

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., Intervenors,
Respondents.

APPELLANT'S REPLY BRIEF

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ARGUMENT

I. LITTLE LAKE AND MUD LAKES SHOULD BE RESTORED TO ENVIRONMENTALLY FUNCTIONAL LEVELS OF 976.0 FEET ABOVE SEA LEVEL

Right now Little Lake and Mud Lake are bone dry. Their water table levels are a several inches below the lake bottoms. This Court and the District Court have the ability to write a new slate, to make a new beginning for these abused water resources. What this court and the lower court decide will most likely determine what value and utility Little and Mud Lakes will have for as long as Minnesota endures as a state.

Candidly, the Swan Lake Area Wildlife Association did not come this far for these basins to become consigned as mudflats or seasonal puddles. The Swan Lake Wildlife Association has been insistent throughout this litigation that Little and Mud Lakes must be restored to environmentally functional bodies of water. The lakes should support wildlife and provide other environmental purposes which they have historically performed. There is no plausible justification for these lakes to be less than elevation 976.0 feet above sea level. The environmental witnesses established for these lakes to be functional aquatic resources for wildlife purposes, the lake levels should be at that height. Before the ditch was constructed Little Lake was up to six feet in depth [Exhibit RL169] and historic water level of 977.4. [T.1331 and T. 1001]. When the experts testified that 976.0 was the desirable level, that would certainly lie within the natural lake basins.

DNR in its Brief quibbles with the Association's characterization of Mr. Simon's testimony as favoring 976.0. Mr. Simon's testimony strongly advocated a three-foot depth particularly through the late fall fledgling period and muskrat wintering time. [T. 721-723] Mr. Simon said unequivocally "We consider three feet 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 testified that a Type 3 wetland was the same thing as a hemi-marsh [T. 780].

To DNR's criticism, we would respectfully respond: Do the math. Three feet of lake level height necessitates a 976.0 dam crest to provide 3.3 feet of water during this critical fall period. [See T. 1022 as represented in the chart from Limnologist Osgood's testimony as it appears on page xvi of Appellant's Brief.]

What is especially disconcerting to the Association is that DNR has consistently sided with the County Board and Interveners in advocating the lowest possible water elevation on these lakes.

There is no evidence in the record for a dam crest elevation of 973.8 feet other than DNR's 1971 Order and DNR's insistence that this is the level that it wants for Little and Mud Lakes. Judge Rodenberg adopted the 973.8 determination because he concluded that the Court had no jurisdiction and he felt that the dam crest decision lay exclusively with DNR.

Interveners' Brief is primarily an argument for "existing rights" in the riparian landowners and ditch participants to the continuing impairment of Little and Mud Lakes. First of all, Interveners' argument is a transparent attempt to persuade this court to

overturn **Pratt v. Department of Natural Resources**, 309 N.W.2d 767, 771 (Minn. 1981), **Application of Central Baptist Church**, 370 N.W.2d 642, 646 (Minn. App. 1985) and **Application of Christenson**, 417 N.W.2d 607, 612 (Minn. App. 1987). Those cases held that “existing rights” in the law only pertained to existing riparian rights and did not include any right to drain lakes or wetlands.

Secondly, Interveners argue that the restoration of Little and Mud Lakes to elevation 976.0 would damage Interveners’ land which the state cannot damage without paying them compensation. For one thing, the 148 acres of affected land lies in the basin of Mud Lake which Appellant wants restored as a viable lake. [T. 865, T. 973-974] In addressing damage to a landowner’s interest occasioned by the reflooding of the bed of a meandered lake, the Minnesota Supreme Court ruled: “Damages consequent thereon to riparian owners were **damnum absque injuria** for which they were entitled to no compensation.” **Stenberg v County of Blue Earth**, 112 Minn. 117, 120, 127 N.W. 496, 497 (1910). Moreover, even if the Interveners were entitled to compensation for a “taking” either as a seizure of their land rights or drainage rights, those interests are subordinate to the paramount state obligation to protect and preserve natural resources. **PEER V. MEQC**, 266, N.W.2D 858, 869 (Minn. 1978). If the County were obliged to condemn Interveners’ land in order to accomplish the restoration of Little and Mud Lakes, then that is what the County must do. See **Floodwood-Fine Lakes Citizens Group v. Minnesota Environmental Quality Council**, 287 N.W.2d 390, 399-400 (Minn. 1979).

