

STATE OF WISCONSIN      CIRCUIT COURT      WAUKESHA COUNTY

10CV03792

State ex rel. Reddelien Road Neighborhood Association, Inc. ("RRNA"),  
F. Robert Moebius, David Draeger, Frederick A. Hanson, Doris Lattos,  
James Wozniak, Donna Anderson, Brad Barke, Carol Barke, James  
Baumgartner, Hilda Baumgartner, Douglas Bruch, Linda Bruch, Charlene  
Cary, Annabelle M. Dorn, Paulette Draeger, Margo Hanson, Christine  
Janssen, Frank Janssen, Brian Kennedy, Mary Lou Kennedy, Mitchell Kohls,  
Joseph G. Krakora, Marie Krakora, Charles Luebke, Patricia Luebke, Mary  
Mitchell, David Mirsberger, Patti Mirsberger, Jill  
Moebius, Gerhard Palmer, Betty Palmer, Aletta Ruesch, Thomas  
Schwartzburg, Stephanie Smith, William Timmer, Suzanne Timmer,  
Deborah Wozniak, Daniel Yuhas, and Jennifer Yuhas,

Plaintiffs,

HASSIN

vs.

Case No.  
Case Code: 30701, 30704  
Declaratory Judgment  
Injunction/Restrain Order

The Department of Natural Resources ("DNR"),  
an agency of the State of Wisconsin,  
Gloria McCutcheon, James Morrissey and  
Thomas Kraus,

Defendants.

CLERK OF COURTS

SEP - 3 2010

THIS IS AN AUTHENTICATED COPY OF AN  
ORIGINAL DOCUMENT FILED IN THE CLERK  
OF COURTS OFFICE WAUKESHA COUNTY.

SUMMONS

**THE STATE OF WISCONSIN**

To each person named above as a Defendant:

You are hereby notified that the Plaintiffs named above have filed a lawsuit  
or other legal action against you. The Complaint, which is attached, states the nature  
of and basis of the legal action.

Within forty five (45) days of receiving this summons, you must respond with a written answer, as that term is used in Chapter 802 of the Wisconsin Statutes, to the Complaint. The Court may reject or disregard an answer that does not follow the requirements of the Statutes. The answer must be sent or delivered to the Court, whose address is: **Clerk of the Circuit Court, Waukesha County Courthouse, P.O. Box 1627, Waukesha, Wisconsin 53187-1627 and to Attorney William C. Gleisner, III, 300 Cottonwood Avenue, Suite No. 3, Hartland, Wisconsin 53029.**

You may have an attorney help or represent you.

If you do not provide a proper Answer within forty-five (45) days, the Court may grant judgment against you for the award of money or other legal action requested in the Complaint, and you may lose your right to object to anything that is or may be incorrect in the Complaint. A judgment may be enforced as provided by law. A judgment awarding money may become a lien against any real estate you own now or in the future, and may also be enforced by garnishment or seizure of property.

Issued this 3<sup>rd</sup> day of September, 2010, at Hartland, Wisconsin

LAW OFFICES OF WILLIAM C. GLEISNER, III  
Co-Counsel for the Plaintiffs

By:   
William C. Gleisner, III  
State Bar No. 1014276  
300 Cottonwood Avenue, Suite No. 3  
Hartland, Wisconsin 53029  
Telephone: (262) 367-1222  
Fax: (262) 367-1236

Elizabeth G. Rich  
Co-Counsel for the Plaintiffs  
State Bar No. 1019123  
W6661 Sumac Road  
Plymouth, Wisconsin 53073  
Telephone (920) 892-2449

~~10CV03792~~

State ex rel. Reddelien Road Neighborhood Association, Inc. ("RRNA"),  
F. Robert Moebius, David Draeger, Frederick A. Hanson, Doris Lattos,  
James Wozniak, Donna Anderson, Brad Barke, Carol Barke, James  
Baumgartner, Hilda Baumgartner, Douglas Bruch, Linda Bruch, Charlene  
Cary, Annabelle M. Dorn, Paulette Draeger, Margo Hanson, Christine  
Janssen, Frank Janssen, Brian Kennedy, Mary Lou Kennedy, Mitchell  
Kohls, Joseph G. Krakora, Marie Krakora, Charles Luebke, Patricia  
Luebke, Mary Mitchell, David Mirsberger, Patti Mirsberger, Jill  
Moebius, Gerhard Palmer, Betty Palmer, Aletta Ruesch, Thomas  
Schwartzburg, Stephanie Smith, William Timmer, Suzanne Timmer,  
Deborah Wozniak, Daniel Yuhás, and Jennifer Yuhás,

Plaintiffs,

HASSIN

vs.

