

105.51 OWNERS TO CAP ARTESIAN WELLS

NOTE: Section 105.51 is taken from section 111.52.

105.52 EXAMINATION AND REPAIR OF DAMS AND RESERVOIRS

NOTE: Section 105.52 is taken from section 111.54.

105.53 APPLICATION OF SECTIONS 105.37 TO 105.55

NOTE: Section 105.53 is taken from sections 111.59 and 111.63.

105.54 VIOLATION A GROSS MISDEMEANOR

NOTE: Section 105.54 is taken from section 111.61.

105.55 MAY ENFORCE ORDERS OF COMMISSIONER

NOTE: Section 105.55 is taken from section 111.62.

105.63 TRANSFER OF CUSTODY OF CERTAIN DAM AND WATER CONTROLS TO STATE AGENCY

HISTORY. 1949 c 571 s 1.

105.64 DRAINAGE OR DIVERSION OF WATER TO FACILITATE MINING

HISTORY. 1949 c 599 s 1-4.

CHAPTER 106

DRAINAGE

106.01-106.79 Repealed, 1947 c 143 s 67.

106.80 Repealed, 1947 c 122 s 1 (Saving clause).

106.81-106.93 Repealed, 1947 c 143 s 67.

NOTE: Excepted from Rules of Civil Procedure insofar as inconsistent or in conflict therewith.

106.011 DEFINITIONS

HISTORY. 1947 c 143 s 1; 1949 c 220 s 1; 1953 c 407 s 1.

NOTE: This is Section 106.01 with added definitions.

New public drainage system code. 33 MLR 34.

The viewers did not adopt an illegal and improper method in assessing benefits and awarding damages; and even if the lands that should have been assessed were omitted, it does not go to the validity of the order establishing the ditch or making the assessments. Errors in individual assessments may be corrected from the appeal from the assessments. State v District Court, 227 M 482, 36 NW(2d) 336.

In a proceeding to establish a judicial ditch under Chapter 106 the court's finding that the proposed drainage system is practical and feasible and such that it will be of public utility and benefit and promote the public health is supported by the evidence. State v District Court, 227 M 482, 36 NW(2d) 336.

The final order in a ditch proceeding is presumptive evidence of the validity of each step taken, and the presumption continues until the contrary affirmatively is shown or clearly appears from the record as made and certified to the appellate court; and where the contrary was not shown and did not clearly appear from the record so made and certified to the appellate court, the trial court's finding in order establishing ditch that petition for ditch was signed by the requisite number of owners was presumptively correct. *State v District Court*, 227 M 482, 36 NW(2d) 336.

A member of the county board whose property would be beneficially affected by the proposed ditch improvement should withdraw from proceedings relative thereto. Absence from the meeting at which the order was made would not constitute validation of the proceedings. *Petition of Jacobson*, 234 M 296, 48 NW(2d) 441.

Where a drainage system extending into two or more counties is to be used as an outlet for a lateral, the district court and not the county board has jurisdiction of the petition for the establishment of such lateral. *Petition for Construction of an Open Ditch Lateral*, *Laue v Faribault County*, M, 56 NW(2d) 435.

In a county ditch proceeding the county is not a party. It is merely charged with the duty of performing a certain function on behalf of citizens interested in the ditch proceeding. The real parties in interest are the petitioners on the one hand, and the objectors on the other. Costs are paid out of the bond of the petitioners if the ditch is not established, and if the ditch is established or a repair ordered, costs are paid out of the ditch fund. An appeal may be made to the supreme court to tax costs against the county which appealed unsuccessfully since the county is ultimately reimbursed. *Construction of Open Ditch Lateral*, M, 57 NW(2d) 29.

A lateral, once established, becomes a part of the ditch or drainage system to which it is attached. *Schultz v Chippewa County*, M, 57 NW(2d) 158.

County boards are not authorized by law to enter into a contract with the United States government whereby the federal government conducts drainage proceedings and constructs drainage works not authorized by Minnesota statute. OAG Dec. 13, 1948 (602-C).

Drainage ditch may not be established under a plan whereby a lateral in an existing system is utilized in the new system except by proceedings in eminent domain by which any person having property rights resulting from the establishment of the first ditch is compensated for any damages resulting from construction of second ditch. OAG Sept. 16, 1949 (602-E).

106.021 POWERS OF COUNTY BOARDS AND OF DISTRICT COURTS

HISTORY. 1947 c 143 s 2.

NOTE: In rewriting section 106.02 the commission transferred certain powers to the commissioner of conservation.

A member of the county board whose property would be beneficially affected by a proposed county ditch improvement is an interested party and should not participate in any of the proceedings relating to the project. Even though the board member who participated in preliminary proceedings did not participate in the final hearing at which the order was made, his absence from the final hearing would not constitute validation of the proceedings where the preliminary proceedings related to the ultimate action of the final hearing. *Petition of Jacobson*, 234 M 296, 48 NW(2d) 441.

In reforestation project areas, proper appropriation being made, state lands may be assessed for benefits resulting from the repair of county ditches lying wholly within the area. OAG May 29, 1947 (602-B).

For the county to expend any sum whatever from road and bridge funds for the drainage of private lands which will benefit the lands and not the road, is unwarranted; but it is legal for the county board to spend money for the purpose of obtaining drainage of county roads where incidentally it might also accomplish drainage in the farmer's private fields. No more money should be expended from public funds upon drainage than is warranted by the benefits to the road. Where, as

incidental to constructing a public ditch, it is necessary or helpful to dig an off-take ditch through the property of private owners, an easement should be obtained. OAG Jan. 30, 1948 (602-I).

In granting permission to drain a lake the interests of the state must be preserved and this includes preservation of evidence and preservation of a record of the physical characteristics of the lakes to be drained. Should it later appear that minerals are present in the bed of the lake it may be necessary to establish the ownership of the minerals. In such event the state must establish by proper evidence that the lake was navigable in fact and was in its ordinary and natural condition, a highway of commerce as of the date of the state's admission to the union. OAG Mar. 25, 1948 (273-A-13).

In a county ditch proceeding a member of the county board who is financially interested in the outcome of the proceeding is disqualified from serving or voting on the particular ditch proceeding in which he is financially interested. OAG Oct. 10, 1949 (90-B).

After a ditch is established it operates as a judgment in rem and proceedings cannot be opened thereafter and the plan of the ditch changed. OAG Sept. 24, 1952 (602-E).

106.031 PETITION

HISTORY. 1947 c 143 s 3.

NOTE: This section is based on section 106.03 with modifications.

In establishing a drainage system or for the repair thereof proceedings must be in accordance with the statute. *Seidlitz v Faribault County*, 237 M 358, 55 NW(2d) 308.

Legislature contemplated that from time to time it would be necessary to enlarge the capacity of various systems. There is no requirement that enlargement should follow the plan or system of the old. When it is necessary to adequately drain the lands to be drained by the system and no additional lands are included, proceedings under section 106.501 to accomplish the purpose were properly instituted. *Petition of Jagodzinske*, M, 58 NW(2d) 61.

Where a petition was made to the county board to establish a county ditch, and an engineer was appointed, who in his preliminary report determined that the outlet planned to be used by the proposed ditch must be deepened before it could be used as an outlet. Under such circumstances, under provisions of section 106.101, subdivision 3, an order should be made by the county board, either denying the petition, or referring the petition back to the petitioners for amendment in accordance with the report of the engineer and the obtaining of additional signatures in order that work may be done on the old ditch to provide a sufficient outlet. OAG Jan. 15, 1948 (602-H).

Section 106.501 applies to (1) tiling, (2) enlarging, or (3) extending an existing ditch. It does not apply to straightening the course. When one of the above three things is to be accomplished section 106.501 applies, but if it is proposed to depart from the line of the old ditch, the petitioner must proceed under section 106.031. The two sections have different requirements in respect to the number of petitioners required. When it is desired to construct new laterals, the procedure required in section 106.521 must be followed. OAG Sept. 21, 1948 (602-G).

If the county board determines that a petition for the establishment of a drainage ditch is sufficient, when it is in fact insufficient as shown by the record, the decision of the board can be reviewed by certiorari but steps taken to review must be prompt and within the time permitted by law. OAG April 11, 1949 (602-I).

Where part of the main ditch is to be improved by a proceeding under section 106.501, the number of petitioners required must be based on the entire main ditch. Whether the procedure under section 106.031 for establishing it, or the procedure under section 106.521 for connecting a lateral with an existing ditch may be used, where the parties have in mind making a ditch improvement, depends upon the

MINNESOTA STATUTES 1953 ANNOTATIONS

223

DRAINAGE 106.051

facts, the statutory provisions being designed to fit certain facts and not others. OAG July 26, 1951 (602-H).

"Resident owner" or "resident freeholder" means the owner of land or the contract purchaser who resides in the state. Such resident owner need not reside upon the lands involved and described in the petition but he must be a resident of the state. OAG Oct. 11, 1951 (602-I).

In determining the sufficiency of the signers of a drainage petition and determining the 51 percent requirement, a municipal corporation will be counted only when the corporation owns lands over which the ditch will pass. A quarter section of land is the largest subdivision to be considered in computing area. OAG May 1, 1952 (602-I).

The authorized representative of a municipal corporation, which corporation has an easement in land for a public highway, is a qualified signer of the petition, under section 106.031. The municipality must be counted as an owner when determining whether 51 percent of the area of the land described in the petition have signed the same. Likewise the state is the owner when it has an easement upon land which is laid out a trunk highway. When the commissioner of highways signs such petition, the state is counted as an owner in determining whether the necessary owners have signed. OAG May 15, 1952 (602-I).

Where the cost of repair is prohibitive a new drainage system may be created along the same line as the old ditch. OAG Sept. 22, 1952 (602-J).

The two municipalities and the one power corporation being resident corporations and affected by the proposed drainage system should be added to those who, within the meaning of section 106.031, constitute resident owners of the lands described in the petition. OAG Nov. 26, 1952 (602-I).

In the event that the village council authorized the mayor to sign a petition for proceedings to establish a ditch in behalf of the village, then the village would be obligated to pay costs and expenses which might be incurred in case the proceedings were dismissed. OAG Oct. 15, 1953 (602-I).

106.041 PETITIONERS' BOND

HISTORY. 1947 c 143 s 4.

NOTE: Section 106.041 is a part of the second paragraph of section 106.03 and all of section 106.04.

In a county ditch proceeding, the county is not party to the controversy except in the sense that the county has been charged with the duty of performing certain functions on behalf of those interested in the establishment of a ditch. Petitioners and objectors are the real parties. If the proceeding is dismissed the costs are paid out of the bond of the petitioners, and if the ditch is established or the proceeding involves the repair of an established ditch, the costs are paid out of the ditch fund, and so the county is ultimately reimbursed even though the costs and disbursements in the supreme court are technically charged against the county. *Laue v Faribault Co.*, M; 57 NW(2d) 29.

In a proceeding to establish a judicial ditch, the parties to a controversy were the resident petitioners, who were liable for costs and expenses if the proceedings were dismissed, and nonresident railroads, protesting the assessment of benefits so as to authorize removal to the federal district court, and the controversy was not with the state so as to preclude the removal, where the interests of the state in the project was no different in principle than the county's interest, and it was a party only in the sense that it was charged by the state with working out the project and its financial phases. *Re Judicial Ditch No. 24, Freeborn and Mower Counties*, 87 F. Supp. 198.

106.051 INSUFFICIENT BOND; EXPENSES NOT TO EXCEED PENALTY OF BOND

HISTORY. 1947 c 143 s 5.

MINNESOTA STATUTES 1953 ANNOTATIONS

106.061 DRAINAGE

224

NOTE: Section 106.051 combines all of section 106.04, as modified, with that part of section 106.03 not included in sections 106.031 and 106.041.

106.061 DISMISSAL OF PROCEEDINGS

HISTORY. 1947 c 143 s 6.

NOTE: Section 106.061 is taken from section 106.91.

106.071 ENGINEER

HISTORY. 1947 c 143 s 7.

NOTE: Section 106.071 combines in one section all matters relating to the engineer, his appointment, bond, privileges and duties, and was taken from sections 106.05, 106.09, 106.81, 106.12 and 106.67, with modifications.

A county ditch proceeding is one in rem and the order establishing the ditch has the same final and binding force as a judgment in rem. A county commissioner should not sit in his official capacity to pass on a question which will arise before him as a public officer and in which he has a personal, financial interest. OAG Oct. 10, 1949 (90-B).

106.081 PRELIMINARY SURVEY AND REPORT

HISTORY. 1947 c 143 s 8; 1949 c 220 s 2.

NOTE: Section 106.081 is section 106.06 with no material change except the provision as to standard sea level datum.

Section 106.08 was not violated where engineer cooperated with engineers of the state highway department in laying out the ditch and the proposed rebuilding of a state highway paralleling the ditch, the excavated material from the ditch to be used in the reconstruction of the highway. State v District Court, 227 M 482, 336 NW(2d) 336.

Where a petition was made to the county board to establish a county ditch, and an engineer was appointed, who in his preliminary report determined that the outlet planned to be used by the proposed ditch must be deepened before it could be used as an outlet. Under such circumstances, under provisions of section 106.101, subdivision 3, an order should be made by the county board, either denying the petition, or referring the petition back to the petitioners for amendment in accordance with the report of the engineer and the obtaining of additional signatures in order that work may be done on the old ditch to provide a sufficient outlet. OAG Jan. 15, 1948 (602-H).

