

CHAPTER 88.

FARM DRAINAGE LAW.

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88.01 Farm drainage law. This chapter, and all subsequent amendments thereto, shall be known as the "Farm Drainage Law."

Note: The farm drainage statutes manifest an intent to incorporate applicable parts of the drainage district law into the chapter dealing with farm drainage law. *Lewiston Drainage Dist. v. Diehl*, 227 W 372, 279 NW 45.

88.02 Definitions. Whenever used in the farm drainage law the following terms and expressions shall mean unless otherwise indicated:

(1) "Benefits" shall include all pecuniary advantages accruing to lands and corporations from the construction of the proposed drains.

(2) "Board" or "drainage board" means the board and the members thereof created and appointed under section 88.04 of the statutes.

(3) "Chief engineer" means the chief engineer of the state of Wisconsin.

(4) "Cost of construction" shall include damages to lands and corporations both within and without a "drainage," the necessary reasonable fees and expenses of the board, the cost of surveying, a reasonable attorney's fees for petitioners and the board and all other reasonable necessary expenses incurred in the organization of and in the construction and completion of the work included within such "drainage."

(5) "Corporation" means all private and public corporations including drainage districts, farm "drainages" and all other drainage corporations.

(6) "County treasurer" means the treasurer of the county in which is located the county court having jurisdiction of any "drainage."

(7) "Court" or "county court" means the court of the county in which the "drainage" is located or the court having jurisdiction of the proceedings in any "drainage" located in more than one county.

(8) "Drainage," when appearing in quotation marks, shall refer to the lands or districts sought to be organized or included and lands organized and included in a drainage project.

(9) "Judge" or "county judge" shall refer to the judge, or the person sitting for the judge, of the county court having jurisdiction of the proceedings of any "drainage."

(10) "Land" or "lands" means lands, easements, and servitudes.

(11) "Mortgagee" shall include every person holding a mortgage or an assignment of a mortgage against lands within a "drainage" whose name and post-office address is known to the board or whose mortgage or assignment is legally recorded and contains the post-office address of such mortgagee or assignee.

(12) "Drain" shall mean an open ditch, a pipe line tile, levee, pump or other device for the drainage of water from land or the protection of land from water.

88.03 Proceeding before county court. (1) Orders fixing the time and place of hearing on all petitions and reports filed in the county court shall be made either by the court or the presiding judge or the person sitting in his place.

(2) All notices required to be given under the farm drainage law, unless otherwise therein specifically provided, shall be given by publishing the notice in a newspaper of general circulation in the vicinity once a week for 3 weeks, and by posting a written notice in 3 public places on or in the immediate vicinity of the lands proposed to be drained at least 10 days before the time fixed for hearing. Such notices shall also be given to the county highway committee by personal service on the chairman thereof. Where a railroad company is involved, all such notices shall be served upon such railroad company in the manner provided in section 88.03 (3a).

(3) Service of any notice in the manner required by sections 262.08 and 262.09, on all owners, occupants and mortgagees of lands proposed to be drained or crossed by the drains to be constructed, at least ten days before such hearing shall be sufficient notice.

(3a) Railroad companies shall file with the secretary of state a document stating the name and post-office address of the person upon whom any notice, required by chapter 88, may be served; and when such document has been so filed, notice of any proceeding under chapter 88 shall be served upon said person either by registered mail or personally within five days after the first publication of such notice. An affidavit of such service shall be filed by the commissioners with the proof of publication of such notice.

(4) Failure to post or serve notice as provided by subsections (2) and (3) of this section or to announce any adjournment shall not defeat the jurisdiction either of the court or of the drainage board. If failure to give legal notice to any person entitled thereto be discovered before an order or judgment is entered, the court shall adjourn the hearing and direct the giving of proper notice. If failure to give such legal notice be discovered after an order or judgment is entered, the court may order the person not served with notice to show cause before such court why he should not be bound by the order or judgment already entered.

(5) Notice of lis pendens shall be filed in the office of the register of deeds of the county in which are located any lands affected by any drainage proceedings under the farm drainage law but failure to file such notice shall not affect the jurisdiction of the court or board.

(6) Any petition, proof of service, report, order, judgment, or other paper filed or entered under the farm drainage law may be amended, modified, or corrected at any time, either before, at, or after hearing thereon but no amendment, modification or correction of any order or judgment shall be made after the issue of money obligations based thereon that will render the same more difficult of collection.

(7) In case the county judge is interested in any "drainage" or is otherwise disqualified to act in any hearing, he shall call in to act in his stead in such hearing some other county judge or a circuit judge or a court commissioner of his county, not disqualified.

(8) All objections or remonstrances made to the jurisdiction of the court or to the sufficiency or legality of any petition, report, or assessment or to the equity of any assessment or to any award of damages shall be in writing and filed in court and shall set forth clearly and in detail such objections. For satisfactory cause the court may adjourn any hearing for a period of not to exceed one month at any one adjournment.

(9) Several petitions may be filed in any proceeding and additional signers may be added to the petition with like force and effect as if they had signed the original petition or petitions at any time before the sufficiency of the signers of the petition or petitions has been adjudicated.

(10) The adjournment of any meeting or hearing beyond the time or failure to act within the time provided in the farm drainage law shall not affect the jurisdiction of either the county court or the drainage board.

