

JAMES HAUSMAN,
3000 W. Iles Avenue,
Springfield, IL 62704,

Case No. 03-CV-167

Plaintiff,

v.

SAWYER COUNTY,
10610 Main Street,
Hayward, WI 54843,

Case Code: 30201 and 30301
(Property Damage and Money
Judgment)

Defendant.

AMENDED COMPLAINT FOR INJUNCTIVE RELIEF AND DAMAGES

Plaintiff, James Hausman, by and through his attorneys, Michael Best & Friedrich LLP, states and alleges for his Amended Complaint against Sawyer County as follows:

NATURE OF THE CASE

1. The plaintiff, James Hausman, owns lakefront property on Round Lake in Sawyer County. Mr. Hausman seeks damages as well as injunctive relief against the defendant, Sawyer County for property losses resulting from high water on Round Lake. Mr. Hausman's claim is based, among other things, on the failure of Sawyer County to control the water levels of Round Lake, resulting in high water conditions on Round Lake that has physically taken Mr. Hausman's property through severe erosion of Mr. Hausman's shoreline, destruction of his rock retaining wall and created deep fissures on Mr. Hausman's property from soil saturation.

THE PARTIES

2. The plaintiff is James Hausman, who owns a home on Round Lake in Sawyer County.

3. The defendant is Sawyer County, a Wisconsin body corporate that can sue and be sued which is located at 10610 Main Street in Hayward, Wisconsin. Sawyer County constructed, owns, maintains, and operates several control structures that regulate the water level on Round Lake, as well as the culverts under County Highway NN that are an outlet for water from Round Lake.

ALLEGATIONS COMMON TO ALL CLAIMS

4. Mr. Hausman owns a home located on Round Lake at 10536 N. Scarlet Tanager Lane in Hayward, Wisconsin. He uses that property for vacation, recreation and business purposes.

The Round Lake Chain of Lakes

5. Round Lake is a large, navigable lake in Sawyer County that is about four miles long and three miles wide that covers approximately five square miles. Round Lake is well developed for resorts and summer homes and currently has about 650 homes around the lake.

6. The water from Round Lake flows into Little Round Lake and from there into Osprey Lake which was formerly known as Squaw Lake (herein, "Osprey Lake"). The water flows from Osprey Lake down Osprey Creek then continues to Lac Court Oreilles Lake.

The 1937 Orders

7. In 1937 Sawyer County requested authorization to build the Tiger Cat Dam on the north fork of the Chief River thereby creating the Tiger Cat Flowage. The Public Service Commission of Wisconsin ("PSCW") granted Sawyer County's request through an order in

Docket No. 2-WP-255. In that 1937 order, the PSCW set the normal elevation of the Tiger Cat Flowage at 90.0 feet. Since 1937, the elevation of the Tiger Cat Flowage has been raised twice at the request of Sawyer County, viz. in Docket No. 2-WP-766 and Permit No. 3-NW-83-806. In the most recent permit, and at Sawyer County's request, the maximum level was set at 91.34 feet and the normal level at 91.09 feet.

8. In 1937, Sawyer County also requested authorization for the construction of a diversion canal (known as Diversion Canal No. 4) to allow water from the Tiger Cat Flowage to be diverted into Round Lake, thereby diverting water from one watershed into a separate watershed. Prior to 1937, there were no inflows from this other watershed into Round Lake. The PSCW granted Sawyer County's request in Docket No. 2-WP-298.

9. The purpose of Diversion Canal No. 4 was to permit water from the Tiger Cat Flowage to flow into Round Lake, thereby raising the water level of Round Lake and allowing Sawyer County to maintain the water level on Round Lake. Sawyer County made this request in response to a five-year drought that had lowered the water level on Round Lake to an unacceptable level.

10. In its 1937 Order in Docket No. 2-WP-298, the PSCW specified that Sawyer County was to regulate the amount of water diverted from the Tiger Cat Flowage into Round Lake by the construction, maintenance and operation of a head spillway and control dam located on Diversion Canal No. 4 (the "Lake Placid Dam").

Sawyer County Fails to Comply with the 1937 Order

11. Since 1941, Sawyer County has failed to maintain and operate the Lake Placid Dam and Tiger Cat Dam in compliance with PSCW and WDNR directions.

12. For years, Sawyer County operated the Tiger Cat Dam so that the water elevation of the Tiger Cat Flowage exceeded the maximum level allowed by the State.

13. Since 1941, Sawyer County has repeatedly been informed of tampering with the stop logs at the Lake Placid Dam wherein stop logs were removed allowing excessive water to be diverted to Round Lake even though water was not necessary to restore or maintain Round Lake water levels at its normal elevation. Though Sawyer County installed a locking device to prevent tampering, periodically the lock is either missing or unlocked.

14. Since 1941, because of poor maintenance, Sawyer County has periodically been informed of water coming through the stop logs at the Lake Placid Dam, allowing excessive water to be diverted to Round Lake even though water was not necessary to restore or maintain Round Lake water levels at its normal elevation.

15. Since at least 1947, water from the Tiger Cat Flowage was being diverted to Round Lake not only through the Lake Placid Dam but also through a wetland that circumvented the Lake Placid Dam.

