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 December 28, 2020
Affirmed
Segal, Chief Judge

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

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Considered and decided by Reilly, Presiding Judge; Segal, Chief Judge; and Bratvold, Judge.

U N P U B L I S H E D O P I N I O N

SEGAL, Chief Judge

This appeal is taken from a district court judgment and injunction on claims asserted by respondent-associations against appellants, the Minnesota Department of Natural Resources and its commissioner (together the DNR), alleging that groundwater pumping is adversely affecting White Bear Lake (the lake) and the Prairie du Chien-Jordan Aquifer (the aquifer) that runs below the lake. A divided panel of this court issued a decision reversing the judgment and remanding for further proceedings. *See White Bear Lake Restoration Ass'n ex rel. State v. Minn. Dep't of Nat. Res.*, 928 N.W.2d 351 (Minn. App. 2019) (*White Bear Lake I*), *aff'd in part and rev'd in part*, 946 N.W.2d 373 (Minn. 2020). The supreme court granted review, reversed our decision in part, and remanded to us for consideration of issues that were raised on appeal but that we did not reach in *White Bear Lake I*. *See White Bear Lake Restoration Ass'n ex rel. State v. Minn. Dep't of Nat. Res.*, 946 N.W.2d 373 (Minn. 2020) (*White Bear Lake II*).

Because there are no reversible errors of law and the challenged findings of fact are supported by adequate evidence in the record, we affirm the judgment with regard to the remaining issues remanded to this court, but require an amendment to a portion of the ordered relief to avoid a conflict with the right of the municipal water-appropriation permit holders to an administrative contested-case hearing prior to the imposition of any permit amendments.

FACTS

The facts underlying respondents' claims are recited in both of the previous decisions, and we do not fully restate them here. Respondents' suit is based on their allegation that groundwater pumping by municipalities, pursuant to permits issued by the DNR, has impaired the lake and aquifer and is a cause of the low lake levels reached in the early 2010s.

The lake is a closed basin lake, meaning that it has no natural input from streams or rivers. The lake and the aquifer are, however, hydrologically connected. The level of the lake has fluctuated over time by a range of more than seven feet. There have been four periods of time since records on the elevation of the lake have been collected when the lake has been at its low-end level, including the mid-1920s, mid-1930s, and late 1980s, with the most recent low level at its worst in 2012-13. While precipitation and evaporation may have the greatest impact on the level of the lake, respondents' experts theorized, and the district court found, that groundwater pumping has had a negative, cumulative impact on both the lake and the aquifer.

Respondent White Bear Lake Restoration Association initiated this action in April 2013, asserting claims under the Minnesota Environmental Rights Act (MERA), Minn. Stat. §§ 116B.01-.13 (2018). Respondent White Bear Lake Homeowners' Association intervened as a plaintiff in May 2013, asserting claims under MERA and the common-law public-trust doctrine. Appellants City of White Bear Lake (the city) and Town of White Bear (the town) subsequently intervened as defendants.

In 2014, the parties reached a conditional settlement and the case was stayed from December 2014 through August 2016, while the parties unsuccessfully sought legislative funding to transition lake-area municipalities from groundwater wells to surface-water sources. After that condition of the settlement failed, the case proceeded to a bench trial. In August 2017, the district court issued findings of fact, conclusions of law and an order granting declaratory and injunctive relief pursuant to Minn. Stat. § 116B.03 of MERA and the public-trust doctrine.

The DNR, the city, and the town (together appellants) filed notices of appeal in May 2018, collectively raising nine issues. A divided panel of this court issued a decision in April 2019. *White Bear Lake I*, 928 N.W.2d 351. We addressed two of the nine issues raised by appellants, and held that the district court erred by (1) allowing respondents' claims to proceed under Minn. Stat. § 116B.03 of MERA instead of Minn. Stat. § 116B.10, and (2) applying the public-trust doctrine to groundwater outside the confines of the lake and lakebed. *White Bear Lake I*, 928 N.W.2d at 363-64, 367; *see also White Bear Lake Restoration Ass'n ex rel. State v. Minn. Dep't of Nat. Res.*, 928 N.W.2d 351, 368-75 (Minn. App. 2019) (Bratvold, J., dissenting). Section 116B.03 of MERA broadly allows suits against "any person" for the "protection of air, water, land, or other natural resources . . . from pollution, impairment, or destruction." Minn. Stat. § 116B.03, subd. 1. Section 116B.10 more narrowly provides for actions against the state or other political subdivisions to challenge, among other things, permits issued by the state. Minn. Stat. § 116B.10, subd. 1.

With regard to the question of whether this action could be brought against the DNR under section 116B.03, this court held that since the suit involved challenges to permits granted by the DNR, the suit could only be brought under section 116B.10. On the public-trust-doctrine claim, this court held that the doctrine did not extend so far as to impose a duty on the DNR to manage the groundwater and the surface water level of the lake. We thus reversed the judgment and remanded for proceedings under Minn. Stat. § 116B.10. *White Bear Lake I*, 928 N.W.2d at 368.

Respondents petitioned for further review, which the supreme court granted. The supreme court reversed this court's holding on the issue of whether the suit could proceed under Minn. Stat. § 116B.03 of MERA, but affirmed our ruling on the public-trust doctrine (on other grounds),[1] and remanded for this court's consideration of the additional issues raised by appellants but not addressed in *White Bear Lake I*. *White Bear Lake II*, 946 N.W.2d at 387.

The remaining seven issues, as identified in *White Bear Lake I*, are whether the district court erred by

> (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

[1] The supreme court's decision fully disposed of the public-trust claim, leaving only the claims under MERA for this court's further consideration.

> without holding administrative hearings, and (9) making clearly erroneous factual findings.

White Bear Lake I, 928 N.W.2d at 358.

