

NO. A05-1001

State of Minnesota
In Court of Appeals

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

Respondent,

vs.

Nicollet County Board of County Commissioners,

Appellant.

RESPONDENT'S BRIEF

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LEGAL ISSUES

1. Does the District Court have subject matter jurisdiction to hear a case under the Minnesota Environmental Rights Act, Minn. Stat. § 116B.03?

Trial Court held: In the affirmative.

Salient Authorities: Minn. Stat. § 116B.01, § 116B.03, § 116B.12, **County of Freeborn by Tuveson v. Bryson**, 297 Minn. 218, 210 N.W.2d 290 (1973); **County of Freeborn by Tuveson v. Bryson**, 309 Minn. 178, 243 N.W.2d 316, 322 (1976); **State by Fort Snelling Park Association v. Minneapolis Park and Recreation Board**, 673 N.W.2d 169 (Minn. App. 2003).

2. Are the County's powers and duties regarding public ditches under the Drainage Code (Minn. Stat. chapter 103E) subject to the Minnesota Environmental Rights Act (Minn. Stat. Chapter 116B)?

Trial Court held: In the affirmative

Salient Authorities: Minn. Stat. § 116B.03, § 116B.12; **County of Freeborn by Tuveson v. Bryson**, 297 Minn. 218, 210 N.W.2d 290 (1973); **County of Freeborn by Tuveson v. Bryson**, 309 Minn. 178, 243 N.W.2d 316, 322 (1976); **Rice Creek Watershed District v. State Environmental Quality Board**, 315 N.W.2d 604 (Minn. 1982), **McLeod County Board of Commissioners as Drainage Authority v. State of Minnesota Department of Natural Resources**, 549 N.W.2d 630 Minn. App. 1996); **Minnesota Center for Environmental Advocacy v. County of Big Stone**, 638 N.W.2d 198 (Minn. App. 2002)

3. Does the Minnesota Drainage Code (Minn. Stat. Chapter 103E) provide a procedure for non-property owners such as Respondent to petition for repairs under Minn. Stat. § 103E.415 or appeal under Minn. Stat. § 103E.095?

Trial Court held: Did not rule on this issue.

Salient Authorities: **In Re Petition of Schoenfelder**, 238 Minn., 55 N.W.2d 305 (1952); **In Re Petition for Lateral to Judicial Ditch No. 7, Martin and Faribault Counties**, 238 Minn. 165, 56 N.W.2d 435, 57 N.W.2d 29 (1952)

4. Did the trial court commit “clear abuse of discretion” in allowing relator to amend its Complaint?

Trial Court held: In the negative.

Salient Authorities: **Raspler v. Seng** 215 Minn. 596, 11 N.W.2d 440 (1943); **LaFee v. Winona County** 655 N.W.2d 662 (Minn. App. 2003)

STATEMENT OF THE CASE

This case began with the service of a Summons and Complaint on Respondent County of Nicollet on June 5, 2003. The matter was brought as a Complaint by the Swan Lake Area Wildlife Association, Inc., a Minnesota non-profit corporation. Count I alleged that pursuant to the Minnesota Environmental Rights Act (“MERA”), Minn. Stat. §116B.03, the County should be compelled to comply with the order of the Commissioner of Natural Resources dated March 15, 1972, to replace the dilapidated dam at the outlet of Little Lake in Nicollet County which the County had previously installed as part of a ditch project. Count II alleged that the County had a duty to maintain the water level of Little Lake and Mud Lake, two meandered lakes in Nicollet County and that its failure to do so constituted impairment and destruction of natural resources within the meaning of MERA which the County had a duty to remedy. Count III alleged that a nuisance was created by the Respondent. The Complaint was duly served on the Minnesota Attorney General and the Minnesota Pollution Control Agency and Notice thereof was published in the **St. Peter Herald** within 21 days of filing.

Respondent County of Nicollet served its Answer on July 25, 2003. By consent of both parties, Marlin Fitzner and other landowners were permitted to intervene on December 15, 2003.

On August 4, 2004, the County brought a motion for summary judgment. On August 25, 2004, the court rendered its order granting partial summary

judgment. It granted the County's motion relative to Count I but denied the motion as to Count II and Count III. The Court's decision was not an appealable order.

The Relator then moved to amend its Complaint and join the Department of Natural Resources as a party. The Respondent County moved to dismiss the Complaint of Relator on the grounds that the district court did not have subject matter jurisdiction under MERA.

