

NO. A10-1025

State of Minnesota  
In Court of Appeals

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

*Appellant,*

vs.

Nicollet County Board of County Commissioners,

*Respondent,*

vs.

Marlin Fitzner, et al., Intervenors,

*Respondents,*

vs.

Minnesota Department of Natural Resources,

*Respondent.*

RESPONDENT NICOLLET COUNTY'S BRIEF

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## STATEMENT OF THE LEGAL ISSUES

**I. Whether the District Court followed the remand instructions from this Court in Swan Lake II.**

This Court's remand instruction to the District Court was to determine and order the crest elevation of a weir at the outlet of Little Lake. The District Court complied with this order.

Halverson v. Vill. of Deerwood, 322 N.W.2d 761 (Minn. 1982).

**II. Whether the crest elevation ordered by the District Court was a proper remedy for the MERA violation in this case.**

The District Court ordered the creation of a weir that is the proper remedy for the MERA violation. Its order addressed the harm caused by the MERA violation and crafted a remedy to rectify that harm.

Minn. Stat. § 116B.07

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).

State ex. rel. Wacouta Twshp. v. Brunkow Hardwood Corp., 510 N.W.2d 27 (Minn. App. 1993).

**III. Whether the District Court's order was arbitrary and capricious.**

The District Court's order was not arbitrary and capricious. It was supported by evidence submitted at trial.

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).

## STATEMENT OF THE CASE

In June of 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 weir in County Ditch 46A (“CD46A”) in Nicollet County. Several landowners subsequently intervened (“the Intervenors”). The County moved for summary judgment. The District 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) (Swan Lake I).

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 but did amend the findings and conclusions.

Appellant appealed the amended Order. The Court of Appeals affirmed in part, reversed in part, and remanded. Swan Lake Ass'n v. Nicollet County Board of County Comm'rs, 771 N.W.2d 529 (Minn. App. 2009) (Swan Lake II). The Court of Appeals affirmed that the County violated MERA, but reversed the District Court's holding that the DNR was liable for the County's violation. The Court of Appeals also reversed the District Court's holding that it did not have jurisdiction over the DNR, and remanded to the District Court to determine the appropriate crest elevation for a weir to be constructed in CD46A.

On remand, the District Court ruled that it had received sufficient evidence at trial, and accepted briefs addressing the appropriate crest elevation of the weir to be constructed. The District Court ordered that the County construct the weir with a crest elevation of 973.8 feet above sea level. Appellant filed a Notice of Appeal and brought this matter to this Court, once again arguing the crest elevation ordered by the District Court was incorrect.

### STATEMENT OF THE FACTS

CD46A<sup>1</sup> was established pursuant to drainage law by the Nicollet County Board of Commissioners 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. It continues

in an easterly direction for several miles where it joins CD Tile 58 until eventually emptying into Seven Mile Creek. Exh. RL163.

The original establishment order was 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. In its Order, the District Court made important findings about the area, the character of the lakes, and the impact of creating CD46A. The court acknowledged that the creation of CD46A would partially drain Little Lake, which prior to being drained covered an area of approximately 406 acres. Id. The court also noted:

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.

Id.

The Court also found that the ditch would partially drain a small lake to the south and west of Little Lake (now known as Mud Lake) and described that lake as “normally shallow and grassy and to be of no beneficial public use for any purpose.” Id.

On May 2, 1949, a petition was filed with the Nicollet County Board of Commissioners seeking improvements to and enlargement of CD46A to increase the

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<sup>1</sup> When originally established, the ditch was known as County Ditch 46.

ditch's flow. Exh. RL12. A.J. Bradshaw, an engineer, submitted a preliminary and a final report to the County recommending certain improvements. Exh. RL18; 28. Mr. Bradshaw said that the proposed expansion and improvements would not affect the levels of Little Lake and Mud Lake despite enlarging CD46A if a weir would be constructed at the outlet of Little Lake to maintain the lakes' current depths. Exh. RL18. The weir was to be constructed with a crest elevation of 973.2 feet. T. 537. The Minnesota Department of Conservation (now known as the DNR) examined and approved Mr. Bradshaw's reports concerning the improvements. Exh. RL29. The Nicollet County Board of Commissioners granted the petition for the improvements and expansion of CD46A in accordance with Mr. Bradshaw's report. Exh. RL35. The County's July 31, 1950, order noted that the improvements would not affect Little Lake or Mud Lake in any different manner than the original construction of CD46A. Id. In 1952, the improvements, expansion, and construction of the weir were completed. Exh. RL36.

