

June 29, 1998

**LeSueur County Board**

LeSueur County Courthouse  
88 S. Park Ave.  
Le Center, MN 56057

RE: In the Matter of the Appeals of the Trespass Citations Issued to Larry James Card; OAH Docket No. 9-2000-11994-2

To the Board:

This matter came on for hearing on June 4, 1999. In attendance, including myself, were Douglas Christian, LeSueur County Attorney, Deputy Robert Vollmer, Larry Card, and James O'Brien. Larry Card was represented by Michelle Zender of MacKenzie & Gustafson Ltd. As a result of the facts elicited at the hearing, I am recommending to you that the citation issued to Larry Card be upheld. The basis for this recommendation is set forth below.

At daybreak on November 1, 1998, Larry James Card entered onto property owned by Mark and Patty Pettis ("Pettis property") under the terms of a license agreement that allowed Mr. Card to use the property for hunting.<sup>[1]</sup> Mr. Card placed his duck boat on open water on the Pettis property near the boundary with property owned by Thomas O'Brien (O'Brien property).<sup>[2]</sup> In prior years Mr. O'Brien had given Mr. Card permission to hunt on the O'Brien property. In recent years, O'Brien had informed Card that Card was not permitted entry onto the O'Brien property. Mr. Card had not obtained permission to enter onto the O'Brien property on November 1, 1998.

Mr. Card used a pole to move his boat approximately 100 feet across the property line from the Pettis property to the open water on the O'Brien property.<sup>[3]</sup> In moving the boat, Mr. Card created a path through dense standing bulrushes. This path

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was the width of the boat and formed the surface over which the boat traveled. Along the length of path, except for the entry and exit points, Mr. Card's boat was not in contact with any water. At several points along the path, Mr. Card had to get out of the boat and push it to continue forward. The surface underneath the bulrushes consisted of soils capable of supporting weight. The bulrushes themselves were dry. Mr. Card's

boots left muddy footprints, but only near the open water at each end of path. Upon reaching open water on the O'Brien property, Mr. Card began to hunt ducks.

Upon hearing shooting on the water, Steve Campbell, a relation to Thomas O'Brien by marriage, called the County Sheriff's Office to report a trespass. Deputy Vollmer arrived at the Pettis property and observed the pick-up truck used by Mr. Card, parked near a drainage ditch. At that time, Campbell walked down toward the property line, and observed Deputy Vollmer across the open water on the Pettis property. Deputy Vollmer observed Mr. Campbell standing on the path running from the Pettis property toward the open water on the O'Brien property.

No boat was used by Campbell to inspect the area. Campbell walked along the length of the path created by Mr. Card. Mr. Campbell took photographs of the immediate area while standing on the path. Mr. Campbell informed Deputy Vollmer that Larry James Card was the person who made the path. Deputy Vollmer observed "No Hunting" signs that had been posted on the O'Brien property. Deputy Vollmer returned to his office and issued a trespass citation to Mr. Card.

Mr. Card asserted that the water on the Pettis property and the water on the O'Brien property were one body of water. But the presence of bulrushes growing densely between the two stretches of open water is an indication that the water becomes shallower between them and that there are two bodies of water. The existence of muddy ground along the route taken by Mr. Card is a further indication that there is one body of water on each property, not a single body of water on both. But as applied to the circumstances of this matter, the distinction is not relevant to the outcome. In *Bronczyk v. State*, the Minnesota Court of Appeals has held the designation of the wetland to be irrelevant to access, stating:

Here, the threat of prosecution is minimal, because the statute does not protect a hunter who is on private land posted with signs prohibiting hunting, and **the public has no legal right of access to the Bronczyks'**

**property because the surface water of Columbus Lake does not extend to County Road 23.<sup>[4]</sup>**

Under the holding in *Bronczyk*, access is not determined by the status of the property, but by the presence of open water. Mr. Card also asserts the he lacked intent to trespass and therefore the citation should be dismissed. The assertion relies upon certain standards for criminal trespass. The citation was issued in this matter under Minn. Stat. § 97B.001, *et seq.*, which is the civil trespass statute. The intent required under civil trespass is an intent to enter onto land, not an intent to commit a trespass.<sup>[5]</sup> Mr. Card's long history of dealings with Mr. O'Brien makes clear that Mr. Card intended to enter on the land. Mr. Card having a good faith belief that he had a right to enter the O'Brien property is no reason to dismiss this citation. The significant controversy Mr. Card was aware of and participated demonstrates that Mr. Card was aware of the potential for a trespass citation. If Mr. Card desired to avoid such a citation, other options, such as obtaining a declaratory judgment, are available.

