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 **JOINT STATUS REPORT REGARDING IOWA SUPREME COURT RULING**

Through this filing, the parties seek to comply with this Court's January 27, 2017, Order that they file "a joint status report indicating their positions as to if and how further proceedings should be scheduled in this court" in light of the Iowa Supreme Court's Answers to four certified questions. (Docket No. 80.)

Plaintiff Des Moines Water Works ("DMWW") filed a ten count lawsuit against various drainage districts (the "Drainage Districts") in three counties in Northwest Iowa. The parties agree the Drainage Districts sought summary judgment on all claims against them in two separate motions filed on September 24, 2015 (Counts III-X) and April 1, 2016 (Counts I and II),

respectively. Both motions remain pending and are ripe for resolution.[1] Four questions certified to the Iowa Supreme Court regarding the September 24, 2015 Motion were answered on January 27, 2017. *Board Of Water Works Trustees Of The City Of Des Moines, Iowa v. Sac County Board Of Supervisors, As Trustee Of Drainage Districts 32, 42, 65, 79, 81, 83, 86, & Calhoun County Board Of Supervisors & Sac County Board Of Supervisors As Joint Trustees Of Drainage Districts 2 And 51 & Buena Vista County Board Of Supervisors & Sac County Board Of Supervisors As Joint Trustees Of Drainage Districts 19 And 26 And Drainage Districts 64 And 105*, No. 16-0076, 2017 WL 382402, (Iowa Jan. 27, 2017) (hereinafter, the "Ruling on Certified Questions").

The parties disagree on the impact of the Supreme Court's ruling. This Status Report identifies the parties' respective positions.

I. REMAINING ISSUES FOR THE COURT.

1. **Counts I and II.** The parties agree Counts I and II remain pending before this Court. The parties completed discovery on Counts I and II by the March 1, 2016 deadline. The summary judgment deadline on those Counts was April 1, 2016. The Drainage Districts sought summary judgment on Counts I and II on April 1, 2016. That motion remains pending and is ripe for determination, unless the Court grants DMWW's request for oral argument. The parties disagree on whether the Iowa Supreme Court's ruling impacts Counts I and II.

a. DMWW's Position. The Iowa Supreme Court's Ruling on Certified Questions does not affect Counts I and II, because Counts I and II were not part of the Certification process. The Ruling on Certified Questions does not address Counts I and II.

The Drainage Districts argue that the Ruling on Certified Questions impacts the Court's ability to provide redress for DMWW's harms. However, DMWW addressed the Drainage

[1] DMWW requested oral argument on the April 1, 2016 motion, but at this time no oral argument has been granted.

Districts' redressability arguments in its Resistance to the April 1, 2016 summary judgment motion at pages 16-27, (Dkt. 68-1), and those arguments are not obviated by anything in the Ruling on Certified Questions.

The Drainage Districts' reliance on the Ruling on Certified Questions to claim they are exempt from the Clean Water Act is contrary to law and fact. First, no matter what the Ruling on Certified Questions says, the questions were certified to resolve the September 24, 2015 motion for summary judgment. The Ruling on Certified Questions is necessarily limited to the certified questions themselves, and they do not address Counts I and II. (Dkt. 50). Indeed, at oral argument, Justice Mansfield acknowledged as much:

> Justice Mansfield: Does anything we decide today affect your Count I, your Clean Water Act claim, your federal claim . . . .
> Justice Mansfield: ***But the notion that we're deciding the issue once and for all forever, is perhaps not correct***. I'm not saying you're making that claim. ***One should not get the impression that our ruling is dispositive of the case***.

(Sep. 14, 2016, Oral Argument Recording at 38 min. 29 second located at https://www.youtube.com/watch?v=83iE-my_kvE&index=9&list=PLhC3lSpOElz7KXbKD_sxpZ0OP6kdgs2r1) (emphasis added). While not dipositive of any legal issue, Justice Mansfield's comments during oral argument illustrate that the Iowa Supreme Court's ruling by its terms and procedural posture cannot ultimately decide all of the merits issues of the case giving rise to the certification.

