

NO. A05-1001

State of Minnesota
In Court of Appeals

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

Respondent,

vs.

Nicollet County Board of County Commissioners,

Appellant,

vs.

Marlin Fitzner, et al., Intervenor,

Respondents.

APPELLANT'S BRIEF AND ADDENDUM

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STATEMENT OF LEGAL ISSUES

I. Whether the Nicollet County District Court has subject matter jurisdiction to decide county drainage issues, when the Drainage Code provides that the Drainage Authority is to make those decisions.

The Nicollet County District Court held that it did have subject matter jurisdiction over county ditch drainage issues when it denied the Appellant's motion to dismiss and granted the Respondent petitioner's motion to amend the complaint.

Apposite caselaw and statutes:

Cochrane v. Tudor Oaks Condominium Project, 529 N.W.2d 429 (Minn. App. 1995).

Dokmo v Independent School Dist. No. 11, 459 N.W.2d 671 (Minn. 1990).

Slosser v. Great Northern Ry. Co., 16 N.W.2d 47 (Minn. 1944).

Zaluckyj v. Rice Creek Watershed District, 639 N.W.2d 70 (Minn. App. 2002).

Minn. Stat. § 103E.095.

Minn. Stat. § 103E.101.

Minn. Stat. § 103E.202.

Minn. Stat. § 103E.215.

Minn. Stat. § 103E.221.

Minn. Stat. § 103E.331.

Minn. Stat. § 103E.701-715.

Minn. Stat. § 103G.255.

Minn. Stat. § 103G.401.

II. Whether the Nicollet County District Court had subject matter jurisdiction to amend the complaint when the court lacked subject matter jurisdiction over the issues in the original complaint and those sought to be included in the amended complaint.

The Nicollet County District Court held that it did have subject matter jurisdiction to amend the complaint by adding additional counts and joining the DNR as a party, when it granted the Respondent petitioner's motion to amend the complaint.

Apposite caselaw:

Jinadu v. Centrust Mortgage Corp., 517 N.W.2d 84 (Minn. App. 1994).

Cochrane v. Tudor Oaks Condominium Project, 529 N.W.2d 429 (Minn. App. 1995).

STATEMENT OF THE CASE

Within Nicollet County Ditch 46A there is a water control structure near the outlet of Little Lake in Nicollet County, Minnesota. A.764, A.765, A.52-55. The water control structure was constructed in the early 1950's, and is now in a state of disrepair. Id.; 89-93. That disrepair and its effect on Little Lake led to discussions between the Appellant Nicollet County Board of Commissioners ("Nicollet County"), the Respondent petitioner Swan Lake Area Wildlife Association ("Wildlife Association"), the Department of Natural Resources ("DNR"), and several landowners ("Landowners") with property abutting the ditch, regarding the elevation of a new water control structure. A.106-A.109, A.110, A.130-A.133. The Wildlife Association argued for replacement of the water control structure at 973.8 feet, while Nicollet County asserted that the original elevation of 973.2 feet was all that could be authorized. Id. Before any resolution of this issue was reached, the Wildlife Association filed suit against Nicollet County. A.1-A.19. Rather than an action under the Drainage Code, the Wildlife Association alleged two counts of violation of the Minnesota Environmental Rights Act ("MERA") and one count of nuisance. Id. Landowners along the ditch in question intervened. A.25.

On June 29, 2004 Nicollet County moved for summary judgment. A.26-A.48. On August 26, 2004, the Honorable Judge John R. Moonan granted the motion as to one of the MERA counts; that count was based on a 1972 DNR permit. A.187-A.196. The remainder of the motion was denied. Id. Shortly before trial, the Wildlife Association filed a motion to amend its complaint, adding one count of mandamus and one count of

declaratory judgment, attempting to resurrect the MERA count based on the 1972 DNR permit, and joining the DNR as a party. A.197-A.212. The Wildlife Association also proposed to amend its requests for relief to reflect a water control structure which would guarantee lake levels at no less than 976 feet, rather than 973.8 feet, and alleging that Nicollet County was obligated to maintain Little Lake at its ordinary high water level (purported to be 976 feet). Id.

Nicollet County filed a motion to dismiss the Wildlife Association's complaint and to deny amendment of the action based on the argument that the Nicollet County District Court had no subject matter jurisdiction to hear the case, to amend the complaint or join a party. A.495-A.521; A.548-A.586. Subsequently, the District Court issued two orders. A.799-A.805. One order denied Nicollet County's motion to dismiss, and the other order granted the Wildlife Association's motion to amend its complaint and to join the DNR as a party. Id. Nicollet County appealed both orders, under the authority of Minn. R. Civ. App. P. 103.03(j) and McGowan v. Our Savior's Lutheran Church, 527 N.W.2d 830 (Minn.1995). Notice of Appeal.

STATEMENT OF FACTS

Nicollet County Ditch 46A ("CD46A") begins in the northeast corner of Mud Lake and runs northerly and easterly through the southeastern portion of Little Lake in Nicollet County, Minnesota. A.49. Established in 1907¹, the drainage system partially drained the wet marsh known as Little Lake. A.606-A.608. The decision establishing the

¹ At the time it was established, CD46A was known as CD46.

ditch system was not challenged or appealed at the time. The system existed, as originally constructed, through 1950, when Nicollet County conducted drainage improvement proceedings. A.609-A.679.

The Department of Conservation and local wildlife groups actively participated in the 1950 improvement proceedings. A.610, A.615, A.619, A.668. At a preliminary hearing, a representative of the Commissioner of Conservation and the ditch engineer agreed to meet to discuss the impact of the proposal on Little Lake to make sure that it would not compromise Little Lake. A.610. The drainage engineer submitted a report stating that the proposed improvement would fix the level of the lake exactly as determined in the original 1907 drainage proceedings. A.619. He explained that the essence of the improvement was to “substantially deepen the ditch” downstream of the lakes in the altered natural watercourse below. Id. A dam would be constructed so as to hold the marsh at the level fixed in the original 1907 proceeding. Id. As required by the Drainage Code, the County filed the engineer’s report with the Director of the Division of Water Resources, and the Director filed a report with the County and the County convened public hearings. A.676-A.679. Douglas Barr, a representative from the Department of Conservation, attended the hearing and read the Department’s comments into the record. A.668. Representatives of the St. Peter’s Sportsman’s Club participated in the drainage proceedings as well. They asserted that “a dam be built in the Ditch east of Little Lake [at Station 90] as recommended by the Engineer in his report.” A.610.

In his preliminary comments, the Commissioner of Conservation did not oppose the project. "The Commissioner of Conservation has not been requested to approve the further lowering or draining of Little Lake, a meandered body of water...for which reason it is assumed that the original grade of the present main ditch above station 90 will not be lowered by the pending repair proceeding." A.529. After examining the final report, the Commissioner approved the project, stating that "[t]he engineer's final report has been examined according to Laws 1947, Chapter 143, Section 13, and on the basis of the information included in the engineer's report, it is hereby approved." A.530.