The weir began to fail approximately ten years after its construction. In a June 28, 1963 letter, the Department of Conservation summarized inspections of the weir and mentioned seepage through the weir at various points. Exh. RL44. Although that letter says the problems with the weir were repaired, concerns with the weir occurred again the following year. A September 17, 1964 memorandum from the Department of Conservation reports that Little Lake did not have any water. Exh. RL48. A different memorandum from 1966 said that the weir "has not functioned correctly in the last three years" and would need new piling since "all other repairs have failed." Exh. RL50.

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.

On November 10, 1971, the County submitted an application to the DNR for a permit to construct the replacement weir in connection with the improvements to CD46A. Exh. RL89. After reviewing the application, the DNR issued its Findings of Fact, Conclusions, Order, and Permit on March 15, 1972. Exh. RL94. These findings summarized the history of CD46A and the surrounding area. Id. The DNR found that Little Lake was a marsh lake of a Type III wetlands category that provided moderate waterfowl production, including fair nesting and courting areas for waterfowl. Id. Additionally, it found that the depth of water in a Type III marsh lake necessary for optimal wildlife habitat is two feet, and constructing a new weir at an elevation of 973.8 feet would keep water levels in Little Lake at approximately this depth. Id. For these reasons, it concluded that a new weir with a crest elevation of 973.8 feet would "preserve and restore some of the wildlife productivity and hunting utility of Little Lake" and is an "acceptable accommodation between the private interests of the surrounding landowners and the public interests in Little Lake." Id. Therefore, the DNR authorized the County to build a replacement weir at its previous location and with

a crest elevation of 973.8 feet. However, although the County made some of the ditch improvements, it did not replace the weir with the proposed new structure. T. 598.

It is undisputed that the weir 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.

Appellant argues that the District Court did not obey the mandate instructions from this Court's decision in Swan Lake II. Appellant argues that the remand directive

from that decision was for the District Court to set the crest elevation at a height that would create hemi-marsh conditions for Little and Mud Lakes. However, as explained below, Appellant is incorrect in this assertion.

### **ARGUMENT**

Appellant states that the cornerstone of its case is that Little Lake and Mud Lake should be environmentally functional public lakes. The only way Appellant will be satisfied is if these lakes are hemi-marsh lakes, with 50% of the lakes being three feet deep. Appellant will not be satisfied with replacing the weir with a crest elevation so that it would function in the same manner as the weir that fell into disrepair that was the MERA violation in this case.

However, Appellant has shown no legal basis for the creation of its desired hemi-marsh environment. This Court did not order its creation. It is an improper remedy for the MERA violation in this case. It would have negative impact on surrounding land, landowners, and the general public. It would broaden the scope of MERA to allow an individual to use MERA to require the filling in of any existing legally established drainage system in the state. For these reasons, this Court should affirm the District Court's Order to the County to construct a weir with a crest elevation of 973.8 feet.

#### **I. THE DISTRICT COURT FOLLOWED THE REMAND INSTRUCTIONS FROM THIS COURT IN SWAN LAKE II BY ORDERING THE WEIR'S CREST ELEVATION.**

Appellant asserts that the District Court did not follow this Court's direction on remand. This matter was before this Court in 2009 when it rendered its decision in Swan Lake II. The Court's review was limited to just two issues: 1) whether the District

Court had jurisdiction to set the crest elevation of the weir, and 2) whether the District Court erred by holding the DNR violated MERA.<sup>2</sup> This Court held that the DNR did not have the exclusive authority to craft the appropriate remedy for the MERA violation in this case. Rather, “the District Court has jurisdiction over the DNR and may set the crest elevation for the dam at the outlet of Little Lake.” Appellant’s Appendix, p. 152. The Court then remanded to the District Court for further proceedings as necessary to determine the appropriate crest elevation of that weir.

Following that decision, the District Court held a hearing on November 30, 2009 to discuss whether additional evidence was necessary to determine the appropriate crest elevation of the weir. Counsel for all parties submitted briefs on that issue, and all agreed that the District Court did not need to receive additional evidence. The court received briefs and heard oral arguments on February 12, 2010 that addressed the appropriate crest elevation. The District Court’s Order directed Nicollet County to construct a weir with a crest elevation of 973.8 feet above sea level within one year of the issuance of the order. The Court’s Order incorporated a 21 page memorandum explaining the Court’s reasons for its directive to the County.

