

STATE OF MINNESOTA IN COURT OF APPEALS

Case No. A14-0679

Save Mille Lacs Sportsfishing, Inc.,
Proper Economic Resource Management,
Twin Pines Resort, Incorporated,
Bill Eno and Fred Dally,

Petitioners,

vs.

Minnesota Department of Natural
Resources,

Respondent.

BRIEF OF PETITIONERS IN SUPPORT OF DECLARATORY JUDGMENT AND ADDENDUM

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July 11, 2014

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STATEMENT OF LEGAL ISSUE

Whether a DNR adopted fishing rule is *per se* invalid when the adopted rule and supporting 18,700-page administrative record do not apply nor mention Minnesota's Preserve Hunting and Fishing Heritage constitutional provision (Minn. Const. Art. XIII, Sec. 12) and the related public trust doctrine.

STATEMENT OF THE CASE

The Petitioners have petitioned the Court of Appeals under Minnesota Statute § 14.44 for a declaratory judgment holding the DNR's 2014 Adopted Expedited Emergency Game and Fish Rules for Mille Lacs Lake Fishing, amending Rule 6264.0400, subpart 4 ("Rule"), to be invalid due to failure of the DNR to apply Minnesota's Preserve Hunting and Fishing Heritage constitutional provision and the related public trust doctrine. In adopting this Rule via an 18,700-page administrative record, the DNR never applied nor mentioned the applicable law, rendering the adopted Rule *per se* invalid.

Minnesota's Preserve Hunting and Fishing Heritage constitutional provision and Minnesota's public trust doctrine require DNR preservation of fishing heritage on Minnesota lakes including Mille Lacs Lake. Both laws are part of the legal standards the DNR is required to apply to preserve fishing heritage for Minnesota citizens.

The public trust doctrine applies to Mille Lacs Lake. The Minnesota Supreme Court since 1942 has recognized that the public trust doctrine provides that "[t]he state, in its sovereign capacity, as trustee for the people, holds all navigable waters and the lands under them for public use." *Nelson v. De Long*, 213 Minn. 425, 431, 7 N.W.2d 342, 346 (1942). In *State v. Longyear Holding Co.*, the

Minnesota Supreme Court in 1947 discussed the origin of the doctrine, the purpose of the trust, and the state's duty under the trust:

[W]e have repudiated the doctrine that the state has any private or proprietary right (as had the king) in navigable waters, but that it holds them in its sovereign capacity, as trustee for the people, for public use....

In the exercise of its trust, it cannot be seriously doubted that the state has the power, and, in fact, the duty rests upon it, to use such lands for the greatest public good, and, where they can be put to productive use, not to permit them to lie waste and unproductive. In so doing, of course, it cannot parcel or alienate them or otherwise interfere with the public purposes of the trust in which they are held.

224 Minn. 451, 473, 29 N.W.2d 657, 670 (1947) (quotation omitted). The “primary purposes” of the state's trust are “to maintain such waters for navigation and other public uses.” *Id.* The state is the administrator of the public trust.

In the State of California, where the public trust doctrine is also applied, the California Supreme Court in a landmark environmental case applied the public trust doctrine to protect a single lake – Mono Lake – from ecosystem degradation including lower lake levels, dewatered and damaged stream habitat and severe air quality impacts. *Nat'l Audubon Soc'y v. Superior Court of Alpine Cnty.* (Mono Lake Case), 658 P.2d 709 (Cal. 1983). *See also* Sax, Joseph L., “The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention,” 68 Michigan Law Review 471 (1970).

More recently, this Court in two cases acknowledged the public trust doctrine, but declined to expand the scope of the public trust doctrine. This Court held that the doctrine does not apply to the state's management of land and does not apply to the state's management of the atmosphere, respectively. *Larson v. Sando*, 508 N.W.2d 782, 787 (Minn. App. 1993), *review denied* (Minn. 1994); *Aronow v. State*, A12-0585, 2012 WL 4476642, at *3 (Minn. App. 2012).

In 1998, Minnesota's Preserve Hunting and Fishing Heritage constitutional requirement was adopted. The people adopted Minnesota's Preserve Hunting and Fishing Heritage constitutional requirement in 1998 understanding the public trust doctrine already applied to Minnesota and its state agencies including the DNR. Thus, after the 1998 adoption of Minnesota's Preserve Hunting and Fishing Heritage constitutional requirement, both the public trust doctrine and the Preserve Hunting and Fishing Heritage constitutional provision applied to the DNR.

Minnesota's Preserve Hunting and Fishing Heritage constitutional provision and the related public trust doctrine require the government to preserve fishing heritage on Mille Lacs Lake. Mille Lacs Lake walleye fishing is part of Minnesota's fishing heritage protected by the Preserve Hunting and Fishing Heritage constitutional provision. Mille Lacs Lake, with 132,516 acres, is the second-largest lake within Minnesota. Mille Lacs Lake is accessible by automobile from the Twin Cities – approximately a 90-mile trip. Mille Lacs Lake

has outstanding natural walleye habitat and topography. For over 100 years, Mille Lacs Lake has been recognized as a tremendous walleye lake. For centuries, Mille Lacs Lake has been fished for walleyes. More walleye is eaten in Minnesota than in any other jurisdiction of the United States. Mille Lacs Lake has even been known as the "Walleye Capital of the World." The City of Garrison has a large statue of a walleye on its lake shore in the middle of town. Over the decades, the DNR has marketed Mille Lacs Lake as a tourist destination for walleye fishing. Since 1965, the walleye has been legally recognized as Minnesota's state fish. *See* Minn. Stat. § 1.146. Mille Lacs Lake walleye fishing is thus a part of Minnesota's fishing heritage. As such, Mille Lacs Lake walleye fishing is legally protected by the public trust doctrine and Minnesota Constitution, Article XIII, section 12 — the Preserve Hunting and Fishing Heritage constitutional provision.

