



*State of Minnesota  
In Court of Appeals*

State of Minnesota ex rel. Swan Lake Area Wildlife Association,  
*Petitioner-Appellant,*

vs.

Nicollet County Board of County Commissioners,  
*Respondent,*

vs.

Marlin Fitzner, et al., Intervenor,  
*Respondents*

vs.

Minnesota Department of Natural Resources,  
*Respondent.*

**APPELLANT'S BRIEF**

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## LEGAL ISSUES

**1. Did the District Court on remand comply with the mandate issued by the Court of Appeals?**

**Trial Court held:** In the affirmative

**References:** *State ex rel Swan Lake Wildlife Association v. Nicollet County*, 771 N.W.2d 529 (Minn. App. 2009); *5 Am. Jur.2d, Appellate Review § 734; Vargas v. Superior Court*, 60 Ariz. 395, 138 P.2d 287, 288(1943) *Estate of Hartz*, 238 Minn. 558, 58 N.W.2d 57 (1953)

**2. Did the remedy sought by Relator pursuant to Minn. Stat. Chapter 116B (MERA) consist of a repair of the dam on Little Lake rather than a restoration of Little and Mud Lake as beneficial public resources?**

**Trial Court held:** In the affirmative

**References:** *State ex rel Swan Lake Wildlife Association v. Nicollet County*, 771 N.W.2d 529 (Minn. App. 2009); *Minn. Stat. § 116B.04 County of Freeborn by Tuveson v. Bryson*, 309 Minn. 178, 180, 243 N.W.2d 316, 317 (1976). [Bryson II]

**3. Did the Relator establish at trial that the “paramount concern” for natural resources of Little Lake and Mud Lake is accomplished by establishment of a crest elevation on the lake dam at 976.0 feet above sea level?**

**Trial Court held:** Did not rule on this issue

**References:** *State ex rel Swan Lake Wildlife Association v. Nicollet County*, 771 N.W.2d 529 (Minn. App. 2009); *Minn. Stat. § 116B.04; Freeborn County by Tuveson v. Bryson* 309 Minn. 178, 243 N.W.2d 316 (1976) [Bryson II]

**4. Was the District Court obliged to render Findings of Fact to justify its determination of a crest elevation on the dam on the subject lake?**

**Trial Court held:** Did not issue findings

**References:** *Chickering and Sons v. White*, 42 Minn. 457, 44 N.W. 988 (1890) *Midway Mobile Home Mart, Inc. v. City of Fridley*, 271 Minn. 189, 193-194, 135 N.W.2d 199, 202 (1965); *Posselt v. Posselt*, 271 Minn. 575, 136 N.W.2d 659 (1965)

**5. Were the Intervenor in this case afforded the opportunity to be heard on the deletion of language from the original Findings ?**

**Trial Court held:** In the affirmative

**References:** *State ex rel Swan Lake Wildlife Association v. Nicollet County*, 771 N.W.2d 529 (Minn. App. 2009).

**6. Does the restoration of water in the basins of protected meandered lakes constitute a “taking” of landowner’s property rights that would preclude a remedy under Minn. Stat. Chapter 116B (MERA)?**

**Trial Court held:** Apparently in the affirmative

**References:** *Stenberg v, County of Blue Earth*, 112 Minn. 117, 120, 127 N.W. 496, 497 (1910); *Floodwood-Fine Lakes Citizens Group v. Minnesota Environmental Quality Council*, 287 N.W.2d 390 (1979) *In Re Lake Elysian High Water Level* 208 Minn. 159, 293 N.W. 141 (1940)

## PROCEDURAL HISTORY

Appellant Swan Lake Area Wildlife Association (the “Association”) brought the present action under the Minnesota Environmental Rights Act in June 2003 against the Nicollet County Board as the agency responsible for the administration of Nicollet County Ditch No. 46A and the drainage of Little Lake and Mud Lake, two meandered lakes in Nicollet County. Several local landowners sought to intervene which was granted by the lower court.

Following discovery, the Association moved to amend its Complaint and add the Department of Natural Resources as a party which motion was granted. The County moved to dismiss the case which the court denied. The County appealed the denial of the dismissal and this Court affirmed the district court. **(State ex. rel. Swan Lake Area Wildlife Association v. County of Nicollet** 711 N.W.2d (Minn. App. 2006). [**Swan Lake I**]

After the affirmance, the MERA call went to trial in St. Peter for seven days in April 2007.

At the trial, the Association submitted its case to establish that the County had violated MERA for its destruction and impairment of Little Lake and Mud Lake. Secondly, the Association called various expert witnesses to establish that the lake should be restored to at least three feet of depth year around which the Association’s expert witnesses established as needing a crest elevation of 976.0.

The Nicollet County Board's case disputed whether the Association had proven that the County had violated MERA. The County did not respond with witnesses or evidence to attempt to establish a desirable elevation for the lakes.

The Department of Natural Resources in its case alleged that it had the exclusive jurisdiction to establish the outlet elevation for the structure on Little Lake which it wanted at 973.8 feet above sea level. DNR rested without attempting to submit proof through witnesses or other evidence of an environmentally desirable elevation for the lakes.

The Intervenors alleged that the lakebeds that they occupied would suffer loss of value if the lakes were restored. They denied that the Association had submitted a prima facie MERA case. The Intervenors did not submit proof through witnesses or other evidence of an environmentally desirable elevation for the lakes.

The trial judge concluded that the Association had established a MERA violation and that the desirable depth of the lakes should be three feet to create a hemi-marsh.

Judge Moonan who had presided over the trial and who issued the Findings of Fact, Conclusions of Law, Order for Judgment and Judgment died before post-trial motions could be brought. The case was assigned to Judge John Rodenberg who heard the motions.

Judge Rodenberg revised the Findings and Conclusions of Judge Moonan. He determined that DNR had exclusive jurisdiction of establishing an outlet crest elevation so he confirmed the DNR's desired elevation at 973.8.

The Association appealed that decision urging that DNR did not have exclusive jurisdiction to establish outlet control elevation and that a three-foot depth hemi-marsh should be restored in the basins of Little Lake and Mud Lake.

The Court of Appeals reversed and remanded the case to Judge Rodenberg. **State ex. rel. Swan Lake Area Wildlife Association v. County of Nicollet**, 771 N.W.2d 529 (Minn. App. 2009) [**Swan Lake II**].

Judge Rodenberg received oral argument and briefs from the four parties. None of the parties sought to introduce new evidence.

Judge Rodenberg ordered that the outlet elevation should be 973.8 which would provide a maximum depth of two feet when the lake water reached the crest of the dam.

It is from this order and judgment that this appeal has been taken.

## STATEMENT OF FACTS

Little Lake is a meandered lake in Oshawa and Granby Townships of Nicollet County comprising approximately 440 acres. (Exhibit NC-17) Mud Lake is a meandered lake entirely in Granby Township and includes approximately 444 acres [Exhibit RL-1M]. The lakes provide the potential for significant game habitat, storm water and nutrient retention and hunting recreation. [T. 1124]

There has been significant effort from local farmers over the years to drain these lakes and turn these lakebeds into farm fields. In 1898, the Respondent County Board authorized Nicollet County Ditch 36 to drain these meandered lakes and the surrounding countryside. William Witty, a local sportsman, objected to the drainage of these lakes and sought judicial relief in the district court and ultimately the Minnesota Supreme Court. In denying the authority of Nicollet County to drain these lakes, Justice William Mitchell acknowledged Little and Mud Lakes as follows: “The lakes in question<sup>1</sup>, although neither very large nor deep, are each of more than 160 acres in extent, and of sufficient size and depth to be capable of beneficial public use.” **Witty v. Nicollet County Board of Commissioners**, 76 Minn. 286, 79 N.W. 112 (1899).

Justice Mitchell then held:

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<sup>1</sup> The identity of Little and Mud Lakes can be confirmed by reference to the Witty Briefs in the Appellate Court Library of which the court can take judicial notice. Which clearly show Little and Mud Lakes as the subject meandered lakes. The Supreme Court has said that it “will take judicial notice of its own past orders and records.” **Sharood v. Hatfield**, 296 Minn. 416, 210 N.W.2d 275 (1973). In **Bowe-Burke Mining Co v. Willcuts**, 45 F.2d 394 (D. Minn. 1930) the Minnesota Federal District Court acknowledged that a court will take judicial notice of its own records. In **Rhodes v. Meyer**, 334 F.2d 709 (8<sup>th</sup> Cir. 1964) the U.S. Eight Circuit Court of Appeals, held that it was proper for the state appellate court to take judicial notice of briefs and transcripts filed in other related cases.

Lakes which come within the definition of 'public waters' belong to the state, not in its proprietary, but in its sovereign, capacity, in trust for the public. **Lamprey v. State**, 52 Minn. 181, 53 N.W. 1139 If one of these public lakes is to be drained, it will amount to the destruction of one public right for the sake of another public use. This is very different from exercising the right of eminent domain or of taxation over private property for a public purpose. It would naturally be supposed that, if the legislature intended to delegate to the county commissioners authority to determine whether the damage to result from destroying one public right would be more than counterbalanced by other public benefits to be derived therefrom, it would have expressly so declared, and not left it to inference or doubtful implication.

