

Case No. A10-1025  
STATE OF MINNESOTA  
IN COURT OF APPEALS

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

*Appellant,*

vs.

Nicollet County Board of County Commissioners,

*Respondent,*

vs.

Marlin Fitzner, et al, Intervenors,

*Respondents,*

vs.

Minnesota Department of Natural Resources,

*Respondent.*

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RESPONDENTS INTERVENORS'  
BRIEF

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## ISSUES PRESENTED

Did the District Court Clearly Err When it Determined that the Crest Elevation for the Little Lake Weir Should Be Set at the Elevation Supported by the Department of Natural Resources, the Very Elevation Originally Sought by Appellant's Complaint?

May Appellant Challenge the Pre-Trial Order Ruling that Relief Could Not Take away Rights Conferred on Intervenors by the 1950 Improvement Order?

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### I. STATEMENT OF THE CASE AND SUMMARY

Intervenors are farmers and homeowners whose property would be flooded by Swan Lake Association's proposal to raise the elevation of Little and Mud Lakes about three feet higher than established by the District Court in the 1908 drainage proceedings. In 1908 Nicollet County ordered the establishment and construction of Nicollet County Ditch 46A. The project partially drained Little and Mud Lakes, which was fully lawful under legislation passed in 1905. In 1950, Nicollet County established an official drainage improvement to the 1908 system by making drainage enhancements below the outlet to Little and Mud Lakes. To assure that this improvement would not compromise the lake elevation established in 1908, the Commissioner of Conservation insisted that an outlet dam be constructed at elevation 973.2 SLD. However, erosion compromised the dam's efficiency, causing Little Lake's elevation to drop below that established by the

1908 and 1950 drainage orders. To fix the problem, the DNR proposed to install a replacement dam with a wider spillway, but with six inches higher crest elevation than possessed by the original 1950 dam. The higher crest elevation would compensate for the increased flow crossing the wider spillway, assuring that the new dam would maintain the required lake elevations.

Swan Lake Association originally brought this case to force the County to comply with the DNR's repeated demands that the new dam be constructed at elevation 973.8 with the wider spillway. However, Swan Lake Association later amended its Complaint to demand, instead, that these lakes be raised to 976 feet. Raising the dam to this elevation would have flooded hundreds of acres of private lands and would have impaired the operation of the established drainage system. The original trial judge, Judge Moonan, ruled in advance of trial that impairing an established drainage system, or flooding private lands, would be outside the scope of issues to be tried, because MERA could not be used to launch a collateral attack on a drainage system established in 1908.

After trial, Judge Moonan found that the environment would benefit by raising the Lakes to 976 feet, but that he was barred from his previous ruling (and of course, by law) from impairing the ditch or from flooding private lands protected by that lawfully established drainage system. His solution was to construct a giant impoundment around the lakes and to pump water into the impoundment, and he ordered the DNR to proceed to construct that impoundment at public expense. After Judge Moonan's death, Judge

Rodenberg amended these findings (as described below) and approved a dam at a crest elevation of 973.8 SLD. In discussing his rationale, Judge Rodenberg stated that the District Court lacks jurisdiction to establish the ordinary high water level of lakes, and that ordinary high water level proceedings are allocated by statute to the DNR.

On appeal, Swan Lake Association argued that Judge Rodenberg's belief that he lacked jurisdiction to set the ordinary high water level might have infected his decision regarding the crest elevation of the dam. We discuss this Court's remand decision in a later section of this brief. On remand, both the County and Intervenors supported the crest elevation proposed by the Department of Natural Resources. Swan Lake Association persisted, however, in demanding that the Court violate the pre-trial ruling and to flood private lands, so as to restore wetlands lawfully drained in 1908. The District Court ruled that the DNR's proposed elevation was appropriate, and Swan Lake appealed. We support the ruling of the District Court for the following reasons: (a) The District Court's decision is supported by the great weight of the evidence and is not clearly erroneous, (b) in any event, MERA cannot be used retroactively to attack a century old public improvement on the grounds that when it was constructed, it could not have passed muster under current environmental laws, and (c) the relief that Swan Lake Association seeks is not only barred by the law of the case, but is also legally impermissible. The next section of this brief is devoted to a detailed description of the history of the system from its establishment through the trial.

