

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,

vs.

Minnesota Department of Natural Resources,
Respondent.

RESPONDENT NICOLLET COUNTY'S BRIEF

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STATEMENT OF LEGAL ISSUES

I. Whether the remedies ordered by the Nicollet County District Court were within the Court's jurisdiction under MERA.

The District Court noted the limitations of its jurisdiction under MERA and amended the original Judgment in accordance with those limitations.

Minn. Stat. § 116B.07

Swan Lake Ass'n v. Nicollet County Board of County Comm'rs, 711 N.W.2d 522 (Minn. App. 2006); petition for review denied (June 20, 2006).
State by Schaller v. County of Blue Earth, 563 N.W.2d 260 (Minn. 1997).

II. Whether the evidence supported the District Court's order.

The Court revised the original Judgment to reflect the evidence submitted at trial.

Minn. Stat. § 116B.04

Minn. Stat. § 116B.07

Swan Lake Ass'n v. Nicollet County Board of County Comm'rs, 711 N.W.2d 522 (Minn. App. 2006); petition for review denied (June 20, 2006).
State by Schaller v. County of Blue Earth, 563 N.W.2d 260 (Minn. 1997).

III. Whether an individual's authority to bring a MERA claim in the name of the state expands the court's jurisdiction and authority to order remedies to that of the State of Minnesota and its agencies.

The District Court noted the limitations of its jurisdiction and authority, and that of the DNR, when the District Court deferred and remanded the issue of setting lake levels to the DNR on the basis that the Legislature entrusted exclusive responsibility for lake level establishment and maintenance to the DNR.

Minn. Stat §116B.04

Minn. Const. art. 6, §1

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MPIRG v. Minn. Dept. of Labor, 249 N.W.2d 437 (Minn. 1976).

STATEMENT OF THE CASE

In June 2003 Appellant Swan Lake Area Wildlife Association (“Appellant”) brought Minnesota Environmental Rights Act (“MERA”) and nuisance claims against Nicollet County (“the County”) for alleged harm to the environment from the absence of a functioning sheet pile dam in County Ditch 46A (“CD46A”) in Nicollet County. Several landowners subsequently intervened (“the Intervenors”). The County moved for summary judgment. The Court granted the County’s motion as to one count of MERA that was based on a 30 year old Department of Natural Resources (“DNR”) permit, and denied the motion as to the other counts.

Appellant amended its complaint and added counts of mandamus and declaratory judgment, and joined the DNR as a third party defendant. The County moved for dismissal for lack of subject matter jurisdiction based on the assertion that the District Court lacked the authority to address drainage matters in a MERA action, and on statute of limitations and retroactivity arguments. The motion was denied; the County appealed; and the Court of Appeals affirmed the District Court’s denial. Swan Lake Ass’n v. Nicollet County Board of County Comm’rs, 711 N.W.2d 522 (Minn. App. 2006); petition for review denied (June 20, 2006).

The matter was tried in April 2007 before the Honorable John Moonan. Judgment was entered in favor of Appellant on one count of MERA, and the other counts were dismissed. All parties filed post-decision motions requesting amended findings or a new trial. A hearing and argument on the parties’ motions was held and the District Court

issued an Order on July 30, 2008 amending the October 17, 2007 Judgment. The Order did not change the verdict. The Order amended the findings and conclusions.

Appellant filed a Notice of Appeal. The Intervenors and the DNR filed Notices of Review. Appellant submitted its brief, arguing that the District Court erred in its interpretation of its subject matter jurisdiction under MERA.

STATEMENT OF THE FACTS

CD46A¹ was established pursuant to drainage law in 1907. Exh. NC1; NC2, NC3; NC5.1-NC5.12; NC15.1-NC15.21; NC16; T. 567-572; 1278. The ditch begins in the northeast corner of Mud Lake and runs northerly and easterly through the southeastern portion of Little Lake and then continues in an easterly direction for several miles where it joins CD Tile 58 and then continues until eventually emptying into Seven Mile Creek. Exh. RL163.

The establishment order was subsequently appealed to Nicollet County District Court on the basis that the ditch would illegally drain Little and Mud lakes. Exh. NC2.1, 2.3; RL169. On September 8, 1908, the District Court upheld the establishment order and found that the partial drainage of the lakes was legal. Exh. RL169.