On April 11, 2005, the District Court issued its order granting the motion of the Swan lake Area Wildlife Association to amend its complaint and denying the motion of the County of Nicollet to dismiss the case. The Court ruled:

Any person, including an association, may maintain an action for declaratory or equitable relief for the protection of the air, water, land or other natural resource from pollution, impairment, or destruction, including conduct that may materially adversely affect or its likely to materially affect the environment. County of Freeborn v. Bryson, 210 N.W.2d 290 (Minn. 1973). Minn. Stat. 116B.03, Subd. 1. The rights and remedies provided by MERA are in addition to any administrative, regulatory, statutory, or common law rights and remedies. Minn. Stat. 116B.12. Fort Snelling State Park Association v. Minneapolis Park and Recreation Board, 673 N.W.2d 169 (Minn. App. 2003).

Thereupon Respondent County filed its present Notice appealing the district court's order allowing the amendment of Relator's Complaint and appealing the order denying its motion to dismiss the complaint.

STATEMENT OF FACTS¹

Little Lake is a meandered lake in Oshawa and Granby Townships of Nicollet County comprising approximately 440 acres. (Appellant's Appendix, p. 12 [AA-12]) Mud Lake is a meandered lake entirely in Granby Township and includes approximately 444 acres [AA-272]. The lakes provide significant game habitat and hunting recreation to this area of the state. [AA-13; 173].

There has been significant effort from local farmers over the years to drain these lakes and turn the 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 question², 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

¹ The facts of the case are in considerable dispute since there has been no evidentiary hearings before the pretrial appeal occurred. Respondent cannot even get the County to concede that the public records show that Little Lake and Mud Lake are meandered lakes. [See Requests 1 & 2, Appellant's Appendix pp. 222-223.] Respondent does not agree with many of the facts alleged by appellant and we expect appellant will probably dispute the facts claimed by respondent. Consequently respondent will set forth the facts as it understands them to be and trust that on remand, the factual disputes can be resolved.

² 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 (8th 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.

beneficial public use.” **Witty v. Nicollet County Board of Commissioners**, 76 Minn. 286, 79 N.W. 112 (1899).

Justice Mitchell then held:

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 came into the vicinity of 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. [AA-169 to 171]. The viewers (ditch appraisers) did not find any lakebed lands converted into farm use so they did not assess those lands for benefits. [AA-269].

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. [AA-12]. 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. [AA-299].

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 at elevation 973.3 feet above sea level that impounded approximately 300 acres of the old lakebed of Little Lake. [AA-297]. This left Little Lake with only an average of a foot of water depth [AA-290] which was not satisfactory for wildlife habitat; at least two feet is necessary [AA-94]. The 1950 ditch improvement proceedings did not award assessed benefits for the conversion of lakebed to farmland [AA-269] thus no claim of vested rights in lake drainage can be made.

By 1966, even the marginal wildlife values provided by the sheet metal structure was lost when the structure collapsed because the county had installed “inadequate sheet piling depth”. [AA-531] 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 but talk. Little Lake and Mud Lake remain today as they did in 1966 as little more than mud flats with “practically no standing water.” [AA-295].

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. [AA-12]. 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 [AA-698 to 699]. 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, some 2.2 feet below the Ordinary High Water Level of Little Lake. [AA-11 to AA-17].

This the County Board refused to do. In fact the Board has done nothing to replace its dam that has laid flat on the lakebed since 1966. Little Lake and Mud Lake, meandered public waters of the state of Minnesota, have remained in their degenerated condition despite the efforts of the Swan Lake Area Wildlife Association and other sportsmen's groups to bring attention to the issue and regenerate these public lakes.

Small wonder that the Association has grown disenchanted with the environmental stewardship of the Nicollet County Board and the Department of Natural Resources and have sought their own recourse under the Minnesota Environmental Rights Act.

STANDARD OF REVIEW

The determination of the presence or absence of subject matter jurisdiction is a *de novo* issue for the Court of Appeals. **Johnson v. Murray**, 648 N.W.2d 664 (Minn. 2002).

The Trial Court is vested with discretion whether to allow or deny an amendment of the pleadings. The standard for review of that determination is a “clear abuse of discretion”. **Raspler v. Seng** 215 Minn. 596, 11 N.W.2d 440 (1943); **LaFee v. Winona County** 655 N.W.2d 662 (Minn. App. 2003).

ARGUMENT

I. THE SCOPE OF A PRETRIAL APPEAL SHOULD BE NARROWLY LIMITED TO WHETHER THE DISTRICT COURT HAS SUBJECT MATTER JURISDICTION UNDER THE ENVIRONMENTAL RIGHTS ACT (MINN. STAT. CHAPTER 116B) AND NOTHING MORE

In the present case, the Appellant labels its appeal as one based on subject matter jurisdiction. In reality, however, the appellant has unloaded 937 pages of miscellaneous documents (849 pages in appellant's so-called "Appendix" and 88 pages in what it has called the "Addendum") and has virtually requested the Court of Appeals to try a case that has never been tried before the district court.

Respondent objects that this is not a proper record and submission to this court.