Case No.  
Case Code: 30701, 30704  
Declaratory Judgment  
Injunction/Restrain Order

The Department of Natural Resources ("DNR"),  
an agency of the State of Wisconsin,  
Gloria McCutcheon, James Morrissey and  
Thomas Kraus,

Defendants.

CLERK OF COURTS

SEP - 3 2010

THIS IS AN AUTHENTICATED COPY OF AN  
ORIGINAL DOCUMENT FILED IN THE CLERK  
OF COURTS OFFICE WAUKESHA COUNTY.

---

COMPLAINT

---

NOW COME THE ABOVE NAMED PLAINTIFFS, by their  
attorneys, WILLIAM C. GLEISNER, III and ELIZABETH G. RICH, and  
as and for a complaint against the above-named Defendants respectfully  
allege, state, show and pray to the Court as follows:

## PARTIES

1. Plaintiff Reddelien Road Neighborhood Association, Inc. (hereafter, the “RRNA”) is a non-stock corporation duly organized and operating under Chapter 181 of the Wisconsin Statutes, which has as its purpose the representation of Citizens of Wisconsin who own or reside in riparian property on Reddelien and River Roads in the Town of Merton, County of Waukesha, State of Wisconsin.
2. The other Plaintiffs to this action, specifically named and identified below in the section of this Complaint entitled “Named Plaintiffs” (beginning at ¶37 *infra*) are all members in good standing of the RRNA who own or reside in riparian property in the Reddelien Road Neighborhood (surrounded by a red line in attached Exhibit A), which neighborhood lies under, along or abuts navigable waters of the State of Wisconsin in or next to i) North Lake in Waukesha County (see attached Exhibit A), ii) the property owned by the Hansons and iii) the property owned by Defendant DNR.
3. Plaintiffs Frederick A. Hanson, Margo R. Hanson and Thomas Schwartzburg (hereafter collectively, the “Hansons”) are also members in good standing of the RRNA who own riparian property in the Town of Merton, County of Waukesha, State of Wisconsin (surrounded by a green line in attached Exhibit A), which property marks the northernmost point of the Reddelien Road Neighborhood and bears the legal description in attached Exhibit B, which property

further lies under, along or abuts navigable waters of the State of Wisconsin in or next to i) North Lake in Waukesha County, ii) the properties owned by the Named Plaintiffs and iii) the property owned by Defendant DNR.

4. Defendant Department of Natural Resources (hereafter "DNR") is an agency of the State of Wisconsin *and an owner of riparian property* in the Town of Merton, County of Waukesha, State of Wisconsin (outlined with a black line in attached Exhibit A and often referred to as the "Kraus site"), bearing the legal description in attached Exhibit C, and which property lies under, along or abuts navigable waters of the State of Wisconsin in or next to i) North Lake in Waukesha County, ii) the property owned by the Hansons and iii) the properties owned by the other Named Plaintiffs in this action. The access easement to and from the Kraus site is surrounded by a white broken line in attached Exhibit A.
5. Defendant Gloria McCutcheon is the DNR's Regional Director for Southeast Wisconsin, with offices located at 2300 N. Martin Luther Drive, Milwaukee, Wisconsin 53212.
6. Defendant James Morrissey is the DNR's Regional Program Manager for Southeast Wisconsin, with offices located at 2300 N. Martin Luther Drive, Milwaukee, Wisconsin 53212.
7. Defendant Thomas Kraus resides at W323 N7605 Silver Spring Drive, Hartland, Wisconsin 53029. Defendant Kraus sold his interest

in the “Kraus site” to the DNR in 2005, but continues to retain ownership today of riparian property (surrounded by an orange line in attached Exhibit A), which is directly contiguous with and lies directly to the north of the DNR Kraus site, bearing the legal description in attached Exhibit D.