Where a plan for construction of a ditch is submitted to the county board by petition, and the engineer to whom the plan is submitted reports on the plan proposed and suggests several alternate plans, the plan proposed is the one before the board; but as the adoption or refusal of such plan depends on the advisability of accepting some other plan, the board may hold the matter in abeyance and employ the engineer to investigate and report on one or more of the alternate plans, with a view to taking such action as may be advisable. OAG Feb. 3, 1948 (602-H).

Where two judicial ditches exist and the proceeding is pending on a petition for a county ditch, branches or laterals of the county ditch to be connected with the outlets on the judicial ditches are not authorized by law. The judicial ditches may be improved in proceedings relating to the specific ditches to be improved but not through the construction of an independent ditch. Drainage ditches are not entities or corporations and may not be assessed or charged as such but lands benefited by construction of drainage ditches are directly assessed. No lands benefited by the judicial ditches may be assessed for construction of the county ditch except all notices provided by law are given and owners of benefited lands on the judicial ditches have due process of law. OAG May 15, 1950 (602-B).

Where the engineer's report was in effect a substitution of the petitioners' plan and the county board favored the recommendations by the engineer, the board

should have referred the petition back to the petitioners in order that an amended petition could be filed. OAG Oct. 30, 1951 (602-H).

A petition was filed for the establishment of a county ditch and a petitioners' bond furnished. The engineer making the preliminary survey disclosed facts indicating that the only feasible plan required two separate ditch systems. The original plan was abandoned and petitioners paid the expense. Upon new proceedings being commenced on new petition for two ditches, based on the engineer's recommendation as above set forth, if the engineer in such new proceedings used part or all of the original survey, the amount saved in the subsequent proceedings should be paid to the parties who paid the expense of the first survey. OAG April 8, 1953 (602-I).

106.091 FILING ENGINEER'S REPORT: AUTHORITY OF DIRECTOR

HISTORY. 1947 c 143 s 9.

NOTE: This is a new section recommended by the interim commission.

Where a petition was made to the county board to establish a county ditch, and an engineer was appointed who in his preliminary report determined that the outlet planned to be used by the proposed ditch must be deepened before it could be used as an outlet. Under such circumstances, under provisions of section 106.101, subdivision 3, an order should be made by the county board, either denying the petition, or referring the petition back to the petitioners for amendment in accordance with the report of the engineer and the obtaining of additional signatures in order that work may be done on the old ditch to provide a sufficient outlet. OAG Jan. 15, 1948 (602-H).

Where engineer's report on preliminary survey complied with requirements of section 106.081 and provisions of this section were observed, and the report of the engineer and the evidence adduced upon hearing held under section 106.101 disclosed that petition sought the establishment of a ditch without a sufficient outlet, but that, if the recommendation of the engineer were followed, a sufficient outlet would be provided, an order should be made by the county board either denying petition or referring petition back to the petitioners upon the condition that the petition be amended in accordance with the recommendations of the engineer for the extension along the route of the former ditch to such a point as the engineer recommended in order that work might be done in the old ditch to provide a sufficient outlet. OAG Jan. 15, 1948 (602-H).

Where the cost of repair is prohibited a new drainage system may be created along the same line as the old ditch. OAG Sept. 22, 1952 (602-J).

106.101 PRELIMINARY HEARING

HISTORY. 1947 c 143 s 10; 1949 c 220 s 3.

NOTE: Section 106.101 is taken from section 106.07 but contains new matter.

The rule that applied to section 106.107, subdivision 2, that where at the preliminary hearing it was found that no outlet had been arranged for required a dismissal of the petition, applies to the new code, section 106.101. *Schultz v Chippewa Co.*, M, 57 NW(2d) 158.

A county board's determination as to the feasibility of a proposed drainage ditch at a preliminary hearing on petitions for the establishment of a ditch is not conclusive, but is subject to change when the engineer's final plans are examined at the final hearing. *Schultz v Chippewa County*, M, 57 NW(2d) 158.

Where a petition was made to the county board to establish a county ditch, and an engineer was appointed, who in his preliminary report determined that the outlet planned to be used by the proposed ditch must be deepened before it could be used as an outlet. Under such circumstances, under provisions of section 106.101, subdivision 3, an order should be made by the county board, either denying the petition, or referring the petition back to the petitioners for amendment in accordance

MINNESOTA STATUTES 1953 ANNOTATIONS

106.111 DRAINAGE

226

with the report of the engineer and the obtaining of additional signatures in order that work may be done on the old ditch to provide a sufficient outlet. OAG Jan. 15, 1948 (602-H).

Where a plan for construction of a ditch is submitted to the county board by petition, and the engineer to whom the plan is submitted reports on the plan proposed and suggests several alternate plans, the plan proposed is the one before the board but as the adoption or refusal of such plan depends on the advisability of accepting some other plan, the board may hold the matter in abeyance and employ the engineer to investigate and report on one or more of the alternate plans, with a view to taking such action as may be advisable. OAG Feb. 3, 1948 (602-H).

There being no statutory provision for appeal, the sufficiency of a petition for a drainage ditch determined upon at a preliminary hearing may be reviewed by certiorari. OAG April 11, 1949 (602-I).

If the petition for a new ditch is insufficient it may, by unanimous consent of the petitioners, be amended. OAG March 11, 1952 (602-G).

106.111 ORDER FOR DETAILED SURVEY

HISTORY. 1947 c 143 s 11; 1949 c 220 s 4.

NOTE: Section 106.111 contains the provisions found in section 106.08.

"In the vicinity" means in the drainage area or in the watershed. An established drainage ditch may be used for any lawful purpose including drainage from an industrial establishment, if such drainage does not constitute a nuisance. OAG Nov. 9, 1948 (148-A).

"Resident owner" as used in section 106.031 and defined in section 106.111 need not reside upon the lands involved and described in the drainage petition. OAG Oct. 11, 1951 (602-I).

106.121 ENGINEER'S SURVEY

HISTORY. 1947 c 143 s 12; 1949 c 220 s 5.

NOTE: Section 106.121 is practically new but covers the matter found in sections 106.10, 106.11, 106.12 and 106.18. The drain tile provision is section 105.04, subdivision 4, and the requirements for soil survey is new.

Whatever money is spent by a town for the protection or improvement of roads must be spent for the benefit of the public and not for the improvement of the land of an adjoining owner. While there is always danger of complications arising where a public body joins in an enterprise with an individual for the accomplishment of a project involving benefits to the individual and the public, there is no express provision forbidding a joint enterprise supervised by the federal soil conservation service where the town and an individual landowner join in the construction of a dam to result in soil conservation, improvement to abutting owner's land and protection of the highway and drainage ditches. OAG Oct. 15, 1947 (273-B-4).

Where the installation of a stop culvert was not specified in the original plan, and was not installed when the ditch was constructed, a culvert may not be installed under the guise of repair, nor may it be installed by a landowner without permission. If a culvert is to be installed it must be by the procedure required in the statute for improvements. OAG Oct. 3, 1950 (602-H).

Laws in force when the ditch was constructed determine the duty and liability of the county in respect to bridges on drainage ditches. OAG Aug. 18, 1952 (642-B-8).

106.131 AUTHORITY OF DIRECTOR; DIRECTOR'S REPORT

HISTORY. 1947 c 143 s 13.

NOTE: Section 106.131 is taken from section 106.12, subdivisions 3 and 4, plus much new matter.

106.141 VIEWERS; APPOINTMENT; QUALIFICATION

HISTORY. 1947 c 143 s 14.

NOTE: Section 106.141 is taken largely from section 106.16.

Up to the point where the court or board can refuse to establish a ditch, the proceeding is not judicial but administrative. Re Judicial Ditch No. 24, 87 F. Supp. 198.

106.151 VIEWERS, DUTIES

HISTORY. 1947 c 14 s 15; 1953 c 529 s 1.

NOTE: While section 106.151 is taken from sections 106.17, 106.18, 106.19, 106.20 and 106.22, there are important changes. That part of section 106.19 defining benefits to municipal corporations has been eliminated. It is now required that benefits and damages be returned by forties. Benefits may result from making an outlet more accessible. The construction and maintenance of public bridges is left to the road authorities.

Public drainage proceedings under Minnesota Statutes, Chapter 106 may invoke the power of eminent domain. Private property taken or damaged is an exercise of that power. An easement for a gas pipe-line is property. Section 106.151 requires compensation to owners of private property damaged by reason of construction of a county ditch. Where a county ditch will cross easement and private right of way of gas pipe-line company, necessitating the relocation of its gas transmission lines at the points of intersection, company is entitled to damages for cost of reconstructing pipe-line to accommodate new ditch. It was error to dismiss the pipe-line company's appeal to the district court from an order of the county board establishing the county ditch and awarding no damages to the pipe-line company. In re Petition of Drosch, 233 M 274, 47 NW(2d) 106.

There are various ways in which lands may be benefited and consequently assessed. If the system prevents water from coming upon the land it may be assessed. If the system affords an outlet for drainage thereafter to be constructed by the landowner, it may be assessed. If, in any manner, the drainage system as constructed directly benefits the land, the land may be assessed. Although a landowner has been assessed for benefits because of a ditch which affords an outlet for drainage thereafter to be constructed and the landowner constructs or desires further drainage, he cannot expect the expense of such further drainage to be paid by others when the benefits accrue to himself alone. OAG March 8, 1948 (602-B).

Where two judicial ditches exist and the proceeding is pending on a petition for a county ditch, branches or laterals of the county ditch to be connected with the outlets on the judicial ditches are not authorized by law. The judicial ditches may be improved in proceedings relating to the specific ditches to be improved but not through the construction of an independent ditch. Drainage ditches are not entities or corporations and may not be assessed or charged as such but lands benefited by construction of drainage ditches are directly assessed. No lands benefited by the judicial ditches may be assessed for construction of the county ditch except all notices provided by law are given and owners of benefited lands on the judicial ditches have due process of law. OAG May 15, 1950 (602-B).

Damages to lands due to drainage operations when finally ascertained, are paid without interest. OAG May 11, 1951 (602-H).

Lands owned by the state are subject to an assessment for repairs of drainage ditches constructed under Minnesota Statutes, Chapter 106. OAG May 18, 1951 (602-H).

Damages caused by construction of ditch must be ascertained and paid as provided by law. OAG Aug. 21, 1951 (602-D).

Drainage ditch assessments may be made against state-owned land under the provisions of section 106.151. When assessments are levied against such land, they

are payable from funds appropriated and available therefor under section 106.381. If funds are not appropriated or available for a drainage ditch assessment, such assessment can only be paid if the legislature appropriates money therefor. OAG Aug. 31, 1951 (602-B).

In proceedings to establish a ditch, it is the duty of the viewers to award damages by reason of the necessary construction of the bridge across the ditch. Although section 106.271 makes it the duty of the authority charged by law with the duty of keeping the highway in repair, to construct and maintain such bridge, this does not mean that such public corporation having such duty is not entitled to damages actually sustained. OAG May 27, 1952 (642-A-12).

106.161 FILING OF VIEWERS' REPORT

HISTORY. 1947 c 143 s 16.

NOTE: Section 106.161 covers the provisions of section 106.23.

106.171 FINAL HEARING

HISTORY. 1947 c 143 s 17.

NOTE: Section 106.171 covers the provisions of section 106.24.

Where the proposed county ditch would drain its waters into a previously completed judicial ditch in an increased amount to the damage of adjacent property, the county board was without authority to enter an order establishing such a county ditch in the absence of owners of land adjacent to the judicial ditch not made parties to the proceedings or designated as affected property owners therein. *Petition of Jacobson*, 284 M 296, 48 NW(2d) 441.

Where after an order establishing a ditch is made and before the contract is let it is desired to abandon and change the plan because of the cost of construction, the county board may vacate the order heretofore made establishing the ditch and may by order authorize the engineer to amend his report. There must be a new consideration of the determined report and all statutory requisites of viewing, hearings and the like, must be observed and proceedings upon the amended report must be similar to those on the original report. OAG Sept. 1, 1948 (602-E).

106.181 JURISDICTION

HISTORY. 1947 c 143 s 18.

Section 106.181 covers the provisions of section 106.25.

Where the evidence disclosed that a newly proposed county ditch would drain its waters into a previously completed judicial ditch in an increased amount to the damage of adjacent property; where land owners adjacent to the judicial ditch who had a vested right therein were not made parties to the proceedings; where the newly proposed county ditch would substantially affect the high water level of a meandered lake and would involve the construction of a dam or control system therefor; and where no authorization from the state commissioner of conservation had been obtained, the order of the county board authorizing such improvement was without authority and was properly vacated by the district court. *Petition of Jacobson*, 234 M 296, 48 NW(2d) 441.

Where on appeal the district court finds that the order of the county board in ditch proceedings is unlawful or not supported by the evidence, the court may, pursuant to section 106.631, subdivision 4, properly vacate such order. *Petition of Jacobson*, 234 M 296, 48 NW(2d) 441.

The county board cannot damage a landowner's property by damming up water without acquiring the right to do so, nor can it accomplish that purpose by dumping water from a county ditch system into an entirely separate and distinct established ditch system without first acquiring the right so to do. *Hawkins v Kandiyohi County*, 234 M 296, 48 NW(2d) 441.

106.191 PROCEEDINGS AT HEARING

HISTORY. 1947 c 143 s 19.

NOTE: Section 106.191 covers the provisions of section 106.26.

The total cost of construction of a drainage ditch plus administrative costs and damages to be paid may not exceed total benefits assessed. County officers are not warranted in payment to a contractor of a sum in excess thereof. OAG Feb. 23, 1949 (602-C).