16. As late as 1993, Sawyer County did not have an operational procedure specifying how the Lake Placid Dam should be operated.

17. As late as 2003, Sawyer County was operating the Tiger Cat Dam and the Lake Placid Dam such that water was discharged over the Lake Placid Dam allowing excessive water to be diverted to Round Lake even though water was not necessary to restore or maintain Round Lake water levels at its normal elevation.

The Dispute Over Water Levels on Round Lake

18. After the construction of Diversion Canal No. 4, a dispute arose about the normal water level for Round Lake. Some property owners wanted the Round Lake water level to be

lowered because the increased flow into Round Lake from the Tiger Cat Flowage combined with precipitation and groundwater had created high lake levels that caused property damage and erosion. On information and belief, and thereon it is alleged, certain property owners wanted Round Lake to be maintained at a higher lake level to increase the value of development property.

19. On November 30, 1940 Sawyer County petitioned the PSCW in Docket No. 2-WP-513 to establish the normal Round Lake water level at elevation 79 feet and to determine how the Round Lake water level was to be maintained. Certain property owners objected to Sawyer County's request to set the normal level at elevation 79 feet because that higher lake level would result in further damage to their Round Lake property.

The Public Hearing on Lake Levels

20. The PSCW held a public hearing on February 4, 1941 in Docket No. 2-WP-513 and testimony was taken to determine the normal lake level for Round Lake. The PSCW also conducted an investigation into the normal lake level for Round Lake.

21. At the conclusion of that hearing in February 1941 but before issuing a final decision, the PSCW requested Sawyer County divert water from the Tiger Cat Flowage through the Diversion Canal No. 4 and the Lake Placid Dam to maintain the water level of Round Lake at elevation 76.6 feet. The PSCW also requested Sawyer County to obtain surveys and engineering data to determine the levels of the adjacent land around Round Lake and to furnish the PSCW engineers and examiners with data to make future inspections.

22. Sawyer County failed to timely provide the PSCW with the requested information and failed to operate the Diversion Canal No. 4 and the Lake Placid Dam to maintain Round

Lake at elevation 76.6 feet. As a result, the Round Lake water level increased above elevation 76.6 feet causing further damage to Round Lake property.

Sawyer County is Ordered to Maintain Proper Water Levels

23. On September 29, 1941 the PSCW issued an Order (the "1941 Order") concluding, *inter alia*, that the normal elevation of Round and Little Round Lake was elevation 77.0 feet and ordered that:

Sawyer County shall maintain Round and Little Round Lakes at the normal elevation of 77.00 feet at all times when a sufficient water supply exists and during freshets and heavy runoffs to prevent the water levels from rising above the elevation of 77.25 feet.

A copy of the 1941 PSCW Order is attached and incorporated as Exhibit A.

24. The PSCW ordered Sawyer County to take the following actions no later than July 1, 1942:

2. That Sawyer County constructs an outlet channel from Little Round Lake to Squaw Lake of the capacity to discharge 150 c.f.s., with a dam and control gates whereby the water level in Round and Little Round Lakes may be controlled.
3. That Sawyer County shall maintain Round and Little Round Lakes at the normal elevation of 77.00 feet at all times when a sufficient water supply exists and during freshets and heavy run-off to prevent the water levels from rising above elevation 77.25 feet. These elevations are referred to the staff gage at Kaiser's resort.

25. The PSCW found that in order for the normal elevation of Round and Little Round Lakes to be maintained, a water-control structure (hereafter "the Carlson Road Dam") and a channel from Little Round Lake to Osprey Lake (hereafter "the Northern Channel") must be constructed at least ten feet in width with the high point not higher than elevation 75.25 feet.

26. Sawyer County had a duty to properly maintain the Round Lake water levels.

Sawyer County Fails to Maintain the Water Level

27. After the issuance of the 1941 Order, Sawyer County constructed a series of structures to control the water level of Round Lake without ever receiving the necessary approvals for those structures. Sawyer County also constructed, at least in part, the Northern Channel.

28. In 1942, Sawyer County constructed a temporary timber dam without obtaining prior approval from the PSCW. The timber dam did not comply with all of the construction specifications in the 1941 Order. In 1947, Sawyer County removed the temporary timber dam and replaced it with one 36" culvert. The PSCW promptly and repeatedly informed Sawyer County that the single culvert was inadequate, violated the 1941 Order and had to be replaced immediately. In 1949, Sawyer County submitted plans for a twin-box reinforced concrete culvert. Though the PSCW told Sawyer County that the proposed structure was inadequate to comply with the 1941 Order, on information and belief, the County built the structure anyway.

29. The current dam and control gates between Little Round Lake and Osprey Lake were built sometime after 1949 and do not comply with the construction specifications listed in the 1941 Order.