As to appeals, the general rule is "[A] order denying a motion to dismiss is not appealable because it simply retains the action for trial, does not involve the merits of the case and is not a final order." **County of Hennepin v. Decathlon Athletic Club, Inc.**, 559 N.W.2d 108, 109 (Minn.1997)

The only arguable issue on this pre-trial appeal is whether a district court can entertain a case under the Minnesota Environmental Rights Act ("MERA" as coded in Minn. Stat. § 116B.) The district court succinctly answered this question in the affirmative in a one-paragraph memorandum (Respondent's Appendix, p. R-2)

Appellant has framed its appeal as one of subject matter jurisdiction but has expanded its submissions to this Court greatly in excess of the meaning of “subject matter jurisdiction.”

Black’s Law Dictionary (8th Ed. 2004) defines “subject matter jurisdiction” as follows:

Subject matter jurisdiction: Jurisdiction over the nature of the case and the type of relief sought; the extent to which a court can rule on the conduct of persons or the status of things. – Also termed *jurisdiction of the subject matter; jurisdiction of the cause; jurisdiction over the action.*

“Subject matter jurisdiction involves a court’s authority to decide a particular class of actions and its authority to decide the particular questions before it.” **Herubin v. Finn**, 603 N.W.2d 133, 137 (Minn. App. 1999).

Once the decision is made as to whether or not the district court has subject matter jurisdiction, the process of judicial review should cease and the matter remanded to the district court. Either the trial court should be affirmed as to having jurisdiction or it should be reversed as not having jurisdiction. The appellate court should not proceed (as Appellant desires) to weigh the evidence and adjudicate the case in the absence of full trial before the district court.

If this approach by appellant were allowed the pre-trial appeal exception to the **Decathlon** rule cited previously would become meaningless and the exception would become the rule.

The correctness of Judge Moonan’s decision that the court had jurisdiction will be discussed in the next section.

In a similar setting, the Court of Appeals at one time reviewed issues of law post-trial on appeal in the absence of a motion for a new trial. The Supreme Court disapproved of that practice in **Sauter v. Wasemiller**, 389 N.W.2d 200 (Minn.1986). The court noted the hazard of “issue expansion” when it later stated: “With a little ingenuity, most questions can be converted into so-called ‘question of law’; if the exception were to be allowed, it would soon swallow up **Sauter**. Nor would orderly appellate review be served if appealability of an issue degenerated into debates over what was a question of law.” **Tyroll v. Private Label Chemicals, Inc.** 505 N.W.2d 54, 57 (Minn. 1993).

Likewise in the instant case, despite the “ingenuity” of Appellant, the exception of pre-trial “subject matter jurisdiction” should be narrowly construed to determine whether or not the District Court has subject matter jurisdiction in an Environmental Rights Act case to consider matters affecting public drainage ditches. The appeal ought not wander afield into a substitution for a trial before the district court.

**II. DISTRICT COURT HAS SUBJECT MATTER JURISDICTION
UNDER THE MINNESOTA ENVIRONMENTAL RIGHTS ACT (MINN.
STAT. CHAPTER 116B) TO CONSIDER CONDUCT BY DRAINAGE
AUTHORITIES**

The district court's denial of the County's motion for dismissal was
succinct:

Any person, including an association, may maintain an action for declaratory or equitable relief for the protection of the air, water, land or other natural resource from pollution, impairment, or destruction, including conduct that may materially adversely affect or its likely to materially affect the environment. County of Freeborn v. Bryson, 210 N.W.2d 290 (Minn. 1973). Minn. Stat. 116B.03, Subd. 1. The rights and remedies provided by MERA are in addition to any administrative, regulatory, statutory, or common law rights and remedies. Minn. Stat. 116B.12. Fort Snelling State Park Association v. Minneapolis Park and Recreation Board, 673 N.W.2d 169 (Minn. App. 2003).

Remarkably in the course of its 38-page Brief, Appellant never once cited a case involving MERA or attempted to distinguish the cases cited by the trial court. Appellant's only reference to MERA is a passing reference to part of Minn. Stat. § 116B.03 (Appellant's Brief, p. 27).

Public drainage has been a mixed blessing for Minnesota. On the one hand, it has enhanced agricultural productivity in this state. On the other hand, it has destroyed ten million acres of lakes and wetlands and has reduced the numbers of waterfowl and furbearers produced in our state. Note, Preserving Minnesota Wetlands, 6 Wm Mitchell L. Rev 137 (1980). If any governmental activity deserves environmental scrutiny, it is certainly public drainage.

As Mr. Justice Lees stated in **Erickschen v. County of Sibley**, 142 Minn. 37, 170 N.W. 883(1919).