### **JURISDICTION**

8. This Court has jurisdiction over this action pursuant to Article I, Section 13 and Article IX, Section I of the Wisconsin Constitution. This Court further has jurisdiction over this action pursuant to Wis. Stats. §30.10, §30.294, §281.11, §281.31 and §806.04. This Court also has jurisdiction by virtue of Wisconsin Administrative Code NR §1.90, §1.95, §103.08 and §299.03. This Court also has jurisdiction because this case involves an issue under the Wisconsin Common Law of Riparian Ownership.
9. Venue properly lies in Waukesha County because one of the Defendants is a resident and citizen of Waukesha County. Venue also properly lies in Waukesha County because this case involves property which is located entirely within Waukesha County. This case also involves a determination of relative riparian rights under the Wisconsin Common Law of Riparian Ownership as to property which lies entirely within Waukesha County. Venue also properly lies in this Court because this case involves an issue concerning the creation of public nuisances in Waukesha County. Further, for the

purposes of venue this action marks a continuation of an ongoing dispute in the Circuit Court of Waukesha County between citizens of North Lake and the DNR. This ongoing dispute involves the following cases in which the DNR has previously acquiesced in venue: *North Lake Management District v. DNR*, Case No. 09CV4828 (a Wis. Stats. Chapter 227 review still pending before Waukesha Circuit Court Judge Hassin); *Margo Hanson v. DNR*, Waukesha County Circuit Court Case No. 07CV3169 (disposed of by decision of the Court of Appeals for District II, dated June 16, 2010 – Appeal No. 2009AP1959); *Aletta Ruesch v. DNR*, Waukesha County Circuit Court Case No. 2005CV1715 (disposed of by decision of the Court of Appeals for District II, dated September 26, 2007 – Appeal No. 2007AP1099). Three of the parties appearing as plaintiffs in Waukesha County Circuit Court Case Nos. 07CV3169 and 2005CV1715 are the exact same parties named as Plaintiffs in the case at bar.

#### **NATURE OF THE CASE**

10. In this case the DNR purchased riparian property (known as the “Kraus site”), which was formally residential property, located within the Reddelien Road Neighborhood, for the purposes of achieving public access to North Lake. The DNR insists on going ahead with the development of a public boat launch on the Kraus site despite the fact that it will result in: i) the elimination of navigable

waters contrary to Wis. Stats. §30.10(2); ii) the creation of a public nuisance in violation of Wis. Stats. §30.294; iii) the infliction of other public nuisances, including flooding and pollution, on the property owned by the Plaintiffs contrary to Wis. Stats. §281.31, Wis. Admin. Code NR §1.90 and §1.95; iv) the destruction wetlands contrary to Wis. Admin. Code NR Chapter 103; v) unreasonable harm to the riparian rights of the Plaintiffs under the Common Law of Riparian Ownership; and vi) the pollution of North Lake. The DNR's insistence on proceeding even though it will do serious harm to the Plaintiffs and North Lake is consistent with the demonstrated history of the DNR which has previously: i) caused serious ecological harm to North Lake, which harm was recognized and acknowledged by Judge Nettesheim of the Court of Appeals for District II and ii) disregarded its Constitutional duties to some of the Plaintiffs, such as the Hansons.

## **GENERAL ALLEGATIONS**

### **A. The Interests of the Plaintiffs.**

11. At all times material, the Plaintiffs have Common Law, statutory and Constitutional rights to the enjoyment of their property and the contiguous navigable waters of the State of Wisconsin, including wetlands and North Lake.
12. At all times material, the Hansons had and have a Constitutional right pursuant to Article I, Section 13 of the Wisconsin Constitution



to compensation for private property owned by them which has been taken from them by the DNR without any compensation. The Plaintiffs have commenced suit in the name of the State of Wisconsin as private attorneys general pursuant to Article IX, Section I of the Wisconsin Constitution, Wis. Stats. §30.294 and other laws as detailed herein, due to the DNR's multiple failures to act responsibly and because of the DNR's breach of its fiduciary duty to protect both navigable water and the riparian land adjoining that water as the statutorily designated "Trustee" under Wisconsin's Public Trust Doctrine.