30. Sawyer County failed to maintain the water levels on Round Lake by, *inter alia*:

- a) failing to properly construct, maintain and operate the Carlson Road Dam by, without limitation, designing and constructing a dam that did not achieve the construction specifications specified in the 1941 Order and could not control the water flows so as to prevent excessive water levels that caused damage to property around Round Lake;

b) failing to properly construct and maintain the Northern Channel, by, without limitation, exceeding a maximum elevation of 75.25 feet and having insufficient capacity to discharge 150 c.f.s.; and

c) failing to properly construct, maintain and/or operate existing structures such as the Tiger Cat Dam, the Lake Placid Dam and the culverts at County Highway NN, which further constrained the water flow from Round Lake, all of which caused high water levels in Round Lake that damaged property around Round Lake.

The Higher Water Levels and Continued Damage

31. From at least 1942 to the present the water levels on Round Lake have periodically exceeded the maximum water level of elevation 77.25 feet. Sawyer County has been continually notified of this condition from 1942 to the present and has failed and refused to control the lake levels despite having the ability to do so and undertaking a duty to do so.

32. In 1984, on information and belief, Sawyer County was informed that the Carlson Road Dam and the Northern Ditch were not constructed in accordance with the 1941 Order. The County was also informed that to discharge 150 c.f.s. through the Carlson Road Dam--which according to the PSCW was necessary to control the water levels on Round Lake--Round Lake's water level would have to exceed the maximum-allowed elevation by 3.4 feet. Sawyer County did nothing to redesign the Carlson Road Dam to enable it to control the water levels on Round Lake.

33. On information and belief, in 1999, Sawyer County replaced the culverts at County Highway NN without conducting any hydrologic analysis as to the culverts' impacts on the Round Lake water levels and on the floodplain of the Round Lake chain. Sawyer County did

not obtain the required permit from the State of Wisconsin prior to installing the culverts at NN in 1999.

34. The higher water levels continued to cause property damage and erosion of property around Round Lake. Property owners complained, *inter alia*, that property had flooded, roadways had been flooded, sand beaches had been washed away and shoreline eroded.

35. On information and belief, the higher water levels, left uncontrolled by Sawyer County, will adversely affect property owners by raising the 100-year floodplain. On information and belief, and thereon it is alleged, the failure of Sawyer County to control the water levels will result in the establishment of a new 100-year floodplain level of approximately elevation 81 feet. This change in the 100-year floodplain will result in restrictions to property owners on Round Lake property, including the plaintiff, Mr. Hausman.

36. On information and belief, if a 100-year flood event occurs under current conditions--that is with the current structures in place--numerous septic tanks and systems around Round Lake will be flooded dumping hundreds or thousands of gallons of raw sewage into Round Lake.

The Damage to Mr. Hausman's Property

37. In the spring of 2002 the Round Lake water levels rose to an excess level and damaged the shoreline of Round Lake, including land located above the ordinary high water mark of Mr. Hausman's property. The swells from Round Lake destroyed most of his rock retaining wall and removed more than eight feet in depth of shoreline on Mr. Hausman's property.

38. Due to the excessively high water levels numerous fissures from water saturation and erosion started appearing on Mr. Hausman's property running parallel to the shoreline on or

about February 26, 2003. The fissures were set back from the shoreline by about fifteen feet and varied in size up to two-feet wide, four-feet deep and span approximately fifty feet of shoreline. The land and mature trees between the shoreline and the fissures started falling into Round Lake.

39. Knowing that he would lose additional shoreline, Mr. Hausman submitted an application to the WDNR on March 12, 2003 requesting permission to fill in the property above the ordinary high water mark that had been washed away in 2002 and to build a retaining wall along his shoreline. WDNR approved the application on June 10, 2003 and the retaining wall was installed in June 2003.

40. Mr. Hausman timely provided actual notice to Sawyer County of the damages, and on May 9, 2003 Mr. Hausman served a Notice of Claim on Sawyer County pursuant to Wis. Stat. §893.80.

41. By failing to take action, Sawyer County denied Mr. Hausman's claim.

42. On September 4, 2003, the Sawyer County Land and Water Conservation Committee decided to do nothing to address the high water levels that exceeded the levels ordered in the 1941 Order.

43. On December 4, 2003, in a closed session with Attorney Matthew Dregne, the Sawyer County Land and Water Conservation Committee changed their minds and decided to recommend to the full Sawyer County Board of Supervisors the following:

The County should initiate a process leading to the filing of a petition with the Wisconsin Department of Natural Resources to establish normal maximum and minimum levels for Round Lake, and potentially Little Round Lake, and Osprey Lake, pursuant to section 31.02 of the Wisconsin Statutes.

FIRST CLAIM
(Inverse Condemnation and Takings)

44. Mr. Hausman realleges, as though fully set forth herein, the allegations contained in paragraphs 1 through 43.

45. Sawyer County has a duty to control the water levels of Round Lake, and to properly construct, maintain and operate the water control devices that affect the water levels of Round Lake.

46. Sawyer County has failed and refused to fulfill its duty to control the water levels of Round Lake and its duty to properly construct, maintain and operate numerous water control devices and without instituting condemnation proceedings has caused the unlawful and physical occupation of Mr. Hausman's property without the legal right to do so all of which has resulted in either a temporary or permanent taking of Mr. Hausman's Round Lake property without just compensation.

47. Sawyer County's taking of Mr. Hausman's property is in violation of Wis. Stat. § 32.10, Wis. Const. Art. I, Sec. 13 and U.S. Const. Amend V and entitles Mr. Hausman to just compensation, including the recovery of fees and expenses in bringing this claim.