The challenged Rule affecting Mille Lacs Lake fishing in this case was published by the DNR on April 21, 2014. The adopted Rule is legally invalid because neither the Rule nor the supporting 18,700-page administrative record apply or mention the applicable legal standards: the Preserve Hunting and Fishing Heritage constitutional provision and the public trust doctrine.

STATEMENT OF FACTS

The emergency Rule, published by the DNR on April 21, 2014, does not mention the public trust doctrine and the Preserve Hunting and Fishing Heritage constitutional provision. Instead, the Rule states:

Minnesota Department of Natural Resources (DNR)
Adopted Expedited Emergency Game and Fish Rules: Mille Lacs
Lake Fishing

NOTICE IS HEREBY GIVEN that the above entitled rules have been adopted through the process prescribed by *Minnesota Statutes*, section 84.027, subdivision 13 (b). The statutory authority for the contents of the rules is *Minnesota Statutes*, sections 97A.045, subd. 2; 97C.005; and 97C.401.

The emergency conditions that do not allow compliance with *Minnesota Statutes*, sections 97A.0451 to 97A.0459, are that under the terms of the Federal District Court the Mille Lacs Band, Fond Du Lac Band, and six Wisconsin Bands of Chippewa are not required to declare their harvest intentions on inland waters until mid-March. The Mille Lacs proposed regulations are based on a safe harvest level determined for 2014. Final harvest threshold levels to be included in the proposed rules were not available until March. These new threshold levels and regulations need to be put in place as soon as possible to ensure that angler harvest does not exceed state angler harvest thresholds for the 2014 open water fishing season.

Dated: 27 March 2014
Tom Landwehr, Commissioner
Department of Natural Resources

6264.0400 DESIGNATED SPECIAL MANAGEMENT WATERS.

[For text of subps 1 to 3, see M.R.]

Subp. 4. Mille Lacs Lake and associated tributaries special management regulations.

A. ~~While a person is on or fishing in Mille Lacs Lake or its associated tributaries to the posted boundaries, all northern pike in possession must be less than 24 inches in length or greater than 36 inches in length. All northern pike that are 24 to 36 inches in length, inclusive, must be immediately returned to the water. A person's possession limit may not include more than one northern pike over 36 inches in length.~~ the possession limit for northern pike is ten. Only one northern pike in possession may be greater than 30 inches in length. The season for taking northern pike is the Saturday two weeks prior to the Saturday of Memorial Day weekend to the last Sunday in March.

B. ~~While a person is on or fishing in Mille Lacs Lake or its associated tributaries, the possession limit for largemouth and smallmouth bass in aggregate is one six, with only one smallmouth bass greater than 18 inches in length. While a person is on or fishing in Mille Lacs Lake or its associated tributaries to the posted boundaries, all smallmouth bass in possession must be 21 inches or greater in length. All smallmouth bass less than 21 inches in length must be immediately returned to the water. The season for taking largemouth and smallmouth bass is the Saturday two weeks prior to the Saturday of Memorial Day weekend to the last Sunday in February. Notwithstanding part 6262.0200, subpart 1, item A, subitem (2), the catch and release season for bass does not apply to Mille Lacs Lake or its associated tributaries.~~

C. Mille Lacs Lake is closed to the taking of fish between the hours of 10 p.m. and 6 a.m. daily during the period commencing at 10 p.m. on the Monday following the Saturday two weeks prior to the Saturday of Memorial Day weekend and ending at 12:01 a.m. on ~~Monday, four weeks after the date of commencement~~ December 1. During the closure, no person shall be on the waters of Mille Lacs Lake while having in possession any equipment whereby fish may be taken. ~~Spearing is prohibited from December 1 through April 30. A person may not have a spear in possession while on or fishing in Mille Lacs Lake during this period.~~

[For text of item D, see M.R.]

E. While a person is on or fishing in Mille Lacs Lake or its associated tributaries to the posted boundaries:

(1) the daily and possession limit for walleye is two, with only one over 28 inches in length; and

(2) except as provided in subitem (1), all walleye in possession must be equal to or greater than 18 inches in length or equal to or less than 20 inches in length. All walleye that are less than 18 or greater than 20 inches in length must be immediately returned to the water.

~~E.~~ F. While a person is on or fishing in Mille Lacs Lake or its associated tributaries to the posted boundaries, the possession and daily limit for Northern cisco (tullibee) is ten fish.

~~F.~~ G. Fish that are taken by angling and not immediately released into the water after capture are considered to be in possession and part of the bag limit. Once a fish has been reduced to possession, culling or live-well sorting (the act of exchanging one fish for another) is not allowed.

~~G.~~ H. This subpart applies to the following waters.

