

3-2000-7969-2

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS

FOR THE MINNESOTA DEPARTMENT OF NATURAL RESOURCES

In the Matter of the Alleged
Public Waters Violation by
Mr. Richard Stoehr

FINDINGS OF FACT
CONCLUSIONS OF LAW
AND RECOMMENDATION

The above-entitled matter came on for hearing before Administrative Law Judge Allen E. Giles on July 28, 1993 at 9:00 a.m. at the Brainerd Public Library, 416 - 5th Street South, Brainerd, Minnesota.

Appearing on behalf of the staff for the Minnesota Department of Natural Resources (hereinafter also referred to as "DNR" or "the Department") was Donald A. Kannas, Assistant Attorney General, Suite 200, 520 Lafayette Road, St. Paul, Minnesota 55101.

Appearing on behalf of Mr. Richard Stoehr was Mr. John H. Erickson, Erickson Law Offices, 319 South 6th Street, P.O. Box 525, Brainerd, Minnesota 56401.

The record in this proceeding closed upon receipt of the final Reply Brief on November 4, 1993.

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 which may adopt, reject or modify the Findings of Fact, Conclusions, and Recommendations contained herein. 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. 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 Rodney Sando, Minnesota Department of Natural Resources, 500 Lafayette Road, St. Paul, Minnesota 55155, to ascertain the procedure for filing exceptions or presenting argument.

STATEMENT OF ISSUE

Whether the Respondent, Mr. Richard Stoehr, placed fill below the ordinary high water level of Pelican Lake, 18-308, Crow Wing County, a Public Water of the state of Minnesota in violation of Minn. Stat. * DQG

If Mr. Stoehr has improperly placed fill in the bed of Pelican Lake, whether he should be required to remove the fill and restore the property to the condition as it existed before the filling. Based upon of the proceedings herein, the Administrative Law Judge makes the following:

FINDINGS OF FACT

1. Respondent, Mr. Richard Stoehr, is 64 years of age and retired. His mailing address is HCR 2, Box 435, Pequot Lakes, Minnesota 56472. In July, 1985 Mr. Stoehr purchased property that has shoreline on Pelican Lake, 18-308, Crow Wing County. Pelican Lake is a 8,468-acre lake located entirely within Crow Wing County.

2. At the time Mr. Stoehr purchased the property in 1985 a house and garage were already located on the property. Mr. Stoehr planned improvements to the yard on the lake side of his property. He desired to level the land for planting grass seed and/or laying sod. In 1989 he hired a local jobber to bring in soil that would be used to level the yard. The jobber brought in ten to fifteen truckloads of soil that were placed in mounds in the southwesterly portion of his yard near the areas designated as "Boring 14" and "Boring 15" on the cross-hatched area on Exhibit 5. Mr. Stoehr was dissatisfied with the location that the fill was placed. He rented a "Bobcat" and over three days spread the soil around to level up the yard. Exhibit 5 is a topographic survey of Mr. Stoehr's property; the cross-hatched area represents the location that the soil was spread.

The OHWL of Pelican Lake

3. Pelican Lake is a protected Public Water of the State of Minnesota. As a protected Public Water it comes under the regulatory jurisdiction of the Commissioner of Natural Resources. The Commissioner's jurisdiction begins at the Ordinary High Water Level (hereinafter referred to as the "OHWL") of Pelican Lake. The OHWL is the boundary between a protected Public Water and a private property.

4. The OHWL is determined by observation of the highest watermark left on the landscape by water, for example, a field investigation of the OHWL would include observations of "wash marks", "stain marks", "beach ridges", "banks that have been formed by action of water on the landscape", location of established vegetation along the shoreline - "trees tend to grow at a consistent elevation around the lake", and "marsh lines". Testimony of Mr. John Scherek.

5. The OHWL for Pelican Lake was not field investigated for

this particular proceeding. Instead of conducting a field investigation, the Department relied upon historical on-site surveys and records of water level data on Pelican Lake preserved in its files.

