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June 2, 2004

BY HAND DELIVERY

P. Scott Hassett, Secretary  
Wisconsin Department of Natural Resources  
101 South Webster Street  
Madison, WI 53703

Re: PETITION OF SAWYER COUNTY TO REVIEW AND CLARIFY CERTAIN  
ORDERS RELATING TO ROUND LAKE

Dear Secretary Hassett:

We are writing on behalf of Sawyer County to request that the Department of Natural Resources ("DNR") exercise its authority to regulate and control the level and flow of water in navigable waters, and review and clarify certain orders issued by the Public Service Commission of Wisconsin ("PSC") and the DNR relating to Round Lake, Little Round Lake and Osprey Lake<sup>1</sup> in Sawyer County.

#### INTRODUCTION

Sawyer County has been sued by Round Lake property owner James Hausman, who is seeking a court order requiring the County to manage Round Lake in accordance with the terms of a 1941 order issued by the PSC.

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<sup>1</sup> Osprey Lake and Osprey Creek were formerly named Squaw Lake and Squaw Creek. All references in this petition to Squaw Lake and Squaw Creek are to Osprey Lake and Osprey Creek.

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The PSC and DNR have issued a series of orders from 1937 through 1985 that relate directly or indirectly to the management of Round Lake. Today, there are significant questions regarding how Round Lake should be managed under those orders. Some orders are inconsistent. Some requirements cannot be followed without further approvals from the DNR, and without impacts on property owners, other interested parties, and the environment. Letters and directions from the DNR and other state officials during the last several decades also raise significant questions about how the system should be managed.

There are 668 parcels of land on Round Lake, 74 parcels on Little Round Lake, and 53 parcels on Osprey Lake and Osprey Lake Creek. Different property owners have different views regarding how the lakes should be managed. In addition, this system flows into the Lac Courte Oreilles tribal reservation. The Lac Courte Oreilles Tribal Council has adopted resolutions strongly opposing any dredging or other disturbance of Osprey Creek, and favoring establishing a new revised lawful water level on Round Lake to prevent any lowering of the lake and to reflect the current normal variations of the lake.

A lawsuit commenced by a single property owner is not the appropriate forum to determine how the Round Lake system should be managed. Most affected and interested persons (including the DNR) are not parties to the litigation. There is a substantial risk of multiple lawsuits and inconsistent determinations. Only the DNR has the authority to consider the broad range of interests in the level and flow of the Round Lake system, and if appropriate issue a new order that finally and authoritatively determines the manner in which the Round Lake system should be managed.

The DNR should exercise its primary authority to regulate and control the level and flow of water in the Round Lake system, and should review and clarify the County's obligations with respect to the management of that system. The County intends to play an active and constructive role in that process.

Further information supporting this petition is set forth below.

## SUMMARY OF BACKGROUND INFORMATION

### I. DESCRIPTION OF THE ROUND LAKE SYSTEM AND ORDERS ISSUED BY PSC AND DNR.

Before the Round Lake system was artificially altered, Round Lake was recharged only through rainfall and ground water, and water flowed between Round Lake and Osprey Lake only during times of high water levels on Round Lake. Historically, the water levels on Round Lake fluctuated by more than 10 feet.

#### A. *PSC 2-WP-255 and PSC 2 WP 298 - Relating To Creating The Tiger Cat Flowage And Diverting Water To Round Lake.*

From 1929 through the early 1930s, drought conditions caused unusually low lake levels on Round Lake. On February 25, 1937, the PSC issued PSC 2-WP-255, authorizing Sawyer County to dam the Chief River, creating the Tiger Cat Flowage. One purpose of that order was to allow for a supply of water to raise Round Lake from its then low water stage. On June 21, 1937, the PSC issued PSC 2 WP 298, authorizing Sawyer County to divert waters from the Tiger Cat Flowage to Round Lake to increase the level of Round Lake.

