

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS

FOR THE MINNESOTA DEPARTMENT OF NATURAL RESOURCES

In the Matter of Determining the
Ordinary High Water Level of
Goose Lake, Waconia Township,
Carver County, and Establishing
and Maintaining Appropriate Water
Levels Thereon

**FINDINGS OF FACT,
CONCLUSIONS,
RECOMMENDATION AND
MEMORANDUM**

The above-entitled matter came on for hearing before Allan W. Klein, Administrative Law Judge, on May 31, June 1 and June 2, 2000 at the Chaska City Hall in Chaska, Minnesota.

Appearing on behalf of the Department of Natural Resources staff was Peter L. Tester, Assistant Attorney General, 900 NCL Tower, 445 Minnesota Street, St. Paul, Minnesota 55101-2127.

Appearing on behalf of the Goose Lake Property Owners Association was William G. Peterson, Attorney at Law, 3601 Minnesota Drive, Suite 880, Bloomington, Minnesota 55435.

Appearing on behalf of Harold E. Farnes was Scott R. Timm, Attorney at Law, 133 West First Street, Waconia, Minnesota 55387.

The record in this matter closed on September 5, 2000, upon receipt of the final briefs from counsel.

NOTICE

This Report is a recommendation, not a final decision. The Commissioner of Natural Resources will make the final decision after a review of the record. The Commissioner of Natural Resources may adopt, reject or modify the Findings of Fact, Conclusions, Recommendation and Memorandum. Under Minn. Stat. § 14.61, the final decision of the Commissioner of Natural Resources shall not be made until this Report has been made available to the parties to the proceeding for at least ten days. An opportunity must be afforded to each party adversely affected by this Report to file exceptions and present argument to the Commissioner of Natural Resources. Parties should contact Commissioner Allen Garber, Minnesota Department of Natural Resources, 500 Lafayette Road, St. Paul, Minnesota 55155 to determine the appropriate method for proceeding.

STATEMENT OF ISSUE

What is the ordinary high water level of Goose Lake, in Carver County, and what is the desirable lake level for the lake?

Based upon all the testimony, exhibits, and written comments, the Administrative Law Judge makes the following:

FINDINGS OF FACT

1. Goose Lake is located in the west central part of Carver County, just to the northwest of the City of Waconia and Waconia Lake. The planimetered area of the lake is 407 acres, according to Bulletin No. 25 published by the DNR in 1968. It has a tributary watershed of approximately 3200 acres, including the lake area. This computes to 7.8 acres of drainage for each acre of lake. The lake is shallow. It had a maximum depth of 10 feet back in 1960. Its maximum depth is shallower today.^[1]

2. The watershed surrounding the lake is primarily agricultural, and there are fewer than 15 landowners around the lake.^[2] However, recreational lakeshore development has started around the lake, and it is likely that such development will continue. The Department does own a public access on the lake.

3. Both residents and visitors use the lake for swimming, boating, water skiing, observing waterfowl and other wildlife, and fishing (but fishing was much more common in past decades than in the past few years).

Historic Lake Levels and Events Affecting the Lake

4. The earliest known recorded lake level for Goose Lake was recorded in 1935, when the lake was at 970 feet above sea level.^[3]

5. In late 1940, a drainage ditch project began which had a substantial effect on the level of Goose Lake. This drainage ditch ran from a point on the northwest edge of Lake Waconia in a generally northwesterly, then westerly direction for a distance of approximately 1-½ miles.^[4]

6. In June of 1941, Herman Hilke arranged to have the ditch extended onto his land, which was at the east side of Goose Lake. At the same time, the Carver County chapter of the Isaak Walton League was discussing with the Department the possibility of having the state build a dam at the lake's outlet, so that the water would be maintained at its then-present level. The Isaak Walton League argued that this dam would prevent fish from dying out during the winter, and would also assist in using Goose Lake as a fish-rearing lake to provide fish for Waconia Lake.^[5]

