

Obstructions in Mutual Drains and Natural Surface Watercourses: Statutory Procedure (IC 36-9-27.4)

Request	Petition	Investigation	Hearing	Findings/Order	Judicial Review
<p>Petitioner asks respondent landowner to remove obstruction</p> <p>Landowner does not remove</p> <p>Definitions:</p> <ul style="list-style-type: none"> - Mutual drain (IC 36-9-27-2) - NSW (IC 36-9-27.4-3) - Obstruction (IC 36-9-27.4-4) 	<p>From petitioner to the county drainage board</p> <p>General descriptions of:</p> <ul style="list-style-type: none"> - Petitioner-owned tract; - Need for removal; and - Site of obstruction <p>Filing fee</p>	<p>County surveyor promptly searches, finds an existing obstruction in the location alleged by the petition</p> <p>County surveyor sends report to the drainage board declaring such findings</p> <p>Drainage board sets a hearing date for 30-90 days after the petition was filed, provides notice to parties via mail</p>	<p>Finding of obstruction</p> <p>If removal will...:</p> <ul style="list-style-type: none"> - Promote better drainage on petitioner's land; and - Not cause unreasonable damage to the respondents <p>...then the drainage board finds for the petitioner</p> <p>Next, the drainage board determines intent by a preponderance of the evidence</p>	<p>Drains; <u>unintentional</u></p> <ul style="list-style-type: none"> - Expenses: apportioned among owners of all tracts <u>benefitted by the drain</u>; those with greater benefit pay more - Physical removal: petitioner, respondent, county surveyor, or any combination <p>Natural Surface Watercourses; <u>unintentional</u></p> <ul style="list-style-type: none"> - Expenses: petitioner - Physical removal: petitioner or county surveyor <p>Drains and Natural Surface Watercourses; <u>intentional</u></p> <ul style="list-style-type: none"> - Expenses: respondent - Physical removal: respondent or county surveyor 	<p>Respondent may file an action in the county circuit or superior court assessing at least one of the following:</p> <ul style="list-style-type: none"> - Drainage board lacked authority - Drainage board erred in finding that removal will promote better drainage and not cause unreasonable harm - Insufficient compensation for harm/inconvenience - Drainage board didn't follow procedure

Precedent from 27.4 Hearings

Hearings/background	“Promote better drainage of the petitioner’s land”	“Not cause unreasonable damage to the land of the respondents”	Intent – by a preponderance of the evidence
<p>Wright vs Dhani (2022) [order; intent]</p> <ul style="list-style-type: none"> - “The downstream landowner has placed fill dirt within the open swale, downstream from the Petitioner’s driveway...causing water to backup upon the Petitioner’s Real Estate” - Order issued, Dhani must remove the berm at own expense <p>Sawyer vs Westfield Commercial (2021) [petition dismissal]</p> <ul style="list-style-type: none"> - WC puts fill dirt into a swale. Water that would flow away from Sawyer’s property into the swale backs up on Sawyer’s driveway - Parties agree on fill dirt removal outside of an order, push back hearing date to re-assess - New hearing date finds fill dirt gone, but a silt fence now blocks some water flow. Petition dismissed, but Sawyer can re-file for free if WC does not remove the silt fence 	<p>Wright vs Dhani</p> <ul style="list-style-type: none"> - “There was clear and obvious evidence...that the water from Petitioner’s Real Estate and the upstream parcels could no longer flow from the Open Swale because of the obstruction caused by the fill dirt located upon the Respondents’ Real Estate” - “[A]erial photos from 1974, 2008, and 2019... (show that) surface water historically flowed from the parcels to the south and east of the Petitioners’ Real Estate to Petitioners’ southern boundary” - Based on the photos, “a grass waterway had historically conveyed the water...onto the Respondents’ Real Estate” <p>Sawyer vs Westfield Commercial</p> <ul style="list-style-type: none"> - Lot floods when it rains; dirt fill over previous swale - Historical photos show defined channel indicating waterflow through the swale (2014, 2016, 2019) 	<p>Wright vs Dhani</p> <ul style="list-style-type: none"> - References to aerial historical photos <p>Sawyer vs Westfield Commercial</p> <ul style="list-style-type: none"> - Removing the fill dirt would cause “no more” harm than it had in the past 	<p>Wright vs Dhani</p> <ul style="list-style-type: none"> - Intent: “Respondent...testified that because the Petitioners were casting water onto his property, he intentionally caused the placement of dirt to block the water from the Respondents’ Real Estate. The Respondent testified that he did not make any allowance for upstream water to flow from the Petitioners’ Real Estate, through his property”