76 Minn. at 288-290, 79 N.W. at 113

The proposed drainage of Little and Mud Lakes, and other meandered lakes was declared contrary to law. **Id.**

Eight years later the Nicollet County Board again proposed approaching Little and Mud Lakes with a new ditch, County Ditch 46. The Order of the County Board did not acknowledge any impact on meandered Little or Mud Lakes and made no findings regarding them. [Exhibit RL-6]. The viewers (ditch appraisers) did not find any lakebed lands converted into farm use so they did not assess those lands for benefits. The District Court approved of the ditch including the partial drainage of Little Lake on the grounds that it had a depth of only six feet and was of a marshy character and was not of substantial public benefit. [Exhibit 94, T. 810].

Little Lake had a water elevation of 977.4 feet above sea level prior to ditch construction. [T.1001, T. 1331] When the ditch was dug by the drainage contractor in 1909, he dug the ditch 1.4 feet deeper than authorized by the

drainage authority. [T. 276; Exhibit NC-17]. Over the next 40 years, however, the ditch filled in so that by 1950, the lake had restored to at least 357 of its open water acres. [T. 1006].

By then, however, there was a movement afoot to install more drainage. As part of that effort, the County Board authorized ditching on the south side of Little Lake and installed a sheet metal structure with a crest at elevation 973.09 feet above sea level. [T. 1296]

By 1966, even the marginal wildlife values provided by the sheet metal structure were lost when the structure collapsed because the county had installed “inadequate sheet piling depth”. [T.1282, Exhibit RL-51] The Department of Conservation brought the problem to the attention of the Board but it did not react. Since 1966 the Nicollet County Board has done nothing. Little Lake and Mud Lake remain today as they did in 1966 as little more than mud flats. There is no water in the lakes except for some isolated pockets and the water levels at the time of trial were 0.2 of a foot below the lake bottom. [T.993]

In 1970 the County was interested in more drainage improvements in the watershed of Little and Mud Lakes. The Board applied for a determination from the Commissioner of Conservation whether meandered Little Lake was public waters. The Commissioner issued his decision on October 9, 1970, that Little Lake constitutes public waters. [Exhibit 61]. No appeal was taken from that decision.

By 1971 the Nicollet County Board was moving rapidly toward the establishment of an improvement to County Ditch 46A (as it had now been renumbered) in the watershed of Little and Mud Lakes. On October 18, 1971, the Board ordered the approval of the ditch and let bids thereon . The Board later requested the Commissioner for authority to place a structure at elevation 973.2 but the Commissioner indicated that in order provide desirable waterfowl habitat, the structure must be at a control elevation of at least 973.8. [Exhibit 94].

This the County Board declined to do. In fact the Board has done nothing to replace its dam that has laid flat on the lakebed since 1966. The County Board later did construction in 1974 in the beds of the lakes [T.1056-1058] but never sought or obtained DNR Waters authorization to do so. [T.1282] Little Lake and Mud Lake are meandered protected public waters of the State of Minnesota<sup>2</sup>, have remained in their drained condition despite the efforts of the Swan Lake Area Wildlife Association and other sportsmen's groups to bring attention to the issue and to restore these public lakes.

On June 5, 2003, the Swan Lake Wildlife Association brought this action pursuant to the Minnesota Environmental Rights Act. The Complaint also included a Count I which sought to enforce the Commissioner's order of March 15, 1972 [Exhibit 94].The history of proceedings is set forth in more detail in the Procedural History section of this brief.

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<sup>2</sup> Mr. Johnson noted that Mud Lake and Little Lake are now connected so that an outlet control on Little Lake will also control water levels on Mud Lake [T.205]

Trial commenced on April 9, 2007 before the Honorable John R. Moonan in St. Peter. Engineer and Association Board member Pell Johnson introduced the historical documents on the background of Little and Mud Lakes<sup>3</sup> as well as those relating to Nicollet County Ditch 46 and 46A. [T. 35 – 374; T. 403-507; T. 671-701]

DNR Fisheries Supervisor Hugh Valiant testified to the trout fisheries values of Seven Mile Creek which is the outlet of County Ditch 46A. He spoke of the importance of sediment retention and water impoundment to protect the Creek water temperatures and water clarity for that trout stream. [T. 375-401].

County Attorney Michael Riley identified certain documents and procedures of the county board. [T. 511-669]

Dennis Simon, a DNR wildlife specialist was called by the Relator to testify. Mr. Simon was DNR's game specialist for Nicollet County and three adjoining counties from 1987-2000. [T.708]. While assigned to Nicollet County, one of his main responsibilities was the coordination of the Swan Lake Wildlife Project, a major public venture to foster improved waterfowl conditions. [T.710]. Mr. Simon noted the significant loss of wetlands in Nicollet County. [T.711]. Little and Mud Lakes are part of a large complex of marshes and wetlands that span the lands from Courtland, Minnesota, to Swan Lake. [T.712]. Little Lake and Mud Lake are important satellite wetland lakes to Swan Lake. [T. 743].

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<sup>3</sup> It was uncontested at trial that Little Lake and Mud Lake are protected (public) lakes of Nicollet County. The trial court and this Court can take judicial notice of the certified protected water inventory as it appears on Appendix A.189 to A.192. See **State Department of Highway v. Halvorson** 424 181 N.W.2d 473 (1970) and **Nelms v. Civil Service Commission** 300 Minn. 319, 220 N.W.2d 300 (1974).

Mr. Simon also described in detail the life cycles for waterfowl provided by good wetland habitat conditions. [T.712-714]. He stated that Mud Lake and Little Lake provide poor waterfowl habitat conditions at the present time because of the low water levels on those lakes, which it turn leaves them with little open water and related food and cover amenities [T.714-719]. The low water conditions are particularly a problem in July, August and September of the year when the birds are flightless. [T.719].

In order to provide a reasonable productive waterfowl lake, it is desirable to provide a "hemi-marsh" condition which requires approximately 50% open water and 50% emergent vegetation. This is correlated with water depths of at least half the basin covered by at least three feet of water [T.719-720].

In the recent past, two feet of water depth would have been sufficient to maintain a wildlife lake. [T.722]. However, Minnesota has experienced an invasion of narrow leaf cattail from the eastern United States. [T.722]. Narrow leaf cattail tends to choke out other species and reduces wildlife production [T.721-724]. The best method of controlling narrow leaf cattail is the maintenance of water levels over three feet in depth which floods out narrow leaf cattail. [T.722-723]. Furthermore, three feet of water will allow muskrats to survive the winter under the ice which is beneficial because muskrats work to keep water areas open and not choked with narrow leaf cattail and other problem emergent vegetation. [T.722-723]. ***"We consider three feet really to be the***

***minimum that we would like to see in order to – to maintain that 50 percent open water in a Type 3 wetland.” [T.723].***

Mr. Simon expressed his expert opinion that (1) Little and Mud Lakes are significant resources of the State of Minnesota (2) Little and Mud Lakes are unique resources of the State of Minnesota and (3) The drainage of Little and Mud Lakes has an adverse effect upon them as resources and (4) The drainage of Little and Mud Lakes would not have an adverse long-term effect on them provided the lakes are restored. The drainage damage is “reversible” by placement of a control structure on the lakes providing restoration of water depths. [T. 724-726].

Engineer Geoffrey Griffin determined what flooding would occur in the basins of Little Lake and Mud Lake under certain water conditions and rainfall events. [T. 838-980]. The witness had accomplished over 200 wetland restorations. [T. 893]. Mr. Griffin found there would be 148 acres of land flooded [T. 865] All of these lands would be converted lakebed lands “because the farmers are trying to farm the historic lake bottom.” [T. 973-974]

Jeff Allen Hoffmann, a registered land surveyor, testified to the survey of the water levels he undertook in the basin of Little Lake.[T. 981-995]. He took six survey shots on April 13, 2007. What he found was that the ambient water level was 2/10 of a foot or about three inches below the bottom of Little Lake. [T. 993]. The lake was dry.

Richard Allen Osgood, a limnologist, was next called to the stand. Mr. Osgood is the President-Elect of the North American Lake Management Society, an international organization of 1500 limnologists and other lake managers. [T. 998]. Considering different depths, if the control elevation was 976, the deepest point in the lake would be five feet. Correspondingly, with a crest of 975 the deepest point would be 4 feet and at 974, it would be 3 feet of depth.[T. 1021]. Mr. Osgood also conducted studies of the basin of Little Lake to determine what water depths could be anticipated with a control elevation on the lake of 976.0. He then applied the limnological formulae for normal expected rainfall, temperatures and evaporation through the growing season and arrived at the maximum water depths for Little Lake as shown in the following chart:

<b>976.0 Outlet Crest</b>					
June	July	August	September	October	November
5.0 ft.	4.3ft.	4.0 ft.	3.7 ft.	3.4 ft.	3.3 ft

[T. 1022]

If the crest were set at 975.0, we would have the following depths

<b>975.0 Outlet Crest</b>					
June	July	August	September	October	November
4.0 ft.	3.4ft.	3.0 ft.	2.6 ft.	2.3 ft.	2.3 ft

[T. 1023]

Intervenor Ray Allen Smith confirmed that various work was performed in the bed of Little Lake in the 1970's which he knew required a water permit from the DNR. [T. 1045] He thought that the county would have gotten one. He also expressed concern that some of the land he farms may be flooded although he did not know if it was lower than the lakebed. [T. 1053]

Intervenor Roger Rosin testified that the county performed ditching in the beds of Little and Mud Lakes in or about 1974. [T. 1056-1058]. He had sold the land he owned near Little Lake to his sons. [T. 1061]

Kevin Kuehner,, a Water Quality Board employee of Nicollet, Brown and Cottonwood Counties, was next called to the stand. He testified about water quality issues and potential solutions along the Seven Mile Creek, which is the outlet of County Ditch 46A. He had worked on a number of wetland restoration projects in Nicollet County [T. 1148-1153]. Silt retaining impoundments such as lake basins can retard erosion and sedimentation into the Creek. [Exhibit 163]. At the close of his testimony, the trial judge asked him:

**THE COURT: Has that--the county board ever discussed that with you regarding water control or anything?**

**THE WITNESS [Kevin Kuehner]: No.**

(T. p. 1195).