#### B. *PSC 2-WP-513 - Relating To The "Normal" Elevation Of Round Lake And Creating A Means Of Releasing Water From Round Lake.*

In December 1940, after construction of the diversion canals from the Tiger Cat Flowage to Round Lake, Sawyer County petitioned the PSC to establish the "normal" elevation for Round Lake. On September 29, 1941, the PSC issued PSC 2-WP-513 (the "1941 order"). The PSC found that the "normal" elevation of Round Lake was elevation 77.0 feet, when referred to the staff gage at Kaiser's resort on Round Lake. However, Round Lake contained no outlet that would allow water to be released when the lake exceeded that "normal" elevation. Therefore, PSC directed Sawyer County to construct an outlet channel from Little Round Lake to Osprey Lake of sufficient capacity to discharge 150 cfs, with a dam and control gates. The order did not specify the circumstances under which the outlet channel was to discharge 150 cfs. The order also states that Sawyer County was to maintain Round and Little Round Lakes at the normal elevation of 77.0 feet at all times when a sufficient water supply existed and during freshets and heavy run-off to prevent the water levels from rising above elevation 77.25.

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C. *PSC 2-WP-766 - Relating To Raising The Operating Level Of The Tiger Cat Flowage, And Mitigating Downstream Impacts Of Higher Round Lake Water Levels.*

In 1949 Sawyer County applied to the PSC for a permit to raise and enlarge the Tiger Cat Dam, and to raise the elevation of the Tiger Cat Flowage from 90.0 feet to 90.5 feet. The PSC's opinion stated residents of the Court Oreilles Lakes regions filed a petition opposing the application out of concern that raising the Tiger Cat Flowage would raise the level of Round Lake and cause excess water to flow through Osprey Lake and into Court Oreilles Lake. The opinion contains the following additional discussion:

The order establishing levels for Round Lakes provided for the construction of a ditch from Little Round Lake to Squaw Lake and having an outlet works to control the level of Round Lakes. This ditch was only partially completed according to the requirements of the order, and the outlet works are temporary in nature.

It appears that in some years, before any diversion was effected to Round Lakes, the Round Lakes had attained normal elevations higher than that set by the Commission. At the high levels there were two channels running from Little Round Lake to Squaw Lake. Subsequent to the high levels and before the diversion, no channels connected Little Round Lake and Squaw Lake, and the only instance of flow of water towards Squaw Lake was when excess waters occurred in the Round Lakes area.

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The hearing in this matter was held open to permit an investigation by the Conservation Department of the probable effect on Court Oreilles Lakes by a raised and enlarged Tiger Cat flowage. The Conservation Department has made a report of its investigation and is of the opinion that the Tiger cat flowage can be raised 0.5 foot without causing any substantial excess waters to flow towards Squaw Lake. However, its opinion is conditioned on the requirement that diversion from Tiger Cat flowage to Round Lake be permitted only as authorized by the Public Service Commission which retained jurisdiction for this authority ..., *and also that the partially constructed channel from Little Round Lake to Squaw Lake be kept blocked up to the elevation of the natural ground levels to cause any excess waters to flow towards Squaw lake as determined by the natural ground contour.*

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In view of the report made by the Conservation Department and knowledge of the order of the Commission requiring specific authorization for each diversion to Round Lake, the objection of the residents in the Court Oreilles area has been withdrawn.

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The Great Lakes Indian Agency appeared in this matter as its interests might appear. Before this action the agency had complained to the Commission concerning the diversion of waters from Tiger Cat flowage to Round Lake which could damage reservation lands in the area of Squaw Lake.

The order states that raising the elevation of the Tiger Cat flowage to 90.5 feet "will not materially obstruct existing navigation or violate other public rights and will not endanger life, health or property." The decision concludes that the permit is granted "for the raising and enlarging of the Tiger Cat dam ... as herein described." In sum, the order appears to require blockage of the Little Round Lake outlet channel.

D. *DNR Permit - 3-WR-442.7 - Relating To Dredging Osprey Creek And Maintaining The Elevation Of Osprey Lake.*

In 1969, Sawyer County applied to the DNR for a permit to dredge materials from the bed of Osprey Creek. The permit indicated that the purpose was to create better flow conditions out of Little Round Lake and Osprey Lake. The permit was granted subject to 12 conditions. Condition 12 states:

The applicant shall take all necessary action to prevent the level of [Osprey] Lake from dropping below elevation 76.52 feet, Department of Natural Resources datum. If the level of [Osprey] Lake does drop below 76.52 feet, the applicant shall do such necessary work as directed by the Department.

II. SUMMARY OF THE CURRENT ROUND LAKE SYSTEM.

Today, Round Lake is an approximately 5 square-mile lake and one part of a complex water system. Water flows into Round Lake through groundwater and rainfall and can be diverted from the Tiger Cat Flowage to Round Lake through a series of diversion canals. Water can also seep into Round Lake from the Tiger Cat Flowage through a wetland area north of the diversion canal.

