

No. A08-1739

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., Intervenor,
Respondents.

APPELLANT'S BRIEF

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LEGAL ISSUES

1. *Does the District Court have jurisdiction under the Minnesota Environmental Rights Act (Minn. Stat. Chapter 11B) to determine whether a governmental agency has caused impairment of a meandered lake as a resource and to order the restoration of such a lake?*

Trial Court held: In the affirmative

References: Minn. Stat. § 116B.07; **County of Freeborn by Tuveson v. Bryson** 309 Minn. 178, 243 N.W.2d 316, 322 (1976); **Beliveau v. Beliveau** 217 Minn. 835 14 N.W.2d 360, 366 (1944).

2. *Does the District Court have jurisdiction under the Minnesota Environmental Rights Act (Minn. Stat. Chapter 116B) to establish an environmentally functional water level on such a meandered lake to cure the impairment of that resource?*

Trial Court held: In the negative

References: Minn. Stat. § 116B.03 subd 1; **People for Environmental Enlightenment and Responsibility (PEER) v. Minnesota Environmental Quality Council**, 266 N.W.2d 858 (Minn. 1978); **State ex rel Swan Lake Wildlife Association v. Nicollet County Board of County Commissioner** 711 N.W.2d 522 (2006).

3. *Do the Intervenors or the County have pre-existing rights that restrain the equitable powers of the Court to restore these meandered lakes to environmentally functional elevations?*

Trial Court held: In the negative.

References: Minn. Stat. § 116B.07; Minn. Stat § 103A.201; **Application of Christensen** 417 N.W.2d 607 (Minn. App. 1987); **Floodwood-Fine Lakes Citizen Group v. Minnesota Quality Council** 287 N.W.2d 390 (1979); **In Re Lake Elysian High Water Level**, 208 Minn. 158, 293 N.W.140 (1940).

PROCEDURAL HISTORY

A Summons and Complaint was served on Respondent County of Nicollet on June 5, 2003. The matter was brought as a Complaint by the Swan Lake Area Wildlife Association, Inc., a Minnesota non-profit corporation. Count I alleged that pursuant to the Minnesota Environmental Rights Act ("MERA"), Minn. Stat. §116B.03, the County should be compelled to comply with the order of the Commissioner of Natural Resources dated March 15, 1972, to replace the dilapidated dam at the outlet of Little Lake in Nicollet County which the County had previously installed as part of a ditch project. Count II alleged that the County had a duty to maintain the water level of Little Lake and Mud Lake, two meandered lakes in Nicollet County and that its failure to do so constituted impairment and destruction of natural resources within the meaning of MERA which the County had a duty to remedy. Count III alleged that a nuisance was created by the Respondent. The Complaint was duly served on the Minnesota Attorney General and the Minnesota Pollution Control Agency and Notice thereof was published in the **St. Peter Herald** within 21 days of filing.

Respondent County of Nicollet served its Answer on July 25, 2003. By consent of both parties, Marlin Fitzner and other landowners were permitted to intervene on December 15, 2003.

On August 4, 2004, the County brought a motion for summary judgment. On August 25, 2004, the court rendered its order granting partial summary judgment. It granted the County's motion relative to Count I but denied the motion as to Count II and Count III. The Court's decision was not an appealable order.

The Relator then moved to amend its Complaint and join the Department of Natural Resources as a party. The Respondent County moved to dismiss the Complaint of Relator on the grounds that the district court did not have subject matter jurisdiction under MERA.

On April 11, 2005, the District Court issued its order granting the motion of the Swan Lake Area Wildlife Association to amend its complaint and denying the motion of the County of Nicollet to dismiss the case.

Thereupon Respondent County filed a Notice of Appeal challenging the jurisdiction of the District Court under MERA and disputing the District Court's order allowing Relator to amend its complaint and joining the Minnesota Department of Natural Resources.

Following the submission of briefs and oral argument, this court issued its decision affirming the District Court on all issues. See **State ex rel Swan Lake Area Wildlife Association v. Nicollet County Board of Commissioners**, 711 N.W.2d 522 (Minn. App/. 2006) (Appendix pp. A-72 – A-75).

Thereafter the case proceeded to trial for seven days in April 2007.

The District Court issued its Findings of Fact, Conclusions of Law, Order for Judgment and Judgment on September 17, 2007. (A-76 to A-103).

Among other things, the trial court ordered that the Department of Natural Resources establish a control structure at the outlet of Little Lake that would restore a hemi-marsh in the basin of Little Lake with a water depth of three feet within the meander lines of the lakes.

The parties filed motions for amended findings or for new trial in the matter. DNR submitted affidavits post-trial claiming that the restoration of Little Lake and Mud Lake was not feasible to the lake elevation requested by Relator. Relator objected that the submissions by DNR were not valid in a motion for amended findings or for a new trial. Relator also moved for the award of attorneys' fees.

In December 2007, the judge presiding at the trial, Hon. John R. Moonan, died and the case was reassigned to Hon. John R. Rodenberg.

On May 2, 2008, the motions for amended findings or for new trial were heard by Judge Rodenberg.

On July 30, 2008, Judge Rodenberg issued his decision. The Court found that it did not have jurisdiction to establish a water control elevation on Little and Mud Lakes. The court further found that DNR's post-trial submissions established that the lake level sought by Relator and pumps and dikes provided by the Findings of Fact, Conclusions of Law, Order for Judgment and Judgment of Judge Moonan were not feasible. The Court then set the water control level for the lakes at 973.8 pursuant to the Permit of March 15, 1972. (A-11 to A-17). It is from this Order that this appeal has been taken.

STATEMENT OF FACTS

Little Lake is a meandered lake in Oshawa and Granby Townships of Nicollet County comprising approximately 440 acres. (Exhibit NC-17) Mud Lake is a meandered lake entirely in Granby Township and includes approximately 444 acres [Exhibit RL-1M]. The lakes provide the potential for significant game habitat, storm water and nutrient retention and hunting recreation. [T. 1124]

There has been significant effort from local farmers over the years to drain these lakes and turn these lakebeds into farm fields. In 1898, the Respondent County Board authorized Nicollet County Ditch 36 to drain these meandered lakes and the surrounding countryside. William Witty, a local sportsman, objected to the drainage of these lakes and sought judicial relief in the district court and ultimately the Minnesota Supreme Court. In denying the authority of Nicollet County to drain these lakes, Justice William Mitchell acknowledged Little and Mud Lakes as follows: "The lakes in question¹, although neither very large nor deep, are each of more than 160 acres in extent, and of sufficient size and depth to be capable of beneficial public use." **Witty v. Nicollet County Board of Commissioners**, 76 Minn. 286, 79 N.W. 112 (1899).

Justice Mitchell then held:

¹ The identity of Little and Mud Lakes can be confirmed by reference to the Witty Briefs in the Appellate Court Library of which the court can take judicial notice. Which clearly show Little and Mud Lakes as the subject meandered lakes. The Supreme Court has said that it "will take judicial notice of its own past orders and records." **Sharood v. Hatfield**, 296 Minn. 416, 210 N.W.2d 275 (1973). In **Bowe-Burke Mining Co v. Willcuts**, 45 F.2d 394 (D. Minn. 1930) the Minnesota Federal District Court acknowledged that a court will take judicial notice of its own records. In **Rhodes v. Meyer**, 334 F.2d 709 (8th Cir. 1964) the U.S. Eight Circuit Court of Appeals, held that it was proper for the state appellate court to take judicial notice of briefs and transcripts filed in other related cases.

