20110083

IN THE SUPREME COURT

STATE OF NORTH DAKOTA

Alvin Peterson, Plaintiff/Appellant/ Cross-Appellee, v. Todd Sando, State Engineer, Office of the State Engineer, Defendant/Appellee/ Cross-Appellant.	STATE OF NORTH DAKOTA **Supreme Court No. 20110083** **District Court No. 50-10-C-00181**

APPEAL FROM THE DISTRICT COURT
WALSH COUNTY, NORTH DAKOTA
NORTHEAST JUDICIAL DISTRICT

HONORABLE M. RICHARD GEIGER

BRIEF OF DEFENDANT/APPELLEE/CROSS-APPELLANT

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STATEMENT OF ISSUES

I. Judicial estoppel prohibits a party from adopting contradictory positions during litigation so litigants cannot prevail twice on contradictory legal theories. At the administrative level, Mr. Peterson "support[ed] the ALJ's recommendation and urge[d] the State Engineer to adopt the ALJ's recommendation." Mr. Peterson now asks this Court to vacate the State Engineer's Order that adopted the ALJ's recommendation. Did the District Court err in concluding there was insufficient support for the application of judicial estoppel to the proceedings?

II. Dams are barriers across waterways that control flow. Both parties agree the "man-made rock ridge" is ineffective at blocking water. Is the finding that the "dam" constitutes more than the "man-made rock ridge" (i.e., the "man-made rock ridge" plus the surrounding soil) supported by the evidence in the record?

III. The U.S. Fish and Wildlife Service considers the slough restored to natural conditions at elevation 1543.0 feet. The Natural Resources Conservation Service considers the slough's natural outlet elevation to be 1543.0 feet. Mr. Peterson testified during a previous hearing that 1543 feet was within the land's contour. Is the finding that 1543.0 feet constitutes the slough's natural elevation supported by the evidence in the record?

IV. N.D.C.C. § 61-03-21.2 gives the State Engineer the authority to require the removal or modification of unauthorized works. Cutting a channel through an illegal dam would constitute partial rather than complete removal of the dam. A channel would also constitute a modification to the dam. Is the State Engineer's Order requiring Mr. Peterson to construct a channel through or around the dam in accordance with the law?

V. Under N.D.C.C. § 28-26-11, "the costs of an appeal are in the discretion of the court ... [w]hen a judgment is affirmed in part and reversed in part." Did the District Court abuse its discretion by awarding costs to the State Engineer when the State Engineer's Order was affirmed in part and vacated in part?

STATEMENT OF THE CASE

1. In August 2009, the Office of the State Engineer (OSE) received a complaint under N.D.C.C. § 61-16.1-53.1 regarding an illegal dam. App. 8. Ms. Laura Ackerman, Water Resource Engineer with the OSE, investigated the

complaint and recommended the OSE issue an administrative order to lower the dam to 1543.0 feet mean sea level. App. 23-27.

2. On January 22, 2010, the OSE ordered Mr. Alvin Peterson, the owner of the land where the dam is located, to remove the dam. Mr. Peterson requested a hearing. App. 6. Administrative Law Judge (ALJ) Allen Hoberg conducted a hearing on April 19, 2010, and issued a recommended decision on May 14, 2010 (ALJ Recommendations). App. 6-21. ALJ Hoberg effectively recommended the dam be lowered to 1543.5 feet. Id. In addition, he suggested Mr. Peterson be given the option of constructing a channel through or around the dam rather than requiring removal of all the entire dam. App. 19.

3. Unhappy with the ALJ Recommendations, the State petitioned the OSE to adopt revised findings and order the dam lowered to 1543.0 feet. Supp. App. 3-14. Mr. Peterson responded by urging the OSE to adopt the ALJ's 1543.0 recommendation. Supp. App. 16. On June 25, 2010, the OSE granted Mr. Peterson's request and issued Administrative Order 10-4 adopting the ALJ Recommendations, though modified the Order's wording for clarity. App. 89.

4. On July 9, 2010, Mr. Peterson appealed to the Walsh County District Court. App. 90. The State filed a motion to dismiss on the grounds that Mr. Peterson was not an aggrieved party because he had consented to any alleged injury, which the District Court denied. Id. On January 25, 2011, the District Court: (1) affirmed the OSE's order requiring Mr. Peterson to maintain the slough's level behind the dam at not greater than 1543.5 feet, (2) reversed the

OSE's order requiring Mr. Peterson maintain a channel, and (3) awarded the State costs. App. 90-97.

5. Mr. Peterson filed a Notice of Appeal (App. 98), and the OSE filed a Notice of Cross-Appeal and Specification of Error (Supp. App. 53).

STATEMENT OF THE FACTS

I. General Summary

6. The OSE received a complaint under to N.D.C.C. § 61-16.1-53.1 in August 2009, regarding an illegal dam on Mr. Peterson's property. App. 8. A complaint had previously been filed with the Walsh County Water Resource District under N.D.C.C. § 61-16.1-53, but the Board failed to act on the complaint within the required 120 days. Id. As required under N.D.C.C. § 61-16.1-53.1, Ms. Ackerman, Water Resource Engineer with the OSE, investigated the complaint. Id.

7. Ms. Ackerman conducted a preliminary field inspection of the area in October 2009, and had the area surveyed in October and November 2009. App. 25. The survey data showed the dam's overflow elevation at 1543.9 feet. App. 26. Ms. Ackerman relied on data obtained from United States Fish and Wildlife Services (USFWS) and Natural Resources Conservation Service (NRCS) to determine the slough's natural outlet elevation (i.e, the dam's base elevation), 1543.0 feet. App. 25-26. Using the survey data, Ms. Ackerman calculated that the dam impounds 177 acre-feet between 1543.0 and 1543.9 feet. App. 26. Ms. Ackerman also calculated that the dam impounds 12.5 acre-feet of water at elevation 1543.06 and 50 acre-feet of water at elevation 1543.25. Id.

8. N.D.C.C. § 61-04-02 requires a person to "secure a water permit prior to constructing an impoundment capable of retaining more than twelve and one-half acre-feet" of water. In addition, N.D.C.C. § 61-16.1-38 requires a construction permit before constructing a dam "capable of retaining, obstructing, or diverting more than fifty acre-feet" of water. The OSE has never received an application from nor granted a water use permit or a construction permit to Mr. Peterson (or anyone else) for the dam in question. Supp. App. 59.

9. The OSE has the authority under N.D.C.C. § 61-03-21.2 to require the removal or modification of unauthorized dams. Since Mr. Peterson's property contains an unpermitted dam capable of retaining more than 12.5 (and 50) acre-feet, the OSE requires Mr. Peterson to remove or modify the dam.