The system existed as originally constructed through 1950, at which time the County conducted drainage improvement proceedings. Exh. NC3. The Department of Conservation (currently known as the DNR) was involved in the proceedings and approved the proposed construction of a dam within CD46A at a crest elevation of 973.2 feet. Exh. NC5.1-5.12. The intent of the dam was to maintain Little and Mud lakes at

¹ When originally established, the ditch was known as County Ditch 46.

the same level as was authorized under the 1907 establishment order, i.e., 973.2 feet. Id.; T.537. The improvement was ordered by the County and constructed.

In 1971, the County again held improvement proceedings. Exh. NC15.1-15.21. The proposed improvement involved enlarging the ditch and replacing the dam and increasing the length of its spillway from 9 to 25 feet. Id. The Department was involved in the proceedings and recommended that the height of the new dam be increased to accommodate for the increased spillway length. Exh. NC16.1-16.8. The improvement was ordered by the County, but without adoption of the Department's recommendation for increasing the height of the new dam. Exh. NC15.10; 15.16.

Subsequently the County submitted an application to the Department for a permit to work in public waters as was required for replacing the dam and increasing the spillway length. Exh. NC16.7. On March 15, 1972, the Department issued its Findings of Fact, Conclusions, Order and Permit ("1972 Permit.") Exh. RL94. The Department granted the County's application for a public waters permit to replace the dam and construct a longer spillway provided that the County increased the elevation of the dam from the original 973.2 feet to 973.8 feet. Id. The ditch improvement was completed in December 1972; however, the County decided not to replace the original dam or increase the spillway length. Exh. NC15.16. The 1972 Permit expired.

It is undisputed that the dam at issue has been failing and the water levels in Little Lake have been an issue since at least 1966. The County made numerous attempts to reach an agreement with the DNR, wildlife groups and landowners to repair, replace or relocate the dam from 1996 through the commencement of the lawsuit in 2003, including

discussions with Appellant. Exh. NC25; NC27.1-NC27.12; NC28.1-NC28.21; NC30.1-30.6; T.. 524-546; 657-659; 669. Difficulties ensued to prevent the repair, including the determination of the appropriate run-out elevation for the dam. Id; T. 524-528.

Appellant insisted that the appropriate elevation was 973.8 feet as was indicated in the 1972 Permit. Landowners abutting the ditch objected to the increase in elevation from 973.2 to 973.8 feet. The County questioned its legal ability to change the elevation. In the midst of discussions among the County, Appellant, DNR, and Intervenor landowners, Appellant brought suit against the County alleging two counts of MERA violations and one count of nuisance.

STANDARD OF REVIEW

In a MERA action, an appellate court must defer to the trial court in its findings of fact. Archabal v. County of Hennepin, 495 N.W.2d 416, 420, 421 (Minn. 1993).

Accordingly, the clearly erroneous standard applies to the findings. Id.

The trial court's conclusions of law in a MERA action are reviewed de novo. Id. Subject matter jurisdiction is a question of law and accordingly it is reviewed de novo. Odenthal v. Minn. Conference of Seventh Day Adventists, 649 N.W.2d 426 (Minn.2002).

The trial court's denial of a party's post-trial motions for amended findings or a new trial are not to be disturbed on appeal absent a clear abuse of discretion. State by Fort Snelling State Park Ass'n v. Minneapolis Park & Recreation Bd., 673 N.W.2d 169 (Minn. App. 2003), review denied (Minn. Mar. 16, 2004). A motion for amended findings must identify the alleged defect and explain why the findings are defective. Id. at 178. Further, the moving party must show that the district court was compelled to

make the requested findings and failed to do so to overturn a district court's denial of the motion. Id.

ARGUMENT

I. SUBJECT MATTER JURISDICTION UNDER MERA EXTENDS ONLY TO THOSE REMEDIES THAT CORRECT THE HARM CAUSED BY THE ACTIVITY AT ISSUE.

A. Relief Available Under MERA is Limited.

The Legislature and the Courts have limited the relief that is available under MERA: Minn. Stat. § 116B.07 provides:

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.

The plain language of MERA limits relief to that “necessary or appropriate to protect” the environment. MERA does not authorize types or scope of relief that exceeds that which is necessary or appropriate, nor does the language authorize relief that exceeds protection of the environment. The Legislature limited relief available under MERA. The Court's subject matter jurisdiction as to remedies under MERA is limited accordingly.

