

Case No. A08-1739

**STATE OF MINNESOTA
IN COURT OF APPEALS**

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

Appellant,

vs.

Nicollet County Board of County Commissioners,

Respondent,

vs.

Marlin Fitzner, et al, Intervenors,

Respondents,

vs.

Minnesota Department of Natural Resources,
Third Party Defendant,

Respondent.

**RESPONDENTS INTERVENORS'
BRIEF**

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ISSUES PRESENTED

Did the District Court Correctly Deny Swan Lake's Attempt under MERA to Restore the Hydrology of the Little Lake Watershed to its 19th Century Condition in Light of Existing Drainage Orders and the DNR's Exclusive Jurisdiction to Establish the Ordinary High Water Level of Minnesota Waters?

Did the Amended Findings Improperly Fail to Include a Pre-Trial Order Finding Removing from the Trial any Attempt to Alter the Function of the Drainage System?

I. INTRODUCTION AND SUMMARY OF THE ARGUMENT

Swan Lake sued the County to force it to use a public drainage system to increase the level of Little Lake by repairing a weir (dam) at a higher crest elevation than authorized by drainage law. At Swan Lake's request, the District Court required the County to stop Chapter 103E drainage repair proceedings preventing repair of the weir. After a lengthy court trial, the original District judge ordered Little Lake to be raised a full three feet. Because raising the lake would flood surrounding private lands, the Court ordered DNR to build a giant impoundment which would have essentially created a reservoir in place of the natural lake system. The original district judge passed away while post-trial proceedings were pending.

The new district judge vacated the portion of the decision raising the lake level, finding that DNR, not the District Courts, have jurisdiction to determine the ordinary high Water Level of public waters. However, the district judge ordered the County to replace the weir at a higher elevation. Both Swan Lake and Intervenors agree that this part of the

order cannot be sustained, but for different reasons. We write largely in support of the decision of the District Court rejecting Swan Lake's attempt to misuse MERA fundamentally to alter the hydrology of the watershed surrounding Little Lake. For over fifty years, the setting of water levels has been allocated by law to administrative hearings conducted under the jurisdiction of the Commissioner of Natural Resources, proceedings which bring before the Commissioner all interests which may be impacted by the decision and which rely on the technical expertise of the agency in hydrology. The amended findings refusing to raise Little Lake should be affirmed. However, we seek a clarification in the amended judgment incorporating the District Court's pre-trial findings regarding preservation of the function of the drainage system. Both Swan Lake and intervenor agree (although for different reasons) that having decided that the District Court lacks jurisdiction to determine or change the OHWL of Swan Lake, it was in error for the District Court to order repair of the weir¹ at a higher elevation than established by previous drainage orders. It follows from this concession, that if this Court affirms the District Court in other respects, it must reverse that part of the order that raises the weir.

Since commencement of this litigation, appellant Swan Lake has proceeded under a fatally flawed legal theory that asserts that Nicollet County Ditch 46A was constructed in violation of Minnesota law in force in 1907. Swan Lake has doggedly relied upon the

¹ A weir is "a low dam built across a stream to raise its level or divert its flow."

Witty² decision which Swan Lake wrongly asserts represents the Supreme Court's final mandate barring any drainage of Little Lake. From this faulty conclusion, Swan Lake has contended that all drainage activity which occurred from 1907 forward violated Minnesota law. That error has led Swan Lake to assert that on the mere petition of citizens, the District Court has jurisdiction to raise Little Lake's Ordinary High Water Level by three feet, flooding the lands of surrounding landowners without compensation. It appears also to be Swan Lake's position that alleging that a location could be environmentally improved if restored to its 19th Century hydrology, entitles any citizen to seek a District Court MERA order restoring that lake river or stream.

While there are many fundamental flaws in Swan Lake's approach, perhaps the most fundamental flaw is its failure to acknowledge that the legislature changed the drainage laws after the Witty decision.. As we show in Section II-A, below, Ditch 46A was constructed under Laws 1905 Chapter 230, a law entitled an "act providing for the drainage of lands and meandered bodies of water in certain cases³." In Section II-A, we describe in considerable detail the legal foundation for the establishment of the original drainage system and the improved system. We show that the drainage configuration was established, and then reconfirmed, by two final drainage orders and judgments in 1907 and 1950 respectively, both properly issued after full public participation and with the

² Witty v. Board of Commissioners, Nicollet County, 79 N.W.2d 112 (Minn. 1899)

³ (The 1907 Act granted similar power to the judges of the district courts.)

concurrence of the State of Minnesota. These are final judgments in rem that establish conclusively the riparian rights of property owners along the system which cannot be violated in the way that Swan Lake proposes. (See Section III-B).

In 1950, a weir was constructed at the base of Little Lake at elevation 973.2 sea level datum (SLD). The elevation was established upon the recommendation of an engineer and the support of the Commissioner of Conservation. The County Board, acting as drainage authority entered a drainage order installing the weir at 973.2 SLD as a permanent part of the drainage system, and that order was supported by conservation and sportsmens' interests who actively participated in the proceedings at the time.

It is true that over the years, the existing weir at the base of Little Lake has deteriorated, compromising the hydrology of the waters upstream. Everyone agrees that this weir needs to be fixed. Drainage code section 103E.715 subdivision 1, entitles any interested party to compel the County to conduct in rem drainage proceedings to repair the weir, and if the County fails to order that repair, the disappointed citizen can seek judicial review. Swan Lake has chosen instead a convoluted, inappropriate, cumbersome, indirect and costly method to deal with the repair of this weir, and if the correct method had been utilized, the repair could have been effected long ago.

Part of the confusion, and indeed some of the delay in accomplishing a repair, arose from Swan Lake's misunderstanding of a Commissioner's permit issued in the 1970's. As we show in section II-C below, the County was confronted with a 1970

proposal, never implemented, to repair and widen the old weir. If the weir were to be widened at its previously approved level, that would result effectively in a lowering of the water level upstream, because the amount of water which passes over the weir is a function of weir elevation and the span of the weir. As we show, the DNR issued a permit to allow reconstruction of a wider weir conditioned upon the raising of the weir by a half foot to compensate for the proposed wider span. But, the County failed to construct the wider weir, and hence the increased elevation authorized in the permit was no longer applicable. When the County failed to repair the weir at all, any interested person, including the DNR or Swan Lake, or any of its members could have initiated a petition to cause that to happen under Chapter 103E. The appropriate relief in this case was to allow the County to proceed to repair the weir under Chapter 103E, and if necessary order that the proceeding be completed by a time certain.

