Before the
State of Wisconsin
DIVISION OF HEARINGS AND APPEALS

In the Matter of Manual Code 3565.1 for The Approval Authorizing the Department of Natural Resources to Grade More Than 10,000 Square Feet on the Bank of North Lake, Install a Boat Ramp Structure and Two Outfall Structures on the Bed of North Lake, Install Four Culvert Crossings Over Wetlands, and Fill Up to 0.16 Acres of Wetlands for Construction of a Public Boat Launch on North Lake And Adjacent Property Located in the Town of Merton, Waukesha County.	Case Nos. IP-SE-2009-68-05745 IP-SE-2009-68-05746 IP-SE-2009-68-05747 IP-SE-2009-68-05748 IP-SE-2009-68-05749 IP-SE-2009-68-05750

RRNA POST HEARING REPLY BRIEF

Respectfully submitted this 26th day of March, 2012.

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TABLE OF CONTENTS

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INTRODUCTION

In this Reply Brief the RRNA will first respond to the DNR's claims in its Respondent's Brief that the water which accumulates in the area of the proposed parking lot is not navigable. The RRNA will next discuss the DNR's concession in its Respondent's Brief that, contrary to the "plain language" of Chapter 30, it failed to undertake a Chapter 30 analysis for its proposed placement of fill in navigable waters along the proposed access road. Finally, the RRNA will address the DNR's *ad hominem* attack on Dr. Neal O'Reilly, which has no basis in law or fact and was designed only to maliciously injure Dr. O'Reilly.

A.

In the DNR's March 12, 2012 Respondent's Brief in this case [hereafter, "DNR Brief"], the DNR dismisses the RRNA's arguments that portions of the proposed parking lot area are navigable, and thus subject to Chapter 30, in part because the

RRNA's expert did not identify the OHWM for the area at issue. The DNR's argument that the RRNA's failure to determine "exactly where [the OHWM] is" (DNR Brief at 17) is directly at odds with the DNR's approach when it evaluates applications by private parties. In *State v. Kelley*, 2001 WI 84, 244 Wis. 2d 777, 629 N.W.2d 601, the DNR argued **exactly the opposite** of what it is arguing in the case at bar. In its Brief to the Wisconsin Supreme Court in *Kelley* (discussed at length *infra*), the DNR unequivocally asserted an OHWM is irrelevant to any determination of whether water is navigable. DNR Brief in *State v. Kelley*, p. 19.

The RRNA adduced plenty of evidence that certain portions of the area of the proposed parking lot on the Kraus Site are navigable-in-fact on a recurring basis and that there is a bed and bank. The DNR evidently believes that when its own project is at issue, it can rely on its own self-interested "professional judgment," based upon its observations when the area was dry. Its approach is not only unsupported by case law, it is directly at odds with the approach it has taken when dealing with private citizens and with the position it has taken in arguments to the Wisconsin Supreme Court.

B.

With respect to the DNR's proposal to place fill in what it concedes are navigable waters adjacent to the access road, the DNR makes a number of concessions in its response brief. For example, the DNR acknowledges that the "plain language" of Chapter 30 requires specific Chapter 30 approval without any exception for areas that may also be wetlands. The DNR admits that it did not specifically undertake such Chapter 30 review, and that it's November 4, 2010 Manual Code Approval contains none of the findings required by Chapter 30. It argues that it has "discretion" to ignore

the Chapter 30 requirements, and that its approach should be validated because it has disregarded Chapter 30 for about 20 years. The DNR agrees that NR 103, an administrative regulation, cannot trump Chapter 30 of the Statutes, but its argument that its evaluation under NR 103 should be good enough does exactly that. Its admitted failure to subject the access road fill to Chapter 30 thus also renders the MC Approval invalid.

C.

Finally, the RRNA will address the completely groundless and unethical charge that Dr. O'Reilly committed "blatant perjury" and we are asking that this scurrilous language be stricken from the DNR's Brief, *infra*.

ARGUMENT

I. PORTIONS OF THE PROPOSED PARKING LOT ARE NAVIGABLE BECAUSE THE WATER THAT ACCUMULATES THERE IS EITHER FROM NORTH LAKE OR LOCATED WITHIN A SLOUGH.

The RRNA has submitted compelling evidence that certain areas where water accumulates in the vicinity of the proposed DNR parking lot are navigable either because the water comes from North Lake (RRNA Brief-in-Chief, pp. 30-35) or because it is located in an area which is in fact a slough. *Id.* at 35-40. Because the DNR has never acknowledged these navigable waters, it has never applied Chapter 30 to them thus rendering its MC Approval invalid. In this Section of its Reply, the RRNA will first address the DNR's contentions with regard to water from North Lake which flows into the area of the proposed parking lot.[1]

[1] The DNR has acknowledged that the "grove of trees" is shorthand for the area of the proposed boat launch parking lot. *See* p. 12 of the DNR's Respondent's Brief where the DNR states "Petitioner's allegation that a navigable waterway exists in the area of the grove of trees (a.k.a. the area of the boat launch parking lot)…"

A. The DNR's Argument regarding Flood Water from North Lake in the Proposed Parking Lot Ignores its Previous Arguments to the Supreme Court.

In its response brief, the DNR argues that the RRNA has misconstrued case law by "asserting that … if one can 'navigate-in-fact' in an area, regardless of whether an OHWM exists or whether flood water flows beyond the OHWM, a navigable water … exists there." *Id.* at p. 15. The DNR dismisses Dr. O'Reilly's testimony by stating "[u]nder O'Reilly's proffered legal standard, DNR would have jurisdictional authority over people's homes, fences and residential improvements every time those areas flooded with waters deep enough to float a kayak." *Id.* at 16. In so doing, the DNR completely overlooks a position that the DNR itself has taken before the Wisconsin Supreme Court which is directly contrary to the position it is taking here.

i. The DNR Brief in *State v. Kelley* Clearly Argues that a Lake's § 30.10(1) Navigability Follows the Flow of Flood Water.

The DNR evidently has forgotten about the position it took in *State v. Kelley*, 2001 WI 84, 244 Wis. 2d 777, 629 N.W.2d 601. The *Kelley* case was a civil forfeiture action on behalf of the DNR against the Kelleys for violating Wis. Stats. § 30.12. In *Kelley* the DNR argued "[b]ecause the fill area is navigable-in-fact, **any dispute as to the OHWM is irrelevant** [Emphasis supplied]." DNR Brief filed December 5, 2000 in *State v. Kelley,* Wisconsin Supreme Court Appeal No. 99-1066 [hereafter, "Kelley Brief"], p. 19. In order to refresh the DNR's recollection of the position it took in *Kelley*, the RRNA is attaching a complete copy of the DNR's Kelley Brief as Appendix A.

The facts in *Kelley* appear to have been largely stipulated and are not fully recited in the Kelley Brief in Appendix A. So we have to turn to the Supreme Court

opinion in *State v. Kelley*, *supra*, for some of the preliminary facts. According to the Supreme Court, the Kelleys owned property that was adjacent to Lake Killarney in Oneida County. From time to time, Lake Killarney would rise and partially flood a road on the western portion of the Kelleys' property. *Kelley, Id.*, at ¶12. There is no dispute that the road was on the Kelleys' private property. *Id.* In the fall of 1988, the Kelleys deposited fill on a section of their private roadway to make the road usable. *Id.*, at ¶13. Based on the test for navigability in *DeGayner & Co. v. DNR*, 70 Wis. 2d 936, 946, 236 N.W.2d 216 (1975) (*Id.* at ¶30), and based on testimony from private citizens that boat travel was possible over the roadway absent the fill, the Trial Court in *Kelley* found that the area where the fill was placed on the Kelleys' private road was navigable. *Id.* at ¶31. The DNR sought to force the Kelleys to remove the fill on their private road because they had not first obtained a permit under Wis. Stats. §30.12. Just as the DNR's response brief here argues in dismissing the RRNA's position that the parking lot area is navigable (DNR Brief at 16), the Kelleys contended that what the DNR was doing was tantamount to requiring a private property owner to obtain a permit to fill a backyard if their backyard was periodically flooded. *Id.* at ¶32.

Turning to the DNR's argument in its Kelley Brief, the DNR emphasized the public trust doctrine this way: "The [DNR] alleged, and the lower courts found, that the defendants had placed fill on the bed of a navigable water in violation of Wis. Stat. §§ 30.12 and 30.15. The trial and appellate courts' finding is firmly grounded in the record, the statutes and over one hundred years of case law interpreting the state's public trust rule under [the] 'forever free' clause of the Wisconsin Constitution." Kelley Brief, at 9.

The DNR went on to note in its Kelley Brief that Article IX, Section 1 of the Wisconsin Constitution protects navigable water. *Id*. Citing *State v. Trudeau,* 139 Wis. 2d 91, 408 N.W.2d 337 (1987), the DNR further stated that Chapter 30 is a codification of the public trust doctrine. *Id.* The DNR then reviewed the definition of navigable water: "A water body that is navigable-in-fact is one that 'has periods of navigable capacity which ordinarily recur from year to year, e.g., spring freshets…. The test is not whether the stream is navigable in a normal or natural condition…. [F]or purposes of determining the extent of control of the public trust it is immaterial what the character of the stream of water is. It may be deep or shallow, clear or covered with aquatic vegetation." *Id.*, at p. 10.

In its Kelley Brief, the DNR then embarked on an argument that is contrary to what it is now contending. According to the DNR in its Kelley Brief:

> The defendants [Kelleys] argue that a finding of navigability-in-fact does not alone trigger state regulation, but that navigable water must also be found to be located below the ordinary high water mark (OHWM). … Even if the defendants' contention that the OHWM is disputed is correct, the court of appeals properly held that such a dispute is irrelevant. **Water that is navigable-in-fact is, as a matter of law, subject to state regulation under Wis. Stats. § 30.12**… **The precise identification of the OHWM is needed only where an activity straddles the bed and upland of a water body, or where there is a question of ownership…** [Emphasis supplied].

Kelley Brief, p. 11.

Emphasizing that the waters that flow onto the Kelleys' private roadway come from Lake Killarney, the DNR spent a good deal of time discussing how Wisconsin courts have long recognized that the state's jurisdiction over state waters flows with the water, wherever it may go. *Id.* at p. 12. "If the public volume or expanse of

navigable waters is increased … the public right to use the water is increased correspondingly." *Id.* Just like North Lake, from time to time Lake Killarney floods. And when that happens, the DNR provides an abundance of authority in its Kelley Brief for the proposition that "where waters of a natural, navigable lake are … raised, the public and the riparian owners enjoy the same rights in and upon [the raised] waters." *Id.* at p. 14. The DNR then underscores the significance of flood water from a lake. "Killarney Lake is not the Kelley's private impoundment.… [T]he public did not need to establish its rights to use the water by adverse possession or prescription, but had navigability rights immediately." *Id.*

In its response brief here, DNR lambasts the RRNA and its expert for not ascertaining the OHWM in the area of the proposed parking lot. But in its Kelley Brief the DNR argued that an OHWM is irrelevant and unnecessary. The DNR noted that "… persons navigating the lake cannot be required or expected to carry with them a chart and compass and measuring lines to determine whether they are at all times within what were the limits of the lake….'" *Id.*, at p. 12. The DNR then continued by asserting the following important point: "[E]ven if 'the body of water found to be navigable … is small, … if it is navigable in fact and constitutes a public highway **the rights of the public therein are … sacred**…. [Emphasis supplied].'" *Id.* at p. 15. The DNR emphatically made the following crucial point:

> [W]here an area is navigable-in-fact, **determining the ordinary high water mark is not necessary** to authorize state regulation of activity in that area in order to protect public rights…. **Because the fill area is navigable-in-fact, any dispute as to the OHWM is irrelevant** …. [Emphasis supplied].