The Ruling on Certified Questions is an affirmation that the Court's pre-existing precedents apply to this case. This precedent includes *Polk Cnty. Drainage Dist. Four v. Iowa Natural Res. Council*, 377 N.W.2d 236, 241 (Iowa 1985), which expressly holds that drainage districts are subject to environmental permitting requirements. The Ruling on Certified Questions did not address, and therefore did not overrule, the holding in *Polk Cnty. Drainage Dist. Four*. That case demonstrates that a court can compel Drainage Districts to comply with the federal Clean Water Act as alleged in Count I, and Iowa Code Ch. 455B as alleged in Count II.

There is a more fundamental problem with the gravamen of the Drainage Districts' argument regarding Count I. "A fundamental principle of the Constitution is that Congress has the power to preempt state law." *Crosby v. National Foreign Trade Council*, 530 U.S. 363, 372 (2000). "[T]he meaning of a federal statute is for this Court to decide." *United States v. Gilbert Associates, Inc.*, 345 U.S. 361, 363 (1953). The United States Supreme Court has been clear:

> If the purpose of the act cannot otherwise be accomplished—if its operation within its chosen field else must be frustrated and its provisions be refused their natural effect—*the state law must yield* to the regulation of Congress within its sphere of delegated power.

Crosby, 530 U.S. at 372 (quoting *Savage v. Jones*, 225 U.S. 501, 533 (1912)). The Drainage Districts cannot avoid federal law even if it conflicts with state law.

Finally, the Drainage Districts' argument is contrary to fact. DMWW's resistance to the April 1, 2016 summary judgment motion details how the Drainage Districts already comply with federal dredge and fill regulations, and wetland mitigation regulations. (Dkt. 67-2 ¶¶ 96-111). The Drainage Districts have no express authority in Iowa Code Ch. 468 to purchase wetland mitigation credits, or to otherwise comply with Clean Water Act Section 404, 33 U.S.C. § 1344. Nevertheless, the Drainage Districts comply. Drainage Districts were doing this before the Ruling on Certified Questions, and there is no reason to think they will stop.

The Iowa Supreme Court did not have access to this factual background when it rendered its decision. If it had, it may have added context to the ruling. *Life Investors Ins. Co. of Am. v. Estate of Corrado*, 838 N.W.2d 640, 644 (Iowa 2013) ("[W]e restrict our answer to the facts provided by the certifying court . . . ."). Nevertheless, the Ruling on Certified Questions could not address these facts nor Counts I and II, because these issues were not part of the certification order. The Iowa Supreme Court cannot address issues that are not certified to it. Iowa Code § 684A.1 (providing the power to respond to certified questions of state law).

The Drainage Districts contend that they have no power to comply with permits unless obtaining a permit is necessary for a drainage district to perform a function "within their power." The Drainage Districts claim that power is limited to adding drainage capacity or repairing existing drainage capacity. Even assuming the Drainage Districts are correct; Drainage Districts have the power to do what is necessary in order to keep draining, which would certainly include obtaining permits required by law to continue drainage discharge. Drainage Districts do this now. For example, they purchase wetland mitigation credits, despite a lack of statutory authority, because doing so allows Drainage Districts to keep draining. Similarly, if the Court orders compliance with the Clean Water Act and Iowa Code Ch. 455B then the Drainage Districts will have the power to do what is necessary to keep draining.

Nevertheless, the Drainage Districts persist in their reliance on Eleventh Amendment case law such as *Okpalobi v. Foster*, 244 F.3d 405, 411 (5th Cir. 2001). The key point of cases like *Okpalobi* is that there must be a connection between the state official and the complained of state law. That rule exists because of the Eleventh Amendment and *Ex Parte Young*'s exception to the Eleventh Amendment. *Okpalobi*, 244 F.3d at 411. The Eleventh Amendment concerns that triggered the analysis in *Okpalobi*, are not implicated in this case for two reasons. First, Drainage Districts are political subdivisions, and therefore do not have Eleventh Amendment protection. *See* (Dkt. 36-1 at 37-39). Second, Drainage Districts own and control the infrastructure that causes DMWW's injury, so they have a definite connection to the harm at issue. *See* (Dkt 67-2. ¶¶ 65-67).[2]