That brings us to the chaos and legal confusion arising from Swan Lake's attempt to use MERA proceedings to increase the ordinary high water level of the lake by three feet. At the commencement of the trial, the District Judge made a preliminary and binding ruling that any claim or relief that resulted at the end of the trial would retain the drainage system, upstream and down, in its original condition and functionality. See Section III-C. This ruling eliminated completely from the trial any possibility that the drainage system could be adversely impacted, or that landowner rights could be impaired by negatively impacting their drainage (even if it ultimately decided to raise the lake

level.) That ruling was the law of the case, and having withdrawn the issue from consideration, and eliminated it the possibility as an issue in dispute, the District Court could not at the end of trial retract that ruling without conducting a new trial. One of our purposes here, is to make sure that the amended order continues clearly to recognize that ruling.

The District Court's first decision, however flawed, clearly recognized this constraint. The Court accepted Swan Lake's request to raise the lake level by three feet, evidently because the Court believed that a higher lake elevation would be better for the environment. As the DNR's post trial motion papers showed, the effect would have been to create an environmental disaster, establishing a giant impoundment system which would have been hydrologically unworkable. Despite the magnitude of that impoundment, the District Court's first order respected its pre-trial ruling, or at least tried to, and ordered the Department of Natural Resources to take great lengths to protect surrounding landowners and to maintain the drainage system at its original level of efficiency both upstream and down.

On the DNR's motion to amend findings, the District Court correctly recognized that Minnesota law allocates lake level determinations to the DNR via administrative OHWL determinations. But, the District Court's amended decision should then have simply released the Court's stay on the repair proceedings, and allowed repair to occur forthwith.

II. STATEMENT OF FACTS AND PROCEDURAL HISTORY

A. Establishment of Ditch 46A

Nicollet County Ditch #46A begins in the tributary watershed of Mud Lake, passes through Mud Lake, through Little Lake, leaves the Little Lake outlet and proceeds downstream of the Lake. Some distance downstream of Little Lake there now exists a weir, in the form of a sheet pile dam, serving as a control structure, the deteriorated condition of which has triggered this litigation. Little Lake was meandered by the Government Land Office in 1854; the original records show a meandered area of 440 acres. Near the end of the 19th century, the Nicollet County Board made an effort to drain two lakes that it regarded as too shallow to merit protection. In 1899, Witty v. Board of Commissioners, Nicollet County, 79 N.W.2d 112 (Minn. 1899), the Supreme Court affirmed a District Court decision holding that under Laws 1887, c. 97, the legislature had not granted authority to county boards to drain those meandered lakes for agricultural purposes. To this point, our exposition of the history of Ditch 46A coincides with that of Swan Lake. The history which follows, however, is virtually ignored by Swan Lake's brief.

Swan Lake fails to explain that in succeeding years, as part of a state and national policy encourage agricultural development, the legislature significantly changed existing drainage law to allow drainage of certain meandered lakes. In 1901, the legislature created a drainage commission to "provide for the drainage of the swamp and marshy

lands of the state.” Gen Laws Minn. 1901 Chap 90⁴ During this same period, the legislature passed a series of laws allowing and encouraging drainage of wet lands and meandered bodies of water which we would now call wetlands or open marshes. One statute, General; Laws 1905, Chapter 230, entitled an “act providing for the drainage of lands and meandered bodies of water in certain cases⁵ conferred this authority on county drainage authorities like the Nicollet County Board. The other statute, Laws 1907, Chapter 448 conferred this same authority on the district courts in their administration of so-called “judicial ditches.” We have repeatedly called Swan Lake’s attention to these laws, and Swan Lake has nonetheless persisted in briefing in the District Court, and now here, on the basis of the repealed 19th Century drainage laws.

Section 1 of both new laws empowered the drainage authority “to cause to be constructed...any ditch, drain, creek or water course....” The county commissioners (or judges for Judicial Ditches) were granted the power to “widen, deepen, change, lower or cause to be drained the channel or bed of any creek, river, lake or other natural water course, whether navigable and whether meandered or not.” Section 1. These statutes served to clarify local authority to implement drainage, or partial drainage of meandered

⁴ The Commission intended to create a network of ditches on both state and private lands. But in 1909, the Attorney General wrote an opinion that it would violate the internal improvements provisions of the Constitution of Minnesota for the state, through the drainage commission to appropriate public funds where the primary benefit of the drainage was to benefit individual private landowners.

⁵ (The 1907 Act granted similar power to the judges of the district courts.)

lakes.⁶

Under these laws, a meandered lake could be drained if the lake was normally shallow and grassy and of a marshy character, or if “such lake is no longer of sufficient depth and volume to be capable of any beneficial use of a substantial character for fishing, boating or public water supply.” In each law, 1905 and 1907, a mechanism was provided for 75 affected landowners to file a “remonstrance” objecting to drainage of a meandered lake, which would then lead to a hearing to determine if drainage was in the public interest. Also, a municipality adjoining the shallow meandered lake could prevent drainage of the lake.

Nicollet County Ditch #46A was duly established in 1907 under the drainage laws that existed at that time. The District Court order of September 9, 1908, referred to by Mr. Barnett at page 15 of the transcript, implements the public policy existing at that time. Swan Lake’s brief studiously avoids explaining that fact, because it must recognize that MERA does not allow the courts to re-engineer valid decisions made a century ago. One of the impacts of the new system was to move Little Lake and Mud Lake from one

⁶ Later legislation began to restrict this authority to drain meandered lakes. For example, Section 5523, G. S. 1913, as amended by section 1 of Chapter 300 of the Laws of 1915 (Gen. St. Supp. 1917, § 5523) sought to prevent the drainage of meandered lakes bordering on cities and villages: ‘No meandered lake upon which any city or village is now a riparian owner shall be drained or lowered unless by the approval of a majority vote of the legal voters of said city or village at any annual or special election held for such purpose.’ See In re Judicial Ditch Proceeding No. 15 of Faribault County, 167 N.W. 1042 (Minn. 1918).

watershed to another. As a result, more water flowed into Seven-Mile Creek and less into the Middle Lake Watershed.⁷ Tr. 97. Establishment had a significant impact upon land usage and property rights in the watershed. Landowners were assessed for establishment and in return granted permanent statutory rights in drainage, and in reliance on these statutory rights, they developed their farms. Maintenance of this drainage infrastructure is now central to Minnesota's rural economy and critical to the ability of farmers like intervenors to keep their land productive. As much as Swan Lake regrets what it regards as improvident decisions made over a century ago, MERA does not authorize retroactive challenge of decisions fully valid when made.

