

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS
FOR THE DEPARTMENT OF NATURAL RESOURCES

in the Matter of the
Alteration of Wetland
Basin 75-139W in
Stevens County by
Audray W. Henrichs
Without a Permit

FINDINGS OF FACT,
CONCLUSIONS,
RECOMMENDATION
AND MEMORANDUM

The above entitled matter came on for hearing before Allan W. Klein, Administrative law judge, on April 5, 1988, in Morris, Minnesota.

Appearing on behalf of Audray W. Henrichs, Respondent herein, was Dion K. Dalager, of the firm of Fluegel, Anderson, Dalager, Dalager & Seibel, Attorneys at law, 215 Atlantic Avenue, P.O. Box 527, Morris, Minnesota 56267.

Appearing on behalf of the staff of the Department of Natural Resources was Donald A. Kannas, Special Assistant Attorney General, Suite 200, 520 Lafayette Road, St. Paul, Minnesota 55155.

The record in this matter closed on July 1, 1988, upon receipt of the final brief.

Notice is hereby given that, pursuant to Minn. Stat. sec. 14.61 the final decision of the Commissioner shall not be made until this Report has been made available to the parties to the proceeding for at least ten days, and an opportunity has been afforded to each party adversely affected to file exceptions and present argument to the Commissioner. Exceptions to this Report, if any, shall be filed with Commissioner Joseph Alexander, Minnesota Department of Natural Resources, 500 Lafayette Road, St. Paul, Minnesota 55155.

STATEMENT OF ISSUES

Must Audray Henrichs plug up a ditch which he had cleaned out so as to restore an area to its condition in 1981? Was the area protected because of its character as a Type 3 wetland regardless of the statutory inventory? Was

the area protected because of the inventory, despite the fact that the final inventory had not yet been issued?

Based upon all of the proceedings herein, the Administrative law judge makes the following:

FINDINGS OF FACT

1. The area in question is located in the east half of the northeast quarter of Section 10 in Rendsville Township (I. 126, R. 42W) in Stevens County. This area is unincorporated .

2. This area was homesteaded by Audray Henrichs' grandfather. it then was owned by his father, James Henrichs, who died in 1982. In April of 1984, Audray Henrichs entered into an agreement with his family whereby he purchased the land on a contract for deed.

3. Prior to that purchase, in the fall of 1983, Henrichs hired a contractor to clear out an existing ditch. The ditch had been there as long as Henrichs could recall, but when James Henrichs owned the land, the area in question was used as a cattle pasture, and so he did not maintain the ditch. James Henrichs told Audray that the last time the land was plowed was in 1940, when flax was raised there. Since then, however, it had been used as a pasture. Audray Henrichs had never cleaned out the ditch, nor could he recall it ever being cleaned out in his lifetime.

4. In the fall of 1983, Audray began cleaning out the ditch. The ditch runs in a generally southerly fashion from the south tip of the area to near the center line dividing the north half of the section from the south half of the section, at which point it turns to the northwest and proceeds in a northerly and westerly direction throughout the north half of the section. Henrichs only owned the east half of the northeast quarter of the section, and the ditch flows virtually all southerly on his property,

5. The area in question is part of a drainage system that extends into a much broader geographic area. For example, to the north of the area is an east-west road. On the other side of that east west road is an artificial ditch which drains a small depression. There is a culvert under the road, and the water runs from north to south, so it runs into Henrichs low area. In addition, there is a road ditch along the north-south road immediately to the east of the low area. There is also a culvert in that road, so that water from the east of Henrichs' farm flows into the road ditch, through the culvert, and into his low area. The ditch to the south, when it is not blocked by debris, allows water to flow out of Henrichs' low area and onto his neighbor's property to the west.

6. The record contains aerial photographs of this area dating back to

1938. In 1938, the area has open water in it, despite the fact that the photos were taken in October of that year.

7. in June of 1951, there was open water, but with more cattail vegetation.

B. In August of 1958, a much smaller percentage of the area is wet. The northeast half of the area is in cattails, while only the Southwest half is wet.

9. in July of 1965, there is hardly any wet area, with most of the basin being in cattails.

10, In September of 1973, the area is even drier, with cattails only in the southwestern half.

!I. In 1980, the area has a couple of open water spots in the western half, but the basin is primarily vegetation. Ex. 6.

12. In 1981, there are four obvious areas of open water along the westerly edge, with vegetation in the rest of the area.