(11) Failure to act at or adjourn any hearing shall not affect the jurisdiction of the court but a subsequent hearing shall be had and notice of time and place thereof shall be given. [1947 c. 245]

88.04 Appointment of farm drainage board; qualification of members; term. Upon the filing of the first petition for drainage under the provisions of the farm drainage law, the county court shall appoint in writing a farm drainage board which shall be constituted and have the powers and duties and receive the compensation herein provided for, as follows:

(1) Such board shall consist of three competent suitable persons, residents of such county, one of whom shall preferably be an experienced farmer and familiar with drainage and one shall be to some extent familiar with drainage engineering, if such person be available.

(2) At the time of their first appointment one member shall be appointed for a term of three years, one for a term of two years, and one for a term of one year. Upon the

expiration of their several terms of office the county court shall appoint a successor, whose term of office shall be for three years and until a successor is appointed and qualified. The county court may remove any member of the board for cause after notice given and may fill any vacancy.

(3) Each member of the board shall take and file the official oath.

(4) Ownership of or interest in lands sought to be drained shall not disqualify any person from acting as a member of such board, but the county court may in its discretion appoint a suitable person in his place to act as the third member of such board with reference to the particular "drainage" in which such member is interested.

(5) A majority of such board shall constitute a quorum to do business and in the absence of two members one member may adjourn any meeting and make announcement thereof.

(6) Such board, when all of its members shall have been duly sworn and qualified, shall be a permanent body corporate and shall have charge of all drains hereafter constructed under the farm drainage law and that have been heretofore constructed in attempted compliance with statutory enactment, except drainage district drains and except that drains now in process of construction under the existing town drain statutes, may be completed thereunder.

(7) Such board shall organize by electing one of its members president and another of its members secretary.

(8) The secretary shall keep a separate record of all proceedings and accurate minutes of all hearings held in each "drainage."

(9) Each member of the board shall keep an accurate statement of his necessary expenses and of the services rendered by him together with the dates thereof.

(10) Each member of the board shall receive as compensation for his actual necessary services five dollars per day of eight hours and proportionately for fractions of days for actual time spent in rendition of services and his actual reasonable expenses. Such compensation and expenses shall be filed in the county court as a bill and when allowed by that court shall be paid by the county treasurer out of any moneys in his hands belonging to such "drainage."

(11) The board may borrow money in the name of a proposed "drainage" to defray the expenses of organization.

Note: Member of county board or of county board committee may collect per diem for his services as provided in 59.03 (2) (f) and 59.06 (2), and on the same day collect a per diem as farm drainage board member at the rate prescribed in 88.04 (10). 35 Atty. Gen. 169.

88.05 Who may petition; what must be alleged. (1) Whenever lands will be improved and the public health or public welfare will be promoted by drainage the owner or owners of a majority of such lands or a majority of the owners owning one-third in area of such lands or a majority of the county board in which such lands are situated or a majority of the town board or boards of supervisors of the town or towns in which such lands are situated, may file in the county court a petition or petitions setting forth:

(a) A description of such lands and that same will be improved by drainage.

(b) That the public health or public welfare will be promoted by such drainage.

(c) A map or sketch of the area sought to be drained with the proposed drains shown thereon.

(d) That the benefits arising from such drainage will exceed the cost of construction.

(e) A proposed name or number for such "drainage."

(f) A prayer for such "drainage."

(g) Such petition need not be verified and in place of the foregoing paragraph (d) a petitioner or petitioners may file with the petition a written agreement that such petitioner or petitioners will pay such portion of the cost of construction as exceeds the benefits to all lands and corporations resulting from the construction of the proposed work.

(2) Upon filing such petition the court or judge thereof shall by order refer the same to and direct the board to report thereon.

88.06 Board and an engineer to examine lands; notice of same; report. (1) So soon as the petition shall be referred to the board, the board shall with the aid of an engineer examine the lands described in the petition and all other lands that the board believes will be benefited or damaged by the proposed work and shall consider whether the drains as proposed in the petition are satisfactory.

(2) The board shall fix a time and place of hearing on such petition which place shall be on or conveniently near the lands described in the petition.

(3) At least ten days' notice of the time and place of such hearing describing the lands described in the petition shall be given to all interested parties by serving a copy of such notice on each head of family residing on any of the lands described in the petition or by leaving a copy at his residence with a member of his household to whom the contents shall be explained or in the absence of such resident by posting the same upon or at the front

door of such residence and by posting the same in three public places on or near the lands described in the petition.

(4) Such notice may be in substantially the following form:

"Notice is hereby given that the drainage board of county will meet on the day of, 19.., at o'clock, .. M. at the (here describe the place of meeting) to consider the petition filed in the county court of county to drain lands among which are the following: (here describe the lands described in the petition). All persons interested may appear and be heard on the petition.

Dated

.....

Drainage Board.

(5) Such hearing may be adjourned to such time and place within the county as the board, after consideration thereof with those interested persons present, shall determine convenient. Public announcement shall be made of the time and place of such adjourned hearing but in case of failure to make such announcement notice thereof shall be given as provided in subsection (2) of section 88.03.