⁷ The District Court order of 1908 contains the following findings:

- That County Ditch No. 46A “will partly drain a meandered lake known as Little Lake.”
- That prior to construction of the ditch system, the waters of Little Lake at stages of high water cover an area of approximately 406.58 acres and in the deepest parts ...attain a depth of about six feet.
- That in dry seasons the greater part of the lake becomes dry and the water in the deepest parts does not exceed three feet in depth.
- That every summer a large part of the lake becomes covered with reeds, grasses and vegetation, and in dry seasons practically the whole [lake] is overgrown with vegetation.
- That the lake “is no longer of sufficient depth and volume to be capable of any beneficial use of a substantial character for fishing, hunting, boating or public water supply.”
- That the shores of [the] lake are to a large extent low, mashy and muddy, and the water...stagnant.
- That the ditch “will drain, improve and better approximately one thousand acres of slough, swamp and wet land, and remove the stagnant and foul water, and drain and improve the public roads....”

B. 1950 Improvement of Ditch #46A

While Swan Lake has focused its attention on the original drainage order of 1907, actually, operation of the system, and intervenors' rights in maintaining that system rests on the original drainage order as supplemented by the 1950 improvement order.⁸ In 1949, some forty years after the construction of Ditch 46A, 104 landowners petitioned under then existing agricultural drainage laws to improve the drainage system below Little Lake. This proposal triggered a fair amount of scrutiny by the County, the Department of Conservation (now the DNR), and advocates for wildlife and fishing. At the time, everyone recognized that the portion of Ditch 46A, which passes through Little Lake had never held its profile, because of the flat, marshy mucky wet conditions. For this reason, the petitioning landowners did not seek to restore the ditch above the outlet of Little Lake to its original as-built profile.⁹ They focused their improvement efforts instead on the ditch at the outlet of Ditch 46A and below. The central issue debated during the 1950

⁸ Under the drainage code, the drainage authority must maintain the system as nearly as practicable to the same condition “as originally constructed and subsequently improved.” Minn. Stat. 103E.701, Subd. 1. Thus, the baseline for all future proceedings is not the system as constructed, as Swan Lake keeps suggesting, but rather the system as constructed and subsequently improved under the 1949 order.

⁹ “Upstream of Station 90 the ditch, even if cleaned out to the specifications of the original ditch, will be inadequate to effectively drain the lands adjoining Little Lake and Mud Lake,” the Commissioner found. Thus, the engineer rightly did not call for repair of this portion of the system. “The main ditch gradient above Station 90 is too flat to produce velocities sufficient to prevent settling of sediment and as a consequence, frequent cleanouts will probably be required. Apparently there is no remedy for this condition under the proposed plan. Commissioner’s Letter, March 31, 1950.

proceedings was how to provide the drainage benefit that landowners wanted below the outlet of Little Lake, without compromising the existing condition of the marsh upstream.

At a preliminary hearing, a representative of the Commissioner of Conservation and the ditch engineer agreed to meet to discuss the impact of the proposal on Little Lake to make sure that it would not further drain Little Lake. Exhibit 2, page 2. The drainage engineer submitted a report stating that the proposed improvement would fix the level of the lake exactly as determined in the original drainage proceedings.¹⁰ He explained that the essence of the improvement was to “substantially deepen the ditch” downstream of the lakes, that is in the altered natural watercourse below.¹¹ However, below the outlet of Little Lake, that is downstream of the outlet, a dam would be constructed so as to hold the marsh at the level fixed in the original proceeding back in 1907. As required by the drainage code, the County filed the engineer’s report with the Director of the Division of Water Resources, and the Director filed a report with the County and the County

¹⁰ “The original ditch system lowered and partially drained two meandered Lakes known as Little Lake and Mud Lake. Benefits were assessed to riparian lands and property rights thus established in the lower lake level. Your engineer has surveyed and designed the improvement of the ditch so as to lower these two lakes to the exact level fixed in the original proceeding....Below the outlet of Little Lake a dam will be constructed so as to hold the Lake at the level fixed in the original proceeding. The work contemplated between Little Lake and Mud Lake consists only in restoring the ditch to the gradient fixed in the original proceedings.

¹¹ Current law would define the system below Little Lake as an “altered natural watercourse.” 103G.005, Subd. 3.

convened public hearing. Douglas Barr, a representative from the Department of Conservation attended the hearing, read the Department of Conservation's comments into the record. Representatives of the St. Peter's Sportsman's club participated in the drainage proceedings as well. They insisted that "a dam be built in the Ditch east of Little Lake as recommended by the Engineer in his report," a location referred to on the plans as Station 90. In other words, the elevation of the weir provided for in the 1950 drainage order was actually supported by conservation interests at the time.

In his preliminary comments, the Commissioner of Conservation did not oppose the improvement project. The comments stated:

"The Commissioner of Conservation has not been requested to approve the further lowering or draining of Little Lake, a meandered body of water....for which reason it is assumed that the original grade of the present main ditch above station 90 will not be lowered by the pending repair proceeding."

After examining the final report, the Commissioner approved the project.¹²

After issuance of the final drainage order, the improvement was constructed, and the authorized dam serving as a control structure was placed at station 90 with a crest elevation of 973.2 S.L.D. The fishing and hunting interests who participated in the drainage hearing did not appeal from the drainage order, nor did they challenge the implementation of that order. The Department of Conservation also accepted the

¹² The report stated: "The engineer's final report has been examined according to Laws 1947, Chapter 143, Section 13, and on the basis of the information included in the engineer's report, it is hereby approved."

decision and allowed it to be implemented without challenge. This new order became a judgment in rem, establishing the operating conditions for the improved Nicollet County Ditch 46A. In re Petition of Jacobson re County Ditch No. 24, 48 N.W.2d 441, 444 (1951).