As a rule drainage proceedings are begun for the sole purpose of reclaiming wet lands, primarily for the direct benefit of the owners thereof, and incidentally for the promotion of the public welfare, by increasing the productiveness and taxable value of lands having little or no value unless drained. Doubtless there is an advantage to the public in reclaiming waste lands, but there must be set it the loss which follows upon the destruction of public waters, where that result is brought about in the process of draining such lands. We have observed that in contested drainage proceedings the petitioners are chiefly interested in adding to their holding of arable land, while their opponents are concerned over possible damage to their lands as a result of the drainage of those of their neighbors. In the clash of conflicting private interests, those of the public are apt to drop out of sight. Yet the state, though not a party to nor represented in the proceedings, has real and substantial rights to protect.

142 Minn. at 41-42, 170 N.W. at 885.

This gap in the protection of natural resources was filled in part by the enactment of the Environmental Rights Act of 1971 (Minn. Laws 1971 Chapter 952 coded as Minn. Stat. Chapter 116B).

Nowhere in the Environmental Rights Act (Minn. Stat. Chapter 116B) does the statute declare that its provisions do not apply to drainage proceedings under the Drainage Code (Minn. Stat. Chapter 103E).

Nowhere in the Drainage Code does it declare that its provisions are exempt from the coverage of the Environmental Rights Act.

The Environmental Rights Act declares in this introduction that it is intended to provide judicial relief for the protection of the environment.

The legislature finds and declares that each person is entitled by right to the protection, preservation, and

enhancement of air, water, land, and other natural resources located within the state and that each person has the responsibility to contribute to the protection, preservation, and enhancement thereof. The legislature further declares its policy to create and maintain within the state conditions under which human beings and nature can exist in productive harmony in order that present and future generations may enjoy clean air and water, productive land, and other natural resources with which this state has been endowed. Accordingly, it is in the public interest 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. § 116B.01 [Emphasis added].

That section alone is sufficient to establish that the district court has subject matter jurisdiction over public ditch systems constructed and maintained by the counties. But there is a great deal more.

Minn. Stat. § 116B.02, subd.2 defines an association such as the Swan Lake Area Wildlife Association as a “person” for the purpose of MERA. Next Minn.

Stat. § 116B.03, subd.1 provided in part

Any person residing within the state; the attorney general; any political subdivision of the state; any instrumentally or agency of the state or of a political subdivision thereof; or any partnership, corporation, association, organization, or other entity having shareholders, members, partners or employees residing within the state may maintain a civil action in the district court for declaratory or equitable relief in the name of the state of Minnesota against any person, for the protection of the air, water, land, or other natural resources located within the state, whether publicly or privately owned, from pollution, impairment, or destruction.

This section gives the association standing to institute litigation under MERA even though the association does not own real estate or pay property taxes to the County or maintain any of the other conventional interests that vest standing

in other legal settings. By contrast, the Association does not have standing in drainage ditch proceedings as will be discussed in the next section.

Were there any lingering doubt about whether the district court has subject matter jurisdiction beyond what redress (if any) is provided by the Drainage Code, that doubt is dissolved by the clear language of Minn. Stat. § 116B.12 which provide in part: “The rights and remedies provided herein shall be in addition to any administrative, regulatory, statutory, or common law rights or remedies now or hereafter available.”

Shortly after MERA was enacted its applicability was tested in Freeborn County. The County Highway Department sought to construct a highway across a 7 ½ acre pond owned by William Bryson. The County undertook condemnation of the tract under the provisions of Minn. Stat. Chapter 117, the Eminent Domain Code. Bryson resisted the County’s efforts, citing MERA “The main issue on this appeal is whether the County’s power to condemn land for a public use [pursuant to Minn. Stat. Chapter 117] is limited by the Environmental Rights Act enacted by the 1971 Legislature.” **County of Freeborn by Tuveson v. Bryson**, 297 Minn. 218, 220, 210 N.W.2d 290, 292, (1973). (hereafter “**Bryson I**”).

The Supreme Court concluded that MERA did indeed limit the exercise of the County’s power under Chapter 117. The court held “The power of eminent domain inheres in the state as an essential attribution of sovereignty. [Omitting case citation]. A delegation of that power may be modified or withdrawn by the legislature.” 297 Minn. at 225, 210 N.W.2d at 295. The Court further found that

Bryson's Marsh (considerably smaller than Little and Mud Lakes) is a natural resource under the meaning of the MERA with "abundant animal and botanical life along with water, land, timber, soil and quietude resources." 297 Minn. at 228, 210 N.W.2d at 297. The Supreme Court remanded the case to the district court with the instructions to proceed to trial.

Correspondingly, in the present case, to paraphrase **Bryson I**: "The main issue on this appeal is whether the county's power to construct and maintain public ditches is limited by the Environmental Rights Act enacted by the 1971 Legislature." The Swan Lake Area Wildlife Association urges that the answer should be the same as the Supreme Court gave in **Bryson I**.

The dispute over the highway and the Bryson Marsh was not resolved in the subsequent district court action and the matter returned to the Supreme Court in 1976.

