

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., Intervenors,

Respondents.

APPELLANT'S REPLY BRIEF

RINKE-NOONAN, LTD.
Kurt A. Deter (#22342)
300 US Bank Plaza
P.O. Box 1497
St. Cloud, MN 56302-1497
(320) 251-6700

*Attorney for Marlin Fitzner, et al.,
Intervenors, Respondents*

BARNETT LAW, LTD.
Gary D. Barnett (#4280)
600 South Second Street
P.O. Box 3008
Mankato, MN 56002-3008
(507) 345-7733

*Attorney for State of Minnesota ex rel.
Swan Lake Area Wildlife Association,
petitioners, Respondent*

PETERSON LAW OFFICE, P.A.
William G. Peterson (#86435)
3601 Minnesota Drive
Suite 800
Bloomington, MN 55435
(952) 921-5818

*Attorney for State of Minnesota ex rel., Swan Lake
Area Wildlife Association, petitioners, Respondent*

RATWIK, ROSZAK & MALONEY, P.A.
Scott T. Anderson (#157405)
Kimberley K. Sobieck (#288299)
730 Second Avenue South, Suite 300
Minneapolis, MN 55402
(612) 339-0060

*Attorneys for Nicollet County Board of County
Commissioners, Appellant*

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ARGUMENT

I. ENVIRONMENTAL CASELAW CITED BY WILDLIFE ASSOCIATION DOES NOT AUTHORIZE THE REDUCTION OF VESTED DRAINAGE RIGHTS, THE ABOLISHMENT OF A DRAINAGE DITCH, THE IMPOUNDMENT OF WATERS, OR AN INCREASE IN THE ORDINARY HIGH WATER LEVEL OF A LAKE WITHOUT ACTION BY THE DRAINAGE AUTHORITY OR DNR COMMISSIONER, AND THEREFORE THE DISTRICT COURT HAS NO SUBJECT-MATTER JURISDICTION OVER THESE MERA CLAIMS.

The Wildlife Association misconstrues the appeal issue by arguing that drainage proceedings are subject to environmental acts and therefore the District Court has subject-matter jurisdiction over their claims. Nicollet County's subject-matter jurisdiction argument is not an argument that the Drainage Statutes are or are not subject to MERA. Rather, while the District Court generally may have subject-matter jurisdiction over an environmental issue that also involves drainage issues, in this specific case the nature of the Wildlife Association's MERA claims cause it to fall outside that jurisdiction. See Cochrane v. Tudor Oaks Condominium Project, 529 N.W.2d 429 (Minn.App.1995) (subject-matter jurisdiction includes the authority to hear and determine the particular questions the court assumes to decide).

In analyzing the subject-matter jurisdiction issue, it is vital to keep in mind exactly what the Wildlife Association is claiming. They are not claiming that water levels in Little Lake must be restored to the levels that existed after CD46A was established in the early 1900's or even when the water control structure was constructed in 1953. Rather, they are claiming that CD46A must be altered to allow water levels in Little Lake to rise well above those levels to the pre-human habitation, pre-drainage ditch "natural ordinary

high water level” of 976 feet. This claim exceeds the intent or the authority of MERA or any other environmental act, and the authority to grant such a claim necessarily triggers the requirement of action by the Drainage Authority and the DNR Commissioner.

The Wildlife Association cites several cases in support of their argument of subject-matter jurisdiction in the instant case. However, these cases do not stand for the proposition that a MERA claim can include acts exclusively within the jurisdiction of the Drainage Authority and the DNR Commissioner, or that the claim can ignore vested drainage rights of landowners. Rather, the cases merely state that a Drainage Proceeding must comply with the policies and procedures in the environmental acts when the Drainage Authority acts. This requirement cannot be interpreted as justifying subject-matter jurisdiction under the facts in this case.