The scope of remedies in a MERA claim was at issue in Werlein v. United States, 746 F.Supp. 887, 898 (D.Minn.1990), vacated in part on other grounds, 793 F.Supp. 898 (D.Minn.1992). In that case, the court observed:

Generally, MERA does not seem to contemplate affirmative injunctive relief that essentially amounts to an order to clean up past pollution.... In fact, if MERA were so construed, courts could use MERA to order clean-up of all pollution anywhere within the state.

746 F.Supp. at 898.

Under Werlein, available remedies under MERA do not include correction of any and all pollution, impairment or destruction. Rather, MERA remedies are limited to correction of the pollution, impairment or destruction directly attributable to the complained of conduct, and nothing more. See also, State ex. rel. Wacouta Twshp. v. Brunkow Hardwood Corp., 510 N.W.2d 27 (Minn.App. 1993) (scope of injunction must be supported by the evidence in MERA case.); Kennedy Building Associates v. Viacom, Inc., 375 F.3d 731 (8th Cir. 2004) (Order issued in MERA case remanded because relief exceeded that authorized by MERA where injunction was not tailored to address the problem.)

B. The District Court Did Not Err Because the Order Redressed the Harm.

The District Court's remedy was within its jurisdiction. The order was limited to correcting the harm attributable to the County's inaction. It is well established that where a statute gives a right and creates a remedy unknown unto the common law, and at the same time points to a specific remedy, the remedy provided by statute is exclusive. See, e.g., Davis v. Great N. Ry. Co., 128 Minn. 354, 358, 151 N.W. 128, 129 (1915); County of Morrison v. Litke, 558 N.W.2d 16 (Minn. App. 1997); Olson v. Moorhead County Club, 568 N.W.2d 871 (Minn. App. 1997); Valtakakis v. Putnam, 504 N.W.2d 264 (Minn. App. 1993). As to remedial statutes, such as MERA, a remedy's purpose is to redress those wrongs identified by the Legislature.

The duty to construe a remedial statute liberally simply means that the court should so apply it as to suppress the mischief sought to be

avoided by affording the remedy intended. It stops short of extending a statute to purposes and objects not mentioned therein.

Christensen v. Hennepin Transp. Co., 10 N.W.2d 406, 416, 215 Minn. 394 (Minn. 1943).

The District Court found that the County failed to replace the dam in the 1970's and found that had the dam been replaced at that time, the DNR would have required the dam to have a crest elevation of 973.8 feet. Judg. Finding 14, 17. The District Court also found that the County's failure to replace the dam caused unnecessary drainage of the lakes. Judg., Finding 25. The District Court then concluded that the County violated MERA by failing to replace the dam because that inaction caused the drainage of the lakes. Judg. Concl. 2. Therefore, the legal wrong to be redressed by the District Court was the drainage of the lakes caused by the County's failure to replace the dam in the 1970's.

The District Court crafted a remedy designed to correct the wrong attributable to the County's inaction. The District Court ordered the construction of a dam to correct the wrong of failing to replace the original dam. The District Court also ordered the new dam at 973.8 feet to correct the wrong caused by the failure of the County to construct a new dam at 973.8 feet in the 1970's. See Am. Judg. Finding 7. The 973.8 feet crest elevation was also the level at which the DNR currently asserted as being the proper elevation. Thus, the District Court ordered a remedy that was crafted to correct the legal wrong that was proved during the trial. The District Court's remedy was not in error.

The District Court's statement that it lacked the jurisdiction to order the dam's crest elevation at 976 feet was also not in error. Nowhere in the Findings or Conclusions

did the District Court state that but for the County's inaction the lakes would be at 976 feet elevation, or that the County had a duty to take action to increase the lakes to 976 feet, or that in the early 1970's the County should have constructed a dam with a crest elevation of 976 feet. See Judg.: Am. Judg. Despite the fact that at trial the Appellant argued that harm to the lakes began in 1907 with the ditch's construction and partial drainage of the lakes², the District Court did not find or conclude, nor was the District Court compelled to find, that the original construction of CD46A in 1907 was the MERA violation.

As suggested in Werlein, supra, the District Court did not use MERA to correct all harm that was ever instilled upon the Little and Mud lake environment. In rejecting the Appellant's argument for 976 feet, the District Court properly rejected correcting all harm to the Little and Mud lake environment attributable to and extending back to its original construction in the 1900's. Had the District Court so ordered, it would have impermissibly redressed a "wrong" that was not legally recognizable. In ordering a dam at 973.8 feet, and rejecting the Appellant's proffered 976 feet, the District Court properly observed the limits of its jurisdiction under MERA, the statute of limitations, and its judicial authority to fashion remedies for legally recognizable wrongs.