7. The ditch work that was done in the 1940-41 period caused the lake to go down approximately six feet.^[6]

8. The existence of a higher lake level at some time many years prior to 1981 in the past was confirmed by the expert lake basin evaluations performed by the DNR's survey crew. That crew performed two survey examinations of the lake basin, one in 1981 and the other in 1999. On both occasions, the crew noted and recorded evidence of an "historic" ordinary high water level at 973.3. This was based on a distinct line of numerous hardwoods growing just slightly up slope from the toe of a fairly well defined bank at several areas around the lake.^[7]

9. There is correspondence in the Department's files which indicates that at some time prior to 1947, there was litigation over drainage in the area and a court-ordered restoration of the outlet of Lake Waconia to its natural condition. In 1948, citizens were again asking the Department to erect a dam at the outlet of Goose Lake to increase the water level of Goose Lake. In 1948, the Department was unable to find funding to build a dam at the outlet of Goose Lake.^[8]

10. By 1964, the Mayer/New Germany Sportsman's Club considered erecting a control structure at the outlet of Goose Lake in order to stabilize (and raise) the lake levels. It was not unusual for the club to perform such projects, particularly when the DNR or other governmental entities did not have adequate funds to do it themselves.^[9] Often such volunteer efforts were done at the suggestion of the local DNR conservation officer, and were "approved" with a handshake.^[10]

11. Frank Sauerbrey, a member of the club, was delegated to determine whether or not a permit was required for the dam. He called the Department.^[11] Sauerbrey indicated that the club wanted to control the outlet of Goose Lake, and wanted a survey to establish the natural runout. The Department's Elroy Schultz told Sauerbrey to submit a list of property owners on the lake who desired to have the lake controlled at a higher level.^[12] That is all the Department's files indicate about the 1964 contact. There was no permit application or permit issued for any control structure.

12. The club, however, decided to go ahead with the project. The local conservation officer, William Mihelich, was an honorary member of the Club, and was involved in this project.^[13] It is more likely than not that this project was "approved with a handshake" from Mihelich.^[14] At some time during 1964, the club built a small rectangular outlet control structure at the outlet at the eastern end of Goose Lake.

13. The structure is a wooden box with a cement slab bottom. At the front of the box, there are channel iron pieces placed in such a way as to create slots to hold planks which can be placed in the slots so as to raise the effective outlet level, or planks can be removed from the slots, so as to lower it. Approximately three feet behind these planks are two large (24 inch) culverts, which transmit water to the east. The upstream invert elevation of one culvert is 965.91, while the upstream invert elevation of the other is 965.84. The downstream elevations of the two are 966.22 and 966.15, respectively. The fact that the culverts are not exactly equal, and the fact that they are laid so that the inlet is lower than the outlet, attests to the fact that the entire project was "home-made".

The “mouth” of the structure is 5.6 feet wide. When the structure was first built, it did not have any sort of fish trap in it, but in 1973 a fish trap was inserted between the control planks and the inlet of the culverts. This fish trap was an adjustable device, with tines welded to a pipe. The pipe could be turned to either raise the tines vertically, or lower them horizontally.^[15] At some time after 1964, concrete aprons were built on either side of the dam, but those aprons have now fallen into disrepair, and one of them has caved in to the waterway in front of the planks. The sill of the structure is at elevation 966.84. The top of the slots is at elevation 971.01, but when water exceeds 969.3, it will flow around the sides of the structure and into the culverts. In other words, given the maximum height of the sides at 969.3, it makes no sense to try to use boards to control the lake at any higher elevation, because water will flow around the sides of the boards.

14. Between the outlet structure and the lake is a channel. This channel can also control the level of the lake if it fills in with sediment or other materials. When that happens, water from the lake cannot get past the fill in order to flow toward the control structure. On May 4, 2000, there was an elevation of 967.8 feet in the channel, about 200 feet upstream of the outlet structure, which was stopping water from even flowing to the outlet structure. The lake level on that date was 967.72, and thus until the lake level rose past 967.8, there would be no flow to the outlet structure.