Gerald Gray is a wildlife biologist with 42 years of wildlife management experience including 2000 lake and wetland restorations including projects ranging from four to 5000 acres. [T. 1210]. In visiting Little Lake and Mud Lake,

he observed that the lakes are in poor condition to produce and support waterfowl. [T. 1216, T. 12-18-1219]. He took aerial photographs showing the current conditions of the lakes [Exhibits 182, 183, 184 and 185]. He compared Little and Mud Lakes to nearby Middle Lake which he believed provided a high quality of waterfowl production amenities. [T. 1219]. Ms. Gray testified that Little and Mud Lakes could provide a similar degree of quality habitat if the lakes were restored to elevation 976.0. [T. 1220-1221] He also indicated that “typha angustifolia” also known as narrow leaf cattail is a major problem for wildlife production on lakes which can be prevented by maintaining water levels at three feet or greater. [T. 1222-1223] Restoring the water levels on Little and Mud Lakes would cause a significant improvement to these lakes without undertaking any additional land management changes [T. 1223]. He explained that 976 was the best elevation on the lakes because through the summer evaporation would absorb water from the lakes – even as much as an inch a day - so it is necessary to have a sufficient depth of water to sustain the open water conditions. [T.1224, 1260] He also confirmed from his study of the aerial photographs that portions of the beds of Little Lake and Mud Lake have been diked off and farmed. [T. 1262].

The Department called DNR Area Hydrologist Leo Getsfried to the stand. He testified that the control structure placed in 1950 was extremely deteriorated and nonfunctional. He noted that it had apparently even been struck with a large hammer to damage it [T.1277]. He stated that the Department at one time had authorized a dam at with a crest at elevation 973.8 but the dam was never

installed. [T. 1281-1282]. The Department never granted a permit for work in the bed of Little Lake. [T. 1282]. He testified that water and silt retention was an important function of Little and Mud Lakes and setting the outlet crest would provide additional public benefits. [T. 1379]. The proposal for restoration of Little Lake that was prepared in 1996 identified a dam location on land owned by the Department of Natural Resources which the witness testified was a suitable and reasonable location for a control structure. [T. 1381].

John Scherek, chief of the survey crew for the DNR Division of Waters testified to his observations of the destroyed dam on Ditch 46A and measurements that were made since 1972 [T. 1292-1348].

Intervenor Marlin Fitzer testified that he owns the 148 acres that Mr. Griffin had described and expressed concern that if Mud Lake were restored, he would lose farmland. [T. 1352-1353]. He pumps water into Mud Lake in order to keep the land dry. He acknowledged that the land may be in the lake basin. [T. 1355-1359].

Intervenor Dan Rosin owns a homesite of 2.78 acres that is 30 to 40 yards from the ditch. [T. 1360-1362]. He observed ducks nesting in Mud Lake approximately ten yards from his back window. [T. 1364-1365].

The trial was concluded at 12:55 in the afternoon of April 20, 2007. [T. 1395] thereupon the judge took the matter under advisement.

On September 17, 2007, Judge Moonan issued his Findings of Fact, Conclusions of Law, Order for Judgment and Judgment. [A-76 to A-103]. In his

Findings he concluded that the County of Nicollet and the Department of Natural Resources through inaction had failed to maintain Little and Mud Lakes as resources pursuant to the Minnesota Environmental Rights Act (Minn. Stat. Chapter 116B). The Court acknowledged the evidence of the desirability of the maintenance of three (3) feet of water in these lakes [Finding # 59, T. A-89] which corresponded to Relator's request for a crest on the outlet control structure of 976.0 and the consequential reflooding of 148 acres of Mud Lake lakebed that had been farmed in recent years. [Finding # 66, A-91).

When the case was originally served, in Count 1 of the Complaint Relator sought to enforce the March 15, 1972 "Findings of Fact, conclusions Order and Permit and Order" (A-11 to A-17). This contained the proposed crest elevation of 973.8. This Count was dismissed by the Court on August 25, 2004 (A-25 to A-35). This dismissal was confirmed by Judge Moonan's Judgment (A-107). No evidence had been submitted at the April 2007 trial as to the desirability or feasibility of establishing a crest elevation at 973.8 feet above sea level.

Judge Moonan further ordered a dam to be constructed capable of impounding water to a depth of three feet and constructing "dikes within the meandered boundaries of Little Lake and Mud Lake" pumps and lift stations that would "ensure that no sub-terrain water would enter any of the farmland and home sites on Mud and Little Lake." (A-96).

Among other things, Judge Moonan issued Finding #66 which stated:

The request by Relator for a remedy of a run-out elevation of the dam at 976 feet, if granted, would cause flooding on many acres of surrounding farmland, perhaps as much as 148 acres of land now used in agricultural production. That agricultural land contains tiling which Intervenor or others have relied upon for years. Some homesteads and roadways would also be impacted by such a water level.

[Appendix A.91]

Judge Moonan's Finding #67 stated:

Some of the Intervenor, and presumably the Nicollet County Board of Commissioners, believe flooding would occur on said lands if there is any change in the level of the surface of the water in the lake. But, no precise evidence, other than general elevation maps, identifies the extent of that flooding or what could be done to prevent such flooding.

[Appendix A.91]

The Findings were not amended by Judge Rodenberg and remain the Law of the Case.

Due to various issues all parties had with the workability of some of the provisions of the Judgment, all of the parties filed motions for amended findings or new trial. In December 2007, Judge Moonan died and the case was assigned to Judge John R. Rodenberg.

Judge Rodenberg entertained the motions in New Ulm on May 2, 2008. On July 30, 2008, he issued an Order, Memorandum and Amended Judgment. (A-151 to A-177). In that decision he stripped the provisions relating to the installation of dikes and lift stations. He reaffirmed the dismissal of Count 1 relating to the enforcement of the Commissioner's 1972 Order for a 973.8 crest

(A-163 to A-164). He concluded that “the legislature has entrusted the exclusive responsibility for lake level establishment and maintenance to the DNR” (A-166) and “The Association vigorously and passionately argues that the lake levels should be established in this proceeding and that, as to Little Lake, the proper elevation should be 976.0 feet above sea level. The Court has very seriously considered those arguments, but is without jurisdiction to grant the relief requested.” (A-167 to A-168). Nevertheless, the Court established the crest elevation at 973.8 pursuant to the dismissed 1972 Order (A-155).

The Association appealed that decision and this Court reversed the district court and held:

In sum, based on our previous holding, the plain language of MERA, and the evidence presented at trial regarding the impairment of Little Lake and Mud Lake, we are compelled to conclude that the district court may properly exercise jurisdiction over the DNR and may order the lakes to be refilled. Furthermore, it is well within the district court’s authority to set the dam’s crest elevation in order to raise the lakes’ water levels to protect them as natural resources.

771 N.W.2d at 536-537

On remand the district court made no findings or conclusions other than to say that if MERA is enforceable as the Association has petitioned at 976.0 “There will be large-scale flooding of areas currently occupied by homes, farms, roads and other improvements.” [Appendix A.184-185]. That observation was at odds with the confirmed Finding No. 66 [Appendix A.91] that the flooding would occur on 148 acres in the lake basin as identified by Engineer Griffin [T.865, T.973-974].

Judge Rodenberg then ordered that the same elevation of 973.8 that he had previously ordered would be the crest elevation and 976.0 would be the ordinary high water level of the lakes. He did not make Findings on these Conclusions.

It is from the Order and Judgment resulting therefrom that this appeal is taken.

## STANDARD OF REVIEW

An important issue of Appellant Association is that the district court did not obey the Mandate on Remand that this Court issued in its decision of September 1, 2009. The Mandate was a remand directive to the district court to establish an elevation crest on the dam at Little Lake that would provide the permanent hemi-marsh condition of three feet of depth that Judge Moonan determined to be the proper depth for Little and Mud Lake.

The ultimate decision that this Court must make on that issue is an interpretation of what is the Law of the Case as mandated by this Court. As such, the court accords the lower court no deference in the determination of the Mandate contained in **Swan Lake II**.

This is a jurisdictional matter and the standard of review of the Mandate is de novo. **Reed v. Albaaj** 723 N.W.2d 50 (Minn. App. 2006); **Johnson v. Western National Mutual Insurance Co.**, 540 N.W.2d 78 (Minn. App. 1995).

As the Eighth Circuit stated in appeal following remand.

On remand, a district court is bound to obey strictly an appellate mandate [omitting cases]. If the district court fails to comply with an appellate mandate, the appellate court has authority to review the district court's actions and order it to comply with the original mandate.

**Bethea v. Levi Strauss and Co.** 916 F.2d 453, 456 (8<sup>th</sup> Cir. 1990). See **City of Okoboji v. Iowa District Court** 744 N.W.2d 327 (Iowa, 2008) Hence, the interpretation of the previous Mandate of this Court is a de novo matter.