In proceedings for the establishment of a new drainage system after final hearing on the engineer's and viewers' reports, the order may modify their reports. The order establishing the ditch should be dated on the day it is signed. Time for appeal runs from the date of the order. OAG April 11, 1949 (602-E).

The order establishing a ditch is of the effect of a judgment in rem. The right of the landowner whose lands have been assessed for the construction of a ditch is such that even under the provisions of section 106.191, subdivision 2 and section 106.221, it is doubtful if any modification could be made that would lessen or modify that which the taxpayer was entitled to under the order establishing the ditch. OAG Aug. 12, 1949 (602-E).

When repairs are made under provisions of section 106.271 it is the duty to notify the public authority charged with the responsibility of keeping the highway in repair to construct culverts and bridges if any are required. If the towns do not do so then the county will and the cost of construction will be deducted from the damages to be paid. OAG March 26, 1951 (377-A-3).

General taxpayers are not liable for the expense in the repair of ditches. Drainage proceedings are statutory. Tax liens existing at the time of tax forfeiture against forfeited lands are canceled upon forfeiture. OAG Nov. 19, 1951 (602-J).

106.201 ORDER ESTABLISHING

HISTORY. 1947 c 143 s 20.

The first subdivision of section 106.201 is new and evidences a change in policy in that a dismissal is required if the ditch be not planned in a practicable manner and permits of dismissal where the benefits are not greater than the estimated cost.

The second subdivision is taken from section 106.27 except that the ditch must be practicable.

Where a tract of land receives no benefit from the construction of a ditch it may not be assessed for benefits merely because it is located within the drainage basin. There can be no assessment for benefits unless benefits are derived. Seidlitz v Faribault County, 237 M 358, 55 NW(2d) 308.

Where a statute provides that ditch proceedings instituted under a prior law and incomplete at its effective date may be completed under provisions of the prior law, but further provides that either the board or the court may avail itself of the provisions of the new law when such course seems to be in the public interest; and where such new law provides for an appeal to the district court from an order of the county board establishing a ditch, under the language of the saving clause, the district court may consider an appeal from the board's order establishing a ditch even though the prior act contained no provision for such appeal. Schroeder v Busack, 233 M 12, 47 NW(2d) 592.

The order establishing a ditch is of the effect of a judgment in rem. The right of the landowner whose lands have been assessed for the construction of a ditch is such that even under the provisions of section 106.191, subdivision 2, and section 106.221, it is doubtful if any modification could be made that would lessen or modify that which the taxpayer was entitled to under the order establishing the ditch. OAG Aug. 12, 1949 (602-E).

A drainage system is a unit and branches and laterals are mere parts of units and cannot by themselves be abandoned. The law relates to the entire system. The

MINNESOTA STATUTES 1953 ANNOTATIONS

106.211 DRAINAGE

230

statute provides a method of abandonment but the authority to abandon relates to the entire ditch, and any abandonment of the whole or any part of the ditch must be under the procedure defined by the statute. OAG Oct. 27, 1949 (602-I).

The only lands which may be assessed in proceedings for a county ditch are those lands described in the viewers' report. OAG May 15, 1950 (602-B).

Damages caused by construction of ditch must be ascertained and paid as provided by law. OAG Aug. 21, 1951 (602-D).

A petition for a new ditch to replace a portion of an existing ditch by persons on the upper portion of the main ditch is not prohibited. OAG Sept. 4, 1951 (602-H).

After a ditch is established it operates as a judgment in rem and proceedings cannot be opened thereafter and the plan of the ditch changed. OAG Sept. 24, 1952 (602-E).

The village council in behalf of a village may petition the county board to secure permission to connect a storm sewer with a drainage ditch where the village was not assessed benefits before construction. OAG Aug. 20, 1953 (387-G).

106.211 JUDICIAL DITCHES; APPORTIONMENT OF COST

HISTORY. 1947 c 143 s 21.

NOTE: Section 106.211 contains the provisions of section 106.28 but permits apportionment on petition of the county auditor.

In judicial ditch proceedings there is no statutory provision for an increase of assessments if no appeal is taken within the statutory time provided by law. OAG Jan. 7, 1953 (901-E).

106.221 CONTRACT AND BOND

HISTORY. 1947 c 143 s 22; 1949 c 220 s 6.

NOTE: Section 106.221 contains provisions found in sections 106.13, 106.30, 106.31, 106.33 and 108.11.

There are various ways in which lands may be benefited and consequently assessed. If the system prevents water from coming upon the land it may be assessed. If the system affords an outlet for drainage thereafter to be constructed by the landowner, it may be assessed. If, in any manner, the drainage system as constructed directly benefits the land, the land may be assessed. Although a landowner has been assessed by benefits from a ditch which affords an outlet for drainage thereafter to be constructed and the landowner constructs or desires further drainage, he cannot expect the expense of such further drainage to be paid by others when the benefits accrue to himself alone. OAG March 8, 1948 (602-B).

The owner of a tract assessed for benefits may drain that tract into the drainage ditch by means of a ditch or piping. OAG June 11, 1949 (602-J).

The order establishing a ditch is of the effect of a judgment in rem. The right of the landowner whose lands have been assessed for the construction of a ditch is such that even under the provisions of section 106.191, subdivision 2 and section 106.221, it is doubtful if any modification could be made that would lessen or modify that which the taxpayer was entitled to under the order establishing the ditch. OAG Aug. 12, 1949 (602-E).

After the final order establishing an open drainage ditch and time for appeal therefrom has expired, the county board may not modify the order so as to provide that a portion of the ditch be tiled; but a contract may be made by the landowner with the contractor on the ditch for modification of the plans and specifications for construction of a portion of the ditch. OAG Sept. 25, 1952 (602-E).

106.231 LETTING CONTRACT

HISTORY. 1947 c 143 s 23; 1949 s 220 s 7.

MINNESOTA STATUTES 1953 ANNOTATIONS

231

DRAINAGE 106.241

NOTE: Section 106.231 follows largely that part of section 106.30 not included in section 106.221, with certain modifications. It is now mandatory to run an advertisement in a trade paper, and the 30 percent limitation applies to the whole job and not to separate parts.

Unless the total benefits to accrue to assessed land are greater than the contract price, no drainage contract should be let. OAG Sept. 26, 1947 (901-H).

"Bids shall not be entertained which in the aggregate exceed by more than 30 percent the total estimated cost of construction" relates to contract cost of construction of the ditch as included in the contract and not to the cost of the entire proceeding. OAG Oct. 8, 1948 (602-C).

On August 1, 1944, the county board established a ditch, one of the parties benefited being the Village of Bellevue. The county called for bids in 1944 and again in 1945, but no contract was let. The village later contracted with another ditch enterprise for an outlet.

Failure of the county board to let a contract for construction of the ditch does not constitute abatement of the proceedings. The viewer's determination of benefits to the village still holds, and the fact that the village had availed itself of drainage into another drainage system does not relieve the village of liability to the original ditch enterprise. OAG June 28, 1950 (602-E).

A supplemental contract for the repair of a county drainage ditch, while work on the original contract was still in progress, may be made but the limitations of section 106.221 would apply unless a separate contract was entered into to complete the repair. OAG Aug. 30, 1951 (602-J).

County board may let a contract for the repair of a ditch involving work, labor and materials where even though only one bid is submitted. OAG Aug. 1, 1952 (602-J).

After more than 30 days have elapsed since the making of an order establishing a drainage ditch, and no appeal having been taken from the order, the auditor should let a contract. Preliminary to the letting of a contract the board must advertise for bids. Advertising for bids may be before the expiration of the 30 days from filing the order establishing the ditch. OAG Sept. 10, 1952 (602-C).

The engineer's report of completion of construction called for by the contract for completion of a ditch under section 106.231 should show an unqualified completion according to plans and specifications. Until such unqualified report is filed, section 106.331 does not require that a meeting of the board be called to consider the report. OAG Oct. 21, 1952 (602-C).

106.241 PROCEDURE WHEN CONTRACT NOT LET

HISTORY. 1947 c 143 s 24.

NOTE: Section 106.241 contains the provisions of section 106.87 except that under the present law there must be reconsideration if the bids exceed the available benefits.

If an amended engineer's and, to all effects, a new viewers' report is filed the original notice by publication of pendency of petition with adjournment thereof is not sufficient notice. It will be necessary that notice be again given with all the details as in a new proceeding. OAG Sept. 1, 1948 (602-C).

Where after an order establishing a ditch is made and before the contract is let it is desired to abandon and change the plan because of the cost of construction, the county board may vacate the order heretofore made establishing the ditch and may by order authorize the engineer to amend his report. There must be a new consideration of the determined report and all statutory requisites of viewing, hearings and the like, must be observed and proceedings upon the amended report must be similar to those on the original report. OAG Sept. 1, 1948 (602-E).

When the cost of construction of a ditch exceeds 130% of the engineer's estimate thereof procedure is established by section 106.241. The engineer's estimate of cost of construction does not include administrative costs. OAG Aug. 15, 1950 (602-C).

MINNESOTA STATUTES 1953 ANNOTATIONS

106.251 DRAINAGE

232

106.251 DAMAGES, PAYMENT

HISTORY. 1947 c 143 s 25; 1953 c 15 s 1.

NOTE: Section 106.251 covers the provisions of section 106.29.

In effecting a reasonable use of land for a legitimate purpose, a landowner, acting in good faith, may drain his land of surface waters and cast them as a burden upon the land of another, although such drainage carries with it some waters which would otherwise have never gone that way but would have remained on the land until they were absorbed or evaporated, if (a) there is a reasonable necessity for such drainage; (b) reasonable care be taken to avoid unnecessary injury to the land receiving the burden; (c) the utility or benefit accruing to the land drained reasonably outweighs the gravity of the harm resulting to the land receiving the burden; and (d) where practicable, it is accomplished by reasonably improving and aiding the normal and natural system of drainage according to its reasonable carrying capacity; or if, in the absence of a practicable natural drain, a reasonable and feasible artificial drainage system is adopted. *Enderston v Kelehan*, 226 M 163, 32 NW(2d) 286.

"Surface waters" consist of waters from rain, springs, or melting snow which lie or flow on the surface of the earth but which do not form a part of a well-defined body of water or natural water course. Waters do not lose their character "surface waters" because in a measure they are absorbed by or soak into the marshy or boggy ground where collected. *Enderston v Kelehan*, 226 M 163, 32 NW(2d) 286.

Where both damages and benefits are determined and the benefits exceed the damages, the auditor will not pay the damages but such damages will be deducted from the benefits. OAG June 15, 1951 (602-D).

106.261 SUPERVISION OF CONSTRUCTION

HISTORY. 1947 c 143 s 26.

NOTE: Section 106.261 covers the provisions of section 106.15. Inspector is not required to furnish a bond.

106.271 CONSTRUCTION AND MAINTENANCE OF BRIDGES; AUTHORITY OF DIRECTOR

NOTE: The first paragraph of section 106.271 is taken from section 106.21. The third paragraph relating to the maintenance of public ditch bridges is new and evidences a change in policy. The fourth and fifth paragraphs relating to bridges over town line roads is taken from the provisions of sections 106.20, 113.17, 163.09 and 164.26. The sixth paragraph is new and relates to private bridges; and the last paragraph, relating to waterway openings is also new.

The total cost of construction of a drainage ditch plus administrative costs and damages to be paid may not exceed total benefits assessed. County officers are not warranted in payment to a contractor of a sum in excess thereof. OAG Feb. 23, 1949 (602-C).

Bridges and culverts required by construction and improvement of public open ditch must be constructed and maintained by the town where the bridge is on a town road; and the town is not relieved from duty because the bridge is on a right of way of a county road. OAG July 27, 1949 (642-B-8).

On August 1, 1944, the county board established a ditch, one of the parties benefited being the village of Bellevue. The county called for bids in 1944 and again in 1945, but no contract was let. The village later contracted with another ditch enterprise for an outlet.

Failure of the county board to let a contract for construction of the ditch does not constitute abatement of the proceedings. The viewers' determination of benefits to the village still holds, and the fact that the village has availed itself of drainage into another drainage system does not relieve the village of liability to the original ditch enterprise. OAG June 28, 1950 (602-E).

MINNESOTA STATUTES 1953 ANNOTATIONS

233

DRAINAGE 106.331

When repairs are made under provisions of section 106.271 it is the duty to notify the public authority charged with the responsibility of keeping the highway in repair to construct culverts and bridges if any are required. If the towns do not do so then the county will and the cost of construction will be deducted from the damages to be paid. OAG March 26, 1951 (377-A-3).

Where a town road is on a line between two towns the cost of constructing and maintaining any bridge or culvert on such road, made necessary by the improvement of a public drainage ditch, is borne jointly and in equal shares by the towns involved. OAG May 14, 1952 (642-A-12).

In proceedings to establish a ditch, it is the duty of the viewers to award damages by reason of the necessary construction of the bridge across the ditch. Although section 106.271 makes it the duty of the authority charged by law with the duty of keeping the highway in repair, to construct and maintain such bridge, this does not mean that such public corporation having such duty is not entitled to damages actually sustained. OAG May 27, 1952 (642-A-12).

Where the drainage ditch was established on the county line between two counties and bridges must be built across such public drainage ditches, the cost must be borne equally by the counties. OAG April 6, 1953 (642-B-8).

106.281 INSPECTION; PARTIAL PAYMENTS

NOTE: Section 106.281 covers the provisions of section 106.38 but evidences considerable change in policy.