Lakes which come within the definition of 'public waters' belong to the state, not in its proprietary, but in its sovereign, capacity, in trust for the public. **Lamprey v. State**, 52 Minn. 181, 53 N.W. 1139 If one of these public lakes is to be drained, it will amount to the destruction of one public right for the sake of another public use. This is very different from exercising the right of eminent domain or of taxation over private property for a public purpose. It would naturally be supposed that, if the legislature intended to delegate to the county commissioners authority to determine whether the damage to result from destroying one public right would be more than counterbalanced by other public benefits to be derived therefrom, it would have expressly so declared, and not left it to inference or doubtful implication.

76 Minn. at 288-290, 79 N.W. at 113

The proposed drainage of Little and Mud Lakes, and other meandered lakes was declared contrary to law. **Id.**

Eight years later the Nicollet County Board again proposed approaching Little and Mud Lakes with a new ditch, County Ditch 46. The Order of the County Board did not acknowledge any impact on meandered Little or Mud Lakes and made no findings regarding them. [Exhibit RL-6]. The viewers (ditch appraisers) did not find any lakebed lands converted into farm use so they did not assess those lands for benefits. The District Court approved of the ditch including the partial drainage of Little Lake on the grounds that it had a depth of only six feet and was of a marshy character and was not of substantial public benefit. [Exhibit 94, T. 810].

Little Lake had a water elevation of 977.4 feet above sea level prior to ditch construction. [T.1001, T. 1331] When the ditch was dug by the drainage contractor in 1909, he dug the ditch 1.4 feet deeper than authorized by the drainage authority. [T. 276;

Exhibit NC-17]. Over the next 40 years, however, the ditch filled in so that by 1950, the lake had restored to at least 357 of its open water acres. [T. 1006].

By then, however, there was a movement afoot to install more drainage. As part of that effort, the County Board authorized ditching on the south side of Little Lake and installed a sheet metal structure with a crest at elevation 973.09 feet above sea level. [T. 1296]

By 1966, even the marginal wildlife values provided by the sheet metal structure was lost when the structure collapsed because the county had installed "inadequate sheet piling depth". [T.1282, Exhibit RL-51] The Department of Conservation brought the problem to the attention of the Board but it did not react. Since 1966 the Nicollet County Board has done nothing. Little Lake and Mud Lake remain today as they did in 1966 as little more than mud flats. There is no water in the lakes except for some isolated pockets and the water levels at the time of trial were 0.2 of a foot below the lake bottom. [T.993]

In 1970 the County was interested in more drainage improvements in the watershed of Little and Mud Lakes. The Board applied for a determination from the Commissioner of Conservation whether meandered Little Lake was public waters. The Commissioner issued his decision on October 9, 1970, that Little Lake constitutes public waters. [Exhibit 61]. No appeal was taken from that decision.

By 1971 the Nicollet County Board was moving rapidly toward the establishment of an improvement to County Ditch 46A (as it had now been renumbered) in the watershed of Little and Mud Lakes. On October 18, 1971, the Board ordered the approval of the ditch and let bids thereon . The Board later requested the Commissioner for

authority to place a structure at elevation 973.2 but the Commissioner indicated that in order provide desirable waterfowl habitat, the structure must be at a control elevation of at least 973.8. [Exhibit 94].

This the County Board declined to do. In fact the Board has done nothing to replace its dam that has laid flat on the lakebed since 1966. The County Board later did construction in 1974 in the beds of the lakes [T.1056-1058] but never sought or obtained DNR Waters permits to do so. [T.1282] Little Lake and Mud Lake, meandered public waters of the State of Minnesota, have remained in their drained condition despite the efforts of the Swan Lake Area Wildlife Association and other sportsmen's groups to bring attention to the issue and to restore these public lakes.

On June 5, 2003, the Swan Lake Wildlife Association brought this action pursuant to the Minnesota Environmental Rights Act. The Complaint also included a Count I which sought to enforce the Commissioner's order of March 15, 1972 [Exhibit 94]. The history of proceedings is set forth in more detail in the Procedural History section of this brief.

Trial commenced on April 9, 2007 before the Honorable John R. Moonan in St. Peter. Engineer and Association Board member Pell Johnson introduced the historical documents on the background of Little and Mud Lakes as well as those relating to Nicollet County Ditch 46 and 46A. [T. 35 – 374; T. 403-507; T. 671-701]

DNR Fisheries Supervisor Hugh Valiant testified to the trout fisheries values of Seven Mile Creek which is the outlet of County Ditch 46A. He spoke of the importance

of sediment retention and water impoundment to protect the Creek water temperatures and water clarity for that trout stream. [T. 375-401].

County Attorney Michael Riley identified certain documents and procedures of the county board. [T. 511-669]

Dennis Simon, a DNR wildlife specialist was called by the Relator to testify. Mr. Simon was DNR's game specialist for Nicollet County and three adjoining counties from 1987-2000. [T.708]. While assigned to Nicollet County, one of his main responsibilities was the coordination of the Swan Lake Wildlife Project, a major public venture to foster improved waterfowl conditions. [T.710]. Mr. Simon noted the significant loss of wetlands in Nicollet County. [T.711]. Little and Mud Lakes are part of a large complex of marshes and wetlands that span the lands from Courtland, Minnesota, to Swan Lake. [T.712]. Little Lake and Mud Lake are important satellite wetland lakes to Swan Lake. [T. 743].

Mr. Simon also described in detail the life cycles for waterfowl provided by good wetland habitat conditions. [T.712-714]. He stated that Mud Lake and Little Lake provide poor waterfowl habitat conditions at the present time because of the low water levels on those lakes, which it turn leaves them with little open water and related food and cover amenities [T.714-719]. The low water conditions are particularly a problem in July, August and September of the year when the birds are flightless. [T.719].

In order to provide a reasonable productive waterfowl lake, it is desirable to provide a "hemi-marsh" condition which requires approximately 50% open water and

50% emergent vegetation. This is correlated with water depths of at least half the basin covered by at least three feet of water [T.719-720].

In the recent past, two feet of water depth would have been sufficient to maintain a wildlife lake. [T.722]. However, Minnesota has experienced an invasion of narrow leaf cattail from the eastern United States. [T.722]. Narrow leaf cattail tends to choke out other species and reduces wildlife production [T.721-724]. The best method of controlling narrow leaf cattail is the maintenance of water levels over three feet in depth which floods out narrow leaf cattail. [T.722-723]. Furthermore, three feet of water will allow muskrats to survive the winter under the ice which is beneficial because muskrats work to keep water areas open and not choked with narrow leaf cattail and other problem emergent vegetation. [T.722-723]. *"We consider three feet really to be the minimum that we would like to see in order to – to maintain that 50 percent open water in a Type 3 wetland."* [T.723].

Mr. Simon expressed his expert opinion that (1) Little and Mud Lakes are significant resources of the State of Minnesota (2) Little and Mud Lakes are unique resources of the State of Minnesota and (3) The drainage of Little and Mud Lakes has an adverse effect upon them as resources and (4) The drainage of Little and Mud Lakes would not have an adverse long-term effect on them provided the lakes are restored. The drainage damage is "reversible" by placement of a control structure on the lakes providing restoration of water depths. [T. 724-726].

Engineer Geoffrey Griffin determined what flooding would occur in the basins of Little Lake and Mud Lake under certain water conditions and rainfall events. [T. 838-

980]. The witness had accomplished over 200 wetland restorations. [T. 893]. Mr. Griffin found there would be 148 acres of land flooded [T. 865] All of these lands would be converted lakebed lands “because the farmers are trying to farm the historic lake bottom.” [T. 973-974]

Jeff Allen Hoffmann, a registered land surveyor, testified to the survey of the water levels he undertook in the basin of Little Lake.[T. 981-995]. He took six survey shots on April 13, 2007. What he found was that the ambient water level was 2/10 of a foot or about three inches below the bottom of Little Lake. [T. 993]. The lake was dry.