6. The Department maintains a file containing water level data for Pelican Lake. Exhibits 12 and 13 are documents from the Pelican Lake file maintained by the Department. Exhibit 13 indicates that between November, 1933 and May, 1993, approximately 60 years, there were 2,906 readings of the water level at Pelican Lake. Exhibit 13 also concludes that the OHWL elevation for Pelican Lake is 1207.40 ft. National Geodetic Vertical Datum (hereinafter referred to as "NGVD"). That conclusion is consistent with the lake level data evaluation and on-site field investigation of Kenneth D. Reed, a former Supervisor of the Hydrographic Unit at the Department. Exhibit 12 is his memorandum of September 7, 1977 summarizing his analysis of historical data and his field investigation of the water level at Pelican Lake. In the memorandum Mr. Reed states in part as follows:

Having checked our field notes and lake files since 1933 and converting the numerous datums to N.G.V.D. 1929, I offer the following water surface evaluations and some additional data which I used in conjunction with information gathered in our most recent survey in determining the ordinary high water elevation for Pelican Lake.

. . . .

The upland growths (pine, cottonwood, willow, and maple) recorded during our 8/23/77 field survey indicate an O.H.W. of 1207.5+. The following elevations were recorded at the same time:

Toe of the ice push at beachline	1208.1
Debris line	1208.0
Recent beachlines	1206.8
Toe of Ice Push	1207.9

From the evidence recorded in the files at the Division of Waters it has been concluded that the Ordinary High Water Level for Pelican Lake is 1207.4, NGVD 1929.

Ex. 12

7. Mr. John Scherek, Reed's successor as Supervisor of DNR's Hydrographics Survey Crew, reviewed the Department's file containing the lake level data for Pelican Lake. Mr. Scherek has worked for the Department for approximately 20 years as a part of a hydrographics survey crew; he has substantial experience performing topographic and OHWL surveys. After review of the data compiled from field investigations of Pelican Lake water levels, Mr. Scherek concluded that a OHWL of 1207.4 ft. was reasonable for Pelican Lake.

8. For the purpose of this enforcement proceeding, the OHWL

for Pelican Lake is 1207.4 ft., NGVD 1929.

DNR Field Investigation and Analysis

9. On September 5, 1990, a DNR hydrographic survey crew investigated the fill on Mr. Stoehr's property. The purpose of the investigation was to determine whether fill was placed below the OHWL. The DNR crew assumed that they would discover aquatic vegetation (usually cattails) and dark peat-type soil below the fill if the fill was placed below the OHWL (upon the lake bed of Pelican Lake).

10. As a part of their investigation, the DNR survey crew made borings into the fill. To do the borings, the crew members used hand augers with attached containers. The auger extracted approximately six to eight inches of soil before the container was loaded. When the container was loaded, the auger was pulled out of the ground and the soil was tossed off to the side. When an auger came in contact with aquatic vegetation and peat-type soils, the hole drilling was terminated.

11. The survey crew members were primarily focused upon determining the elevation where there was an obvious change from sandy type soils to vegetative matter. The change from sandy soils to vegetative matter was easily observable, often accompanied by foul smelling putrescent vegetation.

12. Elevations were taken at the top or surface of the fill where the boring was begun and at the bottom where the boring was terminated. Each boring has two elevation numbers. The lower elevation is the bottom of the boring hole which represents the elevation of the land without fill. The top elevation number represents the current surface or top of the fill.

13. Exhibit 5 is a depiction of the topographic survey undertaken by the DNR crew on September 5, 1990 at Mr. Stoehr's property. The survey indicates that 15 boring holes were made by the survey team. Cattails or aquatic vegetation was found at all of the elevations indicated below 1207.4 ft. on the topographic survey. On Exhibit 5 is a north-south line designated as "AA". Along the "AA" line, aquatic vegetation was found at the bottom of each of the borings where the elevation of the original ground is below 1207.40 ft. The DNR survey crew did not determine an east-west contour line across Mr. Stoehr's property that represented the OHWL. Exhibit 5.