Name Location County

Mille Lacs T.42-45, R.25-28, S.Various Aitkin, Mille Lacs

Borden Creek T.44, R.25, S.5 Aitkin

Seastade Creek T.45, R.26, S.22 Aitkin

Marmon (Twenty) Creek T.45, R.25, S.32 Aitkin

Grave Creek T.45, R.25, S.8 Aitkin

Peterson Creek T.43, R.25, S.5 Mille Lacs

Thains River (Malone Creek) T.42, R.25, S.2 Mille Lacs

West Sucker Creek T.42, R.25, S.18 Mille Lacs

South Sucker Creek T.42, R.25, S.18 Mille Lacs

Garrison (Borden) Creek T.44, R.28, S.12 Crow Wing

Seguchie Creek T.44, R.28, S.36 Crow Wing

Reddy Creek T.45, R.26, S.23 Aitkin

Whitefish Creek T.43, R.27, S.7 Mille Lacs

Seventeen Creek T.44, R.25, S.17,18,29 Aitkin

Cedar Creek T.43, R.25, S.15 Mille Lacs

McCleans Creek T.45, R.27, S.34 Aitkin

Unnamed T.43, R.25, S.8 Mille Lacs

Unnamed T.42, R.26, S.11 Mille Lacs

Unnamed T.42, R.26, S.22 Mille Lacs

Unnamed T.43, R.27, S.8 Mille Lacs

Unnamed T.43, R.27, S.6 Mille Lacs
Unnamed T.43, R.27, S.21 Mille Lacs
Unnamed T.44, R.27, S.31 Crow Wing
Unnamed T.44, R.28, S.36 Crow Wing
Unnamed T.44, R.27, S.4 Aitkin
Unnamed T.45, R.27, S.25 Aitkin
Unnamed T.44, R.25, S.29 Aitkin
Unnamed T.44, R.25, S.31,32 Aitkin
Unnamed T.44, R.28, S.24 Crow Wing
Unnamed T.44, R.28, S.13 Crow Wing
Rum River Outlet T.43, R.27, S.33 Mille Lacs

[For text of subps 5 to 116, see M.R.]

REPEALER. The expedited emergency amendments to *Minnesota Rules*, part 6264.0400, subpart 4, published in the *State Register*, volume 37, page 1477, April 15, 2013, are repealed.

Similarly, the DNR's 18,700-page administrative record produced in this case does not mention the Preserve Hunting and Fishing Heritage constitutional provision nor the public trust doctrine.

ARGUMENT

The Court of Appeals should grant the petition under Minnesota Statute § 14.44 issuing a declaratory judgment to Petitioners and determining that the DNR's Adopted Expedited Emergency Game and Fish Rules for Mille Lacs Lake Fishing, amending Rule 6264.0400, subpart 4 ("Rule"), is invalid due to failure to apply applicable law: Minnesota Constitution, Article XIII, section 12 and the public trust doctrine.

I. The Court Should Grant the Petition for Declaratory Judgment Because the DNR Adopted a Fishing Rule Without Applying or Referencing the Preserve Hunting and Fishing Heritage Constitutional Provision and the Public Trust Doctrine.

A. The Standard of Review for Administrative Misapplication of Law and Legal Error Is De Novo.

“Every agency decision must be anchored in the language of one or more statutes the agency is charged to implement.” 1 Richard J. Pierce, Jr., *Administrative Law Treatise* 155 (5th ed. 2010). This fundamental precept of administrative law — that an agency may only act pursuant to and within the scope of a statutory delegation of authority granted by statute — is embodied in Minn. Stat. § 14.001, *et seq.*, Minnesota’s Administrative Procedure Act, and in Minn. Stat. § 14.69, including judicial review of legislative delegations of power to administrative agencies.¹

Minn. Stat. § 14.05 limits the powers of state agencies to adopting rules that follow, as opposed to violate, the law. Minn. Stat. § 14.05 states:

14.05. General authority

Subdivision 1. Authority to adopt original rules restricted. Each agency shall adopt, amend, suspend, or repeal its rules in accordance with the procedures specified in sections 14.001 to 14.69, and only pursuant to authority delegated by law and in full compliance with its duties and obligations.

¹ Administrative agencies of the state may make rules and regulations, but such rules must not exceed the power vested in the agency by statute. Op. Atty. Gen. 9-a-11, Dec. 26, 1950.

(Emphasis added.)

Moreover, under the Minnesota Constitution, funds from the state treasury cannot be used for purposes other than those permitted by law – that is, constitutional law or statute. Minnesota Const., Art. XI, section 1 states:

Section 1. Money paid from state treasury.

No money shall be paid out of the treasury of this state except in pursuance of an appropriation by law.

Therefore, money may be paid out of the state treasury only through an appropriation made by law; in other words, the payment of money from the state treasury must be authorized by law. No matter how much money may be in the state treasury at any one time, not a dollar of it can be used in the payment of anything that would violate constitutional provisions or statutes.

Significantly, the Court of Appeals in *Citizens for Rule of Law v. Senate Comm. on Rules & Admin.*, 770 N.W.2d 169, 175 (Minn. Ct. App. 2009), recognized that “while the activities of governmental agencies engaged in public service ought not to be hindered merely because a citizen does not agree with the policy or discretion of those charged with the responsibility of executing the law, the right of a taxpayer to maintain an action in the courts to restrain the unlawful use of public funds cannot be denied.” *Id.*, citing *McKee v. Likins*, 261 N.W.2d 566, 571 (Minn.1977).

Accordingly, Minnesota's standard of review for claims of agency misapplication of law is *de novo*. *In re Application of Minnesota Power for Auth. to Increase Rates for Elec. Serv. in Minnesota*, 838 N.W.2d 747, 753 (Minn. 2013), *as modified on denial of reh'g* (2013) The reviewing court retains the authority to review *de novo* errors of law which arise when an agency decision is based upon the meaning of words in a statute. *In re Grand Rapids Public Utilities Com'n*, 731 N.W.2d 866, 871 (Minn. App. 2007). The Court of Appeals reviews all questions of law *de novo*. *Matter of Retirement Benefits of Yetka*, App.1996, 554 N.W.2d 85, 89 (Minn. App. 1996).

Appellate courts may “reverse an agency decision if the decision was affected by an error of law.” *N. States Power Co. v. Minn. Pub. Utils. Comm'n*, 344 N.W.2d 374, 377 (Minn. 1984). The appellate courts apply the *de novo* standard of review to the question of whether an agency has exceeded its statutory authority. *In re Qwest's Wholesale Serv. Quality Standards*, 702 N.W.2d 246, 259 (Minn. 2005); *Minnegasco v. Minn. Pub. Utils. Comm'n*, 549 N.W.2d 904, 907 (Minn. 1996), *rehearing denied*. Minnesota courts “resolve any doubt about the existence of an agency's authority against the exercise of such authority.” *In re Qwest's*, 702 N.W.2d at 259.