Richard Allen Osgood, a limnologist, was next called to the stand. Mr. Osgood is the President-Elect of the North American Lake Management Society, an international organization of 1500 limnologists and other lake managers. [T. 998]. Considering different depths, if the control elevation was 976, the deepest point in the lake would be five feet. Correspondingly, with a crest of 975 the deepest point would be 4 feet and at 974, it would be 3 feet of depth.[T. 1021]. Mr. Osgood also conducted studies of the basin of Little Lake to determine what water depths could be anticipated with a control elevation on the lake of 976.0. He then applied the limnological formulae for normal expected rainfall, temperatures and evaporation through the growing season and arrived at the maximum water depths for Little Lake as shown in the following chart:

976.0 Outlet Crest					
June	July	August	September	October	November
5.0 ft.	4.3ft.	4.0 ft.	3.7 ft.	3.4 ft.	3.3 ft

[T. 1022]

If the crest were set at 975.0, we would have the following depths

975.0 Outlet Crest					
June	July	August	September	October	November
4.0 ft.	3.4ft.	3.0 ft.	2.6 ft.	2.3 ft.	2.3 ft

[T. 1023]

Intervenor Ray Allen Smith confirmed that various work was performed in the bed of Little Lake in the 1970's which he knew required a water permit from the DNR.

[T. 1045] He thought that the county would have gotten one. He also expressed concern that some of the land he farms may be flooded although he did not know if it was lower than the lakebed. [T. 1053]

Intervenor Roger Rosin testified that the county performed ditching in the beds of Little and Mud Lakes in or about 1974. [T. 1056-1058]. He had sold the land he owned near Little Lake to his sons. [T. 1061]

Kevin Kuehner,, a Water Quality Board employee of Nicollet, Brown and Cottonwood Counties, was next called to the stand. He testified about water quality issues and potential solutions along the Seven Mile Creek, which is the outlet of County Ditch 46A. He had worked on a number of wetland restoration projects in Nicollet County [T. 1148-1153]. Silt retaining impoundments such as lake basins can retard erosion and sedimentation into the Creek. [Exhibit 163]. At the close of his testimony, the trial judge asked him:

THE COURT: Has that--the county board ever discussed that with you regarding water control or anything?

THE WITNESS [Kevin Kuehner]: No.

(T. p. 1195).

Gerald Gray is a wildlife biologist with 42 years of wildlife management experience including 2000 lake and wetland restorations including projects ranging from four to 5000 acres. [T. 1210]. In visiting Little Lake and Mud Lake, he observed that the lakes are in poor condition to produce and support waterfowl. [T. 1216, T. 12-18-1219]. He took aerial photographs showing the current conditions of the lakes [Exhibits 182, 183, 184 and 185]. He compared Little and Mud Lakes to nearby Middle Lake which he believed provided a high quality of waterfowl production amenities. [T. 1219]. Ms. Gray testified that Little and Mud Lakes could provide a similar degree of quality habitat if the lakes were restored to elevation 976.0. [T. 1220-1221] He also indicated that "typha angustifolia" also known as narrow leaf cattail is a major problem for wildlife production on lakes which can be prevented by maintaining water levels at three feet or greater. [T. 1222-1223] Restoring the water levels on Little and Mud Lakes would cause a significant improvement to these lakes without undertaking any additional land management changes [T. 1223]. He explained that 976 was the best elevation on the lakes because through the summer evaporation would absorb water from the lakes -- even as much as an inch a day - so it is necessary to have a sufficient depth of water to sustain the open water conditions. [T.1224, 1260] He also confirmed from his study of the aerial photographs that portions of the beds of Little Lake and Mud Lake have been diked off and farmed.

[T. 1262].

The Department called DNR Area Hydrologist Leo Getsfried to the stand. He testified that the control structure placed in 1950 was extremely deteriorated and nonfunctional. He noted that it had apparently even been struck with a large hammer to damage it [T.1277]. He stated that the Department at one time had authorized a dam at with a crest at elevation 973.8 but the dam was never installed. [T. 1281-1282]. The Department never granted a permit for work in the bed of Little Lake. [T. 1282]. He testified that water and silt retention was an important function of Little and Mud Lakes and setting the outlet crest would provide additional public benefits. [T. 1379]. The proposal for restoration of Little Lake that was prepared in 1996 identified a dam location on land owned by the Department of Natural Resources which the witness testified was a suitable and reasonable location for a control structure. [T. 1381].

John Scherek, chief of the survey crew for the DNR Division of Waters testified to his observations of the destroyed dam on Ditch 46A and measurements that were made since 1972 [T. 1292-1348].

Intervenor Marlin Fitzer testified that he owns the 148 acres that Mr. Griffin had described and expressed concern that if Mud Lake were restored, he would lose farmland. [T. 1352-1353]. He pumps water into Mud Lake in order to keep the land dry. He acknowledged that the land may be in the lake basin. [T. 1355-1359].

Intervenor Dan Rosin owns a homesite of 2.78 acres that is 30 to 40 yards from the ditch. [T. 1360-1362]. He observed ducks nesting in Mud Lake approximately ten yards from his back window. [T. 1364-1365].

The trial was concluded at 12:55 in the afternoon of April 20, 2007. [T. 1395] thereupon the judge took the matter under advisement.

On September 17, 2007, Judge Moonan issued his Findings of Fact, Conclusions of Law, Order for Judgment and Judgment.[A-76 to A-103]. In his Findings he concluded that the County of Nicollet and the Department of Natural Resources through inaction had failed to maintain Little and Mud Lakes as resources pursuant to the Minnesota Environmental Rights Act (Minn. Stat. Chapter 116B). The Court acknowledged the evidence of the desirability of the maintenance of three (3) feet of water in these lakes [Finding # 59, T. A-89] which corresponded to Relator's request for a crest on the outlet control structure of 976.0 and the consequential reflooding of 148 acres of Mud Lake lakebed that had been farmed in recent years. [Finding # 66, A-91).

When the case was originally served, in Count 1 of the Complaint Relator sought to enforce the March 15, 1972 "Findings of Fact, conclusions Order and Permit and Order" (A-11 to A-17). This contained the proposed crest elevation of 973.8. This Count was dismissed by the Court on August 25, 2004 (A-25 to A-35). This dismissal was confirmed by Judge Moonan's Judgment (A-107). No evidence had been submitted at the April 2007 trial as to the desirability or feasibility of establishing a crest elevation at 973.8 feet above sea level.

Judge Moonan further ordered a dam to be constructed capable of impounding water to a depth of three feet and constructing "dikes within the meandered boundaries of Little Lake and Mud Lake" pumps and lift stations that would "ensure that no sub-terrain water would enter any of the farmland and home sites on Mud and Little Lake." (A-96).

Due to various issues all parties had with the workability of some of the provisions of the Judgment, all of the parties filed motions for amended findings or new trial. In December 2007, Judge Moonan died and the case was assigned to Judge John R. Rodenberg.