Photographs of the Shoreline

14. The Thirty Lakes Watershed District is a local government unit that monitors lakes (including Pelican Lake) within its watershed district for changes that include, for example, shoreline changes, changes in vegetation growth and water quality. The Thirty Lakes Watershed District routinely takes aerial photographs of the shoreline, including Exhibits 6, 7 and 8. These Exhibits are aerial photographs of the shoreline showing Mr. Stoehr's shoreline for the years 1985, 1988 and 1990.

15. Mr. Stoehr's property is distinguished from other properties by the two buildings (house and garage) situated close together in each of the photographs. The tan colored area on Mr. Stoehr's property in the 1988 and 1990 photos represents the locations where fill has been placed. Where the soil was placed, the vegetation was covered and cannot be viewed on the photographs. The Exhibits show that between the summer of 1985 and the summer of 1990 substantial vegetation, aquatic and terrestrial, has been eliminated from Mr. Stoehr's shoreline.

16. Exhibits 10 and 11 are photographs taken at ground level showing the filled-in area of Mr. Stoehr's property. These photographs show the absence of aquatic vegetation in the filled-in area; however, on both sides, cattails and other aquatic vegetation are present. Exhibit 10 shows the berm placed on lake side the edge of the filled-in area by Mr. Stoehr to prevent lawn and garden chemicals from flowing into the lake.

17. Before Mr. Stoehr purchased the property in 1985, soil was brought on to the property on at least two other occasion. First, because the land was low, fill was brought onto the property to accommodate the erection of the house and garage. After erection of the house and garage, additional soil was brought onto the property. These fills were made in the late 1960s and 1970s. The record does not establish how much fill was brought in during these times.

18. The fill that was placed on Mr. Stoehr's property before he purchased it in 1985 did not eliminate the natural shoreline vegetation. Exhibits 16 and 8, aerial photographs taken in 1980 and 1985, show a natural shoreline growth of vegetation across Mr. Stoehr's property with no major or abrupt changes in the shoreline. Fill placed on the property shoreline after the purchase by Mr. Stoehr caused a change in the shoreline including the elimination of aquatic vegetation as seen in Exhibits 6, 7, 10 and 11.

19. The record in this proceeding is incomplete in that it does not identify with any meaningful precision the east-west contour line representing the OHWL as it crosses Mr. Stoehr's property. The record is also incomplete in that it provides no meaningful estimate of the amount of fill placed below the OHWL on the property by Mr. Stoehr. It is clear Mr. Stoehr placed substantial fill below the OHWL, but there is no meaningful estimate of precisely how much.

Notice of Hearing

20. On June 21, 1993, Commissioner Rodney W. Sando, issued an Order and Notice of Hearing setting this matter for hearing on July 28, 1993 at 10:00 in the Breezy Point City Hall, Breezy Point, Minnesota. A subsequent Order and Notice for Hearing dated June 29, 1993, corrected the location of the hearing by indicating that the hearing would be held in the Large Meeting Room of the Brainerd Public Library in Brainerd, Minnesota beginning at 9:00 a.m. Notice of the hearing was served upon Mr. Richard Stoehr and other federal, state and local officials. Ex.

4.

21. A copy of the Order and Notice of Hearing was published in the Brainerd Daily Dispatch for two successive weeks on July 12 and 19, 1993. Ex. 2. The Order and Notice of Hearing was also published in the EQB Monitor, Vol. 18, No. 1, July 5, 1993. Ex. 3.

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

CONCLUSIONS

1. The hearing notice issued in this proceeding complies with the requirements of Minn. Stat. 103G.311, the Administrative Procedures Act and the Rules of the Office of Administrative Hearings. All relevant, substantive and procedural requirements of law and rule have been fulfilled so as to vest the Commissioner of Natural Resources and the Administrative Law Judge with jurisdiction in this matter.

2. Pelican Lake is a protected Public Water pursuant to Minn. Stat. 103G.005, subd. 15 (1992).

3. Minn. Stat. 103G.005, subd. 14 provides a definition of Ordinary High Water Level in part as follows:

The ordinary high water level is an elevation delineating the highest water level that has been maintained for a sufficient period of time to leave evidence upon the landscape, commonly the point where the natural vegetation changes from predominately aquatic to predominately terrestrial.