(6) At such hearing or adjourned hearing the board shall ascertain the sufficiency of the signers of the petition, shall hear all present that desire to be heard for or against the petition and within thirty days shall report to the court:

- (a) Whether the petition has the required number of signers;
- (b) Whether the lands described in the petition will be improved by drainage;
- (c) Whether other lands in the vicinity, draining to, from, or through the proposed drains, require drainage and if so describe the same;
- (d) Whether such drainage is feasible;
- (e) Whether the public health or public welfare will be promoted by the proposed work. The board in determining whether public health and welfare will be promoted shall include in their consideration whether the cumulative effect of such drainage over a period of years will lower the water levels of lakes or streams, or the subterranean sources that supply farm and city water systems and whether the general need for the type of land that will be made available for cultivation or other purposes by such drainage is sufficiently great to warrant the possible lowering of such water levels;
- (f) Whether the drains proposed in the petition will best accomplish the drainage prayed for and the area that should be drained. If the proposed drains are not satisfactory the board shall recommend other drains;
- (g) Whether the benefits from such work will exceed the cost of construction;
- (h) Such other facts as in the opinion of the board will aid the court in its decision upon the report; and may recommend to the court an increase or decrease in the area proposed in the petition to be drained;
- (i) The board shall attach to its report proof of the posting and service of notice of hearing on the petition together with a copy of its minutes of such hearing.

(7) If the area recommended by the board for drainage exceeds two hundred acres it shall, prior to the hearing on its report, procure and file a report of the chief engineer on (a) the location, design, feasibility and cost of the proposed outlet drains; (b) a general description of the additional drainage necessary to reclaim the land fully for general agricultural purposes, and the probable cost of the same; (c) a general comparison of the benefits in the different parts of the district on the basis of the location and design of the proposed drains, and the physical features of the land to be drained. The report of the chief engineer shall also include a report of the college of agriculture of the University of Wisconsin on (d) quality and character of soils and subsoils; (e) a soil map of the district; (f) the present agricultural value of the lands; (g) the kinds of crops to which such lands will be adapted after drainage. The chief engineer and the college of agriculture shall furnish such reports when requested so to do. Such reports and the report of the commissioners shall be prima facie evidence of the facts therein contained.

(8) The chief engineer upon receipt of a request for the report required in the preceding subsection, shall direct the board as to the necessary survey. Upon the completion of the survey the chief engineer shall make his report.

(9) Upon the filing of such report together with the report of the chief engineer, if such report be necessary, the court or judge shall fix a time and place of hearing thereon and cause notice of such hearing to be given to the owners of all lands and the county highway committee as provided in subsection (2) of section 88.03, and to all mortgagees by mailing a copy of such order to such mortgagees at their post-office addresses, if known to the board or shown upon the recorded mortgages, at least ten days before such hearing.

(10) The order fixing such hearing may be in substantially the following form and a copy of such order may be served as notice of such hearing:

County court for . . . county,
In the matter of the . . . drainage.

Whereas a report has been filed in this court by the county drainage board recommending the drainage of the following described lands: (here describe the lands reported for drainage).

It is ordered that said report be heard and examined before this court on the . . . day of . . . , 19 . . . , at . . . o'clock . . M. at the (here state the place of hearing) at which time and place all interested persons may appear and be heard. All objections must be in writing and comply with subsection (8) of section 88.03.

Dated

.....
County Judge.

[1945 c. 422]

88.07 Hearing on report; findings; costs. (1) If on such hearing the court shall find (a) That the petition or petitions have sufficient signers, (b) that the lands described in the petition or petitions together with any additional lands recommended by the board for drainage will be improved by the proposed work, (c) that the public health or public welfare will be promoted thereby, and (d) that the benefits from such proposed work will exceed the cost of construction, the court shall make an order organizing such "drainage" and direct the board to proceed with all convenient speed.

(2) If the court finds the first three facts above stated but finds that the benefits from such work will not exceed the cost of construction and a petitioner or petitioners shall, within ten days, file with the court a bond with sufficient surety or sureties to be approved by the court conditioned for the payment of the excess of the cost of construction over benefits or shall deposit and leave with such court such sum of money as the court shall determine will cover such excess, the court shall organize such "drainage;" otherwise the court shall deny the petition, shall tax the taxable costs of the proceedings and shall assess the same against the petitioners' lands described in the petition pro rata per acre.

(3) The court may include in a "drainage" any lands requiring drainage and lying adjacent to the lands described in the petition and shall not lose jurisdiction by reason of bringing in lands not described in the petition.

88.075 Drainage project may be stopped. (1) Whenever the owners of land who represent a majority of the lands described in the petition for the formation of the district, or represent a majority of the lands contained in the report of the drainage commission, shall before confirmation of the report of the commissioners for the creation of such district, and whenever the owners of land who represent more than a majority of the confirmed benefits in a farm "drainage" shall file with the county judge having jurisdiction of such drainage a petition requesting that no further proceeding be had and that no further expense be caused against such drainage, the court shall order a hearing thereon, notice of which shall be posted in 3 public places on or in the immediate vicinity of the land included in the "drainage" at least 10 days before the date of hearing. If on such hearing the court shall find that such petition is signed by the required number of owners and that notice of hearing was properly given it shall enter an order directing that no more work be done in or expense created against such "drainage," but such order shall in no way affect existing contracts.

(2) Thereafter the county clerk shall certify to the different town, city or village clerks the amount of taxes to be by them collected for the purpose of paying any indebtedness of such "drainage," with the names of the persons from whom the same is to be collected.

(3) Said "drainage" shall be liable for all debts existing against it at the time of the entry of said order to the same effect as if the order was not entered.

(4) The secretary of any such "drainage" having a bonded indebtedness shall continue to make an annual report as provided in section 88.13 and make a charge therefor notwithstanding the entering of an order as provided in subsection (1) herein.

