims,[2] while claims against political subdivisions can be brought in the circuit courts.[3] The appropriate parties and forums under the statutory drainage laws are typically addressed in the relevant statutes.[4]

The two primary remedies are damages and injunctions. These two modes of redress apply to both natural and statutory drainage violations. In at least one statutory section, damages and injunctive relief are expressly provided for.[5] In other situations, these remedies are applied without express provision.[6] In addition, certain statutory sections authorize a fine as the penalty for the specific violation[7] or give the highway authority the right to fill certain ditches.[8]

An additional remedy often pursued is that of self-help. Self-help can be used either to enter upon the easement within a servient estate to remove barriers to natural drainage[9] or to obstruct unlawful flows from a dominant estate.[10] The following sections elaborate on these remedies.

B. JURISDICTION

INDIVIDUALS, MUNICIPALITIES, COUNTIES, AND STATE HIGHWAY AUTHORITIES ARE SUBJECT TO THE NATURAL DRAINAGE LAW WITH

LIMITED EXCEPTIONS. ACTIONS INVOLVING PRIVATE LANDOWNERS, COUNTIES OR MUNICIPALITIES, OR INJUNCTIVE RELIEF AGAINST THE STATE ARE BROUGHT IN THE CIRCUIT COURTS. ACTIONS SEEKING MONETARY DAMAGES FROM THE STATE ARE BROUGHT IN THE COURT OF CLAIMS.

The preceding chapters have discussed the various drainage rights and obligations of landowners. This chapter will address the parties that can be subjected to an action for drainage rights violations and identify the forums where a case may be litigated.

1. Parties

Municipal,[11] county,[12] and state highway authorities[13] are governed by the drainage laws in the same manner as an individual landowner. They are therefore subject to the same actions and remedies.[14] A primary distinction is that public bodies can often utilize condemnation proceedings to secure drainage easements,[15] avoiding much potential litigation. In addition, public bodies cannot be subjected to a claim of adverse possession or prescription.

2. Forums

Between individual landowners, counties,[16] and municipal corporations,[17] drainage actions are brought in the circuit courts of Illinois.[18] If the plaintiff seeks monetary damages, any drainage dispute involving the state or one of its agencies is to be brought in the Court of Claims. If the plaintiff seeks injunctive relief, the dispute comes before the circuit court.[19]

Most litigation against a highway authority begins with a complaint to the authority from a landowner who feels harmed by the authority's actions. It is the policy of the Department of Transportation to recognize and take prompt actions to correct any problem for which the Department is responsible. Should the Department not be responsible, the utmost tact is to be used to explain why it is not responsible.[20]

C. RELIEF

NOMINAL, SPECIAL, AND PERMANENT DAMAGES ARE AVAILABLE REMEDIES FOR DRAINAGE VIOLATIONS. DETERMINING THE NATURE AND EXTENT OF MONETARY DAMAGES IS OFTEN DIFFICULT. INJUNCTIONS ARE AVAILABLE IN INSTANCES OF SUBSTANTIAL OR IRREPARABLE INJURY AND WHERE NO ADEQUATE LEGAL REMEDY EXISTS. FINALLY, SELF-HELP MAY BE AVAILABLE, SIMPLIFYING THE REMEDY PROCESS.

1. Damages

The term "damages" has been defined as a compensation, recompense, or satisfaction in money for a loss or injury sustained.[21] Subject to certain limitations to be discussed shortly, damages may be recovered by injured parties because of violation of a natural drainage rule. For example, damages have been recovered when the violations involved diversion,[22] obstruction,[23] and overflow.[24]

Although the right to damages may be clear, problems are often encountered in measuring the extent of the damages. The general rules are well defined but their application proves difficult. "General" or "nominal" damages are those presumed by the law to have been sustained because of the legal wrong committed by the defendant. Recovery for any such technical legal injury does not present a measurement problem. The court has stated that "every violation of a right imports some damage, and if none other be proved, the law allows nominal damages."[25] Thus the plaintiff may recover a nominal sum (often $1.00) for any technical invasion of a right, regardless of actual injury sustained.

"Special" or "substantial" damages on the other hand should compensate for injuries actually suffered.[26] These damages create measurement problems. Damages in this category are classified as temporary or permanent according to the type of injury sustained.[27] Permanent damages are those of a lasting or enduring nature. In an action for permanent damages, the plaintiff may recover not only present but future damages. Because both present and future damages are recoverable, such recovery bars all future actions by that plaintiff or any other person holding the property through him or her.[28] Permanent damages are measured by the difference between fair market price of a parcel before and after the injury.[29]

Where the injury is not of such lasting or enduring nature as to be termed "permanent," a measure of temporary damages applies. If the injury can be corrected, only those sustained up to the commencement of the lawsuit may be recovered. Because only present damages are recoverable, successive causes of action may be brought. This point is illustrated by an early Illinois Supreme Court case, *Schlitz Brewing Company v. Compton.*[30]

In *Compton* the plaintiff sought to recover damages for flooding caused by an illegal change in drainage by the adjacent defendant. At trial the plaintiff tried to introduce evidence of damages caused by rains that occurred after the suit was filed. The court did not permit the introduction of the evidence because the nuisance was intermittent, occurring only after heavy rains:

> In all those cases where the cause of the injury is in its nature permanent, . . . the entire damage may be recovered in a single action; but, where the cause of the injury is in the nature of a nuisance and not permanent in its character, but of such a character that it may be supposed that the defendant would remove it rather than suffer at once the entire damage, . . . actions may be maintained from time to time as long as the cause of the injury continues.[31]

Damages for temporary injuries are measured by the cost to repair or restore the property to its condition prior to the injury plus an amount for the loss of use. The court has phrased this measure as "such a sum as would put his property in as good condition as it was before it was injured by the flooding, together with compensation for any loss of use during the time it was rendered unfit for occupation."[32]