13. In 1982, there are three Obvious areas of open water, and the situation is similar to 1981, but with less open water. In 1983 in late July (Ex. 9), there is more open water showing, by a small fraction, than in 1981 or 1982.

14. In 1984, there was a marked change. Ex. 10. Instead of the area in question being wetter than the surrounding cropland (as it had been consistently from 1938 to 1983), the area is as dry as the cropland around it.

15. In 1985, the area is once again wetter than the cropland around it.

16. In 1986 (Ex. 12), the area is much the same as the cropland around it, except that the ditch that extends south from the area has been extended to the north, through the area, and it is intersected by an east west ditch.

11, By 1987, there is no longer any aquatic vegetation visible.

18. Department personnel took surface level photographs in October of 1985 and June of 1987. Photographs from October of 1985 (Ex. 33) show remnants of cattail vegetation and bullrushes, along with tractor tracks and the ditch. The 1987 photographs (Ex. 34) show the ditch, but with no water in it any longer. Bullrush and cattail vegetation is still visible, although some of it has been burned.

19. The natural outlines of the area are still intact. Ex. 34, which are 1987 panoramic views, demonstrate that topographic contours still exist to form the basin. There are definite edges to the wetland area.

20. In 1985, samples of vegetation from the center of the area, included cattail, bullrush and fragments of shells. Exs. 35 and 36.

21. The amount of water in the wetland varies with the season and with the year. Rainfall in this area varies from year to year. While the average precipitation at the Morris West Central Experiment Station from 1885 to 1986 is 23.91 inches, annual variation is substantial. For example, 1975 was 27.5 inches, while 1976 was only 9.9 inches. 1977, on the other hand, was 34.1 inches. The variations seen in the aerial photographs are, to a large part, explainable by the weather records until the drainage of 1983 and 1984

occurred.

22. Based on all the evidence of the basin, this basin was a Type 3 wetland from 1938 to 1984. Its size was 10.2 or 10.3 acres. A portion of its inflow was from artificial devices, such as ditches. But there has been no showing of what the size would be without the inflow from those devices.

The Statutory inventory

23. In the late 1970s, the Department began the process of inventorying water basins and wetlands as either public waters, public wetlands, or neither. This was pursuant to statutes adopted in 1976 and amended in 1979. In the case of Stevens County, on April 1, 1980, the Department submitted a preliminary map and a list to the County Board for review and comment. It included

'this area as Wetland 75-139W, and described it as a Type 3 wetland of 10.2 - 10.3 acres. On July 22, 1980, the County Board conducted an informational meeting regarding the preliminary designations. On August 4, 1980, the County Board presented its recommendations to the Commissioner, including waters in which the County Board disagreed with the Commissioner's preliminary designation. On September 3, 1980, the Department responded, setting forth its position on the areas of disagreement. On November 4, 1980, a revised map and list was issued.

24. Throughout the process set forth above, there was always identified a wetlands labeled "75-139W", in Section 10 of Rendsville Township. At no time was any objection raised by the County Board or any landowner regarding this wetland designation. While there were objections raised to some of the designations in Stevens County, those objections did not include this wetland. Because of those objections, a public hearing was held in March of 1981, and a private appeal was taken to the district court, resulting in a remand in October of 1981. This remand was not resolved by the hearing panel until May of 1983, and, therefore, the Commissioner did not publish his final inventory of protected waters and wetlands for Stevens County until February 5, 1985. Ex. 39. The final inventory does include Wetland 75-139 located in the northeast quarter of Section 10. It is also shown on the final map published in 1985. Ex. 38.

Thy Application Process

25. Henrichs first drained the area in the fall of 1963. In 1984, he did not do any work in it, but in 1985 he mowed cattails. By 1986, he had done more cleaning and mowing, and in 1987 he disked it.

26. On October 21, 1985, James Nelson, a Department employee, reported the violation. He spoke with Henrichs on October 28, who explained that it was an old ditch that had not been cleaned for years, and that he had begun to clean it when he took the farm over. It was during that conversation between Henrichs, Nelson and Terrance Lejcher that Henrichs learned, for the first time, that the area was a protected wetland and that there were restrictions

on his ditch work. During that conversation, Lejcher told Henrichs that the Department would be interested in compensating him for restoring the wetland by placing it in the state water bank program. One of the requirements for participation in the program is that the applicant applies for a permit to drain the wetland. If the Department then denies the permit, it can offer money to the landowner as part of the water bank program.

27. On February 13, 1986, Lejcher sent a letter to Henrichs, urging him to consider the state water bank program. He enclosed a permit application and a brochure about the program.