The Ruling on Certified Questions is authoritative as to issues of Iowa law certified, but it should not be extended beyond its scope. In particular, the ruling should not be seen as a means

[2] Therefore, the instant case, contrary to the Drainage Districts' assertion, is not like *Scott v. DiGuglielmo* where a prisoner sued prison officials at a different prison than the one he was housed at. *Scott v. DiGuglielmo*, 615 F. Supp. 2d 368, 374 (E.D. Penn. 2009).

to vitiate express prohibitions and remedies under the Clean Water Act. Iowa law, it seems, favors drainage districts to an extraordinary degree, but the Clean Water Act applies to all within its scope. The Clean Water Act seeks to control point sources of pollution by a national permit system that applies to all point source polluters, unless expressly excluded or exempted. The Ruling on Certified Questions makes no reference to evading or avoiding that uniform national system, and cannot have the effect of doing so because federal law is not subject to nullification by state law. If this Court rules in DMWW's favor on Counts I and II then there is no doubt that the Drainage Districts will have to comply.

b. Drainage Districts' Position. The Drainage Districts agree the Iowa Supreme Court could not decide Counts I and II because they were not before it, but the Iowa Supreme Court *does* determine Iowa law and the Supreme Court's pronouncements of Iowa law apply and are binding in this case. The Supreme Court's ruling was clear in identifying the severe limits on Drainage Districts' powers and, in so doing, established the Constitutional limitation on jurisdiction known as redressability applies in this case. Thus, the Supreme Court's Ruling, although not directed toward Counts I and II, nonetheless disposes of them as a matter of law based on the redressability argument presented in the Drainage Districts' Memorandum in Support of Summary Judgment at pages 15-17 and Reply in Support of Summary Judgment at pages 5-11.

The Supreme Court's ruling decides the redressability issue because the power of the state entity for purposes of redressability analysis is a matter of *state* law—not federal. *Deida v. City of Milwaukee*, 192 F. Supp. 2d 899, 911 (E.D. Wis. 2002) ("In order to meet these elements, the named defendants must have the power **under state law** to enforce the statute against her." (emphasis added)). The Supreme Court's decision confirmed the Drainage District's position

that "The legislature has not authorized drainage districts to assess costs to redesign existing drainage systems to abate nitrates." Ruling on Certified Questions *Slip Op.* at 28.

Indeed, the Supreme Court's Ruling on Certified Questions cited the redressability cases of *Okpalobi v. Foster*, 244 F.3d 405, 427 (5th Cir. 2001) and *McDaniel v. Bd. of Educ.*, 956 F. Supp. 2d 887, 894 (N.D. Ill. 2013), in holding Drainage Districts lack the powers at issue in this case. The following portions of the Supreme Court's Ruling make the Drainage Districts' limited powers clear:

> **Drainage district immunity is premised on their limited purpose, which is "to build and maintain drainage improvements that provide for the 'drainage and improvement of agricultural and other lands, thereby making them tillable or suitable for profitable use.'"** *Hardin Cty. Drainage Dist. 55, Div. 3, Lateral 10 v. Union Pac. R.R.*, 826 N.W.2d 507, 510 (Iowa 2013) (quoting *Chi., Milwaukee & St. Paul Ry. v. Mosquito Drainage Dist.*, 190 Iowa 162, 163, 180 N.W. 170, 170 (1920)). **Drainage districts have no other function, power, or purpose.**"

Id. at 13-14 (emphasis added).

> Chapter 468 imposes no duty on the districts to filter out nitrates. Rather, chapter 468 simply requires drainage districts to maintain drainage systems to keep the water flowing to drain lands. *See, e.g.*, Iowa Code § 468.126(1)(*a*)(requiring repairs as necessary to "restore or maintain a drainage ... improvement in its original efficiency or capacity"). **No provision in chapter 468 authorizes drainage districts to mandate changes in farming practices to reduce fertilizer runoff or to assess farmers for the costs of removing nitrates from waters flowing through agricultural drainage systems.**

Id. at 23 (emphasis added).