D E C I S I O N

In relevant part, Minn. Stat. § 116B.03, subd. 1, provides for "a civil action in the district court for declaratory or equitable relief in the name of the state of Minnesota against any person, for the protection of the air, water, land, or other natural resources located within the state, whether publicly or privately owned, from pollution, impairment, or destruction." "Pollution, impairment, or destruction" is defined as conduct that (1) violates or is likely to violate any environmental quality standard, limitation, rule, order, license, or permit; or (2) materially adversely affects or is likely to materially adversely affect the environment. Minn. Stat. § 116B.02, subd. 5; *see also State by Schaller v. County of Blue Earth*, 563 N.W.2d 260, 264 (Minn. 1997) (noting that "[t]here are two types of pollution, impairment or destruction of natural resources subject to action under MERA").

The supreme court has identified five factors (the *Schaller* factors) for district courts to consider in determining whether conduct has a materially adverse impact on the environment, or is likely to do so:

> (1) The quality and severity of any adverse effects of the proposed action on the natural resources affected;
>
> (2) Whether the natural resources affected are rare, unique, endangered, or have historical significance;
>
> (3) Whether the proposed action will have long-term adverse effects on natural resources, including whether the affected resources are easily replaceable (for example, by replanting trees or restocking fish);
>
> (4) Whether the proposed action will have significant consequential effects on other natural resources (for example,

> whether wildlife will be lost if its habitat is impaired or destroyed);
>
> (5) Whether the affected natural resources are significantly increasing or decreasing in number, considering the direct and consequential impact of the proposed action.

Schaller, 563 N.W.2d at 267. The *Schaller* factors are nonexclusive and "each factor need not be met in order to find a materially adverse effect." *Id.* Upon finding a MERA violation, a district court has broad authority to grant declaratory and injunctive relief. *See* Minn. Stat. § 116B.07.

In this case, respondents argued, and the district court found, that the DNR's conduct in permitting groundwater appropriations met both definitions of "pollution, impairment, or destruction." First, the district court found that the DNR's conduct in permitting groundwater appropriations had materially adversely affected the aquifer and lake, or was likely to do so. The district court also found that the DNR's conduct violated, or was likely to violate, various sections of chapter 103G of the Minnesota Statutes, which in part requires the commissioner of natural resources to administer the use, allocation, and control of waters of the state as provided in the statute. Minn. Stat. § 103G.255 (2018). Specifically, the district found actual or likely violations of Minn. Stat. §§ 103G.211 (prohibiting drainage of public waters without replacement), 103G.285, subds. 3, 6 (requiring certain actions for groundwater withdrawals that have a negative impact on surface waters), 103G.287, subd. 5 (allowing the DNR to issue groundwater-appropriation permits only if it is determined that the groundwater use is "sustainable" as defined therein) (2018), as well as Minn. R. 6115.0670, subd. 3(C)(3) (2019) (providing that appropriation of groundwater shall not be approved "where sufficient hydrologic data are not available

to allow the commissioner to adequately determine the effects of the proposed appropriation").

Having found MERA violations, the district court granted declaratory and injunctive relief. The relief ordered by the district court includes:

(1) Prohibiting the issuance of any new groundwater-appropriation permits within a five-mile radius of the lake until the DNR has reviewed existing permits for sustainability and reopened and downsized any permits that do not comply with sustainability standards of Minn. Stat. § 103G.287, subd. 5;

(2) Requiring the DNR to take actions consistent with the requirements of Minn. Stat. § 103G.285 (2018), including setting a collective annual withdrawal limit for the lake; setting a trigger elevation of 923.5 feet for implementation of the 922-foot protective elevation already adopted by the DNR; preparing, enacting, and enforcing a residential irrigation ban when the level of the lake falls below the trigger elevation and until the elevation returns to 924 feet;

(3) Amending all existing permits within a five-mile radius of the lake to require:

    a. an enforceable plan to phase down per capita residential water use to 75 gallons per day and total per capita use to 90 gallons per day; and

    b. for each permittee to submit, within one year, a contingency plan for conversion from groundwater to surface water as the source for their municipal water supply;

(4) Requiring the DNR to work with the Metropolitan Council to evaluate, and update as needed, conservation goals and to amend groundwater-appropriation permits to include water supply plans with measurable conservation goals and downsize permits if the goals are not met; and

(5) Prohibiting the DNR from issuing any groundwater permits unless it has sufficient hydrologic data to understand the impact of the groundwater appropriations on the lake and aquifer.

With this context in mind, we turn to the issues remaining for our consideration, addressing first the questions of law and then the challenges to the district court's findings of fact.

I. The district court did not err by denying the DNR's joinder motion.

The DNR asserts that the district court erred by not requiring joinder of a group of municipalities (the municipalities) who have groundwater-appropriation permits that could be affected by a judgment in respondents' favor.[2]

The parties' briefs assert different standards of review on the joinder issue. Respondents point to opinions of this court in which decisions on joinder have been reviewed for abuse of discretion. *See Rilley v. MoneyMutual, LLC*, 863 N.W.2d 789, 796 (Minn. App. 2015), *aff'd*, 884 N.W.2d 321 (Minn. 2016); *Hoyt Props, Inc. v. Prod. Res. Grp., L.L.C.*, 716 N.W.2d 366, 377 (Minn. App. 2006), *aff'd*, 736 N.W.2d 313 (Minn. July 26, 2007).[3] The DNR points to a more recent supreme court opinion employing a de novo standard of review. *See Schulz v. Town of Duluth*, 936 N.W.2d 334, 338 (Minn. 2019) (stating that appellate courts review "the application of the Minnesota Rules of Civil Procedure de novo"). We need not resolve this issue because we conclude that the district court's decision should be affirmed under either standard.

