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STATE OF MICHIGAN

BARRY COUNTY TRIAL COURT - CIRCUIT DIVISION

IN RE PINE LAKE LEVEL,
MARVIN ANSON, ET AL,

Plaintiff,

v.

BARRY COUNTY DRAIN
COMMISSIONER ET AL,

Defendants;

PINE LAKE ASSOCIATION,

Intervenors,

ROSEMARY DECKER, ET AL

Intervenors,

OPINION & JUDGMENT

File No. 92-601-AW & 1666

HON. JAMES H. FISHER

NELSON KARRE (P27639)
Attorney for Plaintiffs
312 Old Kent Bank Building
Battle Creek, MI 49017
(616) 965-7000

David H. Tripp (P29290)
Atty. For Intervenor Pine Lake Assoc.
206 South Broadway
Hastings, MI 49058
(616) 945-9585

Terrence Lilley
Attorney for Rosemary Decker, et al
232 West Michigan Ave.
Kalamazoo, MI 49007
(616) 349-8623

Dale A. Crowley (P26633)
Barry County Prosecuting Atty.
Atty. For Barry County & Barry
County Drain Commissioner
220 West State Street
Hastings, MI 49058
(616) 948-4850

Diane L. Galbraith (P38106)
Attorney for MDNR & MDEQ
300 S. Washington, Suite 530
Lansing, MI 48913
(517) 335-1488

Michael L. Buck (P27674)
Allegan County Pros. Attorney
Atty. For Allegan County &
Allegan Co. Drain Commission
County Building, Room 20
Allegan, MI 49010

At a session of said Court, held in the City of
Hastings, Barry County, Michigan, this 18th
day of December, 1996.

Present: HONORABLE JAMES H. FISHER, Circuit Judge

A wise person once said that "today's problems were yesterday's solutions." That quote is an apt description of this case, which involves a determination of the legal lake level of Pine Lake in southwestern Barry County and the legal implications of that determination.

The earlier of these two consolidated cases was instituted in 1969, and resulted from a joint petition of the Barry and Allegan Boards of Commission asking that the Circuit Court establish a legal lake level above that which existed at that time. (A small part of Pine Lake extends into Allegan County). Due to an extended period of low precipitation in the mid-1960's, the lake had reached its lowest-ever recorded level, and the court was asked to fix a higher lake level so that an assessment district could be established to install a pumping system to bring the level back to where the residents could more effectively use the lake for recreation.

A return to more normal levels of precipitation made use of the resulting pumping system unnecessary within a few months of its installation in 1970, and it has remained unused ever since that time.

The most recent action involving Pine Lake's level was instituted in 1992 by several residents who objected to the fact that the lake level had exceeded

the maximum level of 891 feet set by Judge Robinson in 1969. They filed a mandamus action requesting that the court order the Barry County Drain Commissioner to lower the lake level to the maximum level set at that time.

The Court of Appeals reversed the order of Judge Shuster "voiding" the 1969 judgment, and remanded the case for a hearing to determine whether or not the normal level of Pine Lake as established in 1969 remains beneficial to the public. The Court of Appeals ordered that the hearing be conducted consistent with the Inland Lake Level Act, which is now found at MCL 324.30707; MSA 13A. 30707.

Following remand, the Pine Lake Association intervened, as did a group of several individual lot owners, many of whom are attorneys from Kalamazoo. The Court also ordered that the Allegan County Drain Commissioner and Board of Commissioners be added as Defendants, and that the Michigan Department of Natural Resources and Department of Environmental Quality be added as parties.

A hearing was conducted by the Court pursuant to Section 30707, following the guidelines set forth in In Re Van Ettan Lake, 149 Mich App. 517 (1986). Three experts were sworn as witnesses and were subject to cross-examination, as were a few of the litigants. Most of the several residents who participated in the hearing were simply allowed to give an unsworn statement.

An engineering report was prepared by Tony Groves of Progressive Engineering, which was the firm appointed by the court to prepare a report as anticipated by Section 30703 of the Inland Lake Level Act. The Pine Lake

Association called Tim Bureau of the Resource Management Group as its expert in the area of wetlands management, and the Michigan Department of Natural Resources called Joan Duffy as an expert in fisheries management.

