

*State of Minnesota
In Court of Appeals*

State of Minnesota ex rel. Swan Lake Area Wildlife Association,
Petitioner-Appellant,

vs.

Nicollet County Board of County Commissioners,
Respondent,

vs.

Marlin Fitzner, et al., Intervenors,
Respondents

vs.

Minnesota Department of Natural Resources,
Respondent.

APPELLANT'S REPLY BRIEF

PETERSON LAW OFFICE, LLC
William G. Peterson (#86435)
3601 Minnesota Drive
Suite 800
Bloomington, MN 55435
(952) 921-5818

*Attorney for State of Minnesota ex rel. Swan Lake,
Area Wildlife Association, Petitioner-Appellant*

RATWIK, ROSZAK & MALONEY, P.A.
Scott T. Anderson (#157405)
7300 Second Avenue South
300 U.S. Trust Building
Minneapolis, MN 55402
(612) 339-0060

*Attorney for Nicollet County Board of County
Commissioners, Respondent*

BARNETT LAW, LTD.
Gary D. Barnett (#4280)
600 South Second Street
P.O. Box 3008
Mankato, MN 56002-3008
(507) 345-7733

*Attorney for State of Minnesota ex rel. Swan Lake,
Area Wildlife Association, Petitioner-Appellant*

RINKE-NOONAN, LTD
Kurt A. Deter (#22342)
300 US Bank Plaza
P.O. Box 1497
St. Cloud, MN 56302-1497
(320) 251-6700

*Attorney for Marlin Fitzner, et. al., Intervenors,
Respondents*

MINNESOTA ATTORNEY GENERAL
Jill Schlick Nguyen (#292874)
445 Minnesota Street, Suite 900
St. Paul, MN 55101-2127
(651) 296-2377

*Attorney for Minnesota Department of
Natural Resources, Third Party
Defendant, Respondent*

TABLE OF CONTENTS

ARGUMENT

I. THE RESOURCES TO BE PROTECTED IN THIS ACTION ARE THE MEANDERED LITTLE LAKE AND MUD LAKE AS FUNCTIONAL RESOURCES AND NOT THE PREVIOUS DAM ON LITTLE LAKE.....1

II. THE SUBMISSION OF A DIRECTOR'S REPORT ON BEHALF OF THE DEPARTMENT OF CONSERVATION IN 1949 PURSUANT TO MINN. STAT. § 106.091 (1949) IS NOT A "RULE, ORDER, LICENSE STIPULATION OR AGREEMENT" UNDER MINN. STAT. § 116B.03....5

CONCLUSION.....9

TABLE OF AUTHORITIES

CASES

Application of Baldwin , 218 Minn. 11, 18, 15 N.W.2d 184, 188 (1944).....	2,8
Bloomquist v. Commissioner of Natural Resources , 704 N.W.2d 184 (Minn. App. 2005).	7,8
Corwine v. Crow Wing County , 309 Minn. 345, 244 N.W.2d 482 (1976)....	2
Erickschen v. County of Sibley , 142 Minn. 37, 42, 170 N.W. 883, 885 (1919).....	3
In re Trailer Transit Inc. , 97 F. Supp. 571, 573 (D. Minn. 1951).....	4
Kennedy Building Associates v. Viacom Inc. , 375 F.3d 731 (8 TH Cir.2004).....	7
Minnesota Public Interest Research Group v. White Bear Rod and Gun Club , 257 N.W.2d 762 (Minn. 1977).....	2
Petraborg v. Zontelli , 217 Minn. 536, 552, 15 N.W.2d 174, 183 (1944).....	3,4

STATUTES

Minn. Stat. § 103E.015, subd. 2.....	3
Minn. Stat. 1949 § 106.011, subd. 9.....	6
Minn. Stat. 1949§ 106.021, subd. 2.....	6
Minn.Stat. 1949§ 106.091 (1949).....	5,7
Minn. Stat. 1949 § 106.091, subd. 2.....	5
Minn. Stat. § 116B.03.....	5
Minn. Stat. § 116B.04.....	5

ARGUMENT

I. THE RESOURCES TO BE PROTECTED IN THIS ACTION ARE THE MEANDERED LITTLE LAKE AND MUD LAKE AS FUNCTIONAL RESOURCES AND NOT THE PREVIOUS DAM ON LITTLE LAKE

Respondent Nicollet County Board has argued: “This is a MERA case concerning the failure of the weir at the outlet of Little Lake.” [Respondent Nicollet County Board’s Brief at p. 11]. Respondent Department of Natural Resources has argued “The MERA violation here is the County’s failure to repair or replace the dam at the outlet of Little Lake”. [Respondent DNR’s Brief at p. 14]

Neither of these statements is an accurate framing of the real issue and real resources involved in the case.

