IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF IOWA
WESTERN DIVISION

BOARD OF WATER WORKS TRUSTEES OF THE CITY OF DES MOINES, IOWA, Plaintiff vs. SAC COUNTY BOARD OF SUPERVISORS AS TRUSTEES OF DRAINAGE DISTRICTS 32, 42, 65, 79, 81, 83, 86, and CALHOUN COUNTY BOARD OF SUPERVISORS and SAC COUNTY BOARD OF SUPERVISORS AS JOINT TRUSTEES OF DRAINAGE DISTRICTS 2 AND 51 and BUENA VISTA COUNTY BOARD OF SUPERVISORS and SAC COUNTY BOARD OF SUPERVISORS AS JOINT TRUSTEES OF DRAINAGE DISTRICTS 19 and 26 and DRAINAGE DISTRICTS 64 and 105. Defendants.	NO.: 5:15-cv-04020 **BRIEF OF BOARD OF WATER WORKS TRUSTEES OF THE CITY OF DES MOINES, IOWA IN RESISTANCE TO DEFENDANTS' MOTION FOR PARTIAL SUMMARY JUDGMENT**

Plaintiff Board of Water Works Trustees of the City of Des Moines, Iowa ("DMWW") hereby submits its Brief in Support of its Resistance to the Defendants' Motion for Partial Summary Judgment.

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INTRODUCTION

The Board of Water Works Trustees of the City of Des Moines, Iowa ("DMWW") is a municipal water utility that serves approximately 500,000 persons in the Des Moines area, with its source water derived from the Raccoon and Des Moines Rivers.

These source waters face a severe challenge from nitrate pollution in the effluent conveyed into the rivers by government-created and operated agricultural drainage infrastructure systems, such as those of the Defendant drainage districts ("Drainage Districts"). The specific problem of nitrate from drainage has been identified and studied for many years, both as a matter of local and national concern. (Dkt. 2 ¶ 34-39). However, no effective measures to address nitrate pollution at its primary source have been taken for many reasons, including an erroneous, unreasoning, unsustainable, and ultimately shortsighted assumption that agricultural drainage infrastructure is, and must be, totally exempt from legal responsibility for its water pollution.

This assumption is exemplified by the legal position presented by Defendants' Motion for Partial Summary Judgment ("Motion"). Relying on outdated presumptions and narrow interpretations limiting their authority to express powers, and an oddly inconsistent defense of implied immunity, Drainage Districts disclaim any and all responsibility for the pollution they cause. Worse still, they deny they have any authority to address the issue. In the terms of the familiar, if outdated, adage, "The king can do no wrong", Drainage Districts say not only that they can do no wrong, but also that they can do no right when it comes to pollution. Thus, this case and the Motion, raise a critical question of the responsibility for water pollution by agricultural drainage districts in Iowa.

As this Brief will show, the unqualified assertion that Drainage Districts are immune from suit for all claims, save mandamus to enforce express ministerial duties, although supported

to an extent by case law and dicta from other times arising on different facts and arguments, cannot withstand scrutiny in the context presented here.

Reduced to simple terms, DMWW asserts Drainage Districts have the power under state law, properly construed, to address nitrate pollution and may be, and should be, held accountable when they do not.

I. STATEMENT OF FACTS

DMWW is a municipal water utility in Des Moines, Iowa organized and acting under Iowa Code Chapter 388, which provides water service regionally in the Des Moines area. (Dkt. 2 ¶ 23). It provides drinking water to approximately 500,000 Iowans both by direct service and by wholesale service to other water utilities and districts. (Dkt. 2 ¶ 69). Drainage Districts are managed or jointly managed by the Sac County Board of Supervisors, Buena Vista County Board of Supervisors, and Calhoun County Board of Supervisors as trustees under Iowa Code Chapter 468. (Dkt. 2 ¶¶ 25, 29). They are political subdivisions of the State of Iowa. (Dkt. 2 ¶ 25). Drainage Districts are organized and existing under authority of Article I, § 18 of the Iowa Constitution and Iowa Code Chapter 468. (Dkt. 2 ¶ 27).

DMWW obtains a portion of its raw water supply from the Raccoon and Des Moines Rivers by means of direct river intake, access to shallow alluvial aquifers, and surface waters recharged by the rivers. (Dkt. 2 ¶ 72). These waters have been increasingly contaminated by nitrate. (Dkt. 2 ¶¶ 45-107).

Under the Safe Drinking Water Act, 42 U.S.C. § 300f et seq. (1996), DMWW is obligated to meet the maximum contaminant level ("MCL") standards set by the Environmental Protection Agency (the "EPA") in its finished water. The MCL for nitrate is 10 mg/L. 40 C.F.R. § 141.62(b)(7) (2015); (Dkt. 2 ¶ 5). DMWW has a nitrate removal facility that it operates when

needed. (Dkt. 2 ¶¶ 92-105).

Nitrate is a soluble ion of Nitrogen (N) found in the soil. (Dkt. 2 ¶ 144). It moves out of the soil only with water. (Dkt. 2 ¶ 144). Under natural hydrologic conditions very little nitrate is discharged from groundwater to streams, but artificial subsurface drainage short-circuits the natural conditions that otherwise keep nitrate out of streams and rivers. (Dkt. 2 ¶ 146). From 1995 to 2014, nitrate concentrations in the Raccoon River at DMWW intake points exceeded the 10 mg/L standard for drinking water at least 1,636 days—24% of the time. (Dkt. 2 ¶ 99).

The nitrate problem in the watersheds from which DMWW obtains its water has been observed and studied for many years but there has been no adequate legislative, executive, or regulatory response. See (Dkt. 2 ¶¶ 45-68). From March 28, 2014, until December 30, 2014, DMWW staff drew water samples on 40 separate occasions from 72 sample site locations in drainage districts in Sac, Calhoun, and Buena Vista counties. (Dkt. 2 ¶ 137). The data collected reflects groundwater containing nitrate substantially in excess of 10 mg/L on various dates. (Dkt. 2 ¶¶ 139-140). The primary source of nitrate pollution of the Raccoon River and Des Moines River is agricultural drainage infrastructure such as that created, maintained, and operated by Drainage Districts. (Dkt. 2 ¶¶ 145-153).

II. THE STANDARDS GOVERNING THIS MOTION

A. The Motion Should Be Considered as a Motion for Judgment on the Pleadings Under Fed. R. Civ. P. 12(c)

The general standards governing summary judgment are familiar and subject to rote recital. As explained, for example, in Iowa, Chicago & Eastern Railroad Corporation v. Pay Load, Inc., 348 F. Supp. 2d 1045, 1050-51 (N.D. Iowa 2004), "the trial judge's function at the summary judgment stage of the proceedings is not to weigh the evidence and determine the truth of the matter, but to determine whether there are genuine issues for trial."

However, the Motion, although titled as a motion for partial judgment, is actually of a fundamentally different character because no effort is made to support the Motion by any matter of record beyond the pleadings.[1] In effect it is a motion under Fed. R. Civ. P. 12(c) for judgment on the pleadings. Thus, it is essentially a motion to dismiss. N. Ark. Med. Ctr. v. Barrett, 962 F.2d 780, 784 (8th Cir. 1992) ("[A] summary judgment motion filed solely on the basis of pleadings is the functional equivalent of a dismissal motion."); see also Blum v. Morgan Guar. Trust Co. of N.Y., 709 F.2d 1463, 1466 (11th Cir. 1983); Marvasi v. Shorty, 70 F.R.D. 14, 17 (E.D. Pa. 1976); Easley v. Univ. of Mich. Bd. of Regents, 632 F. Supp. 1539, 1541-42 (E.D. Mich. 1986) aff'd, 906 F.2d 1143 (6th Cir. 1990).

The difference is important because a properly supported motion under Fed. R. Civ. P. 56 imposes responsive factual burdens on the non-moving party, whereas Fed. R. Civ. P. 12(c) does not. As explained in Waldron v. Boeing Co., 388 F.3d 591, 593 (8th Cir. 2004):

> A motion for judgment on the pleadings will be granted "only where the moving party has clearly established that no material issue of fact remains and the moving party is entitled to judgment as a matter of law." [citation omitted] In our evaluation of the motion, we accept all facts pled by the nonmoving party as true and draw all reasonable inferences from the facts in favor of the nonmovant.

See also Elnashar v. U.S. Dept. of Justice, 446 F.3d 792, 794 (8th Cir. 2006); cf. Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009); Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570 (2007). Factual burden shifting under Fed. R. Civ. P. 56 does not apply, and DMWW is entitled to the presumption, for the purposes of the Motion, that its well pleaded facts are true.

B. The Determination of Iowa Law

The Motion here calls into question points of Iowa law, which Drainage Districts contend are completely settled by the case law they cite in support of their Motion. (Dkt. 34-1 at 4).

[1] The Drainage Districts' Supporting Statement of Material Facts not in dispute is limited to two "facts" concerning the identity and character of the parties as alleged in the Complaint and admitted in the Answer. (Dkt. 34-2).

However, Drainage Districts overstate the scope and breadth of the doctrines of non-suability that they rely upon here, and the implied immunity doctrine that underlays their Motion should not be applied to these facts without critical scrutiny.

Of course this Court takes Iowa law as it finds it. Blankenship v. USA Truck, Inc., 601 F.3d 852, 856 (8th Cir. 2010) ("[W]e are obligated to apply governing precedent from the Arkansas Supreme Court."). However, this is not to say that the Court cannot find a new rule in a new case or consider arguments never yet considered by Iowa courts. Id. ("When there is no state supreme court case directly on point, our role is to predict how the state supreme court would rule if faced with the [same issue] before us." (internal quotations omitted)).

Indeed, the Iowa law governing this case includes a rule that Iowa law will change when circumstances and conditions change. Koenig v. Koenig, 766 N.W.2d 635, 645 (Iowa 2009) (quoting Alexander v. Med. Assocs. Clinic, 646 N.W.2d 74, 84 (Iowa 2002) (Lavorato, C.J., specially concurring)) ("'When the reasons for the rule disappear, the rule ought to disappear.'"); see also Funk v. U.S., 290 U.S. 371, 381-382 (1933). Iowa courts have never hesitated to reexamine and sometimes change a rule of law "borne of a different time, a product of a different culture, and utilized by a legal system far removed from today's realities." Koenig, 766 N.W.2d at 645; see also Bierkamp v. Rogers, 293 N.W.2d 577, 585 (Iowa 1980) (in which the Iowa Supreme Court held the Iowa guest statute unconstitutional despite having upheld it just a few years previously in Keasling v. Thompson, 217 N.W.2d 687 (Iowa 1974)).