> Improvements exceeding a certain amount can be stopped by a majority of landowners in the district through a process called remonstrance. *Id.* § 468.126(4)(*c*).

Id at 8.

> **The defendants' lack of statutory authority to regulate farmer nitrate use cuts against revisiting our longstanding precedent, which rests upon the limited existence and powers of drainage districts. 'Liability follows control ....'** *Estate of McFarlin v. State*, 881 N.W.2d 51, 64 (Iowa 2016). A party in control of an activity can take precautions to reduce the risk of harm to others. *See McCormick v. Nikkel & Assocs., Inc.*, 819 N.W.2d 368, 374 (Iowa 2012) ("The reason is simple:

> The party in control of the work site is best positioned to take precautions to identify risks and take measures to improve safety."); *Allison by Fox v. Page*, 545 N.W.2d 281, 283 (Iowa 1996) ("The general rule and exceptions reveal a common principle: liability is premised upon control."); *Schlotfelt v. Vinton Farmers' Supply Co.*, 252 Iowa 1102, 1113, 109 N.W.2d 695, 701 (1961) (declining to issue injunction in nuisance action for foot traffic entering plaintiff's business because "defendant ... should not be compelled to control its customers and in any event could not do so"); *see also* ***Okpalobi v. Foster*, 244 F.3d 405, 427 (5th Cir. 2001) (reversing injunction against government officials who "have no power to redress the asserted injuries"); *McDaniel v. Bd. of Educ.*, 956 F. Supp. 2d 887, 894 (N.D. Ill. 2013) (rejecting equitable claims against parties who would "lack the power to carry out the injunction")**; *State v. Lead Indus. Ass'n*, 951 A.2d 428, 449–50 (R.I. 2008) (holding public nuisance claim for contamination required proof defendants were in control over the instrumentality causing the alleged nuisance at the time the damage occurred). These basic principles of tort law favor preserving, not abrogating, the immunity for drainage districts.

Id. at 23-24 (emphasis added).

> **Nothing** in the home rule amendment broadens the supervisors' operational authority over drainage districts or **gives drainage districts the power to regulate farming practices or water quality.**

Id. at 32 (emphasis added).

In response, rather than discussing the Iowa Supreme Court's statements about a Drainage District's power under Iowa law, DMWW repeats arguments from its summary judgment resistance. In doing so, DMWW again misunderstands the nature of redressability. DMWW persists in arguing the Supremacy Clause allows federal statutes to override state law. Although the point is subtle, it remains fundamental. It is Article III of the U.S. Constitution that drives redressability analysis and no federal statute can override Article III. Thus, an argument that a federal statute overcomes a redressability problem must fail as a matter of constitutional law. *See Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1547-48 (2016) (noting Congress cannot create jurisdiction); *Gladstone, Realtors v. Village of Bellwood*, 441 U.S. 91, 100 ("In no event ... may Congress abrogate the Art. III minima"). The fact a federal statute is argued to provide certain protections does not mean the particular state entity sued is the proper entity with the power of

redress. The point is made forcefully in *Okpalobi*, 244 F.3d at 410, where a clear federal right—indeed, one of constitutional dimension—was at issue, but the sued state entity lacked the power of redress. Again, state law determines the state entity's power for purposes of this analysis. *Deida*, 192 F. Supp. 2d at 911.

