STATE OF MINNESOTA
IN COURT OF APPEALS
A18-0750

White Bear Lake Restoration Association,
ex rel. State of Minnesota,
Respondent,

and

White Bear Lake Homeowners' Association, Inc.,
ex rel. State of Minnesota, plaintiff intervenor,
Respondent,

vs.

Minnesota Department of Natural Resources, et al.,
Appellants

and

Town of White Bear, defendant intervenor,
Co-Appellant,

City of White Bear Lake, defendant intervenor,
Co-Appellant.

Filed April 22, 2019
Reversed and remanded
Rodenberg, Judge
Dissenting, Bratvold, Judge

Ramsey County District Court
File No. 62-CV-13-2414

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Considered and decided by Rodenberg, Presiding Judge; Reilly, Judge; and Bratvold, Judge.

S Y L L A B U S

1. When a complaint alleging violations of the Minnesota Environmental Rights Act (MERA) relates to conduct undertaken pursuant to a permit issued by the Minnesota Department of Natural Resources, the only available relief is under Minn. Stat. § 116B.10 (2018), and the bar in Minn. Stat. § 116B.03 (2018) applies.

2. In Minnesota, the common-law public-trust doctrine applies to navigable waters and does not apply to groundwater withdrawals.

O P I N I O N

RODENBERG, Judge

Appellants, the Minnesota Department of Natural Resources (DNR)[1] along with its commissioner of natural resources, City of White Bear Lake, and Town of White Bear,[2] appeal from the district court's grant of declaratory and injunctive relief to respondents White Bear Lake Restoration Association[3] and White Bear Lake Homeowners'

[1] The DNR is the state agency responsible for preserving and protecting Minnesota's water resources. Its duties include managing groundwater appropriation, issuing high-capacity well permits, and monitoring and controlling high-capacity groundwater pumping within the state. The DNR has authorized groundwater pumping from a number of high-capacity groundwater wells.

[2] Appellants City of White Bear Lake and Town of White Bear are intervenors that hold groundwater-appropriation permits impacted by the ordered relief.

[3] White Bear Lake Restoration Association is a registered Minnesota nonprofit corporation dedicated to the restoration and preservation of White Bear Lake.

Association Inc.[4] on respondents' claims that the DNR violated MERA and the common-law public-trust doctrine by making water-appropriation decisions that have lowered the water level of White Bear Lake. Appellants challenge the district court's application of Minn. Stat. § 116B.03 and the public-trust doctrine to respondents' claims, and argue that the district court was without jurisdiction to make orders concerning the DNR's issuance of well permits. They also challenge the district court's findings of fact and the scope of its remedial order as unsupported by the record. We reverse and remand.

FACTS

White Bear Lake (the lake) is a large lake lying within Ramsey and Washington Counties. It has a surface area of between 2,100 and 3,100 acres, depending on its water level. It is a closed-basin lake, meaning that it has no major natural surface water inlets or outlets, such as rivers or streams. The lake depends on groundwater and precipitation for water. Because of this, and its relatively small watershed area, significant water-level fluctuations occur. Since 1924, water levels in the lake have ranged from 919.33 to 926.69 feet above sea level.

Closed-basin lakes depend primarily on underlying groundwater levels for lake water. Two bedrock aquifers, commonly referenced together as the Prairie du Chien-Jordan aquifer (the aquifer), are located below the lake. The lake and the aquifer are

[4] White Bear Lake Homeowners' Association is an association of homeowners living on White Bear Lake dedicated to helping restore the lake.

hydrologically[5] connected, and the lake's water levels are affected by groundwater pumping, among other factors.

The aquifer is a main source of drinking water for the Minneapolis-St. Paul metropolitan area. While the cities of Minneapolis and St. Paul are able to use surface water from the Mississippi River for their domestic water supply, most of the rest of the metropolitan area relies on groundwater pumped from municipal and private wells. Multiple high-capacity groundwater wells surround White Bear Lake, providing domestic water supply to area communities.

Cities and municipalities must first obtain a water-use permit from the DNR before extracting groundwater for municipal use. The DNR has authorized the pumping of groundwater from the aquifer through groundwater-appropriation permits. The DNR is responsible for issuing and amending groundwater-appropriation permits, ensuring that

[5] "Hydrology" is "[t]he scientific study of the properties, distribution, and effects of water on the earth's surface, in the soil and underlying rocks, and in the atmosphere." *American Heritage Dictionary of the English Language* 862 (5th ed. 2011). "Hydraulic" means "[o]f, involving, moved by, or operated by a fluid, especially water, under pressure." *Id.* at 861. In this case, the record contains references to both terms concerning the relationship between the lake and the aquifer. The district court found that lakes such as this one "depend on a hydrologic balance between precipitation, evaporation, and groundwater inflow and lake-water discharge to aquifers to maintain their water levels," a finding and usage supported by the voluminous record on appeal. That the terms hydrologic and hydraulic are interchangeably used at times in the record does not affect our analysis. We use "hydrology" and "hydrologic" in this opinion, thinking those to be the most accurate terms. That witnesses, exhibits, and briefing use "hydraulic" in places seems not to affect the legal analysis.

permittees comply with those permits, and taking action as needed when groundwater permits negatively impact a natural resource.

Respondent White Bear Lake Restoration Association (the restoration association) initiated this action in April 2013, seeking declaratory and injunctive relief related to groundwater-appropriation permits issued by the DNR. The only defendants named in the summons and complaint were the DNR and then-Commissioner Thomas J. Landwehr. The complaint alleged that increased groundwater withdrawals under the DNR's groundwater-appropriation permits from high-capacity wells in the area of the lake had created and accelerated declines in lake-water elevations due to the DNR's failure to review and amend permits. The restoration association alleged that the DNR had allowed the lake's water levels to drop, and had violated MERA, Minn. Stat. §§ 116B.01-.13 (2018). The restoration association alleged that the resulting low water levels had diminished the lake's value as a recreational, historical, cultural, and aesthetic asset. The restoration association further claimed that, due to the lake's low water levels, noxious plant and animal species had increased, businesses had experienced significant losses, a beach had closed due to a dangerous drop-off created by the lower lake level, and homeowners needed to extend docks hundreds of feet to access the lake.

Respondent White Bear Lake Homeowners' Association (the homeowners' association) intervened as a plaintiff, alleging that the DNR had violated MERA and the common-law public-trust doctrine. Its complaint alleged that the increased groundwater appropriations authorized by the DNR have materially and adversely affected the

environment and that White Bear Lake and the aquifer have been materially and adversely impacted. Like the restoration association, the homeowners' association claimed that the declining water levels harmed native aquatic plants, exposed lakebeds, reduced recreational boating activity, impaired swimming and fishing, reduced access to the water for lakefront homeowners, and negatively impacted the economy around the lake.

In their pleadings, respondents suggested that a potential solution to increase the water level of White Bear Lake would be to order the DNR to amend groundwater-appropriation permits it had issued to municipalities. That remedy would impact groundwater-appropriation permits held by cities and municipalities who rely on the permits to supply water to their residents. Appellants City of White Bear Lake and Town of White Bear intervened as defendants. The DNR challenged respondents' claims, arguing, among other things, that those claims are not properly asserted under either Minn. Stat. § 116B.03 or the common-law public-trust doctrine. The DNR asserted that, instead, the available MERA relief was under Minn. Stat. § 116B.10.

The district court denied appellants' pretrial motions to dismiss and for summary judgment, allowing respondents' claims to proceed under Minn. Stat. § 116B.03 and the public-trust doctrine. It rejected appellants' argument that the only viable MERA claim in this circumstance would be under Minn. Stat. § 116B.10, providing that persons may initiate a civil action in district court for declaratory or equitable relief "against the state or any agency or instrumentality thereof where the nature of the action is a challenge to . . .

[a] permit promulgated or issued by the state or any agency or instrumentality thereof for which the applicable statutory appeal period has elapsed." Minn. Stat. § 116B.10, subd. 1.

From December 2014 to August 2016, the parties agreed to stay the district-court case while they jointly supported a request to the legislature to fund construction of systems to convert the domestic water supply in certain communities in the northeast metropolitan area from groundwater to surface-water sources. The district court lifted the stay after the legislature declined to fund the surface-water conversion.

The case was tried to the district court. Multiple experts testified for the associations and opined that the DNR's groundwater-appropriation permits negatively impacted the lake's water levels. Contrary evidence was produced by appellants. The district court ultimately concluded that the DNR did not properly manage its permitting process in light of its knowledge that groundwater pumping affected the lake's water levels. The district court determined that the DNR knew, as early as 1998, that the groundwater-appropriation permits it issued could have significant effects on groundwater levels and ultimately on the water levels of the lake. The district court found that the DNR had failed to consider "regional or cumulative impact" when reviewing permit requests and instead issued and reviewed permits on a case-by-case basis.

