

EXHIBIT C
STATE OF MICHIGAN

CIRCUIT COURT FOR THE COUNTY OF MISSAUKEE

HAROLD JACKSON and GLADYS JACKSON,
on their own behalf and on behalf of all
others similarly situated as a class,
Plaintiffs

v.

ORDER
File No. C-280.

BOARD OF COMMISSIONERS FOR
MISSAUKEE COUNTY and
MISSAUKEE COUNTY ROAD COMMISSION
Defendant

At a session of said Court held in the Courthouse
in the City of Cadillac in Wexford County, Michigan
on the 22nd day of May, A. D. 1970,

Present: HONORABLE ELZA H. PAPP, Acting Circuit Judge.

This cause having been brought on for hearing upon the pleadings filed in said cause, the parties being present in Court and having testified, and being represented by their respective attorneys, and the Court having found that the allegations in the complaint are true, and that Defendant Boards of Commissioners are responsible for maintaining the level of Lake Missaukee at no more than 1238 feet, and that the present level of said lake is approximately 2 feet higher than said maximum level of 1238 feet as previously determined by order of this Court, which level it appears from the testimony offered, is a reasonable level for said lake, and that the existing high water level has flooded septic systems of residents on the lake resulting in a dangerous pollution problem and a danger to public health as determined by representatives of the Michigan Department of Health and that there presently exists an emergency situation at Lake Missaukee that requires immediate remedial action by the Boards responsible and that the Boards having failed to take corrective action to remedy this emergency situation although it appears said Boards have for some time past been aware of the public health emergency created by high water and resultant pollution,

Now therefor, It is Ordered that the Boards of Commissioners immediately call an emergency meeting of said Boards to take appropriate action on the findings and order of this Court.

The Court further orders the Defendant Boards, or their agents, forthwith obtain from the State Highway Department and the Department of Natural Resources any permits, approvals or comments that may be required in connection with construction or maintenance of the necessary stream outlet channel as proposed by the engineer retained by the Boards in accordance with plans and specifications as referred to by said engineer in testimony at the hearing

of this cause and to provide that such outlet be covered, tubed or tiled and buried near any private residence so that it does not create an eyesore for anyone and to provide that any such tubing be sealed, where passing any private residence so that there will be no leakage into the home or residence of any individual.

The Court, having been advised by the Mayor of Lake City, that the City Council will make available a right-of-way for the subject project, the Court orders that that project be carried out in such manner that the installation of the necessary lake level control devices and tubing do not present an unsightly appearance so that the finished project preserves as much of the natural beauty of the site as practicable and no objectionable ditches or piles of dirt are left on the finished site.

It is further Ordered that this whole project shall be completed on or before August 1, 1970, excepting for acts of God or causes beyond the control of the Defendant Boards.

It is further Ordered, that, this Court having found that an emergency situation exists, the Defendant Boards may proceed with the necessary contractual commitments without the necessity of competitive bidding, notice or publication, or any other statutory requirements limiting the time in which the Boards may act.

No costs assessed, a public issue being involved.


Eliza H. Papp, Acting Circuit Judge

6-16-1970

Approved as to form:


Gary G. Hoffman, Prosecutor
Attorney for Defendants


R. E. Thompson
Attorney for Plaintiffs

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

JOHN R. NYLAND and
DOROTHY A. NYLAND,
his wife; ANDREW KUIPERS
and ALIDA P. KUIPERS,
his wife; ROBERT E.
ROWLAND, and SALLY J.
ROWLAND, his wife;
EDWARD F. WELLER, JR.
and MARY R. WELLER, h.s wife,

Plaintiffs,

v.

No. 0323

BOARD OF COMMISSIONERS OF
THE COUNTY OF MISSAUKEE,

Defendant.

COMPLAINT FOR MANDAMUS

NOW COME the above-named plaintiffs by Cozadd, Shangle &
Smith, their attorneys, and Korn & Burns, attorneys of counsel, and
represent unto this court as follows:

1. That the plaintiffs are owners of property situated in the
County of Missaukee, State of Michigan, described more fully as follows:

John R. Nyland and Dorothy A. Nyland, his wife,
as to Lots 20-23, both inclusive, and 55-58,
both inclusive, Redman Isle Sub.

Andrew Kuipers and Alida P. Kuipers, his wife,
as to Lots 16-17 and 51-52, Redman Isle Sub.

Robert E. Rowland and Sally J. Rowland, his
wife, as to Lots 15 and 50, Redman Isle Sub.

Edward F. Weller, Jr. and Mary R. Weller,
his wife, as to Lot 10, Plat of North Lawn
Beach Subdivision.

FILED March 31-1971
Allen Perry
CLERK, CIRCUIT COURT
28TH JUDICIAL DISTRICT
MISSAUKEE COUNTY, MICHIGAN

2. That the property of the plaintiffs herein described all abuts on Lake Missaukee in Lake Township, Missaukee County.

3. That on or about October 13, 1941, the Board of Supervisors of Missaukee County (predecessors to the present Board of Commissioners) adopted a resolution pursuant to the provisions of Act 194 of the Public Acts of 1939 (§11.221 et seq., MSA, 52 Revised Volume) directing the Prosecuting Attorney of the County of Missaukee to file a petition in the Circuit Court of said County requesting the said court to determine and establish the normal height and water level of said Lake Missaukee.

4. That thereafter and on April 16, 1942, the Honorable Fred S. Lamb, Circuit Judge, did sign an Order determining and establishing the normal height and water level of Lake Missaukee to be 1,238 feet above sea level.

5. That after the entry of said Order determining the height and water level of Lake Missaukee by the Circuit Court, it was mandatory and the clear legal duty of the Board of Supervisors (Board of Commissioners) to maintain the established lake level.

6. That at least during the year 1970 and up to and including March 10, 1971, the level of Lake Missaukee has consistently been higher than the 1,238 feet established and determined by the court; that as of March 10, 1971, the reported lake level was 1,240.1 feet.

7. That the property of the plaintiffs abutting Lake Missaukee has been repeatedly flooded by the high levels of the lake; that the operation of the septic system on some properties is impeded or stopped;

that the property owned by the plaintiffs, JOHN R. NYLAND and DOROTHY A. NYLAND, has water in the crawl space and the original furnace has been made useless requiring the installation of a new furnace and the present lake levels are jeopardizing the operation of this new furnace; that the property of EDWARD F. WELLER, JR. and MARY R. WELLER, his wife, has been condemned for normal living purposes by the Department of Health; that the property of the other two plaintiffs is being flooded and they are fearful that they will sustain damage to their property and the possible condemnation for normal use by the Public Health authorities.

8. That notwithstanding the clear and mandatory duty imposed by law upon the defendant, it has permitted the lake level to exceed 1,238 feet and has thus deprived the plaintiffs of valuable property rights.

9. That plaintiffs have repeatedly requested the BOARD OF COMMISSIONERS to take the necessary action to discharge their legal duties in maintaining the established lake level at 1,238 feet, but the BOARD has failed and refused to take sufficient action so as to maintain the lake level at 1,238 feet as required by law.

10. That the Board of Supervisors in adopting the resolution of October 13, 1941, deemed it expedient in the interest of the public health, welfare or safety to petition the court for a determination of the lake level and the failure of the said BOARD OF COMMISSIONERS to fulfill its mandatory legal duties in maintaining the lake level at 1,238 feet jeopardizes the health, welfare or safety of your plaintiffs.

11. That plaintiffs being owners of property abutting Lake Missaukee have a clear legal right to have the lake level maintained in accordance with the determination of this court to protect their health, welfare and safety and to avoid the loss of use of their property without compensation because of the flooding of their properties.

12. That with the level of Lake Missaukee being 1,240.1 feet as of March 10, 1971, plaintiffs are fearful that with the spring thaw the level of the lake will raise substantially higher thus further damaging their property and making the same unusable for normal living purposes.

13. That as the spring thaws are imminent, it is imperative that this court immediately consider plaintiffs' Complaint and grant to them the necessary relief in order to protect their properties and protect their health, welfare and safety.

14. That the failure of the BOARD OF COMMISSIONERS to carry out its mandatory and clear legal obligation to maintain the lake level as ordered by this court, the plaintiffs are being wrongfully and illegally deprived of valuable property rights, contrary to applicable law and contrary to applicable provisions of the U. S. and Michigan Constitutions.

15. That because the spring thaws pose a serious threat to the property of the plaintiffs, they believe they are entitled to a speedy hearing on this matter in order to provide them immediate relief so as to avoid any further damaging of their property.

16. That your plaintiffs are advised and verily believe that they are without adequate remedies in the premises except by the aid of a Judgment of Mandamus.

WHEREFORE, plaintiffs pray:

1. That this court issue an Order to Show Cause directed to the defendant to show cause before this court on _____, the _____ day of _____, 1971, at _____ o'clock why mandamus should not be granted as requested in this action. Such Order to Show Cause to be issued on the ground that there is necessity for immediate action as shown in the Complaint.

2. That this court enter a Judgment ordering the defendant, BOARD OF COMMISSIONERS OF THE COUNTY OF MISSAUKEE, to forthwith make adequate provision to maintain the lake level of Lake Missaukee at 1,240 feet and to forthwith make adequate provision to reduce the level of said lake to 1,238 feet and to maintain said level.

3. That your plaintiffs may have such other and further relief as shall be deemed proper by this court.

COZADD, SHANGLE & SMITH
Attorneys for Plaintiffs

By: 

B. Ward Smith

2143 First National Building
Detroit, Michigan 48226
961-2490

KORN & BURNS
Attorneys of Counsel for Plaintiffs
Sandelius Building
Cadillac, Michigan 49601

Dated: 3-30-71

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

JOHN R. NYLAND and
DOROTHY A. NYLAND
his wife; ANDREW KUIPERS
and ALIDA P. KUIPERS,
his wife; ROBERT E. ROWLAND,
and SALLY J. ROWLAND, his
wife; EDWARD F. WELLER, JR.
and MARY R. WELLER, his wife

Plaintiffs,

No. C-323

v.

BOARD OF COMMISSIONERS OF
THE COUNTY OF MISSAUKKEE,

Defendant.

ANSWER TO COMPLAINT FOR MANDAMUS

NOW COME the above-named Board of Commissioners of the County of Missaukee, by Alfred Diemer, Chairman of the Board of County Commissioners, for answer to complaint of John R. Nyland, Dorothy A. Nyland, Andrew Kuipers, Alida P. Kuipers, Robert E. Rowland, Sally J. Rowland, Edward F. Weller, Jr. and Mary R. Weller, plaintiffs herein, and for cause why a Writ of Mandamus should not be issued as prayed for in complaint of plaintiffs, respectfully show:

1-4. Answering paragraph 1 through 4 of plaintiffs Complaint for Mandamus, defendant admits the allegations therein contained.

5. Answering paragraph 5 of plaintiffs Complaint for Mandamus, defendants deny that it was a mandatory and clear legal duty of the Board of Commissioners to maintain the established lake level and that status was only permissive until March 20, 1970, but avers that plaintiffs had a duty under the Lake Level Statute to circulate petitions for the construction of a proper structure and thus were negligent in their failure to do so.

6. Answering paragraph 6 of plaintiffs Complaint for Mandamus, defendant admits the allegations therein contained.

FILED

4-15-71
CLERK, CIRCUIT COURT
28TH JUDICIAL DISTRICT
MISSAUKKEE COUNTY, MICHIGAN

7. Answering paragraph 7 of plaintiffs Complaint for Mandamus defendant does not have sufficient information upon which to form a belief and, therefore, neither admits nor denies the allegations therein contained but leaves plaintiff to its proofs.

8. Answering paragraph 8 of plaintiffs Complaint for Mandamus defendants deny that they permitted the lake level to exceed 1238 feet and in support of such denial aver that action has been taken by the respective county departments to construct and build a permanent lake level structure, that contractors are presently working in such an endeavor, that condemnation proceedings to procure the necessary easements to build the said lake level structure were authorized on February 7, 1971, and are in the process of completion, that all necessary easements with one exception have been obtained for said construction, that the County Department sought the cooperation of the Department of Natural Resources for permission to dam up Goose Lake and Long Lake in order to prevent the overflowing of Lake Missaukee and was refused, and further avers that defendants were in no sacred position to prevent the heavy snowfall that is causing the acute problem.

9. Answering paragraph 9 of plaintiffs Complaint for Mandamus defendants do not have sufficient information upon which to form a belief, and therefore neither admits nor denies the allegation therein contained but leaves plaintiffs to their proofs and further avers that plaintiffs were guilty of negligence and had a clear duty under the Lake Level Statute to circulate a petition for the mandatory construction of the improvement.

10. Answering paragraph 10 of plaintiffs Complaint for Mandamus defendants deny the allegations contained therein.

11. Answering paragraph 11 of plaintiffs Complaint for Mandamus defendants admit the same, and aver that defendants and their agents have proceeded as expeditiously as possible to build a lake level and which is presently under construction and realize the need for prompt and speedy action and are proceeding with quick remedial action to safeguard all properties abutting Lake Missaukee.

12. Answering paragraph 12 of plaintiffs Complaint for Mandamus, defendants neither admit nor deny the allegations therein contained but leave plaintiffs to their proofs.

13. Answering paragraph 13 of plaintiffs Complaint for Mandamus, defendants admit that spring thaws are imminent, but deny that any relief is in order as defendants are engaged in the construction of the lake level structure that will give as great of direct relief to plaintiffs as is humanly possible.

14. Answering paragraph 14 of plaintiffs Complaint for Mandamus, defendants deny the allegations therein contained and aver that said Board of County Commissioners are immune from tort liability pursuant to the provisions of Act 155 of the Public Acts of Michigan of 1970 as amended, Michigan Compiled Laws 691.1407 which provides that all governmental agencies shall be immune from tort liability in all cases wherein the governmental agency is engaged in the exercise or discharge of a governmental function.....

15. Answering paragraph 15 of plaintiffs Complaint for Mandamus, defendants deny the allegations contained therein.

16. Answering paragraph 16 of plaintiffs Complaint for Mandamus, defendants deny the allegations contained therein and aver that plaintiffs have an adequate remedy at law against defendant pursuant to the provisions of the Order of the Circuit Court rendered by the Honorable Elza H. Papp Acting Circuit Judge in Circuit Court File No. C-280 No. C-292 and rendered on August 17, 1970.

Defendants therefore submit that the prayer of said complaint should be denied, and asks that the Complaint and Order to Show Cause be dismissed.

Alfred Diemer
ALFRED DIEMER, Chairman for the
Board of County Commissioners
of the County of Milwaukee

CHESTER C. PIERCE
Attorney for Defendants
3130 Cassere
Hamtramck, Michigan 48212

DATED: April 14, 1971

Shawit

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

JOHN R. NYLAND and
DOROTHY A. NYLAND,
his wife; ANDREW KUIPERS
and ALIDA P. KUIPERS,
his wife; ROBERT E.
ROWLAND, and SALLY J.
ROWLAND, his wife;
EDWARD F. WELLER, JR.
and MARY R. WELLER, his wife,

FILED 4-15-1971
Hilda Leg
CLERK, CIRCUIT COURT
23RD JUDICIAL DISTRICT
MISSAUKEE COUNTY, MICHIGAN

Plaintiffs,

v.

No. C-323

BOARD OF COMMISSIONERS OF
THE COUNTY OF MISSAUKEE,

Defendant.

ORDER TO SHOW CAUSE

At a session of said court held in the County
Building at CADILLAC MICHIGAN
on this 30th day of MARCH, 1971.

PRESENT: HONORABLE William R. Peterson
Circuit Judge

In this cause a Complaint being filed by plaintiffs for a Judgment
of Mandamus, and it appearing to the court that immediate action is
necessary,

IT IS ORDERED, that the defendant show cause before this court
at the City of Cadillac on Thursday, the 15th day of April, 1971, at
9:00 o'clock why the Judgment of Mandamus should not be awarded
as prayed for.

IT IS FURTHER ORDERED, that a copy of the Complaint and this
Order to Show Cause be served on defendant at least Seven days before the
time fixed for showing cause, and that proof of such service be made.

William R. Peterson
CIRCUIT JUDGE

11. That plaintiffs being owners of property abutting Lake Missaukee have a clear legal right to have the lake level maintained in accordance with the determination of this court to protect their health, welfare and safety and to avoid the loss of use of their property without compensation because of the flooding of their properties.

12. That with the level of Lake Missaukee being 1,240.1 feet as of March 10, 1971, plaintiffs are fearful that with the spring thaw the level of the lake will raise substantially higher thus further damaging their property and making the same unusable for normal living purposes.

13. That as the spring thaws are imminent, it is imperative that this court immediately consider plaintiffs' Complaint and grant to them the necessary relief in order to protect their properties and protect their health, welfare and safety.

14. That the failure of the BOARD OF COMMISSIONERS to carry out its mandatory and clear legal obligation to maintain the lake level as ordered by this court, the plaintiffs are being wrongfully and illegally deprived of valuable property rights, contrary to applicable law and contrary to applicable provisions of the U. S. and Michigan Constitutions.

15. That because the spring thaws pose a serious threat to the property of the plaintiffs, they believe they are entitled to a speedy hearing on this matter in order to provide them immediate relief so as to avoid any further damaging of their property.

16. That your plaintiffs are advised and verily believe that they are without adequate remedies in the premises except by the aid of a Judgment of Mandamus.

STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF MISSAUKEE

6-2-71

JOHN R. NYLAND and
DOROTHY A. NYLAND,
his wife; ANDREW KUIPERS
and ALIDA P. KUIPERS,
his wife; ROBERT E.
ROWLAND, and SALLY J.
ROWLAND, his wife;
EDWARD F. WELLER, JR.
and MARY R. WELLER, his wife,

FILED 4-15-1971
Richard Leeg
CLERK, CIRCUIT COURT
24TH JUDICIAL DISTRICT
MISSAUKEE COUNTY, MICHIGAN

Plaintiffs,

v.

No. C-323

BOARD OF COMMISSIONERS OF
THE COUNTY OF MISSAUKEE,

Defendant.

JUDGMENT

At a session of said court held in the City of
Cadillac, County of Missaukee, State of
Michigan, on the 15 day of April, 1971.

PRESENT: HONORABLE William R. Peterson
Circuit Judge

This matter having come on to be heard upon the plaintiffs'

Complaint for Mandamus and an Order to Show Cause having been issued
thereon and the court being fully advised in the premises.

IT IS ADJUDGED that under the provisions of the Lake Level Act
and the Order of this court entered on April 16, 1942 pursuant to a petition
filed by the Board of Supervisors of the County of Missaukee that it is the
clear and mandatory duty of the defendant to maintain the lake level of
Lake Missaukee as set forth in said Order.

WHEREFORE, plaintiffs pray:

1. That this court issue an Order to Show Cause directed to the defendant to show cause ^{at City Hall} before this court on Thursday, the 15 day of April, 1971, at 9:00 o'clock why mandamus should not be granted as requested in this action. Such Order to Show Cause to be issued on the ground that there is necessity for immediate action as shown in the Complaint.

2. That this court enter a Judgment ordering the defendant, BOARD OF COMMISSIONERS OF THE COUNTY OF MISSAUKEE, to forthwith make adequate provision to maintain the lake level of Lake Missaukee at 1,240 feet and to forthwith make adequate provision to reduce the level of said lake to 1,238 feet and to maintain said level.

3. That your plaintiffs may have such other and further relief as shall be deemed proper by this court.

COZADD, SHANGLE & SMITH
Attorneys for Plaintiffs

By: B. Ward Smith

B. Ward Smith

2143 First National Building
Detroit, Michigan 48226
961-2490

Korn & Burns
KORN & BURNS
Attorneys of Counsel for Plaintiffs
Sandelius Building
Cadillac, Michigan 49601

Dated: 3-30-71

C-384

IT IS FURTHER ORDERED AND ADJUDGED, that the Board of Commissioners of the County of Missaukee, defendant herein, forthwith make adequate provision to maintain the lake level of Lake Missaukee at 1240 feet.

IT IS FURTHER ORDERED AND ADJUDGED, that the Board of Commissioners of the County of Missaukee, defendant herein, forthwith make adequate provision to reduce the lake level of Lake Missaukee to 1238 feet and that said level be maintained.

IT IS FURTHER ORDERED AND ADJUDGED, that no costs be awarded either party, a public question being involved.

IT IS FURTHER ORDERED AND ADJUDGED THAT this cause is consolidated with files C-280 and C-292 in this Court for enforcement of this writ and such further proceedings as may be applicable.

William R. Peterson

CIRCUIT JUDGE

affirmed

STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF MISSAUKEE

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JOHN R. NYLAND, et al,

Plaintiffs

v.

Docket No: 323

TRANSCRIPT OF ORDER

BOARD OF COMMISSIONERS OF
MISSAUKEE COUNTY,

Defendant.

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April 15, 1971
Circuit Court
Cadillac, Michigan

B e f o r e: HON. WILLIAM R. PETERSON, Circuit Judge

Appearances: Chester C. Pierce, Esq.,

Attorney for the Defendant

B. Ward Smith, Esq.,

Attorney for the Plaintiffs

Robert A. Burns, Esq.,

Attorney for the Plaintiffs

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Ellen R. Looks
Circuit Court
Cadillac, Michigan

FILED 4/20/71
[Signature]
CLERK CIRCUIT COURT
24th JUDICIAL DISTRICT
MISSAUKEE COUNTY, MICHIGAN

THE COURT: All right, the Court, of course, takes some judicial notice of the existing litigation, and it is not, of course, the first litigation that has involved the level of the lake. Most of the past litigation arose out of the inadequately filled lake. We're concerned here with the question of the right of the plaintiffs to a writ of mandamus; there appears to be no question as to their standing to raise the question. The question is one of the interpretation of the Court Order which was entered by Judge Lamb, under the previous act on a petition which was governmentally initiated and which resulted in an order April 16, 1942 establishing a normal level of 1238 feet.

It's the contention of the defendant among other things that there is no legal obligation imposed by the prior act or by the Order of the Court upon the defendant to maintain that level. It's the contention of the plaintiffs that the prior act and the prior Order of the Court would have no meaning if there were not impliedly the means of enforcing the Order; that if the act could not be implemented, that it would mean nothing.

I have no doubt as to the jurisdiction of the Court to make the Order. I think the opinion of then Attorney General Dethmers is logical. I think that it would be a fruitless act on the part of the legislature to say that the Court like King Knute could sit at the water's edge and say, "Go back," and that that would be the only thing the Court could do would be to use the words. There could be no purpose to the act; there could be no purpose to the legislatively authorized

proceedings, unless impliedly there was the authority to compel observation of that Court ordered duty by ordering maintenance, by ordering the implementation of it. Now in fact what has happened is that historically the trend of the lake level has been towards a lowering of the level at most periods of time, and probably it was an attempt to prevent this that the original petition was filed, that people wanted to keep the level up. For some reason nobody saw fit to bring any proceedings to compel the public bodies to try and maintain that level by construction of a dam in the impounding and conserving of water, and somehow over the years the presence of that 1942 Order was largely forgotten.

Governments operate through people and they have short memories, and there are changes in personnel as there must always be and so it was lost, but some of the litigation that this present incumbent judge has already had involving that lake in the last eleven years involved questions of relicted lands and the like, and everyone was totally unaware of the existence of the Order apparently, property owners and governmental agencies alike. At least no one called it to the attention of the Court. That might raise a question as to whether, perhaps, the failure to, on the part of property owners, and other interested parties, to compel the governmental agency to maintain a high level, resulted in a loss of the right to rely upon the old Order, but there certainly has been nothing in this period of time to indicate any acquiescence in higher levels than that established by the Court. The question at any rate isn't really raised, and

though individuals may have forgotten the act, the government is charged with its own responsible duties. It's charged with the knowledge of its own acts and it cannot forget that the Court made the Order.

In construing the statute and the Order of the Court, it is the opinion of the Court that there is a legal duty upon which property owners are entitled to rely to the maintenance of this legal lake level. Now individual by individual, case by case, the rights of these property owners in relation to any governmental body are going to be determined by their own position. We're not determining that. The existence of the lake level was something that prospective property owners were entitled to rely upon, and in the same sense they, I suppose, were obligated to be aware of that fact at their peril if they built below that level so nothing in this determination is dispositive of the rights of any particular property owner but only of the rights of riparian owners as a class to be entitled to the enforcement of the Order and the maintenance of the level that was set by the Court.

Now perhaps I should at this point ask the question, you may be wondering why I've called this meeting. I didn't call it; it was called by the property owners who wanted an opportunity to be heard. It is the opinion of the Court that they are entitled to be heard individually, but as counsel are well aware the involvement of similar and related questions in litigation are to be heard by the judge who has the first one, Judge Papp. I have acted here with her consent. It is her understanding that I would determine the question

of the legal right to a remedy and that this would be all that I would be doing. It is, therefore, the Order of the Court that a writ of mandamus may issue. It's the further Order of the Court that this proceeding is consolidated with the existing litigation.

Again we're back in the same position that we were with King Knute. When the lake level was down, the Court can't compel moisture to fall. It could have upon proper petition compelled compliance with the Order by a construction of a dam and some systematic effort to conserve impounded water, but the other extreme, when you've got too much water, the Court can't compel its removal instantly. We have an adequate supply of hot air in the court but we can't evaporate it right now; it just can't be done. And so I -- this is simply dicta at this point, of course, since it's not any longer my responsibility being consolidated with the other case but it would be my judgment that the implementation of the writ of mandamus, the enforcement of the obligation of the defendant to comply with it has to be done on a reasonable basis, and this supervision of the relief will be tied in with the enforcement of the Order in the case by Judge Papp, and essentially I take it it's going to boil down, Mr. Pierce says that the defendant has acted as expeditiously as possible. Quite obviously some of the plaintiffs here don't feel that to be true.

I would also suggest by way of dicta that I note in the complaint and in the answer that the question of governmental immunity is raised as to possible tort questions; it is my

understanding that a continuing type of trespass by overflowing could amount constitutionally to a wrongful taking in violation of the prohibition against the condemnation or taking of property without just compensation so that admittedly the defendant has problems with the riparian owners on the lake and equally with the riparian owners downstream.

An Order may be entered granting the writ of mandamus, consolidating the matter with the other proceeding for enforcement of the writ.

Now one further point: it has been suggested that there may be other lawsuits or that other people may wish to intervene or that other parties ought to be joined as parties-defendant; I can only suggest that if that's going to happen, it should happen right soon.

Thank you, gentlemen.

MR. SMITH: Thank you, Judge.

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STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF MISSAUKEE

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JOHN R. NYLAND, et al,

Plaintiffs,

v.

TRANSCRIPT OF ORDER

BOARD OF COMMISSIONERS OF

MISSAUKEE COUNTY,

Defendant.

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REPORTER'S CERTIFICATE

I, Ellen R. Loeks, Official Court Reporter in and for the 28th Judicial Circuit of Michigan, do hereby certify that the foregoing is a true and accurate transcription of my stenographic notes taken at the time of the hearing in the above-entitled cause, and is all of the same so far as pertains thereto.

Ellen R. Loeks

Official Court Reporter.
April 17, 1971.

STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF MISSAUKEE

HAROLD JACKSON and GLADYS JACKSON, et al
vs.
BOARD OF COMMISSIONERS FOR MISSAUKEE
COUNTY, et al

File No. C-280

LUTZ, et al
vs.
BOARD OF COMMISSIONERS, et al

File No. C-292

NYLAND, et al
vs.
BOARD OF COMMISSIONERS, et al

File No. C-323

INTERIM DISCOVERY and PRE-TRIAL CONFERENCE

Before: HON. ELZA H. PAPP, Acting Circuit Judge
Tuesday, April 27, 1971, at the Courthouse,
Flint, Genesee County, Michigan.

The parties by their respective attorneys having met in chambers for a report on the current status of the County Commissioners activities in complying with the prior order of this Court for maintaining the level of Lake Missaukee at no more than 1,238 feet as previously determined by order of this Court, and the Commissioners having advised the Court that a temporary ditch had been opened on Friday, April 22, 1971, to provide additional drainage for Lake Missaukee, it was agreed that the following actions would be taken to assist in controlling the water level of the lake:

A. Work will proceed at once to increase the size of culverts under the state highway and railroad bed lying between Lake Missaukee and Mesquito Creek.

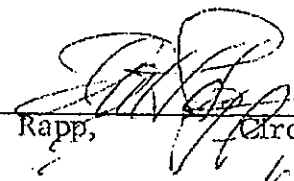
B Approval will be sought from the Michigan Department of Natural Resources to temporarily flood state lands lying north of Lake Missaukee by damming up water draining into the lake, such dam to be removed by the county on or about August 1, 1971.

FILED _____

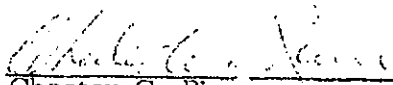
CLERK, CIRCUIT COURT
28TH JUDICIAL DISTRICT
MISSAUKEE COUNTY, MICHIGAN

C. Approval will be sought from Missaukee Lakes Land Company to flood lands owned by it and lying north of Lake Missaukee in the same area as the state lands referred to in B above.

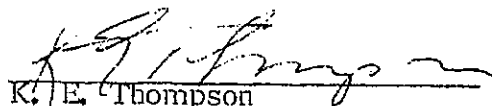
D. Based on studies of the Department of Natural Resources, the Court will entertain a petition for a hearing to establish a variable level for Lake Missaukee in July or August of 1971 in an appropriate proceeding after due notice.


Elza H. Rapp, Circuit Judge

6-7-1971


Chester C. Pierce
Attorney for Commission

B. Ward Smith
Attorney for Plaintiffs Nyland, et al


K. E. Thompson
Attorney for Plaintiffs Jackson, et al

STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF MISSAUKEE

BOARD OF COMMISSIONERS OF
MISSAUKEE COUNTY, AND
MISSAUKEE COUNTY ROAD COMMISSION,

No. C-347

Plaintiffs,

vs.

ANDREW REPIK, Otto Balzer,
Jay W. Price, (See Exhibit A
for Additional Defendants.

Defendants

ORDER ~~FIXING~~ DATE FOR HEARING ON COMPLAINT TO CONFIRM NORMAL HEIGHT
AND LEVEL OF LAKE MISSAUKEE, AND SPECIAL ASSESSMENT DISTRICT BOUNDARIES
PURSUANT TO PROVISIONS OF ACT 146 OF THE PUBLIC ACTS OF 1961 AS AMENDED.

At a session of said Court held in the Court House in the City of
Cadillac, Wexford County, Michigan on the 29th day of October 1971 A.D.

PRESENT: HONORABLE WILLIAM R. PETERSON, CIRCUIT JUDGE

A complaint having been heretofore filed praying for the confirmation
of the normal height and level of Lake Missaukee and the special assessment
district boundaries pursuant to the provisions of Act 146 of the Public
Acts of 1961 as amended, and it appearing to the Court that the prayer
in said complaint should be granted;

NOW THEREFOR IT IS ORDERED:

1. That the 13th day of January A.D. 1972 at
10:30 o'clock in the fore noon of said day be and it hereby
is fixed as the date for hearing upon the merits of said Complaint;

2. That Notice of this proceeding be published in the Waterfront
for six (6) successive weeks preceding the date herein set for hearing
on said Complaint.

3. That copies of this Order, Notice of Hearing, as published
and Complaint be served by certified mail at least 3 weeks prior to the
date herein set for hearing on each person whose name appears upon the
latest township tax assessment rolls or city assessment rolls, as
owning lands within the special assessment district at the address shown
on the roll.

4. That a copy of this order, Notice of Hearing, as published
and Complaint be served by certified mail on the Department of
Conservation of the State of Michigan;

5. That any and all persons interested or affected by this
proceeding appear before this Court on the day and date aforesaid in
the City of Cadillac, Wexford County Michigan, then and there to show
cause why the Prayer in the Complaint should not be granted.

FILED

10-29-71

William R. Peterson
CLERK, CIRCUIT COURT
23TH JUDICIAL DISTRICT
MISSAUKEE COUNTY, MICHIGAN

William R. Peterson
Circuit Judge

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

BOARD OF COMMISSIONERS OF
MISSAUKEE COUNTY, AND
MISSAUKEE COUNTY ROAD COMMISSION,

No. C-347

Plaintiffs,

vs.

ANDREW REPIK, Otto Balzer,
Jay W. Price, (See Exhibit A
for Additional Defendants.)

Defendants.

COMPLAINT

Now comes the Missaukee County Board of Commissioners, and the Missaukee County Road Commission, by the Office of the Prosecuting Attorney, thru the Office of Special Counsel for Missaukee County and pursuant to provisions of Act 146 of the Public Acts of 1961 as amended by Act 175 of the Public Acts of 1969, and gives the Court to understand and be informed as follows:

- Oct 27, 1971
1. That the Missaukee County Board of Commissioners by resolution #455, dated February 9, 1971, a copy which is attached hereto marked Exhibit B, and made a part hereof by reference, has directed the Missaukee County Road Commission to prepare a Special Assessment District and submit it to the Circuit Court for approval.
 2. That Lake Missaukee is a natural inland public lake as defined in said Act 146 of the Public Acts of 1961 as amended.
 3. That pursuant to Court orders rendered by this Circuit Court in causes adjudicated under File C-280 and C-292 and an Order of this Court rendered on April 16, 1942, by the Hon. Fred S. Lamb, the Board of Commissioners of the County of Missaukee were ordered to maintain the level of Lake Missaukee at 1238 feet and to build the permanent installation called a lake level control structure in order to accomplish the setting of the lake level and controlling the same which said plaintiffs have accomplished.
 4. That it is necessary to control and maintain the level of Lake Missaukee pursuant to said Court orders and the provisions of Act 146 of the Public Acts of 1961 as amended.
 5. That if the waters in Lake Missaukee are low and mud flats are exposed, the mud flats impair the use of the lake for recreational purposes, all to the detriment of the welfare and safety of the owners of the abutting property.

6. That a portion of the tax base in Lake City and the surrounding townships in which the lake is located is derived from the value of improvements made by the abutting land owners as well as other property near the lake with access thereto and to preservation of these values depends to a great extent on the preservation of the normal water level of said lake as set by this Circuit Court.

7. That if the level of the said lake is too high or too low, the owners of the property abutting on the lake will suffer irreparable damages.

8. That the following described individual parcels of land and all or parts of subdivisions as hereinafter set forth are the lands within the special assessment district as determined by the Missaukee County Road Commission acting as the department, said lands being in the City of Lake City, and the Townships of Lake, Caldwell, and Reeder, all in Missaukee County, Michigan, to-wit:

Beginning 538.75 ft. S and 908.20 ft. W of NE cor sec. 1-22-8 N 44° 46' W 124 ft. to P.O.B. N 44° 46' W 23.25 ft. N 88° 24' W 112.74 ft S 47° 50' W 52.56 ft S 44° 46' E 48.23 ft alg lake shore N 69° 35' E 143.10 ft to beg. City of Lake City

Beg 538.75 ft S and 908.20 ft W of NE corner Sec. 1 T22 N R8W N 44° 46' W 100 feet to P.O.B. Thence N 44° 46' W 24 feet S 69° 35' W 143.10 feet to shore of Lake Missaukee. S 44° 46' E 60 feet along shore N 55° 09' E 132.10 feet to P.O.B. City of Lake City

Beginning 538.75 feet S and 908.20 feet W of NE corner Sec. 1-22-8 N 44° 46' W 50 feet to P.O.B. N 44° 46' W 50 feet S 55° 09' W 132.10 feet S 44° 46' E 60 feet along shore Lake Missaukee N 50° 50' E 130.76 feet to place of beginning. City of Lake City

Beginning 538.75 feet S and 908.20 feet W of NE corner Sec. 1-22-8 N 44° 46' W 50 feet S 50° 50' W 130.76 feet to shore Lake Missaukee S 44° 46' E 60 feet along shore N 46° 27' E 130.16 feet to P.O.B. City of Lake City

Lot 6 - Rising's Add.