This rule of mutability applies here. As will be explained in greater detail below, the immunity rule advanced by Drainage Districts was born of different era, and although it has continued to be routinely applied in modern times, it has never been critically reexamined. No Iowa appellate court has, to DMWW's knowledge, yet heard a water pollution claim against an

Iowa drainage district, nor have Iowa courts ever considered the county home rule or public health issues DMWW raises in this case.

The nature of the DMWW challenge to the existing orthodoxies of drainage district law also explains why a judgment on the pleadings, such as that presented here, would be premature. The basis and rationale for the DMWW view that there is a new day requiring a new rule of liability and responsibility for drainage districts concerning pollution is intensely factual. DMWW understands that its position will not be lightly adopted by the Court. DMWW urges the Court to take, weigh and consider the evidence before deciding on the applicability and scope of any immunity doctrine to be applied here.[2]

III. IMMUNITY FROM SUIT SHOULD NOT APPLY

The Motion seeks dismissal without trial of Counts III through Count X based on an Iowa doctrine of immunity exemplified by Fisher v. Dallas County, 369 N.W.2d 426 (Iowa 1985), which Drainage Districts contend grants them unqualified immunity from suit of every kind, other than mandamus to compel a non-discretionary duty.

Drainage Districts raise two arguments in support of their motion. (Dkt. 34-1 at 4). First, Drainage Districts overstate the scope of the Iowa jurisprudence embodied by Fisher when they claim that Drainage Districts may only be sued in mandamus.

Second, Drainage Districts assert that their implied immunity shields them from damages claims, but Drainage Districts overlook issues that have not yet been considered by any Iowa appellate court. Therefore, such implied immunity is ripe for reconsideration on the special facts and circumstances of this case. In particular, the entire rationale of implied immunity, which has

[2] DMWW understands that the Court could certify questions of Iowa law to the Iowa Supreme Court pursuant to Iowa Code 684A.1 (2015). However, DMWW requests that it be done, if need be, after trial but before deciding the substantive issues as the Court did in Hagen v. Siouxland Obstetrics & Gynecology, P.C., 964 F. Supp. 2d 951 (N.D. Iowa 2013).

always been based on a view of limited powers leading to limited responsibilities, has been undercut by the grant of home rule to county entities. Moreover, the essential underlying premise of Iowa drainage law has, since the nineteenth century, been the supposed promotion of public health and welfare, which the law and the cases came to indulge as an un-rebuttable presumption. However, this presumption cannot be sustained in view of the harmful public health impacts resulting from nitrate pollution of the Raccoon River by Drainage Districts. (Dkt. 2 ¶¶ 6-7, 9, 12, 157-158).

Thus, Drainage Districts' immunity should have no applicability in this case because: (A) the history of drainage district immunity does not support its application to these facts; (B) drainage districts are subject to equitable remedies; and (C) Drainage Districts' claim of immunity is inconsistent with modern legal principles.

A. History Does Not Support Application of Immunity to This Case

The doctrine of immunity sought to be applied here is an artifact of a different scientific, economic, legislative, and judicial era. To understand this it is necessary first to understand the genesis of the doctrine. Indeed, to borrow the memorable phrase of Justice Holmes from that era, "Upon this point a page of history is worth a volume of logic." N.Y. Trust Co. v. Eisner, 256 U.S. 345, 349 (1921). Hence, DMWW will begin with a review of relevant history.

The history of Iowa agricultural drainage goes back to the nineteenth century. See (Dkt. 2 ¶¶ 109-115). As noted in Polk County Drainage Dist. Four v. Iowa Natural Resources Council, 377 N.W.2d 236, 241 (Iowa 1985), "the General Assembly enacted our drainage legislation about a century ago, mainly to render wetlands tillable for agricultural purposes. Iowa Code Title X, ch. 2 (1873)."

Originally grouped in Title X of the Iowa Code with other development enterprises

described in the argot of the times as "internal improvements", Iowa law has from earliest times tied construction of public drainage infrastructure to findings of "public health, convenience and welfare." See, e.g., Iowa Code § 1207 (1873).

Later, the idea of distinct drainage districts took hold, and in 1904 the 30th Regular Session of the Iowa General Assembly provided a detailed scheme for the formation and financing of drainage districts. 30 G.A. Chs. 67 & 68 (1904). Incorporating the public health rationale, the formation of drainage districts was to be predicated on findings to be made by County boards of supervisors that such districts would be "of public utility or conducive to the public health, convenience and welfare, and the drainage of surface waters from surface lands shall be considered a public benefit and conducive to the public health, convenience, utility and welfare." 30 G.A. Ch 68, §1, codified at § 1989a1, Iowa Code Supplement (1907).

One of the purposes of the new scheme was to overcome constitutional infirmities in the methods used to finance the improvements. See Beebe v. Magoun, 97 N.W. 986, 987 (Iowa 1904), as explained in Canal Const. Co. v. Woodbury Cnty., 121 N.W. 556 (Iowa 1909).

A subsequent challenge to the constitutionality of the legislative direction for the formation of drainage districts was rejected by the Iowa Supreme Court in 1905 with the Court recognizing drainage district creation as a proper exercise of legislative power delegated to the boards of supervisors in a case described as "peculiarly within the jurisdiction of a court of equity." Sisson v. Bd. of Sup'rs of Buena Vista Cnty., 104 N.W. 454, 461 (Iowa 1905). Lest there be any doubt as to the matter, in 1908, Art. I, § 18 of the Iowa Constitution, governing eminent domain, was amended by adding a specific exception and authorization for drainage districts, so that the entire section then read, and still reads, in relevant part:

> The general assembly, however, may pass laws permitting the owners of lands to construct drains, ditches, and levees for agricultural, sanitary or mining purposes

> across the lands of others, and provide for the organization of drainage districts, vest the proper authorities with power to construct and maintain levees, drains and ditches and to keep in repair all drains, ditches, and levees heretofore constructed under the laws of the state, by special assessments upon the property benefited thereby. The general assembly may provide by law for the condemnation of such real estate as shall be necessary for the construction and maintenance of such drains, ditches and levees, and prescribe the method of making such condemnation.

Iowa Const. Art. I, § 18.

Later cases characterized the Sisson rule as based on the exercise of the "police power." Mason City & Ft. D.R. Co. v. Bd. of Sup'rs of Wright Cnty., 121 N.W. 39, 40 (Iowa 1909); Hatcher v. Bd. of Sup'rs of Greene Cnty., 145 N.W. 12, 13 (Iowa 1914). This characterization was important because it allowed the court to deny compensation for various kinds of resulting injury. As explained in Board of Sup'rs of Wright County*:*

> Drainage within the contemplation of the above statute is for public use, convenience, and welfare and, this being so, the making of the improvement is within the police power of the state, and injury such as here claimed, being merely incidental thereto, cannot be regarded as the taking of property within the contemplation of the Constitution.

121 N.W. at 40 (internal citation omitted).

The "shall be considered a public benefit and conducive to public health" formula was restated as a presumption in 1923 by 40 Ex GA Ch. 126 § 1. This presumption was codified at Iowa Code § 7422 (1924) and remains in the statute today at Iowa Code §468.2 (2015). This presumption has been a fundamental basis for the law governing drainage, but has remained unexamined and unchallenged for over a century. It is time to reexamine that presumption as to water quality impacts, and this case presents the opportunity.

In addition to the presumption based on public health and welfare there was an additional thread from which the idea of immunity evolved based on the nature of drainage and drainage districts, their powers, and the relationship to boards of supervisors. The earliest case seems to be

Dashner v. Mills County, 55 N.W. 468, 469 (Iowa 1893), which denied money damages to a landowner harmed by a County's failure to maintain a ditch based on the idea that ditches were not a general obligation of the county. Clary v. Woodbury County, 113 N.W. 330, 332-33 (Iowa 1907) reflects the early view of claims against drainage districts. In Clary, the Court found no responsibility for downstream "overflow" (flooding) outside the county because (1) the drainage district involved was not an entity, and (2) that the board of supervisors had nearly unlimited power to create drainage districts, but only limited powers to implement them. 113 N.W. 330.

From Clary forward there are numerous cases denying relief in tort and for monetary claims generally. See, e.g., Canal Const. Co., 121 N.W. 556; Miller v. Monona County, 294 N.W. 308, 310-11 (Iowa 1940); Fisher, 369 N.W.2d 426; Gard v. Little Sioux Intercounty Drainage Dist. of Monona and Harrison Counties, 521 N.W.2d 696 (Iowa 1994); Chicago Cent. & Pac. R. Co. v. Calhoun Cnty. Bd. of Sup'rs, 816 N.W.2d 367 (Iowa 2012).

The gravamen of the case law that emerged at the beginning of the twentieth century, and remained essentially unchanged ever since, was a judicially created doctrine of immunity from monetary claims, not based on any explicit statutory immunity and not based on the doctrine of sovereign immunity, but rather based on concepts of (1) limited existence and (2) limited powers in pursuit of a presumed benefit to public health and welfare. See Calhoun Cnty. Bd. of Sup'rs, 816 N.W.2d at 374 ("A drainage district's immunity is not based on the doctrine of sovereign immunity; instead, it flows from the fact that a drainage district is an entity with 'special and limited powers and duties conferred by the Iowa Constitution.'") (internal citation omitted)).

Despite the implied immunity for tort liability, the idea that drainage districts had no corporate existence had in fact been previously abandoned to obtain funding for IPERS and the state unemployment fund. In State ex rel. Iowa Emp't Sec. Comm'n v. Des Moines Cnty., 149

N.W.2d 288, 291 (Iowa 1967) the Court held:

> Counties are political subdivisions of the state. And an organized drainage district is a political subdivision of the county in which it is located, its purpose being to aid in the governmental functions of the county. It is a legally identifiable political instrumentality.
>
> We conclude drainage districts come within the classification of a political subdivision or instrumentality of the state, or one of its political subdivisions or instrumentalities.

(internal citation omitted).

The rule of immunity from damages persisted unexamined, and unchanged, and even survived the enactment of a municipal tort claims act that would have seemed by its text to cover all "political subdivisions" including drainage districts. Fisher carved out a judicially implied exception to the otherwise quite comprehensive tort reform enacted in 1971, now codified at Iowa Code Ch. 670 (then codified at Iowa Code, Ch. 613A). 369 N.W.2d 426.

This history demonstrates that implied immunity has survived through repetition rather than critical analysis.