One decision applying the permanent/temporary distinction also considered the use of the land in assessing the proper remedy. Where land damage is purely financial, the lesser of two figures — the cost of repair or the diminution in value — is considered satisfactory. However, when the property is held for a personal use, such as a residence, the cost of repair is the proper measure of damages, provided it is not excessive relative to the land value.[33]

It is not always clear whether damage to a landowner is temporary or permanent. An appellate court case, *Firestone v. Fritz,*[34] discusses this issue. A structure that unreasonably increases the burden on a landowner can be injurious by reason of its construction. However, if the structure is used in a way that may or may not cause injury, the intermittent damages may be considered temporary. But the court emphasized,

> The fact that flooding may be uncertain in time, duration, and extent does not prevent an improvement, which displays obvious potential to cause an unnatural overflow upon completion, from constituting an immediate, permanent injury.[35]

Thus, whether an injury is permanent or not is a question of fact that seems to turn on the potential and degree of unnatural overflows.[36]

The damages recoverable for injuries to growing crops have been a source of controversy in Illinois decisions. The rule on the destruction of growing crops is clear: damages to immature growing crops are the "value of the crops as they were when destroyed, together with the value of the right which the owner had to mature the crops and harvest or gather them at the proper time."[37] The means of arriving at this value has been the focus of dispute.

One view holds that the value at the time of destruction is ascertained by estimating maturity value and deducting estimated future cultivation, harvesting, and marketing costs.[38] Another view holds that the value at the time of destruction should be ascertained

by estimating what the crop would have brought in its immature condition. This estimate would necessarily be based on soil condition and quality, nature of crop, probable yield, hazard of maturity, and so forth.[39]

A different measure is applied to crops destroyed before they have come up or before they have reached a point where their immature value can be determined: "When crops planted are destroyed before coming up, the measure of damages is the rental value of the land, the cost of the seed, and the value of the labor expended."[40]

Courts can also assess punitive or exemplary damages. Only two Illinois appellate court cases consider the award of punitive damages in a drainage case.[41] In both instances the court found that the defendant's conduct did not warrant punitive damages. In discussing denial of the award one court stated, "Punitive damages are not a 'favorite in the law,' and are allowable only where the conduct is accompanied by aggravated circumstances such as willfulness, malice, fraud, or violence."[42] While no Illinois court has actually assessed punitive damages in a drainage case, there is no apparent reason why punitive damages should not be available in this area of the law, provided defendant's conduct warrants such an award.[43] However, governmental bodies are normally exempted from punitive damages.[44]

Certain questions arise when the party seeking to bring an action is either a landlord or a tenant. A tenant clearly has the right to recover damages for injuries to crops during his or her period of tenancy.[45] However, the tenant may not recover if the condition existed at the beginning of the tenancy with the tenant's knowledge.[46]

The landlord may have a cause of action in addition to that of the tenant. "[I]f a person interferes with the tenant so far as to disturb his enjoyment of the use of the premises and thereby causes loss of rent or damages to the landlord, he [the landlord] may have action."[47]

Just as the landlord-tenant relationship may affect the right of the particular party to bring an action, the grantor-grantee relationship may have a similar effect. An injury existing when land is transferred cannot be the basis for action by the grantee against the wrongdoer. The injury was to the grantor, and he or she is the proper party to bring the action.[48]

A grantee who comes into possession of land creating a drainage nuisance cannot be held liable until he or she has first been notified to remove the nuisance. However, notice may not be required where a nuisance is actively prolonged, where the grantee actively participates in the nuisance, or where the grantee uses a structure in a manner previously thought to be a nuisance.[49]

2. Injunction

The second of the two primary remedies for natural drainage rules violations is the injunction. An injunction is a judicial process whereby a party is required to do or refrain from doing a particular act.[50] In general, the remedy is a preventive one,[51] and its usual purpose is to restrain.[52]

The following court opinion best conveys the prerequisites for an injunction. Note that the plaintiff must show facts and that the court acts only with extreme caution.

> To entitle a person to relief by injunction he must establish an actual and substantial injury, and not merely a technical or inconsequential wrong entitling him to nominal damages; and this is true whether the injury be single or continuous. The courts move with caution in granting any injunction . . . .[53]

Substantial and irreparable injury must be threatened.[54] Conjectural apprehensions are not sufficient.[55] Therefore, if it is not reasonably certain that injury will result, the injunction will be denied.[56]

The foregoing discussion presupposes that an order to cease or not to begin, that is, a negative order, will prevent or terminate the injury. In some situations, however, the plaintiff can only be protected by a positive act of the defendant. Such a situation gives rise to the mandatory injunction, a device that commands the performance of some positive act. Because this type of order is difficult to supervise and control, the courts do not favor the mandatory injunction.[57] Despite their reluctance, however, this remedy has been used to compel the return of water to its natural channel[58] and to compel the removal of an obstruction from a natural watercourse.[59]

In considering granting an injunction, the first general rule is that it will not be granted when the plaintiff has another adequate remedy at law.[60] This rule means that the plaintiff may not obtain an injunction if damages constitute adequate compensation. The Illinois Supreme Court applied this principle to the subject of drainage when it said:

> It is true that to justify relief by injunction an actual and substantial injury must be shown . . . but this does not mean that the injury must necessarily be great in the pecuniary loss involved or impossible of compensation in damages. When an owner of property is about to be deprived of a legal right in connection with it by the wrongful act of another for which there is no legal redress, the act may be restrained by injunction, or, if it has already been executed, may be required to be undone, if this is practicable. The irreparable injury necessary to give a court of equity jurisdiction in such a case is not one so great as to be impossible of compensation but one of such a character that the law cannot give adequate compensation

> for it. The fact that no actual damages can be proved, so that in an action at law the jury could award nominal damages only, often furnishes the very best reason why a court of equity should interfere in a case where a nuisance is a continuous one.[61]

A second general rule is that an injunction will not be issued until the existence of a nuisance has been established at law. The courts have long recognized, however, that strict application of this rule would be a formidable barrier to adequate protection of property rights. The rule was substantially discredited in 1875 when the court said:

