

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

PLATTE LAKE IMPROVEMENT ASSOCIATION,
a Michigan Non-Profit Corporation,
BIG PLATTE LAKE, a natural living
body of water in the State of
Michigan,

Plaintiffs,

File No. 86-57122-CE

v

Hon. Thomas L. Brown

MICHIGAN DEPARTMENT OF NATURAL
RESOURCES, an Agency of the
State of Michigan; GORDON E. GUYER,
Director of Michigan Department of
Natural Resources; JOHN A SCOTT,
Chief of the Fisheries Division,
Michigan Department of Natural
Resources,

OPINION AND ORDER

Defendants.

Plaintiffs seek Declaratory, Temporary and Permanent Injunctive Relief. In Count I of their complaint Plaintiffs allege a violation of Sec. 3(1) of the Michigan Environmental Protection Act (MEPA), MCLA 691.1203(1); MSA 14.528(203)(1). In Count II the Plaintiffs allege a violation of Sec. 2(2) of the MEPA, MCLA 691.1202(2); MSA 14.528(202)(2). And, in Count III the Plaintiffs allege a violation of Sec. 6(a) of the Water Resources Commission Act, MCLA 323.6(a); MSA 3.526(a).

A hearing on a Preliminary Injunction was conducted October 13, 1986 and the Defendants were ordered to observe a prescribed level of operations.

Trial was held commencing November 23, 1987 and the evidence received on October 13, 1986 was made a part of the trial record.

The evidence establishes the following facts:

1) Big Platte Lake, located in Northwest Michigan, is a part of the Platte River watershed. It is approximately five (5) miles upstream from the mouth of the Platte River at Lake Michigan.

2) Big Platte Lake has been a popular fishing and recreation lake for many years. The majority of its residents are of a seasonal nature using Big Platte for summer vacations and retreats;

3) Big Platte is a high quality lake and even a small change in its total phosphorus concentration results in a deterioration of its water quality and aquatic life;

4) Platte River is a designated trout stream having special protection under water quality standards promulgated by the Defendants;

5) Phosphorus is a nutrient which may pollute impair or destroy water quality and aquatic life. Phosphorus from fish hatcheries can have harmful environmental effects on water quality and aquatic life;

6) The Defendants operated a trout rearing station on the Platte River approximately eleven (11) mile upstream from Big Platte Lake from about 1928 until about 1965;

7) The Defendants have conducted numerous surveys of Big Platte over the years having to do with water quality and aquatic life;

8) The phosphorus discharge to Big Platte from the hatchery operation increases the turbidity of the water, increases algae growth, depletes dissolved oxygen and reduces fish and aquatic plant habitat.

a) A survey conducted in 1940 established that temperature and chemical conditions in Big Platte were favorable for fish productions and vegetation;

10) In 1965 the Defendant MDNR constructed a new and larger facility at the old hatchery to introduce coho and chinook salmon into the Great Lakes, to provide biological control of the alewife and to develop an open water sport fishery;

11) The Defendant MDNR knew that its program had inherent problems, including but not limited to, the introductions of phosphorus to Big Platte from fish feeding, fish waste and decaying salmon;

12) The Defendant MDNR constructed a lower and upper weir to catch fish and provide eggs to its hatchery operation;

13) The sole point source, as opposed to non-point, of phosphorus discharge to Big Platte is the fish hatchery and

related operations;

14) Prior to the establishment of the salmon program:

- a) The waters of Big Platte were clear, objects being distinguished at depths of 10-12 feet;
- b) The crayfish population in Big Platte was abundant;
- c) Vegetation, such as bulrushes, existed at depths of 5-7 feet along various segments of the shore;
- d) Large mayfly hatches were observed on a yearly basis;

15) Subsequent to the operation of the salmon program:

- a) The waters of Big Platte have become mucky and obscure;
- b) Aquatic life is reduced or no longer exists;
- c) Vegetation is at a minimal level or has disappeared;
- d) Mayfly hatches and crayfish are rare to non-existent;
- e) Dark, polluted appearing matter accumulates on docks, rafts and boats;
- f) Bass and pike fishing along with the presence of minnows has deteriorated;

16) In 1976 the Water Resources Commission issued a permit limiting suspended solids but not phosphorus;

17) When the 1976 permit was renewed it was recommended that the hatchery receive a National Pollutant Discharge Elimination System (NPDES) permit to include a phosphorus limitation of not greater than 1400 pounds per year net total phosphorus;

18) The proofs establish that a significant percentage of the total phosphorus from the hatchery and related operations remains in the bottom of Big Platte each season;

19) The proofs establish that the phosphorus from the hatchery and related operations results from the quantity of fish food, the nature of the fish food, the phosphorus content of reared fish, fish waste, unconsumed food and the phosphorus content of dead, decaying migrating salmon;

20) The proofs clearly establish that to achieve the goal of maintaining Big Platte at the highest water quality conditions

phosphorus concentrations must be reduced;

21) The proofs establish that to achieve the above goal, source load of phosphorus at the hatchery must be controlled since non-source phosphorus load cannot be reasonably reduced below its present rather stable level;