Pursuant to Nicollet County's final drainage order, the improvement was constructed, and the dam was placed at station 90 with a crest elevation of 973.2 feet, A.669-A.672; A.674. The fishing and hunting interests who participated in the drainage hearing did not appeal from the drainage order. There was never any challenge to the implementation of that order. The Department of Conservation also accepted the decision and allowed it to be implemented without challenge. In both of the 1907 and 1950 drainage proceedings, landowners were assessed benefits for drainage provided by the original and improved system. A.601-A.608; A.675.

On October 18, 1971, in response to a petition by landowners, Nicollet County again ordered an improvement of CD46A. A.697-A.699. The improvement involved enlarging the ditch, and again the Department of Conservation was involved in the process.² A.680-A.683, A.687-A.699. In correspondence dated September 21, 1971,

² Minutes from the June 14, 1971 Preliminary Hearing show that Assistant

Department of Conservation Waters Director Gere stated he received the County's Engineer's final report, and recommended that the County add 6 inches (in height) to the plans for the water control structure. A.714-A.716. The planned improvement included replacement of the dam with a change in spillway length from 9 feet to 25 feet, but it did not include an increase in overall height of the structure. A.697-A.699. On November 10, 1971, Nicollet County submitted a request for permit for work in the beds of public waters in order "to change the length and construction of the sheet pile dam in Nicollet County Ditch #46." A.701-A.704.

On March 15, 1972, the Commissioner of Natural Resources issued its Findings of Fact, Conclusions, Order and Permit in response to Nicollet County's request for a permit. A.66-A.69. The Commissioner granted the permit to construct a new and longer water control structure, but included a revision of the elevation from the original 973.2 feet to 973.8 feet. Id. The ditch improvement was completed in December 1972. A.705-A.712. However, the Ditch Authority decided not to construct a new water control structure. Id.; A.134. Subsequently, the viewers submitted an amended report suggesting a reduction of benefits for those landowners upstream from the dam, because the new dam had not been constructed. Id. On June 11, 1973, the County ordered the reduction in benefits. Id.

The sheet pile dam has been failing and the water levels in Little Lake have been an issue since at least 1966. A.89-A.93. From the mid 1990's to the onset of the lawsuit,

Attorney General Bill Peterson was present at the Hearing. Mr. Peterson is one of the Wildlife Association's attorneys in this lawsuit. A.690-A.696.

Nicollet County engaged in discussions with the DNR, the Landowners, and the Wildlife Association to resolve the issue of construction of the water control structure and the disputed elevation of such a structure. A.94-A.109. From March 2002 through June 2002, the Wildlife Association offered to pay for the construction of a water control structure if Nicollet County and the DNR agreed to certain conditions, including an elevation of 973.8 feet. A.106-A.107; A.109. As recently as April 2003, the Wildlife Association maintained its position that the water control structure be constructed at an elevation of 973.8, rather than 973.2 feet. A.110.

Faced with the issue of determining the correct elevation, Nicollet County Attorney Michael Riley prepared a declaratory judgment action. A.593-A.595. He identified over 100³ individuals and entities he believed could be affected by a change in the dam and water levels from 973.2 to 973.8 feet. After numerous revisions, feedback and authorizations from county personnel, Mr. Riley was prepared to file the action. Id. However, on August 8, 2002, Mr. Riley received a phone call from Assistant Attorney General Joan Eichhorst asking that Mr. Riley not file the action and to hold off on litigation in the hope of resolving the issue.

A meeting among the County Attorney, the Landowners' attorney, the Wildlife Association's attorney and Assistant Attorney General Eichhorst occurred in October 2002. Id. The issue of the elevation of the dam was not resolved. However, the parties agreed to provide engineering reports and other information in the hope to come to an

³ The Intervenor Landowners in the lawsuit comprise only 22 persons/entities.

understanding. Id. Again faced with the prospect of having to resort to litigation, on January 23, 2003, Mr. Riley wrote to Ms. Eichhorst and the other attorneys asking whether he should file the declaratory judgment action or if another meeting would be helpful. Id. Ms. Eichhorst and the Landowners' attorney responded that they would participate in another meeting, but the Wildlife Association's attorney did not respond. Id. It took another letter to the attorney before the meeting took place on April 7, 2003. Id. As a result of that meeting, Mr. Riley agreed to get quotes for a water control structure at 973.2 feet, which could be permanently retrofitted up to 973.8 feet, and designed to safeguard against tampering with the structure. Id.; A.110. The Wildlife Association's attorney was to inform the participants of his clients' opinion on the proposed elevation and retrofitting. Id. He did not do so. Id.

Instead, on June 4, 2003 the Wildlife Association served a Complaint upon Nicollet County alleging two counts of violation of MERA and one count of nuisance. A.1-A.19. Subsequently, the Landowners intervened. A.25. In its original prayer for relief, the Wildlife Association requested an order directing the "Nicollet County Board of County Commissioners to otherwise comply with the Order of the Commissioner of Natural Resources of March 15, 1972," constructing a new water control structure at 973.8 feet. A.9. The Wildlife Association served the Minnesota Attorney General with a copy of its complaint, pursuant to the requirements of MERA. A.192. The Attorney General did not respond. Id.

On June 29, 2004 Nicollet County filed a motion for summary judgment, arguing that the 1972 DNR permit was not an order within the meaning of MERA, that Minnesota Statutes Chapter 103E was the exclusive remedy under the facts of this case, and raising argument as to the statute of limitations, laches, and failure to exhaust administrative remedies. A.26-A.48. The Honorable Judge John R. Moonan granted the motion, in part, as to the MERA count which was based on the 1972 DNR permit. A.187-A.196. Judge Moonan found that the 1972 Order and Permit was substantively a provisional or conditional order and was no longer enforceable. A.194-A.195. In addition, Judge Moonan found that the long delay between the issuance of the Permit and the onset of the lawsuit made it inequitable to enforce the Permit 32 years later. Id. Finally, Judge Moonan held that laches also applied. Id.

Shortly before trial the Wildlife Association filed a motion to amend its complaint, adding one count of mandamus and one count of declaratory judgment, resurrecting the MERA count based on the 1972 DNR permit, and joining the DNR as a party. A.197-A.212; A.248-A.257. The Wildlife Association also proposed to amend its requests for relief to reflect a water control structure which would guarantee Little Lake water levels at no less than 976 feet, rather than 973.8 feet, and alleging that Nicollet County had a legal duty to maintain Little Lake at 976 feet. A.248-A.257. The new complaint asserted that the original drainage order from 1907 resulted in the illegal drainage of a meandered lake. Id. It alleged that the natural ordinary high water level (that is the original ordinary high, before man-made changes) was 976 feet. Id. It claimed that the control structure

should now raise the lake to the level it would have been had the drainage system never been installed. Id.