For the purposes of this discussion, let us assume *arguendo* that the dam maintenance is the entire case. We know that the county installed the dam in 1949 at elevation 973.2. If what the respondent asserts to be the issue, then it would be a simple matter of reinstallation of the dam at 973.2 that would leave a thin veneer of water on parts of the basins of these meandered lakes during parts of the year. Obviously that is not a satisfactory remedy. If that was the violation the most efficient cure would have been to petition for the repair of that structure at 973.2 under Minn. Stat. § 103E.715. Of course that could have been done years ago. It also would have been worthless as a ponded area.

If dam maintenance was the resource and remedy, then there would be no rationale for establishing the outlet elevation at any elevation **other than 973.2**.

So where does the proposed crest come from that was adopted by the district court and favored by respondents of 973.8? It comes from the 1972 DNR Order. [See Appellant's Appendix p A-11 to A-17]. This is the same Order which the Respondent County argued and the district court ordered on August 25, 2004 as follows: "The County chose not to construct the dam under those conditions [of the Commissioner's Order of March 15, 1972]. The time has expired to do the work allowed by the order and permit. By the document's own language, its conditions are no longer enforceable. Therefore, Relator cannot rely on that order and permit in a MERA claim." [Appellant's Appendix, p. A-31] The Order of August 25, 2004 thus stands as the Law of the Case yet its substance is reintroduced into the case first as DNR's preference and now as the finding-less Order of Judge Rodenberg.

Of course, when the evidence of experts clearly established that 976.0 was the desirable crest elevation, the Association conformed its Amended Complaint to ask for that relief. [Appellant's Appendix p. A-45, prayer #1].

Natural resources are defined by Minn. Stat. §116B.02 subd. 4, as follows: " 'Natural resources' shall include, but not be limited to, all mineral, animal, botanical, air, water, land, timber, soil, quietude, recreational and historical resources." Lakes are a fundamental resource of Minnesota and protected by MERA . **Corwine v. Crow Wing County**, 309 Minn. 345, 244 N.W.2d 482 (1976); **Minnesota Public Interest Research Group v. White Bear Rod and Gun Club**, 257 N.W.2d 762 (Minn. 1977). See also **Application of**

Baldwin, 218 Minn. 11, 18, 15 N.W.2d 184, 188 (1944) *“It is a well settled policy of this state that meandered lakes belong to the state in its sovereign capacity in trust for the public.”* **Petraborg v. Zontelli**, 217 Minn. 536, 552, 15 N.W.2d 174, 183 (1944). Meandered Little Lake and Mud Lake should be protected in their environmentally functional condition. This means a crest elevation at 976.0 which will provide the year-around three foot height that Judge Moonan decided was the most suitable depth.

The County Board has always had an obligation to regard the impact of drainage on the meandered lakes within its borders. As Justice Lees stated nearly 92 years ago:

We have observed that in contested drainage proceedings the petitioners are chiefly interested in adding to their holdings of arable land, while their opponents are concerned over possible damage to their lands as a result of the drainage of those of their neighbors. In the clash of conflicting private interests, those of the public are apt to drop out of sight. Yet the state, though not a party to nor represented in the proceedings, has real and substantial rights to protect. The title it holds in its sovereign capacity in trust for the public is directly affected whenever a meandered lake is drained. It should be the concern of the county board and of the courts to guard the rights of the public, and to preserve for the enjoyment of this and future generations all bodies of water which have present or potential public value.

Erickschen v. County of Sibley, 142 Minn. 37, 42, 170 N.W. 883, 885 (1919).

Minn. Stat. § 103E.015, subd. 2 tasks the County Board as follows:

In any proceeding to establish a drainage project, or in the construction of or other work affecting a public drainage system under any law, the drainage authority or other authority having jurisdiction over the proceeding must give proper consideration to conservation of soil, water, forests, wild animals, and related natural resources, and to other public

interests affected, together with other material matters as provided by law in determining whether the project will be of public utility, benefit, or welfare.

Looked at from a different perspective, the remedy that the Association is seeking is injunctive relief at the elevation of 976.0. As a proceeding in equity, the court does not have equitable jurisdiction to order a meaningless result. That is a principle well ingrained in equitable maxims. "Equity will not order a useless act." **In re Trailer Transit Inc.**, 97 F. Supp. 571, 573 (D. Minn. 1951).

The placement of the crest at the previous elevation of 972.3 would be a travesty by providing an occasional thin film of water that would quickly dissipate in the summer as Biologist Gray testified about. [T. 1224, 1260]. Restoring the lakes to 973.8 would only provide water depths that would allow narrow leaf cattail to overtake the basins and choke out other species and wildlife production, as DNR Wildlife Chief Dennis Simon testified to. [T. 721-724]. These are useless remedies. The only meaningful and useful equitable remedy is establishment of the crest elevation on Little and Mud Lakes at 976.0.