The District Court's rejection of Appellant's proffered 976 feet was also consistent with the Court of Appeals' decision in State by Schaller v. County of Blue Earth, 563

² The original establishment of the ditch was appealed on the basis that the ditch would result in partial drainage of Little and Mud lakes. Exh. RL169. The matter was tried and the District Court found that the ditch would partially drain the lakes and upheld the establishment order. Id.

N.W.2d 260 (Minn. 1997). In that case, the Minnesota Supreme Court held that although almost every human activity has some kind of adverse effect on the environment, MERA is not construed to prohibit all human enterprise. *Id.* at 265. An order for 976 feet would have been equivalent to the lake's elevations prior to "human enterprise." The District Court's rejection of the Appellant's proffered 976 feet was, in fact, a rejection of the Appellant's invitation to issue an order contrary to the Court's holding in Schaller.

Finally, the District Court's rejection of Appellant's proffered 976 feet elevation was consistent with the Court of Appeals' holding in Swan Lake Area Wildlife Assn. v. Nicollet County Board, et al., 711 N.W.2d 522 (Minn. App. 2006). In that case, the County appealed the District Court's denial of a motion challenging the District Court's subject matter jurisdiction to hear a MERA claim that involved a county ditch, specifically CD46A. The Court upheld the District Court's order and stated that "the district court has subject matter jurisdiction over a claim under the Minnesota Environmental Rights Act, even if that claim involves drainage[.]" *Id.* at 526. This holding simply means that a district court has jurisdiction to hear a MERA claim even if it involves drainage through a county ditch that is under the jurisdiction and control of a drainage authority. *Id.* The Court did not hold, as suggested by Appellant, that the district court had jurisdiction to order the remedies that Appellant requested. In fact, the Court refused to analyze the substance of Appellant's claims. *Id.* Thus, the holding in Swan Lake did not extend to the remedies requested by Appellant. Accordingly, the holding in Swan Lake does not stand for the proposition that the District Court had jurisdiction to order the remedies requested by Appellant.

In sum, the District Court's order was within its jurisdiction. The District Court did not err when stating that it lacked jurisdiction to set the lakes at 976 feet.

C. Appellant's Request For Ideal Waterfowl Lakes Was Beyond the Scope of MERA.

Appellant argues that MERA authorizes the Court to order lake levels that would result in "environmentally functional lakes" and lakes ideal for waterfowl. Appellant's argument runs contrary to the purposes of MERA and contrary to the evidence.

The evidence at trial supported the conclusion that an ideal waterfowl lake, or optimum waterfowl habitat, would be created with a minimum of three feet of water in the lake basins. T. 715, 788, 720, 1008, 1012, 1219-1221, 1242. DNR employee Dennis Simon testified that a hemi-marsh, made up of 50% open water and 50% emergent vegetation, would create optimum waterfowl habitat. T. 715-720; 770-788. Mr. Simon testified that optimum waterfowl habitat could be obtained in Little Lake with a water depth of three feet over 40-50% of the basin. Id. Thus, increasing water levels to three feet would not merely reverse the impairment or restore the habitat to its moderate quality, but it would greatly increase the quality of the habitat to an optimum level.

However, no evidence was submitted that the lakes ever offered anything but moderate waterfowl habitat. In issuing the Permit for a new dam in the 1970's, the DNR determined that Little Lake provided habitat for moderate waterfowl production, including fair nesting and courting areas, with a run-out elevation of 973.2 feet. Exh. RL94.

The evidence demonstrated that even prior to the construction of the ditch, the lakes did not offer optimum habitat. In the September 8, 1908 Order upholding the partial drainage of the lakes, the District Court described the Little Lake habitat:

That every summer, a large part of the lake becomes covered with reeds, grasses and vegetation, and in dry seasons practically the whole thereof is overgrown with vegetation....That said lake is normally shallow and grassy and of a marshy character. That it 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 said lake are to a large extent low, marshy and muddy, and the water thereof is stagnant.

Exh. RL169.

Thus, even before the ditch was constructed, the habitat was not optimum or ideal. Little Lake was not the ideal “hemi-marsh.”