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[2] The DNR raised the issue of joinder in a motion to dismiss for failure to join necessary parties, characterizing as necessary parties the city and the town (neither having yet moved to intervene), as well as the cities of Centerville, Columbus, Forest Lake, Hugo, Lino Lakes, Mahtomedi, North St. Paul, and Vadnais Heights. Respondents assert that these municipalities all received notice of the suit, but only the city and town sought to intervene. We note, however, that given the five-mile radius included in the district court's order, it is not clear in the record if the group of affected municipalities is limited to those identified in the motion to dismiss or includes additional municipalities that received no notice. Because we affirm the district court's ruling on the joinder motion on grounds that are not relevant to the question of notice, this lack of clarity does not alter the result.

[3] The supreme court granted review on issues other than joinder in *Rilley* and *Hoyt* and thus did not address the appropriate standard of review for joinder decisions in affirming this court's decisions in those cases.

Under Minn. R. Civ. P. 19.01:

> A person who is subject to service of process shall be joined as a party in the action if (a) in the person's absence complete relief cannot be accorded among those already parties, or (b) the person claims an interest relating to the subject of the action and is so situated that the disposition of the action in the person's absence may (1) as a practical matter impair or impede the person's ability to protect that interest or (2) leave any one already a party subject to a substantial risk [of] incurring double, multiple, or otherwise inconsistent obligations by reason of the person's claimed interest.

Parties required to be joined under rule 19.01 are referred to as "necessary parties." *See id.* at 340-41.

The DNR's joinder arguments on appeal implicate the absent-party-interests analysis under rule 19.01(b)(1) and (2). The threshold determination under this analysis is whether the municipalities "claim[] an interest relating to the subject of the action." Minn. R. Civ. P. 19.01(b). Neither the rule nor Minnesota caselaw addresses the nature of the "interest" required to determine that a person is a necessary party. But our supreme court has interpreted similar language in a related rule as requiring a "legally protected interest." *Minneapolis Star & Tribune Co. v. Schumacher*, 392 N.W.2d 197, 207 (Minn. 1986) (applying Minn. R. Civ. P. 24.01, which requires a putative intervenor to "claim[] an interest relating to the property or transaction which is the subject of the action"). And federal courts applying Fed. R. Civ. P. 19(a)(2) have held that a person must have a "legally protectable interest." *See, e.g.*, *N. Alaska Envtl. Ctr. v. Hodel*, 803 F.2d 466, 468 (9th Cir. 1986) (citing 3A *Moore's Federal Practice* ¶ 19.07[2.-0], at 19–99 (2d ed. 1986)); *see also Kisch v. Skow*, 233 N.W.2d 732, 734 & n.4 (Minn. 1975) (recognizing similarity between

Minn. R. Civ. P. 19.01 and Fed. R. Civ. P. 19(a) and relying on federal caselaw to interpret state rule).

The above holdings are consistent with the general understanding of "interest" to mean a "right, claim, or legal share." *The American Heritage Dictionary of the English Language* 914 (5th ed. 2011). Thus, we agree with the district court that, in order to compel joinder, appellants were required to demonstrate that absent parties had legally protected interests in the subject of this action.

In concluding that the municipalities did not have legally protected interests in the subject of this action, the district court relied on Minn. R. 6115.0740, subp. 2(A) (2019), which, in the context of addressing conflicts between water users, provides: "In no case shall a permittee be considered to have established a right of use or appropriation by obtaining a permit." In addition, we note that, under Minn. Stat. § 103G.315, subd. 11(a) (2018), a permit is subject to

> (1) cancellation by the commissioner at any time if necessary to protect the public interests;
>
> (2) further conditions on the term of the permit or its cancellation as the commissioner may prescribe and amend and reissue the permit; and
>
> (3) applicable law existing before or after the issuance of the permit.

The DNR concedes that the municipalities do not have "an absolute right to appropriate water," but argues that they do "have a right to appropriate water under permit if they meet the applicable statutory conditions." In support of this assertion, the DNR cites to Minn. Stat. § 103G.315 (2018), which sets out the criteria and process for granting or denying permits. Subdivision 3 of that section states that a permit shall be granted "[i]f

the commissioner concludes that the plans of the applicant are reasonable, practical, and will adequately protect public safety and promote the public welfare." Minn. Stat. § 103G.315, subd. 3. "Otherwise the commissioner shall reject the application or may require modification of the plan as the commissioner finds proper to protect the public interest." Minn. Stat. § 103G.315, subd. 5. Under these provisions, whether a permit is to be granted or denied is dependent on a case-by-case analysis by the DNR of compliance with a host of statutory and regulatory requirements along with the exercise of agency discretion. We thereby cannot conclude that the district court erred in rejecting this argument.

Thus, while we are acutely aware of the substantial practical and financial interests of the municipalities in being able to continue to provide their residents with affordable water,[4] we are not persuaded that the permit holders have a "legally protectable interest" for the purposes of rule 19.01 and we conclude that the district court did not err in denying the DNR's joinder motion.[5]

[4] The city noted that respondents' own expert estimated that the cost for just the city, not including the other municipalities, to develop an alternative source for its water supply would range from $18 million to $56 million.

[5] We also note that because the absent municipalities in this case were subject to service of process, joinder would have been the proper remedy, not dismissal, if the municipalities were necessary parties. *Compare* Minn. R. Civ. P. 19.01 *with* Minn. R. Civ. P. 19.02; *see also Schulz*, 936 N.W.2d at 341-42.

II. The district court did not err by denying summary judgment on the ground that respondents failed to exhaust administrative remedies.

The town asserts that the district court erred by denying its motion for summary judgment on the ground that respondents failed to exhaust their administrative remedies. We conclude that this argument is foreclosed by the plain language of MERA and by our decision in *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).