Id. at p. 16, 19.

In its Kelley Brief, the DNR did not even concern itself with the issue of a bed and bank. It noted that the reason the Kelleys placed fill in the road was because it was "flooded from time to time by high water [from the lake]." *Id.* In other words, just as the water in the parking lot area at the Kraus site comes from North Lake, the navigable water that occasionally inundated the Kelleys' private road came from Lake Killarney.

Thus the waters that occasionally flooded the Kelleys' private road were not navigable because they were a stream, slough, bayou, or marsh outlet under § 30.10(2); instead, those waters were navigable because they came from and partook in the §30.10(1) navigability of Lake Killarney. [2]

ii. The Supreme Court Opinion in *Kelley*.

The Supreme Court in *Kelley* concluded that based upon the record it could not answer the question as to whether a property owner was required to obtain a permit from the DNR before depositing fill on land that was navigable water even though the

[2] The position of the DNR in Supreme Court Brief it submitted in *Kelley* draws considerable strength from two other Wisconsin appellate decisions. In *State v. Trudeau,* 139 Wis. 2d 91, 408 N.W.2d 337 (1987), the Supreme Court stated:

> And the reason of the rule [that the public trust of the lakebed or river bottom cannot be part of private lands] applies equally, whether the water immediately next the shore be shoal or deep. For the fee is equally in the public; even the shoal water next the shore may aid the public use, and may deepen or be deepened, so as to become practically capable of navigation.

Id. at 104.

See also *Rock-Koshkonong Lake Dist. v. State Dep't of Natural Res.*, 2011 WI App 115, 336 Wis. 2d 677, 803 N.W.2d 853 (2011), where the Court of Appeals said:

> It is well-established that the public rights protected under the public trust doctrine do not stop at the edge of the beds of navigable waters. **Lands adjacent to or near navigable waters exist in a special relationship to the state**,' declared the court, and 'are subject to the state public trust powers.' Id. at 18-19. [Emphasis supplied].

Id. at ¶¶51-52

land may be above the lake's ordinary high water mark. *Id.* at ¶42. Therefore, the Supreme Court remanded the case for further fact finding.[3] *Id.* at ¶43.

iii. The RRNA Adopts the Relevant Arguments Contained in DNR's Kelley Brief.

The RRNA took its arguments and authority at Section V(iv) of its Brief-in-Chief (at pp. 34-35) directly from the brief filed on behalf of the DNR with the Supreme Court in *Kelley*. *See* Appendix A, pp. 12-15. The DNR said it well in its Brief to the Supreme Court in 2000: "Wisconsin courts have long recognized that the state's jurisdiction over state waters flows with the water." Kelley Brief, at p. 12. In other words, if navigable water from a lake flows into an area, the essence of the lake's navigability flows with it, along with the rights of the public in that navigability. *Id.*

The DNR made it crystal clear in its Kelley Brief that where water which flows from a navigable lake is found to be navigable-in-fact, it is navigable for all purposes, irrespective of whether it is above or below the OHWM. "Water that is navigable-in-fact is, **as a matter of law**, subject to state regulation under Wis. Stat. §§ 30.12 and 30.15 [Emphasis supplied]." *Id.*, at p. 11.

The DNR's arguments in *Kelley* make it abundantly clear that to the extent the area of the proposed parking lot on the Kraus Site floods with water from North Lake, the essence of the lake's navigability follows the flood water. And if the lake water in the area of the proposed parking lot is navigable-in-fact, the location or existence of an OWHM is of no relevance. [4] As the DNR cogently declared in the Kelley Brief, "[W]here an area is navigable-in-fact, determining the ordinary high water mark is not

[3] The fact finding did not take place. According to CCAP the case settled before trial.
[4] Dr. O'Reilly didn't state that the area did not have an OHWM. He just said that he hadn't determined its exact location. TR5.p.100.

necessary to authorize state regulation of activity in that area in order to protect public rights." *Id.* at p. 16.

iv. As a Matter of Law, the Water in the Area of the Proposed Parking Lot is Navigable.

The DNR claims that the water which accumulates in the area of the parking lot is "diffuse surface waters." DNR Brief, p. 13. Mr. Hudak defined "diffuse surface water" as an occurrence "of natural water … whether it be snow melt, rainfall, **flooding…** [Emphasis supplied]**"** TR4, pp. 190-191. However, the DNR's official definition of diffuse surface water at Wis. Adm. Code NR 104.02(1)(b) does not include flood water.[5]

Mr. Peters testified that the water in the area of the proposed parking lot, portrayed in Exhibit 35-001 (above), comes primarily from North Lake, occurs every year or two, is at least 18 inches deep and will support a 180 pound man as he rows a 60 pound canoe across more than the width of the proposed parking lot from North to South. RRNA Brief-in-Chief, p. 29. As shown in the RRNA's Brief-in-Chief, a number of other witnesses have corroborated Mr. Peters' testimony that the water that is located in the area of the proposed parking lot comes at least in part from North

[5] Wis. Adm. Code NR 104.02(1)(b) specifies: "Diffused surface waters. This classification includes any water from rains, intermittent springs or melting snow which flows on the land surface…"

Lake. *See* RRNA Brief-in-Chief, pp. 29, 33. The DNR has supplied absolutely no evidence to the contrary.

In other words, the RRNA has shown by a preponderance of the evidence that water from North Lake enters the area where the proposed parking lot will be located on a recurring basis. Even under the "substantial evidence" standard, the DNR has to produce some evidence that this is not the case. *See Reinke v. Personnel Bd.,* 53 Wis. 2d 123, 139-140, 191 N.W.2d 833 (1971).

Instead, the DNR concedes the point. The DNR's Pete Wood acknowledged that water from North Lake will from time to time flow into the area of the parking lot. TR5, p. 271. The DNR's definition of "diffuse surface water" implicitly acknowledges the existence of flood water from North Lake. DNR Brief, pp. 13-14 (According to the DNR, diffuse surface waters include "precipitation [from] melting snow **or floods** which are spread over the ground instead of being confined to a watercourse [Emphasis supplied]." *Id.*). The DNR also states that flood water may enter the area. *Id.* at p. 14 ("[t]his occasional flooding merely reflects the fact that the mapped floodplain is functioning as it should." *Id.*).

In short, as a matter of law as that law was interpreted by the DNR in its Brief to the Wisconsin Supreme Court in *Kelley*,[6] **because the water which enters the area of the proposed parking lot on a recurring basis comes from North Lake it partakes of the § 30.10(1) navigability of the lake**.[7]

[6] The position taken by the DNR in *Kelley* is not just a concession or an admission against interest of a party in a different case. It is an interpretation of the law governing navigable water by the Agency charged with enforcing the law on navigable water.

[7] DNR's Kelley Brief stands for the proposition that a lake's navigability follows flood water that flows onto private property. The fact that the flood water in the case at bar flows onto public property owned by the DNR

Placing tens of thousands of square feet of fill in the area of the proposed parking lot will impact that navigable area, requiring that DNR comply fully with Wis. Stats. § 30.12(3m)(c) before issuing a Manual Code Approval to itself allowing the placement of fill in that location. And since DNR did not consider this area navigable, it did not even attempt to comply with Chapter 30.

B. Even Putting Aside the DNR's Arguments in *Kelley*, there is also Considerable Evidence that the Proposed Parking Lot Area is a Slough.

The RRNA's Brief-in-Chief also adduced evidence demonstrating that a navigable portion of the parking lot is in fact a slough. RRNA Brief-in-Chief, at 35-40. In this Section of its Reply Brief, the RRNA provides further authority as to why the area of the proposed parking lot is a slough.

i. Counsel can Draw Inferences from the Evidence.

The DNR first attacks the RRNA's position regarding sloughs by making the puzzling accusation that RRNA is "attempting to testify via a post-hearing brief." (DNR Brief, pp. 18-19.). While the DNR fails to identify the supposedly offending language in the RRNA's brief, its assertion is of no moment. The RRNA concurs that one cannot "testify" in a post-hearing brief. However, it is well recognized that counsel can make arguments based upon inferences from existing facts. *See* Blinka, 7 Wisconsin Practice Series – Wisconsin Evidence (3d Ed. 2008) § 301.2 ("The inference may be communicated to the jury through argument by counsel." *Id.* at p. 75). *See Affett v. Milwaukee & Suburban Transport*, 11 Wis. 2d 604, 106 N.W.2d 274 (1960) ("…closing arguments of counsel [can include] … facts in the evidence or …

(i.e., the Kraus Site) increases the public's right to insist that the DNR protect that navigable water under the public trust doctrine. The fact that the DNR has refused to open the Kraus Site to use by the public for over six years does not diminish the fact that the Kraus Site is public property.

what may be properly inferred from the evidence…" *Id.* at 607); *Cf. State ex rel. Kanieski v. Gagnon*, 54 Wis. 2d 108, 194 N.W.2d 808 (1972) ("A jury may draw reasonable inferences from facts established by circumstantial evidence…" *Id.* at 117); *and Millonig v. Bakken*, 112 Wis. 2d 445, 334 N.W.2d 80 (1983) ("Even if the evidence adduced is undisputed, if that evidence permits different or conflicting inferences**,** a verdict should not be directed…" *Id.* at 451).

ii. The DNR's Arguments Based on Attempted Statutory Construction are Without Legal Foundation.

The DNR appears to argue that because § 30.10(2) is entitled "Streams," it only applies to "Streams" and no other water body. DNR Brief, p. 19. First, according to 2A Sutherland on Statutory Construction § 47.14 (5th Ed. 1997), courts should not consider headings when construing a statute. Second, the DNR's interpretation ignores the plain language that follows this heading, making it applicable to "all streams, bayous, and marsh outlets. . . ."

The DNR next appears to be making an attempt at applying the constructional doctrine of *ejusdem generis* by suggesting that "slough, bayou and marsh outlet" should be read as the same as "stream." Again, according to Sutherland, *Id.* at § 47.17, *ejusdem generis* is a canon of statutory construction which specifies that where general words follow specific words in a statutory enumeration, the general words are construed to embrace only objects similar in nature to those objects enumerated by the preceding specific words. In the case of § 30.10(2) we have the opposite in that specific words follow a general word. Be that as it may, there is no reason or justification for attempting **any form of statutory construction analysis** of §

30.10(2). According to the Wisconsin Supreme Court in *State v. Peters*, 2003 WI 88, 263 Wis. 2d 475, 665 N.W.2d 171:

> If the language of a statute is clear on its face, we need not look any further than the statutory text to determine the statute's meaning. 'When a statute unambiguously expresses the intent of the legislature, we apply that meaning without resorting to extrinsic sources' of legislative intent. Statutory language is given its common, ordinary and accepted meaning. Rules of statutory construction are inapplicable if the language of the statute has a plain and reasonable meaning on its face.... [C]anons of construction, including *ejusdem generis*, are inapplicable when the statute is clear on its face [Citations omitted].