Judge Rodenberg entertained the motions in New Ulm on May 2, 2008. On July 30, 2008, he issued an Order, Memorandum and Amended Judgment. (A-151 to A-177). In that decision he stripped the provisions relating to the installation of dikes and lift stations. He reaffirmed the dismissal of Count 1 relating to the enforcement of the Commissioner's 1972 Order for a 973.8 crest (A-163 to A-164). He concluded that "the legislature has entrusted the exclusive responsibility for lake level establishment and maintenance to the DNR" (A-166) and "The Association vigorously and passionately argues that the lake levels should be established in this proceeding and that, as to Little Lake, the proper elevation should be 976.0 feet above sea level. The Court has very seriously considered those arguments, but is without jurisdiction to grant the relief requested." (A-167 to A-168). Nevertheless, the Court established the crest elevation at 973.8 pursuant to the dismissed 1972 Order (A-155).

It is from this Order and Amended Judgment that this appeal is taken.

STANDARD OF REVIEW

Relator-Appellant submits that this Court's review of the decisions by the lower courts are subject to a two-tiered Standard of Review.

Judge Rodenberg determined that the district court did not have jurisdiction under MERA (Minn. Stat. ch. 116B) to determine what the proper lake level for Little Lake should be. The lower court held: "The foregoing statutes [Minn. Stat. § 103A.201 and § 103G.255] convince this court that the legislature has entrusted the exclusive responsibility for lake level establishment and maintenance to the DNR." [A-166]. The lower court also ruled "The Association vigorously and passionately argues that the lake levels should be established in this proceeding and that, as to Little Lake, the proper elevation should be 976.0 feet above sea level. The Court has very seriously considered those arguments, but is without jurisdiction to grant the relief requested." (A-167-168)

The determination of the presence or absence of subject matter jurisdiction is a *de novo* issue for the Court of Appeals. **Johnson v. Murray**, 648 N.W.2d 664 (Minn. 2002).

Moreover, it is clear that this determination by Judge Rodenberg that the Court is "without jurisdiction" influenced his other amendments of Judge Moonan's Findings of Fact, Conclusions of Law, Order for Judgment and Judgment of September 17, 2007. Accordingly, those other amendments should likewise be subject to *de novo* review by this court.

As to non-jurisdictional matters, the lower court is vested with discretion whether to allow or deny an amendment of the findings or grant a new trial. The standard for

review of that determination is a “clear abuse of discretion”. **Boschee v. Duevel**, 530

N.W.2d 834 (Minn. App., 1995)

INTRODUCTION

In terms of sheer size, this case involves the largest acreage (approximately 840 acres) of lake remediation ever to come before this court under the Minnesota Environmental Rights Act (MERA) Minn. Stat. Chapter 116B.

By comparison the MERA case of **Freeborn County by Tuveson v. Bryson**, 297 Minn. 218, 225-229, 210 N.W.2d 290, 297-298 (1973) involved less than an acre of wetlands. **Krmpotich v. City of Duluth**, 483 N.W.2d 55, 56-57 (Minn. 1992) involved less than two acres of wetlands and **Zander v. State**, 703 N.W.2d 645 (Minn. 2005) involved seven acres of wetlands.

This case is also unique because it does not involve affirmative effort by government to destroy a resource but rather the government's malign neglect over an extended period of time by Nicollet County and the Department of Natural Resources to protect Little Lake and Mud Lake from exploitation.

From May 17, 1899 when Supreme Court Justice Mitchell declared Little and Mud Lakes to be "of sufficient size and depth to be capable "of beneficial public use" **Witty v. Nicollet County Board**, 76 Minn. 286, N.W. (1899 we have seen a virtual drainage of these bodies of waters. "ably assisted by human endeavor."

The legislature has declared that environmental protection is "paramount" to all other considerations. Minn. Stat. § 116B.04 and § 116B.09 subd. 2. See **Fleetwood Fine Lakes Citizen Group v. MEQC**, 287 N.W.2d 390, 399-400 (Minn. 1979) that means

environmental consideration supersedes considerations of the Drainage Code or even the Eminent Domain Code.

A generation ago, the conservationist Aldo Leopold espoused a 'land ethic' which he described as follows:

'All ethics so far evolved rest upon a single premise: that the individual is a member of a community of interdependent parts. His instincts prompt him to compete for his place in the community, but his ethics prompt him also to cooperate (perhaps in order that there may be a place to compete for).

'The land ethic simply enlarges the boundaries of the community to include soils, waters, plants, and animals, or collectively: the land.

'In short, a land ethic changes the role of Homo sapiens from conqueror of the land-community to plain member and citizen of it. It implies respect for his fellow-members, and also respect for the community as such.' A Sand County Almanac (1949) p. 203.

In the Environmental Rights Act, our state legislature has given this land ethic the force of law. Our construction of the Act gives effect to this broad remedial purpose.

County of Freeborn by Tuveson v. Bryson, 309 Minn. 178, 189, 243 N.W.2d 316, 322 (1976).

Appellant Swan Lake Wildlife Association simply seeks Little Lake and its tributary Mud Lake restored as functioning natural resources that many years of neglect have denied them.

ARGUMENT

I. MINNESOTA ENVIRONMENTAL RIGHTS ACT (MINN. STAT. CHAPTER 116B) PROVIDES A BROAD AND COMPREHENSIVE REMEDY FOR ENVIRONMENTAL IMPAIRMENT OF LITTLE LAKE AND MUD LAKE

"Individual thinkers since the days of Ezekiel and Isaiah have asserted that the despoliation of land is not only inexpedient but wrong. Society, however, has not yet affirmed their belief. I regard the present conservation movement as the embryo of such an affirmation." - *Aldo Leopold, Sand County Almanac, The Land Ethic*

The Minnesota Environmental Rights Act (Minn. Stat. Chapter 116B) hereafter "MERA" is sweeping and, as the Supreme Court has said, MERA "drastically changed" pre-existing law.

The purpose of the Act is set forth in Minn. Stat. § 116B.01:

The legislature finds and declares that each person is entitled by right to the protection, preservation, and enhancement of air, water, land, and other natural resources located within the state and that each person has the responsibility to contribute to the protection, preservation, and enhancement thereof. The legislature further declares its policy to create and maintain within the state conditions under which human beings and nature can exist in productive harmony in order that present and future generations may enjoy clean air and water, productive land, and other natural resources with which this state has been endowed.

The mechanism for this Act is the citizen lawsuit to seek "the protection, preservation, and enhancement" of the environment:

Any person residing within the state; the attorney general; any political subdivision of the state; any instrumentality or agency of the state or of a political subdivision thereof; or any partnership, corporation, association, organization, or other entity having shareholders, members, partners or employees residing within the state may maintain a civil action in the district court for declaratory or equitable relief in the name of the state of Minnesota against any person, for the protection of the air, water, land, or other natural resources located within the state, whether publicly or privately owned, from pollution, impairment, or destruction

Minn. Stat. § 116B.03, subd 1. This citizen involvement is an important feature of MERA. It's an old canard that war is too important to leave to the generals. Likewise environmental protection is too important to leave to the governmental administrative agencies. "The need for citizen vigilance exists whether or not specific environmental legislation applies, and MERA is clearly a proper mechanism to force an administrative agency, even the MEQC, to consider environmental values that it might have overlooked." **People for Environmental Enlightenment and Responsibility (PEER) v. Minnesota Environmental Quality Council**, 266 N.W.2d 858, 866 (Minn. 1978) (hereafter **PEER v. MEQC**).

The relief that the District Court may grant is quite broad:

The court may grant declaratory relief, temporary and permanent equitable relief, or may impose such conditions upon a party as are necessary or appropriate to protect the air, water, land or other natural resources located within the state from pollution, impairment, or destruction.

Minn. Stat. § 116B.07. In this regard it is important to note that MERA was designed as a substantive implement for the courts, not merely an ancillary or procedural device: "[T]his court has recognized that MERA provides not only a procedural cause of action for protection of the state's natural resources, but also delineates the substantive environmental rights, duties, and functions of those subject to the Act." **PEER v. MEQC**, 266 N.W.2d at 866.