> [T]o say that such a nuisance must be suffered to be created and continued until its character shall be formally determined at law, would seem to be but little better than a mockery of justice to him whose residence is affected by it.[62]

Because of this pragmatic attitude, injunctions are useful and effective remedies in the area of drainage litigation. They have been frequently used to prevent diversion,[63] obstruction,[64] deposition of sewage,[65] unlawful connection to a mutual drain,[66] and so forth. In addition, since the rules of natural drainage may be applied to highway authorities and to individuals, highway authorities have received some of these injunctions.[67]

3. Self-help

A third remedy that is sometimes available to an aggrieved landowner is self-help. This remedy avoids the high costs and bad feelings that often accompany litigation. Self-help is permitted in two situations: first, in order to enter upon the easement over a servient estate to remove obstructions[68] and second, allowing a servient landowner to obstruct wrongful flows from a dominant estate.[69]

Wessels v. Colebank,[70] an early Supreme Court case, addresses the right of a drainage easement holder to enter upon the servient estate to maintain the easement. In essence, the landowners having a perpetual easement in the form of a drain across another's land have a right to go upon the servient estate and make necessary repairs to keep the flow unobstructed, as long as the servient estate is not unnecessarily damaged. Although no cases specifically address a natural drainage easement, the broad language of *Wessels,* as well as the language in subsequent appellate cases, suggests that all types of drainage easements include the right of access to the servient estate for maintenance purposes.[71]

It is important to realize that the dominant estate owner cannot compel the servient landowner to remove natural obstructions.[72] Thus, when a natural obstruction impedes the drainage of a dominant estate,

the landowner's only remedy is to enter upon the easement and remove the obstruction. Furthermore, access rights are limited to maintenance purposes, and the dominant landowner is not permitted to harm the servient estate.[73]

An early appellate court case upheld a servient landowner's right to obstruct unlawful flows from a dominant estate.[74] The court held that a servient landowner could obstruct unlawful flows if it could be accomplished without a breach of the peace. While this right of obstruction does exist, the good husbandry and reasonable use exceptions to the natural drainage rule make it very difficult to determine when increased flows become unlawful.[75] Thus, if a servient landowner mistakenly obstructs lawful flows, he or she may be liable for any resulting damage to the dominant landowner. Finally, if a servient landowner has maintained an embankment across a channel for longer than twenty years, the prescriptive period, he or she may restore the embankment if it has been washed away. However, he or she may not increase the height beyond that of the original embankment.[76]

Highway authorities and drainage districts may also use the power of condemnation, which is related to self-help. If a state entity possessing this power must drain onto the land of another outside the course of natural drainage, the state entity may condemn an easement. This power is limited only by the requirements of necessity and just compensation.[77] Under the Drainage Code, a private landowner may pass a covered drain under the land of another[78] but there are serious questions as to the constitutionality of this provision.[79]

D. LIMITATIONS ON GRANTING OF DAMAGES AND INJUNCTIONS

IN SOME INSTANCES, CIRCUMSTANCES WILL LIMIT AN AVAILABLE REMEDY.

The legal remedies discussed in the two preceding sections are not always applicable. Certain circumstances may preclude either remedy, even though a drainage rule has been violated. For example, the plaintiff may not be entitled to the remedy sought because the time under the statute of limitations has run out[80] or because the party being sued cannot be made a defendant in a court of law or equity.[81] Another limitation might involve the different degrees of liability placed upon a highway authority, depending upon whether a ministerial or a discretionary duty is performed.[82]

NOTES

1. Doerr v. State, 22 Ill. Ct. Cl. 314 (1956).
2. Ill. Rev. Stat. ch. 37, §439.8 (1983).
3. Ill. Rev. Stat. ch. 37, §72.1 (1983); Lynch v. Devine, 45 Ill. App. 3d 743, 359 N.E.2d 1137 (1977) (county); Smith v. State, 16 Ill. Ct. Cl. 208 (1947) (municipal corporation).
4. Ill. Rev. Stat. ch. 37, §439.8 (1983).
5. Ill. Rev. Stat. ch. 42, §2-9 (1983).
6. *See, e.g.,* Moore v. Gar Creek Drainage District, 266 Ill. 399, 107 N.E. 642 (1915); Chaplin v. Highway Commissioners, 129 Ill. 651, 22 N.E. 484 (1889).
7. Ill. Rev. Stat. ch. 42, §§12-7, 12-8, and 12-10; ch. 121, §9-117 (1983).
8. Ill. Rev. Stat. ch. 121, §9-117 (1983).
9. Wessels v. Colebank, 174 Ill. 618, 51 N.E. 639 (1898).
10. Coomer v. Chicago and N.W. Transportation Co., 91 Ill. App. 3d 17, 414 N.E.2d 865 (1980).
11. Elser v. Village of Gross Point, 223 Ill. 230, 242, 79 N.E. 27, 31 (1906). "A municipal corporation has no greater right than a natural person to divert surface waters in large quantities by an artificial channel upon the land of another, except it may do this in the exercise of eminent domain, upon making just compensation as required by the constitution."
12. Young v. Commissioners of Highways, 134 Ill. 569, 581, 25 N.E. 689, 693 (1890). "The commissioners of highways, where they undertake to drain a public highway, possess the same rights, and are to be governed by the same rules, as adjoining landowners who may undertake to drain their own lands, except where they may be proceeding under the eminent domain laws of the State."
13. Doerr v. State, 22 Ill. Ct. Cl. 314, 324-325 (1956). "[T]he state would be liable for the negligent acts of its servants or agents for the diversion of the flow of surface waters by reason of the doing of a wrongful act, or omitting to do something for the protection of property owners in seeing to it that surface water is not diverted, resulting in damage."
14. Doerr v. State, 22 Ill. Ct. Cl. 314, 319 (1956). "This is not a case under Sec. 13 of Art. 2 of the Constitution of Illinois, wherein private property is being taken for a public improvement, for which the state is required to make payment therefor, but is a case where the state has negligently changed the drainage or

omitted to remove obstructions, so that water could flow in its natural course. . . ."