When repairs are made on a drainage system under authority of section 106.471, subdivision 4, there is provided in clause (b) that a contract shall be let for the repair. The contract is let as provided in chapter 106 for original ditch construction. The duty of the engineer during the progress of the work is specified in section 106.281. It appears that sections 106.281, 106.291 and 106.331 should apply to contracts for repair. OAG Dec. 20, 1948 (602-J).

106.291 ADDITIONAL PARTIAL PAYMENTS

NOTE: Section 106.291 covers the provisions of section 106.39.

106.301 EXTENSION OF TIME ON CONTRACTS

NOTE: Section 106.301 covers the provisions of section 106.32, with certain changes in policy.

106.311 REDUCTION OF CONTRACTOR'S BOND

NOTE: Section 106.311 covers the provisions of section 106.34.

The total cost of construction of a drainage ditch plus administrative costs and damages to be paid may not exceed total benefits assessed. County officers are not warranted in payment to a contractor of a sum in excess thereof. OAG Feb. 23, 1949 (602-C).

106.321 CONTRACTOR'S DEFAULT

NOTE: While it covers the provisions of sections 106.35 and 106.36, section 106.321 contains material changes.

106.331 ACCEPTANCE OF CONTRACT

NOTE: Section 106.331 covers the provisions of section 106.37 with material changes.

An engineer's certificate of completion of a contract dealing with ditch repairs is not conclusive evidence of the completion of the contract. A board must make a final determination before the contractor receives his final payment. OAG Dec. 8, 1948 (602-C).

MINNESOTA STATUTES 1953 ANNOTATIONS

106.341 DRAINAGE

234

The law makes no provision for determining damages resulting from repair or maintenance of a ditch. The original determination of damages before the construction of the ditch contemplates damage for all time. OAG Dec. 8, 1948 (602-D).

The engineer's report of completion of construction called for by the contract for completion of a ditch under section 106.231 should show an unqualified completion according to plans and specifications. Until such unqualified report is filed, section 106.331 does not require that a meeting of the board be called to consider the report. OAG Oct. 21, 1952 (602-C).

106.341 AUDITOR'S LIEN STATEMENT

NOTE: Section 106.341 covers the provisions found in sections 106.19 and 106.41.

The question of assessing the state as the owner of a lake bed for benefits resulting from a drainage project does not arise until the navigability of the lake has been determined. The fact that the lake was meandered does not constitute the lake a navigable lake within the federal rule. The test of navigability to fix ownership of lake beds is determined as of the date of the state's admission to the Union and under the federal decisions with reference thereto. Upon the admission of the state to the union, title to beds of all navigable waters therein remains in the state. OAG June 25, 1948 (602-B).

106.351 FILING LIEN STATEMENT; EFFECT THEREOF

NOTE: Section 106.351 covers the provisions found in the first paragraph of section 106.42, the subsequent paragraphs being eliminated as curative.

Up to the point where the court or board can refuse to establish a ditch, the proceeding is not judicial but administrative. Re Judicial Ditch No. 24, 87 F.Supp. 198.

The question of assessing the state as the owner of a lake bed for benefits resulting from a drainage project does not arise until the navigability of the lake has been determined. The fact that the lake was meandered does not constitute the lake a navigable lake within the federal rule. The test of navigability to fix ownership of lake beds is determined as of the date of the state's admission to the Union and under the federal decisions with reference thereto. Upon the admission of the state to the Union, title to beds of navigable waters therein remains in the state. OAG June 25, 1948 (602-B).

A lien imposed by section 106.351 is superior to a pipeline easement thereafter created. The county board has no authority to change the law concerning the priority. OAG April 25, 1950 (520-L).

106.361 SUPPLEMENTAL LIEN STATEMENT

NOTE: Section 106.361 combines the provisions of section 108.35 with the penultimate paragraph of section 106.46.

106.371 PAYMENT OF LIENS; INTEREST

NOTE: Section 106.371 is taken from sections 106.45 and 106.46, with material changes.

The question of assessing the state as the owner of a lake bed for benefits resulting from a drainage project does not arise until the navigability of the lake has been determined. The fact that the lake was meandered does not constitute the lake a navigable lake within the federal rule. The test of navigability to fix ownership of lake beds is determined as of the date of state's admission to the Union and under the federal decisions with reference thereto. Upon the admission of the state to the Union, title to beds of all navigable waters therein remains in the state. OAG June 25, 1948 (602-B).

MINNESOTA STATUTES 1953 ANNOTATIONS

235

DRAINAGE 106.431

106.381 ENFORCEMENT OF ASSESSMENTS; PUBLIC AND CORPORATE

NOTE: Section 106.381 is new but made up of provisions found in sections 106.19, 106.46 and 107.43.

Section 106.381 permits assessments on tax-forfeited land. OAG Sept. 16, 1947 (602-B).

Drainage ditch assessments may be made against state-owned land under the provisions of section 106.151. When assessments are levied against such land, they are payable from funds appropriated and available therefor under section 106.381. If funds are not appropriated or available for a drainage ditch assessment, such assessment can only be paid if the legislature appropriates money therefor. OAG Aug. 31, 1951 (602-B).

106.391 SATISFACTION OF LIENS

NOTE: Section 106.391 is adapted from the sixth paragraph of section 106.46.

106.401 APPORTIONMENT OF LIENS

NOTE: Section 106.401 covers the provisions of section 106.47.

The auditor's lien statement, filed under section 106.341, is not affected by the subdivision of a tract subsequent to the establishment of the ditch, but the lien is filed and is as though the tract were not subdivided, and the fact that there are now several separate owners of the tract is not material. OAG Oct. 14, 1952 (921-A).

106.411 BOND ISSUES

HISTORY. 1947 c 143 s 41; 1951 c 357 s 1.

NOTE: Section 106.411 covers the provisions of section 106.40 and adds a provision from section 107.41 pledging the faith and credit of the county. See sections 475.51 to 475.75.

A county board may sell any bonds it issues for the construction of county ditches to the state without calling a special election therefor. OAG Aug. 7, 1950 (38-G).

106.421 FUNDING BONDS

NOTE: Section 106.421 covers the provisions of sections 108.01 through 108.05. See section 475.67.

106.431 FEES AND EXPENSES; PAYMENT

NOTE: Section 106.431 covers the provisions of section 106.66 with material changes.

"Reasonable compensation" provided by statute must be fixed by the county board or by the court. OAG April 27, 1950 (144-B-10).

It is the county board's duty to provide funds for payment of costs and expenses incurred in any drainage proceedings. The county auditor must keep a separate account for each drainage system and charge the account of any judicial ditch with each item of expenditure made on account of that drainage system. OAG Oct. 15, 1951 (150-B).

A county commissioner who serves on a committee appointed by the county board to inspect drainage ditches is entitled to compensation of \$5 for one day's services even though he inspects several ditches on that day. OAG Nov. 25, 1952 (124-C).

When members of a county board inspect ditches their compensation is limited to \$5 per day plus mileage no matter how many ditches they inspect. When more

than one ditch is inspected in a day the total expense of the inspection must be prorated among the several ditches. OAG Dec. 9, 1952 (124-C).

If a person desires to perfect an appeal to the district court from any action taken by the county board in respect to a county drainage proceeding, section 357.07 requires that before the clerk of the district court shall enter this appeal on his records, he must collect from the appeal the sum of \$5. When the appeal is determined this is a proper item of disbursements when the disbursements are taxed. OAG May 15, 1953 (144-B-10).

County commissioners are reimbursed for travel expense of members of the county board when actually employed in drainage proceedings. The amount is limited to seven and one-half cents per mile, as provided in section 350.11. Section 375.06 is not applicable to drainage proceedings. OAG Dec. 16, 1953 (104-A-8).

106.441 COUNTY ATTORNEY

NOTE: Section 106.441 establishes a new policy and changes one paragraph of section 106.66.

When the county board petitions for ditch improvement under section 106.511, it is the duty of the county attorney to represent the county, and the county only, as provided in section 106.441. OAG Nov. 7, 1947 (121-B-8).

In drainage proceedings the county attorney represents the county only and receives no special compensation. OAG Oct. 14, 1948 (121-B-8).

On August 1, 1944, the county board established a ditch, one of the parties benefited being the village of Bellevue. The county called for bids in 1944 and again in 1945, but no contract was let. The village later contracted with another ditch enterprise for an outlet.

Failure of the county board to let a contract for construction of the ditch does not constitute abatement of the proceedings. The viewers' determination of benefits to the village still holds, and the fact that the village has availed itself of drainage into another drainage system does not relieve the village of liability to the original ditch enterprise. OAG June 28, 1950 (602-E).

106.451 PAYMENT OF COSTS AND EXPENSES; WARRANTS; DITCH FUNDS

NOTE: Section 106.451 contains general financial provisions. It eliminates the general ditch fund, fixes the rate of interest at four percent, and permits the investment of a surplus in federal or state bonds. The section substitutes certain sections found in sections 106.40, 106.46, 106.54, 106.88 and 107.16.

Section 106.451 is a general financial section relating to drainage systems and controls the payment of warrants. The provisions of section 385.31, dealing generally with warrants, is not applicable. OAG July 28, 1949 (107-A-5).

Each ditch is considered a separate institution. It is not a legal entity but it has a recognized governmental status, and the law requires all funds for the benefit of each separate ditch to be credited to that ditch, and all disbursements made for the construction, repair or improvement of a particular ditch to be charged to that particular ditch, and there should be a credit balance in each ditch fund so that it will not be necessary to assess benefited lands every time a few dollars are spent for maintenance. Any interest collected or paid out of any funds should be credited or charged to the fund. OAG May 29, 1950 (602-B).

The county board has authority under subdivision 6 to create a repair fund for each ditch. This should be done. When the money is needed it is available and may be used. County boards should follow the policy declared by the legislature and thus avoid spending money before it is available. If, when the repair is made, there is no money to the credit of the ditch from which cost of repair may be paid, action must be taken under section 106.451. No money should be transferred from the general revenue fund to the credit of the ditch fund except as authorized by section 106.451. OAG Aug. 3, 1953 (602-F).

106.461 DUTIES OF PUBLIC EXAMINER

HISTORY. 1947 c 143 s 46; 1949 c 34 s 1.

NOTE: Section 106.461 covers the provisions found in section 106.088, subdivision 22.

The evidence sustains the finding of the lower court that as to the lands here involved the assessments for the construction of county ditch No. 17, in Chippewa county, were paid in full; and the county was bound to comply strictly with the procedure outlined by Minnesota Statutes 1941, Section 106.48, as amended by Laws 1943, Chapter 626, in imposing an assessment for ditch repairs. The board failed to do so and the assessment was, therefore, void. *Teichert v County of Chippewa*, 225 M 406, 31 NW(2d) 11.

106.471 REPAIRS

HISTORY. 1947 c 143 s 47; 1949 c 498 s 7; 1953 c 532 s 1.

NOTE: Section 106.471 is taken from Laws 1945, Chapter 82, with material changes.

The establishment of laterals into a drainage ditch is not authorized under petition for repair proceedings. It is permitted only in proceedings for the improvement of an outlet into an established ditch and for the establishment of laterals into such ditches. *Seidlitz v Faribault County*, 237 M 358, 55 NW(2d) 308.

Where a county has only jurisdiction to "repair" a certain ditch, but actually proceeds with "improvements," a landowner whose land is thereby appropriated and damaged is not limited in his remedy to the statutory appeal provisions relating to ditch proceedings but is free to choose a common law remedy, such as an action in nuisance and trespass, since judgment or order rendered without jurisdiction may be collaterally attacked. *Johnson v Steele County*, M, 60 NW(2d) 32.

A "repair" of a ditch as authorized under section 106.471, involves no awarding of damages since it contemplates only the restoration of the ditch to its original condition, and thus has no effect on the land through which it flows other than the effects of the original ditch construction for which all property owners are awarded their damages. An "improvement" proceeding, authorized by section 106.501, provides for award of damages since it contemplates an extension and alteration of the original ditch channel with resulting damage and injury to private property. A proper petition is a jurisdictional prerequisite to an improvement proceeding. *Johnson v Steele County*, M, 60 NW(2d) 32.

The 1947 legislature clearly intended to distinguish between the repair of a ditch, where the procedure is under the provisions of section 106.471, and the improvement of a ditch where the procedure is under the provisions of section 106.501. OAG July 31, 1947 (602-J).

A petition for repair of a ditch by a single owner initiates the proceedings but does not control the discretion of the board; but where the petition is by 26 percent of owners of area of property affected by or assessed for the original construction of the ditch, and substantial proof is forthcoming, the board or court must take action if the cost is within the statutory limit. OAG Sept. 2, 1947 (602-J).

Where a ditch is being repaired or improved, and the county demands that the town install a culvert 123 inches wide and 77 inches high, and the town considers the size excessive and will only install a 72 inch culvert, the decision depends on the statute under which the work is being done. If it is a repair job under section 106.471, the county is not at liberty to improve the ditch as to size of culvert, but if it is an improvement job under section 106.501 the procedure will strictly follow that section. OAG Sept. 3, 1947 (602-J).

After judicial ditch No. 1 had been built, county ditch No. 4 was established, using No. 1 as an outlet and thereafter county ditch No. 13 was constructed, also using No. 1 as an outlet. Proceedings are now pending in the district court for the improvement of judicial ditch No. 1. If the engineers' report shows that the land

drained by the county ditches will be benefited by the proposed improvements, they may be brought into the proceedings under the provisions of section 106.471, subdivision 7, and the benefits to the three ditches determined in the original action relating to judicial ditch No. 1. This is not a determination of the benefits to county ditch No. 4 and county ditch No. 13, but the benefits to the lands drained by ditches Nos. 4 and 13. OAG Sept. 11, 1947 (602-H).