B. Equitable Remedies May be Obtained Against Drainage Districts

Despite Drainage Districts' argument to the contrary, Iowa courts have entertained suits in equity in various drainage cases. Indeed, as early as 1905, the court entertained a challenge in equity, on constitutional grounds, to a discretionary decision of a Board of Supervisors to authorize the formation of a drainage system. See Sisson, 104 N.W. at 461; see also Voogd v. Joint Drainage Dist. No. 3-11, 188 N.W.2d 387 (Iowa 1971) (sustaining collateral attack on a drainage district assessment determined to be void by reason of defective procedures and issuing injunctive relief with respect thereto); Reed v. Muscatine Louisa Drainage Dist. No. 13, 263 N.W.2d 548, 551 (Iowa 1978) (affirming decree setting aside deed to drainage district property sold without proper compliance with Iowa Code §332.13(2)); Polk Cnty. Drainage Dist. Four,

377 N.W.2d at 241 (holding drainage district liable to state administrative proceedings.)

These cases make plain that drainage districts are not totally immune from equitable claims in a proper case, and must generally follow the law. As explained in Sedore v. Board of Trustees of Streeby Drainage District No. 1 of Wapello and Davis Counties, 525 N.W.2d 432, 433 (Iowa App. 1994) a suit may be heard in order "to compel, complete, or correct the performance of a duty or the exercise of power by those acting on behalf of" a drainage district.

Thus, since the Motion relies entirely on total immunity from any suit, except for claims in mandamus, it greatly overshoots the mark as applied to the claims made for equitable relief. For example, a drainage district can be subject to equitable relief when it disposes of its property in violation of the statutory procedure governing sales by counties. Voogd, 188 N.W.2d 387; Reed, 263 N.W.2d at 551. Surely drainage districts are likewise subject to the Iowa provision which defines the following act as a statutory nuisance:

> The corrupting or rendering unwholesome or impure the water of any river, stream, or pond, or unlawfully diverting the same from its natural course or state, to the injury or prejudice of others.

Iowa Code § 657.2(4).

It is important to note that the Motion does not address the substantive "merits" of Counts III through X. Rather it indiscriminately attacks them all—generally saying no relief save mandamus may be granted. This being demonstrably false based on the above authorities, it should be clear that no basis for dismissal of any of the Counts is shown, at least as to claims for equitable relief, even if the defense of immunity from damages otherwise holds.

C. Unqualified Immunity Cannot Withstand Critical Analysis

DMWW cannot deny drainage district have enjoyed a judicially created immunity from damages claims since they were created. Nevertheless, there is good reason to restrict the

applicability of such immunity to defeat DMWW's claims for damages here for three reason: (1) the rationale for drainage district implied immunity that is based on limited powers cannot withstand scrutiny in view of the expansion of powers effected by the County Home Rule Amendment to the Iowa Constitution; (2) immunity based on a presumption of promotion of public health cannot survive as to the claims of impairment of public health made here; and (3) the denial of constitutional rights inherent in the doctrine of immunity cannot withstand scrutiny on the facts here.

Each issue will be separately discussed, but before proceeding to such discussions DMWW notes the maxim that when the reason for a common law rule ends, so should the rule. Koenig, 766 N.W.2d at 645; Utility Air Regulatory Group v. E.P.A., --- U.S. ---, 134 S.Ct. 2427, 2452 (U.S. 2014) (Breyer., J Concurring); Funk, 290 U.S. at 385.

1. County home rule undermines the immunity rationale.

The implied immunity doctrine upon which the Motion depends, (Dkt. 34-1 at 4), is predicated upon the concept that drainage districts only have the limited powers expressly granted by statute. Fisher, 369 N.W.2d at 429 ("The limited nature of a drainage district's purposes and powers are, therefore, reflected in the limited circumstances in which a drainage district is subject to suit.")

Although, this concept has been carried forward from the earliest case law concerning drainage systems, it is impossible to square these cases today with the grant of county home rule in 1978. Iowa Const. Art. III, § 39A. It is particularly hard to reconcile the rationale set forth in Fisher with the text of § 39A:

> The proposition or rule of law that a county or joint county-municipal corporation government possesses and can exercise only those powers granted in express words *is not a part of the law of this state*.

Iowa Const. Art. III, § 39A (emphasis added). The effect of § 39A was to abrogate the previously entrenched "Dillon Rule" first announced in City of Clinton v. Cedar Rapids & M.R.R. Co., 24 Iowa 455, 475 (1868). Cf. Berent v. City of Iowa City, 738 N.W.2d 193, 196 (Iowa 2007) (The Dillon Rule's "tight legislative grip was relaxed, to some extent, in 1968, when Iowa enacted a home rule amendment to the Iowa Constitution" (internal citations omitted)).

The amendment to the Iowa Constitution granting counties home rule authority, and a corresponding amendment for municipalities, Iowa Const. Art. III, § 38A, mean that political subdivisions in Iowa have "self-executing" authority. Survey of Iowa Law: Implementation of Constitutional Home Rule in Iowa, 22 Drake L. Rev. 294, 304 (1973). Political subdivision's "self-executing" authority is a change from the past state of the law:

> The grant of home rule power combined with a repudiation of Dillon's Rule would appear to mean that cities were given the power to act in certain areas without the need for statutory grants of authority from the legislature.

Id.; Polk Cnty. Bd. of Sup'rs v. Polk Commonwealth Charter Com'n, 522 N.W.2d 783, 791 (Iowa 1994) ("The effect of the Dillon Rule was to, 'render cities [and counties] incapacitated in numberless matters of vital importance to local governments.' . . . The legislature and the electors responded by adding 'home rule' amendments to the Iowa Constitution in 1968 and 1978 which removed the Dillon doctrine from Iowa law." (internal quotations omitted)). The end of the Dillon Rule means that political subdivisions should be presumed to have authority to act, whereas under the Dillon Rule the presumption was that political subdivisions could not act. Today, political subdivisions enjoy freedom to act outside the boundaries of their statutes unless circumscribed[3] by the limited conditions contained in Iowa Const. Art. III, §§ 38A, 39A.

[3] There are narrow limitations on the exercise of political subdivision authority. Political subdivisions do not have authority to "levy any tax unless expressly authorized by the general assembly" and cannot exercise power in a way

This freedom and the existence of expanded powers is completely at odds with the rationale of the immunity doctrine based on limited powers. Thus, implied immunity should be reexamined and modified to fit the current case.

Drainage districts are political subdivisions of counties governed by a board of supervisors. See, e.g., Voogd, 188 N.W.2d at 393 ("[D]rainage districts are political subdivisions of the counties"); State ex rel. Iowa, 149 N.W.2d at 291. ("[A]n organized drainage district is a political subdivision of the county in which it is located, its purpose being to aid in the governmental functions of the county. It is a legally identifiable political instrumentality."). The county boards of supervisors have authority to establish and construct drainage districts and to control and supervise the infrastructure once a drainage district has been established. Iowa Code §§ 468.1, 500. As political subdivisions of the county governed by the county board of supervisors, home rule extends to drainage districts. Therefore, the appropriate inquiry is whether DMWW's relief is within the purview of local affairs and government and is consistent with the laws of the general assembly under home rule analysis. See, e.g., Goodell, 575 N.W.2d at 492; 1998 Iowa Op. Att'y Gen. 98-7-6, 1998 WL 698398 (July 28, 1998) (Discussing whether a proposed county ordinance regulating manure lines crossing drainage districts represents a valid exercise of drainage district authority under Iowa Const., Art. III, § 39A).

Although Drainage Districts argue their "powers are extremely limited," (Dkt. 34-1 at 3), and that they cannot control other things such as "landowners use or management of their properties," (Dkt. 34-1 at 3), these assertions overstate the case. Drainage districts not only have

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that is "inconsistent with the laws of the general assembly . . . ." Iowa Const. Art. III, §§ 38A, 39A. An action is inconsistent with Iowa law when it (1) permits an act prohibited by statute, (2) prohibits an act permitted by statute, or (3) invades a regulatory area the state has reserved for itself. Goodell v. Humboldt County, 575 N.W.2d 486, 492-93 (Iowa 1998); see also, Iowa Code § 331.301(4) ("An exercise of county power is not inconsistent with state law unless it is irreconcilable with state law."); Iowa Code § 331.301(6)(a) ("A county . . . may set standards and requirements which are higher or more stringent than those imposed by state law . . . ."); Iowa Code § 364.3(3)(a) ("A city . . . may set standards and requirements which are higher or more stringent than those imposed by state law . . . .").

various express powers, see, e.g., Iowa Code § 468.150 (authority to recoup expenses for abating nuisance on private lots); Iowa Code § 468.130 (authority to discharge with City, treated sewage); Iowa Code § 468.128 (authority to construct flood and erosion control devices and acquire lands), but also have the benefit of home rule to take other steps to reduce pollution. See, e.g., 1980 Iowa Op. Att'y Gen. 631, Op. No. 80-3-13, 1980 WL 25947 (March 13, 1980) (A county board of supervisors managing a drainage district may act upon the authority granted county governments through the County Home Rule Amendment, Iowa Const. Article III, § 39A); 1979 Iowa Op. Att'y. Gen 54, Op. No. 79-4-7, 1979 WL 20913 (April 6, 1979) (Under home rule, a drainage district governed by a board of supervisors could transfer funds to form a common revolving fund without enumerated authority under the Iowa Code).

No Iowa case dealing with drainage districts makes any mention of Iowa Const. Art. III, § 39A. Fisher cited Iowa Const. Art. I, § 18, but did not address county home rule because the parties did not raise Iowa Const. Art. III, § 39A. See Fisher, 369 N.W.2d 426. Given the central role of limited powers in supporting the doctrine of immunity, this is a significant omission.

When the reason for a rule ends so should the rule. A central pillar of implied immunity was the limited authority of drainage districts as political subdivisions. The limited powers rationale of the immunity rule has been largely, if not entirely, undermined by home rule.

2. The facts of this case rebut the legislative presumption that drainage districts promote public health, and therefore the presumption cannot serve as a basis for implied immunity.

The judicially created doctrine of implied immunity is also fundamentally intertwined with the idea that drainage promotes public health, but no court has analyzed the implied immunity doctrine when there is a compelling public health interest at odds with the drainage districts' position. Implied immunity should not be applied in a case such as this where a

detriment to public health exceeds the legislatively determined public health benefits.

There are, to be sure, cases from earliest times that address flow effects of drainage. Se See e.g. Miller, 294 N.W. at 310-11. DMWW's research has revealed no Iowa case where the public health impact of pollution from drainage district activity has been considered, and it believes the precise issue here is one of first impression.

This does not mean that no Iowa case has considered liability for river pollution. It is quite interesting to compare the holding in Miller to the holding of another case, Vogt v. City of Grinnell, 110 N.W. 603, 603 (Iowa 1907). In Miller the court held that a drainage district could not create a nuisance, "while operating within the ambit of powers constitutionally delegated."[4] Miller, 294 N.W. at 311. However in Vogt the court held a city liable for pollution. Vogt, 110 N.W. at 603; see also, Boyd v. City of Oskaloosa, 161 N.W. 491 (Iowa 1917). What was the basis for the difference in Miller and Vogt? DMWW submits it was the distinction between the overflow impacts considered in Miller versus the sanitation issues in Vogt. These cases suggest that when the immunity doctrine was being developed there was a sense that flow issues were an acceptable price of progress in the exercise of police powers, and there was no recognition of possible pollution effects of agricultural drainage.