The district court concluded that respondents had properly asserted their claims under Minn. Stat. § 116B.03, that the lake and the aquifer are natural resources subject to MERA protections, and that the lake and the aquifer have been and will likely continue to be impaired by the DNR's permitting conduct. The district court declared that the DNR,

through its actions and inaction in relation to groundwater-appropriation permits in the vicinity of the lake, had violated MERA, multiple provisions of the state's water law, and the common-law public-trust doctrine.

The district court ordered injunctive relief that included requiring the DNR to review and amend all groundwater-appropriation permits within a five-mile radius of the lake, require permittees to submit contingency plans for conversion to surface-water supply, and impose a residential irrigation ban when the water level of the lake is below 923.5 feet (and continuing until the lake reaches 924 feet). The district court's order prohibited the DNR from issuing any new groundwater-well permits and from increasing appropriation amounts in existing groundwater-appropriation permits within a five-mile radius of the lake until it had fully complied with statutory requirements. The order also enjoined the DNR from issuing any groundwater-appropriation permits within that radius unless and until it had sufficient data to understand the impact of those appropriations on the lake and the aquifer. These injunctions affect the groundwater permits not only of the intervenors, but also of municipalities that are not parties to this litigation.[6]

[6] Amici cities of Stillwater, Lake Elmo, Hugo, and North St. Paul express grave concerns about the effect of the district court's injunctions on those nonparty cities, including that the district court order purports to limit groundwater-appropriation permits granted over 40 years ago, without offering the permittees an opportunity to be heard. Our disposition will resolve these joinder concerns, because these amici and other affected individuals and communities will have an opportunity to be heard after the matter is remitted to the administrative process under section 116B.10.

Following the district court's order and judgment, the DNR moved for an amended judgment, a new trial, and a stay of the district court's order pending appeal. The district court rejected the stay motion. Appellants appealed and sought review of the stay order by this court. We remanded, and the district court stayed parts of its order.

ISSUES

I. Did the district court err by determining that Minn. Stat. § 116B.03, subd. 1, applies to claims relating to DNR-issued groundwater-appropriation permits?

II. Did the district court err by concluding that the common-law public-trust doctrine applies to groundwater in Minnesota?

ANALYSIS

Together, appellants make nine arguments. They argue that the district court erred by (1) allowing the action to proceed under Minn. Stat. § 116B.03 instead of Minn. Stat. § 116B.10, (2) misapplying the public-trust doctrine, (3) denying summary judgment on the ground that respondents failed to exhaust administrative remedies, (4) refusing to require joinder of affected permit holders not parties to the case, (5) interpreting MERA to require the DNR to reopen and amend permits, (6) failing to give deference to the DNR's permitting decisions, (7) violating separation-of-powers principles, (8) requiring the DNR to amend existing permits without holding administrative hearings, and (9) making clearly

erroneous factual findings.[7] Because our resolution of the first two arguments is dispositive, we do not reach the remaining arguments.

I. When a complaint alleges violations of MERA based on conduct undertaken pursuant to a permit issued by the DNR, MERA relief is available only under Minn. Stat. § 116.10 and the bar in Minn. Stat. § 116B.03 applies.

Appellants argue that the district court erred by allowing respondents to pursue claims under Minn. Stat. § 116B.03. They argue that respondents' claims challenge the adequacy and propriety of DNR-issued permits and were therefore required to be brought under Minn. Stat. § 116B.10. Respondents argue that the statute does not require them to bring their claims under section 116B.10, because their challenge is to the DNR's *overall* permitting process and the *cumulative* impact of the water-use permits.

Whether the district court properly applied Minn. Stat. § 116B.03 to respondents' claims presents a question of statutory interpretation, and we review such questions de novo. *Caldas v. Affordable Granite & Stone, Inc.*, 820 N.W.2d 826, 836 (Minn. 2012). The object of statutory interpretation is to ascertain and effectuate the intention of the legislative body. Minn. Stat. § 645.16 (2018). "If the legislature's intent is clear from the

[7] Appellants also challenge the district court's pretrial denial of dispositive motions, in which appellants argued—as they do on appeal—that this action should have proceeded under section 116B.10. Because this question is subsumed in the other issues raised in the appeal from the district court's judgment, we do not separately address it. *See* Minn. R. Civ. App. P. 103.03(a) (authorizing appeal in civil cases after entry of final judgment); *see also Sterling State Bank v. Maas Commercial Props., LLC*, 837 N.W.2d 733, 735 (Minn. App. 2013) (indicating that partial summary judgment is ordinarily not appealable, but can be challenged in a single appeal from final judgment that disposes of the litigation), *review denied* (Minn. Nov. 12, 2013).

unambiguous language of the statute, [appellate courts] apply the statute according to its plain meaning." *Staab v. Diocese of St. Cloud*, 853 N.W.2d 713, 716-17 (Minn. 2014).

In interpreting a statute, we must construe statutory words and phrases according to the rules of grammar and according to their common and approved usage. Minn. Stat. § 645.08(1) (2018). A court may turn to dictionaries to assess the plain and ordinary meaning of a term. *State v. Thonesavanh*, 904 N.W.2d 432, 436 (Minn. 2017).

MERA provides "any person" residing within Minnesota a private right of action for declaratory or equitable relief to protect natural resources from "pollution, impairment, or destruction." Minn. Stat. § 116B.03, subd. 1. MERA broadly defines "person" as "any natural person, any state, municipality or other governmental or political subdivision or other public agency or instrumentality . . . or other organization . . . and any other entity, except a family farm, a family farm corporation or a bona fide farmer corporation." Minn. Stat. § 116B.02, subd. 2. Both respondents and appellants concede—and we agree—that the associations and the DNR are "persons" as defined by the statute. Likewise, the municipalities withdrawing groundwater are "persons" under MERA because they are governmental or political subdivisions.

To maintain an action in district court under section 116B.03, a plaintiff must make "a prima facie showing that the conduct of the defendant has, or is likely to cause the pollution, impairment, or destruction of the air, water, land or other natural resources located within the state." Minn. Stat. § 116B.04(b); *State by Archbal v. County of Hennepin*, 495 N.W.2d 416, 421 (Minn. 1993). The scope of the private right of action

under section 116B.03, however, is limited: "[N]o action shall be allowable under this section for conduct taken by a person pursuant to any environmental quality standard, limitation, rule, order, license, stipulation agreement or permit issued by the Pollution Control Agency, Department of Natural Resources, Department of Health or Department of Agriculture." Minn. Stat. § 116B.03, subd. 1.

A separate provision of MERA, section 116B.10 (captioned "Civil Action Against State"), authorizes a suit in district court challenging the adequacy of "an environmental quality standard, limitation, rule, order, license, stipulation agreement, *or permit* promulgated or issued by the state or any agency or instrumentality thereof." Minn. Stat. § 116B.10, subd. 1 (emphasis added). Under section 116B.10, a plaintiff must produce "material evidence" showing that the challenged standard or permit is "inadequate to protect" the state's natural resources. *Id.*, subd. 2.

Respondents' action is plainly one against a state agency, and it challenges the adequacy of the groundwater-extraction permits to protect the lake. The lake, in turn, is a natural resource. Minn. Stat. § 116B.02.

Respondents argue, and the district court concluded, that section 116B.10 is not the exclusive remedy available when the challenge is to a standard or permit. Respondents allege, and the district court found, that the DNR's actions and failures to act adversely affected the lake. At issue, then, is whether the relief available under section 116B.10 is exclusive.[8] We agree with appellants that, under the statute's plain language, section

[8] The parties agree that relief is available under section 116B.10.

116B.10 is the exclusive remedy available under MERA when the challenged action is that of a state agency in issuing a permit.

In situations where, as here, a permit issued by an agency pursuant to its duties under a regulatory scheme requires the application of rules or statutes to data within the realm of agency expertise, courts are generally deferential to agency determinations. *Minn. Ctr. for Envtl. Advocacy v. City of Winsted*, 890 N.W.2d 153, 158 (Minn. App. 2017). *See Reserve Mining Co. v. Herbst*, 256 N.W.2d 808, 824 (Minn. 1977) (stating that it is a "fundamental concept that decisions of administrative agencies enjoy a presumption of correctness, and deference should be shown by courts to the agencies' expertise and their special knowledge in the field of their technical training, education, and experience"). Appellants' proposed construction of section 116B.10 as the exclusive remedy under MERA in this circumstance is consistent with this standard of review. Under section 116B.10, as more fully discussed below, the remedy upon a showing that an agency-issued permit is inadequate to protect natural resources is that the district court remits the parties to the agency that issued the permit for "appropriate administrative proceedings," subject to further court review. Minn. Stat. § 116B.10, subd. 3.