15. In 1967, Harold Farnes purchased property located on the south side of Goose Lake. He did not live there regularly until December of 1972. Although he had seen the outlet control structure before he bought his property, he understood it to be only a carp trap, and did not pay much attention to the wooden slot gate that extended about half the height of the steel slots at the front of the structure.^[16] In 1970 or 1971, Harold Goede, who was Farnes’ neighbor to the east, told Farnes that lake water was preventing Goede from getting into a field. They went over and looked at the control structure and discovered that boards had been stacked “very high” in the slots. Farnes removed at least some of the boards, and the water level went down.^[17] That was the start of a process which has now gone on for some 30 years. Some people place additional planks into the control structure when they believe the lake has gotten too low. Others remove planks from the control structure when they believe the lake has gotten too high. Some years, there are no changes in the planks, but other years there have been several. In both 1998 and 1999, there were three times each year when Farnes removed boards, and presumably an equal number of times when persons unknown inserted boards.^[18]

16. In 1972, the Mayer Sportsman’s Club contacted the Department with a request that the outlet channel be dredged. They alleged that cattails and bog had built up to the point where fish were having difficulty migrating in and out of Goose Lake when the water receded. Their request was ultimately granted when, in May of 1973, a permit^[19] was issued for the dredging. One of the special provisions of the permit was that there be “no change in the natural outlet elevation as defined by the soil at the bottom of the stream bed”. The dredging was ultimately carried out by the Department at taxpayer expense. A later summary of the activity noted that: “DNR personnel

dredged with care so they would not affect the water level of the lake and installed a fish trap in the outlet.”^[20]

17. After 1973, there were no more major alterations to the control structure. The lake level fluctuated according to the precipitation, runoff, and other natural factors and also, the lake level fluctuated when boards were added or removed from the structure. There are only a few lake level readings before mid-1998. They range from 966.5 in June of 1989 to 968.29 in June of 1981. Then, beginning in mid 1998 there are more frequent measurements. During calendar year 1998 the highest was 968.62 in July, while the lowest measured level was 967.96 in October. During calendar year 1999 (measurements available from April through July), the lake ranged from 968.95 in April to 968.03 in June. During the fall of 1999 the lake fell to 967.80 on September 30 and 967.57 on November 22. During calendar year 2000 (up to May 19) the lake has stayed between 967.70 and 967.80.^[21]

18. In 1999, friction between Farnes and others increased, as did the frequency of plank manipulation at the structure. On July 15, 1999, Conservation Officer Walter and Regional Hydrologist Dale Homuth met with a number of landowners on Goose Lake. This meeting was held at the Waldera residence and was organized by Jane Wolf, who became president of the unincorporated Goose Lake Property Owners Association. She invited all the known lakeshore owners around the lake to the meeting. Most attended, but Harold Farnes did not. At the meeting, Homuth presented a fact sheet^[22] which he had prepared to assist the discussions. Those present then talked about the difficulties they were having with the low lake levels and the manipulations. Homuth told them what little information was available in the Department’s file about the status of the control structure and discussed the possibility of having a unit of government take over ownership and maintenance responsibility for it. He also noted that there was no permit for it, and that the owner of the property where it was located (Keith Hanson) might want to consider applying for a permit to maintain the current structure with the same runout level as in past years. Hanson indicated that he was not even aware that he “owned” the structure, but that he would be reluctantly willing to apply for a permit if he had to. The general feeling of the people present was that they would like to see the level at approximately the level that it was at that time, perhaps a bit higher, but certainly not any lower.^[23] Homuth summarized the meeting in a memorandum, which indicates that almost all of the residents and other landowners did attend except for Harold Farnes. The memo indicates that “the owners will work on Mr. Farnes, the person who started this whole controversy”.^[24]