## II. PROCEDURAL HISTORY

### A. Original Drainage System Established.

Near the end of the Nineteenth Century, the Nicollet County Board issued an order authorizing the drainage of two marshy shallow lakes, Little and Mud Lakes, in order to open up lands for agricultural production. Witty and others sued to enjoin that drainage, and the District Court found that drainage of meandered lakes had not been authorized by the 1887 drainage code. That decision was affirmed by the Minnesota Supreme Court in Witty v. Board of Commissioners, Nicollet County, 79 N.W.2d 112 (Minn. 1899). In 1901, however, the legislature established a State Drainage Commission to examine state drainage policy, and that reexamination resulted in the passage of two new substantially altered drainage codes, one authorizing county boards (Laws 1905, Chapter 230) and a second authorizing District Courts (Laws 1907, Chapter 448) to establish drainage ditches that would drain certain marshy shallow meandered lakes like Little and Mud lake. Under these laws, a meandered lake could be drained if the lake was normally shallow and grassy and had a marshy character, or if “such lake is no longer of sufficient depth and volume to be capable of any beneficial use of a substantial character for fishing, boating or public water supply.”

Under this new authority, Ditch #46A was duly established by the District Court in 1908, and consequently, Little and Mud Lake were partially drained. The new drainage system significantly altered the hydrology of the region, and even moved Little and Mud

Lake from one watershed to another.<sup>1</sup> TR97. As intended, the new system did open new lands for production and established new land use patterns<sup>2</sup>. In 1915, to cement the status of established drainage systems, the legislature enacted 1915 Laws 1915 Chapter 6 to ratify previously established drainage systems, in those cases where no appeal had been filed.

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<sup>1</sup> The District Court order of 1908 contains the following findings:

- That county ditch No 46A “will partly drain a meandered lake known as Little Lake.”
- That prior to construction of the ditch system, the waters of Little Lake at stages of high water cover an area of approximately 406.58 acres and in the deepest parts ...attain a depth of about six feet.
- That in dry seasons the greater part of the lake becomes dry and the water in the deepest parts does not exceed three feet in depth.
- That every summer a large part of the lake becomes covered with reeds, grasses and vegetation, and in dry seasons practically the whole [lake] is overgrown with vegetation.
- That the lake “is no longer of sufficient depth and volume to be capable of any beneficial use of a substantial character for fishing, hunting, boating or public water supply.”
- That the shores of [the] lake are to a large extent low, masy and muddy, and the water...stagnant.
- That the ditch “will drain, improve and better approximately one thousand acres of slough, swamp and wet land, and remove the stagnant and foul water, and drain and improve the public roads....”

<sup>2</sup> Later legislation began to restrict this authority to drain meandered lakes. For example, Section 5523, G. S. 1913, as amended by section 1 of Chapter 300 of the Laws of 1915 (Gen. St. Supp. 1917, § 5523) sought to prevent the drainage of meandered lakes bordering on cities and villages: 'No meandered lake upon which any city or village is now a riparian owner shall be drained or lowered unless by the approval of a majority vote of the legal voters of said city or village at any annual or special election held for such purpose.' See In re Judicial Ditch Proceeding No. 15 of Faribault County, 167 N.W. 1042 (Minn. 1918).

**B. 1950 Improvement and Installation of Weir at 973.2 SLD.**

In 1949, some 40 years after the construction of Ditch #46A, landowners petitioned to improve the drainage system below the outlet of Little and Mud Lakes. The Department of Conservation (now the DNR) opposed any improvement below the outlet, unless steps were taken to prevent increased downstream drainage from draining Little and Mud Lake more than authorized by the 1908 drainage order. The representatives of the Commissioner of Conservation, as well as local conservation interests, agreed that this could be accomplished by installation of an outlet dam at an elevation of 973.2 SLD. A final drainage improvement order issued embodying that agreement, and that judgment became a final judgment in rem.<sup>3</sup> In re Petition of Jacobson re County Ditch No. 24, 48 N.W.2d 441, 444 (1951). Upstream of the dam, Little and Mud Lakes would be maintained in their partially drained condition, as established in the 1908 drainage order.<sup>4</sup>

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<sup>3</sup> Under the drainage code, the drainage authority must maintain the system as nearly as practicable to the same condition “as originally constructed and subsequently improved.” Minn. Stat. 103E.701, Subd. 1. Thus, the baseline for all future proceedings is not the system as constructed, as Swan Lake keep suggesting, but rather the system as constructed and subsequently improved under the 1949 order.