Moreover, and as appellants point out, to conclude that a section 116B.03 action is available to challenge an agency-issued permit would render section 116B.10 "both meaningless and superfluous." Again, we agree. Interpreting MERA to allow a section 116B.03 action to challenge whether an agency-issued permit adequately protects the state's natural resources puts the district court in the position of substituting its own

judgment for that of the agency to which courts ordinarily defer. Moreover, there would seem to be nothing left of section 116B.10 if a district court may exercise jurisdiction over permit-issuing agencies under section 116B.03 to order relief within the scope of the legislature's grant of authority to the agency.[9]

We also observe that section 116B.03, subd. 1, contains a provision that applies here: "[N]o action shall be allowable under this section for conduct taken by a person pursuant to any . . . permit issued by . . . the Department of Natural Resources." Minn. Stat. § 116B.03, subd. 1.

The bar in Minn. Stat. § 116B.03 applies to "conduct" pursuant to a permit. MERA does not define "conduct." A reviewing court therefore considers the dictionary definition to determine the word's ordinary meaning. *Shire v. Rosemount, Inc.*, 875 N.W.2d 289, 292 (Minn. 2016). "Conduct," as a noun, means "the manner in which a person behaves, especially in a particular place or situation." *Oxford Dictionary of English* 364 (3d ed. 2010). Another definition is "personal behavior; way of acting; bearing or deportment." *Random House Dictionary of the English Language* 426 (2d ed. 1987). And another

[9] We observe in passing that, if section 116B.03 relief is available in this circumstance, then the multitude of certiorari appeals concerning mining permits, pipeline-construction permits, and the like will never be final so long as there is a person or entity with a district-court filing fee who can state a colorable claim to a district court that the agency permit allows the pollution, impairment, or destruction of natural resources. If respondents' construction of section 116B.03 is accepted, district courts will, in the future, be reviewing agency-issued environmental quality standards, licenses, permits, and the like and will be authorized to issue remedies outside of the ordinary administrative process established by the legislature. We cannot see in section 116B.03 such a disruptive and far-ranging authorization of the exercise of court jurisdiction.

provision of MERA, Minn. Stat. § 116B.02, provides that "[p]ollution, impairment, or destruction" is (1) "any conduct by any person which violates, or is likely to violate, any environmental quality standard, limitation, rule, order, license, stipulation agreement, or permit of the state or any instrumentality, agency, or political subdivision thereof which was issued prior to the date the alleged violation occurred" or (2) "any conduct which materially adversely affects or is likely to materially adversely affect the environment." Minn. Stat. § 116B.02, subd. 5.

MERA does not further define when conduct is taken "pursuant to" a permit. *Garner's Dictionary of Legal Usage* presents multiple definitions of the phrase "pursuant to": "(1) In accordance with; (2) under; (3) as authorized by; or (4) in carrying out." Bryan A. Garner, *Garner's Dictionary of Legal Usage* 737 (3d ed. 2011). We have recently given the phrase similar meaning when interpreting it in the collateral-source-offset statute. *See Getz v. Peace*, 918 N.W.2d 233, 236 (Minn. App. 2018), *review granted* (Minn. Nov. 27, 2018). In the phrase "pursuant to," "to" is a "preposition modifying the adjective pursuant and is used to introduce an object or subject." *Id.* "In full, the phrase 'pursuant to' means 'in carrying out,' 'in conformity with,' and 'according to.'" *Id.* The Minnesota Supreme Court, interpreting the phrase in a federal statute, has interpreted it to mean "in compliance with," "in accordance with," "as authorized by," and "under." *Risdall v. Brown-Wilbert, Inc.*, 753 N.W.2d 723, 730 n.6 (Minn. 2008).

The conduct alleged to have impaired the lake's water levels is groundwater pumping. The DNR issued, maintained, and reviewed groundwater-appropriation permits

necessary for municipalities to extract groundwater. The DNR has only one tool for regulating water appropriations—permits. The complained-of conduct that impairs the lake is the withdrawal of groundwater in conformity with or under the authority of the DNR's permits. Applying the plain language of the statute, the section 116B.03 bar applies here. Accordingly, the district court erred in applying Minn. Stat. § 116B.03 to respondents' claims.

Our interpretation of the plain language of the bar under section 116B.03, subdivision 1, is confirmed by reference to the other provisions of MERA. A statute should be interpreted, whenever possible, to give effect to all of its provisions; no word phrase or sentence should be deemed superfluous, void, or insignificant. *Martin v. Dicklich*, 823 N.W.2d 336, 345 (Minn. 2012). A statute is to be read and construed as a whole and each section must be interpreted in light of the surrounding sections to avoid conflicting interpretations. *Am. Family Ins. Grp. v. Schroedl*, 616 N.W.2d 273, 277 (Minn. 2000). Sometimes the meaning of a section only becomes clear when it is read in conjunction with surrounding sections. *Id.* at 277-78.

Although we think that the plain language of section 116B.03 is sufficient to demonstrate that no action under that section is allowable here, applying the bar to permit-related challenges also makes sense in the overall context of MERA. The unambiguous language in section 116B.03 aligns with the evident legislative intent underlying section 116B.10, which applies when a MERA claim is a challenge to a permit issued by the state or any agency. Minn. Stat. § 116B.10, subd. 1. Section 116B.10 authorizes a civil action

in district court for declaratory or equitable relief where "the nature of the action is a challenge to an environmental quality standard, limitation, rule, order, license, stipulation agreement, or permit promulgated or issued by the state or any agency or instrumentality thereof for which the applicable statutory appeal period has elapsed." *Id.* Here, the nature of respondents' challenge is to permits "promulgated or issued" by the DNR. Despite the appeal period for the permits having elapsed, section 116B.10 provides for a process to remit the parties to the permit-issuing agency for further proceedings.

Under Minn. Stat. § 116B.10, subd. 2, pertaining to a "civil action . . . against the state," a plaintiff has "the burden of proving the existence of material evidence showing said inadequacy of said environmental quality standard, limitation, rule, order, license, stipulation agreement, or permit." Minn. Stat. § 116B.10, subd. 2. But, unlike in section 116B.03, under section 116B.10, once a MERA plaintiff makes a prima facie showing of the inadequacy of a permit in protecting the environment, the district court remits to "the state agency or instrumentality that promulgated the environmental quality standard, limitation, rule, order, license, stipulation agreement, or permit which is the subject of the action." Minn. Stat. § 116B.10, subd. 3. Once the case is remitted to the proper administrative agency, that agency is to "institute the appropriate administrative proceedings to consider and make findings and an order on those matters specified in subdivision 2." *Id.* "In so remitting the parties, the court may grant temporary equitable

relief where appropriate to prevent irreparable injury."[10] *Id.* The district court retains jurisdiction to review whether the agency's resulting order is supported by a preponderance of the evidence. *Id.*

Read together, MERA sections 116B.03 and 116B.10 set out an orderly process for permit-related challenges under Minn. Stat. § 116B.10 that confirms the plain language of section 116B.03 barring permit-related challenges under that process and provision. We do not reach appellants' separation-of-powers arguments because the plain language of Minn. Stat. § 116B.03, subd. 1, renders it unnecessary to do so. The obvious legislative purpose is to entrust rule-making and permit issuance to the executive branch, subject to judicial oversight under chapter 116B.

The district court erred in determining that section 116B.03 applies to respondents' claims, because it reasoned that the conduct at issue was not the DNR's permitting, but instead was the broader impact of the DNR's permits. But the conduct at issue here is groundwater pumping, which the DNR controls through its permitting authority. Because respondents' claims challenge the adequacy of DNR-issued groundwater-appropriation permits, and because the groundwater withdrawals are actions taken pursuant to DNR permits, the plain language of MERA requires that appellants' challenges be brought under Minn. Stat. § 116B.10.

[10] As discussed below, we express no opinion concerning the appropriateness or the scope of interim equitable relief on remand, but note that the availability of such relief, coupled with the case being remitted to the agency, should suffice to both protect the lake during the process while remaining faithful to the clear legislative directives under MERA.

We are mindful of both parties' arguments that this case is controlled by our decisions in the *Swan Lake* series of cases. *State ex rel. Swan Lake Area Wildlife Ass'n v. Nicollet Cty. Bd. of Cty. Comm'rs*, 799 N.W.2d 619 (Minn. App. 2011) (*Swan Lake III*); *State ex rel. Swan Lake Area Wildlife Ass'n v. Nicollet Cty. Bd. of Cty. Comm'rs*, 771 N.W.2d 529 (Minn. App. 2009) (*Swan Lake II*); *State ex rel. Swan Lake Area Wildlife Ass'n v. Nicollet Cty. Bd. of Cty. Comm'rs*, 711 N.W.2d 522 (Minn. App. 2006) (*Swan Lake I*), *review denied* (Minn. June 20, 2006).