Under Minnesota’s administrative procedures act provision relating to court review, Minn. Stat. § 14.69, the Court’s scope of review includes correcting agency misapplications of law:

In a judicial review under sections 14.63 to 14.68, the court may affirm the decision of the agency or remand the case for further proceedings; or it may reverse or modify the decision if the substantial rights of the petitioners may have been prejudiced because the administrative finding, inferences, conclusion, or decisions are:

- (a) in violation of constitutional provisions; or
- (b) in excess of the statutory authority or jurisdiction of the agency; or
- (c) made upon unlawful procedure; or
- (d) affected by other error of law; or...
- (f) arbitrary or capricious.

Significantly, because the legal claim against the DNR’s adopted Rule is that the DNR did not apply the applicable laws at all, the DNR’s rule does not enjoy a presumption of correctness due to deference to the commissioner's expertise in the agency's field under *In re Review of 2005 Annual Automatic Adjustment of Charges for All Elec. & Gas Utils.*, 768 N.W.2d 112, 119 (Minn. 2009). “Whether the DNR applied the applicable law” is a pure legal question perfectly suited for a court to decide. “Whether the DNR applied the applicable law” is not a question exclusively within the DNR’s expertise where the Court would have to defer to the agency’s expertise. *See id.* Under these circumstances, the Court should not apply the standard presumption of correctness to the DNR’s adopted Rule.

B. Any DNR Hunting or Fishing Rule Adopted Without Consideration of the Preserve Hunting and Fishing Heritage Constitutional Provision and the Public Trust Doctrine Is *Per Se* Invalid – As Is the Rule Here.

Under the *de novo* standard, the DNR's Rule must be *per se* invalid because the applicable constitutional law was never considered, and not even mentioned, in the DNR process adopting the Rule. In violation of its general agency duties, the DNR adopted and published the Rule on April 21, 2014 without considering the applicable Article XIII, section 12 and the related public trust doctrine. In fact, the 18,700-page administrative record produced by the DNR in this proceeding shows neither consideration nor reference to either Article XIII, section 12 or the public trust doctrine. The type of error the DNR has made by adopting the Rule without consideration of applicable law would fall under Minn. Stat. § 14.69 (a), (b), (c), (d) and (f) because agencies must follow, not ignore, applicable law. For the DNR, ignoring Minnesota's Preserve Hunting and Fishing Heritage constitutional provision and the related public trust doctrine is a *per se* violation of law.

First, under subsection (a) for "violation of constitutional provisions," the failure of the DNR to apply Article XIII, Section 12 when it adopted the Rule is "in violation of constitutional provisions." It is not optional for state agencies to ignore applicable constitutional provisions; agencies never have the discretion to ignore applicable law. The Supreme Court in *Monk & Excelsior, Inc. v. Minnesota State Bd. of Health*, 302 Minn. 502, 225 N.W.2d 821, 825 (1975) states that, under

the Administrative Procedure Act, administrative officials are not permitted to act on mere whim or their own impulse, however well-intentioned they might be, but must follow due process in their official acts and in the promulgation of rules defining their operations.

In *Wallace v. Commissioner of Taxation*, 289 Minn. 220, 184 N.W.2d 588, 594 (1971), the Supreme Court stated that even though the Commissioner of Taxation has authority to enact regulations with reference to administration of income tax law, he does not have authority to determine what the law should be or to supply substantive provisions of law which he thinks the legislature should have enacted in first place.

In the federal case, *N.A.A.C.P. v. Secretary of Housing and Urban Development*, 817 F.2d 149 (1st Cir. 1987), the United States Court of Appeals for the First Circuit, through an opinion by then-Judge Stephen Breyer, held that a claim that the Secretary of Housing and Urban Development did not administer certain programs in a manner to affirmatively further basic policies of Title VIII Fair Housing Act was subject to judicial review by federal courts. Judge Breyer wrote under the federal Administrative Procedures Act:

Clearly, HUD possesses broad discretionary powers to develop, award, and administer its grants and to decide the degree to which they can be shaped to help achieve Title VIII's goals. This fact, however, does not in itself mean that HUD is immune from review for "abuse of discretion" in exercising those powers. 5 U.S.C. § 706(2)(A).

Id. at 157.

Similarly, the DNR may have broad discretionary powers, but those powers do not include violating express law – the Preserve Hunting and Fishing Heritage constitutional provision.

Simply put, the DNR does not have the discretion to completely ignore applicable law without abusing its discretion. Undoubtedly, the Preserve Hunting and Fishing Heritage Amendment creates, establishes, and preserves rights of the people for the preservation of wildlife and fish for the purpose of hunting and fishing:

Hunting and fishing and the taking of game and fish are a valued part of our heritage that shall be forever preserved for the people and shall be managed by law and regulation for the public good.

Minnesota Constitution, Article XIII, Section 12 (adopted November 3, 1998).

The public trust doctrine also protects hunting and fishing heritage for Minnesotans.

The DNR is Minnesota's state agency, created by statute, to preserve game and fish for hunting and fishing. Thus, when the DNR adopts hunting and fishing rules, it is legally required to apply applicable provisions of the Minnesota Constitution, including Article XIII, Section 12. The DNR cannot, in its rule-adopting process, completely ignore Article XIII, Section 12 – which was voted for by the people as part of the Minnesota Constitution in 1998 – as the DNR has done

here. Any DNR hunting or fishing rule adopted without reference to the people's Preserve Hunting and Fishing Heritage Amendment is *per se* invalid – as is the Rule contested here.