It is the position of the Association that this Court need not go beyond the failure of the district court to obey this Court's Mandate on remand. However; if for any reason this Court deemed it necessary or desirable to proceed beyond the remand Mandate, then the standard of review for these issues would be clear abuse of discretion. **Boschee v. Duevel** 530 N.W.2d 834 (Minn. App. 1995).

## INTRODUCTION

The cornerstone of the Association's case is that the meandered Little Lake and Mud Lake should be environmentally functional public lakes. This means a year-round depth of three feet of water to provide the hemi-marsh condition that the Association's biologist witnesses proved at trial.

The Association does not want the one- to two-foot veneer of water that a mere replacement of the Ditch 46 lake dam would provide with a crest at 973.2 or even 973.8 as suggested by the district court, DNR, the County Board and the local landowners.

Defendants would be satisfied with moist mud flats in the basins of Little Lake and Mud Lake. The Association has battled for years for meaningful lake depths and would not be satisfied with the minimal water levels proposed by the lower court.

The Association pleaded and proved that the public interest mandates a three-foot year-round depth which the lake bottom contours show needs to be at 976.0 feet above sea level.

Before he died, Judge Moonan ruled that three feet was the appropriate water depth for Little and Mud Lakes. The issue was what crest elevation on the dam to be constructed would accomplish this result.

Thereafter DNR argued that it alone could establish the outlet crest elevation which it determined without evidence as 973.8. The County and the landowners agreed that DNR alone had this authority. The Association

maintained that the district court had concurrent authority to establish it pursuant to the evidence submitted in the trial in April 2007. The lower court established the level of 973.8 because it said that DNR had the exclusive authority. The Association appealed and this Court held that the district court had concurrent power to set the crest elevation of the outlet structure based on the evidence.

On remand before the lower court, the Association relied on its evidence at trial that the crest elevation should be 976.0. All of the defendants challenged whether the Association had submitted a prima facie case on a MERA violation but none of the defendants introduced evidence that the elevation urged by the Association was impractical or infeasible under Minn. Stat. § 116B.04.

The lower court decided once again that the crest elevation should be what DNR wanted. Once again, at 973.8.

This Court has judicial supervision over the lower court to which it remanded the case. The Association submits the lower court did not follow this Court's mandate and that the crest elevation should be set at 976.0

As discussed in the Introduction to the Association's Brief in **Swan Lake II**, "In terms of sheer size, this case involves the largest acreage (approximately 840 acres) of lake remediation ever to come before this Court under the Minnesota Environmental Rights Act (MERA) Minn. Stat. Chapter 116B" (Appellant's Brief of February 19, 2009, p. xxiv)

## ARGUMENT

### **I. DISTRICT COURT DID NOT FOLLOW THE MANDATE OF THIS COURT ON THE RECENT REMAND**

In **State ex rel. Swan Lake Area Wildlife Association v. County of Nicollet** 771 N.W.2d 529 (Minn. App. 2009) [**Swan Lake II**], this Court ruled that the district court in a MERA action could not simply defer to the state DNR's preference for 973.8 feet above sea level based on DNR claim of exclusive jurisdiction over the establishment of lake levels.

When an appellate court returns a case to a lower court on remand, that is linked with a Mandate of what the lower court is to do. "A trial court must follow the mandate of the appellate court. In other words, a trial court on remand should be in accordance with the mandate and the result contemplated in the appellate court's opinion." 5 **Am. Jur.2d, Appellate Review**, § 734.

As one court held:

The duty of the respondent court and judge to comply with the mandate may not be questioned or evaded. The law is that the mandate must be strictly followed. It is binding on the trial court and enforceable according to its true intent and meaning.

**Vargas v. Superior Court**, 60 Ariz. 395, 138 P.2d 287, 288(1943)

In the present case, the mandate was plain and direct: "it is well within the district court's authority to set the dam's crest elevation in order to raise the lakes' water levels to protect them as natural resources." **Swan Lake II**, 771 N.W.2d at 537. [Emphasis added.] The district court did not do this.

The exercise of judicial authority in setting the water levels was not to reflect what DNR wanted, namely 973.8.

The exercise of judicial authority was not to set them at levels that were personally acceptable to the Board or to the intervenors (also 973.8).

This court did not authorize the lower court to set “the lakes’ water levels to preserve the intervenors’ ability to cultivate and occupy the lakebed”.

This court tasked the lower court with the responsibility “to raise the lakes’ water levels to protect them as natural resources.” What this required the court to do was to apply MERA standards including giving the environmental factors “paramount” status. **County of Freeborn by Tuveson v. Bryson**, 309 Minn. 178, 180, 243 N.W.2d 316, 317 (1976). [**Bryson II**]

Instead the court chose a number somewhat at random which was acceptable to the county board, the intervenors and DNR, namely 973.8. With similar *ipse dixit* treatment, the court chose the number of 976.0 to be the ordinary high water level of the lakes.

The court should have read the 1395-page transcript, reviewed the exhibits and made an environmental determination of what was best for the natural resources, namely Little and Mud Lakes.

In this regard, the erroneous process that the trial court was similar to the mistaken approach taken by the lower court in **Bryson II**. On remand, the district court judge balanced the environmental factors in preserving the Bryon Marsh against the impairment of farming operations by the neighboring farmer.

309 Minn 183-184, 243 N.W.2d 319. The Supreme Court found this calculus to be faulty in light of the paramount consideration to be given to environmental considerations.

Had the district court applied the proper approach “to protect [Little and Mud Lakes] as natural resources” we submit that the inescapable conclusion is that the lakes should be maintained with a crest elevation on the dam at 976.0. The Association was the only litigant to put on a case of what the desirable elevation on the control structure should be. As will be discussed presently, the county board and the intervenors based their cases on the alleged failure of the Association to present a prima facie case and then they rested without further evidence of their own. DNR tried its case based on its alleged exclusive power to set water levels and produced no evidence of why a particular level was desirable because it thought that the court did not have that authority. DNR then rested. The case was then complete.

When the Board and DNR raised their arguments to this court that a lower crest elevation such as 973.8 would have environmental benefits, this court dismissed those contentions:

[R]espondents claim that there was evidence at trial that lower water levels could benefit the environment and that the flooding caused by raising the crest elevation would actually "harm" other kinds of wildlife in the area. We find no support for these contentions in the record.

771 N.W.2d at 536. [Emphasis added.]

Certainly in light of the failure of the district court authority “to set the dam's crest elevation in order to raise the lakes' water levels to protect them as natural resources”, this court could remand the case to the lower court for yet another round of hearings and potential further appeals. On the other hand, this court could utilize its inherent power to correct the record to conform to the case for 976.0 which the relator established by its evidence.

In **Posselt v. Posselt**, 271 Minn. 575, 136 N.W.2d 659 (1965) the court critiqued the lower court's disposition of the record. The court further noted that it could remand the case for the lower court to take further action but the court noted:

However, here the record is clear; the evidence is without significant dispute; and we have undertaken the task of painstakingly reading and analyzing the entire record. While we would have been immeasurably aided had the court responded to defendant's post-trial motion and made more detailed findings, no purpose would now be served by a remand.

271 Minn. at 577, 136 N.W.2d at 661.

Since this court has already also done a painstaking review of the trial record in this case, we would urge that a similar disposition of this case upon its reversal would be proper.

**II. TRIAL COURT AND DEFENDANTS ERRONEOUSLY  
CHARACTERIZED THIS CASE AS ONE TO REPLACE THE  
WEIR ON A DAM IN A PUBLIC DITCH RATHER THAN TO  
RESTORE LITTLE LAKE AND MUD LAKE**

The Association has always focused on the regeneration of Little Lake and Mud Lake as environmentally functioning resources of the State of Minnesota. The Association has proven that three feet of water depth year-around will provide the environmental amenities that most closely approximate the natural conditions of Little Lake and Mud Lake. This conforms to the fundamental purpose of MERA “to preserve the environment in its natural state.” **State by Skeie v. Minnesota Power Coop Inc.** 281 N.W.2d 372, 373 (Minn. 1979) quoted with approval in **Swan Lake II**, 771 N.W. 2d at 535-536.

Where the lower court and the defendants have gone wrong is their contention that this MERA case is merely about the County Board’s poor maintenance of a dam in a public ditch.

The trial court stated:

There was, for some period of time, an outlet structure on the ditch, with an elevation of 973.2 feet above sea level. This structure maintained some level of water in the subject lakes. However, the County’s neglect of the outlet structure ultimately resulted in the outlet structure not functioning as it should have, and in fact not really existing at all.

That neglect of the outlet structures and the failure to repair it is the MERA violation that must be remedied.

Order of April 1, 2010, p. A.153 [Emphasis added.]

That is not what the Association's MERA case is about. If the trial court's statement were true, then the County could redeem itself from a MERA violation simply by installing a replacement ditch dam with a crest at 973.2. That would remedy the trial court's analysis of what the County did wrong.

Moreover, if all the County did wrong was failing to repair the existing dam, then how could a court under MERA compel a dam to be constructed higher than 973.2 - even for as little as 6/10 of a foot higher as the Board, Intervenors and DNR are anxious to do in this case? Clearly the case is not about repair of an existing dam.

Furthermore, if putting the outlet dam back to its condition as part of the ditch was all that was involved, then the Association could have compelled that to be done nine years ago under Minn. Stat. § 103E.715 and Little Lake and Mud Lake would continue to be no more than wet meadows.