13. The Plaintiffs do not oppose public access on North Lake. However, *they do oppose* the wanton and completely unnecessary destruction of wetlands, navigable waters and their neighborhood. The DNR seeks to insert a very large 24/7 public boat launch into wetlands and navigable waters located in the very heart of a quiet residential neighborhood which launch will only be accessible over a small dead-end rural road. The DNR seeks to do this because they claim that there is no alternative way for the public to access North Lake.
14. In fact, public access to North Lake could easily be achieved if the DNR made use of a completely satisfactory alternative site available for a public boat launch directly across the Lake from the Plaintiffs' neighborhood, known as the Kuchler site. The DNR now dismisses the Kuchler site as unsatisfactory, although the DNR helped to

design the Kuchler site as is alleged in Count II *infra*. Additionally, several years ago the DNR sought to purchase the Kuchler site for public access, and it is easy to understand why. The Kuchler site can be easily accessed by the public by means of a busy highway located in a commercial area with businesses that would benefit greatly from a public launch. In addition to the Kuchler site, there is now public access to North Lake by means of a number of informal launch sites, such as the Corey Oil site, which are located near the Kuchler site.

15. Because of the Kuchler site and the nearby informal sites, the Kraus site actually constitutes *additional available access* to North Lake which will be achieved at the expense of precious wetlands, navigable waters and the continued vitality, beauty, health, welfare and safety of the Reddelien Road Neighborhood.
16. The Town of Merton, the Village of Chenequa, the North Lake Management District, as well as local law and emergency services, are all on record as strongly opposing the Kraus site.
17. Unfortunately, the Plaintiffs have not received adequate protection of their Common Law, statutory and Constitutional rights from those governmental bodies charged with the protection of those rights, including the United States Army Corps of Engineers, the State of Wisconsin DNR, the County of Waukesha, the Town of Merton and the North Lake Management District.

18. While the North Lake Management District has tried hard to prevent the DNR from damaging the environment and the Reddelien Road Neighborhood, there are many avenues of redress that have not been pursued against the DNR's arbitrary and capricious conduct, and the Reddelien Road Neighborhood is now faced with imminent, very serious and irreparable injury. The Plaintiffs, who are all long standing taxpaying residents and Citizens of Waukesha County, have no alternative but to ask this Court to exercise its equitable jurisdiction to protect valuable wetlands, navigable waters, the Reddelien Road Neighborhood and North Lake from destruction, pollution and the arbitrary and capricious excesses of the DNR.

**B. The Actions of Defendant DNR.**

19. The present and future actions of the DNR threaten to perpetrate public nuisances which will cause direct and proximate, and irreparable injury to the Plaintiffs, in breach of the DNR's fiduciary, statutory and Constitutional duties to the Plaintiffs, as further detailed in the Counts and paragraphs of this Complaint.

20. At all times material, the DNR is both a governmental body charged with enforcing Wisconsin law *and a simple riparian owner of property which makes them a neighbor of the Plaintiffs*. As a riparian owner the DNR owes to the Plaintiffs certain Common Law, statutory and Constitutional duties to refrain from unreasonable

infringements upon the riparian rights of the Plaintiffs, as further detailed in the Counts and paragraphs of this Complaint.

21. At all times material, the present or future wrongful actions of the DNR are imminent, and the Plaintiffs are without any legal remedy to stop the DNR from causing irreparable injury to the rights and property of the Plaintiffs. Therefore, the Plaintiffs have no alternative but to seek immediate equitable relief, including declaratory and injunctive relief from this Court against those threatened actions, as further detailed in the Counts and paragraphs of this Complaint.
22. The DNR does not enjoy sovereign immunity from injunctive and declaratory relief under the facts of this case because it has exceeded its statutory and Constitutional authority by: i) threatening to violate its fiduciary duties to the Plaintiffs under Article IX, Section I of the Wisconsin Constitution, Wis. Stats. §30.294, §281.31 and other laws; ii) threatening to create and inflict public nuisances upon the Plaintiffs, iii) threatening to violate the riparian rights of the Plaintiffs; iv) threatening to pollute the Plaintiffs' property; v) threatening to pollute North Lake; vi) acting in an arbitrary and capricious manner; and vii) violating the provisions of Wis. Const. Article I, Sect. 13. Because prospective injunctive and declaratory relief are being sought to protect the foregoing enumerated Common Law, statutory and Constitutional rights of the Plaintiffs from the

imminent and threatened actions of the DNR, the Plaintiffs are not required to provide any notice to the DNR or its employees named as Defendants pursuant to the provisions of Wis. Stats. §893.82.