Public Streets - Lake City

Lot A (Boat House) commencing at a point on the S side of Logan Street 32.2 feet W of NW corner of Lot 5; proceeding thence W along Logan Street 122.5 feet to shore of Lake Missaukee; thence SE along Lake shore 72.9 feet; thence N 53° 43' E 92 feet to beginning. Blk. 5 Langley's Second Addition.

Commencing at a point on S side of Logan St. which lies 20.6 feet W of NW corner of Lot 5; proceeding W along Logan Street 11.6 feet; thence S 53° 43' W 92 feet; thence SE along shore of Lake Missaukee 47.8 feet; thence N 52° 58' E 97.2 feet N 37° 02' W 32.3 feet to beginning. Langley's Second Addition.

Commencing at a point on S side of Logan St. which lies 20.6 feet W of NW corner of Lot 5 and proceeding thence S $37^{\circ} 02'$ E a distance of 32.3 feet for a beginning; thence S $37^{\circ} 02'$ E 44.4 feet; thence S $52^{\circ} 58'$ W 92.7 feet; thence NW along lake front 44.4 feet; thence N $52^{\circ} 58'$ E 97.2 feet to beginning. To be described as Lot C proposed Plat Blk. 5 Langley's Second Addition.

Beginning at point 20.6 feet W and S $37^{\circ} 02'$ E 78.7 feet of NW corner Lot 5; thence S $37^{\circ} 02'$ E 50.2 feet; thence S $52^{\circ} 58'$ W 89.2 feet to water's edge; thence NW'ly along edge 50.2 feet; thence N $52^{\circ} 58'$ E 92.7 feet to point of beginning. Blk. 5 Langley's Second Addition.

Entire Blk. 5, exc. beginning 20.6 feet W of NW corner of Lot 5, Blk. 5, S $37^{\circ} 02'$ E 128.9 feet S $52^{\circ} 58'$ W 89.2 feet; NW'ly along lake shore 215.3 feet to intersection of S line of Logan Street; extend to shore of lake, E along S line of Logan Street 134.1 feet to beginning. Blk. 5 Langley's Second Addition.

Lots 10-11-12, Blk. 3 - Langley's Second Addition.

Lots 6-7-8-9, Blk. 3 - Langley's Second Addition.

Lots 6-7-8- Blk 2 - Langley's Second Addition

Lot 5, Blk 2 - Langley's Second Addition

N 45 feet of Lots 3-4-5 Blk 1 Langley's Second Addition

Commencing at NE corner Lot 5, Blk 1; thence S $0^{\circ} 30'$ E 45 feet S $89^{\circ} 30'$ W 32.78 feet to a point; thence S $89^{\circ} 30'$ W 142.58 feet; thence S $32^{\circ} 50'$ E 54.46 feet along shore of Lake Missaukee; thence N $76^{\circ} 8'$ E 54.50 feet N $0^{\circ} 0'$ W 10.81 feet; thence N $69^{\circ} 0'$ E 67.67 feet to beginning. Blk 1 Langley's Second Addition.

Entire Blk 1, except S 60 feet of Lots 1 and 2 and except N 45 feet of Lots 3-4-5, and except commencing at a point on highwater mark on Lot 3, Blk 1 in Langley's Second Addition located 59.71 feet SE'ly from a point on the highwater mark on N boundary line of said Lot 3; thence due E on a line parallel with the S boundary line of Langley Street in said Plat a distance of 82 feet to a point in Lot 3, in said Blk 1; thence due S on a line parallel with Front Street in said Plat a distance of 28 feet to a point in said Lot 4; thence SW'ly an indeterminate distance to a point on the highwater mark of said Lot 3 located 48 feet SE'ly from the beginning; thence NW'ly along the highwater mark to beginning. Langley's Second Addition Blk 1

E 25 feet of S $\frac{1}{2}$ of Lot 1 and S 10 feet of N $\frac{1}{2}$ of Lot 1 and S 60 feet of Lot 2 Langley's Second Addition Blk 2

W $\frac{1}{2}$ of S $\frac{1}{2}$ of Lot 1 - Langley's Second Addition - Blk 1

Lots 1-2-3-4-5 N 10 ft. of Lot 6 exc. E 10 ft. of N $\frac{1}{2}$ thereof; W $\frac{1}{2}$ of Lot 12; Lots 13-14 & S $\frac{1}{2}$ of W 40 ft. of N $\frac{1}{2}$ of Lot 15 Blk 2 Orig. Plat City of Lake City

S 40 ft. of Lot 6; N $37\frac{1}{2}$ ft. of Lot 7; N 21 ft. of Lot 10; S $32\frac{1}{2}$ ft. of Lot 11. Blk 2 orig. Plat City of Lake City

S $12\frac{1}{2}$ ft. of Lot 7; Lots 8 & 9 & beg at SE cor. of Lot 10, Blk 2, Th. N 10 Ft. 6 In; W 41 Ft. 6 In; S 8 In; W 58 Ft. 6 In; S 9 Ft. 10 In; E 100 Ft. to beg. Blk 2 orig. Plat City of Lake City

Entire Blk 3 - Orig. Plat City of Lake City

Com. at SE Cor. of Blk 3, Orig L/C; Th along W/L of Main St. S $15^{\circ} 22'$ E 214.90 ft; S $77^{\circ} 36'$ W 60 ft; N $22^{\circ} 7'$ W 218.62 ft; N $78^{\circ} 13'$ E 85.05 ft. to beg. exc. S 75 ft. of this desc.
City of Lake City

Com. on W Line of Main St. in City at a Pt. which lies 70 ft. N'ly (N $15^{\circ} 22'$ W) Fr. the intersection of centerline of Union St.; with W line of Main St.; Th. N'ly $15^{\circ} 22'$ W along W line of Main St. 75 Ft; W'ly (S $81^{\circ} 37'$ W) 68.77 ft. to a pt. on Sh. of Lake Miss; Th. SE'ly (S $22^{\circ} 07'$ E) along shore of Lake Miss. 75 ft; th. E'ly (N $77^{\circ} 36'$ E) 60 ft. to beg. City of Lake City

Com. at Int. of C/L of Union St. & W. Line of Main St. Th. along PRLGTH of Union St. Ext S $89^{\circ} 6'$ W 54.03 ft. to shore of L/Miss; Th. N $22^{\circ} 7'$ W along S/L of Lake 60 ft Th N $77^{\circ} 36'$ E 60 ft to W/L of Main St. S $15^{\circ} 22'$ E along W/L of Main St. 70 ft. to beg.
City of Lake City

Unplatted portion of Miltner Park

Henry Miltner Memorial Park

Lot 143 Miltner's Addition

Lot 142 Miltner's Addition

Lot 141 Miltner's Addition

N $41\frac{1}{2}$ ft. of Lot 140 Miltner's Addition

That part of Lot 140 desc. as beg. 229.05 ft. N'ly of SE cor. of Lot 138 along E'ly line of SD Lot to a Pt: Th. W'ly to a Pt. on the W'ly line of Lot 140 being 18.9 ft. N'ly of the NW cor. of Lot 139; Th. N'ly 41.5 ft. on W'ly line of Lot 140 to a Pt: Th. E'ly to a Pt. on E'ly Line of Lot 140, being 270.55 ft. N'ly of the SE cor. of lot 138: Th. S'ly along E'ly line of Lot 140 to Pt. of beg. Miltner's Add.

Those parts of Lot 139 & 140 desc. as beg. 187.55 ft. N'ly of SE Cor. of Lot 138 along E'ly line of SD Lots to a pt: Th. W'ly to a pt. on W'ly line of Lot 139 being 21 ft. S'ly of the NW cor. of Lot 139; th. N'ly 39.9 ft. on W'ly line of Lots 139 & 140 to a pt: th. E'ly to a pt. on E'ly line of Lot 140 being 229.05 ft. N'ly of the SE Cor. of Lot 138; th. S'ly along the E'ly line of Lots 140 & 139 to Beg. Miltner's Add.

Those parts of Lots 138 & 139 & 140 desc. as beg. 187.55 ft. N'ly of SE Cor. of Lot 138 along E'ly line of SD Lots to a pt: Th. W'ly to a Pt. on W'ly line of Lot 139 being 21 ft. S'ly on NW Cor. of Lot 139; Th. S'ly 55. ft. on W'ly line of 139 to a Pt. Th. E'ly to a Pt. on E'ly line of lot 139 being 128 ft. N'ly of SE Cor. of Lot 138; Th. N'ly along E'ly line of Lot 139 to a Pt. of Beg. except all that part of Lot 139 lying E of present Estab. Dr. W. Miltner's Add.

N'ly 16.7 ft. of lot 138 & S'ly 25.9 ft of lot 139 lying W'ly of Drive. Miltner's Add.

N'ly 42.6 ft of S'ly 85.2 ft of lot 138 lying W'ly of drive Miltner's Add.

S'ly 42.6 ft of Lot 138 lying W'ly of Drive. Miltner's Add.

Beg. 3952.62 ft W and 264 ft N of SD Cor. Sec. 6 T22N R 7 W W 541.38 Ft S 100 ft E 441.38 ft NE'ly to beg. Pt. Sec. 6 City of Lake City

N 100 ft of S 164 ft of SW $\frac{1}{4}$ of SW $\frac{1}{4}$ Sec. 6-22-7 W of Hwy. M-66 City of Lake City

S 64 ft. of SW $\frac{1}{4}$ of SW $\frac{1}{4}$ Sec. 6 T22N R7W West of Hwy. City of Lake City

Lot 1 - Engelwood Plat

Lot 2 - Engelwood Plat

Lot 3 - Engelwood Plat

Lot 4 - Engelwood Plat

Lot 5 - Engelwood Plat

Lot 6 - Engelwood Plat

Lot 7 - Engelwood Plat

Lot 8 - Engelwood Plat

Lot 9 - Engelwood Plat

Lot 10 - Engelwood Plat

Lot 11 - Engelwood Plat

Lot 12 - Engelwood Plat

Lot 13 - Engelwood Plat

Lot 14 - Engelwood Plat

Lot 15 - Engelwood Plat

Lot 16 - Engelwood Plat

Lot 17-31-32 Engelwood Plat

Lot 33 Engelwood Plat

Lot 34 Engelwood Plat

Lot 35 Engelwood Plat

Lot 36 Engelwood Plat

Lots 23 & 37 Engelwood Plat

Lots 24 & 38 Engelwood Plat

Lot 39 Engelwood Plat

Lot 40 Engelwood Plat

Lot 41 Engelwood Plat

Lot 42 Engelwood Plat

S 5 Ft. of Lot 28 and Lots 29-30-43-44 exc. S 5 ft. of Lot 30
Engelwood Plat

Lot 1 South Shore Plat & also beg. at SW Cor Englewood Plat Th
S'ly to NW Cor South Shore Plat Th E'ly to NE cor South Shore
Plat Th N to SE Cor of Englewood Plat Th W'ly to POB Pt of NW $\frac{1}{4}$
of SW $\frac{1}{4}$ Sec. 7-22-7 City of Lake City

Lot 2 South Shore Plat

Lot 3 South Shore Plat

Lot 4 South Shore Plat

Lot 6 & W $\frac{1}{2}$ of Lot 5 South Shore Plat

Lot 7 South Shore Plat

Lot 8 South Shore Plat

Lot 9 South Shore Plat

Lot 10 South Shore Plat

Lot 11 & Beg. at NW Cor. Lot 12 SW'ly on W'ly bdry of Lot 12 A
dist. of 10 ft: E'ly to NE Cor. of Lot 12; W'ly to beg. South
Shore Plat

Lot 12 exc beg. at NW Cor. Lot 12; SW'ly on W'ly bdry of Lot 12
A dist. of 10 ft: E'ly to NE cor. of Lot 12; W'ly to beg.
South Shore Plat

Lot 13, South Shore Plat

Lot 14, South Shore Plat

Pine Oaks Park & Park Lane - Palmer's Pine Oak Plat

Lot 1 - Palmer's Pine Oak Plat

Lot 2 - Palmer's Pine Oak Plat

Lot 3 - Palmer's Pine Oak Plat

Lot 4 - Palmer's Pine Oak Plat

Lot 5 - Palmer's Pine Oak Plat

Lot 6 - Palmer's Pine Oak Plat

SW $\frac{1}{4}$ ly $\frac{1}{2}$ of Lot 7 - Palmer's Pine Oak Plat

NE $\frac{1}{4}$ ly $\frac{1}{2}$ of Lot 7 - Palmer's Pine Oaks Plat

Lot 8 lying in Lake Twp. - Palmer's Pine Oak Plat

Lot 9 lying in Lake Twp. - Palmer's Pine Oak Plat

Lot 10 - Palmer's Pine Oak Plat

Lot 11 - Palmer's Pine Oak Plat

Lot 12 lying in Lake Twp. - Palmer's Pine Oak Plat

That part of Lot 8 lying in Reeder Twp., Sec. 7, T22 N, R7W
Palmer's Pine Oaks Plat

All that part of Lot 9 lying in Reeder Twp.
Palmer's Pine Oaks Plat

Lot 12 lying in Reeder Twp., Palmer's Pine Oaks Plat

Lots 13 & 14 & E $\frac{1}{2}$ Lot 15 lying in Reeder Twp.
Palmer's Pine Oaks Plat

That part of W $\frac{1}{2}$ Lot 15 lying in Reeder Twp.
Palmer's Pine Oaks Plat

Outlot "A" Buena Vista Park

Lot 11 - Buena Vista Park

Lot 12 - Buena Vista Park

Lot 13 - Buena Vista Park

Lot 14 - Buena Vista Park

Lot 15 - Buena Vista Park
10' Public Walk
Lot 16 - Buena Vista Park
Lot 17 - Buena Vista Park
Lot 18 - Buena Vista Park
Lot 19 - Buena Vista Park
Lot 20 - Buena Vista Park
Lot 21 - Buena Vista Park
Lot 22 - Buena Vista Park
Lot 23 - Buena Vista Park
Lot 24 - Buena Vista Park
Lot 25 - Buena Vista Park
Lot 26 - Buena Vista Park
Lot 27 - Buena Vista Park
Lot 28 - Buena Vista Park
Lot 29 - Buena Vista Park
Lot 30 & 31 - Buena Vista Park
Lots 32 & 33 - Buena Vista Park
Lots 34 - 35 - 36 - 37 - Buena Vista Park
Lots 38-39 - Buena Vista Park
Lot 40 - Buena Vista Park
Lot 41 - Buena Vista Park
Lot 42 - Buena Vista Park
Lot 43 - Buena Vista Park
Lot 44 - Buena Vista Park
Lot 45 - Buena Vista Park
Lots 46-47 - Buena Vista Park
Lot 48 - Buena Vista Park
Lot 49 - Buena Vista Park
Lot 50 - Buena Vista Park
Lot 51-52 - Buena Vista Park

Lots 53-54-55 - Buena Vista Park
Lots 56 & 57 - Buena Vista Park
Lots 58 & 59 - Buena Vista Park
Lots 60 & 61 - Buena Vista Park
Lots 62 & 63 - Buena Vista Park
Lots 64-65-66-67 & 68 - Buena Vista Park
Lots 69-70 - Buena Vista Park
Lot 71 - Buena Vista Park
Lot 72-73 - Buena Vista Park
Lot 74 - Buena Vista Park
Lots 75 & 76 - Buena Vista Park
Lot 77 - Buena Vista Park
Lot 78 - Buena Vista Park
Lot 79 - Buena Vista Park
Lots 80 & 81 - Buena Vista Park
Lots 82-83-84 & 85 - Buena Vista Park
Lot 86 - Buena Vista Park
Lots 87 & 88 - Buena Vista Park
Lot 89 - Buena Vista Park
Lot 90 - Buena Vista Park
Lot 91 - Buena Vista Park
Lot 92 - Buena Vista Park
Lot 93 - Buena Vista Park
Lot 94-95 - Buena Vista Park
Lot 96 - Buena Vista Park
Lots 97-98 - Buena Vista Park
Lots 99 & 100 - Buena Vista Park
Lot 101 - Buena Vista Park
Lot 102 - Buena Vista Park
Lots 103-104-107-108 - Buena Vista Park

Lots 105-106 - Buena Vista Park
Lot 109 - Buena Vista Park
Lot 110 - Buena Vista Park
Lots 111-112-113-114 - Buena Vista Park
Lots 115-116 & 117 - Buena Vista Park
Lot 118 - Buena Vista Park
Lot 119 - Buena Vista Park
Lot 120 - Buena Vista Park
Lots 121-122-123 - Buena Vista Park
Lots 124-125-126 - Buena Vista Park
Lot 127 - Buena Vista Park
Lot 128 - Buena Vista Park
Lots 129-130-131 - Buena Vista Park
Lot 132 - Buena Vista Park
Lot 133 - Buena Vista Park
Lot 134 - Buena Vista Park
Lot 135 - Buena Vista Park
Lot 136 - Buena Vista Park
Lot 137 - Buena Vista Park
Lot 138 - Buena Vista Park
Lots 139-140-141-142 - Buena Vista Park
Lots 143 and W $\frac{1}{2}$ of 145 & 146 - Buena Vista Park
Lots 144 and TH S $\frac{1}{2}$ of 145 & 146 - Buena Vista Park
Lot 147 - Buena Vista Park
Lot 148 - Buena Vista Park
Lot 149 - Buena Vista Park
Lot 150 - Buena Vista Park
Lot 151 - Buena Vista Park
Lot 152 - Buena Vista Park
Lot 153 - Buena Vista Park
Lot 154 - Buena Vista Park

Lot 155-156-157 - Buena Vista Park

Lot 158 - Buena Vista Park

Lot 159-160 - Buena Vista Park

Lot 161-162-163 - Buena Vista Park

Outlot "B" Missaukee Heights No. 2 (reference)

Lot 1 - Missaukee Heights 2

Lot 2 - Missaukee Heights 2

Lot 3 - Missaukee Heights 2

Lot 4 - Missaukee Heights 2

Lot 5 - Missaukee Heights 2

Lot 6 - Missaukee Heights 2

Lot 7 - Missaukee Heights 2

Lot 8 - Missaukee Heights 2

Lot 9 - Missaukee Heights 2

Lot 10 - Missaukee Heights 2

Lot 11 - Missaukee Heights 2

Lot 12 - Missaukee Heights 2

Lot 13 - Missaukee Heights 2

Lot 14 - Missaukee Heights 2

Lot 15 - Missaukee Heights 2

Lot 16 - Missaukee Heights 2

Lot 17 - Missaukee Heights 2

Lot 18 - Missaukee Heights 2

Lot 19 - Missaukee Heights 2

Lot 20 & E 44 ft of Lot 21 - Missaukee Heights 2

W 6 ft of Lot 21 & Lot 22 Exc W 6 ft. thereof
Missaukee Heights 2

West 6 ft. of Lot 22; Lot 23 & East 6 Ft. of Lot 24
Missaukee Heights 2

West 44 ft. of Lot 24, Lots 25-26 & Lots 45 to 49 inc.
Missaukee Heights 2

Lots 27-28-29 - Missaukee Heights 2

Lot 30 exc W 55 ft & Ent. Lot 31 - Missaukee Heights 2

W 55 ft of Lot 30 - Missaukee Heights 2

Lots 32-33 - Missaukee Heights 2

Lot 34 - Missaukee Heights 2

Lot 35 - Missaukee Heights 2

Lot 36 - Missaukee Heights 2

Lot 37 - Missaukee Heights 2

Lot 38 - Missaukee Heights 2

Lot 39 - Missaukee Heights 2

Lot 40 - Missaukee Heights 2

Lot 41 - Missaukee Heights 2

Lot 42 - Missaukee Heights 2

Lots 43-44 - Missaukee Heights 2

Beg. at Inter of N'y line of Lakeview St. with W line Miss. Hts.
No. 2 Th N 0° 05' 30" W 199.98 ft to NW cor outlot B Th S 69° 33'
W 69.57 Ft Th S 20° 27' E 187.49 ft to POB with Riparian Rights
Pt. Gov't. Lot 4 Sec. 12 T22N R8W

All Gov't. Lot 4 E of Line N & S & // to its W Line 26 2/3 Rds
E of SD Line Exc beg at inter of N'y line Lakeview St. with W
Line Miss. Hts. No. 2 Th N 0° 05' 30" W 199.98 ft to NW cor.
Outlot B TH S 69° 33' W 69.57 ft TH S 20° 27' E 187.49 Ft to POB
with Riparian Rts. Sec. 12 T22N R8W

Midway Heights

Lots 1-2 - Midway Heights Plat

Lots 3-4 Midway Heights Plat

Lots 5-6 Exc N. 25 Ft: of Lot 6 - Midway Heights Plat

Lots 7-8 and N. 25 Ft: of Lot 6 - Midway Heights Plat

Lot 9 - Midway Heights Plat

Beg at SW Cor Lot 10 TH Alg W Line N 02° 40' W 48.5 ft TH N 77°
40' E 93.77 Ft Th S 01° 46' 30" W 65.28 Ft TH S 77° 40' W 93.77
ft TH N 02° 40' W 16.73 ft to POB Midway Heights

Par. A Comm at Monument near NW Cor Lot 10 S 2° 40' E 39.32 ft N 67° 58' 30" E 16.02 ft to P.O.B. N 5° 18' W 213.77 ft N 58° 38' 30" E along Water 60 ft S 4° 55' E 173.67 ft S 22° 18' E 48.35 ft S 67° 58' 30" W 69.89 ft to beg. part of Lot 10 Midway Heights Plat

Par. B Comm at Monument near NW Cor Lot 10 S 2° 40' E 39.32 ft N 67° 58' 30" E 85.91 ft to P.O.B. N 22° 18' W 48.35 ft N 4° 55' W 173.67 ft N 58° 38' 30" E along water 87.27 ft S 1° 46' 30" E 243.21 ft S 67° 58' 30" W 52.90 ft to P.O.B. Part of Lot 10 Midway Heights Plat

Beg at SE Cor Lot 10 Th Alg E Line N 01° 46' 30" E 197.50 ft Th S 67° 58' 30" W 65.68 ft S 11° 07' E 135.8 ft S 01° 46' 30" W 65.28 ft N 77° 40' E 40 ft N 01° 46' 30" E 16.73 ft to beg Midway Heights Plat

Beg at SW Cor Lot 10 TH N 02° 40' W 48.5 ft to POB TH Alg W Side Lot N 02° 40' W 342.16 ft N 58° 38' 30" E 6 Ft S 05° 18' E 213.77 Ft N 67° 58' 30" E 57.11 ft S 11° 07' E 135.8 ft TH S 77° 40' W 93.77 ft to POB Midway Heights Plat

Lot 11 - Midway Heights Plat

Lot 12 - Midway Heights Plat

Lot 13 - Midway Heights Plat

Lot 14 - Midway Heights Plat

Lot 15 - Midway Heights Plat

Lots 16-17-18-22-23-24 - Midway Heights Plat

Lots 19-20-21-25 - Midway Heights Plat

Lot 18 - Missaukee Park 2nd Add.

Lot 19 - Missaukee Park 2nd Add.

Lot 20 - Missaukee Park 2nd Add.

Lot 21 - Missaukee Park 2nd Add.

Lot 22 - Missaukee Park 2nd Add.

Lot 23 - Missaukee Park 2nd Add.

Lot 24 - Missaukee Park 2nd Add.

Lot 25 - Missaukee Park 2nd Add.

Lot 26 - Missaukee Park 2nd Add.

Lot 27 - Missaukee Park 2nd Add.

Lot 28-29 - Missaukee Park 2nd Add.

Lot 30 - Missaukee Park 2nd Add.

Lot 31 - Missaukee Park 2nd Add.
Lot 32 - Missaukee Park 2nd Add.
Lot 33 - Missaukee Park 2nd Add.
Lot 34 - Missaukee Park 2nd Add.
Lot 35 - Missaukee Park 2nd Add.
Lot 36 & W $\frac{1}{2}$ of Lot 37 - Missaukee Park 2nd Add.
E $\frac{1}{2}$ of Lot 37 & W $\frac{1}{2}$ of Lot 38 - Missaukee Park 2nd Add.
E $\frac{1}{2}$ of Lot 38 & Lot 39 - Missaukee Park 2nd Add.
Lot 40 - Missaukee Park 2nd Add.
Lot 41 - Missaukee Park 2nd Add.
Lot 1 - Missaukee Park Orig. Plat
Lot 2 - Missaukee Park Orig. Plat
Lot 3 - Missaukee Park Orig. Plat
Lot 4 - Missaukee Park Orig. Plat
Lot 5 - Missaukee Park Orig. Plat
Lot 6-7 - Missaukee Park Orig. Plat
Lot 8-9 - Missaukee Park Orig. Plat
Lot 10 - Missaukee Park Orig. Plat
Lot 11 - Missaukee Park Orig. Plat
Lot 12 - Missaukee Park Orig. Plat
Lot 13 - Missaukee Park Orig. Plat
N 100 ft: of Lot 14 - Missaukee Park Orig. Plat
N $\frac{1}{2}$ of Lot 15 - Missaukee Park Orig. Plat
Lot 16 - Missaukee Park Orig. Plat
Lot 17 - Missaukee Park Orig. Plat
Lot 18 - Missaukee Park Orig. Plat
Lot 19 Exc 16 Ft: N & S by 40 Ft: E & W for driving alley
Missaukee Park Orig. Plat
Lot 20 - Missaukee Park Orig. Plat
Lot 21 - Missaukee Park Orig. Plat
Lot 22 - Missaukee Park Orig. Plat

Lot 23 - Missaukee Park Orig. Plat

Lot 24 - Missaukee Park Orig. Plat

Lot 25 - Missaukee Park Orig. Plat

Lot 26 - Missaukee Park Orig. Plat

Lot 27-28 - Missaukee Park Orig. Plat

Lots 1-2 - Missaukee Park 1st Add.

Lot 3 - Missaukee Park 1st Add.

West 75 ft: of Lot 1 - Silver Birch Bluff

East 75 ft of the West 150 Ft: of Lot 1 - Silver Birch Bluff

E 75 ft of W 225 Ft of Lot 1 - Silver Birch Bluff

E 75 ft of W 300 ft of Lot 1 - Silver Birch Bluff

Beg at NE Cor Lot 1 TH W'yly on N Line 41 ft TH S'yly on straight line to SE Cor SD Lot TH E'yly on S Line to SE Cor Lot 2 TH N'yly on straight line to pt on N line Lot1 which lies 34 ft E'yly of NW cor Lot 2 TH W'yly 34 ft to beg. Pt of Lots 1 & 2 Silver Birch Bluff

E 16 ft of Lot 2 all of Lot 3 and W $\frac{1}{2}$ of Lot 4 Silver Birch Bluff

E $\frac{1}{2}$ of Lot 4 and Lot 5 - Silver Birch Bluff

Lots 6-7 - Silver Birch Bluff

Lot 8 - Silver Birch Bluff

Lots 9-10 - Silver Birch Bluff

Lots 11 & 12 - Silver Birch Bluff

Lot 13 - Silver Birch Bluff

Lots 14-15-16 - Silver Birch Bluff

Lots 17-18 - Silver Birch Bluff

Lot 19 - Silver Birch Bluff

Lot 20 - Silver Birch Bluff

Lot 21 - Silver Birch Bluff

Lot 22 - Silver Birch Bluff

Lot 23 - Silver Birch Bluff

Lot 24 - Silver Birch Bluff

Lot 25 - Silver Birch Bluff

Lot 26 - Silver Birch Bluff

Lot 27 - Silver Birch Bluff

Lot 28 - Silver Birch Bluff

Plat 2nd Addition to Missaukee Park. L 2 P 45, adjacent to Public Walk & Beach

Plat of Missaukee Park, L 1, P 40

1st Addition to Missaukee Park, L 2, P42

Silver Birch Bluff, L 2, P 43

Roadways and Public Walks in Lake Twp.

A Pt of the W 890 ft of Gov't Lot 4 & the W 890 ft of the SW $\frac{1}{4}$ of the SW $\frac{1}{4}$ of Sec 11, for a pt of beg. proceed N of the SW Cor of Sec 11, A Dis of 1, 782 ft to a Pt. TH S $86^{\circ} 15'$ E 515.2 ft S $64^{\circ} 15'$ E 200 ft to P.O.B. Pro. N $64^{\circ} 15'$ W 50 ft N $25^{\circ} 45'$ E 125 ft S $64^{\circ} 15'$ E 100 ft SW'ly 135 ft more or less to P.O.B. Sec. 11 T 22 N R8W

A Pr of the W 890 ft; of Gov't Lot 4 & the W 890 ft; of SW $\frac{1}{4}$ of TH SW $\frac{1}{4}$ of Sec. 11, for a Pt. of Beg. Proceed N of the SW Cor. of Sec 11, A Dist. of 1,782 ft: to a Pt. TH S $86^{\circ} 15'$ E 515.2 ft to P.O.B. of following desc. - From P.O.B. Pro. S $64^{\circ} 15'$ E 15 ft N $25^{\circ} 45'$ E 125 Ft Th N $64^{\circ} 15'$ W 150 Ft TH S $25^{\circ} 45'$ W 125 ft to P.O.B. Sec. 11-22-8

W 890 ft; of Th SW $\frac{1}{4}$ of the SW $\frac{1}{4}$ exc. a Par. of Land beg. at a Pt 890 ft; E of SW Cor of Sec. 11, TH N 183 Ft; W 152 ft; S 183 ft; E 152 ft; to beg also W 890 ft; to Gov't Lot 4 Exc. a part of TH W 890 Ft; of Gov't Lot 4 and the W 98 ft; of SW $\frac{1}{4}$ of SW $\frac{1}{4}$ of Sec 11-22-8 for a pt of beg proceed N of the SW Cor of Sec 11 A dist of 1,782 ft; to a pt Th S $86^{\circ} 15'$ E 515.2 ft; to a pt. th S $64^{\circ} 15'$ E 200 ft; to a pt. which is the pt. of beg. of the fol. desc. of land from the pt. of beg proceed N $64^{\circ} 15'$ W 50 ft E 100 ft th sw'ly 135 ft; more or less to a pt of beg. Sec. 11, T22N, R8W 41.60 A.