Lands not assessed for construction of the ditch are not entitled to any benefits thereof. Under the provisions of section 106.487, proceedings may be had by which, on such terms as are applicable, landowners operating the private ditch may be assessed so benefits resulting from the ditch will be included in assessments for repairs. Lands benefited by the repair of an established ditch may, by proper proceedings, be assessed in accordance with benefits derived. OAG Sept. 12, 1947 (602-B).

Where the engineer appointed by the court finds that the bench marks on the ditch are obliterated and cannot now be found; that it will be impossible to restore the ditch so as to render it efficient to answer its purpose if the original grade line of the ditch is followed; that the grade must be increased $\frac{1}{8}$ of an inch per 100 ft., lowering the grade 6.6 inches per mile making the ditch 4 ft. deeper at the terminus than was the original ditch; and requiring removal of trees and shrubs that have grown up; and requiring resloping of the banks, the proceedings contemplated are deemed improvements and are not mere repairs and cannot be conducted under the repair statute. OAG Oct. 29, 1947 (602-J).

Where the petition for a repair to an existing ditch is by less than 26 percent of the abutting owners, the board or court may determine if the ditch is out of repairs, and if in need of repairs may direct the engineer to determine the facts, and the court, based upon the engineer's report, may in its discretion, order the repairs and assess the damages; but if on the other hand, the petition is signed by not less than 26 percent of the area of the property affected, and if on hearing it appears repairs are necessary, it is then mandatory that the court order such repairs within the legal cost limited. In the first instance, the repairs are ordered and have the best interest of the property owners affected, but where 26 percent of the property owners of the area sign the petition, repairs must be ordered if the ditch is in such condition that it no longer serves its original purpose. The entire structure of the law relating to drainage ditches is based upon the theory of benefits and no assessments will stand where it is materially in excess of the special benefits. OAG Nov. 20, 1947 (602-J).

The county board is authorized to make repairs of a drainage ditch lying within its county or so much of it as lies within its county. Subdivision 2 relates to routine repairs and the amount to be expended is limited to 10 percent of the cost of construction and the repairs may be made by the board on their own initiative. Subdivision 4 relates to repairs brought about by a petition in which event there is no limit to expenditures except that they must not exceed the total benefits determined in the ditch proceeding. OAG Nov. 20, 1947 (602-J).

In a petition for repairs a signing by owners of 26 percent-of area of property affected by a lateral is not sufficient. The signatures must be those of owners of not less than 26 percent of the area of the property affected and assessed for the original construction of the ditch. Care has been taken in the writing of the ditch laws to carefully distinguish between repairs and improvements. In any petition under section 106.47 the provisions of section 106.501 are not applicable. OAG Jan. 29, 1948 (602-I).

The authority of the legislature to enact drainage laws is derived from the police power, the right of eminent domain, of the taxing power, and is undoubted. When assessments levied against land are included in the taxes, they become a part of the taxes. The cost of maintenance of the ditches is an obligation imposed by law upon the benefited land and when repairs are made the cost became a burden upon the benefited land, the amount to be ascertained and established by computation in accordance with the law, and it was the duty of the administrative office to levy the tax and if the officers do not perform their duty imposed upon them by law, the burden on the land continued. When the omission is discovered, the assessment

MINNESOTA STATUTES 1953 ANNOTATIONS

against the land may be spread by conforming to the law and the tax included in a tax for a subsequent year. OAG April 7, 1948 (602-B).

Where the total benefits determined to flow from the original construction of the ditch amounted to \$24,000, and upon a hearing on a petition to repair the ditch the engineer's report indicated a cost of a prohibited amount of \$34,000; but where the engineer's report showed that a considerable area of land, not originally assessed for benefits in connection with the construction of the ditch has actually benefited from such construction and it further appearing from the report of the engineer that if the benefits to the land not assessed were added to the benefits assessed, the total benefits would be double those actually assessed. Under section 106.471, subdivision 7, notice will be given to the owners of the land actually benefited but not assessed and in pursuance of such notice a hearing may be held. Viewers may be appointed, and after due hearing, the board may make its determination. A person aggrieved, may appeal. In the present state of proceedings, the county board has no power to assess the land not included in the original assessment until the parties are brought in under the provisions of subdivision 7. OAG April 7, 1948 (602-B).

Where the estimated cost of the repair of a ditch exceeds \$1,000 the work must be done on contract and not by day labor. OAG April 29, 1948 (602-J) (707-D-2).

Where a judicial ditch established a tract of land but the land was not included in case of a repair job, the engineer makes a report that lands not previously assessed for benefits are benefited, procedure should be had under section 106.471, subdivision 7, to bring the land within the proceedings. Due notice must be given and the viewers must determine the benefits. OAG June 14, 1948 (602-B).

The law does not contemplate payment of damages in repair proceedings and any area of land taken for ditch and waste banks in the absence of a record thereof may be taken to be the land on which the ditch was actually constructed and the waste banks deposited. OAG July 21, 1948 (602-D).

Under the present law where petition for repairs is made by the owners of not less than 26 percent of the area of the property vacated by and assessed for the original construction of the ditch, where it appears on hearing of the engineer's report that the ditch is in need of repair so that it no longer serves its original purpose, it is mandatory that the board or court order the repair. The landowners have the right to the maintenance of an established ditch and maintained as such. OAG Aug. 6, 1948 (602-J).

The term "repair" is defined in M.S.A., Section 106.471. If the cleaning out of the ditch and the installation of the culverts restores the system as nearly as practicable to the same condition as when it was originally constructed or afterward improved, then the work is a repair under section 106.471; but if these culverts proposed will provide a spillway for water which flows in the ditch and if such spillways were not provided in the plans for the ditch, the installation thereof is not a repair, but must fall under the classification of "improvement." OAG July 23, 1948 (602-J).

In ditch repair proceedings relating to county ditch No. 31 lands benefited and not assessed may be assessed for benefits received; but this power does not extend to lands benefited by ditch No. 10. OAG Sept. 16, 1948 (602-B).

The law makes no provision for determining damages resulting from repair or maintenance of a ditch. The original determination of damages before the construction of the ditch contemplates damage for all time. OAG Dec. 8, 1948 (602-D).

An engineer's certificate of completion of a contract dealing with ditch repairs is not conclusive evidence of the completion of the contract. A board must make a final determination before the contractor receives his final payment. OAG Dec. 8, 1948 (602-C).

Where a public drainage ditch system has been established and constructed and thereafter lands not assessed for benefits caused by the construction are drained into this system, thereby imposing a burden upon the system not contemplated, if damage or injury result to private landowners, they may bring action in their own

MINNESOTA STATUTES 1953 ANNOTATIONS

106.471 DRAINAGE

240

name as parties in interest; and the county attorney on behalf of the public may bring action if the public health is endangered, or the public roads flooded. The circumstances may warrant injunction proceedings. OAG Dec. 20, 1948 (361-B).

A town which has participated in total benefits resulting from construction of a drainage ditch is an eligible petitioner for repair; and where the viewers' report in respect to a tract shows benefits and damages to be equal it is questionable whether such tract should be considered to be one assessed for benefits and repairs. OAG Feb. 28, 1949 (602-B).

A ditch is a unit—the repair of a lateral is repair of the ditch system, a ditch being constructed under one entire plan and one part not being dependent on another part. By following the proper provisions a lateral may be authorized even though the cost be greater than the cost of the original lateral so long as the cost is not greater than the original cost of the ditch. OAG April 21, 1949 (602-J).

In case of the repair of an existing ditch under the procedure designated in section 106.471, a bond is required as stated in section 574.26. The minimum penalty of the bond is the sum equal to the contract price. The fact that the estimated cost involves an expenditure of less than \$1,000 is immaterial. OAG June 11, 1949, June 16, 1949 (602-J).

When petition for repairs under section 106.471 is denied for the reason that the cost of repair exceeds the original benefits assessed on the ditch system, the cost of the proceedings on the petition for the repair are to be assessed against lands originally assessed when ditch was constructed. OAG Aug. 1, 1949 (602-B).

Under the guise of repair, ditch banks may not be resloped or waste banks levelled to the extent that damages are caused not contemplated when the ditch was originally constructed. Such proceedings must be under the improvement statute. OAG Sept. 12, 1949 (602-J).

Unless acting upon a petition the county board may not expend for repairs to exceed ten percent of the original cost of the ditch in any one year. This limitation does not apply in cases where a petition for repairs is filed. OAG Dec. 5, 1949 (602-J).

A petition for repairs to a judicial ditch where the estimated cost thereof is in excess of ten percent of the original cost of the ditch should be presented and filed with the clerk of the district court having jurisdiction. OAG Feb. 23, 1950 (602-J).

Where there is no petition for repairs to a drainage ditch as provided in section 106.471, subdivision 4, and the board is acting on authority of subdivision 2, its authority to spend money stops when it reaches ten percent of the cost of construction of the ditch. This is the limitation for one year's expenditure. OAG May 23, 1950 (602-J).

Where a long established county ditch outlets into a creek at a point within the county, the outlet being a few feet from the county line, and an obstruction exists in the creek caused by debris from the ditch, and the obstruction is situated outside the county wherein the ditch was authorized, the removal of the obstruction is not a repair job. The work to be done in removing the obstruction is not within the planned ditch and the remedy is not found in section 106.471, but under section 106.511 which relates to improvements of outlets. OAG Sept. 8, 1950 (602-J).

Section 106.471 deals with repairs while section 106.501 relates to improvements, and section 106.511 relates to improvements of outlets. The contemplated change lowering the depth of the tile system two or three feet below that specified in the original plan under which the ditch was originally constructed is an improvement of the system rather than a repair, and the procedure required is the procedure set forth for the repair of a system. OAG Sept. 13, 1950 (602-J).

Where the installation of a stop culvert was not specified in the original plan, and was not installed when the ditch was constructed, a culvert may not be installed under the guise of repair, nor may it be installed by a landowner without permission. If a culvert is to be installed it must be by the procedure required in the statute for improvements. OAG Oct. 3, 1950 (602-H).

MINNESOTA STATUTES 1953 ANNOTATIONS

241

DRAINAGE 106.471

Repair should not involve natural variance or departure from the plan. Whether a particular variance is a departure is a question for the engineer, and if he so determines that the most practical and economical method to attain the desired result is to lay the tile at a lower level than in the plan proposed, there is not material variance. OAG Oct. 31, 1950 (602-J).

When the work of repair has been done the cost thereof must be paid out of money in the county treasury to the credit of the ditch system. If there is not sufficient funds to the credit of the ditch fund, the county board must approve the cost which will be spread pro rata upon all lands, corporations, and municipalities which have participated in the total benefits theretofore determined in the entire ditch system. OAG July 12, 1951 (602-B).

The consent of the commissioner of conservation is a condition precedent to repair of a drainage system affecting state lands in a conservation area. An assessment may not be levied against such lands unless the commissioner has joined in a petition for repair. Laws 1951, Chapter 652, Section 3, is the only authority for the expenditure of state funds for the repair of such ditches. OAG Oct. 29, 1951 (602-J).

The repairer of a ditch includes the resloping of open ditches and leveling of waste banks thereon. The repair is restricted to restoration of a condition in which the ditch was originally constructed and the repair may include such resloping as will better prevent deterioration. OAG Oct. 30, 1951 (602-J).

General taxpayers are not liable for the expense in the repair of ditches. Drainage proceedings are statutory. Tax liens existing at the time of tax forfeiture against forfeited lands are canceled upon forfeiture. OAG Nov. 19, 1951 (602-J).

The moneys which are to be raised for the fund provided for in section 106.471, subdivision 6 are raised for prospective use in the payment of repairs not yet made from which no benefits have been received at the time the moneys are collected for said fund. Section 106.381 only authorizes assessments against state lands for benefits received. As this language is retrospective in its application, it cannot serve as authority for assessing benefits prospectively. OAG April 4, 1952 (700-D-19).

The duty to build and maintain a bridge depends upon what was done in the drainage proceeding. If the ditch plans and specifications and the order establishing the ditch show that the bridge in question was a part of the project, and the cost of the building thereof was a part of the cost of construction of the ditch, neither of the towns involved built the bridge and the bridge being a part of the drainage project it should be forever maintained at the expense of the drainage system. OAG May 15, 1952 (642-A-12).

Where a cow was killed because it entered a ditch during the course of repairs, there is no liability on the part of the ditch system for tort. OAG Sept. 16, 1952 (844-C-2).

The auditor's lien statement, filed under section 106.341, is not affected by the subdivision of a tract subsequent to the establishment of the ditch, but the lien is filed and is as though the tract were not subdivided, and the fact that there are now several separate owners of the tract is not material. OAG Oct. 14, 1952 (921-A).

The expense of maintenance of a bridge which is a part of a drainage project is to be paid in the same manner as repairs for the ditch are paid. OAG Dec. 9, 1952 (642-A-12).

In computing the cost of construction of a ditch and for the purposes of section 106.471, subdivision 2 (b), add the original cost of construction plus the cost of improvement. OAG March 14, 1953 (602-J).

Laws 1953, Chapter 530, coded as section 106.531, has no retroactive effect. A ditch constructed in 1905 used as an outlet the source of a ditch constructed theretofore without payment of damages to the first ditch constructed for the owners benefited thereby. In repair proceedings in 1953 on the second ditch the procedure of section 106.471, subdivision 7, is available. OAG June 26, 1953 (602-B).