The evidence also supported the conclusion that raising lake levels to 976 feet would result in a lake, or wetland, 25% larger than it was in 1908 prior to the ditch being constructed. Appellant’s expert witness, Gerald Gray, testified that at 976 feet, the wetland would increase by 100 acres--from 423 acres to approximately 523 acres. T. 1241. However, in 1908, Little Lake was noted to be only 406 acres. Exh. RL169.

An order that goes beyond correcting the harm attributable to the County’s action, and extends to creation of an environment that never existed, is plainly beyond the scope of MERA. In this case, MERA cannot be used to create an ideal or optimum waterfowl lake, or an “environmentally functional lake” that has never existed. The District Court would have erred by ordering lake levels at 976 feet because at that level brand new ideal or optimum habitat would have been created.

The District Court's Amended Judgment was not error because it did fall within the purposes of MERA because the remedy was tailored to restore the environment to its moderate state. Contrary to Appellant's argument, there was persuasive evidence that at less than 976 feet, the lake levels would provide environmental benefits. The evidence demonstrated that at 973.2 feet, Little Lake would remain a Type III wetland, just as it was in 1972. T. 820. The evidence also showed that at 973.2 feet, Little Lake would have approximately one to two feet of water, and at that level the habitat for waterfowl would be moderate. Exh. RL94; T. 828. At 973.8 feet, the lakes would be slightly deeper and consequently offer better quality habitat. Appellant's witness, Kevin Kuehner, testified that his studies showed significant decreases in the pollutant nitrate-nitrogen when water levels were only one to two feet in depth. T. 1185-6. This would be an environmental benefit. Id.; T. 1145; 1187. Two DNR employees testified that benefits to wildlife and water quality would result from water levels less than 976 feet. T. 828; 1287-1289.

The evidence demonstrated that at 973.8 feet, the depth of the lakes would increase, the habitat for waterfowl would improve to its historical moderate state, and any pollution would be decreased. The District Court's conclusions were reasonable and based on the evidence, and therefore the Court did not err by ordering lake levels, and the crest elevation of the dam, at 973.8 feet.

D. Appellant's Arguments For Lakes at 976 Feet Require the Impermissible Retroactive Application of MERA.

Appellant argues that under MERA the Court may make an order restoring the lakes to an environmentally functional state, and that the last time the lake levels were fully beneficial to the public was prior to 1953. Ap. Brf. 5; 21. Appellant is arguing that the County took action, or failed to take action, to maintain the lakes sometime before 1953. However, to hold the County responsible for acts occurring prior to 1953 requires that MERA be applied retroactively. MERA, adopted in 1971, cannot be applied retroactively, and therefore any order based on retroactive application of MERA would be in error.

Minn. Stat. § 645.21 (2006) provides that “No law shall be construed to be retroactive unless clearly and manifestly so intended by the legislature.” The Courts have repeatedly held that statutes are presumptively prospective and not retroactive, and that the language of a statute must contain clear evidence of the retroactive intent in order to be applied retroactively. See Chapman v. Davis, 233 Minn. 62, 65, 45 N.W.2d 822, 824 (1951); Duluth Firemen's Relief Ass'n v. City of Duluth, 361 N.W.2d 381, 385 (Minn.1985). In Sletto v. Wesley Construction, Inc., et. al., 733 N.W.2d 838 (Minn. App. 2007), the Court held that a statute can be applied retroactively only if the statutory text clearly and manifestly indicates the Legislature intended the statute to have retroactive effect.

The text of MERA contains no language to even suggest it was meant to apply retroactively. Nowhere does the Legislature use the word “retroactive.” Nowhere does it

make reference to addressing actions prior to MERA's enactment in 1971. MERA therefore cannot be applied retroactively.

The Court could not apply MERA retroactively to actions taken before MERA's inception. Those actions that fall outside MERA included the establishment of the ditch and the legal partial drainage of Little and Mud lakes that was affirmed by the Nicollet County District Court in 1908 and the construction of the dam at 973.2 feet that was approved by the DNR and ordered in the 1950's.

Furthermore, a MERA action cannot be maintained when the DNR has approved the conduct at issue. Minn. Stat. Sec. 116B.03, subd. 1. The evidence showed that the Department of Conservation approved the installation of the dam at 973.2 feet. T. 1278; Exh. NC5.1-NC5.12. The County took action pursuant to that approval and installed the dam at 973.2 feet. Id.; Exh. RL94. The County's actions were lawful. Therefore, under Minn. Stat. Sec. 116B.03, subd. 1, any environmental effects associated with the lakes or dam at 973.2 feet run-out elevation cannot form the basis for Relator's MERA action.