Nicollet County filed a motion to dismiss the Wildlife Association's complaint and to deny the amendments based on the District Court's lack of subject matter jurisdiction. A.495-A.521; A.548-A.586. Subsequently, on April 11, 2005 the District Court issued one order denying Nicollet County's motion to dismiss, and one order granting the Wildlife Association's motion to amend its complaint and to join the DNR as a party. A.799-A.805. Nicollet County appealed both orders, under the authority of Minn. R. Civ. App. P. 103.03(j) and McGowan v. Our Savior's Lutheran Church, 527 N.W.2d 830 (Minn.1995). A.833-849.

The Wildlife Association has never petitioned Nicollet County for the improvement, repair, abandonment or impoundment of County Ditch 46A, as it relates to the construction of a new or repaired water control structure. A.89-A.92.

ARGUMENT

I. STANDARD OF REVIEW.

Subject matter jurisdiction is a question of law, which is reviewed de novo.

Odenthal v. Minn. Conference of Seventh Day Adventists, 649 N.W.2d 426 (Minn.2002).

A trial court's grant of an amendment to a complaint is reviewed de novo. Independent

School Dist. No. 534 v. City of Stewartville, 304 N.W.2d 637 (Minn.1981).

II. THE DISTRICT COURT MUST HAVE SUBJECT MATTER JURISDICTION OVER THE SPECIFIC CLAIMS MADE UNDER MERA AND NUISANCE.

Rule 12.08 of the Minnesota Rules of Civil Procedure, subd. (c) states as follows:

Whenever it appears by suggestion of the parties or otherwise that the court lacks jurisdiction of the subject matter, the court shall dismiss the action.

Subject matter jurisdiction goes to the authority of the court to hear a particular class of

actions. Cochrane v. Tudor Oaks Condominium Project, 529 N.W.2d 429, 432

(Minn.App.1995). Hence, lack of subject matter jurisdiction may be raised at any time,

whenever it appears that the court lacks jurisdiction of the subject matter. Id.; Dakota

County v. City of Lakeville, 555 N.W.2d 716 (Minn. App. 1997). Not only may a lack of

subject matter jurisdiction be raised at any time, by any party, but it can also be raised by

the court itself. Stadum v. Norman County, 508 N.W.2d 217, 218 (Minn. App. 1993).

See also Schaeffer v. State, 444 N.W.2d 876, 879 (Minn. App. 1989) (holding that lack of

subject matter jurisdiction can be raised at any time despite the notice provisions for

dispositive motions); Jinadu v. Centrust Mortgage Corp., 517 N.W.2d 84 (Minn. App.

1994) (holding that a party may raise an objection based on lack of subject matter jurisdiction at any stage of a proceeding.) Because subject matter jurisdiction goes to a court's authority to preside over a matter, lack of subject matter jurisdiction may even be raised for the first time on appeal. Cochrane, 529 N.W.2d at 432. Subject matter jurisdiction may not be conferred by consent of the parties. Irwin v. Goodno, 686 N.W.2d 878, 880 (Minn.App.2004).

Subject matter jurisdiction also includes the authority to “hear and determine the particular questions the court assumes to decide.” Cochrane, 529 N.W.2d at 432, citing, Duenow v. Lindeman, 27 N.W.2d 421, 425 (Minn.1907). This means that although the court may have the authority to hear a particular class of actions, the court may not have the authority to “hear and determine particular questions the court assumes to decide” within that particular class of actions, i.e., the particular claims themselves. Id. Therefore, even though the District Court may have subject matter jurisdiction over the particular class of actions, the particular questions inherent in those actions may prevent the court from having subject matter jurisdiction.

Upon finding lack of subject matter jurisdiction, the court must dismiss the action. Id.; Minn.R.Civ.P. 12.08(c). A judgment rendered by a court without subject matter jurisdiction is void. See Jinadu, supra.

In order to hear the Wildlife Association's claims and amend its complaint, the Nicollet County District Court must have subject matter jurisdiction over the claims in

the Wildlife Association's original complaint and the claims in the amended complaint. However, the District Court does not have that subject matter jurisdiction.

III. THE DRAINAGE CODE DIRECTS THAT JURISDICTION OVER DRAINAGE ISSUES IS WITH THE DRAINAGE AUTHORITY.

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. The matrix was adopted with the intent of reclaiming agricultural land by disposing of excess water that renders land untillable, and then fairly allocating the costs and benefits among the benefited landowners. Id. at 75. The Legislature provided this statutory matrix to assure that the intent, integrity and purpose of the drainage statutes was maintained.

That scheme includes requirements for the petition, bonds, appointment of viewers and an engineer, surveys, hearings, assessment of benefits and damages, and construction. Minn. Stat. §§ 103E.212, 103E.241, 103E.245, 103E.315, 103E.505. The Drainage Code requires notification of affected landowners of the hearings and the drainage project's damages and benefits to their property. Minn. Stat. §§ 103E.261, 103E.323, 103E.325. It authorizes participation in the hearings by affected landowners and any other interested persons. "The petitioners and all other interested parties may appear and be heard." Minn. Stat. § 103E.261 (preliminary hearing). "The Drainage

Authority shall hear and consider the testimony presented by all interested parties.”

Minn. Stat. § 103E.335 (final hearing).

The Drainage Code requires the Drainage Authority to consider certain criteria such as water conservation, water quality, flooding, effects on fish and wildlife, the conservation of soil, water, forests, wild animals, and related natural resources, and to other public interests affected in its determination as to whether the project will be of public utility, benefit, or welfare Minn. Stat. § 103E.015. It requires reports from the Commissioner of Natural Resources on effects on public waters and the environment, (Minn. Stat. § 103E.255) and an advisory opinion from the Commissioner as to the project (Minn. Stat. § 103E.301). The Drainage Code directs the director of the DNR’s Division of Waters to give advice regarding engineering questions. Minn. Stat. § 103E.105.

The Drainage Code provides rights of entry (Minn. Stat. § 103E.061), criminal penalties for obstructing a drainage ditch (Minn. Stat. § 103E.075), appeal procedures (Minn. Stat. §§ 103E.091, Minn. Stat. § 103E.095), construction contract provisions (Minn. Stat. §§ 103E.521-.555), liens (Minn. Stat. §§ 103E.601-631), funding bonds (Minn. Stat. §§ 103E.635-.641), and cost apportionment (Minn. Stat. § 103E.711).

If future work on the ditch is necessary, the Drainage Code provides for improvement (Minn. Stat. §103E .215), improvement of an outlet (Minn. Stat. § 103E.221), laterals (Minn. Stat. § 103E 225), impoundment (Minn. Stat. § 103E.227), or repairs (Minn. Stat. §§ 103E 701-728.) If the ditch will be abandoned (Minn. Stat.