II. Clarification of Parties

10. The Defendant/Appellee/Cross-Appellant is Mr. Todd Sando, the State Engineer, representing the OSE. The OSE's responsibilities and authorities are regulated under N.D.C.C. Chapter 61-03. When this case was initiated, Mr. Dale Frink was the State Engineer. Mr. Frink retired after issuing Administrative Order 10-4, but prior to the case being appealed to District Court.

11. The State Water Commission (SWC) is a separate entity from the OSE. Its governing statutes are in N.D.C.C. Chapter 61-02. Though listed as a party in Mr. Peterson's brief caption, SWC is not a party to this case. Confusion resulted at the administrative level because OSE employees did not always keep clear the legal distinction between the OSE and the SWC and refer to themselves as employed by the SWC.

III. Definition of Terms

12. The administrative hearing testimony and Mr. Peterson's briefs use the words "dam," "dike," "dam/dike," "ditch plug," "ditch plug/dike," "dam/ditch-plug," "block," "plug," "berm," "dirt berm," "dirt berm under the rock ridge," "rock ridge," "man-made rock ridge," "rock pile," and others, which leads to imprecision and a lack of clarity. Unless quoting, this brief uses the terms "dam" and "man-made rock ridge". In this brief, "dam" encompasses the terms "dike," "dam/dike," "ditch plug," "ditch plug/dike," "dam/ditch-plug," "block," "plug," "berm," "dirt berm," and "dirt berm under the rock ridge." The "man-made rock ridge" refers to rocks on top of and around the dam. "Rock pile" identifies a reference point northwest of the dam.

13. "Slough" and "wetland," both used throughout the proceedings, have the same meaning. This brief uses the term "slough," unless quoting, to describe the body of water behind Mr. Peterson's dam.

IV. Definition of Elevations

14. All elevations used throughout the proceedings refer to mean sea level (msl), which laypeople refer to as sea level. While other elevations are mentioned or discussed in the proceedings, there are three important elevations, and the State's use of these elevations will have the following meanings:

- 1543.0 feet – The slough's natural outlet elevation; or, stated in a different way, it is the dam's base elevation. (This elevation is in dispute.)
- 1543.5 feet – The level set, in effect, by the ALJ Recommendations, and the District Court's Order to which the dam

must be lowered. Stated another way, 1543.5 feet is the maximum elevation to which Mr. Peterson may maintain the slough. App. 6-21, 89, 96.

- 1543.9 feet – The dam's current effective height, including the man-made rock ridge. Supp. App. 57-58.

15. Two other elevations discussed are the historic ponded level (1542.9 feet) and the historic saturation level (1543.2 feet). In layman's terms, the ponded level is the elevation that the water typically sits at, and the saturation level is the elevation of wet soil.

V. Facts in Dispute

16. At the heart of this dispute, two factual matters caused misunderstanding at the administrative hearing and led to the subsequent appeals -- first, the question of what constitutes "the dam", and second, the question of what elevation should be considered the dam's base to begin calculating how much water the dam impounds.

A. What is a Dam?

17. The crux of the confusion at the administrative hearing resulted from Mr. Peterson's treatment of the terms "dam" and "man-made rock ridge" as synonyms. Mr. Peterson uses these terms interchangeably throughout his brief, alleging the man-made rock ridge is the dam, and after creating that straw man then arguing that "there is a blatant lack of evidence to suggest that the dike is anything other than the man-made rock ridge." Peterson Br. ¶ 51.

18. A dam – whether long or short, narrow or wide – is merely a barrier across a waterway that controls the flow of water. American Heritage Dictionary 364 (2d ed. 1985).

19. Additionally, "[i]t was agreed by both parties ... that the actual height of the top of the man-made rock ridge is irrelevant because it [the man-made rock ridge] is ineffective at blocking water." Peterson Br. ¶ 52, Supp. App. 61, 73.

20. As stated repeatedly throughout Ms. Ackerman's testimony, the dam consists of the soil under and around the man-made rock ridge. Supp. App. 62, 64, 65.

B. What is the Slough's Natural Overflow Elevation?

21. The second main problem during the administrative hearing arose over what elevation constitutes the slough's natural overflow elevation. This elevation is important because this is the dam's base elevation from which storage volume is measured to determine the need for a permit (i.e., when the storage volume above the outlet elevation reaches 12.5 and 50 acre-feet.)

22. While the natural outlet elevation is often easy to determine, several factors cause difficulty here. First, survey data cannot be used to determine the slough's natural outlet elevation because it "just indicates the current elevation at the time [of] the survey" and "provides no indication of what the historical elevations in that area would be[.]" Supp. App. 76. Second, there have been numerous manipulations to the land in the area of the dam since the early 1970s. App. 25. Because of these previous disturbances in the soil profile,

Ms. Ackerman believed "it would be nearly impossible to determine at this time the natural outlet elevation of the wetland . . . ." by conducting a current soil analysis. Id.

23. The dam was first installed by Mr. Peterson as a USFWS requirement. App. 23. In 1966, Mr. Peterson's father entered into an easement agreement with USFWS to protect the slough, and sometime prior to 1973, Mr. Peterson excavated a channel to drain the slough. Id. The USFWS negotiated an easement settlement with Mr. Peterson in 1973, under which the dam was installed "to restore the wetland back to natural conditions." Id. There is no evidence from that time specifically stating what the dam's elevation needed to be to protect the slough. App. 25. At some point, however, the USFWS established 1543.0 feet as the minimum elevation it considered acceptable to protect its easement. App. 24.

24. In November 1997, the NRCS conducted a hydric soil survey analysis of the dam area. Id., Supp. App. 55, App. 38. NRCS documentation from that study indicates that the slough's historic saturation level is 1543.2 feet, and the historic ponded water level is 1542.9 feet. Id. As explained by OSE's witness, Mr. John Paczkowski, a wetland acts like a sponge in that when you get the sponge's corner wet, water soaks up into higher levels of the sponge. Supp. App. 70. While the slough's historic ponded water level was 1542.9 feet, water is sucked up through the soil to slightly higher elevations, in this case 1543.2 feet. Id. Based on the soil sample investigation, NRCS considered the slough's natural outlet elevation to be 1543.0. App. 25.