23. As to all the Counts herein, there are reasonable grounds for the conclusion that the Plaintiffs can prevail at trial and the Plaintiffs are without any adequate remedy at law so that a preliminary injunction is necessary to prevent the threatened wrongful conduct of the DNR pending a full trial on whether a permanent injunction should be entered against the DNR. As to Count II herein, the Plaintiffs additionally request an advisory Jury Trial pursuant to §806.04(9) and a declaration of rights pursuant to Wis. Stats. §806.04.

**C. The DNR has Previously Done Grave Ecological Damage to North Lake for which there was no Legal Redress.**

24. The DNR has a history of specific wrongful conduct toward the Citizens of North Lake (including a number of the Plaintiffs in this action), which was adjudged to be non-compensable by legal redress after the fact of injury. This gives rise to a real and present fear by the Plaintiffs that the DNR will once again disregard its Common Law, statutory and Constitutional duties to the Plaintiffs with complete legal impunity.
25. In the case of *Froebel v. DNR*, 217 Wis. 2d 652, 579 N.W.2d 774 (1998), it is reported that the DNR sought to remove what was then known as “Funks Dam.” This Dam blocked sediment and other

pollutants from entering North Lake. Funks Dam was approximately one mile upstream of North Lake on the Oconomowoc River in the Town of Merton in Waukesha County. *Id.* at 656.

26. Strong objections were made to the removal of Funks Dam by the DNR because it was feared the removal would pollute North Lake. The DNR gave strong assurances that the removal of Funk's Dam would not cause harm to North Lake. *Id.* In point of fact, as alleged and proven by the plaintiff in *Froebel*, when the DNR removed Funks Dam in 1992 it failed follow its own plans which led to foreseeable massive sediment discharges into North Lake which ruined the ecology of North Lake. *Id.* The effects of the injuries thus inflicted upon North Lake by the DNR continue to this day.
27. An Administrative Law Judge ("ALJ") assigned in the *Froebel* case specifically determined that the plaintiff in *Froebel* had established that the removal of Funk's Dam resulted in the infusion of considerable amounts of muck and sediment into North Lake and that the harm inflicted upon North Lake had i) been foreseeable by the DNR and ii) was a result of the DNR's wrongful failure to follow its own plans. *Id.* at 659 to 660.
28. The plaintiff in *Froebel* sought an affirmative injunction after harm had been inflicted on North Lake by the DNR seeking to have the DNR "remove the fill, silt and sediment" from North Lake. The DNR sought to dismiss the request of the plaintiff in *Froebel* for

legal redress on the grounds that the requested relief was not available to the plaintiff under and pursuant to Chapter 227 of the Wisconsin Statutes. Id. 661 to 662.

29. The Court of Appeals in *Froebel* concluded that neither the ALJ nor the Circuit Court had the legal power to compel the DNR to take remedial action after the fact to undo the harm it had wrongfully done to North Lake. Id 662. Thus, once the DNR had inflicted harm on North Lake in *Froebel*, there was no legal redress available to the plaintiff. The Court of Appeals further found that the ALJ and the Circuit Court were without power to enter *affirmative* injunctive relief against the DNR (Id. at 666-667). The *Froebel* Court never reached the question of whether the DNR was amenable to prohibitory injunctive relief before it inflicted injury, such as the prohibitory relief sought by the Plaintiffs now before this Court.

30. The Court of Appeals noted that one of the chief reasons why legal redress could not be ordered in favor of the plaintiff was that under the law the DNR was the enforcer of the law and could not properly be the subject of an action to impose a legal remedy for a wrong it had done. Id. at 666. Thus, by the reasoning of the Court in *Froebel*, the only way to prevent the infliction of a wrong by the DNR is to seek equitable relief before that wrong has been perpetrated.

31. The Court of Appeals in *Froebel* made it abundantly clear that it recognized that the DNR had acted to harm the Citizens of North

Lake by polluting North Lake, but concluded that unfortunately those Citizens were without a legal remedy. As the author of the *Froebel* decision, Judge Nettlesheim, made abundantly clear:

We join in the ALJ's criticisms of the DNR's practices in this case. We would expect the DNR, as the protector of this state's natural resources and the chief enforcer of our laws protecting those assets, to abide by the rules which it imposes and enforces on others. We also would expect it to abide by the promises and representations it makes to the public regarding its own activities. These expectations may perhaps explain why the legislature has not deemed it necessary to create laws which make the DNR subject to the requirements imposed on others. However, we cannot rewrite the existing laws to accommodate Froebel's legitimate complaints. His arguments and his criticisms are more properly directed to the legislature.