With full equitable powers, the Court has broad authority to craft a remedy that will solve the environmental challenges brought before it. As the Supreme Court said in **Beliveau v. Beliveau**, 217 Minn. 235, 245, 14 N.W.2d 360, 366 (Minn., 1944)

A court of equity has the power to adapt its decree to the exigencies of each particular case so as to accomplish justice. It is traditional and characteristic of equity that it possesses the flexibility and expansiveness to invent new remedies or modify old ones to meet the requirements of every case and to satisfy the needs of a progressive social condition. *Union Pac. Ry. Co. v. Chicago, R. I. & P. R. Co.* 163 U.S. 564, 16 S.Ct. 1173, 41 L.Ed. 265. Equity has not been rendered entirely inflexible by the precedents of bygone ages. See Walsh, "Is Equity Decadent?" 22 *Minn.L.Rev.* 479.

See also **Pooley v. Mankato Iron and Metal Inc.**, 513 N.W.2d 834, 837 (Minn. App. 1994): "A court may fashion equitable remedies based on the exigencies and facts of each case so as to accomplish justice."

The procedure laid out by MERA compels the Relator to submit its prima facie case to show that the conduct of the County and the Department of Natural Resources caused the impairment of meandered bodies of water, Little Lake and Mud Lake:

In any other action maintained under section 116B.03, whenever the plaintiff shall have made a prima facie showing that the conduct of the defendant has, or is likely to cause the pollution, impairment, or destruction of the air, water, land or other natural resources located within the state, the defendant may rebut the prima facie showing by the submission of evidence to the contrary. The defendant may also show, by way of an affirmative defense, that there is no feasible and prudent alternative and the conduct at issue is consistent with and reasonably required for promotion of the public health, safety, and welfare in light of the state's paramount concern for the protection of its air, water, land and other natural resources from pollution, impairment, or destruction. Economic considerations alone shall not constitute a defense hereunder.

Minn. Stat. § 116B.04. In Relator's case it was shown that the lakes have been degraded and that restoration to elevation 976.0 feet above sea level was necessary in order to restore the lakes as functional natural resources. Relator's case will be discussed in greater detail in the next section of this brief. In response, the County offered no

rebuttal to Relator's environmental case and, in fact, rested without offering any witnesses. DNR did not rebut Relator's environmental case but merely submitted two department witnesses regarding DNR procedures. In the absence of environmental rebuttal or evidence "that there is no feasible and prudent alternative and the conduct at issue is consistent with and reasonably required for promotion of the public health, safety, and welfare," Relator submits that Respondents failed to establish a contravening case under Minn. Stat. § 116B.04 and **State by Powderly v. Erickson**, 285 N.W.2d 84 (Minn. 1979). Little and Mud Lakes should be restored to a control elevation of 976.0.

MERA also provides the court with concurrent authority with administrative agencies to make the substantive decisions indicated in **PEER v. MEQC**, *supra*. Minn. Stat. §116B.12 provides in part: "*The rights and remedies provided herein shall be in addition to any administrative, regulatory, statutory, or common law rights and remedies now or hereafter available.*"

Viewing the Minnesota Environmental Rights Act as a whole and in conjunction with the body of environmental policies and laws enacted at the same time strengthens the inference that Little Lake and Mud Lake ought to be restored as functioning lakes for the benefit of the people of Minnesota.

II. LITTLE LAKE AND MUD LAKE SHOULD BE RESTORED TO AN ENVIRONMENTALLY FUNCTIONAL LEVEL OF 976.0 FEET ABOVE SEA LEVEL

"In some instances, the assumed lack of profit in these 'waste' areas has proved to be wrong, but only after most of them had been done away with. The present scramble to reflood muskrat marshes is a case in point." - Aldo Leopold, *Sand County Almanac*, *The Land Ethic*

What Appellant-Relator wants in this case is environmentally functional bodies of water in the basins of Little Lake and Mud Lake.

There is really no serious dispute on the most important factual issues in this case.

Little Lake and Mud Lake are major environmental assets of Nicollet County and the State of Minnesota. Right now they are bone dry due to the inattention of the DNR and the Nicollet County Board. They need to be restored. The question is the water level to which they need to be restored.

Appellant submitted considerable evidence that Little and Mud Lakes should be restored as bodies of water that will provide environmental value. What Appellant wants are lakes that will perform waterfowl and water retention values. The Relator did not begin this case nor go to trial only to get mudflats or useless puddles instead of functioning and meaningful lakes. For this purpose, Appellant refers to what it wants from the lakes as "environmentally functional" For this reason, the Appellant went to great expense and effort to locate and produce experts who verified at trial that in order to obtain environmentally functional lakes, we need water at the level of 976.0 feet above sea level. We don't want a water veneer of 972 or 973 or 974 or 975. Appellant

respectfully suggests this would be would be a disservice to the meaning of MERA and an injustice. Judge Moonan understood the point and tried to craft an order that would provide for the three-foot minimum depths (especially in the periods of low water in the autumn and early winter periods when duck fledgling activity and muskrat activity are so vital). Regrettably Judge Moonan in attempting to implement this three-foot standard overlooked the need to establish the environmentally functional level of 976.0 to protect the hemi-marsh characters of Little Lake and Mud Lake. Moreover, Judge Moonan inserted some unworkable features in his order including a meander line provision and enforced diking and pumping. Appellant agrees with DNR that those provisions should be removed from the Judgment.

Unfortunately, Judge Rodenberg did not understand the paramount significance of the minimum of three feet of water that is necessary to preserve these lake resources as environmentally functioning lakes especially in the late fall and early winter.

It would be senseless for the District Court to be able to entertain a MERA case (as this Court said can be done in **State ex rel Swan Lake Area Wildlife Associations vs. County of Nicollet, supra**) but then preclude the District Court from taking the next logical step of providing a remedy, namely, the environmentally functional lake elevation proven by the Relator. If it were merely a case to show the lakes had been impaired by the neglect and inaction of DNR and the county, that case would have been litigated in an afternoon rather than the seven days it took in April 2007.

The Department of Natural Resources has taken the unyielding position that they should be restored only to elevation 973.8. This would amount to a veneer of surface water that would quickly dissipate in the critical time of late fall when these lakes would otherwise provide nesting and feeding cover for resident and migratory waterfowl. Secondly the water level suggested by DNR would not drown out the invasive narrow leaf cattail that will otherwise choke out that invasion of these plant species. Furthermore, it is essential that these lakes maintain a water depth of three feet or more in the fall in order for the resident muskrat population to survive the winter and eliminate the lush growth of these invasive plants. (See testimony of Dennis Simon, T. 712-719] He said: *"We consider three feet really to be the minimum that we would like to see in order to – to maintain that 50 percent open water in a Type 3 wetland."* [T.723].

In order to achieve the three feet of water depth for narrow leaf cattail destruction advocated by Mr. Simon (which he described as a "hemi-marsh") and achieve the three-foot depth for muskrat activity in the late fall [T.722], it is essential that a surplus depth of water be provided by storage of water to withstand the normal hot Minnesota summers and our rate of evaporation.

Limnologist Richard Osgood calculated that to provide for year-around maintenance of three feet of water on Little Lake would require an outlet structure with a crest at elevation 976.0. [T. 1022].

Biologist Gerald Gray testified that the restoration of Little and Mud Lakes to elevation 976.0 would allow the lakes to recover good waterfowl productivity. [T. 1220-1221].