On remand, the District Court shall execute the appellate court’s instructions without altering, amending, or modifying the court’s directions. Halverson v. Vill. of Deerwood, 322 N.W.2d 761, 766 (Minn. 1982). The District Court’s compliance with the remand instructions is to be reviewed under an abuse of discretion standard. Janssen v. Best & Flanagan, LLP, 704 N.W.2d 759, 763 (Minn. 2005).

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<sup>2</sup> For purposes of this appeal, the liability of the DNR for violating MERA does not matter.

Here, the District Court fully complied with the remand instructions. This Court instructed the District Court to determine the crest elevation of the weir at the outlet of Little Lake. The District Court did exactly that, ordering the County to construct a weir with a crest elevation of 973.8 feet. The Court provided both the factual and legal support for its decisions in a 21 page memorandum.

Appellant asserts that this Court's statement that the District Court had the authority to set the elevation in order to raise the levels to protect them as natural resources was a specific direction to the District Court to reach the "inescapable conclusion" that the lakes should be maintained by a weir with a crest elevation of 976 feet. However, ordering the construction of a weir with a crest elevation of 976 was not the direction by this Court. Rather, this Court remanded to the District Court to make its own finding of the appropriate crest elevation of the weir. In this Court's prior opinion, it specifically declined to address the advisability of the lakes having three feet of depth. It left the question of the crest elevation to the District Court so that court could make the proper determination in accordance with MERA and applicable precedents. This is exactly what the District Court did in its April 1, 2010 Order. If this Court was directing the construction of a weir with a crest elevation of 976 feet, it could have done that itself without remanding to the lower court. Simply because Appellant disagrees with the decision made on remand does not mean that the District Court failed to follow this Court's mandate.

**II. THIS IS A MERA CASE CONCERNING THE FAILURE OF THE WEIR AT THE OUTLET OF LITTLE LAKE**

**A. The District Court's remedy addressed the MERA violation in this case**

Appellant asserts that its MERA case is not about the County's failure to repair the weir, but instead concerns the regeneration of Little and Mud Lakes as environmentally functioning resources of Minnesota. However, Appellant has confused its motivations and desires with the findings of the District Court and the allowable legal remedies resulting from those findings.

Appellant's Amended Complaint alleges that the County violated MERA by refusing and neglecting to maintain the levels of Little and Mud Lakes at 976 feet. That issue was tried before Judge Moonan where Appellant introduced evidence that the County's actions violated MERA, while the County argued it did not. Following that trial, Judge Moonan made extensive findings of fact and held that the County violated MERA. Judge Moonan found Appellant made a prima facie showing that the County's inaction and neglect materially and adversely affected Little Lake. A.83. He also found the County was obligated to maintain the weir in CD46A. Id. Because the County failed to construct a new weir, it was appropriate to impose equitable relief and prevent increasing drainage of the lakes. A.83-84.

In his amended judgment, Judge Rodenberg did not disturb these findings and affirmed Judge Moonan's conclusion that the neglect of the outlet structure by the DNR and County violated MERA. A.127.

Appellant asserts that on remand, the District Court mischaracterized the remedy as simply being drainage dam replacement. However, Appellant is ignoring the District Court's findings relating to the MERA violation in this case. Judge Moonan found that Appellant established the elements of a MERA case by proving the County's failure to repair or replace the weir had a material adverse effect on the environment because of unnecessary drainage of Little and Mud Lakes. The MERA violation was not refusing or neglecting to maintain Little Lake and Mud Lake at an elevation of 976 feet. The failure to repair was the MERA violation. The proper remedy is the one that will address that violation. Therefore, the appropriate remedy is replacing the weir to function as when it was originally created, which is what the District Court did on remand.

Appellant argues that its objective in bringing the complaint was not to simply repair a faulty weir that led to the drainage of the lakes, but rather to restore the lakes to a new condition. Notwithstanding that Appellant is seeking to "restore" the lakes to a condition that has never previously existed, it does not matter what Appellant says this case is "about." Appellant claims it "elected its remedy under [MERA]" instead of as a ditch dam repair, so therefore this Court should order the alteration of Little and Mud Lakes. However, Appellant does not have the right to select its preferred "remedy." A cause of action is separate from the remedies resulting from it. Eklund v. Evans, 300 N.W. 617, 618 (Minn. 1941). The scope of the remedy is decided by the fact finder. See Koehner v. Kline, 185 N.W.2d 539, 541 (Minn. 1971) (questions regarding the amount of damage suffered by a tort claimant are factual matters to be resolved by a

jury); Schindele v. Ulrich, 268 N.W.2d 547, 552 (Minn. 1978) (assessment of damages is the peculiar province of the jury). Here, the District Court was acting as the fact finder, and was responsible for determining the remedy to rectify the violation. Appellant was only able to select the statutory scheme by which to seek a remedy, not the remedy itself.

