

STATE OF MINNESOTA  
OFFICE OF ADMINISTRATIVE HEARINGS

FOR THE MINNESOTA DEPARTMENT OF NATURAL RESOURCES

In the Matter of the Alleged Alteration  
of the Cross-Section of Goose Lake by  
George Zimmerman.

FINDINGS OF FACT,  
CONCLUSIONS AND  
RECOMMENDATION

The above-entitled matter came on for hearing before Administrative Law Judge Richard C. Luis on March 6 and 7, 1986, in the County Courtroom, Le Sueur County Courthouse, Le Center, Minnesota. The record in this case closed on August 15, 1986.

A.W. Clapp, III, Special Assistant Attorney General, Suite 200, 520 Lafayette Road, St. Paul, Minnesota 55101, appeared on behalf of the Minnesota Department of Natural Resources ("Agency", "DNR", "Department"). Patrick J. Moriarty, Moriarty Law Office, P.O. Box 415, New Ulm, Minnesota 56073, appeared on behalf of George Zimmerman ("Appellant", "Respondent").

Notice is hereby given that, pursuant to 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, 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 Joseph N. Alexander, Commissioner of Natural Resources, 520 Lafayette Road, St. Paul, Minnesota 55101.

STATEMENT OF ISSUE

Does George Zimmerman have an existing right, within the meaning of Minn. Stat. 105.38(1), to perform ditch work that alters the cross-section of Goose Lake without having to apply to the Commissioner for a permit, and, if he does not have such a right, should a permit be granted to him authorizing the ditch work he performed south of the Lake in 1984?

Based upon all of the proceedings herein, the Administrative Law Judge makes the following:

FINDINGS OF FACT

1. Goose Lake, located in Township 110 North (Cordova Township), Range 24 West, Le Sueur County, is a meandered Lake which is 262 acres in size. The Lake's water surface is usually considerably less than its meandered area, and has fluctuated over the last 40 years from a full basin at flood or other high water times to a dried-up hay meadow. At the present time, the Lake's water surface is approximately 40-50 acres. The shoreline of the open water is

irregular in shape, about one mile around at the present. The Lake has a maximum depth of four feet.

2. The meandered Goose Lake lies in Sections 20, 21, 28 and 29 of Cordova Township. At present, the surface water is all within Sections 28 and 29.

3. During the period from 1897-99, landowners in Cordova Township petitioned for construction of a ditch to drain some swampy, marshy area near the Goose Lake site, the Petition was approved by the County Board, and Le Sueur County Ditch No. 12 was constructed. The ditch runs in a southeast to northwest direction through land lying generally north and east of Goose Lake. All the parcels of land surrounding Goose Lake were assessed benefits for County Ditch No. 12.

4. Spur No. 1 (a branch ditch) of County Ditch No. 12 was constructed during 1898 or 1899 as part of the original ditch project. Spur No. 1 runs along the line dividing Sections 20 and 21, from south to north, for just over one-half mile, at which point it joins with the main line of County Ditch No. 12. Spur No. 1 begins at the "Four Corners" intersection of Sections 20, 21, 28 and 29, a point well inside (over 200 feet, see Exhibit 10) the meander lines of Goose Lake. Spur No. 1 filled up with silt and other debris many years ago, and has never been cleaned out.

5. In 1958-59, local landowners petitioned for a new ditch to serve the same area originally drained by County Ditch No. 12 and certain other areas, which Petition was approved and Le Sueur County Ditch No. 64 was constructed. The course of Ditch No. 64 varies somewhat from that of Ditch No. 12. Not all of the land surrounding Goose Lake has been assessed benefits for Ditch No. 64.

6. Sometime in the 1960's a private ditch was dug by an unknown party that provided an outlet for Goose Lake on the east, at an altitude of 1021.57 feet. This ditch runs straight east from the outlet point to the south end of Branch No. 4A of County Ditch No. 64. Therefore, water flowing out of Goose Lake at its outlet has, since construction of this private ditch, flowed into County Ditch No. 64.