MINNESOTA STATUTES 1953 ANNOTATIONS

106.481 DRAINAGE

242

The county board has authority under subdivision 6 to create a repair fund for each ditch. This should be done. When the money is needed it is available and may be used. County boards should follow the policy declared by the legislature and thus avoid spending money before it is available. If, when the repair is made, there is no money to the credit of the ditch from which cost of repair may be paid, action must be taken under section 106.451. No money should be transferred from the general revenue fund to the credit of the ditch fund except as authorized by section 106.451. OAG Aug. 3, 1953 (602-F).

Subdivision 4 (2) applies to procedure and is applicable to a petition filed before the enactment of Laws 1953, Chapter 532. OAG Aug. 5, 1953 (602-J).

The changes proposed to be made to a branch of the county ditch involved the lowering of the tile in a section thereof so as to conform to the levels as shown on the drawings and plans for the original construction. This involves restoring the ditch or the branch involved as nearly as practicable to the same condition as when originally constructed or subsequently improved. This would not constitute repairs. This is, in effect, a petition for improvement under section 106.501, which relates to ditch improvement, and not section 106.47 which relates to repairs. OAG Sept. 19, 1953 (602-J).

106.481 DITCH INSPECTORS

NOTE: Section 106.481 embodies the provisions of section 106.80.

Where the board failed to file the additional tabular statement and lien against all the parcels as required by statute, the ditch assessment was void. *Teichert v Chippewa County*, 225 M 406, 31 NW(2d) 11.

The evidence sustains the finding of the lower court that as to the lands here involved the assessments for the construction of county ditch No. 17, in Chippewa county, were paid in full; and the county was bound to comply strictly with the procedure outlined by Minnesota Statutes 1941, Section 106.48, as amended by Laws 1943, Chapter 626, in imposing an assessment for ditch repairs. The board failed to do so and the assessment was, therefore, void. *Teichert v County of Chippewa*, 225 M 406, 31 NW(2d) 11.

Where property changed ownership between the time when the repairs were made and the assessment was laid, the change of ownership does not permit the property to escape its share of the cost. *Re Wilking*, 225 M 425, 31 NW(2d) 437.

The county auditor is without power to spread an assessment for ditch repairs against property when no ditch assessment had been levied by the county board. *Handevit v Martin County*, 227 M 404, 36 NW(2d) 585.

The county board has no authority to omit lands benefited from assessments for repair of a ditch and if it did so, an assessment could subsequently be made. OAG Sept. 16, 1947 (602-B).

Proceedings pending to improve a portion of a judicial ditch if instituted before the enactment of Laws 1947, Chapter 143, may be completed under the provisions of the laws under which they were instituted. Benefits may be assessed against tax-forfeited lands. The proceedings having been instituted in Clearwater county, the court upon proper petition and showing may assess benefits against lands in Polk county. OAG Sept. 16, 1947 (602-B).

Repairs on drainage ditches includes resloping of banks, leveling of waste banks, and general restoring the ditch to the same condition as when originally constructed or subsequently improved. OAG Oct. 15, 1947 (602-J).

Increasing the grade of a ditch so as to deepen the ditch at its terminus is an improvement and is not included in the term "repairs." OAG Oct. 29, 1947 (602-J).

The provisions of subdivision 4, limiting the cost of the repair to an amount not exceeding the total benefits determined in the ditch proceeding, applies to all situations whether the petition is by more or less than 26 percent of the owners. OAG, Nov. 20, 1947 (602-J).

The ditch inspector must be paid the compensation specified by the county board in its resolution of appointment. This may be in addition to his salary as county engineer. OAG Nov. 26, 1947 (148-A-10).

Section 106.481 provides that the ditch inspector be paid the amount specified in the resolution of appointment and if the county engineer is appointed ditch inspector he is entitled to additional compensation. OAG Nov. 26, 1947 (148-A-10).

Where repairs were made on a county ditch from 1931 to 1942 without any valid assessment being made against benefited land an assessment could be made in 1948, but in making the assessment the board should adopt separate resolutions relating to the separate repairs for each of the years involved. OAG April 7, 1948 (602-B).

106.491 OBSTRUCTION OF DITCH

NOTE: Section 106.491 is taken from section 106.80, with material changes.

Upon the establishment of a judicial ditch the town board built a bridge on a road at a point where the road intersects the ditch, thereafter the town substituted a culvert for the bridge. If the ditch has been obstructed by the installment of the culvert, the town board should notify the authority responsible for the obstruction to remove same; or show cause before the board as required by section 106.491. The town having undertaken to pass a road over the ditch by means of a culvert rather than a bridge is under obligation to do so without impeding the flow of water in the ditch. OAG May 2, 1950 (148-A-14).

106.492. ALTERATION IN PUBLIC DRAINAGE DITCH AFFECTING TRUNK HIGHWAY

HISTORY. 1949 c 325 s 1.

106.493 DAMAGE TO LANDOWNERS; RECOVERY

HISTORY. 1949 c 325 s 2.

Where the engineer appointed by the court finds that the bench marks on the ditch are obliterated and cannot now be found; that it will be impossible to restore the ditch so as to render it efficient to answer its purpose if the original grade line of the ditch is followed; that the grade must be increased $\frac{1}{8}$ of an inch per 100 feet, lowering the grade 6.6 inches per mile making the ditch 4 feet deeper at the terminus than was the original ditch; and requiring removal of trees and shrubs that have grown up; and requiring resloping of the banks, the proceedings contemplated are deemed improvements and are not mere repairs and cannot be conducted under the repair statute. OAG Oct. 29, 1947 (602-J).

106.501 IMPROVEMENTS

HISTORY. 1947 c 143 s 50; 1953 c 533 s 1.

NOTE: Section 106.501 is based upon Laws 1945, Chapter 71, with important changes.

In proceedings to set aside a county board order establishing a county ditch, the evidence sustained the trial court's finding that the proposed ditch would drain its waters into a previously completed judicial ditch in an increased amount to the damage of adjacent property, and that the proposed ditch would substantially affect the high water level of a meandered public lake and would involve construction of a dam or control system therefor. *Hawkins v Kandiyohi County*, 234 M 296, 48 NW(2d) 441.

A proposed lateral to connect with an existing judicial drainage ditch which extended into and drained lands in more than one county, "affected" land situated in more than one county, within the statute giving the district court and not the county board jurisdiction of a petition for construction of a lateral if the land affected extended into two or more counties. *Petition for Construction of an Open Ditch Lateral, Laue v Faribault County*, M, 56 NW(2d) 435.

MINNESOTA STATUTES 1953 ANNOTATIONS

Under section 106.501, which provides for the "tiling, enlarging, or extending" of public drainage systems, proceedings may be instituted for the enlargement of the capacity of an existing drainage system by the construction of a new open ditch along the main tile line of the original ditch where the improvement drained only the lands affected by the original ditch. *Jagodzinske v County of Martin*, M, 58 NW(2d) 61.

Where a county has only jurisdiction to "repair" a certain ditch, but actually proceeds with "improvements," a landowner whose land is thereby appropriated and damaged is not limited in his remedy to the statutory appeal provisions relating to ditch proceedings but is free to choose a common law remedy, such as an action in nuisance and trespass, since a judgment or order rendered without jurisdiction may be colaterally attacked. *Johnson v Steele County*, M, 60 NW(2d) 32.

A "repair" of a ditch as authorized under section 106.471 involves no awarding of damages since it contemplates only the restoration of the ditch to its original condition, and thus has no effect on the land through which it flows other than the effects of the original ditch construction for which all property owners are awarded their damages. An "improvement" proceeding, authorized by section 106.501, provides for award of damages since it contemplates an extension and alteration of the original ditch channel with resulting damage and injury to private property. A proper petition is a jurisdictional prerequisite to an improvement proceeding. *Johnson v Steele County*, M, 60 NW(2d) 32.

If a change is contemplated installing culverts larger than in the original plan it would not be a repair job under the provisions of section 106.471 but would be an improvement job under section 106.501. OAG Sept. 3, 1947 (602-J).

Where a land owner's property is flooded through imperfect operation of a tile branch flowing into a county ditch, he should apply for correction of the defect by instituting proceedings under section 106.501. OAG Sept. 15, 1947 (602-B).

Proceedings pending to improve a portion of a judicial ditch if instituted before the enactment of Laws 1947, Chapter 143, may be completed under the provisions of the laws under which they were instituted. Benefits may be assessed against tax-forfeited lands. The proceedings having been instituted in Clearwater county, the court upon proper petition and showing may assess benefits against lands in Polk county. OAG Sept. 16, 1947 (602-B).

When land was assessed in ditch proceedings, an owner of land situated 300 feet from the judicial ditch may avail himself of the benefits by proven application under provisions of section 106.521. OAG March 8, 1948 (602-B).

There are various ways in which lands may be benefited and consequently assessed. If the system prevents water from coming upon the land it may be assessed. If the system affords an outlet for drainage thereafter to be constructed by the landowner, it may be assessed. If, in any manner, the drainage system as constructed directly benefits the land, the land may be assessed. Although a landowner has been assessed by benefits from a ditch which affords an outlet for drainage thereafter to be construed and the landowner constructs or desires further drainage, he cannot expect the expense of such further drainage to be paid by others when the benefits accrue to himself alone. OAG March 8, 1948 (602-B).

The law does not contemplate payment of damages in repair proceedings, and any area of land taken for ditch and waste banks in the absence of a record thereof may be taken to be the land on which the ditch was actually constructed and the waste banks deposited. OAG July 21, 1948 (602-D).

County ditch No. 4 empties into a natural creek and is the outlet for county ditches No. 3, 18, and 22. Due to the cleaning of ditches 3, 18, and 22 and other causes, county ditch No. 4 can no longer serve as an outlet without flooding adjoining land to adequately improve ditch No. 4. The cost would be excessive unless imposed upon land owners other than those assessed when ditch No. 4 was constructed. The venture is not a repair job covered by provisions under section 106.471, but is an improvement because it is necessary to enlarge and extend the outlet and assessments may be found under the provisions of sections 106.511 and 106.501. OAG July 23, 1948 (602-B).

MINNESOTA STATUTES 1953 ANNOTATIONS

The term "repair" is defined in section 106.471. If the cleaning out of the ditch and the installation of the culverts restores the system as nearly as practicable to the same condition as when it was originally constructed or afterward improved, then the work is a repair under section 106.471; but if these culverts proposed will provide a spillway for water which flows in the ditch, and if such spillways were not provided in the plans for the ditch, the installation thereof is not a repair, but must fall under the classification of "improvement." OAG July 23, 1948 (602-J).

Section 106.501 applies to (1) tiling, (2) enlarging, or (3) extending an existing ditch. It does not apply to straightening the course. When one of the above three things is to be accomplished, section 106.501 applies, but if it is proposed to depart from the line of the old ditch, the petitioner must proceed under section 106.031. The two sections have different requirements in respect to the number of petitioners required. When it is desired to construct new laterals, the procedure required in section 106.521 must be followed. OAG Sept. 21, 1948 (602-G).

Under the guise of repair, ditch banks may not be resloped or waste banks levelled to the extent that damages are caused not contemplated when the ditch was originally constructed. Such proceedings must be under the improvement statute. OAG Sept. 12, 1949 (602-J).

Where two judicial ditches exist and the proceeding is pending on a petition for a county ditch, branches or laterals of the county ditch to be connected with the outlets on the judicial ditches are not authorized by law. The judicial ditches may be improved in proceedings relating to the specific ditches to be improved but not through the construction of an independent ditch. Drainage ditches are not entities or corporations and may not be assessed or charged as such but lands benefited by construction of drainage ditches are directly assessed. No lands benefited by the judicial ditches may be assessed for construction of the county ditch except all notices provided by law are given and owners of benefited lands on the judicial ditches have due process of law. OAG May 15, 1950 (602-B).

Where a long established county ditch outlets into a creek at a point within the county, the outlet being a few feet from the county line, and an obstruction exists in the creek caused by debris from the ditch, and the obstruction is situated outside the county wherein the ditch was authorized, the removal of the obstruction is not a repair job. The work to be done in removing the obstruction is not within the planned ditch and the remedy is not found in section 106.471, but under section 106.511 which relates to improvements of outlets. OAG Sept. 8, 1950 (602-J).

Section 106.471 deals with repairs while 106.501 relates to improvements, and section 106.511 relates to improvements of outlets. The contemplated change lowering the depth of the tile system two or three feet below that specified in the original plan under which the ditch was originally constructed is an improvement of the system rather than a repair, and the procedure required is the procedure set forth for the repair of a system. OAG Sept. 13, 1950 (602-J).

Where the installation of a stop culvert was not specified in the original plan, and was not installed when the ditch was constructed, a culvert may not be installed under the guise of repair, nor may it be installed by a landowner without permission. If a culvert is to be installed it must be by the procedure required in the statute for improvements. OAG Oct. 3, 1950 (602-H).

Repair should not involve natural variance or departure from the plan. Whether a particular variance is a departure is a question for the engineer, and if he so determines that the most practical and economical method to attain the desired result is to lay the tile at a lower level than in the plan proposed, there is not material variance. OAG Oct. 31, 1950 (602-J).

Laterals may be established under ditch proceedings conducted under section 106.501. OAG Dec. 27, 1950 (602-H).