The DNR may argue a logical fallacy -- that what difference would it have made for the Mille Lacs Lake walleye if the DNR had applied Article XIII, Section 12 and the public trust doctrine? The DNR's argument would go that the DNR would have made the same mistakes leading to the demise of the Mille Lacs Lake walleye even if the DNR had applied Article XIII, Section 12 and the public trust doctrine. The Petitioners' response is, if the DNR had applied Article XIII, Section 12 and the related public trust doctrine in adopting the Rule, it would be a different case with a different Rule and with a different outcome. So, the DNR's argument would be speculative and counterfactual. The Court should only consider the case before it – not a hypothetical case where the DNR assumes it applied Article XIII, Section 12 and the related public trust doctrine when it did not.

Second, for similar reasons, the adopted Rule is invalid under Minn. Stat. § 14.69 subsection (b) for being in “excess of the statutory authority or jurisdiction of the agency,” under subsection (c) for being “made upon unlawful procedure,” under subsection (d) for being “affected by other error of law,” and under subsection (f) for being “arbitrary or capricious.”

C. There Is No Way for the Court, After the Fact, to Fix the DNR's Ignoring of the Applicable Laws in Adopting the Rule.

An agency cannot cite the wrong law as its authority for rule-making and then seek a court “do-over” in the declaratory judgment action process. For example, in the federal case of *The Business Roundtable v. Securities and Exchange Comm'n*, 905 F.2d 406, 407 (D.C. Cir. 1990), the issue was whether the agency had exceeded its jurisdiction when it promulgated a regulation impacting the rules of self-regulatory organizations. The relevant provision of the Securities Exchange Act establishing the limits of the SEC's jurisdiction provided that the SEC could amend the rules of a self-regulatory organization if doing so was in furtherance of the purposes of the Act. *See id.* at 408–09. The SEC pointed to a number of provisions of the Exchange Act, arguing that each revealed a “purpose” of the Act that the new rule could be said to be “in furtherance” of. *See id.* at 410–16. The court rejected the SEC's arguments and decided that the Exchange Act could not be read as granting the SEC jurisdiction to promulgate the rule at issue in that case. *Id.* at 417. The court concluded its opinion by stating: “Even if other statutory provisions could support the Commission's asserted authority, we cannot supply grounds to sustain the regulations that were not invoked by the Commission below.” *Id.* at 417 (footnote omitted).

Similarly, here the DNR can not possibly claim that it rooted its rule-making process in the applicable law. As mentioned above, the Preserve Hunting

and Fishing Heritage constitutional provision and the related public trust doctrine, which are the applicable laws for the DNR here, are neither mentioned in the Rule itself nor the 18,700-page record. The Court cannot, after the fact, connect the adopted Rule with the Preserve Hunting and Fishing Heritage constitutional provision when the DNR itself has not done so in adopting the Rule as reflected in the 18,700-page record.

D. The Petitioners Request a Broad, Not a Narrow, Declaratory Judgment Against the DNR to Ensure That the DNR Follows the Preserve Hunting and Fishing Heritage Constitutional Provision and Public Trust Doctrine When Adopting Future Hunting and Fishing Rules.

Finally, the Petitioners request a declaratory judgment with consequences for not only the Rule under contest in this action, but also consequences for future DNR rule-making proceedings. Minn. Stat. § 14.45 provides for declaring the Rule invalid under these legal circumstances:

In proceedings under section 14.44, the court shall declare the rule invalid if it finds that it violates constitutional provisions or exceeds the statutory authority of the agency or was adopted without compliance with statutory rulemaking procedures. Any party to proceedings under section 14.44, including the agency, may appeal an adverse decision of the Court of Appeals to the Supreme Court as in other civil cases.

Additionally, Petitioners specifically request the Court of Appeals to issue a broad declaratory judgment that whenever the DNR fails to consider or reference Article XIII, Section 12 and the public trust doctrine in adopting a hunting or fishing rule —

as the DNR has done here adopting the Rule – the hunting or fishing rule is *per se* invalid.

There are many reasons why a broad holding is preferred over a narrow holding. First, the DNR apparently needs judicial direction to follow the Minnesota Constitution. A broad holding would leave no legal doubt as to what the DNR would have to do in adopting the next hunting or fishing rule. Second, as a matter of law and order, the Court should make it clear to the DNR that it must follow the Minnesota Constitution. Third, the broad ruling would be a catalyst to the DNR to implement Article XIII, Section 12 statewide in a thoughtful and constructive way. Fourth, a broader holding will avoid piecemeal litigation – lake by lake or species by species, which could be disastrous to individual lakes and species. A narrow holding would give the DNR in future cases a chance to make a distinction between this case and that case. A broader ruling would require the DNR to apply the law in every case. Fifth, there is only one possible affected party by a broader ruling: the Defendant DNR in this case. So there is no danger of unrepresented interests being ignored. The Court issuing a broader ruling makes common sense and advances the rule of law in a substantial way.

II. The Court Has Jurisdiction Over this Petition for Declaratory Judgment Against the Rule.

The Court of Appeals has jurisdiction to determine the validity of any state rule under Minnesota Statute § 14.44:

The validity of any rule may be determined upon the petition for a declaratory judgment thereon, addressed to the Court of Appeals, when it appears that the rule, or its threatened application, interferes with or impairs, or threatens to interfere with or impair the legal rights or privileges of the petitioner. The agency shall be made a party to the proceeding. The declaratory judgment may be rendered whether or not the petitioner has first requested the agency to pass upon the validity of the rule in question, and whether or not the agency has commenced an action against the petitioner to enforce the rule.