Following trial the district court judge concluded that the desirability of constructing a direct and less expensive road outweighed the protection of Bryson's Marsh. The Supreme Court reversed the district court's findings and stated in plain and unmistakable language the policy of the State of Minnesota:

To some of our citizens, a swamp or marshland is physically unattractive, an inconvenience to cross by foot and an obstacle to road construction or improvement. However, to an increasing number of our citizens who have become concerned enough about the vanishing wetlands to seek legislative relief, a swamp or marsh is a thing of beauty. To one who is willing to risk wet feet to walk through it, a marsh frequently contains a springy soft moss, vegetation of many varieties, and wildlife not normally seen on higher ground. It is quiet and peaceful—the most ancient of cathedrals—antedating the oldest of manmade structures. More than

that, it acts as nature's sponge, holding heavy moisture to prevent flooding during heavy rainfalls and slowly releasing the moisture and maintaining the water tables during dry cycles. In short, marshes and swamps are something to protect and preserve.

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

County of Freeborn by Tuveson v. Bryson, 309 Minn. 178, 243 N.W.2d 316, 322 (1976). (hereafter **Bryson II**”).

From there, the Court enunciated its ultimate principle:

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.

Id.

Subsequent to **Bryson II**, the Supreme Court has established more detailed procedures for the application of the Environmental Rights Act but it has never flagged in the Court's or the State's commitment to environmental considerations in the activities of the state and its political subdivisions such and Nicollet County.

In **Krmpotich v. City of Duluth**, 483 N.W.2d 55 (Minn. 1992) the Supreme Court noted “The state has demonstrated an acute awareness of the need for identification and preservation of our natural resources including wetlands.” 483 N.W.2d at 56. In that case the trial court after full trial, concluded that the Environmental Rights Act did not preclude a development that would eliminate a 1.85 acre wetland. In this case, respondent seeks a trial and let the facts lead to the conclusion. The Association should not be denied its day in court.

It is true that as yet there is no case that categorically states that county board activities under the Drainage Code are subject to the scrutiny of the Environmental Rights Act. However, as discussed previously, Minn. Stat. Chapter 103E and Minn. Stat. Chapter 116B do not exempt such applicability.

Moreover, as a matter of common environmental sense, the drainage of public waters and alteration of landscapes pursuant to the Drainage Code logically should be subject to the environmental review of MERA.

Furthermore, in a number of other instances, related environmental laws have been applied to public drainage proceedings. For example in **Rice Creek Watershed District v. State Environmental Quality Board**, 315 N.W.2d 604 (Minn. 1982), the drainage authority asserted that it was exempt from the provisions of the Environmental Protection Act (Minn. Stat. chapter 116D) including the need to prepare an Environmental Impact Statement (EIS) for a ditch repair. The Supreme Court rejected that argument and directed that the Board was subject to the Environmental Protection Act. It cited with approval the argument

of the Environmental Quality Board: "An EIS examines the environmental consequences of an action, explores alternatives, and suggests measures which could be helpful in mitigating any adverse environmental impact caused by the action." 315 N.W.2d at 605-606.

In **McLeod County Board of Commissioners as Drainage Authority v. State of Minnesota Department of Natural Resources**, 549 N.W.2d 630 Minn. App. 1996) the drainage authority argued on similar grounds that in performing ditch repairs it was exempt from the provisions of the Minnesota Wetlands Conservation Act (Minn. Stat. § 103G.221 et seq). This court stated:

As a creature of the state deriving its sovereignty from the state, the county should play a leadership role in carrying out legislative policy. **County of Freeborn v Bryson**, 309 Minn. 178, 188, 243 N.W.2d 316, 321 (Minn. 1976). Therefore, when the county undertakes the maintenance of a ditch, pursuant to statute, "it must do so in a way that is consistent with the objectives of the statute and other announced state policies." **Kasch v Clearwater County**, 289 N.W.2d 148, 151 (Minn. 1980).

The supreme court has stated that Aldo Leopold's "land ethic simply enlarges the boundaries of the community to include * * * the land." **In re Application of Christenson**, 417 N.W.2d 607, 615 (Minn. 1987) (quoting **Bryson** 309 Minn. At 189, 243 N.W.2d at 322 The court has reaffirmed that the state's environmental legislation had given this land ethic the force of law, and imposed on the courts a duty to support the legislative goal of protecting our state's environmental resources. Vanishing wetlands require, even more today than in 1976 when **Bryson** was decided, the protection and preservation that environmental legislation was intended to provide. *Id.* Thus, the county has an obligation to maintain the ditch in a manner consistent with the policies established by the legislature in the [Wetlands Conservation] Act.