<sup>4</sup> The 1950 Improvement engineer’s report stated: “The original ditch system lowered and partially drained two meandered Lakes known as Little Lake and Mud Lake. Benefits were assessed to riparian lands and property rights thus established in the lower lake level. Your engineer has surveyed and designed the improvement of the ditch so as to lower these two lakes to the exact level fixed in the original proceeding....Below the outlet of Little Lake a dam will be constructed so as to hold the Lake at the level fixed in the original proceeding. The work contemplated between Little Lake and Mud Lake consists only in restoring the ditch to the gradient fixed in the original proceedings.

**C. Failure of Dam and Alternative Proposals to Address the Problem.**

During the 1960's, erosion around the 1950 dam began to compromise the efficiency of the dam, and at times lowered the lake below the level established by the 1908 and 1950 drainage orders. DNR Exhibit 2. The County ordered the structure to be repaired in April of 1966, but the erosion controls did not function as planned. Efforts to resolve this problem resulted in competing permanent plans for the lakes and surrounding watershed. One proposal sought to prevent erosion by installing a wider dam and spillway. But, the Department of Natural Resources determined that a wider spillway, if installed at the 1950 authorized elevation would increase outflow from the lakes upstream, possibly compromising the lake elevations established in 1908 and 1950. Hence, the DNR refused to issue a permit for the wider dam, unless the crest elevation would be raised by six inches to compensate for the increased flow, thus maintaining the established lake elevation.

A second approach was advocated by the Swan Lake Association. The Association proposed an increase in the lake elevation to approximately 974 feet SLD, two feet less than the elevation that Swan Lake now demands. TR 482. DNR employees began to explore the possibility of acquiring flood easements from nearby landowners to allow the flooding that would ensue when the lake elevation increased to 974 feet. The perceived benefit of this approach was that Little Lake would change from a type 3 wetland, TR504, to a type 4 wetland with more and deeper open water. Because advocates for this lake alteration project recognized installing a higher at 974 feet would

flood large areas<sup>5</sup>, Exhibit 45, TR 483-484, it could not move forward unless compensation were paid to the landowners whose property would be taken. TR765-770-776.

**D. MERA Complaint.**

As the various interested parties wrangled over these competing proposals, the existing structure was allowed further to deteriorate. Periodically, the DNR sent letters urging the County to replace the old 1950 sheet pile dam at its established elevation, 973.2 SLD. After various efforts to arrive at a consensus solution failed, Swan Lake Association commenced this lawsuit demanding, initially, that a weir be installed at the 973.8 SLD elevation—the elevation which the District Court ultimately chose in its remand decision.

However, Swan Lake Association later amended its Complaint and began to contend that MERA could be used to force the County to roll back all drainage authorized both in 1908 and 1950 and establish a new lake elevation of 976 feet. As the District Court found, the effect would be to destroy the operation of the drainage system and flood hundreds of acres of private land.

**E. Court of Appeals Affirms District Court's Rejection of Immunity Defense.**

In the first appellate decision, (an appeal in which intervenors did not participate)

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<sup>5</sup> The Plaintiff's own expert wrote at the time: "The area around Mud Lake is so damn flat, the water is going to flood a very large area." Exhibit 45, Tr.483-484.

this Court affirmed the District Court's rejection of the County's Rule 12 Motion to dismiss based on immunity grounds<sup>6</sup>. On remand from the first appellate decision, intervenors argued to the District Court that their rights as property owners were fixed by drainage orders of 1908 and 1950, and that MERA could not be used to flood private lands. The disposition of this contention is of considerable importance to the future management of the litigation, and is addressed in the following section (F).

**F. District Court Removes Collateral Attack on Drainage Judgment from the Case.**

Just prior to trial, the District Court ruled from the bench that it would not allow MERA to be used to launch a collateral attack on the 1908 drainage order or the 1950 drainage judgment. The drainage system had been duly established by those judgments. The Court specifically removed from the trial, the issue of whether MERA could be used to interfere with the drainage system as established, or to flood the private lands belonging to intervenors<sup>7</sup>. This pre-trial ruling was confirmed and reconfirmed

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<sup>6</sup> Throughout these proceedings, Swan Lake has failed to recognize that the Court's refusal to dismiss a complaint on immunity grounds is based upon the assumption that all of the facts alleged in the complaint are true. That decision cannot be used to justify relief in the event that there is a failure of proof in the District Court.