The thousands of lake and wetlands restorations conducted by witnesses Gray, Griffin and Simon attest to the viability of performing lake restorations such as on Little and Mud Lakes.

No one testified that a crest at 973.8 or any other elevation would protect the waterfowl or any other resource.

The order of the District Court should be reversed and 976.0 feet above sea level should be set as the environmentally functional crest as a Conclusion of the case.

III. OTHER LEGAL CLAIMS ARE SUBORDINATE TO THE "PARAMOUNT CONCERN FOR THE PROTECTION OF [MINNESOTA'S] AIR, WATER, LAND AND OTHER NATURAL RESOURCES" PURSUANT TO MINN. STAT. §116B.04

"In short, a land ethic changes the role of *Homo sapiens* from conqueror of the land-community to plain member and citizen of it. It implies respect for his fellow-members, and also respect for the community as such." - Aldo Leopold, *Sand County Almanac*, *The Land Ethic*

In this case the initial trial judge was concerned about providing diking and pumping services to landowners who lived in the basins of Little and Mud Lakes. With all due respect for the deceased judge, these are not recognized interests under the law.

As to the objections of the Department of Natural Resources, we would agree that it should have no obligation to provide diking or pumping services. Accordingly, that portion of Judge Moonan's Order should be excised.

That is not to say, however, that DNR should be emancipated from the case.

The evidence is still uncontroverted that the control elevation for Little Lake should be 976.0. There has been no evidence that that elevation is not correct.

In **Floodwood-Fine Lakes Citizens Group v. Minnesota Environmental Quality Council**, 287 N.W.2d 390 (1979) the court cited Minn. Stat. § 116B.09, subd 2. The Supreme Court noted Minn. Stat. § 116B.09, subd. 2 which is comparable to Minn. Stat. § 116B.04 in part which provides as follows:

The defendant may also show, by way of an affirmative defense, that there is no feasible and prudent alternative and the conduct at issue is consistent with and reasonably required for promotion of the public health, safety, and welfare in light of the state's paramount concern for the protection of its air, water, land and other

natural resources from pollution, impairment, or destruction. Economic considerations alone shall not constitute a defense hereunder.

[Emphasis added.]

The court said:

By definition, the word "paramount" as used in the phrase "the state's paramount concern for the protection of its air, water, land and other natural resources" means "superior to all others."⁵ This legislative policy was construed and applied in PEER v. MEQC, 266 N.W.2d 858, 869 (Minn.1978). There we rejected the argument that one power line site was preferable to another because it would require the condemnation of fewer homes, and stated that "condemnation of a number of homes does not, without more, overcome the law's preference for containment of powerlines as expressed in the policy of nonproliferation. Persons who lose their homes can be fully compensated in damages. The destruction of protectable environmental resources, however, is non-compensable and injurious to all present and future residents of Minnesota."

287 N.W.2d 399-400

Accordingly, if the intervenors' property is taken or if they had any rights under the Drainage Code (even if it were compensable which we doubt), those concerns would not prevail over the environmental mandates of MERA.

The restoration of Little and Mud Lakes must prevail over any competing economic interests in this case.

The Department of Natural Resources and the County of Nicollet have been unduly solicitous of the interests of the local landowners in the drainage of these lakes to the prejudice of these important aquatic resources. It is time that the state and county acknowledge the "paramount" status of these resources under Minn. Stat. §116B.04 and the "leadership" imperative that Justice Yetka imposed on the state and counties in **Bryson**.

IV. TRIAL COURT ERRED IN CONCLUDING IT WAS WITHOUT JURISDICTION TO ESTABLISH CONTROL ELEVATION WHICH IT THEN PROCEEDED TO ESTABLISH

"In short, a land ethic changes the role of *Homo sapiens* from conqueror of the land-community to plain member and citizen of it. It implies respect for his fellow-members, and also respect for the community as such." - Aldo Leopold, *Sand County Almanac, The Land Ethic*

A. TRIAL COURT ERRED WHEN IT RULED THAT IT HAD NO JURISDICTION TO SET DESIRABLE LAKE LEVELS

The District Court in considering the motions for Amended Findings ruled "the legislature has entrusted the exclusive responsibility for lake level establishment and maintenance to the DNR" (A-166) and "The Association vigorously and passionately argues that the lake levels should be established in this proceeding and that, as to Little Lake, the proper elevation should be 976.0 feet above sea level. The Court has very seriously considered those arguments, but is without jurisdiction to grant the relief requested." (A-167 to A-168).

The heart of MERA is that citizen and court involvement is an alternative to government action. As was stated in *PEER v. MEQC* 266 N.W.2d 858, 866 (Minn. 1978) "The need for citizen vigilance exists whether or not specific environmental legislation applies, and MERA is clearly a proper mechanism to force an administrative agency, even the MEQC, to consider environmental values that it might have overlooked."

This issue now argued by the Department of Natural Resources was decided as part of the previous history of this case. Shortly after the Association commenced the

litigation, the Nicollet County Board asserted that water impoundment decisions on drainage ditches could be presented to the Drainage Authority. In this assertion, the County was quite correct. However, the County went on to argue that the Drainage Authority was the exclusive governmental agency that could entertain such matters. The Association disagreed and urged that the district court under MERA had at least concurrent authority over such issues. When the District Court denied the County Board's motion, it took an appeal to this court.

On appeal, this court construed the language of Minn. Stat. § 116B.12 which provides:

No existing civil or criminal remedy for any wrongful action shall be excluded or impaired by sections 116B.01 to 116B.13. *The rights and remedies provided herein shall be in addition to any administrative, regulatory, statutory, or common law rights and remedies now or hereafter available.*

This Court held:

The plain language of MERA provides that its remedies "shall be in addition to any administrative . . . rights and remedies now or hereafter available." *Id.* (emphasis added). The legislature could have supplied an exception for MERA claims subject to drainage code proceedings. But it did not. And this court "cannot supply that which the legislature purposely omits or inadvertently overlooks." *Wallace v. Comm'r of Taxation*, 289 Minn. 220, 230, 184 N.W.2d 588, 594 (1971).

State ex rel Swan Lake Wildlife Association v. Nicollet County Board of

Commissioners, 711 N.W.2d 522, 525 (2006). See also **State by Fort Snelling Park**

Association v. Minneapolis Park and Recreation Board, 673 N.W.2d 169 (Minn. App. 2003).

As an administrative agency, the Department of Natural Resources stands in no different position than the Nicollet County Board sitting as a Drainage Authority. Accordingly, the District Court sitting on a MERA case has jurisdiction to hear all matters relating to the MERA claim including what should be the control elevation for the resource lake for the benefit of the people and wildlife of this state. Any other interpretation would run counter to MERA and result in fractionalization of a MERA case.

Furthermore, the District Court overlooks the clear language of Minn. Stat. § 116B.03 subd 1, that a MERA case is brought “in the name of the state of Minnesota.” As a state action, the court is vested with concurrent state agency authority as well as equitable power to ascertain the environmentally functional level that these lakes should be restored to and to apply the proper remedy.

The Court was in error about the subject matter jurisdiction that it possessed and that error clearly influenced its disposition of all issues in its Amended Findings and its obvious deference to the wishes of the Department of Natural Resources.

B. TRIAL COURT ERRED WHEN IT ESTABLISHED 973.8 AS THE CONTROL ELEVATION FOR LITTLE LAKE

When the Swan Lake Wildlife Association began this lawsuit in 2003 as one of its alternative counts (Count1) it sought at least the enforcement of the Commissioner’s Order of March 15, 1972. That would only put a maximum of two feet of water on the lake at high water times (See A-13 ¶ 10). More importantly, as the summer progressed, the water depth would end up at a foot or less of depth when the fledglings need deeper

water and the muskrats are building their homes in the lake (See testimony of Dennis Simon, T. 719, 722). The two-foot depth standard is over 30 years old and is no longer valid. (T.722).