549 N.W.2d at 633-634.

In **In Re Lake Elysian High Water Level**, 208 Minn. 158, 293 N.W. 140

(1940) the Supreme Court enforced the restoration of Lake Elysian by

Commissioner's Order against a County Board even though the landowners argued they had acquired a "new status." In quoting from a previous opinion, the court said: "No riparian owner has a right to complain of improvements by the public whereby the water is maintained in the conditions which nature has given it. The law justified the maintenance of the lake at its natural and usual height and level."

208 Minn. at 165, 293 N.W. at 143.

In **Minnesota Center for Environmental Advocacy v. County of Big Stone**, 638 N.W.2d 198 (Minn. App. 2002) the County asserted that its ditch proceeding was exempt from the requirement of a permit under the Public Waters Permit Act (Minn. Stat. §103G.245).¹ This court decided that the drainage authority was not exempt from the Public Waters Permit Act.

The cycle is now almost complete. The courts have held that Drainage Authorities are subject to the Environmental Protection Act, the Wetlands Conservation Act and the Public Waters Permit Act. The heart of Nicollet County's appeal is the claim that a Drainage Authority is not subject to the Environmental Rights Act. This court should decide that the County Drainage Authority must conform to MERA as well as the other environmental laws and affirm Judge Moonan's Order.

¹ Interestingly Big Stone County was represented by the same law firm that is representing Nicollet County in the present proceedings.

III. THE MINNESOTA DRAINAGE CODE DOES NOT PRECLUDE THE SWAN LAKE AREA WILDLIFE ASSOCIATION FROM SEEKING A JUDICIAL REMEDY UNDER THE MINNESOTA ENVIRONMENTAL RIGHTS ACT (MINN STAT. CHAPTER 116B)

Appellant in its argument asserts that the exclusive remedy that the Swan Lake Area Wildlife Association has is by petitioning the Nicollet County Board to “repair” County Ditch 46A so as to restore Little and Mud Lakes. This makes no sense. It is the Nicollet County Board that caused the damage to Little and Mud Lakes by its drainage activity and then by its neglect to restore the lakes. This is like petitioning the goat to restore the cabbage patch. However, the absurdity of the County’s argument not only is contrary to common sense, its argument also flies in the face of established law.

A. ENVIRONMENTAL RIGHTS ACT PROVIDES THAT ITS PROVISIONS ARE IN ADDITION TO ANY OTHER STATUTORY OR ADMINISTRATIVE REMEDIES, PURSUANT TO MINN STAT. § 116B.12

The remedies provided by the Minnesota Environmental Rights Act are in addition to any other remedy provided by any other statute, regulation, or other remedy provided by law. Minn. Stat. § 116B.112 provides: *“The rights and remedies provided herein shall be in addition to any administrative, regulatory, statutory, or common law rights and remedies now or hereafter available.”*

In *State by Fort Snelling Park Association v. Minneapolis Park and Recreation Board*, 673 N.W.2d 169 (Minn. App. 2003) the identical issue raised

here by Appellant here was raised by the Minneapolis Park and Recreation Board:
“Respondent park board contends that the district court erroneously concluded that it had de novo jurisdiction over the MERA. It argues that the [Minnesota Historical Society] and [National Park Service] administrative processes required for approval of the athletic center preclude a MERA action.” 673 N.W.2d at 177. This court rejected that allegation citing the foregoing statute. “We conclude there is no support for this contention. The legislature expressly stated that the "rights and remedies provided [in MERA] shall be in addition to any administrative, regulatory, statutory, or common law rights and remedies now or hereafter available." 673 N.W.2d at 177. The same result should follow here.

B. DRAINAGE CODE DOES NOT PROVIDE STANDING TO PERSONS WHO DO NOT OWN LAND AFFECTED BY THE PUBLIC DITCH

In its brief, the county argues that the Swan Lake Area Wildlife Association should seek to petition the County Board to restore Little and Mud Lakes as a ditch “repair” (Appellant’s Brief, p.22, 24). First of all as a practical matter that is futile because the members of the Association have been begging the county for years to restore these lakes but the county has done nothing.

More importantly as a matter of law the Association does not have any legal standing to petition the Board for such official action and it has no right to obtain judicial review under the Drainage Code.

The argument of the County that the Association is restricted to petitioning the County Board and, supposedly if the Association is dissatisfied with the

County's decision, it can appeal the County's order under § 103E.095 is based on **Zaluckj v. Rice Creek Watershed District**, 639 N.W.2d 70 (Minn. App. 2002) and **Anderson v. County of Stearns**, 519 N.W.2d 212 (Minn. App.1994)

Proceedings under the Minnesota Drainage Code (Minn. Stat. Chapter 103E) are proceedings of the assessed owners, by the assessed owners, and for the assessed owners. The Drainage Code is a closed system which limits participation in its procedure to landowners whose real estate is affected and/or who are awarded damages or assessed benefits.