15. *See* Elser v. Village of Gross Point, 223 Ill. 230, 242, 79 N.E. 27, 31 (1906) (municipal corporation); Young v. Commissioners of Highways, 134 Ill. 569, 581, 25 N.E. 689, 693 (1890) (county); Doerr v. State, 22 Ill. Ct. Cl. 314, 318 (1956) (state).
16. Lynch v. Devine, 45 Ill. App. 3d 743, 359 N.E.2d 1137 (1977).
17. Smith v. State, 16 Ill. Ct. Cl. 208 (1947).
18. Ill. Rev. Stat. ch. 37, §72.1 (1983).
19. Ill. Rev. Stat. ch. 37, §439.8(d); ch. 37, §§72.25-.26 (1983); 21A I.L.P. *Injunction* §182 (1968).
20. ILLINOIS DEPARTMENT OF HIGHWAYS, PERSONNEL POLICY AND PROCEDURE MANUAL 20 (rev. ed. 1984).
21. 15 I.L.P. *Damages* §2 (1968); Cromwell v. Allen, 151 Ill. App. 404 (1909).
22. Jacksonville, N.W. & S.E. R.R. v. Cox, 91 Ill. 500 (1879).
23. Bradbury v. Vandalia Levee & Drainage District, 236 Ill. 36, 86 N.E. 163 (1908). *See also* Gormley v. Sanford, 52 Ill. 158 (1869).
24. Baker v. Leka, 48 Ill. App. 353 (1892).
25. Mellor v. Pilgrim, 7 Ill. App. 306, 311 (1880).
26. Olmstead v. Burke, 25 Ill. 74 (1860).
27. *See* Myers v. Arnold, 83 Ill. App. 3d 1, 7-8, 403 N.E.2d 316, 321 (1980).
28. Atherton v. East Side Levee & Sanitary District, 211 Ill. App. 55 (1918); Baker v. Leka, 48 Ill. App. 353 (1892).
29. Reinke v. Sanitary District, 260 Ill. 380, 103 N.E. 236 (1913); First National Bank of Des Plaines v. Amco Engineering Co., 32 Ill. App. 3d 451, 335 N.E.2d 591 (1975).
30. Schlitz Brewing Co. v. Compton, 142 Ill. 511, 32 N.E. 693 (1892).
31. Schlitz Brewing Co. v. Compton, 142 Ill. 511, 517, 32 N.E. 693, 695 (1892).
32. City of Keithsburg v. Simpson, 70 Ill. App. 467, 470-471 (1896).
33. Myers v. Arnold, 83 Ill. App. 3d 1, 403 N.E.2d 316 (1980).
34. Firestone v. Fritz, 119 Ill. App. 3d 685, 456 N.E.2d 904 (1983).
35. Firestone v. Fritz, 119 Ill. App. 3d 685, 688, 456 N.E.2d 904, 907 (1983).
36. County of Winnebago v. Kennedy, 60 Ill. App. 2d 408, 412, 208 N.E.2d 612, 614 (1965).
37. St. Louis Merchants' Bridge Terminal Ry. Association v. Schultz,

226 Ill. 409, 415, 80 N.E. 879, 882 (1907). *See also* Grommes v. Town of Aurora, 37 Ill. App. 2d 1, 185 N.E.2d 3 (1962).

38. Adams v. Stadler, 78 Ill. App. 432 (1898).
39. Zuidema v. Sanitary District, 223 Ill. App. 138 (1921).
40. Young v. West, 130 Ill. App. 216, 218 (1906). *See also* Grommes v. Town of Aurora, 37 Ill. App. 2d 1, 185 N.E.2d 3 (1962); Comerford v. Morrison, 145 Ill. App. 615 (1908).
41. Delano v. Collins, 49 Ill. App. 3d 791, 364 N.E.2d 716 (1977); Pierce v. DeJong, 13 Ill. App. 3d 889, 300 N.E.2d 782 (1973).
42. Pierce v. DeJong, 13 Ill. App. 3d 889, 892, 300 N.E.2d 782, 785 (1973).
43. CLARK, 5 WATER AND WATER RIGHTS §458.2(B) at 124-125 (1972 & Supp. 1978). *See also* Hughes v. Anderson, 68 Ala. 280, 283, 286, 44 Am. Rep. 147, 148, 151 (1880); Anvil Inv. Ltd. v. Thornhill Condominiums, 85 Ill. App. 3d 1108, 1119, 407 N.E.2d 645, 653 (1980) ("[A]bsent a statutory prohibition, punitive damages should be awarded independent of the cause of action.").
44. Ill. Rev. Stat. ch. 85, §2-102 (1983) (local governments). No Illinois statute specifically exempts the state from an action for punitive damages. While there is no case law on point, the nature of punitive damages and characteristics of a governmental entity suggest the principle that the state not be subject to punitive damages. The objectives of punitive damages are punishment and deterrence. Since the burden of punitive damages assessed against the state would be borne by its taxpayers, the punitive damages would punish the innocent taxpayers without directly punishing the wrongdoer. There is little justification for punishing taxpayers or attempting to deter them from future misconduct committed by the state. Thus, the common law of Illinois suggests that the state is not subject to punitive damages.
45. Sanitary District v. Ray, 199 Ill. 63, 64 N.E. 1048 (1902); Indiana, Illinois, & Iowa R.R. v. Patchette, 59 Ill. App. 251 (1894).
46. Funston v. Hoffman, 232 Ill. 360, 83 N.E. 917 (1908).
47. Younggreen v. Shelton, 101 Ill. App. 89, 90 (1901).
48. Illinois Central R.R. v. Allen, 39 Ill. 205 (1866).
49. Groff v. Ankenbrandt, 124 Ill. 51, 15 N.E. 40 (1888); Covenant Club v. Thompson, 259 Ill. App. 311 (1930). *See also* Elliott v. Nordorf, 83 Ill. App. 2d 279, 227 N.E.2d 547 (1967). Without an allegation that purchasers of lots in a subdivision had participated in the construction of the streets, drains, or tiles that changed

the surface flow, there was no cause of action against the purchasers.