For the purpose of this enforcement action, the OHWL of Pelican Lake is 1207.4 ft., N.G.V.D.

4. Minn. Stat. 103G.245 prohibits any work in a Public Water without a permit that will:

Change or diminish the course, current, or cross-section of public waters, entirely or partially within the state by any means, including filling, excavating, or placing of materials in or on the beds of public waters.

5. The Department has the burden of proving by a preponderance of the evidence that Mr. Stoehr has engaged in conduct or activities affecting Pelican Lake that require the issuance of a permit by the Commissioner or is otherwise prohibited by Minn. Stat. 103G.245.

6. The Department has proved by a preponderance of the evidence that Mr. Stoehr has placed fill on the lakeside edge of his property below the OHWL that has covered aquatic vegetation.

7. By placing fill on the lakeside of his property covering aquatic vegetation, and changing the elevation of the shoreline on his property, Mr. Stoehr has changed the cross-section of Pelican Lake as it intercepts his property in violation of Minn. Stat. 103G.245, subd. 1 (1992).

8. Mr. Stoehr should be required to restore the shoreline below the OHWL to the condition it was in prior to his placement of fill. However, the contour line for the Ordinary High Water Level as it crosses Mr. Stoehr's property should be determined with more specificity or precision before he is required to remove any fill.

9. The Administrative Law Judge will reserve jurisdiction in this matter in the event the Commissioner determines that additional fact-finding is necessary for (a) determining the OHWL intercept on Mr. Stoehr's property and (b) determining the amount of fill that must be removed by Mr. Stoehr.

10. The Findings of Fact that are more appropriately considered Conclusions are hereby adopted and incorporated herein as Conclusions.

11. The Administrative Law Judge makes these Conclusions for the reasons in the attached Memorandum. Where necessary, reasons contained in the Memorandum are adopted and incorporated herein as Conclusions.

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

RECOMMENDATION

That the Commissioner issue an Order requiring that Mr. Stoehr restore the natural shoreline of Pelican Lake along his property, but that any such restoration activity not be undertaken until the contour line for the Ordinary High Water Level as it intercepts Mr. Stoehr's property is identified with more precision.

Dated this 3rd day of December, 1993.

s/Allen E. Giles

ALLEN E. GILES
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 (five cassette tapes)

MEMORANDUM

The Administrative Law Judge is satisfied that the Department has proved by a preponderance of the evidence that Mr. Stoehr placed fill below the OHWL on the lakeside edge of his property so as to change the shoreline vegetation. The change in the

shoreline vegetation after Mr. Stoehr purchased the property in 1985 is well documented by aerial photographs that are exhibits in this proceeding. The hydrographic survey by the Department's survey crew established that aquatic vegetation previously seen had been covered. The fill placed by Mr. Stoehr caused an observable change in the shoreline vegetation. Therefore, the Administrative Law Judge has no problem concluding that the fill placed by Mr. Stoehr on the lakeside edge of his property caused a change in the cross-section of Pelican Lake as it intercepts Mr. Stoehr's property. However, Mr. Stoehr has established that not all the fill moved onto the property was done by him. Some aquatic vegetation could have been covered by previous fills; the record is not well-developed on this issue. However, previous fills notwithstanding, this record clearly establishes that Mr. Stoehr did change the shoreline vegetation as it existed after 1980-1985 by his more recent fill.

A major factual issue in this proceeding is the determination of the Ordinary High Water Level. The Administrative Law Judge has allowed as evidence in this proceeding Exhibits 11 and 12, the Department's historical lake level records contained in the Department's file for Pelican Lake. These records span approximately 60 years and were not created for the purpose of this hearing. The records contain actual field investigation notes of examination of physical characteristics of the lake levels, such as stains on trees, shoreline edges such as beaches and banks showing the impact of wave action on shores. The historical data were examined by Mr. John Scherek who concluded after his review of the file that the OHWL of 1207.4 ft. was correct. Upon evaluation of all this evidence the Administrative Law Judge is satisfied that the OHWL contained in the Department's files is reliable and should be used for the purpose of determining the OHWL for this contested proceeding. This finding, of course, applies only for this proceeding and cannot apply to any subsequent proceeding undertaken by the Department. If the Department desires to permanently establish a OHWL for Pelican Lake it will be necessary for it to conduct a more formal proceeding with proper notice.