In **Petraborg v. Zontelli, supra**, the developer sought to drain part of Rabbit Lake for mining purposes and argued that Rabbit Lake should not be considered as an integrated totality but rather as a collection of individual bays. Mr. Justice Youngdahl regarded such hypothetical dismemberment of a meandered lake as a claim that "would be shocking indeed for the riparian owners and the public" 217 Minn. at 545, 15 N.W.2d at 179. Similarly today we

should be shocked if meandered Little Lake and Mud Lake should be consigned only to the diminished elevations of these sorry mudflats that their drainage by the County Board have left us with.

Regrettably the district court judge with the support of respondents did not provide more than a cursory consideration of the “paramount” criterion to which these lakes were entitled under Minn. Stat. § 116B.04.

II. THE SUBMISSION OF A DIRECTOR’S REPORT ON BEHALF OF THE DEPARTMENT OF CONSERVATION IN 1949 PURSUANT TO MINN. STAT. § 106.091 (1949) IS NOT A “RULE, ORDER, LICENSE STIPULATION OR AGREEMENT” UNDER MINN. STAT. § 116B.03

In the DNR’s Respondent Brief it argues “ As part of the 1949 improvement proceeding, the County sought and received DNR’s approval of the final engineering plans. This approval is the equivalent of a permit for construction of the dam and therefore MERA does not apply to this conduct.”

[DNR Brief p. 22]

First of all this claim of inapplicability of MERA is inconsistent with DNR’s posture throughout the trial and appeal that DNR alone had jurisdiction to establish water levels on lakes. However, even if this argument were entertained at this late date in the proceedings, it is without merit.

The “approval of final engineering plans” arose from the authorization of the then-existing statute, Minn. Stat. 1949 § 106.091, subd. 2 which provided in part:

Upon request by the [county] board or court¹ the director [of the Division of Water Resources and Engineering of the Department of Conservation²] shall report to the board or court giving his opinion as to the sufficiency of the engineer's report and as to the practicality and feasibility of the drainage system or improvements shown therein. Such report shall be filed with the auditor or clerk on or before the date fixed for the preliminary hearing or at any continuance thereof.

[Emphasis added.] The purpose of the Director's Report is "practicality and feasibility", namely whether the proposed ditch or improvement will do what it is supposedly designed to do, namely drain the lands and wetlands as proposed. The design of Ditch 46 certainly would accomplish the drainage proposed. The Director's Report was filed in the ditch proceedings as DNR alleges in its Brief.

What DNR misstates in its brief is that the Director's Report is the "equivalent of a permit". This is false.

The Drainage Code in 1949 also provided:

The board or court is authorized to drain in whole or in part lakes which have become normally shallow and of a marshy character and are not of sufficient depth or volume to be of any substantial public use; provided no meandered lake shall be so drained except upon the determination of the commissioner of conservation of the state of Minnesota that such lake is not public waters or pursuant to a permit of the commissioner as provided in subdivision 3 hereof.

Minn. Stat. § 106.021, subd. 2. [Emphasis added.] There was never a permit issued for the drainage of meandered Little Lake and Mud Lake. Accordingly DNR's argument that MERA is inapplicable under Minn. Stat. § 116B.03, subd. 1

¹ In cases of Judicial Ditched as they existed at the time. See Minn. Stat. 1949 § 106.021 subd. 2

² See definition in Minn. Stat. 1949 § 106.011, subd. 9.

because the Director's Report under Minn. Stat. 1949 § 106.091 is not the equivalent of a permit under Minn. Stat. 1949 § 106.021 is without merit.

Moreover, in its citation of **Kennedy Building Associates v. Viacom Inc.**, 375 F.3d 731 (8th Cir. 2004) does not support the proposition urged by DNR.³ In that case the improperly worded injunction tied Viacom's compliance with MERA to performing such work as would clear a deed restriction. That was not a proper criterion for the injunction. The court said that past contamination was actionable under MERA to the extent that it impaired land and resources in the future. In this case, the Association is also looking to the future. As the DNR's own Chief of Wildlife, Dennis Simon, testified, in order to preserve Little and Mud Lakes as functional lake resources in the future, the lake levels should be controlled with three feet of water year around. As biologist Gerald Gray, engineer Geoffrey Griffin and limnologist Richard Osgood all testified, this necessitated a crest elevation of 976.0.

However, even if the DNR's inaction could be elevated to the status of a "permit", it is clear that a prior acquiescence would not preclude a MERA action and, correspondingly, the landowners who farmed the beds of Little and Mud Lakes acquired no enhanced property status. In **Bloomquist v. Commissioner of Natural Resources**, 704 N.W.2d 184 (Minn. App. 2005).