Coalition of Greater Minnesota Cities v. Minnesota Pollution Control Agency, 765

N.W.2d 159, 163 (Minn. App. 2009) (The Court of Appeals has original

jurisdiction under judicial review provision to determine the validity of an

agency's rules, including amendments, in a declaratory judgment action), *review*

denied; *Minnesota Chamber of Commerce v. Minnesota Pollution Control Agency*,

469 N.W.2d 100, 102 (Minn. App. 1991) (Court of Appeals has original

jurisdiction to determine validity of administrative agency's rules, including

amendments to those rules), *review denied*; *Ellingson & Associates, Inc. v. Keefe*,

410 N.W.2d 857, 861 (Minn. App. 1984) (Claim that Commissioner of Labor and

Industry improperly chose to use rule-making procedure to promulgate and amend

certain rehabilitation rules presented pre-enforcement challenge of validity of rule

or agency action that was within original jurisdiction of Court of Appeals); *L.K. v.*

Gregg, 380 N.W.2d 145, 149 (Minn. App. 1986) (Suit filed by residents upon

receipt of letters indicating that they would be transferred or discharged from state

veterans home within 30 days was within original jurisdiction of district court

under M.S.A. Const. Art. 6, § 3, and declaratory judgment sought directly from the Court of Appeals was premature, since no rules had been promulgated regarding discharge or transfer of residents), *review denied*; *Minnesota Public Interest Research Group v. Northern States Power Co.*, 360 N.W.2d 654, 656 (Minn. App. 1985) (Court of Appeals has jurisdiction to review final decision of Public Utilities Commission not resulting from contested case or rule-making procedure).

In this case, Minnesota Statute § 14.44 is satisfied for Court of Appeals jurisdiction. Petitioners seek declaratory judgment to determine the invalidity of the Rule on the grounds that the DNR failed to consider Article XIII, section 12 and the related public trust doctrine. The DNR's failure to apply the applicable legal standards to the adopted emergency Rule have violated the petitioners' rights – as Mille Lacs Lake resorts owners, sportsfishermen and citizens, and as taxpayers.

III. The Petitioners Have Standing.

A petitioner must have standing to challenge an agency rule by way of a declaratory judgment action under a judicial review provision governing pre-enforcement determinations as to validity. *Coalition of Greater Minnesota Cities v. Minnesota Pollution Control Agency*, 765 N.W.2d 159, 163 (Minn. App. 2009), *review denied*. A person may have standing to bring a lawsuit if the person has

suffered an “injury-in-fact” or if the legislature has conferred standing by statute. *Nash v. Wollan*, 656 N.W.2d 585, 588 (Minn. App. 2003), *review denied*. “Injury in fact” is the test for standing to challenge administrative action under the Administrative Procedure Act, absent a discernible legislative intent to the contrary in a given case. *McKee v. Likins*, 261 N.W.2d 566, 570 (Minn. 1977).

To have standing in declaratory judgment action to challenge agency rule, petitioners must have a direct interest in the validity of that agency rule, which is different in character from interest of citizenry in general; mere possibility of injury in and of itself is insufficient to confer standing. *Rocco Altobelli, Inc. v. State, Dept. of Commerce*, 524 N.W.2d 30, 34 (Minn. App. 1994). A petitioner has standing to bring a declaratory judgment action asserting a pre-enforcement challenge to an administrative rule if the petitioner can show that the rule or its threatened application interferes with or threatens to interfere with its legal rights or privileges. *Coalition of Greater Minnesota Cities*, 765 N.W.2d at 163. Ultimately, in order to invoke jurisdiction of the court, petitioners challenging validity of statute must be able to show that statute is, or is about to be, applied to their disadvantage. *Rocco Altobelli*, 524 N.W.2d at 34.

Three examples demonstrate how standing has been applied in rule challenges. First, the Court of Appeal in *Coalition of Greater Minnesota Cities*, 765 N.W.2d 159, 164, held that a coalition of cities had standing to bring

declaratory judgment action asserting pre-enforcement challenge to rule adopted by Minnesota Pollution Control Agency (MPCA) relating to MPCA's discretion to deny exemptions to limits on phosphorus effluent discharges in situations involving a new or expanded discharge of more than 1,800 pounds of phosphorus per year into state's waters because the coalition demonstrated that the application or threatened application of the rule could interfere with or threaten to interfere with the interests of its members in obtaining exemptions. Second, the Supreme Court in a 1977 opinion in *McKee v. Likins*, 261 N.W.2d 566, 571 held that a plaintiff, in his status as taxpayer, had standing to seek a declaratory judgment that a policy bulletin of Commissioner of Public Welfare requiring a county to provide medical assistance to welfare recipients for elective, nontherapeutic abortions was invalid. Third, the Supreme Court in a 1974 opinion in *Snyder's Drug Stores, Inc. v. Minnesota State Bd. of Pharmacy*, 301 Minn. 28, 221 N.W.2d 162, 165-66 held that a nonprofit consumer advocate corporations who alleged economic injury to their individual members resulting from a ban on retail prescription drug price advertising imposed by State Board of Pharmacy Regulation has standing to challenge the validity of said regulation under this section.

Similarly, each of the petitioners in this case will suffer injury-in-fact from the Rule and the lack of consideration of the Minnesota Constitution and public trust doctrine which protect Minnesota's fishing heritage. First, Petitioner Save

Mille Lacs Sportsfishing, Inc. is a non-profit corporation organized to save sportsfishing on Mille Lacs Lake. Save Mille Lacs Sportsfishing, Inc. members engage in hunting or fishing and other engagements to ensure the enjoyment of these activities and derivative economic enterprises that arise for the public good. Through oversight of governmental and private acts, Save Mille Lacs Sportfishing, Inc. and its members seek to preserve the cultural heritage of Mille Lacs Lake through efforts to ensure the sustainability of game wildlife and fish, particularly the walleye. Thus, Save Mille Lacs Sportfishing, Inc. has protected rights and privileges under Minnesota's Preserve Hunting and Fishing Heritage constitutional provision which are detrimentally affected by the adopted Rule.