MERA expressly provides that its remedies are "in addition to any administrative, regulatory, statutory, or common law rights and remedies now or hereafter available." Minn. Stat. § 116B.12. In *Swan Lake I*, we relied on that statutory language to reject an argument that the district court lacked subject-matter jurisdiction over a MERA claim because of available administrative remedies. 711 N.W.2d at 525-26 ("In light of the broad language of Minn. Stat. § 116B.12, we conclude that the district court has subject matter jurisdiction over respondent's MERA claim regardless of the administrative processes and remedies available . . . ."). The supreme court similarly relied on section 116B.12 in this case in determining that respondents had stated a claim under section 116B.03. *White Bear Lake II*, 946 N.W.2d at 382; *see also id.* ("What we review today is not an administrative decision; we review judicial decisions of the district court and the court of appeals.").

For the same reasons here, we conclude that the district court did not err by denying the town's motion for summary judgment on the ground that respondents failed to exhaust administrative remedies before pursuing a MERA claim in district court.

III. The district court neither exceeded its authority under MERA nor violated separation-of-powers or commandeering principles in the relief ordered.

Appellants argue that the district court exceeded its authority and violated separation-of-powers or commandeering principles in granting relief. Specifically, the DNR argues that the district court erred by requiring it to reopen and amend existing permits. The DNR argues that this usurps its permitting discretion, mandates retroactive application of statutory amendments not in effect at the time the permits were issued, and violates the right of the permittees to a hearing before their permits can be amended. The town argues that the district court violated separation-of-powers principles by ordering relief—including the requirement that the DNR amend existing permits to require permit holders to create contingency plans for an alternative, feasible source of water—that will require permit holders to expend funds. The city also challenges the contingency-plan requirement, relying on general separation-of-powers principles.

Our analysis of these arguments is guided by the fact, as recently reinforced by the supreme court in *White Bear Lake II*, that MERA grants broad authority and substantial discretion to the district court in fashioning remedies. 946 N.W.2d at 382-83. Under Minn. Stat. § 116B.07:

> 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.

In *White Bear Lake II*, in addressing the scope of conduct actionable under Minn. Stat. § 116B.03, the supreme court rejected an argument for narrow construction based on

deference and separation-of-powers principles. *Id.* at 382.[6] The court explained that deference was not required because it was not reviewing an administrative decision, but rather a decision by the district court sitting as fact-finder under MERA:

> More than 40 years ago, we put to rest the DNR's and the dissent's concern about MERA's relationship to the principles of administrative deference and the separation of powers. In *Minnesota Public Interest Research Group v. White Bear Rod & Gun Club*, 257 N.W.2d 762 (Minn. 1977), we addressed civil actions brought under section 116B.03, subdivision 1 of MERA. We determined that, on such claims, no special deference is due to an administrative agency because "the trial court [sits] as a court of first impression and not an appellate tribunal." *Id.* at 783 n.13.

Id. at 382-83 (alteration in original). The supreme court reaffirmed language in *White Bear Rod & Gun Club* providing 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 383 (quoting *White Bear Rod & Gun Club*, 257 N.W.2d at 782). And the supreme court unequivocally stated: "The principle of agency deference does not apply to actions under section 116B.03, which courts adjudicate in a fashion similar to traditional courts of equity." *Id.* Accordingly, the supreme court concluded: "The DNR's and the dissent's invocations of deference and separation-of-powers principles are unavailing." *Id.*

[6] The DNR sought conditional cross review of its separation-of-powers arguments, but the supreme court limited its review to the two issues that had been addressed by this court in *White Bear Lake I*. *White Bear Lake II*, 946 N.W.2d at 379.

Although the supreme court's analysis was made in the context of deciding the scope of conduct actionable under Minn. Stat. § 116B.03, it offers useful guidance as we address appellants' challenges to the remedies granted by the district court.

A. District court authority to require the DNR to reopen and amend permits

1. Authority under MERA

The DNR relies on several different theories to challenge the authority of the district court to order the DNR to reopen and amend permits. First, the DNR claims that the relief exceeded the district court's authority under MERA and violates separation-of-powers principles. The DNR contends that the district court lacks authority to order the DNR, for example, to set a trigger elevation of 923.5 feet, to require an irrigation ban at that trigger elevation, or to require submission of contingency plans for conversion to surface-water use. The DNR contrasts these specific permit requirements with the more general requirement that it perform a cumulative analysis of all permits within five miles of the lake, which it concedes falls within the district court's authority under MERA.

This court addressed similar arguments in the *Swan Lake* litigation. *See 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*). In *Swan Lake II*, this court held that a district court had authority to set a specific crest elevation for a dam to remedy a MERA violation. 771 N.W.2d at 535. This court explained:

> To hold, as we did in *Swan Lake I*, that the district court has subject-matter jurisdiction over a MERA claim regarding the water levels of lakes but that the DNR has the exclusive authority to set crest elevations would render the MERA protections largely illusory and beyond the reach of the courts,

> especially where, as here, the question of the crest elevation is a focus of the dispute. . . . It would also be meaningless to hold that the district court may entertain a claim under MERA about the drainage of wetlands, decide that a wetland has been impermissibly drained in violation of the statute, and yet hold that it is unable to order an appropriate remedy because it lacks jurisdiction to effectuate the law completely.

Id. at 536.

The analysis in *Swan Lake II* is consistent with the supreme court's description of the district court's role in this case. *See White Bear Lake II*, 946 N.W.2d at 373 (describing that role as "analogous to one traditionally employed by courts of equity" and concluding that "the responsibilities that MERA assigns to the courts are fully consistent with our judicial role" (quotation omitted)); *see also id.* ("More than 40 years ago, we put to rest the DNR's and the dissent's concern about MERA's relationship to the principles of administration deference and separation of powers."). Based on *Swan Lake II* and *White Bear Lake II*, we conclude that the district court has the authority under MERA to require the DNR to reopen permits and seek to modify requirements consistent with the district court's order.