DMWW suggests it can circumvent the lack of redressability by obtaining a court order requiring Drainage Districts to obtain permits. According to DMWW, because Drainage Districts have the power to do what is necessary to keep draining, if the court orders Drainage Districts to obtain permits to keep draining, Drainage Districts have the necessary power and redressability is not an issue. Notably absent from DMWW's discussion, however, is how Drainage Districts will comply with permits requiring it to take actions the Iowa Supreme Court just told them they do not have power to take. DMWW focuses on Drainage Districts' purchase of wetland mitigation credits, for example, but ignores the differences. DMWW is correct that there is nothing in the law prohibiting Drainage Districts from obtaining a permit not required by law, but the law does limit their ability to *comply* with that permit. Because Drainage Districts cannot comply with DMWW's proposed permits, DMWW's argument must fail. *See Scott v. DiGuglielmo*, 615 F.Supp. 2d 368, 373 (E.D.Pa. 2009) ("If the defendants have no power to redress the alleged injuries even if the court were to grant the requested relief, the plaintiff has no case or controversy against those particular defendants.").

The Iowa Supreme Court confirmed the redressability problem in Plaintiff's claims when it confirmed that Drainage Districts lack the power to do the things DMWW wants them to do:

> [A] drainage district is a legislative creation which has no rights or powers other than those found in statutes which give and sustain its life." *State ex rel. Iowa Emp't Sec. Comm'n*, 260 Iowa at 345, 149 N.W.2d at 291. Iowa Code chapter 468 empowers drainage districts to
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> > restore or maintain a drainage or levee improvement in its *original* efficiency or capacity, and for that purpose may remove silt, debris, repair

> any damaged structures, remove weeds and other vegetable growth, and whatever else may be needed to *restore or maintain* such efficiency or capacity to prolong its useful life.
>
> Iowa Code § 468.126(1)(*a*) (emphasis added). An improvement is further defined as "a project intended to expand, enlarge, or otherwise increase the capacity of any existing ditch, drain, or other facility above that for which it was designed." *Id.* § 468.126(4). Thus, **under the express language of the statute, the drainage district is empowered only to 'restore,' 'maintain,' or 'increase' the flow of water through the drainage system. *Id.* § 468.126(1), (4). The legislature has not authorized drainage districts to assess costs to redesign existing drainage systems to abate nitrates.**

Id. at 27-28 (emphasis added). Requiring a Drainage District to get a permit to do something within its power is one thing. Requiring it to get a permit to do something ***outside*** its power is quite another and runs afoul of Article III. Because Iowa's Supreme Court now has made clear Drainage Districts lack authority to address nitrate, DMWW has not met its burden to prove redressability.

2. **Counts III-X**. The parties agree Counts III-X of DMWW's Complaint remain pending before this Court and that the Drainage Districts' September 24, 2015 Summary Judgment Motion addresses those counts. The parties further agree these claims are no longer viable unless this Court deems the Iowa Supreme Court's position on Counts III-X to run afoul of the United States Constitution. The parties disagree, however, whether the Iowa Supreme Court's decision effectively resolves the federal constitutional questions.

a. DMWW's Position. DMWW asks this Court to conclude that Iowa law, which allows total immunity for pollution regardless of the facts, violates 42 U.S.C. § 1983 because it violates the Constitution's Due Process, Equal Protection, and Takings Clauses.

The Drainage Districts incorrectly claim that the certification order was intended to resolve all of the federal law issues in Counts III-X. The plaint text of the Certification Order demonstrates that is not the case:

> I would have to reject the thoughtful, creative, novel, and well-argued positions of DMWW, as unsupported by ***Iowa law*** and unlikely to be adopted by the Iowa Supreme Court, if I did not certify these questions. But, without certification, I would be substituting my judgment of ***Iowa law*** in lieu of the seven justices of the Iowa Supreme Court. In light of the novelty of DMWW's ***state law arguments***, the fact that this case is one of first impression, for either this court or the Iowa Supreme Court, and the public importance of this case, I believe that the interests of the parties and the public are best served by a definitive adjudication of these ***state law issues*** by the ultimate authority on them - the Iowa Supreme Court. Given the importance of these questions, I find no serious prejudice to the defendants by certifying these questions to the Iowa Supreme Court, despite their forceful resistance to certification.

(Dkt. 50 at 25) (emphasis added). The Court's certification order recognizes the certified questions address state law, not federal, issues. The Court did not ask the Iowa Supreme Court to opine on the merits of DMWW's federal constitutional and statutory claims.