³ Interestingly the **Kennedy** case also demolishes the "retroactivity" argument of respondents about MERA since the court in **Kennedy** used MERA to abate actions taken by Westinghouse going back to the year 1920 – fully 51 years before MERA was enacted.

Warren Bloomquist argued that a prior permit vested him with ownership rights.

This court rejected that argument in language that is pertinent here:

Bloomquist claims he has prescriptive riparian rights to use the channel. A party may acquire a right by prescription if the claimant can prove open, continuous, actual, hostile, and exclusive use for a period of fifteen years. *Heuer v. County of Aitkin*, 645 N.W.2d 753, 759 (Minn.App. 2002); see also Minn.Stat. § 541.02 (setting statutory period at fifteen years). Although use may presumptively be hostile or adverse, this presumption is rebutted by evidence that the use was permissive. *Ehle v. Prosser*, 293 Minn. 183, 190-91, 197 N.W.2d 458, 463 (1972). Permissive use generates no prescriptive rights, and, if the use was permissive at inception, it must become adverse with the owner's knowledge before any prescriptive rights can arise. *Id.* at 191, 197 N.W.2d at 463.

704 N.W.2d at 188 [Emphasis added.]

This Court also went on to state:

Second, Bloomquist cannot acquire rights in public property by prescription, and the channel, when it existed, was part of a public waterway. See Minn.Stat. § 541.01 (2004) ("[N]o occupant of a public way, levee, square, or other ground dedicated or appropriated to public use shall acquire, by reason of occupancy, any title thereto."); *Heuer*, 645 N.W.2d at 757 (applying prohibition against acquiring title to public land by adverse possession to acquiring use of public land by prescriptive easement).

Neither DNR nor the Nicollet County Board nor the adjacent landowners can rely on the prior ignoring the protection of these meandered lakes. Perhaps they as well as the Association bear some responsibility for the future of these lakes as Justice Streissguth noted:

If eternal vigilance is the price of preserving the full benefit of Minnesota's lakes for all members of the public — as it is of liberty — public officials must gladly pay that price. They must not stand by, wholly unconcerned, like Nero, who fiddled while Rome burned, and permit public access to our lakes to be cut off or reduced for selfish private purposes.

Application of Baldwin, 218 Minn. 11, 18, 15 N.W.2d 184, 188 (1944).

CONCLUSION

Pursuant to the preceding arguments and those of Appellant's Brief in this matter, the judgment of the district court should be reversed and the elevation on the Little Lake-Mud Lake control structure of 976.0 feet above sea level should be ordered as Petitioner established as the desirable elevation in light of the paramount natural resources consideration mandated by Minn. Stat. § 116B.04.

Dated this 8th day of November, 2010.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'W.G. Peterson', written over a horizontal line.

William G. Peterson

PETERSON LAW OFFICE, LLC

3601 Minnesota Drive, Suite 800

Bloomington, MN 55435

Telephone No. 952-921-5818

Atty. Reg. No. 86435

ATTORNEY FOR PETITIONER

NO. A10-1025

**STATE OF MINNESOTA
IN THE COURT OF APPEALS**

State of Minnesota ex rel Swan Lake Area
Wildlife Association, a Minnesota
non-profit organization,

Petitioner-Appellant ,

vs.

Nicollet County Board of County Commissioners,
a political subdivision of the State of Minnesota,

Respondent,

vs.

Marlin Fitzner, Bob Gronholz, High Point Farms,
Harold Honken, Jr., Tom Martens, Oliver Martens,
Harold Mead, Richard Musing, Chuck Peters, Dan Rosin,
Elmer Rosin, Roger Rosin, Rick Rosin, Ron Rudenick,
Scott Rudenick, Bob Schuck, Loren Seys, Ray Smith,
Harley Wels, Kevin Wels, Thomas Wilking, and Paul Zins,

Intervenors,

vs.

Minnesota Department of Natural Resources,

Third Party Defendant.

PETITIONER'S CERTIFICATE OF BRIEF LENGTH

I hereby certify that this Brief conforms to the requirements of Minnesota
Rules of Civil Appellate Procedure Rule 132.01, subdivisions 1 and 3 for a brief

produced with Georgia font. The length of the brief is 191 lines and 2410 words.

The Brief was prepared using Microsoft Word 2007.

Dated this 8th day of November, 2010.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'W. G. Peterson', written over a horizontal line.

William G. Peterson

PETERSON LAW OFFICE, LLC

3601 Minnesota Drive, Suite 800

Bloomington, MN 55435

Telephone No. 952-921-5818

Atty. Reg. No. 86435

ATTORNEY FOR PETITIONER