The District Court's factual findings demonstrate that the failure to repair the existing weir is the only wrongful act by the County to be remedied. The District Court did not find the County violated MERA in any way other than its failure to fix or repair the weir. It is clear the Appellant believes the County committed other improper acts. However, the District Court did not make such findings. Appellants may contend that failure to maintain three feet of depth in Little and Mud Lakes violated MERA, but the District Court, as fact finder, did not make this finding.

**B. Establishing a violation and determining the remedy are separate matters**

Appellant also confuses a finding of a violation with the imposition of the proper remedy. Appellant argues that because it submitted un rebutted evidence of a MERA violation, it is entitled to its desired remedy- the creation of a previously nonexistent environment at Little and Mud Lakes consisting of hemi-marsh conditions. Contrary to Appellant's assertions, it is not automatically entitled to the remedy it sought because the District Court ruled in its favor concerning the violation. If Appellant were entitled to its preferred remedy as a matter of law, this Court would not have needed to remand this

matter back to District Court to make findings about the proper crest elevation. Clearly that did not happen here.

Appellant relies on two cases for its assertion- Freeborn County by Tuveson v. Bryson, 210 N.W.2d 290 (1973) (Bryson I) and Freeborn County by Tuveson v. Bryson, 243 N.W.2d 316 (1976) (Bryson II). However, these cases do not stand for this proposition. Rather, they simply describe the procedure to be used when a defendant moves for dismissal after a MERA plaintiff presents its case in chief. These cases are inapposite to the present matter. The only matter left to be determined is the proper remedy for the County's violation, a topic to which the Bryson decisions have no bearing.

Appellant argues that its proposed elevation is the proper remedy because it was the only party that provided evidence of the impact of weir crest elevations while the other parties focused on other issues. As the plaintiff, Appellants had the burden of production in this case. None of the other three parties had to establish anything. The decision of the other parties to decline to put forth witnesses to testify about the impact of different crest elevations for the weir does not mean Appellant is entitled to its desired remedy. The method by which evidence is put before a fact finder does not affect the remedy relating to it.

Appellant also argues that the other parties did not submit any affirmative defenses to the MERA violation in their latest briefs to the District Court concerning the crest elevation of the weir. The County, DNR, and Intervenors did not assert any affirmative defenses because affirmative defenses only concerns liability. Such an

argument would have been pointless because the MERA violation was already established. The fact of the violation was not an issue. It was not even appealed by the County. It would have no bearing on the remedy for that violation, and the remedy was the only matter before the District Court, and the only matter before this Court. That no party addressed an issue that was already decided does not provide any support for Appellant's proposed remedy.

Appellant argued that the District Court "mischaracterized" the remedy in this case, but based on the findings, Appellant has mischaracterized its right to its preferred remedy.

### **III. APPELLANT IS NOT ENTITLED TO A CREST ELEVATION OF 976 FEET AS A MATTER OF LAW**

#### **A. Appellant's proposed remedy does not rectify the violation in this case**

##### **1. Appellant's proposed remedy violates fundamental remedies principles**

The Minnesota Supreme Court has held that it is an "elementary principle" that an individual plaintiff seeking monetary damages should only be awarded the amount that would leave him in the same financial condition as if no injury had occurred. Vanderlinde v. Wehle, 114 N.W.2d 547, 550 (Minn. 1966). It is a basic tenant of contract law that the remedy for a breach of contract is to place the wronged party in the same situation as if the contract had been performed. Clark v. Quinn, 281 N.W. 815, 817-18 (Minn. 1938); Johnson v. Garages, Etc., Inc., 367 N.W.2d 85, 86 (Minn. App. 1985). The Court has held that in any sort of action, as a matter of right and justice, a wronged party is only entitled to that amount which will compensate the party for

damages caused that are the natural and proximate result of the wrong. Johnson v. Gustafson, 277 N.W. 252, 255 (Minn. 1938). This rule holds regardless of whether or not the wrong arises from a contractual agreement. Id. These cases lay out the fundamental principle that the only allowable remedies in a civil action are those that remedy a defendant's actions by placing the plaintiff in the same position as before those actions occurred.

Appellant is not a typical plaintiff in that it was not suing for injury to itself caused by the County's misconduct, but basic remedies principles still apply. Appellant has standing to bring this action only because of a statutory grant by the legislature. See Minn. Stat. § 116B.03, subd. 1. This grant of authority allows an individual or organization to bring an action in the name of the State of Minnesota for the protection of natural resources within the state. Id. However, nothing in MERA indicates a change to the fundamental notion that a prevailing party is only entitled to a remedy addressing the damages that are the natural and proximate cause of the established violation. As explained below, caselaw holds that relief under MERA is limited to that which remedies the MERA violation.