The Respondent County of Nicollet argues in its Brief that the Minnesota Environmental Rights Act (Minn. Stat. Chapter 116B) is limited in scope. This assertion is not correct especially in light of the analysis of Mr. Justice Yetka in **Freeborn County by Tuveson v. Bryson**, 309 Minn. 178, 188, 243 N.W.2d 316, 321 (1976) and **Floodwood-Fine Lakes Citizens Group v. Minnesota Environmental Quality Council**, 287 N.W.2d 390 (1979). MERA has a broad purpose and is designed to be remedial in its application. In short MERA must be given a broad and liberal reading to remediate environmental pollution and impairment. The impairment and rescue of Little Lake and Mud Lake deserve nothing less.

II. APPLICATION OF MERA TO RESTORE LITTLE LAKE AND MUD LAKE IS NOT AN UNLAWFUL RETROACTIVE REMEDY.

In its Brief, the Department of Natural Resources raises the claim that Appellant is seeking an unlawful retroactive application of the Minnesota Environmental Rights Act. That is not a correct interpretation of the law.

What the Association is seeking is a return of Little and Mud Lakes to environmentally functional levels. As discussed in the previous section, that is at elevation 976.0. This water height lies within the basins of the lakes – otherwise the bodies of water would not be sustainable in these glacially-carved basins. Any lesser elevation would not maintain the hemi-marsh (Type 3 Wetland) characters of these lakes.

The return of water levels to these lakes could have been achieved by the State Department of Conservation (or the present DNR) or private sources going all the way back to 1937 (See **Minn. Laws** 1937 chapter 468).

The fact that restoration of lake levels is not an unlawful retroactive application of law is well-established by the premier case of **In Re Lake Elysian High Water Level**, 208 Minn. 158, 293 N.W. 140 (1940).

In that case, the Department of Conservation (the predecessor to the present Department of Natural Resources) took the newly enacted Public Waters Act (**Minn. Laws** 1937, chapter 468) and applied it to overcome the thirty years of drainage of Lake Elysian. There was no plausible argument that the Commissioner of Conservation was unlawfully applying a law enacted the previous year to unlawfully and retrospectively undo the lake drainage that had occurred in the thirty years prior to the 1937 Act.

Similarly the Blue Earth Board of County Commissioners initiated proceedings in 1908 to restore Jackson Lake that had been gradually drained by surrounding landowners over a period of twenty years. To accomplish this, the Board of Commissioners invoked a session law enacted the year before that authorized the County Board to do so. (**Minn. Laws** 1907 chapter 104). Again there was no plausible argument that the county board was acting unlawfully and retrospectively in restoring Jackson Lake.

As set forth in our original Brief and in section I of this Reply Brief, Appellant seeks Environmentally Functional Lakes. It would make little sense for the Court to rule

that Little Lake and Mud Lake should be only partially functional. It would invite a chaotic environmental situation if some part or reach of Little Lake or Mud Lake were excluded from protection.

It must not be forgotten that neither the Nicollet County Board nor the riparian landowners ever obtained a permit that they acted upon to drain Little Lake and Mud Lake. Even if they would have obtained such an authorization, such a permission was always subject to cancellation or modification. For example the permit that was never acted upon in 1971 provided "This Permit may be terminated by the Commissioner of Natural Resources without notice at any time he deems it necessary for the conservation of the water resources of the state or in the interest of public health and welfare or for violation of any of the provisions of this permit." (Appellant's Appendix, p. A.16 paragraph G). Also the Permit provided "This Permit shall not release the Permittee from any liability or obligation imposed by Minnesota Statutes, Federal Law or local ordinances relating thereto and shall remain in force subject to all conditions and limitations now or hereafter imposed by law." (Appellant's Appendix p. A.16 paragraph J). Similarly Minn. Stat. § 103G.315, subd. 11 provides in past material:

- (a) Except as otherwise expressly provided by law, a permit issued by the commissioner under this chapter is subject to:
 - (1) cancellation by the commissioner at any time if necessary to protect the public interests;
 - (2) further conditions on the term of the permit or its cancellation as the commissioner may prescribe and amend and reissue the permit; and

(3) applicable law existing before or after the issuance of the permit.