Where part of the main ditch is to be improved by a proceeding under section 106.501, the number of petitioners required must be based on the entire main ditch. Whether the procedure under section 106.031 for establishing it, or the procedure under section 106.521 for connecting a lateral with an existing ditch may be used,

MINNESOTA STATUTES 1953 ANNOTATIONS

106.511 DRAINAGE

246

where the parties have in mind making a ditch improvement, depends upon the facts, the statutory provisions being designed to fit certain facts and not others. OAG July 26, 1951 (602-H).

Separate proceedings must be conducted under separate petitions for repair of a drainage ditch and for improvement which would require extending the ditch into another state. OAG Sept. 5, 1951 (602-H).

An improvement proceeding should not be a departure from the original plan of the ditch. OAG March 26, 1953 (602-G).

Where it is proposed to construct an off-take ditch serving a judicial ditch extending through two counties or a lateral having its outlet in said ditch, the proceedings must be initiated under the provisions of section 106.501. OAG July 9, 1953 (602-H).

The changes proposed to be made to a branch of the county ditch involved the lowering of the tile in a section thereof so as to conform to the levels as shown on the drawings and plans for the original construction. This involves restoring the ditch or the branch involved as nearly as practicable to the same condition as when originally constructed or subsequently improved. This would not constitute repairs. This is, in effect, a petition for improvement under section 106.501, which relates to ditch improvement, and not section 106.47 which relates to repairs. OAG Sept. 19, 1953 (602-J).

There is no provision in the statutes relating to improvements or to laterals or outlets whereby lands which have not been heretofore assessed in pending proceedings may now be brought therein for the purpose of assessing benefits against such lands. Final order of the board has same effect as a final judgment. OAG Nov. 18, 1953 (602-B).

106.511 IMPROVEMENT OF OUTLETS; PETITION; PROCEEDINGS

NOTE: Section 106.511 embodies the provisions of section 106.77 as modified by Laws 1945, Chapter 33.

Where a drainage ditch has been established, owners of land who have recovered damages or have been assessed benefits for its construction, have a property right in the maintenance of the ditch in the same condition as it was when originally established, which right cannot be divested without due process of law. The same rule applies where an established ditch is to be used as an outlet for a separate ditch or drainage system, whether such ditch is new or merely an enlargement of an old. *Schultz v Chippewa Co.*, M , 57 NW(2d) 158.

Lands not assessed for construction of the ditch are not entitled to any benefits thereof. Under the provisions of section 106.487, proceedings may be had by which, on such terms as are applicable, landowners operating the private ditch may be assessed so benefits resulting from the ditch will be included in assessments for repairs. Lands benefited by the repair of an established ditch may, by proper proceedings, be assessed in accordance with benefits derived. OAG Sept. 12, 1947 (602-B).

When the county board petitions for ditch improvement under section 106.511, it is the duty of the county attorney to represent the county and the county only as provided in section 106.441. OAG Nov. 7, 1947 (121-B-8).

Where a petition was made to the county board to establish a county ditch, and an engineer was appointed, who in his preliminary report determined that the outlet planned to be used by the proposed ditch must be deepened before it could be used as an outlet. Under such circumstances, under provisions of section 106.101, subdivision 3, an order should be made by the county board, either denying the petition, or referring the petition back to the petitioners for amendment in accordance with the report of the engineer and the obtaining of additional signatures in order that work may be done on the old ditch to provide a sufficient outlet. OAG Jan. 15, 1948 (602-H).

The procedure in section 106.511 should be followed when it is contemplated that the water from the proposed ditch should empty into an existing drain especially if

MINNESOTA STATUTES 1953 ANNOTATIONS

247

DRAINAGE 106.521

there is a possibility that such action will cause an overflow. OAG Jan. 15, 1948 (602-H).

Where a long established county ditch outlets into a creek at a point within the county, the outlet being a few feet from the county line, and an obstruction exists in the creek caused by debris from the ditch, and the obstruction is situated outside the county wherein the ditch was authorized, the removal of the obstruction is not a repair job. The work to be done in removing the obstruction is not within the planned ditch and the remedy is not found in section 106.471, but under section 106.511 which relates to improvements of outlets. OAG Sept. 8, 1950 (602-J).

Section 106.471 deals with repairs while section 106.501 relates to improvements, and section 106.511 relates to improvements of outlets. The contemplated change lowering the depth of the title system two or three feet below that specified in the original plan under which the ditch was originally constructed is an improvement of the system rather than a repair, and the procedure required is the procedure set forth for the repair of a system. OAG Sept. 13, 1950 (602-J).

In procedure under section 106.511 the lands benefited will be assessed for such benefits. If the lands are benefited is a fact question determined by the viewers. The procedure under section 106.511 is similar to that had in an original drainage proceeding. The engineer is required to show the existing drains which cause the overflow, together with the lands and properties drained or to be drained thereby. The viewers will report all benefits and damages to lands and properties resulting from the improvement. OAG Aug. 18, 1952 (602-H).

Where county ditch No. 9 was first created, and thereafter county ditch No. 10 was created emptying into No. 9, thereby flooding land tributary to No. 9, upon a proper petition and a proper showing and proof thereof, the county board may authorize ditch No. 10 to construct an off-take ditch for the relief of the overload of the overflowed lands. OAG Sept. 30, 1952 (602-H).

When proceedings are instituted for improvement, and if it is determined that lands other than those originally assessed when the ditch was established and constructed should be now assessed for the purpose of improvement, such assessment can be made only after it has been determined that such lands have been benefited. OAG Oct. 16, 1953 (602-B).

106.521 LATERALS

HISTORY. 1947 c 143 s 52; 1953 c 531 s 1.

NOTE: Section 106.521 supersedes the provisions of sections 106.56 to 106.59 by providing that proceedings regarding laterals be the same as proceedings for any other ditch.

Where a drainage system extending into two or more counties is to be used as an outlet for a lateral, the district court and not the county board has jurisdiction of the petition for the establishment of such lateral. *Petition for Construction of an Open Ditch Lateral, Laue v Faribault County, M, 56.NW(2d) 435.*

The establishment of laterals into a drainage ditch is not authorized under petition for repair proceedings. It is permitted only in proceedings for the improvement of an outlet into an established ditch and for the establishment of laterals into such ditches. *Seidlitz v Faribault County, 237 M 358, 55 NW(2d) 308.*

Section 106.521 must be followed if the owner wishes to use an existing drainage system as an outlet for laterals constructed subsequent to the time of the construction of the ditch system. OAG April 21, 1947 (602-H).

Where procedure is instituted to obtain permission to outlet a new lateral through an established judicial ditch, the petition must be addressed to the court. The proceedings in section 106.531 must be observed. If all the lands affected by the new lateral are in one county, a duplicate of such petition should be filed with the auditor of the county wherein lies the land. Proceedings for the establishment of the lateral will be conducted under section 106.521. A certified copy of the order of the

court made by authority of section 106.531 should be filed with the auditor, but the establishment and construction of the lateral, the assessment of benefits, and the spreading of cost against the lands is under section 106.521. OAG Dec. 4, 1947 (602-H).

Lands not originally assessed for benefits may not use the ditch as lateral without permission upon terms by order of board or court. Who may be eligible petitioners for a lateral after a ditch is established is defined by section 106.521. OAG Feb. 5, 1948 (602-I) (602-H).

There are various ways in which lands may be benefited and consequently assessed. If the system prevents water from coming upon the land it may be assessed. If the system affords an outlet for drainage thereafter to be constructed by the landowner, it may be assessed. If, in any manner, the drainage system as constructed directly benefits the land, the land may be assessed. Although a landowner has been assessed by benefits from a ditch which affords an outlet for drainage thereafter to be constructed and the landowner constructs or desires further drainage, he cannot expect the expense of such further drainage to be paid by others when the benefits accrue to himself alone. OAG March 8, 1948 (602-B).

Section 106.501 applies to (1) tiling, (2) enlarging, or (3) extending an existing ditch. It does not apply to straightening the course. When one of the above three things is to be accomplished section 106.501 applies, but if it is proposed to depart from the line of the old ditch, the petitioner must proceed under section 106.031. The two sections have different requirements in respect to the number of petitioners required. When it is desired to construct new laterals, the procedure required in section 106.521 must be followed. OAG Sept. 21, 1948 (602-G).

"In the vicinity" means in the drainage area or in the watershed. An established drainage ditch may be used for any lawful purpose including drainage from an industrial establishment, if such drainage does not constitute a nuisance. OAG Nov. 9, 1948 (148-A).

Drainage ditch may not be established under a plan whereby a lateral in an existing system is utilized in the new system except by proceedings in eminent domain by which any person having property rights resulting from the establishment of the first ditch is compensated for any damages resulting from construction of second ditch. OAG Sept. 16, 1949 (602-E).

Where two judicial ditches exist and the proceeding is pending on a petition for a county ditch, branches or laterals of the county ditch to be connected with the outlets on the judicial ditches are not authorized by law. The judicial ditches may be improved in proceedings relating to the specific ditches to be improved but not through the construction of an independent ditch. Drainage ditches are not entities or corporations and may not be assessed or charged as such but lands benefited by construction of drainage ditches are directly assessed. No lands benefited by the judicial ditches may be assessed for construction of the county ditch except all notices provided by law are given and owners of benefited lands on the judicial ditches have due process of law. OAG May 15, 1950 (602-B).

Sections 106.521 and 106.531 are not inconsistent. They are supplementary to each other. The first relates to laterals; the latter relates to outlets for drainage systems. If the law is followed and is adapted to its purpose, the requirements of due process are met. OAG Aug. 29, 1950 (602-H).

Sections 106.521 and 106.531 are supplementary and should be considered together. Benefits arising under both sections might be invoked under a single petition or under two petitions. Proceedings for laterals should not be had in connection with proceedings for repair of a theretofore established ditch. OAG April 15, 1952 (602-I).

A petition asking for the establishment of a lateral to a judicial ditch must be filed with the clerk of the district court in the county in which the records appear; and all the requirements of section 106.521 must be complied with. The court has no power to impose an assessment upon lands beyond the boundaries of the state. OAG Sept. 14, 1950 (602-H).

Where part of the main ditch is to be improved by a proceeding under section 106.501, the number of petitioners required must be based on the entire main ditch. Whether the procedure under section 106.031 for establishing it, or the procedure under section 106.521 for connecting a lateral with an existing ditch may be used, where the parties have in mind making a ditch improvement, depends upon the facts, the statutory provisions being designed to fit certain facts and not others. OAG July 26, 1951 (602-H).

106.531 DRAINAGE SYSTEM, USE AS OUTLET

HISTORY. 1947 c 143 s 53; 1953 c 530 s 1.

NOTE: Section 106.531 is taken from section 106.55.

The establishment of laterals into a drainage ditch is not authorized under petition for repair proceedings. It is permitted only in proceedings for the improvement of an outlet into an established ditch and for the establishment of laterals into such ditches. *Seidlitz v Faribault County*, 237 M 358, 55 NW(2d) 308.

Where a drainage ditch or system has been established, owners of the land who have recovered damages, or have been assessed for benefits for its construction, have a property right in the maintenance of the ditch in the same condition as it was when originally established, and the same rule applies where an established ditch is to be used for a separate ditch or drainage system. This is a right that cannot be divested without due process of law. A separate ditch or drainage system is not a lateral within the meaning of section 106.531. *Schultz v Chippewa County*, M, 57 NW(2d) 158.

Where procedure is instituted to obtain permission to outlet a new lateral through an established judicial ditch, the petition must be addressed to the court. The proceedings in section 106.531 must be observed. If all the lands affected by the new lateral are in one county, a duplicate of such petition should be filed with the auditor of the county wherein lies the land. Proceedings for the establishment of the lateral will be conducted under section 106.521. A certified copy of the order of the court made by authority of section 106.531 should be filed with the auditor, but the establishment and construction of the lateral, the assessment of benefits, and the spreading of cost against the lands is under section 106.521. OAG Dec. 4, 1947 (602-H).

Where a petition was made to the county board to establish a county ditch, and an engineer was appointed who in his preliminary report determined that the outlet planned to be used by the proposed ditch must be deepened before it could be used as an outlet. Under such circumstances, under provisions of section 106.101, subdivision 3, an order should be made by the county board, either denying the petition, or referring the petition back to the petitioners for amendment in accordance with the report of the engineer and the obtaining of additional signatures in order that work may be done on the old ditch to provide a sufficient outlet. OAG Jan. 15, 1948 (602-H).

Lands not originally assessed for benefits may not use the ditch as lateral without permission upon terms by order of board or court. Who may be eligible petitioners for a lateral after a ditch is established is defined by section 106.521. OAG Feb. 3, 1948 (602-I) (602-H).

Persons desiring to utilize the existing ditch as an outlet for a proposed ditch must petition the county board for express authority. When the petition for the new ditch is filed, a certified copy thereof should be filed in the proceedings relating to the existing ditch into which it is to flow. Any order made by the board should be filed in the proceedings relating to both ditches. Benefits which are accrued to lands by reason of the construction of the new county ditch in addition to the benefits which have accrued to the same lands by reason of the construction of the existing ditch may properly be assessed in the proceedings for the establishment of the new ditch. Proper notice of all proceedings should be given to all parties concerned. OAG Oct. 19, 1948 (602-H).

106.541 DRAINAGE

250

A drainage ditch may not be utilized for drainage of lands not assessed for benefits when the ditch was established. It is immaterial that the landowner formerly had the right to drain his land into a creek which forms the line of the ditch. OAG Oct. 15, 1949 (602-H).