The Ruling on Certified Questions is not dispositive of DMWW's claims for violation of the Equal Protection and Due Process clauses of the United States Constitution. DMWW directly challenges the constitutionality of state law that shields the Drainage Districts from responsibility for pollution. (Dkt. 36-1 at 21-27, 31-42); (Dkt. 2 ¶¶ 276-282). In addition to its property claims, DMWW asserts that Iowa law impairs DMWW's right to access the courts in violation of the Due Process and Equal Protection Clauses. *Jones v. Clinton*, 72 F.3d 1354, 1365 (8th Cir. 1996) ("[A]ccess to the courts has been held to be a 'fundamental constitutional right founded in the Due Process and Equal Protection Clauses.'") (Beam, concurring) (quoting *Bounds v. Smith*, 430 U.S. 817, 828 (1977)).

"Article VI of the Constitution makes the Constitution the 'supreme Law of the Land.'" *Cooper v. Aaron*, 358 U.S. 1, 18 (1958). The Drainage Districts, like the proponents of school segregation then, now claim that a ruling from a state court deprives the federal judiciary of any role in defining the contours of federal constitutional rights. The Drainage Districts' argument has been resoundingly rejected. *See Bush v. Orleans Parish Sch. Bd.*, 188 F. Supp. 916, 920 n.1

(E.D. La. 1960) ("Repeatedly, however, the state legislature has enacted legislation designed to circumvent the law of the land and to perpetuate segregation in the schools of Louisiana."). The Drainage Districts' argument would allow any state to nullify the Constitution:

> If we concede that the state, by legislation, can deprive the federal courts of jurisdiction in one case by declaring that certain parties shall be permitted to sue or be sued in the federal courts, it would follow, of course, that the state might by their legislation deprive the federal courts of all jurisdiction. For, if the state can, by its own act, provide that one citizen shall not sue or be sued in a federal court, in a case coming within the constitution and laws of the United States, it may, in like manner, exclude all its citizens from the federal courts.

See Cunningham v. Ralls Cnty., 1 F. 453, 455 (C.C. E.D. Mo. 1880);[3] *see also*, *Penn Gen. Cas. Co. v. Commonwealth of Pennsylvania ex rel. Schnader*, 294 U.S. 189, 197 (1935) ("The jurisdiction conferred on the District Courts by the Constitution and laws of the United States cannot be affected by state legislation."). *Accurate Controls, Inc. v. Cerro Gordo Cnty. Bd. of Sup'rs*, 627 F. Supp. 2d 976, 986 (N.D. Iowa 2009) (noting that a state venue statute could not be used to preclude federal jurisdiction); *Bush*, 188 F.Supp. at 924 ("If the legislatures . . . of the states may . . . annul the judgments of the [federal] courts . . . the Constitution itself becomes a mockery.") (quoting Justice Marshal in *United States v. Peters*, 9 U.S. 115, 136 (1809)).

b. Drainage Districts' Position. The Supreme Court's Ruling effectively resolves the federal aspects of Counts III-X because ***state*** law defines property for purposes of federal analysis.

DMWW repeatedly made clear in its filings that its federal constitutional claims depended on showing its property was taken in violation of Due Process, Equal Protection, or the Takings Clause. The fundamental right of which DMWW claims it was deprived was its purported "property right to unpolluted water." DMWW's Appeal Brief at p. 43. In explaining

[3] It is worth noting that *Cunningham* quotes Judge Dillon heavily for the proposition that federal courts should disregard state law that purports to immunize parties from federal intervention. *See Cunningham*, 1 F. at 454. Judge Dillon, of course, was the progenitor of the "Dillon Rule" upon which drainage district immunity was based.

its Due Process claim, DMWW argued "the constitutional right to just compensation for takings is a fundamental right." *Id*. at 48 ("Substantive due process . . . protects other property rights . . ."). DMWW said the same for Equal Protection. *Id.* at pp. 42-43 ("DMWW has riparian property rights because DMWW owns real estate adjacent to the Raccoon River."). The Iowa Supreme Court's ruling disposes of these claims not because the federal issues were presented to it, but because ***state law*** defines property within the state's boundaries for purposes of federal law and the Iowa Supreme Court held the property right DMWW alleges simply does not exist under Iowa law. Thus, unless this Court disregards Iowa's definition of property, the Iowa Supreme Court's ruling resolved DMWW's federal claims that it was deprived of property as well.