Indeed in the present case, over the past 38 years the alarming loss of wildlife habitat and the intrusion of narrow leaf cattail are two supervening factors that militate in favor of a lake level of 976.0. The 1971-proposed elevation of 973.8 is not defensible.

When the legislature enacted Minn. Stat. chapter 116B, it stated as its purpose:

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. Accordingly, it is in the public interest to provide an adequate civil remedy to protect air, water, land and other natural resources located within the state from pollution, impairment, or destruction.

We submit that this legislative purpose envisions that no pre-MERA drainage should preclude the protection of Minnesota resources such as these lakes as functional environmental resources.

In **Peterson v. City of Minneapolis**, 285 Minn. 282, 173 N.W.2d 353 (1969) the Supreme Court took up the issue of retroactivity of legislation.

The court found that the defendant city had no vested right in precluding the operation of the new law. Similarly in this case, the state has no substantial pre-MERA right against the restoration of the lakes with three feet of depth. Appellant agrees that the

diking and pumping contemplated by Judge Moonan's Order should not be done. This leaves only the installation of a dam that should have been installed many years ago. The location of the structure is feasible on DNR property [T.1381]The cost of the dam is nominal (and the Association has previously volunteered that it would contribute toward the construction). Hence DNR has no substantial or vested rights impaired by the restoration of these lakes to 976.0. Likewise (although they did not raise the retroactivity issue) the Intervenor has no vested rights impaired since, as stated in **Stenberg v. County of Blue Earth**, 112 Minn. 117, 120, 127, N.W. 496, 497 (1910). "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 debet currere ut currere solabat*. Farnham, Waters, p. 1765. And see volume 1, c. 6. The law justified the maintenance of the lake at its natural and usual height and level." See also **Melander v. County of Freeborn**, 170 Minn. 378, 212 N.W. 590 (1927) and **In Re Lake Elysian High Water Level**, *supra*.

The neighboring landowners have been farming the lakebeds of Little and Mud Lakes. They have no unfettered right to use these resources to the disadvantage of the lakes' public environmental purposes.

Peterson v. City of Minneapolis also reviewed whether the Legislature intended the new law to be retroactive. In light of our argument made previously and the compelling environmental needs for which MERA was adopted, we submit that the

Legislature did indeed intend MERA to regard all activities affecting the water resources such as Little and Mud Lakes both before and subsequent to MERA's enactment.

MERA is inherently a remedial statute. As such its application should be considered retrospective. To do less would further degrade these already impaired resources. See also **Landgraf v. USI Film Products**, 511 U.S.244 (1994).

CONCLUSION

All the parties to this case agree that the bone-dry basins of Little Lake and Mud Lake should be restored. The issue is what water level does the evidence support.

The Swan Lake Area Wildlife Association advocated and established at trial that the environmentally functional lake depth is three feet particularly for the fall fledgling and winter muskrat activity. The math clearly shows by Limnologist Richard Osgood that the lake level needs to be at 976.0. Any lower level would not preserve these environmental functions.

There was no evidence at trial that 973.8 had any evidentiary or substantial basis. This was a number selected by DNR in 1971 without a hearing. Moreover, as the evidence demonstrated at trial, conditions have changed dramatically since that time. Now for these lakes to serve their substantial purposes, an elevation of 976.0 is necessary. DNR's stubborn insistence for 973.8 without any substantive basis indicates that it cannot be relied upon for a rational environmental decision in this matter.

Certainly this Court could order a new trial of the case if it felt such an order was appropriate. However, the Swan Lake Area Wildlife Association submits that the seven days of trial in April 2007 amply demonstrated that the environmentally functional level of 976.0 is proper. The District Court's opinion that it had no jurisdiction to determine a level different from the unsubstantiated mandate of DNR was erroneous. The matter should be remanded to the district court to conform its conclusion to the level of a 976.0 feet crest.

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Respectfully submitted,



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