25. Based on the NRCS data, and buttressed by USFWS's acceptance of the 1543.0-foot elevation to protect its investment in the easement, Ms. Ackerman concluded it was reasonable to assume the slough's natural overflow elevation is 1543.0 feet, and this is the elevation she used to begin calculating storage volume behind the dam. App. 26. In relying on the NRCS's investigation, Ms. Ackerman made a professional assessment that due to the numerous documented manipulations in the dam area, the NRCS's historical work would likely be more accurate than what could be obtained by hiring an expert to conduct a new soil investigation. Supp. App. 60.

26. Lastly, in 1998, Mr. Peterson stated three times during a hearing that 1543 feet was the land's contour in the area of the dam. App. 39-74. In that matter, the Walsh County Water Resource District requested Mr. Peterson

> be permanently enjoined or stopped from adding materials or otherwise manipulating the ditch plug, constructing dikes, water control structures or other - - otherwise obstructing in any manner the drain intersecting the property, or place materials within the flooded land that would in any manner retain water above a 1543 mean sea level elevation . . . . App. 40.

In the hearing, Mr. Peterson testified:

- To make it perfectly clear, I am not in disagreement with the 1543 elevation - - mean sea level. That elevation complies solely with the contour of the land. App. 50.

- And this is where the plug is in at 1543, and it is in at the contour of the land. App. 66.

- I am totally in agreement with the elevation of 1543 because it is very much within the contour of the land. App. 70.

Although Mr. Peterson was not represented by legal counsel at the hearing, he was asked on three occasions throughout the hearing whether he wanted to

continue, and each time Mr. Peterson willing chose to proceed with his testimony without the assistance of counsel. App. 43, 49.

27. Mr. Peterson asserts that his testimony from that hearing should not be considered as evidence in this matter because no court order was provided. Peterson Br. ¶ 46. The lack of an order is irrelevant to whether Mr. Peterson testified under oath regarding the natural elevation at the dam site.

28. Additionally, Mr. Peterson discusses a negotiated oral agreement and the fact that it does not establish the historical elevation. Peterson Br. ¶¶ 47-48. The OSE agrees that the agreement does not establish any relevant facts, and Ms. Ackerman testified that she did not rely on the agreement because, from the OSE's perspective, the agreement was superfluous. Supp. App. 67.

VI. Clarification of ALJ's "Effective" Findings

29. As stated in Paragraph 3 above, the OSE adopted the ALJ Recommendations, but modified the Order's wording for clarity. When reading the Order portion of the ALJ Recommendations, "[t]he ALJ recommend[ed] that the State Engineer order the unauthorized ... dam ... be lowered to 1543.0." App. 19. The OSE order requires that "Peterson maintain the slough at 1543.5 feet msl. This requires Peterson to construct and maintain a channel through or around the unauthorized dam, such that the water will overflow once the water level exceeds 1543.5 feet msl." App. 89.

30. The District Court, confused by the fact that both parties agreed the OSE had adopted the ALJ Recommendations and the effective result was that the dam be lowered to 1543.5 feet rather than 1543.0 feet, requested clarification from the parties. Supp. App. 18.

31. The parties jointly sent an email to the District Court explaining that although in the Order portion the ALJ recommended the dam be removed to a level of 1543.0 feet, when read as a whole, the Findings of Fact define the dam in such a way that the slough's water level will be controlled at a maximum elevation of 1543.5. Supp. App. 19. Therefore, the ALJ's "Effective" Recommendation and the OSE's order both result in a requirement that the dam be lowered to 1543.5 feet.

LAW AND ARGUMENT

I. The District Court Erred in Concluding There Was Insufficient Support for the Application of Judicial Estoppel

A. Standard of Review

32. This Court has not addressed the standard of review for judicial estoppel. A handful of other state courts have addressed the issue, most with little to no substantive discussion, and creating a split of opinion. Watertown Concrete Products, Inc. v. Foster, 630 N.W.2d 108, 112 (S.D. 2001) (Equitable estoppel is reviewed de novo, so judicial estoppel should be reviewed in same manner.); Middleton v. Caterpillar Indus., Inc., 979 So. 2d 53, 57 (Ala. 2007) (Judicial estoppel is an affirmative defense, and court reviews summary judgment based on affirmative defense under de novo standard.). But see Keith v. ManorCare, Inc., 218 P.3d 1257, 1262 (N.M. Ct. App. 2009) (Judicial estoppel application reviewed for an abuse of discretion.); Barack Ferrazzano Kirschbaum Perlman & Nagelberg v. Loffredi, 795 N.E.2d 779, 784 (Ill. App. Ct. 2003) (quoting Bidani v. Lewis, 675 N.E. 2d 647, 650-51 (Ill. App. Ct. 1996) ("The application of the doctrine of judicial estoppel will not be reversed unless it was

an abuse of the trial court's discretion.")); Bentley Funding Group, L.L.C. v. SK & R Group, L.L.C., 609 S.E.2d 49, 53 (Va. 2005) (Applying abuse of discretion standard because judicial estoppel is an equitable doctrine.); Hamm v. Norfolk S. Ry. Co., 52 So. 3d 484, 489 (Ala. 2010) (Applying abuse of discretion standard) (citing Talavera v. School Bd. of Palm Beach County, 129 F.3d 1214, 1216 (11th Cir.1997)).

33. The majority of federal appellate courts that have addressed the standard of review for judicial estoppel apply the abuse of discretion standard. Stallings v. Hussmann Corp., 447 F.3d 1041, 1046 (8th Cir. 2006) (citing Alternative Sys. Concepts, Inc. v. Synopsys, Inc., 374 F.3d 23, 30-31 (1st Cir. 2004); In re Coastal Plains, Inc., 179 F.3d 197, 205 (5th Cir. 1999); Talavera v. School. Bd., 129 F.3d 1214, 1216 (11th Cir. 1997); McNemar v. Disney Store, Inc., 91 F.3d 610, 616-17 (3d Cir. 1996); Data Gen. Corp. v. Johnson, 78 F.3d 1556, 1565 (Fed. Cir. 1996); United States v. Garcia, 37 F.3d 1359, 1367 (9th Cir. 1994)). Only the Seventh Circuit applies the de novo standard. United States v. Hook, 195 F.3d 299, 305 (1999) ("[J]udicial estoppel is a question of law, which we review *de novo*.").