50. Wangelin v. Goe, 50 Ill. 459 (1869).
51. Fisher v. Board of Trade of Chicago, 80 Ill. 85 (1875).
52. Newlin v. Prevo, 81 Ill. App. 75 (1898).
53. Dunn v. Youmans, 224 Ill. 34, 40, 79 N.E. 321, 323 (1906).
54. Graham v. Keene, 143 Ill. 425, 32 N.E. 180 (1892); Wilson v. Bondurant, 142 Ill. 645, 32 N.E. 498 (1892); Francis v. Galbreath, 278 Ill. App. 389 (1935).
55. Daum v. Cooper, 208 Ill. 391, 70 N.E. 339 (1904).
56. Hotz v. Hoyt, 135 Ill. 388, 25 N.E. 753 (1890).
57. 21A I.L.P. *Injunctions* §3 (1977); Lyle v. City of Chicago, 357 Ill. 41, 191 N.E. 255 (1934).
58. Baumgartner v. Bradt, 207 Ill. 345, 69 N.E. 912 (1904).
59. Town of Nameoki v. Buenger, 275 Ill. 423, 114 N.E. 129 (1916); Town of Bois D'Arc v. Convery, 255 Ill. 511, 99 N.E. 666 (1912); Brown v. Ponton, 80 Ill. App. 3d 1069, 400 N.E.2d 558 (1980).
60. Baughman v. Heinselman, 180 Ill. 251, 54 N.E. 313 (1899).
61. Francis v. Galbreath, 278 Ill. App. 389, 392-393 (1935) (quoting Winhold v. Finch, 286 Ill. 614, 619, 122 N.E. 53, 55 (1919)).
62. Wahle v. Reinbach, 76 Ill. 322, 327 (1875). *See also* Village of Dwight v. Hayes, 150 Ill. 273, 37 N.E. 218 (1894); Minke v. Hopeman, 87 Ill. 450 (1877).
63. Dayton v. Rutherford, 128 Ill. 271, 21 N.E. 198 (1889).
64. Town of Nameoki v. Buenger, 275 Ill. 423, 114 N.E. 129 (1916).
65. Dierks v. Commissioners of Highways, 142 Ill. 197, 31 N.E. 496 (1892).
66. King v. Manning, 305 Ill. 31, 136 N.E. 730 (1922).
67. Jewett v. Sweet, 178 Ill. 96, 52 N.E. 962 (1899); Young v. Commissioners of Highways, 134 Ill. 569, 25 N.E. 689 (1890); Commissioners of Highways v. Foster, 134 Ill. App. 520 (1907). *See also* Barnard v. Commissioners of Highways, 172 Ill. 391, 50 N.E. 120 (1898).
68. Wessels v. Colebank, 174 Ill. 618, 51 N.E. 639 (1898).
69. Coomer v. Chicago and N. W. Transportation Co., 91 Ill. App. 3d 17, 414 N.E.2d 865 (1980); Schmitz v. Ort, 92 Ill. App. 407 (1900).
70. Wessels v. Colebank, 174 Ill. 618, 51 N.E. 639 (1898).
71. *See* Triplett v. Beuckman, 40 Ill. App. 3d 379, 354 N.E.2d 458 (1976); Savoie v. Town of Bourbonnais, 339 Ill. App. 551, 90

N.E.2d 645 (1950). *See also* Advising Farmers, Vol. 1, §24.16 (Ill. Inst. for CLE, 1983, Supp. 1985).

72. H.W. Hannah, Illinois Farm Drainage Law 7 (University of Illinois College of Agriculture Circular 751, 1956).
73. *See* People *ex rel.* Burow v. Block, 276 Ill. 286, 292, 114 N.E. 527, 529 (1916) ("The right of the owner of a dominant heritage by ditches and drains to collect the surface water falling on his estate and discharge it into a natural water channel, even if the quantity of water cast upon the servient estate is thereby increased, is not involved. The existence of such a right does not give the landowner the right to enter upon and cut through a highway without incurring any liability. . . .").
74. Schmitz v. Ort, 92 Ill. App. 407 (1900); Coomer v. Chicago and N. W. Transportation Co., 91 Ill. App. 3d 17, 414 N.E.2d 865 (1980). *See also* CLARK, 5 WATER AND WATER RIGHTS §458.3 n. 3 at 590 (1972 and Supp. 1978) (citing various other jurisdictions recognizing this right).
75. *See* Templeton v. Huss, 57 Ill. 2d 134, 311 N.E.2d 141 (1974).
76. Beechley v. Harms, 332 Ill. 185, 163 N.E. 387 (1928).
77. *See, e.g.,* Ill. Rev. Stat. ch. 42, §4-17 (1983).
78. Ill. Rev. Stat. ch. 42, §2-2 (1983).
79. Advising Farmers, Vol. 1, §24.18 (Ill. Inst. for CLE, 1983, Supp. 1985).
80. Ill. Rev. Stat. ch. 110, §§13-101 *et seq.* (1983); ch. 37, §439.22 (1983); Zerban v. Eidman, 258 Ill. 486, 101 N.E. 925 (1913).
81. Ill. Rev. Stat. ch. 127, §801; ch. 37, §439.8 (1983).
82. Nagle v. Wakey, 161 Ill. 387, 43 N.E. 1079 (1896); Tearney v. Smith, 86 Ill. 391 (1877).

CHAPTER VII: SUMMARY

This chapter summarizes the basic principles of drainage law discussed in the previous chapters. These principles are grouped according to the chapters in which they were fully developed.

A. NATURAL DRAINAGE RULES

Landowners, including highway authorities, may drain water away as it would drain in a state of nature. Lower landowners, including highway authorities, must accept water flowing naturally onto or through their lands and have no right to interfere with such natural drainage.