C. Concerns Over Deterioration of the Weir—Alternative Proposals

Over time there were concerns that the weir installed as part of the 1950 improvement project needed repair. The simplest solution would have been merely to replace the weir at its original elevation, 973.2 SLD. However, consideration of the repair became embroiled in two competing proposals for hydrological changes involving Little Lake. One group, spearheaded by Pell Nelson and his fellow Swan Lake Wildlife Association board members, sought to reverse the original drainage project itself. They wanted to increase the level of Little Lake towards 19th century levels and to move the lake system back to its original watershed as well. At the same time, some landowners wanted to implement a further drainage improvement downstream of the weir. Their proposed improvement would involve installation of a wider weir. The DNR opposed installation of the wider weir because it could have potentially increased the flow of water across the dam¹³ during high water times, by increasing the width across which water

¹³ Although calculating the flow of water across a weir can be a complicated exercise in hydrology, one can think of the wider weir allowing additional flow at high water times, because the amount of water crossing the weir at any one time is related to the width times the height times the velocity of flow. The height of flow is relevant not only because it increases the volume of water crossing the weir, but also because the

could flow. This led the DNR to condition approval of any proposed wider weir upon an six-inch increase in elevation of the widened weir its original height, that is from 973.2 to 973.8 feet SLD. Raising the weir would compensate for the occasional additional flow when water levels rose to the point of flowing across the full width of the wider weir. Reducing the depth of flow across the weir would also reduce the rate of flow across the weir by lowering the head¹⁴ pressure above the weir crest. Thus, the purpose of the DNR permit condition was to maintain the upstream drainage at the same rate as existed under the weir approved in 1950. The permit was designed to maintain the sanctity of the drainage order and landowner rights in drainage.

After approving the new construction, on November 10, 1971, the County submitted a request for permit for work in the beds of public waters for Nicollet County Ditch No 46A. The application was made by the Nicollet County Board of Commissioners “to change the length and construction of the sheet pile dam in Nicollet County Ditch No. 46A.” The Commissioner’s decision granted a permit to the County to replace the old dam, but only if the newly constructed dam would raise the crest elevation of the new dam to 973.8 feet SLD. Eventually, however, the County decided that it could not accept the permit conditions, and elected not to proceed with construction

depth of flow creates additional “head” pressure, increasing the velocity across the weir.

¹⁴ Changes in hydraulic head are the driving force which causes water to move from one place to another. It is composed of pressure head and elevation head. The simplest way to think about head is to recognize that other things being equal, deeper water flows faster, because the greater depth creates more water pressure.

of a new control structure at an increased elevation.

While the County considered whether to proceed with the improvement, a variety of entities began to look at implementing a possible major environmental restoration project. For decades, members of the local sportsman's club had wanted to undo the old 1908 drainage project which they regarded as environmentally harmful.¹⁵ To that end, representatives of the DNR, the County, the Swan Lake Area Wildlife Association, and others began to discuss a water diversion project that would change the course of Nicollet County Ditch 46A, effectively returning Little Lake to its original watershed. From 1992 to 1996, Area Wildlife Manager, Dennis Simon conducted feasibility surveys and prepared various plans to partially restore Little Lake as a cooperative project between local landowners, sportsmen's groups, county and the DNR. DNR Exhibit 2.

The plans most seriously considered envisioned increasing the lake elevation to approximately 974 feet SLD. Tr. 482. Advocates for these options believed that the impoundment and diversion project would benefit the environment by increasing water storage, creating new fish, fowl and wildlife habitat, and upgrading Little Lake from its current status as a type 3 wetland, Tr. 504, to a Type 4 wetland with more and deeper open water. Pell Nelson, later to become Swan Lake's expert witness in this case, but

¹⁵ In 1949 a petition signed by "many sportsmen" was allegedly sent to the Commissioner of Conservation" seeking to establish the ordinary high water level. DNR Exhibit 2. From that time forward, there has been friction over the management of the drainage system and lakes. However, as stated above, these sportsmen supported the 1950 drainage order and placement of the weir at 973.2 SLD.

then acting as a member of the Wildlife Association Board, began to commit a considerable amount of his free time to advocating for this project. It was recognized that the reclamation project would flood private property by raising the level of Little Lake. Mr. Nelson wrote:

“The area around Mud Lake is so damn flat, the water is going to flood a very large area.” Exhibit 45, Tr.483-484.

Because the flooding caused by raising the water level to 974 feet would take private property, see Tr. 765, 770-776, representatives of various State agencies began to look at the possibility of compensating landowners for acquisition of flood easements.

With the two competing interests unable to come to closure, the weir remained unrepaired. From time to time, the DNR sent letters to the County trying to find a way to convince the County to replace the old 1950 sheet pile dam to its original level. The DNR, the County, landowners, and conservation interests met on several occasions in unsuccessful attempts to arrive at an agreement on the appropriate elevation and design of the new structure. As these negotiations were proceeding, Swan Lake initiated a MERA action wrongly claiming that the Commissioner’s 1972 permit was essentially an environmental standard which could be enforced through MERA. The District Court properly rejected that contention and Swan Lake does not appeal from that aspect of the District Court’s decision.

D. Swan Lake Brings MERA Case Demanding that County Raise Level of Little Lake.

In their complaint, Swan Lake thus originally demanded that a new structure should be built, six inches higher than the existing structure, that is with a crest elevation at 973.8 feet, based on the thesis that the DNR's permit conditions required an increase in weir elevation, even if a wider weir were not installed. Next, Swan Lake moved the Court for an order allowing them to amend their complaint to have the Court force the County to adopt the Wildlife Association's plan to raise Little Lake to 976 feet and to flood a wide area of private lands. See Exhibit 45, Tr. 483-484. This would have raised the water level two feet even higher than the proposal which had previously been recognized as requiring acquisition of landowner flooding easements. But now, Swan Lake wants to impose even greater flooding without any compensation at all.