I am recommending that the citation be UPHELD because the law on access to public waters requires a person have access to the surface of the public water. Mr. Card was within a wetland area but even he acknowledged that his boat crossed "muddy" ground to reach the open water on Mr. O'Brien's property. As the 1998 *Minnesota Hunting and Trapping Regulation Handbook* states:

1. What is lawful access?

**A stream or lake is lawfully accessible** if there is a public access, or if public land or a public road right of way abuts the surface of the water, or **if you have permission to cross private land to reach the surface of the water.**

\* \* \*

3. What waters are open to recreational use?

A stream or lake is open to recreational use over its entire surface if it is capable of recreational use and if it is lawfully accessible. **Any water that will float a canoe is capable of recreational use, but other waters may also qualify depending upon circumstances.**<sup>[6]</sup>

There is no doubt that Mr. Card had permission to cross the Pettis property. That entitled Mr. Card access to all of the open water that can be reached from the Pettis property. The path created by Mr. Card to the surface of the water on the O'Brien property required Mr. Card to cross property that is not open water. Mr. Card was explicitly and repeatedly denied permission to cross that property. Mr. Card did not have legal access to cross Mr. O'Brien's private land to obtain access to the surface of the water located on the O'Brien property.

Several documents obtained from the Minnesota Department of Natural Resources (DNR) and statements from DNR officials were relied upon by Mr. Card as support for his assertion of a right to enter on the O'Brien property. These resources were obtained prior to the adjustment of a control structure that lowered the elevation of the water on the O'Brien property and assumed Mr. Card would be following a drainage ditch onto the O'Brien property.<sup>[7]</sup> The documents and statements are irrelevant to the conditions present on November 1, 1998, and means actually used to access the O'Brien property. The classification of the O'Brien property as public waters or a wetland is insufficient, standing alone, to support a right of access.<sup>[8]</sup> That right is determined by the ability to access the surface of a body of water.

Mr. O'Brien argued that the sudden appearance of deep water on the Pettis property and other work done on the Pettis property constitutes an improper effort to gain access to the public water on the O'Brien property. The Judge lacks jurisdiction to determine whether work altering the cross-section of a public water was done. Under the facts of this case, there is no need to reach the issue, even if jurisdiction were present in this matter.

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Mr. Card has strenuously argued that the fact he poled his boat (and pushed it a short distance) over this path between two portions of open water makes his access lawful. Lawful access to public waters was discussed in *Johnson v. Seifert*, wherein the Minnesota Supreme Court held:

In the light of the foregoing we expressly overrule *Lamprey v. Danz*, 86 Minn. 317, 90 N.W. 578, and hold that an abutting or riparian owner of a lake, suitable for fishing, boating, hunting, swimming, and other uses, domestic or recreational, to which our lakes are ordinarily put in common with other abutting owners, has a right to make such use of the lake over its entire surface, in common with all other abutting owners, provided such use is reasonable and does not unduly interfere with the exercise of similar rights on the part of other abutting owners, regardless of the navigable or public character of the lake and regardless of the ownership of the bed thereof. **It does not follow that the foregoing riparian-rights rule applies to every pothole or swamp frequented by wild fowl and over which a small boat might be poled to retrieve game, but which as a practical matter does not lend itself in any substantial degree to the customary propulsion of boats by outboard motors or oars.** A minor body of water which by its nature and character reasonably has no overall utility common to two or more abutting owners would fall outside the rule. No hard-and-fast line can be drawn and each case must be determined according to its own peculiar facts.<sup>[9]</sup>