SECOND CLAIM
(Obstruction To Surface-Water Flows)

48. Mr. Hausman realleges, as though fully set forth herein, the allegations contained in paragraphs 1 through 47.

49. Wis. Stat. § 88.87 provides that:

Whenever any county, town . . . has heretofore constructed and now maintains or hereafter constructs and maintains any highway...grade...in or across any marsh, lowland,... natural watercourse, natural or man-made channel of drainage course, it shall not impede the general flow of surface water or stream water in any unreasonable manner so as to either cause an unnecessary accumulation of waters flooding or water-soaking uplands or an

unreasonable accumulation and discharge of surface water flooding or water-soaking lowlands. All such highways...shall be constructed with adequate ditches, culverts and other facilities as may be feasible, consonant with sound engineering practices, to the end of maintaining as far as practicable the original flow lines of drainage.

50. Sawyer County was responsible to construct and maintain the culverts at County Highway NN, through which Osprey Creek runs.

51. Sawyer County has failed to properly construct and maintain the culverts at County Highway NN. Sawyer County installed the culverts under County Highway NN without the necessary permits and in a fashion that impedes the general flow of surface water or stream water in Osprey Creek. As a result, there was an unreasonable accumulation of waters flooding or water soaking upland on Mr. Hausman's Round Lake property.

52. Mr. Hausman provided actual notice to Sawyer County of the inadequate culverts at County Highway NN. Sawyer County has failed and refused to correct the inadequate culverts at County Highway NN.

53. Mr. Hausman has been damaged as a result of Sawyer County installing inadequate culverts at County Highway NN and is entitled to injunctive relief.

THIRD CLAIM (Statutory Nuisance)

54. Mr. Hausman realleges, as though fully set forth herein, the allegations contained in paragraphs 1 through 53.

55. Wis. Stat. § 31.25 provides as follows:

Nuisances, abatement. Every dam, bridge or other obstruction constructed or maintained in or over any navigable waters of this state in violation of this chapter, and every dam not furnished with a slide, chute or other equipment prescribed by the department, is hereby declared to be a public nuisance, and the construction

thereof may be enjoined and the maintenance thereof may be abated by action at the suit of the state or an citizen thereof.

56. Sawyer County constructed and maintained the Carlson Road Dam, the Lake Placid Dam, and the Tiger Cat Dam in and over navigable waters.

57. Sawyer County's construction, maintenance and operation of the Carlson Road Dam are in violation of Chapter 31 and, specifically, in violation of Wis. Stats. §§ 31.02(1) and 31.18 because, among other things, Sawyer County has failed to maintain and operate the dam in good repair and condition, and, has failed to construct, maintain and operate the Carlson Road Dam in a fashion that protects property surrounding Round Lake from damage and in compliance with the 1941 Order.

58. Sawyer County's maintenance and operation of the Lake Placid Dam are in violation of Chapter 31 and, specifically, in violation of Wis. Stats. §§ 31.02(1) and 31.18 because Sawyer County has failed to maintain and operate the Lake Placid Dam in good repair and condition, and, has failed to construct, maintain and operate the Lake Placid Dam in compliance with the 1937 Order, in a manner that achieves the requirements specified in the 1941 Order, and in a fashion that protects property surrounding Round Lake from damage.

59. On information and belief, Sawyer County has operated the Tiger Cat Dam in violation of Chapter 31, and specifically, in violation of Wis. Stats. §§ 31.02(1) and 31.18 because Sawyer County has failed to operate the dam in compliance with the 1937 Orders and their progeny, has failed to operate the dam in a manner that achieves the requirements specified in the 1941 Order, and in a fashion that protects property surrounding Round Lake from damage.

60. The failure of Sawyer County to construct, maintain, and/or operate the Carlson Road Dam, the Lake Placid Dam, and the Tiger Cat Dam has created a nuisance in violation of

Wis. Stat. § 31.25 which has caused damage to Mr. Hausman's property and which Sawyer County must be directed to abate.

**FOURTH CLAIM
(Public and Private Nuisance)**

61. Mr. Hausman realleges, as though fully set forth herein, the allegations contained in paragraphs 1 through 60.

62. The failure of Sawyer County to properly construct, maintain and/or operate the Tiger Cat Dam, the Lake Placid Dam, the Carlson Road Dam, the Northern Channel and the culverts under County Highway NN has substantially or unduly interfered with Mr. Hausman's use of his Round Lake property and the public's use and enjoyment of Round Lake due to the excessively high water that has caused damage to Mr. Hausman's property, has increased sedimentation in Round Lake endangering the fishery, the quality of water and wildlife habitat, and has obstructed navigation on navigable water bodies.

63. Sawyer County has been provided actual knowledge of this nuisance on numerous occasions.

64. The failure of Sawyer County to properly construct, maintain and/or operate the Tiger Cat Dam, the Lake Placid Dam, the Carlson Road Dam, the Northern Channel and the culverts under County Highway NN is the substantial cause of the damage to Mr. Hausman's property and the public's use and enjoyment of Round Lake.