<sup>7</sup> "The ditch flowed when the dam was functioning, maybe too much when the dam was in disrepair but, in any event, the ditch did exist and **I'm going to make a Finding of Fact in this trial that the ditch has a right to exist and this Court will not change anything about its existence or function.** I will make a further Finding of Fact that the Court, in its order, will not impair that ditch or impede that ditch in any manner. Now, it's come to the Court's attention that maybe Nicollet County's going to build another dam and that's fine with the Court, but that dam— and I will see to it—it will not impair the flowage of that ditch in any manner—so I don't feel there is a necessity for a

throughout the trial of this case and was embodied in the final judgment issued after trial. As a consequence of this ruling, the District Court announced that intervenors would not be required to put on evidence defending the 1950 drainage system, or defending against the contention that MERA could be used to flood their lands to restore wetlands lawfully drained in 1908. During the trial the District Court admonished intervenors to avoid spending time defending against this possibility. The District Court's findings include the following:

- **Systems Right to Exist Without Changing Function.** “I am going to make a finding of fact in this trial that the ditch has the right to exist and that this Court will not change anything about its existence or function.”
- **No Impairment of the System in Any Manner.** “I will make a further finding of fact that the Court in its order will not impair that ditch or impede that ditch in any manner.”
- **Position of Dam Must Not Impair the Flow of the Ditch in Any Manner.** “Now its come to the Court’s attention that maybe Nicollet County’s going to build another dam, and that’s fine with the Court, but that dam--and I will see to--it will not impair the flowage of that ditch in any manner--so I don’t feel there is a necessity for a hearing on your rights on

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hearing on your rights on the ditch because they are not going to be impaired. **I wanted to state for the record today and there is a transcript being made of everything I say here this morning and those things will be incorporated in the Court's findings.**

the ditch because they are not going to be impaired.”

It is important to keep in mind that these rulings were made in advance of trial and throughout the trial, as part of the District Court’s rulings on the law. The District Court repeatedly rejected attempts to justify (or defend against) flooding of interveners land and warned counsel for all parties that putting on evidence to justify flooding interveners land was not going to be allowed, because it was simply not a matter before the Court.

**G. Initial Decision: Judge Moonan Attempts to Raise the Lake Level without Impairing his Pre-Trial Ruling—Orders Huge Impoundment and Pumping.**

Following the trial, in a decision issued shortly before his death, Judge Moonan found that a better marsh could be created if the water level were raised to 976 feet, as requested by Swan Lake in its amended complaint. He further recognized, however, that reaching that elevation would cause massive flooding, as predicted by Swan Lake’s own expert. He recognized that his pre-trial order had barred consideration of such an action and he had explicitly ruled that such an action was legally out of bounds and could not be the subject even of testimony. In order to avoid this quandary, Judge Moonan decided to order the DNR to engineer a giant impoundment dike that would prevent the newly raised water level from flooding the surrounding flat lands. This would raise the lake level while complying with the pre-trial ruling. To avoid his pre-trial decision, he ordered installation of pumping systems which would assure the water which might collect at the base of the outside of the impoundment would be pumped over the impoundment and into the elevated lake. There had been no testimony to establish whether this was even

feasible, but Judge Moonan ordered the DNR to install a pumping system that would pump waters over the impoundment dike and create a new impoundment pool 3 feet above the former elevation.

The decision would have resulted in catastrophic changes in the hydrology of the watershed and the creation of a giant artificial pond surrounded by an earthen dam, relief never presented to the District Court at trial. The District Judge was essentially engineering his own solution without any support in the record to determine the impact on hydrology or the environment. The State filed a motion seeking amended findings or a new trial. We supported some of the amended findings, but we clearly and unequivocally objected to any alteration in the District Court's judgment which would violate the pre-trial ruling impairing the function of the ditch or flooding intervenors land, because the issue had been removed from the issues presented for trial. They could not be summarily added back into the case without conducting a new trial to consider the facts and law applicable to that proposal.

After Judge Moonan's death, the post-trial motions were assigned to Judge Rodenberg. Judge Rodenberg re-examined the District Court record and issued amended findings. He ordered the County to install a weir six inches higher than established by the 1950 improvement, but his decision was unclear as to whether the new weir would be constructed with a wider spillway. In addition, Judge Rodenberg's amended judgment omitted, inadvertently we believe, that portion of Judge Moonan's decision which reflected his pre-trial ruling protecting the integrity of the drainage system: "the ditch has

a right to exist, and this Court will not change anything about its existence or function.”