Several residents submitted written statements and letters, all of which were marked as exhibits. The court also had the benefit of numerous pictures taken during the last 30 years, a chart of the lake level going back to 1916, and precipitation levels for approximately the past 40 years. The Court also reviewed over 20 letters and affidavits from lake residents, and heard the live statements or testimony of approximately 25 lake residents.

Findings of Fact

Tony Groves of Progressive Engineering was the first witness, and he discussed their engineering report (Exhibit 1).

Pine Lake is somewhat unusual for this area in that it is a closed basin lake; ie, it has no natural inlet or outlet. Its level is thus dependent on the water table in the area adjacent to the lake, which in turn depends on annual precipitation levels.

Pine Lake is a highly developed lake of approximately 660 acres, comprising four separate basins surrounded by approximately 550 residences.

Figure 3 in Exhibit #1, a lake level chart dating back to 1916, indicates that for a few years in the mid-1960's the lake receded to its lowest recorded levels of approximately 888 feet above sea level. The 1969 Judgment set the

level at 890.5 feet, plus or minus 0.5 feet. The lake attained its highest levels of 892 - 893 feet in the early 1990's, when this lawsuit was started.

The report of Progressive included a study of the effects of flooding at higher levels, and concluded that some flooding problems would occur at levels in excess of 892.75 feet. A study of the topographic map of the residential structures indicates that at a level of 893 feet nominal flooding of the foundations of garages and ancillary structures like storage sheds would occur. At a level of 893 feet, 5 homes would be affected, and at 894 feet an additional 20 homes would have some flooding problems.

Twenty-five homes comprises 4-1/2% of the homes on Pine Lake. None of the homes appears to be totally unusable at a level of 894 feet. There is no record of the lake ever being higher than 893.95 feet, which was recorded in 1993.

Progressive concluded that a maximum level of 892.75 feet should be set, with a normal level of 892 and a minimum level of 890.5 feet. They recommended that the augmentation pump be turned off at a level of 892.0 feet. The current lake level is approximately 892 feet, which appears to be an optimum level.

The recommended normal level of 892 feet would leave a 9 inch cushion to allow for any storm surge. The testimony indicated that a 100 year storm (a storm with a 1% likelihood of occurrence in any given year) could cause a 9 inch surge in the lake level.

Michigan Department of Natural Resources is in favor of a higher lake level than that set in 1969, since a higher level has a positive impact on fish and other wildlife. In addition, higher lake levels make it easier to navigate between the four lake basins, so recreational use is enhanced.

The most questionable recommendation of Progressive called for installation of a 30 inch drain from the lake near its southwest corner. This was a central part of their plan. The main problems with this recommendation are as follows:

1. Its regulatory feasibility is questionable;
2. Its cost is very high;
3. Its need and its benefits are debatable at best.

Installation of this gravity drain is problematic because the intended route involves drilling under a ridge which lies 40 - 50 feet above the lake level. The inlet would be at a level of 892.0 feet, keeping the lake at that level except for brief periods after storms.

The drain is estimated to cost approximately \$640,000. This is only an estimate, and actual costs could be considerably higher.

The lack of regulatory feasibility results from the fact that Michigan Department of Natural Resources would most likely require, as part of its licensing process under the Inland Lakes and Streams Act, a cold water siphon because the discharge is into an unnamed tributary of the Gun River, a nearby trout stream.(See Exhibit #3). Since recent studies by Michigan Department of Natural Resources indicate that this tributary is a nursery for brown trout fingerlings, Michigan Department of Natural Resources objects to any plan

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involving discharge of warm surface water into this stream. Mr. Groves indicated that the cost of a deep water siphon system could easily add \$200,000 or more to the project, and it would also be problematic for trout because the water from the lake bottom would be low in dissolved oxygen.

Based on the past experiences with cost "estimates", the court concludes that the drain envisioned in the plan of Progressive could easily exceed \$1,000,000, and that only 25 of 550 landowners on the lake would benefit from such a project.

no
proof +
benefit

The testimony, statements and letters from residents indicated that a large majority are opposed to such a project, and for good reason. The required assessment for this project would most likely exceed \$2,000, with over 95% of the residents receiving no substantial benefit. Ironically, this project is proposed at a point when a recently completed sewer system around the lake and more normal precipitation levels have resulted in a gradual lowering of the lake level from its high point in 1993.