**FIFTH CLAIM
(Trespass)**

65. Mr. Hausman realleges, as though fully set forth herein, the allegations contained in paragraphs 1 through 64.

66. Sawyer County caused flooding of Mr. Hausman's Round Lake property by failing to properly construct, maintain and/or operate the Tiger Cat Dam, the Lake Placid Dam, the Carlson Road Dam, the Northern Channel and the culverts under County Highway NN.

67. Mr. Hausman has suffered damage as a result of Sawyer County's trespass.

PRAYER FOR RELIEF

WHEREFORE, plaintiff, Mr. James Hausman, prays for judgment in his favor and against Sawyer County as follows:

1. Actual damages to compensate Mr. Hausman for the taking and losses suffered as a result of the physical loss of property resulting from the failure of Sawyer County to control the water levels on Round Lake;
2. Injunctive relief requiring Sawyer County to maintain Round Lake at levels that will not damage property including requiring Sawyer County to maintain the levels as directed in the 1941 Order and to take the necessary steps to insure that the Round Lake water levels do not exceed the maximum water level set by the 1941 Order;
3. Attorneys fees and costs; and
4. Such other and further relief as this Court deems just and reasonable.

Dated this 14th day of April, 2004.

Respectfully submitted,

MICHAEL BEST & FRIEDRICH LLP

By: 

Jon G. Furlow, SBN 1020448
Lauren L. Azar, SBN 1023003
One South Pinckney Street
P.O. Box 1806
Madison, Wisconsin 53701-1806
(608) 257-3501

Attorneys for Plaintiff, James Hausman

Q:\client\043655\0001\B0340400.6

VERIFICATION

I, James Hausman, verify that the allegations as to inverse condemnation are true and accurate to the best of my knowledge, information and belief.



James Hausman

Subscribed and sworn to before me
this 13th day of April, 2004

Susan E. Kocurek
Notary Public, State of Illinois
My Commission expires on 8-18-05

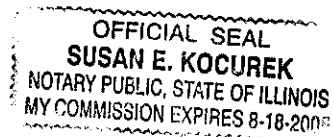


EXHIBIT A

BEFORE THE
PUBLIC SERVICE COMMISSION OF WISCONSIN

Application of Sawyer County for a)
Finding and Determination of the)
Problem of What Constitutes the) 2-WP-513
Normal Water Levels of Round and)
Little Round Lakes in Sawyer County.)

FINDING AND ORDER

On December 6, 1940 Sawyer County filed an application with the Commission requesting it to determine and find the normal water levels of Round and Little Round Lakes in Sawyer County and make such further finding or order as may be necessary for holding said lakes at such normal water elevations.

Upon receipt of said application the Commission fixed a time and place for a public hearing thereon, of which due notice by publication and mailing was given. The hearing was held at the court house in the city of Hayward on February 4, 1941 at 10 o'clock in the forenoon before Adolph Kanneberg, examiner.

Appearances:

Sawyer County by

- ✓ James H. Wilson, chairman, Sawyer County Board
Hayward
- ✓ Adolph Sandstrom, county clerk, Hayward
- ✓ Henry C. Brandt, chairman, county conservation
committee
- ✓ Carl Hanson, member, county conservation committee
- ✓ Arthur Goucher, member, county conservation
committee
- ✓ Ralph Steller, district attorney, Hayward

The following riparian proprietors on Round or Little Round Lakes appeared either in person, by agent, or by attorney:

- ✓ Lester MacDonald (in person)
- ✓ Clarence E. Wead (in person)
- ✓ James McSweeney (in person)
- ✓ Fred Paulson (in person)
- ✓ Rev. Kalaneyk (in person)
- ✓ J. C. Davis, personally, and as attorney for:
Mrs. Lillie Paulson
Mrs. Lewis Williams
John C. Herschfield
- ✓ Mrs. Agnes Frisch (in person)

Hildred Richardson (in person)
John E. Moreland (in person)
A. M. Ryerson, personally, and on behalf of:
William Raschke, Oak Park, Illinois
Frank Dinsbier (in person)
Jack M. Franks, by
Fred Paulson
H. Dwig (in person)
O. F. Meier (in person)
James Ryan, by
James McGweeney, agent
C. J. Wood (in person)
Steven Kobsy, by
J. O. Moreland, agent
Miss Mable Morrow and Miss Beatrice Baxter, by
C. E. Wood, agent
Frank Hamblin (in person)
Jennie Kohn, by
J. C. Davis, attorney
B. J. Cresay (in person)
Ed. Wilkes (in person)
Mamie Gobler, by
H. Gobler, agent

Conservation Department, by

Col. A. H. Smith
Madison

Of the Commission Staff:

K. C. MacLeish
Senior assistant public service engineer

A petition requesting the Commission to fix a normal level not to exceed 76.6 feet was filed with the Commission.

The petition was signed by Marie H. MacLean, et al.