The Wildlife Association points to Coon Creek Watershed District v. Environmental Quality Board, 315 N.W.2d 200 (Minn.1986)¹; McLeod County Board of Commissioners v. Department of Natural Resources, 549 N.W.2d 630 (Minn.App.1996); Minnesota Center for Environmental Advocacy v. County of Big Stone, 638 N.W.2d 198 (Minn.App.2002); and Fort Snelling State Park Association v. Minneapolis Park and Recreation Board, 673 N.W.2d 169 (Minn.App.2003) as support for their argument that the District Court has subject-matter jurisdiction over their claims. They argue that because the Court has found that drainage proceedings are subject to certain environmental acts, it should extend its holdings to include MERA and grant subject-

¹ The Wildlife Association mistakenly cites this case name as “Rice Creek Watershed District.” Resp.B.10.

matter jurisdiction to the District Court accordingly. The Wildlife Association misstates the nature of the Court's holdings in each of the cases, and therefore their reliance on these cases is misplaced.

In Coon Creek, the Court held that a ditch repair was subject to the Minnesota Environmental Protection Act's ("MEPA") requirement to complete an Environmental Impact Statement ("EIS"). Coon Creek, 315 N.W.2d at 605. The Court specifically stated that the EIS requirement did not preclude the drainage ditch repair, but that an EIS must be completed and the repair must be performed in the least harmful manner. Id. The Court did not state or imply that MEPA could be used to prevent a Drainage Authority from repairing a ditch. It merely said that upon taking action, the Drainage Authority is subject to the procedural requirement of completion of an EIS and that the action taken must be performed in the least harmful manner. Id.

Similarly, in McLeod, the Court held that the maintenance of the ditch must be in a manner that is consistent with the policies stated in the Wetland Conservation Act ("WCA"). McLeod, 549 N.W.2d at 633. Again, the Court did not state or imply that the WCA could be used to prevent the repair of a ditch or other action by a Drainage Authority.

In Big Stone, the Court held that a Drainage Authority must either obtain permission from the DNR Commissioner or obtain a public waters permit before repairing a drainage ditch. Big Stone, 638 N.W. at 203. The Court did not state or imply that the Drainage Authority could not repair the ditch, but only that the drainage proceeding was subject to the statutory procedure. Again, being subject to a procedure is

not the equivalent of pre-empting the jurisdiction of the Drainage Authority or the Commissioner of Natural Resources, or ignoring landowners' drainage rights.

In Fort Snelling, the Park Board argued that a MERA claim could not be maintained because its plans for an athletic center were subject to review under the Minnesota Historic Sites Act and the National Historic Preservation Act. Fort Snelling, 673 N.W.2d at 177. The Court held that the administrative processes did not preclude a separate MERA action. Id. However, unlike the instant case, the MERA action in Fort Snelling did not pre-empt the ability of the state and federal agencies to review the Park Board's plans. Nor did the MERA action attempt to accomplish a goal which was within the exclusive jurisdiction of another agency or that ignored the vested rights of affected landowners who were not a party to the MERA action. In addition, the action in Fort Snelling was limited to stopping the construction of an athletic center on the polo grounds. Id. at 172.

Further, unlike the instant case, the MERA action in Fort Snelling did not involve an entity acting in a quasi-judicial capacity. See Zander v. State, --N.W.2d--, 2005 WL 2277283 (Minn.App.2005)(MERA action collaterally estopped when decision made by entity acting in quasi-judicial manner.) In summary, there are significant factual and procedural differences between Fort Snelling and the instant case such that the holding in Fort Snelling is not persuasive.

The Wildlife Association also points to Lake Elysian High Water Level v. Wenzel, 293 N.W. 140 (Minn.1940) for further support of their MERA claim to restore Little and Mud lakes. In that case, the Court upheld the restoration of a lake to its original level

even though ditch drainage would be affected. Lake Elysian, 293 N.W. at 143-144.

However, in its holding the Court found that the vested drainage rights of the landowners were limited by the stated purposes for the drainage as set forth in the original drainage petition. Id. at 143. The Court consequently held that the landowners' drainage rights were not affected by an increase in the waters levels in Lake Elysian because the scope of the drainage purposes stated in the original petition did not include any benefit accruing from lowered water levels in Lake Elysian. Id. Because their original benefits were limited in scope and did not include benefits accruing from changes in the water levels in Lake Elysian, the DNR Commissioner could restore Lake Elysian to its original levels without affecting drainage rights or necessitating action by the Drainage Authority. Id.