Lot 1 - Birchaven Beach

Lots 2-3 - Birchaven Beach

Lots 4-5-6 - Birchaven Beach

Lot 7 - Birchaven Beach

Lot 8 - Birchaven Beach

Lot 9 - Birchaven Beach

Lots 10-11 - Birchaven Beach

Lot 12 - Birchaven Beach

Lots 13 - 14 - Birchaven Beach

Lot 15 - Birchaven Beach

Lot 16 - Birchaven Beach
Lot 17 - Birchaven Beach
Lot 18 - Birchaven Beach
Lot 19 - Birchaven Beach
Lots 20-21 - Birchaven Beach
Lot 22 - Birchaven Beach
Lot 23 - Birchaven Beach
Lot 24 - Birchaven Beach
Lot 25 - Birchaven Beach
Lot 26 - Birchaven Beach
Lot 27 - Birchaven Beach
Lots 28-29 - Birchaven Beach
Lot 30 - Birchaven Beach
Lot 31 - Birchaven Beach
Lot 32 - Birchaven Beach
Lot 33 - Birchaven Beach
Lot 34 - Birchaven Beach
Lots 35-36-37 - Birchaven Beach
Lot 38 - Birchaven Beach
Lot 39 - Birchaven Beach
Lot 40 - Birchaven Beach
Lot 41-42 - Birchaven Beach
Lot 43 - Birchaven Beach
Lot 44-45 - Birchaven Beach
Lot 46 - Birchaven Beach
Lots 47-48 - Birchaven Beach

E $\frac{1}{2}$ of N $\frac{1}{2}$ of Gov't Lot 2 Sec. 10, T 22N, R8W 8.54A

Birch Haven Beach Unit of Miss. Lakes Land Co., Plat No. 1,
Private Beach of Miss. Lakes Club

Gov't Lot 4 N & E of Sapphire Lake Plat 2 & Gov't Lot 5 W & S
of Birch Haven Beach Unit 1 Sec. 10, T22N, R8W 37.71A

Frac. Sec. 3

Gov't Lots 1 & 2 Sec. 2, T22N, R8W 58.69A

Pine Drive

Lot 27 - Crow's Nest

Lot 28 - Crow's Nest

Lot 29 - Crow's Nest

Lot 30 - Crow's Nest

Lot 31 - Crow's Nest

Lot 32 - Crow's Nest

Lot 33 - Crow's Nest

Lot 34 - Crow's Nest

Lot 35 - Crow's Nest

Lot 43 - Crow's Nest

Lot 44 - Crow's Nest

Lot 45 - Crow's Nest

Lot 46 - Crow's Nest

Lot 47 - Crow's Nest

Lot 48 - Crow's Nest

Lot 49 - Crow's Nest

Lot 50 - Crow's Nest

Lot 51 - Crow's Nest

Lot 52 - Crow's Nest

Lot 53 - Crow's Nest

Lot 54 - Crow's Nest

Lot 55 - Crow's Nest

Lot 56 - Crow's Nest

Lot 57 - Crow's Nest

Lot 58 - Crow's Nest

Lot 59 - Crow's Nest
Lot 60 - Crow's Nest
Lot 61 - Crow's Nest
Lot 62 - Crow's Nest
Lot 63 - Crow's Nest
Lot 64 - Crow's Nest
Lot 65 - Crow's Nest
Lot 36 - Crow's Nest
Lot 37 - Crow's Nest
Lot 38 - Crow's Nest
Lot 39 - Crow's Nest
Lot 40 - Crow's Nest
Lot 41 - Crow's Nest
Lot 42 - Crow's Nest
Lot 26 - Crow's Nest
Lot 25 - Crow's Nest
Lot 24 - Crow's Nest
Lot 23 - Crow's Nest
Lot 22 - Crow's Nest
Lot 21 - Crow's Nest
Lot 20 - Crow's Nest
Lot 19 - Crow's Nest
Lot 18 - Crow's Nest
Lot 17 - Crow's Nest
Lot 16 - Crow's Nest
Lot 15 - Crow's Nest
Lot 14 - Crow's Nest
Lot 13 - Crow's Nest
Lot 12 - Crow's Nest
Lot 11 - Crow's Nest

Lot 10 - Crow's Nest

Lot 9 - Crow's Nest

Lot 8 - Crow's Nest

Lot 7 - Crow's Nest

Lot 6 - Crow's Nest

Lot 5 - Crow's Nest

Lot 4 - Crow's Nest

Lot 3 - Crow's Nest

Lot 2 - Crow's Nest

Lot 1 - Crow's Nest

Lot 1 - Redman's Missaukee Lake Plat

Lot 2 - Redman's Missaukee Lake Plat

Lot 3 - Redman's Missaukee Lake Plat

Lot 4 - Redman's Missaukee Lake Plat

Lot 5 - Redman's Missaukee Lake Plat

Lot 6 - Redman's Missaukee Lake Plat

Lot 7 - Redman's Missaukee Lake Plat

Lot 8 - Redman's Missaukee Lake Plat

Lot 9 - Redman's Missaukee Lake Plat

Lot 10 - Redman's Missaukee Lake Plat

Lot 11 - Redman's Missaukee Lake Plat

Lot 12 - Redman's Missaukee Lake Plat

Lot 13 - Redman's Missaukee Lake Plat

Lot 14 - Redman's Missaukee Lake Plat

Lot 15 - Redman's Missaukee Lake Plat

Lot 16 - Redman's Missaukee Lake Plat

Lot 17 - Redman's Missaukee Lake Plat

Lot 18 - Redman's Missaukee Lake Plat

Lot 1 - Tom's Bay

Lot 2 - Tom's Bay

Lot 3 - Tom's Bay
Lot 4 - Tom's Bay
Lot 5 - Tom's Bay
Lot 6 - Tom's Bay
Lot 7 - Tom's Bay
Lot 8 - Tom's Bay
Lot 10 - Tom's Bay
Lot 11 - Tom's Bay
Lot 12 - Tom's Bay
Lot 13 - Tom's Bay
Lot 14 - Tom's Bay
Lot 15 - Tom's Bay
Lot 16 - Tom's Bay
Lot 17 - Tom's Bay
Lots 18 & 19 - Tom's Bay
Lot 20 - Tom's Bay
Lot 21 - Tom's Bay
Lot 22 - Tom's Bay
Lot 23 - Tom's Bay
Lot 24 - Tom's Bay
Lot 25 - Tom's Bay
Lot 26 - Tom's Bay
Lot 27 - Tom's Bay
Lot 1 - Lettich Cove
Lot 2 - Lettich Cove
Lot 3 - Lettich Cove
Lot 4 - Lettich Cove
Lot 5 - Lettich Cove
Lot 6 - Lettich Cove
Lot 7 - Lettich Cove

Lot 8 - Lettich Cove

Lot 9 - Lettich Cove

Lot 10 - Lettich Cove

Lot 11 - Lettich Cove

Lot 12 - Lettich Cove

Lot 13 - Lettich Cove

Lot 14 - Lettich Cove

Lot 15 - Lettich Cove

Lot 16 - Lettich Cove

Lot 17 - Lettich Cove

Lot 18 - Lettich Cove

Lot 19 - Lettich Cove

Lot 20 - Lettich Cove

Lot 21 - Lettich Cove

Lot 22 - Lettich Cove

Lot 23 - Lettich Cove

Lots 10 & 45 - Redman Isle

Lots 11 & 46 - Redman Isle

Lots 12 & 47 - Redman Isle

Lots 13 & 48 - Redman Isle

Lots 14 & 49 - Redman Isle

Lots 15 & 50 - Redman Isle

Lots 16-17-51 & 52 - Redman Isle

Lots 18 & 53 - Redman Isle

Lots 19 & 54 - Redman Isle

Lots 20 & 21 55 & 56 - Redman Isle

Lots 22 & 57 - Redman Isle

Lots 23 & 58 - Redman Isle

Lots 24 & 25 59 & 60 - Redman Isle

Lots 26 & 61 - Redman Isle

Lots 27 & 62 - Redman Isle

Lots 28 & 63 - Redman Isle

Lots 29-30-64 & 65 - Redman Isle

Lots 31 & 66 - Redman Isle

Lot 67 - Redman Isle

Lots 32 & 68 - Redman Isle

Lots 33 & 69 - Redman Isle

Lots 34 & 70 - Redman Isle

Lots 35 & 36 & 71 - Redman Isle

Lots 9 & 44 - Redman Isle

Lots 8 & 43 - Redman Isle

Lots 7 & 42 - Redman Isle

Lots 6 & 41 - Redman Isle

Lots 5 & 40 - Redman Isle

Lots 4 & 39 - Redman Isle

Lots 3 & 38 - Redman Isle

Lots 2 & 37 - Redman Isle

Lot 1 - Redman Isle

Lot 1 - Nancy Plat

Lot 2 - Nancy Plat

Lot 3 - Nancy Plat

Lot 4 - Nancy Plat

Lot 5 - Nancy Plat

Lot 6 - Nancy Plat

Gov't, Lot 6 except Plat of Clayton's Harbor Sec. 2T22N R 8W

Clayton's Harbor

Lot 1 - Clayton's Harbor

Lot 2 - Clayton's Harbor

Lot 3 - Clayton's Harbor

Lot 4 - Clayton's Harbor

Lot 5 - Clayton's Harbor

Lot 6 - Clayton's Harbor

Lot 7 - Clayton's Harbor
Lot 8 - Clayton's Harbor
Lot 9 - Clayton's Harbor
Lot 10 - Clayton's Harbor
Lot 11 - Clayton's Harbor
Lot 12 - Clayton's Harbor
Lot 13 - Clayton's Harbor
Lot 14 - Clayton's Harbor
Lot 15 - Clayton's Harbor
Lot 16 - Clayton's Harbor
Lot 17 - Clayton's Harbor
Lot 18 - Clayton's Harbor
Lot 19 - Clayton's Harbor
Lot 20 - Clayton's Harbor
Lot 21 - Clayton's Harbor
Pt. of Lot 61 in Lake Twp. - Clayton's Harbor
Pt of Lot 62 in Lake Twp. - Clayton's Harbor
Lot 63 - Clayton's Harbor
Lot 64 - Clayton's Harbor
Lot 65 - Clayton's Harbor
Lot 66- Clayton's Harbor
Lot 67 - Clayton's Harbor
Lot 68 - Clayton's Harbor
Pt. of Lot 30 in Caldwell Twp. - Clayton's Harbor
Pt. of Lot 30 in Caldwell Twp. - Clayton's Harbor
Lot 58 - Clayton's Harbor
Lot 59 - Clayton's Harbor
Lot 60 - Clayton's Harbor
Part of Lot 61 in Caldwell Twp. - Clayton's Harbor
Part of Lot 62 in Cladwell Twp. - Clayton's Harbor
Lot 22 - Clayton's Harbor

Lot 23 - Clayton's Harbor
Lot 24 - Clayton's Harbor
Lot 25 - Clayton's Harbor
Lot 26 - Clayton's Harbor
Lot 27 - Clayton's Harbor
Lot 28 - Clayton's Harbor
Lot 29 - Clayton's Harbor
Pt of Lot 30 in Lake Twp. - Clayton's Harbor
Pt of Lot 31 in Lake Twp. - Clayton's Harbor
Lot 32 - Clayton's Harbor
Lot 33 - Clayton's Harbor
Lot 34 - Clayton's Harbor
Lot 35 - Clayton's Harbor
Lot 36 - Clayton's Harbor
Lot 37 - Clayton's Harbor
Lot 38 - Clayton's Harbor
Lot 39 - Clayton's Harbor
Lot 40 - Clayton's Harbor
Lot 41 - Clayton's Harbor
Lot 42 - Clayton's Harbor
Lot 43 - Clayton's Harbor
Lot 44 - Clayton's Harbor
Outlot A - Clayton's Harbor
Lot 57 - Clayton's Harbor
Lot 56 - Clayton's Harbbr
Lot 55 - Clayton's Harbor
Lot 54 - Clayton's Harbor
Lot 53 - Clayton's Harbor
Lot 52 - Clayton's Harbor
Lot 51 - Clayton's Harbor
Lot 50 - Clayton's Harbor

Lot 49 - Clayton's Harbor

Lot 48 - Clayton's Harbor

Lot 47 - Clayton's Harbor

Lot 46 - Clayton's Harbor

Lot 45 - Clayton's Harbor

North Lawn Beach

That Part of Lots 26-27-28 lying in Lake Twp. - North Lawn Beach

Lots 29-30-31 - North Lawn Beach

N Part of Lot 26 extending into Caldwell Twp., beg. 1202.2 ft.
S of NW cor of Gov't Lot 2; E 100 ft.; S 100 ft.; W 100 ft.:
N 100 Ft. to place of beg. Sec 36, T23N, R8W North Lawn Beach

Lot 27 - Beg. 1202.2 ft. S & 100 ft. E of NW Cor of Gov't Lot 2;
Th E 100 ft.: S 100 ft.; W 100 ft.; N 100 ft. to place of beg.
Sec. 36, T23N, R8W - North Lawn Beach

Lot 28 - Beg. 1202.2 ft. S & 200 ft. E of NW cor of Gov't. Lot
2; E 155 ft.; SE'ly 151.4 ft.: W approx. 260 ft.: N 100 ft. to
beg. Sec. 36, T23N, R8W - North Lawn Beach

Lot 15 - North Lawn Beach

Lot 14 - North Lawn Beach

Lot 13 - North Lawn Beach

Lot 16 - North Lawn Beach

Lot 17 - North Lawn Beach

Lot 18 - North Lawn Beach

Lot 19 - North Lawn Beach

Lots 20-21 - North Lawn Beach

Lot 22 - North Lawn Beach

Lot 23 - North Lawn Beach

Lot 24 - North Lawn Beach

Lot 25 - North Lawn Beach

Lot 12 - North Lawn Beach

Lot 11 - North Lawn Beach

Lot 10 - North Lawn Beach

Lot 9 - North Lawn Beach

Lot 8 - North Lawn Beach

Lot 7 - North Lawn Beach

Lot 6 - North Lawn Beach

Lot 5 - North Lawn Beach

Lot 4 - North Lawn Beach

Lot 3 - North Lawn Beach

Lot 2 - North Lawn Beach

Lot 1 - North Lawn Beach

County Park

9. That Lake Missaukee is located within the City of Lake City, the Township of Lake, the Township of Caldwell and the Township of Reeder, all in Missaukee County, Michigan.

10. That the County Board of Commissioners, and the County Road Commission has surveyed the lake, referred to government surveys, noted high water lines, consulted with residents of the area, and constructed the improvement to maintain and control the lake level.

11. WHEREFORE, THESE PLAINTIFFS PRAY:

A. That this Court set a time and place for the hearing to affirm the 1238 level of Lake Missaukee; and confirm the special assessment district boundaries.

B. That the Prosecuting Attorney, thru the Office of Counsel, be authorized to give Notice of the Hearing by publication same once each week for six (6) consecutive weeks prior to the date set for hearing, to each person whose name appears upon the latest city and township tax assessment roll as owning lands within the special assessment district at the address shown on the roll; such notice shall also be served by certified mail upon the Department of Conservation of the State of Michigan.

C. That this Court affirm the level of Lake Missaukee at 1238 feet above mean sea level.

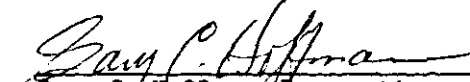
D. That the Court consider and review the description of lands within the special assessment district;

E. That the Notice, to be published and served by certified mail, direct to all interested persons to show cause, if any that they have, why the normal height and level of said lake should not remain at a maximum of 1238 feet above mean sea level.

F. That the Notice be in substantially the form of Exhibit C attached hereto.

BOARD OF COMMISSIONERS OF
COUNTY OF MISSAUKEE

MISSAUKEE COUNTY ROAD COMMISSION


Gary C. Hoffman, Prosecuting
Attorney, Missaukee County, Mich.

Business Address:
3130 Casmere Avenue
Hamtramck, Michigan 48212
Phone: TW 1-0492

By 
Attorney for Plaintiffs
of Counsel.

Dated: October 29, 1971

State of Michigan--County of Missaukee-- Board of Commissioners
October 27, 1971 at 10:00 o'clock A.M.
Chairman called board to order; All Present
Prayer offered by Com. VanderWal
Com. Helmboldt moved, supported by Com. Helsel the following:

WHEREAS pursuant to direction of the Circuit Court of the County of Missaukee in causes No. C-323 and C-280, the Board of County Commissioners and the Missaukee County Road Commission was directed by order of said Court to build and maintain a lake level structure on Lake Missaukee in order to protect the public health, welfare and safety of the citizens of the City of Lake City and the Townships of Lake, Reeder and Caldwell, and

WHEREAS said water level control structure has been constructed and related improvements have been completed, and

WHEREAS the special assessment District boundaries and properties in said district have been enumerated, designated and prepared by the Board of County Road Commissioners,

NOW, THEREFORE, BE IT RESOLVED by the Board of County Commissioners of the County of Missaukee as follows:

1. That said Board of County Commissioners hereby approves of the special assessment district and all properties therein as presented to it by the Missaukee County Road Commission.
2. That said Board of County Commissioners hereby determines that the full costs of said lake level structure and related improvements shall be financed by levying special assessments in three equal annual installments over the benefited properties in the special assessment district pursuant to provisions of Act 146 of the Public Act of 1961 as amended, and Act 175 of the Public Acts of 1969 as amended.
3. That the said Board of County Commissioners hereby directs the Prosecuting Attorney of the County to institute in the Circuit Court of the County of Missaukee the proper petition, and with the aid of counsel, Attorney Chester C. Pierce, a determination of the concurrence of the established normal height and level of the waters of Lake Missaukee at 1238 feet, and

BE IT FURTHER RESOLVED that said petition request the approval of said Court of the special assessment district and its boundaries, and of all parcels of land and political subdivisions which are benefited by the construction and establishment of the lake level structure and related improvements and which parcels of land benefited thereby shall constitute the special assessment district.

Motion Carried 9 Yea 0 Nay

EXHIBIT "C"

NOTICE OF HEARING

ON

CONFIRMING THE NORMAL HEIGHT AND
LEVEL OF WATER IN LAKE MISSAUKEE
AND REVIEWING AND CONFIRMING THE
SPECIAL ASSESSMENT DISTRICT BOUN-
DARIES ALL IN THE CITY OF LAKE CITY,
TOWNSHIPS OF LAKE, REEDER AND CALDWELL
IN THE COUNTY OF MISSAUKEE, MICHIGAN.

TO WHOM IT MAY CONCERN,
PARTICULARLY,

ALL OWNERS OF PROPERTY FRONTING ON, ABUTTING OR HAVING ACCESS
TO RIGHTS IN LAKE MISSAUKEE, OR WHO ARE INTERESTED IN HAVING
CONFIRMED AND MAINTAINED THE NORMAL HEIGHT AND LEVEL OF SAID
LAKE PURSUANT TO PROVISIONS OF ACT 146 OF THE PUBLIC ACTS OF
1961, AS AMENDED, AND CONFIRMING THE SPECIAL ASSESSMENT DISTRICT
BOUNDARIES, ALL IN THE CITY OF LAKE CITY, TOWNSHIP OF LAKE,
REEDER AND CALDWELL IN THE COUNTY OF MISSAUKEE, MICHIGAN.

YOU ARE HEREBY NOTIFIED that a Hearing on the matter will be
held in the Circuit Court of the County of Missaukee at the
Court House in the City of Cadillac, in Wexford County, Michigan
on the 13th day of February, A.D., 1972, before the
Honorable William R. Peterson, Circuit Judge, or soon thereafter
as Counsel can be heard.

AT 10:30 A.M.

YOU ARE FURTHER NOTIFIED that on said date the Complainant in-
tends to ask this Court to confirm the level of Lake Missaukee
at 1238 feet above mean sea level and confirm the boundaries of
the special assessment district for the purpose of maintaining
said level of the said Lake Missaukee and for financing the
cost of constructing said lake level control project, you should
then and there appear and show cause, if any you have, why:

- (a) The normal height and level of said lake should not be confirmed at 1238 feet above mean sea level;
- (b) Why the special assessment district boundaries and properties constituting the special assessment district should not be confirmed for the purpose of maintaining said level and for financing the cost of constructing said lake level project.
- (c) Why such other and further relief as the Court seems fitting and proper should not be granted to Complainant.

GARY C. HOFFMAN, Prosecuting Attorney
Missaukee County, Michigan

BY: Cheater C. Pierce, of Counsel

By: Chester C. Pierce
CHESTER C. PIERCE

Office Address:
3130 Cassmere Avenue
Hamtramck, Michigan 48212
Phone TW 1-0492

STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF MISSAUKEE

BOARD OF COMMISSIONERS OF
MISSAUKEE COUNTY, AND
MISSAUKEE COUNTY ROAD COMMISSION,

Plaintiffs,

No. C 347

vs.

ANDREW REPIK, Otto Balzer,
Jay W. Price, (See Exhibit A
in original pleadings for
additional defendants)

Defendants


ORDER FOR ADJOURNMENT

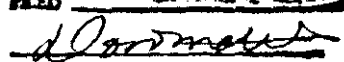
At a session of said Court held in the Court House in the
City of Cadillac, Wexford County, Michigan on the 13th day of
January, 1972, A.D.

PRESENT: HONORABLE WILLIAM R. PETERSON,
CIRCUIT JUDGE

This cause having come on to be heard upon the motion of
Chester C. Pierce, attorney for plaintiffs for a continuance.

NOW, THEREFORE, IT IS ORDERED that the said matter is
adjourned to January 31, 1972, A.D. at 10:30 a.m.


Circuit Judge

FILED 1-10-72

CLERK, CIRCUIT COURT
25TH JUDICIAL DISTRICT
MISSAUKEE COUNTY, MICHIGAN

STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF MISSAUKEE

BOARD OF COMMISSIONERS FOR
MISSAUKEE COUNTY AND
MISSAUKEE COUNTY ROAD COMMISSION
Plaintiffs

vs.

FILE NO. C-347

JOHN R. NYLAND and DOROTHY
A. NYLAND, his wife; and
HAROLD JACKSON and GLADYS
JACKSON, his wife; on their own
behalf and on behalf of others
similarly situated as a class
Defendant

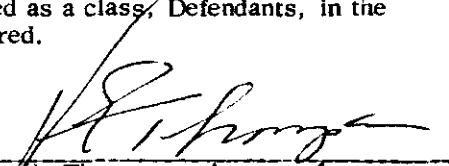
APPEARANCE

TO: THE CLERK OF SAID COURT,

GARY C. HOFFMAN,
Prosecuting Attorney,

CHESTER C. PIERCE
Attorney for Plaintiffs
3130 Casmere Avenue
Hamtramck, Michigan 48212

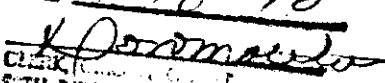
PLEASE TAKE NOTICE that my appearance as
attorney for John R. Nyland and Dorothy A. Nyland, his wife; and
Harold Jackson and Gladys Jackson, his wife; on their own behalf and
on behalf of others similarly situated as a class, Defendants, in the
above-entitled cause is hereby entered.


K. E. Thompson, Attorney for
Defendants, John R. Nyland and Dorothy
A. Nyland, his wife; and Harold Jackson
and Gladys Jackson, his wife; on their own
behalf and on behalf of others similarly
situated as a class.

308 E. Front Street
Traverse City, Michigan 49684

Dated : January 12, 1972.

616-946-8630.

FILED 1-18-72

CLERK OF COURT
EIGHTH JUDICIAL DISTRICT
MISSAUKEE COUNTY, MICHIGAN

STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF MISSAUKEE

BOARD OF COMMISSIONERS FOR
MISSAUKEE COUNTY AND
MISSAUKEE COUNTY ROAD COMMISSION
Plaintiff

FILE NO. C-347

vs.

A N S W E R

JOHN R. NYLAND and DOROTHY A.
NYLAND, his wife; and HAROLD JACKSON
and GLADYS JACKSON, his wife; on their
own behalf and on behalf of others similarly
situated as a class

Defendants

Defendants, by their attorney, K. E. Thompson, for answer to the complaint, state that Defendants admit that plaintiffs are proceeding pursuant to the provisions of Act 146 of Public Acts of 1961, (M. S. A. 11. 300 (1) et sub), as amended by Act 175 of the Public Acts of 1969 (Cum. Supp. M. S. A. 11. 300 (2)) but defendants deny that such acts are applicable to this case or these proceedings, and answer the complaint as follows:

1. Defendants admit the allegations of paragraph 1.
2. Defendants admit that Lake Missaukee is a natural, inland, public lake, but assert that such determination was made by Order of Circuit Judge Fred S. Lamb establishing the normal height and water level of said Lake at a height of one thousand two hundred thirty-eight (1,238) feet U.S.G.S. at a session of the Circuit Court for the County of Missaukee on the 16 day of April A.D. 1942, upon a petition filed by the Board of Supervisors of the County of Missaukee, pursuant to the provisions of Act 39 of 1937 (M.S. A. 1121, et sub) and Judge Lamb further ordered that a certified copy of the Court's Order be filed in the Office of the Register of Deeds of Missaukee County as a permanent public record and notice. (Attached hereto and made a part hereof as Exhibit A is a typed copy of Judge Lamb's decision.)

3. Defendants admit that Circuit Court for the County of Missaukee ordered the Board of Commissioners for that County to maintain the level of Lake Missaukee at no higher than 1238 feet, but assert that such order has been in full force and effect since Judge Lamb's unchallenged, recorded decision of April 16, 1942 (Exhibit A) and that Judge Elza H. Papp in her decision of May 22, 1970 (Exhibit C - File No. C-280) reaffirmed Judge Lamb's 1942 decision and further, Judge Peterson in his decision of April 15, 1971 (Exhibit B, File No. C-323) again reaffirmed that under the Order of this Court entered by Judge Lamb on April 16, 1942 "****it is the clear and mandatory duty of the defendant (Missaukee County) to maintain the lake level of Lake Missaukee as set forth in said Order (of Judge Lamb) ". It therefor is the position of the defendant property owners that there have been no new adjudications by this Court of the 1238 foot lake level since Judge Lamb's original 1942 order and defendants efforts have been directed to securing the Missaukee County's recognition of their "mandatory duty" under the law as determined almost thirty (30) years ago.

4. Defendants admit the allegation of paragraph 4. that it is necessary to control the level of Lake Missaukee at no higher than level of 1238 U.S.G.S. established by this Court in 1942, but deny other allegations of said paragraph 4.

5. Defendants deny the allegations of paragraph 5.

6. Defendants deny that the allegations of paragraph 6 are related to issues in this case, and they are therefore denied.

7. Defendants deny the allegations of paragraph 7 since this Court has by its Order established the level of Lake Missaukee at 1238 U.S.G.S. and this has been a matter of public record in the office of the Register of Deeds at Missaukee County since 1942.

8. Defendants deny that various parcels of land set forth in paragraph 8 and subsequent pages, set forth a proper special assessment district.

9. Defendants admit the allegations of paragraph 9.

10. Defendants are without information or belief with respect to paragraph 10 but admit that a lake level control outlet has recently been established.

11. Defendants allege the Board of Commissioners is without legal authority to adopt the resolution of October 27, 1971 identified as Exhibit H 528 and prays this Court order it set aside as null and void and of no force or effect.

WHEREFORE, Defendants respectfully request that this Court deny the prayers of the Plaintiff Missaukee County.

AFFIRMATIVE DEFENSES

1. Defendants are property owners located on and about Lake Missaukee and are threatened in this action with sizable assessments or taxes by the plaintiff Missaukee County to pay for a drain outlet from said lake to lower the lake level to 1238 U.S.G.S. as originally ordered by Judge Fred S. Lamb on April 16, 1942.

2. At all times since 1942 to the present, Missaukee County has been under a mandatory duty to retain the level of Lake Missaukee at a level no higher than that established by Judge Lamb's 1942 order.

3. During that period from 1942 the County has taken no steps and has made no effort to comply with Judge Lamb's recorded order, although all officials of said County have been fully cognizant of the order so entered by the Court.

4. Although frequently importuned by the many residents owning cottages along Lake Missaukee that water levels of the lake were 3 or 4 feet above the Court established level, Missaukee County officials took no affirmative steps to correct the high water situation with resulting substantial damages to their lakeshore properties.

5. Due to the conditions described, Michigan State Health authorities determined septic tanks were unworkable and condemned the further use by owners of their summer homes and residences.

6. In addition, erosion caused by high water resulted in loss of beach frontage and other loss of the enjoyment of their property.

7. It was not until all persuasion and discussion with County officials failed that litigation on behalf of affected property was filed against the County, Complaint File No. C-280, May 15, 1970, that any action was taken by the County and it was not until the early winter of 1971 the property owners actually got any relief from the high water through the completion of the outlet.

8. The original Case C-280 was brought to enforce Judge Lamb's original mandatory order.

9. Judge Lamb's order was issued in April of 1942.

10. In 1942, the controlling legislation concerning Inland Lake Levels was Act 194 of 1939 (M. S. A. 11. 211) as supplemented by Act 319 of 1941, eff. Jan. 10, 1942 (M. S. A. 11. 242). It was under the authority of this legislation that Judge Lamb acted. At that time there existed no provisions for the kind of assessments against cottage owners and residents contemplated by the 1961 and 1965 Acts now cited by Plaintiff to justify the very sizable assessments they are asking this Court to approve against these very modest residences.

11. A reading of Judge Lamb's decision makes it clear there was no assessment of any kind contemplated when he established the 1238 level. In this he was merely following a practice established in many lakes in northern Michigan of which this Court may take judicial knowledge.

12. If nothing more, the County has long since been estopped from claiming any assessment arising from Judge Lamb's decision.

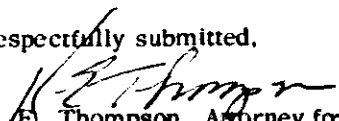
13. In fact, what the Plaintiff County is trying to establish is that Judge Papp or Judge Peterson has somehow created a new legal lake level of 1238 feet as indicated by the first several paragraphs of their complaint. If this reasoning were followed then they can fall back on Act 146 of 1961 and Act 175 of 1969 that does have provisions for special assessment districts -- but only for orders issued under those modern laws. This is not that case. It is a 1942^{Act}, under the law of that time and there is no basis for a special assessment.

14. Very simply, the Missaukee County officials neglected to carry out Judge Lamb's mandate for 30 years and it was through their own negligence and inaction which brought about the critical health and other problems at Lake Missaukee. These County officials have now simply been forced to comply with Judge Lamb's 1942 order.

It is therefore the Defendants prayer that:

1. Missaukee's County ~~prayer~~ for an extensive and expensive assessment district solely against Lake owners and residents be dismissed by this Court.
2. The Court issue an appropriate order spreading the cost of this Lake improvement over the entire County, and
3. Issue such additional orders that may be equitable under the circumstances of this case.

Respectfully submitted,


K. E. Thompson, Attorney for Defendants
308 E. Front Street, Traverse City, Mich. 49684
5.

Dated: January 12, 1972.

EXHIBIT A

**ORDER ESTABLISHING
NORMAL HEIGHT and
WATER LEVEL OF LAKE.**

STATE OF MICHIGAN

THE CIRCUIT COURT FOR THE COUNTY OF MISSAUKEE

In The Matter of the Petition
of the Board of Supervisors
of the County of Missaukee
Michigan, by Gerrit J. Leemgraven
Prosecuting Attorney of said
County, to Establish the Normal
Height and Water Level of Lake
Missaukee.

At a session of said court held in the Court House in the
city of Lake City, on the 16th day of April A.D. 1942.

Present Honorable Fred S. Lamb, Circuit Judge.

This cause having been brought on for hearing upon the petition of Gerrit J. Leemgraven, Prosecuting Attorney for the County of Missaukee, as by resolution directed, by the Board of Supervisors of said County of Missaukee; deeming it expedient that a normal height and water level be established by the order of this Court for Lake Missaukee a body of water lying entirely within the County of Missaukee, Michigan.

It appearing to the Court, that due notice of the day and time of hearing upon said petition has been given as by an order of this Court directed dated the 13th day of October A.D. 1942 and by statute in such case made and provided.

Gerrit J. Leemgraven Prosecuting Attorney for the County of the County of Missaukee appearing for the Petitioners and no one appearing in opposition to the petition.

Upon reading and filing and reading the petition and upon a careful consideration of the testimony and evidence produced at the hearing of said cause, it appears to the Court that it is in the interest of public health and the conservation of the natural resources of said County and State, that the normal height and water level of Lake Missaukee be determined and established by an order of this court.

On motion of Gerrit J. Leemgraven Prosecuting Attorney for the County of Missaukee, Attorney for the Board of Supervisors petitioner;

It is ordered and adjudged that the normal height and water level of said Lake Missaukee, be and the same is hereby determined and established to be One thousand two hundred thirty-eight Point 0, (1238.0) U.S.G.S.

It is further ordered that a certified of this Order shall be filed in the office of the Register of Deeds of the County of Missaukee, Michigan.

Signed Fred S. Lamb
CIRCUIT JUDGE

COUNTERSIGNED SIGNED

M. Louisa Wolcott
CLERK

EXHIBIT B
STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF MISSAUKEE

JOHN R. NYLAND and
DOROTHY A. NYLAND,
his wife; ANDREW KUIPERS
and ALIDA P. KUIPERS,
his wife; ROBERT E.
ROWLAND, and SALLY J.
ROWLAND, his wife;
EDWARD F. WELLER, JR.
and MARY R. WELLER, his wife,

FILED 4-15-1971
Richard L. Berg
CLERK, CIRCUIT COURT
20TH JUDICIAL DISTRICT
MISSAUKEE COUNTY, MICHIGAN

Plaintiffs,

v.

No. C-323

BOARD OF COMMISSIONERS OF
THE COUNTY OF MISSAUKEE,

Defendant.

JUDGMENT

At a session of said court held in the City of
Cadillac, County of Missaukee, State of
Michigan, on the 15 day of April, 1971.

PRESENT: HONORABLE William R. Peterson
Circuit Judge

This case having come on to be heard upon the plaintiffs'

Complaint for Mandamus and an Order to Show Cause having been issued
thereon and the court being fully advised in the premises.

IT IS ADJUDGED that under the provisions of the Lake Level Act
and the Order of this court entered on April 16, 1942 pursuant to a petition
filed by the Board of Supervisors of the County of Missaukee that it is the
clear and mandatory duty of the defendant to maintain the lake level of
Lake Missaukee as set forth in said Order.

A CERTIFIED TRUE COPY

Dated 4-15-1971

Richard L. Berg
DON MCNITCH, Co. Clerk-Reg. of
Missaukee Co., Lake City, Mich

IT IS FURTHER ORDERED AND ADJUDGED, that the Board of Commissioners of the County of Missaukee, defendant herein, forthwith make adequate provision to maintain the lake level of Lake Missaukee at 1240 feet.

IT IS FURTHER ORDERED AND ADJUDGED, that the Board of Commissioners of the County of Missaukee, defendant herein, forthwith make adequate provision to reduce the lake level of Lake Missaukee to 1238 feet and that said level be maintained.

IT IS FURTHER ORDERED AND ADJUDGED, that no costs be awarded either party, a public question being involved.

IT IS FURTHER ORDERED AND ADJUDGED THAT this cause is consolidated with files C-280 and C-292 in this Court for enforcement of this writ and such further proceedings as may be applicable.

William R. Peters

CIRCUIT JUDGE

William R. Peters

STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF MISSAUKKEE

BOARD OF COMMISSIONERS OF
MISSAUKKEE COUNTY, AND
MISSAUKKEE COUNTY ROAD COMMISSION,

Plaintiffs,

No. C 347

vs.

ANDREW REPIK, Otto Balzer,
Jay W. Price, (See Exhibit A
in original pleadings for
additional defendants)

Defendants


ORDER FOR ADJOURNMENT

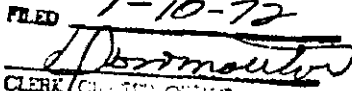
At a session of said Court held in the Court House in the
City of Cadillac, Wexford County, Michigan on the 13th day of
January, 1972, A.D.

PRESENT: HONORABLE WILLIAM R. PETERSON,
CIRCUIT JUDGE

This cause having come on to be heard upon the motion of
Chester C. Pierce, attorney for plaintiffs for a continuance.

NOW, THEREFORE, IT IS ORDERED that the said matter is
adjourned to January 31, 1972, A.D. at 10:30 a.m.


Circuit Judge

FILED 1-10-72

CLERK/CORRECTION CLERK
25TH JUDICIAL DISTRICT
MISSAUKKEE COUNTY, MICHIGAN

STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF MISSAUKEE

BOARD OF COMMISSIONERS OF
MISSAUKEE COUNTY, AND
MISSAUKEE COUNTY ROAD COMMISSION,

Plaintiffs,

vs.

No. C 347

ANDREW REPIK, Otto Blazer,
Jay W. Price, (See Exhibit A
in original pleadings for
additional defendants)

Defendants.

ORDER FOR ADJOURNMENT

At a session of said Court held in the Court House in the
City of Cadillac, Wexford County, Michigan on the 31st day of
January, 1972, A.D.

PRESENT: HONORABLE WILLIAM R. PETERSON,
CIRCUIT JUDGE

This cause having come on to be heard upon the motion of
Chester C. Pierce, attorney for plaintiffs for a continuance.

NOW, THEREFORE, IT IS ORDERED that the said matter is
adjourned to February 10, 1972, A.D. at 11:00 a.m. in the Court
House, City of Lake City, Missaukee County, Michigan.

FILED 1-24-72
Heena Levy
CLERK OF COURT
2114 JUDICIAL BLDG. EAST
MISSAUKEE COUNTY, MICHIGAN

William R. Peterson
CIRCUIT JUDGE

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

BOARD OF COMMISSIONERS FOR
MISSAUKEE COUNTY AND
MISSAUKEE COUNTY ROAD COMMISSION,

Plaintiffs,

-vs-

JOHN R. NYLAND and DOROTHY A. NYLAND,
his wife; and HAROLD JACKSON and
GLADYS JACKSON, his wife; on their
own behalf and on behalf of others
similarly situated as a class,

Defendants.

FILED

Feb 2-1972
Anna Ferguson
CLERK, CIRCUIT COURT
2ND JUDICIAL DISTRICT
MISSAUKEE COUNTY, MICHIGAN

FILE NO. C-347

REPLY AND MOTION FOR
SUMMARY JUDGMENT

Plaintiffs, by their attorney, Gary C. Hoffman, Prosecuting Attorney, through the office of Special Counsel, Chester C. Pierce, claiming the benefit for a Motion for Summary Judgment, and in reply to defendants' answer, moves for a dismissal of defendants' answer and moves for summary judgment for the following reasons:

1. Defendants' answer has failed to state a claim upon which relief can be granted.
2. Answering paragraph 2 of defendants' answer, plaintiffs deny that the original petition filed by the County Board of Supervisors was pursuant to the provisions of 1937 P.A. 39, MSA 11.211, but say that the said petition was filed pursuant to the provisions of 1939 P.A. 194, as amended, MSA 11.221, 1948 CL 281.101. Subsequently, said Act was amended by 1952 P.A. 128 and 1952 P.A. 116 and finally by 1961 P.A. 146, MSA 11.300 (1) to MSA 11.300 (26).
3. Plaintiffs admit the defendants' allegations in paragraph 3, but deny that the provisions of the Statute were mandatory as then in effect which portions of said Statute MSA 11.224 (Sec. 4), 1948 CL 281.104 provided . . . and may proceed, as hereinafter provided, to cause to be constructed and

maintained any dam or embankment that may be determined by said board to be necessary for the purpose of maintaining the normal height and level of the waters of any such lake, as provided in Section 2 Plaintiffs further state that it was not until the legislature adopted 1969 P.A. 175 that the Statute provided the following mandatory language, "When a court determined lake level is established, the Board of Supervisors of the county or counties in which the waters are situated shall proceed with the necessary steps to construct or maintain or both sufficient dams to keep and maintain the water in the lake at its normal height and level." MCLA 281.63, MSA 11.300 (3).

4. Plaintiffs in reply to defendants' allegation of paragraph 4, admit the establishment of the 1238 level, but deny that plaintiffs' procedures under Act 146 of the Public Acts of 1961 are invalid.

5, 6, 7. Plaintiffs in reply to defendants' denial of allegations in said paragraphs wish to state that the Court will take judicial notice of the factors which resulted in the establishment of the original lake level of 1238 and the Court may in its discretion after proper hearing in accordance with the provisions of Act 146 of the Public Acts of 1961 alter said level if in the public interest.

8. Plaintiffs in reply to defendants' allegations in paragraph 8, deny the same.

9, 10. Plaintiffs replying to paragraphs 9 and 10 are in agreement.

11. Plaintiffs deny defendants' allegations in paragraph 11, but say that not only are plaintiffs performing their statutory duty under the provisions of 1961 P.A. 146 but also under a portion of a Court Order signed by the Honorable Elza H. Papp and attached to this reply as EXHIBIT "D," which provided that the Board of Commissioners "are to employ two extra title search individuals to expedite the forming of the special assessment district."