The defendants insisted in **Swan Lake I** that the Association should petition the Defendant Nicollet County Board to repair the dam on Little Lake that was part of the ditch on a Repair Proceeding under Minn. Stat. § 103E.715. (See **Swan Lake I**) Even though this Court rejected the Ditch Repair argument

in **Swan Lake I**, it seems that bad arguments do not die easily. In its brief in **Swan Lake II**, defendant intervenors repeated the same discredited argument. See Intervenor's Brief of March 24, 2009. **"The Proper Method to Effect a Weir Repair in a Drainage System is a Drainage Repair Order."** (Intervenors **Swan Lake II** Brief, p. 21)

The Association agrees that it could have begun such a proceeding under Minn. Stat. § 103E.715 of the Drainage Code and forced the dam replacement.

For one thing, bringing a petition to the very county board that drained the lakes in the first place would be asking the fox to return the poultry to the chicken coop.

The objective of the Association is not to repair the ditch under Stat. § 103E.715. Rather the focus of the Association is to restore these two meandered lakes to a condition that once again provides natural environmental values. Thus the Association elected its remedy under Minn. Stat. Chapter 116B, the Minnesota Environmental Rights Act and not as a Minn. Stat. Chapter 103E ditch dam repair.

When the district court mischaracterized the remedy as one of drainage ditch dam replacement, this error diverted the legal considerations from one about public environmental rights to one about private ditch rights.

**III. AS A MATTER OF LAW UNDER MERA, LITTLE LAKE AND  
MUD LAKE SHOULD BE ORDERED RESTORED TO ELEVATION**

**976.0 AS SOUGHT BY APPELLANT**

This Appellant followed the well-established procedures under the Minnesota Environmental Rights Act, Minn. Stat. Chapter 116B.

The Relator Swan Lake Area Wildlife Association (“Association”) was required to set forth a prima facie case that the defendant county board (“Board”) acting as a drainage authority had caused “pollution, impairment or destruction” of natural resources.” Minn. Stat. § 116B.03.

The Association alleged in its original and amended Complaint that the Board had caused pollution, impairment or destruction of Little Lake and Mud Lake in Nicollet County by allowing the lakes to become impaired through drainage and failing to restore them to their natural condition. (Appendix, pp. A.7, A.43). The Board responded in its Answer by denying that it had caused pollution, impairment or destruction of these lakes. The Board did not allege affirmative defenses under Minn. Stat. § 116B.04 in the manner as set forth in Rule 8.03 of the Minnesota Rules of Civil Procedure. (Appendix p. 22)

The Association submitted its case to the trial court in April 2007 which it asserted constituted a prima facie case for pollution, impairment or destruction of these lake resources pursuant to Minn. Stat. § 116B.04.

The Association submitted evidence from a DNR biologist, an independent wildlife biologist and a qualified limnologist that three feet of depth on the lakes

year-around was environmentally beneficial for wildlife production and would cause the suppression of narrow leaf cattail. Three feet of water depth required a crest elevation on the dam of 976.0 feet above sea level.

At trial the Board and the intervening landowners denied that the Association had established a prima facie case. Defendant Board and Intervenors then rested their cases.

The Board and the Intervenors did not introduce evidence rebutting the Association's allegation of pollution, impairment or destruction of natural resources. They did not submit evidence to establish "that there is no feasible and prudent alternative and the conduct at issue is consistent with and reasonably required for promotion of the public health, safety, and welfare in light of the state's paramount concern for the protection of its air, water, land and other natural resources from pollution, impairment, or destruction." They did not submit evidence that some other elevation on the outlet structure would safeguard the public's "paramount concern" for its public resources.

At trial DNR did not dispute the Association's case of pollution, impairment or destruction of natural resources. DNR challenged the jurisdiction of the district court under MERA to establish the crest elevation on the Little Lake structure but asserted that DNR had sole jurisdiction to set the crest elevation which it wanted at 973.8. DNR then rested its case.

DNR did not submit evidence to establish "that there is no feasible and prudent alternative and the conduct at issue is consistent with and reasonably

required for promotion of the public health, safety, and welfare in light of the state's paramount concern for the protection of its air, water, land and other natural resources from pollution, impairment, or destruction.” DNR did not submit evidence that some other elevation on the outlet structure would safeguard the public’s “paramount concern” for its public resources other than its command that the crest shall be at 973.8.

All of the defendants gambled their legal positions on the validity of their respective theories of the case. When the Court of Appeals decided that the Association had submitted a prima facie case and that DNR did not have exclusive jurisdiction to determine the crest elevation on the structure, their respective cases collapsed and the Association was entitled to judgment on the remedy it sought, namely a Little Lake outlet dam crest at 976.0.

Minn. Stat. § 116B.04 provides in part material:

[W] henever the plaintiff shall have made a prima facie showing that the conduct of the defendant has, or is likely to cause the pollution, impairment, or destruction of the air, water, land or other natural resources located within the state, the defendant may rebut the prima facie showing by the submission of evidence to the contrary. The defendant may also show, by way of an affirmative defense, that there is no feasible and prudent alternative and the conduct at issue is consistent with and reasonably required for promotion of the public health, safety, and welfare in light of the state's paramount concern for the protection of its air, water, land and other natural resources from pollution, impairment, or destruction. Economic considerations alone shall not constitute a defense hereunder.

The seminal cases of **Freeborn County by Tuveson v. Bryson**, 297 Minn. 218, 210 N.W.2d 290 (1973) [**Bryson I**] and **Freeborn County by**

**Tuveson v. Bryson**, 309 Minn. 178, 243 N.W.2d 316 (1976) [**Bryson II**] provides valuable guidance for the proper procedure to be followed in MERA cases.

In **Bryson I** at the close of Relator Bryson's case in chief, the County Board moved to dismiss Bryson's MERA case without having to put on the Board's case. This was based on the alleged failure of Bryson to submit a prima facie case. The district court granted the dismissal. The Supreme Court reversed holding that Bryson had submitted a prima facie case and remanded it to give the Board the opportunity to put on its case. The Supreme Court held:

At the close of the Brysons' and intervenors' evidence, the defendants' motion for dismissal of the injunction action was granted. Rule 41.02(2), Rules of Civil Procedure, provides that a defendant does not waive his right to present evidence if his motion to dismiss at the time plaintiff completes his evidence is denied. It follows that when the trial court's grant of the motion is reversed on appeal, the defendants should be allowed to offer the evidence submitted on their condemnation petition as a defense and to present such other matters as may be a defense under the Environmental Rights Act.

We therefore remand the case to permit the defendants to present any affirmative defenses they may have under the Environmental Rights Act and to give to the Brysons and intervenors the opportunity of rebutting such defenses.

297 Minn. at 230, 219 N.W.2d at 298. Obviously if the Board had taken the opportunity to put in its case and then moved to dismiss, the Board would have at that point exhausted its opportunity to submit evidence on any additional theory and there probably would not have been a **Bryson II**.

For the purposes of the present case, **Bryson I** illustrates that once the Board, the intervenors and DNR rested, that concluded their respective opportunities to challenge the Association's MERA case.

In **Bryson II**, the County Board returned to the district court and submitted its case claiming that there was no prudent and feasible alternative to the corridor that it selected through the Bryson marsh since the alternative would cause financial losses on the adjacent Peterson farm because of shortened crop row. The Board then rested. The district court balanced the environmental factors against preservation of the Bryson Marsh. The trial court concluded that the road across the marsh was more desirable. 309 Minn. 184, 243 N.W.2d 319. The Supreme Court reversed, concluding: "We do not think the possibility of shortened crop rows on the Peterson farm is a factor of unusual or extraordinary significance." 309 Minn. 187, 243 N.W.2d 321. Obviously the court had in mind the "paramount concern" criterion of Minn. Stat. § 116B.04 and the rule that "Economic considerations alone shall not constitute a defense hereunder." *Id.*

The court then cited Aldo Leopold:

A generation ago, the conservationist Aldo Leopold espoused a 'land ethic' which he described as follows:

'All ethics so far evolved rest upon a single premise: that the individual is a member of a community of interdependent parts. His instincts prompt him to compete for his place in the community, but his ethics prompt him also to co-operate (perhaps in order that there may be a place to compete for).  
'The land ethic simply enlarges the boundaries of the community to include soils, waters, plants, and animals, or collectively: the land.  
'In short, a land ethic changes the role of Homo sapiens from conqueror of the land-community to plain member and citizen of it. It implies respect

for his fellow-members, and also respect for the community as such.' A Sand County Almanac (1949) p. 203.

In the Environmental Rights Act, our state legislature has given this land ethic the force of law. Our construction of the Act gives effect to this broad remedial purpose.

309 Minn. 189, 243 N.W.2d 322

At trial, the defendants here did not submit any affirmative defense under Minn. Stat. § 116B. DNR's defense of exclusive jurisdiction was rejected by this court. The Board's and intervenors' purported defenses that the reflooding of the basins would reduce the landowners' ability to farm the lakebeds and impair the functioning of the ditches that traverse these basins are matters which the Association admits. However, such consequences are inescapable and do not constitute defenses to the remediation of this pollution, impairment or destruction of resources pursuant to MERA as will be discussed in subsequent sections of this brief.