19. That night, Keith Hanson did fill out a permit application (assigned MDNR number 2000-6003), asking to repair the dam to restore lake levels “to former runout elevation of 968.5 feet”. That number was suggested to him by Homuth because it was the only definite level in the Department’s records, having come from the 1981 survey.^[25]

20. During the summer of 1999, it became clear that Harold Farnes did not agree with the 968.5 foot level suggested in the application, believing that it would

cause around 20 acres of his land to be flooded, saturated, spongy, and eroded. He urged that the lake's level be returned to 967.0 (the level when the outlet has no planks in it).^[26]

21. The matter culminated with a meeting between Farnes, Homuth and Hanson on September 30, 1999. Farnes (who is a lawyer, now retired) stated that he was going to seek an injunction against the Department if they would not take the planks out of the dam. Farnes also indicated that Hanson, as the permit applicant and ultimate recipient of a permit if it were issued, would be included as a defendant as well, even though Farnes did not want to have to do that. Hanson then stated that he wanted to withdraw the application, and in a letter dated that day, Hanson did withdraw it.^[27]

22. On October 4, 1999 Homuth accepted the withdrawal of the application.^[28]

23. On March 9, 2000, the Department issued its Notice of and Order for Hearing in this matter, setting the hearing to begin on May 31, 2000 in the Chaska City Hall.^[29] The Notice was published in the Chaska Herald on March 23 and March 30 and was mailed to a variety of state and local public officials and entities, as well as to all known landowners around the lake.

Ordinary High Water Level

24. In 1981, Carver County requested assistance in administering its shoreline management program, and asked the Department to determine the ordinary high water mark for Goose Lake. A Department survey crew went out on Goose Lake in June of 1981, took survey elevations at various locations, and determined an informal ordinary high water mark of 969.3. The crew also noted a "historic" ordinary high water level of 973.3. Later, the crew speculated that this historic level was in existence prior to the ditching which occurred in the early 1940s.^[30] The 969.3 level was used informally for shoreline management purposes, but it was never legally adopted by the Commissioner as the official high water level for the lake.^[31]

25. In the spring of 1999, residents around the lake contacted Conservation Officer Steve Walter, with complaints about boards being removed from the structure. As a result of this, the lake basin survey crew was asked to again survey Goose Lake.^[32] On May 25, 1999, the lake basin survey crew did another ordinary high water mark investigation of the lake. Because there had been threats of litigation earlier in 1999, they performed "a much more extensive investigation" in order to determine an ordinary high water level.^[33] The crew determined that the ordinary high water level for the lake was 968.7, which was .6 foot lower than the 1981 estimate. The 1990 investigation was much more thorough than the 1981 process. In 1981, the main focus of attention was a possible fill violation, and the ordinary high water level estimated in 1981 was not even formally adopted by the Commissioner. In 1981, the surveyors did not use a boat to go around the shoreline looking for evidence of the ordinary high water level. In 1999, on the other hand, they did use a boat and they did travel all around the

shoreline looking for evidence, such as wash lines, stain lines, banks, and trees which were close to the lakeshore, but still surviving.

26. The process used to determine the 1999 ordinary high water level was the same process which the Department has used for decades. Essentially, the Department's crew looks for evidence of the action of water on the landscape. They look for lines and stains, and they also look at vegetation, primarily trees. They look for trees which have survived for a long period of time, measure their base elevations and their diameters, then adjust the base elevations according to a formula depending on what kind of tree it is, and then finally average the adjusted elevations in order to determine what level the lake has been to, but not exceeded often enough to kill the trees. This, together with any lines, stains, etc. is put together to determine the ordinary high water level.^[34]

27. Scherek's 1999 Ordinary High Water Level Investigation was conducted in a manner consistent with Minn. Stat. § 103G.005, subd. 14 (1) (1999) and the court cases interpreting it. Scherek utilized the "tree data" described in the Department's Technical Paper No. 11^[35] and there is no evidence in the record to suggest there were any errors made in his application of that methodology.