WHEREFORE, Plaintiffs respectfully request that this Court deny the prayer of Defendants and grant Plaintiffs Motion for Summary Judgment.

REPLY TO DEFENDANTS' AFFIRMATIVE DEFENSES

1. Plaintiffs admit that defendants are property owners on Lake Missaukee but deny that defendants are threatened in this action with sizable assessments or taxes.

2. Plaintiffs deny the allegations of defendants' paragraph 2, and for definite reply refer to plaintiffs' reply contained in paragraph 3 of plaintiffs' reply to defendants' answer.

3. Plaintiffs admit that during the period from 1942 the County had not taken steps for compliance with said order, but deny that the present officials were fully cognizant of the existence of the 1942 order and further answering defendants' allegations, plaintiffs plead that defendants were guilty of laches. Defendants failed to pursue their claim or right at the proper time, and such inaction from 1942 to pursue their statutory remedies should effectively bar their dilatory actions after the County is pursuing the statutory requirements.

4. Plaintiffs in reply to defendants' allegations in paragraph 4 deny the same.

5. Plaintiffs deny the allegations of defendants' paragraph 5.

6. Plaintiffs deny the allegations of defendants in paragraph 6.

7. Plaintiffs deny the failure of persuasion and discussion and in support of that denial state that the County was engaging engineers for reports to correct the situation when the Complaint No. C-280 was filed. Plaintiffs deny that all property owners did not receive relief until early 1971, but state that only a minority of property owners were affected.

8. Plaintiffs admit the defendants' allegations in paragraph 8.

9. Plaintiffs admit the defendants' allegations in paragraph 9.

10. Plaintiffs deny the defendants' allegations that there were not in existence provisions for special assessments under 1939 P.A. 194, MSA 11.221, but specifically state that the title provided in part, "to authorize the raising of money by taxation and by special assessments for the purposes of this act." Plaintiffs further state that special assessments were levied at that time on private lakes. Plaintiffs further deny defendants' allegations that 1939 P.A. 194 was supplemented by Act 319 of 1941, but that 1939 P.A. 194 under which Judge Lamb acted was amended by 1952 P.A. 128 and 1952 P.A. 116 and finally by 1961 P.A. 146.

Plaintiffs further replying to defendants' paragraph 10 say that 1961 P.A. 146, MCLA 281.86, MSA 11.300 (26) provides in part as follows:

"Act 194 of the Public Acts of 1939, as amended, (the Act under which Judge Lamb acted) being Sections 281.101 to 281.121 of the Compiled Laws of 1948, are hereby repealed, except that actions and petitions to establish and maintain an inland lake level now in process may be concluded under those acts or commenced under this act. This act is again discretionary with the Board of Supervisors who have chosen to act under the present statute.

11. Plaintiffs deny defendants' allegation in paragraph 11, but allege that the facts are that it was a low lake level that was the problem.

12. Plaintiffs deny defendants' allegations in paragraph 12, but in reply say that the special assessment is made pursuant to today's statute as well as providing a method to maintain and protect the installation for its future life.

13. Plaintiffs deny defendants' allegations in paragraph 13, but in reply say that statutes have prospective operation and the act relied on by plaintiffs not in existence has no application whatsoever to the present situation. Plaintiffs' latches bar any application of the statute and the statute is discretionary with the Board of Supervisors.

14. Plaintiffs deny the defendants' allegations contained in paragraph 14 and hope that the Court takes judicial notice of the Water Resources Exhibit in File C-280 which attests that Lake Missaukee level of 1238 was not exceeded until December 1945 and early 1946 and stayed substantially below level until 1952. ^{the statute} Further answering said paragraph/provides as follows: "The procedure

for repairs, maintenance, reconstruction, relocating, enlarging or altering of lake level projects established under this act or prior acts in excess of \$500.00 shall be the same as that the establishment of a normal lake level as set forth in this act, 1961 P.A. 146 Sec. 25, MCLA 281.25, MSA 11.300 (25).

IT IS THEREFORE Plaintiffs' prayer that:

1. That the motion for summary judgment be granted plaintiffs against the defendants.

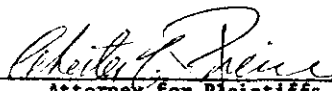
2. The Court confirm and consider the special assessment district boundaries and review the description of lands within the special assessment district.

3. The Court deny the relief prayed for by the defendants in paragraph 1, 2, 3 of their prayer.

BOARD OF COMMISSIONERS OF
COUNTY OF MISSAUKEE
MISSAUKEE COUNTY ROAD COMMISSION

GARY C. HOFFMAN
PROSECUTING ATTORNEY

By



Attorney for Plaintiffs
Of Counsel

Business address:
3130 Casmere
Hamtramck, Michigan 48212
Phone TW. 10492

Dated: January 31, 1972

EXHIBIT D

STATE OF MICHIGAN

CIRCUIT COURT FOR THE COUNTY OF MISSAUKEE

HAROLD JACKSON AND GLADYS JACKSON,
On their own behalf and on behalf
of all others similarly situated
as a class,

Plaintiffs,

-vs.-

File No. C-280

BOARD OF COMMISSIONERS for
Missaukee County and MISSAUKEE
COUNTY ROAD COMMISSION,

Defendants.

KENNETH E. LUTZ, RUTH C. LUTZ, ROY
WINTERROWD, HELEN WINTERROWD,
on their own behalf and on behalf of all
other persons similarly situated as a
class,

Plaintiffs,

-vs.-

File No. C-292

BOARD OF COMMISSIONERS FOR MISSAUKEE
COUNTY AND MISSAUKEE COUNTY ROAD
COMMISSION,

Defendants.

ORDER

At a session of said Court held in the Courthouse
in the City of Cadillac in Wexford County, Michigan
on the 17th day of August, A.D. 1970.

PRESENT: HONORABLE ELZA H. PAPP, Acting Circuit Judge

This cause having been brought on for hearing upon the pleadings in
said cause, the above parties being represented by their respective attorneys
in this Court, and the Court having held pre-trial proceedings in the above
two matters and having held a pre-trial hearing, this Court being cognizant
fact that corrective action must be taken hereby orders the following:

NOW, THEREFORE, IT IS ORDERED that the Court hereby lifts the restraining order in the File No. C-292 and orders the ORDER TO Show Cause to be dismissed against said defendants.

THE COURT FURTHER ORDERS that both of the court matters C-280 and File No. C-292 are hereby consolidated.

The Court having been advised that a possible nuisance is being created through the temporary installation of the pumping equipment in the attempt to lower the level of Lake Missaukee to approximately 1238 feet pending the final design and installation of the permanent structure for this purpose, hereby orders the meter box be lowered as to not interfere with the view of plaintiffs Kenneth E. Lutz and Ruth C. Lutz, and that insulation be provided around said pumping equipment to control the noise and, if need be, in the temporary pumping.

The defendants are hereby authorized to straighten the channel in order to permit said pumping by gravity means.

THE COURT FURTHER ORDERS that the temporary engineering design plan presented to this Court by the engineers on behalf of the Board of Commissioners for Missaukee County and Missaukee County Road Commission is hereby tentatively approved and the preparation of the final plan over a parcel of property known as Helms properties is hereby authorized and said defendants are authorized to proceed with final construction plans.

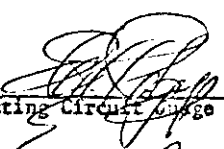
THE COURT FURTHER ORDERS that plaintiffs represented by their attorneys in file No. C-292 are to select one appraiser to appraise the value of the permanent and temporary construction easements needed by said defendants over their respective parcels of land and that the defendants are to select one appraiser for this purpose and attempt to resolve the value of the easements needed over the said plaintiffs lands in this matter.

THE COURT FURTHER ORDERS that the defendants are to employ two extra title search individuals to expedite the forming of the special assessment district for the purposes of building a permanent installation which shall set the lake level at approximately 1238 feet.


IT IS FURTHER ORDERED that the pumping is to continue twenty-four hours around the clock each and every day in order to lower the lake level prior to winter setting in.

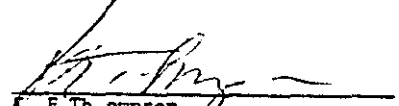
THE COURT FURTHER ORDERED that the project date for completion which was set at August 1, 1970, is hereby extended to a reasonable time ^{but} ~~not~~ *not later than June 1, 1971 and* that the defendants are to report to this Court at least once every thirty days as to their progress to build the permanent installation in order to accomplish the setting of the lake level and that the Court hereby orders that all parties have an open channel of communication between each other in order to proceed with the permanent improvement as expeditiously as possible and IT IS FURTHER ORDERED that this Court continue jurisdiction over all parties until its further orders.

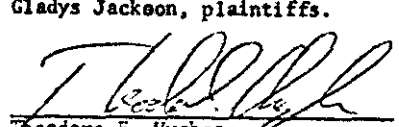
No costs assessed, a public issue being involved.


Elza H. Papp, Acting Circuit Judge

Approved as to form:


Chester C. Pierce
Attorney for defendants


K. E. Thompson
Attorney for Harold Jackson and
Gladys Jackson, plaintiffs.


Theodore E. Hughes
Attorney for Kenneth E. Lutz,
Ruth C. Lutz, Roy Winterrowd,
Helen Winterrowd, plaintiffs.

FILED Feb 10 - 1972
19
DOE NOTICE
Register of Deeds
Missaukee Co. Mich.
MISSAUKEE COUNTY MICHIGAN

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

BOARD OF COMMISSIONERS OF MISSAUKEE
COUNTY, AND MISSAUKEE COUNTY ROAD
COMMISSION,

Plaintiffs,

vs

A N S W E R

ANDREW REPIK, OTTO BALZER, JAY W.
PRICE, (See Exhibit A for Additional
Defendants),

No. C347

Defendants.

Now comes NORMAN V. LINCOLN, by his attorney, James C.
Thompson, and for his answer to Plaintiff's Complaint, says:

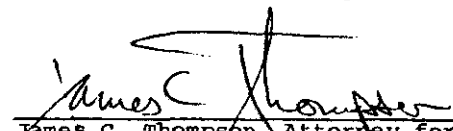
1. As to paragraph 1, he neither admits nor denies
the same.
2. As to paragraph 2, he admits the same.
3. As to paragraph 3, he neither admits nor denies.
4. As to paragraph 4, he neither admits nor denies.
5. As to paragraph 5, he admits the same and defendant
further shows that it would likewise be a detriment to the wel-
fare and safety of all persons and political subdivisions which
are benefited by the establishment of a lake level, and that the
district should include the entire County of Missaukee.
6. As to paragraph 6, he admits the same and further
shows that the entire County of Missaukee is benefited by the
value of said improvements.
7. As to paragraph 7, it is admitted and defendant
further shows that the entire County of Missaukee would suffer
irreparable damages.
8. As to paragraph 8, defendant neither admits nor
denies the same.

9. As to paragraph 9, defendant admits the same.

10. As to paragraph 10, defendant neither admits nor denies the same.

WHEREFORE, DEFENDANT PRAYS:

1. That this Court order that the boundary of the special assessment district include the entire County of Miss-
aukee.


James C. Thompson, Attorney for
Norman V. Lincoln, Defendant.

CHESTER C. PIERCE

ATTORNEY AT LAW

8120 CASHMERE

HAMTRAMCK, MICHIGAN 48218

TWINBROOK 1-0488

REGARDING:

BOARD OF COMMISSIONERS OF
MISSAUKEE COUNTY, AND
MISSAUKEE COUNTY ROAD COMMISSION,

Plaintiffs,

No. C-347

vs.

ANDREW REPIK, Otto Balzer,
Jay W. Price, (See Exhibit A
for Additional Defendants.)

Defendants

PLEASE BE ADVISED THAT THE ABOVE MATTER WHICH HAS BEEN
SCHEDULED TO BE HEARD ON JANUARY 31, 1972 AT 10:30 BY
THE HON. JUDGE WILLIAM R. PETERSON WILL BE ADJOURNED
UNTIL FEBRUARY 10 AT 11:00 A.M. IN THE COURT HOUSE IN
THE CITY OF LAKE CITY, MISSAUKEE COUNTY, MICHIGAN, AT
WHICH TIME AND PLACE THE MATTER WILL BE HEARD.

Respectfully yours,


CHESTER C. PIERCE
Attorney at Law

STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF MISSAUKEE

BOARD OF COMMISSIONERS
FOR MISSAUKEE COUNTY AND
MISSAUKEE COUNTY ROAD COMMISSION
Plaintiffs

vs.

ORDER
File No. C-347.

JOHN R. NYLAND and DOROTHY A.
NYLAND, HIS WIFE; AND HAROLD
JACKSON and GLADYS JACKSON, his
wife; on their own behalf and on behalf
of others similarly situated as a class
Defendants

At a session of said Court on the 3rd day of March, 1972.

Present: HONORABLE WILLIAM R. PETERSON, Circuit Judge.

The Court having heard and rendered an opinion on this matter on the 10th day of February, 1972, and this matter having been brought on for hearing upon the pleadings filed in said cause, and the parties being present in Court and the Court having heard the arguments by their respective attorneys, and the Court having found that the level of Lake Missaukee was established in 1942; that such finding was not appealed and it is res adjudicata; and that proceedings in case 280 and 323 in this Court were based upon that decision and were not new proceedings respecting the lake level of Lake Missaukee; it is the opinion of the Court that complainants' may not establish a special assessment district pursuant to Act 146 of 1961 as amended by Act 175 of 1969 (M.S.A. 11.300 et sub.) to impose special assessments upon the property of riparian owners on Lake Missaukee, inasmuch as such property owners' rights were established under the 1942 judgment of this Court; and the Court concurs with the position of defendant property owners, that the rights of the respective parties were fixed under the Act applicable to the Court proceedings held in 1942; that there is no basis at this time for plaintiffs to establish a special assessment district and that the expenses of the County and the Road Commission in complying with the Court's 1942 lake level order must be borne from the general revenues of the County rather than assessed against the riparian owners on Lake Missaukee, and accordingly,


IT IS ORDERED, that the complaint of the plaintiffs be dismissed without costs, a public issue being involved.

Dated: March 3 1972.



William R. Peterson, Circuit Judge.

1.

March 8-1972

Clerk of the Court
2nd Judicial District
MISSAUKEE COUNTY, MICHIGAN

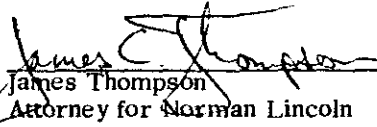
Approved as to form:



Chester C. Pierce
Attorney for Plaintiffs



K. E. Thompson
Attorney for Defendants



James Thompson
Attorney for Norman Lincoln

STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF MISSAUKEE

BOARD OF COMMISSIONERS FOR MISSAUKEE
COUNTY and MISSAUKEE COUNTY ROAD
COMMISSION,

Plaintiffs, : File No. C-347

-vs-

JOHN R. NYLAND and DOROTHY A. NYLAND,
his wife; and HAROLD JACKSON and GLADYS
JACKSON, his wife; on their own behalf and on
behalf of others similarly situated as a class,

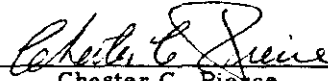
Defendants.

NOTICE OF FILING CLAIM OF APPEAL
AND PAYMENT OF FEES

TO: Kenneth E. Thompson, Esq.
308 East Front Street
Traverse City, Michigan 49684

James C. Thompson, Esq.
Sahlin & Thompson
Kilmer Building
Reed City, Michigan 49677

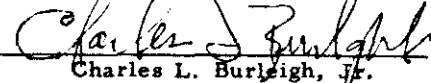
PLEASE TAKE NOTICE that plaintiffs in the within cause filed the
attached Claim of Appeal with the Court of Appeals and the Missaukee County
Circuit Court and that plaintiffs have paid the entry and appeal fees required
by the Michigan Court Rules.



Chester C. Piexce


Attorney for Plaintiffs
3130 Casmere
Hamtramck, Michigan 48212

Miller, Canfield, Paddock and Stone

By 
Charles L. Burleigh, Jr.

Of Counsel
2500 Detroit Bank & Trust Building
Detroit, Michigan 48226

March 20, 1972.

March 22-1972

CLERK, CIRCUIT COURT
25TH JUDICIAL DISTRICT
MISSAUKEE COUNTY, MICHIGAN

STATE OF MICHIGAN
IN THE COURT OF APPEALS

BOARD OF COMMISSIONERS FOR MISSAUKEE
COUNTY and MISSAUKEE COUNTY ROAD
COMMISSION,

Court of Appeals
Docket No. _____

Plaintiffs-Appellants,

Missaukee Circuit
Court No. C-347

-vs-

JOHN R. NYLAND and DOROTHY A. NYLAND,
his wife; and HAROLD JACKSON and GLADYS
JACKSON, his wife; on their own behalf and on
behalf of others similarly situated as a class,

Defendants-Appellees.

CLAIM OF APPEAL

NOW COME the BOARD OF COMMISSIONERS FOR MISSAUKEE
COUNTY and the MISSAUKEE COUNTY ROAD COMMISSION, plaintiffs-appellants,
by their attorney Chester C. Pierce, and Miller, Canfield, Paddock and Stone,
of counsel, and claim an appeal from the attached Order entered March 3, 1972
in the Circuit Court for the County of Missaukee by the Honorable William R.
Peterson, Judge of said Court.



Chester C. Pierce

Attorney for Plaintiffs-Appellants
3130 Casmere
Hamtramck, Michigan 48212

Miller, Canfield, Paddock and Stone

By 

Charles L. Burleigh, Jr.

Of Counsel
2500 Detroit Bank & Trust Building
Detroit, Michigan 48226

Dated: March 20, 1972.

MILLER, CANFIELD, PADDOCK AND STONE, 1800 DETROIT BANK & TRUST BUILDING, DETROIT, MICHIGAN 48226

STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF MISSAUKEE

BOARD OF COMMISSIONERS
FOR MISSAUKEE COUNTY AND
MISSAUKEE COUNTY ROAD COMMISSION
Plaintiffs

VS.

ORDER

File No. C-347.

JOHN R. NYLAND and DOROTHY A.
NYLAND, HIS WIFE: AND HAROLD
JACKSON and GLADYS JACKSON, his
wife; on their own behalf and on behalf
of others similarly situated as a class
Defendants

At a session of said Court on the 3rd day of March, 1972.

Present: HONORABLE WILLIAM R. PETERSON, Circuit Judge.

The Court having heard and rendered an opinion on this matter on the 10th day of February, 1972, and this matter having been brought on for hearing upon the pleadings filed in said cause, and the parties being present in Court and the Court having heard the arguments by their respective attorneys, and the Court having found that the level of Lake Missaukee was established in 1942; that such finding was not appealed and it is res adjudicata; and that proceedings in case 280 and 323 in this Court were based upon that decision and were not new proceedings respecting the lake level of Lake Missaukee; it is the opinion of the Court that complainants' may not establish a special assessment district pursuant to Act 146 of 1961 as amended by Act 175 of 1969 (M.S.A. 11.300 et sub.) to impose special assessments upon the property of riparian owners on Lake Missaukee, inasmuch as such property owners' rights were established under the 1942 judgment of this Court; and the Court concurs with the position of defendant property owners, that the rights of the respective parties were fixed under the Act applicable to the Court proceedings held in 1942; that there is no basis at this time for plaintiffs to establish a special assessment district and that the expenses of the County and the Road Commission in complying with the Court's 1942 lake level order must be borne from the general revenues of the County rather than assessed against the riparian owners on Lake Missaukee, and accordingly,

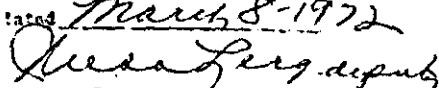
IT IS ORDERED, that the complaint of the plaintiffs be dismissed without costs, a public issue being involved.

Dated: March 3 1972.

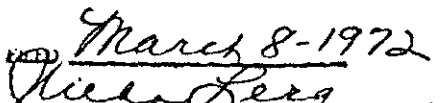


William R. Peterson, Circuit Judge.

A CERTIFIED TRUE COPY

Dated March 8-1972

SUSAN FERGUSON, Co. Clerk-Reg. of
Missaukee Co., Lake City, Mich

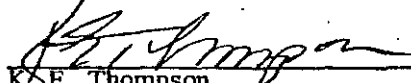
1.

March 8-1972

SUSAN FERGUSON, deputy
CLERK, CIRCUIT COURT
24TH JUDICIAL DISTRICT
MISSAUKEE COUNTY, MICHIGAN

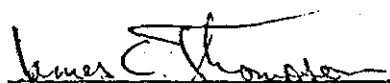
Approved as to form:



Chester C. Pierce
Attorney for Plaintiffs



K. E. Thompson
Attorney for Defendants



James Thompson
Attorney for Norman Lincoln

STATE OF MICHIGAN
IN THE COURT OF APPEALS

BOARD OF COMMISSIONERS FOR MISSAUKEE
COUNTY and MISSAUKEE COUNTY ROAD
COMMISSION,

Court of Appeals
Docket No. _____

Plaintiffs-Appellants,

-vs-

Missaukee Circuit
Court No. C-347

JOHN R. NYLAND and DOROTHY A. NYLAND,
his wife, and HAROLD JACKSON and GLADYS
JACKSON, his wife; on their own behalf and on
behalf of others similarly situated as a class,

Defendants-Appellees.

PROOF OF SERVICE

State of Michigan)

ss.

County of Wayne)

JULIE M. BEAUPRE, being duly sworn, deposes and says that on
the 20th day of March, A.D. 1972, she served copies of the Claim of Appeal
and Notice of Filing Claim of Appeal and Payment of Fees upon the following:

Kenneth E. Thompson, Esq.
308 East Front Street
Traverse City, Michigan 49684

James C. Thompson, Esq.
Sahlin & Thompson
Kilmer Building
Reed City, Michigan 49677

by mailing copies thereof in sealed envelopes plainly addressed to them as
above, with postage fully prepaid thereon, and depositing said sealed envelopes
in the United States mail depository located in the Detroit Bank & Trust Building,
Detroit, Michigan.

Further deponent sayeth not.

Subscribed and sworn to before me
this 20th day of March, A.D. 1972


Julie M. Beaupre

Janet Divonzo
Notary Public, Wayne County, Michigan
My commission expires: 4-29-72

STATE OF MICHIGAN
IN THE COURT OF APPEALS

BOARD OF COMMISSIONERS FOR MISSAUKEE
COUNTY and MISSAUKEE COUNTY ROAD
COMMISSION,

Plaintiffs-Appellants,

-vs-

JOHN R. NYLAND and DOROTHY A. NYLAND,
his wife; and HAROLD JACKSON and GLADYS
JACKSON, his wife; on their own behalf and on
behalf of others similarly situated as a class,

Defendants-Appellees.

Court of Appeals
Docket No. _____

Missaukee Circuit
Court No. C-347

NOTICE OF HEARING

TO: THE CLERK OF THE COURT OF APPEALS


SIR,

Please place Appellants' Motion to Consolidate for Purpose of
Hearing on Merits and for Determination of Parties Entitled to Notice on the
Docket of this Court for hearing on Tuesday, March 28, 1972, Session of said
Court, held in Detroit, Michigan.


Chester C. Pierce

Attorney for Plaintiffs-Appellants
3130 Cassmere
Hamtramck, Michigan 48212

Miller, Canfield, Paddock and Stone

By 
Charles L. Burleigh, Jr.
Of Counsel
2500 Detroit Bank & Trust Building
Detroit, Michigan 48226

Dated: March 20, 1972.

STATE OF MICHIGAN
IN THE COURT OF APPEALS

BOARD OF COMMISSIONERS FOR MISSAUKEE
COUNTY and MISSAUKEE COUNTY ROAD
COMMISSION,

Plaintiffs-Appellants,

-vs-

JOHN R. NYLAND and DOROTHY A. NYLAND,
his wife; and HAROLD JACKSON and GLADYS
JACKSON, his wife; on their own behalf and on
behalf of others similarly situated as a class,

Defendants-Appellees.

Court of Appeals
Docket No. _____

Missaukee Circuit
Court No. C-347

MOTION TO CONSOLIDATE
FOR PURPOSE OF HEARING ON MERITS
AND FOR DETERMINATION OF PARTIES ENTITLED TO NOTICE

NOW COME the BOARD OF COMMISSIONERS FOR MISSAUKEE
COUNTY and the MISSAUKEE COUNTY ROAD COMMISSION, plaintiffs-appellants
herein, by their attorney Chester C. Pierce and Miller, Canfield, Paddock and
Stone, of counsel, and, pursuant to Rule 801.3 of the General Court Rules of
1963, move this Court to consolidate the Circuit Court files relating to (i) the
Order entered April 16, 1942 in the Circuit Court for the County of Missaukee
by the Honorable Fred S. Lamb, Judge of said Court, (ii) the matter of Harold
Jackson and Gladys Jackson, on their own behalf and on behalf of all others
similarly situated, as a class, plaintiffs v. Board of Commissioners for
Missaukee County and Missaukee County Road Commission, defendants,
Missaukee Circuit Court No. C-280, and (iii) the matter of John R. Nyland and
Dorothy A. Nyland, et al., plaintiffs v. Board of Commissioners of the County
of Missaukee, defendant, Missaukee Circuit Court No. C-323, and to determine
that no other parties are entitled to notice in these proceedings, other than those

named as defendants in the Notice of Filing Claim of Appeal and Payment of Fees filed herein. Plaintiffs and Appellants show this Court as follows:

1. The Order entered March 3, 1972, in the Circuit Court for the County of Missaukee, from which the instant appeal is taken, contains a determination that the said Order entered April 16, 1942 in the Circuit Court for the County of Missaukee, and the proceedings had in the said matter docketed as Missaukee Circuit Court No. C-280 and in the said matter docketed as Missaukee Circuit Court No. C-323, fix and determine the rights of plaintiffs and appellants to establish a special assessment district pursuant to Act 146 of Public Acts, 1961, as amended by Act 175 of Public Acts, 1969, to impose special assessments upon the riparian owners on Lake Missaukee, and consolidation and review of the Circuit Court files relating to the said Order entered April 16, 1942 and the said proceedings docketed as Missaukee Circuit Court Nos. C-280 and C-323 is necessary to adequate consideration of the issues sought to be raised in the instant appeal.

2. That all riparian owners on Lake Missaukee, as a class, were made parties defendant and served with notice in the Circuit Court proceedings from which this appeal is taken.

WHEREFORE, plaintiffs and appellants pray that this Court consolidate the Circuit Court files relating to (i) the Order entered April 16, 1942 in the Circuit Court for the County of Missaukee by the Honorable Fred S. Lamb, Judge of said Court, (ii) the matter of Harold Jackson and Gladys Jackson, on their own behalf and on behalf of all others similarly situated, as a class, plaintiffs v. Board of Commissioners for Missaukee County and Missaukee County Road Commission, defendants, Missaukee Circuit Court No. C-280, and (iii) the matter of John R. Nyland and Dorothy A. Nyland, et al. plaintiffs v. Board of Commissioners of the County of Missaukee, defendant, Missaukee

Circuit Court No. C-323 and, further, that this Court determine that no other parties are entitled to notice in these proceedings, other than those named as defendants in the Notice of Filing Claim of Appeal and Payment of Fees filed herein.



Chester C. Pierce
Attorney for Plaintiffs-Appellants
3130 Casmere
Hamtramck, Michigan 48212

Miller, Canfield, Paddock and Stone

By 

Charles L. Burleigh, Jr.
Of Counsel
2500 Detroit Bank & Trust Building
Detroit, Michigan 48226

Dated: March 20, 1972.

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

BOARD OF COMMISSIONERS FOR MISSAUKEE
COUNTY & MISSAUKEE COUNTY ROAD COMMISSION,

Plaintiffs,

-vs-

File No. C-347

JOHN R. NYLAND, ET AL,

Defendants.

P R E T R I A L S T A T E M E N T

ATTORNEYS:

Chester C. Pierce, Esq.

Attorney at Law

3130 Casmere

Hamtramck, Michigan 48212

For the Plaintiffs,

Kenneth E. Thompson, Esq.

Attorney at Law

308 E. Front Street

Traverse City, Michigan 49684

For Defendant Nyland.

ACTION:

Suit to establish lake level and to
create special assessment district
for the payment of costs of lake
level control.

NOTICES:

Notice is to be prepared under the
Act, with copy to be furnished prior
to publication to the prosecuting
attorney and to all counsel appearing,

FILED 11-27-73
CLERK, CIRCUIT
20th JUDICIAL DISTRICT
MISSAUKEE COUNTY, MICHIGAN

such notice to be prepared by counsel for the Board of Road Commissioners.

PARTIES:

It is contemplated that as to the special assessment district that claims may be made, that there are benefits to the entire drainage district and notice should be prepared accordingly. Because of the possibility of determination that part of the expense should be paid from the County general fund, it is the opinion of the Court that notice of all proceedings should be served upon the prosecuting attorney of the County as distinguished from counsel retained by the Road Commissioners.

ISSUES:

Issues will or may exist as to: (1) lake level, it being understood that the Board of Commissioners will recommend a fluctuating level according to the season of the year; (2) as to the establishment of a special assessment district, as to which the following questions will or may be raised: (a) the determination of the rights, benefits and detriments to individual property owners surrounding Lake Missaukee; (b) determination of rights, benefits and detriments to other property in the general area,

including the drainage district; (c) determination of the extent to which the expense should be borne by the general fund of the County.

MOTIONS:

Any motions that are to be filed by counsel are to be filed within 10 days from date.

TRIAL BRIEFS:

As to any questions to be raised at hearing, trial briefs are to be filed at least 10 days prior to the hearing date.

TRIAL:

The matter will be scheduled for April 4, 1974, at 10:00 a.m.

DATED: November 20, 1973.



WILLIAM R. PETERSON, Circuit Judge

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

BOARD OF COMMISSIONERS FOR MISSAUKEE
COUNTY & MISSAUKEE COUNTY ROAD COMMISSION,

Plaintiffs,

-vs-

File No. C-347

JOHN R. NYLAND, ET AL,

Defendants.

FINAL PRETRIAL STATEMENT

ATTORNEYS:

Chester C. Pierce, Esq.

Attorney at Law

3130 Casmere

Hamtramck, Michigan 48212

For the Plaintiffs,

Kenneth E. Thompson, Esq.

Attorney at Law

308 E. Front Street

Traverse City, Michigan 49684

For Defendant Nyland,

James C. Thompson, Esq.

Attorney at Law

Kilmer Bldg.

Reed City, Michigan 49677

For Defendants,

and

Russell E. Prins, Esq.

Assistant Attorney General

Law Bldg.

FILED

3-28-74

Reed City
CLERK, CIRCUIT COURT
28th JUDICIAL DISTRICT
MISSAUKEE COUNTY, MICHIGAN

Lansing, Michigan 48902

For the State of Michigan, but
not appearing at pretrial.

FACTS:

See pretrial statement of November 20, 1973.

ISSUES:

At pretrial, the petitioners indicate that they will proceed on the drainage basin theory pursuant to the published notice and map herein, from which there will be only small technical changes.

It is also noted that the range of lake level to be sought by petitioners will be from 1237 feet above sea level to 1238.5 (instead of 1238.0) feet above sea level.

EXHIBITS:

Petitioners offered the following exhibits for identification, which it is agreed may be received without objection.

Px 1 - Letter of March 12, 1974, from Bruce Reynolds, Chief, Environmental Health Section of District Health Department No. 1, to Chester Pierce, counsel for petitioner.

Px 2 - Letter to the Court of March 12, 1974, from William J. Henry of the South Missaukee Association (property owners).

Px 3 - Copy of the minutes of the Lake Level Board Meeting of February 23, 1974, adopting the amended special assessment district presented by its engineers and confirming the special assessment district

notices, which minutes are certified by clerk David C. Hejnal.

Px 4 - Minutes of the Missaukee Board of County Commissioners meeting of October 27, 1971, authorizing the petition herein and certified by County Clerk Don Molitor.

ASSESSMENT:

Petitioners indicate that they will propose a sharing of the expense involved by various public corporations with the property owners and proposing that Missaukee County bear 25% of the cost, the Missaukee County Road Commission 5% of the cost, the City of Lake City 5% of the cost, the townships of Lake, Reeder, Forest, Caldwell and Cedar Creek to bear not to exceed 5% of the cost as apportioned by the Court among such townships, and that further assessment be made against the Michigan Department of State Highways and Department of Natural Resources.

TRIAL:

The matter remains scheduled for April 4, 1974, at 10:00 a.m.

DATED: March 22, 1974.



WILLIAM R. PETERSON, Circuit Judge

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

BOARD OF COMMISSIONERS FOR
MISSAUKEE COUNTY & MISSAUKEE
COUNTY ROAD COMMISSION,

Plaintiffs,

-vs-

File No. C-347

JOHN R. NYLAND, et al,

Defendants.

Russell E Prins (P 19110)
Assistant Attorney General

Attorney for Department of
State Highways and Transportation
and Department of Natural
Resources

Environmental Protection
and Natural Resources
Division
The Law Building, Room 630
525 West Ottawa Street
Lansing, Michigan 48913

Chester C. Pierce
Attorney for Plaintiffs

3130 Casmere
Hamtramck, Michigan 48212

Kenneth E. Thompson
Attorney for Defendant Nyland

308 E. Front Street
Traverse City, Michigan 49684

James C. Thompson
Attorney for Defendants

Kilmer Building
Reed City, Michigan 49677

MEMORANDUM OF LAW

FILED 4-1-74
Allen King
CLERK, CIRCUIT COURT
DISTRICT
MICHIGAN

FRANK J. KELLEY
Attorney General

Jerome Maslowski
Assistant Attorney General

Attorneys for Department of
State Highways and Transportation
and Department of Natural
Resources

MARCH 29, 1974

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

BOARD OF COMMISSIONERS FOR
MISSAUKEE COUNTY & MISSAUKEE
COUNTY ROAD COMMISSION,

Plaintiffs,

-vs-

File No. C-347

JOHN R. NYLAND, et al,

Defendants.

Russell E Prins (P 19110)
Assistant Attorney General

Attorney for Department of
State Highways and Transportation
and Department of Natural
Resources

Environmental Protection
and Natural Resources
Division
The Law Building, Room 630
525 West Ottawa Street
Lansing, Michigan 48913

Chester C. Pierce
Attorney for Plaintiffs

3130 Casmere
Hamtramck, Michigan 48212

Kenneth E. Thompson
Attorney for Defendant Nyland

308 E. Front Street
Traverse City, Michigan 49684

James C. Thompson
Attorney for Defendants

Kilmer Building
Reed City, Michigan 49677

MEMORANDUM OF LAW

FRANK J. KELLEY
Attorney General

Jerome Maslowski
Assistant Attorney General

Attorneys for Department of
State Highways and Transportation
and Department of Natural
Resources

MARCH 29, 1974

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

BOARD OF COMMISSIONERS FOR
MISSAUKEE COUNTY & MISSAUKEE
COUNTY ROAD COMMISSION,

Plaintiffs,

-vs-

File No. C-347

JOHN R. NYLAND, et al,

Defendants.

MEMORANDUM OF LAW

NOW COME the State of Michigan, Department of State Highways and Transportation, and Department of Natural Resources, by their attorneys, Frank J. Kelley, Attorney General, Jerome Maslowski, Assistant Attorney General, and Russell E Prins, Assistant Attorney General, and SUBMIT THE FOLLOWING MEMORANDUM OF LAW relating to issues raised by pleadings and orders hereto filed or entered in the above cause.

[Issues Presented]

1. Is the Circuit Court vested with the jurisdiction to apportion benefits among parcels of land within a special assessment district established under the Inland Lake Level Act?