Appellant argued for the pre-settlement, pre-ditch, pre-dam lake elevations of 976 feet. Therefore, to grant Appellant's request for 976 feet would have required that the Court apply MERA retroactively and find that the County acted unlawfully in violation of MERA in 1908 and in the 1950's. The District Court's Am. Judgment was not based on either pre-MERA actions or on actions shielded from liability under MERA. Rather, the District Court applied MERA prospectively to the County's actions after 1971, and therefore the Court did not err.

II. THE EVIDENCE DID NOT COMPEL THE COURT TO FIND THAT THE COUNTY WAS OBLIGATED TO MAINTAIN THE LAKES AT 976 FEET.

Appellant argues that because it made a prima facie showing as to the 976 feet lake elevation, and because the County³ and DNR failed to rebut that evidence, the Court was compelled to order lake levels at 976 feet. Appellant's argument misstates the trial evidence and misconstrues the conclusions based on that evidence.

To succeed on a MERA claim, a plaintiff must make a prima facie showing that a defendant's conduct has or will likely cause pollution, impairment or destruction. Minn. Stat. § 116B.04. If a prima facie showing is made, a defendant "may rebut the prima facie showing by the submission of evidence to the contrary." *Id.* In the alternative, a defendant may 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[.]" *Id.*

The burden was on Appellant to prove some unauthorized action caused pollution, impairment and/or destruction of the environment in violation of MERA. Appellant failed to meet its burden of demonstrating that the County was obligated to take action to maintain the lakes at 976 feet.

It was undisputed that the original establishment and construction of the ditch partially drained Little and Mud lakes. It was undisputed that the dam was constructed in the 1950's to control the lake elevations on Little and Mud lakes. It was undisputed that

³ Contrary to Appellant's argument, the County did submit evidence during the trial. County Attorney Michael Riley testified at length regarding the history of the ditch and his attempts at determining the appropriate crest elevation (973.2 or 973.8 feet) for a new dam, and numerous exhibits were submitted through Mr. Riley. T. 511-671.

the dam was constructed with the approval of the DNR at a crest elevation of 973.2 feet.

T. 1278; Exh. NC5.1-NC5.12. It was also undisputed that the DNR wanted the

replacement dam at a crest elevation of 973.8 feet in the 1970's. Exh. RL94.

Therefore, the evidence supported the conclusion that the County was legally obligated to keep the dam in good repair, and failure to do so could form the basis for a MERA action if the environmental effects rose to the level of pollution, impairment or destruction. The evidence also supported the conclusion that the dam was originally constructed at 973.2 feet, and that the DNR wanted the replacement dam to be constructed at 973.8 feet, so the County was legally obligated to keep the dam in good repair at either 973.2 feet or 973.8 feet. Consequently, the evidence supported an order setting the crest elevation of the dam at either 973.2 feet or 973.8 feet.

The evidence did not, however, support an order setting the lake levels, or crest elevation of the dam, at 976 feet. Appellant submitted no evidence whatsoever that the County was legally obligated to maintain the lakes at 976 feet. The evidence does not support, and the District Court did not find, that the County should have constructed a dam at 976 feet in the 1970's, or that the lakes would be at 976 feet but for the County's failure to replace the dam. See Judg; Am. Judg. Without a duty to maintain the lakes at 976 feet, the County could not act unlawfully in violation of MERA. Therefore, an order setting the lakes, or the crest elevation of the dam, at 976 feet would have been error.

In addition, because the environmental consequences would be unknown, an order for 976 feet would have the potential of creating environmental harm. Appellant submitted no evidence showing that studies were conducted to determine the effects on

upland game and other wildlife, vegetation, non-waterfowl birds, fish, and soils from increasing lake levels to 976 feet. T. 1238-1240; 798-799. Appellant's expert, Gerald Gray, testified that optimum habitat for waterfowl is not optimum habitat for other wildlife. T. 1237. He acknowledged that at 976 feet the upland and transitional areas around the lakes would be reduced through flooding of the areas. T. 1251. Upland and transitional areas are utilized by deer, pheasants, turkeys, raccoons and migratory songbirds. T. 764; 771; 1237. The evidence demonstrated that the habitat for these species would be destroyed by increasing water levels in the lakes, and thus it was undisputed that wildlife will be harmed with an increase in lake levels to 976 feet. T. 799.