The problem of determining and finding the normal elevations of Round and Little Round Lakes calls for the solution of another problem, namely, how the normal levels as determined and found by the Commission may be maintained, or, more specifically, how an abnormal rise in the water elevations can be prevented during abnormal floods or freshets or during successive wet years. This case is quite unusual in this, that whereas water can be released into Round Lake to compensate for losses by evaporation and seepage, Round Lake contains no outlets through which water may be discharged if and when abnormal rainfall and

runoff causes the lake to exceed its normal elevation. The necessity of providing an outlet and control works for Round Lake is so intimately connected with the finding of what the normal level is, that it would be impracticable to find and determine the normal level without also providing the means of maintaining such normal level.

Round Lake is rather well developed for resorts and summer homes and great damage would be caused if the lake should rise greatly above the normal elevation fixed by the Commission.

While we do not agree with the contention of the applicant that the normal level of Round Lake is at 79.00 feet, Public Service Commission datum, nor with the contention of a few riparians that the normal level of the lake is as low as 75.00 feet, we believe that the elevation which we find to be normal, as hereinafter provided, will not only be generally concurred in but will be almost universally approved, provided an outlet is provided which will enable Sawyer County to prevent the lake from rising above the normal elevation.

For a better understanding of the problems involved, it is deemed desirable to set forth a brief statement of the facts in this case.

On February 25, 1937, in docket 2-WF-255, the Commission authorized Sawyer County to construct a dam across the north fork of the Chief River in the southeast quarter of the southeast quarter of section 16, township 41 north, range 7 west, Sawyer County, for the purpose of creating a large pond for recreation, the restoration of lake levels, and to "eventually supply surplus water to raise Round Lake from its then low water stage to normal."

On February 3, 1937 Sawyer County requested permission to divert surplus water from the north fork of the Chief River to Round Lake for the purpose of restoring Round Lake to

its normal elevation. It was proposed to cause such diversion as soon as the dam authorized in docket 2-WP-255 was constructed. However, before such diversion could be accomplished, it was necessary to construct four diversion canals to connect the various lakes between the Tiger Cat pond and Round Lake, namely, Canal No. 1 from the Tiger Cat pond to Burns Lake; Diversion Canal No. 2 which would lead the water from Burns Lake to Placid Lake; Diversion Canal No. 3 which would conduct the water from Placid Lake to a natural depression or slough on Lot 1, section 19, township 41 north, range 7 west; and Diversion Canal No. 4 to lead the water from the slough to Round Lake. A head spillway and control dam were constructed at the outlet of Diversion Canal No. 4 to regulate the amount of water to be diverted into Round Lake. A permit upon said application was issued to Sawyer County June 21, 1937.

Round Lake is a large navigable lake located in township 41 north, ranges 7 and 8 west, in Sawyer County. It embraces about 5 square miles.

Little Round Lake lies to the south of Round Lake. It was formerly a part of Round Lake. It is now separated from Round Lake by a low, swampy area several hundred feet wide. County trunkhighway B runs between the two lakes. The water level of Little Round Lake is somewhat lower than that of Round Lake. In 1914 an outlet stream flowed from Round Lake to Little Round Lake. County trunk highway B crosses this stream on a wooden bridge. The stream was of sufficient size to permit the floating of boats in the same. The bridge was later taken out and a solid fill put across the swampy area and in the channel itself.

About 1/2 mile southeast of Little Round Lake lies Squaw Lake. Squaw Lake is round in shape, having a diameter of somewhat less than 1/2 mile. Squaw Lake is located mainly in the northwest quarter of section 1, township 40 north, range

8 west. It has an outlet which flows into the Court Oreilles Lake, a tributary of the Chippewa River.

The evidence indicates that Round Lake formerly had an elevation of approximately 83 feet and that at this elevation a stream flowed from Round Lake to Little Round Lake, thence into Squaw Lake and thence into the Court Oreilles chain. Navigation seems to have been carried on from Round Lake to Lake Court Oreilles during the early history of the State. However that may be, a survey made during the summer of 1941 by Cecil Noyes, county surveyor, shows that Squaw Lake is about 2,600 feet distant from Round Lake by way of an old natural water course or depression. This is the water course that was later obstructed by a road fill. At the time of the survey, Squaw Lake was at elevation 74.8 feet; Little Round Lake was at elevation 75.05 feet, and Round Lake was at elevation 75.6 feet. The profile on the map prepared by Mr. Noyes shows that the ground surface along the natural depression rises on a fill at the old trail to elevation 82.36 feet. Except for this fill, the ground surface varies from 77.71 feet in a gradual slope to elevation 76.05 feet. According to Mr. Noyes it will require the removal of approximately 1,200 cubic feet of dirt to provide an outlet from Round Lake when the water in that lake is at elevation 77.00 feet. The problem of providing an outlet from Round Lake will be greatly facilitated with a water level in Round Lake at an elevation above 76.00 feet.

Sawyer County spent \$75,000 to build the Tiger Cat Dam and \$10,000 to construct the diversion canals. The diversion canals were completed in the fall of 1939. The gates in the dam (stop-log) were opened in September or October 1939. From a survey made in September 1935, it appears that Round

Lake was at elevation 72.70 feet. (WPA Report, March 1938, docket 2-WF-255) This low elevation followed a marked decline in rainfall for the years 1929 and 1930. The total for the 5-year period ending 1930 showed a precipitation 10.2 inches below normal. The years 1931, 1932, 1933, and 1934 all showed a pronounced decline in rainfall. The total for the 4-year period showed 17.6 inches below the normal rainfall. (See precipitation record attached.)