Id. at 481-482.

There is nothing ambiguous about § 30.10(2).

iii. The DNR's Reliance on Ancient Case Law which only Describes, but does not Define, a Slough is Misplaced.

Because the DNR has itself never defined a slough (Wakeman at TR4, p. 73[8]) it resorts to ancient case law from the Nineteenth and early Twentieth Centuries as support for its position that the area of the parking lot is not a slough. However, the cases it cites do not offer definitions; they offer descriptions which just happen to only relate to rivers. The case law referred to by the DNR does not mean that sloughs are only a river phenomenon, but just that Wisconsin case law has by and large only addressed sloughs which are in some way related to rivers instead of lakes.

In other jurisdictions, where the issue has arisen more recently, sloughs are in fact often associated with lakes or oceans. *See, e.g., U.S. v. Bd. of Trustees of Florida Keys Community College*, 531 F. Supp. 267 (S.D. Fla. 1981) (dealing with a slough on the edge of Florida Bay); *Allen Gun Club of Illinois v. U.S.*, 180 Ct. Cl. 423 (Ct. Cl.

[8] In fact, Mr. Hudak had never even heard the term. Hudak Dep. 8-26, p. 35. *See also* RRNA Brief-in-Chief at pp. 35-36.

1967) ("From the Bay, eastward, Hager Slough led into Coleman Lake. Other interconnected sloughs and lakes lay north of them." *Id.* at 426); *Utah v. U.S.*, 2005 WL 2087869 (D. Utah 2005) ("The court's previous opinion regarding the boundary issues related to all areas of the Lake with the exception of the Powell Slough area, which the parties agreed to address separately." *Id.* at *1).

And there is even an old Wisconsin case which deals with lakes and sloughs. *See Keator Lumber Co. v. St. Croix Boom Corp.*, 72 Wis. 62, 38 N.W. 529 (1888) ("There was evidence tending to show that Mud and Butler lakes connected with Page's slough…" *Id.* at 79-80).

iv. There is Considerable Evidence that a Portion of the Proposed Parking Lot is a Slough.

As the RRNA's Brief-in-Chief demonstrates, there is considerable evidence that the parking lot area acts as a slough. RRNA Brief-in-Chief, pp. 36-40. The DNR's arguments in this regard do not dispute any of these facts -- its arguments are purely of law. The DNR's constrained reading of the old Wisconsin case law and its disregard of law directly on point from other jurisdictions fail to overcome the RRNA's showing.[9] The DNR objects to the legal definition of a slough, not with the existence of a slough.

v. Once the RRNA Makes a Prima Facia Showing that the Waters on the Proposed Parking Lot are Navigable, the Burden Shifts to the DNR to Rebut the Presumption of Navigability.

The DNR makes much of the RRNA's burden of proof. DNR Brief, pp. 6-9. In fact, Wis. Stats. § 30.10(2) is clearly a codification of a Common Law presumption

[9] It is also worth noting that the DNR does not even attempt to address the RRNA's argument at Section V(vi) of its Brief-in-Chief that a well-defined bed and bank is not essential to establish navigability.

within the meaning of Wis. Stats. § 903.01. According to the Common Law, as expressed in *Nekoosa Paper Co. v. Railroad Commission of Wisconsin*, 201 Wis. 40, 228 N.W. 144 (1930):

> Once [a stream is] shown to be navigable in its natural state, it is **presumed** to be navigable and 'forever free.' Being navigable, the public may use it for the public rights incidental thereto of hunting, fishing, or pleasure boating. *Willow River Club v. Wade*, 100 Wis. 86, 76 N.W. 273; *Diana Shooting Club v. Husting*, 156 Wis. 261, 145 N.W. 816.

Id. at 46. *See also Wausaukee v. Laureman*, 240 Wis. 320, 327, 3 N.W. 2d 362 (1942).

Wis. Stats. § 30.10(2) codifies this principle when it provides: "… all streams, sloughs, bayous and marsh outlets, which are navigable in fact for any purpose whatsoever, **are declared navigable**… [Emphasis supplied]."

The RRNA does not dispute that it had the initial burden to establish that the parking lot area is navigable-in-fact. It has done so, and by the terms of Wis. Stats. § 903.01 the burden then shifted to the DNR both as to the burden of production and burden of persuasion as to the presumed facts." Blinka, *supra*, at pp. 81-82.

vi. The RRNA has Made a Prima Facie Showing that the Area where the Parking Lot will be Located is Navigable-in-Fact.

The DNR concedes that it has never conducted any navigability tests in the parking lot area that would refute RRNA's evidence. RRNA Brief-in-Chief, pp. 41-43. Nevertheless, the DNR appears to argue that the burden of persuasion discussed in *State v. Bleck*, 114 Wis. 2d 454, 338 N.W. 2d 492, 494 (1983), does not shift to it because there is no "body of water" in the parking lot area. DNR Brief, at p. 8.

This argument completely overlooks the fact that navigability is not dependent upon the continual existence of a "body of water." Wisconsin case law is clear that an

area does not always have to be navigable, but merely needs to be navigable on either a recurring basis or "of sufficient duration to make it conducive to recreational uses." According to *FAS, LLC v. Town of Bass Lake,* 2007 WI 73, 301 Wis. 2d 321, 733 N.W.2d 287:

> The test for navigability is whether the body of water is 'capable of floating any boat, skiff, or canoe, of the shallowest draft used for recreational purposes.' [citations omitted] **The test does not depend on whether [the body of water] is always navigable, or whether its navigability is due to natural conditions. The test is whether the navigability is regularly recurring or of a sufficient duration to make it conducive to recreational uses** [Emphasis supplied].

Id. at ¶11, fn. 8.

An area that is navigable-in-fact is one that "has periods of navigable capacity which ordinarily recur from year to year, e.g. spring freshets, or has continued navigable long enough to make it useful as a highway for recreation…." *DeGayner & Co. v. DNR*, 70 Wis. 2d 936, 946-47, 236 N.W.2d 217 (1975). Mr. Hudak agreed that intermittent periods of navigability were all that was necessary in order to establish navigability. Hudak Dep., 8-26, p. 75.[10]

Finally, even if the area is shallow or covered with vegetation, it is nevertheless subject to the public trust. "For the purposes of determining the extent of control of the public trust it is immaterial what the character of the stream of water is. It may be deep or shallow, clear or covered with aquatic vegetation." *State v. Trudeau,* 139 Wis. 2d 139 Wis. 2d 91, 101-102, 408 N.W.2d 337 (1987), quoting *Diana Shooting Club v. Husting*, 156 Wis. 261, 272, 145 N.W. 816 (1914). As made clear in its Brief-in-Chief, the RRNA introduced a preponderance of completely unrebutted evidence that the area

[10] In fact, an area that is navigable, such as a slough, can often be dry. *See* RRNA Brief-in-Chief, p. 38.

where the DNR proposed to place the parking lot is "navigable-in-fact" (RRNA Brief-in-Chief, pp. 27-30), thus rendering the MC Approval invalid.

II. THE DNR HAS CONCEDED THAT IT DID NOT ISSUE A CHAPTER 30 MANUAL CODE APPROVAL FOR ITS PROPOSED PLACEMENT OF FILL INTO NAVIGABLE WATERS ADJACENT TO THE ACCESS ROAD.

As a result of concessions made by the DNR in its response brief, the facts relating to the DNR's proposed placement of fill in connection with the access road expansion are now undisputed. Whether Chapter 30 applies to this aspect of the project has thus become a pure question of law.

The DNR does not contest that it did not formally apply the chapter 30 standards to the placement of fill adjacent to the access road." DNR Brief, p. 37. However, the DNR asserts that as the administrative agency charged with protecting and regulating navigable waters and wetlands, it is up to the agency "to administer, interpret and apply the wetland and navigable water programs." *Id.* In other words, unlike every other Chapter 30 applicant in Wisconsin, when it is a question of whether or not the DNR has complied with the law it gets to act as judge and jury. The following are the relevant concessions that the DNR has made:

- The DNR acknowledges that the area where it proposes to place fill adjacent to the Access Road is navigable. TR 1, p. 231.
- It acknowledges that the "Plain Language" of Chapter 30 requires Chapter 30 regulation of water determined to be navigable, without any exception for navigable wetlands. DNR Brief p. 40.
- It acknowledges that it did not apply Chapter 30 to the 0.14 acres of fill along the access road. It only applied Chapter 30 to the placement of culverts, some structures at North Lake, and the grading of parking lot area. *Id.* at p. 41.
- It concedes that it did not separately and specifically evaluate whether the access road fill met the standards in 30.12(3m)(c). *Id.* at p. 42.

- It did not make specific findings in the MC Approval in regard to 30.12(3m)(c) for that fill. *Id.*

The DNR states that its approach in only applying NR 103 where there are navigable waters that are also wetlands is one of "long-standing" (DNR Brief p. 38), without citing authority for that practice. But the fact that it has been ignoring Chapter 30's mandate for 20 some years doesn't make it right (Imagine telling a policeman who pulls you over for going 60 mph in a 30 mph zone that you shouldn't get a ticket because you had been going that fast for over 20 years).

The DNR's arguments that its NR 103 analysis adequately addresses Chapter 30 are erroneous. First, as noted above, and as the DNR concedes, Chapter 30 does not contain an exception to its application when wetlands are involved. Whether or not Chapter 30 and NR 103 overlap to some extent, Chapter 30 **requires** a Chapter 30 permit whenever navigable waters are at issue. The DNR's argument that its NR 103 evaluation and authorization should be "good enough" is without statutory or case law support. Second, while perhaps overlapping to some extent, NR 103 and Chapter 30 protect different interests. *See* TR2, p. 32 ("NR 103 is a set of standards to protect wetlands, but it does not address … navigability which is dealt with … [by] Chapter 30."). Third, § 30.12(3m)(c) requires that **before a permit** is issued, the following specific findings must be made:

> 1. The structure or deposit will not materially obstruct navigation.
>
> 2. The structure or deposit will not be detrimental to the public interest.
>
> 3. The structure or deposit will not materially reduce the flood flow capacity of a stream.

Here, there are no such specific findings in the MC Approval, a fact that DNR concedes. DNR Brief, pp. 42-43. The DNR's belated attempt to manufacture such findings in its post-hearing brief do not comply with § 30.12(3m)(c) which requires those specific findings be made **prior to issuance of the permit**. The DNR's effort to establish ex post-facto that it in effect met the Chapter 30 standards is also at odds with the fact that the DNR virtually never authorizes any private party to place fill into the bed of navigable water. Wakeman Dep., 10-17, pp. 38-39. Specifically, Mr. Wakeman testified as follows at his October 17, 2011 deposition:

> Q. So it sounds like typically and maybe universally … DNR would not allow the placement of fill permanently in a navigable water under Chapter 30 or any other process?
> A. Under Chapter 30, it would be very difficult….