**IV. AS A MATTER OF SOUND AND "PARAMOUNT"  
ENVIRONMENTAL VALUES UNDER MINN. STAT. § 116B.04, LITTLE  
LAKE AND MUD LAKE SHOULD BE RESTORED TO A CREST  
ELEVATION OF 976.0**

A cornerstone of the Association's case from the beginning has been the language of **Stenberg v, County of Blue Earth**, 112 Minn. 117, 120, 127 N.W. 496, 497 (1910)

No riparian owner has a right to complain of improvements by the public whereby the water is maintained in the condition which nature has given it. "**Aqua currit, et debet currere ut currere solabat.**" Farnham, Waters, p. 1765. And see volume 1, c. 6. The law justified the maintenance of the lake at its natural and usual height and level. . . . Damages consequent thereon to riparian owners was **damnum absque injuria**, for which they were entitled to no compensation.

In a similar case, Lake Elysian in Waseca County was ordered restored notwithstanding the objections of farmers who were benefitted by Waseca County Ditch No 6, **In Re Lake Elysian High Water Level**, 208 Minn. 159, 293 N.W. 141 (1940).

The evidence submitted in the present case indicates that the appropriate elevation of the crest on the control structure on Little Lake is 976.0.

The lowest point in Little Lake is slightly less than 972.0. [Transcript p. 993 {T.993}]. The Lake has historically had an identifiable water level of 977.4 [T. 1331; T.1001] The district court previously found Little Lake water depths to be six feet [T. 810; Exhibit 94]. If the lake were restored to the depth previously found by the court, the crest elevation on the Little Lake structure would be 978.0.

In determining the appropriate crest elevation, the testimony of the wildlife biologists is determinative. As DNR biologist Dennis Simon aptly described it, it is essential that the new strain of narrow leaf cattail (*typha angustifolia*, T. 1222.) that has invaded Minnesota in recent years from the East Coast must be overcome. In the recent past, two feet of water depth would have been sufficient to maintain a wildlife lake. [T.722]. However, Minnesota has

experienced an invasion of narrow leaf cattail from the eastern United States. [T.722]. Narrow leaf cattail tends to choke out other species and reduces wildlife production [T.721-724]. The best method of controlling narrow leaf cattail is the maintenance of water levels over three feet in depth which floods out narrow leaf cattail. [T.722-723]. Furthermore, three feet of water will allow muskrats to survive the winter under the ice which is beneficial because muskrats work to keep water areas open and not choked with narrow leaf cattail and other problem emergent vegetation. [T.722-723]. Muskrat activity is crucial but those animals need at least three feet of water depth over the winter months in order to survive in the lake. [T. 723].

Dennis Simon, a DNR wildlife specialist, testified to the poor waterfowl habitat that the lakes currently provide because of their shallow depth. According to Simon, Mud Lake is "generally choked with cattails and emergent vegetation," and Little Lake provides only a "marginal" waterfowl habitat. He testified that an ideal waterfowl lake should have a "hemi-marsh" condition, which means that approximately half of the lake is open water and half is emergent vegetation. Simon explained that in the past a "couple" feet of water may have sufficed to maintain the hemi-marsh condition in a wetland such as Little Lake, but a recent narrow-leaf cattail invasion has changed things. Narrow-leaf cattail "tends to completely choke out a shallow wetland system that is not controlled in some way, so it's 100 percent dense stands of almost impenetrable cattail and then it doesn't allow the light to penetrate or anything else." Consequently, the wetland becomes totally dominated by the cattail, and the amount and diversity of wildlife in the wetland are reduced. Thus, Simon testified, a three-foot lake depth is "really ... the minimum that we would like to see" because three feet of water would encourage the cattail to "die back," and permit muskrats to "over winter" under the ice, which helps to further remove the invasive vegetation

**State ex rel Swan Lake Area Wildlife Association v. Nicollet County Board**, 771 N.W.2d 529, 533 (Minn. App. 2009).

Mr. Simon's observations and conclusions were supported by biologist Gerald Gray. Mr. Gray is a wildlife biologist with 42 years of wildlife management experience including 2000 lake and wetland restorations including projects ranging from four to 5000 acres. [T. 1210]. In visiting Little Lake and Mud Lake, he observed that the lakes are in poor condition to produce and support waterfowl. [T. 1216, T. 12-18-1219]. He took aerial photographs showing the current conditions of the lakes [Exhibits 182, 183, 184 and 185]. He compared Little and Mud Lakes to nearby Middle Lake which he believed provided a high quality of waterfowl production amenities. [T. 1219]. Ms. Gray testified that Little and Mud Lakes could provide a similar degree of quality habitat if the lakes were restored to elevation 976.0. [T. 1220-1221] He also indicated that "typha angustifolia" also known as narrow leaf cattail is a major problem for wildlife production on lakes which can be prevented by maintaining water levels at three feet or greater. [T. 1222-1223] Restoring the water levels on Little and Mud Lakes would cause a significant improvement to these lakes without undertaking any additional land management changes [T. 1223]. He explained that 976 was the best elevation on the lakes because through the summer evaporation would absorb water from the lakes – even as much as an inch a day - so it is necessary to have a sufficient depth of water to sustain the open water conditions. [T.1224, 1260] He also confirmed from his study of the aerial photographs that portions of

the beds of Little Lake and Mud Lake have been diked off and farmed. [T. 1262].

The Association's witnesses and the Court of Appeals were certainly persuaded that Little Lake and Mud Lake should be restored to meaningful wildlife-producing lakes and not mere mudflats or intermittent ponds.

The issue thus becomes, what crest on the Little Lake control structure is appropriate to accomplish this hemi-marsh condition. The challenge as Mr. Gray described it, is that much of our recharge of water on prairie lakes such as Little Lake comes from spring runoff and rains and is counterbalanced by seepage and evaporation that typically will lower water levels considerably by the late fall [T. 1220-1224, 1260.] The answer was supplied by the well-qualified limnologist, Richard Osgood. Limnologist Osgood conducted what he termed a "morphometric" analysis [T.1002]. He then applied standard seasonal rainfall, seepage and evaporation rates to quantify what crest on the outlet structure would be essential to provide the year-round conditions that would be necessary to preserve the three-foot hemi marsh conditions. He tested 974 and 975 and found that crests at those levels would not sustain the three-foot hemi-marsh conditions indicated by the wildlife biologists [T.1023]. However, a crest elevation at 976 would sustain those water levels through the typical growing season. The following chart indicates Mr. Osgood's analysis for a 976 crest on the structure:

976.0 Outlet Crest					
June	July	August	September	October	November
5.0 ft.	4.3ft.	4.0 ft.	3.7 ft.	3.4 ft.	3.3 ft

[T. 1022]

The Board, the Department of Natural Resources and the Intervenors all did not provide evidence on the critical issue of appropriate crest elevation for Little Lake because they were focused exclusively on other issues they felt were determinative. Accordingly the uncontradicted evidence of the Association as recognized by this Court and the Court of Appeals provides ample justification for the establishment of the crest elevation at 976.0

**V. DISTRICT COURT’S UNEXPLAINED CHOICE OF THE SAME  
CREST ELEVATION IT HAD PREVIOUSLY ORDERED (973.8) AND  
WHICH WAS PREVIOUSLY REVERSED BY THIS COURT WAS  
ARBITRARY AND CAPRICIOUS.**

The Association does not believe that there is any reason for choosing 973.8 feet above sea level as the crest on the outlet structure on Little Lake. Such an outlet will result in Little Lake and Mud Lake being no more than unproductive mudflats.

The choice of 973.8 has the solitary merit of being an elevation favored by all of the nonprevailing defendants, namely the Board, DNR and the Intervenors.

The district court's Memorandum seems mildly critical of the Court of Appeals for ruling that it had concurrent authority to set outlet structure elevations (Appendix A.168) and resigned to what he perceived as the likelihood of the case being subject to further appellate review (Appendix A.184).

Notwithstanding this, the lower court makes no findings<sup>1</sup> justifying a 973.8 crest that would give this court a rationale' for the district court's decision.

Because the district court did this in its order of April 1, 2010, it committed reversible error.

Rule 52.01 of the Minnesota Rules of Civil Procedure provide in part material:

In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon and direct the entry of the appropriate judgment; and in granting or refusing interlocutory injunctions the court shall similarly set forth the findings of fact and conclusions of law which constitute grounds for its action. Requests for finding are not necessary for purposes of review. Findings of fact, whether based on oral or documentary evidence, shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses.

Long ago Mr. Justice Mitchell discussed the necessity for findings in order to provide a basis for appellate review. In **Chickering and Sons v. White**, 42 Minn. 457, 44 N.W. 988 (1890), he wrote: "Where the

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<sup>1</sup> The District Court's order contained no references to any exhibit or testimony in the 1395-page transcript of the trial. That raises some doubts as to whether Judge Rodenberg read the transcribed record of the trial before Judge Moonan.

determination of a case is upon the merits, upon the evidence, there should be a verdict or findings as a basis for the judgment; otherwise the record will fail to show anything upon which the judgment rests.” 42 Minn. at 460.

Neither the counsel in making the motion, nor the court in making the order, contemplated or had in mind any such thing as findings of fact. The order contains nothing that will enable it to perform the office of such findings. It neither discloses the views of the court upon any particular fact, nor his conclusions upon any particular question of law. It does not show what facts he thought the evidence established, or whether he decided the motion upon the statute of frauds or upon the insolvent law; or, if upon the latter, what construction he placed upon the act. In short, it furnishes no sort of a basis for the review on appeal of the decision of the trial judge, either upon the facts or the law. . . The order must therefore be reversed

42 Minn. at 460-461.

“Before a judgment can be sustained on appeal, the conclusions upon which it is based must find support in the findings of the trial court.” **Naffke v. Naffke**, 240 Minn. 468, 470, 62 N.W.2d 63, 65 (1953).