28. Soon thereafter, Henrichs completed the permit application form, and submitted it. He also submitted a separate form, referred to as a "W54" form, which was an application for the water bank program. It was, however, incomplete. It did not include information regarding soil test data. In addition to the soil classification data, Henrichs also failed to supply a form stating that there were no federal or other easements on the land. Henrichs did not submit this information because he thought it was only necessary if he were going to sell land to the Department. He had no intention of selling land, so he did not fill it out.

29. On March 6, 1987, the Department informed Henrichs that if he was not going to complete the application, the Department would consider his application for a permit withdrawn. On April 4, 1987, having heard nothing from Henrichs, the Department sent him a notice of withdrawal of his application.

30. The letter of February 13, 1986 (Ex. 17) set forth three alternatives as possible options for Henrichs. First of all, it suggested that criminal legal action could be initiated. Secondly, it suggested civil legal action would be initiated by an issuance of a restoration order from the Commissioner with the possibility of a public hearing, if appealed. Thirdly, it suggested an after-the-fact permit could be applied for, but it went on to say that the law would not allow the issuance of such a permit unless the wetland were to be replaced with another wetland of equal or greater value.

31. The parties stipulated that Henrichs was entitled to a hearing in this matter. On March 1, 1988, Commissioner Joseph N. Alexander issued an Order and Notice of Hearing, setting the Matter for hearing on April 5 in Morris .

32. On March 1, 1988, copies of the Order and Notice were served upon Henrichs and his attorney, as well as various other federal, state and local officials .

33. On March 10, and again on March 17, a copy of the Order and Notice was published in the Morris Tribune. On March 21, the Notice was published in the EQB Monitor at Volume 12, Issue 19.

Value of the Land for Crops or Wildlife

34. The soil in the wetland, not having been farmed for many years, is fertile and good cropland. Its organic content is high. There are also high levels of phosphorus, potash, sulphur and zinc. Its pH is neutral. While it would require a little more fertilizer to raise an excellent crop, basically the soil is very good cropland. The value of the land is approximately \$600 per acre or more. The average rent would be in the range of \$50 per acre.

35. The wetland does provide a number of intangible benefits. it does entrap nutrients carried by surface water. It does filter water that seeps downward to recharge groundwater. It does provide a retent on site in case of heavy rains that might otherwise cause erosion.

36. Except for wet years, there is very little wildlife or waterfowl use

of the area. There would be a few ducks early in an average year, but the area dries up too much to allow them to nest there. There were no muskrat, no beaver, no deer and no fox seen by Henrichs or his neighbors.

37. Henrichs is a duck hunter. However, by the time of the average fall Season, there are no ducks in the area because it is too dry. Henrichs has hunted in nearby basins, but not in this one.

38. in the fall of 1983, when Henrichs began working in the ditch, there was no water in the wetland. It was fairly dry, not as dry as in the surrounding field areas, but still dry. There were cattails and grass in the low area.

39. The land was rented to Stan Koehntop for four years. Koehntop has lived in this area since 1940. Some years, the area is bone dry, but some years there is a little water. In the springtime, there would be standing water in some years, but there was never open water visible in the fall. Between 1980 and 1983, Koehntop never saw any wildlife in the area.

40. Wetlands such as this serve as brood sites for waterfowl in wet years, but not in average years. They can serve as territorial sites, even in dry years. There are other wetlands within five miles of The area that are much better brood bites and are able to maintain waterfowl through the year; ducks stay in Henrichs' only in wet years.

41. The value of the area for other wildlife is only theoretical. A wildlife expert who has been stationed at Morris since 1959 had never walked down to the area, despite the fact that he had driven by it many times. While the area could be of benefit to pheasants and deer, no one who testified, including the Department's wildlife expert, had ever seen either pheasants or deer in the area. The area is too small to serve as a wintering area for deer.

Based upon the foregoing Findings, the Administrative Law Judge makes the following:

CONCLUSIONS

1. All relevant substantive and procedural requirements of law and rule have been fulfilled so as to vest the Commissioner and the Administrative Law Judge with jurisdiction in this matter.

2. The wetland located in the east half of the northeast quarter of Section 10, Rendsville Township, on property owned by Audray Henrichs, is a Type 3 wetland, as defined by U.S. Fish & Wildlife Service Circular No. 39 (1971 Edition). The expert testimony on this designation was uncontroverted. The area is greater than ten acres in size in an unincorporated area. It is, therefore, a "wetland" as defined in Minn. Stat. 105.37, subd. 15.