It should be clear that today's public health concerns, go to the heart of, and negate the basis of, the implied immunity rule when considering a pollution case. The effects of pollution created by drainage districts can no longer be ignored.

This analysis should be accepted despite the health and public welfare "presumption" set forth at Iowa Code § 468.2 for several reasons. Iowa Code § 468.2(1) ("The drainage of surface

[4] There is good reason to question the rule of total immunity from nuisance claims as announced in Miller in view of the rejection in Gacke v. Pork Xtra, L.L.C., 684 N.W.2d 168 (Iowa 2004) on constitutional grounds of blanket statutory immunity from nuisance claims for animal feeding facilities.

waters from agricultural lands and all other lands, including state-owned lakes and wetlands, or the protection of such lands from overflow shall be presumed to be a public benefit and conducive to the public health, convenience, and welfare.").

First, the statutory presumption here dates back to 1873, or 1924 at the latest. Since then there has been a radical change in our scientific understanding and in the nature of the impact of drainage. (Dkt. 2 ¶¶ 32-44). There has also been a shift in our concern for environmental impacts. Polk County Drainage Dist. Four, 377 N.W.2d at 241 (noting the enactment of water legislation 75 years after the enactment of drainage district laws). There has also been a fundamental shift in the balancing of property and human rights. Alexander v. Medical Associates Clinic, 646 N.W.2d 74, 84 (Iowa 2002) ("A final reason for abolishing the distinction [in favor of property owners] is that our modern social mores and humanitarian values place more importance on human life than on property.").

Second, the legislative presumption in § 468.2(1) is an inference not a fact. Ezzard v. U.S., 7 F.2d 808, 810 (8th Cir. 1925) ("A presumption is an inference as to the existence of a fact not actually known, arising from its usual connection with another which is known.").

Finally, a presumption is generally rebuttable. Fed R. Evid. 301; Fresh v. Gilson, 41 U.S. 327, 331 (1842) ("[P]resumptions . . . must give place, when in conflict with clear, distinct and convincing proof."); Western & A.R.R. v. Henderson, 279 U.S. 639, 642 (1929) ("Legislative fiat may not take the place of fact in the judicial determination of issues involving life, liberty, or property.")

This is not to say that the public health presumption of § 468.2 has no meaning or effect. To the contrary the presumption has been a basis for the immunity doctrine founded on the exercise of the police power. However, the immunity doctrine should not apply in a case where

the presumption is rebutted because a threat to public health is shown. DMWW's claims rebut the presumption that drainage is only a benefit to public health. The police power can justify many things, but the police power has limits. Gacke, 684 N.W.2d at 176. One of these limits must surely be that the police power does not immunize conduct detrimental to public health.

However, this Court need not limit Iowa precedent beyond the boundaries of DMWW's claims. Certainly a doctrine allowing damages in matters affecting public health may be fashioned without overturning the mass of precedent that might remain in other kinds of cases.

3. Unqualified immunity is unconstitutional.

Denying DMWW the right to damage claims, (Dkt. 2 Counts III-VII), also violates the Iowa and United States Constitutions because immunity (a) denies DMWW its Iowa and federal equal protection rights as applied to this case, (b) denies DMWW its Iowa and federal due process rights as applied to this case, (c) denies DMWW its Iowa inalienable rights as applied to this case, and (d) cannot withstand claims asserted pursuant 42 U.S.C. § 1983.

a. Immunity from claims denies equal protection as applied to this case.

The rule of immunity urged by Drainage Districts creates a classification scheme of a kind that has often been the subject of scrutiny on equal protection grounds—that is between different classes of tort victims. See, e.g., Bierkamp, 293 N.W.2d at 585 (automobile guests versus non-guests); Miller v. Boone Cnty. Hosp., 394 N.W.2d 776, 776-77 (Iowa 1986) (restrictive limitation provisions in government subdivision tort law). The question here is whether it is proper to single out the victims of Drainage Districts' torts from all other tort victims, or perhaps all other victims of torts by governmental subdivisions.

The cases cited above are an application of standard equal protection analysis under of the Iowa Const. Art. I, § 6 and Art. III, § 30, and the Fourteenth Amendment to the United States

Constitution. The standards for such analysis are well settled generally and involve the same general framework of either strict or rational basis scrutiny under both the Iowa and United Sates Constitutions. See, e.g., Hawkeye Commodity Promotions, Inc. v. Miller, 432 F. Supp. 2d 822, 858-59 (N.D. Iowa 2006) affirmed 486 F.3d 430 (8th Cir. 2007); Salcido ex rel. Gilliland v. Woodbury Cnty., Iowa, 66 F. Supp. 2d 1035, 1049-51 (N.D. Iowa 1999). However, as explained in Johnson v. University of Iowa, 408 F. Supp. 2d 728, 749-51 (S.D. Iowa 2004) affirmed 431 F.3d 325 (8th Cir 2005):

> Iowa rational basis analysis is more searching than federal equal protection analysis in evaluating the relationship between the proposed purpose and the legislation as a means to achieve that purpose.

see, also, Bierkamp, 293 N.W.2d 577; Racing Ass'n of Cent. Iowa v. Fitzgerald, 675 N.W.2d 1 (Iowa 2004), cert. denied 541 U.S. 1086 (2004), on remand from Fitzgerald v. Racing Ass'n of Central Iowa, 539 U.S. 103 (2003).

The Iowa Supreme Court has upheld drainage district immunity in the face of an equal protection challenge using rational basis review. Gard, 521 N.W.2d at 698-699 ("Suits have been allowed against a drainage district 'only to compel, complete, or correct the performance of a duty or the exercise of a power by those acting on behalf of a drainage district.' Fisher, 369 N.W.2d at 429. Because of the limited nature of a drainage district's purposes and powers, there is a rational basis for the classification.").

Gard applied a traditional equal protection analysis and upheld the immunity doctrine based on a terse finding of rational basis. The Court concluded that the special character traditionally granted to drainage districts by the Court was a rational basis for the special treatment of immunity. However, to say that special entities may be granted special immunities certainly does not preclude a different analysis in this case under either Constitution. This is

particularly true in view of the changes wrought by county home rule that the Court did not consider in Gard and the public health considerations presented here. Simply stated, if the powers of drainage districts are not as limited as the court thought, what is the rational basis for the classification? Moreover, if the powers of a drainage district may be seen as extending to measures to curb pollution, what is the basis for immunity from damages for pollution?

In Boone Cnty. Hosp., the Iowa Supreme Court overruled its prior equal protection analysis as set forth in Lunday v. Vogelmann, 213 N.W.2d 904 (Iowa 1973), noting the "continual reexamination of rationales and principles that is necessary in constitutional decision making." Boone Cnty. Hosp., 394 N.W.2d at 780-81 (quoting Hunter v. North Mason High Sch., 539 P.2d 845, 851 (Wash. 1975)). DMWW's claims in this case call for reexamination of the basis for unqualified immunity.

An otherwise rational basis becomes irrational when it creates irrational results. DMWW submits that the immunity doctrine as applied to this case is irrational for numerous reasons: (1) a false presumption of promotion of public health; (2) a false understanding of the authority of drainage districts; (3) a failure to consider the harmful environmental consequences of unregulated drainage; (4) an allowance, indeed a promotion, of the export of negative environmental impacts downstream; (5) the treatment of other polluters, including other municipal and private entities unfavorably while protecting the largest polluters from responsibility; (6) a protection of narrow interests at the cost of perpetuating great public injury; and (7) a total exculpation of responsibility, not narrowly tailored to achieve its ends.

The precise issue is one of simple arithmetic. The Iowa Nutrient Reduction Strategy, in line with national goals, seeks a 45% reduction of nitrate and other nutrient pollution. (Dkt. 2 ¶¶ 39, 40). At the same time it estimates that 8% of nitrate comes from currently regulated sources

such as sewer systems and 92% come from unregulated sources, namely agriculture, and primarily drainage. Dkt. 2 ¶¶ 39, 40). It strains rationality to believe that 8% of the problem can create 45% of the solution. In that context, the irrationality of immunity for drainage is patent, and at the very least these issues require a factual examination.

b. Immunity from claims denies due process as applied to this case.

Implied immunity of the drainage districts would, as applied here, also deprive DMWW of due process in several respects under Iowa Const. Art. I, § 9 and the Fourteenth Amendment. Due process analysis under both Constitutions is similar. The Iowa Supreme Court explained:

> The United States Supreme Court has identified two separate but related due process concepts. The first, generally referred to as substantive due process, prevents government from "interfer[ing] with rights 'implicit in the concept of ordered liberty.'" . . . The second concept is procedural due process. Procedural due process requires a government action impinging upon a protected interest to be implemented in a fair manner.
>
> With respect to substantive due process, the United States Supreme Court has developed a two-step analytical process. . . . The first step is to identify the nature of the individual interest involved. If the interest is found to be fundamental, strict scrutiny applies. . . . Alternatively, if the interest is not fundamental, the government action is subject to a rational basis test. Under the rational basis test, the government must have a legitimate interest in the regulation and there must be a reasonable fit between the government interest and the means utilized to advance that interest.

City of Sioux City v. Jacobsma, 862 N.W.2d 335, 339-41 (Iowa 2015) (internal citations and quotations omitted); see also, Hawkeye Commodity Promotions, 432 F. Supp. 2d at 858-59.

The immunity defense here violates substantive due process, as applied to clean water interests, by depriving all those downstream, including DMWW, of any effective redress for wrongs that would otherwise be actionable. "Ordered liberty" surely demands that a fair means of reconciliation of conflicts involving vital water resources be available. Unlimited, unqualified immunity denies that opportunity here and thus denies due process.

Applying the first step in the analytical process is relatively straight forward. The interest at stake is reasonably clean water. See Section V, infra at 42. This is an important interest, but not a fundamental right except to the extent it is protected by Fifth and Fourteenth Amendments and the Iowa Constitution.

The next step is more complex. Is there a legitimate government interest and a reasonable fit between the interest and the means employed? DMWW understand there is a legitimate interest in creating drainage infrastructure to promote agriculture, but an unqualified immunity from claims is not a reasonable fit to achieve the purpose for all the reasons set forth in the equal protection argument above. Section III(C)(3)(a), supra at 21.

Immunity is also not a reasonable fit to the end sought to be achieved in other ways. If the end is promoting agriculture, then there must be a more reasonably fitting means than an immunity that absolves drainage districts from responsibility for pollution. The law sometime recognizes absolute immunity for government officials in certain circumstances, but for others "qualified immunity represents the norm." Harlow v. Fitzgerald, 457 U.S. 800, 807 (1982).