Generally speaking, a court exercising its equitable jurisdiction has the power to render a decision that accomplishes justice. Clark v. Clark, 288 N.W.2d 1, 11 (1979). However, an equitable decision must still abide by the fundamental limitation on remedies of compensating a person for the wrong committed against him. A plaintiff may not use a court's equitable jurisdiction for the enrichment of himself because of another's mistake. Schoenfeld v. Buker, 114 N.W.2d 560, 566-67 (Minn. 1962); Pratt

Inv. Co. v. Kennedy, 636 N.W.2d 844, 851 (Minn. 2001). Rather, as with general limitations on damages, equity seeks to restore a plaintiff to his previous position as existed before a defendant's wrongful conduct. R.E.R. v. J.G., 552 N.W.2d 27, 30 (Minn. App. 1996).

## **2. Relief under MERA is limited**

The plain language of MERA limits relief to that "necessary or appropriate to protect" the environment. 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 Court's subject matter jurisdiction as to remedies under MERA is limited accordingly.

The Minnesota Supreme Court has acknowledged that a trial court's decision under MERA is to be made based on the unique facts of the situation presently before it. The Court has held a trial court's decision is to balance competing interests in a matter analogous to that of a court of equity. MPIRG v. White Bear Rod and Gun Club, 257 N.W.2d 762, 782 (Minn. 1977). See also State by Powderly v. Erickson, 301 N.W.2d 324, 326 (Minn. 1981) (holding courts should exercise equitable jurisdiction in granting appropriate remedies in a MERA action). However, even when acting in an equitable manner, a court's judgment may not go beyond the fundamental remedies principles listed above. Like all remedies, MERA does not authorize relief in excess of that which

is necessary or appropriate to remedy the harm. Nor does MERA's language authorize relief that exceeds protection of the environment.

It is well established that where a statute gives a right and creates a remedy unknown to the common law, and at the same time points to a specific remedy, the remedy provided by the statute is exclusive. See e.g., Davis v. Great N. Ry. Co., 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); Valtakis v. Putnam, 504 N.W.2d 264 (Minn. App. 1993). Also, though protective statutes such as MERA are to be interpreted broadly, the remedy is designed only to redress those wrongs identified by the Legislature. As stated by the Minnesota Supreme Court in 1943:

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 (Minn. 1943). Furthermore, MERA was created to provide civil remedies for the protection of the environment. McGuire v. County of Scott, 525 N.W.2d 583, 586 (Minn. App. 1995). It provides a mechanism for repairing the environment after harmful conduct, and is not to be used to proactively make changes that are not related to a violation.

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, remedies available 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 established MERA violation, 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 remedy the violation).

The District Court found the County violated MERA by its neglect and failure to repair the weir. The pollution or impairment arising from this violation was the draining of Little and Mud Lakes. Therefore, the proper remedy is to repair the weir and restore Little and Mud Lakes to their status prior to the violation. Any further remedy would not be supported by the evidence. It would exceed the harm caused by the County's MERA violation. Because the environmental harm here is drainage, the remedy is to cause the lakes to no longer be drained. This is done by repairing or replacing the weir, thereby restoring the lakes to their levels prior to the weir's deterioration. In other words, the crest elevation of the weir should be set at the height that will restore the lakes to the same depth as if the weir never leaked or fell into disrepair. Therefore, the

proper crest elevation is the one that will restore the lakes to their levels as when the weir was initially installed and fully functional.

The quote from the District Court in 1908 gives a description of the lakes as they existed at that time of CD46A's creation. As the District Court noted, Little Lake was practically overgrown with vegetation during the dry season, and normally shallow, grassy, and of a marshy character. It covered approximately 406 acres before the partial drainage that was allowed. Mud Lake was smaller but had similar characteristics. The County's improvements to the ditch in 1950 did not change the conditions of Little Lake and Mud Lake. This was accomplished by placing the weir at the outlet of Little Lake so that the lake would not be further drained by the increase in size of the ditch. The weir kept Little Lake and Mud Lake in the same condition despite the increased size of the ditch- grassy and marsh-like. This type of environment should be the standard for determining the extent of the restoration by setting the crest elevation of the new weir. As the testimony showed, an elevation of 973.8 will be most likely to have Little Lake and Mud Lake returned to their previous levels and environment (T. 1281) and, therefore, it is the proper crest elevation for the new weir.