Before trial, each party prepared a pre-trial brief. In our submission, we argued that the District Court lacked authority or jurisdiction to modify the drainage system, because that would represent a collateral attack on the prior drainage judgments and violate the statutory rights afforded assessed landowners under the Drainage Code. This resulted in a pre-trial ruling by the Court, strictly excluding as a matter for trial any prospect of altering the drainage system. Endorsing our pre-trial position, the Court specifically ruled that it was no longer an issue before the Court that the system could be removed or the landowners deprived of their rights in the system. The Trial transcript contains the following ruling made before testimony was taken:

“The ditch flowed when the dam was functioning, maybe too much when the dam was in disrepair but, in any event, the ditch did exist and **I'm going to make a Finding of Fact in this trial that the ditch has a right to exist and this Court will not change anything about its existence or function.** I will make a further Finding of Fact that the Court, in its order, will not impair that ditch or impede that ditch in any manner. Now, it's come to the Court's attention that maybe Nicollet County's going to build another dam and that's fine with the Court, but that dam— and I will see to it—it will not impair the flowage of that ditch in any manner—so I don't feel there is a necessity for a hearing on your rights on the ditch because they are not going to be impaired. **I wanted to state for the record today and there is a transcript being made of everything I say here this morning and those things will be incorporated in the Court's findings.**

This finding is the law of the case, but it is more than that. The Court cautioned parties during trial that the Court's time should not be wasted with testimony either attacking or supporting this ruling. The finding drove our decision as to how to present our case. Not only was the Court's finding correct, but it could not be reversed at the close of trial by amended findings because to reverse the finding would leave the record incomplete on the factual issues presented by that reversal. As explained below, this finding was incorporated in the first version of the Court's findings, but was removed in the amended findings, perhaps inadvertently. The finding “the ditch has a right to exist, and this Court will not change anything about its existence or function,” should be incorporated into the Court's findings. As a practical matter, this simply means that any weir installed must not impair the hydrological function of the drainage system.

E. The Trial and Post-Trial Motions

In a full week trial, Swan Lake tried to prove that raising the lake three feet would be good for the environment and upon Swan Lake's flawed belief that the original 1908 drainage order was unlawful and thus could be ignored. In addition, Swan Lake suggested that aerial photos tended to show that some more recent action taken by the County had caused Little Lake to drop precipitously and that the environment would benefit from raising the water level. But the evidence, especially when judged under the clearly erroneous standard, does not support Swan Lake's position. At the end of the trial, District Judge Moonan entered findings determining that the environment could be improved by raising the lake three feet. In order to keep the lake from spreading across the flat surrounding lands and flooding private lands, he ordered the creation of a giant earthen impoundment. After Judge Moonan passed away, a new District Judge took his place and heard motions for amended findings and new trial. The amended findings recognized that the District Court has no jurisdiction to raise lakes by three feet and agreed with the Department of Natural Resources that Swan Lake's proposal did not really provide the promised environmental benefits. Instead, the District Court ordered installation of a weir at an elevation six inches higher.

As Swan Lake now attacks the amended findings in its brief, it fails to provide appropriate deference to the standard of review. The factual findings of the District Court in this posture are binding on this Court, unless they are shown to be clearly

erroneous. Schweich v. Ziegler, 463 N.W.2d 722, 729 (Minn. 1990); Matter of Welfare of M.J.L., 582 N.W.2d 585 (Minn. App. 1998). Swan Lake tried to show that Little Lake had less open water than previously, but the testimony, transcript pages 700 ff, showed that the same changes are occurring in lakes unconnected to the Little Lake watershed and for reasons unrelated to the weir issue. For example, it was shown that even though Middle Lake is unconnected to the watershed, Middle Lake is changing in its appearance, exactly as Little Lake does. A variety of factors, not attributable to its elevation, including changing precipitation, the time of year the lake is observed, and temperature trends, explain the appearance of Little Lake. Tr. 486-487, 726. There was testimony that the amount of open water was substantially reduced because of the introduction of invasive species, not because of the weir as Swan Lake argued, and that evidence must be given credence under the clearly erroneous standard.

III. ARGUMENT

A. The Proper Method to Effect a Weir Repair in a Drainage System is a Drainage Repair Order.

The weir which creates this controversy is part of an existing drainage system, and when it goes out of repair, Minnesota Statutes Section 103.715, Subd.1 affords any interested party the right to petition for its repair. MERA is not necessary to force repair of a component of a drainage system. Had Swan Lake followed the appropriate procedure to cause repair of the weir, it could have forced repair in a simple proceeding that would have taken no more than a part of one afternoon of the County Board's time.

Instead, using a MERA cause of action, it took a full week of trial testimony, and days of expert testimony to address a problem for which Minnesota law provides a simple straightforward remedy. Had Swan Lake petitioned for a repair, those proceedings would have all parties who have an interest in the hydrological impact of the proposed repair before the drainage authority in proceedings in rem. Both Chapter 103E and MERA gives Swan Lake standing to raise their environmental concerns before the drainage authority in these repair proceedings.

Moreover, had the County denied a repair petition, any interested person could have exercised their statutory right of appeal to the District Court under Minnesota Statutes Section 103D.095, and those rights include the right to contend that DNR permission or permit is required, or that other applicable environmental laws have been violated. Swan Lake's choice of a MERA case, and their insistence that a repair proceeding be prohibited pending the outcome of this case has actually delayed the weir repair and made the resolution of disputes surrounding the repair vastly more costly and time consuming. As this very case shows, adoption of the MERA litigation as a device to conduct a simple drainage repair would not protect the environment. Rather it has delayed implementation of the repair and made the transactional cost of getting to the end result vastly more complicated. All of the rest of the legal issues presented by this Court arise because of the complexities inherent in trying to solve this simple problem the hard

way. Swan Lake is trying to make MERA do the job that section 103E.715 was intended to do.

B. Swan Lake' Proposal to Raise the Level of Little Lake to 976 Feet is Unlawful and Would Take Intervenors' Property.

At the heart of Swan Lake's case is its assertion that MERA grants it the right to make a collateral attack on final judgments in drainage or other proceedings if that collateral attack will improve the environment. As Swan Lake's counsel explained at trial, their case was based upon the contention that:

“You are allowed to make a collateral attack on the judgment of that [drainage decision] and also, under MERA—MERA's not subject to that court's decision going back to —1906. Tr. 57.