2. May special assessments be levied and collected from the Department of State Highways and Transportation based

upon its jurisdiction and control over lands and interests in land owned by the State of Michigan for purposes of highway construction, maintenance, and use?

3. May lands owned or controlled by the Department of Natural Resources be included within a special assessment district established under 1961 PA 146, as amended, CL 281.61 et seq.

[Discussion]

I.

THIS COURT LACKS THE JURISDICTION TO
APPORTION BENEFITS AMONG PARCELS OF LAND
WITHIN A SPECIAL ASSESSMENT DISTRICT
ESTABLISHED AND CONFIRMED UNDER 1961 PA
146, AS AMENDED, CL 281.61 ET SEQ

The Board of Commissioners for Missaukee County and the Missaukee County Road Commission have made and filed a petition invoking this Court's jurisdiction under 1961 PA 146, as amended.

In entertaining that petition, the Court might properly:

(A) Determine the level at which the waters of Lake Missaukee should be established and maintained; and

(B) Confirm, within 60 days of such determination, the boundaries of the special assessment district established in pursuance of the act. Section 10, 1961 PA 146, as amended, CL 281.70.

The Court is not, however, vested with original jurisdiction to apportion benefits and costs among the various assessable parcels included within the confirmed boundaries of the special assessment district.

Section 5 of 1961 PA 146, as amended, CL 281.65, provides in part:

"Whenever the board of supervisors of any county deems it expedient to have determined and established the normal height and level of the waters in any inland lake, . . . the board . . . shall . . . direct the department to establish a special assessment district if required. . . ."

Section 6 of 1961 PA 146, as amended, CL 281.66, provides in part:

". . . All proceedings relating to the making, levying and collection of special assessments herein authorized . . . shall conform as near as may be to the proceedings for levying special assessments . . . as set forth in Act No. 40 of the Public Acts of 1956, as amended, being sections 280.1 to 280.623 of the Compiled Laws of 1948."

Referring to 1956 PA 40, as amended, we find the appropriate procedure for apportioning and review set forth in Sections 151 through 162 (CL 280.151 -280.162; MSA 11.1151 - 11.1162).

Based upon the foregoing sections, the State of Michigan maintains the power and duty to apportion benefits is vested solely in the drain commissioner, after compliance by him with the requisite giving of notice and holding of hearings required by Sections 154 and 155. Review of such apportionment is to be had in the probate court and such jurisdiction as is possessed by the circuit court is not original but appellate.

II.

THE DEPARTMENT OF STATE HIGHWAYS CANNOT LAWFULLY BE ASSESSED ANY PORTION OF THE COSTS OF DETERMINING THE LEVEL OF LAKE MISSAUKEE, NOR CAN IT BE ASSESSED FOR ANY COSTS INCURRED IN BUILDING AND MAINTAINING STRUCTURES NECESSARY TO CONTROL SUCH LEVELS UNDER 1961 PA 146, AS AMENDED, CL 281.61 et seq.

Section 19 of the Inland Lake Level Act (CL 281.79) provides:

"The expense of determining the normal height and water level of any public inland lake, the expense of constructing and maintaining any dam, together with the cost and expense of acquiring lands and other property by condemnation necessary thereto, may be assessed, levied and collected upon the taxable property within the special assessment district."

It is clear that no lands owned by the State of Michigan under the control of the Department of State Highways and Transportation, dedicated to public uses, may be classified as taxable property and so taxed. Section 7, 1893 PA 206, as amended, CL 211.7; MSA 7.7, provides:

"The following property shall be exempt from taxation:

" * * *

"Second, All public property belonging to the state of Michigan, except licensed homestead lands, part-paid lands held under certificates, and lands purchased at tax sales, and still held by the state. . . ."

III.

ONLY THOSE LANDS OWNED BY THE STATE OF MICHIGAN UNDER THE CONTROL AND JURISDICTION OF THE DEPARTMENT OF NATURAL RESOURCES BENEFITED BY THE CONTROL OF LAKE LEVELS ESTABLISHED UNDER 1961 PA 146 MAY BE ASSESSED.

An assessment would be proper as to the State of Michigan only if, among other necessary conditions, the Department of Natural Resources had jurisdiction and control over lands within the special assessment district, the fee title to which was held by the State of Michigan.

Section 9 of the Inland Lake Level Act (CL 281.69) provides:

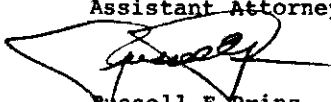
"The department [drain commissioner], when instructed by resolution of the board of supervisors, shall establish a special assessment district including therein all parcels of land and political subdivisions and each parcel of land owned by the department of natural resources which are benefited by the establishment of the lake level. . . ."

The mandate of the legislature is that only lands under the control and jurisdiction of the Department of Natural Resources be included. The inclusion of but one classification of state-owned lands must be construed to exclude consideration and inclusion of any other class of lands owned by the State.

Respectfully submitted,

FRANK J. KELLEY
Attorney General

Jerome Maslowski
Assistant Attorney General



Russell E. Prins
Assistant Attorney General

Environmental Protection and
Natural Resources Division
The Law Building, Room 630
525 West Ottawa Street
Lansing, Michigan 48913

(517) 373-1130

MARCH 29, 1974

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

BOARD OF COMMISSIONERS FOR
MISSAUKEE COUNTY & MISSAUKEE
COUNTY ROAD COMMISSION,

Plaintiffs,

-vs-

File No. C-347

JOHN R. NYLAND, et al,

Defendants.

STATE OF MICHIGAN)
) ss.
COUNTY OF INGHAM)

PROOF OF SERVICE

DELORES EVANS, being duly sworn, deposes and says that on March 29, 1974, she served a copy of MEMORANDUM OF LAW upon CHESTER C. PIERCE, attorney for plaintiffs, KENNETH E. THOMPSON, attorney for defendant Nyland, and JAMES C. THOMPSON, attorney for defendants, by depositing the same in the United States Post Office in the City of Lansing, Michigan, enclosed in envelopes bearing postage fully prepaid, and plainly addressed to the aforesaid attorneys as follows:

Mr. Chester C. Pierce
3130 Casmere
Hamtramck, MI 48212

Mr. Kenneth E. Thompson
308 E. Front Street
Traverse City, Michigan 49684

Mr. James C. Thompson
Kilmer Building
Reed City, Michigan 49677

DELORES EVANS

Subscribed and sworn to before
me this 29th day of March, 1974.

Mary T. Castanier
Mary T. Castanier, Notary Public
Ingham County, Michigan
My Commission Expires November 5, 1977

FILED 4-1-74
Debra Lee
CLERK, CIRCUIT COURT
28th JUDICIAL DISTRICT
MISSAUKEE COUNTY, MICHIGAN

South Missaukee Association
Lake City, Michigan 49651
March 12, 1974

The Honorable William R. Peterson
Judge of Circuit Court
County Court House
Cadillac, Michigan 49601

0-347

Re: Hearing pertaining to the water level
and assessment district for Lake Missaukee
on April 4, 1974.

Dear Sir:

The undersigned represents 135 property owners with permanent and seasonal dwellings located on the south shore area of Lake Missaukee. It is our desire that the proper Missaukee County authorities be given permission to use the recently installed lake outlet system as a controlling device, to control the lake level at the optimum levels, causing the lake to best serve all the lake area residents.

If the lake level is maintained at a maximum of 1238 feet above mean sea level during the wet seasons, the lake level will recede to level's considerably below the 1238 foot level during dry seasons. Based on past experiences, the level during dry seasons caused mud flats and sand bars to be exposed on beaches and in the lake area, damaging the lake's use for bathing, boating and its beauty and no doubt effects its fish life.

We are therefore asking that the proper Missaukee County Department be authorized by court order, on April 4, 1974 or as soon thereafter as counsel can be heard, to control the lake at a level higher than 1238 feet above mean sea level, during wet seasons, permitting the lake to use this reservoir effect, to reduce the damaging effects that would otherwise occur during the dry seasons. We recommend that the lake level be maintained at a maximum of 1238.5 feet above mean sea level during these wet seasons.

We thank you for your considerations.

Very truly yours,

William J. Henry
William J. Henry, President of South Missaukee Association

c.c. Mr. Chester C. Pierce, Attorney
Missaukee County Board of Commissioners
Missaukee County Road Commission
Mr. Cook, Department of Natural Resources

FILED
12/11/74
CLERK, CIRCUIT COURT
2nd JUDICIAL DISTRICT
MISSAUKIE COUNTY, MICHIGAN

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

BOARD OF COMMISSIONERS FOR
MISSAUKEE COUNTY & MISSAUKEE
COUNTY ROAD COMMISSION,

Plaintiffs,

-vs-

File No. C-347

JOHN R. NYLAND, et al,

Defendants.

Russell E Prins (P 19110)
Assistant Attorney General

Attorney for Department of
Natural Resources and the
Department of State Highways
and Transportation

Environmental Protection and
Natural Resources Division
The Law Building, Room 630
525 West Ottawa Street
Lansing, Michigan 48913

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3130 Casmere
Hamtramck, Michigan 48212

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Attorney for defendant Nyland

308 E. Front Street
Traverse City, Michigan 49684

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POST TRIAL BRIEF FOR STATE OF MICHIGAN
DEPARTMENT OF NATURAL RESOURCES, AND THE
DEPARTMENT OF STATE HIGHWAYS AND TRANSPORTATION

FILED

4/12/74
CLERK, CIRCUIT COURT
20th JUDICIAL DISTRICT
MISSAUKEE COUNTY, MICHIGAN

FRANK J. KELLEY
Attorney General

Jerome Maslowski
Assistant Attorney General

Attorneys for Department of
Natural Resources and the
Department of State Highways
and Transportation

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

BOARD OF COMMISSIONERS
FOR MISSAUKEE COUNTY and
MISSAUKEE COUNTY ROAD
COMMISSION,

Plaintiffs,

-vs-

File No. C 347

JOHN R. NYLAND and DOROTHY
A. NYLAND, his wife; and
HARLD JACKSON and GLADYS
JACKSON, his wife; on their
own behalf and on behalf of
others similarly situated as
a class,

Defendants.

POST TRIAL BRIEF FOR STATE OF MICHIGAN,
DEPARTMENT OF NATURAL RESOURCES, AND THE
DEPARTMENT OF STATE HIGHWAYS AND TRANSPORTATION

QUESTION PRESENTED

HAS THE PLAINTIFF, COUNTY OF MISSAUKEE, BY
TESTIMONY OFFERED ON ITS BEHALF AT A HEAR-
ING HELD IN THE ABOVE CAUSE, ESTABLISHED A
LAWFUL BASIS FOR THE ENTRY OF AN ORDER OF
THIS COURT CONFIRMING THE SPECIAL ASSESS-
MENT DISTRICT BOUNDARIES PROPOSED BY THE
PLAINTIFF COUNTY?

The State of Michigan, Department of
Natural Resources and the Department
of State Highways and Transportation
contend the answer is: "NO."

FILED

4/12/74

CLERK, CIRCUIT COURT
28th JUDICIAL DISTRICT
MISSAUKEE COUNTY, MICHIGAN

ARGUMENT

I.

A SPECIAL ASSESSMENT DISTRICT ESTABLISHED IN PURSUANCE OF 1961 PA 146, AS AMENDED, CL 281.61 ET SEQ; MSA 11.300(1) ET SEQ (INLAND LAKE LEVEL ACT), CAN LAWFULLY INCLUDE WITHIN ITS CONFIRMED BOUNDARIES ONLY THOSE PARCELS OF LAND SPECIALLY BENEFITED BY IMPROVEMENT UNDERTAKEN OR TO BE UNDERTAKEN UNDER AUTHORITY GRANTED BY THE ACT.

Section 5 of the Inland Lake Level Act [CL 281.65; MSA 11.300(5)] authorizes the board of commissioners of any county, which undertakes to construct and maintain facilities controlling the level of an inland lake within the county's jurisdiction, to determine whether the same shall be financed by means of a general tax or special assessment or both.

Should the board of commissioners determine that the costs of such lake control facilities be defrayed by special assessments, the board must direct the county drain commissioner to establish a special assessment district, the boundaries of which are subject to confirmation by the Circuit Court [Sections 5 and 10 of the Inland Lake Level Act, CL 281.65 and 281.70; MSA 11.300(5) and 11.300(10)].

In establishing a special assessment district and inferentially in suggesting boundaries for judicial confirmation, the drain commissioner may lawfully include within the boundaries of the suggested district only those parcels of land and those political subdivisions specially benefited by the public improvement [Section 9 of the Inland Lake Level Act, CL 281.69; MSA 11.300(9)].

To quote from Section 9 of the Inland Lake Level Act,
CL 281.69; MSA 11.300(9):

"The department [i.e., drain commissioner], when instructed by resolution of the board of [commissioners], shall establish a special assessment district including therein all parcels of land and political subdivisions and each parcel of land owned by the department of natural resources which are benefited by the establishment of a lake level. . . ."

The cited provisions of the Inland Lake Level Act, we submit, authorize the establishment of special assessment districts solely on the basis of benefits accruing to land and on no other basis.

II.

THE VALIDITY OF A SPECIAL ASSESSMENT DISTRICT ESTABLISHED UNDER THE INLAND LAKE LEVEL ACT CAN BE LAWFULLY AND CONSTITUTIONALLY SUSTAINED ONLY ON THE BASIS OF A FACTUAL DEMONSTRATION THAT EACH PARCEL INCLUDED WITHIN THE DISTRICT RECEIVES A SPECIAL BENEFIT, I.E., A BENEFIT ACCRUING TO THE PARCELS INCLUDED IN THE DISTRICT NOT ACCRUING TO AND DIFFERING FROM THAT THE GENERAL PUBLIC ENJOYS.

As stated in Fluckey v City of Plymouth, 358 Mich 447, 453-454 (1960):

". . . [T]he theory of the special assessment is that a special benefit has been conferred, over and above that conferred upon the community itself. Cooley's exposition of the problem makes clear the theory of the special assessment:

"The general levy of taxes is understood to exact contributions in return for the general benefits of government, and it promises nothing to the persons taxed, beyond what may be anticipated from an administration of the laws for

individual protection and the general public good. Special assessments, on the other hand, are made upon the assumption that a portion of the community is to be specially and peculiarly benefited, in the enhancement of the value of property peculiarly situated as regards a contemplated expenditure of public funds; and, in addition to the general levy, they demand that special contributions, in consideration of the special benefit, shall be made by the persons receiving it. The justice of demanding the special contribution is supposed to be evident in the fact that the persons who are to make it, while they are made to bear the cost of a public work, are at the same time to suffer no pecuniary loss thereby; their property being increased in value by the expenditure to an amount at least equal to the sum they are required to pay.'"

[Quoting from 2 Cooley, Taxation (3d ed), pp 1153, 1154; citing also City of Detroit v Weil, 180 Mich 593; Powers v City of Grand Rapids, 98 Mich 393; Long v City of Monroe, 265 Mich 425, 430 (dissenting opinion); and New York Central R Co v City of Detroit, 354 Mich 637.]

In the absence of any benefit or enhancement of the value of property within a special assessment district, the inclusion of such property may well constitute a fraud upon the individual landowner. Fluckey v City of Plymouth, *supra*, p 454.

To quote from several decisions of the Michigan Supreme Court:

"It has been often held that the sole ground for imposing a part or all of the cost of a public improvement upon one part of a municipality is that the part burdened with the cost receives corresponding benefits, which the general public does not receive." [German Lutheran Church Society v City of Mt. Clemens, 179 Mich 35, 40 (1914), citing with approval City of Detroit v Judge of Recorder's Court, 112 Mich 588, and cases therein cited.]

". . . To be valid, it [the assessment] must be based upon actual or probable benefits. In Thomas v. Gain, 35 Mich. 155 (24 Am Rep. 535), it was said:

"The principle upon which alone special assessments can be sustained, is that those who enjoy the benefits shall equally bear the burden."

[Hatch v Michigan Central Railroad Company, 238 Mich 381, 385 (1927)]

". . . But it is without authority of law, and special taxation and not assessment for benefits, to compel them to pay now toward the widening if of no benefit to their properties.

"We need but say that all law limits special assessments to benefits, and no action can be legally taken otherwise. Property is accorded that much protection by the Constitution of the State.

"Defendant city stands upon the presumption of good faith, lawful action, and considerate creation of the assessment districts. Such presumption cannot withstand established facts to the contrary. Not that the honesty of any official is impugned, for such is not asserted, but it is asserted and established that unlawful districts were arbitrarily and capriciously fixed without benefits in fact, and such constitutes an unlawful levy in the eye of the law."

[Dix-Ferndale Taxpayers' Association v City of Detroit, 258 Mich 390, 395 (1932); emphasis added]

Neither in the instant case do we impugn the honesty or good faith of the public officers who have advanced a proposal to establish a special assessment district including all land in the surface water basin above Lake Missaukee. Rather, we assert, that these officers have erroneously concluded that they may advance such a proposal absent any showing of special benefits, proceeding rather upon a "contributory" theory.

At the hearing held in the instant case, plaintiffs neither made nor attempted to make any showing that any special benefit, distinct from that enjoyed by the public at large, would be received by parcels of land within the basin other than those lots littoral to Lake Missaukee. The sole benefit to which testimony alluded was public health. It goes without saying that such benefits accrue to the public at large and not specially to all parcels within the basin. The testimony of plaintiffs in no wise justifies an exaction of assessments from owners of lands within the basin other than from those littoral owners whose property is affected by the high-waters of Lake Missaukee.

III.

NO PARCEL OF LAND CAN BE INCLUDED WITHIN A SPECIAL ASSESSMENT DISTRICT ESTABLISHED UNDER THE INLAND LAKE LEVEL ACT [1961 PA 146, AS AMENDED, CL 281.61 ET SEQ; MSA 11.300(1) ET SEQ] SOLELY UPON THE BASIS THAT IT IS WITHIN THE SURFACE WATER BASIN SITUATE ABOVE AND CONTRIBUTING WATERS TO A LAKE, THE LEVELS OF WHICH THE COUNTY SEEKS TO CONTROL.

As we have previously stated and argued, the sole basis upon which lands may be included in a special assessment district established under the Inland Lake Level Act, is that the parcel included is benefited or enhanced in value by the improvements made or to be made. No such demonstration has been made.

The plaintiffs advance the theory that surface water run-off from lands lying within the surface water basin above Lake Missaukee contribute to the "problem" and hence the owners of such land should be assessed.

Such theory is not only contrary to the only justifiable basis for assessing special benefits, but also is in contradiction of the common law.

"The law is well settled in this State and elsewhere that the natural flowage of surface water from an upper estate is a servitude which the owner of the lower estate must bear, and he cannot hold it back by dikes or dam its natural channels of drainage to the injury of the owner of the upper estate."

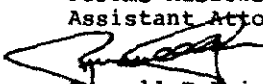
[Robinson v Belanger, 332 Mich 657, 662 (1952), quoting with approval, Crane v Valley Land Co, 203 Mich 353, 359]

CONCLUSION

WHEREFORE, the State of Michigan, Department of Natural Resources and the Department of State Highways and Transportation contend that the plaintiffs have failed to establish any basis in law or in fact permitting this Court to enter any Order confirming the boundaries of the proposed special assessment district, and therefore PRAY that this Court enter an ORDER DENYING plaintiffs' prayer for CONFIRMATION with LEAVE given to re-determine and re-submit a new proposal conforming to the requirements of law.

FRANK J. KELLEY
Attorney General

Jerome Maslowski
Assistant Attorney General



Russell E Prins
Assistant Attorney General

Attorneys for Department of
Natural Resources and the
Department of State Highways
and Transportation

The Law Building, Room 630
525 West Ottawa Street
Lansing, Michigan 48913

April 11, 1974

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

BOARD OF COMMISSIONERS FOR
MISSAUKEE COUNTY & MISSAUKEE
COUNTY ROAD COMMISSION,

Plaintiffs,

-vs-

File No. C-347

JOHN R. NYLAND, et al,

Defendants.

STATE OF MICHIGAN)
) ss.
COUNTY OF INGHAM)

PROOF OF SERVICE

DELORES EVANS, being duly sworn, deposes and says that on April 11, 1974, she served a copy of POST TRIAL BRIEF FOR STATE OF MICHIGAN, DEPARTMENT OF NATURAL RESOURCES AND THE DEPARTMENT OF STATE HIGHWAYS AND TRANSPORTATION upon CHESTER C. PIERCE, attorney for plaintiffs, KENNETH E. THOMPSON, attorney for defendant Nyland, and JAMES C. THOMPSON, attorney for defendants, by depositing the same in the United States Post Office in the City of Lansing, Michigan, enclosed in envelopes bearing postage fully prepaid, and plainly addressed to the aforesaid attorneys as follows:

Mr. Chester C. Pierce
3130 Casmere
Hamtramck, MI 48212

Mr. Kenneth E. Thompson
308 E. Front Street
Traverse City, Michigan 49684

Mr. James C. Thompson
Kilmer Building
Reed City, Michigan 49677

Delores Evans
DELORES EVANS

Subscribed and sworn to before
me this 11th day of April, 1974.

Mary T. Castanier
Mary T. Castanier, Notary Public
Ingham County, Michigan
My Commission Expires November 5, 1977

FILED

4/12/74

CLERK, CIRCUIT COURT
20th JUDICIAL DISTRICT
MISSAUKEE COUNTY, MICHIGAN

April 1, 1974

To: Honorable William P. Peterson

Subject: Hearing on Petition: To
Confirm the Normal Height
and Level of Water in Lake
Missaukee in the City of
Lake City" (April 4, 1974).

C-347

Dear Judge Peterson,

I am against being assessed
for this level control project
for the purpose of maintaining
level of water in Lake Missaukee.

Property Owner of Lot 3
on ~~Dyers~~ Dyer Lake

Charles B. Mangiaracina

FILED

4-4-74
~~Kenneth Lee~~
CLERK, CIRCUIT COURT
28th JUDICIAL DISTRICT
MISSAUKEE COUNTY, MICHIGAN

MILLER, CANFIELD, PADDOCK AND STONE, 1500 DETROIT BANK & TRUST BUILDING, DETROIT, MICHIGAN 48226

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

BOARD OF COMMISSIONERS FOR :
MISSAUKEE COUNTY and :
MISSAUKEE COUNTY ROAD :
COMMISSION, :

Plaintiffs, :
:

No. C 347

- vs -

JOHN R. NYLAND and DOROTHY A. :
NYLAND, his wife; and HAROLD :
JACKSON and GLADYS JACKSON, :
his wife; on their own behalf and on :
behalf of others similarly situated as :
a class, :

Defendants. :

FILED 4-24-74
Charles L. Burleigh
CLERK, CIRCUIT COURT
28th JUDICIAL DISTRICT
MISSAUKEE COUNTY, MICHIGAN

POST TRIAL BRIEF FOR BOARD OF COMMISSIONERS
FOR MISSAUKEE COUNTY AND MISSAUKEE COUNTY
ROAD COMMISSION

CHESTER C. PIERCE (P18896)
Attorney for Board of Commissioners
for Missaukee County and Missaukee
County Road Commission

MILLER, CANFIELD, PADDOCK AND STONE
BY: CHARLES L. BURLEIGH, JR. (P11423)
Of Counsel

Copy made to jury petition
5-2-74

INTRODUCTION

In his Post Trial Brief for the Department of Natural Resources and the Department of State Highways and Transportation, the Attorney General takes the position that the Board of Commissioners for Missaukee County and the Missaukee County Road Commission have failed to offer testimony in this cause sufficient to support an Order of this Court confirming the proposed special assessment district boundaries. The Attorney General claims that these boundaries, which include the land area in the surface water basin above Lake Missaukee, may be attacked on the basis of the following argument:

1. A special assessment district established under 1961 PA 146, as amended, (the Inland Lake Level Act), it is said, can only include land "specially benefitted" by the improvement for which the assessment is levied.
2. An outlet for the passage of surface and drain waters which flow from land, it is claimed, is not a "special benefit" in this sense.
3. No benefit which accrues to the public at large, as distinct from the owners of particular lands, can be a "special benefit" sufficient to support assessment.

This argument is defective in each of its parts, as the following authorities will demonstrate.

ARGUMENT

In Section I of his argument, the Attorney General states, "In establishing a special assessment district and inferentially in suggesting boundaries for judicial confirmation [under the Inland Lake Level Act], the drain commissioner may lawfully include within the boundaries of the suggested district only those portions of land and those political subdivisions specially benefited by the public improvement" (emphasis supplied). From this it appears that the Attorney General has undertaken to amend the statute. The language of Section 9 of the Act, CL 281.69; MSA 11.300(9), which the Attorney General quotes to support his position, does not contain the qualifying adverb "specially":

"The department [i. e., drain commissioner], when instructed by resolution of the board of [commissioners], shall establish a special assessment district including therein all parcels of land and political subdivisions and each parcel of land owned by the department of natural resources which are benefited by the establishment of a lake level. . . ."
(Emphasis supplied.)

The language "specially and peculiarly benefitted" does occur in one case quoted by the Attorney General, Fluckey v City of Plymouth, 358 Mich 447 (1960), a case involving paving assessments. Because the Fluckey opinion, in turn, had quoted this language from Cooley on Taxation, it is worth noting that in Thomas v Gain, 35 Mich 155 (1876), another case quoted by the Attorney General, Justice Cooley said:

"The only discretion which the act in question allows to the common council as an assessing board is in determining what lots and lands are benefited by the improvement. . . . It is not required that the lands shall lie contiguous to each other, or that the benefits to be taken into the account shall be only the direct benefits to the land. . . ."
At 161-62 of the opinion.

The same principle was stated in the case of City of Fort Meyers v State of Florida, 95 Fla. 704 (1928), which in construing early Michigan cases held;

" . . . Assessments for the cost of a paving program can be justified only on the basis of special and positive benefits accruing to the lands improved, while assessments for the cost of a storm sewer program may be justified on the basis of direct, indirect, or incidental benefits. The test being whether or not lots and lands remote from the storm sewer are connected with or will drain into it. Thomas v Gain, 35 Mich. 156; Auditor General v O'Neill, 143 Mich. 343, 106 N. W. Rep. 895; Meggott v City of Eau Claire, 81 Wis. 326, 51 N. W. Rep. 566. . . . "

At 720-21 of the opinion.

On the basis of these authorities it seems clear that what the Attorney General attempts to disparage as a "contributory theory" may indeed be used to identify benefits which will support the establishment of a special assessment district and the levy of special assessments.

It is also clear that the Attorney General has missed the mark when he suggests that benefits to the public health, because they accrue to the public at large, can not be used to support special assessments. The Attorney General concedes the presence in the record of this cause of testimony relating to the public health. Bruce W. Reynolds in fact testified that the provision of an outlet to control the level of Lake Missaukee was necessary in order to prevent serious public health problems and hazards. Such problems and hazards are by no means foreign to the Inland Lake Level Act. The title of the Act declares that it is "AN ACT to provide for the determination and maintenance of the normal height and level of the waters in inland lakes of this state, for the protection of the public health, safety and welfare" Moreover, Section 3 of the Act, CL 281.63; MSA 11.300(3) provides that a determination of normal lake level and the construction of dams and ditches may be undertaken "for the protection of the public health, welfare and safety. . . ."

The modifier "specially," it must be insisted, does not have the status in authority which the Attorney General would give it.

More importantly, neither the word "specially" nor the statute itself excludes the possibility that provision of an outlet for the passage of surface and drain waters may constitute a benefit to the lands from which such waters flow. Michigan case authorities, in fact, are squarely to the contrary.

In the case of Hynes v Barrett, 188 Mich 154 (1915), the question of benefits to an upstream landowner from the construction of a downstream outlet was squarely presented. There, the plaintiff's lands were served by a drain which had been in existence for over 20 years, known as the Weeks Drain. The outlet of the Weeks Drain was located near, but not in, a creek known as Swan Creek, and it was determined that proper disposition of the waters from the Weeks Drain required both an extension to Swan Creek and the widening and deepening of the Creek. The plaintiff had claimed that his land could not be benefited by the work on Swan Creek because "it and the surrounding land have an altitude much higher than that of the land in which the creek runs, an altitude which secures, naturally, the drainage of the said land, which natural drainage is a matter of right." At 160-61 of the opinion. To this, the Court responded:

"The bill cannot be read in such a way as to sustain complainant's theory. It must be assumed that his lands are benefited by the Weeks drain; that the Weeks drain needs a new outlet; that the new outlet should be in Swan creek. It may be assumed that, if the outlet is established, Swan creek, in its present state, although a water course, cannot receive the water. Therefore it must be enlarged. In this way a connection is established between a benefit to complainant's land and the enlargement of Swan creek. . . ." At 161 of the opinion; emphasis supplied.

It would be completely nonsensical if lake level control projects could be built to benefit the public health but no assessments could be levied based on these benefits.

A similar point was decided in the case of Hinkley v Bishopp, 152 Mich 256 (1908), where plaintiffs claimed that their lands were assessed for a drain on the basis of an improper theory. Speaking at 264 of the opinion, the Court said:

" . . . There are other benefits beside the mere reclamation of land, especially the influence of the drain upon the health of the locality, and it does not follow from the fact that a parcel of land has no standing water upon it that a drain will not benefit it, or that the commissioner, if he assess it, does not assess it upon the basis of benefits as required by section 4350. . . ."

Benefits to the public health, in other words, provide a reasonable and proper ground for making assessments.

CONCLUSION

On the basis of the foregoing authorities, the Board of Commissioners for Missaukee County and the Missaukee County Road Commission respectfully submit that they have fully established a sound basis permitting this Honorable Court to enter its Order confirming the boundaries of the proposed special assessment district to include all lands lying in the surface water basin above Lake Missaukee.

Respectfully submitted,



Chester C. Pierce

Attorney for the Board of Commissioners
for Missaukee County and Missaukee County
Road Commission
3130 Casmere
Hamtramck, Michigan 48212

Miller, Canfield, Paddock and Stone

By 
Charles L. Burleigh, Jr.
Of Counsel

2500 Detroit Bank & Trust Bldg.
Detroit, Michigan 48226

THE CIRCUIT COURT
TWENTY-EIGHTH JUDICIAL CIRCUIT

STATE OF



MICHIGAN

COUNTIES OF BENZIE, MISSAUKEE AND WEXFORD

May 9, 1974

WILLIAM R. PETERSON
CIRCUIT JUDGE
CADILLAC, MICHIGAN 49601

Mr. Don Molitor
Missaukee County Clerk
Courthouse
Lake City, Michigan 49651

Re: Board of Commissioners v Nyland, et al
Missaukee #C-347

Dear Don:

Enclosed please find a letter from Mr. Eugene
Schafranek, which I would like filed in the above matter.

Very truly yours,

Diana N. Ransom

(Mrs.) Diana N. Ransom,
Administrative Secretary

Enclosure

FILED

5/10/74
CLERK, CIRCUIT COURT
28th JUDICIAL DISTRICT
MISSAUKEE COUNTY, MICHIGAN

Dear Judge Peterson

My wife and I recieved a notification of the hearing in your court room regarding the Lake Missaukee level control but could not attend the hearing. We have since read a newspaper account of the hearing and would like to communicate our thoughts on the subject to you in this letter.

We have owned a cottage on Lake Missaukee for 4 years. Our first year on the lake the water level was high and we enjoyed excellent fishing and fair swimming in nearby waters. That same year a friend at work mentioned to me that his father in law had a cottage on adjacent Saphire Lake and that he was helping him build a sea wall to protect his beach and property from high water levels on that lake. When the water level of Lake Missaukee was lowered the next year, my friend at work said his father in law was no longer concerned about the sea wall and relaxed his efforts to build one because the water level on the adjacent lake had been lowered also. I believe this is an indication of how people other than those on Lake Missaukee benefited from the lake level lowering.

We personally have never been bothered by the higher water levels on the lake because our cottage is 12 feet above the lake. As a matter of fact, since the lowering of the lake level, our nearby fishing has deteriorated as has our swimming due to increased weed growth. I strongly urge that the lake level be set as high as possible without causing any grievous flooding problem for those people who have built on lowground. If there

is any safety margin for the controlled water level it should be on the high side since the lake level can be lowered at will but can never be raised. For the last 2 years the lake level near the end of summer has been lower than the control level due to evaporation.

I think it is unfortunate that the natural drainage of the lake was eliminated in the first place and that it was not restored instead of building the expensive level control structure. If property owners are going to have to pay for the level control project, the assessment should be as wide spread as possible to assure that all parties who derive benefit from it or who have contributed to the problem pay a share. This will reduce the individual cost burden which might be too high if too few people are forced to pay.

I hope the level of the lake can be set high enough to insure better fishing and swimming and reduced weed growth in the shallower regions of the lake. People who built cottages or homes on extremely low ground should bear the major responsibility for protecting their property. The level control will provide them with some protection but at the same time it should not penalize those people who exercised good judgement, acted responsibly, and built their cottages and homes on higher ground to allow for water level fluctuations.

Respectfully,

{ Crown Point Sub. }
{ Lake Muskegon }

Eugene Schapranek
17 Maywood
Pleasant Ridge, Michigan
48069

FILED 5-14-74
Thomas M. Miller
CLERK, CIRCUIT COURT
28th JUDICIAL DISTRICT
MISSAUKEE COUNTY, MICHIGAN

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

BOARD OF COMMISSIONERS OF MISSAUKEE COUNTY
& MISSAUKEE COUNTY ROAD COMMISSION,
Plaintiffs,

-vs-

Case No. C-347

JOHN R. NYLAND, ET AL,
Defendants.

O P I N I O N

This is a proceeding for the establishment of lake level under 1961 PA 146 and for the creation of a special assessment district in connection therewith. The lake in question is Lake Missaukee, which has been the subject of a previous proceeding under 1941 PA 319. That proceeding fixed a lake level at 1238.0 feet above sea level.

Testimony in support of the within petition establishes that that figure appears to be the best "normal lake level" within the meaning of the Act and to attain the purposes thereof, but further established that because of the summer evaporation rate, it would be desirable to attempt to retain an additional one-half foot during the season of spring rains and run-off in anticipation of such evaporation. The testimony establishes that the present lake level control facility operates with sufficient efficiency that the retention of such an additional one-half foot can be reasonably managed and without risk of exceeding such amount by virtue of any heavy storm.

An order may accordingly be entered establishing the normal lake level at 1238.0, and authorizing plaintiff-road commission in its management of the outlet control facility to impound an additional one-half foot during the spring period, not to exceed 1238.5 feet above sea level.

The petition also seeks to establish the limits of a special assessment district. Testimony was offered in support of the boundaries proposed by the plaintiffs, which boundaries coincide with the drainage basin

feeding Lake Missaukee.

Objection to the proposed boundaries is made on behalf of the State of Michigan Department of Natural Resources and the Department of State Highways and Transportation, asserting that the areas drained by the natural flow of surface water have a right to cast the waters upon the servient estates below and that there is, therefore, no benefit to the higher land thus drained from the establishment of the lake level. That such right of higher land to natural drainage across lower is not the equivalent of a lack of benefit from the proposed lake level establishment, see Oakland County Drain Commissioner v Royal Oak, 325 Mich 298. While it is true that special assessments generally require some benefit to the land to be assessed other than the general benefit to the community at large, the improvement of the system of drainage itself is sufficient benefit to warrant inclusion of a property within the special assessment district. See Hynes v Barrett, 188 Mich 154.

It is undoubtedly true that there may be particular parcels within the special assessment district having little, if any, benefit, and that the extent of the benefit will vary depending upon location within the boundaries of the special assessment district; nevertheless, the general boundary of the drainage basin reasonably establishes areas benefited and an order may be drawn confirming the special assessment district, accordingly.