34. The Eighth Circuit in Stallings relied heavily on the reasoning articulated in Alternative, 374 F.3d 23, 30-31, which established four bases for applying the abuse of discretion standard:

> First, the Supreme Court has explained that "judicial estoppel is an equitable doctrine invoked by a court at its discretion." On that basis, the abuse of discretion standard seems a natural fit. Cf. Pierce v. Underwood, 487 U.S. 552, 558, 108 S.Ct. 2541, 101 L.Ed.2d 490 (1988) (noting that matters consigned to a trial court's discretion are generally reviewed for abuse of discretion). Second,

> deferential review often is appropriate for matters in which the trial court is "better positioned ... to decide the issue in question." Judicial estoppel is such a matter. Determining whether a litigant is playing fast and loose with the courts has a subjective element. Its resolution draws upon the trier's intimate knowledge of the case at bar and his or her first-hand observations of the lawyers and their litigation strategies. Third, abuse of discretion is a flexible standard, and the amorphous nature of judicial estoppel, cf. Desjardins, 37 F.3d at 23 (observing that "judicial estoppel is not extrinsically a matter of fact or law; the issues that arise may turn out to be ones of raw fact, abstract law, or something in between"), places a high premium on such flexibility. Last-but far from least-the other courts of appeals to have addressed this question have settled unanimously on abuse of discretion review. A court of appeals should always be reluctant to create a circuit split without a compelling reason, and none exists here. Id. (citations omitted).

35. In this case, the reasons expressed in Alternative do not apply, and the OSE urges the court to apply a de novo standard of review. First, although judicial estoppel itself is an equitable doctrine invoked at the court's discretion, whether the doctrine has been properly applied is a question of law. "Questions of law are reviewed under the de novo standard of review." State v. Genre, 2006 ND 77, ¶ 12, 712 N.W.2d 624.

36. Second, the fact that a trial court has more "intimate knowledge" and is "better positioned ... to decide the issue in question" does not apply here. This is an administrative appeal case and not the usual litigation with pleadings, discovery, motions, and then trial. Typically, administrative appeal cases are procedurally simple and decided on the administrative record. Therefore, this Court is in the same or similar position as the District Court in weighing equities. Furthermore, in this case, the parties submitted to the District Court via paper and never appeared in person, so there has been no "first-hand observations of

the lawyers and their litigation strategies" other than what can be gleaned through briefs.

37. Third, if judicial estoppel's amorphous nature places such a high premium on flexibility, this would seem to argue against the abuse of discretion standard rather than for it. Such flexibility can become standardless and applied in widely different ways by district courts. A less deferential standard will allow the Supreme Court to maintain the necessary level of uniformity and coherence to judicial estoppel and its application.

38. Lastly, while no split in authority existed at the time of the Alternative decision, that is no longer true. Both the federal and the state courts are split, and although the majority of courts apply an abuse of discretion standard, a handful use the de novo standard.

39. Finally, although the OSE urges the Court to adopt the de novo standard of review, the facts of this case are such that even if an abuse of discretion standard applies, the District Court should be reversed because it considered only one of the judicial estoppel factors and ignored the rest.

B. Facts Pertinent to Judicial Estoppel

40. After receiving the ALJ's recommendation that the dam be lowered to 1543.5 feet, the State petitioned the OSE to reject that recommendation and instead require the dam be lowered to 1543.0 feet. Supp. App. 3-14. In response, Mr. Peterson stated that he "support[ed] the ALJ's recommendation and urge[d] the State Engineer to adopt the ALJ's recommendation." Supp. App.

16, emphasis added. Seeking to avoid the time and cost of an appeal, the State Engineer did just that. App. 89.

41. Because Mr. Peterson received exactly the outcome he requested, the OSE asked the District Court to apply judicial estoppel. Supp. App. 22-24. Mr. Peterson then argued he did not actually support the ALJ Recommendations, but merely chose between "the lesser of two evils" and preferred the 1543.5 elevation to the 1543.0 elevation. Supp. App. 39.

42. The District Court found the judicial estoppel doctrine did not apply because Mr. Peterson's statement that he "supported the ALJ's recommendation and urged the State Engineer to adopt the ALJ's recommendation" to lower the dam to 1543.5 feet was not wholly inconsistent with his argument throughout the remainder of the case that the proper elevation should be 1543.9 feet. App. 91. Because the OSE limited review "to the issue of the controlling elevation to which the dam must be lowered", the District Court found it was a reasonable conclusion for Mr. Peterson to believe his argument was limited in scope. Id.

C. Judicial Estoppel Doctrine

43. To protect the integrity of the judicial process, judicial estoppel prohibits a party from adopting inconsistent or contradictory positions during litigation so litigants cannot prevail twice on contradictory legal theories. BTA Oil Producers v. MDU Res. Group, Inc., 2002 ND 55, ¶ 14, 642 N.W.2d 873. "Such use of inconsistent positions ... has been emphasized as an evil the courts should not tolerate." Scarano v. Cent. R.R. Co. of N.J., 203 F.2d 510, 513, (3d Cir. 1953). The doctrine "is designed to prevent litigants and their counsel from

playing fast and loose with the courts, ... to protect the courts from being manipulated by chameleonic litigants who seek to prevail, twice, ... [and] reduce fraud in the legal process by forcing a modicum of consistency on the repeating litigant." Meide v. Stenehjem ex rel. State of N.D., 2002 ND 128, ¶ 15, 649 N.W.2d 532. The doctrine's rationale applies to administrative proceedings as well as judicial ones. Dunn v. N.D. Dep't. of Transp., 2010 ND 41, 779 N.W.2d 628.

44. While no "inflexible prerequisites or ... exhaustive formula[s] ... determin[e] the applicability of judicial estoppel," three factors help determine its application. Meide, 2002 ND 128, ¶ 13 (citing New Hampshire v. Maine, 532 U.S. 742, 750-51 (2001)). They are: (1) a party's later position must be clearly inconsistent with its earlier position, (2) the party succeeded in persuading the court to accept the earlier position, and (3) the party asserting the inconsistent position would derive an unfair advantage or impose an unfair detriment if not estopped. New Hampshire v. Maine, 532 U.S. at 750-51.

D. Judicial Estoppel As Applied to Case Facts

45. This case meets all three factors. First, Mr. Peterson's current position is inconsistent with his final position in the administrative proceeding. In this appeal, Mr. Peterson asks that the OSE's Order adopting the ALJ Recommendations be vacated. Peterson Br., ¶ 64. In the administrative proceeding, Mr. Peterson "urge[d] the State Engineer to adopt the ALJ's recommendation." Supp. App. 16. These positions are inconsistent, meeting the first factor.

46. Mr. Peterson may assert (as he has previously, Supp. App. 36-43) that he has consistently argued the dam should remain at 1543.9 feet. While that may have been his consistent case theory, the ultimate remedies he has requested have been inconsistent.