Swan Lake Association filed an appeal from the amended judgment, and we filed a notice of review. Appellant asserted, wrongly we believe, that the District Court might have further raised the elevation of the outlet dam had it not found that the District Court lacked jurisdiction to set the ordinary high water level of Swan Lake at 976 feet. We believed, on the contrary, that the District Court recognized that it had jurisdiction to set the crest elevation of the outlet dam, and that the ordinary high water level issue was a red herring under the circumstances of this particular case. In our notice of review, we complained that the District Court’s order had not expressly preserved our rights under Judge Moonan’s pre-trial order and his defense of that ruling throughout the trial. We were primarily concerned that in the event of remand, Swan Lake Association might argue that we had lost the benefit of the pre-trial rulings as a result of our failure to seek review. We wanted explicitly to preserve the benefit of the order protecting landowner rights and the integrity of the public drainage system, in the event that this Court considered relief other than that ordered by the District Court.

This Court’s decision in the second Ditch 46A decision is reasonably straightforward. It states:

- That the District Court has jurisdiction to set the crest elevation of the dam which all parties agree should be repaired and that the District Court should exercise that

jurisdiction on remand.<sup>8</sup>

- That Swan Lake's request on appeal that the Court of Appeals order the District Court to raise the level of Swan Lake even further than the increase that would be caused by repairing the weir to its DNR permitted crest elevation is denied.
- That the Minnesota DNR cannot be cited for a MERA violation under the circumstances.
- That the District Court's amended findings cannot be construed to deprive intervenors of the property rights recognized by Judge Moonan's orders and rulings, and that intervenors are free to raise and enforce the rights granted by Judge Moonan in the proceedings on remand.
- That the District Court should proceed to set the crest elevation of the repaired weir.

#### **H. Proceedings on Remand.**

On remand, the District Court asked the parties whether they wanted an evidentiary ruling. The DNR, Swan Lake Association, and the County waived an evidentiary hearing. Swan Lake Association asserted that, relying on the trial record as it existed, it could make out a case for raising the crest elevation of the dam to 976 feet causing widespread flooding, and it waived an evidentiary hearing. Intervenors stated that based on the County's proposed weir design, we would stipulate that this design

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<sup>8</sup> In our view, the jurisdiction of the District Court to set the crest elevation of the dam was never at issue.

could be ordered without taking further evidence. But we made it crystal clear that we expected that if the record was closed, the Court must be bound by Judge Moonan's order and decision that the ditch could not be impaired. The ruling was the law of the case, we said. Moreover, failing to implement this ruling would summarily deprive intervenors of the right to challenge the factual and legal basis. We specifically made it clear that in the event that the District Court were to consider raising the elevation above the stipulated elevation, (relief that is legally impossible in any event) that this could not be accomplished without a new trial. We stated:

“Judge Moonan's decision has become the law of the case with recognition of our continuing rights by the Court of Appeals. Swan Lake did not seek review of that portion of the decision in the Supreme Court. The only possible relief now available is to construct the weir as proposed by the County and permitted by the DNR<sup>9</sup>.”

It is this history that is referenced in the District Court's order on remand on page 22 and footnote 1, A181.

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<sup>9</sup> As we explained to the District Court: “We want to emphasize that the issue of interfering with the system or damaging intervenors lands was removed from the trial. It cannot be inserted back into the trial (a) because that portion of the order was not challenged on appeal, nor was it reversed, and (b) even if it could be changed, it could not be changed without opening the case up for a new trial. In that connection, we have indicated that an evidentiary hearing is not required to place the weir, but we have not waved our right to a trial in the event that the Court were to decide to raise the weir and flood lands or interfere with the system.”

### III. ARGUMENT

A. **The District Court's decision is supported by the evidence and is predicated on factual findings that are not clearly erroneous.**

The core issue presented on remand was the weir elevation that would undo the damage caused by the deterioration of the dam at the base of Little Lake and Mud Lake. The District Court's determination in this regard is subject to the clearly erroneous standard. Wacouta Township v. Brunkow Hardwood Corp, 510 N.W2d 27 (Minn. 1993) Minnesota Public Interest Research Group v. White Bear Rod & Gun Club, 257 N.W.2d 762 (Minn. 1977) (findings of fact by the district court may be set aside only if this court on the entire evidence is left with the definite and firm conviction that a mistake has been made).

It cannot be seriously argued that there is no environmental benefit to replacing the weir at 973.8, pursuant to the currently issued DNR permit. In fact, paragraphs 18 through 27 of the Amended Complaint advocates the environmental benefit that Plaintiff asserts will derive from that repair. Paragraph 3 of the Amended Complaint states that the "outlet is seriously deteriorated" Paragraph 26 alleges that as a result of " the County's refusal "to maintain the Outlet Control Structure" at the level stated in the Commissioner's order (which is 973.8), "Little Lake and Mud Lake have contained lessened amounts of water and provided decreased desirable habitat for waterfowl and fish and have become less desirable as hunting areas." These paragraphs, taken together represent a judicial admission on the part of Plaintiff that there is environmental benefit

resulting from the 973.8 weir installation as proposed by County, Intervenors and DNR.