Turning to the DNR's specific challenge to the district court's creation of a "trigger elevation" of 923.5 feet for the lake, the DNR contends that this violates separation-of-powers principles because the DNR has the sole authority to establish a protected elevation for the lake. The DNR states that it exercised this authority to set a protected elevation of 922 feet, not 923.5 feet. As respondents argue, however, the district court did not establish a different *protected* elevation level. The district court left the protected level at 922 feet but, based on the evidence in the case, found that the DNR could not wait until the lake hit

922 feet before taking action to prevent the lake from going below 922 feet. The district court, thus, established a "trigger elevation" requiring action by the DNR to prevent further reductions in the lake level. While this could be characterized as creative relabeling, we conclude that the district court was within its authority under MERA to order this relief and it does not violate the separation of powers.

2. Retroactive application of amendments

The DNR's next argument is that the district court's order improperly requires the DNR to amend permits to conform to statutory requirements that did not exist at the time the permits were issued. The DNR argues that its authority to amend permits is discretionary and "there was no mandatory obligation on [the] DNR to reopen permits to apply new statutes retroactively."

Respondents, however, persuasively argue that the statutory amendments are applicable to the permits issued under Minn. Stat. § 103G.315, subd. 11, and Minn. R. 6115.0750, subp. 7 (2019). Indeed, the statute expressly states that water-appropriation permits are subject to "applicable law existing before *or after* the issuance of the permit." Minn. Stat. § 103G.315, subd. 11(3) (emphasis added).

Moreover, the district court found separate violations of MERA based on the DNR's violation of statutes and rules, and its finding that the DNR's failure to comply with those provisions has caused a material adverse impact on the aquifer and the lake. Thus, even if the DNR did not otherwise have a duty to reopen permits, its conduct violating MERA under the material-adverse-impact standard independently supports the district court's order requiring the DNR to reopen and amend permits in conformity with the law,

assuming such relief is otherwise authorized. And, given the scope of the remedial authority afforded under MERA, we conclude that the district court was authorized to require the DNR to reopen permits of the municipalities within the five-mile radius of the lake.

Significantly, the DNR acknowledges that *it* has authority to reopen and amend permits, and this is consistent with the applicable statute and rules. Likewise, under the broad authority of MERA, the district court did not err in ordering the DNR to exercise this authority and the relief ordered does not amount to an improper retroactive application of statutory amendments.

B. The right of permit holders to a contested-case hearing prior to a permit amendment

The DNR contends that relief ordered by the district court deprives the municipalities of their right to an administrative, contested-case hearing before an amendment can be made to their permits. Here, respondents acknowledge unequivocally that "the municipalities have a guaranteed 'day in court' via contested-case proceedings before any amendments can be made to their permits." These rights are set out in Minn. Stat. § 103G.311 (2018) and Minn. R. 6115.0750, subp. 5(C) (2019).[7] Respondents, however, argue that there is no deprivation because the relief ordered is just directed to the DNR to require the DNR to comply with its statutory obligations to manage water appropriations, and is not directed against any specific permittee. For example,

[7] The DNR notes in its supplemental brief to this court that all of the municipalities have requested contested-case hearings.

respondents have stated repeatedly in the district court and on appeal that "[t]he relief sought . . . **does not involve the municipalities**." In their supplemental brief to this court on remand, respondents again stress that "[t]his is a suit against an agency to require compliance with statutes and to challenge its overall procedures, *not* to review or change a particular permit . . . ."[8] Yet, the relief sought and ordered by the district court will change "particular permits."

As noted above, the district court ordered the following, set out in paragraph 4 of the relief, with respect to amendments to the permits of municipalities within a five-mile radius of the lake:

> (D) Requiring that all existing permits include an enforceable plan to phase down *per capita* residential water use to 75 gallons per day and total *per capita* water use to 90 gallons per day. The enactment of this requirement will be completed no later than 1 year from the date of this order.

[8] It also bears noting that the reasoning of the supreme court in affirming that this suit was appropriate to bring under section 116B.03 stressed the fact that the suit focused on the failure of the DNR, on a collective basis, to manage groundwater use:

> We do not dismiss out of hand the possibility that the associations could have sought some relief under section 116B.10. But *we do not understand the associations to be alleging that any single groundwater appropriation permit is "inadequate"*; rather, the gravamen of the associations' MERA claim is that *about 70 permits collectively and cumulatively*, in combination with agency mismanagement and the violation of other environmental statutes, caused pollution and impairment of the lake and the aquifer.

White Bear Lake II, 946 N.W.2d at 384 (emphasis added).

> (E) Immediately amending all permits within the five mile radius of White Bear Lake to require that within one year of the date of this order, permittees submit a contingency plan in their water supply plans for conversion to total or partial supply from surface water sources. This contingency plan will include a schedule for funding design, construction and conversion to surface water supply.

(Emphasis omitted.)

At the outset, we note the error of the district court in its phrasing of paragraph 4(E) of the relief. The paragraph, which dictates that the DNR must "immediately amend" all permits, is in conflict with the statutory right of permit holders to a hearing before their permits can be amended by the DNR. The district court can order the DNR to reopen the impacted permits to seek this amendment, but cannot order the DNR to impose amendments without honoring the right of the permit holders to obtain a contested-case hearing. This is not to say, however, that the permit holders have the right to relitigate whether groundwater appropriations within a five-mile radius of the lake have or will have a negative impact on surface waters within the meaning of Minn. Stat. § 103G.287, subd. 2 (2018). The issue of a negative impact has been determined in this case. Nevertheless, paragraph 4(E) must be revised to reflect the right of the permit holders to a hearing prior to any permit amendments.

We also express our concern that the scope of the impact of the paragraph 4(D) and (E) relief on individual municipal permit holders is not known because they were not made parties to this action. As argued by the DNR, the contested-case hearings may produce results that create inconsistent and conflicting obligations.