Political subdivisions are benefited and will assume 40% of the costs, in amounts varying by agreement.

DATED: May 7, 1974.



WILLIAM R. PETERSON, Circuit Judge

KENNETH E. THOMPSON
BERNARD H. STOVER

THOMPSON & STOVER
ATTORNEYS AT LAW
308 EAST FRONT STREET
TRAVERSE CITY, MICHIGAN 49684

TELEPHONE (616) 945-8630
P. O. BOX 662

May 28, 1974

Hon. William R. Peterson
Circuit Judge
Courthouse
Cadillac, Michigan 49601

and

✓ Clerk of the Court
Missaukee County Circuit
Courthouse
Lake City, Michigan 49651

Re: Board of Commissioners for Missaukee County, et al.
v. John R. Nyland, et al.
Case No. C-347

Dear Sir:

This is to advise that on behalf of my clients, defendant Nyland, et al, the form of judgment proposed by plaintiffs, attached to their notice of May 24, 1974, is in order.

Accordingly, I do not propose to appear at the May 31, 1974 hearing on the same, unless the Court deems it desirable.

Your very truly,


K. E. Thompson

ket:tg

cc: Mr. Chester C. Pierce
Mr. James C. Thompson
Mr. Charles J. Burleigh, Jr.
Mr. John R. Nyland

FILED *May 29-1974*
Richard L. [Signature]
CLERK, CIRCUIT COURT
28th JUDICIAL DISTRICT
MISSAUEE COUNTY, MICHIGAN

Copies to Judge given

copy

LAW OFFICES OF
MILLER, CANFIELD, PADDOCK AND STONE
2500 DETROIT BANK & TRUST BUILDING
DETROIT, MICHIGAN 48226

CLEVELAND THURBER
LAWRENCE S. KING
EMMETT E. ZAGAN
WILLIAM O. BUTLER
JOHN A. GILRAY, JR.
JAMES E. TOSHI
STRATTON S. BROWN
RICHARD S. GUSHÉE
GEORGE E. BUSHNELL, JR.
PETER P. THURBER
LAWRENCE A. KING
ROBERT E. HANNELL
JOSEPH F. WATCOCK, JR.
ALLEN SCHWARTZ
JOHN W. GELDER
GEORGE E. PARKER III
RICHARD A. JONES
STEVEN UZELAC
GILBERT E. GOVE
WOLFGANG HOPPE
ROBERT S. KETCHUM
SAMUEL J. MCNIN III
JOEL L. PIELL
ROBERT E. GILBERT
BRUCE D. BIRGBAUM

DAVID OLMSTEAD
GEORGE T. STEVENSON
JOHN A. THURBER
ANTHONY M. VERNAVA
ORIN D. BRUSTAD
CHARLES L. BURLEIGH, JR.
CARL H. VONENDE
GORDON A. BECKER
DAVID D. JOSWICK
JOHN A. WARRER
GREGORY L. CURTNER
EMMETT E. ZAGAN, JR.
DENNIS R. NEWMAN
KENNETH E. KOPRO
LEONARD D. GIVENS
W. HACK FAISON
CHRISTOPHER J. DUNSHY
MICHAEL D. MULCANY
JAMES W. WILLIAMS
DAVID A. CITRIN
WILSON H. NORTHCROSS, JR.
JOHN P. SHERIDAN
PAUL R. WASSERMAN
THOMAS G. SCHROETER
LARRY MOORE

TELEPHONE (313) 963-6420
CABLE "STEM DETROIT"

SIDNEY T. MILLER (1884-1940)
GEORGE L. CANFIELD (1885-1928)
LEWIS H. PADDOCK (1886-1935)
FERRIS D. STONE (1882-1948)
SIDNEY T. MILLER, JR. (1894-1936)
LOUIS H. FEAD (1877-1943)

BIRMINGHAM OFFICE
318 WAREH BUILDING
BIRMINGHAM, MICHIGAN 48011
(313) 645-5000
(313) 584-6910

May 24, 1974

Clerk of the Court
Circuit Court for the
County of Missaukee
Courthouse
Cadillac, Michigan 49601

Re: Board of Commissioners for Missaukee County, et al.
-vs- John R. Nyland, et al.; File No. C-347

Dear Sir:

Enclosed please find Motion for Entry of Judgment, Judgment
Establishing Level of Lake Missaukee and Approving Special Assessment
District, Notice of Hearing, Praecipe for Motion and Proof of Service
thereon, for filing in the above-referenced matter.

Very truly yours,

Miller, Canfield, Paddock and Stone

By *Charles L. Burleigh, Jr.*
Charles L. Burleigh, Jr.

CLBjr mr
Encs.

cc: Chester C. Pierce, Esq.
James C. Thompson, Esq.
K. E. Thompson, Esq.

*3 Jones Pierce
5-29-74*

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

BOARD OF COMMISSIONERS FOR
MISSAUKEE COUNTY, et al.

vs

Plaintiffs

Civil Action
No. C-347

JOHN R. NYLAND, et al.

Defendants

MOTION FOR ENTRY OF JUDGMENT

JUDGMENT ESTABLISHING LEVEL OF LAKE MISSAUKEE AND
APPROVING SPECIAL ASSESSMENT DISTRICT

NOTICE OF HEARING

PROOF OF SERVICE

Miller, Canfield, Paddock & Stone
1540 DETROIT BANK & TRUST BUILDING
DETROIT, MICHIGAN 48224
TELEPHONE 461-6120

ATTORNEYS FOR Defendants.

FILED 5-29-74
[Signature]
CLERK, CIRCUIT COURT
28th JUDICIAL DISTRICT
MISSAUKEE COUNTY, MICHIGAN

Chester C. Pierce, Esq.
(P-18896)

Charles L. Burleigh, Jr., Esq.
(P-11423)

FILED 5-31-74
[Signature]
CLERK, CIRCUIT COURT
28th JUDICIAL DISTRICT
MISSAUKEE COUNTY, MICHIGAN

*cc. Col. a
1/1*

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

BOARD OF COMMISSIONERS FOR
MISSAUKEE COUNTY, et al.

Plaintiffs

vs

JOHN R. NYLAND, et al.

Defendants

Civil Action
No. C-347

MOTION FOR ENTRY OF JUDGMENT

JUDGMENT ESTABLISHING LEVEL OF LAKE MISSAUKEE AND
APPROVING SPECIAL ASSESSMENT DISTRICT

NOTICE OF HEARING

PROOF OF SERVICE

Miller, Canfield, Paddock & Stone
2340 DETROIT BANK & TRUST BUILDING
DETROIT, MICHIGAN 48226
TELEPHONE 263-6420

ATTORNEYS FOR Defendants.

FILED 5-29-74
[Signature]
CLERK, CIRCUIT COURT
28th JUDICIAL DISTRICT
MISSAUKEE COUNTY, MICHIGAN

Chester C. Pierce, Esq.
(P-18896)

Charles L. Burleigh, Jr., Esq.
(P-11423)

FILED 5-31-74
[Signature]
CLERK, CIRCUIT COURT
28th JUDICIAL DISTRICT
MISSAUKEE COUNTY, MICHIGAN

*cc. action
1 pm*

STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF MISSAUKEE

BOARD OF COMMISSIONERS FOR :
MISSAUKEE COUNTY and MISSAUKEE :
COUNTY ROAD COMMISSION, :

Plaintiffs, :

No. C 347

-vs- :

JOHN R. NYLAND and DOROTHY A. :
NYLAND, his wife; and HAROLD :
JACKSON and GLADYS JACKSON, :
his wife; on their own behalf and on :
behalf of others similarly situated as :
a class, :

Defendants. :

MOTION FOR ENTRY OF JUDGMENT

NOW COMES the Board of Commissioners of Missaukee County and
Missaukee County Road Commission, plaintiffs herein, by Chester C. Pierce,
their attorney, and move this Honorable Court for entry of judgment in this
cause, respectfully representing as follows:

1. This Court's Opinion herein was filed on May 7, 1974.
2. A draft of Judgment implementing said opinion, in substantially
the form attached hereto as Exhibit A, was circulated to opposing counsel for
approval.
3. Such approval has not been forthcoming from opposing counsel.

WHEREFORE, plaintiffs pray that this Court enter Judgment in this
cause in the form herewith submitted as Exhibit A.

FILED 5-31-74
CLERK, CIRCUIT COURT
28th JUDICIAL DISTRICT
MISSAUKEE COUNTY, MICHIGAN

Chester C. Pierce
Chester C. Pierce (P-18896)
Attorney for Plaintiffs
3130 Casmere
Hamtramck, Michigan 48212

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

BOARD OF COMMISSIONERS FOR :
MISSAUKEE COUNTY and MISSAUKEE :
COUNTY ROAD COMMISSION, :

Plaintiffs, :

No. C-347

-VS-

JOHN R. NYLAND and DOROTHY A. :
NYLAND, his wife; and HAROLD :
JACKSON and GLADYS JACKSON, :
his wife; on their own behalf and on :
behalf of others similarly situated as :
a class, :

Defendants. :

NOTICE OF HEARING

TO: James C. Thompson, Esq. K. E. Thompson, Esq.
Kilmer Building 308 E. Front Street
Reed City, MI 49677 Traverse City, MI 49684

PLEASE TAKE NOTICE that the attached Motion for Entry of Judgment on behalf of plaintiffs, Board of Commissioners for Missaukee County and Missaukee County Road Commission, will be brought on for hearing before the Hon. William R. Peterson, Circuit Judge, in the Courthouse, Cadillac, Michigan 49601, on Friday, May 31, 1974, at 1:30 p.m., or as soon thereafter as counsel may be heard.

Miller, Canfield, Paddock and Stone

By Charles L. Burleigh, Jr. (R-11423)
Of Counsel

Dated: May 24, 1974

2500 Detroit Bank & Trust Bldg.
Detroit, Michigan 48226
Telephone: (313) 963-6420

FILED 5-31-74
Heena L...
CLERK, CIRCUIT COURT
28th JUDICIAL DISTRICT
MISSAUKEE COUNTY, MICHIGAN

STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF MISSAUKEE

BOARD OF COMMISSIONERS FOR :
MISSAUKEE COUNTY and MISSAUKEE
COUNTY ROAD COMMISSION, :

Plaintiffs, :

-vs-

JOHN R. NYLAND and DOROTHY A. :
NYLAND, his wife; and HAROLD
JACKSON and GLADYS JACKSON, :
his wife; on their own behalf and on
behalf of others similarly situated as :
a class,

Defendants. :

Case No. C 347

JUDGMENT ESTABLISHING
LEVEL OF LAKE MISSAUKEE
AND APPROVING SPECIAL
ASSESSMENT DISTRICT.

JUDGMENT

At a session of said Court, held in the Court in
the City of Cadillac, Westford County, Michigan,
on the 31st day of May, A. D. 1974.

PRESENT: THE HONORABLE William R. Peterson
Circuit Court Judge

This matter having been set for hearing by service and publication as
required by Act 146 of the Public Acts of 1961, as amended, and

The Court having heretofore been fully advised and informed in the
premises and having rendered its opinion on the matters involved herein, to
which opinion reference is hereby made for more particularity and which shall
be considered a part of this Judgment,

NOW, THEREFORE, in order to protect the public health, safety and
welfare, conserve the natural resources of this state, safeguard and preserve
the property values of properties around Lake Missaukee and improve the

FILED 5-31-74
William R. Peterson
CLERK, CIRCUIT COURT
28th JUDICIAL DISTRICT
MISSAUKEE COUNTY, MICHIGAN

system of drainage to properties in the Lake Missaukee drainage basin, keep and maintain the waters in Lake Missaukee at normal height and level; and provide the maximum benefit to the public, public agencies, and public properties, all in accordance with the statute in such cases made and provided;

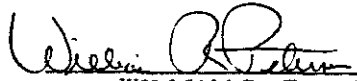
IT IS ORDERED AND ADJUDGED that the normal height and level of Lake Missaukee be, and is hereby, determined and established, to be 1238.0 feet above mean sea level; and

IT IS FURTHER ORDERED AND ADJUDGED that the plaintiff Missaukee County Road Commission, in its management of the outlet control facility constructed to maintain said normal height and level, may impound an additional one-half foot of water during the months of February, March, April and May, provided that the level of Lake Missaukee shall not exceed 1238.5 feet above mean sea level; and

IT IS FURTHER ORDERED AND ADJUDGED, that the special assessment district for Lake Missaukee as set forth in Exhibit A hereto attached, be, and is hereby, approved, to which, however shall be added those particular individual parcels of land or parts of lands owned by public agencies and subdivisions within the general boundaries of the drainage basin as described in plaintiffs' pleadings and proofs, including certain lands in the City of Lake City, the Township of Lake Forest, Caldwell and Reeder in Missaukee County and the Township of Cedar Creek in Wexford County, viz, all lands under the waters of Lake Missaukee, lands of the Michigan Department of Highways lying in and under those portions of highways M-66 and M-55 which are within said drainage basin and all lands of the Michigan Department of Natural Resources within said drainage basin.

FILED _____
CLERK, CIRCUIT COURT
28th JUDICIAL DISTRICT
MISSAUCKEE COUNTY, MICHIGAN

IT IS FURTHER ORDERED AND ADJUDGED that, in addition to benefits to the Michigan Department of Highways and Michigan Department of Natural Resources, political subdivisions are benefited by the lake level control project and will assume not less than 40% of the costs.



WILLIAM R. PETERSON
Circuit Judge

Dated: *May 31, 1974*

MILLER, CANFIELD, PADDOCK AND STONE, 2500 DETROIT BANK & TRUST BUILDING, DETROIT, MICHIGAN 48226

FILED _____

CLERK, CIRCUIT COURT
28th JUDICIAL DISTRICT
MISSAUKEE COUNTY, MICHIGAN

STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF MISSAUKEE

BOARD OF COMMISSIONERS FOR :
MISSAUKEE COUNTY and MISSAUKEE :
COUNTY ROAD COMMISSION, :

Plaintiffs, :

No. C-347

-vs- :

JOHN R. NYLAND and DORATHY A. :
NYLAND, his wife; and HAROLD :
JACKSON and GLADYS JACKSON, :
his wife; on their own behalf and on :
behalf of others similarly situated as :
a class, :

Defendants. :

PROOF OF SERVICE

State of Michigan)
: ss.
County of Wayne)

CHARLES L. BURLEIGH, JR., being first duly sworn, deposes and says that he is associated with the firm of Miller, Canfield, Paddock and Stone, and that he did on the 24th day of May, A. D. 1974, serve copies of Motion for Entry of Judgment, Judgment Establishing Level of Lake Missaukee and Approving Special Assessment District, and Notice of Hearing thereon, upon the following:

James C. Thompson, Esq.
Kilmer Building
Reed City, MI 49677

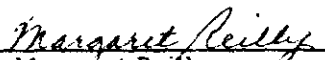
K. E. Thompson, Esq.
308 E. Front Street
Traverse City, MI 49684

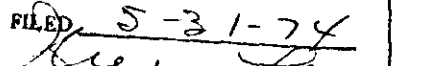
by mailing copies thereof in sealed envelopes plainly addressed to them as above, with postage thereon fully prepaid, and depositing said sealed envelopes in the United States mail depository located on the first floor of The Detroit Bank & Trust Building, Detroit, Michigan.

Further deponent saith not.


Charles L. Burleigh, Jr.

Subscribed and sworn to before me this
24th day of May, A. D. 1974.


Margaret Reilly
Notary Public, Wayne County, Michigan
My commission expires: 1/15/77

FILED 5-31-74

CLERK, CIRCUIT COURT
28th JUDICIAL DISTRICT
MISSAUKEE COUNTY, MICHIGAN

**STATE OF MICHIGAN
IN THE COURT OF APPEALS**

**BOARD OF COMMISSIONERS FOR MISSAUKEE
COUNTY and MISSAUKEE COUNTY ROAD
COMMISSION,**

vs

Plaintiffs - Appellants,

Docket No. _____

**JOHN R. NYLAND and DOROTHY A. NYLAND,
his wife, and HAROLD JACKSON and GLADYS
JACKSON, his wife; on their own behalf and on
behalf of others similarly situated as a class,**

**Missaukee Circuit
Court No. C-347**

Defendants - Appellees.

BRIEF OF APPELLANTS

**CHESTER C. PIERCE
3130 Cassmere
Hamtramck, Michigan 48212**

Miller, Canfield, Paddock & Stone

1140 DETROIT BANK & TRUST BUILDING

DETROIT, MICHIGAN 48226

TELEPHONE 912-4420

OF COUNSEL

ATTORNEYS FOR Plaintiffs - Appellants

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Statutory Authority (cont'd.)

Compilations

M. C. L. A. § 281.61 et seq.; M. S. A. § 11.300 (1) et seq.

9, 11, 22, 23

MILLER, CAMFIELD, PADDOCK AND STONE, 2800 DETROIT BANK & TRUST BUILDING, DETROIT, MICHIGAN 48226

QUESTION PRESENTED:

Were the Board of Commissioners for Missaukee County and the Missaukee County Road Commission precluded from proceeding on their complaint in the court below by reason of the lake level order entered by Judge Lamb in 1942?

The trial court answered "Yes."

Appellants answered "No."

STATE OF MICHIGAN
IN THE COURT OF APPEALS

BOARD OF COMMISSIONERS FOR MISSAUKEE :
COUNTY and MISSAUKEE COUNTY ROAD
COMMISSION, :

Court of Appeals
Docket No. _____

Plaintiffs-Appellants, :

-vs-

Missaukee Circuit
Court No. C-347

JOHN R. NYLAND and DOROTHY A. NYLAND, :
his wife, and HAROLD JACKSON and GLADYS
JACKSON, his wife; on their own behalf and on :
behalf of others similarly situated as a class, :

Defendants-Appellees. .

BRIEF OF APPELLANTS

STATEMENT OF FACTS

Lake Missaukee, the subject of the action from which this appeal is taken, is a natural inland public lake located wholly in Missaukee County, Michigan (R 1, 27, 434, 45, 47). It is not controverted that in 1942 the level of Lake Missaukee was low, and that this situation led to the institution of proceedings by the Missaukee County Prosecuting Attorney, as directed by resolution of the Missaukee County Board of Supervisors, to establish a normal level for Lake Missaukee (R 51, 71, 73). These proceedings culminated on April 16, 1942 when the Honorable Fred S. Lamb of the Missaukee County Circuit Court entered an order whereby the normal level of Lake Missaukee was established at an elevation of 1,238.0 feet U.S.G.S. (R 51).

Act 194 of Public Acts, 1939, the statute under which the April 16,

1942 order was entered, provided the following procedure for lake level determination:

"Sec. 3. Whenever in the judgment of the board of supervisors of any county, or in the judgment of the conservation commission, or in the judgment of such board of supervisors and the conservation commission, acting jointly, it shall be deemed expedient to have determined and established the normal height and level of the waters in any inland lake situated in said county for the purpose of promoting the public health, welfare or safety and the conservation of the natural resources of this state, such determination shall be arrived at in the following manner: In the event the board of supervisors takes action alone under the provisions of this act, such board shall by resolution, duly adopted, determine the expediency at any regular or special meeting thereof and shall direct the prosecuting attorney of the county to institute by proper petition in the circuit court of said county a proceeding for such determination. Such prosecuting attorney shall thereupon prepare and file in said court a petition on behalf of the board of supervisors of said county, addressed to said court, in which said petition shall be set forth the description of the lake and the reasons why the normal height and level of the waters thereof should be determined and established: Provided, That when the waters of any inland lake are situated in 2 or more counties, the normal height and level of the waters of such lake may be determined in the same manner and with the same effect as the waters of any lake lying wholly within 1 county, if the several boards of supervisors of all the said counties determine such expedient and by resolution direct the prosecuting attorney of any one or more of said counties to institute such proceedings for such determination.

"If the conservation commission shall by resolution deem it expedient to have the normal height and level of any such inland lake determined, whether wholly situated in 1 county or situated in 2 or more counties, such commission shall authorize the director thereof to institute by proper petition on behalf of the state, in the circuit court of any county in which the whole or any part of said lake shall be situated, a proceeding for such determination. Said petition shall contain the allegations and the reasons therefor as hereinabove set forth. The conservation commission may likewise join with the board or boards of supervisors of any counties of the state in instituting proceedings as herein set forth for such determination.

"Upon receipt of any such petition, the court shall fix a day of hearing, shall direct the prosecuting attorney and/or the conservation commission, or both, in the event of joint action, to give notice thereof by publication in one or more newspapers of general circulation in said county, and in the

event the waters of such inland lake are situated in 2 or more counties, in one or more newspapers in general circulation in each of the counties in which said lake or any part thereof is situated. Said notice shall be published at least once each week for 6 successive weeks prior to the date fixed for such hearing. Said court shall also direct that copies of the published notice of hearing shall be served by registered mail upon all the owners of record of lands abutting or touching on said lake, said notices to be mailed at least 3 weeks prior to the date set for hearing.

"On the day of hearing, the court shall proceed to hear the allegations and proof with respect to the matters set forth in said petition and shall, by order entered in the records of said court, fix and determine the normal height and level of such waters. A certified copy of such order, when final, shall be filed in the office of the register of deeds of every county in which said lake or portion thereof is situated. Such order shall be final as to the facts, but any interested party claiming to be aggrieved thereby may make application to the supreme court of the state for a writ of certiorari to review such proceeding. The board of supervisors and/or the conservation commission, in the preparation and presentation of the allegations and proofs in support of such petitions, may require the assistance of the drain commissioner of the county or counties affected thereby with respect to the facts, conditions and methods necessary to the proper accomplishment of the purposes of this act." (emphasis supplied)

At the time of the 1942 proceeding, Act 194 contained two provisions relating to payment for the cost of necessary dams and embankments where proceedings under the Act were initiated at the direction of a county board of supervisors. Section 13 of the Act applied in cases where the proceedings involved a public lake:

"Sec. 13. In the event the board or boards of supervisors alone conduct the proceedings hereunder, the expense of determining the normal height and water level of any inland lake, the expense of constructing and maintaining any dam or embankment, as herein provided, together with the cost and expense of acquiring lands and other property by condemnation necessary thereto, shall be assessed, levied and collected upon the taxable real estate of the county, the same as other general taxes are assessed, levied and collected in such county or counties, whenever such inland lake shall be a public lake."

Where private lakes were involved, Section 14 provided as follows:

"Sec. 14. If such inland lake shall not be a public lake, and if the board or boards of supervisors believe that a portion of the area in the vicinity of the proposed improvement will be benefited by such improvement, they shall, by an entry in their minutes, determine that the whole or any just proportion of the compensation awarded by the jury or commissioners, in the event of condemnation proceedings, as hereinabove provided, and the estimated cost of the dam or embankment, shall be assessed upon the owners or occupants of real estate deemed to be thus benefited. Such board or boards may include therein the cost and expense of the condemnation proceedings and the estimated cost of the proceedings for assessments of benefits or such part thereof as they may deem just, and they shall by resolution fix and determine the district or portion of the county benefited and specify the amount to be assessed upon the owners or occupants of the taxable real estate therein. The amount of the benefit thus estimated shall be assessed upon the owner or occupants of such taxable real estate in proportion as nearly as may be to the advantage which such lot, parcel, or subdivision is deemed to acquire by the improvement.

"The assessments shall be made, and the amounts levied and collected in the same manner and by the same officers, and proceedings had, as nearly as may be, as is provided for the assessment, levying and collection of special assessments for public improvements under the provisions of act number 124 of the public acts of 1883, as amended, and as may hereafter be amended, being sections 3800 et seq. of the compiled laws of 1929. The provisions herein contained for the levying and collection of taxes for the purpose of paying for the improvement and its maintenance, shall be applicable only to proceedings commenced under the provisions of this act by the board or boards of supervisors of the respective counties of the state. In the determination of taxes necessary to be raised for the purposes herein contained, such board or boards of supervisors shall make proper allowances for any gifts or grants in aid received and accepted by said county for such purpose."

The Act contained no provision, however, for creation of a special assessment district to defray the cost of improvements necessary to maintain the level of a public lake.

By virtue of the structure of Act 194, it must be assumed that the County at large bore the cost of such measures as were necessary to correct

deficiencies in the level of Lake Missaukee, which led to the 1942 proceedings. It was not until 1952, however, that the lake first rose to a level substantially in excess of 1,238 feet (R 73).

By coincidence, it was in 1952 that the legislature undertook to remedy the unavailability of special assessment proceedings for improvements involving public lakes under Act 194. Act 116 of Public Acts, 1952 amended Section 14 of Act 194 to read as follows:

"Sec. 14. If such inland lake shall not be a public lake, or if the board or boards of supervisors believe that a portion of the area in the vicinity of the proposed improvement will be benefited by such improvement, they shall, by an entry in their minutes, determine that the whole or any just proportion of the compensation awarded by the jury or commissioners, in the event of condemnation proceedings, as hereinabove provided, and the estimated cost of the dam or embankment, shall be assessed upon the owners or occupants of real estate deemed to be thus benefited. Such board or boards may include therein the cost and expense of the condemnation proceedings and the estimated cost of the proceedings for assessments of benefits or such part thereof as they may deem just, and they shall by resolution fix and determine the district or portion of the county benefited and specify the amount to be assessed upon the owners or occupants of the taxable real estate therein. The resolution may also provide for the issuance and sale of special assessment bonds in anticipation of the collection of said special assessment taxes. The amount of the benefit thus estimated shall be assessed upon the owner or occupants of such taxable real estate in proportion as nearly as may be to the advantage which such lot, parcel, or subdivision is deemed to acquire by the improvement.

"All proceedings relating to the making, levying and collection of special assessments herein authorized and the issuance of bonds in anticipation of the collection thereof shall conform as near as may be to the proceedings for levying special assessments and issuing special assessment bonds of villages, as set forth in Act No. 3 of the Public Acts of 1895, as amended, being sections 67.24 to 67.34, inclusive, of the Compiled Laws of 1948. The provisions herein contained for the levying and collection of taxes for the purpose of paying for the improvement and its maintenance, shall be applicable only to proceedings commenced under the provisions of this act by the board or boards of supervisors of the respective counties of the state. In the determination of taxes

necessary to be raised for the purposes herein contained, such board or boards of supervisors shall make proper allowances for any gifts or grants in aid received and accepted by said county for such purpose."

Act 128 of Public Acts, 1952, further amended Act 194 in respect not here material. Act 121 of Public Acts, 1954 again amended Act 194, making changes in the procedure established in Section 3 of this Act. By Act 72 of 1960, Section 14 of Act 194 was given the following form:

"Sec. 14. If such inland lake shall not be a public lake, or if the board or boards of supervisors believe that a portion of the area in the vicinity of the proposed improvement will be benefited by such improvement, by an entry in their minutes they shall determine that the whole or any just proportion of the compensation awarded by the jury or commissioners, in the event of condemnation proceedings, as hereinabove provided, and the estimated cost of the dam or embankment shall be assessed upon the owners or occupants of real estate deemed to be thus benefited. In the event a special assessment district has been created and a dam or embankment constructed, then the board of supervisors, upon petition of at least 55% of the taxable property owners of said district, or by resolution duly adopted, may assess the cost of operation, repair and maintenance of the dam or embankment against or upon the owners or occupants of real estate subject to taxation in the original special assessment district. Such board or boards may include therein the cost and expense of the condemnation proceedings and the estimated cost of the proceedings for assessments of benefits or such part thereof as they may deem just, and they shall by resolution fix and determine the district or portion of the county benefited and specify the amount to be assessed upon the owners or occupants of the taxable real estate therein. The resolution may also provide for the issuance and sale of special assessment bonds in anticipation of the collection of said special assessment taxes. The amount of the benefit thus estimated shall be assessed upon the owner or occupants of such taxable real estate in proportion as nearly as may be to the advantage which such lot, parcel, or subdivision is deemed to acquire by the improvement.

"Enlargement of district.

"As provided in this act whenever costs of operation, repairs or maintenance are to be assessed against an existing special assessment district, the board of supervisors may enlarge the district if a determination is made that additional property owners shall benefit from the work to be done."

"Procedure for levy and collection of special assessments and taxes.

"All proceedings relating to the making, levying and collection of special assessments herein authorized and the issuance of bonds in anticipation of the collection thereof shall conform as near as may be to the proceedings for levying special assessments and issuing special assessment bonds of villages, as set forth in sections 24 to 34 of chapter 7 of Act No. 3 of the Public Acts of 1895, as amended, being sections 67.24 to 67.34 of the Compiled Laws of 1948. The provisions herein contained for the levying and collection of taxes for the purpose of paying for the improvement and its maintenance shall be applicable only to proceedings commenced under the provisions of this act by the board or boards of supervisors of the respective counties of the state. In the determination of taxes necessary to be raised for the purposes herein contained, such board or boards of supervisors shall make proper allowances for any gifts or grants in aid received and accepted by said county for such purpose."

In 1961, Act 194 was repealed and superseded by Act 146 of Public Acts, 1961, known as the Inland Lake Level Act of 1961.

On May 18, 1970, Missaukee Circuit Court action No. C-280 was instituted by Harold Jackson and Gladys Jackson, on their own behalf and on behalf of all others similarly situated, against the Missaukee County Board of Commissioners and the Missaukee County Road Commission. The order in that action signed by Acting Judge Elza H. Papp on June 16, 1970 found that the defendant Boards "have for some time past been aware" of a public health emergency affecting residents of Lake Missaukee as a result of high lake levels (R54). An exhibit to the complaint filed in that action, all allegations of which were expressly found to be true in the June 19, 1970 order, indicates that after a period of consistently high lake levels in 1954, 1955 and 1956 the next time the lake was in excess of its normal level for more than six months occurred in 1968, which was also the first year since 1956 in which the normal level was exceeded by more than half a foot (R54). In order to bring the level of the lake back down to 1,238 feet, Judge Papp's order of June 16, 1970

required the defendant Boards to proceed with construction of a lake level control outlet (R 54-55)

On July 29, 1970, civil action No. C-292 was instituted by Kenneth E. Lutz, Ruth C. Lutz, Roy Winterrowd and Helen Winterrowd on their own behalf and on behalf of all other persons similarly situated against the Missaukee County Board of Commissioners and the Missaukee County Road Commission. This action was consolidated with No. C-280 by Judge Papp's order signed September 1, 1970, which order contained certain provisions in favor of Kenneth and Ruth Lutz in connection with temporary pumping operations employed by the defendants to lower the lake level (R 76). This order also gave tentative approval to an "engineering design plan" submitted to the Court on behalf of the Board of Commissioners and the Road Commission and ordered the two Boards to employ title searchers "to expedite the forming of the special assessment district for the purposes of building a permanent installation which shall set the lake level at approximately 1,238 feet" (R 76).

On March 30, 1971, John R. Nyland and Dorothy A. Nyland, his wife, et al, commenced action No. C-323 against the Missaukee County Board of Commissioners as sole defendant. This action was consolidated with files C-280 and C-292 by force of the Judgment entered by the Honorable William R. Peterson on April 15, 1971 (R 53). By the terms of this Judgment it was determined "that under the provisions of the Lake Level Act and the Order of this court entered on April 16, 1942 pursuant to a petition filed by the Board of Supervisors of the County of Missaukee that it is the clear and mandatory duty of the defendant to maintain the lake level of Lake Missaukee as set forth in said Order" (R 52). The Judgment also ordered the

Board of Commissioners to "forthwith make adequate provisions to maintain the lake level of Lake Missaukee at 1,240 feet" and to "make adequate provisions to reduce the lake level of Missaukee to 1,238 feet" (R 53).

By having come into possession of the consolidated file, Judge Peterson acquired a background in the matters at issue in this case. During argument in the court below, counsel were able to elicit this background simply by referring to the Circuit Court file number (T 3-5). On August 25, 1971, Judge Papp entered a final Order in case No. 280, in which she recited the court's previous order to open an outlet from Lake Missaukee, found that the defendant Boards had complied with the order, and dismissed the action without costs (T 5).

On October 29, 1971, the Missaukee County Board of Commissions and the Missaukee County Road Commission filed their complaint in the action from which this appeal was taken, invoking the provisions of the Inland Lake Level Act of 1961, as amended by Act 175 of Public Acts, 1969, MSA §11.300 (1) et seq., MCLA § 281.61 et seq. and seeking confirmation of the boundaries of a special assessment district to defray the costs of constructing the lake level control outlet (R 1, 27). An Answer was filed on behalf of Norman V. Lincoln, admitting most of the allegations of the Complaint, but claiming that the entire county benefited from the improvements and requesting that the special assessment district include the entire county (R 43-44). A separate answer was filed by John R. Nyland and Dorothy A. Nyland, et al, which took the position that the order entered by Judge Lamb in 1942 fixed the obligation of the county to construct and pay for the lake level control outlet without recourse to special assessment, and raised questions of estoppel by way of affirmative defense (R 46-50). A reply was made to affirmative matters contained in the second answer and the County Board of Commissioners and

County Road Commission moved for summary judgment (R70-74). At the hearing on the motion held on February 10, 1972, Judge Peterson determined to grant summary relief in favor of the defendants, and his order dismissing the County's complaint was entered March 3, 1972. The order of March 3rd holds that the 1942 lake level order was res adjudicata as to the County's claim of right to establish a special assessment district and that the 1942 order established property rights in the riparian owners to have the lake level maintained thereafter at the expense of the County (R 78).

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ARGUMENT

I. THE ACTION TO CONFIRM A SPECIAL ASSESSMENT DISTRICT WAS PROPERLY BROUGHT UNDER THE INLAND LAKE LEVEL ACT OF 1961, AS AMENDED.

There is no suggestion that the County has failed to comply with the requirements of the Inland Lake Level Act of 1961, as amended, in filing this action. Section 3 of the 1961 Act provides that "[t]he board of supervisors of any county in which the whole . . . of the waters of any inland lake is situated may upon its own motion . . . cause to be determined the normal height and level of the waters in the inland lake" This the County Board of Commissioners sought to do by its resolution of October 27, 1971, a copy of which was attached to the County's complaint. Section 5 of the 1961 Act provides that "[w]henver the board of supervisors of any county deems it expedient to have determined and established the normal height and level of the waters in any inland lake . . . the board, by resolution shall determine the expediency of and the method of financing. . ."(emphasis supplied) of projects for maintaining the lake level. This the Board also did by its resolution of October 27, 1971. Likewise, as required by Section 5, the Board directed "the prosecuting attorney of the county to institute by proper petition in the circuit court of the county a proceeding for determination." As provided in Section 10 of the 1961 Act, these steps should have resulted in a proceeding whereby

"The court shall hear proofs and allegations of all parties interested. The court shall determine the level to be established and maintained and shall have continuing jurisdiction and may provide for departure from the normal level as may be necessary to accomplish the purposes of this act. The court shall confirm the special assessment district boundaries within 60 days following the lake level determination."

(M.S.A. § 11.300 (10); M.C.L.A. § 281.70)

While it was not denied that these steps were followed properly, it

was claimed, and it was held by the court below, that the County was precluded from taking such action by the existence of the 1942 lake level order.

II. THE 1942 LAKE LEVEL ORDER WAS NOT RES ADJUDICATA AS TO THE COUNTY'S RIGHT TO ESTABLISH A SPECIAL ASSESSMENT DISTRICT.

Laying aside for the moment the question of whether it is appropriate to apply the doctrine of res adjudicata to a lake level determination, that doctrine clearly has no application to the establishment of a special assessment district by the County. It is firmly established that the doctrine of res adjudicata applies only to hear matters adjudicated, or which could have been adjudicated, in prior litigation between the same parties concerning the same issues. The requirement of identity of matters in issue was stated in McCormick v. Hartman, 306 Mich. 346 (1943) as follows:

" 'The first essential of the rule of res judicata is the identity of the matter in issue. The "matter in issue" is defined to be "that matter upon which the plaintiff proceeds by his action, and which the defendant controverts by his pleadings." ' LeRoy v. Collins, 165 Mich. 380.

