

STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE COUNTY OF HOUGHTON

IN THE MATTER OF ESTABLISHMENT OF
LAKE LEVEL FOR LAKE ROLAND & LAKE
GERALD, ELM RIVER TOWNSHIP, HOUGHTON
COUNTY, MICHIGAN,

File No. 71-2011
Hon. Charles R. Goodman

OPINION AND ORDER

At a session of said Court held in the Courthouse in the City of Houghton, Houghton County, Michigan on this 13th Day of October, 2015.

Present: HONORABLE CHARLES R. GOODMAN, Chief 12th Circuit Judge

This matter was originally instituted in 1971, by then Houghton County Prosecuting Attorney Sterling W. Schrock. Mr. Schrock, on behalf of the Houghton County Board of Commissioners, brought a petition before the circuit court under the authority of the Inland Lake Level Act, being P.A. 1961 No. 146, as amended. (The Inland Lake Level Act was repealed in 1995)

On October 4, 1971, the court conducted a hearing on Mr. Schrock's petition. Mr. Schrock requested that the court enter an order establishing the height and level of the water of Lake Gerald and Lake Roland. By Order dated March 24, 1972, however, the court declined to determine a normal lake level for Lakes Gerald and Roland, finding that the court was not provided with any expert testimony or factual data upon which to make such a determination.

Because a normal lake level for Lakes Gerald and Roland, a/k/a, Twin Lakes has never legally been established, the Houghton County Board of Commissioners, on July 14, 2015, adopted yet another resolution regarding the matter, a copy of which is hereby incorporated by reference. The resolution directed the county drain commissioner to petition the court for the establishment of a normal lake level for Lakes Gerald and Roland. The resolution also requested that the Court determine the boundaries of a Twin Lakes Special Assessment District.

In furtherance of the resolution adopted unanimously by the Board of Commissioners, Mr. John Pekkala, the county's drain commissioner, retained legal counsel and caused to be filed the petition which now pends before the Court. When a petition is filed seeking a determination of a normal level of an inland lake, MCL 324.30707, in applicable part, states that the court is to consider all of the following:

- "(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."

The statute goes on to read:

"The court shall determine the normal level to be established and maintained, shall have continuing jurisdiction, and may provide for departure from the normal level as necessary to accomplish the purposes of this part. The court shall confirm the special assessment district boundaries within 60 days following the lake level determination. The court may determine that the normal level shall vary seasonally." *Emphasis added*

Lake Gerald and Lake Roland are inland lakes situated in Elm River Township, Houghton County, Michigan. The lakes were formed by glacial activity. The watershed area for Twin Lakes consists of some 10.5 square miles. The contributing drainage area, however, has been calculated to be 10.2 square miles.

This proceeding is brought pursuant to the provisions of Part 307 of the Natural Resources Environmental Protection Act, P.A. 451 of 1994, being MCL 324.30701, et seq. A hearing was held on the petition on October 2, 2015. The hearing was properly noticed in compliance with the provisions of MCL 324.30707. This Court has jurisdiction to establish a normal lake level for the aforementioned lakes, and this Court also has jurisdiction, pursuant to statute, to set the boundaries of a special assessment district.

During the October 2nd hearing, the Court received testimony from Mr. Pekkala. Mr. Pekkala testified that the engineering firm of OHM Advisors was retained to study the issue presented and to prepare a report containing their findings and opinions. As a result, unlike the situation presented in 1971, petitioner has provided this Court with expert opinion, testimony and data to support the request for the establishment of normal lake levels for Lakes Gerald and Roland. Mr. Stephen Wright and Mr. Christopher Nielsen, both employees of OHM offered testimony at the hearing. Mr. Wright is a Michigan licensed professional engineer with twenty-two (22) years of experience in the field. Mr. Nielsen is an individual skilled in the discipline of land surveying.

those persons who have taken it upon themselves to monitor and manage the surface level of Lake Gerald and Lake Roland.

Exhibit 2, being a Lake Level Study for Twin Lakes, notes that the rail historically has been removed in the fall to prepare for the spring water levels, and then later reinstalled to maintain the lake level at a higher elevation at the beginning of the summer recreation season. During the summer, the report goes on to state the lake surface elevation slowly drops below the top of the rail elevation due to hydrologic losses (evaporation, transpiration, etc.) being greater than summer rainfall amounts.

The high water elevation of Lakes Gerald and Roland, therefore, has been controlled by the aforementioned weir/rail system which is set at 1188.04 feet. Raising the lake level significantly above such elevation could negatively impact the recreational aspects of the lakes, and affect the properties which abut them, by reducing beach areas and potentially damaging structures which serve certain lakeside residents. Mr. Wright, at page five (5) of his report, indicates that drain fields of several low lying properties can become flooded, mainly during spring runoff events, and that large storms during the summer may also be a threat to such properties if the water elevation is set too high. Also, significantly raising lake elevations could detrimentally affect wetlands which lie along the shoreline in those areas where the feeder springs exist.