It is uncontested that the Wildlife Association project would have entailed flooding the surrounding lands. Tr. 765. Several intervenors explained the impact that raising the elevation of the lake level would impair their farming operations. It would also directly impact intervenor Dan Rosin's home. It would dramatically expand the size of the Lake and actually flood their land. Also, it would remove an outlet for the drainage systems in violation of Chapter 103E.

At times, Swan Lake has sought to justify its collateral attack on prior drainage judgments based on the erroneous assertion that in 1907, County drainage authorities could not drain meandered lakes. In the District Court, Swan Lake rightly pointed out that under the current state of law, a drainage authority lacks jurisdiction to drain a meandered lake without a permit from the Commissioner of Natural Resources.

Herschman v. Department of Natural Resources, 225 N.W.2d 841 (Minn. 1975) (Sibley County lacked jurisdiction to issue drainage order which lowered water level of Swan Lake since Minnesota Statutes Section 106.021, Subd. 2 requires a DNR permit). But that was not the law in 1907, and Swan Lake's attempt to challenge these old orders are predicated on the patently incorrect assertion that the County lacked jurisdiction to drain meandered public waters in 1907.

When Nicollet County Ditch 46A was constructed, Minnesota drainage law was designed to encourage and enable drainage of marshy swampland. Today, public policy favors marshland preservation, but the laws under which Ditch 46A were constructed had an entirely different purpose. Swan Lake is arguing that property rights acquired in reliance on existing law and policy have been retroactively been rendered a nullity by later passage of MERA. Lakes can be raised or lowered, flooding cabins and homes, drowning out agriculture with impunity, under Swan Lake's theory, so long as a citizen can convince the District Court that doing so would make a better haven for wildlife.

As we explained in our Statement of Facts and Procedural History, the law at that time allowed judges or county commissioners the power to "widen, deepen, change, lower or cause to be drained the channel or bed of any creek, river, lake or other natural water course, whether navigable and whether meandered or not." Section 1. Thus, Swan Lakes' assertion that a drainage project could not drain, or partially drain, meandered lakes is wrong.

Land all over the state of Minnesota is now in production as a result of the drainage systems installed in this way, financed by assessments based upon the increment in the value of the land created by the drainage. Entire farms and farmsteads have been located in reliance on the permanency of these systems. Farmers were assessed and were required to pay for the land that they could now farm as a result of the drainage obtained. We can see in an early reported case Rooney v. Stearns County Board, 153 NW. 858 (Minn. 1915), an example of a dispute over the calculation of the mandatory payments which farmers were required to pay when meandered Sand Lake was drained. The drainage of the lake would result in the accession of the lake bed to the adjoining owners, who now would divide up in pie-like fashion a given portion of the newly drained meandered lake. But it was unclear how much of the dry lake bed would belong to each of the adjoining landowners. The Rooney decision determines how to allocate interests in the drained lake to surrounding owners.¹⁶ If it were unlawful to drain meandered lakes,

¹⁶ The Court wrote: It is perhaps unfortunate that in drainage projects involving a meandered lake, the law does not provide, in the proceeding itself, for a division of the bed of the lake among the different shore owners. As it now is, after a person has paid an assessment on the basis of having acquired a large acreage of land from the reclaimed lake bed, he may find that, in an action brought afterwards for partition, a great part thereof goes to other parties. Under existing provisions of the law, the assessment of benefits in drainage proceedings involving a lake bed cannot be estimated on the exact acreage which each shore owner will eventually acquire. But the aim should be to approximate what will finally be owned by each. Hence the viewers and the jury, in this case, were to base benefits for added land upon what portion thereof would, in all probability, be allotted to appellant, were a division of the lake bed had in a partition suit, with all interested parties before the court. We are satisfied that the method adopted by the jury in this trial cannot be used and bring about an equitable and just division of Sand

the Rooney decision would be inexplicable.

At the time the original drainage proceedings were held, landowners who objected to the project on the grounds that they violated Minnesota law, could seek appellate review. If the courts then determined that the statute was being violated, they would have provided appropriate relief. County Ditch No. 34 v. Sibley County, 142 Minn. 37, 170 N.W. 883 (Minn. 1919). Once the decision became final, it could not be attacked, except by proceedings to vacate the order, under circumstances which today would be afforded by Rule 60, that is mistake or excusable neglect. Cf Troska v. Brecht, 167 N.W.1042 (Minn. 1918) (drainage order seeking to drain navigable lake could be vacated, because attorney charged with filing appeal was seriously ill and could not return to Minnesota from Minnesota).

C. Minnesota Law Protects Statutory Drainage Rights Accruing Under Prior Proceedings.

Under the pre-trial ruling of the District Court Intervenors have a right to maintenance of the drainage system in a condition established by previous drainage orders. This ruling removed issues from trial in a way that amended findings could not undo, because the ruling in advance of the trial took all legal and factual issues relating to these questions out of the issues being tried to the Court. These findings include the following:

Lake among those whose lands abut thereon.

- **System’s right to exist without change in function.** “I’m going to make a Finding of Fact in this trial that the ditch has a right to exist and this Court will not change anything about its existence or function.”
- **No impairment of the system in any manner.** “I will make a further Finding of Fact that the Court, in its order, will not impair that ditch or impede that ditch in any manner.”
- **Position of Dam must not impair the flowage of the ditch in any manner.** “Now, it’s come to the Court’s attention that maybe Nicollet County’s going to build another dam and that’s fine with the Court, but that dam— and I will see to it—it will not impair the flowage of that ditch in any manner—so I don’t feel there is a necessity for a hearing on your rights on the ditch because they are not going to be impaired.”