§ 103E.811) or transferred (Minn. Stat. § 103E.812), the Drainage Code provides the procedures necessary to accomplish the task. If one wants to use the ditch as an outlet, one must obtain “express authority from the Drainage Authority having jurisdiction over the drainage system,” and must petition the Drainage Authority. Minn. Stat. § 401, subds. 2, 3. If one wants to divide or consolidate a drainage ditch system, one must petition the Drainage Authority. Minn. Stat. § 801, subd. 2.

The Legislature even provided that findings made by the Drainage Authority “are prima facie evidence of the matters stated in the [Drainage Authority’s] findings,” and the Drainage Authority’s “order is prima facie reasonable.” Minn. Stat. § 103E.095. Finally, the Legislature provided a specific appeal process for challenges of drainage decisions in Minn. Stat. §§ 103E.091 and 103E.095. Once an order establishing or refusing to establish a drainage project is entered by the Drainage Authority, any challenges to such a project can only be maintained under Minn. Stat. § 103E.095.

The Legislature purposely went to great lengths to provide a statutory scheme and framework for the establishment of a drainage ditch, and then went further and set up additional extensive provisions for the myriad of “what if’s” for the future of that ditch. The Drainage Code was designed with every power, procedure, and standard necessary to accomplish tasks related to the ditch, including provisions for challenges. It is a complete system, with explicit statutory directives that mandate that it is the Drainage Authority who has jurisdiction over the drainage ditch and that mandate adherence to the provisions of the Drainage Code. Put another way, when an issue arises and a county ditch is

implicated, the Legislature has mandated that the procedures and the remedies to address the issue lie within the statutory scheme for drainage.

In order for the Drainage Code framework to operate as intended, all of its provisions must be given effect, including that of the role of the District Court. See Kirkwald Const. Co. v. M.G.A. Construction Co., 513 N.W.2d 241 (Minn. 1994). The integrity of the framework is compromised, if not destroyed, when the Drainage Code provisions are ignored or circumvented. And, the Drainage Code does not authorize a District Court to make drainage decisions such as the particulars involved in an improvement, but only as to whether the Drainage Authority's decision regarding that improvement was unsupported by the record. Minn. Stat. § 103E.095, subd. 2. By observing its limited role as provided by the Drainage Code, the District Court allows it to operate as was intended by the Legislature.

Moreover, 60 years of drainage caselaw drives home this mandate. The Minnesota Supreme Court held that 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). The Court held that consequently, the subject matter of the drainage proceeding and all property rights affected thereby are fixed in a new status which can only be altered pursuant to the drainage statutes. Id. The engineer's plans and specifications, where confirmed by valid order from the Drainage Authority, become final and conclusive, *unless altered pursuant to the drainage statutes.* Id. The Court has also held that courts are under a "duty to compel all concerned to respect the new status

created by the governmental authority in the construction of [a ditch.]” Lupkes v. Town of Clifton, 196 N.W. 666 (Minn. 1924). Finally, the Court held that once a drainage system is established by order of a Drainage Authority, alterations to that ditch must be as provided by the drainage statutes. See Slosser supra.

The Court has held that drainage laws must be liberally construed, so as to promote the public health and the drainage and reclamation of wet or overflowed land. See, e.g., Lippmann v. Huhn, 249 Minn. 1, 81 N.W.2d 100 (Minn.1957). The Court has held that provisions in statutes regulating the construction of public drains were designed for the protection of landowners, and therefore they must be strictly followed. Johnson v. Steele County, 60 N.W.2d 32 (Minn.1953).

Any confusion or doubt over the issue of subject matter jurisdiction disappears in light of the separation of powers doctrine. Under the Drainage Code, it is only after the Drainage Authority has acted pursuant to the Drainage Code provisions that the District Courts have a role in drainage issues. That role is limited to appeals of Drainage Authority decisions as provided in the Drainage Code. Minn. Stat. §§ 103E.091, 103E.095. This is the principle of separation of powers.

The separation of powers doctrine is found in the Drainage Code provisions themselves, and, in particular, in the standard of review for those decisions. The Court does not second guess or substitute its opinion for that of the Drainage Authority. Its review is “on the record” and the decisions of the Drainage Authority are disturbed only

when the proceedings are unlawful or unsupported by the evidence. Petition of Jacobson, 48 N.W.2d 441 (Minn. 1951); Minn. Stat. §§ 103E.091, 103E.095.

The Courts have observed this same principle in fashioning standards of review for zoning and other quasi-judicial decisions, and a full understanding of the reasons why the Court utilizes such a standard is important in understanding the subject matter jurisdiction issue in this case. When the Legislature has delegated powers to municipalities those municipal entities act in legislative and quasi-judicial capacities. For instance, when a municipality adopts or amends a zoning ordinance, it acts in a legislative capacity under its delegated police powers and as such, it is well established in this state that the scope judicial review is necessarily narrow. See, e.g., Sun Oil Company v. Village of New Hope, 220 N.W. 2d 256 (Minn. 1974). When under such an ordinance scheme, a municipality acts upon a permit request, whether that be a variance or a conditional use permit, the municipality is acting in a quasi-judicial capacity. See e.g., Neitzel v. County of Redwood, 521 N.W.2d 73 (Minn. App. 1994). In such a capacity the municipality decides the law, bases a decision on evidentiary facts, and ends up resolving what may be a disputed claim of rights. When acting in such a capacity, review of the municipality's decision challenging the denial of a conditional use permit is by way of a writ of certiorari to the Court of Appeals. Neitzel, supra.

Municipalities' decision making in areas that are delegated to them is generally "on the record." For instance, a municipality's decision on environmental review issues is on the record based on the "substantial evidence test". See e.g., Cable

Communications Bd v. Nor-West Cable Communications Partnership, 356 N.W. 2d 658 (Minn. 1984). In the permitting process for a municipality, review is on the record and the standard of the review is whether the decision was arbitrary, capricious or unreasonable. See, e.g., Honn v. City of Coon Rapids, 313 N.W.2d 408 (Minn. 1981). Decisions of municipal authorities as to employment matters are likewise given deference and are reviewed on the basis of the record. See e.g., Dietz v. Dodge County, 487 N.W. 2d 237 (Minn.1992); Dokmo v Independent School Dist. No. 11, 459 N.W.2d 671 (Minn. 1990). The Minnesota Supreme Court has repeatedly stated:

With respect to the decisions of municipal and other governmental bodies having the duty of making decisions involving judgment and discretion that it is not the province of the court to substitute its judgment for that of the body making such a decision, but merely to determine whether the body was within its jurisdiction, was not mistaken as to the applicable law, and did not act arbitrarily, capriciously, oppressively or unreasonably, and to determine whether the evidence could reasonably support or justify the determination.