Turning first to the requirement for enforceable plans to achieve the 75-gallon residential and 90-gallon total per day, per capita level of water usage, we note that the source of these numbers is the Metropolitan Council's Master Water Supply Plan, where they are set out as a "desired outcome" on a *regional* level.[9] And evidence in the record establishes that there can be wide variation, municipality to municipality, in the ability to achieve the water-use numbers set out in paragraph 4(D) of the ordered relief. The factors include the size of the municipality, the mix of residential and industrial users and factors such as the ability of the municipality to repair leaking pipes. Depending on these factors, it may not be feasible for a particular municipality—for example, a small municipality with a high percentage of industrial users to residential users—to reduce its water use to these levels. Thus, based on the evidence that may be produced at the contested-case hearings, we foresee a risk of conflicting outcomes between the relief ordered in this case and the decisions reached in the individual hearings.

With regard to the requirement that the permit holders develop contingency plans for full or partial conversion to surface-water sources, here again there is a risk of conflicting results. For example, the DNR posed a hypothetical (set out in the City of Stillwater amicus brief) that a municipality, even though within a five-mile radius of the lake, may draw its water not from the aquifer, but from a different source not within the scope of this suit. Consequently, there would be no basis to require that particular municipality to develop a contingency plan for alternate water sources.

[9] We further note that the testimony shows that the numbers derive from national goals promoted by the American Water Association.

At this point in time, however, these concerns are only hypothetical. Since the municipalities (aside from the city and town) were not parties to these proceedings, the evidence is simply not in the record to allow us to evaluate these issues or order modification of the relief beyond correcting paragraph 4(E) as set out above. We nevertheless caution the district court that heed must be taken of the permit holders' statutory right to a hearing as it administers the injunction and that, depending on the evidence adduced at the contested-case hearings, modifications may be appropriate.

C. District court authority to order terms requiring expenditure of public funds

The city argues that the district court's order violates separation-of-powers principles by requiring permit holders to expend public funds to create contingency plans for conversion to surface-water use. The city cites no authority for the proposition that the courts are prohibited from ordering relief that requires the expenditure of public funds, and we are not aware of any. Rather, the city relies on cases that recognize the general principle that Congress (or the state legislature) holds the "power of the purse." *See Mathews v. De Castro*, 429 U.S. 181, 185, 97 S. Ct. 431, 434 (1976) (stating general proposition that governmental decisions to spend money belong to Congress, and not the courts, in rejecting an equal-protection challenge to law governing Social Security benefits); *Minn. Energy & Econ. Dev. Auth. v. Printy*, 351 N.W.2d 319, 349 (Minn. 1984) (stating similar principle in a case rejecting challenge to issuance of bonds in relation to particular project); *see also State of Ark. ex rel. Ark. State Highway Comm'n v. Goldschmidt*, 627 F.2d 839, 842 (8th Cir. 1980) (recognizing, in determining moot challenge to a funding scheme that was

changed by Congress, that "the courts have no power to resurrect budget authority which does not exist, either because it was never provided or because it has terminated").

The city's argument, however, ignores the scope of the grant of remedial authority accorded the courts by the legislature under MERA. To draw an analogy to *Swan Lake II*, it would make little sense to recognize the district court's broad equitable authority under MERA but then hold that the district court is precluded from granting any relief that may require a governmental subdivision to spend money. We recognize that there are real costs involved in developing such contingency plans,[10] but conclude that this does not render the relief invalid.

D. Commandeering

The DNR finally argues that this case raises an issue of "commandeering" and that the court may not exercise permitting powers that have been assigned to the DNR. The DNR's commandeering argument, however, misses the mark because the legislature *both* authorized the DNR to issue permits *and* authorized the district courts to grant broad relief under MERA to protect the environment.[11] Thus, when the DNR is found to have violated

[10] We stress that in reaching this conclusion the only issue before us is the development of contingency plans for conversion to surface water, not the implementation of any such plans. The implementation of a conversion from groundwater to surface-water sources is many magnitudes the cost and we are keenly aware that, pursuant to the settlement agreement, the parties sought funding from the legislature to accomplish the transition, but failed in that mission. We, thus, want to make clear that our ruling should not be viewed as expressing any opinion on the propriety of requiring the implementation of any such contingency plans.

[11] The legislature has the prerogative to make both authorizations. This is not a case in which the legislature has stripped the office of an executive officer of all of its independent

MERA, it is within the court's authority to order the DNR to remedy the violation. Indeed, MERA specifically contemplates a district court order requiring action by the executive branch by defining a "person" subject to the act to include "any state, municipality or other governmental or political subdivision or other public agency or instrumentality." Minn. Stat. § 116B.02, subd. 2; *see also* Minn. Stat. §§ 116B.03, subd. 1 (authorizing civil action against any "person"), 116B.07 (authorizing district court to "impose such conditions upon a party as are necessary or appropriate to protect . . . natural resources").

The DNR cites three Minnesota appellate court decisions in support of its commandeering argument.[12] Two of the cases cited address the usurpation of constitutionally assigned powers, which is not at issue here. *See Limmer v. Ritchie*, 819 N.W.2d 622, 627 (Minn. 2012) ("Our precedent has also recognized that *where the constitution commits a matter to one branch of government*, the constitution prohibits the other branches from . . . interfering with the coordinate branch's exercise of its authority." (emphasis added) (quotation omitted)); *In re Civil Commitment of Giem*, 742 N.W.2d 422,

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core functions. *See Otto v. Wright County*, 910 N.W.2d 446, 452 (Minn. 2018) (explaining that legislature has authority to assign duties of executive officers but may not strip office of "independent core functions" (quotation omitted)). The commissioner's position is one created by the legislature, which also controls the authority of that position. *Compare* Minn. Const. art. V, § 4 (designating executive officers) *with* Minn. Stat. §§ 84.01-.65 (2018) (governing duties of the department and commissioner of natural resources).