Neither Mr. Grey nor anyone else performed studies on the effects of increasing the size of the wetland and water levels on the wildlife species that inhabit the transitional and upland areas. Destroying wildlife habitat harms wildlife, and not knowing the full extent of the effects on the wildlife that inhabit the affected areas means that there is a very real possibility that increasing water levels may result in even more harm than just destruction of habitat.

Even at lake levels of 974.8 feet, the effects on wildlife are not known. The DNR testified that although it had explored the possibility of increasing lake levels to 974.8 feet, it had not studied the environmental effects on turkey, pheasant or deer habitat if lake levels were increased to that level. T.770-771.

The Court concluded that the evidence was not clear that raising lake levels to 976 feet would actually protect the environment. The environmental effects from raising lake

levels to 974.8 feet or 976 feet are not fully known, and therefore the District Court did not err in refusing to order a remedy setting lake levels, or the crest elevation of the dam, at such levels.

III. THE LEGISLATURE DID NOT IMBUE THE COURT OR A PLAINTIFF WITH THE UNFETTERED POWERS OF THE STATE WHEN IT PASSED MERA, AND THEREFORE THE COURT DID NOT ERR IN OBSERVING THE LIMITS OF ITS JURISDICTIONAL POWERS.

A. The Legislature's Directive to Bring a MERA Claim in the Name of the State is Nothing More Than A Legislative Provision for Standing.

Contrary to Appellants' arguments, the significance of MERA's citizen suit provisions is not to expand the jurisdictional power and authority of the District Court to that of the State of Minnesota and its agencies. The significance of bringing a MERA claim in the name of the State is merely a matter of standing.

It is black letter law that an individual or entity that lacks standing may not bring suit. Minnesota has adopted an "injury in fact" test for standing. Snyder's Drug Stores, Inc. v. Minn. State Bd. of Pharmacy, 221 N.W.2d 162, 165 (Minn. 1974). Under this test, an individual has standing when he or she has suffered an actual injury or otherwise has a cognizable stake in a justiciable controversy. Leffler v. Leffler, 602 N.W.2d 420, 422 (Minn. App. 1999). The individual must have a direct interest in the litigation and articulate more than an abstract concern. Byrd v. Indep. Sch. Dist. No. 194, 495 N.W.2d 226, 231 (Minn. App. 1993), review denied (Minn. Apr. 20, 1993). The individual must also demonstrate an injury or imminent threat of injury to a legally recognized interest. Envall v. Indep. Sch. Dist. No. 704, 399 N.W.2d 593, 596 (Minn. App. 1987), review denied (Minn. Mar. 25, 1987); see also State ex. rel Sammons v. Nelson, 136 Minn. 272,

274, 159 N.W. 758, 759 (1916) (individual lacked standing to challenge a ditch project that did not directly affect his land).

Thus, under Minnesota law, an individual without an injury in fact is generally without standing to bring suit. However, the Legislature has the authority to grant standing to a particular group of individuals or entities in certain circumstances, including when the action is a creation of the Legislature. See MPIRG v. Minn. Dept. of Labor, 249 N.W.2d 437 (Minn. 1976) (Legislature has authority to determine what parties have standing to institute action when action was created solely by the Legislature.) Put simply, if the Legislature created the action, the Legislature has the authority to identify who has standing to bring suit under that action.

MERA is a creation of the Legislature. See Minn. Stat. Chap. 116B. As such a creation, the Legislature had the authority to identify those individuals who could bring suit under MERA, and the Legislature exercised that authority.⁴ The individuals and entities granted standing are identified in MERA's citizen suit provision:

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;

⁴ That the Legislature was exercising its authority to grant standing under MERA is apparent when one notes that actions under MERA are essentially public nuisance actions, and under Minnesota's Public Nuisance Law, Minn. Stat. §617.80, et. seq., only a "prosecuting attorney" may bring an action to enjoin or abate a public nuisance.

Minn. Stat. § 116B.03, subd.1.

Thus, an individual or entity need not assert an injury in fact to gain standing to bring a claim under MERA. Rather, an individual or entity need only to assert residency and an injury, or potential injury, to the public's interest in the protection of the State's natural resources to gain standing to bring such a claim. Id. Thus, the significance of bringing a MERA claim in the name of the State is nothing more than a matter of standing.

Appellant cites no provision of MERA or caselaw for its argument that the Legislature intended that a district court, or a MERA plaintiff, to take on the jurisdictional power and authority of the State in a MERA action. Appellant's argument is without any legal support, and must be ignored.