47. To this, Mr. Peterson may say "he did not receive the remedy he requested ... he simply advised the State Engineer that it (sic) preferred one outcome over the other." Supp. App. 24. Mr. Peterson's final brief to the OSE, however, could not have been clearer about his desired outcome. There he "support[ed] the ALJ's recommendation and urge[d] the State Engineer to adopt the ALJ's recommendation." Supp. App. 16. If Mr. Peterson merely preferred the ALJ's recommendation (1543.5 feet) to the State's recommendation (1543.0 feet), but really sought to maintain the status quo (1543.9 feet), then why not "*support* the status quo and *urge* the State Engineer to maintain the status quo?" Words have meaning, so if Mr. Peterson did not actually support the ALJ's recommendation, he should have stated so rather than leaving the OSE to divine he merely had a preference. Now that Mr. Peterson has received the outcome he expressly "support[ed] . . . and urge[d] the State Engineer to adopt", it is disingenuous and untimely to claim he merely preferred it to other alternatives. This both-sides-of-the-fence argument is exactly the sort of "fast and loose," "chameleonic" behavior judicial estoppel is designed to prevent. Applying the doctrine here would also promote its other underlying policies. It would further litigation consistency and prevent court and agency manipulation.

48. Regarding the second factor, Mr. Peterson successfully persuaded the OSE to adopt the ALJ Recommendations. With a slight change in wording to make the Order clearer (as explained above at ¶¶ 3, 29-31), the OSE adopted the ALJ Recommendations wholesale. App. 89.

49. Lastly, if not estopped, Mr. Peterson will derive an unfair advantage because he would be eligible to obtain a more favorable outcome on appeal after being granted the original outcome he requested. In addition, the OSE suffers detriment. The OSE (contrary to his own staff members' recommendations) adopted the ALJ Recommendations at Mr. Peterson's urging, but after doing so, finds himself in court spending time and resources defending the very relief Mr. Peterson requested. Further, since the OSE accepted Mr. Peterson's concession to the 1543.5 elevation, making it the law of the case, the OSE now has no ability to revisit factual issues that were also concessions on its part. Specifically, the OSE must accept the finding of fact that cause the ALJ Recommendations to be "effective" findings such that even though the dam's natural overflow elevation was found to be 1543.0 feet, the slough will still only be controlled at 1543.5 feet.

50. The District Court declined to apply judicial estoppel because "it was a reasonable conclusion on Mr. Peterson's part that he had been limited in the scope of his argument" to only discuss the dam's controlling elevation. Given this was the case's entire underlying issue, this was not much of a limitation. Furthermore, even within the scope of any perceived limitation, nothing precluded Mr. Peterson from "urging the State Engineer to adopt a controlling

elevation of 1543.9 (i.e., maintain the status quo)" or from stating he "preferred 1543.9 feet to 1543.5 feet." However, Mr. Peterson did neither, but instead adopted a position inconsistent with his position today.

51. Furthermore, the District Court only examined judicial estoppel's first factor. In an argument that cuts both ways, Mr. Peterson argued at length in his District Court reply brief that the factors are merely a helpful guidance, and "'do not establish inflexible prerequisites or an exhaustive formula for determining the applicability of judicial estoppel.' Indeed, other considerations 'may inform the doctrine's applications in specific factual contexts.'" Supp. App. 36-43 (quoting New Hampshire v. Maine, 532 U.S. at 751). The argument's equitable nature calls on the court to examine the totality of the circumstances, including the test's three factors. When that is done, it is clear that the District Court abused its discretion in concluding judicial estoppel does not apply.

E. Conclusion

52. The OSE's Final Order should be affirmed under the judicial estoppel doctrine because Mr. Peterson: (1) now requests a different remedy (vacate the OSE's Order adopting the ALJ Recommendations) than requested during the administrative proceedings (adopt the ALJ Recommendations), (2) was successful at persuading the OSE to adopt his requested remedy, and (3) would derive an unfair advantage by now seeking a more advantageous outcome than he requested below. In addition, the OSE now suffers the unfair detriment of defending an appeal in a case that was purportedly "settled" as Mr. Peterson requested, with no ability to revisit factual issues conceded by the OSE.

II. The Evidence Supports the Finding that the Dam Constitutes the Man-Made Rock Ridge and the Underneath Soil.

A. Standard of Review

53. This Court has limited review of Mr. Peterson's challenge of the OSE's decision. Under N.D.C.C. § 28-32-46, the agency's decision cannot be overturned "[i]f the hearing officer's findings of fact are supported by a preponderance of the evidence, the conclusions of law are sustained by the findings of fact, and the decision is supported by the conclusions of law . . . ." Brewer v. Ziegler, 2007 ND 207, ¶ 4, 743 N.W.2d 391. Administrative rulings are entitled to great deference, and the court should not substitute its judgment for the agency's. Christofferson v. N.D. Dep't. of Health, 2007 ND 199, ¶ 7, 742 N.W.2d 799 (citing Wetzel v. N.D. Dep't. of Transp., 2001 ND 35, ¶ 9, 622 N.W.2d 180). Furthermore, "[i]f the subject matter of a question before an administrative agency is of a highly technical nature," the agency's expertise is not only entitled to respect, but also "appreciable deference." Hanson v. Indus. Comm'n of N.D., 466 N.W.2d 587, 591 (N.D. 1991) (citations omitted); see also Amoco Prod. Co. v. N.D. Indus. Comm'n, 307 N.W.2d 839, 842 (N.D. 1981) (Court "reluctan[t] to substitute its own judgment for that of qualified experts in matters entrusted to administrative agencies.").

B. The Dam Must Include the Soil Under Man-Made Rock Ridge

54. As stated above, confusion occurred at the administrative level because of Mr. Peterson's allegations that the "dam" is the same as the "man-made rock ridge." While Mr. Peterson alleges "there is a blatant lack of evidence to suggest that the dike is anything other than the man-made rock ridge,"

(Peterson Br. ¶ 51), Mr. Peterson's own admission that "[i]t was agreed by both parties ... that the actual height of the top of the man-made rock ridge is irrelevant because it [the man-made rock ridge] is ineffective at blocking water," (Peterson Br. ¶ 52, Supp. App. 61, 73), is evidence enough. A dam is a barrier across a waterway that controls the flow of water. American Heritage Dictionary 364 (2d ed. 1985). The fact that Mr. Peterson agrees the man-made rock ridge is ineffective at blocking water shows the fallacy of claiming the dam is only the man-made rock ridge.

55. Furthermore, Ms. Ackerman stated several times that the dam consists of the soil under and around the man-made rock ridge because this is what is blocking the water's flow. Supp. App. 61-62, 64-66, 68-69. As the OSE's expert, this opinion is entitled to appreciable deference.