The facts here are unlike those in *Swan Lake*. In those cases, the Swan Lake Area Wildlife Association asserted a MERA claim against the Nicollet County Board of County Commissioners. *Swan Lake I*, 711 N.W.2d at 524. In *Swan Lake I*, the county board of commissioners argued that the district court did not have subject-matter jurisdiction over the wildlife association's MERA claim, because the drainage code provided the proper administrative processes and remedies. *Id.* at 525. We concluded that, under Minn. Stat. § 116B.12, the district court had subject-matter jurisdiction over the MERA claim, regardless of the administrative processes and remedies available under the drainage code provisions. *Id.* at 526.

In *Swan Lake II*, the DNR argued that it could not be held liable under MERA, because a state agency's failure to take enforcement action is not conduct that materially adversely affects the environment under MERA. *Swan Lake II*, 771 N.W.2d. at 537. The association sought to hold the DNR responsible because it failed to take enforcement action or use its authority to protect public waters from continued drainage where the county had

neglected a dam and allowed it to deteriorate. *Id.* at 533. We rejected the DNR's argument that section 116B.10 provides the exclusive mechanism by which a citizen may challenge an agency's conduct, but concluded that, under the facts of the case, the DNR could not be liable for the county's failure to maintain the dam in question. *Id.* at 538.

In *Swan Lake III*, we further explained that if a plaintiff "proves a violation of MERA, the district court may grant declaratory relief, temporary and permanent equitable relief, or may impose such conditions upon a party as are necessary to protect the air, water, land or other natural resources located within the state from pollution, impairment, or destruction." *Swan Lake III*, 799 N.W.2d at 625 (quotation omitted). But the relief granted—and the only relief available—in *Swan Lake III* was against Nicollet County, and there was neither evidence nor argument that the county's neglect of the dam was action taken pursuant to a permit.

The facts of *Swan Lake* significantly differ from the facts here. In *Swan Lake*, the only DNR conduct at issue was its alleged failure to take enforcement action against the county. *Swan Lake* did not involve a challenge to action taken pursuant to a DNR-issued permit. To the contrary, the county's inaction was at issue in *Swan Lake*, and there was no DNR permit. The *Swan Lake* decisions stand for the propositions that MERA claims do not require the exhaustion of administrative processes, and that inaction—in that case by a county—can give rise to a MERA claim. Our *Swan Lake* decisions do not control here.

We hold that, because the conduct that respondents allege impairs the lake is taken pursuant to DNR permits, "no action shall be allowable" under section 116B.03. This does

not mean that respondents have no recourse. Relief under Minn. Stat. § 116B.10, captioned "Civil Action Against State," is available.

To the extent that the DNR has itself violated the law, as respondents claim and as the district court found, the remedy for that is clear. When a district court remits the subject of a permit-related action to the agency for "appropriate administrative proceedings," it "shall retain jurisdiction for purposes of judicial review." Minn. Stat. § 116B.10, subd. 3. And, when administrative actions are unlawful, courts will not affirm the agency action. *See, e.g.*, Minn. Stat. § 14.69 (2018) (providing that courts may reverse or modify an agency action that violates the constitution, is affected by an error of law, or is arbitrary and capricious).

Here, the district court made detailed findings and, as the DNR agrees, respondents have met their burden of showing that the existing DNR-issued permits are inadequate to protect White Bear Lake. Accordingly, respondents have made a prima facie showing as required under Minn. Stat. § 116B.10, subd. 3. Under section 116B.10, temporary equitable relief is available "to prevent irreparable injury to" the lake. Whether and to what extent such relief should be ordered on remand is entrusted to the district court's discretion. We therefore reverse and remand to the district court to remit the parties to the DNR to institute appropriate administrative proceedings.[11]

[11] Minn. Stat. § 116B.10 contemplates that, once a MERA plaintiff has made a prima facie showing and the case has been remitted to the state agency, the agency's decision is subject to court review. Although the issue is not before us now, the statute seems to contemplate that the review is by the remitting district court. The statute permits the action to be maintained "in the district court." Minn. Stat. § 116B.10, subd. 1. In the absence of a

II. Minnesota courts have never applied the public-trust doctrine to groundwater; any expansion of the public-trust doctrine to encompass groundwater as "navigable waters" is beyond our authority as an error-correcting court.

The DNR and Town of White Bear argue that the district court erroneously held that the public-trust doctrine applies to authorize relief in these circumstances. Respondents argue that the district court properly applied the public-trust doctrine to the DNR's "failure to impose conditions and limits" on groundwater withdrawal "despite its knowledge that its failure to manage those permits" was damaging the lake.

"The public-trust doctrine is a common-law principle, adopted in Minnesota, providing that the state, in its sovereign capacity, holds absolute title to 'all . . . navigable waters and the soil under them for [the] common use' and imposes a duty upon the state to maintain those waters for navigation and other public uses." *Save Mille Lacs Sportsfishing, Inc. v. Minn. Dep't of Nat. Res.*, 859 N.W.2d 845, 849 (Minn. App. 2015) (quoting *State v. Longyear Holding Co.*, 29 N.W.2d 657, 669-70 (Minn. 1947)). This doctrine is founded on the principle that "upon admission of a state to the Union title to the beds of all navigable waters therein remains in the state, the federal government taking no title or interest therein except under its power to regulate commerce between the states." *Longyear*, 29 N.W.2d at 665.

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statutory appeal procedure, we would typically have jurisdiction to review agency decisions by writ of certiorari. Minn. Stat. § 480A.06, subd. 3 (2018). At the time MERA was enacted by the legislature, the Minnesota Court of Appeals did not exist. *See* 1983 Minn. Laws, ch. 247, § 171, at 944. The legislature has not amended section 116B.10 since the creation of the Minnesota Court of Appeals, suggesting that review after the district court remits to an agency under that section remains for the district court.

Under the public-trust doctrine, the "state owns navigable waters and the lands under them for public use, as trustee for the public, and not as a proprietor with right of alienation." *Larson v. Sando*, 508 N.W.2d 782, 787 (Minn. App. 1993), *review denied* (Minn. Jan. 21, 1994); *see also Oregon ex rel. State Land Board v. Corvallis Sand & Gravel Co.*, 429 U.S. 363, 373-74, 97 S. Ct. 582, 588 (1977) (stating that the state's title includes both the navigable waters and the waterbed below); *Illinois Cent. R.R. Co. v. Illinois*, 146 U.S. 387, 13 S. Ct. 110 (1892). Public use comprehends not only navigation by watercraft for commercial purposes, but the use also for the ordinary purposes of life such as "boating, fowling, skating, bathing, taking water for domestic or agricultural purposes, and cutting ice." *Nelson v. DeLong*, 7 N.W.2d 342, 346 (Minn. 1942); *see also State v. Korrer*, 148 N.W. 617 & 1095 (Minn. 1914) (division of waters into navigable and nonnavigable is another way of dividing them into public and private waters and if a body of water is adapted for public use, it is a public or navigable water).

"Caselaw in Minnesota on the scope and application of the public-trust doctrine is sparse." *Save Mille Lacs Sportsfishing, Inc.*, 859 N.W.2d at 851. Traditionally, the public-trust doctrine has been applied to the state's responsibility for managing public waters as a trustee for the public good. *Id.* No Minnesota case has directly addressed whether the public-trust doctrine encompasses a duty to manage groundwater-appropriation permits. *Cf. id.* at 852 (public-trust doctrine does not encompass a duty to manage fish or wildlife population); *Larson*, 508 N.W.2d at 787 (public-trust doctrine does not apply to land in outdoor recreation system); *Aronow v. State*, No. A12-0585, 2012 WL 4476642, at *2

(Minn. App. Oct. 1, 2012) (rejecting claims under public-trust doctrine because the doctrine does not apply to the atmosphere).[12]

We first consider appellants' argument that respondents' claims under MERA subsume its claims under the public-trust doctrine. Appellants argue that applying the public-trust doctrine would impede the DNR's efforts to manage the state's water, because statutes and rules already create a thorough framework for managing the state's water resources, and that decisions on how to manage those resources are matters of public policy.

No Minnesota cases discuss the specific contention that the public-trust doctrine does not apply where a statutory right has been created, but we reject appellants' argument. MERA expressly provides that "[t]he rights and remedies provided herein shall be in addition to any administrative, regulatory, statutory, or common law rights and remedies now or hereafter available." Minn. Stat. § 116B.12. MERA and the public-trust doctrine may each apply in cases that concern the state's absolute title to navigable waters.