" 'A judgment is not res judicata unless the identical matter in issue in the subsequent proceeding was determined by the former adjudication.' Creek v. Laski, 248 Mich. 425, 430 (65 A. L. R. 1113).

" 'The general rule is that judgments are res judicata only as to matters in issue or that could have been put into issue in the law action.' Thompson v. Doore, 269 Mich. 466. " McCormick v. Hartman, 346M 346, 351 (At 351 of the opinion.)

In that case it was held that prior litigation between a salesman and a distributor concerning the division of profits from sales was not a bar to the salesman's subsequent claim for part of a credit to a customer which was returned to the selling organization by reason of customer's prepayment of a note. This was in the nature of contingent claim, the Court noted at 350, and so "was not a claim which [the salesman] could have asserted in a former suit at law between these same parties "

The question of identity of matters in issue is sometimes tested by asking whether the same proofs would sustain both the prior and the subsequent actions. Thus, in Rose v. Rose, 10 Mich. App. 233 (1968), it was held that an action for separate maintenance constituted a bar to a subsequent action for absolute divorce brought on the same grounds. At 236-37 of the opinion the Court observed:

"The test for determining identity of claims is set forth in 30 A Am Jur. Judgments, § 365:

" 'In the application of the doctrine of res judicata, if it is doubtful whether a second action is for the same cause of action as the first, the test generally applied is to consider the identity of facts essential to their maintenance, or whether the same evidence would sustain both. If the same facts or evidence would sustain both, the two actions are considered the same within the rule that the judgment in the former is a bar to the subsequent action. If, however, the two actions rest upon different states of facts, or if different proofs would be required to sustain the two actions, a judgment in one is no bar to the maintenance of the other.' "

Whether the parties to prior litigation could have put in issue matters thereafter sought to be decided in a subsequent suit, or whether substantially the same proofs would sustain both actions, are questions readily answered where a controlling provision of a statute has been changed between the two actions. This was the situation in the case of Detroit Edison Co. v. State Board of Tax Administration, 298 Mich. 259 (1941), where the company protested payment of sales tax on compensation received for the furnishing of heat from its central heating steam plants. Because steam was not actually delivered to the company's heating customers, the company had prevailed in a former action challenging collection of the tax. That action had been decided prior to amendment of the statute to provide the following definition:

" 'The term "sale at retail" includes sales of electricity, natural and/or artificial gas and steam when made to the consumer or user for consumption or use rather than for resale: Provided, however, That the term "sale at retail" shall not include the sale of water through water mains.' "

At 262 of the opinion.

After the statute had been amended, the company pleaded the former adjudication in bar of collection of the tax. The Court found the doctrine of res judicata inapplicable:

"Plaintiff invokes as res judicata an unappealed holding of the Wayne circuit court in a suit between these same parties previous to the amendment to the act, that:

" 'The term, sale at retail, includes sales of electricity for light, heat and power, and the sale of natural and artificial gas,' is sufficient to include the sale of steam actually delivered as such to a customer,' and

" 'That said Act No. 167, Pub. Acts 1933, does not apply to the steam heating service furnished by plaintiff, where the furnishing of such service takes the form of a sale and delivery of thermal units by the passing of steam through a radiating system, such service * * * not constituting a sale taxable under the act.'

"Thereafter the legislature, as before stated, amended the term 'sale at retail' to include 'steam,' and we now have the question anew for decision under such subsequent enactment and issues thereon untrammelled by the doctrine res judicata." Edison v. State Board, 298 Mich. 259, 262 (At 262 of the opinion.)

Nothing could more clearly state the applicability of res judicata in these circumstances than the Court's declaration that, after the amendment, "we now have the question anew for decision under such subsequent enactment"

A strong parallel can be drawn between the position of the Board of Tax Administrators in the foregoing case and the position of the Board of Commissioners for Missaukee County in the court below. The tax sought to be collected in each case is assessed under a statutory provision not in existence at the time of the prior litigation. With the change in the statute in each case there is a question as to the basis for the tax which could not have been raised and decided in the prior litigation. This is more striking in the instant case, since it would have been absurd to claim any basis for specially assessing the riparian owners on Lake Missaukee prior to the enactment of Act 116 of 1952. Likewise, the proofs necessary and sufficient to sustain taxation at the time of subsequent litigation in each case would not have sustained

the tax in the first instance. Certainly, proofs relating to special assessment boundaries and the description of properties therein could not have been given effect at the time of the 1942 proceeding to set the level of Lake Missaukee. The doctrine of res judicata simply has no relevance to the County's right to establish a special assessment district under the Inland Lake Level Act of 1961, as amended.

III. THE 1942 LAKE LEVEL ORDER DID NOT ESTABLISH PROPERTY RIGHTS IN THE RIPARIAN OWNERS ON LAKE MISSAUKEE TO HAVE THE LAKE LEVEL MAINTAINED THEREAFTER AT THE COUNTY'S EXPENSE.

The proposition that the 1942 order created a right in riparian owners to maintenance of the level of Lake Missaukee free from any future expense is reducible to absurdity. A general application of this proposition would mean that once a road was established or a sewer laid, no special assessment could ever be levied for repair, replacement or maintenance of such improvements. Michigan authorities expressly reject such a theory.

The question was raised squarely in Sheley v. Detroit, 45 Mich. 431 (1881) and dealt with at length in the Court's opinion issued by Justice Cooley. The complainant in that case was the owner of property abutting Woodward Avenue in Detroit which, in the words of the opinion, "has been paved and repaved several times, sometimes at the expense of abutting owners and sometimes not, according as the law in force at the time provided." (At 431-32 of the opinion.) The complainant denied the constitutionality of an assessment for the cost of removing a cobble stone pavement and laying a new one of cedar blocks, stating the question at issue to be "[t]he right of the Legislature to authorize municipal authorities to require the owners of property on streets in the city to continue, at their own expense, to repave them, whenever ordered

by the common council. . . . " (At 432 of the opinion.) After affirming the power to assess the cost of such improvements on a frontage basis, the Court turned to this question at 434-35 of the opinion:

"It is urged, however, that even conceding it to be admissible to charge the owners of abutting lots with the cost of the first pavement of the street, the special exaction should stop there, and all repaving should be by general levy. But the learned counsel for complainant does not undertake to explain to us how it can be that the legislature can have power to order the first improvement at the expense of adjoining owners, and still not have power to order any subsequent pavement on the like basis. The argument to that effect appears to assume that a pavement once laid is an improvement which is to last for ages, like some substantial structure of granite or marble; and that the adjacent proprietors having incurred the expense of making it, the comparatively insignificant cost of keeping it in condition for use from year to year ought properly and justly to be taken upon the shoulders of the community. But no assumption can be more unfounded. A pavement is but a temporary improvement of the street. It may last for five years, or ten, or twenty, but at the end of some short period the street will need a new one, and the question who shall be at the cost of it is the same as before and rests upon the same equities. It can never be said of any street that it is permanently paved. It is paved for the time being only; and the payment will wear out or become unsuitable, just as a sewer will decay or become inadequate to the needs it was intended to meet.

"If there is any soundness in the theory on which the bill is filed, it must be found in this: that when the adjacent owners have once made the street a substantial thoroughfare at their own expense, a principle of constitutional justice requires that the city should afterwards maintain it as a substantial thoroughfare. But any such principle rests upon such a basis of uncertainty that it would not only be difficult of application, but lead to the most absurd results. When shall it be said that the duty of the property holder in making the thoroughfare is fully performed? Is it when the street is planked? Or when it is laid with cobble stone? . . . And if it can be exercised but once for all time, as to any particular parcel of land, shall the [legislative] power a generation hence depend upon the uncertain recollection of old inhabitants as to the nature of the first improvements, and how the cost was borne, or perhaps upon the care with which city records are made up and kept?"

The problem with the theory of perpetual rights in public improvements, as Justice Cooley clearly saw it, is twofold: not only are all public improvements temporary in nature to a greater or lesser degree, but circumstances may change,

and what was once a satisfactory improvement may cease to be such:

"Examine the case in whatever light we will, the supposed principle rests upon a fallacy. All street improvements are ordered in view of existing needs, and are, therefore, of one kind at one time and another at another time, as the needs are supposed to require. To-day in an incipient city they are cheap, imperfect and temporary; but ten years hence, if the city fulfills its promise, they may be expensive and constructed with greater regard to durability. The equity that the lot owners shall pay for the cheap, temporary improvement is no greater than that they or their successors in ownership shall pay for that which is more expensive, but which answers the local needs more perfectly and makes their lots more valuable. It will be no less fifty or a hundred years hence, though the improvement may have been renewed many times in the interval. It rested in the first place on the undoubted fact that all these local improvements, while they are public benefits in a general sense, have a special and peculiar value to the lots fronting upon them, and tend to increase their value in a degree bearing some proportion to the cost of the work. Let the improvements go to decay and the value of the lots will deteriorate; let them be renewed, and the price immediately comes up again. Leave a business street without a pavement, and business will be driven from it. These are facts of common observation, but they need no experience to prove them; they are what our reason would teach us to expect. There is ample ground, therefore, upon which the legislature may act when they decide that in their opinion considerations of equity require the cost of paving to be imposed upon the owners of abutting lots. We do not hold that they decide right, for that is not our concern; we only decide that they have the power and the discretion to do what they have done."

At 435-36 of the opinion.

So saying, the Court affirmed the decree of the trial court in dismissing complainant's action to restrain the tax sale of his property.

The power of a municipality acting under proper legislative authorization to make assessments for repair or renewal of existing improvements has been upheld in numerous cases subsequent to Sheley, supra, and has been specifically found to exist where the original cost of the improvement was borne at large. To this effect is the case of City of Kalamazoo v. Perrin, 194 Mich. 484 (1916), in which the city sued a property owner to recover an assessment for the purpose of repaving and resurfacing the street which the defendant's property abutted. At 488-89 of the opinion, the Court held:

"The third point made on behalf of appellant is that because, when the street was paved in 1902-03, the entire cost thereof was assessed against the property of the city at large, the city thereby elected:

'To make all needed repairs in the pavement itself and to relieve the abutting property owners from assessment upon the theory of benefits to be derived therefrom.'

"Counsel for defendant does not assert that the city, by its election to charge the entire cost in 1903 to the city at large, thereby estopped itself forever from assessing the cost of repavement to the abutting owners; but that is the logic of the argument under this head. This seems to us not only unreasonable, but is clearly contrary to the charter (section 20, chap. 16, as amended, Act No. 648, Local Acts 1907), which provides:

'The city council shall have power to cause the public streets, highways, avenues, and alleys of said city to be graded, macadamized, paved, repaved, planked, or graveled and otherwise constructed, improved and repaired and the gutters paved. The cost and expense thereof may be paid by the corporation, or the same, or any part thereof, may, as the council may by resolution determine, be assessed on the property adjacent thereto and benefited thereby.' "

Judgment for the city in the amount of the assessment was affirmed.

The question of successive assessments for the same purpose was again raised in Kuick v. City of Grand Rapids, 200 Mich. 582 (1918), where plaintiffs sought to set aside an order confirming an assessment roll for a sewer in the street in front of their property. Among plaintiffs' contentions was the following:

" 'Second. The property owned by us was assessed for a sewer in said street in the year 1903, and which assessment was paid.' "

At 587 of the opinion.

Speaking at 589 of the opinion, the court responded:

"A study of the record has not convinced me that any of plaintiff's contentions ought to be sustained. The idea that their property was not at all benefited by the improvement is preposterous. The fact that a sewer has been constructed for some distance in a city street does not prevent its extension and enlargement as the necessities of property farther out on the street may require, or the public health may demand. The

new improvement involved the old, and might of course destroy the old one entirely. In fact, it did destroy it, in this case, larger tile being used and laid at a greater depth than the old tile. Farther west, where the sewer was smaller, the old tile, all or some of it, was utilized. But plaintiffs did not own the tile and had no vested right to have the old sewer maintained."

Kuick v. City of Grand Rapids, 200 M 582, 587, 589
(Emphasis supplied.)

See also Graham v. City of Saginaw, 317 Mich. 427 (1947), quoting with approval from the opinion in Sheley v. Detroit, *supra*.

The foregoing cases are clear that establishment of a public improvement does not endow persons benefited with a right to have the improvement permanently maintained free of charge to them. This is true whether or not such persons contributed to the cost of the improvement originally; the fact that the initial cost may have been distributed at large does not estop the municipality constructing the improvement from specially assessing the cost of subsequent improvements or repairs. Considering these authorities, it cannot plausibly be maintained that Judge Lamb's 1942 lake level order, which did not require construction of a lake level control outlet, invested the riparian owners on Lake Missaukee with a right to have such a facility built by the County without expense on their part when the need for it later arose. If present assessments do not guarantee against liability for future assessments when the need for them should arise, it is difficult to see how needed future assessments could be precluded by the lack of present assessments or the absence of present need for them.

Moreover, the fact that the legislature does not provide at one point in time for assessments of a particular nature can hardly be said to indicate an intent that such assessments shall never be authorized in the future. Even if such an intent could be inferred, it would constitute an impermissible and void limitation of the legislative powers of government. The legislature cannot bind the hands of successor legislatures where the elements of contract, concession and

consideration do not appear, see Detroit v. Detroit & Howell P. R. Co., 43 Mich. 140, 145 (1880). In Harsha v. City of Detroit, 261 Mich. 586 (1933) it was said, concerning the claimed unconstitutionality of legislation which increased the limit of taxation on property in the city subject to assessment and increased the limit on bonded indebtedness of the city:

"There can, in the nature of things, be no vested right in an existing law which precludes its change or repeal, nor vested right in the omission to legislate upon a particular subject. . . ."

At 594 of the opinion.

See also Gale v. Board of Supervisors, 260 Mich. 399, 404 (1932) and Johnson v. Liquor Control Commission, 266 Mich. 282, 286 (1934).

It would seem therefore, that nothing in favor of the defendants in this action can be derived either from the fact that they were not assessed in connection with establishment of the level of Lake Missaukee in 1942 or from the fact that there was in 1942 no procedure for assessing them. There is thus no right in the defendants not to be assessed in connection with the lake level control outlet constructed in Lake Missaukee by the County.

IV. THE 1942 LAKE LEVEL ORDER DOES NOT PREVENT THE COUNTY FROM COMPLYING WITH THE REQUIREMENTS OF THE INLAND LAKE LEVEL CONTROL ACT OF 1961, AS AMENDED.

It may be suggested that even if the County's ability to establish a special assessment district has not been decided by Judge Lamb's 1942 order, that order nonetheless establishes once for all time the level of Lake Missaukee, and precludes any subsequent proceeding to set the lake level. If this were conceded, the argument would advance to the proposition that the 1961 Act makes no provision for creation of a special assessment district apart from proceedings to establish a lake level, and therefore the County was

without power to establish a special assessment district in this case.

Assuming that the doctrine of res judicata is appropriate to a lake level determination, that doctrine still will not bear the weight of the argument just described. Res judicata will be applied to prevent parties to a former action from subsequently seeking to establish a different resolution of the same issues, but the doctrine was never intended to preclude parties from establishing claims extending beyond the scope of prior litigation. Thus in Palmer v. Kleiner, 236 Mich. 480 (1926), while it was held improper for plaintiff in an action to quiet tenure under a lease to introduce matters relating to rental payments previously brought before a circuit court commissioner, the plaintiff was permitted to introduce testimony that repeated possessory proceedings were intentionally vexatious. Speaking at 486 of the opinion, the Court said:

"Unquestionably, material issues squarely presented, tried before and determined by the commissioner and not appealed from in the former cases, may not be retried in a later case, but cannot preclude subsequent proceedings arising out of new issues and demands during the life of the lease."

No case has been found which, under the aegis of res judicata, would prevent the County from seeking to affirm a previously established lake level in conjunction with special assessment proceedings.

Nor is it certain that res judicata has any application to a judicial determination of a lake level. From the opinion in Rice v. Naimish, 6 Mich. App. 698 (1967), it appears that the level of Duck Lake in Oakland County had been judicially determined at the same elevation in litigation between substantially the same parties on four separate occasions. Rather than give conclusory effect to these determinations, this Court noted simply:

"Under these circumstances, the trial judge was correct in placing upon the plaintiffs the burden of proving any lake level less than 1,016.63 feet."

At 705 of the opinion.

There are, of course, compelling reasons in support of a reluctance to apply a doctrine such as *res judicata* in a manner that may impair the ability of governmental units to respond to unpredictable natural events. On the other hand, any application of the doctrine would presumably be sensitive to changes in circumstance, and thus would be productive of little in the way of permanence or finality. In either case, it is impossible to find any justification for applying the doctrine in the case of Lake Missaukee where the natural tendency of the lake level has completely reversed itself between 1942 and 1968.

These considerations aside, the language of the Inland Lake Level Act itself does not support the construction that a lake level, once established under the Act or under some prior act, is to be immutable thereafter. To the contrary, the statute conditions lake level determination proceedings on an event which may occur more than once, i. e., the decision of the board of supervisors that it is expedient to have a determination made. The language employed by the statute is that "[w]henever the board of supervisors of any county deems it expedient to have determined and established the normal height and level of the waters in any inland lake . . . " they shall adopt the required resolution (M. S. A. § 11.300 (5); M. C. L. A. § 281.65). The statutory term "whenever," is by no means restrictive; it merely signifies the presence of some condition. In People v. Merhige, 212 Mich. 601 (1920), the term was construed in the following statutory context:

" 'That whenever any person shall plead guilty to an information filed against him in any circuit court it shall be the duty of the judge of such court, before pronouncing judgment or sentence upon such plea, to become satisfied, ' etc. " Quoted at 609-10 of the opinion.

The Court interpreted the term as follows:

" 'Whenever' is equivalent to 'as soon as,' 'at whatever time.' The word is synonymous with, or equivalent to, the words 'upon which,' 'where,' 'in case' and 'if.' In this sense it is a word of condition or contingency. In construing statutes the word is frequently an equivalent to 'if.' 40 Cyc. p. 920 et seq. " At 610 of the opinion.

The case of Gage v. United States, 101 F. Supp. 765 (Ct. Cl. 1952) gave the following interpretation in construing a provision of Federal patent law:

"Section 1498 says 'whenever' an invention is used by the United States the owner may bring an action therefor in this court. 'Whenever' means, 'at whatever time' or 'no matter when.' The first use would give rise immediately to a cause of action. Then, later, another use, perhaps after a long interval, would give rise to another cause of action. Such seems to have been the plain intent of the statute. 'Whenever,' the statute says, a patented 'invention * * * is used or manufactured by or for the United States * * * the owner's remedy shall be by action against the United States in the Court of Claims * * *.' It does not say when it is first used the patentee shall have a right of action, but 'whenever' it is used." At 766 of the opinion.

See also Hobby v. Hodges, 215 F.2d 754 (C.A. 10, 1954) holding at 758 that the term "[w]hen used as an adverb, . . . is defined to mean, 'At whatever time; no matter when.' When used as a conjunction, it is defined to mean, 'At any or all times that; in any or every instance which.' "

Section 10 of the Inland Lake Level Act in fact states that the court "may provide for departure from the normal level as necessary to accomplish the purposes of this act" (M.S.A. § 11.300 (10); M.C.L.A. § 281.70). The matters constituting the necessity for such departure must of course come to the court's notice in some way, and the structure of the act implies that the parties empowered to initiate lake level determinations are the appropriate parties to seek a departure. The statute states that departure from a normal level may be provided "to accomplish the purposes of this act," those being "to provide for the determination and maintenance of the normal height and level of the waters in inland lakes of this state, for the protection of the public health, safety and welfare and the conservation of the natural resources of this state" It would seem to do great violence to the purposes of the act if a county board of supervisors were prevented from seeking a lower or higher lake level in order to avoid septic pollution or check the growth of

weeds, merely because a prior determination had been made affecting the lake level. Moreover, it is scarcely to be presumed that the drafters of the 1961 statute thought that human beings were any more infallible, or their determination less in need of occasional correction, in setting lake levels than they are in other respects.

If it may be granted that a county board acting under the Inland Lake Level Act could seek establishment of a new level for an inland lake which departed from a previously determined level, it may be asked whether there is any reason why such a board could not seek determination of a lake level at the previously established elevation if it deemed it expedient to do so. Clearly, there is none. The statute empowers a county board to seek determinations without restriction as to number, the sole limitation being that imposed upon the court in terms of necessity and the purposes of the Act. The existence of a prior determination should in no way be construed as preventing a county from complying with the requirements of the Act for the purpose of defraying the costs of needed public improvements.

RELIEF

For the foregoing reasons, appellants the Board of Commissioners for Missaukee County and the Missaukee County Road Commission respectfully request that the Court of Appeals reverse the Order dismissing their complaint in the court below and direct said court to hear and determine all matters pertaining to this cause in accordance with the tenor of said complaint.

Chester C. Pierce
Attorney for Plaintiffs-Appellants
3130 Casmere
Hamtramck, Michigan 48212

Miller, Canfield, Paddock and Stone

By

Charles L. Burleigh, Jr.
Of Counsel
2500 Detroit Bank & Trust Building
Detroit, Michigan 48226

Dated;

STATE OF MICHIGAN
DEPARTMENT OF ATTORNEY GENERAL



STANLEY D. STEINBORN
Chief Assistant Attorney General

FRANK J. KELLEY
ATTORNEY GENERAL

LANSING
48913

June 29, 1989

Clerk of the Court
Missaukee County Circuit Court
Missaukee County Courthouse
Lake City, MI 49651

RE: Board of Commissioners for Missaukee County and
Missaukee County Road Commission v John R. Nyland,
et al. Missaukee County Circuit Court Case No. C-347

Dear Clerk:

Defendant State of Michigan conditionally consents to the Plaintiff's petition and an entry to modify a judgment establishing lake level as requested by plaintiff's petition.

Accordingly, the State does not propose to attend the July 5, 1989 hearing unless for any reason the court requires its participation. Should the plaintiff or the court require the State's participation, please so advise.

Very truly yours,

FRANK J. KELLEY
Attorney General

Roland Hwang
Roland Hwang
Assistant Attorney General
Natural Resources Division
530 West Allegan, 8th Floor
Lansing, Michigan 48913
Telephone (517) 373-7540

RH/rsc
Enc.
4/missau-1

cc: John Dexter
Gary C. Hoffman, Esq.

FILED 7-3-89
County Clerk - Register of Deeds
MISSAUKEE COUNTY, MI

H. Pomator

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

BOARD OF COMMISSIONERS FOR
MISSAUKEE COUNTY and MISSAUKEE
COUNTY ROAD COMMISSION.

PLAINTIFF,

CONSENT TO HEARING ON
PETITION TO MODIFY JUDGMENT
ESTABLISHING LAKE LEVEL
FILE NO. C 347

VS

JOHN R. NYLAND and DOROTHY A.
NYLAND, husband and wife, and
HAROLD JACKSON and GLADYS
JACKSON, husband and wife, on
their own behalf and on behalf
of other similarly situated as
a class,

DEFENDANTS.

Gary C. Hoffman (P15040)
Attorney for Plaintiffs
Hoffman Building
Lake City, Michigan 49651
(616) 839-4326

NOW COMES John R. Nyland and Dorothy A. Nyland, and
herewith consent and have no objection to Petition to Modify
Judgment Establishing lake level scheduled for hearing on
07/05/89 at 2:30 p.m.

Dated: June 30, 1989

John R. Nyland
JOHN R. NYLAND

Dorothy A. Nyland
DOROTHY A. NYLAND

FILED 7-6-89
County Clerk - Register of Deeds
MISSAUKEE COUNTY, MI

H. Pomator

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

BOARD OF COMMISSIONERS FOR
MISSAUKEE COUNTY and MISSAUKEE
COUNTY ROAD COMMISSION,

PLAINTIFF,

PETITION TO MODIFY JUDGMENT
ESTABLISHING LAKE LEVEL
FILE NO. C 347

VS

JOHN R. NYLAND and DOROTHY A.
NYLAND, husband and wife, and
HAROLD JACKSON and GLADYS
JACKSON, husband and wife, on
their own behalf and on behalf
of other similarly situated as
a class,

DEFENDANTS.

Gary C. Hoffman (P15040)
Attorney for Plaintiffs
Hoffman Building
Lake City, Michigan 49651
(616) 839-4326 _____

NOW COMES Board of Commissioners for Missaukee County and
Missaukee County Road Commission and says unto this Honorable
Court as follows:

1.) That Lake Missaukee is an inland lake and its normal
level was determined, by judgment of this court dated April
16, 1942, to be 1238.0 feet above sea level.

2.) That an Order was entered in this cause on August
17, 1970, reaffirming the lake level in Missaukee County at
"approximately 1238 feet pending final design and permanent
installation.

3.) That the original Order only provided for high water
conditions not low water.

4.) That in recent years there has been appreciable low
water.

5.) That this change in circumstances has resulted in
your Petitioners taking this action.

6.) That on May 31, 1974 an Amended Order was entered
by this Honorable Court, copy is attached hereto and made a

H. Pomoutar

part hereof, which permitted the Missaukee County Road Commission to "... impound an additional one-half foot of water during the months of February, March, April and May, provided that the level of Lake Missaukee shall not exceed 1238.5 feet above mean sea level".

7.) That Plaintiff bring this action under the Inland Lake Level Act of 1961 (Act 146 of 1961) (MSA 11.300 et sub.) (MCL 281.61).

8.) That Plaintiffs desire to continue to maintain the lake level for the months of June and July for the following reasons:

a. The low level during June, July, August and the first part of September have created pools of stagnate water along the beach, foul odor and requires additional weed clean-up, plus potential accelerated weed growth;

b. To create a more stable lake level during periods of drought;

c. To off set some major effects of a dry year;

d. To generally give a more healthy and appealing view of the lake and immediate beach area;

e. The reduced water level has caused problems to boat launching at the County lagoon area, access to North bays and coves, boat damage by sand bars and rocks and many private moorings being unusable;

f. Seemingly apparent damage to spawning areas and increasing fish kill.

9.) That the Missaukee County Drain Commission is prepared to supervise and maintain such level for the months of June and July as they do for the other months.

10.) That Defendant John R. Nyland and Dorothy A. Nyland have tacitly advised Petitioners through their respective agents, that they have no objection to maintaining the lake level at 1238.5 feet and in fact would consider it to be an asset so long as it doesn't exceed 1238.5 feet.

11.) That Defendants Harold Jackson and Gladys Jackson no long own property in the special assessment district and therefore have no further interest de jure in these proceedings.

12.) That the modification of the lake level for the months of June and July is endorsed by the Missaukee County Park Commission, Missaukee County Planning Commission, Missaukee County Board of Commissioners, Lake Township Board, Missaukee County Drain Commission, Lake City City Council, Lake City Downtown Development Authority, Lake City Planning Commission and the Lake City Area Chamber of Commerce as evidenced by the attached Resolutions.

13.) That the Department of Natural Resources by and through their respective agencies have no opposition to the modification for the months of June and July.

14.) That notice of these proceedings have been given to Department of Natural Resources and the Attorney General's Office pursuant to the statutes in such cases made and provided, Act No. 146, Public Acts of 1961 as amended by Act No. 175. Public Acts of 1969.

15.) That to maintain the lake level at 1238.5 for the months of June and July would best protect the public health, safety and welfare, conserve the natural resources of this state, safeguard and preserve property values around the lake and improve the system of drainage to properties in the Lake Missaukee drainage basin, keep and maintain the waters in Lake Missaukee at normal height and level; and provide the maximum benefit to the public, public agencies, and public properties, all in accordance with the statute in such cases made and provided.

16.) That as a further change of circumstances, at the time the lake level was established and the Orders placed in effect, there was no sewer system in Missaukee County.

17.) That Missaukee County now has a sewer system covering approximately 30% of the physical lake and approximately 30% of the populace.

18.) That such extension of time for the months of June and July would not require any construction activity.

19.) That Petitioners through their agents, more particularly, Lake City Area Chamber of Commerce, has publicized the intent and import to this Petition in the local news papers with virtually little or no opposition. A copy of such advertisement being attached hereto.

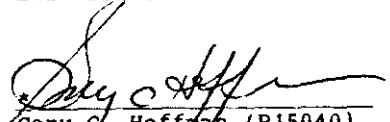
20.) That the aforesaid Lake City Area Chamber of Commerce has mailed out in excess of 700 questionnaires requesting the input of Missaukee County residents and non-resident property owners with virtually universal acceptance of the idea. A copy of such questionnaire being attached hereto and made a part hereof.

WHEREFORE PETITIONERS PRAY:

A.) That an Order be entered modifying the prior Judgments and Amendments heretofore entered in this matter to maintain the lake level at 1238.5 feet for the months of June and July.

B.) That in all other respects the prior Orders entered in this cause remain in full force and effect.

Dated: June 7, 1989


Gary Q. Hoffman (P15040)
Attorney for Plaintiffs
Hoffman Building
Lake City, Michigan 49651
(616) 839-4326

STATE OF MICHIGAN
DEPARTMENT OF ATTORNEY GENERAL



STANLEY D. STEINBORN
Chief Assistant Attorney General

FRANK J. KELLEY
ATTORNEY GENERAL

LANSING
48913

June 19, 1989

C-347

Clerk of the Court
Missaukee County Circuit Court
Missaukee County Courthouse
Lake City, MI 49651

RE: Board of Commissioners for Missaukee County and
Missaukee County Road Commission v John R. Nyland
and Dorothy A. Nyland, et al, Missaukee County
Circuit Court File No. C 347

Dear Clerk:

Enclosed for filing find Michigan Department of Natural
Resources' Conditional Consent to Petition to Modify Judgment
Establishing Lake Level regarding the above captioned cause.

Very truly yours,

FRANK J. KELLEY
Attorney General

Roland Hwang
Roland Hwang
Assistant Attorney General

Natural Resources Division
Stevens T. Mason Building
8th Floor
530 W. Allegan
Lansing, MI 48913

FILED 6-22-89
County Clerk - Register of Deeds
MISSAUKIE COUNTY, MI

H. Hoffman

Enclosure
cc: Gary C. Hoffman

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

BOARD OF COMMISSIONERS FOR
MISSAUKEE COUNTY and MISSAUKEE
COUNTY ROAD COMMISSION,

Plaintiff

File No. C 347

v

JOHN R. NYLAND and DOROTHY A.
NYLAND, husband and wife, and
HAROLD JACKSON and GLADYS
JACKSON, husband and wife, on
their own behalf and on behalf of
others similarly situated as a class,

Defendants.

Gary C. Hoffman (P 15040)
Attorney for Plaintiffs
Hoffman Building
Lake City, Michigan 49651
(616) 839-4326

Roland Hwang (P32697)
Attorney General
Natural Resources Division
Stevens T. Mason Bldg., 8th Fl.
530 West Allegan
Lansing, Michigan 48913
(517) 373-7540

MICHIGAN DEPARTMENT OF NATURAL RESOURCES'
CONDITIONAL CONSENT TO PETITION TO MODIFY JUDGMENT
ESTABLISHING LAKE LEVEL

PROOF OF SERVICE

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

BOARD OF COMMISSIONERS FOR
MISSAUKEE COUNTY and MISSAUKEE
COUNTY ROAD COMMISSION,

Plaintiff

File No. C 347

v

JOHN R. NYLAND and DOROTHY A.
NYLAND, husband and wife, and
HAROLD JACKSON and GLADYS
JACKSON, husband and wife, on
their own behalf and on behalf of
others similarly situated as a class,

Defendants.

MICHIGAN DEPARTMENT OF NATURAL RESOURCES'
CONDITIONAL CONSENT TO PETITION TO MODIFY JUDGMENT
ESTABLISHING LAKE LEVEL

NOW COMES Michigan Department of Natural Resources
(DNR), herein by its counsel Frank J. Kelley, Attorney General
for the State of Michigan, and Thomas J. Emery and Roland Hwang,
Assistant Attorneys General, and in response to the Petition sta-
tes as follows:

1. The DNR CONDITIONALLY CONSENTS to the entry of
judgment granting the Plaintiff the relief prayed for in said
Petition: that an Order be entered modifying the prior Judgments
and Amendments heretofore entered in this matter to maintain the
lake level on Lake Missaukee at 1238.5 feet for the months of
June and July.

2. This consent is given upon the condition that the Missaukee County Health Department make a determination and indicate to the Court and the DNR that the increased summer level will not detrimentally affect the operation of any septic tanks in unsewered areas. The Missaukee County Health Department should indicate that the aerated zone underneath each septic system will not be substantially decreased such which would cause increased leaching of sewage effluent into the lake.

3. Though it is not the intention of the DNR to participate further in this matter, DNR does request and demand that the Attorney General, as their counsel, receive notice of any and all hearings, including adjourned or rescheduled hearings; copies of all pleadings filed; and a true copy of any and all orders or judgments entered by the Court.

Respectfully submitted,

FRANK J. KELLEY
Attorney General

Thomas J. Emery (P 22876)
Assistant Attorney General

Roland Hwang
Roland Hwang (P32697)
Assistant Attorney General

Natural Resources Division
Stevens T. Mason Building
8th Floor
530 W. Allegan
Lansing, MI 48913

Dated: June 19, 1989

RH/kms/4/miss

IN THE CIRCUIT COURT FOR THE COUNTY OF MISSAUKEE

Plaintiff

File No. C 347

v

JOHN R. NYLAND and DOROTHY A. NYLAND, husband and wife, and HAROLD JACKSON and GLADYS JACKSON, husband and wife, on their own behalf and on behalf of others similarly situated as a class,

Defendants.

PROOF OF SERVICE

STATE OF MICHIGAN)
COUNTY OF INGHAM) ss

Robbin S. Clickner, being first duly sworn deposes and says that on the 20th day of June, 1989, she did serve a copy of Michigan Department of Natural Resources' Conditional Consent to Petition to Modify Judgment Establishing Lake Level upon the following:

Gary C. Hoffman
Attorney at Law
Hoffman Building
Lake City, Michigan 49651

by mailing the same to said attorney in a properly addressed and stamped envelope and depositing the same in the United States Mail in Lansing, Michigan.

Robbin S. Clickner
Robbin S. Clickner

Subscribed and sworn to before me
this 20th day of June, 1989.

Kathryn M. Schneider
Kathryn M. Schneider, Notary Public
Acting in Ingham County, Michigan
My Commission expires 10/15/90

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

BOARD OF COMMISSIONERS FOR
MISSAUKEE COUNTY and MISSAUKEE
COUNTY ROAD COMMISSION.

PLAINTIFF,

VS

NOTICE OF HEARING ON
PETITION TO MODIFY JUDGMENT
ESTABLISHING LAKE LEVEL
FILE NO. C 347

JOHN R. NYLAND and DOROTHY A.
NYLAND, husband and wife, and
HAROLD JACKSON and GLADYS
JACKSON, husband and wife, on
their own behalf and on behalf
of other similarly situated as
a class,

DEFENDANTS.

Gary C. Hoffman (P15040)
Attorney for Plaintiffs
Hoffman Building
Lake City, Michigan 49651
(616) 839-4326

TO:

John R. Nyland and
Dorothy A. Nyland
22 Bear Creek
Hilton Head, S.C. 29926

Department of Natural
Resources
Mr. John Dexter
P.O. Box 30028
Lansing, MI 48909

Frank J. Kelley
Attorney General
Stevens T. Mason Building
8th Floor
530 W. Allegan
Lansing, Michigan 48913

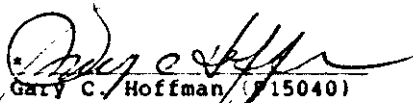
PLEASE TAKE NOTICE that a Hearing on Petition to Modify
Judgment Establishing Lake Level will be brought on for
hearing as follows:

DATED: WEDNESDAY, JUNE 5, 1989

TIME: 2:30 P.M.