Unlike the landowners in Lake Elysian, the landowners' original drainage rights from the establishment and improvements in CD46A do include benefits accruing from the water levels in Little and Mud lakes. Because their rights include such benefits, the water levels in Little and Mud lakes cannot be altered solely within a MERA action. Therefore, the Court's holding in Lake Elysian is inapplicable and unpersuasive.

Most importantly, none of these cases stand for the proposition that MEPA, WCA, MERA or any other environmental act might be utilized to abolish a ditch, reduce vested drainage rights, or pre-empt the DNR Commissioner from determining ordinary high water levels in public waters. The cases merely state that the policies and procedures of the acts must be followed in the course of a drainage proceeding. Being subject to procedures and policies is not the equivalent of pre-empting the Drainage Authority's

jurisdiction over drainage issues or ignoring the vested rights of landowners in the drainage ditch, and this is exactly what the Wildlife Association is asking the Court. The caselaw cited by the Wildlife Association in support of their arguments for subject-matter jurisdiction are inapplicable to the facts of this case, and should be disregarded.

II. THE WILDLIFE ASSOCIATION MAY PETITION FOR IMPOUNDMENT, OR INTERVENE IN A REPAIR PROCEEDING, AND WOULD BE AN AGGRIEVED PARTY FOR PURPOSES OF APPEAL.

The Wildlife Association argues that it cannot participate in a drainage proceeding, and it cannot achieve party status or appeal a drainage proceeding order. The argument is without merit.

If the Wildlife Association is to achieve its goal of obligating the County to guarantee Little Lake water levels at 976 feet, the water must be impounded, i.e., a water control structure must be constructed and placed so that water cannot escape unless it exceeds 976 feet. This goal may be achieved through a petition for impoundment under the Drainage Statutes.

To conserve and make more adequate use of our water resources, a person, public or municipal corporation, governmental subdivision, the state or a department or agency of the state, the commissioner of natural resources, and the United States or any of its agencies, may petition for the installation of dams or other control works in drainage ditch systems to impound or divert waters for beneficial use.

Minn. Stat. § 103E.227, subd. 1(a).

Because the Wildlife Association qualifies as a “person” under the Drainage Statutes, it may petition the Drainage Authority for an impoundment. See Minn. Stat. § 103E.005, subd. 20. As a petitioner of an impoundment proceeding, the Wildlife

Association would be a party. And as a party to the proceeding, the Wildlife Association could appeal the Drainage Authority's order establishing the drainage project or the order refusing to establish the drainage project, and also appeal the district court's subsequent order. See Minn. Stat. §§ 103E.095, subs. 1 and 5.

The Wildlife Association could also intervene in a drainage proceeding. And as a party to the proceeding, it could appeal the Drainage Authority's order.

The Wildlife Association argues that caselaw shows that unless a person is both a party and financially aggrieved by a Drainage Authority's order, the person cannot appeal the order. Resp.B.15-16. This interpretation of caselaw and the Drainage Statutes is flawed.

A party to a drainage proceeding may appeal an order by the Drainage Authority that dismisses drainage proceedings or establishes or refuses to establish a drainage project, to district court. Minn. Stat. § 103E.095, subd. 1. By the plain words of the statute, the Drainage Authority's order may be appealed by anyone who was a party to the drainage proceeding. A party aggrieved by a final order or judgment on appeal to the district court may appeal as in other civil cases. Minn. Stat. § 103E.095, subd. 5. Again, if a person is a party to the appeal and that person is aggrieved by the district's court's final order or judgment on appeal, then that person may appeal.

The meaning of "aggrieved" in the context of appeals of orders establishing a drainage ditch was discussed in Anderson v. Board Of County Commissioners Of Meeker County et al., 48 N.W. 1022 (Minn.1891). The Court stated that to be aggrieved is to "have sustained an injury of which the district court can take cognizance when

proofs are made.” Id. at 1023. Such an injury would be evidenced by the Drainage Authority’s action, “with reference to appellant, as authorized him to call in question the propriety of their order or judgment locating or establishing the ditch in controversy.” Id. Therefore, to be aggrieved would include suffering the assessment of benefits or damages from the drainage proceeding, and also suffering a “negative” final order or judgment as a party to the petition.