The testimony supports this same conclusion. Mr. Gestfried testified that one of the reasons the DNR wanted to maintain the 973.2 elevation (if the weir remained narrow) or 973.8 elevation (if the weir were widened) was to restore the environmental benefits of a larger storage pool that existed when the dam was in place. Tr. 1287-88.

The Minnesota Environmental Rights Act (MERA) is designed “to provide an adequate civil remedy to protect air, water, land and other natural resources located within the state from pollution, impairment, or destruction.” Minn. Stat. Section 116B.01. There are two prongs to MERA, and thus two kinds of MERA cases. See State v. Schaller v. County of Blue Earth, 563 N.W.2d 260 (Minn. 1997). The first involves conduct which violates or is likely to violate an environmental standard, broadly defined.<sup>10</sup> Section 116B.02, Subd. 5. Operating Ditch 46A in violation of the 1950 drainage judgment, which requires maintenance of the outlet dam, is amenable to MERA remedies under this first prong of MERA—violation of an environmental quality standard<sup>11</sup>. Restoring the outlet dam to its original hydrological efficiency involves a simple, straightforward

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<sup>10</sup> ...any conduct by any person which violates, or is likely to violate, any environmental quality standard, limitation, rule, order, license, stipulation agreement, or permit of the state or any instrumentality, agency, or political subdivision thereof which was issued prior to the date the alleged violation occurred.

<sup>11</sup> Actually, as we explained in the previous appeal, MERA can more effectively and efficiently be used to provide standing to use the Drainage Code’s repair provisions to restore the dam, and had Swan Lake Association proceeded in this fashion, the dam would have been repaired years ago saving many tens of thousands of dollars of legal costs.

application of MERA principles. Had the Swan Lake Association utilized MERA in the way it is intended to be used, the new weir would have been in place, and the lakes restored years ago.

The problem is that Swan Lake Association is seeking to use MERA in a way it was never intended to be used, to attempt to negate government projects that were implemented 100 and 50 years ago respectively. This position was directly articulated at trial by Swan Lake's attorney as follows:

“You are allowed to make a collateral attack on the judgment of that [drainage decision] and also, under MERA—MERA's not subject to that court's decision going back to —1906. Tr. 57.

Now in this case, as it arrives here, Swan Lake Association is barred from making this argument by the District Judge's pre-trial ruling. But even so, this contention is breathtakingly audacious.

The State of Minnesota regulates approximately 1,280 dams<sup>12</sup>, of which 23% are owned by the State, 14% by the federal government, 20% by local government, 39% by private owners, and 4% by a public utility. In addition, the DNR Division of Waters, itself owns and maintains more than 300 lake outlet dams in Minnesota, the primary goals of which are to protect existing shoreland owners' rights and downstream owners' rights to water available within natural precipitation variations. There are 25,000 miles of drainage

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[http://www.damsafety.org/media/Documents/STATE\\_INFO/FACT\\_SHEETS/MN\\_NEW.pdf](http://www.damsafety.org/media/Documents/STATE_INFO/FACT_SHEETS/MN_NEW.pdf)

systems in the State of Minnesota, which serve as the backbone of Minnesota agriculture and in many cases afford flood control protection to rural and urban infrastructure. It is Swan Lake's contention in this case, that any citizen can come into district court and use MERA to force a change in the course, current, or elevation of any of these water structures, albeit lawfully established for decades, and even flood private lands without compensation, simply upon a finding that the decision, when made, was harmful to the environment based upon retroactive application of MERA standards.

Perhaps to undercut the sweeping nature of the Association's position, in each of the three briefs filed in this Court, the Association has relied on the Witty decision and implied that Ditch 46A unlawfully drained Little and Mud Lakes. Witty v. Board of Commissioners, Nicollet County, 79 N.W.2d 112 (Minn. 1899). Although we have repeatedly pointed out to Swan Lake Association that Witty applied a statute that had been repealed and replaced when Ditch 46A was established, still, the Association persists in beginning its legal argument here with the suggestion that the drainage system was somehow void, ab initio. This argument ignores Laws 1905, Chapter 230 Laws 1907, Chapter 448, and 1915 Laws 1915 Chapter 6, discussed in the procedural history section above. It also ignores the District Court's orders removing this contention from the scope of the case.