The District Court dismissed Count No. 1 on August 24, 2004 as stale. (A-32) The dismissal of Count 1 was reaffirmed by Judge Moonan on September 17, 2007 (A-97), and by Judge Rodenberg on July 30, 2008 (A-163to A-164). Appellant-Relator agrees that Judge Moonan and Judge Rodenberg made the right decisions. Nevertheless, that dismissed Order and discredited water elevation reappeared in the final order issued by Judge Rodenberg. (A-155).

In the seven days of trial in April 2007, not a single witness appeared to support the discredited elevation of 973.8. In fact, as discussed earlier, the unanimous opinion of experts (including DNR's own biologist) enthusiastically testified for 976.0.

We acknowledge that notwithstanding the clear evidence for a crest elevation of 976.0, DNR has stubbornly lobbied for the 973.8 crest elevation.(A-117). The Association believes that DNR's position is palpably erroneous and when the District Court judge concluded that he had no jurisdiction in the matter and acceded to DNR's position, the trial court's decision was arbitrary and capricious.

V. LANDOWNERS ADJACENT TO LITTLE LAKE AND MUD LAKES DO NOT HAVE EXISTING RIGHTS SUPERIOR TO THE RIGHTS OF THE PUBLIC TO PREVENT HAVING THESE LAKES RESTORED.

“There is as yet no ethic dealing with man’s relation to land and to the animals and plants which grow upon it. Land, like Odysseus’ slave-girls, is still property. The land-relation is still strictly economic, entailing privileges but not obligations.” - *Aldo Leopold, Sand County Almanac, The Land Ethic*

It is well-recognized law that “public waters are subject to the control of the state.”

Minn. Stat. § 103A.201 subd. 1 (1).

That is well and good because in this court, the relator is bringing this lawsuit “in the name of the state.” Minn. Stat. § 116B.03. Thus the court is clothed with the authority of the state in a MERA action. As will be discussed presently, relator upon the action of this court is entitled to exercise the powers and immunities of the State of Minnesota.

The Intervenors have argued, the exercise of this state power is “subject to existing rights.” Minn. Stat. § 103A.201 subd. 1(1).

However, the “existing rights” to which neighboring landowners are entitled are only riparian rights relating to the use of the water such as boating, fishing, swimming and hunting. **Pratt v. Department of Natural Resources**, 309 N.W.2d 767, 771 (Minn. 1981) and **Application of Central Baptist Church**, 370 N.W.2d 642, 646 (Minn. App. 1985). “Existing rights” do not include the right to drain the body of water or to re-excavate a previously existing ditch. **Application of Christenson** 417 N.W.2d 607, 614 (Minn. App. 1987).

The facts of the case will show that what ditch assessments were paid were miniscule. The landowners were not assessed for lakebed lands and the beds of Little Lake and Mud Lake were never partitioned as was done, for example, in the case of Rooney v. Stearns County Board, 130 Minn. 176, 153 N.W.858 (1915).

Moreover, no landowner in the vicinity of Little or Mud Lakes has the right to challenge their restoration.

“No riparian owner has a right to complain of improvements by the public whereby the water is maintained in the condition which nature has given it. ‘*Aqua currit, et currere debet ut currere solabat.*’ Franham on Waters, p. 1765.”

Stenberg v. County of Blue Earth, 12 Minn. 117, 120, 127 N.W. 496, 497 (1910).

The premier case of **In Re Lake Elysian High Water Level**, 208 Minn. 158, 293 N.W. 140 (1940) is instructive on this matter. There, as here, the action was brought in the name of the state.

Several landowners protested the restoration of Lake Elysian in Waseca County because they complained they would be flooded and they claimed entitlement to the 40-year drainage based on a “new status.” The court rejected their claims and ordered the lake restored.

Nor does the fact that the lakes may have been partially drained in the original ditch proceedings bear any weight in justifying continued drainage. Each time that the Lakes are proposed to be affected by drainage projects, the county must comply with the environmental laws existing at the time. The County must comply with environmental regulations for the repair of a public ditch regardless of what the law was previously.

Coon Creek Watershed District v. Environmental Quality Board, 315 N.W.2d 604 (Minn. 1982); **Minnesota Center for Environmental Advocacy v. Big Stone County Board** 638 N.W.2d 198 (Minn. App. 2002) (rev. den. March 27, 2002).

The only difference between those cases and the present case is that in the prior cases the threatened environmental damage was proposed to be done by acts of the county ditch authority. In this case, the damage was done by the county ditch authority's inaction and neglect to care for Little Lake and Mud Lakes which accomplished drainage of these lakes by "natural erosion of the outlet...ably assisted by human endeavor." **In Re Lake Elysian**, 208 Minn. at 160, 293 N.W. at 141.

Whether the environmental damage is caused by the active efforts of the county or official lassitude in carrying out its responsibilities, the county should be held accountable for its inaction. Inaction by the principal that causes environmental damage constitutes "conduct" no less than an active misdeed. **Werlein v. United States** 746 Fed. Supp. 887 (D. Minn. 1990)

In the past, a major goal of state and local government was to drain lakes and wetlands and convert "wastelands" (that is wetlands) into farmland.

In **McLeod County Commissioners as the Drainage Authority for McLeod County Ditch No. 8 v. Department of Natural Resources**, 549 N.W.2d 603 (Minn. App. 1996) (rev. den. August 20, 1996) the Court held:

The Minnesota Supreme Court has stated that:

Once a ditch system is established, the order creating it constitutes a judgment in rem. *** Thereafter, every owner of land who has recovered damages or been assessed for benefits has a property

right in the maintenance of the ditch in the same condition as it was when originally established.

Fischer v. Town of Albin, 258 Minn. 154, 156, 104 N.W.2d 32, 34 (Minn. 1960) (quoting Petition of Jacobsen v. Kandiyohi County, 234 Minn. 296, 299, 48 N.W.2d 441, 444 (1951)). Thus, the landowners have a right to have the ditch maintained, and it is the county that must undertake the maintenance. However, as a political subdivision of the state, the county has a greater duty than does a private individual to see that legislative policy is carried out. As a creature of the state deriving its sovereignty from the state, the county should play a leadership role in carrying out legislative policy.

County of Freeborn v. Bryson, 309 Minn. 178, 188, 243 N.W.2d 316, 321 (Minn. 1976). Therefore, when the county undertakes the maintenance of a ditch, pursuant to statute, "it must do so in a way that is consistent with the objective of the statute and other announced state policies." Kasch v. Clearwater County, 289 N.W.2d 148, 151 (Minn. 1980).

The supreme court has stated that Aldo Leopold's "land ethic simply enlarges the boundaries of the community to include *** the land." In re Application of Christenson, 417, N.W.2d 607, 615 (Minn. 1987) (quoting Bryson, 309 Minn. at 189, 243 N.W.2d at 322). The court has reaffirmed that

The state's environmental legislation had given this land ethic the force of law, and imposed on the courts a duty to support the legislative goals of protecting our state's environmental resources. Vanishing wetlands require, even more today that in 1976 when Bryson was decided, the protection and preservation that environmental legislation was intended to provide.

Id. Thus the county has an obligation to maintain the ditch in a manner consistent with the policies established by the legislature in the Act.