7. In 1971, Charles Rezac, who owns land on the east and southeast sides

.of Goose Lake, constructed a private ditch of his own, which ditch drains a portion of his land and flows off his land into the private ditch described in

Finding 6. Rezac's ditch (known locally as the "Rezac Spur"), thus provides drainage off land owned by Mr. Rezac, through the private ditch that starts at the outlet of Goose Lake, into Branch 4A and, eventually, the main line of County Ditch No. 64. The "Rezac Spur" is several hundred feet long.

8. The Respondent, George Zimmerman, owns the land along the southwest shore of Goose Lake and all of the land along the south shore of the Lake, except for the southeast corner, which is owned by Rezac. All of the shoreline parcels owned by Zimmerman were assessed for benefits with respect to County Ditch No. 12, but not for County Ditch No. 64.

9. During the 1980's, the tiling and pump system that drains approximately 65 acres owned by Zimmerman at or near the southwest shore of Goose Lake has been inadequate to keep his land in that area from frequent flooding (from Goose Lake and/or surface runoff) or frequent conditions of prolonged standing water. In the late spring of 1984, Zimmerman dug a ditch

on land owned-by himself and Mr. Rezac (with Rezac's permission) which ditch connects his acreage on the southwest shore of the Lake with the Rezac Spur described in Finding 7. He also dug out the Rezac Spur so that its bottom would be comparable to the bed of the ditch dug on his (Zimmerman's) land, not stopping construction until he reached the intersection of the Rezac Spur and the private ditch described in Finding 6.

As a result, Mr. Zimmerman created a drainage system running from the southwest shore area of Goose Lake, through the Rezac Spur and the other private ditch (which is the outlet for Goose Lake), into Branch 4A of the County Ditch No. 64 system.

10. The total length of the ditching work performed by Zimmerman in 1984, from the area of his pumping station on the southwest shore of Goose Lake, to the end of the Rezac Spur, is approximately 5,700 feet (almost 1.1 miles). All of the digging performed by Zimmerman, which was done with a back hoe machine, was done outside the meandered portion of Goose Lake. Zimmerman did not apply to the Department of Natural Resources for a permit to perform this work.

11. All of the parcels of land owned by the Respondent through which he dug the ditch in question have acreage that was directly benefited by County Ditch No. 12. It is impossible to determine with certainty whether land through which the ditch was constructed was within the acreage benefited directly by construction of County Ditch No. 12, but the construction was done very near the meander lines of the Lake. Zimmerman dug the ditch to prevent the flooding of 65 acres on two parcels of land. The amount of acreage directly benefited by construction of County Ditch No. 12 in the two parcels is 43.4.

12. The watershed area of Goose Lake prior to Zimmerman's ditch construction was 789 acres. The newly dug ditch diverts surface runoff from 177 of those 789 acres or 22% of the watershed area. This diversion of water results in an annual lowering of the lake level by 3.4 inches, a recession of

the shoreline by 17 feet and a reduction in surface area of 4.6 acres.

13. At one point along the south shore of Goose Lake, Zimmerman's ditch intersects, and in effect "unplugs" a "lens" of gravel material, which is surrounded by less porous peat soil. This "lens" is approximately 50 feet long and 18 inches in height. The "lens" appears only on the lakeward side of the ditch and is above the water-channel portion of the ditch. Water seeps through the gravel material and out into the ditch. Prior to the ditch construction this water had no outlet. The ditch end of the gravel "lens" is approximately 100 feet south of the open water of Goose Lake. The seepage of water through this gravel accounts for a drop in the lake surface of 4.4 inches, a reduction of shoreline by 30 feet, and a reduction of surface area of nine acres.

14. The combined effect of diverted surface runoff and seepage through the gravel "lens", both caused by Zimmerman's ditch work, dropped the lake surface 7.8 inches, receded the meandered shoreline by 47 to 50 feet and reduced the Lake's surface area by 13-14 acres.