Sections 106.521 and 106.531 are not inconsistent. They are supplementary to each other. The first relates to laterals, the latter relates to outlets for drainage systems. If the law is followed and is adapted to its purpose, the requirements of due process are met. OAG Aug. 29, 1950 (602-H).

Sections 106.521 and 106.531 are supplementary and should be considered together. Benefits arising under both sections might be invoked under a single petition or under two petitions. Proceedings for laterals should not be had in connection with proceedings for repair of a theretofore established ditch. OAG April 15, 1952 (602-I).

A petition asking for the establishment of a lateral to a judicial ditch must be filed with the clerk of the district court in the county in which the records appear; and all the requirements of section 106.521 must be complied with. The court has no power to impose an assessment upon lands beyond the boundaries of the state. OAG Sept. 14, 1950 (602-H).

In making repairs the cost is to be distributed on the basis of total benefits ascertained when the ditch was originally constructed and when the laterals were constructed subsequent thereto. OAG Nov. 5, 1951 (602-J).

Where laterals are constructed into an existing drainage system, the county board has authority to fix the amount of benefits to properties for assessment benefits. OAG Nov. 21, 1951 (602-H).

The use of a drainage system for outlets for other ditches requires, in case of a system lying wholly within one county, the consent of the county board. In case the system extends into more than one county, the consent of the court controlling the judicial ditch system must be obtained. OAG Aug. 19, 1952 (602-H).

Laws 1953, Chapter 530, has no retroactive effect. A ditch constructed in 1905, used as an outlet the source of a ditch constructed theretofore without payment of damages to the first ditch constructed for the owners benefited thereby. In repair proceedings in 1953 on the second ditch the procedure of section 106.471, subdivision 7, is available. OAG June 26, 1953 (602-B).

The village council in behalf of a village may petition the county board to secure permission to connect a storm sewer with a drainage ditch where the village was not assessed benefits before construction. OAG Aug. 20, 1953 (387-G).

106.541 OUTLETS IN ADJOINING STATES

HISTORY. 1947 c 143 § 54.

NOTE: Section 106.541 is taken from section 106.74.

106.551 CONNECTION WITH DRAINS IN ADJOINING STATES

HISTORY. 1947 c 143 s 55.

NOTE: Section 106.551 is taken from section 106.75.

Lands not assessed for construction of the ditch are not entitled to any benefits thereof. Under the provisions of section 106.487, proceedings may be had by which, on such terms as are applicable, landowners operating the private ditch may be assessed so benefits resulting from the ditch will be included in assessments for repairs. Lands benefited by the repair of an established ditch may, by proper proceedings, be assessed in accordance with benefits derived. OAG Sept. 12, 1947 (602-B).

106.561 MUNICIPAL SEWER CONNECTIONS

HISTORY. 1947 c 143 s 56.

MINNESOTA STATUTES 1953 ANNOTATIONS

251

DRAINAGE 106.621

NOTE: Section 106.561 supersedes the provisions of sections 106.61, 106.62, and 106.63.

When a municipality wishes to connect its sewer system with a drainage ditch the procedure is specified in section 106.561. If a proprietor wishes to make sanitary sewer connections with a drainage ditch, he must make application therefore to the water pollution control commission and under its authority, specified by section 144.373, the commission will make the appropriate order. If the connection resulted in a nuisance the appropriate law will apply. OAG Dec. 5, 1947 (150).

Drainage ditches are contemplated to drain surface water but there is specific authority for municipalities under certain procedure to make use thereof. The law does not contemplate the use of drainage ditches for disposal of industrial waste direct from the industry. A municipality may petition for the right to discharge its sewage waste into a drainage ditch as an outlet under certain specified conditions. The operators of a mill may petition the city council for a drain to be connected with the city sewer system and the city may then petition the county board but there will be no direct dealing between the county board and the proprietors of the soy bean mill. OAG March 20, 1951 (602).

A municipality having a sewer system may use any public drainage system upon prescribed conditions but section 106.561 does not apply to municipalities which do not have a sewer system. OAG July 29, 1952 (602-B).

106.571 DEFECTIVE NOTICE; SERVICE

HISTORY. 1947 c 143 s 57.

NOTE: Section 106.571 is taken from sections 106.68 and 106.69.

106.581 RIGHT OF ENTRY

HISTORY. 1947 c 143 s 58.

NOTE: Section 106.581 embodies the provisions of section 106.70.

106.591 RECORDS, PRIMA FACIE EVIDENCE

HISTORY. 1947 c 143 s 59.

NOTE: Section 106.591 embodies the provisions of section 106.71.

106.601 FAILURE OF BOARD OR COURT TO ATTEND HEARINGS

HISTORY. 1947 c 143 s 60.

NOTE: Section 106.601 is taken from the provisions of section 106.72.

106.611 EFFECT OF DEFECTIVE PROCEEDINGS

HISTORY. 1947 c 143 s 61.

NOTE: Section 106.611 embodies the provisions of section 106.79.

106.621 USE OF FORMER SURVEYS

HISTORY. 1947 c 143 s 62.

NOTE: Section 106.621 embodies the provisions of section 106.82.

A petition was filed for the establishment of a county ditch and a petitioners' bond furnished, and the engineer making the preliminary survey disclosed facts indicating the only feasible plan required two separate ditch systems, the original plan was abandoned and petitioners paid the expense. Upon new proceedings being commenced on new petition for two ditches, based on the engineer's recommendation as above set forth, if the engineer in such new proceedings used part or all of

MINNESOTA STATUTES 1953 ANNOTATIONS

the original survey, the amount saved in the subsequent proceedings should be paid to the parties who paid the expense of the first survey. OAG April 8, 1953. (602-I).

106.631 APPEALS

HISTORY. 1947 c 143 s 63; 1949 c 357 s 1.

NOTE: Section 106.631 supersedes sections 106.89, 106.90, 107.17 and 108.25 and provides that all orders of the district court are reviewable by appeal.

In proceedings for construction of a judicial ditch where nonresident railroads appealed assessment of benefits against them to the proper state court, and then removed the controversy to the federal court, other landowners were not parties because their assessment liens would be increased if the benefits assessed against the railroads were decreased, so as to be entitled to notice of the removal in view that one landowner can appeal his part of the proceedings independently of the others. *Re Judicial Ditch No. 24*, 87 F. Supp. 198.

In an appeal from an order of the board of county commissioners establishing a county ditch, the failure to file a bond with sufficient surety and the failure to comply strictly with the provisions of section 106.631, subdivision 2 (b) which require that the notice of appeal shall state the particular benefits or damages appealed from, are not such defects as to result in a failure to invest the district court with jurisdiction, particularly where the notice informs sufficiently as to the nature of the appeal, where there has been no prejudice to the opposing parties by such failures or lack of good faith on the part of the appellant, and where the failures are the mistakes of counsel and not of appellant.

The appeal from the order of the district court vacating its order to show cause and thereby denying appellant's motion to vacate the order dismissing his appeal from the order of the county board falls within the scope of *Bennett v Johnson*, 230 M 404, 42 NW(2d) 44, which holds that an order refusing to vacate an appealable order is non-appealable. *Carson*, appeal of, 232 M 329, 45 NW(2d) 555.

Where a statute provides that ditch proceedings instituted under a prior law and incomplete at its effective date may be completed under provisions of the prior law, but further provides that either the board or the court may avail itself of the provisions of the new law when such course seems to be in the public interest; and where such new law provides for an appeal to the district court from an order of the county board establishing a ditch, under the language of the saving clause, the district court may consider an appeal from the board's order establishing a ditch even though the prior act contained no provision for such appeal. *Schroeder v Busack*, 233 M 12, 47 NW(2d) 592.

Where on appeal the district court finds that the order of the county board in ditch proceedings was unlawful and unsupported by evidence, the court may, pursuant to authority granted by the statute, properly effect such order. *Hawkins v Kandiyohi County*, 234 M 296, 48 NW(2d) 441.

Where the county board ordered the imprisonment sought on petition for the improvement of a county ditch, and on appeal by a group of individuals, the district court entered an order overruling an objection of appeals to the jurisdiction of the county board, the latter order was not a final order or judgment and was not appealable. *Re Schoenfelder*, M, 55 NW(2d) 305.

Landowners who are not parties to a proceeding for improvement of a drainage ditch and were not subject to an assessment for benefits or entitled to damages were not "aggrieved parties" so as to entitle them under the statutes to appeal to the district court from an order of the board of county commissioners granting the petition for such improvement, or to appeal to the supreme court from an order of the district court dismissing such appeal. *Re Schoenfelder*, M, 55 NW(2d) 305.

On appeal to the district court from the county board's order dismissing a petition for the establishment of a county ditch, trial is de novo for all intents and purposes so the court can make such findings governing the whole case as may be necessary. *Schultz v Chippewa County*, M, 57 NW(2d) 158.

The force and effect of an order establishing a public ditch is that of a judgment in rem, and all property rights affected thereby are settled and fixed in a new status and may be altered only by competent legal change authorized by law. If a town interested has suffered a judgment to be entered and if the town permits the time for appeal to expire without taking an appeal, the judgment is final and the town having allowed the time for appeal to expire without taking an appeal is without remedy and the order is binding on the town. OAG Nov. 23, 1948 (602-E).

In proceedings for the establishment of a new drainage system after the final hearing on the engineers' and viewers' reports, the order may modify their reports. The order establishing the ditch should be dated on the day it is signed. Time for appeal runs from the date of the order. OAG April 11, 1949 (602-E).

Upon appeal by a landowner which results in a reduction of assessment of benefits, the landowner may not tax costs and disbursements. OAG April 26, 1949 (602-B).

Damages to lands due to drainage operations when finally ascertained, are paid without interest. OAG May 11, 1951 (602-H).

After more than 30 days have elapsed since the making of an order establishing a drainage ditch, and no appeal having been taken from the order, the auditor should let a contract. Preliminary to the letting of a contract the board must advertise for bids. Advertising for bids may be before the expiration of the 30 days from filing the order establishing the ditch. OAG Sept. 10, 1952 (602-C).

On appeal from assessment of benefits in drainage proceedings, under section 106.631, the question for determination is how much will the land be benefited by the construction, irrespective of the number of persons owning an interest therein. OAG March 27, 1953 (602-B).

106.641 OFFENSES; PENALTIES

HISTORY. 1947 c 143 s 64.

NOTE: Section 106.641 covers the provisions of section 106.92 with numerous changes in policy.

106.651 DIVERSION OF DRAINAGE

HISTORY. 1947 c 143 s 65.

NOTE: Section 106.651 is new.

"Surface waters" consist of waters from rain, springs, or melting snow which lie or flow on the surface of the earth but which do not form a part of a well-defined body of water or natural water course. Waters do not lose their character "surface waters" because in a measure they are absorbed by or soak into the marshy or boggy ground where collected. *Enderson v Kelehan*, 226 M 163, 32 NW(2d) 286.

In effecting a reasonable use of land for a legitimate purpose, a landowner, acting in good faith, may drain his land of surface waters and cast them as a burden upon the land of another, although such drainage carries with it some waters which would otherwise have never gone that way but would have remained on the land until they were absorbed or evaporated, if (a) there is a reasonable necessity for such drainage; (b) reasonable care be taken to avoid unnecessary injury to the land receiving the burden; (c) the utility or benefit accruing to the land drained reasonably outweighs the gravity of the harm resulting to the land receiving the burden; and (d) where practicable, it is accomplished by reasonably improving and aiding the normal and natural system of drainage according to its reasonable carrying capacity; or if, in the absence of a practicable natural drain, a reasonable and feasible artificial drainage system is adopted. *Enderson v Kelehan*, 226 M 163, 32 NW(2d) 286.

MINNESOTA STATUTES 1953 ANNOTATIONS

106.661 DRAINAGE

254

106.661 ABANDONMENT

HISTORY. 1947 c 143 s 66.

NOTE: Section 106.661 is new.

A drainage system is a unit and branches and laterals are merely parts of units and cannot by themselves be abandoned. The law relates to the entire system. The statute provides a method of abandonment but the authority to abandon relates to the entire ditch, and any abandonment of the whole or any part of the ditch must be under the procedure defined by the statute. OAG Oct. 27, 1949 (602-I).

On August 1, 1944, the county board established a ditch, one of the parties benefited being the village of Bellevue. The county called for bids in 1944 and again in 1945, but no contract was let. The village later contracted with another ditch enterprise for an outlet.

Failure of the county board to let a contract for construction of the ditch does not constitute abatement of the proceedings. The viewers' determination of benefits to the village still holds, and the fact that the village has availed itself of drainage into another drainage system does not relieve the village of liability to the original ditch enterprise. OAG June 28, 1950 (602-E).

A public drainage ditch may be abandoned through proceedings instituted under section 106.661, and upon a finding based upon the essential facts that the ditch is no longer a public benefit or utility. OAG Sept. 14, 1950 (602).

Ditch plans and ditches may be abandoned. No statutory provision exists for disposition of the money remaining in the ditch fund of an abandoned ditch. Funds derived from assessments or proceeds from both issues are trust funds. OAG July 22, 1952 (602-F).

There is no statute permitting an official change of an existing ditch by which its original outlet is abandoned and replaced by emptying the water of the ditch through a designated manhole; but that part of the ditch may be abandoned and the same end reached through proceedings under section 106.661. OAG Nov. 16, 1953 (602).

CHAPTER 107

LIENS, BONDS REFUNDING

107.01-107.19 Repealed, 1947 c 143 s 67.

CHAPTER 108

COUNTY, JUDICIAL

108.01-108.35 Repealed, 1947 c 143 s 67.