C. Discussion of "Natural Topography" is Irrelevant

56. Lastly, Mr. Peterson's arguments regarding the "natural terrain" and the fact that the 1543.5 contour is allegedly "natural topography" confuses the issue. Supp. App. 74-75. The argument implies that if 1543.5 feet is natural topography, then there can be no dam at 1543.5 feet. First, all dams contain some "natural topography" because at some point, all dams must tie in with natural topography. Second, the quality that defines a dam is whether the water's flow is being controlled, not whether portions of the dam are natural or unnatural topography.

57. Imagine the letter "W" as representing the area's "natural topography." Everything underneath the W is solid ground, and everything above

the W allows water to flow out of a slough. Now imagine the valleys of the W being filled with soil and smoothed across the top, ▼▼. A dam would have been created because water would no longer flow through the valleys, and the water's flow would now be controlled until it over-topped the ▼▼. The top three points of the original W would still be considered "natural topography," even though other portions of the dam would be unnatural. Furthermore, to an observer with no historical background knowledge of the W's natural topography, the ▼▼ could easily appear natural.

58. The Walsh County Water Resource District hired Mr. Dan Fischer to survey Mr. Peterson's property, and Mr. Fischer produced a survey document (App. 75) showing various topographic features and elevations. Supp. App. 71-72. Mr. Peterson seems to rely heavily on Mr. Fischer's testimony. According to Mr. Peterson, Mr. Fischer "opined that the terrain appeared natural." Peterson Br. ¶ 54, Supp. App. 77. The key word is "appeared". Mr. Fischer also testified "survey data just indicates the current elevation at the time [of] the survey" and "one never knows if it's [the elevation] natural or not." Supp. App. 76.

59. Given that Mr. Peterson's own witness admits it is impossible to tell based on survey data alone whether an area is "natural topography" or not, this "natural topography" argument obfuscates the real issue whether there is "a barrier across a waterway that controls the flow of water."

D. Conclusion

60. The evidence in the record supports the fact that the dam includes the soil under the man-made rock ridge because: 1) in order to be a dam, there

must be a blockage controlling the water's flow, and 2) both parties agree the man-made rock ridge itself does not control the water's flow. Also, whether a portion of the area controlling the water's flow is natural or unnatural topography is irrelevant. The fact that water is being controlled at an elevation higher than the natural outlet elevation means the area functions as a dam. Lastly, as long as there is sufficient evidence to support a finding that the dam includes the soil under the man-made rock ridge, it is beyond the scope of this Court's review to substitute its judgment for the administrative agency's.

III. The Evidence in the Record Supports the Finding that 1543.0 Feet Constitutes the Slough's Natural Elevation.

A. Standard of Review

61. For the reasons stated in paragraph 53, this Court has limited review of Mr. Peterson's challenge of the administrative decision.

B. Facts Support 1543.0 Feet as Slough's Natural Outlet Elevation

62. The slough's natural overflow elevation determines the base elevation above which the storage volume must be calculated to determine whether the dam is unauthorized. The natural overflow elevation is 1543.0 feet.

63. While man-made changes to elevation are sometimes easy to identify visually, an area's natural elevation can rarely be visually determined with certainty. In addition, as discussed above ¶ 58, a topographic survey of an area can only provide the elevation on the survey date, so without a series of historical surveys to track changes, the natural elevation cannot be determined with certainty solely through topographic surveys.

64. One method to determine the natural elevation is by a soil investigation, something the NRCS, formerly the Soil Conservation Service, has

expertise doing. In November 1997, NRCS conducted an investigation to determine the natural elevation of the same slough area in dispute here. App. 38. Specifically, the soil investigation concluded that the slough's historic saturation level was 1543.2 feet, and the historic ponded water level was 1541.9 feet. Id. According to NRCS, the investigation concluded the slough in question would be considered restored at elevation 1543.0 feet. Id. The investigation further concluded that based on the record's entirety, including soil, topography, and hydrology data and historic photographic evidence, the data did not "support the claim that a natural berm existed at an elevation of 1543.9 feet prior to manipulations." Id.

65. Ms. Ackerman testified she relied upon the NRCS determination of the 1543.0 foot elevation for two reasons. First, the OSE does not have the NRCS's expertise in determining wetland boundaries. Supp. App. 63. Second, because of several known prior man-made changes to the area, Ms. Ackerman made a professional assessment that the NRCS's work would likely be more accurate than what could be obtained by with a new soil investigation. Supp. App. 60.

66. Additionally, the USFWS established 1543.0 feet as the minimum elevation it considered acceptable to protect its easement. App. 24. Given that the dam was first installed by Mr. Peterson as a USFWS requirement "to restore the wetland back to natural conditions" (Id.), Ms. Ackerman considered the USFWS requirement supporting evidence to the NRCS determination.

67. Lastly, Mr. Peterson, as the landowner, was in the best position of any layman to assess the natural elevation, and in his prior hearing testimony, he stated three times that 1543 feet was the land's contour in the area of the dam. App. 50, 66, 70.

68. Based on the 1997 NRCS investigation, the USFWS acceptance for easement protection, and Mr. Peterson's own 1998 testimony, it is reasonable to conclude the slough's natural overflow elevation is 1543.0 feet.

C. Admission of the NRCS Letter was Proper

69. The main evidence the OSE used to establish a natural outlet elevation of 1543.0 was the NRCS letter. App. 38. Mr. Peterson made a hearsay objection, but the ALJ admitted the evidence. Supp. App. 55-56, 60. For several reasons, this evidence was properly admitted.

1. Standard of Review

70. An abuse of discretion standard applies to review of a trial court's evidentiary rulings as well as hearing officers' rulings. Knudson v. Director, N.D. Dep't. of Transp., 530 N.W.2d 313, 316-17 (N.D. 1995).

2. Mr. Peterson Had Opportunity to Cross-Examine

71. The NRCS letter was properly admitted because a party receiving advance notice that hearsay statements may be introduced is deemed to have had the opportunity to cross-examine the declarant. In re B.B., 2007 ND 115, ¶ 16, 735 N.W.2d 855. Mr. Peterson knew in advance the NRCS letter was going to be introduced (Supp. App. 1-2), but did not subpoena anyone for cross-examination, thereby waiving the right to exclude the letter on the basis of hearsay.