Id. at 39.

As noted above, the DNR agrees that NR 103, an administrative regulation, cannot trump Chapter 30, but its argument that its evaluation under NR 103 should be good enough does exactly that. Its admitted failure to subject the access road fill to Chapter 30 renders the MC Approval invalid.

III. DNR'S COUNSEL VIOLATED THE CODE OF PROFESSIONAL RESPONSIBILITY BY ACCUSING DR. O'REILLY OF "BLATANT PERJURY."

A. Under any Analysis, Dr. O'Reilly's Testimony did not even come close a Misrepresentation of Fact.

Before discussing the DNR's extraordinary accusation of "blatant perjury," it is necessary to review just what in fact occurred. Counsel for the RRNA **did not ask** if Dr. O'Reilly had helped draft NR 103. TR2, pp. 33-36. Instead, RRNA Counsel asked

Dr. O'Reilly if **he had ever worked with NR 103** (*Id.* at p. 34), and Dr. O'Reilly replied with an incidental observation that NR 103 was being drafted while he was still at DNR[11] and he had been part of a group **that had worked on** NR 103 while he was still at the Agency. *Id*. However, the material and primary portion of Dr. O'Reilly's relevant testimony begins after these incidental observations. Dr. O'Reilly testified that the majority of his experience with NR 103 comes from "implementing it as part of the permitting process for my private clients and municipal clients." *Id.*

RRNA counsel then asked Dr. O'Reilly if he was familiar with NR 103 from his private practice, to which Dr. O'Reilly responded "I'm very familiar with its terms. I've actually done workshops on how to interpret [it]." *Id.* at p. 35. RRNA counsel also asked if Dr. O'Reilly was familiar with how the DNR implements NR 103 and Dr. O'Reilly said that he was. *Id.*

The cross-examination snippets which DNR cites in its response brief (at pp. 10-11) come from cross-examination conducted by George Meyer (TR2, pp. 161-168). Mr. Meyer never once asked Dr. O'Reilly if he had ever claimed to have been a member of the NR 103 drafting committee. Instead, Mr. Meyer asked a series of "would it surprise you questions." The last "would it surprise you" question reads (top of 165): "Q. Would it surprise you that most of NR 103 was drafted in my house?" Mr. Meyer then withdraws that question before O'Reilly has a chance to answer. *Id.*

The DNR never established, and Mr. Meyer never asked, if Dr. O'Reilly claimed to be part of the committee that drafted NR 103, and Dr. O'Reilly never made

[11] Dr. O'Reilly left the DNR in 1992. *See* O'Reilly CV, Exhibit 001-005. NR 103 became effective on August 31, 1991. *See* Legislative Reference Note following Wis. Adm. Code NR 103.01. Presumably, NR 103 was under consideration within the Agency for a considerable period of time before 1991.

such a claim. The testimonial basis for the DNR's assertion that Dr. O'Reilly committed "blatant perjury" is very ambiguous at best, and is beside the point at worst.

The whole point of the allegedly objectionable portion of Dr. O'Reilly's testimony had to do with RRNA counsel's establishing the material point that O'Reilly is and was familiar **today** with NR 103. Dr. O'Reilly cited to an abundance of experience in that regard.

What makes the DNR's charge of "blatant perjury" particularly outrageous is how the DNR phrased it. The DNR's counsel states: "O'Reilly went out of his way **to testify regarding his expertise in wetlands and in providing that testimony** under oath committed blatant perjury [Emphasis supplied]." DNR Brief, p. 10.

One has only to look at Dr. O'Reilly's fifteen page resume and review his education, publications and teaching credits to recognize that Dr. O'Reilly did not exaggerate his expertise with regard to wetlands in the slightest degree during his testimony in the hearing in this matter.

B. The Accusation of "Blatant Perjury" is Clearly Improper and Violates SCR § 20:3.1(a).

SCR § 20:3.1(a) of the Wisconsin Code of Professional Responsibility provides in pertinent part: "In representing a client, a lawyer shall not… assert a position… or take other action on behalf of the client **when the lawyer knows or when it is obvious that such an action would** serve merely to harass or **maliciously injure another** [Emphasis supplied]."

Perhaps the DNR resents the fact that Dr. O'Reilly is testifying against the DNR after having worked for the DNR for over fifteen years. Whatever the case,

counsel for the DNR knew or should have known that accusing someone in Dr. O'Reilly's position of blatant perjury could harm him in his business and profession, especially since the accusation came from representatives of the government agency for whom he once worked. However, the gravity of what the DNR's counsel has done goes well beyond the mean-spiritedness of the accusation. Both the DNR counsel are lawyers of considerable experience and learning, and presumably are aware of how inappropriate such an accusation is as a matter of law. Maybe they felt safe making such a serious accusation in the context of a filing with an administrative tribunal, but perjury is a crime (Wis. Stats. § 946.31), and merely accusing someone of a crime would be actionable if it were not for the protection of a tribunal filing.

In any event, § 946.31 of our Criminal Code requires *a criminal prosecutor* to charge, try and prove beyond a reasonable doubt that a person has made a false *material* statement under oath which "the person does not believe to be true." *Id.*

It has long been libelous per se in Wisconsin to falsely impute criminal misconduct to someone. *See Dufresne v. Weise*, 46 Wis. 290, 1 N.W. 59 (1879). This continues to be very good law in Wisconsin. See *Starobin v. Northridge Lakes Development, Inc.* 94 Wis. 2d 1, 287 N.W.2d 747 (1980) ("It is not necessary that the charge be made in technical language. It is enough that the language used imputes to the other the criminal offense."). *See also* Restatement of Torts (Second) Sec. 571 ("One who publishes a slander that imputes to another conduct constituting a criminal offense is subject to liability to the other without proof of special harm….").

It has also long been the law in Wisconsin that it is libelous per se to falsely ascribe moral turpitude to a person which harms that person in his or her trade or

profession. *See Elmergreen v. Horn*, 115 Wis. 385, 91 N.W. 973 (1902). That is still very much the law in Wisconsin. *See Freer v. M&I Marshall & Ilsley Corp*., 2004 WI App 201, 276 Wis. 2d 721, 688 N.W.2d 756 ("Saying that a lawyer 'is ignorant and unqualified to practice law,' saying that a merchant is 'insolvent,' and calling a merchant 'insane,' are all actionable without proof of special damages."). *See also* Restatement of Torts (Second) Sec. 573 ("One who publishes a slander that ascribes to another conduct, characteristics or a condition that would adversely affect his fitness for the proper conduct of his lawful business, trade or profession … is subject to liability without proof of special harm.").

The DNR's counsel should not be permitted to falsely make accusations of criminal misconduct believing that they can hide in the sanctuary of an administrative filing. The RRNA would certainly understand if Dr. O'Reilly decides to file a complaint with the OLR based on SCR § 20:3.1(a) of the Wisconsin Code of Professional Responsibility. At a minimum, assuming that the DNR's counsel refuses to immediately withdraw the outrageous accusation that Dr. O'Reilly committed perjury and apologize to him, then the RRNA asks that the ALJ *sua sponte* strike those words from the DNR's Brief.

CONCLUSION

The RRNA has met its burden to show that a portion of the proposed parking lot area is navigable-in-fact. This evidence has gone completely unrebutted by the DNR. The DNR has failed to conduct the required Chapter 30 analysis for these unacknowledged navigable waters. For that reason alone, the DNR's Manual Code Approval is invalid.

The DNR has also conceded that wetland areas adjacent to the proposed access road are navigable. The DNR has further conceded that it has failed to conduct the required Chapter 30 analysis for these so-called "navigable wetlands". For this reason as well, its Manual Code Approval is invalid.

Respectfully submitted this 26th day of March, 2012.

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APPENDIX A

STATE OF WISCONSIN

IN SUPREME COURT

No. 99-1066

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

JOHN W. KELLY and
PETER M. KELLY,

Defendants-Appellants-Petitioners,

and ARNOTT TRUCKING, INC.,

Defendant.

APPEAL FROM THE DISTRICT III COURT OF APPEALS DECISION DATED FEBRUARY 8, 2000, AFFIRMING A JUDGMENT OF THE CIRCUIT COURT FOR ONEIDA COUNTY, THE HONORABLE ROBERT E. KINNEY PRESIDING

BRIEF AND APPENDIX OF PLAINTIFF-RESPONDENT

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TABLE OF CONTENTS

Page

Page

Cases

Page

Page

Statutes

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IN SUPREME COURT

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BRIEF OF PLAINTIFF-RESPONDENT

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

By accepting defendants-appellants-petitioners' petition for review, the court deemed the case sufficiently important to merit both oral argument and publication.

STATEMENT OF THE FACTS

The town of Little Rice in 1939 obtained a permit to build a dam where the current dam sits. The town never built under this permit but reapplied in 1958. The second permit was granted to the town of Little Rice on April 17, 1959 (14:4-8). The permit has four main sections: the findings of facts, the conclusions of law, the permit and the order. The findings of fact state that the town of Little Rice intends to operate the dam to maintain a pond level at 112 (14:6). The permit and order are silent on the lake level. The dam was completed during 1961 (14:2). The moving force behind the dam was Pete Kelley, defendant John Kelley's uncle (59:13). Pete Kelley owned the land that defendant-appellant-petitioner (defendant) John Kelley eventually acquired, and which is involved in these violations. Pete Kelley ran the dam and set the water level from 1961 until his death in 1968 (59:13). After Pete Kelley's death, Reid Schmieden operated the dam for a period of time (17:1).

Jack Lewis has owned land on the lake since 1983 and would periodically help Reid Schmieden with the boards in the dam. He confirmed that four boards would be left in during the summer and one board would be pulled in the fall. Mr. Lewis also stated that when he purchased his land, the developer told him that unlike other nearby lakes, the water level on Killarney rarely fluctuated more than 1 to 2 inches during the year. Mr. Lewis found this to be true. The water level remained constant until the dam was repaired. Since then there has been a dispute over the water level (70:1-3).

The parties have stipulated that the level on the lake was maintained such that water from the dam flooded the Kelley access roads (14:2). There was other uncontradicted evidence presented that the area where the defendants placed fill in 1988 was regularly underwater. Defendant Peter Kelley testified that at the time the fill was placed on the most westerly road, there was water across it (58:16). It is this westernmost fill which the trial court found to be in

violation of chapter 30. Peter Kelley testified that between 1986, when his father obtained the property and the fall of 1988, when the fill was placed, this portion of the road was often or more than half the time underwater (58:8, 11). During the summer of 1987 the water at its deepest was one foot over a portion of this road (58:9-10). Peter further rowed a 12-foot rowboat across the area, which was subsequently filled (58:11). Prior to the placement of the fill, one could not drive any of the three fill areas because of mud and ruts (58:12).

Joseph Kelley, son of John and brother to Peter, testified that it was a common occurrence to see water across the most westerly road on which fill was placed (60:5).

Mrs. Konkol testified on January 25, 1995, that she had traversed by canoe, with her husband, the westerly section of the fill area, a number of times before the fill was placed (49:9). After the fill was placed, they were obstructed from continuing north.