549 N.W.2d at 633

Long-past "wetlands-as-wastelands" attitudes are superseded by the principles of the Environmental Rights Act. The observations of Mr. Justice Yetka about highway construction apply equally to public drainage:

Times change. Until the [Environmental Rights] Act was passed, the holder of the power of eminent domain had in its hands almost a legislative fiat to construct a highway wherever it wished. In the 1920's and 1930's, the state encouraged highway reconstruction to facilitate industrial expansion and transportation of farm products to market. However, a consequence of such construction has been the elimination or impairment of natural resources. Whether for highways or for numerous other reasons, including agriculture, it is a well-known fact that marshes have been drained almost indiscriminately over the past 50 years, greatly reducing their numbers. The remaining resources will not be destroyed so indiscriminately because the law has been drastically changed by the Act. Since the legislature has determined that this change is necessary, it is the duty of the courts to support the legislative goal of protecting our environmental resources.

Freeborn County by Tuveson v. Bryson, 309 Minn. 178, 188, 243 N.W.2d 316, 321 (1976).

VI. NEITHER LACHES NOR ANY STATUTE OF LIMITATIONS PRECLUDES REMEDY SOUGHT IN THIS CASE

"Politics and economics are advanced symbioses in which the original free-for-all competition has been replaced, in part, by co-operative mechanisms with an ethical content." - *Aldo Leopold, Sand County Almanac, The Land Ethic*

The County and of the Intervenors claim that an appreciable period of time has elapsed while Little Lake and Mud Lake have been drained. Therefore, they argue, the lakes should not be fully restored.

This makes little sense since it has been the county's inaction and the intervenors' obstruction (and temporary occupation of these lakebeds) that have stalled restoration.

Furthermore, as indicated previously, Relator is bringing this action "in the name of the state" Minn. Stat. § 116B.03 subd. 1. As such, relator is entitled to the powers and immunities of the state.

When a similar objection was raised by the opponents of the Lake Elysian restoration, the Supreme Court ruled:

Nor are we persuaded that the long delay occurring between the establishment of the ditch and the present proceedings in any way tends to diminish the state's right to proceed as here. As against the sovereign, absent statutory limitation, no prescriptive rights can be obtained by anyone. Counsel has cited no authority holding otherwise, and we have discovered none so holding.

208 Minn. at 167, 293 N.W. at 144. The same result should follow here.

**VII. THE JUDGMENT OF SEPTEMBER 17, 2007, SHOULD BE AMENDED IN
SEVERAL MINOR RESPECTS OR THIS COURT SHOULD DIRECT THE
LOWER COURT TO GRANT A NEW TRIAL**

“The ordinary citizen today assumes that the science knows what makes the community clock tick; the scientist is equally sure that he does not. He knows that the biotic mechanism is so complex that its workings may never be fully understood.” - *Aldo Leopold, Sand County Almanac, The Land Ethic*

The major point of correction to which Relator would agree with DNR is that the District Court should set a specific elevation for the crest of the outlet based on the evidence. The meander lines of Little and Mud Lakes are not reliable jurisdictional benchmarks for restoration. See *Sherwin v. Bitzer*, 97 Minn. 252, 106 N.W. 1046 (1906); *Department of Natural Resources v. Todd County Hearing Unit*, 356 N.W.2d 703, 707 (1980). This should be established by the District Court at 976.0 and should be located on DNR land just to the east of Little Lake. This was the location initially proposed for the dam on the Diversion Project that was scrapped in the late 1990’s. It was feasible as a dam for the Diversion Project. Moreover, the feasibility of this dam location to restore Little and Mud Lakes was confirmed by the trial testimony of DNR Hydrologist Leo Getsfried. . [T. 1381].

It is true that occasionally the courts may defer to administrative agencies for certain administrative action. However, the sorry 60-year record of neglect and abuse that Little Lake and Mud Lake have endured at the hands of all three Respondents necessitate curative action by the District Court. The last time Little and Mud Lakes were at levels fully beneficial to public was before drainage in 1953. These lakes did not lose their

characters as meandered lakes or public bodies of water entitled to the protection of law to their full extent by the temporary partial unpermitted drainage of their basins. See **Herschman v. Department of Natural Resources**, 303 Minn. 50, 225 N.W.2d 841 (1975). We cannot trust DNR to take appropriate enforcement action and we cannot wait another 64 years. Furthermore, DNR has clearly thrown its lot in with the Nicollet County Board and the Intervenor who wish to see no restoration of Little Lake and Mud Lake or (at most) the lowest possible lake levels on these bodies of water. Despite all the experts who testified to the contrary, the Department has taken the unreasonable position that the discredited and unsubstantiated elevation of 973.8 should be the control elevation for Little and Mud Lakes. In light of DNR's firm stated position, it would be an exercise in futility to cast the decision to that Department. Following administrative procedures is not necessary to do so would be futile and the government's position is predetermined. **McShane v. City of Faribault**, 292 N.W.2d 253 (Minn. 1980).

As discussed previously, Relator has no objection to the removal of language from Judge Moonan's Order that DNR should construct dikes and install lift stations. As Engineer Griffin testified, the acreage that would be flooded by a crest elevation of 976.0 is all reclaimed lakebed. [T. 973-974]. The Association submits that Little and Mud Lakes should be restored and no dikes or pumps should be placed in the lakebeds.

CONCLUSION

"The evolution of a land ethic is an intellectual as well as emotional process. Conservation is paved with good intentions which prove to be futile, or even dangerous, because they are devoid of critical understanding either of the land, or of economic land-use. I think it is a truism that as the ethical frontier advances from the individual to the community, its intellectual content increases." - *Aldo Leopold, Sand County Almanac, The Land Ethic*

Little Lake and Mud Lake are two important aquatic resources in Nicollet County. These have been ignored and abused for over a century despite the best efforts of Justice William Mitchell and others to preserve them.

In the seven day trial of the case, the Association established without any real contradiction that their best use is as hemi-marshes for the production of waterfowl and other species and for water and sediment retention. The water levels in the basins should be at 976.0 feet above sea level in order to maintain at least a three foot level in the deeper parts of the lake throughout the year. This will allow reasonable habitat for fledgling waterfowl and will allow muskrats to survive the winter in their basins. The combination of continuous three-foot water levels and muskrat activity will control narrow leaf cattails which are an invasive species and detrimental to the lakes and their wildlife.

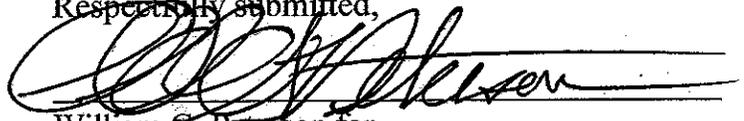
In trying the case, Judge Moonan grasped the significance of this three-foot water level. He properly regarded the old DNR order from 1972 recommending a 2-foot maximum at 973.8 as out of date and not responsive to present environmental needs. Judge Moonan did err in attempting to mandate diking and pumps for the benefit of landowners who have farmed the lakebed.

When Judge Rodenberg took the case, he erroneously concluded that he had no jurisdiction to determine the environmentally functional lake levels. DNR which has been rightly criticized for a half century of inattention to Little and Mud Lakes was insistent that the level should be only 973.8 which the judge then accepted and determined to be the proper elevation.

Appellant-Relator requests that the portions of Judge Rodenberg's order that eliminated the requirement for diking and pumping of the basins of Little Lake and Mud Lake be affirmed. As to the District Court's determination that the elevation should be 973.8, that determination should be reversed and the elevation as established by the overwhelming weight of evidence of 976.0 be adopted in the remand order of this court.

Dated this 19th day of February, 2009.

Respectfully submitted,



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