28. Harold Farnes attacked Scherek's selection of trees and other data on the basis that the boards in the control structure on and off since 1964 had raised water levels, affecting the trees and other evidence of water levels so that regardless of how accurate Scherek had been in gathering his evidence, his conclusion was flawed. Scherek concluded that the ordinary high water level was 968.7. Farnes proposed, in the alternative, that the ordinary high water level would be not higher than 967.56-967.64.^[36] Farnes did not base this level upon any investigation of the trees or vegetation or shoreline around the lake. Instead, he computed it by taking the level of the bottom of the control structure without any planks in it (966.6-967.07) and adding to it an "average differential" of .486. This differential, in turn, was an average of the differentials between the lake level and the OHWL as computed by the Department in the 1981 survey, 1999 survey, and three computer models.^[37]

29. The Goose Lake Property Owners Association, on the other hand, argued that the "historic" ordinary high water level ("OHWL") of 973.3 ought to be used because it was the true "natural" level. The Association argued that the ditching in the early 1940s had disturbed the natural state by lowering the lake, that no permit had been sought or obtained to do so, and thus it was appropriate to return the lake to the level to which it would have maintained had the ditching not occurred. The Association would "reluctantly accept" the Department's 968.7 as a "worst case" position.^[38]

30. The Administrative Law Judge finds that the ordinary high water level of Goose Lake is 968.7 feet above mean sea level, for the reasons set forth more fully in the attached Memorandum, which is incorporated herein.

Desirable Lake Level

31. Public uses of the lake include swimming, boating, water skiing, wildlife observation and fishing. Substantial testimony was offered from residents and visitors concerning these uses.^[39]

32. Low water levels adversely affect public use of the lake, both by residents and by visitors. Low water levels impede navigation because of rocks and sandbars which have caused broken propellers^[40] and have resulted in boats being stuck in mud.^[41] An amateur water ski team has used the lake as a practice area for approximately six years. Not only have they had propeller problems noted above, but also they are at risk of not being able to use one of their two slalom courses.^[42] They, like some lake residents who testified, have had difficulty launching their boats because of low lake levels. Dock and boat launches which used to be perfectly adequate are no longer useable (without having to add extensions, which is sometimes not possible). Ordinary boating has also been impeded. A seventeen-year-old girl and three of her friends were out in a paddleboat when they got stuck in cattails, in an area that they used to be able to get through without difficulty.^[43] Cattails and other aquatic vegetation have “invaded” areas which used to be free of them.^[44]

33. No expert testimony was offered with regard to the impact of lake levels on fishing opportunities and spawning success, but residents generally believe that the higher the lake level, the better the fishing.^[45] Low lake levels have, in the past, contributed to concerns of winter fish kills.^[46] The only lakeshore owner or non-owner user who believes that the Department’s proposed control elevation of 968.3 is too high, is Harold Farnes.^[47]

34. Harold Farnes’ land is located on the south “point” of Goose Lake. It is on a large peninsula that divides the southwest lobe and the southeast lobe of the lake. Farnes used to raise cattle, but he sold them around 1975 and now rents portions of his land to a neighbor who pastures cattle on it.^[48]

35. Farnes’ residence and outbuildings are situated in a relatively high area near elevation 990. However, between his buildings and the lake is a definite bank or bluff. Between the bottom of the bluff and the lakeshore is a flat, meadowy area.^[49] It has terrestrial vegetation down to the shoreline (or, if the lake is low, down to the exposed dirt). There is no evidence of aquatic vegetation in this area. Elevation readings taken on May 4, 2000, on Farnes’ property, on the south shore of the lake (where the lakeshore runs roughly east west) illustrate how flat this “meadow” area is.^[50] Measurements on that date indicated a water surface elevation of 967.7. Proceeding landward directly away from the lake, 3.5 feet from the shoreline was an “obvious washline at toe of bank” at 968.2. Another 1.5 feet landward was the top of a low bank at 968.6 feet. Proceeding another five feet landward, the elevation was 969.1. Proceeding yet another 25 feet landward, the elevation was 969.8. Therefore, the elevation difference between the shoreline (967.7) and a point 35 feet landward (969.8) is only 2.1 feet. This gentle slope means that a small change in the lake’s level

(say a one foot vertical rise) makes a much bigger difference in the location of Farnes' shoreline (which would move inland about six feet horizontally).