Jack Lewis stated he has fished on Lake Killarney since 1982 (70:1-2). On two or three occasions, he had taken his 14-foot tri-hull board back to the Kelley property. When there were four boards in the dam and the water was at a normal level, he could travel in his boat completely around the larger island. Mr. Lewis also stated that he has been out to the Kelley property since the fill was laid and it blocked him from going through this area with his boat (70:2).

John W. Kelley was deeded the property in question on December 16, 1986, from Lake Killarney, Inc. and he owned it at the time of the fill placement (14:2). During the fall of 1988, Peter Kelley, the son of John, hired Arnott Trucking, Inc. to place fill upon the beaver dam section and two sections of the westerly portion of the road flooded from time to time by high water (14:2).

At the time the fill was placed on the most westerly portion of the fill, there was water across it according to Peter Kelley and Roger Wojner, an employe of Arnott Trucking who worked at the site. Mr. Wojner stated that where the water was not over the road, it was close enough that he had to be careful in backing up, not to get stuck (15:1-2).

The parties have stipulated that fill material was placed in the long fill area (westerly section) at some spots below what the DNR calculated on June 25, 1990, to be the ordinary high-water mark (OHWM) (14:2).

The Kelleys had not complained to the town of Little Rice or to the DNR about the lake level before placing this fill. Nor did the Kelleys request a permit to place fill on the bed of Killarney Lake from the DNR.

In October of 1988 Jon Smith of the DNR was contacted by letter by Alan Konkol about the fill that the Kelleys had placed on Killarney Lake (67:1).

Warden Wenninger followed up on Konkol's letter and went out to the area in the fall and attempted to locate the violations in his vehicle (69:1). He was unable to locate the area and had the Konkols locate the violation site on an aerial map for him in late December 1988. The warden attempted to locate the violation site in the winter while driving on the ice but was unable to locate it. On May 13, 1989, he was able to locate the site in his boat. Warden Wenninger found three areas of fill. Sand and gravel had been used to construct a road across water that was approximately 2 feet deep near the road. The first fill area he encountered turned out to be the middle fill area. This was approximately 45 feet long and 22 feet wide and appeared to connect two islands. He had been able to navigate his boat right up to the edge of the fill. The count involving this area was dismissed by the State after summary judgment was granted on the next fill area (69:2).

The second fill area is the longest, most westerly, and the scene of the challenged violations. This was approximately 200 feet long and 20 feet wide, with fresh fill in the water. The depth of the water at the toe of the fill was 2 feet. There were three photo exhibits of the west fill area marked for the trial, Exhibits 16, 17 and 18 (52).

The third fill area was near the beaver dam. This was the furthermost east. It was approximately 80 feet long and 22 feet wide (69:2). The count involving this area was also dismissed by the State after obtaining a judgment on the longest fill area.

While at the site on May 13, 1989, the warden encountered two individuals, Peter and Joseph Kelley (69:3). They told him that their father, John Kelley, gave them the property but that he still had the deed. Peter Kelley also advised him that he had hired Arnott Enterprise to do the work and had paid them $1,200. Peter believed that this work was done in September or October of 1988. The Kelleys also advised the warden that they had not applied for or received any permits from the DNR for placing the material on the bed of Killarney Lake. Peter advised him that he had asked a retired DNR employe about getting a permit and was told that it was too much red tape. They advised the warden that they tried to use bottom material from the lake for the road but that it did not work. So they used excavated material from the nearby upland.

The DNR determined the ordinary high-water mark on June 25, 1990, to be 113.50, using 115.25 as the reference height for benchmark 1080A at the dam (14:2).

After placing the fill on the lakebed, Peter Kelley continued to develop the most westerly island without obtaining all of the necessary permits. According to correspondence from the Oneida County Planning and Zoning Department, he placed a concrete slab, partial concrete block wall and wooden storage shed on the last island without an approved Location and Occupancy

Permit (68:7). This permit was subsequently obtained in 1993.

Defendant John Kelley was aware that his son was going to place fill and was present when the fill was placed on his land in 1988 (30:1-2). He remained party to the continuing violation of obstructing the navigable portion of the lake when he refused to totally remove the fill that had been in place for nine years. The total removal of the fill in 1997 only occurred after the court ordered that all the fill be removed under the supervision of the DNR (51:56-66). Defendant John Kelly had removed part of the fill in 1995, but the trial court found that he had not removed enough and should have had the DNR present during the removal (51:59).

Additional relevant facts will be presented within each of the arguments.

ARGUMENTS

I. THE COURT OF APPEALS DID NOT ERR IN AFFIRMING THE GRANTING OF SUMMARY JUDGMENT BY THE TRIAL COURT, FINDING THE DEFENDANTS IN VIOLATION OF CHAPTER 30.

The State alleged that the defendants illegally placed fill in three areas on their land leading out to an island. The trial court granted summary judgment in favor of the State with respect to the westernmost area of fill, concluding that the State had proved that the defendants had violated Wis. Stat. §§ 30.12(l)(a), 30.15(l)(a), and 30.15(l)(d) (24:22) (A-Ap. 137). The defendants on appeal challenge the trial court's use of summary judgment (Pet. Brief at p. v).

The court of appeals summarized the standard of review before affirming the trial court's granting of summary judgment:

> We review a summary judgment de novo, applying the same standards as the trial court. *See Brownelli v. McCaughtry,* 182 Wis. 2d 367, 372, 514 N.W.2d 48 (Ct. App. 1994). We will affirm the trial court if the court reached the correct result, even if we disagree with its reasons. *See Negus v. Madison Gas & Elec. Co.*, 112 Wis. 2d 52, 61 n.3, 331 N.W.2d 658 (Ct. App. 1983).
>
> Summary judgment is appropriate if the material facts are undisputed and the reasonable inferences lead to one conclusion. *See* id. at 57-58. Summary judgment, then, is not to be granted "unless the material facts are not in dispute, no competing inferences can arise [from such facts], and the law that resolves the issue is clear." *Lecus v. American Mut. Ins. Co.*, 81 Wis. 2d 183, 189, 260 N.W.2d 241 (1977).
>
> "Because a motion for summary judgment amounts to an explicit assertion that the material facts are undisputed, a party who moves for summary judgment is precluded from later asserting that disputed material facts entitle it to a jury trial." *Fore Way Express v. Bast,* 178 Wis. 2d 693, 702, 505 N.W.2d 408 (Ct. App. 1993). We therefore conclude that when the Kelleys filed their motion for summary judgment, they waived their right to allege that disputed material facts entitle them to a hearing. *See* id. Even on their merits, however, the Kelleys' claims fail.

State v. Kelley, No. 99-1066, slip op. at 6, ¶8-10 (Wis. Ct. App. Feb. 8, 2000).

The parties agreed to present this dispute to the court in motions for summary judgment (24:1) (A-Ap. 116) (50:9) (R-Ap. 109). The trial court found that there was no genuine issue of any essential fact as it relates to the question of whether the defendants had violated chapter 30 as to the western-most fill:

> Because the essential facts are undisputed, and because the applicability of the affirmative defense asserted is a legal rather than factual issue, the court determines that this matter is ripe for determination by summary judgment.

(24:5) (A-Ap.120).

The court of appeals affirmed the granting of summary judgment in this case:

> The uncontradicted affidavits and testimony establish no dispute that, without a permit, the Kelleys placed fill in a navigable waterway where no bulkhead line had been established, and that the fill resulted in an obstruction to navigation. Nonetheless, the Kelleys claim that the following issues constitute defenses to the violations. For the reasons that follow, we reject their contentions.

Slip op. at 7, ¶12.

The lower courts, in keeping with summary judgment methodology, limited their decision and review to stipulated and/or undisputed facts in rendering their decision on the motion (24:2-4) (A-Ap. 107, 117-19) (slip op. at 7, ¶11). The defense raises many factual disputes in their extensive discussion of the case, but a review of the trial court's and court of appeals' reasoning and conclusions shows that the disputed facts are not *material* to the legal issues before the court. For example, the defense has provided the court with color photographs of an altered benchmark on the dam (A-Ap. 150) and discussed it in their brief without establishing who altered it or why it is material (Pet. Brief at 6, 11-12). Like other facts the defendants try to put into dispute, the altered benchmark has no relevancy to the court's review of the granting of the summary judgment or the defendants' constitutional claims.

II. THE COURT OF APPEALS AND TRIAL COURT CORRECTLY RULED THAT THE DEPARTMENT OF NATURAL RESOURCES PROPERLY EXERCISED ITS REGULATORY AUTHORITY OVER THE FILL DEFENDANTS PLACED ON THE BED OF A PUBLIC WATERWAY.

The State alleged, and the lower courts found, that the defendants had placed fill on the bed of a navigable water in violation of Wis. Stat. §§ 30.12 and 30.15. The trial and appellate courts' finding is firmly grounded in the record, the statutes, and over one hundred years of case law interpreting the state's public trust role under the "forever free" clause of the Wisconsin Constitution. The defendants' arguments—that the water in the fill area was not navigable, that no public rights attach to the water there because it resulted from a dam, and that a dispute over the ordinary high-water mark precludes the exercise of state regulatory authority over the water in the fill area—have no foundation in the record or the law.

A. The trial and appellate courts properly found that defendants' conduct in the fill area is subject to, and violated, chapter 30 because the water in the fill area was navigable-in-fact.

Article IX, section 1 of the Wisconsin Constitution protects navigable waters in trust for the public. The Legislature promotes this public trust in navigable waters in part through chapter 30. *See State v. Trudeau*, 139 Wis. 2d 91, 101, 408 N.W.2d 337 (1987) (Wis. Stat. ch. 30 is a codification of the public trust doctrine). Wisconsin Stat. § 30.12 prohibits the placement of any structure or material on the bed of any navigable water, which is detrimental to public rights in navigable waters. Wisconsin Stat. § 30.15 prohibits the obstruction of the

navigable waterway. If a water is navigable, it is subject to state regulation in furtherance of the public trust.

The Legislature and this Court have defined navigable water as a water that is "navigable-in-fact." Wis. Stat. §§ 30.10(1)-(2); *DeGayner & Co. v. DNR*, 70 Wis. 2d 936, 946-47, 236 N.W.2d 217 (1975). *See also Village of Menomonee Falls v. DNR*, 140 Wis. 2d 579, 585-87, 412 N.W.2d 505 (Ct. App. 1987). A water body that is navigable-in-fact is one that "has periods of navigable capacity which ordinarily recur from year to year, *e.g.*, spring freshets, or has continued navigable long enough to make it useful as a highway for recreation or commerce. The test is not whether the stream is navigable in a normal or natural condition, but whether it is in some sense permanently navigable, *i.e.*, regularly recurring or of a duration sufficient to make it conducive to recreational uses." *DeGayner & Co. v. DNR*, 70 Wis. 2d at 946-47. "For purposes of determining the extent of control of the public trust 'it is immaterial what the character of the stream of water is. It may be deep or shallow, clear or covered with aquatic vegetation.'" *State v. Trudeau*, 139 Wis. 2d at 102, *quoting Diana Shooting Club v. Husting*, 156 Wis. 261, 272, 145 N.W. 816 (1914).