These findings have not been clearly and expressly incorporated into the final judgment, and they should be. Section 103E.705 states that the drainage authority shall have the drainage system inspected on a regular basis by an inspection committee of the drainage authority or a drainage inspector appointed by the drainage authority. After the construction of a drainage system has been completed, the drainage authority “shall maintain the drainage system that is located in its jurisdiction including grass strips under section 103E.021 and provide the repairs necessary to make the drainage system efficient.” In Fisher v. Albin, 104 N.W.2d 32 (1960), the Supreme Court stated: “The

rights of an owner of land within a drainage system are well settled. As stated in In re Petition of Jacobson re County Ditch No. 24, 48 N.W.2d 441, 444 (1955):

'Once a ditch system is established, the order creating it constitutes a judgment in rem. The Res or subject matter of the order is the watercourse and all lands determined to be damaged or Benefitted by it. 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. Such a property right cannot be divested or damaged without due process of law.'¹⁷

Minnesota water law provides a series of protections to benefitted landowners. As

¹⁷ The Court's footnote states: "To the same effect, see In re County Ditch No. 31 and Judicial Ditch No. 13, Faribault County, 70 N.W.2d 853 (1955); Lupkes v. Town of Clifton, 196 N.W. 666 (Minn. 1924)." See also Petition of Schoenfelder, 55 N.W.2d 305 (Minn. 1952) (We have held that once a ditch system is established every landowner who has recovered damages or has been assessed benefits has a property right in the maintenance of the ditch in the same condition as it was when originally established. ...A county board cannot damage a landowner's property by damming up the water without acquiring the right to do so.); Nostdal v. Wantonwan County, 22 N.W.2d 461 (Minn. 1946)." See also Great Norther Ry Co v. Lehman, 36 N.W.2d 336 (Minn. 1949) ("Legislation has given to the order establishing a public ditch all the final and binding force of a judgment in rem."); Curran v. County of Sibley, 50 N.W. 237 (1891) (Had the board acquired jurisdiction by due publication of the notice, and merely erred in determining any of the matters submitted to their decision, it would undoubtedly be true that their decision could not be attacked collaterally, and that the only remedy of parties aggrieved would be by appeal); County of Martin v. Kampert, 151 N.W. 897 (Minn. 1915) (objection to the qualification of the viewers does not go to the jurisdiction of the board, and is not ground for collateral attack upon its determination, but that such disqualification, if it exists, is an irregularity only, which must be taken advantage of in the original proceeding); In re Judicial Ditch No. 9, 208 N.W. 417 (Minn. 1926) (in rem jurisdiction of Court limited Court's ability to change scope of proceedings). See Op. Atty. Gen., 602-j, Oct. 24, 1961. See also Normania Twp v. Yellow Medicine County, 286 N.W. 881 (Minn. 1939); Slosser v. Great Northern Ry. Co., 16 N.W.2d 47 (Minn. 1944). See also See Oelke v. County of Faribault, 70 N.W.2d 853, 860 (Minn. 1955).

stated above, Section 103E.705, Subd. 1 provides for mandatory routine repairs. Section 103E.715, Subd. 4 allows a single benefitted property owner to initiate a repair by petition.¹⁸ A single benefitted landowner can challenge abandonment of a drainage system. Minn. Stat. § 103E.811. The objection prevents abandonment of the system, if the drainage authority determines that the drainage system serves any useful purpose to any property or the general public.

Section 103A.201, Subd. 1 of Minnesota's Water Policy states that "**subject to existing rights**, public waters are subject to the control of the state." Minn. Stat. § 103D.515, Subd. 1 (recognizing existing rights of landowners to use waters of watershed district). Section 103D.515, Subd. 1 constrains the activities of Watershed Districts by stating that: "The rights of private or corporate landowners to use the waters of the watershed district for any purpose continue as the rights existed at the time of the organization of the watershed district."¹⁹ Section 103G.225 modifies wetland protection by preventing the existence of public waters wetlands from interfering with drainage

¹⁸ However, the standard for approval differs depending upon whether the petition is signed by a sufficient number of landowners. Minnesota Statutes Section 103E.715, Subd. 4.

¹⁹ Subdivision 2 continues: "All preexisting rights must be recognized by the managers, but if projects constructed by the watershed district make possible a greater, better, or more convenient use of or benefit from the waters of the watershed district for any purpose, the right to the greater use or benefit is the property of the watershed district."

maintenance.²⁰ Section 103G.245, Subd. 2(1) states that a public waters work permit is not required for (1) work in altered natural watercourses that are part of drainage systems established under chapter 103D or 103E if the work is undertaken according to chapter 103D or 103E.²¹ Section 103G.2241, Subd. 2 provides an exemption from the required wetland replacement plan for certain drainage activities. Section 84A.55, Subd. 12 limits the DNR's authority to restrict drainage systems in certain conservation lands.²²

Swan Lake's response is to assert that statutory drainage rights are subject to environmental limitations, and that is correct. If landowners today were to move to establish a new system in the Little Lake watershed, or if they were to seek to improve it, they would of course be bound by existing environmental law. But Swan Lake is making a far different and more radical proposition, to wit, that the Court can flood intervenors land because the decision to open these lands to agricultural development a century ago

²⁰ Section 103G.225: "If the state owns public waters wetlands on or adjacent to existing public drainage systems, the state shall consider the use of the public waters wetlands as part of the drainage system. If the public waters wetlands interfere with or prevent the authorized functioning of the public drainage system, the state shall provide for necessary work to allow proper use and maintenance of the drainage system while still preserving the public waters wetlands."

²¹ It further states that a public waters work permit is not required for a drainage project for a drainage system established under chapter 103E that does not substantially affect public waters.

²² See also Section 103E.401, Subd. 1: "If the commissioner purchases wetlands under section 97A.145, the commissioner must recognize that when a majority of landowners or owners of a majority of the land in the watershed petition for a drainage outlet, the state should not interfere with or unnecessarily delay the drainage proceedings if the proceedings are conducted according to this chapter."

was unwise.

D. Minnesota Law Does Not Grant the District Courts Jurisdiction to Determine the Ordinary High Water Level.

In this section of the brief, we defend that aspect of the District Court's amended decision which determines that MERA does not confer jurisdiction on the District Courts to determine or change the Ordinary High Water Level of Minnesota Lakes and streams. Minnesota Statutes Section §103G.255 vests the Commissioner with the responsibility to administer (1) the use, allocation, and control of waters of the state; (2) the establishment, maintenance and control of lake levels and water storage reservoirs; and (3) the determination of the ordinary high water level of waters of the state. The ordinary high water level (OHWL) means the boundary of water basins, watercourses, public waters, and public waters wetlands. Minnesota Statute 103G.005, Subd. 14. "The ordinary high water level is an elevation delineating the highest water level that has been maintained for a sufficient period of time to leave evidence upon the landscape, commonly the point where the natural vegetation changes from predominantly aquatic to predominantly terrestrial."