B. Imbuing the Court with the Unfettered Jurisdictional Power and Authority of the State and its Agencies Would Require The Violation of the Separation of Powers Doctrine.

While the Courts have recognized the authority of the Legislature to identify those individuals or entities with standing to bring Legislature-created claims, the Courts have not interpreted such an authority to expand the Court's judicial powers. Inherent judicial power grows out of express and implied constitutional provisions. Minn. Stat. Const., art. 6, §1. A court's judicial power is constitutional, and rooted in a separation of powers. Id.; Minn. Stat. Const., art. 3, §1. Under Minnesota law, a court has inherent authority to grant relief. State v. C.A., 304 N.W.2d 353, 358 (Minn.1981). This inherent authority may not be used to extend the jurisdiction of the courts. State v. Osterloh, 275 N.W.2d

578, 580 (Minn. 1978). (court lacked authority to compel county to pay for criminal offender's rehabilitative treatment during probation); In re Clerk of Lyon County Courts' Compensation, 308 Minn. 172, 176, 241 N.W.2d 781, 784 (1976) (court lacked authority to set clerk's salary.) Furthermore, the exercise of a court's inherent authority must be without the infringement of equally important legislative or executive functions. Id.

The courts cannot extend their own judicial authority or jurisdiction, and, absent a constitutional amendment, the Legislature cannot authorize the judiciary to exercise power that is outside the court's constitutional mandate. The constitution requires separation of powers. Minn. Stat. Const., art. 3, §1. The Legislature would violate the separation of powers doctrine if, in passing MERA, the Legislature authorized the court to exercise all the authority and power of the executive branch. It follows that, in passing MERA, the Legislature did not intend that directing plaintiffs to bring MERA claims "in the name of the State" meant that the District Court and/or the Appellant would be imbued with all the powers and authority of the State of Minnesota and its agencies.⁵ Or that the powers and authority of the Court would be unfettered by statutes and rules, such as the statute⁶ that provides the procedure and considerations for setting lake levels, that apply to the Executive branch.

The District Court did not take on the jurisdictional power and authority of the State and its agencies when it issued its Order. The District Court observed the limits of

⁵ The Legislature's nod to the jurisdiction and authority of the executive branch can be seen in Minn. Stat. §116B.08: "If administrative, licensing, or other similar proceedings are required to determine the legality of the defendants' conduct, the court shall remit the parties to such proceedings." (emphasis added)

⁶ See Minn. Stat. §103G.407

its jurisdictional power and authority, and that of the DNR, when refraining from setting the lake levels in Little and Mud lakes at level not approved by the DNR. See Minn. Stat. § 103G.255 (Control of the waters of the State, including setting lake levels, is with the DNR.) Because the District Court was without the jurisdictional power and authority to set the lake levels at 976 feet, a level not approved by the DNR, the District Court did not err.

CONCLUSION

The evidence supported the District Court's amendments of the Judgment. The District Court did not misinterpret the scope of its jurisdiction and did not err in restricting its order to remedies that redressed only the harm attributable to the County's inaction and to a lake level approved by the DNR. Therefore, the County requests that the District Court's judgment be upheld, and Appellant's request for a new trial be denied.

RATWIK, ROSZAK & MALONEY, P.A.

Dated: March 29, 2009

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STATE OF MINNESOTA
IN COURT OF APPEALS

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

Court File No. C5-03-455

Appellant,

vs.

Nicollet County Board of County Commissioners,

Respondent,

vs.

**CERTIFICATE OF
BRIEF LENGTH**

Marlin Fitzner, et al., Intervenors,

Respondents

**APPELLATE COURT
CASE NO. A08-1739**

vs.

Minnesota Department of Natural Resources,

Respondent.

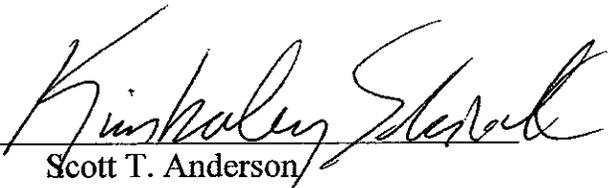
I hereby certify that this Brief conforms to the requirements of Minn. R. Civ. App. P. 132.01, subds. 1 and 3, for a brief produced with a monospaced font. The length of this Brief is 715 lines, 6,895 words. This Brief was prepared using Microsoft Word.

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