(5) The entering of the order as provided in subsection (1) shall be effective and continue in force until a like application upon like notice requesting that work be continued, be heard and determined. [1931 c. 90; 1947 c. 405]

Note: Landowners may interpose opposition when advised that drainage proceedings are under way and that their lands will be included, and the court must order cessation of drainage work and expense on finding that sufficient owners have signed the objectors' petition and that notice of hearing was properly given. In re Proposed Farm Drainage, 207 W 338, 241 NW 347.

88.08 Board with an engineer to lay out drains; assess benefits and damages; estimate and distribute cost of construction. (1) Whenever a "drainage" is organized the board shall with the aid of an engineer (approved by the chief engineer if the area is more than two hundred acres):

(a) Lay out drains of sufficient depth and capacity to adequately drain the lands proposed to be drained and in determining the depth and capacity of such drains the board shall consider whether other lands lie above and drain in the direction of, through, and along the general course of the proposed drains;

(b) Assess the benefits that will accrue to each parcel of land and corporation benefited, and in assessing the benefits to farm lands the board shall ascertain and consider the depth, character and quality of the surface and subsoils, the thoroughness of drainage, the difficulty of drainage, the uses to which the land when drained will be adapted and all other material elements entering into the increase in the value of such land resulting from the proposed work;

(c) Award damages to such lands and corporations as will be damaged thereby;

(d) Estimate the cost of construction;

(e) Assess the cost of construction against the benefited lands and corporations in proportion to the benefits received;

(f) Prepare profiles and specify the grades of all drains;

(g) Prepare a map of such "drainage" showing the boundaries thereof and the location of all drains; and

(h) Report the same to the court in writing. If the area is more than two hundred acres such report shall be submitted to the chief engineer who shall return it within ten days with his approval or disapproval.

(2) The assessment of benefits and awards of damages shall be in substantially the following form:

Description of land or name of corporation.	Assessed benefits.	Assessed for construction.	Damages.	Net assessment for construction.
Section 6, Town.....	.....	.....	.....	.....
Range....., SE¼ NE¼.....	\$850.00	\$425.00	\$10.50	\$414.50
Lot 1.....	400.00	200.00	.....	200.00
Village of.....	2,500.00	1,250.00	666.00	584.00
B. G. & Q. Ry. Co.	1,000.00	500.00	600.00	.....
Town of.....	.....	.....	150.00	.....

(3) If the damages to any land or corporation shall exceed the assessment for cost of construction levied against such land or corporation, such excess shall be paid out of the assessment for cost of construction levied against all lands and corporations.

(4) Upon the filing of such report the court or judge shall fix a time and place of hearing and direct that notice thereof be given by posting and serving a copy of the order in the manner provided by subsection (9) of section 88.06.

88.09 Report confirmed. At the hearing on the report provided by section 88.08 the court shall hear all objections filed thereto; shall amend and correct the same to conform with the facts proven, and shall confirm the same as amended and corrected, and direct the board to enter into a contract or contracts and to proceed with the work. When the board is required, by the court, to advertise for bids, the advertisement shall be for such time, in such manner, and under such conditions as the court shall direct, and the work shall be let to the lowest responsible bidder unless in the opinion of the board the bid is unreasonably high and a lower bid can be obtained. The board may continue the letting of the work from time to time, and may reject any and all bids.

88.10 Collection of assessments; additional assessments. (1) All assessments and additional assessments for cost of construction, and all assessments and additional assessments for supplemental cost of construction, when confirmed by the court shall be certified to and recorded in the office of the register of deeds of the county in which the lands assessed therefor are located and shall thereafter be liens on such lands.

(2) All such assessments for construction shall become due and payable at once unless the court shall by order direct that the same may be paid in annual instalments not exceeding fifteen in number.

(3) The first instalment shall become due and payable on the first day of September following the date of confirmation thereof and one instalment shall become due and payable, together with all accrued interest, on the first day of September of each succeeding year thereafter.

(4) All such assessments shall draw interest from the date of confirmation of the same at the rate of six per cent per annum and such interest and the interest on any unpaid instalments shall be payable annually.

(5) In case the original assessment for cost of construction or for supplemental cost of construction shall not be sufficient to complete the work authorized and confirmed by the court, the court may direct the levy of additional assessments of cost of construction apportioned on the benefits previously confirmed by the court; but in no case shall the

total assessments for cost of construction including assessments for supplemental cost of construction against any land or corporation exceed the benefits assessed against the same unless a person or persons interested shall agree to pay such excess and shall furnish the court with sufficient security therefor substantially as outlined in subsection (2) of section 88.07.

88.11 Other lands may be joined to "drainage;" proceedings. (1) If the original work authorized and confirmed by the court does not sufficiently drain any lands assessed or if the owners of other lands desire to secure to such other lands the benefits of the work installed, any such owner may petition for the construction of the necessary supplemental drains or for the inclusion of his lands within such "drainage."

(2) Such petitioner and all other persons whose lands will be directly affected by the work proposed in such petition may in writing waive any or all notices of hearings and may consent to the immediate filing of a report laying out drains, assessing benefits and supplemental benefits and otherwise in substantially the form provided by section 88.06 and to immediate hearing thereon, upon which hearing the court may enter an order confirming the same as provided in section 88.07.

(3) In the event that no waiver or consent is filed by all persons immediately interested the procedure on such petition shall be substantially as outlined in sections 88.05 to 88.09.