3. Minn. Stat, 105.42, subd. 1, provides that it shall be unlawful for any person to diminish the cross-section of any public waters without a permit from the Commissioner. For purposes of that statute, a "wetland" is included within the term "public waters". Therefore, regardless of the progress of the inventory process in Stevens County, Henrichs was prohibited from draining the

wetland without a permit from the Commissioner. See, Application of Christenson, 417 N.W.2d 607, 609-10 (Minn. 1987).

4. The area in question was also a protected wetland as a result of the inventory process. It acquired that status 90 days after the publication of the revised list and map because its inclusion in the inventory was not challenged. The publication occurred on or about November 4, 1980, so the designation attached on or about February 2, 1981. This it well before Henrichg' ditching in 1983.

Based upon the foregoing, the Administrative Law Judge makes the following:

RECOMMENDATION

That the Commissioner issue an Order to Audray Henrichs to restore Basin 75-139W to its condition prior to the ditch cleaning that began in 1983, but that Henrichs be permitted to participate in the waterbank program.

Dated this 5th day of August, 1988.

ALLAN W. KLEIN
Administrative Law Judge

NOTICE-

Pursuant to Minn. Stat. 14.62, subd. 1, the agency is required to serve its final decision upon each party and the Administrative Law Judge by first class mail.

Reported: Tape Recorded.

MEMORANDUM

I

Audray Henrichs was not aware that he was prohibited from draining this wetland. He was not aware of its inclusion in the statutory inventory, nor was he aware that it was a Type 3 wetland. While neither in a defense to the draining, the Administrative Law Judge does not believe that Henrichs knew he was violating the law.

II.

I have concluded that the drainage was prohibited for two reasons: That the wetland was a Type 3 wetland and met the other tests for protection, and, in addition, that it was included in the inventory at the time that Henrichs did his ditch work. Each of these will be discussed below.

The basis for the determination that the wetland was a Type 3 wetland was the expert testimony, primarily of Terry Lejcher, but secondarily of John Scharf. Lejcher is qualified, both by education and work experience, to review aerial photographs, soil maps, and render a valid opinion regarding the

appropriate classification of the wetland as a Type 2 or Type 3 wetland. He opined it was a Type 3, and that opinion was not seriously shaken by cross examination. While the wetland area appears to be closer to a Type 2 in some years, and a Type 3 in other years, depending on whether the year is a wet one or a dry one, the Administrative Law Judge defers to the expertise of the witnesses.

One question which arises, however, is whether the wetland meets the ten acre test in Minn. Stat. 105.37, subd. 15, if it receives some water

from artificial ditches and culverts. There is no question but that water flows into Henrichs' land from the north and from the east. There is also no question but that the size of the wetland is just over ten acres, in the range of 10.2 to 10.3. What is unknown is what the size of the wetland would be without the artificial flowage. There is no evidence, one way or the other, to indicate the percentage of water flowing into the wetland which comes from those sources. On the other hand, the culverts under the roads presumably convey waters into the wetland which would otherwise flow elsewhere if the roads had not been built and become barriers to natural flow. Again, however, that is only speculation.

Artificial enlargement of natural wetlands should not be included in an acreage measurement, according to a series of recent cases. Department of Natural Resources v. Todd County Hearings Unit, 356 N.W.2d 703, 705 (Minn. App. 1984); Department of Natural Resources v. Mahnomon County Hearings Unit, 407 N.W.2d 434, 439 (Minn. App. 1987). But the courts have also warned that decisions of this type should not be based on mere speculation. In the Todd County case, the court noted that ". . . landowners may challenge proposed designations, but, to do so effectively, must present evidence directed specifically at vegetation types, water depths and acreage." In a case such as this, where the burden of proof rests with Henrichs, it can only be concluded that he has failed to resolve the doubts about the unaltered size of the wetland.

This case is an excellent illustration of why the inventory is needed. In years past, there were numerous disputes over these matters. As the Supreme Court has noted:

Prior to 1976, there had been no systematic inventory of the State's waterbodies, and classification of waterbodies was made on a case-by-case basis. This ad hoc approach to regulation resulted in uncertainty, unknowing violations, and costly and time-consuming litigation. The purpose of the mandated inventory was to identify, count, list and map the state's waterbodies according to specific Statutory standards.

application of Christenson, 417 N.W. 2d 607, 608 (Minn. 1987). The whole point

of the inventory is to eliminate the need for determining what percentage of the water in this wetland came from artificial means, and how much was diverted by roads. The purpose of the inventory is to put these disputes to rest. It, therefore, becomes important to determine whether or not this wetland was in the inventory at the time of the ditch cleaning. If it was in the inventory at the time of drainage, then the dispute over 9.8 or 10.2 acres is irrelevant.