In the long run the concept of unqualified immunity as applied to pollution is self-defeating because it allows for an unsustainable condition to exist and to grow without check or limit. Drainage has been encouraged by the immunity doctrine to export its pollution costs downstream without concern for consequences. Indeed it might be argued by those who take a limited view of the authority of drainage districts that immunity means drainage districts are not permitted to incur the costs of curbing pollution. This must end if the institution of drainage as a promoter of agriculture is to continue.

The conflict between water pollution and a safe water supply is as old as civilization itself, and the need for clean water will inevitably take precedence over the convenience of

unrestrained pollution. See Eugene Davis, Water Rights in Iowa, 41 Iowa Law Rev. 216, 225-26 (1955-1956) ("Davis") (explaining that "artificial" uses of water are subordinate to "natural" uses). Cities have been, and are required to, control and treat sewage and have never been immune from pollution claims. Vogt, 110 N.W. at 603. Cities have thrived under these conditions. Drainage Districts can do the same.

The unqualified immunity doctrine also fails the procedural due process test because of its foundation in a false presumption of promotion of public health. As stated Western & A.R.R.:

> A statute creating a presumption that is arbitrary, or that operates to deny a fair opportunity to repel it, violates the due process clause of the Fourteenth Amendment. Legislative fiat may not take the place of fact in the judicial determination of issues involving life, liberty, or property.

279 U.S. at 642 (internal citations omitted); see also, Hensler v. City of Davenport, 790 N.W.2d 569, 586-87 (Iowa 2010). Given that the presumption of unqualified promotion of public health is false, it necessarily follows that immunity based on such presumption violates due process.

c. Immunity from claims denies inalienable rights as applied to this case.

The Iowa Constitution provides a protection, not mirrored in the United States Constitution, for "inalienable rights." Iowa Const. Art. I, § 1. In general terms it embodies standards not dissimilar to equal protection and due process. Jacobsma, 862 N.W.2d at 352. However, the Inalienable Rights Clause has been said to not be "'a mere glittering generality without substance or meaning.'" Gacke, 684 N.W.2d at 176 (internal quotations omitted). Certainly the reasons negating a rational basis for denial of equal protection and lack of due process as argued above apply with a least the same force in an inalienable rights analysis.

Furthermore the doctrine has been applied by the Iowa Supreme Court in a circumstance conceptually similar to that here. In Gacke the court considered a statutory immunity from nuisance claims in favor of animal feeding facilities and held it that it "constitute[d] an

unreasonable exercise of the state's police power and therefore violate[d] article I, section 1 of the Iowa Constitution." Id. at 171.

Similarly here, the unqualified immunity of drainage districts from pollution liability is likewise an unreasonable exercise of police power and thus invalid under Iowa Const. Art. I, § 1.

d. Immunity does not apply to claims asserted pursuant to 42 U.S.C. § 1983.

Implied immunity is no defense to a claim asserted under § 1983. Monell v. Dept. of Social Services of City of New York, 436 U.S. 658, 690 n.54 (1978) ("Our holding today is, of course, limited to local government units *which are not considered part of the State for Eleventh Amendment purposes*.") (emphasis added). State immunity does not protect political subdivisions from claims based on the United States Constitution. Jaeger v. Dubuque County, 880 F. Supp. 640, 648 (N.D. Iowa 1995) ("The court also finds that federal courts have rejected state-law immunities as providing any bar to § 1983 claims."); Honeywell v. Village of Lakeside, 604 F. Supp. 932, 935 n.2 (W.D. Mo. 1985) (citing Nix v. Sweeney, 573 F.2d 998 (8th Cir. 1978)); see, also, Kingsway Cathedral v. Iowa Dep't Of Transp., 711 N.W.2d 6, 8-9 (Iowa 2006) ("The Fourteenth Amendment to the Federal Constitution makes the Fifth Amendment applicable to the states and their political subdivisions.") (citing Chicago, Burlington & Quincy R.R. v. City of Chicago, 166 U.S. 226, 233-34 (1897)).

In fact, drainage districts do not benefit from any immunity from claims based on the Constitution. The Eleventh Amendment does not protect municipalities and political subdivisions from suit because municipalities do not enjoy sovereign immunity. Printz v. United States, 521 U.S. 898, 931 n.15 (1997); Monell, 436 U.S. 690 n. 54. Thus, whatever else may be true of Drainage Districts' claim of immunity, it cannot withstand DMWW's claims based on the United States Constitution, (Dkt. 2 Counts VIII, IX).

IV. DMWW HAS COGNIZABLE CONSTITUTIONAL RIGHTS

Drainage Districts paint with a broad brush in attacking all of DMWW's federal and state constitutional arguments and claims on the supposed basis that "one political subdivision of a state cannot, as a matter of law deprive another political subdivision of due process or equal protection rights." (Dkt. 34-1 at 4). Drainage Districts rely first on a line of federal authority originating with the United States Supreme Court's decision in Hunter v. City of Pittsburgh, 207 U.S. 161 (1907) and then contend that Iowa law is in accord by reference to Board of Trustees of Monona-Harrison Drainage Dist. No. 1 in Monona and Harrison Counties v. Bd. of Sup'rs of Monona Cnty., Iowa, 5 N.W.2d 189, 190-91 (Iowa 1942). See (Dkt. 34-1 at 5); S. Macomb Disposal Auth. v. Washington Tp., 790 F.2d 500, 505 (6th Cir. 1986); City of Trenton v. State of New Jersey, 262 U.S. 182, 187 (1923) (quoting Hunter, 207 U.S. 161. at 178-79.

These cases rely on antiquated and constitutionally questionable doctrines, overlook other relevant authorities, and greatly over-simplify a number of complex issues. The argument also ignores both the modern status of Iowa home rule entities and difference between applicable Iowa and federal constitutional law. As will be shown in more detail below, DMWW has constitutional rights and the power to assert them generally, and against Drainage Districts, as a matter of (A) Iowa constitutional law and (B) federal constitutional law.

A. DMWW Possesses and May Assert Constitutional Rights Under the Iowa Constitution

The analysis of DMWW's constitutional claims should begin with the Iowa Constitution because a state constitution may confer greater rights than the United States Constitution. Arizona v. Evans, 514 U.S. 1, 8 (1995) ("[S]tate courts are absolutely free to interpret state constitutional provisions to accord greater protection to individual rights than do similar provisions of the United States Constitution."); State v. Gaskins, 866 N.W.2d 1, 6-7 (Iowa 2015)

("Even 'in . . . cases in which no *substantive* distinction appears between state and federal constitutional provisions, we reserve the right to apply the principles differently under the state constitution . . . .'") (internal citations omitted) (emphasis in original).

DMWW's claims based on the Iowa Constitution, (Dkt. 2 Counts VIII, IX),[5] are not guided by an analysis of federal law, (Dkt. 34-1 at 5), but instead must be informed by Iowa law and decisions based on the Iowa Constitution. The Court should deny the Motion for summary judgment because (1) DMWW possesses Iowa constitutional rights that (2) may be asserted against Drainage Districts.

1. DMWW has constitutional rights under the Iowa Constitution.

Examination of the question of whether DMWW has the power to possess and assert constitutional rights as a matter law should begin with its governing statute which grants it the express power to be "a party to legal action" and the right to "exercise all powers of a city" with respect to its utility with limited exceptions. Iowa Code § 388.4. These powers should be understood expansively under Iowa Const. Art. III, § 38A, but must also be understood to not include the power of taxation. Iowa Code § 388.4(1).

There is no conceptual impediment to the possession and exercise of constitutional rights by DMWW based on the idea of limited powers. This alone disposes of the rationale of both the Hunter line of cases and Monona-Harrison Drainage Dist. No. 1. as applied here. (Dkt. 34-1 at 5). These cases are an embodiment of the Dillon Rule which, under the Iowa Constitution, no longer forms any part of the law of Iowa. See City of Coralville v. Iowa Utilities Bd., 750 N.W.2d 523, 530-31 (Iowa 2008) (case in which the Iowa Supreme reached the merits of a constitutional claims raised between a political subdivision and a State Board).

[5] Iowa law would likely recognize a private cause of action based on the Iowa Constitution. Peters v. Woodbury Cnty., 979 F. Supp. 2d 901, 971 (N.D. Iowa 2013) aff'd sub nom. Peters v. Risdal, 786 F.3d 1095 (8th Cir. 2015).

Moreover, the rule that Drainage Districts abstract from Monona-Harrison Drainage Dist. No. 1 cannot be reconciled with other Iowa Supreme Court cases, in which the Iowa Supreme Court adjudicated constitutional questions between drainage districts and boards of supervisors. See Monona-Harrison Drainage Dist. No. 1 v. Board of Sup'rs of Woodbury and Monona Counties, 197 N.W. 82 (Iowa 1924); Bd. of Sup'rs of Pottawattamie Cnty. v. Bd. of Sup'rs of Harrison Cnty., 241 N.W. 14 (Iowa 1932).

It should also be noted that the quotation taken from Monona-Harrison Drainage Dist. No. 1 that a drainage district as a "quasi-corporation" could not challenge the "authority of its creator," has no application here because DMWW and Drainage Districts have no such relationship. (Dkt. 34-1 at 4-5). Moreover, to the extent there is any conflict between municipal or county power, home rule amendments grant superior status to a municipality "within its jurisdiction." Iowa Const. Art. III, § 39A.

Drainage Districts also overlook the separate line of Iowa authority that recognizes that a political subdivision has constitutional rights when it acts in a proprietary, rather than governmental, capacity as DMWW does here. See, e.g., Scott Cnty. v. Johnson, 222 N.W. 378, 382 (Iowa 1928) ("[A] municipal corporation may have a dual capacity and in addition to its public capacity may acquire and exercise proprietary rights which are in the nature of private rights. A city acquiring and operating a public utility might be so classified."); Incorporated Town of Sibley v. Ocheyedan Elec. Co., 187 N.W. 560, 562 (Iowa 1922) ("It is a well recognized and generally established rule that municipalities have two classes of power—one legislative, public and government; the other, proprietary and quasi private."); State v. Barker, 89 N.W. 204, 207 (Iowa 1902) ("We have already called attention to the dual nature of municipal corporations, and have discovered that with respect to private and proprietary rights and interests

they are entitled to constitutional protection. It is quite clear that the establishment and control of waterworks for the benefit of the inhabitants of the city is a matter that pertains to the municipality as distinguished from the state at large." (internal citations omitted)). These cases stand for the proposition that in Iowa a political subdivision operating in its proprietary capacity has, and can vindicate, constitutional rights.