In Re Appeal of Briane, 457 N.W. 2d 268, 269-70 (Minn. App.), aff'd in part, rev'd in part, 460 N.W. 2d 53 (Minn. 1990) (citing Village of Edina v. Joseph, 119 N.W.2d 809, 815 (Minn. 1962)).

These principles are not new. As stated in the case of White Bear Docking v. City of White Bear Lake, 324 N.W.2d 174, (Minn. 1982) “It is the duty of the judiciary to exercise restraint in according appropriate deference to the civil authorities in the performance of their duties.” Id at 176. This, in truth, is a principle of separation of powers. Separation of powers requires that the judiciary refrain from interference in the

duly authorized actions of non-judicial entities unless absolutely called for by law. The Dietz and Dokmo cases show that courts will not unconstitutionally invade and usurp a municipality's decision making process. As stated in Dokmo "constitutional principles of separate governmental powers require that the judiciary refrain from a de novo review of administrative decisions." Dokmo, supra at 674. Dokmo notes that constitutional guarantees are protected when a reviewing court exercises a limited jurisdiction based upon a record that has been completed through a complete hearing process. Id. Indeed, Minn. Stat. § 103E.095 exhibits this principle, indicating that review is on the record, indicating the standard of the review, and indicating that the decisions and findings of the Drainage Authority are deemed to be "prima facie reasonable."

Nor does it help to try to "recast" a claim that is properly decided by a municipal entity into some other legal theory in an effort to get around the requirement that the municipal entity make a decision. Cases decided under the Dietz and Dokmo line of cases make it clear that when what is being contested relates to a governmental body's proper decision making process, casting the claim under different legal theories cannot avoid these important separation of powers principles. See Springer v. City of Marshall, 1994 WL 396324 (Minn. App. 1994) (unpublished, attached as Exhibit); Betchold v. City of Rosemount 1995 W. 507583 (Minn. App. 1995) (unpublished, attached as Exhibit). As long as the claim involves the decision of a public body, that public body has to be allowed to make the decision in the first instance.

By seeking out the District Court to make drainage decisions, rather than petitioning the Drainage Authority for a repair or other drainage proceeding, the Wildlife Association seeks to usurp the power of the Drainage Authority. The Drainage Authority is prevented from making a decision which the Legislature clearly has delegated to it. And, casting a drainage system repair as MERA and nuisance in an effort to get around the requirement that the Drainage Authority make the decision is a further attempt at that usurpation and violates the separation of powers doctrine.

The reason that Nicollet County has spent much of this brief discussing the statutory framework of the Drainage Code is this: What the Relator is attempting to do in this case is to make a collateral attack of decisions of the Drainage Authority. In literally all cases, the Drainage Code is the exclusive avenue for appeal from a Drainage Authority decision. The decision in this case that is sought to be challenged is a decision that was made 54 years ago. 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, 260 Minn. 357, 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).

What is undeniably at issue in this case is the repair of the water control structure within CD46A. A.1-A.19; A.89-A.109. Minn. Stat. §§ 103E.701 through 103E.745 cover repair proceedings. A repair is specifically defined as to “restore all or part of a

drainage system as nearly as practicable to the same condition as originally constructed and subsequently improved..." Minn. Stat. § 103E.701, subd. 1. By definition, a drainage system includes all improvements of outlets--everything within the drainage ditch, including a water control device such as that in CD46A. See Minn. Stat. § 103E.005.

There is a complete procedure set forth for repair proceedings. See Minn. Stat. §§ 103E.701-103E.745. It can be initiated by either the Drainage Authority or by individuals or entities interested in or affected by a drainage system. See Minn. Stat. § 103E.715, subd. 1. Hearings are then held. Id. Benefits and damages are once again determined, just as they were when the ditch was established, and/or just as they were with any improvement of the ditch. Id.; 103E.728. The benefits and damages may be appealed to district court under Minn. Stat. § 103E.091, just as when a ditch is established.

In this case, the ditch records unequivocally show that in 1950 an improvement to the ditch occurred. A.669-A.672. That improvement involved the outlet structure in CD46A. Id.; A.674. The project was in fact submitted to the Department of Conservation⁴ and approved. A.530, A.610, A.615, A.619, A.668. The water control structure that is the very subject of this litigation was a part of that improvement. In fact, as the CD46A ditch documents show, it is part of what maintains the lake level in Little and Mud lakes. A.619. If that improvement is no longer serving its intended purpose,

⁴ The Department of Conservation is now known as the Department of Natural Resources.

then the remedy is to petition for a repair of the outlet control device under Minn. Stat. § 103E.715.

This legal principle was plainly articulated in the case of Zaluckyj v. Rice Creek Watershed District, 639 N.W.2d 70 (Minn. App. 2002). In that case, it was alleged by several landowners that water overflowing the ditch flooded their land. Id. at 72. When landowners sought to initiate obstruction proceedings, the Ditch Authority noted that any interested person was entitled to petition for a ditch repair under Minn. Stat. § 103E.715. Id. at 73. No petition was initiated for repair; instead there was a lawsuit filed seeking a declaratory judgment and a petition for writ of mandamus. Id. These are the exact claims the Wildlife Association seeks in their amended complaint. A.1.

The pronouncement of the Court in that case is exactly that as should be followed in this case. The district court ruled that the person seeking the repair of the ditch must first initiate repair proceedings under the Drainage Code. Id. While the attorneys in that case did not cast the argument in terms of subject matter jurisdiction, the court dismissed the case, noting that the plaintiffs had not exhausted their administrative remedies. Id.

As noted in Rice Creek Watershed, a party must generally exhaust its administrative remedies before seeking judicial relief. Amcon Corp. v. City of Eagan, 348 N.W.2d 66 (Minn. 1984). The Rice Creek Watershed Court noted the variety of reasons for requiring exhaustion on drainage repair issues. First, the Legislature created a specialized administrative process for addressing ditch problems. See Counties of Blue Earth v. Minn. Department of Labor Indus., 49 N.W.2d 265, 268 (Minn.App. 1992)

(discussing reasons for requiring exhaustion of administrative remedies). Requiring exhaustion both protects the autonomy of administrative agencies and promotes judicial efficiency. Rice Creek Watershed at 75. In addition, the record produced in the administrative process facilitates judicial review and may also reduce the need to resort to judicial review. Id.

In the Rice Creek Watershed case, the Court of Appeals noted that

The Legislature enacted an extensive statutory scheme to address drainage issues in Minnesota. The Drainage Ditch laws are a complex matrix adopted with the intent of reclaiming agricultural land by disposing of excess water that renders the land untillable.