With regard to the issue raised by the inventory process not yet being finished, the Administrative Law Judge has concluded that with regard to this wetland, the inventory process was complete in early 1981, well before the ditch cleaning of 1983. The revised list and map were published in November of 1980. There was no appeal or question raised with regard to this wetland. There were appeals, hearings and court actions with regard to other wetlands in Stevens County, but not with regard to this one. The final list was not "published" until early 1985, after those other matters were settled. Henrichs argues that the designation did not attach until the 1985 final publication.

The final "publication" that occurred in 1985 was different from the earlier publications of the preliminary list and revised list because the first two were published in the newspaper, but the last one was not. The 1985 list and map were not published in the newspaper, nor were they required to be. All that the law requires is that the Commissioner publish a list of the waters determined to be public waters and wetlands. He is not required to publish it in the newspaper. And, in fact, he did not. The final list, which is Exhibit 39 in this record, was "published" when the Commissioner signed it and made it available in various state and county offices.

Henrichs' argument would have more force if the law required that the final list and map be published in the newspaper. He could then argue that the purpose of publishing it in the newspaper is to give notice to him, and to the public at large, that the wetland is protected. The Commissioner argues, however, that the notice to Henrichs, and to the public, occurred when the revised list and map were published in the newspaper back in 1980, along with a notice that they would become final unless an appeal was taken within 90 days. Under these circumstances, I believe that the designation did attach once the revised list was published in the newspaper and no appeal was taken.

Henrichs also argues that the language of the statute, which provides that "if any designations are disputed by petition, the Commissioner shall order a public hearing to be held within the county . . .", means that so long as at least one appeal is filed, then all the waters and wetlands on the revised list are subject to revision in the hearings. By emphasizing the word "any" in the statute, he argues that public hearings are necessary for the entire list, even though only one particular wetland may be in dispute. I disagree with that interpretation. When an appeal is taken from the revised list, the hearing deals only with the individual waters or wetlands subject to appeals. Department of Natural Resources v. Todd County Hearings Unit, 356 N.W.2d 703 (Minn. App. 1904) and Department of Natural Resources v. Mahnomen County Hearings Unit, 407 N.W.2d 434 (Minn. App. 1987). --

Finally, support for this interpretation comes from the Mahnomen County case. In that case, a number of landowners did object to the revised list and map, and a local hearings unit was formed pursuant to statute. There were six situations in which the Department recommended that an area be designated as a wetland, but the hearings unit disagreed. All of these areas had been ditched, drained, and sometimes plowed and planted without a permit at some time prior to August, 1979, when revisions to Minn. Stat. 105.391 took effect. For reasons which are not entirely clear, the Department failed to show that any of the wetlands would have qualified as a public water under the 1973 or 1976 definitions. The court held that since the Department failed to establish that pre-1979 drainage was illegal, then the critical question was whether or not the area qualified as a wetland at the time of the local unit hearing.

In Henrichs' case, the draining occurred well after the time that the Stevens County hearings unit would have looked at his land if he had appealed. if the Mahnomen test is, "What is the condition of the land at the time of the local unit hearing?", then Henrichs' land must be evaluated in its pre drainage condition. It makes no sense to say that Henrichs and numerous other land-owners in Stevens County had a "window of opportunity" to drain until 1905 because some other landowners happened to have appealed the designations of other properties. This is particularly true in light of the concept from the Christenson case, cited above, that the State's jurisdiction over public waters was not dependent upon completion of the inventory.

III.

Henrichs has raised other issues concerning the Department's procedures. They have been examined, but none alter the outcome reached above.

IV.

in dry years, such as the present time, it would be wasteful not to allow cropping or pasturing of lands that could support crops or pasture even though they are designated as wetlands. The law, in fact, specifically allows this to happen, in Minn. Stat. 105.391, subd. 10:

This chapter does not prevent a landowner from using the bed of wetlands or public waters for pasture or crop land during periods of drought, if there is no construction of dikes, ditches, tile lines or buildings, and the agricultural use does not result in the drainage of the wetlands or public waters.

While the effect of this recommended decision (if adopted by the Commissioner) will be to gradually restore the wetness of the area, that does not mean that Henrichs is totally deprived of its use. Particularly in years such as this, it can be used for either cropping or pasture.

A.W. K.