Clearly, upon this issue findings are mandatory under Rule 52.01, for without findings it does not appear that the court passed upon the disputed facts material to this issue, and we can only speculate as to the basis for the decision. The purpose of the rule is to make definite and certain what the issues were and how they were decided, and thus afford this court a clear understanding of the basis for the decision.

**Midway Mobile Home Mart, Inc. v. City of Fridley**, 271 Minn. 189, 193-194, 135 N.W.2d 199, 202 (1965)

In the case at bar, there was no analysis in the court’s Memorandum of

April 1, 2010, of the MERA or **Bryson II** factors. There was no reference to the detailed record of 1395 pages. All that the district court recited that purportedly related to the facts of this case was the astonishing conclusion: ***“There will be large-scale flooding of areas currently occupied by homes, farms, roads and other improvements.”*** (Appendix, A.184-185).

There is nothing in the transcript record that would justify this sweeping allegation by the trial judge. Perhaps it is hyperbole by the judge.

We acknowledge that some of the farmers who have farmed or occupied the lakebeds of Little Lake and Mud Lake will no longer be able to cultivate those basins. If any farmers have located buildings in the lakebed basins, those structures may be at risk. However, like in of **Stenberg v, County of Blue Earth**<sup>2</sup>, 112 Minn. 117, 120, 127 N.W. 496, 497 (1910), **In Re Lake Elysian High Water Level**, 208 Minn. 159, 293 N.W. 141 (1940), **Melander v. Freeborn County**, 170 Minn. 378, 212 N.W. 590 (1927) and **State ex rel Anderson v. District Court**, 119 Minn. 132, 137 N.W. 298 (1912), the landowners were all farming lakebed lands. Naturally they did not want to

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<sup>2</sup> **Stenberg** contains the language cited in the subsequent cases:

No riparian owner has a right to complain of improvements by the public whereby the water is maintained in the condition which nature has given it. "**Aqua currit, et debet currere ut currere solabat.**" Farnham, Waters, p. 1765. And see volume 1, c. 6. The law justified the maintenance of the lake at its natural and usual height and level. . . . Damages consequent thereon to riparian owners was **damnum absque injuria**, for which they were entitled to no compensation.

112 Minn. at 120, 127 N.W. at 497.

relinquish their use of the lakebeds to a return of water in the respective lakes. But as hydrologist Geoffrey Griffin testified about the farmers in this case, he found that at 976.0 elevation there would be 148 acres of land flooded [T. 865]. These lands are converted lakebed lands “because the farmers are trying to farm the historic lake bottom.” [T. 973-974].

The fact that some landowners may have put these lakebeds to use for farming or other purposes is not a lawful excuse against the lakes being restored. As the Supreme Court said in **Application of Baldwin**, 218 Minn. 11, 18,15 N.W.2d 184, 188 (1944):

If eternal vigilance is the price of preserving the full benefit of Minnesota's lakes for all members of the public — as it is of liberty — public officials must gladly pay that price. They must not stand by, wholly unconcerned, like Nero, who fiddled while Rome burned, and permit public access to our lakes to be cut off or reduced for selfish private purposes.

Certainly when applying MERA or the Drainage Code (Minn. Stat. Chapter 103E) the cardinal canon of construction is set forth in Minn. Stat. § 645.17 (5): ***“In ascertaining the intention of the legislature the courts may be guided by the following presumptions: . . . (5) the legislature intends to favor the public interest as against any private interest.”*** See also **Petraborg v. Zontelli**, 217 Minn. 536, 15 N.W.2d 174 (1944) **Lamprey v. State**, 52 Minn. 181, 53 N.W. 1139 (1893) *Mitchell J.*; **Nelson v. De Long**, 213 Minn. 425, 7 N.W.2d 342 (1942).

## **VI. INTERVENORS HAD THEIR OPPORTUNITY TO BE HEARD ON REMAND WHICH WAS ACCORDED TO THEM**

When Judge Moonan had the case before him initially, he stated that he did not intend to “impair or impede that ditch [County Ditch 46A] in any manner” [Transcript p. 10].

Performance on this intention would have been impossible unless the court had dismissed the Association’s MERA case. County Ditch 46A as constructed goes right through Little and Mud Lakes so the installation of a dam at 976 or 973.2 or 973.8 would inherently “impair” Ditch 46A.

What Judge Moonan obviously had in mind was a rather Faustian design of dikes and pumps that would allow the restoration of these lakes while dewatering the farmed lakebed that would otherwise be reflooded. (See Judge Moonan’s Findings of Fact, Conclusions of Law, Order for Judgment and Judgment in Appendix pp. A.76 to A.108). Despite the novelty of Judge Moonan’s idea, DNR launched an objection to that part of the Judge’s Order based on its impracticality. All of the parties including the Intervenor agreed that the “dike and pump” part of the order should be removed which Judge Rodenberg did following post-trial motions. (Appendix A.109). As part of the post-trial motions, the Intervenor moved for a new trial based in part on the “non-impairment” language of Judge Moonan.

The case at that point provided that the lakes were to be restored under MERA. The issue was what should be the crest elevation of the structure. Judge

Rodenberg ruled that DNR's wish for 973.8 was determinative since it had exclusive jurisdiction. The Association objected and took its appeal based on the district court's concurrent jurisdiction and on its uncontested evidence that three feet of depth with a 976.0 crest was the appropriate elevation as established by the evidence at trial.

The Intervenors filed a brief in the case but did not appeal in *Swan Lake II* the denial of their motion for a new trial. That becomes the Law of the Case for them on that point. "Law of the case is a rule of practice that once an issue is considered and adjudicated, that issue should not be reexamined in that court or any lower court throughout the case." **Peterson v. BASF Corporation**, 675 N.W.2d 57, 65 (Minn. 2004). See **Estate of Hartz**, 238, Minn. 558, 58 N.W.2d 57 (1953).

In **Swan Lake II**, 771 N.W.2d 529 (Minn. App. 2009) this court reversed the district court on the issues of concurrent jurisdiction and DNR liability. On the matter of Judge Moonan's "non-impairment" language, this court said:

Finally, intervening landowners seek review regarding Judge Rodenberg's deletion of some language in Judge Moonan's order regarding the impact of higher lake levels on County Ditch 46A. Because we are remanding the matter to the district court, we need not address that issue, which they may raise in the district court.

771 N.W.2d at 538.

It bears repeating that this court's mandate to the district court on remand was "to set the dam's crest elevation in order to raise the lakes' water levels to protect them as natural resources." 771 N.W.2d at 537 [Emphasis added.]. This

court did not say that the lower court should set a crest at a level that the court would like or one that was acceptable to the defendants or one that would “protect the landowners’ use of the lakebed”. The district court’s sole responsibility on remand of this issue was to perform a review of the environmental evidence of what was an appropriate elevation that would protect the natural resources.

When the lower court considered the matter on remand, the intervenors might have sought to introduce new evidence or make new arguments or even seek to get a new trial. To the extent that the intervenors were surprised that the restoration of Little and Mud Lakes would “impair or impede” Ditch 46A, they had their opportunity to be heard on remand which they were on February 12, 2010. (See February 12, 2010, Transcript, p.58-60). Intervenors do not have the privilege of preventing a MERA restoration of these valuable lakes.

**VII. INTERVENORS’ ARGUMENTS ALLEGING “TAKING” AND  
“PREEXISTING RIGHTS” ARE NOT VALID ARGUMENTS AGAINST  
THE RESTORATION OF LITTLE LAKE AND MUD LAKE**

In this case, the Intervenors are opposed to the restoration of Little Lake and Mud Lake. It is their claim that they are occupying the lands which are about to be reflooded and the restoration of these lakes should be prohibited because they claim the restoration of these lakes would amount to a taking of their property.

We have had seven days of trial and two appeals. Intervenors brought their motion for new trial and amended findings on May 2, 2008 which were denied. Intervenors did not appeal that part of this court's order in the most recent appeal. It certainly appears that the Law of the Case is well established and their allegation at this juncture is too little and too late.

However, if this court were to entertain Intervenors' claim that the lake restoration should be prohibited because of an alleged "taking", their claim should be dismissed because (1) there is no "taking" under the law and (2) even if there had been a "taking", the "paramount" consideration of protection of natural resources from impairment or pollution would require the responsible governmental unit (the Nicollet County Board) to undertake whatever eminent domain proceedings were necessary to achieve the environmental mandate of the Minnesota Environmental Rights Act.

First of all, there is no "taking". It is true that restoring Little Lake and Mud Lake to the appropriate level of 976 will reflood some lakebed lands that Intervenors are dedicating to agricultural and other uses. However, as Engineer Griffin testified "[T]he farmers are trying to farm the historic lake bottom." (T. 973 and T. 974.) Some of the land that they are attempting to cultivate will be restored to lake basin.