Appellant argued that the proper remedy is to order a crest elevation for the weir that would create hemi-marsh conditions. It argued that the proper elevation to do this is 976.0 feet. Appellant extensively summarized testimony about how a crest elevation of 976.0 would maintain open water conditions and create a habitat with high quality waterfowl production amenities. T. 1220. Such an elevation would cause Little Lake to be approximately 587 acres in size. T. 1024.

However, Appellant has shown no legal basis for its remedy. In fact, Appellant's argument for the creation of this environment for Little and Mud Lakes is in direct contradiction to the holdings of Werlein and Kennedy Building Associates. Such a remedy is not directly attributable to the MERA violation, nor would it be tailored to remedy that violation. It would create a new environment that has never existed. There is no evidence that but for the County's violation, Little and Mud Lakes would be in a hemi-marsh state. There is no evidence that Little Lake would be 587 acres if not for the failure of the weir. Rather, the evidence shows these lakes have always only produced a moderate waterfowl habitat. The evidence shows that Little Lake was shallow and marshy and covered only approximately 406 acres before it was allowed to be partially drained by CD46A in 1908. All of the testimony about how a crest elevation of 976 feet would create a 587 acre lake with hemi-marsh conditions ideal for waterfowl production demonstrates why that elevation is inappropriate, as it is not a remedy for the County's MERA violation. It is the creation of a new environment that has never existed, which is not an allowable remedy under MERA.

Appellants argue that the "paramount" interest in protection of natural resources requires this result. The Minnesota Supreme Court has held that the word "paramount" means "superior to all others." Floodwood-Fine Lakes, Etc., v. Minnesota Environmental Quality Council, 287 N.W.2d 390, 399 (Minn. 1979). However, "superior to all others" does not automatically require a court to rule in favor of the protection of natural resources; a court must still balance the effect on the environment

with the past or proposed action. Krmpotich v. City of Duluth, 483 N.W.2d 55, 57 (Minn. 1992).

Appellant is attempting to use MERA to force the County to make large scale changes to Little and Mud Lakes. These changes are not a remedy to the violation in this case. They are instead the creation of something that has never existed. Appellant is also using a MERA violation to destroy a lawfully established drainage system. Neither result is allowed by law.

**B. MERA should not be expanded to allow it to be used to eliminate lawfully established ditches**

**1. MERA cannot be used as an end-run around the statutory process for ditch abandonment**

Appellant's brief contains many statements about restoring these lakes to their natural state and protecting them as natural resources. It also provides the Latin quote "Aqua currit, et debet currere ut currere solabat," translated to "water runs and ought to run as it is wont to run." BLACK'S LAW DICTIONARY 1706 (8th Ed. 2004). Appellant even admits that its remedy will reflood the lake basins and impair the functioning of the ditches. These statements indicate Appellant would like CD46A to be either partially or fully abandoned. Ordering abandonment of CD46A is an improper remedy for the County's MERA violation, and this Court should not order it.

There is a complex matrix of laws pertaining to drainage ditches that are part of a complete statutory scheme designed to govern the establishment of a drainage system and any of the future repairs, improvements, abandonment, and impoundment of waters within that established system, as well as challenges to that system. See Zaluckyj v.

Rice Creek Watershed District, 639 N.W.2d 70 (Minn. App. 2002); Minn. Stat. §§ 103E.005-103E.812. This Court has already held that courts have subject matter jurisdiction over drainage matters. Swan Lake I. However, this jurisdiction does not mean that a court should ignore the drainage code when considering MERA actions involving ditches. To the contrary, a court should recognize the drainage code when fashioning a remedy that will affect the functioning of a ditch.

Appellant is seeking to use the District Court's finding of a MERA violation to bypass the statutory framework for the abandonment of a ditch. Although MERA provides courts with broad latitude to impose equitable remedies, it should not be used to supersede statutory provisions enacted for specific situations. Minn. Stat. §§ 103E.805 and 103E.811 address abandonment of drainage systems. These statutes list the process prior to an abandonment occurring, including hearings concerning the effect of the abandonment on surrounding landowners and the benefits provided by the ditch. These statutes recognize the various functions a ditch provides and how abandonment of that ditch will have far-reaching effects.