[12] The DNR also cites to federal cases. This court is not bound by federal decisions on matters of state constitutional law. *See, e.g., TCI Bus. Capital, Inc. v. Five Star Am. Die Casting, LLC*, 890 N.W.2d 423, 431 (Minn. App. 2017) ("A federal court's interpretation of Minnesota law is not binding on this court, though it may have persuasive value."). Moreover, for similar reasons as we discuss with respect to the state cases, we do not find the federal cases persuasive.

429 (Minn. 2007) (rejecting construction of statute that would "permit the legislature to interfere with the power *the constitution vests* in the district court" (emphasis added)). These cases are, thus, inapposite.

The third case is also distinguishable. In *State v. Christianson*, the supreme court affirmed the quashing of a writ of mandamus requiring the governor to remove the attorney general. 229 N.W. 313, 314 (Minn. 1930). The supreme court reasoned that the petitioner sought mandamus under a statute that allowed but did not require the governor to remove the attorney general. *Id.* The court recognized "the rule that the courts cannot, by injunction or mandamus, control or direct the head of an executive department in the discharge of any executive duty involving the exercise of his discretion." *Id.* Because the statute allowing removal of the attorney general required the exercise of discretion, the supreme court held that it was not a proper basis for an extraordinary writ. *Id.* at 317. *Christianson* is distinguishable because this case involves not just the DNR's discretionary permitting authority but also the district court's broad authority under MERA. Thus, we discern no impermissible commandeering of the DNR's permitting authority.

IV. The district court's findings of fact are not clearly erroneous.

The DNR and the city challenge six of the district court's findings of fact. "Findings of fact, whether based on oral or documentary evidence, shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the [district] court to judge the credibility of the witnesses." Minn. R. Civ. P. 52.01. Review for clear error involves examining the record to determine whether there is reasonable evidence to support a finding. *Rasmussen v. Two Harbors Fish Co.*, 832 N.W.2d 790, 797 (Minn. 2013). The

evidence is viewed in the light most favorable to the judgment. *Id.* Reversal is warranted only if the court is "left with the definite and firm conviction that a mistake has been made." *Id.* (quotations omitted).

If a finding is supported by evidence in the record, even if another fact-finder might have reached a different conclusion, the finding must be affirmed. As a general proposition, that is the situation here. While appellants point to evidence that supports their contentions, the challenged findings are supported by other evidence in the record and, consequently, may not be reversed on appeal.

A. Findings regarding the "normal" and "average" levels for the lake, and the finding that the lake falling below 922 feet is "unusual"

The DNR and the city challenge the district court's findings that the "normal range" of the lake is 923 to 925 feet, that the long-term average is 923.8 feet, and that it is "unusual" for the lake to fall below 922 feet. These findings are supported by evidence in the record, such as a frequently-asked-questions document prepared by the DNR that notes fluctuating lake levels but concludes: "Most of the time, though, the lake level has been recorded between 923 feet and 925 feet." With respect to the long-term average level of the lake, respondents' limnology expert Dr. Meghan Funke testified at trial that she calculated a long-term average elevation of 923.8 feet. Dr. Funke also testified that the lake levels rarely fall below 922 feet and that she would consider a drop below 922 feet to be "unusual."

Appellants point to the stipulated evidence of historical lake levels from 1924 through 2016 that would support a finding of a wider normal range between 920 and 925

feet, and a long-term-average elevation of 923.13 feet over the full 92 years that lake elevation levels have been collected. Respondents' expert, however, chose to rely on a shorter time frame, based on a 25-year average from 1978 through 2002, to measure the normal range and average lake level. This variation in methodology is the cause of the differing numbers. Respondents' experts presented a rationale for utilizing the shorter time frame, a rationale that the district court found credible. Since the district court's findings are supported by evidence in the record based on the methodology advocated by respondents' experts, we are not left with the "definite and firm conviction" that the district court's findings are clearly erroneous.[13]

B. Findings regarding the increase in groundwater pumping

The DNR and the city challenge the district court's findings regarding increased groundwater pumping from the aquifer and in particular its finding that the use of groundwater in the area around the lake has at times "doubled" since 1980. This finding is supported by testimony from respondents' expert Stu Grubb as well as testimony by the DNR's expert James Berg agreeing that water use had at times doubled since 1980.

The DNR and the city argue that the district court's findings disregard a recent downward trend in groundwater use, and that the district court erroneously relied on the overall increase to find a causal link between groundwater appropriations and lower lake

[13] In their supplemental briefs, the DNR and the city cite data that postjudgment lake levels have increased. Since this is extrarecord information, we have not included it in our analysis. *See* Minn. R. Civ. App. P. 110.01 (providing that the documents filed with the trial court, the exhibits, and the transcript, if any, shall constitute the record on appeal); *Thiele v. Stich*, 425 N.W.2d 580, 582-83 (Minn. 1988).

levels. The DNR and the city acknowledge that groundwater use doubled between 1980 and 1988, but point out that it has since been reduced significantly.[14] Respondents, however, cite to evidence in the record indicating that the effect of groundwater pumping is long-term and cumulative. Because the district court's findings are supported by evidence in the record, we discern no clear error.

C. Finding that there was not a drought between 2007-16

The DNR and the city challenge the district court's finding that there was not a drought during 2007-16. This finding, however, is supported by Dr. Funke's testimony that the most recent period of low lake levels was not considered a drought because there was "not the same repeated, low, annual rainfall that there was in the '88 drought or in the '20s and '40s drought."