3. N.D.R.Ev. 803(6)

72. The NRCS letter was admissible under N.D.R.Ev. 803(6), regarding records of regularly conducted business activity. In Pizza Corner, Inc. v. C.F.L. Transport, Inc., 2010 ND 243, 792 N.W.2d 911, this Court ruled that the business

records exception to the hearsay rule can apply to a document created by a third party if the offering party integrated the document into its own records, relied on the document, and if the records meets the other requirements of N.D.R.Ev. 803(6). Id. at ¶ 16 (citing Brawner v. Allstate Indem. Co., 591 F.3d 984, 987 (8th Cir. 2010) ("[A] record created by a third party and integrated into another entity's records is admissible as the record of the custodian entity, so long as the custodian entity relied upon the accuracy of the record and the other requirements of Rule 803(6) are satisfied."); Air Land Forwarders, Inc. v. United States, 172 F.3d 1338, 1342 (Fed. Cir. 1999) ("[D]ocuments may be admitted into evidence as the business records . . . as long as the entity is able to produce testimony that it was the entity's regular practice to obtain information from such a third party, or that the records were integrated into the office's records and relied upon in its day to day operations.")).

73. Mr. Peterson states "the NRCS letter . . . was offered to show the natural elevation of the wetland without any foundation or witness from NRCS." Peterson Br. ¶ 30. However, "Rule 803(6) does not require that an employee from the company that created the record provide the foundation for a business record." Pizza Corner, 2010 ND 243, ¶ 12 (citing Brawner, 591 F.3d at 987 ("[company] was not required to produce an individual from the entity that prepared the record to establish a foundation"); Dyno Const. Co. v. McWane, Inc., 198 F.3d 567, 575-76 (6th Cir. 1999) (witness does not need to be an employee of the business that created the record)).

74. As applied to this case, the position adopted in Pizza Corner

requires the NRCS letter's admittance. Here, the OSE (the offering company) integrated a third party's document (NRCS letter) into its own records and relied on the information contained in the document to make a determination about the slough's natural outlet elevation. The record meets the other requirements of N.D.R.Ev. 803(6), namely that it is a memorandum or data compilation kept in the course of a regularly conducted business activity by a person with knowledge and prepared by a method that indicates trustworthiness. The OSE was not required to produce an NRCS witness to establish admissibility of the NRCS letter under N.D.R.Ev. 803(6).

4. N.D.R.Ev. 807 Analysis

75. Finally, the NRCS letter could have also been admitted under N.D.R.Ev. 807, a residual exception to the hearsay rule if the court determines three factors are met. First, the statement must be offered as evidence of a material fact. The NRCS letter was evidence of the slough's natural overflow elevation is 1543.0, a key fact. Second, the statement must be more probative on the point for which it is offered than any other evidence that can be produced through reasonable efforts. As Ms. Ackerman testified, she relied upon the NRCS letter rather than conducting her own analysis because it was her professional opinion the letter's information was the most reliable due to the repeated manipulations in the area of the dam, (Supp. App. 60), the NRCS study having been conducted prior to many of those manipulations. Third, the interests of justice must best be served by admitting the evidence. The NRCS letter best serves justice because it was not prepared by a litigant or specifically for the

hearing or this dispute, which enhances its impartiality and trustworthiness. Because the three factors are met, N.D.R.Ev. 807 applies, and the NRCS letter was properly admitted as an exception to the hearsay rule.

5. N.D.R.Ev. 703 Analysis

76. Lastly, even if none of the above exemptions to the hearsay rule applied, under N.D.R.Ev. 703, the facts or data an expert uses to form an opinion do not need to be admissible in order for the opinion to be admitted if they are of a type reasonably relied upon by experts. See Collom v. Pierson, 411 N.W.2d 92, 95 (N.D. 1987); State v. Messner, 1998 ND 151, ¶ 26, 583 N.W.2d 109 (overruled on other grounds by State v. Blue, 2006 ND 134, ¶21, 717 N.W.2d 558); Slaaten v. Amerada Hess Corp., 459 N.W.2d 765, 767-768, nn. 2, 3 (N.D. 1990). Information regarding wetland boundaries, soil surveys, and hydric analysis from the NRCS is a type engineers typically reply upon to form opinions, which is what Ms. Ackerman did.

77. Mr. Peterson argues that "Ms. Ackerman was never proffered as an expert witness in this case and moreover she admitted that she is *not* an expert in determining the boundaries of wetlands." Peterson Br. ¶ 32. This argument was not raised below, nor was an objection raised during the hearing to Ms. Ackerman's opinion testimony, and so the argument was not preserved for appeal. Westby v. Schmidt, 2010 ND 44, ¶ 25, 779 N.W.2d 681 ("This Court does not address issues raised for the first time on appeal."). Secondly, there is no need to formally "proffer" a witness as an expert, and Mr. Peterson does not cite any authority for the need to do so. Lastly, the OSE never claimed expertise

in determining wetland boundaries, and in fact that was one reason the OSE relied on the NRCS's information. Supp. App. 63. But Ms. Ackerman is an engineer and a public official with regulatory responsibilities, and as such, has expertise in permitting issues and dam complaints (Supp. App. 54), including using information obtained from various sources to make technical determinations about dam compliance.

6. Conclusion

78. The NRCS letter could have been properly admitted for four separate reasons. First, Mr. Peterson had the opportunity to cross-examine a witness regarding the letter, but chose not to. In addition, the letter could have been admitted as an exception to the hearsay rule under both N.D.R.Ev. 803(6) and 807. Finally, the NRCS letter could have been properly considered under N.D.R.Ev. 703 because Ms. Ackerman relied on the information to form her opinion regarding the slough's natural outlet elevation.

D. Conclusion

79. The evidence supports the conclusion 1543.0 feet is the slough's natural outlet elevation. Ms. Ackerman based this conclusion on information she gathered from USFWS and NRCS, mostly because she considered this historical information more accurate than what she would have been able to gather today. The NRCS letter was properly admitted for numerous reasons, but even if it should not have been admitted, it was still proper for Ms. Ackerman to use the information to form her opinion. Lastly, Mr. Peterson's own testimony provides sufficient evidence that the slough's natural outlet elevation is 1543.0.

IV. The OSE's Order is in Accordance with the Law.

A. Standard of Review

80. For the reasons stated in paragraph 53, this Court has limited review of Mr. Peterson's challenge of the OSE's decision.

B. Legality of Requiring a Channel

81. The ALJ recommended that Mr. Peterson be given the option of constructing a channel through or around the dam rather than requiring removal of the entire dam. App. 19. The OSE adopted this recommendation and worded the Order "requir[ing] Peterson to construct and maintain a channel through or around the unauthorized dam, such that the water will overflow once the water level exceeds 1543.5 feet msl." App. 89. Mr. Peterson asserts the OSE "has unlawfully expanded its authority and ordered construction of a drainage channel" and "the construction of [a] drainage channel is so far removed from the original complaint, this part of the Order must be vacated." Peterson Br. ¶ 57.