This Court should not expand the scope of MERA and allow Appellant to bypass this statutory scheme to abandon CD46A simply because it established a MERA violation. Conflicting laws should be interpreted so as to give effect to both provisions when possible. Minn. Stat. § 645.26; Beaulieu v. Independent School District 624, 533 N.W.2d 393, 396 (Minn. 1995). Similarly, this Court should not create a conflict between laws where one does not exist. Expanding MERA in such a manner would create an unnecessary conflict between it and the procedure for abandoning a ditch as

provided for in the drainage code. Furthermore, if a conflict between laws does exist, a special statutory provision is to prevail when it conflicts with a general provision. Minn. Stat. § 645.26. MERA is a general statute concerned with protection of the environment, whereas Sections 103E.805 and 103E.811 are specific statutes concerning the abandonment of a drainage system. The Court should not create the ability to abandon ditches through MERA when there is already a statutory scheme addressing exactly that.

**2. MERA cannot be used to divest property owners of their interest in the maintenance of an established ditch**

The Minnesota Supreme Court has held that landowners acquire a property right in having a ditch maintained to its original construction. The Court has stated

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 benefited 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.

Petition of Jacobson, 48 N.W.2d 441, 444 (Minn. 1951); McLeod County Board of Commissioners v. Department of Natural Resources, 549 N.W.2d 630, 633 (Minn. App. 1996) (citing the same). Additionally, alterations that materially affect the benefits of a ditch divest landowners of their property rights. Fischer v. Town of Albin, 104 N.W.2d 32, 35 (Minn. 1960). For this reason, landowners are entitled to have all of the conditions of the ditch maintained so that it will function substantially as established. Id.

Here, Appellant admits its proposed remedy would impair the functioning of CD46A. It says such a consequence is “inescapable.” Appellant is essentially arguing

that the landowners' property right in having the ditch function as established is subservient to its MERA claim. Appellant cites no legal authority for this assertion. Appellant simply inflates its desire for a new environment to be superior to that of the landowners' rights in contravention to the Jacobson, McLeod County, and Fischer cases.

**3. Appellant's Arguments for Lakes at 976 Feet Require the Impermissible Retroactive Application of MERA**

Appellant argues that Little and Mud Lake should be restored to its "natural condition," or its condition prior to the establishment of CD46A in 1908. MERA was adopted in 1971 and cannot be applied retroactively. Any order based on retroactive application of MERA, such as restoring Little and Mud Lakes to the 1908 condition, 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, 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 cannot apply MERA retroactively to actions taken before MERA’s inception. Those actions that fall outside MERA include 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 1950s.

Furthermore, a MERA action cannot be maintained when the DNR has approved the conduct at issue. Minn. Stat. § 116B.03, subd. 1. The evidence shows that the Department of Conservation approved the installation of the weir at 973.2 feet. T. 1278; Exh. NC5.1-NC5.12. Its approval of the installation of the weir at this elevation was an approval of the impact it would have on the surrounding area. This includes lowering the water levels and general conditions of Little and Mud Lakes that result from the creation of the weir. The County took action pursuant to the DNR’s approval and installed the weir at 973.2 feet. Id.; Exh. RL94. The County’s actions were lawful. Therefore, under Minn. Stat. § 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 Appellant’s MERA action. The remedy Appellant is seeking is beyond the jurisdiction of MERA.

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 did not set the crest elevation at 976 feet because it knew that doing so would retroactively apply MERA. Therefore, a crest elevation of 976 feet would be inappropriate.

**4. Appellant is using MERA as a collateral attack on the creation of CD46A**

Granting Appellant's remedy would also be an unlawful collateral attack on the creation of CD46A. As explained above, Appellant is seeking extensive changes to the functionality of CD46A. This ditch was established pursuant to statute over 100 years ago. At the time of its construction, an individual sued seeking an injunction preventing that construction, but the Nicollet County District Court affirmed its creation through a court order. Under drainage law, an order establishing a public ditch has the binding force of a judgment in rem, which is final for all purposes. Slosser v. Great Northern Ry. Co., 16 N.W.2d 47 (Minn. 1944). A collateral attack on the establishment of ditches is inappropriate and without authority. This is simply not allowed under the law. See e.g., Garret v. Skorstad, 173 N.W. 406 (Minn. 1919); Bill's Borrow v. Pierce, 112 N.W.2d 274 (Minn. 1907); Aastad v. Board of County Commissioners of Chippewa County, 110 N.W.2d 19 (1961); Adelman v. Onischuk, 135 N.W.2d 670 (Minn. 1965); Larson v. Freeborn County, 126 N.W.2d 771 (Minn. 1964); Anderson v. Stearns County, 519 N.W.2d 212 (Minn. App. 1994).