*Id.* at 673.

32. The DNR has a demonstrated history of acting to harm and pollute the navigable waters of North Lake and its environs, thus violating the rights of the Citizens of North Lake with impunity from any legal redress once it has so acted. History thus clearly teaches that the Plaintiffs in this case will be without any adequate legal remedy once the DNR has acted to construct the Kraus public launch.

**D. It is Significant that the DNR is both a Trustee under the Public Trust Doctrine and a Riparian Owner of Property.**

33. Pursuant to Article IX, Section I of the Wisconsin Constitution, Wisconsin has adopted and enforced what is known as the Public Trust Doctrine. By the terms of Wis. Stats. §281.11 and other laws,



the DNR has been in effect and in fact delegated the role of Trustee under the Public Trust Doctrine.

34. The purpose of the Public Trust Doctrine is to safeguard the public's use of navigable waters for all purposes, including purely recreational and non-pecuniary purposes. The Public Trust Doctrine establishes standing for the state, or any person acting in the name to sue in order to vindicate the public trust under the existing law of Wisconsin. Therefore, one must look to statutes enacted pursuant to the Public Trust Doctrine, such as Wis. Stats. §30.294 and §281.31(1), to determine whether a plaintiff may bring suit.

35. In addition to the customary role of the DNR as the Trustee under the Public Trust Doctrine and enforcer of the State's water laws, the DNR in this particular case has also elected to a very different role by becoming a riparian owner of frontage on North Lake, with the same rights and obligations as the Plaintiffs in this action who are also riparian owners.

36. Just as with every other right which a riparian owner acquires to the waters of North Lake, under the Common Law of Riparian Ownership the right of the DNR to use its riparian property is restricted always to that which is a reasonable use, and is to be measured and determined by the extent and capacity of North Lake, the uses to which it is and has been put, and the rights that other riparian owners on North Lake also have.

## NAMED PLAINTIFFS

37. In addition to Plaintiff Reddelien Road Neighborhood Association (“RRNA”), the following named Plaintiffs are members in good standing of the RRNA and, like the DNR, are also riparian owners of land on North Lake. They are also Citizens of the Town of Merton, Waukesha County and the State of Wisconsin with full and complete rights under the Wisconsin Constitution, State Statutes, the Public Trust Doctrine and the Wisconsin Common Law.
38. The Constitutional rights, Common Law rights and general civil rights of the Plaintiffs have not been adequately protected to date by any governmental body, including the United States Army Corps of Engineers, the State of Wisconsin, the County of Waukesha, the Town of Merton and the North Lake Management District.
39. While the North Lake Management District has tried hard to help, no governmental body has sought to advocate or vindicate the rights of the Plaintiffs under: A) the Wisconsin Constitution, in particular Article I, Section 13 & Article IX, Section I; C) the provisions of Wisconsin Statutes such as §30.10(2), §30.294 & §281.31; D) Wis. Admin. Code NR Chapters 1, 103 and 299; or D) the Wisconsin Common Law, including the Common Law of Riparian Ownership.
40. In this action, the Plaintiffs assert their right pursuant to Wis. Stats. §30.294 to sue the DNR in the name of the State of Wisconsin for the DNR’s threatened creation of a public nuisance which will

directly and proximately cause irreparable injury to the rights of the Plaintiffs as Citizens of Wisconsin and as riparian owners and residents of the Reddelien Road neighborhood. The Plaintiffs now further assert their rights to sue the DNR under Wis. Stats. §281.31 and Wis. Admin. Code Chapters 1, 103 and 299 for the DNR's threatened breach of its fiduciary duty by the creation of other public nuisances which will directly and proximately cause irreparable injury to the rights of the Plaintiffs. The Plaintiffs now further assert their rights to sue the DNR for breaching the Common Law Riparian Rights of the Plaintiffs. The Plaintiffs and the Hansons further assert their right to sue the DNR on behalf of the Hansons because of the DNR's violation of Article I, Section 13 of the Wisconsin Constitution, which violation will also affect the statutory and Constitutional rights of the other Plaintiffs.