88.12 Board may borrow money. Subject to the approval of the judge, the board may borrow money at a rate of interest not exceeding six per cent per annum and issue notes or bonds of a "drainage" therefor, but such obligations shall become due and payable not later than one year beyond the time fixed for the payment of the assessments on which they are based, and shall be a lien on the assessments for cost of construction, cost of repairs and cost of supplemental work, and any and all other assessments theretofore confirmed by the court. Subject to the approval of the court, the board shall have the power to borrow money under this section for the purpose of paying any and all obligations of the "drainage" and to refund existing notes and bonds. [1933 c. 266]

88.13 Secretary to certify assessments. The secretary shall keep a separate record of all assessments in each "drainage" and shall before the first day of December in each year certify to the clerk of the town, city, or village the amount due from each tract, parcel and easement of land and corporation located or assessed in such municipality.

88.14 Assessments, insertion in tax roll. (1) Each city, town and village clerk shall insert in the tax roll for each year the amounts of the unpaid assessments and interest thereon due that year against the respective lands and corporations as certified to him by the secretary of the board. Such assessments and interest shall be collected by the treasurer of each respective town, city and village and if unpaid, returned by him to the county treasurer. Such assessments and interest shall be kept separate from general taxes and if unpaid shall be sold in the same manner as general taxes and a separate certificate of sale shall be issued therefor in substantially the same form as certificates of sale of lands for general taxes. If taxes and drainage assessments against the same lands are sold at the annual tax sale they shall be sold together to the same bidder. After the expiration of 5 years from the issuing of a drainage assessment certificate a deed substantially in the same form as a tax deed may be issued thereon. No drainage assessment deed shall cut off any unpaid or subsequent drainage assessment or tax nor shall any tax deed cut off any drainage assessment.

(2) The provisions of law relating to interest on general taxes, both before and after tax sale, shall apply to drainage assessments carried into the tax rolls for collection; and the provisions of section 75.20 with reference to limitations on actions and issue of deeds on certificates of sale of lands sold for nonpayment of general taxes shall apply to drainage assessment certificates.

(3) In case of failure to certify or collect the unpaid assessments in any one year or if mistakes are made in certifying or collecting assessments the same may be certified, corrected, and collected in any subsequent year. [1939 c. 329; 1941 c. 158]

88.15 Highway law, when to apply. Whenever a drain is constructed, widened, deepened, or repaired across, or it is necessary to construct, remove, or repair any bridge on, any highway the procedure shall be as provided in, and the cost of such work and the maintenance of such drain shall be borne and apportioned as provided by statute with respect to highways in drainage districts.

88.16 Railway crossing, how effected. (1) Whenever a drain is constructed, widened, deepened, or repaired across, or whenever it becomes necessary to open the right of way or yards of a railway company for the passage of dredges and machinery, the procedure, the duties and liabilities of both the "drainage" and the railway company shall be as provided by statute in drainage districts with respect to crossings and openings through railway rights of way and yards.

(2) Whenever in the construction, cleaning or repairing of any drain it shall be necessary to remove or raise any sluice or pipe carrying water or other fluid, or any wire, conduit or cable used for electricity or for any other purpose for the passage of a dredge or other machinery, the procedure, the duties and liabilities of the "drainage" and the owner of such sluice, pipe, wire, conduit or cable shall be as provided by statute in drainage districts.

88.17 Same; highway crossings. Any drain across any highway or right of way shall be constructed according to like specifications, and at the same time that the drain above such right of way or highway is constructed.

88.18 County treasurer to be treasurer of "drainage." Moneys collected for or payable to any "drainage" shall be turned over to or paid to the county treasurer of the county whose court has jurisdiction thereof and such treasurer shall keep a separate account for each separate "drainage" and pay out the funds of such "drainage" only upon the order of the court or upon proper warrants of the drainage board.

88.19 Annual report of board. (1) On or before the first day of September of each year the board shall file with the county court a separate report on each "drainage" under its supervision. Such report shall set forth:

- (a) What repairs will be necessary for the ensuing year;
- (b) The probable cost of such repairs;
- (c) An estimate of the necessary incidental expense for the coming year;
- (d) An assessment for the incidental expense and necessary repairs of the "drainage" proportioned on the confirmed benefits assessed against all lands and corporations.

(2) Upon the filing of said report the court shall, by its written order, fix a time and place of hearing on the same. The notice of said hearing shall be required to specify the amount proposed to be assessed against the land of each owner and the time and place of such hearing. Copies of such notice shall be posted at least ten days before said hearing in at least ten public places in the territory covered by said proposed assessment. The court shall hear all interested parties at such hearing and shall then examine and may amend or modify the report and when the same shall be made satisfactory, the court shall approve the same and the board shall thereupon apportion such assessment against the lands and corporations benefited.

(3) The board, on approval of the court, may make necessary repairs and if no money is available or assessed therefor may after notice and hearing assess the same in its annual report. Such notice shall in all respects be governed by the provisions of subsection (2) of this section. [1937 c. 175]

88.20 Drainages may be consolidated. (1) Two or more "drainages," petitioned for or in process of organization or fully organized, may, upon the petition of interested persons, upon the recommendation of the board, or upon the initiative of the court, be consolidated into one "drainage" upon such terms as may be just; if the court, after hearing had upon notice to all persons interested, shall be of the opinion that such "drainages" will be benefited by such a consolidation.

(2) Where a drain, heretofore, or hereafter constructed privately or in attempted compliance with any statutory procedure, except drainage district drains, shall be included in any "drainage" petitioned for or consolidated with any "drainage" organized under the farm drainage law the court may, upon hearing after notice given order it to become a part thereof or consolidated with such "drainage" on such terms as may be just.