Both the trial court and the appellate court found ample evidence that the westernmost section of fill was navigable-in-fact. John Kelley testified that when the water was high, "you could pull your way through there" in a boat or canoe (59:26). Peter Kelley testified that he was able to take a 12-foot rowboat over the area during the spring of 1988 (58:11). Joseph Kelley testified that water was commonly observed over the area (60:5-6). Dorothy Konkol, a lake resident from 1985 to 1994, testified that before fill was placed, she would canoe the area "at least two or three times a month" (49:35-36). Jack Lewis, familiar with the area since 1982, went by boat through the area until the fill blocked him in 1988 (70:2). Lastly, one of the men hired by the Kelleys to place the fill testified that portions of the area were under water prior to placing the fill in 1988 (15:1-2).

The trial court found that the periodic navigation of the area in question was sufficient to establish navigability-in-fact (24:12-14) (A-Ap. 127-29). The appellate court affirmed and, quoting *DeGayner*, stressed that navigable waters need not be navigable at low stage, or even ordinary. Slip op. at 10, ¶19. The fact is that the fill area was navigable-in-fact. The law is that a water that is navigable-in-fact is subject to regulation under Wis. Stat. §§ 30.12 and 30.15. The trial and appellate courts' finding that the defendants violated chapter 30 when they placed fill in navigable water in the westernmost area is supported by the record and the law.

The defendants argue that a finding of navigability-in-fact does not alone trigger state regulation, but that navigable water must also be found to be located below the ordinary high-water mark (OHWM). As argued in section C below, the record establishes that the area here is below the OHWM. Even if the defendants' contention that the OHWM is disputed is correct, the court of appeals properly held that such a dispute is irrelevant. Water that is navigable-in-fact is, as a matter of law, subject to state regulation under Wis. Stat. §§ 30.12 and 30.15. The precise identification of the OHWM is needed only where an activity straddles the bed and upland of a waterbody, or where there is a question of ownership, in order to determine where the regulation or ownership begins or ends. However, here, where there is no question of ownership or straddling, but the fill is indisputably on the private bed of a public waterbody and therefore below the OWHM wherever it may be, any dispute over the OHWM is not material.

B. The trial and appellate courts properly found that defendants' conduct in the fill area is subject to, and violated, chapter 30 because the public retains its rights to public waters increased artificially.

Wisconsin courts have long recognized that the state's jurisdiction over state waters flows with the water. If the area covered by the waters expands, either by raising the water level via impoundment or increasing the area into which the water can flow by enlargements or connections, the state's jurisdiction expands to that area as well. *See Mendota Club v. Anderson and another*, 101 Wis. 479, 78 N.W. 185 (1899) (holding that the public's right to navigate waters extends to any increased depth, extent, and breadth of such waters because of a dam). "If the public volume or expanse of navigable waters is increased artificially, the public right to use the water is increased correspondingly." *Klingeisen v. DNR*, 163 Wis. 2d 921, 927, 472 N.W.2d 603 (Ct. App. 1991).

This principle recognizes the difficulty of otherwise determining where jurisdiction would begin and end. As the *Mendota Club* court noted, "[c]ertainly, persons navigating the lake cannot be required or expected to carry with them a chart and compass and measuring lines, to determine whether they are at all times within what were the limits of the lake prior to the construction of the dam." *Mendota Club*, 101 Wis. at 493. This principle and the common sense rationale underlying it also apply to the bed of a waterbody; otherwise, it would be impossible to determine which areas of a lakebed could or could not be filled or dredged without a permit. The DNR would be unable to prevent harm in the non-regulated area from affecting the area where the department had jurisdiction.

It is the burden of the one who objects to the state's jurisdiction to prove that a lake is both artificial **and**

created wholly on the property of a single owner. *See State v. Bleck*, 114 Wis. 2d 454, 460-62, 338 N.W.2d 492 (1983); *Mayer v. Gruber*, 29 Wis. 2d 168, 138 N.W.2d 197 (1965). The defendants cannot make this two-part showing.

Here, the lower courts and parties acknowledge that the Kelleys own title to the submerged lands. However, those ownership rights are qualified and subordinate to public rights to use the public water over those lands. "It is elementary that the owner of private property may make any proper use of it so long as he does not interfere with the rights of the public." *Mayer*, 29 Wis. 2d at 176. "Proper use" includes access to the water. *See Munninghoff v. Wisconsin Conservation Commission*, 255 Wis. 252, 259, 38 N.W. 712 (1949).

In *Munninghoff*, the court considered a request to operate a muskrat farm on privately owned lands submerged by a dam on the navigable Wisconsin River. *See id.* at 255. The court deemed trapping an incident of land use, not an incident of navigation, and held that the permit could be granted because the muskrat farm would not interfere with the public's rights of navigation. *See id.* at 260. The defendants would have this Court turn the *Munninghoff* distinction on its head: since trapping is an allowable incident of land use, surely adding between one and two feet of fill to an otherwise frequently submerged road crossing a flat area is "more of an incident to land use," and should therefore be allowed (Pet. Brief at 28.)

This argument misses the point of the *Munninghoff* holding, that private rights to use land below public water are subject to public rights in that water. Owners of submerged lands can use their land only in ways that do not interfere with the public's superior right to use the public water over those lands. Because the defendants' fill eliminated public use of the water here, it was properly found to be unlawful.

The defendants use arguments from cases dealing with public rights to private waters to argue that the public has no right to use these public waters. Those cases do not apply here. In *Mayer v. Gruber,* the owner of a private gravel pit that had filled with water successfully barred use of the pond by a neighbor. *See Mayer,* 29 Wis. 2d 168. The court ruled that, "An artificial lake located *wholly on the property of* a single owner is his to use as he sees fit, provided, of course, that the use is lawful." *Mayer* at 176, emphasis added. The court held that the neighbor could establish riparian rights to Mayers' private pond only through adverse possession. *See id.* at 179. Here, the water over the fill area was not private, and so adverse possession is irrelevant.

The court in *Haase v. Kingston Co-operative Creamery Association,* 212 Wis. 585, 588, 250 N.W. 444 (1933), which the defendants claim the court of appeals has reversed (Pet. Brief at 26), also distinguishes private water bodies from artificially enlarged public waters. In *Haase*, the plaintiffs had built a dam across a non-navigable creek, and that dam overflowed lands owned entirely by the plaintiff. *See Haase,* 212 Wis. at 585. The court held that ownership of the bed did not transfer to the state, and that public rights to use the water, when appropriately acquired over time, could continue. The court's rulings in that case apply only "where the owner of land creates an artificial body of water upon his own premises." *Haase*, 212 Wis. at 588. Here, "where the waters of a natural, navigable lake are artificially raised, the public and the riparian owners enjoy the same rights in and upon such artificial waters." *Haase,* 212 Wis. at 587.

Killarney Lake is not the Kelleys' private impoundment. It was not entirely on Kelley land when it was created (A-Ap. 149). Therefore, they do not have the right to exclude the public, either directly or by placing fill in the water. Similarly, the public did not need to establish its rights to use the water by adverse possession or prescription, but had navigability rights immediately:

> When the owner of the land raised the lake level so as to cover it, such land *immediately became subject to use by the public as a part of the natural lake bed,* not by permission of the owner of the paper title, but by the same right that the public used any other part of the lake. The owner of the land possessed no right to exclude the public therefrom so long as the waters of the lake were caused to flow over the same. The principle is well settled that if the volume of expanse of navigable waters be increased artificially, the public right is correspondingly increased. As the chief justice put it in the *Mendota Club case*, the public may use the increased volume of water the same as though it had always been in that condition; that the right existed from the start. So long as the artificial condition existed, the person holding the title to submerged lands could not exclude the public therefrom.

Village of Pewaukee v. Savoy and another, 103 Wis. 271, 276-77, 79 N.W. 436 (1899), *internal citations omitted*, emphasis added. And even if "the body of water found to be navigable . . . is small, . . . if it is navigable in fact and constitutes a public highway the rights of the public therein are as sacred and as much entitled to protection as they would be in the case of a more pretentious watercourse." *Johnson v. Eimerman*, 140 Wis. 327, 329, 122 N.W. 775 (1909) (a drainage district cannot, by law, drain millpond because it is navigable-in-fact.)

As a matter of law, the regulations protecting public rights in the water before it was dammed continue in force.[1] Because the defendants' fill harmed those

[1] *See also* Wis. Stat. § 30.10(3):

> ENLARGEMENTS OR IMPROVEMENTS IN NAVIGABLE WATERS. All inner harbors, turning basins, waterways, slips and canals created by any municipality to be used by the public for purposes of navigation... are declared navigable waters and are subject to the same control and regulation that navigable streams are subjected to as regards improvement, use and bridging.

rights, the lower courts properly found that fill to be unlawful.

C. The trial and appellate courts properly found that defendants' conduct in the fill area is subject to, and violated, chapter 30 because the fill area is below the ordinary high-water mark.

As stated in section A above, where an area is navigable-in-fact, determining the ordinary high-water mark is not necessary to authorize state regulation of activity in that area in order to protect public rights. Where navigability is not certain, the OHWM is an indicator of the legal boundary between public and private waters. The court in *State v. Trudeau* held that once a lake is determined to be navigable, its public trust status extends to non-navigable waters below the OHWM. *Trudeau*, 139 Wis. 2d at 101 ("Lake Superior is navigable and if the non-navigable site is part of the lake, then the land below the OHWM is held in trust for the public.").

> By ordinary high-water mark is meant the point on the bank or shore up to which the presence and action of the water is so continuous as to leave a distinct mark either by erosion, destruction of terrestrial vegetation, or other easily recognized characteristic. *Lawrence v. American W. P. Co.*, 144 Wis. 556, 562, 128 N.W. 440. And where the bank or shore at any particular place is of such a character that it is impossible or difficult to ascertain where the point of ordinary high-water mark is, recourse may be had to other places on the bank or shore of the same stream or lake to determine whether a given stage of water is above or below ordinary high-water mark.

State v. Trudeau, 139 Wis. 2d at 101, *quoting Diana Shooting Club v. Husting*, 156 Wis. 261, 272, 145 N.W. 816 (1914).

Here, the Little Rice River was navigable-in-fact prior to the town's construction of the dam "for the preservation and propagation of fish, for recreation, for fire hazard reduction, and to make the area more attractive to the public" (A-Ap. 146).

The OHWM is the physical manifestation of the periodic or consistent level of high water. On June 25, 1990, DNR Chief Biologist Dale Simon, who is responsible for providing training to all DNR Water Regulation and Zoning Staff regarding OHWM determinations, established the official OHWM at the filled site (54:63-73). In addition to measuring and correlating elevations at the dam and at the filled sites, Simon documented water-dependent vegetation in the filled area, thus showing the area was below the OHWM (54:73).

These observations correspond with the Wisconsin Wetland Inventory map indicators that showed the area contained vegetation that was partially submerged by water most of the time (54:12-13). These findings are also supported by the 1971 USGS map repeatedly cited by the defendants: Though soils underneath an impoundment contain upland seeds that could easily dominate the vegetative cover of an infrequently submerged area, the 1971 USGS map shows this area contained wetland flora on the particular day the aerial photo was taken to help produce that map (A-Ap. 149). In sum, DNR's findings correspond with the definitions of the OHWM described in *State v. Trudeau,* 139 Wis. 2d 91.