The district court's public-trust doctrine analysis is limited to its conclusion—with which we agree—that MERA does not preclude application of the public-trust doctrine here. Unexplained by the district court is its reasoning in applying the public-trust doctrine—which concerns the state's title to navigable waters—to groundwater.

[12] Unpublished opinions are not precedential, Minn. Stat. § 480A.08, subd. 3 (2018), "but they may be persuasive." *Kruse v. Comm'r of Pub. Safety*, 906 N.W.2d 554, 559 (Minn. App. 2018).

In support of the district court's application of the doctrine to groundwater beyond the confines of the lake, respondents rely on cases from Arizona and California, primarily relying on *Nat'l Audubon Soc'y v. Superior Court of Alpine Cty.*, 658 P.2d 709 (Cal. 1983), which involved application of the doctrine not to groundwater but to non-navigable *surface* waters.[13] More significantly, we are bound to apply Minnesota law and not the law of other states. *State by Ulland v. Int'l Ass'n of Entrepreneurs of Am.*, 527 N.W.2d 133, 136 (Minn. App. 1995), *review denied* (Minn. Apr. 18, 1995).

Traditionally, the public-trust doctrine has been applied in Minnesota to protect navigable surface water and the "bed" below the surface water. *Longyear*, 29 N.W.2d at 665. The parties agree, and it is clearly the case, that the lake is "[s]ufficiently deep or wide to provide passage for [all or specified] vessels" and is a navigable water. *The American Heritage Dictionary of the English Language* 1176 (5th ed. 2011). But the common-law public-trust doctrine and its application in Minnesota has been limited to

[13] In a related context, the Ninth Circuit Court of Appeals has recently expressly refrained from deciding whether that groundwater is a "navigable water." *Hawai'i Wildlife Fund v. City of Maui*, 886 F.3d 737 (9th Cir. 2018), *cert. granted* (U.S. Feb. 19, 2019) (No. 18-260). We note that the United States Supreme Court granted certiorari, but limited its grant of certiorari to a single issue. The question presented to the Supreme Court for review is whether the Clean Water Act requires a permit when pollutants originate from a point source but are conveyed to navigable waters by a nonpoint source, such as groundwater. The Supreme Court is not addressing the relevant aspect of the Ninth Circuit's opinion cited here—whether groundwater is a "navigable water."

navigable waters like the lake and has never been extended to groundwater not directly beneath the lake.[14]

Here, respondents' claims concern much more than the lake and the lakebed. Respondents seek to remedy harm to the lake alleged to have resulted from the DNR's groundwater-appropriation permits. The subject of the claims here—and the relief ordered by the district court—pertains to groundwater-appropriation permits for wells located up to five miles away from the lake and its bed. Amicus City of Stillwater claims to have one of its multiple municipal wells within the five-mile relief area beyond the lake shore; the well is just yards short of being five miles from the lake and, according to the city, draws groundwater from a different aquifer than the one hydrologically connected to White Bear Lake.

The district court's application of the public-trust doctrine to groundwater withdrawal remote from the lake and its bed conflicts with well-established Minnesota law that landowners own water and mineral rights underlying their property. *In re Envtl. Assessment Worksheet for 33rd Sale of State Metallic Leases*, 838 N.W.2d 212, 213 (Minn. App. 2013) (acknowledging that most surface and mineral rights are privately held), *review denied* (Minn. Nov. 26, 2013). Caselaw in Minnesota recognizes that groundwater is considered part of the public domain and not the sole property of a private landowner.

[14] We have no occasion to consider or address the question of whether the public-trust doctrine would extend to groundwater below the lake bed, because no extraction of groundwater from beneath the lake is permitted or contemplated. The existing groundwater extraction permits are for wells outside the boundaries of the lake and lake bed.

Domtar, Inc. v. Niagara Fire Ins. Co., 563 N.W.2d 724, 734 (Minn. 1997); *Cargill, Inc. v. Evanston Ins. Co.*, 642 N.W.2d 80, 90 (Minn. App. 2002). Minnesota follows a correlative-rights approach to groundwater, meaning that a landowner's right to groundwater is subject to reasonable use. *Erickson v. Crookston Waterworks Power & Light Co.*, 117 N.W. 435, 439 (Minn. 1908) (*Erickson II*); *Erickson v. Crookston Waterworks Power & Light Co.*, 111 N.W. 391, 393-94 (Minn. 1907) (*Erickson I*). Unlike lake water and the bed below it, the state has never been held to have absolute title to groundwater remote from a lake's bed. To extend the reach of the public-trust doctrine to groundwater would vest in the state "absolute title" in essentially all groundwater, and would run contrary to the entire history of Minnesota law concerning groundwater.

To be sure, the lake and the aquifer are hydrologically connected. That is why MERA applies to the groundwater. But that does not make groundwater "navigable." Precipitation also supplies water to the lake, but that fact does not make area rain barrels "navigable."

As an error-correcting court, it is beyond our authority to change the law. That power, if it is to be exercised by the judicial branch, is properly vested in the Minnesota Supreme Court. *Larson v. Wasemiller*, 738 N.W.2d 300, 303 (Minn. 2007) (stating that the Minnesota Supreme Court has the power to recognize and abolish common-law doctrines, while it is the province of the legislature to modify the common law); *Lake George Park, L.L.C. v. IBM Mid-America Emps.' Fed. Credit Union*, 576 N.W.2d 463, 466 (Minn. App. 1998) (explaining that the Minnesota Court of Appeals is an error-correcting

court without authority to change the law), *review denied* (Minn. June 17, 1998); *Stubbs v. N. Mem'l Med. Ctr.*, 448 N.W.2d 78, 81 (Minn. App. 1989) (stating that it is not the function of this court to establish new causes of action), *review denied* (Minn. Jan. 12, 1990); *Tereault v. Palmer*, 413 N.W.2d 283, 286 (Minn. App. 1987) (explaining that the authority to create new law rests not with this court but in the legislature and supreme court), *review denied* (Minn. Dec. 18, 1987).

Applying established Minnesota law, we reverse the district court's application of the public-trust doctrine to respondents' claims.

Appellants raise several other arguments, including that the district court's factual findings are clearly erroneous and that several of the district court's remedies are erroneous or beyond the scope of legally available remedies. Because we reverse and remand on the application of Minn. Stat. § 116B.03 and reverse the district court's application of the public-trust doctrine, we do not address those issues further.

D E C I S I O N

Minn. Stat. § 116B.10 provides the proper remedy for challenged actions taken pursuant to a DNR permit. Because the bar in Minn. Stat. § 116B.03 applies to permit-related claims under the Minnesota Environmental Rights Act, the district court erred by allowing respondents' claims to proceed under Minn. Stat. § 116B.03. Respondents asserted claims under chapter 116B.01 and have met their burden of a prima facie showing that DNR's permitting process is inadequate to protect White Bear Lake. Accordingly, we

reverse and remand for the district court to remit the parties to administrative proceedings under Minn. Stat. § 116B.10, subd. 3, consistent with MERA and this opinion.

Because Minnesota has never applied the public-trust doctrine to groundwater beyond the confines of the boundaries of a lake and its bed, we reverse the district court's application of the public-trust doctrine to respondents' claims.

Reversed and remanded.

BRATVOLD, Judge (dissenting)

I respectfully dissent. Based on the plain language of Minn. Stat. § 116B.03 (2018), the "no-action" provision in the Minnesota Environmental Rights Act (MERA) does not bar a citizen suit against a state agency that has violated Minnesota law by its own conduct and has materially adversely affected the environment, here, White Bear Lake (lake) and the Prairie du Chien-Jordan Aquifer (aquifer). Also, the public-trust doctrine protects navigable waters, including White Bear Lake and its lake bed, therefore, respondents' common-law claim is authorized. Because the legal basis for respondents' claims is valid, I consider other issues raised by appellants. After doing so, I find no basis for reversal or a new trial and would affirm the district court's decision.

MERA's no-action provision

While the no-action provision in Minn. Stat. § 116B.03, subd. 1, allows no action in a citizen suit against an agency "for conduct" taken by the agency "pursuant to any . . . permit issued by" the Minnesota Department of Natural Resources (DNR), I agree with the district court that respondents' suit was *not* for a municipality's or the DNR's conduct pursuant to a permit. Rather, respondents' suit was *for* the DNR's conduct (including its failure to act) pursuant to its statutory authority. To explain my reasoning, I will begin with the statutory framework under chapter 116B, then consider the language of the no-action provision and the conduct challenged by respondent's lawsuit, and, finally, address whether an action under section 116B.10 is the exclusive remedy when a MERA claim relates to permits issued by an agency.