In **Stenberg v. County of Blue Earth, supra**, the Blue Earth County Board was attempting to install a new dam to restore Jackson Lake near Amboy. Thone Stenberg didn't want that to occur because she had been pasturing

livestock on parts of the lakebed for 20 years. She sought an injunction to stop the lake restoration because she said her land would be taken as a result. The district court and the Supreme Court denied her petition. The court then gave its often-cited ruling:

No riparian owner has a right to complain of improvements by the public whereby the water is maintained in the condition which nature has given it. "**Aqua currit, et debet currere ut currere solabat.**" Farnham, Waters, p. 1765. And see volume 1, c. 6. The law justified the maintenance of the lake at its natural and usual height and level. . . . Damages consequent thereon to riparian owners was **damnum absque injuria**, for which they were entitled to no compensation.

112 Minn. at 120, 127 N.W. at 497.

In **Melander v. Freeborn County**, 170 Minn. 378, 212 N.W. 590 (1927)

Ellen Melander and some of her neighbors sought to prevent the County Board from replacing a dam and restoring Freeborn Lake. She claimed her land would be flooded and it could not proceed except through condemnation. The court held that no such "taking" had or would take place.

In **State ex rel Anderson v. District Court**, 119 Minn. 132, 137 N.W.

298 (1912) the Kandiyohi County Board sought to restore Foot Lake as a public works project. In the proceedings, the Board's appraisers reported that no property would be damaged by the project. Swan Anderson challenged the order because he said that he was damaged because his farmland would be flooded by the restored lake and he demanded compensation based on a taking. The court found that restoring Foot Lake would not occasion a taking and denied Anderson's petition.

In the present case, the restoration of Little and Mud Lakes, two meandered lakes of Nicollet County should be restored by this MERA action to 976 feet above sea level and the intervenors are not entitled to compensation for a claimed "taking".

However, even if there had been a genuine "taking" under the law, that would not be a viable legal argument against a MERA lawsuit to restore Little and Mud Lakes to 976.0.

**In Floodwood-Fine Lakes Citizens Group v. Minnesota Environmental Quality Council**, 287 N.W.2d 390 (1979) the court cited Minn. Stat. § 116B.09, subd 2. The Supreme Court noted Minn. Stat. § 116B.09, subd. 2 which is comparable to Minn. Stat. § 116B.04 in part which provides as follows:

The defendant may also show, by way of an affirmative defense, that there is no feasible and prudent alternative and the conduct at issue is consistent with and reasonably required for promotion of the public health, safety, and welfare in light of the state's paramount concern for the protection of its air, water, land and other natural resources from pollution, impairment, or destruction. Economic considerations alone shall not constitute a defense hereunder.

[Emphasis added.]

The court said:

By definition, the word "paramount" as used in the phrase "the state's paramount concern for the protection of its air, water, land and other natural resources" means "superior to all others."<sup>5</sup> This legislative policy was construed and applied in *PEER v. MEQC*, 266 N.W.2d 858, 869 (Minn.1978). There we rejected the argument that one power line site was preferable to another because it would require the condemnation of fewer homes, and stated that "condemnation of a number of homes does not,

without more, overcome the law's preference for containment of powerlines as expressed in the policy of nonproliferation. Persons who lose their homes can be fully compensated in damages. The destruction of protectable environmental resources, however, is non-compensable and injurious to all present and future residents of Minnesota."

287 N.W.2d 399-400 [Emphasis added.]

Accordingly, if the intervenors' property is taken or if they had any rights under the Drainage Code (even if it were compensable, which we doubt), those concerns would not prevail over the environmental mandates of MERA. Hypothetically, if there had been a taking, then the landowners could potentially compel the county board to compensate them from the ditch funds of the county since DNR had been absolved by the Court of Appeals decision.

The restoration of Little and Mud Lakes must prevail over any competing economic interests in this case.

In a somewhat parallel argument, the Intervenor's have alleged that they have particular "existing rights" to "drainage rights" to which the "paramount" authority of MERA must be somehow subservient. That legal argument is groundless.

Intervenors have argued, the exercise of authority under MERA is "subject to existing rights." Minn. Stat. § 103A.201subd. 1(1).

However, the "existing rights" to which neighboring landowners are entitled are only riparian rights relating to the use of the water such as boating, fishing, swimming and hunting. **Pratt v. Department of Natural Resources**, 309 N.W.2d 767, 771 (Minn. 1981) and **Application of Central Baptist**

**Church**, 370 N.W.2d 642, 646 (Minn. App. 1985). “Existing rights” do not include the right to drain the body of water or to re-excavate a previously existing ditch. **Application of Christenson** 417 N.W.2d 607, 614 (Minn. App. 1987).

The Intervenors request what they think was a commitment by Judge Moonan that he didn't intend to impair Ditch 46A. Obviously Judge Moonan thought he could restore the lakes while ordering the dikes and pumps that he thought would “un-impair” the functioning of Ditch 46A in Little and Mud Lakes. All parties agreed that the pump-and-dike system was infeasible and this court and the Court of Appeals excised that from the original Order of Judge Moonan. The Intervenors did not object to the removal of the dikes and pumps. They did not seek amendment of the findings or new trial on that basis. The Intervenors did not appeal to the Court of Appeals on that issue. When this court amended Judge Moonan's order, it deleted Judge Moonan's language in Finding No. 7 that “the flowage of 46A shall not be impaired by the Court in its course through Mud Lake and Little Lake in any manner.” The Intervenors have argued that this Court's striking of that language was “accidental” or “inadvertent”. That is clearly not the case. Implementation of Judge Moonan's Finding No. 7 is clearly impossible without the pumps and dikes which no one wants. The Intervenors have stated that the record after the last Court of Appeals decision should remain closed. Taking all these factors together, the Association suggests that the amendment by this court deleting the language of Judge Moonan's Finding No. 7

was deliberate and should stand. The court should order the crest elevation on Little Lake at 976.0 as requested by the Association.

### **CONCLUSION**

The Swan Lake Area Wildlife Association established its case that the Nicollet County Board violated the Minnesota Environmental Rights Act in its neglect and failure to protect Little Lake and Mud Lake as environmental resources of the State of Minnesota. The Association was the only litigant in this case to submit evidence of an appropriate crest elevation for Little and Mud Lakes, namely 976.0.

The County Board based its entire case around the proposition that the Board had not violated MERA. It then rested its case without further evidence. The County's legal proposition was rejected by this Court. That terminates that issue. However, the County appears to be directly and indirectly resurrecting the discredited proposition after the remand. The Board's repetition of the same but reconfigured argument should be rejected.

The Department of Natural Resources based its entire case at trial around the proposition that DNR alone had the authority to establish the crest elevation for a control structure on a meandered lake. DNR then rested its case. DNR did not offer evidence of a desirable crest elevation because it did not think the district court had the jurisdiction to make such a decision. DNR's legal proposition was adopted by the trial court and then rejected by the Court of Appeals. That terminates that issue. However, DNR is now attempting to

restructure its evidence to persuade this court that its evidence was really directed to prove an environmental issue that it felt it didn't have to address at trial. The Court of Appeals said and the Association agrees: "[R]espondents claim that there was evidence at trial that lower water levels could benefit the environment and that the flooding caused by raising the crest elevation would actually 'harm' other kinds of wildlife in the area. We find no support for these contentions in the record." 771 N.W.2d at 536. This court should not seriously entertain this attempted transfiguration of DNR's case. DNR agrees that the record is closed. The court should adopt the appropriate crest elevation as established by the Association.

The Intervenors claim that they have pre-existing drainage rights to Ditch 46A through the basins of Little and Mud Lakes. If that were so, then MERA would be meaningless to do accomplish anything regarding these lakes since restoration of the lakes will inherently impair the functioning of Ditch 46A. The argument that they have some surviving right to the language of Judge Moonan's Finding No. 7 that was deleted in the amended Findings is not necessary as a matter of law or reasonable.

This Court should amend the findings that the crest on the outlet structure on Little Lake should be at elevation 976.0 feet above sea level which will provide the year-around hemi-marsh conditions as established through the wildlife biologists at trial. In the alternative, this court should remand the matter to the district court with the specific direction that it should amend its judgment to

order the establishment of an outlet control structure with a crest at 976.0 feet above sea level.

Dated this 20<sup>th</sup> day of September, 2010.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "W. G. Peterson", written over a horizontal line.

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**ATTORNEY FOR APPELLANT**

**STATE OF MINNESOTA  
IN COURT OF APPEALS**

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State of Minnesota ex rel.  
Swan Lake Area Wildlife Association,  
a Minnesota non-profit organization

Appellate Court File No. A10-1025

Appellant,

v.

**CERTIFICATION**

Nicollet County Board of  
County Commissioners,  
a political subdivision of the State of Minnesota

Respondent.

v.

Marlin Fitzner, Bob Gronholz, High Point Farms,  
Harold Honken, Jr., Tom Martens, Oliver Martens,  
Harold Mead, Richard Musing, Chuck Peters, Dan Rosin,  
Elmer Rosin, Roger Rosin, Rick Rosin, Ron Rudenick,  
Scott Rudenick, Bob Schuck, Loren Seys, Ray Smith,  
Harley Wels, Kevin Wels, Thomas Wilking, and Paul Zins.

Intervenors,

v.

Minnesota Department of Natural Resources,

Third Party Defendant.

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I hereby certify that this brief conforms to the requirements of Minn. R. Civ. App. P. 132.01, subd. 1 and 3, for a brief produced with a Times New Roman font. The length of this Brief is 704 lines, 8,406 words. This Brief was prepared using Microsoft Word 2007.

Dated this 20<sup>th</sup> day of September, 2010.

Respectfully Submitted,

A handwritten signature in black ink, appearing to read "W. G. Peterson", is written over a horizontal line.

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