36. The Department proposes to establish the control elevation at 968.3. This is based upon computer modeling which suggests that if the control elevation is set at that level, then the lake level "bounce" resulting from five-year and ten-year frequency rain storm events will fall on either side of the 968.7 OHWL. In the Department's experience, this will result in maintaining the OHWL at that level.

37. The Department used two U.S. Army Corps of Engineers' computer models to arrive at its recommended runout elevation. These models considered data such as outflow channel and outlet structure geometry, watershed soils and land use data, and watershed storage and channel characteristics. The models considered the storage characteristics of watershed lakes and wetlands and Goose Lake outflow ratings computed for a range of stoplog alternatives.^[51]

38. There was no serious question raised with regard to the accuracy or methodology of the Department's application of these models to the Goose Lake setting, and the Administrative Law Judge adopts them as the best evidence of the outlet level necessary to maintain the OHWL at 968.7.

39. The Administrative Law Judge finds that the proposed control elevation of 968.3 feet above mean sea level is a reasonable and appropriate elevation to use considering the public interests affected.

Based on the foregoing Findings of Fact, the Administrative Law Judge makes the following:

CONCLUSIONS

1. Any of the foregoing Findings of Fact that are more appropriately considered Conclusions are hereby adopted as such.

2. Goose Lake is a "public water" within the meaning of Minn. Stat. § 103G.005, subd. 15. It is, therefore, subject to the authority of the Commissioner for investigations (Minn. Stat. § 103G.251, subd. 1), setting of an OHWL (Minn. Stat. § 103G.255 (3)) and establishment, maintenance and control of lake levels (Minn. Stat. §§ 103G.255 (2) and 103G.401(b)).

3. Proper notice of the hearing was given pursuant to Minn. Stat. § 103G.311, subd. 2. Additional notice was provided to all landowners as described in Finding 23. It was in the public interest for the commissioner to institute this proceeding and the investigation that preceded it.

4. The ordinary high water level of Goose Lake is 968.7 feet above mean sea level using the definition of Minn. Stat. §103G.005, subd. 14.

5. A control elevation of 968.3 feet above mean sea level is “reasonable, practical, and will adequately protect public safety and promote the public welfare”. Minn. Stat. § 103G.315, subd. 3.

Based upon the foregoing Findings, Conclusions, files and proceedings herein, the Administrative Law Judge makes the following;

RECOMMENDATION

IT IS HEREBY RECOMMENDED that the Commission establish the OHWL of Goose Lake, Carver County, at 968.7, and the control elevation at 968.3.

Dated this 2nd day of February, 2001.

ALLAN W. KLEIN
Administrative Law Judge

Reported: Court Reported by Jane E. Schollmeier, Kirby A. Kennedy and Associates.

MEMORANDUM

There are two primary issues which need further explanation. The first is whether the Commissioner has authority to establish an OHWL on his own initiative, without a petition or permit application from any person. The second is whether an OHWL ought to be based on current conditions, including the effects of the 1940s ditching and the 1960s control structure, or whether the OHWL ought to be based on conditions with the ditching but not the control structure, or whether the OHWL ought to be based on conditions as they existed before the ditching and before the control structure. Each of the two issues will be discussed below.

Statutory Authority

Minn. Stat. § 103G.255 vests the Commissioner with the responsibility to administer (1) the use, allocation, and control of waters of the state; (2) the

establishment, maintenance and control of lake levels and water storage reservoirs; and (3) the determination of the ordinary high water level of waters of the state.