A. Statutory framework: Chapter 116B declares environmental rights and has 13 separate sections. The legislature expressly declared MERA's purpose in three steps: first, each person "is entitled by right" to the protection of air, water, land and other natural resources; second, each person "has the responsibility to contribute to the protection, preservation, and enhancement" of these natural resources; and third, it is in the "public interest to provide an adequate civil remedy" to protect natural resources "from pollution, impairment, or destruction." Minn. Stat. § 116B.01 (2018).

After providing some detailed definitions in section 116B.02, MERA authorized two different civil actions. In section 116B.03, MERA created a civil action "in the name of the state of Minnesota" by "any person" and against "any person" for the protection of natural resources from "pollution, impairment, or destruction." Minn. Stat. § 116B.03, subd. 1. For ease of reference, I will call this a "03 civil action." In section 116B.10, MERA created a civil action "against the state or any agency or instrumentality thereof" with a different focus, specifically, "where the nature of the action is a challenge to an environmental quality standard, limitation, rule, order, license, stipulation agreement, or permit . . . for which the applicable statutory appeal period has elapsed." Minn. Stat. § 116B.10, subd. 1 (2018). For ease of reference, I will call this a "10 civil action."

For both types of civil actions, the legislature set out the plaintiff's burden of proof. For a 03 civil action, the plaintiff's burden of proof depends on the challenged conduct, which it describes as (a) and (b). Under (a), when "the subject of the action is conduct governed by any environmental quality standard, limitation, rule, order, license, stipulation agreement, or permit," a prima facie showing is that the defendant's conduct "violates or

is likely to violate," for example, a permit. Minn. Stat. § 116B.04(a) (2018). Under (b), if the 03 civil action is not about conduct governed by, for example, a permit, then a prima facie showing is that the defendant's conduct "has, or is likely to cause the pollution, impairment, or destruction of" natural resources. *Id*. (b) (2018). The plaintiff's burden of proof for a 03 civil action thus includes proving *either* that the defendant's conduct violates, for example, a permit, *or* that defendant's conduct has caused pollution, impairment or destruction of natural resources.

In contrast, for a 10 civil action, the plaintiff's burden of proof is not described as conduct, but instead as proving that the "environmental quality standard, limitation, rule, order, license, stipulation agreement, or permit is inadequate to protect" natural resources from pollution, impairment, or destruction. Minn. Stat. § 116B.10, subd. 2 (2018). And the plaintiff's burden of proof under a 10 civil action is satisfied by proving the inadequacy of a permit to protect natural resources from pollution, impairment, or destruction.

B. No-action provision and the challenged conduct: This statutory framework carries significant meaning when determining whether the no-action provision in a 03 civil action precludes all relief in a suit against the DNR for conduct by a municipality pursuant to a permit. In relevant part, a 03 civil action has an important exception that is not present in a 10 civil action.

> [P]rovided, however, . . . *no action shall be allowable under this section for conduct taken by a person pursuant to any* environmental quality standard, limitation, rule, order, license, stipulation agreement or *permit issued by* the Pollution Control Agency, *Department of Natural Resources*, Department of Health or Department of Agriculture.

Minn. Stat. § 116B.03, subd. 1 (emphasis added).

Based on the plain-language of the no-action provision, I conclude that it does not apply here because respondents' action is "for conduct" taken (or not taken) *by the DNR* pursuant to its statutory authority and does not challenge a municipality's conduct pursuant to a permit. The no-action provision directly refers to a lawsuit's allegations of wrongful conduct when it states that "no action" is allowable "for conduct." Respondents' MERA claim fits section 116B.04(b)'s prima facie showing for a 03 action because it claims that the DNR's conduct (or lack thereof) has impaired the lake and aquifer, which are both natural resources. *See* Minn. Stat. § 116B.02, subd. 4 (2018). In contrast, respondents' MERA claim does not fit section 116B.10, subdivision 2's prima facie showing for a 10 civil action because it does not contend that a groundwater-appropriation permit is "inadequate to protect" natural resources. Instead, respondents' MERA claim challenges the DNR's failure to comply with state laws that mandate that it protect our surface and groundwater. I disagree that, because respondents' complaint alleges a MERA violation *relating* to conduct by a municipality pursuant to a permit issued by the DNR, the no-action provision bars a 03 civil action against the DNR.

It is not accurate to describe the "complained-of conduct" in respondents' lawsuit as "the withdrawal of groundwater in conformity with or under the authority of the DNR's permits." Respondents do not contend that any municipality's conduct violated state law or a DNR-issued groundwater-appropriation permit. Indeed, respondents did not maintain an action against any municipality, respondents did not seek to enjoin any municipality, and the district court's order did not enjoin any person other than the DNR. And neither

the respondents' evidence nor the district court's findings criticize the issuance of any particular groundwater appropriation permit. Instead, the district court found that the DNR issued "evergreen"[1] groundwater-appropriation permits on a case-by-case basis for decades without considering the cumulative and adverse effect of those permits on the lake and aquifer and without following other statutory mandates.

It also is not accurate to state that the DNR "has only one tool for regulating water appropriation—permits." Indeed, the district court found that the DNR violated Minnesota law by failing to comply with its statutory duties to protect Minnesota's surface and groundwater. The district court issued findings of fact supporting its determination that the DNR either directly or by omission violated multiple Minnesota statutes, and this portion of its opinion extends more than 15 pages. In its conclusions of law, the district court included a detailed analysis of the facts and applicable law, and determined that the DNR violated and "will likely violate" the following statutes and rules: (a) Minn. Stat. § 103G.211 (2018), by allowing public waters to be drained without replacement; (b) Minn. Stat. § 103G.287, subd. 5 (2018), by issuing groundwater-appropriation permits without a determination of sustainability; (c) Minn. Stat. § 103G.287, subd. 2 (2018), and Minn. Stat. § 103G.285, subds. 3, 6 (2018), by failing to set collective annual withdrawal limits for the lake, require permittees to submit a contingency plan, and specify how it will enforce the protected elevation level of the lake; and (d) Minn. R. 6115.0670, subp. 3(C)

[1] Evergreen permits have no expiration date. For example, the district court found that the City of White Bear Lake's permit was issued in 1969 and the expiration date is listed as "long-term appropriation."

(2017), by issuing groundwater-appropriation permits without sufficient hydrologic data. In addition, the district court made specific findings that the DNR's conduct has materially and adversely affected the lake and aquifer.

The district court also found that the DNR had early and ample knowledge of impairment to the lake and aquifer, yet failed to exercise its statutory authority to protect these natural resources. Minnesota law authorizes the commissioner of natural resources (commissioner) to "issue water-use permits for appropriation from groundwater *only if* the commissioner determines that the groundwater use is sustainable to supply the needs of future generations and the proposed use will not harm ecosystems, degrade water, or reduce water levels beyond the reach of public water supply." Minn. Stat. § 103G.287, subd. 5 (emphasis added).[2] The district court found that the DNR violated this and other provisions, by, among other things, failing to exercise its authority to amend the permits with conditions, *see* Minn. Stat. § 103G.255 (2018), and failing to set a "protective elevation for the water basin, below which an appropriation is not allowed." Minn. Stat. § 103G.285, subd. 3(b) (requiring designation of protective elevations); *see* Minn. Stat. § 103G.287,

[2] Appellants contend that chapter 103G does not apply to groundwater permits that were issued before the legislation was adopted in 1990. This position is not supported by the language of the chapter, which says, for example, that "[g]roundwater appropriations that will have negative impacts to surface waters are subject to applicable provisions in section 103G.285." Minn. Stat. § 103G.287, subd. 2. Moreover, Minn. R. 6115.0750, subp. 7, states that "[a]ll [water appropriation] permits issued by the commissioner since 1949 are subject to the provisions of Minnesota Statutes, section 103G.315, subdivision 11." Minn. R. 6115.0750, subp. 7 (2017). Section 103G.315, subdivision 11, in turn, provides that water appropriation permits are subject to "applicable law existing before or after the issuance of the permit," unless the law says otherwise. Minn. Stat. § 103G.315, subd. 11(a)(3) (2018).

subd. 2 (requiring certain steps when groundwater appropriations "will have negative impacts to surface waters").[3]

Because the respondents' claim is against the DNR for its own conduct that impaired the lake and aquifer and that violated the DNR's affirmative statutory duties, the no-action provision does not apply.

C. Exclusivity of a 10 action and effect of the no-action provision: Even assuming that respondents' claims relate to conduct by a municipality pursuant to a DNR permit and state a 10 civil action, I do not agree that a 10 civil action "is the exclusive remedy available under MERA when the challenged action is that of a state agency in issuing a permit." No language in chapter 116B provides that a 10 civil action is exclusive and cannot be pursued in addition or in the alternative to a 03 civil action. In fact, a 10 civil action expressly carves out a specific niche for a citizen suit against (a) the state or an agency (not another type of defendant, as allowed in a 03 action), (b) where the claim is that, for example, a permit is inadequate to protect natural resources, *and* (c) "the applicable statutory appeal period has elapsed." Minn. Stat. § 116B.10, subd. 1.[4] As

[3] The district court found that, in late 2016, the DNR set a protected elevation of 922 feet for the lake. But the district court also found that "[w]ere it not for this lawsuit, DNR would not have set a protected elevation" for the lake, the DNR "has no plans to enforce the protected elevation, and should [the lake] fall to 922 feet, 'nothing will happen.'"