The **Zaluckj** and **Anderson** cases have no applicability to the case of the Swan Lake Area Waterfowl Association and the Nicollet County Board. Alex Zaluckj was a property owner on the ditch rolls for Washington County Judicial District No. 2. James Anderson was a property owner on the ditch rolls for Stearns County Ditch No. 37. As landowners assessed for benefits or awarded damages, they were entitled to participate in all drainage authority hearings respectively on Judicial Ditch No. 2 and County Ditch No. 37. If they were dissatisfied with the Board's decision, they could appeal under the Drainage Code.

Swan Lake Area Wildlife Association is not a landowner assessed for benefits or awarded damages. Even if it wished to waive its rights under Minn. Stat. § 116B.12 and ask for action by the Nicollet County Board, it would not be entitled to file a petition or appeal a ditch authority order.

Appellant suggests that the Association could petition the County Board to restore Little and Mud Lakes pursuant to Minn. Stat. § 103E.715 which provides

in part “An individual or entity interested in or affected by a drainage system may petition to repair the drainage system.” [Emphasis added.] Appellant’s argument is fatuous because that particular language has been construed by the Supreme Court to include only landowners or others with a pecuniary interest in the ditch, which the Swan Lake Area Wildlife Association clearly does not have. See **In Re Petition for Lateral to Judicial Ditch No. 7, Martin and Faribault Counties**, 238 Minn. 165, 56 N.W.2d 435, 57 N.W.2d 29 (1952) [Note both text of opinion and Appeal of Taxation of Costs]; **State ex rel Kohler Contracting Co. v. Hansen**, 140 Minn. 28, 167 N.W.114 (1918).

Even if by some stretch of logic the Association could become a petitioner based on its environmental concerns, it would be precluded from obtaining judicial review of the Board’s decision because it does not have a property interest under the Drainage Code, as established by **In Re Petition of Schoenfelder**, 238 Minn., 55 N.W.2d 305 (1952) in which the court said:

The question presented by this appeal is whether a landowner claiming to be adversely affected by the establishment or improvement of a drainage ditch but who is not a party to the ditch proceedings and is not subject to assessment for benefits or entitled to damages may appeal as an aggrieved party from an order of the county board granting a petition for the establishment or improvement of such ditch without first taking some action to become a party, by intervention or otherwise, in the proceeding itself. We think not.

Ordinarily, only parties to the record or their privies may appeal. 1 Dunnell, Dig. & Supp. s 310. In **State v. Tri-State Telephone & Telegraph Co.**, 146 Minn. 247, 250, 178 N.W. 603, 604, we said:

‘the right of appeal is purely statutory. The Legislature may give or withhold it at its discretion. If it gives the right it may do so upon such conditions as it deems proper. * * * A stranger to an action

cannot take any part in it, except to intervene or apply for leave to become a party. Mann v. Flower, 26 Minn. 479, 5 N.W. 365; Hunt v. O'Leary, 78 Minn. 281, 80 N.W. 1120. He is not a party merely because he is directly interested in the result (Stewart v. Duncan, 40 Minn. 410, 42 N.W. 89), or has an independent claim he seeks to assert without being named as a party (Davis v. Swedish-Am(eric)an Nat. Bank, 78 Minn. 408, 80 N.W. 953, 81 N.W. 210, 79 Am.St.Rep. 400). The term 'parties' included *19 those who are directly interested in the subject-matter and who have the right to control the proceedings, examine and cross-examine the witnesses, and appeal from the order or judgment finally entered. Robbins v. Chicago City, 4 Wall. 657, 18 L.Ed. 427; Green v. Bogue, 158 U.S. 478—503, 15 S.Ct. 975, 39 L.Ed. 1061; Burrell v. United S(tates) 9 Cir., 147 F. 44, 77 C.C.A. 308. The phrase 'a party to the proceeding' is to be construed in its ordinary legal meaning, and embraces only such persons as are parties in a legal sense, and who have been made or become such in some mode prescribed or recognized by law, so that they are bound by the proceeding.'

To permit this appeal would enable any landowner opposed to the establishment or improvement of a drainage ditch but not directly affected by it to unduly interfere with and delay a much needed ditch improvement on a claim, whether meritorious or not, that he will be remotely or indirectly affected by the establishment or improvement of such ditch.

238 Minn. at 18, 55 N.W.2d at 307

In summary, the Swan Lake Area Wildlife Association is entitled to an independent cause of action under Minn. Stat. § 116B.12 to secure relief. Moreover, the Association is not a party interested or affected by Ditch 46A and is not entitled to submit a repair petition under Minn. Stat. §103E.715 nor seek judicial review of an adverse order under Minn. Stat. §103E.095. The Drainage Code is a closed circuit process limiting participation to landowners whose land is physically impacted by the public ditch and who have been assessed benefits or have sustained damages.