Second, Petitioner Proper Economic Resource Management is a non-profit association organized to promote proper use of Minnesota's resources. Members engage in political and other related activities to ensure the people of Minnesota can enjoy hunting and fishing as a cultural heritage through oversight of governmental and private acts that may be detrimental to the sustainability of game wildlife and fish. Thus, Proper Economic Resource Management has protected rights and privileges under Minnesota's Preserve Hunting and Fishing Heritage constitutional provision which are detrimentally affected by the adopted Rule.

Third, Petitioner Twin Pines Resort, Inc. was incorporated under Minnesota law in April 1995. Since that time, it has embraced and preserved the cultural

heritage of Mille Lacs Lake fishing, particularly walleye fishing. Twin Pines is a derivative economic enterprise arising from the preservation interests of the Mille Lacs Lake cultural heritage of fishing. Thus, Twin Pines has protected rights and privileges under Minnesota's Preserve Hunting and Fishing Heritage constitutional provision which are detrimentally affected by the adopted Rule.

Fourth, Petitioner Bill Eno is an owner of Twin Pines Resort, Incorporated, is an avid sportsfisherman of Mille Lacs Lake walleyes, and supports the cultural heritage of Mille Lacs Lake. Bill Eno is a taxpayer and voted for Minnesota's Preserve Hunting and Fishing Heritage constitutional amendment in 1998. His cultural heritage includes walleye fishing. Eno is a Minnesota citizen residing in Garrison, Minnesota. As a Minnesota citizen, Minnesota Constitution, Article XIII, section 12, provides him certain rights regarding fishing and expectations of the preservation of game fish through governmental regulatory or private acts. Governmental or private acts that he deems detrimental to the protection of the cultural heritage of fishing, as he asserts here, are violative of his legal rights and privileges under Minnesota's Preserve Hunting and Fishing Heritage constitutional provision.

Fifth, Petitioner Fred Dally is a former owner of the Red Door Resort on Mille Lacs Lake, is an avid sports fisherman of Mille Lacs Lake walleyes, and supports Mille Lacs Lake walleye fishing heritage. Dally is a taxpaying Minnesota

citizen residing in Minnesota. As a Minnesota citizen, Minnesota Constitution, Article XIII, section 12, provides him certain rights regarding fishing and expectations of the preservation of game fish through governmental regulatory or private acts. Governmental or private acts that he deems detrimental to the protection of the cultural heritage of fishing, as he asserts here, are violative of his legal rights and privileges under Minnesota's Preserve Hunting and Fishing Heritage constitutional provision.

For these reasons, each of the petitioners has suffered an injury-in-fact from the DNR's legal violations. For this reason, each of the petitioners has standing to bring this declaratory judgment action.

CONCLUSION

The Court of Appeals should grant the petition under Minnesota Statute § 14.44 and issue a declaratory judgment to Petitioners determining that the DNR's Adopted Expedited Emergency Game and Fish Rules for Mille Lacs Lake Fishing, amending Rule 6264.0400, subpart 4 ("Rule"), is invalid due to failure to apply Minnesota Constitution, Article XIII, section 12 and the related public trust doctrine. Further, the Court should issue the declaratory judgment in the broadest way possible to ensure that the DNR is directed, when adopting future hunting and fishing rules, to apply Minnesota's Preserve Hunting and Fishing Heritage constitutional provision and the related public trust doctrine.

Dated: July 11, 2014.



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STATE OF MINNESOTA IN COURT OF APPEALS

Case No. A14-0679

Save Mille Lacs Sportsfishing, Inc.,
Proper Economic Resource Management,
Twin Pines Resort, Incorporated,
Bill Eno and Fred Dally,

Petitioners,

vs.

Minnesota Department of Natural
Resources,

Respondent.

ADDENDUM

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July 11, 2014

ADDENDUM INDEX

Department of Natural Resources, Expedited Emergency Game
and Fish Rule, Chapter: 6264, published April 21, 2014.Addendum 1

Department of Natural Resources

Chapters:

Expedited Emergency Game and Fish Rules:

6264

MILLE LACS LAKE FISHING

PUBLISHED 04-21-2014
EFFECTIVE 04-21-2014
EXPIRES 10-21-2015 (18 months)

Please see enclosure for text of this expedited emergency game and fish rules package relating to Mille Lacs Lake fishing.

1.1 **Department of Natural Resources**1.2 **Adopted Expedited Emergency Game and Fish Rules: Mille Lacs Lake Fishing**1.3 **6264.0400 DESIGNATED SPECIAL MANAGEMENT WATERS.**1.4 [For text of subps 1 to 3, see M.R.]1.5 **Subp. 4. Mille Lacs Lake and associated tributaries special management**
1.6 **regulations.**

1.7 A. While a person is on or fishing in Mille Lacs Lake or its associated tributaries
1.8 to the posted boundaries, all northern pike in possession must be less than 24 inches in
1.9 length or greater than 36 inches in length. All northern pike that are 24 to 36 inches in
1.10 length, inclusive, must be immediately returned to the water. A person's possession limit
1.11 may not include more than one northern pike over 36 inches in length. the possession
1.12 limit for northern pike is ten. Only one northern pike in possession may be greater than 30
1.13 inches in length. The season for taking northern pike is the Saturday two weeks prior to
1.14 the Saturday of Memorial Day weekend to the last Sunday in March.

1.15 B. While a person is on or fishing in Mille Lacs Lake or its associated
1.16 tributaries, the possession limit for largemouth and smallmouth bass in aggregate is one
1.17 six, with only one smallmouth bass greater than 18 inches in length. While a person is
1.18 on or fishing in Mille Lacs Lake or its associated tributaries to the posted boundaries, all
1.19 smallmouth bass in possession must be 21 inches or greater in length. All smallmouth bass
1.20 less than 21 inches in length must be immediately returned to the water. The season for
1.21 taking largemouth and smallmouth bass is the Saturday two weeks prior to the Saturday of
1.22 Memorial Day weekend to the last Sunday in February. Notwithstanding part 6262.0200,
1.23 subpart 1, item A, subitem (2), the catch and release season for bass does not apply to
1.24 Mille Lacs Lake or its associated tributaries.