The finding is not undermined, as appellants claim, by testimony from DNR witnesses that 2008 and 2009 were characterized by "*periods* of drought" in the eastern metro area where White Bear Lake is located. The DNR's and the city's challenge is broader than this specific finding of fact, and goes to the district court's reliance on the absence of drought in support of its causation finding. But respondents' experts presented evidence that the above-average precipitation during the recent period of declining lake levels supports a causal connection between groundwater pumping and the declining lake

[14] The stipulated facts submitted by the parties show that the total municipal groundwater extraction for the applicable communities was 3,578 million gallons in 1980. This rose to a high level of 8,060 million gallons in 1989, but decreased significantly starting in 2000 through the date of trial to below 5,000 million gallons per year, except for five years when usage ranged from 5,162 to 5,535 million gallons.

levels. Respondents also point to evidence in the record that the lake failed to rebound as quickly following the dryer conditions in 2018 and 2019, which their experts attribute to reduced aquifer levels caused by groundwater pumping. Finally, the 2016 United States Geological Survey (USGS) report provides strong evidence related to causation between groundwater pumping and lake levels.

Consequently, we conclude that, despite the evidence presented by appellants to the contrary, the district court's findings are supported by evidence in the record and may not be reversed.

D. Findings regarding harm to the aquifer

The DNR and the city argue that the district court erred by finding that groundwater withdrawals harmed the aquifer. This finding is, again, supported by respondents' expert Stu Grubb. He testified that, despite some short periods of rising waters, "in general, the water level has declined since 2003." The finding is also supported by a 2010 Metropolitan Council presentation indicating that increased reliance on groundwater has strained the Prairie du Chien Aquifer, and that hydrographs "show typical seasonal ups and downs in aquifer levels, but also clearly show a steady downward trend overall." And the finding is supported by a 2013 USGS report, which provides, "The recent (2003-11) decline in White Bear Lake reflects the declining water levels in the Prairie du Chien-Jordan aquifer; increases in groundwater withdrawals from this aquifer are a likely cause for declines in

groundwater levels and lake levels."[15] The DNR's arguments regarding current readings of monitoring wells are not sufficient to undermine the district court's finding regarding long-term trends of the level of the aquifer and, since it is supported by evidence in the record, we conclude that the finding is not clearly erroneous.

E. Sustainability of groundwater use

The city challenges the district court's finding that "the existing groundwater permits of the northeast metro communities 'are not sustainable at the current pumping rates.'"[16] This finding, however, contains a direct quote from the testimony of respondents' expert Stu Grubb. Moreover, Grubb's testimony is supported by the Metropolitan Council's projection of 30% growth in metro area water use and a 47-56% increase in northeast metro water use by 2040. And in a 2014 feasibility report to the legislature, the Metropolitan Council noted: "The 2040 projected water demands for the majority of the [northeast metro] communities exceed the 2010 permit appropriations. It is apparent that future water demands may not be met by current groundwater appropriations." Further support for the finding includes the DNR's acknowledgment of Metropolitan Council

[15] As addressed in greater detail below, the DNR faults the district court for relying on the 2013 USGS report for its statistical causation analysis. The DNR, however, does not assert that the report is faulty with respect to its analysis of aquifer levels.

[16] As respondents point out, the full finding is: "*Given the size of the appropriation currently allowed under the DNR-issued groundwater permits,* the existing groundwater permits of the northeast metro communities are 'not sustainable at current pumping rates.'" (Emphasis added.) There is evidence in the record, and the district court found, that current permits allow appropriations significantly greater than current use. Thus, the district court's finding relates to total appropriations allowed (even if not currently used) under current permits.

projections in its 2015 North East Metro Groundwater Management Area (NEMGMA) Plan and the DNR's statement that "[s]ubstantially increased permit volumes and/or new permits would be needed to meet previously projected 2030 demands with locally supplied groundwater."

The city points to testimony by Metropolitan Council representative Ali Elhassan that groundwater use in the northeast metro is currently sustainable and that future use can be sustainable with reductions in per capita use. As respondents point out, however, the reductions in per capita use rely on voluntary conservation efforts, which other testimony asserts would not be sufficient to achieve sustainability. Moreover, the city does not address the population increases projected by the Metropolitan Council. In the 2015 NEMGMA Plan, the DNR states that "[t]he most recent population forecasts suggest that water demands in some suburban cities may not grow as fast as projected by the Metropolitan Council in 2008." However, the DNR concluded: "What is clear is that population and water-use will continue to grow in several suburban communities that use groundwater." Based on this evidence, we conclude that the district court's finding regarding sustainability of groundwater use is not clearly erroneous.

F. Reliance on 2013 USGS report

The DNR's final challenge to the district court's findings concerns the court's reliance on a 2013 USGS report as proof of a causal connection between groundwater pumping and lake levels, arguing that all of the experts agreed that the methodology of the report was flawed. Respondents argue in response that any improper reliance is cured by (1) the 2016 USGS report and (2) Grubb's analysis. We agree that the ultimate

determination of a causal connection between groundwater pumping and lake water levels is supported by this other evidence. Moreover, the DNR's own internal documents, dating back as early as 1998, demonstrate the DNR's knowledge that groundwater pumping could be impacting lake levels. Thus, we agree that any reliance by the district court on the 2013 report as evidence of a causal connection—or the DNR's knowledge thereof—would constitute harmless error. *See* Minn. R. Civ. P. 61 (requiring this court to disregard harmless error).

V. Conclusion

For the above reasons, we affirm the district court on the remanded issues, but in so doing, we are cognizant of the breadth of the relief granted and the significant impacts that it will have on both parties and nonparties. As we have noted, the district court must amend the wording of the relief ordered in paragraph 4(E) and otherwise pay heed to the procedural rights of the permit holders to a hearing before permits can be amended. Because the district court has retained jurisdiction over the matter, it may modify the requirements of its order or lift the injunction as future circumstances may dictate. *See Channel 10, Inc. v. Indep. Sch. Dist. No. 709*, 215 N.W.2d 814, 829 (Minn. 1974) (stating that "the courts have the inherent power to amend, modify, or vacate an injunction where the circumstances have changed and it is just and equitable to do so").

Affirmed.