Fraze v. Skees (Ind. Ct. App. 2015)

- **A court can assign costs similarly to how 27.4 provides for mutual drains**

- “A trial court may exercise its equitable authority to apportion the costs of a needed repair among the owners of land under which the mutual drain lies. In apportioning costs, the trial court could consider, but is not limited to, the factors delineated by IC 36-9-27-112”

- **Consent requirement for a mutual drain can be met without other evidence when:**

- The mutual drain was established by the mutual consent of all affected landowners (reasonable to assume) ; OR
- The drain was originally constructed as a private drain on a common estate because of the contiguous nature of the system” (automatically a mutual drain at the moment of subdivision)

- “The tracts of land under which a mutual drain is located benefit from the existence of that drain. Thus, a landowner is not necessarily responsible for the total cost of repairs made to the portions of the drain underlying that landowner’s property, provided that other landowners receive a benefit from those repairs”

IC 36-9-27-112 Factors

- (1) The watershed affected by the drain to be constructed, reconstructed, or maintained
- (2) The number of acres in each tract
- (3) The total volume of water draining into or through the drain to be constructed, reconstructed, or maintained, and the amount of water contributed by each land owner;
- (4) The land use;
- (5) The increased value accruing to each tract of land from the construction, reconstruction, or maintenance;
- (6) Whether the various tracts are adjacent, upland, upstream, or downstream in relation to the main trunk of the drain;
- (7) Elimination or reduction of damage from floods;
- (8) The soil type; and
- (9) Any other factors affecting the construction, reconstruction, or maintenance

Tract Owner Benefit Under 27.4 - Example

PDP-2022-00001

Tim & Heidi Wright vs. Prithvi Dhani & Simorjot Kaur Dhani

Hearing per Indiana Code 36-9-27.4

Obstruction on Prithvi Dhani property.

Hearing: 11/28/22

Parcel	Owner	Desc	Acres	% of
			Benefited	Total Shed
08-09-17-00-00-010.000	Bernardon, Elide, Nancy Lynn Johnson &	S17 T18 R3 12.85 Ac	9.11	13.65%
08-09-17-00-00-012.000	Bernardon, Elide, Nancy Lynn Johnson &	S17 T18 R3 19.00 Ac	2.54	3.81%
99-99-99-99-99-999.010	City of Westfield	S17-18 T18 R3, Shelborne Rd	1.92	2.88%
08-09-18-00-00-029.001	Dearringer, George R & Paula K	S18 T18 R3 15.71 Ac	13.36	20.02%
08-09-18-00-00-027.004	Dhani, Prithvi & Simorjot Kaur	S18 T18 R3 9.99 Ac (Obstruction)	9.99	14.97%
08-09-17-00-00-011.000	Graffitti, Dina	S17 T18 R3 7.65 Ac	7.23	10.83%
99-99-99-99-99-999.001	Hamilton Co. Highway Dept.	S17-18 T18 R3, 146th St.	12.06	18.07%
08-09-18-00-00-030.000	Indy Latin School Association Inc.	S18 T18 R3 30.84 Ac	2.38	3.57%
08-09-18-00-00-029.000	Kitterman, Joseph R Trustee	S18 T18 R3 4.87 Ac	0.05	0.07%
08-09-18-00-00-028.000	Lindamood, Steven K & Katherine M	S18 T18 R3 4.47 Ac	4.47	6.70%
08-09-18-00-00-028.001	Wright, Tim & Heidi	S18 T18 R3 4.54 Ac	3.03	4.54%
08-09-18-00-00-028.002	Wright, Tim & Heidi	S18 T18 R3 0.60 Ac	0.60	0.90%
Parcels: 12			Total:	66.74 100.00%