In making this finding - that the Department has established the OHWL - the Administrative Law Judge has rejected a number of claims and assertions presented by Mr. Stoehr. For example, Mr. Stoehr's asserts that the determination of the OHWL can only be determined after a formal proceeding such as a rulemaking type proceeding where there is notice and an opportunity to comment. The Administrative Law Judge has summarily rejected this assertion. There are many thousands of Public Waters in Minnesota - far too many for the Department to conduct formal OHWL proceedings for each. The Department would be severely handicapped in its enforcement efforts if it were necessary to base its enforcement activity on previously, formally determined OHWL for Public Waters. In addition, the Commissioner's restoration enforcement authority contained in Minn. Stat. 103G.251 and 103G.315, subd. 7 is not conditioned upon a formal determination of the OHWL along the lines proposed by Mr. Stoehr.

Mr. Stoehr also argues that if 1270.4 ft. is found to be the

OHWL, the Department has nevertheless failed to identify where that elevation transverses Mr. Stoehr's property. He states on page 17 of his post-hearing memorandum as follows:

Despite months of preparatory opportunity and numerous DNR employees having some form of an interest in the case, Exhibit 5 is not physically highlighted by one witness as to where the 1207.4 lakebed contour line is across the cross-hatched portion of the exhibit. Nor did any witness, using words only, verbally describe where the 1207.4 lakebed contour line would be across the width of the Stoehr property. If the Commissioner can't or won't identify where that line is, surely Stoehr should not be held to the consequences of "violating" what was not known and still is not.

Post-hearing Memorandum at 17. Mr. Stoehr's argument regarding the location of the east-west contour line delineating the OHWL is well taken and understood by the Administrative Law Judge. The Department should be required to establish with some precision the location of the OHWL on Mr. Stoehr's property as a part of any restoration work. However, such precision is unnecessary to determine a violation in this case because aerial photographs visually demonstrate the elimination of aquatic vegetation after Mr. Stoehr purchased the property and roughly coinciding with the time he spread fill on the lakeside of his yard.

This Record does not establish precisely how much fill was placed below the OHWL by Mr. Stoehr. Mr. Stoehr argues that because fill was placed on the property by others, he should not be required to move all of the fill. The Administrative Law Judge agrees that Mr. Stoehr should not be required to remove the fill placed by others. He should, however, be required to remove fill he placed on aquatic vegetation below the OHWL. Aquatic vegetation present in the 1980 and 1985 aerial photographs (Exhibits 16 and 8) was eliminated by Mr. Stoehr's placement of fill. The effects of Mr. Stoehr's placement of fill is demonstrated by the photographs taken in 1988 and 1990 (Exhibits 6 and 7). The shoreline vegetation should be restored.

The Administrative Law Judge has carefully considered all other arguments raised by Mr. Stoehr and has rejected those arguments except as otherwise addressed in this Recommendation.

The Administrative Law Judge will reserve jurisdiction in this matter for remand for fact-finding regarding the location where the OHWL intercepts with Mr. Stoehr's property and the amount of fill to be removed from the property by Mr. Stoehr. However, additional proceedings would not be necessary if Mr. Stoehr and the Department could negotiate what fill should be removed. In cases such as this it is usually better for both parties to meet on-site and negotiate what areas are most important for each. It may be that Mr. Stoehr could retain some fill important to his lawn, in exchange for removing other fill (even above the OHWL) that is in an area important to the Department. While the Department is entitled to require Mr. Stoehr to remove all of the

fill which he placed that is below the OHWL, both Mr. Stoehr and the Department might be better off with a negotiated removal.

A.E.G.