IV. LITTLE LAKE AND MUD LAKE ARE MEANDERED LAKES AND PUBLIC WATERS WHICH HAVE BEEN SIGNIFICANTLY IMPAIRED BY APPELLANT AND SHOULD BE RESTORED BY A JUDGMENT PURSUANT TO THE MINNESOTA ENVIRONMENTAL RIGHTS ACT, MINN. STAT. § 116.03, SUBD. 3

The case is still in the pretrial stage so it is premature to expect a post-trial order at this juncture. Moreover, the parties do not agree on the facts so it is clear that a trial must be conducted before any final decision based on the adjudicated facts can be made. Nevertheless, respondent considers it worthwhile to describe the substantial impairment of these natural resources that it perceives and the nature of the relief it will seek in the district court.

Little Lake and Mud Lake combined are nearly 900 acres of what should be prime waterfowl habitat in Nicollet County. They are important satellite brooding, courting and feeding sites for birds that can cruise from the nearby and massive Swan Lake and back again. These lakes have been degraded by the wrongful acts and neglect of the Nicollet County Board. The sad, mudflats to which they have been reduced should be reversed. These lakes should be restored.

In **State by Schaller v. County of Blue Earth**, 563 N.W.2d 260 (Minn. 1997) the Supreme Court established five factors in determining the applicability of MERA to a case:

- (1) The quality and severity of any adverse effects of the proposed action on the natural resources affected;
- (2) Whether the natural resources affected are rare, unique, endangered, or have historical significance;

- (3) Whether the proposed action will have long-term adverse effects on natural resources, including whether the affected resources are easily replaceable (for example, by replanting trees or restocking fish);
- (4) Whether the proposed action will have significant consequential effects on other natural resources (for example, whether wildlife will be lost if its habitat is impaired or destroyed);
- (5) Whether the affected natural resources are significantly increasing or decreasing in number, considering the direct and consequential impact of the proposed action.

563 N.W.2d at 267. Respondent submits that all of these factors will be established at trial.

**V. APPELLANT HAS NOT PROVEN THAT THE DISTRICT COURT'S
PRE-TRIAL ORDER GRANTING RESPONDENT'S MOTION TO
AMEND ITS COMPLAINT WAS "CLEARLY ARBITRARY" WITH
PREJUDICE TO APPELLANT SO THAT ORDER MUST BE AFFIRMED**

Appellant has appealed the decision of the District Court granting Respondent/Relator the right to amend its complaint. Appellant has not submitted evidence either in the district court nor legal argument in this appeal to establish that the order of the District Court permitting amendment of the complaint was wrongful. Accordingly, that decision should be affirmed.

The standard for overturning a court order allowing amendment of pleadings was set forth in **Rasper v. Seng**, 215 Minn. 596, 11 N.W.2d 440 (1943):

The amendment of pleadings on the trial is a matter lying almost wholly in the discretion of the trial court and its action will not be reversed on appeal except for a clear abuse of discretion. 5 **Dunnell, Dig. & Supp.** § 7708, and cases cited; **James E. Carlson Inc. v. Babler**, 144 Minn. 125, 174 N.W. 824; **Seifert v Union Brass & Metal Mfg. Co.** 191 Minn. 362, 254 N.W. 273; **Nygaard v. Maeser Fur Farms Inc.**, 183 Minn. 388, 237 N.W. 7. The party objecting to an amendment has the burden of proving that he will

be prejudiced. **Short v. Great Northern L. Ins. Co.**, 179 Minn. 19, 228 N.W. 440

215 Minn. at 599, 11 N.W.2d at 441.

Appellant has demonstrated neither “clear abuse of discretion” nor prejudice to itself. Accordingly, the decision of the district court should be affirmed. Of course, if for any reason this court were to determine that the district court did not have subject matter jurisdiction, then the decision of the district court on the amendment of pleadings issue would be moot.

CONCLUSION

In reality the issue of this case is a very narrow one: Does the District Court have subject matter jurisdiction to hear a case under the Minnesota Environmental Rights Act? The clear answer is “yes” pursuant to Minn. Stat. § § 116B.01, 116B.03 and 116B.12. The matter should be summarily affirmed and remanded to the district court for a trial of the case. If either the County Board or the Swan Law Wildlife Association is dissatisfied with the results after trial, then that party can seek an appeal when the full evidence and rulings of law are available for judicial review.

Based on the foregoing, the Orders of the District Court, Hon. John Moonan, denying Nicollet County’s motion for Dismissal and granting the Swan Lake Area Wildlife Association’s motion to amend its complaint should be affirmed in their entirety.

Dated: September 12, 2005

Respectfully submitted,

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

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**STATE OF MINNESOTA
IN COURT OF APPEALS**

Nicollet County Board of
County Commissioners,

Court of Appeals File #A-05-1001

Appellant,

vs.

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

Respondent.

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 548 lines, 5,510 words. This brief was prepared using Microsoft Word 2002.

Dated this 12th day of September, 2005

Respectfully Submitted,



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