In the same vein, Swan Lake disingenuously relies on the principle that a drainage authority lacks jurisdiction to drain a meandered lake without a permit from the Commissioner of Natural Resources. Herschman v. Department of Natural Resources,

225 N.W.2d 841 (Minn. 1975) (Sibley County lacked jurisdiction to issue drainage order which lowered water level of Swan Lake since Minnesota Statutes Section 106.021, Subd. 2 requires a DNR permit). This statute was not in place when Ditch 46A was established, and in any event, the Commissioner of Conservation did permit the 1950 drainage improvement.

The second prong of MERA is not designed to reverse decisions made a century ago. A MERA Plaintiff can't demand that the I-94 freeway be moved outside of Minneapolis, because it should have been put there in the first place when it was constructed. A MERA Plaintiff cannot demand that development or private homes on Lake Calhoun should be removed because the environment would be better off if the wetlands located there in the 19<sup>th</sup> Century were re-established. The second prong of MERA addresses proposed new conduct which seeks to alter the status quo in a way that materially adversely affects or is likely to materially adversely affect the environment by causing "pollution, impairment or destruction". MERA, Section 116B.02, Subd. 5.

Minnesota cases have consistently recognized that the purpose of this second prong of MERA is to subject proposed actions to the factors described in the so-called modified Wacouta test. State v. Schaller v. County of Blue Earth, supra (test is whether proposed action is likely to materially adversely affect the environment is contrary to the policy considerations underlying MERA); Wacouta Township v. Brunkow Hardwood Corp, 510 N.W.2d 27 (Minn. 1993) (while all four factors should be considered, the weight given to each factor and the potential impact of the proposed action will depend in large part on the

type and characteristics of the resource involved in the specific case.)

**B. The District Court's Order Protecting the Drainage System is the Law of this Case.**

The pre-trial ruling of the District Court Intervenor have a right to maintenance of the drainage system in a condition established by previous drainage orders and that they have right to be free of flooding caused by an increase in the elevation of the two partially drained lakes. The District Court's order is founded on a panoply of protections found in Minnesota law designed to protect and actually confirm establish investment-backed expectations that the drainage system will not be destroyed and land flooded as a result. See Penn Central Transp. Co. v. New York City, 438 U.S. 104 (1978).

Section 103E.705 of the Drainage Code states that the drainage authority shall have the drainage system inspected on a regular basis by an inspection committee of the drainage authority or a drainage inspector appointed by the drainage authority. After the construction of a drainage system has been completed, the drainage authority "shall maintain the drainage system that is located in its jurisdiction including grass strips under section 103E.021 and provide the repairs necessary to make the drainage system efficient." In Fisher v. Albin, 104 N.W.2d 32 (1960), the Supreme Court stated: "The rights of an owner of land within a drainage system are well settled. As stated in In re Petition of Jacobson re County Ditch No. 24, 48 N.W.2d 441, 444 (1955):

'Once a ditch system is established, the order creating it constitutes a judgment in rem. The Res or subject matter of the order is the watercourse and all lands determined to be damaged or Benefitted by it. Thereafter, every owner of land who has recovered damages or been assessed for

benefits has a property right in the maintenance of the ditch in the same condition as it was when originally established. Such a property right cannot be divested or damaged without due process of law.'<sup>13</sup>

Minnesota water law provides a series of protections to benefitted landowners. As stated above, Section 103E.705, Subd. 1 provides for mandatory routine repairs. Section 103E.715, Subd. 4 allows a single benefitted property owner to initiate a repair by petition.<sup>14</sup> A single benefitted landowner can challenge abandonment of a drainage