Under Iowa law water utilities have been the quintessential example of a proprietary function from the earliest days. Lubin v. Iowa City, 131 N.W.2d 765, 770 (Iowa 1964); Pennington v. Town of Sumner, 270 N.W. 629, 633 (Iowa 1936); Ocheyedan Elec. Co., 187 N.W. at 562. DMWW is a political subdivision acting in a proprietary capacity. Iowa Code § 388.4(2); (Dkt. 2 ¶¶ 69-71). DMWW is entitled to protection under the Iowa Constitution.

2. DMWW may assert constitutional rights under Iowa law.

Iowa law does not support the contention that a constitutional dispute between Iowa political subdivisions is not cognizable. Iowa permits suits between political subdivisions. See, e.g., City of Akron v. Akron Westfield Cmty. Sch. Dist., 659 N.W.2d 223 (Iowa 2003); City of W. Branch v. Miller, 546 N.W.2d 598, 606 (Iowa 1996); City of Ames v. Story Cnty., 392 N.W.2d 145 (Iowa 1986); Concerned Citizens of Se. Polk Sch. Dist. v. City of Pleasant Hill, Iowa, No. 14-1362, 2015 WL 2394178, at *1 (Iowa Ct. App. May 20, 2015) (further review granted July 16, 2015). Iowa law even seems to permit constitutional claims by a political subdivision against the state. See City of Coralville v. Iowa Utilities Bd., 750 N.W.2d at 530-31.

There is no reason that claims between political subdivisions with a constitutional dimension are somehow barred while claims based on common law or statute are permitted.

B. The Hunter Doctrine Does Not Bar DMWW's Federal Constitutional Claims

Drainage Districts' arguments concerning federal constitutional rights present a separate

issue of federal law which is distinct from the general proposition of DMWW's rights under Iowa law. (Dkt. 34-1 at 5-6 (citing S. Macomb Disposal Auth. v. Washington Tp., 790 F.2d 500, 505 (6th Cir. 1986)). Hunter addressed whether a political subdivision could challenge its state's law governing municipal boundaries, and merging one political subdivision into another. Hunter v. City of Pittsburgh, 207 U.S. 161, 177 (1907); see also, City of Trenton, 262 U.S. at 187.

The United States Supreme Court, in the passage now quoted by Drainage Districts, stated the Constitution did not protect a political subdivision from state law, and that a political subdivision could not bring a constitutional claim against its state. (Dkt. 34-1 at 5 (quoting City of Trenton, 262 U.S. at 187)). However, Drainage Districts overlook another passage in which the Court acknowledged a separate line of authority, which it declined to apply on the record before it, suggesting that municipalities acting in a proprietary capacity do have constitutional rights. Hunter, 207 U.S. 179-80.

Drainage Districts, based on Sixth Circuit precedent, now rely on an extension of the Hunter doctrine to assert that DMWW cannot sue another political subdivision of the same state. (Dkt. 34-1 at 5 (citing S. Macomb, 790 F.2d at 505)). However, the Sixth Circuit's extension of the Hunter rule occurred without a critical analysis of whether Hunter remained valid precedent in light of recent developments in constitutional jurisprudence and whether the reasoning in Hunter necessarily extends to suits between political subdivisions.

As explained in more detail below, the Hunter doctrine as extended by S. Macomb should not bar DMWW's federal constitutional claims against Drainage Districts because (1) the Hunter doctrine should not apply to a proprietary municipality such as DMWW, (2) the Hunter doctrine is no longer consistent with constitutional jurisprudence, (3) Drainage Districts and the Sixth Circuit have extended Hunter beyond its analytical foundation, and (4) continued application of

Hunter violates DMWW's Fourteenth Amendment right to equal protection.

1. Hunter does not apply to DMWW because it is a proprietary entity.

A threshold issue for application of the Hunter rule here is whether it applies to DMWW at all in view of DMWW's character as a proprietary municipal entity. Hunter recognized a potentially material distinction based on a political subdivision's governmental and proprietary function, but did not apply the distinction on the record before it. 207 U.S. at 179-80.

Courts have recognized that Hunter may not prohibit suits when political subdivisions are engaged in proprietary functions. Burbank-Glendale-Pasadana Airport Auth. v. City of Burbank, 136 F.3d 1360, 1363 (9th Cir. 1998) (noting that the decision in S. Macomb left open the possibility of a governmental-proprietary distinction); City of New Rochelle v. Town of Mamaroneck, 111 F.Supp.2d 353, 364 (S.D.N.Y. 2000). The Sixth Circuit acknowledged that there might be some circumstances where political subdivisions may sue each other, even as it rejected any such analysis. S. Macomb, 790 F.2d at 505. The issue is squarely presented here.[6]

A variety of cases have articulated the difference between governmental and proprietary functions. Dept. of Revenue of Ky. v. Davis, 553 U.S. 328, 339 (2008) (there is a "basic distinction . . . between States as market participants and States as market regulators." (internal quotations omitted)); Nichols v. City of Kirksville, 68 F.3d 245, 247 (8th Cir. 1995) (under Missouri law "[a] proprietary function entails those acts performed for the specified benefit of the [municipality], . . . rather than the acts performed for the common good of all . . . .") (internal

[6] It is true that the governmental-proprietary distinction has fallen out of favor with many courts as a way for determining whether sovereign immunity applies. See Spencer v. Gen. Hosp. of District of Columbia, 425 F.2d 479, 485-86 (D.C. Cir. 1969); City of Ames v. Story Cnty., 392 N.W.2d 145, 147 (Iowa 1986). Indeed, Iowa's own tort claims act ignores the distinction. Iowa Code § 670.2. However, the government-proprietary distinction is still used in other contexts. See Four T's, Inc. v. Little Rock Mun. Airport Com'n, 108 F.3d 909, 911 (8th Cir. 1997) (recognizing the distinction in the context of the Dormant Commerce Clause and the Sherman Antitrust Act); ABC Disposal Sys., Inc. v. Dept. of Natural Res., 681 N.W.2d 596, 607 (Iowa 2004) (recognizing that "[a] person seeking to invoke the doctrine of equitable estoppel against a government body 'bears a heavy burden, particularly when the government acts in a sovereign or governmental role rather than a proprietary role.'" (citations omitted)).

quotations omitted); Iowa Comprehensive Petroleum Underground Storage Tank Fund Bd. 99C80656 v. Amoco Oil Co., 883 F.Supp. 403, 410, 413 (N.D. Iowa 1995) (first identifying and then adopting a diversity of citizenship test that includes the proprietary-governmental distinction).

Iowa has also recognized the proprietary-governmental function distinction, albeit while rejecting its application in the context of zoning dispute:

> A governmental function is involved when the municipality acts pursuant to and in furtherance of obligations imposed by legislative mandate. The function will be deemed proprietary, however, when it is of a permissive nature-that is, the political unit has the power but not the duty to perform that act.

City of Ames., 392 N.W.2d at 147 (quoting 5 Rohan, Zoning and Land Use Controls § 35.07[1], at 35-60 (1986)).

In this case, DMWW is engaged in a proprietary function in the operation of a water utility. DMWW has the power under Iowa Code Chapter 388 to perform the duties of a water utility. However, DMWW does not operate under a duty to provide water, except to the extent that it must comply with applicable state and federal law if it chooses to do so. Lubin, 131 N.W.2d at 770; (Dkt. 2 ¶¶ 69-71).

Thus, Hunter should not apply because DMWW is more akin to a private corporation acting in the marketplace than a government exercising power of taxation and governance.

2. Hunter is no longer consistent with constitutional jurisprudence.

The Hunter doctrine is also subject to criticism because Hunter is inconsistent with a modern understanding of the nature of political subdivisions and the federal courts' role in the development of the law. See Kathleen S. Morris, The Case for Local Constitutional Enforcement, 47 Harv. C.R.-C.L. L. Rev. 1, 9 (2012) ("Morris") ("Legal scholars explain Hunter as the outcome of a pitched philosophical battle between a handful of nineteenth-century

constitutional theorists, chief among them John Dillon and Thomas Cooley.").

Much has changed since the Supreme Court decided Hunter in 1907. While Hunter arose from a challenge based on the Fourteenth Amendment, Hunter is devoid of constitutional reasoning. See Hunter, 207 U.S. at 178-79; Morris at 18 ("At face value, Hunter announced a 'federal general common law' rule . . . ."). Hunter is an exemplar of the predominant scholarly view of municipal entities at the turn of the century rather than an analysis of constitutional principles. Morris at 9. As explained previously, the role of political subdivisions has changed in Iowa and elsewhere by reason of abandonment of the Dillon Rule.

Hunter is not dispositive of DMWW's constitutional claims because (a) Hunter may have been implicitly overruled by Erie v. Tomkins and other Supreme Court decisions, and (b) Hunter is inconsistent with modern principles of municipal liability.

a. The Supreme Court overruled Hunter's substantive analysis in Erie v. Tomkins.

Hunter is a vestige of a time when federal courts developed general federal common law. Morris at 18. Since Hunter was decided, the Supreme Court has ruled that "[t]here is no federal general common law." Erie R. Co. v. Tomkins, 304 U.S. 64, 78 (1938).[7] The absence of general federal common law has left Hunter's foundation uncertain. Morris at 19-20.

Evidence of the common law underpinning of Hunter's analysis are evident from a close reading of Hunter. See Hunter 207 U.S. at 178. The Court simply relies on a line of cases stretching back to 1845 to arrive at Hunter's conclusion about the nature of political subdivisions vis-à-vis their states. Id.; Morris at 12-16.

[7] Erie's rule was announced in a case where the Court had diversity subject matter jurisdiction. Erie, 304 U.S. at 69. However, the rule abolishing federal common law also applies to cases based on federal question jurisdiction. See 28 U.S.C. § 1652; Camacho v. Texas Workforce Com'n, 445 F.3d 407, 409 n.1 (5th Cir. 2006); Maternally Yours v. Your Maternity Shop, 234 F.2d 538, 540 n.1 (2d Cir. 1956).

Since Erie, the Supreme Court has implicitly recognized the absence of Hunter's constitutional foundation, or at least qualified Hunter's application. Morris at 6 n.6; Josh Bendor, Municipal Constitutional Rights: A New Approach, 31 Yale L. & Pol'y Rev. 389, 390 (2013) ("Bendor"). For example, the Supreme Court in Gomillion v. Lightfoot explained that Hunter's "unconfined dicta" does not mean that a state has power to "manipulate [a municipality] in every conceivable way . . . ." Gomillion v. Lightfoot, 364 U.S. 339, 345 (1960); Bendor at 411. More problematic for continuing Hunter's validity are cases where the Supreme Court allowed a municipality to challenge a state action. See Romer v. Evans, 517 U.S. 620, 625 (1996) (deciding a challenge brought by three municipalities and individuals to a state constitutional amendment); Washington v. Seattle School Dist. No. 1, 458 U.S. 457, 463-64 (1982) (deciding a challenge brought by a school district to challenge a state law); Bd. of Ed. of Cent. School Dist. No. 1 v. Allen, 392 U.S. 236, 240 (1968) (reaching the merits in a case brought by a school board challenging a state law as violating the Fourteenth Amendment);[8] Bendor at 410-11. However, the Supreme Court has recently restated Hunter's broad dicta, albeit without using it as a basis for deciding a case. Ysursa v. Pocatello Educ. Ass'n, 555 U.S. 353, 362 (2009).