At the time of the hearing February 4, 1941, Round Lake had raised to elevation 76.60 feet. October 28, 1940 the gates in the control dam were closed. Round Lake was then at elevation 76.30 feet. November 10, 1940 Round Lake had dropped to 75.20 feet. On the same day the gates were opened and by November 15 the lake had risen to elevation 76.60 feet. The gates in the dam remained closed from November 10, 1940 until the inspection was made by the Commission May 13, 1941 when the water had an elevation of 77.00 feet, or 0.40 feet over its elevation on February 4, 1941. This rise occurred without any release from the Tiger Cat flowage. Round Lake continued to rise and on July 29, 1941 it reached an elevation of 77.9 feet on the staff gage attached to a concrete post in a small dredged bay at Kaiser's resort. The staff was set according to the datum of Public Service Commission bench mark No. 899A, consisting of a spike in a white pine tree on the Ewig property on the east shore of Round Lake, elevation 82.58 feet (Tiger Cat datum). It should be stated that until the staff gage was established sometime after May 13, 1941 all elevations herein were referred to the gage on Kaiser's bridge at the Kaiser resort, which was also set according to the datum of Public Service Commission bench mark No. 899A.

On the establishment of the staff gage on the concrete post the gage on Kaiser's bridge was abandoned.

On June 26, 1941 elevations were run by W. A. Muegge from bench mark No. 899A to the water's surface and from the water's

surface to the staff gage at Kaiser's resort. There was a strong inshore wind and the water surface at Kaiser's resort showed an elevation of 76.77 feet, while the staff gage across the lake registered the water surface at 76.50 feet. Thus, while the staff gage and the bench mark checked within less than 1/2 inch, we are of the opinion that on a calm day a lake level of 77 feet on the gage will be at an elevation of something lower than elevation 77.00 feet when referred to the Commission bench mark No. 899A.

The elevations in the order herein will be referred to the staff gage on the Kaiser resort property, and at a later time the exact difference in elevation between the gage and the bench mark will be determined.

The evidence concerning water elevations at Round Lake in the past may be summarized as follows:

Olaf Treland, chairman of the town of Round Lake, testified that in 1914 or 1915 there was a wooden bridge across the channel between Round and Little Round Lakes in Highway B and that you could go through the channel with boats, and that during high water the water ran through the swamp between Little Round and Squaw Lakes.

Sam Ahrenhiel testified that in 1913, 1914, and 1915 water was always running out of Little Round Lake through the big swamp, and that there was a ditch from Little Round Lake to Squaw Lake.

Reverend Clarence E. Weed testified that in 1921 and 1922 the water in Little Round Lake had an elevation of approximately 2 inches lower than the elevation on September 5, 1940, the latter elevation being 76.50 feet.

Frank Haublin testified that in 1935 or 1936 the lake reached an extreme low elevation and that he measured with a carpenter level and found that the water was 7 feet 6 inches from the high watermark; that the high watermark referred to was about 2 1/2 feet above elevation 76.6 feet.

John E. Moreland testified that the water on the day of the hearing was 2½ to 3 feet lower than it was when he built his boathouse on Round Lake 23 or 24 years previously.

Bert Whitten said that in 1913 the water was 2 or 3 feet higher than on the day of the hearing, and that in 1920 or 1921 the lake was higher than on the day of the hearing but not as high as in 1913.

O. F. Maier testified that he lived on the shore of the lake since 1909; that when he first settled there, there was no such thing as a bathing beach. "You stepped from the shore into 2 feet of water right away and about in 1913 I left there and was gone for 3 years, and during that time the water started to go down, but after 6 years it started to come back. In 1920 it was much higher than it was on the day of the hearing."

Fred Paulson purchased his property in 1927 and found the water level to be about the same at that time as on the day of the hearing. He said that it was about 1½ feet higher in 1928. "There was no beach at all. It was about the same as now. When you raise the water now I have no beach at all."

J. C. Wood testified that the water was higher in 1919, and F. R. Nash testified that the water in 1913 was higher.

An examination of the shore of the lake made by the examiner on July 29 and 30, 1941 and reported to the Commission shows that the water elevation of Round Lake was at 76.9 feet on the staff gage at Kaiser's resort. All large trees of saw-log size were standing approximately 3 feet above the water surface. All trees 20 years old or older were standing at an elevation which would indicate that the water level on the day of the inspection was not above normal. The trees could thrive and reach maturity even though the water had been constantly at an elevation of 77.0 feet or higher. Perhaps this is best illustrated by trees along the flowage of the lot owned by Reverend Clarence E. Weed. A Norway pine about 16 inches in diameter stood on the shore at an

elevation of about 4 feet above the water. A white pine about 20 years old 18 feet from the water's edge grew on land approximately 2½ feet above the elevation of the water. A white pine about 16 years old 12 feet from the water's edge was about 1.75 feet above the water. Another Norway pine 16 years old about 7 feet from the water's edge stood on land approximately 1.75 feet above the water surface. At other locations around the lake there were large trees 50 or 100 years old, all of which were approximately 3 feet or more above the water surface. The water level, as already stated, was at elevation 76.9 feet. The timber line along the shore indicated that the water level was normal rather than abnormally high.