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<sup>13</sup> The Court's footnote states: "To the same effect, see In re County Ditch No. 31 and Judicial Ditch No. 13, Faribault County, 70 N.W.2d 853 (1955); Lupkes v. Town of Clifton, 196 N.W. 666 (Minn. 1924)." See also Petition of Schoenfelder, 55 N.W.2d 305 (Minn. 1952) (We have held that once a ditch system is established every landowner who has recovered damages or has been assessed benefits has a property right in the maintenance of the ditch in the same condition as it was when originally established. ...A county board cannot damage a landowner's property by damming up the water without acquiring the right to do so.); Nostdal v. Wantonwan County, 22 N.W.2d 461 (Minn. 1946)." See also Great Northern Ry Co v. Lehman, 36 N.W.2d 336 (Minn. 1949) ("Legislation has given to the order establishing a public ditch all the final and binding force of a judgment in rem."); Curran v. County of Sibley, 50 N.W. 237 (1891) (Had the board acquired jurisdiction by due publication of the notice, and merely erred in determining any of the matters submitted to their decision, it would undoubtedly be true that their decision could not be attacked collaterally, and that the only remedy of parties aggrieved would be by appeal); County of Martin v. Kampert, 151 N.W. 897 (Minn. 1915) (objection to the qualification of the viewers does not go to the jurisdiction of the board, and is not ground for collateral attack upon its determination, but that such disqualification, if it exists, is an irregularity only, which must be taken advantage of in the original proceeding); In re Judicial Ditch No. 9, 208 N.W. 417 (Minn. 1926) (in rem jurisdiction of Court limited Court's ability to change scope of proceedings). See Op. Atty. Gen., 602-j, Oct. 24, 1961. See also Normania Twp v. Yellow Medicine County, 286 N.W. 881 (Minn. 1939); Slosser v. Great Northern Ry. Co., 16 N.W.2d 47 (Minn. 1944). See also See Oelke v. County of Faribault, 70 N.W.2d 853, 860 (Minn. 1955).

<sup>14</sup> However, the standard for approval differs depending upon whether the petition is signed by a sufficient number of landowners. Minn. Stat. §103E.715, Subd. 4.

system. Minn. Stat. § 103E.811. The objection prevents abandonment of the system, except through a statutory decisional process defined by that statute.

Section 103A.201, Subd. 1 of Minnesota's Water Policy states that "**subject to existing rights**, public waters are subject to the control of the state." Minn. Stat. § 103D.515, Subd. 1 (recognizing existing rights of landowners to use waters of watershed district). Section 103G.225 modifies wetland protection by preventing the existence of public waters wetlands from interfering with drainage maintenance.<sup>15</sup> Section 103G.245, Subd. 2(1) states that a public waters work permit is not required for (1) work in altered natural watercourses that are part of drainage systems established under chapter 103D or 103E if the work is undertaken according to chapter 103D or 103E.<sup>16</sup> Section 103G.2241, Subd. 2 provides an exemption from the required wetland replacement plan for certain drainage activities. Section 84A.55, Subd. 12, limits the DNR's authority to restrict drainage systems in certain conservation lands.<sup>17</sup>

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<sup>15</sup> Section 103G.225: "If the state owns public waters wetlands on or adjacent to existing public drainage systems, the state shall consider the use of the public waters wetlands as part of the drainage system. If the public waters wetlands interfere with or prevent the authorized functioning of the public drainage system, the state shall provide for necessary work to allow proper use and maintenance of the drainage system while still preserving the public waters wetlands."

<sup>16</sup> It further states that a public waters work permit is not required for a drainage project for a drainage system established under chapter 103E that does not substantially affect public waters.

<sup>17</sup> See also Section 103E.401, Subd. 1: "If the commissioner purchases wetlands under section 97A.145, the commissioner must recognize that when a majority of landowners or owners of a majority of the land in the watershed petition for a drainage outlet, the state should not interfere with or unnecessarily delay the drainage proceedings

Swan Lake's response is to assert that statutory drainage rights are subject to environmental limitations, and that is correct. If landowners today were to move to establish a new system in the Little Lake watershed, or if they were to seek to improve it, they would of course be bound by existing environmental law. But Swan Lake is making a far different and more radical proposition, to wit, that the Court can flood intervenors land because the decision to open these lands to agricultural development a century ago would be impermissible under legal standards existing today.

Whether Swan Lake Association agrees with our position in this regard is now beside the point, however, because of the procedural posture of this case. The claim that intervenors could be flooded was removed from the case by the trial judge. The claim that the drainage order and judgment could be collaterally attacked was removed from the case by the trial judge. If Swan Lake Association wanted to challenge that decision, it could not do so via amended findings, because the facts necessary to evaluate that claim were removed from the scope of trial. Swan Lake Association has repeatedly bypassed mandatory steps which would be a prerequisite to a challenge to Judge Moonan's decision. But Swan Lake never asked the District Court to reopen the record to allow the parties to present evidence and indeed at remand hearing specifically waived the opportunity to

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if the proceedings are conducted according to this chapter.”

reopen the record and present new evidence. The law of the case, which is consistent in any event with the law of Minnesota, is that MERA cannot be used collaterally to attack previously established drainage infrastructure and to flood private lands.

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Respectfully Submitted,

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