As previously noted, during the summer months, the lake level naturally declines. The decline brings the water level below the top of the weir. Obviously nothing can be done as regards the natural depletion of water levels. The only way to address decreased lake volume as the summer wears on would be to raise the initial high water elevation which, as before noted, could jeopardize certain structures, wetlands and beach areas.

Mr. Wright's recommended low water elevation is designed to provide a seasonal draw down during the late fall and early spring months to accommodate the typically higher spring flow rates realized by snow and ice melt, and the damages same may cause. According to Mr. Wright, the recommended low water level would also provide a "safety factor" in order to accommodate a 100 year event. In other words, Mr. Wright's low water level recommendation is designed to protect and safeguard property, yet not contribute to, or cause any additional lessening of water levels during the summer months, in that the high water elevation would remain at the current level. Thus, Mr. Wright's low water elevation recommendation would not have any affect upon aquatic life, wildlife which inhabits the area, or downriver riparian landowners.

As a part of their study, OHM sent questionnaires to individuals who own real property abutting Lakes Gerald and Roland, or have lake access. Some one hundred and twenty-one (121) responses were received. In Exhibit 2, Mr. Wright sums up the results of the questionnaires.

"Looking at the results of the questionnaire, it appears that property owners have issues with water levels being both too high and too low at different times of the year. Several land owners directly stated this in their responses. The Responses

from question 12 support this with 25.6% of respondents having property issues because of low water and 13.2% of respondents having issues from high water."

In his report, Mr. Wright summed up applicable public opinion. The report says:

"Public opinion is split as to whether the lake level should be raised, lowered, or left the same."

Some individuals have advised the Court that water levels have declined over the years, while another indicated that high water levels have caused shrinkage of their lake frontage.

The recommended water levels basically continue the historical water levels as seen at Twin Lakes since the installation of the weir/rail system, yet provide additional protection against flooding during significant rain events, and in the spring and early summer. The Court, therefore, finds the recommendations as made reasonable and appropriate.

MCL 324.30704 authorizes a county board of commissioners to request that the Court establish a special assessment district, if the county board determines by resolution that one is necessary. MCL 324.30711(1) goes on to provide thusly:

"The county board may determine by resolution that the whole or a part of the cost of a project to establish and maintain a normal level for an inland lake shall be defrayed by special assessments against the following that are benefitted by the project: privately owned parcels of land, political subdivisions of the state, and state owned lands under the jurisdiction and control of the department. If the county board determines that a special assessment district is to be established, the delegated authority shall compute the cost of the project and prepare a special assessment roll."

Policy decisions as regards the creation of a special assessment district belong to the county board of commissioners, and the Court's role in the decision to create a special assessment district is limited to its legality, not to its desirability or general fairness. The special assessment district, as proposed, is, indeed, legal, in that it is authorized by statute. The boundaries of the special assessment district as proposed include those properties which abut Twin Lakes, and those properties afforded access or a right of access to the lakes. The special assessment district as now proposed and sought by this action to be approved, is depicted in Exhibits 3 and 4, and described in Exhibit 5. Certainly those properties within the proposed special assessment district benefit by the maintenance of appropriate lake levels.

A matter brought to the Court's attention is whether the above-mentioned exhibits accurately reflect the criteria for inclusion within the special assessment district. Obviously it is important that the special assessment district which is to be created accurately reflect and identify those properties which should and should not be included therein. Unrebutted testimony was provided that the exhibits should be modified and nine (9) parcels should be removed from the special assessment district, as well as parcel number 31-00517400100.

Lastly, there was discussion at the hearing regarding four (4) alternatives set forth in the feasibility study so as to maintain the lake levels of Lakes Gerald and Roland as herein established. Such matter, however, is not before this Court. The Court has jurisdiction concerning Petitioner's request that the Court determine a normal lake level for Twin Lakes, and confirm the boundaries of a special assessment district. Matters, however, dealing with alternatives for the establishment and maintenance of the lake levels as now set is an issue to be dealt with by the County Board of Commissioners.

CONCLUSIONS

Based upon the foregoing, the normal lake level of Lakes Gerald and Roland are hereby determined and established, and shall be maintained as follows:

High lake level elevation: 1188.04 feet

Low lake level elevation: 1186.46 feet

Any outlet structure which is utilized to maintain the aforesaid lake levels is to be adjusted seasonally or otherwise at the discretion of the Houghton County drain commissioner. The Court confirms the special assessment district boundaries as set forth in petitioner's Exhibits 3 and 4, subject however, to the modifications hereinbefore set forth.

IT IS SO ORDERED

Charles R. Goodman
Chief 12th Circuit Court Judge