Substantive

The court concludes that this costly drain project is proposed at precisely a point in time where it may not be needed for a period for several years, if ever. This is exactly the reverse of the situation after the first court action, which resulted in installation of a pumping system when the lake level was at historic lows. This system was never used after the first six months of its installation. Setting the maximum lake level at a point that would necessitate such a costly solution after the level of the lake has cycled through its historic high point in 1993 would be an abuse of discretion.

Costly
solution
was
required

There are less costly and simpler actions which would attenuate the effects of higher lake levels which were experienced in the early 1990's. These would involve use of the wetlands surrounding the lake for their natural purpose, ie, regulating the lake level. There is currently a 15 inch drain at an elevation of 891.95 feet into wetland #1 on the north side of the lake. (See Exhibit #44). This wetland is 20 acres in size and could be filled to a depth of 3 - 7 feet, giving 60 - 140 acre/feet of storage, resulting in a decrease of 1 - 3 inches for the entire lake.

There is another wetland on the west end of the lake on the other side of Doster Road (Wetland #3, Exhibit 44). Testimony indicated that there was a culvert leading into this wetland until sometime in the mid to late 1960's, when a local resident plugged it in an effort to raise the then abnormally low lake level. While smaller than the other wetlands, the hydrology studies indicate that this wetland lies in the path of the underground water leading from the lake. It also leads into the area of the unnamed tributary which was the planned route of the drain. (See Exhibit #3). Thus, the court concludes that installation of a simple drain into this wetland at an elevation of 892.0 feet could help attenuate the effects of high lake levels.

The other relevant findings which relate to the court's determination are as follows:

1. There is now a sewer system servicing the lake residents. This has the effect of lowering the lake level, and it also means that there are no septic tanks (or at least very few) which are effected by higher lake levels;

2. Higher lake levels have a positive impact on fish and other wildlife, by increasing the wetlands available for use by the wildlife. Pine Lake is used by Michigan Department of Natural Resources as a broodstock lake for Northern Pike;
3. Implementation of the proposed drain could involve assessment of a drain fee on the lake residents, since the unnamed tributary used as a discharge leads into an Allegan County drain.
4. There is no upstream drainage effected;
5. The higher lake levels make use of the lake for recreation better and easier for the vast majority of riparians. At lower levels navigation is very negatively impacted.
6. Historically, the lowest recorded lake level was 888 feet in 1964. The highest level was 893.95 feet in 1993. The lake level has fluctuated rather widely over the years with periods of relatively high levels (892 - 893 feet), and periods of relatively low levels (888 - 890 feet). The average level over most of the last 25 years has been about 892 feet or more.
7. While many riparians are in favor of controlling the maximum lake level through means resulting in a modest cost, the vast majority favor no control on the maximum lake level. An example is the very thoughtful letter from Phillip Bosma, who suggested that all wetlands should first be used to control the maximum level, and any further measures should be deferred. Many other residents favored this approach.
8. Plaintiff Marvin Anson does not object to a minimum level of 890.5 feet and maximum level of 892.5 feet.
9. In the 1970's and 1980's Michigan Department of Natural Resources had to deal with a number of problems at Pine Lake relating to riparians filling in and building in wetlands.
10. The vast majority of residences on Pine Lake have little if any significant flood damage resulting from the higher lake levels. At the highest-ever level of 893.95 feet, approximately 25 homes and a marina have significant problems.
11. The Pine Lake Association apparently has decided that it has the authority to plug the drain at 891.95 feet leading into wetland #1 on Exhibit #44.

*Debra
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Anson
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12. A one foot tolerance from maximum to minimum levels, given the lack of any inlet or outlet, and given the high cost of constructing an outlet, is not reasonable.
13. The court in 1969 did not set the maximum level of 890.5 feet with the idea that any sort of drainage system would be necessary to comply with the current order. The engineering report prepared for the Court in 1969 stated as follows:

"the indications are such that an artificial outlet will not be needed to manage the lake level"

14. The cost estimate for a 15 inch tube into wetland #3 is \$40-50,000.
15. Pine Lake Association attorney fees are approximately \$6,300, and expert witness fees are approximately \$3,000; Plaintiff's attorney fees are approximately \$9,400.