The lack of constitutional footings for Hunter has sown confusion in the circuits about what to do with Hunter. Morris at 20-26.

The Eighth Circuit has cited Hunter in only two reported decisions. In the first, the Eighth Circuit applied Hunter to a dispute between a street-railway company and the City of Dubuque. Dubuque Electric Co. v. City of Dubuque, Iowa, 260 F. 353, 353 (8th Cir. 1919). The Eighth Circuit relied on Hunter for the proposition that a state law that limited ticket sales of a street-railway company could annul a contract between a municipality and the company. Id. at 356. In

[8] In a dissent to the denial of certiorari in City of South Lake Tahoe v. California Tahoe Regional Planning Agency, 449 U.S. 1039, 1042 (1980), Justice White recognized Allen's inconsistency with the Hunter line of cases.

the second case, Hunter was cited for the proposition that "states have great latitude in structuring political subdivisions." Morgan v. City of Florissant, 147 F.3d 772, 774 (8th Cir. 1998). Neither case is relevant here. The Eighth Circuit has never directly considered whether Hunter has been actually or impliedly overruled by Erie, and whether modern constitutional and municipal law jurisprudence supports continued application of Hunter.

If Hunter is based on anything, it is outdated thinking about the role that political subdivisions fulfill within states. Hunter cites the influential nineteenth century Iowa judge and scholar John Dillon, who, of course, was the author and namesake of the Dillon Rule. Hunter, 207 U.S. at 179-80; Morris at 9. Dillon's thinking about the limited powers of political subdivisions was the predominant legal theory in Iowa. Polk Cnty. Bd. of Sup'rs v. Polk Commonwealth, 522 N.W.2d 785, 790-91 (Iowa 1994) ("The effect of the Dillon Rule was to 'render cities [and counties] incapacitated in numberless matters of vital importance to local governments.'" (internal citations omitted)). The Dillon Rule is no longer the law in Iowa. Id. (citing Iowa Constitution, Art. III, §§ 38A, 39A), Section III(C)(1), supra at 15.

Hunter's foundation, and by extension the foundation of S.Macomb, is not based on the Constitution but instead an outdated theory of political subdivision-state relationships and federal common law. The Court should not apply a principle that is not supported by the Constitution.

b. The Hunter doctrine is inconsistent with modern principles of municipal liability.

The Hunter doctrine's characterization and view of political subdivisions as mere "departments of the state," City of Trenton, 262 U.S. at 187, is also inconsistent with the development of civil rights law pursuant to § 1983. The United States Supreme Court has expanded civil rights liability to political subdivisions. Monell, 436 U.S. at 690 n.54 ("Our holding today is, of course, limited to local government units *which are not considered part of*

the State for Eleventh Amendment purposes." (emphasis added)). It is difficult to square Hunter, and Drainage Districts' argument, with the black letter law that has developed since Monell that has expanded civil rights liability.

If political subdivisions are, as Hunter suggests, merely "agencies" of the states, Hunter, 207 U.S. at 178, or are merely "departments of the state," City of Trenton, 262 U.S. at 187, then the Eleventh Amendment should bar claims against political subdivisions absent waiver from the State of Iowa. Missouri Child Care Ass'n v. Cross, 294 F.3d 1034, 1037 (8th Cir. 2002) (citing Ex Parte Young, 209 U.S. 123 (1908)); Fikse v. State of Iowa Third Judicial Dist. Dept. of Correctional Servs., 633 F.Supp.2d 682, 691 (N.D. Iowa 2009). The Eleventh Amendment guarantees states immunity from suit with only two exceptions. Tinius v. Carroll County. Sheriff Dept., 255 F.Supp.2d 971, 981 (N.D. Iowa 2003) ("Those two exceptions are 'congressional abrogation' and 'state waiver.'" (internal citations omitted)). Section 1983 was not passed pursuant to Congress's Fourteenth Amendment, Section 5 authority, so it does not abrogate state immunity. Quern v. Jordan, 440 U.S. 332, 345 (1979); Thomas v. St. Louis Bd. of Police Com'rs, 447 F.3d 1082, 1084 (8th Cir. 2006)).

The only way for political subdivisions to be liable pursuant to § 1983 is if they do not enjoy sovereign immunity. That rationale is inconsistent with a view of political subdivisions, espoused in Hunter and its progeny, that political subdivisions of states are merely departments or agencies of the state. Departments and agencies of the state enjoy sovereign immunity. See Egerdahl v. Hibbing Comm. College, 72 F.3d 615, 618-19 (8th Cir. 1995) ("'[I]n the absence of consent a suit which the state or one of its *agencies or departments* is named as the defendant is proscribed by the Eleventh Amendment.'" (internal citations omitted ("emphasis added)). If all political subdivisions are state departments then the labyrinth of Eleventh and Fourteenth

Amendment jurisprudence has been unnecessary in light of the fundamental nature of political subdivisions. An alternate, more compelling explanation is that Hunter has been largely ignored in the development of municipal liability for constitutional violations.

As explained in greater detail above, Erie and Monell together represent a total repudiation of the underpinnings of Hunter's analysis. Erie limits the authority of federal courts to create Hunter-style common law. Monell makes clear that political subdivisions are amenable to suit. Monell, 436 U.S. at 690. DMWW has the power and authority to sue. Iowa Code 388.4. Any immunity Drainage Districts claim to enjoy is based on an interpretation of state law, Section III, supra at 8, and is therefore not binding on this Court when considering claims based on the United States Constitution. Reutzel v. Spartan Chemical Co., 903 F.Supp.1272, 1278 (N.D. Iowa 1995). DMWW has the right to sue Drainage Districts for violations of DMWW's constitutional rights.

3. Drainage Districts seek to extend Hunter beyond its analytical foundation.

Even if Hunter remains an accurate statement of federal law, Hunter is still not dispositive of this case. Hunter stands for the proposition that a political subdivision may not sue its state. Hunter, 207 U.S. at 178-79. Hunter does not prohibit one political subdivision from suing another subdivision for a violation of constitutional rights, particularly where the political subdivision making the claim is engaged in proprietary functions. Extending Hunter's reasoning, as Drainage Districts and Sixth Circuit advocate, would do something unprecedented in modern times—restrict application of the Bill of Rights and the Fourteenth Amendment. Political subdivisions in addition to having rights are also uniquely well situated to champion constitutional rights. Morris at 36 ("[I]ncluding local public entities in constitutional debates may serve to strengthen those debates, along with the efficacy of local governments and local public

law offices.").

The Eighth Circuit has only ever considered whether Hunter and its progeny should bar political subdivisions from asserting constitutional claims against a state. See Delta Special School Dist. 5 v. State Bd. of Educ. For State of Ark., 745 F.2d 532, 533 (8th Cir. 1984) (addressing a political subdivision suit against the state); Dubuque Electric Co., 260 F. at 355 (addressing a challenge to a state law). The Eighth Circuit has never addressed whether this rule should be extended to suits between political subdivisions.

The Sixth Circuit extended the Hunter rule to apply to suits between political subdivisions "[f]or the same reasons" as the Hunter decision. S. Macomb, 790 F.2d at 505. However, the cases cited by the Sixth Circuit, and the authority reviewed above, are devoid of analysis regarding the constitutional basis for Hunter's rule. See City of South Lake Tahoe Regional Planning Agency, 625 F.2d 231, 233 (9th Cir. 1980) (simply stating that it is "well established" that political subdivision may not challenge state action); City of New York v. Richardson, 473 F.2d 923, 929 (2d Cir. 1973) ("Political subdivisions of a state may not challenge the validity of a state statute under the Fourteenth Amendment."); see also, Williams v. Mayor and City Council of Baltimore, 289 U.S. 36, 40 (1933). As explained above, the Hunter doctrine rests on an uncertain constitutional foundation, so the fact that courts repeatedly invoke the doctrine without any additional analysis should be of little persuasive value to the Court as it considers DMWW's claims. Section III, supra at 8; Cf. McDuffee v. United States, 769 F.2d 492, 494 (8th Cir. 1985) (noting it is the policy of the Eighth Circuit to follow sister circuit precedent unless the court is "clearly convinced the [sister circuit] [ ] is wrong.").

However, it is possible to distinguish S. Macomb without squarely confronting Hunter. Hunter's reasoning focused on the fact that state's create political subdivisions and a political

subdivision ought not be permitted to sue its creator. Hunter, 207 U.S. at 178. DMWW, however, has not sued the state of Iowa nor has it challenged the statutes under which Drainage Districts are created. The only state law doctrine DMWW challenges is Drainage Districts' implied immunity that is a construct of the judiciary. See Section III, supra at 8. Thus, DMWW does not challenge its creator, but instead a coordinate government entity. The same policy consideration supporting Hunter should not necessarily extend to DMWW's suit, particularly in light of the dearth of analysis in S. Macomb.

This Court should decline to extend Hunter's reasoning to this case. First, the analytical foundation supporting Hunter does not necessarily extend to suits between political subdivisions. Second, S. Macomb recognized a basis for limiting the rule prohibiting political subdivisions from suing each other, and the Court should adopt that distinction.

4. Continued application of the Hunter doctrine violates DMWW's constitutional right to equal protection.

The application of the implied immunity doctrine to DMWW's constitutional claims would similarly deny fundamental right to DMMW and would also require strict scrutiny for the reasons as explained in this section of the Brief. Drainage Districts advocate for creating two separate classes. The first class would be composed of private individuals who can assert constitutional claims against the drainage districts. See Section III(C)(3)(d), supra at 27. The second class created by Drainage Districts' implied immunity is composed of political subdivisions whose constitutional rights have been violated but who have no recourse in court.

"If a classification 'impinge[s] upon the exercise of a fundamental right,' the Equal Protection Clause requires 'the State to demonstrate that its classification has been precisely tailored to serve a compelling governmental interest.'" Rosenbrahn v. Daugaard, 61 F. Supp. 3d 845, 859 (D.S.D. 2014) (quoting Plyler v. Doe, 457 U.S. 202, 216-17 (1982)). As will be

explored in more detail in Section V, infra at 42, DMWW has a protectable property interest that Drainage Districts are infringing upon without just compensation. DMWW's property interest is protected by the Fifth Amendment, so DMWW has a fundamental right that Drainage Districts would deny from protection.

