

March 4, 2004

Gene Merriam, Commissioner  
Minnesota Dept. of Natural Resources  
500 Lafayette Road  
St. Paul, Minnesota 55155

Re: In the Matter of the Appeal of the Trespass Citation Issued to  
W.J.M., Jr. (Juvenile); OAH Docket No. 7-2000-15439-2

Dear Commissioner Merriam:

An Administrative Appeal Hearing was held in this matter by means of a telephone conference call on December 9, 2003. The participants were Administrative Law Judge (ALJ) Richard C. Luis, Conservation Officer Robert Mlynar, W.J.M., Jr. (Respondent) and his parents. The hearing was taped by the ALJ, and the record closed on December 15, 2001, with the filing of the final comment from the Juvenile's parents.

This Report is a RECOMMENDATION, NOT A FINAL DECISION. The Commissioner of Natural Resources will make the final decision, but the Commissioner must wait at least five (5) days after the receipt of this Report before a final decision can be made. During the five-day period, the parties may submit written comments to Gene Merriam, Commissioner of Natural Resources, 500 Lafayette Road, (Box 37), St. Paul, Minnesota 55155. Under Minn. Stat. § 116.072, subd. 6(e), the Commissioner must consider any comments filed in a timely manner. The Commissioner is requested to serve the parties and the Administrative Law Judge a copy of the final decision by first class mail.

Based upon all of the evidence herein, the Administrative Law Judge RECOMMENDS that the Trespass Citation in this case be AFFIRMED. I am persuaded that the enforcement division has established by a preponderance of the evidence that W.J.M., Jr., violated Minn. Stat. § 97B.002 by trespassing on the Nies property near Aitkin at approximately 7:45 p.m. on April 26, 2003. Therefore, the imposition of a civil penalty of \$50 for the trespass is appropriate. It is found specifically that the hearing request was not frivolous nor made for the purposes of delay.

At approximately 7:45 on the evening of April 26, 2003, Terry Nies had just finished with a day of farm field work and was driving home along a field road that runs

parallel to a watercourse known as the "Mississippi River Diversion" near Aitkin, Minnesota. On the other side of the watercourse, at a point approximately 250 to 300 feet from where Nies was driving his tractor, a person Mr. Nies identified as the Respondent was seen by Mr. Nies in the process of picking up the anchor to his small fishing boat. In order to perform that action, the person observed by Mr. Nies had to stand on property owned by Mr. Nies's father. The land on which the boater/fisher was standing to retrieve the anchor was posted for "NO TRESPASSING". In addition, W.J.M., Jr., had been warned the previous fall to stay off the Nies property.

Nies called Conservation Officer Robert Mlynar to complain about the trespass. On May 19, 2003, Mlynar went to the residence of the Respondent and his parents, and met with all three. All three members of the Respondent's family acknowledged that they remembered talking with Mlynar the previous fall about staying off the Nies property. They acknowledged that Mlynar told them that the Nieses had requested Mlynar to tell them not to enter the Nies property again.

Mlynar then asked the Respondent if he had been on the Nies property by the Diversion in late April and the Respondent said that he had thrown an anchor on to their land. When asked if he stepped on to the property to retrieve his anchor, the Respondent admitted he had.

At the hearing, Officer Mlynar reiterated the facts noted in the previous two paragraphs, and Terry Nies testified that the person he saw trespassing on his father's property on April 26, 2003, was the Respondent.

The Administrative Law Judge believes the facts as laid out in the testimony and other evidence presented by the Enforcement Division, so he has Recommended that the Citation be affirmed.

The Respondent's defense is that Mr. Nies was mistaken in identifying him, and that he was confused and angry at the time Officer Mlynar interviewed him on May 19 and does not remember admitting that he had been on the Nies property at the time alleged. Two other items were offered in support of the Respondent's version of the case: (1) an aerial photo designed to prove that Mr. Nies was not in a position, because of the distance involved and the intervention of trees and other vegetation in the line of sight, to make a positive identification of any person on the other side of the Mississippi River Diversion; and (2) a written statement from a customer of the business of the Respondent's father, which statement alleges that between the hours of 7:30 p.m. and 9:00 p.m. on April 26, 2003, the Respondent was helping his father perform a plumbing job at the author's home, which is at least ten miles away from the Nies property. This statement contradicts the allegation that the Respondent was on the Nies property at 7:45 p.m. the same evening.

The Respondent's present lack of memory does not convince the Administrative Law Judge that he did not admit to Officer Mlynar that he was on the Nies property when Officer Mlynar confronted him about that last spring. Since the admission was

made at a point in time close to the event (the statement was made May 19, the event took place April 26), and since the statement is against the interest of the Respondent, it is reasoned that the Respondent likely was telling the truth at that time. As for the accuracy of the identification of the Respondent by Mr. Nies, the Administrative Law Judge is persuaded by the evidence that there was no significant obstruction to the view (since the trees that otherwise may have been in the way had not yet leafed out), and that the distance involved was not so great as to prevent an identification. Regarding the written statement that the Respondent was elsewhere at the time he was alleged to be on the Nies property, that undated statement is discounted because the person making the statement was not present for cross examination. Because of that, there was no way to test whether the allegation that the Respondent was at the author's home between 7:30 and 9:00 p.m. on the evening in question is accurate, or whether W.J.M, Jr. may have been on the water (and the Nies's land) before going to the plumbing job.

Based on the reasons stated herein, the Administrative Law Judge concludes that the Respondent committed trespass on April 26, 2003, and that the Citation in this case should be AFFIRMED.

Very truly yours,

/s/ Richard C. Luis

RICHARD C. LUIS  
Administrative Law Judge

Telephone: (612) 349-2542

RCL:mo  
Encl.

cc: W.J.M., Jr. (Juvenile)  
W.J.M., Sr. and C.M.  
Conservation Officer Robert Mlynar  
Colonel Michael Hamm