Id. at 75. After outlining all of the procedures involved in a repair proceeding, the Court of Appeals noted that judicial review is part of the statutory ditch repair scheme. Once the Drainage Authority has issued a final decision, the Court noted that a party may challenge a decision by Drainage Authority dismissing drainage proceedings or establishing or refusing to establishing drainage project. Id. at 76. This occurs under Minn. Stat. § 103E.095, subd. 1 and Minn. Stat. § 103E.091, subd. 1. Benefits, damages, fees or expenses, or whether environmental and land-use requirements are met under Minn. Stat. § 103E.015, subd. 1, may also be appealed under Minn. Stat. § 103E.091, subd. 1. Id. at 76. The determination of environmental effects is part of the decision making process given over by law to the Drainage Authority and is specifically appealable within the Drainage Code. See Minn. Stat. §§ 103E.015 and 103E.091, subd. 1.

Thus the Court of Appeals has already decided that the exclusive remedy for a party seeking to force a repair of a drainage ditch is through a repair proceeding under the drainage statutes. Certainly the request to insert mandamus and declaratory judgment counts in the complaint is shown to be precluded. See A.1-A.19. But beyond that, the Rice Creek Watershed case shows there is no jurisdiction for the Court to hear this matter until such proceedings have been initiated and completed before the Ditch Authority. This requirement conforms with basic principles of Minnesota law.

In addition to attempting to reframe drainage issues as MERA and nuisance, and usurping the authority of the Drainage Authority, the Wildlife Association also attempts to retroactively apply MERA. Such retroactive application of MERA is not authorized.

Minn. Stat. § 645.21 provides that “no law shall be construed to be retroactive unless clearly and manifestly so intended by the legislature.” See also, Duluth Firemen’s Relief Assn. v. City of Duluth, 361 N.W.2d 381 (Minn. 1985); American Family Mut. Ins. Co. v. Lindsay, 500 N.W.2d 807 (Minn. App. 1993); Dakota County v. City of Lakeville, 559 N.W.2d 716 (Minn. App. 1997); Cochrane v. Tudor Oaks Condominium Project, 529 N.W.2d 429 (Minn. App. 1995). A retroactive, or retrospective, law is one that “relates back to a previous transaction and gives it some legal effect different from what it had under the law when it occurred.” Baron v. Lens Crafters, Inc., 514 N.W.2d 305, 307 (Minn. App. 1994). A retrospective law, “is one which takes away or impairs vested rights acquired under existing laws, or creates a new obligation and imposes a new

duty, or attaches a new disability, in respect of transactions...already past.” Halper v. Halper, 348 N.W.2d 360, 362 (Minn. App. 1984).

MERA came into effect in 1971. See 116B.01, et seq. However, nothing in the language of MERA clearly and manifestly indicates that it is intended to have retroactive application. Thus, MERA only applies to action and conduct taken since its inception, not prior to the date it became effective.

The Wildlife Association is seeking to apply MERA retroactively to actions taken years before its inception. The MERA claims are based on challenges to the course of 46A, the water levels in Little and Mud lakes, and the elevation of the water control structure. A.1-A.19. Each of these elements of 46A was ordered between 20 and 70 years prior to MERA. A.606-A.608; A.669-A.672. The improvement of CD46A through deepening and widening, and the 973.2 feet elevation for the water control structure was set by Nicollet County, with the agreement of the Department of Conservation, on July 31, 1950. A.669-A.672; A.530. The ditch itself was established in 1907 by Nicollet County. A.606-A.608. Thus, the MERA claims are based on conduct which occurred prior to MERA. Because there is no clear and manifest intention of retroactivity in MERA, the Wildlife Association cannot bring MERA claims based on the facts in either the original or amended complaints.

Not only does the Wildlife Association attempt to retroactively apply MERA, but they also ignore the fact that in 1950 the DNR agreed that the water control structure was to be installed at 973.2 feet. A.526-A.530; A.676-A.679. The DNR approved it at 973.2

feet, and yet the Wildlife Association now asserts that Nicollet County is legally obligated to take action to maintain minimum water levels of 976 feet. A.806-A.832.

However, there can be no MERA violation based on action taken pursuant to an agreement by the DNR:

[N]o action shall be allowable under [MERA] for conduct taken by a person pursuant to any environmental quality standard, limitation, rule, order, license, stipulation agreement or permit issued by the Pollution Control Agency, Department of Natural Resources, Department of Health or Department of Agriculture.

Minn. Stat. § 116B.03, subd. 1. The Department of Conservation agreed and approved the elevation of the water control structure in 1950, and was fully aware of the structure's effect on the lake levels. A.526-A.530; A.67-A.679. And yet, the Wildlife Association's MERA claims are centered on that water control structure and those lake levels.

Therefore, because the Department of Conservation agreed and approved Nicollet County's conduct in 1950, there can be no MERA claim, and the District Court lacks subject matter jurisdiction over the Wildlife Association's MERA claims.

The Nicollet County Drainage Authority must be allowed to make a decision regarding the repair of the water control structure. The decision must be by the authority of the entity that was delegated that power, and the decision must be according to the procedures in the Drainage Code. One only needs to look at the history of this ditch to understand this: CD46A was duly established by order of the Nicollet County Drainage Authority in 1907, and further modified pursuant to the drainage statutes in 1950 and again in 1971. A.606-A.608; A.669-A.672; A.697-A.699. By order of the Nicollet

County Drainage Authority, CD46A runs from Mud Lake through the basin of Little Lake, and travels on through the outlet of Little Lake. *Id.*; A.49; A.761-A.767. The portion of the ditch through Little Lake included deepening, i.e., Little Lake was improved and became part of the drainage system. *Id.*; A.642-A.667. See Minn. Stat. § 103E.005, subd. 12. By order of the Drainage Authority, and with the authorization and consent of the DNR, the water in Little Lake is to be regulated by a sheet pile dam near the outlet of Little Lake. A.526-A.530; A.676-A.679. By order of the Drainage Authority, and the consent and authorization of the DNR, the elevation of the sheet pile dam was set at 973.2 feet. *Id.* Each of these orders has the binding force of a judgment in rem and is final for all purposes. See Slosser *supra*. More importantly, pursuant to the Drainage Code and extensive ditch caselaw, and any alteration of CD46A must be as provided by the Drainage Code. *Id.*

The Wildlife Association's amended complaint seeks to alter CD46A by the installation of a water control structure within CD46A to guarantee a minimum water level in Little Lake at 976 feet. A.806-A.832. The amended complaint also seeks to establish the water level of Little Lake to the level that it was before the drainage ditch was constructed 98 years ago. *Id.* This will mean that CD46A will cease to function in the manner and at the efficiency for which it was designed. The agricultural lands reclaimed 98 years ago will be destroyed. The Wildlife Association's plans for Little Lake require the repair, or possibly the impoundment⁵ of waters, or maybe even

⁵ An impoundment consists of the installation of dams or other control works in

abandonment⁶ of the ditch. After all, the water control structure needs to be repaired (repair proceeding), a lake level of 976 feet would occur because a dam would need to be constructed specifically for that purpose (impoundment proceeding), and the increased lake levels may cause the ditch to cease to function (abandonment proceeding). Any one of these actions fall squarely within the statutory scheme and framework for drainage ditches set forth in the Drainage Code. The Drainage Code provides the procedure and the remedy. As intended by the Legislature, the resolution of CD46A drainage issues must be pursuant to the Drainage Code and the decision regarding those issues must be made by the Drainage Authority.