The impact of *Johnson* on this matter is clear. The presence of water on the Pettis property creates no right of access to water on the O'Brien property unless that water can be reached solely by use of watercraft using the "customary propulsion of boats by outboard motors or oars." The distinction set out in *Johnson* requires that the rights of a landowner to exclude the public be respected in circumstances where there is insufficient water to support a boat. Mr. Card's path through the vegetation on O'Brien's property cannot be accomplished with either oars or a motor. Card's path took his boat completely out of the water while on the O'Brien property for approximately 100 feet.<sup>[10]</sup> Mr. Card did not have lawful access to the surface of the

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water that he moved his boat onto and therefore he committed a trespass.<sup>[11]</sup> For these reasons, I recommend that the citation be UPHeld.

The law provides that the final decision in this type of matter must be made by the Commissioner or County Board.<sup>[12]</sup> Since the citation originated from the County, the final decision rests with the LeSueur County Board. Under Minn. Stat. § 116.072, subd. 6, the County Board must wait at least five days after receipt of this recommendation before making that final decision. Mr. Card may, within that five days, make any comments to the County Board on the recommendation under consideration. The law does not require, however, that Mr. Card make comments. The County Board must send a copy of the final decision to the Mr. Card.

Respectfully submitted,

PHYLLIS A. REHA  
Administrative Law Judge  
Telephone: 612/341-7602

PAR:ml

Enclosures

cc: Michelle Zender  
Douglas Christian  
Deputy Robert Vollmer  
Thomas O'Brien  
Mike Grupa, DNR



## Notary Public

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<sup>[1]</sup> Appellant Exhibit 15.

<sup>[2]</sup> The open water on the Pettis property is four feet deep, and squared off, running along the property line with the O'Brien property. The open water appeared suddenly, in the early 1990's. Campbell Testimony, Tape 3. By contrast, the water on the O'Brien property is eighteen inches deep. *Id.*

<sup>[3]</sup> In his description of where the property line runs, Mr. Card indicated that it might be ten yards from the open water on the O'Brien property. See Appellant Exhibit 4. Mr. Card's description is contradicted by the evidence on the ground and the testimony of both landowners and others showing that the property line is approximately one hundred feet from the open water. See County Exhibits 1a, 1b, 1c, 1d, and 2, and Intervenor Exhibit 13.

<sup>[4]</sup> ***Bronczyk v. State***, 1996 WL 706852, 706852 \*3 (Minn.App. 1996)(**emphasis added**).

<sup>[5]</sup> ***LePage v. State***, 1997 WL 714712, \*3-4. (Minn.App. 1997)(Intent to trespass, however, is not necessary for a trespass. See Restatement of Torts (Second) § 164 (stating that one is a trespasser "although he acts under a mistaken belief of law or fact, however reasonable, not induced by the conduct of the possessor" that he has the possessor's consent or some other privilege to be on the land)).

<sup>[6]</sup> Appellant Exhibit 17 (**emphasis added**).

<sup>[7]</sup> Intervenor Exhibit 11.

<sup>[8]</sup> Minn. Stat. § 103G.205 (3)("The designation of waters of this state as public waters does not: ... (3) affect state law forbidding trespass on private lands"). The definition of wetlands includes descriptions of lands that are often dry. Minn. Stat. § 103G.005, subs. 15a, 17b, and 19.

<sup>[9]</sup> ***Johnson v. Seifert***, 100 N.W.2d 689, 696-697 (Minn. 1960)(**emphasis added**).

<sup>[10]</sup> County Exhibits 1a, 1b, 1c, and 1d.

<sup>[11]</sup> It bears noting that, with a higher water level, lawful access across the property line between the Pettis and O'Brien property can be had. The determining factor is not whether the property is or is not determined to be a wetland, but whether the surface of the water **at the time of entry** reaches property that Mr. Card has permission to be on.

<sup>[12]</sup> Minn. Stat. § 116.072, subd. 6.