1.25 C. Mille Lacs Lake is closed to the taking of fish between the hours of 10 p.m.
1.26 and 6 a.m. daily during the period commencing at 10 p.m. on the Monday following the

2.1 Saturday two weeks prior to the Saturday of Memorial Day weekend and ending at 12:01
 2.2 a.m. on ~~Monday, four weeks after the date of commencement~~ December 1. During the
 2.3 closure, no person shall be on the waters of Mille Lacs Lake while having in possession
 2.4 any equipment whereby fish may be taken. ~~Spearing is prohibited from December 1~~
 2.5 ~~through April 30. A person may not have a spear in possession while on or fishing in~~
 2.6 ~~Mille Lacs Lake during this period.~~

2.7 [For text of item D, see M.R.]

2.8 E. While a person is on or fishing in Mille Lacs Lake or its associated tributaries
 2.9 to the posted boundaries:

2.10 (1) the daily and possession limit for walleye is two, with only one over
 2.11 28 inches in length; and

2.12 (2) except as provided in subitem (1), all walleye in possession must be
 2.13 equal to or greater than 18 inches in length or equal to or less than 20 inches in length.
 2.14 All walleye that are less than 18 or greater than 20 inches in length must be immediately
 2.15 returned to the water.

2.16 ~~E. F.~~ While a person is on or fishing in Mille Lacs Lake or its associated
 2.17 tributaries to the posted boundaries, the possession and daily limit for Northern cisco
 2.18 (tullibee) is ten fish.

2.19 ~~F. G.~~ Fish that are taken by angling and not immediately released into the water
 2.20 after capture are considered to be in possession and part of the bag limit. Once a fish
 2.21 has been reduced to possession, culling or live-well sorting (the act of exchanging one
 2.22 fish for another) is not allowed.

2.23 ~~G. H.~~ This subpart applies to the following waters.

2.24 Name	Location	County
2.25 Mille Lacs	T.42-45, R.25-28, S.Various	Aitkin, Mille Lacs

3.1	Borden Creek	T.44, R.25, S.5	Aitkin
3.2	Seastade Creek	T.45, R.26, S.22	Aitkin
3.3	Marmon (Twenty) Creek	T.45, R.25, S.32	Aitkin
3.4	Grave Creek	T.45, R.25, S.8	Aitkin
3.5	Peterson Creek	T.43, R.25, S.5	Mille Lacs
3.6	Thains River (Malone Creek)	T.42, R.25, S.2	Mille Lacs
3.7	West Sucker Creek	T.42, R.25, S.18	Mille Lacs
3.8	South Sucker Creek	T.42, R.25, S.18	Mille Lacs
3.9	Garrison (Borden) Creek	T.44, R.28, S.12	Crow Wing
3.10	Seguchie Creek	T.44, R.28, S.36	Crow Wing
3.11	Reddy Creek	T.45, R.26, S.23	Aitkin
3.12	Whitefish Creek	T.43, R.27, S.7	Mille Lacs
3.13	Seventeen Creek	T.44, R.25, S.17,18,29	Aitkin
3.14	Cedar Creek	T.43, R.25, S.15	Mille Lacs
3.15	McCleans Creek	T.45, R.27, S.34	Aitkin
3.16	Unnamed	T.43, R.25, S.8	Mille Lacs
3.17	Unnamed	T.42, R.26, S.11	Mille Lacs
3.18	Unnamed	T.42, R.26, S.22	Mille Lacs
3.19	Unnamed	T.43, R.27, S.8	Mille Lacs
3.20	Unnamed	T.43, R.27, S.6	Mille Lacs
3.21	Unnamed	T.43, R.27, S.21	Mille Lacs
3.22	Unnamed	T.44, R.27, S.31	Crow Wing
3.23	Unnamed	T.44, R.28, S.36	Crow Wing
3.24	Unnamed	T.44, R.27, S.4	Aitkin
3.25	Unnamed	T.45, R.27, S.25	Aitkin
3.26	Unnamed	T.44, R.25, S.29	Aitkin
3.27	Unnamed	T.44, R.25, S.31,32	Aitkin
3.28	Unnamed	T.44, R.28, S.24	Crow Wing
3.29	Unnamed	T.44, R.28, S.13	Crow Wing
3.30	Rum River Outlet	T.43, R.27, S.33	Mille Lacs

4.1

[For text of subps 5 to 116, see M.R.]

4.2

REPEALER. The expedited emergency amendments to Minnesota Rules, part

4.3

6264.0400, subpart 4, published in the State Register, volume 37, page 1477, April 15,

4.4

2013, are repealed.

STATE OF MINNESOTA
IN COURT OF APPEALS
Case No. A14-0679

Save Mille Lacs Sportsfishing, Inc.,
Proper Economic Resource Management,
Twin Pines Resort, Incorporated,
Bill Eno and Fred Dally,
Petitioners,

vs.

Minnesota Department of Natural
Resources,
Respondent.

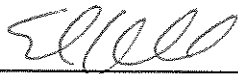
LR 7.1(c) WORD COUNT COMPLIANCE CERTIFICATE

I, Erick G. Kaardal, certify that the Brief of Petitioners in Support of Declaratory Judgment complies with Local Rule 7.1(c).

I further certify that, in preparation of this memorandum, I used Microsoft Word 2007, and that this word processing program has been applied specifically to include all text, including headings, footnotes, and quotations in the following word count.

I further certify that the above referenced memorandum contains 6,384 words.

Dated: July 11, 2014.



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