15. Goose Lake is shallow (four feet or less) and freezes to the bottom every winter. There is no known fish life. As wildlife habitat, it attracts deer, muskrat, mink, several wild bird species and wild fowl such as teal, mallards, woodducks and geese. The vegetation in the lake is mostly cattails, with some other reeds and sedges evident. Zimmerman planted rows of corn on the sides of his newly-constructed ditch and the corn has attracted deer. The area is popular for hunting and trapping.

16. On three occasions in 1950s, game counts were made by the DNR (then, Department of Conservation) at Goose Lake. Few animals (all water fowl) were found in 1950 and 1957, although the area was heavily hunted in 1951. On September 9, 1952, Conservation Officers counted 152 water fowl (mostly teal and mallards) at Goose Lake.

17. The Ordinary High Water Level (OHWL) at Goose Lake is 1022.3 feet. Zimmerman's ditch is entirely below that level.

18. Since 1973, Goose Lake has been assigned a Natural Environment (NE) Shoreland Management Classification by the Commissioner pursuant to provisions of Minn. Stat. 105.485.

19. Although the inventory of public waters for Le Sueur County has not been finalized, those proceedings have been delayed because of appeals of the designation of water other than Goose Lake. Goose Lake was designated as a water basin-public water on September 10, 1980, and no one filed a petition disputing that designation.

20. On October 23, 1985, the Department issued a Restoration Order to the Respondent, ordering him to fill in the ditch dug in the spring of 1984. Zimmerman duly appealed, and after proper notice to the party and public, the evidentiary hearing was convened.

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

#### CONCLUSIONS

1. The Administrative Law Judge and the Commissioner of Natural Resources have jurisdiction in this matter.

2. All of the procedural requirements of law and rule have been met, and the matter is properly before the Administrative Law Judge.

3. Goose Lake is a public water under Minn. Stat. 105.37, subs. 14(a) and (c), and has been inventoried as such under Minn. Stat. 105.391, subd. 1.

4. The ditch construction by Mr. Zimmerman alters the cross-section of Goose Lake by drainage, which lowers the surface area, and by creating a cut in the lake itself (the construction lies below the ordinary high-water level of the Lake and is within the Lake's basin).

5. Zimmerman has an existing right to drainage benefits from County Ditch No. 12.

6. Zimmerman's ditch construction in the spring of 1984 drains land directly benefited by the construction of County Ditch No. 12.

7. Zimmerman has not proven-that the ditch work he performed in the spring of 1984 has the equivalent effect of improving County Ditch No. 12.

8. Zimmerman's existing rights to benefits from County Ditch No. 12 do not give him the right to construct another ditch which is not an improvement of County No. 12 or Spur No. 1 of that ditch, within the meaning of Minn. Stat. 106A.215.

9. Lands drained by the spring, 1984 ditch construction on the part of the Respondent are not lands assessed for benefits within the County Ditch No. 64 system, so Respondent had no existing right to drain off such unassessed lands into that system.

10. Mr. Zimmerman has not met the standards of Minn. Rules 6115.0270 and .0271 for receipt of a permit to alter the cross-section of Goose Lake.

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

#### RECOMMENDATION

IT IS HEREBY RECOMMENDED that the Commissioner of Natural Resources issue an Order requiring George Zimmerman to either fill in and restore the ditch he created in Sections 28 and 29 of Cordova Township, Le Sueur County, or, in the alternative, to petition the drainage authority for a lateral connection with the County Ditch No. 64 system, within 60 days.

Dated this                    day of September, 1986.

RICHARD C. LUIS  
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: Taped

#### MEMORANDUM

In arriving at the above Recommendation, the Administrative Law Judge is attempting a practical solution to what he views as a very close case. The

situation is ironic. Although Mr. Zimmerman has (either by himself or with

his neighbors) the right to drain the land in question through improvement of

County Ditch No. 12, he has no legal right to drain that same land with a private ditch without the granting of a permit from the Commissioner. The Judge believes that the evidence strongly implies, but does not sufficiently

prove, that an improvement of the County Ditch No. 12 system, especially a cleaning out of Spur No. 1, would be more devastating to Goose Lake than what