In In Re Petition of Schoenfelder, 55 N.W.2d 305 (Minn.1952), persons who were not parties to the drainage proceeding or aggrieved by the district court’s order on appeal were found not to have standing to appeal the district court’s order. Schoenfelder, 55 N.W.2d at 307. The Court held that a person who was not a party and would not be assessed benefits or damages could not appeal the district court’s order. Id. The Court also stated that a person could appeal an order by “first taking some action to become a party, by intervention or otherwise, in the proceeding itself.” Id. The Court did not hold that a person must be both a party and financially aggrieved to gain the right of appeal of the district court’s orders. It is ridiculous to assume that a party to the original drainage proceeding could not challenge or allege constitutional violations unless that party’s property was also assessed benefits or damages, as claimed by the Wildlife Association. See Resp.B.16.

As a party to an impoundment proceeding, or as party to a drainage proceeding by intervention, the Wildlife Association would have the right to appeal the Drainage Authority’s decision.

III. THE CONTENTS OF THE COUNTY'S APPENDIX AND ADDENDUM ARE CONSISTENT WITH APPELLATE RULE REQUIREMENTS.

The Wildlife Association's objection to the content of the County's Appendix and Addendum is without merit. Resp.B.1. Minnesota Civil Appellate Rule 130.01, subd. 1 requires the appellant to prepare and file an appendix which includes "the relevant pleadings," "relevant written motions and orders," "memorandum opinions," and "the notice of appeal." Minn. Civ. App. R. 130.01, subd. 1(a)(b)(e) and (h). Minnesota Civil Appellate Rule 128.04 requires the appellant to reproduce the relevant statutes, rules and regulations if the determination of the appellate issues presented requires the study of the statutes, etc. Minn. Civ. App. R. 128.04.

The County followed the requirements of the Civil Appellate Rules in submitting its Appendix and Addendum. The County's Appendix contains the relevant pleadings, written motions and orders, memorandum opinions and the notice of appeal. And, since the appeal requires the study of drainage and water statutes, the County's Addendum includes those statutes, rules and regulations. The County's submission of documents is not an attempt to try the factual issues in its appeal. Rather, the content of its Appendix and Addendum are Civil Appellate Procedure requirements. Accordingly, the Court should strike the Wildlife Association's objection to the County's Appendix and Addendum.

CONCLUSION

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.

RATWIK, ROSZAK & MALONEY, P.A.

Dated: September 26, 2005

By: Kimberley K. Sobieck

Scott T. Anderson
Attorney Reg. No. 157409
Kimberley K. Sobieck
Attorney Reg. No. 288299
300 U.S. Trust Building
730 Second Avenue South
Minneapolis, MN 55402
(612) 339-0060

**ATTORNEYS FOR APPELLANT
NICOLLET COUNTY BOARD OF
COUNTY COMMISSIONERS**

RRM 82155/KKS/tt

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**CERTIFICATION OF
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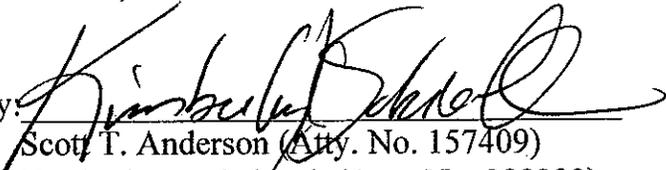
Marlin Fitzner, et al, intervenors,

Respondent.

I hereby certify that this Brief conforms to the requirements of Minn. R. Civ. App. P. 132.01, subds. 1 and 3, for a brief produced with a proportional font. The length of this Brief is 209 lines, 2470 words. This Brief was prepared using Microsoft Word.

RATWIK, ROSZAK & MALONEY, P.A.

Dated: September 26, 2005

By: 

Scott T. Anderson (Atty. No. 157409)
Kimberley K. Sobieck (Atty. No. 288299)
300 U.S. Trust Building
730 Second Avenue South
Minneapolis, MN 55402
(612) 339-0060

ATTORNEYS FOR APPELLANT