In the interest of good husbandry, dominant estate owners may construct open or covered drains on their lands for agricultural purposes, even though they may increase the flow of drainage water in the watercourses from the dominant to the servient estates. Dominant estate owners, however, must discharge the waters at the natural point where they would have entered the servient estates, and they generally may not cut or tile through divides so that waters from different watersheds are discharged upon the servient estates. The amount and manner of water discharged upon the lower owner may be subject to a reasonableness limitation. Construction in streams may require a permit from the Illinois Department of Transportation and the Corps of Engineers.

In nonagricultural settings and absent local ordinances specifying storm drainage and detention requirements, dominant estate owners may drain their land into public drains or onto servient lands. The increased flow of surface water must be consistent with the policy of "reasonableness of use." Large drainage improvements may require a permit from the Illinois Department of Transportation and the Corps of Engineers.

The purpose of highway ditches and subsurface drains is to drain excess water off the highway right-of-way. It is not an obligation of highway authorities to construct ditches and subsurface drains in order to improve the natural drainage on adjacent lands. However,

without acquiring an easement of obstruction by agreement, prescription, or condemnation, the highway authority has no right to obstruct natural drainage across its right-of-way.

Servient estate owners may not intentionally obstruct watercourses flowing across their lands, but they have no duty to keep them clear of brush, silt, or debris carried by nature. Because of their drainage easements, dominant estate owners may go upon the servient estates to make repairs as long as they do not injure the land unnecessarily.

Rights and responsibilities of natural drainage can be altered by agreement between the parties, through prescriptive easements, and where a governmental entity is involved, through exercise of the power of eminent domain. A period of twenty years is necessary to acquire an easement of drainage or obstruction by prescription.

B. STATUTORY DRAINAGE RULES

Highway authorities are subject to the natural drainage law. Through the power of eminent domain, however, a highway authority may modify its natural drainage rights. In addition, a highway authority may contract with landowners to alter its drainage obligations. The Highway Code makes it illegal to obstruct or injure a highway and requires a permit for any work in a right-of-way. In general, a highway authority is liable for maintenance and repair of ditches in a right-of-way that benefits the highway.

The organization of drainage districts in Illinois is governed by the Drainage Code. Highway authorities are exempted from assessment by drainage districts. In general, drainage districts may use highway rights-of-way, subject to a permit by the highway authority. In addition, drainage districts must compensate adjacent landowners whose property rights are invaded. Drainage districts possess the power of eminent domain and probably can exercise eminent domain against a highway authority. In some circumstances drainage districts are required by statute to obtain a permit from the Department of Transportation.

Individual landowners may contract with a highway authority to construct a drainage tile in the highway to accommodate the landowners' drainage in addition to that of the highway. An individual may obtain permission to operate a drain in a highway authority's right-of-way for up to twenty years. Injuring or obstructing highways is prohibited without authority approval.

The Drainage Code authorizes an individual landowner to extend

a covered drain through another's land. However, this provision may not be constitutional under the current Illinois Constitution.

The Drainage Code permits the formation of mutual drainage systems. However, because highway authorities may not be assessed as members of a mutual drainage system, these provisions practically apply only between private landowners.

C. BRIDGES AND CULVERTS

When a highway crosses a natural drain or ditch developed in the course of natural drainage, the highway authority must construct and maintain a bridge or culvert. It must be sufficient to serve the drainage needs of the public for all future time. However, if a drainage district increases the capacity of the natural drain or ditch or changes its alignment and thereby threatens the bridge crossing it, the drainage district is liable to the highway authority for the cost of protecting the bridge. When a drainage district drain crosses an existing highway other than in the course of natural drainage, the district is liable to the highway authority for construction, repair, and maintenance costs.

In urban areas drainage matters are handled by municipal corporations as opposed to drainage districts exercising storm drainage powers. Municipal corporations are liable for the cost of bridge construction over artificial channels and for replacing bridges destroyed by deepening or widening natural channels. Maintenance appears to be the responsibility of highway authorities or municipalities within whose jurisdiction the street or highway lies.

Where drainage districts construct open drains that cut off private lands from public highways, the drainage district must provide access across the ditch, or in some cases it must compensate the landowner for construction and cost. Where highway ditches constructed alongside a highway as part of the highway drainage system deprive an adjacent landowner of access to the highway, the authority must install adequate culverts or other crossings. If additional culverts become necessary because additional houses and driveways are constructed, the highway authority may issue a permit so the homebuilder can install the culvert.

D. DRAINAGE AND THE ENVIRONMENT

Landowners who suffer an unreasonable invasion of the use and enjoyment of their properties may bring a private nuisance action. A public nuisance action may be brought by a public official against any action that threatens the public health, safety, or welfare. Federal

water pollution legislation has created a statutory nuisance action that may be more far-reaching than common law nuisance actions. Where a nuisance is found to exist, the court may enjoin the nuisance conduct, or it may require the party creating the nuisance to pay damages.

The Federal Clean Water Act is designed to regulate all point-source discharges into the waters of the United States. Unless exempted, a discharge must be authorized by a national pollutant discharge elimination system permit. Permits are also required for discharge of dredged and fill material in the waters of the United States and on wetlands.

Under the National Environment Policy Act, federal agencies are required to prepare an environmental impact statement (EIS) prior to any major federal action that significantly affects the quality of the human environment. The EIS must be approved before significant design activities or property acquisitions occur. The environmental impact statement may be prepared by state or local agencies receiving federal funding, but the federal agency administering the funds bears the ultimate responsibility for the scope of this document. Under certain circumstances, a less comprehensive environmental report may be permissible.

A number of federal statutes require permits for construction in navigable waters. Two executive orders have been issued to protect wetlands and floodplains. In addition, Congress has passed the Fish and Wildlife Coordination Act and the Endangered Species Act to protect these special concerns. Construction by highway authorities, drainage districts, or individuals in streams or floodways that drain one square mile in urban areas or ten square miles in rural areas requires a permit from the Illinois Department of Transportation. The Department of Transportation and Corps of Engineers use a joint application form that triggers environmental and water quality reviews.

The Illinois Department of Agriculture has adopted guidelines for erosion and sediment control. Soil and water conservation districts implement the guidelines, although no enforcement mechanism is included in the authorizing act.