The general structure for the exercise of all of the Commissioner's public waters authority is a permit system. Many of the statutes are thus couched in terms of a "permit application" and a "permit issuance or denial." However, there are also provisions allowing the Commissioner to act in the absence of a permit application. Thus, Minn. Stat. § 103G.401 provides that:

- (a) Application for authority to establish and maintain levels of public waters and application to establish the natural ordinary high water level of public waters may be made to the commissioner by a public body or authority or by a majority of the riparian owners on the public water.
- (b) To conserve or utilize the water resources of the state, the commissioner may initiate proceedings to establish and maintain the level of public waters.

There are other provisions, however, that empower the Commissioner to act in the absence of a permit application. Minn. Stat. § 103G.251 empowers the Commissioner to investigate activities being conducted without a permit if he determines that an investigation is in the public interest. The statute goes on to state:

With or without a public hearing, the commissioner may make findings and issue orders related to activities being conducted without a permit that affect waters of the state as otherwise authorized under this chapter.^[52]

Clearly, the manipulation of the boards in the structure was affecting the levels of Goose Lake. No one disputes the authority of the Commissioner to "establish and maintain the level of public waters." Minn. Stat. § 103G.401(b). But Harold Farnes does dispute the authority of the Commissioner to establish an ordinary high water level in the absence of an application from either a public body or a majority of the riparian owners on the public waters, citing Minn. Stat. § 103G.401(a).

The Administrative Law Judge believes that the Commissioner's responsibility to administer the determination of ordinary high water levels, coupled with his authority to investigate and issue orders in the absence of a permit application, does allow him to initiate a proceeding to establish an ordinary high water level without a permit application from either a public body or a majority of landowners, so long as he finds that the proceeding is in the public interest and that the unpermitted activities are affecting public waters of the state. Both of those preconditions were met in this case, and thus the Commissioner is authorized to proceed to establish the OHWL.

OHWL Based on Current Conditions

The second question which needs explanation is why the Administrative Law Judge adopted the Department staff's recommended OHWL, which reflects current conditions, both natural and artificial, including a dramatic lowering of the lake by ditching in the early 1940s and the lesser raising of the lake by the control structure installed in 1964.

The principal reason is that the Department was the only party to present credible evidence of the OHWL. It presented two levels: the "historic" level of 973.3 and the current level of 968.7. The difference between the two is 4.6 vertical feet.

If the OHWL were set at 973.3, most if not all of Farnes' meadow and similarly situated lands would be flooded on those rare occasions when the lake would reach the OHWL. But this is not going to occur, realistically, unless the ditch were filled in (an eventuality which was not even discussed at the hearing) or a substantial new dike or water control structure were built at the outlet. The practical reality is that the OHWL of 973.3 is now unattainable. That leaves the 968.7 level as the only level with credible support in the record.

A.W.K.

^[1] This, and other background data is taken from Exhibit 3, "Ordinary High Water Level Investigation and Water Level Control for Goose Lake", published by the Department's Division of Waters on May 19, 2000.

^[2] See excerpt from County Plat Book at page 37 of Ex. 3.

^[3] Ex. 49, article from *Waconia Patriot* dated June 13, 1940. This same fact is reported in *Waconia, Paradise of the Northwest*, published by the Waconia Heritage Association in 1986, at p. 214.

^[4] An agreement, dated November 4, 1940 is contained in Ex. 49.

^[5] Ex. 49.

^[6] Testimony of Harold Hill, at Tr. 3, pp. 335-339.

^[7] Testimony of John Scherek, at Tr. 1, p. 102-104, 121 and 127-135-137.

^[8] Ex. 4.

^[9] Testimony of Stan Heldt, Tr. 3, pp. 404-409 and Frank Sauerbrey, at pp. 425-431.

^[10] *Ibid.*

^[11] Sauerbrey testified that he called the County, but the ALJ believes it was, in fact, the Department. Ex. 6 is a memo of a telephone call on April 8, 1964 from Sauerbrey to the Department. Memo signed by "EJS", identified as Elroy Schultz.