Mr. Zimmerman has done. Since the Respondent and owners of other land benefited by the construction of the County Ditch could legally compel construction of a new channel which would start several hundred feet inside

the Lake, it is obvious that more than 13-14 acres of the 262 (meandered) acreage of the Lake would be jeopardized. Another equity in Mr. Zimmerman's

favor in this proceeding is that the County Ditch No. 64 is currently fed by

the private ditch that outlets Goose Lake on the east. It can be argued that

all the Respondent's ditch does is connect with the system that has been substituted for County Ditch No. 12. As pointed out in the brief of Zimmerman's counsel, there is a strong argument that the lands currently assessable to County Ditch No. 12 that are drained by Zimmerman's 1984 project

should be properly assessed into the County Ditch No. 64 system.

The Administrative Law Judge has concluded that the land owned by Mr. Zimmerman lying south of the meandered portion of Goose Lake, the same land

through which he performed his ditch work in 1984, is the land directly assessed for benefits for County Ditch No. 12. Such a conclusion is logical

because (1) the ditch is just outside the meandered portion of the Lake and

(2) the closest outlet for the County Ditch No. 12 system for any benefited

lands within those parcels is the end of Spur No. 1, which starts several hundred feet south of the northern end of the meandered Lake. All the rest of

the County Ditch No. 12 system is farther north, so the intent had to have been for drainage to flow from south to north through the lake bed. The evidence also establishes that the lake bed was a dry hay meadow in the past

(but fails to establish whether this condition was created by the drainage effects of Spur No. 1 or simply by dry weather).

While all of the arguments and practical considerations noted above are in

Mr. Zimmerman's favor, it has still been concluded that he has no legal entitlement, based on this record, to do what he has done without obtaining a

DNR permit. The threshold question is whether a permit is required and the

Administrative Law Judge has concluded that such is the case. The Respondent's existing rights to benefits from County Ditch No. 12 and his

putative rights to be assessed for benefits from County Ditch No. 64 do not give him the right to connect to those systems with his own private ditch. He must either petition for cleanout of County Ditch No. 12, including Spur No. 1 into the Lake, or for extension and improvement of the County Ditch No. 64 system so that the east outlet of Goose Lake can be drained or his own construction legally added to the system (which would have the further, positive effect of adding Zimmerman, as a beneficiary, to the assessment rolls for the County Ditch No. 64 system). No such procedures have been undertaken. However, if either situation comes to pass, exercise of a then-existing right to "drain" Goose Lake could have an impact on the local environment equal to or greater than any caused by the Respondent's 1984 construction. It has been recommended that Mr. Zimmerman be allowed to petition for lateral connection to Branch 4A of County Ditch No. 64 because that alternative seems to have a less adverse affect on the environment than would result from an improvement to Spur No. I of County Ditch No. 12.

It has been concluded that the Respondent needs a permit for the work performed in 1984 (unless he applies for a lateral connection under the appropriate ditching statute) because his work changed the cross-section of a public water by excavation in the bed of that water within the meaning of Minn. Stat. 105.42, subd. 1. Even if (as Zimmerman argues) the ditching project lies outside the bed of public waters, that statute still proscribes the causing of a change in the cross-section of a public water "in any manner". Goose Lake is a public water because (among other reasons) it is a meandered lake. See, Minn. Stat. 105.37, subd. 14(c). Even the Appellant concedes that the portion of the Lake lying within the meander lines is a public water. Given that, the evidence provided by Ken Stone of the DNR clearly establishes that the ditch dug by Zimmerman has the effect of changing the cross-section of meandered Goose Lake because it causes a recession of the Lake's shoreline by 50 feet (a loss of 13-14 acres in surface area). Seventeen feet of this recession is caused by the diversion of surface runoff from 22% of the Lake's watershed into the ditch rather than into the Lake. Zimmerman has offered no evidence to refute this proposition. The DNR also proved that the water lost through seepage from the gravel "lens" opened by Zimmerman's digging accounts for a 30 foot recession of the shoreline, the effect of which is added to the effect of diverting the surface runoff. Zimmerman's counsel has argued that there is no proof that the seepage has its source within the Lake, but the Administrative Law Judge rejects that argument because the circumstantial evidence that the water seeping out of the gravel comes from the lake is overwhelming. The gravel lens lies between the altitudes of 1018.5 feet and 1020.0 feet, which is between 2.3 and 3.8 feet below the OHWL of the Lake. The lens does not extend to the landward side of the ditch. It is one hundred feet from the outlet of the lens to the open water of the Lake. Finally, and most fundamentally, there is no place, other than the Lake, that the seepage can come from.