Under current conditions, water flows out of Round Lake, through and into the following structures and bodies of water: (1) the Highway B underpass between Round Lake and Little Round Lake; (2) Little Round Lake; (3) a "dam" or outlet structure at the outlet of Little Round Lake; (4) an artificial channel from the Little Round Lake outlet structure that flows into a wetlands area upstream of Osprey Lake; (5) Osprey Lake; (6) Osprey Creek from

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Osprey Lake to CTH NN; (7) culverts located where CTH NN crosses Osprey Creek; (8) Osprey Creek below CTH NN, to Couderay Lake.

The level of Round Lake is affected by multiple control points, including the Highway B underpass, the outlet structure at Little Round Lake, the channel between Little Round Lake and Osprey Lake, Osprey Creek between Osprey Lake and CTH NN, and the culverts located under CTH NN. The primary control point changes depending on the hydraulic situation.

The level of Round Lake is not controlled by a single gate or control structure that is independent of conditions elsewhere. Rather, the level of the lake is affected by multiple hydraulic control points, including the Highway B underpass, the outlet structure at Little Round Lake, the channel between Little Round Lake and Osprey Lake, Osprey Creek between Osprey Lake and CTH NN, the culverts located under CTH NN, and Osprey Creek downstream of CTH NN. The hydraulic characteristics of these controls are quite different. The flow path between the Little Round Lake outlet structure and Osprey Creek at CTH NN is approximately 9000 feet, with a difference in elevation of typically only a few feet, meaning that the hydraulic system is very flat. This means that water levels in Round Lake are very dependent on water levels downstream, and also on the presence or absence of relatively small obstructions such as accumulations of debris or beaver dams. These types of obstructions apparently occur often in the channel between Little Round Lake and Osprey Lake and in Osprey Creek downstream of Osprey Lake. Further, debris and beaver dams are not permanent features, and can change from one year to the next. In summary, the hydraulic control of the level of Round Lake varies depending on the discharge rate, the water levels downstream of Round Lake, and the presence of obstructions in the downstream areas, all of which can vary through time.

Sawyer County cannot maintain the water level of Round Lake between elevation 77.0 and 77.25 simply through a change to their method of operation of the system. The County can maintain the minimum elevation of elevation 77.0 by placing stop logs in the Little Round Lake outlet structure, and through release of water from the Placid Lake diversion structure, if necessary. However, the outlet structure cannot pass large discharges (such as 150 cfs) without a rise in Round Lake water levels of several feet. In order to limit the maximum elevation of Round Lake to 77.25, the outlet structure would require structural modifications, and the downstream channel and Osprey Creek would require alterations, and continuing maintenance of those alterations. These actions would require permit review by the Wisconsin Department of Natural Resources.

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From a technical and hydraulic standpoint, it is not possible to simultaneously manage the Round Lake System consistent with the requirements of PSC 2-WP-513, PSC 2-WP-766 and DNR 3-WR-442.7. Managing the level of Round Lake between elevation 77.0 and 77.25 (PSC 2-WP-513) would require enlarging the Little Round outlet structure and channel, rather than blocking and filling the existing Little Round Lake outlet channel to the natural ground contour as apparently required by PSC 2-WP-766. Further, control of Round Lake as required by PSC 2-WP-513 would likely require reducing the level of Osprey Lake below the elevation required by DNR 3-WR-442.7, and also require continuous maintenance, including dredging and debris removal, which is not currently authorized.

Evaluating the issues affecting the Round Lake water system is complex. The hydraulic system from Round Lake to the point where Osprey Creek flows under CTH NN is relatively complex, and varies over time. Managing Round Lake to reduce the amount of water level fluctuation that occurs under current conditions would require changing the location, operation and configuration of the various control points. The most likely primary control points for managing the levels on Round Lake are the Little Round Lake outlet structure or the CTH NN crossing over Osprey Creek. Changes in Round Lake, Osprey Lake and downstream areas require careful evaluation of the impacts on recreation, property, shoreline erosion and erosion mitigation, aquatic resources, submerged and emergent wetland resources, and possible threatened and endangered species resources.

The changes necessary to use the Little Round Lake Outlet as the primary control point for reducing water level fluctuation on Round Lake would cause larger and more variable discharges of water from Round Lake during higher water conditions. These variable discharges and associated water level fluctuations could produce impacts on downstream aquatic resources or wetlands. The area downstream of Little Round Lake is rich in aquatic resources. For example, about one-third of Osprey Lake is surrounded by wetlands, and Osprey Creek is bordered by wetlands.