PLACE: COUNTY COURTHOUSE, LAKE CITY, MICHIGAN

Dated: June 23, 1989


Gary C. Hoffman (P15040)
Attorney for Plaintiff
Hoffman Building
Lake City, Michigan 49651
(616) 839-4326

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

BOARD OF COMMISSIONERS FOR
MISSAUKEE COUNTY and MISSAUKEE
COUNTY ROAD COMMISSION,

PLAINTIFF,

AMENDED NOTICE OF HEARING

VS

FILE NO. C 347

JOHN R. NYLAND and DOROTHY A.
NYLAND, husband and wife, and
HAROLD JACKSON and GLADYS
JACKSON, husband and wife, on
their own behalf and on behalf
of other similarly situated as
a class,

DEFENDANTS.

Gary C. Hoffman (P15040)
Attorney for Plaintiffs
Hoffman Building
Lake City, Michigan 49651
(616) 839-4326

TO:

John R. Nyland and
Dorothy A. Nyland
22 Bear Creek
Hilton Head, S.C. 29926

Department of Natural
Resources
Mr. John Dexter
P.O. Box 30028
Lansing, Michigan 48909

Frank J. Kelley
Attorney General
Stevens T. Mason Building
8th Floor
530 W. Allegan
Lansing, Michigan 48913

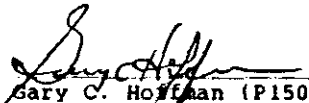
PLEASE TAKE NOTICE that a Hearing on Petition to Modify
Judgment Establishing Lake Level will be brought on for
hearing as follows:

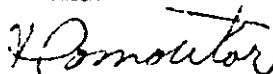
DATE: WEDNESDAY, JULY 5, 1989

TIME: 2:30 P.M.

PLACE: COUNTY COURTHOUSE, LAKE CITY, MICHIGAN

Dated: June 28, 1989


Gary C. Hoffman (P15040)
Attorney for Plaintiff
Hoffman Building
Lake City, Michigan 49651
(616) 839-4326



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

BOARD OF COMMISSIONERS FOR
MISSAUKEE COUNTY and MISSAUKEE
COUNTY ROAD COMMISSION,

PLAINTIFF,

AFFIDAVIT OF MAILING

VS

FILE NO. C 347

JOHN R. NYLAND and DOROTHY A.
NYLAND, husband and wife, and
HAROLD JACKSON and GLADYS
JACKSON, husband and wife, on
their own behalf and on behalf
of other similarly situated as
a class,

DEFENDANTS.

Gary C. Hoffman (P15040)
Attorney for Plaintiffs
Hoffman Building
Lake City, Michigan 49651
(616) 839-4326

STATE OF MICHIGAN)
)ss
COUNTY OF MISSAUKEE)

Sally Jo Randall, being first duly sworn, deposes and
says that she is employed by the law firm of Gary C. Hoffman,
Attorney at Law, attorney for Plaintiff in the above entitled
cause, and that on the date shown below, she served a copy of:
PETITION TO MODIFY JUDGMENT ESTABLISHING LAKE LEVE, NOTICE OF
HEARING ON PETITION
on the following, by placing the same in the U.S. Mail,
postage prepaid:

John R. Nyland and
Dorothy A. Nyland
22 Bear Creek
Hilton Head, S.C. 29926

Department of Natural
Resources
Mr. John Dexter
P.O. Box 30028
Lansing, Michigan 48909

Frank J. Kelley
Attorney General
Stevens T. Mason Building
8th Floor
530 W. Allegan
Lansing, Michigan 48913

Dated: *Jan 23, 1989*

Sally Jo Randall
Sally Jo Randall

Hoffman Building

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

BOARD OF COMMISSIONERS FOR
MISSAUKEE COUNTY and MISSAUKEE
COUNTY ROAD COMMISSION,

Plaintiff

File No. C 347

v

JOHN R. NYLAND and DOROTHY A.
NYLAND, husband and wife, and
HAROLD JACKSON and GLADYS
JACKSON, husband and wife, on
their own behalf and on behalf of
others similarly situated as a class,

Defendants.

MICHIGAN DEPARTMENT OF NATURAL RESOURCES'
CONDITIONAL CONSENT TO PETITION TO MODIFY JUDGMENT
ESTABLISHING LAKE LEVEL

NOW COMES Michigan Department of Natural Resources
(DNR), herein by its counsel Frank J. Kelley, Attorney General
for the State of Michigan, and Thomas J. Emery and Roland Hwang,
Assistant Attorneys General, and in response to the Petition sta-
tes as follows:

1. The DNR CONDITIONALLY CONSENTS to the entry of
judgment granting the Plaintiff the relief prayed for in said
Petition: that an Order be entered modifying the prior Judgments
and Amendments heretofore entered in this matter to maintain the
lake level on Lake Missaukee at 1238.5 feet for the months of
June and July.

FILED 7-6-89
County Clerk - Register of Deeds
MISSAUKEE COUNTY, MI

H. Pomator

2. This consent is given upon the condition that the Missaukee County Health Department make a determination and indicate to the Court and the DNR that the increased summer level will not detrimentally affect the operation of any septic tanks in unsewered areas. The Missaukee County Health Department should indicate that the aerated zone underneath each septic system will not be substantially decreased such which would cause increased leaching of sewage effluent into the lake.

3. Though it is not the intention of the DNR to participate further in this matter, DNR does request and demand that the Attorney General, as their counsel, receive notice of any and all hearings, including adjourned or rescheduled hearings; copies of all pleadings filed; and a true copy of any and all orders or judgments entered by the Court.

Respectfully submitted,

FRANK J. KELLEY
Attorney General

Thomas J. Emery (P 22876)
Assistant Attorney General

Roland Hwang
Roland Hwang (P32697)
Assistant Attorney General

Natural Resources Division
Stevens T. Mason Building
8th Floor
530 W. Allegan
Lansing, MI 48913

Dated: July 3, 1989
RH/kms/4/miss

IN THE CIRCUIT COURT FOR THE COUNTY OF MISSAUKEE

Plaintiff

v

Defendants.

Carla S. Lechler
Carla S. Lechler, Notary Public
Ingham County, Michigan
My Commission expires 9/5/89

STATE OF MICHIGAN
DEPARTMENT OF ATTORNEY GENERAL



STANLEY D. STEINBORN
Chief Assistant Attorney General

FRANK J. KELLEY
ATTORNEY GENERAL

LANSING
48913

October 23, 1989

Clerk of the Court
Missaukee County Circuit Court
Missaukee County Courthouse
Lake City, MI 49651

RE: Board of Commissioners for Missaukee County and
Missaukee County Road Commission v John R. Nyland
and Dorothy A. Nyland, et al, Missaukee County
Circuit Court File No. C 347

Dear Clerk:

Enclosed for filing find Michigan Department of Natural
Resources' Consent to Petition to Modify Judgment Establishing
Lake Level regarding the above captioned cause.

Very truly yours,

FRANK J. KELLEY
Attorney General

Roland Hwang
Assistant Attorney General

Natural Resources Division
Stevens T. Mason Building
8th Floor
530 W. Allegan
Lansing, MI 48913

Enclosure
cc: Gary C. Hoffman

FILED 10-26-89
County Clerk - Register of Deeds
MISSAUKEE COUNTY, MI

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

BOARD OF COMMISSIONERS FOR
MISSAUKEE COUNTY and MISSAUKEE
COUNTY ROAD COMMISSION,

Plaintiff

File No. C 347

v

JOHN R. NYLAND and DOROTHY A.
NYLAND, husband and wife, and
HAROLD JACKSON and GLADYS
JACKSON, husband and wife, on
their own behalf and on behalf of
others similarly situated as a class,

Defendants.

Gary C. Hoffman (P 15040)
Attorney for Plaintiffs
Hoffman Building
Lake City, Michigan 49651
(616) 839-4326

Roland Hwang (P32697)
Attorney General
Natural Resources Division
Stevens T. Mason Bldg., 8th Fl.
530 West Allegan
Lansing, Michigan 48913
(517) 373-7540

MICHIGAN DEPARTMENT OF NATURAL RESOURCES'
CONSENT TO PETITION TO MODIFY JUDGMENT
ESTABLISHING LAKE LEVEL

PROOF OF SERVICE

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

BOARD OF COMMISSIONERS FOR
MISSAUKEE COUNTY and MISSAUKEE
COUNTY ROAD COMMISSION,

Plaintiff

File No. C 347

v

JOHN R. NYLAND and DOROTHY A.
NYLAND, husband and wife, and
HAROLD JACKSON and GLADYS
JACKSON, husband and wife, on
their own behalf and on behalf of
others similarly situated as a class,

Defendants.

MICHIGAN DEPARTMENT OF NATURAL RESOURCES'
CONSENT TO PETITION TO MODIFY JUDGMENT
ESTABLISHING LAKE LEVEL

NOW COMES Michigan Department of Natural Resources
(DNR), herein by its counsel Frank J. Kelley, Attorney General
for the State of Michigan, and Thomas J. Emery and Roland Hwang,
Assistant Attorneys General, and in response to the Petition sta-
tes as follows:

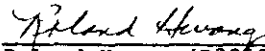
1. The DNR CONSENTS to the entry of judgment granting
the Plaintiff the relief prayed for in said Petition: that an
Order be entered modifying the prior Judgments and Amendments
heretofore entered in this matter to maintain the lake level on
Lake Missaukee at 1238.5 feet for the months of June and July.

2. Though it is not the intention of the DNR to participate further in this matter, DNR does request and demand that the Attorney General, as their counsel, receive notice of any and all hearings, including adjourned or rescheduled hearings; copies of all pleadings filed; and a true copy of any and all orders or judgments entered by the Court.

Respectfully submitted,

FRANK J. KELLEY
Attorney General

Thomas J. Emery (P 22876)
Assistant Attorney General



Roland Hwang (P32697)
Assistant Attorney General

Natural Resources Division
Stevens T. Mason Building
8th Floor
530 W. Allegan
Lansing, MI 48913

Dated: October 23, 1989

RH/kms/6/miss

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

BOARD OF COMMISSIONERS FOR
MISSAUKEE COUNTY and MISSAUKEE
COUNTY ROAD COMMISSION,

PLAINTIFF,

VS

ORDER MODIFYING JUDGMENT
ESTABLISHING LAKE LEVEL
FILE NO. C 347

JOHN R. NYLAND and DOROTHY A.
NYLAND, husband and wife, and
HAROLD JACKSON and GLADYS
JACKSON, husband and wife, on
their own behalf and on behalf
of other similarly situated as
a class,

DEFENDANTS.

Gary C. Hoffman (P15040)
Attorney for Plaintiffs
Hoffman Building
Lake City, Michigan 49651
(616) 839-4326

At a session of said Court
held in the Circuit Court-

room, Lake City, Michigan
on the 5th day of July,
1989.

PRESENT: HONORABLE WILLIAM R. PETERSON, CIRCUIT JUDGE.

This cause having come on to be heard on Petition of Missaukee Board of Commissioners and Missaukee County Road Commission and Gary C. Hoffman, Attorney at Law, having appeared on behalf of said Petitioners; and consents to Modification of Lake Level having been filed by John R. Nyland and Dorothy A. Nyland, original Defendants, and by Frank J. Kelley, Attorney General for the State of Michigan, and by Department of Natural Resources; and the Court having concluded that Harold Jackson and Gladys Jackson, former original Defendants, no longer have an interest in the subject premises, and further consents being on file in this cause from Missaukee County Park Commission, Missaukee County Planning Commission, Missaukee Bounty Board of Commissioners, Lake Township Board, Missaukee County Drain Commission, Lake City City Council, Lake City Downtown Development Authority, Lake City Planning Commission and the Lake City Area Chamber of Commerce, and no one appearing of record in opposition thereto and proofs having been taken in open Court and the Court being satisfied that a sufficient change in circumstances exist;

IT IS ORDERED AND ADJUDGED that the Orders heretofore entered in this cause be and are hereby amended in the following respects:

That the lake level of 1238.5 feet shall be maintained for the additional months of June and July.


GARY C. HOFFMAN
Attorney at Law
Hoffman Building
Lake City, Mich.
49651

FILED 10-27-89
County Clerk - Register of Deeds
MISSAUKEE COUNTY, MI

H. Bonauto

IT IS FURTHER ORDERED AND ADJUDGED that in all other respects the prior Orders in this cause shall remain in full force and effect.

10/27/89


WILLIAM R. PETERSON,
Circuit Judge

THE COURT: We have appearing for the Board of Commissioners Mr. Chester Pierce. Appearing in opposition is Mr. Kenneth Thompson of Traverse City and Mr. James Thompson for Mr. Norman Lincoln.

MR. PIERCE: If it please the Court, I first wish to apologize to the Court for the adjournments; I think there was some mix-up -- possibly I was at fault -- but I did notify everyone with respect to today's 11:00 hearing.

I would also like to ask permission to amend my pleadings as to paragraph 1; the date is listed as February 9, 1971 and it should be October 27, '71 in the bill of complaint. Resolution 455 is dated October 27, 1971 rather than February 9, 1971 -- and I also wish to apologize to the Court and Mr. Thompson and ask that that portion of my answer in paragraph 14 to Mr. Thompson's allegations which says, "further answering said paragraph the statute provides as follows the procedure for repairs, maintenance, reconstruction, relocationlake level establishment of this act or prior act," and it says that \$500 shall be established when the normal lake level is set forth in this act. That portion of the statute was repealed, Your Honor, on further checking in 1970, and I ask that it be stricken.

THE COURT: Which paragraph?

MR. PIERCE: 14 of the Reply.

MR. THOMPSON: What are you striking now?

MR. PIERCE: The procedure for repairs, maintenance, reconstruction, relocation of procedure quoting, the portion of the statute that's been repealed.

MR. THOMPSON: In other words, we cross out starting with further.

MR. PIERCE: Starting with further and all down through that in that Answer.

THE COURT: All right, Mr. Thompson.

MR. THOMPSON: Your Honor, the case specifically before the Court which is C-347 relates to this lake level situation and the drainage from that lake for which the plaintiff county supervisors represented by Mr. Pierce now seek to establish some sort of special assessment district. This matter has been before the Court recently on two or three occasions, has quite a history to it, and I think the Court is generally familiar with it so I'm not going to go into that background.

Briefly, as I see the issue, and as it's the defendant's position representing these property owners, very briefly, I believe there's a fatal jurisdictional defect in Mr. Pierce's presentation to this Court in his complaint, and that is simply stated this way that his complaint is phrased in the nature of a lake level setting procedure which then brings into play the special assessment or taxation features that are in the Inland Water Resources Act which is referred to in the pleadings, and I don't believe that is the case here, and the reason I don't believe that is the case, and the reason I believe his action is defective jurisdictionally is simply this, that the Court's file will show that in Case No. 280 which was commenced on May 22, 1970, there was a petition for mandamus filed to force the county to comply with a pre-existing lake level setting of 1238 feet — now that was a

simple action of mandamus -- and the finding in that case, so we are clear on this point, in referring to Judge Papp's order -- in reading the first paragraph as to the findings of the Court in that case, "this cause," -- and I'm quoting -- "having been brought on for hearing upon the pleading filed in said cause, the parties being brought into court and having testified and being represented by their respective attorneys, and the Court having found that the allegations in the complaint are true and that defendant Boards of Commissioners are responsible for maintaining the level of Lake Missaukee at no more than 1238 feet, and that the present level of said lake is approximately two feet higher than said maximum level of 1238 feet as previously determined by order of this Court, which level, it appears from testimony offered, is a reasonable level for said lake and that the existing high water level has flooded septic systems of residents on the lake resulting in dangerous pollution problems, danger to public health as determined by representatives of the Michigan Department of Health and there presently exists an emergency situation at Lake Missaukee that requires immediate remedial action by the Boards responsible....." That meant the Boards having failed to take corrective action to remedy this emergency situation -- "although it appears said Boards have for some time past been aware of the public health emergency created by high water and resultant pollutions....," and the Court Order goes on to order immediate action by that Board. In other words, Judge Papp, in her Order of May 22, 1970, is reaffirming the fact, the situation, that there is a lake

level standard here, that the Board has been neglecting, is neglecting and is ordered to correct the deficiencies in their action.

Now as to the course of File No. C-280, after a great deal of trials and tribulations and possible show causes and everything, the county took a completely new start and did a lot of other things, but anyway, that case ended with Judge Papp's order of August 25, 1971, in which the Court briefly stated: "This Court having entered its order in this cause for opening the outlet to Lake Missaukee, it appearing that defendants have fully complied with said order, it is ordered that this cause be and it hereby is dismissed, no cost to public issue. Approved by counsel for both sides, that being Mr. Pierce and myself."

In other words, at that point, Your Honor, the Court in 280 recognized that there was a pre-existing lake level order set when it was -- the county corrected the situation -- that case is dismissed. No appeals from any of those orders.

A separate mandamus action was started again in this court before Your Honor in No. C-323, and a judgment entered in that case, and I quote briefly again from the second paragraph: "It is adjudged that under the provisions of the Lake Level Act and the order of this Court entered on April 16, 1942, pursuant to a petition filed by the Board of Supervisors, County of Missaukee, that it is the clear and mandatory duty of the defendant to maintain the lake level of Lake Missaukee as set forth in said order."

In other words, we've had now three specific findings by

this Court, the first, Your Honor, being the exhibit attached to our pleadings in which Judge Lamb from which all this stems, in his finding of April 16, 1942 entered an order stating, "It is ordered and adjudged that the normal height and level -- water level -- of said Lake Missaukee be and the same is hereby determined and established to be 1238.0 feet."

We have then, I submit, Your Honor, always had in this county a water level for Lake Missaukee of 1238 feet, in both the proceedings before Judge Papp, substituting in this circuit, and before Your Honor. There is a confirmation of that fact -- a confirmation of the '42 order -- in other words, there's never been a question in any of this litigation of setting lake levels, and in both cases, neither case of which was appealed, the lake level is 1238. Therefore, it's res adjudicata; 1238 feet is the normal lake level of this lake.

I would now direct your attention -- Your Honor's attention -- to the original complaint of Mr. Pierce and to the prayer. We'll discuss this just a moment. That appears on page 27 of his complaint filed with this Court. Look at paragraph A that this Court set a time and place for the hearing to affirm the 1238 level of Lake Missaukee and confirm the special assessment district boundaries. Paragraph C, that this Court affirm the level of Lake Missaukee at 1238 above sea level. Paragraph E, that the notice to be published and served by certified mail direct to all interested persons to show cause, if any, that they have, why the normal height and level of said lake should not remain at a maximum of 1238 feet above lean sea level. Why those phrases?

Your Honor, I submit to the Court that unless Mr. Pierce can make this a new lake level setting procedure — or action — he has nothing on which to hang a proceeding for a special assessment district.

I would direct Your Honor to a couple other incidental questions. When Judge Lamb originally set 1238 feet — there's been some discussions in prior cases, some indications in the pleadings here by Mr. Pierce about normal level, high level. At that time the term "normal level," and I quote now, Your Honor. I'm quoting from Callaghan's Michigan Digest, citing 276 Mich. 59, In Re Lenawee Supervisors, a 1936 case -- proceed in a lake level setting case here by Judge Lamb. "The term 'normal' may be construed as the equivalent of the term 'natural' with reference to the maintenance of the natural height and level of inland lakes as these terms are used in the statute." That's in Volume 25, page 185. In other words, there's been a lot of conversations in these cases about having to pump water back in and pump water out and so forth, but that generally under the earlier acts in 1942 was a definition of normal.

I would like to refer now to the statutes -- I'm referring first under the Inland Lakes and Streams Statute which is Act 39 of 1937, Act 146 of 1961, generally referred to as the Inland Lake Level Act of 1961. I direct Your Honor's attention to Michigan Statutes Annotated Paragraph 11.300 (3), and the notation thereunder -- Paragraph 11. Do you have the statute in front of you, Judge? Paragraph 3 underneath in the subparagraph 11, at the bottom of the page.

THE COURT: I'm still now following you. Give me the citation over again, please.

MR. THOMPSON: 11.300 (3). That's at page 696. All right, on the footnote 11 under Prior Provisions it was ruled that only one normal water level could be established for a lake, not different levels for different seasons, and that's the Opinion of the Attorney General August 13, 1946. This is the reason I read the definition of what the word "normal" was. This is consistent with the Attorney General's statement.

Turning over to -- in the same act -- to Section 19, page 702: Again in sub-paragraph footnote 11: "Under a former act it was ruled that the county as a whole was the only available source of revenue for remedying severe erosion resulting from construction of a dam, to pay for continued maintenance and repair of such a dam -- it's a 1952 Opinion.

I would just call the Court's attention to one more provision of the act, and that's in the Cumulative Supplement, page 151, paragraph 11.300 (10). The supplement is the 1971 supplement. The last sentence which was added by the Public Acts of 1969 No. 175 effective March 20, 1970: "There's a limitation on the course of jurisdiction in any proceeding, and the Court shall affirm the special assessment district boundaries within sixty days following the lake level determination." You see, this raises a host of, I think, jurisdictional problems at the outset, Your Honor, in that the county is met here with the proposition that they have had this duty since 1942, and the action that forced them to put the drain commission in was compliance with this '42 order,

and the complaint as here filed and the prayer is extraneous, and I submit, Your Honor, that the reason Mr. Pierce has to do this is that he has to hang some assessment action here around a current lake level setting action, and that's res adjudicata -- that's been set. There is no basis for a special assessment district here. This was done in 1942 under the laws of 1942, and to come on in this action in the guise of a lake level setting action thirty years later and try to set a special assessment district up here I don't think can be done. I think he's estopped from that position. I think that briefly summarizes my argument on this. Thank you.

THE COURT: Mr. Pierce.

MR. PIERCE: May it please the Court, I would like to first direct the Court's attention to 11.300 (10) as quoted by Mr. Thompson, and the last paragraph provides as follows:

"The Court shall hear the proofs and allegations of all parties interested. The Court shall determine the level to be established and maintained and shall have continuing jurisdiction, shall have continuing jurisdiction and may provide for the departure from the normal level as may be necessary to accomplish the purposes of this act. Getting back.....

MR. THOMPSON: (Interposing) May I have that citation again.

MR. PIERCE: The same one you quoted with the paragraph right before it. 11.300, Section 10.

The Court shall have continuing jurisdiction.....I believe Your Honor, that the law speaks for itself. The law speaks to the Board of County Commissioners and their duties under this

statute, and I believe that the motion involves the interpretation of Section 25 of the act, M. S. A. 325 which provides as follows: "Act 3277 of the Public Acts of 1921 being Sections 281.1, 281.30 of the Compiled Laws of 1948, Act 39 of the Public Acts of '37, being Sections 281.51, 281.57, Compiled Laws of 1948 and Act 194 of the Public Acts of 1939 as amended, and the Court will take judicial notice that Judge Lamb's decision came under Act 194 of the Public Acts of 1939 when the lake level was established, and it continues further: "...are hereby repealed except the actions and petitions to establish and maintain an inland lake -- actions and petitions to establish and maintain an inland lake level now in process may be continued under those acts or commenced under this act," so what are we talking about when we talk about the actions, when it's the actions of the Board of County Commissioners? One of the actions was to set the lake level. The other continued action of which pursuant to the other provision that the Court has jurisdiction is the action to build the lake level, to set up a special assessment district and pursuant to the new provisions of the statute, they shall maintain such said level. It's mandatory now.

In Rathbun versus the State of Michigan, 284, page 521, our court declared: "A statute will be construed, if possible, so that other statutes with relation to the same subject may be given effect. It is a well established rule that in the construction of a particular statute or in the interpretation of its provisions, all statutes relating to the same subject or having the same general purpose should be read in connec-

tion with it although they were enacted at different times and contained no reference to one." That quote is from page 532.

On 533 the Court said: "To that end it may be determined how the legislative policy with reference to the subject matter has been changed or modified from time to time. In Arnold versus Ellis, 5 Mich. App. 101, which is an inland lake level case, on page 109, the Court says as follows: "Defendants contend in their brief that the Inland Lake Level Act, Public Acts of 1961, No. 146, operate to preclude the Circuit Courts from exercising jurisdiction in this matter because the act vests the power to determine lake levels in the county board of supervisors, drain commissioners and the Conservation Department. The predecessor of this statute, Compiled Laws of 1948, 281. 101 in sequence, Statutes Annotated Revised 11.221 in sequence under which the Drainage Board versus Village of Homer, 351, 73, 84, 85 was decided quoting from Kennedy versus Van Buren County Drain Commissioner as follows: "The act does not appear to be mandatory but merely optional with the several Boards whether they shall assume jurisdiction in any particular case. Had the legislature provided that the waters of an inland lake should remain at their present level unless changed by the Board of Supervisors, or had it used some language indicating an intention to place the whole subject matter at once under the jurisdiction and control of the Board, the construction contended for by counsel would have more force. Our conclusion is that the act does nothing more than to confer on Boards of

Supervisors the authority to act in any given case where in its judgment it is necessary or expedient." (Emphasis supplied)

"Clearly," -- continuing from that decision, "the act as it stood at the time of this decision did not confer exclusive jurisdiction upon County Boards of Supervisors to determine lake levels. Until the agencies mentioned in the statute elect to act under the authority of the statute, there is no reason why the court may not act." The statute before the court at the time of the Village of Homer decision super-provided: "The Board of Supervisors of any county in which the whole or part of the waters of any inland lake is situated, the State Conservation Commission may for the promotion of public health....." Then the Court quotes the other section and says, "the Conservation Department or the Board of Supervisors of any county in which the whole or any part of the waters of any inland lake is situated may upon its motion or shall by petition....." The Court says as follows in its decision on page 11: "Both statutes use the permissive term "may" in conferring jurisdiction over inland lake levels. If the legislature intended that jurisdiction of the Boards of Supervisors and the Conservation Department should be exclusive, it would have used language to convey that intention."

I say that the Court and the legislature has said that this Court has continuing jurisdiction and the question how the actions now in process may be concluded, goes to the power of the county commissioners, and in Malone versus Appeal Board of Michigan, Employment Security Commission, 358

Mich. 472, our court said: "Later and more specific amendment takes precedence over an earlier and more general provision."

We know, Your Honor, that until two years ago, the statute provided for only a tax-at-large. The tax-at-large provision has been repealed completely, and the only provision left presently is the special assessment district provision and no other. How are the county commissioners to maintain this level? There are no provisions for taxes at large, and there are no provisions for a maintenance under a tax-at-large; there's only the provision for a special assessment district and the amendment in 11.300 providing the court shall have continuing jurisdiction and may alter those levels. We have some complaints coming in at 11:00 - if we reach that far, Your Honor - that the level is too high. That's another problem.

I would like to also call your attention to 330 Mich. 465, Huse versus Snodgrass, our court declared: "Where there is no evidence of corrupt conduct for illegality, courts cannot interfere with the actions of elected officials. In Washington Agency versus Courts, 309 Mich. 683: "Courts will not interfere with acts of a public administrative officer acting within the scope of his authority."

In Bartkowiak versus Wayne County, 341 Mich. 333, our Supreme Court declared: "The provisions of a later act which contravene the provisions of an earlier statute control as to the subject matter of the later act." In this case it declared: "The determination of facts and the propriety of

actions of administrative boards is not a judicial function, and when a circuit judge seeks to substitute his judgments for that of an administrative body and the discharge of its administrative functions, he acts without jurisdiction."

In Thomas versus City of Lansing, 315 Mich. 566, our court declared: "Courts cannot annul tax laws because they operate unequally and unjustly in individual instances."

In Helmsley versus the City of Detroit, 320 Fed. 2nd, 476, the court declared: "Taxation is a legislative function and not a judicial function and is therefore proper that a court not substitute its judgment for that of taxing authorities." Last of all, not only does the statute give the discretionary power, now the county commissioners can complete the action, and the only thing that the statute provides for is a special assessment district, but it is also my contention that the plaintiffs are guilty of laches. Had they pursued their remedy for the establishment of the level prior to 1969 when the statute changed, then possibly it could have been financed under a tax-at-large.

THE COURT: Does a Mr. Thompson wish to reply?

MR. THOMPSON: I'm of course a little bit speechless at this laches business when the county has had a duty for thirty years to maintain this lake level, and it took two years of litigation to get them to do it. I don't follow all of - in that quick dissertation of Mr. Pierce - the references to the statutes nor to the cases he's cited. I believe the county has adequate authority to spread this over the general tax roll whatever expense is involved here. I think he's

precluded in this action as I've stated, and because of the historical background in this court and the order is already issued, from trying to turn this, a lake level setting procedure, he's estopped from that. That issue is settled, res adjudicata. Therefore, he has nothing to hang a special assessment district on. In brief, I think that's our position. I think that should be determined before a very lengthy and time consuming and expensive assessment proceeding has entered into.

THE COURT: Mr. James Thompson?

MR. JAMES THOMPSON: Yes, Your Honor, thank you. If the Court please, I have studied the motion of Mr. Thompson and I believe that I do understand it. I would support the statements that he made. His motion is based upon matters that he has had some previous knowledge about because of the prior litigation. I have nothing that I can contribute in addition to what Mr. Thompson has stated though.

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STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF MISSAUKEE

+++++
MISSAUKEE COUNTY,

Plaintiff

V.

Docket No. 347

ANDREW REPEK, et al,

Defendants.

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REPORTER'S CERTIFICATE

I, Ellen R. Loeks, Official Court Reporter in and for the 28th Judicial Circuit of Michigan, do hereby certify that the foregoing is a true and accurate transcription of my stenographic notes taken at the time of the hearing in the above-entitled cause, and is all of the same so far as pertains thereto.

Ellen R. Loeks

Official Court Reporter
February 28, 1972.

STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF MISSAUKEE

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THE BOARD OF COMMISSIONERS FOR

MISSAUKEE COUNTY

FILED 6-6-72
Ellen R. Loeks
 CLERK, CIRCUIT COURT
 28th JUDICIAL DISTRICT
 MISSAUKEE COUNTY, MICHIGAN

V.

Docket No. C-347

JOHN R. NYLAND, et al,

Defendants.

+++++

CERTIFICATE OF REPORTER

I, Ellen R. Loeks, being first duly sworn deposes and says that she is the Official Court Reporter of the 28th Judicial Circuit; that on the 10th day of May, 1972, the transcript of testimony and hearings in the above entitled cause, was mailed to all parties of records and the Clerk of the Court of Appeals, Grand Rapids, Michigan.

Ellen R. Loeks
 Ellen R. Loeks,
 Official Court Reporter,
 28th Judicial Circuit

Subscribed and sworn to before me this 31 day of May, 1972.

William R. Burton
 Circuit Judge

STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF MISSAUKEE

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MISSAUKEE COUNTY,

Plaintiff

#13894
Docket No. 347

V.

TRANSCRIPT OF

ANDREW REPEK, et al,

COURT ORDER

Defendants.

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February 10, 1972
Circuit Court
Lake City, Michigan

B e f o r e: HON. WILLIAM R. PETERSON, Circuit Judge

APPEARANCES: CHESTER PIERCE, Esq.,
Attorney for Plaintiff

KENNETH THOMPSON, Esq.,
Attorney for Defendants

JAMES THOMPSON, Esq.,
Attorney for Norman Lincoln

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Ellen R. Loeks
Circuit Court
Cadillac, Michigan

March 9 - 1972
Kenna Leeg
CLERK OF COURT
MISSAUKEE COUNTY, MICHIGAN

THE COURT: Well, let's start at the back perhaps. The hour of ten o'clock was set for arguing questions of law based on the petition that's filed here ^{and} the affirmative defenses of certain property owners through their counsel, and in response Mr. Pierce has filed a motion for summary judgment also. I think we are in effect going to conclude the legality of it by that motion before we go on to the consideration of assessment district if the motion of property owners is denied.

Starting at the back, I can't concur with Mr. Pierce's statement that the possibility of assessing this against the county as a whole has disappeared by reason of the amendment to the statute by Act 175 of 1969.

MR. THOMPSON: May I interject just a moment, Your Honor, on that specific point. We just looked at 11.300 (19) if that's what you're looking at.

THE COURT: Yes. The act formerly provided this language: "If the Board of Supervisors alone conduct the proceeding under this act....," it goes on and says "the expense may be assessed as if it were a general tax against all of the property in the county." That language was deleted by Act 175 of the Public Acts of 1969. It deleted any reference to the county as being the initiating body and simply provides that the expense may be assessed upon the taxable property within the special assessment district.

Mr. Pierce's point would be well taken if this were a proceeding brought under the present act. Under the act which led to the establishment of a level by Judge Lamb in 1942,

there was no provision for the payment of the expense, and it was accepted that this was an expense that had to be paid from the county at large.

I think that it's important to bear in mind that we are dealing with property rights and that we're dealing with rights as established in 1942. Having voluntarily undertaken to establish a normal lake level under the existing legislation of 1942, certain rights were created for the benefit of the riparian owners. It fixed those property rights at a time when the expense of maintaining that level was borne by the county at large.

I think the importance of those property rights is reflected in the present statute in that it makes a direct relationship between the establishment of a lake level and the establishment of a special assessment district. Under the present statute it is contemplated that in the same proceedings in which the level is established, the establishment of the special assessment district is going to be considered also. This represents a recognition by the legislature that the level that is established and the cost of maintaining it are related to one another directly. I think it also is a recognition of the fact that the extent or the area included within the district, and the determination of the benefits to the property within it, could very well depend upon what particular level was determined. Thus the people, the riparian owners who are directly affected by a possible assessment against their property which involves their property rights, have a right in the same proceeding to be

heard and participate in the determination of what the lake level would be.

The present statute says that the conformation of the district boundaries has to be done within sixty days following the lake level determination. I have been starting at the back. To go back to the beginning, this level was established in 1942; it was not appealed; it's res adjudicata. The proceedings in Case 280 and 323 were based upon that proceeding and not upon a new proceeding.

It is the opinion of the Court that this attempt to establish a special assessment district under the present statute cannot be imposed upon the property rights that were established under the 1942 judgment of the Court.

When the level was established in 1942, it fixed a basis for all future development around the lake. It was binding on the riparian owners. Their development of their property had to be done in conformance to that level. In turn, they were entitled to rely on that determination and know that improvements they made would not be jeopardized by interference with the lake level. Almost thirty years of building growth around the lake has been related to the legal determination of the lake level.

I acknowledge that the present statute has been amended to provide for continuing jurisdiction over such matters. This is a 1969 amendment for the first time applicable to proceedings under the new statute. The amendatory language says that the Court will have continuing jurisdiction and may provide departure from the normal level as necessary to

accomplish the purposes of the act.

I think it's open to question as to whether that language authorizes a permanent change in the established lake level, and even if it is so construed, constitutionally I don't think that it could be made retroactive to affect the vested rights of the riparian owners which they acquired under the judgment of this Court in 1942.

I think the same objection is made to Section 26 of the act which provided that actions in process under the old act could be continued either under the old act or under the new act. This was not an "action in process;" it was an action which had been determined by a judgment of the Court from which there was no appeal.

In short, I am concurring with the position taken by the attorneys for the property owners that the rights were fixed under the act under which the court proceedings were held in 1942 and that there is no right at this time to establish a special assessment district, that the expenses that are involved must, as a matter of law, be borne from the general revenues of the county rather than attributable to the property owners. I do this not in an attempt to impose a burden upon the county but in what I think is a simple recognition of the rights of private property which are constitutionally protected.

An Order may be entered dismissing the petition. Thank you, Gentlemen.

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