(3) In case the court shall determine that it is advisable to consolidate "drainages" heretofore organized, or a "drainage" heretofore organized with a "drainage" organized under the farm drainage law, and the records, assessments and boundaries of any such "drainage" heretofore organized are lost or are incomplete, indefinite or unsatisfactory, the court may upon notice direct a reassessment of the lands within or benefited by any such "drainage" and determine the boundaries thereof, following the general procedure outlined in the farm drainage law, so far as the same may be applicable.

88.21 Drainage area in more than one county. (1) Where a drainage area too small to be profitably drained under the drainage district law is in more than one county, the petition shall be filed in the court of the county containing the largest acreage proposed for drainage by the petition, and the court and board of the county containing such largest acreage shall organize the "drainage."

(2) In cases arising under this section copies of all orders and judgments shall be filed in the county court of each of the other counties in which the proposed "drainage" is located. All moneys collected for such joint drainage in such other counties shall be transmitted to the treasurer of the county wherein the county court has jurisdiction.

88.22 Guardian ad litem for persons under disability. In case a minor or other incompetent person is interested in any lands lying within a proposed "drainage" the court

or judge shall appoint some reputable attorney as guardian ad litem for such incompetent person to represent him upon the organization of the "drainage," the assessment of benefits against and award of damages to his lands. Failure to make such appointment shall not avoid the proceedings but when such failure is discovered a guardian ad litem shall be appointed and an order be served upon such guardian ad litem to show cause why such incompetent be not bound by all prior proceedings therein. On such hearing the court shall enter such order or judgment as the facts warrant.

88.23 Damage to land outside to be paid by "drainage." A "drainage" shall be liable for such damages as may result to lands outside its boundaries from the work done therein. The word "damages" in this section shall be construed to mean only such damages as could be recovered against a natural person for like injury resulting from like work.

88.24 Assessments apportioned, when. When a parcel of land assessed as a single tract becomes divided into smaller parcels the board shall apportion the assessment to be collected from each parcel in such manner as shall be equitable.

88.25 Appeals. (1) The board or any interested person aggrieved may, within thirty days after the entry of an order organizing or refusing to organize a "drainage" or confirming assessments of benefits or awards of damages, appeal therefrom to the circuit court of the same county in which the court entering the order is located. On such appeal all issues, except benefits and damages shall be tried by the court and issues arising with respect to benefits and damages shall be tried by the court unless a jury trial thereon is demanded.

(2) Notice of appeal and an undertaking to be approved by the county judge to pay the taxable costs of such appeal must be filed in the county court within thirty days after the date of the entry of the order appealed from.

(3) The report and order appealed from, and the records in such proceedings, shall be certified by the county court to the circuit court within ten days after the appeal is taken.

(4) The board or any person who shall have been a contestant in circuit court on an appeal from the county court may, within thirty days from the date of entry of any order or judgment of the circuit court on such appeal, appeal therefrom to the supreme court of the state of Wisconsin and the general statutes with reference to appeals from the circuit court to the supreme court shall apply to such appeal. The time for appeal shall run from the time of the entry of the order without notice.

88.26 Board a public corporation. The board is a public corporation and shall be subject to all rules of law applicable to such organizations. It shall have the power to protect and maintain all drains under its jurisdiction and may report to the court all matters on which it desires advice and when authorized by the court or judge may institute all necessary actions. The court shall at all times have supervision over the board and may at any time require it to report on any matters connected with its duties.

88.27 Who may go upon lands, for what purpose. Members of the board, the chief engineer, and persons intending to bid on or to whom contracts have been let for the construction of the work within any "drainage" and their respective agents and employes shall have the right to go upon any lands proposed for inclusion or included within any "drainage," provided they do no unnecessary damage to the same, for the purpose of making surveys, inspecting soils, ascertaining the difficulties of the work and all other necessary purposes in organizing a "drainage" and constructing, maintaining, and repairing the drains therein and shall not be guilty of trespass therefor.

88.28 Curative provisions; limitation of actions. All drains constructed before July 4, 1919, in attempted compliance with any statutory procedure, except drainage district drains or which shall thereafter be constructed under the farm drainage law, and which have been in actual use for a period of 3 years are hereby declared to be legal drains, and watercourses so far as they have been constructed and in actual use and no action shall be brought by any person to nullify or avoid the proceedings taken with reference thereto because of any defect or irregularity in such proceedings after October 4, 1919. [43.08 (3)]

88.29 Liberal construction of the law. The farm drainage law shall be liberally construed to promote the public health, the public welfare, agriculture, horticulture, and mining; and the court shall have an equitable jurisdiction over all proceedings thereunder.

88.30 Drains may be altered. Any drain, ditch or watercourse laid out and constructed under the provisions of statutes now repealed, and which is not within or under the jurisdiction of any farm drainage law district or drainage district law district or the drainage commissioners or board thereof may be altered, widened, deepened or discontinued by the same authority, and upon like application, petition and proceedings, so far as applicable, required to be taken for laying out and constructing the same.

88.31 Repair of drains. Each person to whom any portion of a drain, ditch or watercourse shall have been assigned, to maintain and keep in repair shall keep and maintain the same in repair so long as he shall remain the owner of the lands on account of which the same was so assigned to him, and his heirs and assigns thereof forever afterwards, unless the same shall be discontinued or shall come under the farm drainage or the drainage district law.