The point is simple, but fundamental. "State law defines property rights for federal takings claims." *Rucci v. City of Eureka*, 231 F. Supp. 2d 954, 957 (E.D. Mo. 2002); *see Webb's Fabulous Pharms., Inc. v. Beckwith*, 449 U.S. 155, 161 (1980); *Washington Legal Found. v. Texas Equal Access to Justice Found.*, 94 F.3d 996, 1000 (5th Cir. 1996) ("State law defines 'property' and the United States Constitution protects private property from government encroachment."), *aff'd sub nom. Phillips v. Washington Legal Found.*, 524 U.S. 156 (1998). The Iowa Supreme Court decided the underlying state law issue against DMWW when it held "No private property is involved in this case." Slip Op. at 35, and further when it stated:

> The drainage districts have not unconstitutionally deprived the DMWW of any property. The Raccoon River is owned by the State of Iowa in trust for the public. *See Estate of McFarlin*, 881 N.W.2d at 63. The DMWW does not own the water flowing in the Raccoon River, nor was it denied access to that water. "This case involves public water supplies, not private property. There can be no taking of a public resource . . . ." *Del. Cty. Safe Drinking Coal., Inc. v. McGinty*, No. 07–1782, 2008 WL 2229269, at *1 n.1 (E.D. Penn. May 27, 2008).

Slip Op. at 35-36.

Similarly, Section 1983 creates no rights at all and is merely a vehicle for enforcing other

rights. *Alsbrook v. City of Maumelle*, 184 F.3d 999, 1012 (8th Cir. 1999) ("We have consistently stated that section 1983 creates no substantive rights"); *Arrington v. Richardson*, 660 F. Supp. 2d 1024, 1036 (N.D. Iowa 2009) (same). Because the underlying property right DMWW alleges depends, as a matter of law, on ***state*** law and the Iowa Supreme Court already held the claimed right does not exist, DMWW's federal claim must fail.

In arguing Iowa's Supreme Court should disregard federal cases indicating it has no constitutional claims, DMWW previously urged Iowa's constitutional protections were broader than those under the U.S. Constitution. Thus, even if federal law was against them, DMWW urged they should win under state law:

> This Court applies a more searching form of rational basis review than federal courts do in applying the United Sates Constitution. Racing Ass'n of Cent. Iowa v. Fitzgerald, 675 N.W.2d 1 (Iowa 2004), cert. denied 541 U.S. 1086 (2004) ("RACI"), on remand from Fitzgerald v. Racing Ass'n of Central Iowa, 539 U.S. 103, 123 S. Ct. 2156, 156 L. Ed. 2d 97 (2003); see also Johnson v. Univ. of Iowa, 408 F. Supp. 2d 728, 749-51 (S.D. Iowa 45 2004) affirmed 431 F.3d 325 (8th Cir 2005).

Supreme Court Reply Brief at pp. 44-45. Having now lost under the very state law it argued was broader, DMWW suddenly argues federal protections somehow are broader than state protections. Federal courts, including the U.S. Supreme Court, repeatedly have held the rights DMWW alleges do not exist, however. *City of Trenton v. State of New Jersey*, 262 U.S. 182, 185 (1923); *Chicago, B. & Q. Ry. Co. v. People of State of Illinois*, 200 U.S. 561, 585–86 (1906). In fact, the Iowa Supreme Court cited numerous federal cases to reject DMWW's arguments under Iowa's "more searching" analysis. Slip Op. at 35-37. Relitigating this issue after the Iowa Supreme Court made clear the property right does not exist under state law is not necessary. It has been decided.