Analysis

Section 30707 of the Inland Lake Level Act requires the Court to determine a normal lake level based on the following factors:

- a) Past lake level records, including the ordinary high-water mark and seasonal fluctuations.
- b) The location of septic tanks, drain fields, sea walls, docks, and other pertinent physical features.
- c) Government surveys and reports.
- d) The hydrology of the watershed.
- e) Downstream flow requirements and impacts on downstream riparians.
- f) Fisheries and wildlife habitat protection and enhancement.
- g) Upstream drainage.
- h) Rights of riparians.
- i) Testimony and evidence offered by all interested persons.
- j) Other pertinent facts and circumstances.

That section also provides that the Court may provide for departure from the normal level as necessary to accomplish the purposes of the act. Under the act, the "normal level" means that level which provides the most public benefit, protects public health, safety and welfare, best preserves natural resources and protects property values around the lake. MCL 324.30701(h); MSA 13A.30701(h).

The Inland Lake Level Act also states, in Section 30723, that the requirements of other state statutes are not abrogated. This means that the Michigan Department of Natural Resources retains licensing authority under the Inland Lakes and Streams Act over any means proposed by the delegated authority for controlling the lake level. On the other hand, Section 30708 provides that "the delegated authority ... shall provide for and maintain that normal level."

This leads the court to question which branch of government (ie, the executive or judicial) has the ultimate authority to dictate the level of any lake. In other words, if a court sets a maximum level which would apparently require an artificial means of control, like the drain proposed here, what happens if the Department of Natural Resources refuses to license such a project under the Inland Lakes and Streams Act? The Inland Lake Level Act creates a clear legal duty to do so, but the court's order could easily be frustrated by the licensing decision.

It would seem imprudent to establish a maximum lake level where, as here, that maximum level could only be maintained by an artificial means whose apparent cost is clearly outweighed by any benefit to the vast majority of the riparians, and where the likelihood of regulatory approval is questionable. It also seems to the court improper to order mandamus where it is very possible that the delegated authority could not comply with the court's order. Finally, it seems to the court improper to establish a maximum lake level where the level at which any substantial harm to a small number of property owners has only occurred a few times over a period of 80 years.

The court would like to order the drain commissioner to construct a drain at 892.0 feet into Wetland #3, since that seems to be the next logical step to take to try to control higher lake levels at a modest cost. The problem is, the court is unaware of any authority it has to do so. The court can only establish a lake level. It cannot dictate the means of maintaining that level. It is unclear what the effect of such a drain would be, so the court cannot in effect dictate that result by setting some maximum lake level. It seems to the court that the most appropriate way to obtain this result would be through the Inland Lake Improvement Act, MCL 324.30901, et seq; MSA 13A.30901 et seq. One point that does seem clear to the court is that the delegated authority (ie, the Barry County Drain Commissioner) should control the current drain into Wetland #1, not the Pine Lake Association or any other entity.

Finally, the court determines that there is no legal basis for an award of attorney fees to the Plaintiffs or the intervening parties.

Now, therefore, IT IS ORDERED as follows:

1. The Court determines that the Judgment of September 5, 1969, setting the minimum level of Pine Lake at 890.0 feet should not be modified.

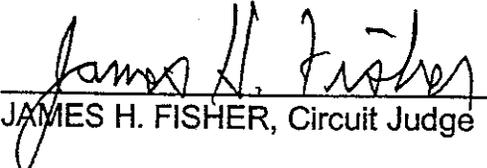
2. The Court determines that the Judgment of September 5, 1969 should be amended to remove any maximum lake level, and it is so amended.

3. The Court determines that no party shall be awarded attorney fees or expert witness fees, or other costs, other than the costs incurred by the prosecuting attorneys for Barry County and Allegan County, and the fees for the Court appointed engineering study by Progressive Engineering, which costs shall be assessed to the residents of Pine Lake pursuant to MCL 324.30711.

4. The Court orders that the current drain into "Wetland #1" under Oakridge Drive shall be controlled by the Barry County Drain Commissioner, and that such drain shall be left open and unobstructed until further Order of the Court.

5. The Court determines that Plaintiffs have no cause of action on their complaint for mandamus.

Dated: December 18, 1996



JAMES H. FISHER, Circuit Judge

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