88.32 Injury to drain, etc. Whoever shall fill up or place any obstruction in any canal, drain, ditch or watercourse dug, built, laid out or opened under the authority of this state, any county board, common council, village trustees, town board or drainage commission, or the farm drainage law, or the drainage district law, or who shall in any way break or interfere with the walls or embankments of any such canal, drain, ditch or watercourse, and any person who shall fill up or in any manner obstruct or injure any canal, drain, ditch or watercourse dug, built, laid out or constructed by any private person or private corporation, shall forfeit for each such offense not more than one hundred dollars nor less than one dollar, and be liable for all damages resulting therefrom; and the boards of the proper county, village and town and the common council of the proper city and the proper farm drainage board and drainage district commissioners, respectively, shall immediately cause any obstruction placed in any canal, drain, ditch or watercourse dug, built, laid out or opened under its authority to be removed and any injury done thereto to be repaired.

88.33 Proceedings on complaint of obstruction. Whenever any such drain, ditch or watercourse, the maintenance and repair of which is chargeable to specific lands under the town drain laws of 1898 has, from any cause, become obstructed so that the natural flow of water along the same is prevented any person feeling himself aggrieved thereby may make complaint to the supervisors of the town where such obstruction is, who shall view the same, and, on being satisfied that the same is so obstructed, shall make an order, under their hands, stating the nature of such obstruction with reasonable certainty and directing the owner or occupant of the lands charged with the maintenance and repair thereof to remove such obstruction within a reasonable time, to be fixed in such order, having reference to the season of the year and the condition of the ground, and shall cause a copy of such order to be served upon such owner or occupant. If such obstruction be not removed by such owner or occupant within the time so fixed, or in case it be denied, then within the time fixed by the certificate of the jury, as hereinafter provided, such owner or occupant shall forfeit the sum of fifty cents for every day during which such obstruction shall thereafter continue; and the supervisors may cause the same to be removed and charge the expenses thereof on the lands so charged with the maintenance and repair of such drain, ditch or watercourse, and shall order the town clerk to enter the same upon the next tax roll as a tax upon such lands; and the money when collected shall be paid out on the order of the supervisors to defray the expenses of removing such obstruction. If such supervisors refuse or neglect to act upon such complaint within fourteen days after it has been made to them, or if they shall refuse to make such order, the person who made the complaint may, within fourteen days after such refusal or neglect, appeal to some justice of the peace of the county in which such drain, ditch or watercourse lies, or if it lies in adjoining towns in two counties, to some justice in either, from such failure or refusal to act or make such order; such appeal shall be taken in the manner, and all proceedings thereon, including the giving of bonds by the appellants, shall be as prescribed by sections 80.17 to 80.20, both inclusive, so far as they are applicable to ditches, drains and watercourses. If upon such appeal the commissioners selected under said sections find that such ditch, drain or watercourse has become so obstructed as to prevent the natural flow of water along the same they shall make such an order as the supervisors should have made, and cause it to be filed within ten days after the date thereof in the office of the clerk of the town in which the ditch, drain or watercourse lies, or in each adjoining town if it lies in them. The supervisors of such town or towns shall, within five days after such filing, proceed to enforce such order in the manner hereinbefore prescribed, and may be compelled to do so by mandamus. If the finding of the commissioners is favorable to the appellant the town or towns in which the ditch, drain or watercourse lies, shall pay all the costs of the appeal; if the action of the supervisors is sustained by the commissioners such costs shall be paid by the appellant.

88.34 Trial of issue. If the owner or occupant upon whom a copy of the order is served shall, within 10 days after the service thereof, deny, in writing, that such obstruction exists, and deliver his denial to one of the supervisors, the said supervisor shall cause a jury to be summoned, and like proceeding shall be had as in case of an encroachment upon a highway. [1943 c. 334 s. 165]

88.35 Removal of obstruction. If the jury find an obstruction to the natural flow of the water in such drain, ditch or watercourse they shall make a certificate under their

hands, describing such obstruction with reasonable certainty, and fix a time within which the same shall be removed, and stating the total cost of such proceeding, which shall be filed in the office of the town clerk and a copy thereof served upon such owner or occupant, who shall remove such obstruction and pay such costs within the time fixed in such certificate; and in case he shall fail so to do the supervisors may cause such obstruction to be removed, and the expenses of such removal and the unpaid costs of such proceedings shall be collected as a tax as provided in section 88.33.

88.36 Costs if no obstruction. If the jury find that there is no obstruction they shall certify the same and shall ascertain what damages the owner or occupant has sustained by reason of such proceeding; also all the costs and expenses of such proceeding, and shall state the same, and in such case the said damages, fees and expenses of such proceeding shall be paid by the town and charged to and collected by the town from the parties complaining of such obstruction.

88.37 Order as evidence. Every order of the supervisors of any town or towns or of the county board of any county laying out, altering, straightening or discontinuing any drain, ditch or watercourse, the record thereof or a certified copy of such record shall be presumptive evidence of the facts therein stated and of the regularity of all the proceedings prior to the making of such order.

88.38 Culverts and outlets to permit natural drainage. (1) Whenever any county, town, city, village or railway company shall have heretofore constructed and now maintains or hereafter shall construct and maintain any public highway or road grade through, over and across any marsh, lowland or other natural depression over or through which surface water naturally flows and percolates, and the stopping of the said flow and percolation of said water by said highway or road grade causes any crop or land to be flooded, water-soaked or otherwise damaged, such county, town, city, village or railway company shall construct, provide and at all times maintain a sufficient ditch or ditches, culverts or other outlets to allow the free and unobstructed flow and percolation of said water from said lands, and to prevent said lands from becoming flooded, water-soaked or otherwise damaged by said water. Provided, however, that the foregoing shall not apply to public highways or road grades now or hereafter used to hold and retain water for cranberry purposes.