II. FEASIBILITY OF THE JUNE 26, 2017 TRIAL DATE

The parties agree the current trial date is feasible and the parties can be prepared for trial on any counts that remain after the Court rules on the pending motions. The parties note, however, that time and resources are limited and the resolution of the pending summary judgment motions may or may not dispose of all claims. The parties would therefore welcome any guidance the Court may be able to provide with respect to the expected timing of rulings on the pending motions, and will cooperate in any way possible to accommodate the Court's schedule.

III. THE IOWA SUPREME COURT RULING'S IMPACT ON THE DISCOVERY STAY

The parties agree discovery on Counts I and II closed on March 1, 2016, subject to any supplementation that may be appropriate under the rules. DMWW wishes to use previously disclosed experts that DMWW informally indicated were just for Counts III-X on Counts I and II. DMWW agrees the Drainage Districts may depose those experts now if they choose. The parties agree that, unless this Court preserves Counts III-X by determining the Iowa Supreme Court's recent ruling runs afoul of federal law, discovery is concluded, subject to any supplementation that may be appropriate under the rules. The parties do not agree, however, whether discovery should be reopened. DMWW's position is identified below at letter a. The Drainage District's position is identified at letter b.

a. DMWW's Position. As noted above, DMWW believes the Iowa Supreme Court's decision violates the Constitution and federal law. Thus, discovery should be permitted. DMWW should have 14 additional days to designate a rebuttal expert.[4] All parties should have

[4] The scheduling order set January 4, 2016 as Plaintiff's rebuttal expert deadline. (Dkt. 18). However, Plaintiff filed an unresisted motion to extend the expert deadlines that the Court granted. (Dkt. 32, 33). Under the revised

40 additional days to complete discovery,[5] and 71 days for dispositive motions on Counts III-X,[6] if any of such Counts remain for trial. The deadlines should begin to run on the date of the Court's ruling on the April 1, 2016 motion for summary judgment if the Court allows any of Counts III-X to proceed to trial.

Independent of the discovery issues on Counts III-X, DMWW requests an opportunity to depose Drainage Districts' experts on Counts I and II—Steven Chapra, Ph.D., and Gerrald T. Hentges, P.G. and Dennis R. Sensenbrenner, P.G. of Terracon Consultants, Inc.

b. Drainage Districts' Position. Consistent with the position described above, the Drainage Districts believe discovery is concluded on Counts I and II, and Counts III-IX must be dismissed. Further, even if this Court wished to reexamine the constitutionality of the Iowa Supreme Court's opinion just solicited and received and to re-examine the definition of "property" under Iowa law, those are issues of law properly decided by the Court and reopening discovery would simply create more needless and unwarranted burden on the Drainage Districts. Presumably, this Court likewise felt the Supreme Court's Ruling would dispose of these issues or it would not have stayed discovery on them pending receipt of the Supreme Court's ruling. Such a conclusion would have been well warranted as these issues long have been decided under federal law. *City of Trenton*, 262 U.S. at 185; *Chicago, B. & Q. Ry. Co.*, 200 U.S. at 585–86 (1906). Indeed, *all* DMWW's arguments have been rejected—sometimes multiple times—by EPA, by DNR, by the United States Congress, by the U.S. Supreme Court and, now, by the Iowa Supreme Court. Reopening discovery in these circumstances so DMWW can argue the very opinion it sought from the Iowa Supreme Court is unconstitutional is a burden the Drainage

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deadlines, Plaintiff's new expert deadline was February 3, 2016. Plaintiff therefore had fourteen days remaining until its rebuttal expert deadline when the Court granted the stay.

[5] The scheduling order set March 1, 2016 as the deadline for discovery completion. (Dkt. 18). Further, 2016 was a leap year, so February had 29 days.

[6] The scheduling order set April 1, 2016 as the deadline for dispositive motions.

Districts should not have to bear on issues of law that are already fully briefed and ready for decision. In addition, the discovery and summary judgment deadlines DMWW proposes would push discovery and dispositive motions too close to trial.

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CERTIFICATE OF SERVICE

I hereby certify that on February 13, 2017, 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

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