The theory of the Respondent's case is that he needs no permit from the DNR for the work he performed, even if that work altered the cross-section of a public water, because he has an "existing right" to perform the work. The basis for this argument lies in Minn. Stat. 105.38(1), which is part of the "Declaration of Policy" statute regarding conservation of water resources. The statute reads:

In order to conserve and utilize the water resources of the state in the best interests of the people of the state, and for the purpose of promoting the public health, safety and welfare, it is hereby declared to be the policy of the state:

(1) Subject to existing rights all public waters and wetlands are subject to the control of this state.

One of the state's "controls" designed to conserve its water resources is found in Minn. Stat. 105.42, subd. 1, which requires a permit for alteration of the cross-section of public waters. The "existing rights" that provide exceptions from the permit requirement are spelled out in the subdivision itself:

. . . No permit shall be required for work in altered natural water courses which are part of drainage systems established pursuant to sections 106A.005 to 106A.811 and

chapter 112 when the work in the waters is undertaken pursuant to those chapters.

This section does not apply to any public drainage system lawfully established under the provisions of sections 106A.005 to 106A.811 which does not substantially affect any public waters. (Emphasis supplied)

Mr. Zimmerman has argued that he has an existing right to perform the work because of the rights he has to have the land drained into the County Ditch No. 12 and/or County Ditch No. 64 systems. This argument must fail because the exception provision in the statute allows exercise of those rights only pursuant to the applicable ditching statutes.

One applicable ditching statute, Minn. Stat. 106A.215 (Improvement of drainage system), which is applicable to an exercise by Zimmerman of his rights acquired by construction of the County Ditch No. 12 system, requires the filing of a proper petition, which has not been done, to start the improvement proceeding. The other statute that seems applicable is Minn. Stat. 106A.225 (Laterals), which sets up a system whereby persons who own property in the vicinity of an existing drainage system may petition for a "lateral" that connects the property with the drainage system. Zimmerman must proceed under this statute if he seeks to establish legally a connection to the County Ditch No. 64 system. That statute requires the filing of a proper petition, and this has not been done.

As pointed out in the brief of counsel for the DNR, Mr. Zimmerman does not qualify for a permit under Minn. Rules 6115.0270 and .0271. Those rules, which are very strict, very specific, and without a variance provision, provide for the partial drainage of protected (public) waters only for specified public purposes (the improvement of navigation, enhancement of recreational uses, and upgrading fish or wildlife habitat are the only listed purposes possibly applicable here) and the evidence fails to establish that Zimmerman's 1984 ditching accomplishes any such purpose. In fact, the purpose of the ditch is not public at all -- it is the drainage of the troublesome wet area to enhance the acreage for farming. Even if Zimmerman clears the hurdle of having to establish a proper public purpose for his project, he must then meet specific standards laid out in Minn. Rule 6115.0271C., among which are requirements that permits for work affecting protected water basins will be issued only to government agencies (which he is not) and that all riparian owners of affected water basins must consent in writing (which they have not).

Zimmerman has argued that these requirements do not apply to him because the process of identifying Goose Lake as a public water has not been completed. The Administrative Law Judge is not persuaded by this argument. Goose Lake has been identified as a public water, and so designated, since

September 10, 1980 (see Finding 19 and Exhibit 33). The fact that the final listing of those waters has not been published for Le Sueur County is unrelated to the already-final designation of Goose Lake as a public water and, as such, is an immaterial technicality. The inventory proceeding is an identification process which does not, in itself, make a water "public". In addition, the Lake is a public water under Minn. Stat. 105.37, subd. 14(a)

because, since April 2, 1973, it has been assigned a shoreline management classification by the Commissioner, which assignment identified Goose Lake as a "Natural Environment Lake" type of public water (see Finding 18).