This Court should not allow MERA to be used to render a collateral attack on the District Court Order establishing CD46A. Whether or not CD46A should be constructed has already been argued to a court once before, and that court upheld its construction. Now, Appellant is seeking to overturn that court order through a MERA action. Appellant cites no authority that would allow it to do so. This Court should decline to expand MERA in this way and instead limit its order to remedying the harm caused by the County's violation.

In summary, Appellant is seeking a drastic expansion of the scope of MERA. Appellant is seeking to use a MERA violation to destroy the functioning of a lawfully established drainage system and change the surrounding land to its "pre-settlement" conditions. Expanding MERA in such a way would have far-reaching effects. Such a ruling would mean that anytime there is a MERA violation arising from a drainage system, a remedy for that violation would be the destruction of that system. The potential impact of filling in all of these drainage systems is enormous. This Court should not expand MERA in this way.

#### **IV. THE DISTRICT COURT'S CREST ELEVATION WAS NOT ARBITRARY AND CAPRICIOUS**

Appellant argues that Judge Rodenberg's April 1, 2010 memorandum lacked sufficient findings to justify its order of the creation of a weir with a crest elevation of 973.8 feet. Appellant notes that the Court made no mention of MERA or the Bryson factors, or references to the 1035 pages of testimony. However, the April 1, 2010 Order was very limited in scope. The only issue was to determine the proper crest elevation of

the weir. The District Court had no reason to address either MERA or the Bryson factors because those factors had already been decided. Judge Moonan already considered those issues and made factual findings in his original Order following trial that found the County violated MERA by its failure to repair or replace the weir.

As for setting the elevation, the District Court's order provides ample support for its decision. The District Court acknowledged that a three foot lake level would provide for optimum waterfowl habitat. The District Court acknowledged that a crest elevation of 973.8 feet is going to impair the functioning of CD46A. It held that an elevation of 976 feet would result in harm to the Intervenors and others in the surrounding area because the land in the area is extremely flat, and any water added to the area by impeding CD46A will spread out a considerable distance. As the Court said, the water would cover an extremely large area. Finally, the District Court noted that a crest elevation of 976 feet would only be appropriate if it were to restore the area to its original conditions that existed prior to the creation of CD46A.

Furthermore, there was ample evidence in the record about the impact of a crest elevation of 976 feet. There was testimony about how raising the lake level to 976 feet would cause water to go onto private property. T. 463. That level would have a significant adverse impact on tillable cropland. T. 778. Also at that elevation, the surface area of Little Lake would be 587 acres, even though Little Lake was only 406 acres in 1908. T. 1005; 771. Even at a crest elevation of 974.8 feet, water would have to be diverted from farmlands. T. 785. The District Court knew of all these impacts of

setting the crest elevation at 976 feet, which is why it determined that 973.8 feet was the appropriate crest elevation.

The District Court's decision to order the construction of a weir with a crest elevation of 973.8 feet was a compromise that remedied the County's MERA violation and struck an appropriate balance between these competing interests. The District Court noted that an elevation of 973.8 feet will impair the functioning of CD46A, but at an acceptable level to the Intervenors. It was not an arbitrary and capricious decision.

### CONCLUSION

In Swan Lake II, this Court remanded to the District Court to order the crest elevation of a weir to be constructed at the outlet of Little Lake. The Court did exactly that by ordering a weir be constructed with a crest elevation of 973.8 feet. Appellant desires the crest elevation of that weir to be 976 feet but it has shown no legal basis for such an elevation. This Court did not order that elevation. Such an elevation is an improper remedy for the MERA violation in this case. That elevation would have a negative impact on surrounding land, landowners, and the general public. That ruling would broaden the scope of MERA to allow an individual to use MERA to require the filling in of any existing legally established drainage system in the state. For these reasons, this Court should affirm the District Court's order to the County to construct a weir with a crest elevation of 973.8 feet.

Respectfully submitted,

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Dated: October 25, 2010

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STATE OF MINNESOTA  
IN COURT OF APPEALS

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

Appellant,

vs.

Nicollet County Board of County Commissioners,

Respondent,

vs.

Marlin Fitzner, et al., Intervenors,

Respondents,

vs.

Minnesota Department of Natural Resources,

Respondent.

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**CERTIFICATE OF  
BRIEF LENGTH**

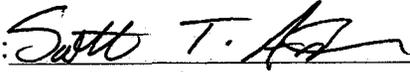
**APPELLATE COURT  
CASE NO. A10-1025**

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 952 lines, 9284 words. This Brief was prepared using Microsoft Word.

Respectfully submitted,

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Dated: October 25, 2010.

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