Soil loss guidelines have been published under the Illinois Soil and Water Conservation Districts Act. Maximum soil losses allowed under these guidelines are being phased in gradually, but the goal is to limit such losses to two to five tons per acre per year by the year 2000. These guidelines and the complaint mechanism through which they are implemented may help highway authorities and landowners

whose drainage ditches and tiles are damaged by sedimentation from excessive erosion on nearby lands.

E. LEGAL REMEDIES

With limited exceptions, individuals, municipalities, counties, and state highway authorities are all subject to drainage law. Actions involving private landowners, counties, and municipalities and actions seeking injunctive relief against the state are brought in the circuit courts. Actions seeking monetary damages from the state are brought in the Court of Claims.

Nominal, special, and permanent damages are available remedies for drainage violations. Determining the nature and extent of monetary damages is often difficult. Injunctions are available for substantial or irreparable injuries and where no other adequate legal remedy exists. In addition, self-help may be available, simplifying the remedy process. For example, if one's drainage is impaired because natural obstructions are blocking the watercourse on the servient land, the owner of the dominant estate may enter the servient estate to remove the natural obstructions.

GLOSSARY

Acquiescence. Conduct recognizing the existence of a transaction and intended, at least to some extent, to carry the transaction or permit it to be carried into effect. The act may not deliberately be intended to ratify a former transaction that is known to be voidable, but it recognizes the transaction as existing and to some extent at least, it carries it into effect or obtains or claims the benefits resulting from it. Thus acquiescence differs from "confirmation," which implies a deliberate act intended to renew and ratify a transaction known to be voidable.

Artificial watercourse. A watercourse generally owing its origin to acts of man. Examples are canals, drainage ditches, and subsurface drains.

Basin. A natural or artificially created space or structure that is capable of holding water by reason of its shape and the character of its confining material; the surface area within a given watershed.

Bridge. A structure erected on foundations, piers, or abutments over a depression or an obstacle such as a river, roadway, or railroad; it carries a roadway for vehicular and pedestrian traffic and provides an opening of twenty feet or more between bearings.

Civil law. A written code of laws that originated in ancient Rome and that is still used in many countries. It is distinguished from English common law, which is based on statutes and court decisions. (Louisiana is the only state now under civil law, although Illinois and some others have adopted natural drainage rules like those in the civil law.)

Codification. The rearrangement of all the laws on a particular subject under one general title and in one place.

Common enemy rule. Surface water is a common enemy, and each landowner has an unlimited legal privilege to deal with it as he or she pleases without regard to the consequences that might be suffered by a neighbor. Opposed to it is the natural drainage rule, which

requires the owner of lower land to accept surface water that naturally drains onto that land.

Common law. The body of principles that evolved from traditional usage and custom and that now receives judicial recognition and sanction through repeated application. These principles develop independent of legislation and are embodied in court decisions.

Condemnation. A legal proceeding to secure private land for a public purpose after reasonable payment for it. Condemnation proceedings are used when an owner does not convey title voluntarily. Eminent domain proceedings are condemnation proceedings.

Contiguous. Adjacent or touching.

Contract. An agreement to do or refrain from doing a certain thing. Consideration, legal subject matter, competent parties, and a meeting of the minds of the parties must all be present.

Culvert. A closed conduit other than a bridge that conveys water in a natural channel or waterway beneath and across a roadway.

Department. The Illinois Department of Transportation, usually acting through its district engineers.

Defendant. The person or group defending or denying; the party against whom relief or recovery is sought in an action or suit; the accused in a criminal case.

Diffused surface water. Water that flows across land in no defined channel.

Dicta. An observation or remark made by a judge concerning a question raised by a case but not necessarily involved in it or essential to its determination.

Ditch. An artificially constructed open drain or a natural drain that has been artificially improved.

Diversion. The deflection of surface waters or stream waters into a watercourse to which they are not naturally tributary.

Divide. The watershed or peak of land from which the heads of streams or runoff waters flow in opposite directions.

Dominant estate or tenement. In a drainage context, the dominant estate is higher land from which water naturally flows. The land to which the water naturally flows is the servient estate.

Dominant land. Property so situated that its owners have rights on adjacent property, such as a right-of-way or a right of natural drainage. The adjacent land is called the servient land.

Drain. Any ditch, watercourse, or conduit, whether open, covered, or enclosed, natural or artificial, or partly natural and partly artificial, by which waters coming or falling upon lands are carried away.

Drainage. The general term applied to the removal of surface or ground water from a given area either by gravity or by pumping.

Drainage area. The area from which water originates at a given point or location on a stream.

Drainage district. A legal entity formed to construct, maintain, or repair drains or levees or to enlarge other drainage or levee work for agricultural, sanitary, or mining purposes.

Drainage structures. Those structures other than drains, levees, and pumping plants that are intended to promote or aid drainage. Such structures may be independent of other drainage work, or they may be a part of or incidental to such work. The term includes but is not restricted to catch-basins, bulkheads, spillways, flumes, drop-boxes, pipe outlets, junction boxes, and structures whose primary purpose is to prevent the erosion of soil into a drain.

Drainage system. A system by which lands are drained and protected from overflow, including use of drains, drainage structures, levees, and pumping plants.

Easement. An interest in another's land that allows the easement owner to use the other's land for special purposes consistent with the other's general property rights; for example, the right to have water flow across a neighbor's land.

Effluent. Liquid that flows out of a containing space; in particular sewage, water, or other liquid that is partially or completely treated or in its natural state that flows out of a reservoir, basin, treatment plant, or part thereof; an overflowing branch of a main stream or lake; a stream fed by ground water.

Elevation. Altitude; height in relation to sea level or any assumed datum.

Eminent domain. The power of the state to take private property for public use.

Erosion. Wearing away of land surface by running water, wind, or other geological agents.

Enjoin. To require, command, estop, or positively direct. To require a person by writ of injunction to perform or to abstain or desist from some act.