Findings

THE COMMISSION FINDS:

1. That the normal elevation of Round and Little Round Lakes is at 77.0 feet, when referred to the staff gage at Kaiser's resort on Round Lake.
2. That the highway fill in County Trunk Highway B in the channel between Round and Little Round Lakes constitutes an illegal obstruction to navigation in the channel between Round and Little Round Lakes; that in order to afford reasonable navigation between the two lakes it will be necessary to construct a bridge in County Trunk Highway B over the outlet stream of a width of not less than 8 feet and an overhead clearance of not less than 3 feet, so that the bottom of the girders underneath the bridge will be not lower than elevation 80.00 feet.
3. That in order that the normal elevation of Round and Little Round Lakes may be maintained, it will be necessary to construct an outlet canal not less than 10 feet in width from Little Round Lake to Squaw Lake, the high point of which shall

be at an elevation of not more than 75.25 feet, and which should contain a control works to regulate the water levels of the lake.

Order

IT IS THEREFORE ORDERED:

1. That Sawyer County construct a bridge in County Trunk Highway B over the outlet in Round and Little Round Lakes of a width of not less than 8 feet and an overhead clearance of 3 feet above the normal elevation of the lakes.

2. That Sawyer County construct an outlet channel from Little Round Lake to Squaw Lake of the capacity to discharge 150 c.f.s., with a dam and control gates whereby the water level in Round and Little Round Lakes may be controlled.

3. That Sawyer County shall maintain Round and Little Round Lakes at the normal elevation of 77.00 feet at all times when a sufficient water supply exists and during freshets and heavy run-off to prevent the water levels from rising above elevation 77.25 feet. These elevations are referred to the staff gage at Kaiser's resort.

4. That the plans for the bridge in County Trunk Highway B and for the outlet canal from Little Round Lake to Squaw Lake, including the control works, be submitted to the Commission on or before December 1, 1941.

5. That the bridge in County Trunk Highway B, the outlet canal, and the control works therein be constructed and ready for operation by July 1, 1942.

IT IS FURTHER ORDERED:

That until the bridge and the canal and control works have been constructed and placed in operation that no

water shall be diverted from the Tiger Cat flowage into Round Lake when the water in Round and Little Round Lakes exceeds elevation 76.0 feet.

Dated at Madison, Wisconsin, this 29th day of September 1941.

PUBLIC SERVICE COMMISSION OF WISCONSIN

R. M. Peterson
Chairman

Robert H. Peterson
Commissioner

W. H. Whitney
Commissioner

STATE OF WISCONSIN

CIRCUIT COURT

SAWYER COUNTY

JAMES HAUSMAN,

Plaintiff,

Case No. Case No. 03-CV-167

v.

SAWYER COUNTY,

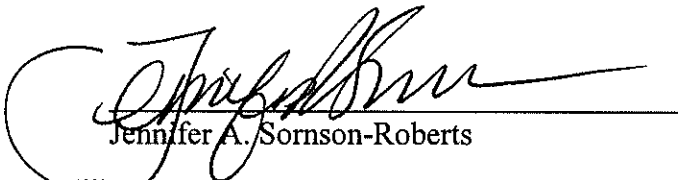
Defendant.

Case Code: 30201 and 30301
(Property Damage and Money
Judgment)

AFFIDAVIT OF SERVICE

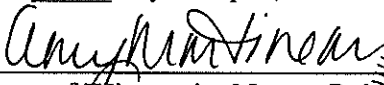
STATE OF WISCONSIN)
 : ss
COUNTY OF DANE)

Jennifer A. Sornson-Roberts of the City of Madison, County of Dane, State of Wisconsin, says that on the 14th day of April, 2004, she served the parties on the attached list with a true and correct copy of the Amended Complaint for Injunctive Relief and Damages by placing in an envelope and depositing same with Federal Express to the Honorable John P. Anderson and serving to the remaining parties as noted on the attached list.

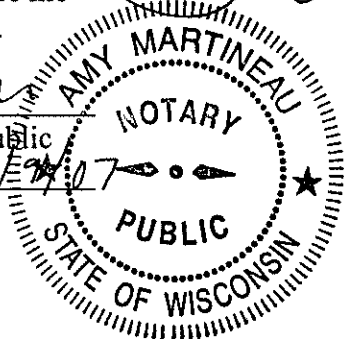


Jennifer A. Sornson-Roberts

Subscribed and sworn to before me
this 14th day of April, 2004.



State of Wisconsin, Notary Public
My commission expires: 12/31/07



(Federal Express)
Ricki L. Briggs
Clerk of Circuit Court
Sawyer County Courthouse
406 Main
Hayward, WI 54843

(Hand Delivery)
Matthew P. Dregne, Esq.
Stafford Rosenbaum, LLP
3 S. Pinckney Street
P.O. Box 1784
Madison, WI 53701-1784

Q:\client\043655\0001\B0352175.1