The defendants stipulated to the OHWM that DNR identified in 1990, and they proffer no evidence to show that the OHWM was different in 1988. They argue instead that the court should recognize an ordinary low-water mark, and find that this mark should be the boundary for the state's public trust authority. They suggest that the ordinary low level of the dam, when water is not "dangerously pouring over the center piers of the dam," should be the OHWM of the lake (Pet. Brief at 23).

But Killarney Lake drains a large area and is fed by at least two streams (A-Ap. 149). According to the dam permit, "the capacity of the pond is approximately 2,300 acre-feet which can be filled readily by the feeding area during a short period of excessive runoff" (A-Ap. 147). The OHWM reflects the dynamic nature of a watershed. It reflects the lake at its consistent high mark, as influenced by drainage, not only by the dam.

The defendants also suggest that because the water was lower than the road in the fall of 1988 when the fill was placed, they were filling high ground, or ground that was above the OHWM. But John Kelley himself notes that it was a "dry fall" (18:2). Moreover, Arnott Trucking employee Roger Wojner, who helped dump the fill, noted that portions of the road were in fact under water prior to filling (15:1).

The photos in the defendants' brief also show a low-water mark, having been taken in the fall, specifically in November (A-Ap. 152). At that time the dam is maintained at a lower level: According to Jack Lewis, who began helping add and remove boards on the dam in 1982, the town maintained four boards on the dam during the summer, taking one off in the fall, and regulating the boards in the spring depending on runoff levels (70:1). In addition, the stipulated facts show that the dam is drawn down every September to prevent high ice loading and subsequent damage to the dam (14:3).

In May 1989, the water was apparently much higher. DNR specialist Jon Smith noted that when he visited the area, the islands were entirely surrounded by water except where fill had been placed (67:2). Also in May 1989, DNR Conservation Warden Thomas Wenninger noted that the water at the toe of the fill was approximately 2 feet deep (69:2).

These observations confirm that the lake's ordinary low stage, as established by the level at which the defendants wish the dam had been maintained, cannot be

the ordinary high-water mark. What the DNR has determined to be the OHWM is the result of recurringly high, not excessive high water. Moreover, the defense expert located the OHWM within six inches of the DNR determination of the OHWM (57:92).

The gravamen of the defendants' petition is that it is the dam permit's suggested lake level, not the actual OHWM or actual navigability, that matters. Defendants cite to no law that supports this proposition. Because the fill area is navigable-in-fact, any dispute as to the OHWM is irrelevant. Accordingly, the court of appeals properly affirmed the trial court's decision that the fill in that area was unlawful.

D. The dam permit allowed the maintenance of a lake level of greater than 112.

The defense contends that the level of the lake was held too high, above 112, in violation of the dam permit, and as a result, they should not be liable for placing fill on their land to accommodate this higher level. The trial court found that the dam permit did not mandate a constant lake level and the historical holding of the lake above 112 was not in violation of the dam permit (24:6-10) (A-Ap. 121-25).

The trial court considered the parties' arguments and accepted the following DNR's interpretation of the dam permit:

> "It is our interpretation that water levels are not mandatory unless they are contained in the permit section of an order. I have reviewed the permit in this case and do not believe that it requires that the Town of Little Rice maintain a lake level of 112." Affidavit of, Michael Cain, DNR Staff Attorney, p. 2.

(24:7) (A-Ap. 122).

The court found DNR's interpretation deserving of deference:

> The Wisconsin Department of Natural Resources is legislatively charged with the duty to administer the laws relating to dams located within the state. This responsibility includes the authority to set water levels under. § 31.02(l) and (2), Stats. As such, the DNR's interpretation of dam permits is entitled to some degree of deference if the interpretation is reasonable. *Carrion Corp. v. DNR,* 179 Wis. 2d 254, 507 N.W.2d 356 (Ct. App. 1993).
>
> The DNR's interpretation of the Kelley dam permit is reasonable because it allows for flexibility in the operation of the dam. This is a practical necessity which the defendants' expert acknowledges:
>
> > "Even with constant manipulation of flashboard heights, it would be almost impossible on a dam of this type to maintain a fixed water level. Every little change in inflow to the lake results in a corresponding change in the lake's water level and corresponding overflow depth on the flashboards if no boards are changed."

(24:7-8) (A-Ap. 122-23).

The court's interpretation that the permit did not mandate a constant level of 112 was a question of law, appropriately made while reviewing a motion for summary judgment and reviewed de novo by this Court. This Court should concur in this legal conclusion. Courts have consistently held that where an agency's experience, technical competence, and specialized knowledge aid the agency in its interpretation and application of the law, the agency's determination is entitled to great weight. *See Carrion Corp. v. DOR,* 179 Wis. 2d 254, 264-65, 507 N.W.2d 356 (Ct. App. 1993).

An additional ground for extending deference to DNR's interpretation is that the agency had previously addressed this issue outside the context of this litigation and given the same interpretation. Chapter 130 of the Water Regulation and Zoning Handbook (16:78).

The trial court, in addition to accepting DNR's interpretation of the permit, found circumstantial support for its ruling:

> Additional support for the proposition that the water levels were not maintained too high comes from the historical failure of riparian property owners to object to the water levels. This includes not only the defendants' predecessors, but also the defendants themselves. The defendants' equitable affirmative defense relating to high water is greatly undercut by this fact. The inference is that the argument relating to the dam permit was happened upon fortuitously, after the fact of the fill being placed.

(24:9) (A-Ap. 124).

E. The defendants did not have the right to place fill on the navigable portion of their land, even if the lake level had been maintained in violation of the permit.

The trial court determined that the dam had not been operated in violation of its permit and found the defendants in violation of chapter 30 for placing the fill. The trial court could have concluded its analysis at this point, but did not. Rather, it assumed for the sake of argument that the lake level had been held in excess of the maximum level authorized by the permit and asked whether this would have allowed the defendants to place the fill without a permit. The court determined that the defendants were still not authorized to place the fill without a permit:

> Because the water level of the lake has remained substantially constant since 1961 and because certain portions of old access roads on the Kelley property have been submerged annually to the point of being navigable in fact, the Kelleys have lost their right to use that land as they see fit. Placing fill upon the portions of the road which had become navigable interferes with the rights of the public and is, therefore, unlawful. Once the public and riparian owners acquired rights in an artificial lake, the owner of the underlying lands is prohibited from obstructing the navigability of that waterway. Therefore, the Kelleys have no right to place fill the bed of the navigable portions of Lake Killarney just as they have no right to place fill on the bed of any other navigable body of water in the state.

(24:17-18) (A-Ap. 132-33).

The court's findings are correct. Wisconsin Stat. §§ 30.12 and 30.15 have not carved out an exception to the permitting requirement for persons in defendants' position. The equitable arguments raised by the Kelleys may have been relevant had they been raised within the context of a permit application to place fill or to obstruct navigation or any of the other remedies available to them. *See Village of Menomonee Falls v. DNR*, 140 Wis. 2d at 589. This equitable defense is not relevant in these proceedings because it does not rebut any of the elements the State must prove. The defendants should not be allowed to engage in self-help to avoid the public notice and protection components of the permitting process.

The long-standing case law in Wisconsin is that prescriptive rights can accrue to other riparians when water levels on artificially created water bodies have been maintained for extended periods of time. *See Minehan v. Murphy*, 149 Wis. 14, 17, 134 N.W. 1130 (1912), and *Haase v. Kingston Co-operative Creamery Asso.*, 212 Wis. 585, 586-87, 250 N.W. 444 (1933). These cases also provide that prescriptive water rights can be established over privately held waterbeds. These rights can be established even if the water level fluctuates, *See Johnson and wife v. Boorman*, 63 Wis. 268, 272, 22 N.W. 514

(1885), or if the higher levels are only seasonal. *See Chippewa & F. Imp. Co. v. Railroad Comm.*, 164 Wis. 105, 120-21, 159 N.W. 739 (1916).

The PSC and DNR took a series of lake level readings at the Kelley Dam throughout its history. The court accepted this data and relied upon it in its decision (24:8-9) (A-Ap. 123-24). This data shows a pattern of consistent water levels on Lake Killarney by the various operators. These levels are the direct result of the dam regimen that has continued through the years and resulted in an OHWM of 113.50.

The defense poses a hypothetical in support of their argument, "Who would say a father who puts a swing set in his back yard was a criminal or subject to huge daily penalties" (Pet. Brief at 31). The court of appeals rejected this analogy:

> The Kelleys also seek to draw an analogy between the flooding caused by the operation of the dam and flooding of street gutters and backyards caused by spring run-off. We are not persuaded. Here, it is undisputed that the recurring flooding was caused by the rising waters of a navigable lake, not overflowing gutters and streets. Kelley's [sic] analogy does not apply.

Slip op. at 11, ¶20.

This court should affirm the lower courts' rulings that the defendants' placement of the fill violated Wis. Stat. §§ 30.12 and 30.15.

III. THE DEFENDANTS' CONSTITUTIONAL RIGHTS WERE NOT VIOLATED.

The defendants claim that the State and this action violated their constitutional rights. The trial court and court of appeals properly found against the defendants on these claims.

A. The defendants have not been denied due process by delay in the commencement of this action.

The defendants claimed in the trial court and on appeal that this action denies them due process because of the delay in its commencement (Pet. Brief 36-41). The defendants' due process rights have not been violated because they failed to show actual prejudice resulting from the delay or an improper motive on the part of the State.

The due process standard for evaluating precommencement delay is set forth in *State v. Wilson*, 149 Wis. 2d 878, 903-06, 440 N.W.2d 534 (1989), and requires that the defendants establish that they have suffered actual prejudice arising from the delay and that the delay arose from an improper motive or purpose, such as to gain a tactical advantage over the accused. The defendants fail to establish either prejudice or improper motive.

The defendants claim that they were prejudiced by the death of two witnesses while the case was pending. The court of appeals rejected this claim finding that they had failed to demonstrate that they were prejudiced by the delay. Slip op. at 14, ¶25.

The trial court also found that the defendants had not been prejudiced by the precommencement delay in presenting their facts in support of their motion for

summary judgment (50:12) (R-Ap. 112).[2] Prior to finding that the defendants had not been prejudiced, the court stated:

> And Mr. Weber says two potential witnesses died and that the defendants have been prejudiced. If the defendants had been seriously prejudiced, I would have thought we would have heard about it earlier, not after reams of affidavits and briefs had been filed and not after the court has rendered an adverse decision on summary judgment.

(50:8-9) (R-Ap. 108-109).

This court should accept the findings of the trial court because there is support for it in the record and it is not against the great weight and clear preponderance of the evidence. *Cogswell v. Robert-Shaw Controls Co.*, 87 Wis. 2d 243, 249-50, 274 N.W.2d 647 (1979).