82. N.D.C.C. § 61-03-21.2 gives the State Engineer the authority to require the removal or modification of unauthorized dams. Cutting a channel through an illegal dam would constitute partial rather than complete removal of the dam. A channel would also constitute a modification to the dam. Since the material that would need to be excavated through the dam for a channel is part of the dam, the OSE was actually wielding its authority in a more limited way rather than "unlawfully expand[ing] its authority."

83. By requiring the construction of a channel through or around the dam, the OSE was attempting to help Mr. Peterson by giving him more flexibility

to accomplish the ultimate goal of controlling the slough at 1543.5 feet. However, because the slough is still required to be maintained at a level of 1543.5 feet, if the Order's "construction of a channel" portion is vacated, this means the entire dam must be lowered to a level of 1543.5 feet.

C. Conclusion

84. The OSE's Order requiring the slough's level to be maintained at 1543.5 feet is in accordance with the law. To accomplish this, Mr. Peterson must remove the dam or at least a portion thereof (i.e., construct a channel). If Mr. Peterson wishes to restrict his options for how to accomplish the task by vacating the Order's "construction of a channel" portion, the OSE takes no issue with requiring the entirety of the dam be removed.

V. The District Court Did Not Abuse Its Discretion By Awarding Costs.

A. Standard of Review

85. An abuse of discretion standard applies to Mr. Peterson's challenge to the award of costs. Under N.D.C.C. § 28-26-10, "costs may be allowed for or against either party in the discretion of the court." "[A] court's ruling on costs will not be disturbed unless the aggrieved party affirmatively establishes an abuse of discretion." Andrews v. O'Hearn, 387 N.W.2d 716, 732-33 (N.D. 1986). "A trial court abuses its discretion if it acts in an arbitrary, unconscionable, or unreasonable manner, or if it misinterprets or misapplies the law." City of Medora v. Golberg, 1997 ND 190, ¶ 18, 569 N.W.2d 257.

B. Costs are Statutorily Authorized at the Discretion of Court

86. Mr. Peterson argues since the District Court vacated a portion of

the OSE's order, there was no prevailing party and an award of costs was an abuse of discretion. Peterson Br. ¶ 61. Under N.D.C.C. § 28-26-11, "the costs of an appeal are in the discretion of the court ... [w]hen a judgment is affirmed in part and reversed in part." Furthermore, while a portion of the OSE's order was vacated, the OSE was still the prevailing party. The vacated portion of the OSE's order merely applies to how the slough's level is maintained. That level itself is the case's core issue, and on that point, the OSE was the prevailing party.

C. Unclear what District Court Included in the "Award of Costs"

87. The OSE agrees with Mr. Peterson that the District Court did not offer a proposed cost calculation. Peterson Br. ¶ 59. With the exception of attorney time, the only direct cost the OSE has incurred has been to pay the Office of Administrative Hearings for conducting the initial hearing and various costs incurred in appellate review. Although not a part of the record, these costs total just over $4,000, and invoices can be provided to both the court and Mr. Peterson. Should this Court uphold the District Court's award of costs, the OSE respectfully asks this portion of the case be remanded to District Court for a clarification regarding the cost calculations.

D. Conclusion

88. Since costs are statutorily authorized when a judgment is both affirmed and reversed in part, and because the OSE was the prevailing party, the District Court did not abuse its discretion by awarding the OSE costs. Though it is unclear what those costs entail, that issue can be easily cleared up by the District Court.

CONCLUSION

89. The OSE asks this Court to affirm Administrative Order 10-4 under the judicial estoppel doctrine because Mr. Peterson requested the OSE adopt the ALJ Recommendations, but then after Mr. Peterson successfully persuaded the OSE to do so, he asked that the judiciary vacate the OSE's Order doing so; Mr. Peterson derives an unfair advantage by now seeking a more advantageous outcome than he requested below, while the OSE has suffered the unfair detriment of defending an appeal in a case purportedly "settled" as Mr. Peterson requested and due to the "law of the case", has no ability to revisit factual issues conceded by the OSE. In particular, the OSE "gave up" its original objective to lower the dam to 1543.0 feet based on Mr. Peterson's request that it be lowered only to 1543.5 feet.

90. In the alternative, the OSE asks this Court to affirm Administrative Order 10-4 requiring the slough's level to be maintained at 1543.5 feet based on the facts that there is evidence in the record to support the OSE's findings that 1543.0 constitutes the slough's natural overflow elevation and the dam constitutes the soil underneath the man-made rock ridge because that soil blocks the water's flow and controls the slough's elevation.

91. The OSE asks this Court to affirm that Administrative Order 10-4 is in accordance with the law in that requiring Mr. Peterson to construct only a channel through or around the dam is a restriction on the OSE's authority rather than an expansion thereof. In the event this Court vacates the portion of Administrative Order 10-4 requiring the construction of a channel, the OSE asks

the Court to clarify that Mr. Peterson must instead remove the entire dam to a level of 1543.5 feet or less.

92. In addition, the OSE asks that the Court affirm the District Court did not abuse its discretion and uphold the award of costs and that the matter be remanded to the District Court for clarification regarding the cost calculations.

Dated this 1ST day of June, 2011.

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IN THE SUPREME COURT

STATE OF NORTH DAKOTA

Alvin Peterson, Plaintiff/Appellant/ Cross-Appellee, v. Todd Sando, State Engineer, Office of the State Engineer, Defendant/Appellee/ Cross-Appellant.	)	**AFFIDAVIT OF SERVICE BY MAIL** **Supreme Court No. 20110083** **District Court No. 50-10-C-00181**

STATE OF NORTH DAKOTA)
) ss.
COUNTY OF BURLEIGH)

Donna J. Connor states under oath as follows:

1. I swear and affirm upon penalty of perjury that the statements made in this affidavit are true and correct.

2. I am of legal age and on the 1st day of June, 2011, I served the attached **BRIEF OF DEFENDANT/APPELLEE/CROSS-APPELLANT and SUPPLEMENTAL APPENDIX**, upon Tami Norgard, by placing a true and correct copy thereof in an envelope addressed as follows:

Tami Norgard
Attorney at Law
P.O. Box 1389
Fargo, ND 58107-1389

and depositing the same, with postage prepaid, in the United States mail at Bismarck, North Dakota.

Donna J. Connor

Subscribed and sworn to before me
this 1st day of June, 2011.
Melissa Castillo
Notary Public

MELISSA CASTILLO
Notary Public
State of North Dakota
My Commission Expires Oct. 15, 2013