Drainage Districts must thus present a compelling reason for prohibiting DMWW from asserting its constitutional rights and demonstrate that the proposed application of Hunter is narrowly tailored to achieve that end. Doctor John's, Inc. v. City of Sioux City, Iowa, 389 F. Supp. 2d 1096, 1121 (N.D. Iowa 2005) ("'Strict scrutiny' requires that, to be constitutional, a regulation must be '*narrowly tailored* to serve a *compelling* state interest.'" (internal citations omitted) (emphasis in original)). Drainage Districts cannot meet the heavy burden imposed by strict scrutiny because there is no *compelling* government interest that can only be served by a total bar to DMWW suing another political subdivision, even a Drainage District, for a violation of a constitutional right. The Court should therefore reject extension of the Hunter doctrine because doing so for DMWW's constitutional claims would violate DMWW's Fourteenth Amendment rights.

V. DMWW HAS PROTECTABLE PROPERTY RIGHTS

DMWW has protectable property interests that Drainage Districts are taking without just compensation.[9] Both the Iowa Constitution and the United States Constitution prohibit Drainage Districts from taking private property without just compensation. Northern States Power Co. v. Fed. Transit Admin., 358 F.3d 1050, 1057 n.5 (8th Cir. 2004) (recognizing the Fourteenth

[9] The Drainage Districts suggest that DMWW may not have standing to bring a claim based on the Takings Clause. (Dkt. 34-1 at 7-8). The Drainage Districts rely on their Hunter arguments for the proposition that DMWW cannot assert a takings claim. Id. There has been much commentary about whether the Hunter doctrine is a doctrine of standing, substantive constitutional law, or capacity. See Morris at 21-26. The Drainage Districts argument is thus not one of traditional Article III standing. For the reasons explained in Section IV, supra at 28, the Hunter doctrine does not bar DMWW's constitutional claims.

Amendment incorporates the Fifth Amendment); Bormann v. Bd. of Sup'rs in and for Kossuth Cnty., 584 N.W.2d 309, 315 (Iowa 1998) (recognizing both the Iowa and federal Constitutions prohibit the taking of property without just compensation). Whether DMWW has a protectable property interest is ultimately a question of state law. Johnson v. Am. Leather Specialties Corp., 578 F.supp.2d 1154, 1173 (N.D. Iowa 2008) (citing Webb's Fabulous Pharmacies, Inc. v. Beckwith, 449 U.S. 155, 161 (1980)). If DMWW has a protectable state law property right then Drainage Districts must compensate DMWW for a physical invasion of its property interests. Hawkeye Commodity Promotions, Inc. v. Miller, 432 F.Supp.2d 822, 854 (N.D. Iowa 2006) affm'd 486 F.3d 430 (8th Cir. 2007) ("[W]here government requires an owner to suffer permanent physical invasion of her property—however minor—it must provide just compensation."(quoting Lingle v. Chevron U.S.A., Inc., 544 U.S. 528, 537 (2005)).

DMWW's rights in property are, moreover, "private property" in a constitutional sense because DMWW exists, and is acting, in a proprietary capacity. Indeed this is the essence of the rationale set forth above in the cases that found Iowa municipal corporations acting in their proprietary capacities to have constitutional rights. See Scott Cnty., 222 N.W. at 382; Ocheyedan Elec. Co., 187 N.W. at 562 ; Barker, 89 N.W. at207.

Drainage Districts mischaracterize the nature of DMWW"s takings claims in order to claim DMWW does not have any protectable property interests. First, Drainage Districts incorrectly state that DMWW is asserting a right over the entirety of the Raccoon River to the exclusion of all other users. (Dkt. 34-1 at 8). Second, Drainage Districts incorrectly assert DMWW's taking claim is premised on DMWW's permit to withdraw water from the Raccoon River. Id.

DMWW has two protectable property interests that Drainage Districts are impairing.

Drainage Districts are impairing (A) DMWW's right to obtain clean water from the Raccoon River, and (B) Drainage Districts' discharge of a pollutant into the Raccoon River impairs DMWW's ability to use its treatment plant and facilities because of the dangerous levels of pollutants that are discharged into the Raccoon River.

A. Drainage Districts Are Taking DMWW's Right to Clean Water.

Iowa law provides DMWW with a property interest in the water adjacent to its real property. The bundle of rights, known at common law as riparian rights, protects DMWW from intrusions in the form of impediments to navigation, reduced water level, excessive water level, and pollution. Davis at 220-29.[10] Any action that impairs DMWW's riparian rights is actionable. Freeman v. Grain Processing Corp., 848 N.W.2d 58, 67 (Iowa 2014) (citing Bowman v. Humphrey, 109 N.W. 714, 714-15, 717 (Iowa 1906)); Willis v. City of Perry, 60 N.W. 727, 729 (Iowa 1894).

In Bowman, the Iowa Supreme Court held that one who "substantially pollutes or destroys the usefulness and value of the water to the proprietors of the lower lands" liable for nuisance. Bowman, 109 N.W. at 715. Bowman is consistent with other Iowa cases that stand for the general principle that "one must exercise ordinary care in the use of his property so as not to injure the rights of neighboring landowners." Oak Leaf Country Club, Inc. v. Wilson, 257 N.W.2d 739, 745 (Iowa 1977) (citing Tretter v. Chicago & G. W. Ry. Co., 126 N.W. 339, 341 (Iowa 1910)); see also Newton v. City of Grundy Center, 70 N.W.2d 162, 165 (Iowa 1955) ("We have held abatable as a nuisance instances where there was a pouring of filth from the sewers into a stream instead of first rendering the sewage innocuous."); Vogt v. City of Grinnell, 110 N.W. 603, 603 (Iowa 1907) ("The statute authorizes the city to construct a system of sewers, but

[10] For a general discussion of the historical foundations of the doctrine of riparian rights and Iowa's adoption of that doctrine see Davis at 216-229.

it nowhere authorizes it to discharge its sewage into a running stream."); Bennett v. City of Marion, 93 N.W. 558, 559 (Iowa 1903) (permitting recovery for downstream farmer affected by a municipal sewer system); accord Perry v. Howe Co-Op. Creamery Co., 101 N.W. 150, 150-51 (Iowa 1904) (finding no nuisance where a creamery constructed a cesspool to limit infiltration of pollution into a stream); Ferguson v. Firmenich Mfg. Co., 42 N.W. 448, 449 (Iowa 1889) ("The upper owner will not be allowed to poison or corrupt the stream."); see also, Davis at 228-229.

DMWW owns property along the Raccoon River which it uses to withdraw water from the Raccoon River pursuant to a state permit for treatment and sale to its customers. (Dkt. 2 ¶ 4). Iowa law provides that owners of property adjacent to a navigable river have common law rights apart from those of the general public. Robert's River Rides, Inc. v. Steamboat Development Corp., 520 N.W.2d 294, 299-300 (Iowa 1994) (abrogated on other grounds by Barreca v. Nickolas, 683 N.W.2d 111, 119 (Iowa 2004)); Davis at 220.

Even though the State of Iowa has enacted statutes governing water, see Iowa Code Chapter 455B, the legislature did not intend to preempt or extinguish other rights associated with water. Freeman, 848 N.W.2d at 87, 88 cert. denied, 135 S. Ct. 712, (2014) ("In short, we think Iowa Code chapter 455B did not impliedly repeal application of Iowa Code chapter 657 to air pollution claims or preempt Iowa common law."); 455B.111(5). Thus, DMWW has a protectable property interest under Iowa law for clean, unpolluted water.

There is no question that Drainage Districts are invading DMWW's property by discharging dangerous levels of a pollutant into the Raccoon River. (Dkt. 2 ¶ 139). As a result of this excess pollution, DMWW has had to take extensive measures to ensure that it complies with federal drinking water standards. See (Dkt. 2 ¶ 158). Drainage Districts are thus physically invading DMWW's riparian water right to clean and unpolluted water, and that invasion is

permanent, see (Dkt. 2 ¶ 98-107). DMWW has never received any compensation for the expenses it has incurred for nitrate removal. (Dkt. 2 ¶ 273). Drainage Districts have thus violated DMWW's constitutional rights.

B. Drainage Districts Are Taking DMWW's Right to Use Its Facilities by Discharging Excessive Levels of a Dangerous Pollutant.

Drainage Districts' discharge of excessive nitrate into the Raccoon River also physically invades DMWW's treatment facilities. As municipal utility created pursuant to Iowa Code Chapter 388, DMWW has control and over the acquisition, use, and disposition of property. Iowa Code § 388.4(2).

DMWW's property, in particular its treatment plants and related facilities, have been infiltrated and impaired by nitrate in Drainage Districts' discharge. (Dkt. 2 ¶¶ 157-158). As articulated throughout the Complaint, DMWW has built substantial infrastructure to contend with drainage districts' discharge of nitrate into the Raccoon River. Id. DMWW draws into its treatment plant the excessive pollution that the Drainage Districts discharge, this represents a physical invasion by Drainage Districts of DMWW's infrastructure and DMWW should be compensated for it. (Dkt. 2 ¶¶ 137-158).

Drainage Districts, by operating without regard to the pollution they discharge into the Raccoon River, are imposing a burden and cost on DMWW and the citizens of Des Moines. The Fifth Amendment expressly prohibits "Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." Armstrong v. United States, 364 U.S. 40, 49 (1960).

CONCLUSION

For all the foregoing reasons DMWW respectfully requests that the Motion for Partial Summary Judgment be denied in its entirety.

By: /s/ John E. Lande
Richard A. Malm, AT004930
John E. Lande, AT0010976
Colleen MacRae, AT0011436
OF
DICKINSON, MACKAMAN, TYLER & HAGEN, P.C.
699 Walnut Street, Suite 1600
Des Moines, Iowa 50309-3986
Telephone: (515) 244-2600
FAX: (515) 246-4550
rmalm@dickinsonlaw.com
jlande@dickinsonlaw.com
cmacrae@dickinsonlaw.com

ATTORNEYS FOR PLAINTIFF, BOARD OF WATER WORKS TRUSTEES OF THE CITY OF DES MOINES, IOWA

CERTIFICATE OF SERVICE

I hereby certify that on October 19, 2015, I electronically filed the foregoing document with the Clerk of the Court by using the CM/ECF system which will send a notice of electronic filing to the following

Charles F. Becker
Michael R. Reck
Stephen H. Locher
Belin McCormick, P.C.
666 Walnut Street, Suite 2000
Des Moines, Iowa 50309-3989
Direct Dial: (515) 283-4609
cfbecker@belinmccormick.com
mrreck@belinmccormick.com
shlocher@belinmccormick.com

David Yolun Chung
Crowell & Moring LLP
1001 Pennsylvania Avenue NW
Washington, DC 20004
Phone: (202) 624-2587
Fax: (202) 628-5116
dchung@crowell.com

/s/ John E. Lande
John E. Lande