Chapter 103G allocates jurisdiction to determine the ordinary high water level to the Commissioner of Natural Resources in administrative proceedings. Minn. Stat. §103G.401, Subd. 14. The administrative proceedings to establish an OHWL may be started in one of three ways, by a public body, by a majority of the riparian owners adjoining the public water, or by the Commissioner himself. Section 103G.401, Subd.1,

2. This statutory provision embodies the Commissioner's historically broad authority to initiate investigations, hearings, and projects to preserve and enhance the public waters of this state, including the establishment of lake levels. See In the Matter of Determining the Ordinary High Water Level of Goose Lake, Waconia Township, Carver County, and Establishing and Maintaining Appropriate Water Levels Thereon, 2001 WL 1327767 (Minn. App), citing In re Lake Elysian High Water Level, 293 N.W. 140, 141- 42 (1940); In re Determining the Natural Ordinary High Water Level of Lake Pulaski, 384 N.W.2d 510, 517-18 (Minn. App.1986); Lindberg v. Dep't of Natural Resources, 381 N.W.2d 494 (Minn. App.1986).

Chapter 103G contemplates an administrative proceeding under the supervision of the Commissioner of Natural Resources. Originally, under previous versions of the statute, the Commissioner himself, in person, conducted these proceedings, conducting them on location. In re Lake Elysian High Water Level, 293 N.W.140 (Minn. 1940). Eventually, under the administrative procedure act, the OHWL process began to be held before administrative law judges who would make recommended decisions to the Commissioner²³. The determination process relies heavily upon technical testimony, often under departmental guidelines. See Guidelines for Ordinary High Water Level (OHWL) Determinations, (DNR Waters Technical Paper 11).²⁴ An example of the kind

²³ See for example an interim report and order in Big Marine and Carnelian Lakes. <http://www.oah.state.mn.us/aljBase/20007705.77.htm>

²⁴ http://www.dnr.state.mn.us/waters/surfacewater_section/hydrographics/ohw.html

of evidence and technical considerations is found in In the Matter of Determining the Natural Ordinary High Water Level of Lake Pulaski, 384 N.W.2d 510 (Minn. App. 1986).

Once the Commissioner makes his determination, it is subject to judicial review by this Court via certiorari, under the arbitrary and capricious and substantial evidence test.

OHWL determinations are allocated to an administrative agency for typical reasons: to take advantage of technical expertise; to place decisional responsibility in the agency charged with administration of public waters and natural resources; to maintain a coherent statewide consistent approach to regulation of public waters. It is absolutely critical that the Division of Waters regulate the hydrology of public waters in a coherent way, because lake levels and water course levels in a hydrological system are inter-independent. It would never work to have a District Judge in one county raise the elevation of a lake in one county and a district judge in another county to make an inconsistent decision with regard to a waterway upstream of that lake in another county. Public waters need to be regulated as an organic consistent whole. Raising and lowering the level of public waters involves harmonizing a variety of policies. When the Commissioner determines lake levels, the public interests at stake include the DNR's goal of maintaining lake levels so as not to alter the OHWL of the lake, to maintain the types of recreational uses that have traditionally occurred on the lake, and to resolve the dispute between landowners over the control structure on the lake. See 2001 WL 1327767

supra.²⁵ Not only do OHWL proceedings assure consistent application of the technical expertise of DNR specialists, but they assure that all parties impacted by the proposed decision have notice and an opportunity to be heard.

Swan Lake in this case is attempting to circumvent the statutory system for establishing an Ordinary High Water Level. Instead of submitting to administrative proceedings under the supervision of the Commissioner of Natural Resources, Swan Lake proposes to conduct an ordinary high water level determination in front of a District Judge, who clearly lacks jurisdiction to make this determination. By proceeding in this fashion, Swan Lake ignores the entire statutory scheme, which is designed to utilize the technical expertise of the Commissioner and Division of Waters. The County properly describes this as a separation of powers issue. The legislature has granted to the Commissioner, not the Courts, the power to determine ordinary high water levels. Allowing this case to proceed would essentially divest the Commissioner of his statutory authority to make administrative determinations regarding public waters. Moreover,

²⁵ The Court discusses the Commissioner's approach to the hydrological problems created by these cases: "When establishing the lake levels, the commissioner necessarily considered that these levels existed and could be maintained under current lake conditions, both natural and artificial. As the ALJ stated, one of the reasons he adopted the DNR's proposed levels is because the DNR considered the current lake conditions. The ALJ further stated that the higher, historic OHWL of 973.3 would be "unattainable" unless the ditch was filled in or unless "a substantial new dike or water control structure were built at the outlet," options which were not presented or considered at the hearing. Thus, the commissioner necessarily concluded that the control elevation of 968.3 could be "maintained" under current lake conditions."

initiation of such proceedings by complaint, supplants the statutory constraints on the initiation of proceedings. Under Chapter 103G a commissioner's determination is begun (a) by a public body, (b) by the requisite number of riparian owners, or (c) by the commissioner in his discretion. Swan Lake, however, seeks to circumvent those requirements altogether and move directly to the District Courts without meeting the statutory requirements.

IV. CONCLUSION

The District Court's amended decision correctly finds that the District Court is not charged with raising and lowering lake levels. In any event, Swan Lake's theory that MERA authorizes citizens to return lake and river hydrology to their 19th century conditions is plainly incorrect. The District Court's decision should be remanded for entry of an amended order that achieves repair of the weir by removing the District Court's stay on Chapter 103E repair proceedings, perhaps with an order providing that the repair must be completed by a designated date. In the alternative, the pre-trial ruling of the District Court finding that any post-trial order will include preservation of the drainage system and landowner's rights in that system should be restored.

Dated: March 24, 2009

Respectfully Submitted,

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Case No. A08-1739

STATE OF MINNESOTA
IN COURT OF APPEALS

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

CERTIFICATE OF BRIEF LENGTH

Appellants,

v.
Nicollet County Board of Commissioners,

Respondents,

v.
Marlin Fitzner, et al., Intervenors,

Respondents,

v.
Minnesota Department of Natural Resources,

Respondents.

I hereby certify that this Brief conforms to the requirements of Minn. R. Civ. App. P. 132.01, subds. 1 and 3, for a brief produced with a monospaced font. The length of this brief is 803 lines, 10,003 words. This brief was prepared using Wordperfect 12 software.

Dated: March 24, 2009

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