[4] The majority expresses concern that, if a 03 civil action is available in addition to a 10 civil action, "then the multitude of certiorari appeals . . . will never be final so long as there is a person . . . who can state a colorable claim . . . that the agency permit allows the pollution, impairment, or destruction of natural resources." Yet the majority's conclusion that a 10 civil action must be exclusive does not remedy this concern. The legislature expressly provided that a 10 civil action is available *only* when "the applicable statutory appeal period has elapsed." Minn. Stat. § 116B.10, subd. 1. In other words, the legislature

discussed above, a 03 civil action has a broader focus because it challenges a defendant's conduct that impairs natural resources. Minn. Stat. § 116B.04(b). Thus, the statutory framework in chapter 116B allows for a variety of theories and, in the absence of statutory language providing that a 10 civil action is exclusive, these theories may be pursued together or in the alternative.

Additionally, MERA's no-action provision does not completely bar a citizen suit under section 116B.03. For two reasons, I conclude that, when applicable, MERA's no-action provision limits the issues and does not entirely preclude a 03 civil action. First, we must read sections 116B.03 and 116B.04 together and give effect to both provisions, which are explicitly linked. *See Martin v. Dicklich*, 823 N.W.2d 336, 345 (Minn. 2012) (providing that a statute should be interpreted to give effect to all of its provisions). Section 116B.04(a), which sets out the burden of proof for the first type of 03 civil action, states that a 03 civil action is proven when "the subject of the action is conduct governed by" a permit. Minn. Stat. § 116B.04(a). The no-action provision uses similar language, and states that "no action shall be allowable under this section for conduct taken by a person pursuant to any" permit issued by the DNR. Minn. Stat. § 116B.03, subd. 1. Reading these two provisions together, at the very least, a 03 civil action allows a MERA plaintiff to contend that a defendant's conduct violates or is likely to violate a permit, as expressly stated in section 116B.04. *See* Minn. Stat. § 116B.04.

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contemplated that a 10 civil action would be available in addition to a certiorari appeal from an agency decision to issue a permit.

Second, relevant case law holds that the no-action provision limits the issues and does not entirely preclude a 03 civil action when the plaintiff's burden of proof is set out in section 116B.04(b), which is the second type of 03 civil action for conduct that has impaired a natural resource. Our court has previously considered the application of the no-action provision to a consent order between a MERA defendant and the Minnesota Pollution Control Agency (MPCA) and we reversed a district court's decision that the no-action provision barred a 03 civil action. *In re Williams Pipeline Co*. reasoned that the consent order did not require "this particular rerouting of the [defendant's] pipeline" and the consent order allowed the defendant to "choose among several alternatives," therefore, the 03 civil action was not barred. 597 N.W.2d 340, 345-46 (Minn. App. 1999). The Eighth Circuit Court of Appeals reached a similar conclusion and upheld a 03 civil action under MERA even though the defendant had entered into a consent order with the MPCA. *Kennedy Bldg. Assocs. v. Viacom, Inc*., 375 F.3d 731, 744-45 (8th Cir. 2004). The Eighth Circuit held that where a consent order "specifies general but not particular actions," the no-action provision "does not preempt a MERA claim based on aspects of the defendant's actions that were not required by the consent order." *Id*. at 744.

Consistent with the decisions in *Williams Pipeline* and *Kennedy Building*, a 03 civil action may proceed so long as a MERA plaintiff bases its claim "on aspects of the defendant's actions that were not required" by the permit. In this case, respondents specifically claimed that the DNR violated *other* statutory duties, did not assert that the DNR permits were illegal, and contended that the municipalities were appropriating

groundwater in compliance with DNR-issued permits. Thus, even assuming the no-action provision applies, respondents' lawsuit is not barred.

In conclusion, based on the plain language of section 116B.03, subdivision 1, and the specific conduct challenged by respondents' lawsuit, the district court correctly decided that MERA's no-action provision does not preclude respondents' 03 civil action for declaratory and injunctive relief on behalf of the state of Minnesota and against the DNR for its own conduct, which has impaired the lake and aquifer.

Alternative remedies under MERA and exhaustion of administrative remedies

To support application of MERA's no-action provision to bar respondents' 03 civil action, appellants contend that respondents' claims are more appropriately brought under Minn. Stat. § 116B.10. For two reasons, I disagree.

First, respondents' suit challenges the DNR's violations of state law and I can find no language in section 116B.10 that would provide relief for agency conduct that violates state law. *See* Minn. Stat. 116B.10, subds. 1, 2, 3. Indeed, a district court's role in a 10 civil action is very limited. After a prima facie showing by a plaintiff in a 10 civil action, a district court is directed to remit the parties to the state agency that promulgated, for example, a challenged permit, and require the agency to institute appropriate administrative proceedings. *Id*., subd. 3. The court retains jurisdiction "for purposes of judicial review to determine whether the order of the agency is supported by the preponderance of the evidence." *Id*. In contrast, a district court is authorized to grant broad relief in a 03 civil action, including declaratory and equitable relief, as well as to impose conditions on the

parties to protect natural resources. *See* Minn. Stat. § 116B.07 (2018). Respondents' claims for the DNR's violations of state law cannot be addressed in a 10 civil action.

Second, in *State ex rel. Swan Lake Area Wildlife Ass'n v. Nicollet Cty Bd. of Cty. Comm'rs*, this court rejected a similar argument that a 10 civil action was a MERA plaintiff's sole basis for relief. 771 N.W.2d 529, 537-38 (Minn. App. 2009). After reading together the civil action alternatives set out in MERA, we held that "these sections [116B.03 and .10] clearly provide two distinct ways for a party to challenge an agency's conduct. To construe section 116B.10 as overriding or usurping the plain language of sections 116B.02 and 116B.03 would be unreasonable." *Id*. at 538. Thus, I disagree that respondents' claim is more appropriately brought under 116B.10.

Appellants also contend that respondents were required to exhaust administrative remedies. The legislature anticipated the appellants' argument that citizens should first be required to pursue administrative relief and made clear that MERA gives them additional rights, separate from other rights and remedies: "No existing civil or criminal remedy for any wrongful action shall be excluded or impaired by sections 116B.01 to 116B.13. 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." Minn. Stat. § 116B.12 (2018); *see also State ex rel. Swan Lake Area Wildlife Ass'n v. Nicollet Cty Bd. of Cty. Comm'rs*, 711 N.W.2d 522, 525-26 (Minn. App. 2006) (rejecting appellant's argument that respondent failed to exhaust administrative remedies and holding that the district court had subject matter jurisdiction over respondent's MERA claim "regardless of the administrative processes and remedies available" under other provisions), *review*

denied (Minn. June 20, 2006). Accordingly, exhaustion of administrative processes is not required before bringing a claim under MERA.

Agency deference and separation of powers

Appellants make a number of arguments about agency deference and separation of powers. In a 03 civil action, the district court does not review any agency decision and accord it deference; it sits as the finder of fact. This principle is solidly established by precedent that is more than 40 years old. In *Minn. Pub. Interest Research Grp. v. White Bear Rod & Gun Club*, the Minnesota Supreme Court noted that, when deciding a 03 civil action, "the trial court sat as a court of first impression and not as an appellate tribunal." 257 N.W.2d 762, 782 n.13 (Minn. 1977). In the same case, the supreme court observed that MERA "does not prescribe elaborate standards to guide trial courts, but allows a case-by-case determination by use of a balancing test, analogous to the one traditionally employed by courts of equity, where the utility of a defendant's conduct which interferes with and invades natural resources is weighed against the gravity of harm resulting from such an interference or invasion." *Id*. at 782. Thus, appellants have no basis for claiming error on the grounds of agency deference.

Similarly, the district court's decision does not overstep the bounds created by the separation of powers for two reasons. First, respondents brought this suit to compel agency compliance with statutes enacted by the legislature. Respondents' request for relief is consistent with MERA's purpose, which the supreme court has described as promoting citizen action: "The need for citizen vigilance exists whether or not specific environmental legislation applies, and MERA is clearly a proper mechanism to force an administrative

agency . . . to consider environmental values that it might have overlooked." *People for Envtl. Enlightenment & Responsibility (PEER), Inc. v. Minn. Envtl. Quality Council*, 266 N.W.2d 858, 866 (Minn. 1978).