IV. THE DEPARTMENT OF NATURAL RESOURCES HAS JURISDICTION OVER CHANGES IN PUBLIC WATER LEVELS.

The Wildlife Association's original complaint and amended complaint center solely on the water levels in Little and Mud Lake. A.806-A.832. From the late 1990s when the Wildlife Association, Nicollet County and the DNR engaged in discussions regarding the replacement of the water control structure, the level of the water in Little Lake was the sole issue. A.94-A.109. At all times during the discussions, Nicollet

drainage ditch systems for the purpose of impounding or diverting waters. An impoundment begins with a petition submitted to the Drainage Authority, along with a public waters permit and a list of affected properties. An engineer is appointed, notice is provided to landowners, and public hearings take place, and the project is approved only if it will not impair the utility of the ditch or deprive affected land owners of its benefit. Flowage easements are required prior to construction. Minn. Stat. § 103E.227.

⁶Abandonment of the entire or only part of the drainage system begins with the filing of a petition. If the drainage system is under the jurisdiction of a Drainage Authority, the petition must be filed with the auditor. There is notice to affected property owners and public hearings. Minn. Stat. §§ 103E.805, 103E.801.

County never took the position that the dam should not be replaced, or argued that the water in Little Lake should be allowed to drain away. Id. The sticking point has always been the water level (elevation) in Little Lake, and the water level in Little Lake is the sole point of the Wildlife Association's contention in this lawsuit.

The logic of their asserted theory, which underlies each of the original and amended MERA counts and the nuisance count, can be distilled as follows:

1. Counties in Minnesota have a legal obligation to maintain lakes and wetlands at their (natural) ordinary high water level, and failure to do so is a violation of MERA and a nuisance.
2. The natural ordinary high water level of Little Lake is 976 feet.
3. Little Lake is at less than 976 feet.
4. Because Little Lake is less than 976 feet, Nicollet County violated MERA.

Setting aside the fact that counties do not have a legal obligation to maintain lakes and wetlands at their ordinary or natural high water level⁷, the clear basis for the Wildlife Association's claims is the water level in Little and Mud lakes. And, the District Court does not have subject matter jurisdiction over the issue of changes to the water level in the lakes and wetlands in the State of Minnesota.

Minnesota Statutes § 103G.255 vests the DNR Commissioner with the responsibility to administer (1) the use, allocation, and control of waters of the state; (2) the establishment, maintenance and control of lake levels and water storage reservoirs;

⁷ There is no statute, rule, or caselaw which stands for this proposition. The Wildlife Association has failed to cite their authority.

and (3) the determination of the ordinary high water level of waters of the state. The ordinary high water level (OHWL) means the boundary of water basins, watercourses, public waters, and public waters wetlands. Minn. Stat. § 103G.005, subd. 14. “The ordinary high water level is an elevation delineating the highest water level that has been maintained for a sufficient period of time to leave evidence upon the landscape, commonly the point where the natural vegetation changes from predominantly aquatic to predominantly terrestrial.” Id.

Chapter 103G allocates jurisdiction to determine the OHWL to the Commissioner of Natural Resources in administrative proceedings. Minn. Stat. § 103G.401. The administrative proceedings to establish an OHWL may be started in one of three ways, by a public body, by a majority of the riparian owners adjoining the public water, or by the Commissioner himself. Id. This statutory provision embodies the Commissioner’s historically broad authority to initiate investigations, hearings, and projects to preserve and enhance the public waters of this state, including the establishment of lake levels. See In the Matter of Determining the Ordinary High Water Level of Goose Lake, Waconia Township, Carver County, and Establishing and Maintaining Appropriate Water Levels Thereon, 2001 WL 1327767 (Minn. App), (Add. 1-3) citing In re Lake Elysian High Water Level, 293 N.W. 140 (Minn. 1940); In re Determining the Natural Ordinary High Water Level of Lake Pulaski, 384 N.W.2d 510 (Minn.App.1986); Lindberg v. Dep’t of Natural Resources, 381 N.W.2d 494 (Minn.App.1986).

Chapter 103G contemplates an administrative proceeding under the supervision of the Commissioner of Natural Resources. The determination process relies heavily upon technical testimony, often under departmental guidelines. See Guidelines for Ordinary High Water Level (OHWL) Determinations, (DNR Waters Technical Paper 11); Add. 4-13. An example of the kind of evidence and technical considerations is found in In the Matter of Determining the Natural Ordinary High Water Level of Lake Pulaski, 384 N.W.2d 510 (Minn.App. 1986). Once the Commissioner makes his determination, it is subject to judicial review by this Court via certiorari, under the arbitrary and capricious and substantial evidence test.

OHWL determinations are allocated to an administrative agency for typical reasons: to take advantage of technical expertise; to place decisional responsibility in the agency charged with administration of public waters and natural resources; to maintain a coherent statewide consistent approach to regulation of public waters. It is absolutely critical that the Division of Waters regulate the hydrology of public waters in a coherent way, because lake levels and water course levels in a hydrological system are independent. It would never work to have a District Judge in one county raise the elevation of a lake in one county and a district judge in another county to make an inconsistent decision with regard to a waterway upstream of that lake in another county. Public waters need to be regulated as an organic consistent whole. Raising and lowering the level of public waters involves harmonizing a variety of policies. When the Commissioner determines lake levels, the public interests at stake include the DNR's

goal of maintaining lake levels so as not to alter the OHWL of the lake, to maintain the types of recreational uses that have traditionally occurred on the lake, and to resolve the dispute between landowners over the control structure on the lake. See Goose Lake, supra.

The Wildlife Association is attempting to circumvent the statutory system for establishing an OHWL. Instead of submitting to administrative proceedings under the supervision of the Commissioner of Natural Resources, the Wildlife Association proposes to conduct an OHWL re-determination in front of a District Judge, who clearly lacks jurisdiction to make this determination. By proceeding in this fashion, they ignore the entire statutory scheme, which is designed to utilize the technical expertise of the Commissioner and the Division of Waters.

This is ultimately a separation of powers issue. The Legislature has granted to the Commissioner, not the Courts, the power to determine OHWL's. Allowing this case to proceed would essentially divest the Commissioner of his statutory authority to make administrative determinations regarding public waters. Moreover, initiation of such proceedings by complaint, supplants the statutory constraints on the initiation of proceedings. Under Chapter 103G a commissioner's determination is begun (a) by a public body, (b) by the requisite number of riparian owners, or (c) by the commissioner in his discretion. Minn. Stat. § 103G.401(a). The Wildlife Association, however, seeks to circumvent those requirements altogether and move directly to the District Court without meeting the statutory requirements.