^[12] Ex. 6.

^[13] Testimony of Frank Sauerbray, Tr. 3, p. 428.

^[14] See Finding 10, above.

^[15] See photo 2 at Ex. 3, p. 12 and Testimony of Stan Heldt, at Tr. 3, p. 409.

^[16] Testimony of Harold Farnes at Tr. 1, pp. 180-182.

^[17] Farnes called the County Sheriff and complained. He was told to call the Department, which he did. After some checking, he was told that the Department had no record of any permit or any dam at the site, and that the issue of the boards was "a civil matter" between him and his neighbors. After a few unsuccessful attempts to obtain help, Farnes quit calling the authorities, both the Sheriff and the Department, and he resorted to "self help". See testimony of Harold Farnes at Tr. 1, p. 184 and his correspondence, Ex. 26.

^[18] *Id.* at Tr. 223.

^[19] P.A. 72-853.

- [20] Excerpt from Waconia, Paradise of the Northwest at p. 165. See footnote 3.
- [21] Ex. 19 and 31, data from Division of Waters.
- [22] Ex. 7.
- [23] Testimony of Dale Homuth, at Tr. 1, p.30. The level on July 16, 1999 was 968.25.
- [24] Ex. 8.
- [25] Testimony of Dale Homuth, at Tr.1, p. 31.
- [26] Ex. 29.
- [27] Ex. 10.
- [28] Ex. 11.
- [29] Ex. 12.
- [30] Testimony of John Scherek at Tr. 1, pp. 100-105.
- [31] Testimony of Dale Homuth at Tr. 1, pp. 26-27.
- [32] Ex. 14.
- [33] Testimony of John Scherek, at Tr. 1, p. 106.
- [34] This process is described in greater detail in the Department's Technical Paper No. 11, "Guidelines for Ordinary High Water Level (OHWL) Determinations" written by John Scherek and Glen Yakel in 1993. This paper is reproduced in Ex. 3. This methodology has been recognized by the courts as the appropriate methodology for determining the ordinary high water level. In the Matter of Determining the Ordinary High Water Level of Lake Pulaski, 384 N.W. 2d 510, 517-518 (Minn. App. 1986) and Lindberg v. Department of Natural Resources, 381 N.W. 2d 494, 496 (Minn. App. 1986).
- [35] Part of Ex. 3.
- [36] Farnes' argument and brief, at p. 3.
- [37] *Id.*
- [38] Summation Memorandum of Goose Lake Property Owners Association at pp. 3 and 6.
- [39] See, for example, Testimony of Jane Wolf, Tr. 2 at 289-333; Mia Waldera, at pages 342-358; and others in Volumes 2 and 3 of the transcript. Photographs of such uses were offered and received as Exhibits 49 and 51.
- [40] Testimony of David Schroeder, at Tr. 3, p. 415.
- [41] Testimony of Eva Waldera, at Tr. 2, pp. 392-395.
- [42] Testimony of David Schroeder, at Tr. 3, p. 416.
- [43] Testimony of Mary Cleveland, at Tr. 2, pp. 366-367.
- [44] *Id.* and Testimony of Jane Wolf, at p. 308.
- [45] See generally, Tr. 2, pp. 309-365.
- [46] Ex. 49.
- [47] See expressions of owners at July 15, 1999 meeting in Ex. 8 and Testimony of Jane Wolf.
- [48] Testimony of Harold Farnes, Tr. 2, pp. 267-268.
- [49] Photos of this meadowy area are in the record as Ex. 23, page 1 and p. 5. However, readers may not rely on the substantive text and elevations written below the photos in Ex. 23. They are not part of the record. See Tr. 2, p. 204 and pp. 263-265.
- [50] Ex. 34 and Testimony of John Scherek, Tr. 2, pp. 282-288.
- [51] Ex. 3, at p. 15.
- [52] Minn. Stat. § 103G.215(a).