Second, as stated, MERA authorizes the district court to provide broad relief: "The court may grant declaratory relief, temporary and permanent equitable relief, or may impose such conditions upon a party as are necessary or appropriate to protect the air, water, land or other natural resources located within the state from pollution, impairment, or destruction." Minn. Stat. § 116B.07. The district court's order is well within its statutory authority to force the DNR to act to prevent the impairment of the lake and aquifer.

The central feature of the district court's order provides that the DNR not issue new groundwater appropriation permits "until it has fully complied" with applicable statutes and "has sufficient hydrologic data to understand the impact" on the lake and aquifer. The order also provides that the DNR must comply with applicable statutory requirements for all groundwater appropriation permits within a 5-mile radius of the lake, which includes the DNR (1) setting a collective-annual-withdrawal limit for the aquifer, (2) enforcing a trigger elevation of 923.5 feet for the implementation of protected elevation, (3) preparing and enacting a residential irrigation ban, (4) requiring an enforceable plan to decrease per capita residential water use, and (5) amending all permits within the 5-mile radius of the lake to require a contingency plan for conversion to total or partial supply from surface-water sources.

Each of these provisions in the district court's order is grounded in statutes governing the DNR's duty to manage surface and ground water and are supported by the

record and the district court's findings. Therefore, I conclude that the district court's decision appropriately balances the utility of agency conduct with the gravity of the harm to prescribe appropriate relief and does not offend agency deference or separation of powers.

Public-trust doctrine

The public-trust doctrine is described as the state's holding in trust "'navigable waters and the soil under them for [the] common use,'" along with the state's authority and duty as trustee to maintain and protect navigable waters, for navigation, boating, swimming, and other public uses. *Save Mille Lacs Sportsfishing, Inc. v. Minn. Dep't of Nat. Res.*, 859 N.W.2d 845, 849 (Minn. App. 2015) (quoting *State v. Longyear Holding Co.*, 29 N.W.2d 657, 669-70 (Minn. 1947)); *see Nelson v. DeLong*, 7 N.W.2d 342, 346 (Minn. 1942). Respondents' MERA claim does not subsume its claim under the public-trust doctrine because the legislature expressly stated in section 116B.12 that MERA is an additional right and remedy. *See* Minn. Stat. § 116B.12.

While no Minnesota case has addressed whether the public-trust doctrine includes a duty to manage groundwater-appropriation permits, such a particular holding is not required to recognize the validity of respondents' claim, which seeks to protect the lake, a body of water that the parties agree is navigable. Indeed, courts in other jurisdictions have held that the public-trust doctrine applies to the extraction of groundwater that adversely impacts a navigable waterway. *See Envtl. Law Found. v. State Water Res. Control Bd.*, 237 Cal. Rptr. 3d 393, 402 (Cal. Ct. App. 2018) ("[T]he [trial] court does not hold the public trust doctrine applies to groundwater itself. Rather, the public trust doctrine applies if

extraction of groundwater adversely impacts a navigable waterway to which the public trust doctrine does apply."), *review denied* (Nov. 28, 2018); *see also N.D. State Water Comm'n v. Bd. of Managers*, 332 N.W.2d 254, 258 n.5 (N.D. 1983) (holding that "protecting the integrity of the waters of the state is . . . part of the state's affirmative duty under the 'public trust' doctrine," and the state "not only has the authority to control drainage of a lake, but also has the authority . . . to restore a lake to its natural water level"). This caselaw is persuasive.

In seeking relief under the public-trust doctrine, respondents' claim and the relief ordered by the district court necessarily affects the aquifer that the parties agree is "hydraulically connected" to the lake. Caselaw in Minnesota provides that groundwater is part of the public domain and that private property owners also have some interest in the groundwater. *See Domtar Inc. v. Niagara Fire Ins. Co.*, 563 N.W.2d 724, 734 (Minn. 1997); *Erickson v. Crookston Waterworks Power & Light Co.*, 117 N.W. 435, 440 (Minn. 1908). No legal authority holds, and I am not persuaded to conclude for the first time, that a private interest in groundwater negates or bars a public-trust claim to protect navigable water.

The record does not distinguish between the groundwater that lies below the lake and the groundwater that is extracted "outside of the boundaries of the lake and lake bed." As discussed below, the district court's findings of fact should be affirmed under the applicable standard of review. These findings include that the groundwater permits allow for extraction from wells located outside the boundaries of the lake, and also that the groundwater lies beneath the lake, is continuous, and extends far beyond the lakeshore.

The district court also found the lake and the aquifer are "strongly hydraulically connected," and the district court specifically found that pumping from wells within five miles of the lake has a "very significant influence" on the lake's levels.[5]

Thus, respondents are entitled to relief under the public-trust doctrine to protect the lake.

Joinder

Appellants contend that the district court erred by failing to dismiss respondents' claims for failure to join the permit-holder municipalities as necessary parties. A party is necessary if complete relief cannot be granted in its absence or it claims an interest in the subject of the litigation. Minn. R. Civ. P. 19.01. A district court's decision to deny a motion to dismiss for failure to join an indispensable party is reviewed for abuse of discretion. *Rilley v. MoneyMutual, LLC*, 863 N.W.2d 789, 796 (Minn. App. 2015), *aff'd*, 884 N.W.2d 321 (Minn. 2016). Here, the district court denied the DNR's motion to dismiss because (a) the proper solution, if the parties are necessary, is joinder, not dismissal; (b) a permittee does not have an established right of groundwater use or appropriation; and (c) the relief sought by respondents is premised on the DNR's alleged violations of MERA, not the municipalities' conduct.

[5] The district court's finding is supported by exhibit 2, the Lake-Ground Water Interaction Study at White Bear Lake, Minnesota, which was prepared by the DNR. Specifically, the report stated that "[c]omparisons of lake level graphs with ground water level graphs shows a strong correlation between the timing of highs and lows of lake levels and observation well levels. . . . This is a strong indication the two are strongly hydraulically connected."

The record supports the district court's findings that adequate notice of respondents' action was provided to ten permit-holder municipalities, only two asked to intervene, and both requests were granted. While appellants criticize the notice given, the record does not disclose a request for additional notice to be given, as provided for in MERA. *See* Minn. Stat. § 116B.03, subd. 2 (authorizing a district court to order additional notice to interested persons). Additionally, the district court's order requires the DNR to review and amend permits within a 5-mile radius consistent with statutory provisions. Presumably, the DNR will follow the appropriate administrative process to do so and will provide all permit-holders with an opportunity to be heard.[6]

More fundamentally, the district court concluded that respondents' failure to join the permit-holder municipalities did not require dismissal and, at most, only affected the relief obtained. I am persuaded by the Minnesota Supreme Court's reasoning in *Cruz-Guzman v. State*, where the parents of children enrolled in public schools brought a putative class-action complaint against the state alleging a violation of Minnesota's constitutional provision for an adequate education, among other claims. 916 N.W.2d 1, 4 (Minn. 2018). There, the plaintiff-parents had failed to join school districts and charter

[6] In addition to the administrative processes that are available to the concerned municipalities that have filed briefs as amici in this appeal, I note that none of these amici intervened even though our rules for permissive intervention are liberally construed. *See* Minn. R. Civ. P. 24.02; *see also* Minn. Stat. § 116B.03, subd. 3 (providing that interested parties "may be permitted to intervene on such terms as the court may deem just and equitable"). In fact, this court has upheld a district court's decision to vacate an order for default judgment against a direct defendant upon the motion by an intervenor who was not notified of the order until after it was entered. *See, e.g.*, *Westfield Ins. Co. v. Wensmann, Inc.*, 840 N.W.2d 438, 442 (Minn. App. 2013).

schools, which the state argued were necessary parties. *Id*. at 13-14. The supreme court rejected the state's argument because "the relief appellants are seeking from the State does not require the joinder of school districts and charter schools." *Id*. at 14. Similarly, respondents seek relief from the DNR, not from the municipal permit-holders. Thus, the district court did not abuse its discretion in denying the DNR's motion to dismiss.

District court's findings of fact

Appellants contend that a number of the district court's factual findings were clearly erroneous. "In an appeal from a bench trial, we do not reconcile conflicting evidence." *Porch v. Gen. Motors Acceptance Corp.*, 642 N.W.2d 473, 477 (Minn. App. 2002), *review denied* (Minn. June 26, 2002). We give the district court's factual findings great deference and do not set them aside unless they are clearly erroneous and we are "left with the definite and firm conviction that a mistake has been made." *White Bear Rod & Gun Club*, 257 N.W.2d at 782-83. While appellants offered evidence in support of their positions and it is understandable that they do not agree with the district court's findings, those findings have support in the record and are not clearly erroneous.

For the reasons stated, I respectfully dissent and would affirm the district court's decision.