22) The proofs establish that some percentage of the phosphorus from the hatchery operations results from migratory salmon that are permitted beyond the lower weir into Big Platte and to the upper weir;

23) Further, the proofs establish that unregulated phosphorus introduction into Big Platte increases oxygen depletion so that upon a lake "turn over" in the autumn phosphorus in bottom sediments is released thereby increasing phosphorus in the lake;

24) The latter situation establishes that a potential exists for pollution, impairment or destruction if conditions are permitted to continue without appropriate regulations;

25) The proof establish that feasible and prudent alternatives exist to reduce phosphorus loading in Big Platte:

- a) Improve the solid waste removal system;
- b) Deepen the treatment ponds;
- c) Implement a low phosphorus fish pond diet;
- d) collect and transport eggs from the lower weir to the hatchery;

26) The proofs establish that some level, subject to appropriate regulation, may be achieved to insure the continued desirable use of Big Platte;

27) The proofs establish that it is therefore unnecessary to entirely close the hatchery operation as demanded by the Plaintiff's and that appropriate regulation will achieve the goal of maintaining Big Platte as a high quality lake.

The Court therefore reaches the following conclusions:

- 1) Plaintiffs pursuant to the statute, have established by the greater weight of the evidence a prima facie case that the operations of Defendants has polluted, impaired and destroyed, through the introduction of phosphorus, the water quality and aquatic life of Big Platte Lake;

2) Further, that the Defendant's continued operation; unregulated, are likely to continue to pollute, impair and destroy the water quality and aquatic life of Big Platte;

3) That the phosphorus level set by the preliminary injunction of 924 pounds per year must be reduced in order to achieve even the Defendant's own standard of acceptable phosphorus loading;

4) That the first point source of phosphorous resulting from fish feeding must be altered to provide for a entire low-phosphorus diet;

5) That the first point source of phosphorus must be reduced even further by deepening the treatment ponds and improving the waste removal system;

6) That the second point source of phosphorus involving the management of the weirs must be modified to prevent fish escaping the lower weir, except under the most extreme conditions, i.e., flooding, to enter Big Platte and subsequently die upstream;

7) Eggs to continue the salmon program must be collected at the lower weir and transported to the hatchery as demand dictates;

The Defendants have failed to produce evidence sufficient to rebut the Plaintiffs contentions of pollution, improvement and destruction. Furthermore, Defendants have failed to establish that there are any other feasible and prudent alternatives to those established by the evidence. Ray v Mason County Drain Commissioner, 393 Mich 294.

The statute, MCLA 691.1203(1); MSA 14.528 (203)(1), provides that if the Plaintiff establishes the likelihood of pollution, impairment or destruction and no feasible and prudent alternatives exist to Defendant's conduct or that Defendant's conduct is inconsistent with the promotion of public health, safety and welfare in light of the state's paramount concern for the protection of its natural resources, then the Defendant's conduct may be enjoined or regulated.

Further, the statute MCLA 691.120 2(2)(a) and (b); MSA 14.528 (202) (2) (a) and (b), provides that when a standard has been involved, the Court has power to determine its validity, applicability and reasonableness and if it is found to be deficient to direct the adoption of a standard approved and

specified by the Court.

Evidence in this case is conclusive that the present level of 928 lbs. per year of phosphorus is unacceptable, but inconclusive whether a lesser amount and of what level would attain the standard of 8 micrograms of phosphorus per liter.

The Court concludes that further operation of the hatchery, subject to rigid standards, and further monitoring will result in a level of phosphorus consistent with the dictates of the statute.

The statute, MCLA 691.1203(3)(2) provides the Court with the power to appoint a master, technically qualified, to make a record and report to the Court results of findings predicated upon the following:

a) The Court directs the parties to consult together to recommend a technically qualified, disinterested person to monitor, analyze and report to the Court the results of the implementation by the Defendant of the feasible and prudent alternatives established by the evidence;

b) The Defendant is directed to implement the alternatives established by the evidence within a reasonable period, under the direction of the master;

c) If the parties cannot agree upon a technically qualified, disinterested person as master, then each party shall suggest one person to serve and the two so selected shall designate a master;

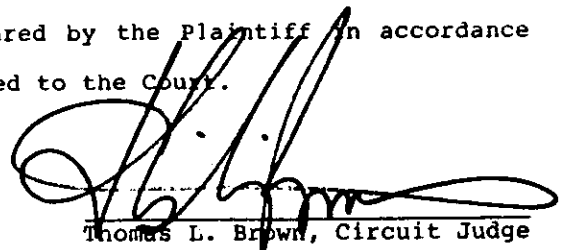
d) If the master so selected cannot timely implement the alternatives ordered, or has other or different alternatives to suggest to the Court, then the Plaintiff shall schedule an evidentiary hearing to resolve the conflict;

e) Payment for the services of the master shall be assumed by the parties in equal shares, subject to further review by the Court.

The Court retains continuing jurisdiction to implement its order to consider needed substitutes and other possible remedies.

An order shall be prepared by the Plaintiff in accordance with this opinion and submitted to the Court.

Date: 7-15 1988


Thomas L. Brown, Circuit Judge