Using the Little Round Lake outlet as the primary control could not only require lowering the level of Osprey Lake, but also would cause more fluctuating levels on Osprey Lake than under current conditions. The location of the shoreline or ordinary high water mark on Osprey Lake could also change.

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Controlling water level fluctuation on Round Lake using the crossing of CTH NN over Osprey Creek as the primary control point would require substantial modifications to the current CTH NN crossing. In this scenario, Osprey Lake would likely have an increased water surface elevation. The CTH NN crossing would need to be reconstructed as a gated dam structure.

Using CTH NN as the primary control point would reduce the extent to which Round Lake and Osprey Lake serve as a buffer that protects lands downstream of CTH NN from variable stream flows. Variable and higher stream flows would occur more frequently. More frequent high stream flows could cause impacts to downstream wetlands, possibly including the erosion of a channel.

### III. SUMMARY OF DNR AND OTHER LETTERS AND DIRECTIVES.

Sawyer County records include numerous letters, memos and directives from DNR officials and others over the past decades relating to Round Lake and the PSC and DNR orders. For example:

- In 1961, W.H. Cartwright of the DNR prepared a report stating that “the physical circumstances are such that proper elevation of the outlet gate cannot effect discharge of sufficient water without raising Round Lake levels above the maximum established level when excess runoff occurs. This is because there is little slope from the Round Lakes to Squaw Lake which is a natural condition and cannot be changed. ... With these circumstances, the control section in the outlet is adequate and the operation is proper. The only improvement would be to operate the control section to hold the established level of Round Lake at elevation 77.0 feet and to have all of the gates out of the dam when Round Lake levels exceed elevation 77.25 feet. With this operation it is expected that the raise in Round Lake levels from heavy precipitation would be a normal variation.”
- In 1967, Gerald P. Wallin of the DNR wrote: “The levels of these lakes have been of concern for many years, the history of which would fill a book ... In reviewing the above elevations it is evident that the high level of Round Lake is due to a small slope of approximately .9 of a foot between Little Round Lake and Squaw Lake, and the culverts at the outlet of Squaw Lake holding approximately 2 ½ feet head. This condition at Little Round Lake was when all the logs were removed from the dam.

The only way that Little Round Lake and Round Lake can be lowered is to lower the level of Squaw Lake to create a better flow condition at the outlet by increasing the slope. ... It would not appear at this time that there could be any legal method of lowering Squaw Lake, as this would adversely affect the property owners on Squaw Lake.”

- In 1974 Osprey Lake property owner G.A. Thomas complained to the DNR that the level of Osprey Lake had dropped 15 inches since 1973. During 1974 and 1975 the DNR corresponded with the County and others requesting the County to install planks or stoplogs across the CTH NN culverts to assist in maintaining the level of Osprey Lake at not less than elevation 76.52'. On June 11, 1975, E.M. Brick of the DNR wrote that “Sawyer County has the authorization to maintain the level of squaw Lake as stipulated in condition 12 of permit 3-WR-442.7 issued March 21, 1959.” On November 6, 1975, E.M. Brick wrote that “steel plates will be used in the culverts [under CTH NN] to raise the water.”
- In 1984 Roger Jasinski, DNR, wrote a lengthy letter regarding Round Lake water levels. He wrote that the Little Round Lake outlet structure and channel will not pass 150 c.f.s, unless the water level in the Round Lake were at 80.65 feet. The letter states that “[p]lans submitted for the outlet structure were initially denied approval pending further investigation. Subsequent investigation and report was made. Although plan approval was not specifically addressed the report seems to give tacit approval of the structure as built.” The letter describes the following conclusions reached by the DNR’s legal counsel:
  - The DNR could not enforce the 1941 Order requiring construction of an outlet ditch because the order was not issued by the DNR, the statutory criterion have changed, and the facts have changed;
  - The DNR cannot enforce the existing levels order because all gates have been out of the dam for two years. “The county is doing all they can under present circumstances to comply with the order.”
  - The PSC action in 1949 probably constitutes plan approval.