(2) Any county, town, city, village or railway company which shall fail to provide such necessary ditches or culverts or other outlets shall be liable for all damages caused by reason of such failure or neglect.

Note: The county is not liable for damages caused by the flooding of lands by waters which accumulated thereon because of the inadequacy of culvert under the road bed of a federal-state highway. *Leininger v. Pierce County*, 226 W. 515, 277 NW 187.

In connection with a question submitted as to the sufficiency of the drain in question, an instruction that under this section the county, when constructing a highway across any natural depression over which surface water naturally flows, is required to provide drains which are sufficient to conduct away in safety the rainfall of ordinary storms, but is not required to provide against any extraordinary rainfall or unusual freshet such as occurs but once in a series of years and which persons of ordinary prudence would not think of guarding against, was correct. *Thurs Box Co. v. Marathon County*, 233 W 387, 289 NW 691.

Section 88.38 did not apply where a pond, although it was a surface-water pond in which was collected the moisture from the drainage area in question, overflowed because of an abnormal condition, occurring only 3 times in 28 years, which resulted from the freezing of the ground at the bottom of the basin rather than from the falling of the rain or the melting of the snow; hence the public service commission should not have proceeded under that section but should have proceeded under applicable section 88.39. *Thomson v. Public Service Comm.*, 241 W 243, 5 NW (2d) 769.

Neither county, town nor state is liable for damages resulting from faulty drainage of surface water, where road was reconstructed by state. 29 Atty. Gen. 378.

88.39 Connecting ditch or sluiceway across railroad right of way. Whenever the owner or owners of any land desire to drain the same by a blind or open ditch, and to properly drain such land, a connecting ditch or sluiceway should be constructed across the right of way of any railroad company, such owner or owners shall file with the depot agent of such company nearest to said land a written petition stating the kind of ditch proposed to be built by such owner or owners and requesting the railroad company to construct a ditch or sluiceway across its right of way which will conform thereto. Within sixty days after the filing of such petition the railroad company shall construct such ditch or sluiceway and the petitioners shall pay the labor cost of such construction.

88.40 Hearings regarding culverts, etc. In case of the failure or refusal of any railroad company to comply with any of the provisions of sections 88.38 and 88.39, the person, firm or corporation or the town, village or city aggrieved thereby may file a complaint with the public service commission setting forth the facts. The commission shall investigate and determine the matter in controversy, in accordance with the provisions of chapter 195, and any order it shall make in said proceeding shall have the same force

and effect as an order in any other proceeding properly begun under and by virtue of the provisions of said chapter. [1931 c. 79 s. 15]

88.41 Watercourse, removal of obstructions. Whenever any natural watercourse becomes obstructed so that the natural flow of water along the same is retarded by the negligent action of the owner, occupant or person in charge of the land wherever such obstruction is located, the owner or occupant of any lands affected and damaged by such obstruction may request the removal thereof by giving notice in writing to such owner, occupant or person in charge of the land wherever such obstruction is located. If such removal is not made within six days after receipt of said notice, the owner or occupant of the lands so affected may make complaint to the supervisors of the town, filing at the same time a copy of said written notice, and such supervisors, upon being satisfied that the complaint is just after viewing the watercourse, shall make recommendations in writing to the owner or occupant of the lands where the obstruction is, for the removal of such obstruction and if such recommendations are not followed within a reasonable time, shall order the obstruction removed. The cost of view and of removal shall be charged and assessed against the lands from which the obstruction was removed and collected as other special assessments are collected. [1935 c. 188]

Note: This section does not apply to spring water, such watercourse not being watercourse which drains surface waters "natural watercourse" in meaning of statute. only, notwithstanding it formerly drained 26 Atty. Gen. 344.

88.42 Town drains. (1) Whenever any owner of agricultural lands in any town desires to install drainage upon agricultural land not exceeding 20 acres in area owned by him, he may present a petition to the town supervisors of such town setting forth that: (a) he desires to install drainage upon agricultural lands owned by him, (b) because of the contour of the land there is no suitable outlet on lands owned by him, (c) such proposed drain will promote the general welfare and health of the community, (d) it is impractical for such owner to drain his land without crossing the land of others, and (e) it is desired that a drain be laid out to a suitable natural outlet specifying the course of the drain and location of the proposed outlet and ownership of lands through which such proposed drain would be laid.

(2) After receiving the petition the supervisors of such town shall promptly fix a time and place for hearing thereon. Thereafter all the provisions of section 89.50 relating to giving notice of time and place of hearing, making orders, laying out drains, assessing benefits and costs of construction and awards of damages and giving notice thereof by drainage district commissioners and the taking of appeals from such orders, shall, so far as applicable, apply to petitions made to and orders and assessments made by town supervisors for installing drains under this section.

(3) No person authorized to install drainage under this section into or through the lands of another shall enter upon such another's lands without the consent of the owner thereof, during any time when there is any growing crop thereon and no order issued under this section shall authorize nor be construed as authorizing such entry.

(4) Nothing in this section shall be held to apply to the installation or construction of a drain across the right of way of any railroad company, proceedings for the construction of which shall be as provided for in section 88.39. [1941 c. 237]