V. THE CONSTITUTIONAL RIGHTS OF LANDOWNERS AND THE PUBLIC CANNOT BE IGNORED.

By circumventing the Drainage Code and the OHWL processes, the constitutional rights of the landowners and the public at large are also ignored. The landowners on the drainage system have important property rights. The Supreme Court has stated that once a ditch system is established, the order creating it constitutes a “judgment in rem... Thereafter, every owner of land who has recovered damages or been assessed for benefits has a property right in the maintenance of the ditch in the same condition as when it was originally established.” Fisher v. Town of Albin, 258 Minn. 154, 104 N.W.2d 32, 34 (1960). A landowner who is assessed for benefits of a drainage system acquires in return the right to receive enhanced drainage for which the land was assessed and to petition for repair of the ditch to ensure continued drainage. See Minn. Stat. § 103E.715.

If the ordinary high water level of Little Lake were to be raised three feet or more, property owners who have been assessed benefits for the drainage system for nearly 100 years will lose property and their vested drainage rights. Such a loss will occur without due process, without just compensation, and in the absence of upwards of eighty landowners. Nor will there be provision for public input into the new lake levels or resolution of water level conflicts, as required in Minn. Stat. § 103G.245, subd. 10(b).

In contrast, seeking the remedy for the failing water control structure in the Drainage Code will not ignore these important rights. Landowners will receive just compensation if their vested property rights are taken pursuant to the Drainage Authority’s inherent powers of eminent domain. See Lupkes v. Town of Clifton, 196

N.W. 66 (Minn. 1924). All affected landowners will receive notice and have an opportunity to participate, along with any other interested party. Public hearings will take place. The environmental effects and land use criteria will be considered. Minn. Stat. § 103E.015. If an Environmental Assessment Worksheet or Environmental Impact Statement is required, it can be completed. Coon Creek Watershed Dist. v. State Environmental Quality Bd., 315 N.W.2d 604 (Minn. 1982) (EIS can be required, under § 103E.015, even for a statutorily mandated repair of a county ditch.) The DNR will lend its technical advice, review the plans, and issue advisory opinions. The DNR Commissioner, who has the technical expertise, resources and experience, can look at the “big picture” in determining the appropriate water level in Little and Mud Lakes.

The statutory framework has been set in place by the Legislature to provide procedures and remedies regarding drainage ditch issues. Simply put, drainage issues need to be decided by the Drainage Authority.

VI. THE INTEGRITY OF COUNTY DITCHES ACROSS MINNESOTA ARE AT RISK IF THE DRAINAGE AUTHORITY’S POWERS ARE USURPED.

Should this Court find that the District Court has subject matter jurisdiction over CD46A drainage issues framed as MERA, every ditch in the state of Minnesota is at risk. It is quite obvious that drainage ditches drain water from property which was once waterlogged, swampy, and untillable. See Rice Creek Watershed, supra. Therefore, a MERA action could conceivably be brought against every county ditch on the theory that the county has a legal obligation to restore those potholes, swamps, and wetlands to their original pre-human/pre-drainage state, and failure to do so violates MERA. That is

exactly what the Wildlife Association is attempting to do in this case, and this is exactly what will happen in future cases if the District Court has subject matter jurisdiction over drainage issues and lake or wetland water levels.

If not the total obliteration of a drainage ditch, plaintiffs will be allowed to disassemble or destroy a drainage system in a piecemeal fashion through the assertion of MERA, and without reasoned analysis or observance of the procedures, protections, or the participation of interested persons provided in the Drainage Code. To allow a plaintiff to circumvent and ignore one hundred years of vested drainage rights without the statutory protections afforded by the Drainage Code is without precedent, and must not occur.

A MERA action does not and cannot accomplish what the Drainage Code can and was designed to do. And, the Court cannot allow a precedent of this magnitude to occur without consideration of exactly what that would mean to the drainage ditches in Minnesota.

VII. BECAUSE THE DISTRICT COURT DID NOT HAVE SUBJECT MATTER JURISDICTION OVER THE ALLEGATIONS IN THE WILDLIFE ASSOCIATION'S COMPLAINT, ITS ORDER GRANTING THE AMENDMENT OF THE COMPLAINT AND JOINING THE DNR IS VOID.

Upon finding lack of subject matter jurisdiction, the court must dismiss the action. Cochrane v. Tudor Oaks Condominium Project, 529 N.W.2d 429, 432 (Minn.App.1995); Minn.R.Civ.P. 12.08(c). A judgment rendered by a court without subject matter jurisdiction is void. Jinadu v. Centrust Mortgage Corp., 517 N.W.2d 84 (Minn. App. 1994).

The District Court did not have subject matter jurisdiction over the specific claims made by the Wildlife Association in its original complaint. Moreover, the District Court does not have subject matter jurisdiction over the specific claims in the amended complaint either. Without subject matter jurisdiction over the original complaint, the District Court was without authority to amend the complaint or to join a party. Stated another way, the District Court cannot amend something or join someone over which it had no jurisdiction in the first place. More importantly, without subject matter jurisdiction, the order granting the Wildlife Association's motion to amend its complaint and join the DNR is void. See Jinadu, supra.

CONCLUSION

The Wildlife Association's utilization of MERA and nuisance to accomplish an incredible change in the water levels of Little and Mud Lakes is a perversion of the intent of MERA. At no time has the Legislature ever indicated that MERA can or should be used to restore the environment to its pre-human habitation state. At no time has the Legislature ever indicated that a benchmark for determining whether pollution, impairment or destruction of the environment can be a fictitious obligation or an arbitrary standard. To use such a fictitious, unobtainable and unrealistic benchmark to assert violations of MERA and nuisance is completely without merit. More importantly, the Nicollet County District Court is without subject matter jurisdiction to consider the claims in the Wildlife Association's original or amended complaint, or to join the DNR because drainage issues must be made pursuant to the Drainage Code and those decisions must be made by the Drainage Authority.

Nicollet County requests that the District Court's orders denying the County's motion to dismiss and granting the Wildlife Association's amendment of the complaint and joinder of the DNR be vacated, and the entire matter be dismissed for the District Court's lack of subject matter jurisdiction.

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**STATE OF MINNESOTA
IN COURT OF APPEALS**

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

Respondent,

**CERTIFICATION OF
BRIEF LENGTH**

v.

Nicollet County
Board of Commissioners,

Appellant,

**COURT OF APPEALS
CASE NO.: A05-1001**

v.

Marlin Fitzner, et al, intervenors,

Respondent.

I hereby certify that this Brief conforms to the requirements of Minn. R. Civ. App. P. 132.01, subs. 1 and 3, for a brief produced with a monospaced font. The length of this Brief is 827 lines, 9848 words. This Brief was prepared using Microsoft Word.

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