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- In 1985, Attorney General Bronson C. La Follette responded to a request that the State of Wisconsin take action to enforce the 1941 order:

In the present case several regulatory and statutory changes have occurred, since the PSC issued its order in 1941. Additionally, the DNR has indicated a concern over possible environmental impacts from enforcing the 1941 PSC order and has informally expressed doubts as to whether enforcing the 1941 order would achieve the result you desire. You should also note that in discussing the 1941 PSC order I have not heretofore discussed the impact of the approval of the structure as built by the PSC in 1949. Although not explicitly stated by the PSC, the effect of its approval of the structure as built would appear to have been to amend the material elements of the 1941 PSC order to conform to the specifications of the dam and channel as built and the water level attained thereby.

Concerning the maintenance of the outlet channel, the 1941 PSC order did not require Sawyer County to maintain the outlet channel from the Round Lakes. Since no statutory duty to maintain such a channel exists, it is my view DNR would be without the authority to impose a duty to maintain the channel at this time.

#### IV. JAMES HAUSMAN LAWSUIT.

Sawyer County is currently defending a lawsuit commenced by James Hausman, an owner of property on Round Lake. Among other things, the amended complaint alleges that Sawyer County has violated the 1941 order by allowing higher lake levels than permitted, and requests injunctive relief requiring Sawyer County to maintain the levels of Round Lake "as directed in the 1941 Order and to take the necessary steps to insure that the Round Lake water levels do not exceed the maximum water level set by the 1941 Order." A copy of this petition has been provided to Mr. Hausman's lawyer.

#### V. RESOLUTIONS ADOPTED BY THE LAC COURTE OREILLES TRIBAL COUNCIL.

Much of Osprey Lake, Osprey Creek, and Couderay Lake downstream of Osprey Creek are located within the Lac Courte Oreilles tribal reservation. On October 8, 2002, the Lac Courte Oreilles Tribal Council adopted Resolution No. 02-81, stating "that the Lac Courte Oreilles

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Tribal Council hereby strongly opposes any dredging or other disturbance of Osprey Creek.” On August 4, 2003, the Lac Courte Oreilles Tribal Council adopted Resolution 03-45, stating “that the Lac Courte Oreilles Tribal Council is in favor of establishing a new revised lawful water level on Round Lake to prevent any lowering of the lake and to reflect the current normal variations of the lake.”

#### VI. ROUND LAKE PROPERTY OWNERS SURVEY AND CORRESPONDENCE.

During 2003, the County conducted a survey by mail of Round Lake property owners asking which of four options they preferred relating to Round Lake water levels. 650 cards were sent out, and 283 responses were received through September 3, 2003. Of those 283 responses, 173 checked “do nothing - continue to operate in the current manner,” 66 checked “revise lawful levels based on current normal variations,” 27 checked “improve the Osprey Lake outlet stream to reduce levels,” and 7 checked “abandon the Little Round and Lake Placid Dams.”

On September 3, 2003, Robert J. Strachota, President of the Round Lake Property Owners Association (“RLPOA”), wrote to the Sawyer County Board of Supervisors. His letter states in part:

This letter formally sets forth the majority position of RLPOA. The executive board and the RLPOA believe that the water level that has prevailed for most of this summer (even though up to six inches or so above the authorized lake level of 77.0 feet) should be left alone to the normal forces of nature. We believe that the natural course of nature will balance the water level over time within acceptable tolerances that the lake has experienced over the past 25 years. In other words, sometimes the lake level will be slightly high and sometimes it will be slightly low but always targeting the existing authorized lake level. We expect that Sawyer County and the DNR will maintain and manage the waterway systems in and out of the lake in a responsible manner so as to be able to quickly control the extreme circumstances of high or low water. Whatever actions are needed by Sawyer County or the DNR to be in a state of readiness should be attended to so that responsive action can be taken immediately for extreme circumstances.

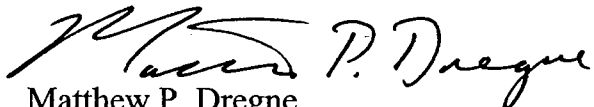
There has been discussion by the County and the DNR about reevaluating Round Lake’s historic water levels. The RLPOA wants to be intimately involved in any and all new proposals for managing the lake. At this time RLPOA does not support a change in the historic lake levels and does not believe that the matter needs to be reevaluated.

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## CONCLUSION

Sawyer County requests that the DNR exercise its primary authority to regulate and control the level and flow of water in the Round Lake system, and review and clarify the manner in which the Round Lake system should be managed.

Very truly yours,



Matthew P. Dregne

MPD:kps

cc: Sawyer County Board  
Jon G. Furlow  
Michael J. Cain