The defense had not been prejudiced by the death of the two witnesses. The violations that the court granted summary judgment on were the violations in which the court found there was no dispute as to the material facts. If there are no material factual disputes on these violations, then not having Helen Anderson or Reed Schmieden to testify is of no import. Additionally, the death of Mrs. Anderson and Mr. Schmieden occurred after the commencement of this suit. These witnesses were available to be interviewed and the State had listed Mr. Schmieden as a witness (8:4). If the defense decided not to depose or preserve the witnesses' testimony, this cannot be considered prejudice caused by the State. In addition, the defendants and other witnesses were available to testify about the historical lake levels as shown in their motion for summary

[2] Defendants-appellants' brief contains a 55-page appendix. The appendix does not contain a transcript of the circuit court's oral ruling on the constitutional issues in controversy (50:1-41). The State has included the relevant transcript in the appendix to its own brief (R-Ap. 101-43).

judgment. Because the defendants have not shown actual prejudice, there has not been a due process violation.

In addition to showing actual prejudice, the defense must establish that the State acted with improper motive. The defense has never claimed or sought to establish that the precommencement delay was caused by an improper motive. The State made an offer of proof explaining and justifying the delay in its trial court brief (73:4-5). The trial court accepted this offer of proof:

> And Mr. Tinker explains in his brief how it's dragged on and why it's dragged on, and I accept that explanation. And I don't really think Mr. Weber would quibble with that.

(50:28) (R-Ap. 128).

The defendants rely on two federal forfeiture cases in support of their constitutional challenge. The trial court correctly distinguished these cases. The trial court found these cases inapplicable because they involved forfeiture of seized property which did not occur in this case and the Kelley prosecution involved a continuing violation which was not the case in the federal forfeiture actions (50:10-13) (R-Ap. 110-13). Even under the analysis of the federal forfeiture cases, there would be no due process violation, given the lack of prejudice to the defendants.

B. There has not been a taking of private property in violation of the United States or Wisconsin Constitution.

1. A number of the defendants' claims of taking were not raised in the trial court and should be denied.

The defendants on appeal allege certain actions by the State constitute constitutional takings. "The failure of the DNR to supervise water levels, allowing them to rise

thirty inches above the level set by the permit, the removal of the fill, and later removal of part of the original road, resulted in the loss of use of the Kelley road and the loss of timberland west of the beaver dam" (Pet. Brief at 35). None of these taking grounds were raised in the trial court. In the trial court, the defense argued that the threat of the removal of the road and the institution of a civil enforcement proceeding constituted a constitutional taking (72:4). This court should not consider the newly added taking claims because they were not submitted to the trial court and involve disputed issues of fact. *Wirth v. Ehly*, 93 Wis. 2d 433, 443-44, 287 N.W.2d 140 (1980).

2. There was no constitutional taking.

The defense in the trial court claimed a taking by the threat of being required to remove the fill and by a possible civil enforcement action (72:4). This potential for governmental action does not constitute a constitutional taking. The Supreme Court has held:

> We have frequently suggested that governmental land-use regulation may under extreme circumstances amount to a "taking" of the affected property . . . . We have never precisely defined those circumstances . . . but our general approach was summed up in *Agins v Tiburon*, 447 U.S. 255, 260, 65 L. Ed. 106, 100 S. Ct. 2138 (1980), where we stated that the application of land-use regulations to a particular piece of property is a taking only "if the ordinance does not substantially advance legitimate state interests . . . or denies an owner economically viable use of his land." Moreover, we have made it quite clear that the mere assertion of regulatory jurisdiction by a governmental body does not constitute a regulatory taking.

United States v. Riverside Bayview Homes, Inc., 474 U.S. 121, 126-27 (1985) (citations omitted.)

Wisconsin law also requires more than the threat of regulatory act. The court in *Busse v. Dane County Regional Planning Comm.*, 181 Wis. 2d 527, 544-45, 511 N.W.2d 356 (Ct. App. 1993), stated:

> But the United States Supreme Court has held that to state a claim for the uncompensated taking of property by regulatory action, the property owner must obtain a final decision regarding the application of the regulations to his or her property: "It follows from the nature of a regulatory takings claim that an essential prerequisite to its assertion is a final and authoritative determination of the type and intensity of development legally permitted on the subject property."

The trial court found that there had not been a taking, accepting the State's arguments (50:42) (R-Ap. 142).

The record does not support the defense claim that the threat of regulatory action or the recently added appellate claims of taking deprived them of the economically viable use of their land. The Kelleys, through their extended refusal to remove the improperly placed fill, benefited by being able to build on an island. Peter Kelley told the investigating DNR warden that he did not seek a permit to place the fill because it was too much red tape (69:3). Despite DNR's continued insistence that the fill was illegal, Peter Kelley installed a septic system, obtained a building permit and commenced construction of a home on the outermost island (68:7). The threat of DNR action and warnings from the Oneida County zoning office did not deter the Kelleys or deprive them of the use of their land.

3. The defendants must still comply with §§ 30.12 and 30.15, even if there was a regulatory taking.

The court of appeals did not directly address whether there had been a taking. Rather, it found that the

remedy for a taking is compensation and not exemption from the permit requirements of ch. 30:

> The record fails to reveal that the Kelleys filed any claim or counterclaim against the State seeking compensation for the alleged wrongful taking. The cases cited do not support the Kelleys' claim that regulatory action or inaction eliminates the permit requirements of Wis. Stat. §§ 30.12 and 30.15. We conclude that their argument fails to create a genuine issue or fact or law precluding summary judgment.

Slip op. at 15, ¶27.

C. The imposition of a $2,500 forfeiture in this case was not constitutionally excessive.

The defendants have challenged the forfeiture in this case. The court of appeals found no violation:

> The parties, however, stipulated that the forfeiture should be imposed on the basis of 250 days of violations. The court imposed a total of $3,000 in forfeitures and assessments against the Kelleys. They fail to show that they were prejudiced by the potential of excessive forfeitures that were caused by the delay.

Slip op. at 14, ¶25.

The court in *State v. Hammad,* 212 Wis. 2d 343, 569 N.W.2d 68 (Ct. App. 1997), extended the excessive fine analysis of *State v. Seraphine,* 266 Wis. 118, 121-22, 62 N.W.2d 403 (1954), to a civil forfeiture of a vehicle action:

> In order to justify the court in interfering and setting aside a judgment for a fine authorized by statute, the fine imposed must be so excessive and unusual, and so disproportionate to the offense committed, as to shock public sentiment and violate the judgment of

> reasonable people concerning what is right and proper under the circumstances.

Hammad, 212 Wis. 2d at 356.

1. The $2,500 forfeiture was reasonable.

The trial court initially found that a forfeiture level of $15,990 for the Kelleys' violations was reasonable and did not raise constitutional concerns. The trial court's findings on October 3, 1995, were based upon the State's offer to amend the complaint to reduce the days of violations from 2,543 days subject to the mandatory minimum forfeiture to 1,599 days (73:11). The trial court found that the resulting mandatory minimum forfeiture of $15,990 was not excessive. The State subsequently, upon stipulation of the parties, amended the complaint to allege only 250 days of violations with a forfeiture of $2,500 (42:3).

The trial court found the proposed forfeiture level appropriate based upon the pattern of the defendants' actions and the nature of the violations. (50:18-21) (R-Ap. 118-21). Given the trial court's factual findings, this court should find that the minimum allowable forfeiture of $2,500 was reasonable and not disproportionate to the offense committed.

2. The potential forfeiture level was not unconstitutionally excessive.

The defendants claim the potential forfeitures in this case were excessive and "violate the excessive fines provisions of the Federal and State Constitutions" (Pet. Brief at 39).

The court of appeals found that the defendants failed to establish a constitutional violation because they have not shown any prejudice flowing from the potential accumulating forfeitures. The defendants' own statement of the case establishes that the potential forfeitures did not cause them to compromise their defense of the case or remove the fill prior to the court ordering it.

The defendants on appeal quote from *Bonnett v. Vallier*, 136 Wis. 193, 212, 116 N.W. 885 (1908). Their quote is incomplete and misleading. *Bonnett* supports the constitutionality of this action. In *Bonnett* the court was troubled by a per day of violation penalty structure. But the court, in the sentence preceding the defendants' quote, stated that had the builder facing the accumulating penalty been allowed to obtain advance official approval of his plans and specifications, the penalty structure could be constitutional. As discussed in the next section, the Kelleys were afforded a variety of remedies to stay within the law. Rather than pursuing these statutory remedies, the defendants elected to use self-help to avoid the "red tape" and place the fill where they wanted it. The large potential forfeitures were caused by the defendants' continued failure to remove the offending fill.

D. The defendants were not denied due process because they had legal remedies available to them.

The defendants proclaim that, "Due process is founded on fair play" (Pet. Brief at 36). The State agrees. The defendants in this case have been treated fairly. The defendants had a number of remedies available to them to remedy the water level problems they were having. The trial court addressed what legal remedies were available to the Kelleys and the equities in this case:

> In this case, the Kelleys should have contacted the DNR with their concerns regarding the level of the water in Lake Killarney *before* taking action to "fix" their access roads. Had they filed a

> complaint and/or made a request to lower the flowage, the DNR would have investigated the situation to determine if a drawdown was an appropriate and lawful option. "A balancing of the dam owner's needs and property owner's concerns is needed to make a determination." Sonntag affidavit, Exhibit Q, p. 6. As it was, benchmarks were not established until 1990, more than a year *after* the fill had been placed and nearly 30 years *after* the creation of Killarney Lake.
>
> Also, the Kelleys should have applied for a permit from the DNR before placing fill on the lands in question. Permits are routinely required for many types of building projects, including the filling in of lands. The Kelleys failed to apply for a permit in this case because it would have involved "too much red tape." Warden Thomas Wenninger, quoting
>
> Peter Kelley, Incident Report dated July 26, 1989. Such reasoning leads to an inference that the Kelleys were aware that a permit was required for the project. Although the Kelleys" request for a permit, if submitted, may ultimately have been denied, they would again have had the right to appeal under chapter 30 or 227.
>
> Self-help is not an appropriate alternative to following the law. The law requires a permit to be issued before material may be placed on the bed of a navigable body of water, irrespective of who holds title to the bed or whether the water body was created naturally or artificially.

(24:19-21) (A-Ap. 134-36).

In addition to the remedies set forth by the trial court, the DNR may grant a riparian owner a permit to "[p]lace crushed rock or gravel, reinforced concrete planks, adequately secured treated timbers, . . . or similar material on the bed of a navigable stream for the purpose of developing a ford if an equal amount of material is removed from the stream bed." Wis. Stat. § 30.12(3)(a) 4. If the Kelleys were permitted to replace bed material with firmer material, they could easily drive to their building site during periods of low water without obstructing navigability. Thus, they are not like a poor father who

cannot put a swing set in his backyard without criminal penalties (Pet. Brief at 31); they are just people who sought self-help in public waters without considering the interests of the public in those waters, and unnecessarily chose a way to solve their problem at the expense of the public.

CONCLUSION

The court should affirm the court of appeals affirmation of the trial court's decisions granting the State summary judgment and denying the defendants' motions to dismiss on constitutional grounds.

Respectfully Submitted,

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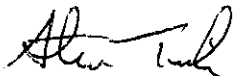

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CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19 and (c) for a brief and appendix produced for a brief and appendix produced with a proportional serif font. The length of this brief is 9,533 words.

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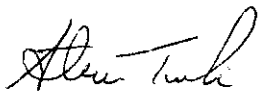

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