In pointing out the potentially devastating effects on Goose Lake of an improvement of the County Ditch No. 12 system, and in recommending that the Commissioner allow Zimmerman to petition for a lateral connection to the County Ditch No. 64 system, the Administrative Law Judge has assumed that Zimmerman possesses existing rights which allow for drainage (at least in part) of Goose Lake. That assumption was reached after careful consideration, and ultimate rejection, of the argument advanced by counsel for the DNR that no right exists to drain a meandered lake. In order to accept the DNR's argument, the Administrative Law Judge would have to conclude that the establishment of County Ditch No. 12, which included a spur that extended well into the meandered area of Goose Lake, was illegal and should be nullified. The Judge is unable to accept such a conclusion. He believes that the Department's reliance on the case of Witty v. Board of Commissioners of Nicollet County, 76 Minn. 286, 79 N.W. 112 (1899), to support its argument is misplaced. The Witty decision does not apply to Goose Lake, which is a small, grassy, shallow (under four feet deep) body of water that could be legally drained at the time the County Ditch No. 12 system was established. Minn. Laws 1883, ch. 139, established that such bodies of water could be drained for the purpose of enhancing public health. In the absence of evidence to the contrary, it is assumed that Spur No. I of County Ditch No. 12 was dug with that purpose in mind and to keep the level of Goose Lake low enough so that the water did not flood over into surrounding farm land. George Zimmerman and his fellow landowners who own land assessable to the County Ditch No. 12 system still have the right to maintain the system that could drain Goose Lake. That is why the Administrative Law Judge has recommended that the Appellant be allowed time to petition for connecting his 1984 project to County Ditch No. 64 system. If this time is not granted, he may exercise his right to have County Ditch No. 12 cleaned out, which would likely have an even greater effect on the environment.

The recommendation to allow Zimmerman to apply for connection to the County Ditch No. 64 system assumes that his ditch would be allowed to remain in place, and that Goose Lake would be permanently lowered by 7.8 inches with a 47 to 50 foot recession in shoreline and a loss in area of 13 to 14 acres. Implicit in this recommendation is a conclusion that maintenance of that condition will not have a "substantial effect" on Goose Lake, as a public water, within the meaning of Minn. Stat. 105.42, subd. 1. In arriving at that conclusion, the Administrative Law Judge has decided not to accept fully

the testimony offered by DNR conservation officer Roy Nelson to the effect that Zimmerman's 1984 ditching has a substantial effect on the plant and wildlife habitat of the Lake. To recite that "any" effect is "significant" is not enough, especially in the absence of evidence that the wildlife population, or plant life, or effectiveness as a nutrient trap of Goose Lake will really suffer. The evidence shows that Zimmerman has actually enhanced the local wildlife picture by attracting deer with the corn planted along side the ditch. The evidence does not show that the duck and muskrat populations (those are the only animals mentioned in the testimony) will show a significant drop by the "reclamation" of 13 or 14 acres out of 262 acres in this Lake. The only evidence of a significant duck population on the Lake is almost 30 years old, and the evidence offered by Milan Weber to the effect that the area is an important muskrat trapping venue is tempered by Weber's

additional testimony that the muskrat population would disappear only if the Lake were completely dried up. In addition, the amount of trapping done in the area is relatively minor, and there is nothing on which to base a conclusion that losing 13-14 acres of Goose Lake would have noticeable effect on that trapping.

Allowing Zimmerman the opportunity to apply for a connection to Branch 4A of County Ditch No. 64 seems to be the alternative that will create the least impact on the environment, apart from filling the ditch back in. And, if Zimmerman is forced to fill in the ditch, he may seek a petition for reopening of Spur No. I of County Ditch No. 12 (an alternative which will probably have greater environmental consequences).

R.C.L.