Equity. A system of jurisprudence administered by courts of equity

as opposed to courts of law. Equity jurisdiction operates in circumstances where the generality, rigidity, and inflexibility of law do not permit a court to provide an adequate remedy. Among the most important of the remedies granted by a court of equity is the injunction.

Fee simple. The unqualified ownership of land.

Flood water. Former stream waters that have escaped a watercourse to flow or stand over adjoining lands.

Flow line. The bed of a stream or culvert.

Heritage. Every type of immovable that can be the subject of property, such as lands, houses, orchards, woods, marshes, ponds, etc., in whatever mode they may have been acquired, either by descent or purchase.

Highway. Any public way for vehicular travel laid out pursuant to any law of the State or the Territory of Illinois; or which has been established by dedication or used by the public as a highway for fifteen years; or which has been or may be laid out to connect a subdivision or plotted land with a public highway and that has been dedicated for the use of the owners of the land in the subdivision or plotted land where such dedication has been accepted and used and which has not been vacated pursuant to law. The term "highway" includes rights-of-way, bridges, drainage structures, signs, guardrails, protective structures, and all other structures and appurtenances necessary or convenient for vehicular traffic. A highway in a rural area may be called a road, while a highway in a municipal area may be called a street.

Highway authority. The state department concerned with state highways; the county board with respect to county highways or county unit district roads if a discretionary function is involved; the county superintendent of highways if a ministerial function is involved; the highway commissioner with respect to township or district roads not in a county unit road district; or the corporate authorities of a municipality with respect to municipal streets.

Injunction. A judicial order requiring one to do or refrain from doing a particular act. When the injunction commands the performance of a positive act, it is termed "mandatory."

Invert. The floor, bottom, or lowest portion of the internal cross section of a conduit.

Jurisdiction. The authority or range of authority for a governing body.

Land. Real property, including but not restricted to lots, railroad rights-of-way, public highways, streets and alleys, and easements.

Landowner. The owner of real property, including an owner of an undivided interest, a life tenant, a remainderman, and a trustee under an active trust; but not including a mortgagee, a trustee under a trust deed in the nature of a mortgage, a lien holder, or a lessee.

Lien. A legal claim against particular property for services rendered the property. A drainage assessment is a legal claim against an assessed property.

Litigate. To pursue in court through a lawsuit.

Maintenance. Preserving and keeping each type of roadway, roadside, structure, and facility as close as possible to its original condition or as later improved.

Ministerial duty. A duty in which nothing is left to discretion; a simple and definite duty imposed by law and arising under conditions admitted or proved to exist.

Natural drainage rule. Where two adjoining pieces of land are so situated that one is dominant and the other servient, the dominant landowner has the right to have water flow naturally from his or her land to that of the servient landowner.

Natural watercourse. The course followed by water where the conformation of land is such that it gives the water a fixed and determinate course and discharges it uniformly upon the servient tract at a fixed and definite point.

Parol. Oral or verbal.

Plaintiff. A person who brings an action; the party who complains or sues in a civil action and is so named on the record; a person who seeks remedial relief for an injury to rights; a complainant; the prosecution in a criminal case.

Plans. Approved drawings or reproductions of drawings pertaining to the construction or details of work.

Prescriptive rights. An easement of drainage through a ditch, drain, or culvert to or across the land of another. In order to acquire this right, open, adverse, and uninterrupted use of the drainage facility must be shown under a claim of right for the required time.

Prima facie. A fact appearing or presumed to be true unless disproved by some evidence to the contrary.

Promulgate. The act of publishing or announcing officially.

Proprietor. An owner or a person who has legal title or exclusive right to some property, whether in possession or not.

Public road. A road constructed on dedicated right-of-way and accepted by a public agency.

Quasi-corporations. Organizations resembling corporations; municipal societies or similar bodies.

Right-of-way. The entire area reserved for the construction and maintenance of a roadway and the improvement of the roadsides.

Right-of-way plan. A number of right-of-way plats indicating all rights-of-way in one particular section.

Right-of-way plat. A drawing of a tract of right-of-way to be acquired from property owners. The plat shows location, width, length, acreage, and legal description of the tract.

Roadway. That portion of a highway improved, designed, or ordinarily used for vehicular travel.

Rural area. All locations outside an urban area.

Servient estate or tenement. An estate that owes a duty or a service to another estate. The dominant tenement is the estate to which the duty or service is owed.

Servient land. If two adjoining pieces of land are so situated that one piece is at a lower elevation than the other, the lower piece of land is considered to be servient.

Sewage. The water supply of a community after it has been fouled by various uses. It may be a combination of the wastes carried from residences, business buildings, institutions, and industrial establishments together with such ground water, surface water, and storm water as may be present.

Statute of limitations. An act of the legislature that sets a period of time within which a legal action must be brought. In the case of interests in land, the period is usually twenty years from the time the right to sue first arises. The statute makes the wrongdoer immune from suit after the term has expired.

Statutory law. Laws enacted by the General Assembly to enlarge or change the common law.

Stream water. Former surface or ground waters that have entered and now flow in a well-defined natural watercourse together with other waters reaching the stream by direct precipitation or rising from springs in the bed or banks of the watercourse.

Subsurface drainage. Collection and removal of underground water.

Surface drainage. Collection and removal of water from the surface of the road and the ground.

Surface water. Waters that fall on the land from the skies or arise in springs and diffuse themselves over the surface of the ground, following no defined course or channel, and not gathering into or forming any more definite body of water than a mere bog or marsh. They are lost by being diffused over the ground through percolation, evaporation, or natural drainage.

Urban area. An incorporated or unincorporated area that has been developed primarily for residential or business purposes.

Watershed. The area contained within a divide above a specific point on a stream.

Writ of mandamus. A writ from a court of superior jurisdiction directed to a private or municipal corporation, its officers, executive, administrative, or juidicial, or to an inferior court, commanding the performance of a particular act therein specified and belonging to the public, official, or ministerial duty. The writ directs the restoration of the complainant to rights or privileges of which he or she has been illegally deprived.