41. As to Count III of this Complaint, the Plaintiffs request an equitable advisory Jury Trial pursuant to Wis. Stats. §806.04(9) and a declaration of the Plaintiffs' rights. As to Count III and the other Counts of this Complaint, based on the allegations herein and based also on accompanying Motion for a Preliminary Injunction pursuant to Wis. Stats. Chapter 813 and supporting Brief, as well as the affidavit of the Plaintiffs' expert, Neal O'Reilly, and also based on the testimony which the Plaintiffs are prepared to adduce at a hearing on that motion for a preliminary injunction, the Plaintiffs

now assert and aver that there are reasonable grounds for the conclusion that the Plaintiffs can prevail at trial, but that the Plaintiffs are without any adequate remedy at law so that a preliminary injunction to prevent the threatened wrongful conduct of the DNR is necessary and proper pending a full trial on whether a permanent injunction should be entered against the DNR.

42. Reddelien and River Road both lie within the Town of Merton and the County of Waukesha and are both adjacent to North Lake and the property owned by the DNR. The Named Plaintiffs in this action are as follows:

- i. F. Robert Moebius, RRNA President, Citizen and owner of property at W322 N7492 Reddelien Road.
- ii. David Draeger, RRNA Board Member, Citizen and owner of property at W322 N7448 Reddelien Road.
- iii. Frederick A. Hanson, RRNA Board Member, Citizen and owner of property at W322 N7574 Reddelien Road.
- iv. Doris Lattos, RRNA Board Member, Citizen and owner of property at W322 N7516 Reddelien Road.
- v. James Wozniak, RRNA Board Member, Citizen and owner of property at W322 N7548 Reddelien Road.
- vi. Donna Anderson, Citizen and owner of property at N73 W32375 River Road.

- vii. Brad Barke, Citizen and owner of property at W322 N7458 Reddelien Road.
- viii. Carol Barke, Citizen and owner of property at W322 N7458 Reddelien Road.
- ix. James Baumgartner, Citizen and owner of property at N73 W32275 Reddelien Road.
- x. Hilda Baumgartner, Citizen and owner of property at N73 W32275 Reddelien Road.
- xi. Douglas Bruch, Citizen and owner of property at W322 N7508 Reddelien Road.
- xii. Charlene Cary, Citizen and owner of property at N73 W32365 River Road.
- xiii. Annabelle M. Dorn, Citizen and owner of property at W322 N7356 Reddelien Road.
- xiv. Linda Bruch, Citizen and owner of property at W322 N7508 Reddelien Road.
- xv. Paulette Draeger, Citizen and owner of property at W322 N7448 Reddelien Road.
- xvi. Margo Hanson, Citizen and owner of property at W322 N7574 Reddelien Road.
- xvii. Christine Janssen, Citizen and resident of property at W322 N7288 Reddelien Road.

- xviii. Frank Janssen, Citizen and resident of property at W322 N7288 Reddelien Road.
- xix. Mitchell Kohls, Citizen and owner of property at N73 W32435 River Road.
- xx. Brian Kennedy, Citizen and owner of property at N73 W32295 Reddelien Road.
- xxi. Mary Lou Kennedy, Citizen and owner of property at N73 W32295 Reddelien Road.
- xxii. Joseph G. Krakora, Citizen and owner of property at W322 N7478 Reddelien Road.
- xxiii. Marie Krakora, Citizen and owner of property at W322 N7478 Reddelien Road.
- xxiv. Charles Luebke, Citizen and owner of property at N72 W32225 Reddelien Road.
- xxv. Patricia Luebke, Citizen and owner of property at N72 W32225 Reddelien Road.
- xxvi. Mary Mitchell, Citizen and owner of property at N73 W32435 River Road.
- xxvii. David Mirsberger, Citizen and owner of property at N72 W32455 River Road.
- xxviii. Patti Mirsberger, Citizen and owner of property at N72 W32455 River Road.

- xxix. Jill Moebius, Citizen and owner of property at W322  
N7492 Reddelien Road.
- xxx. Gerhard Palmer, Citizen and owner of property at W322  
N7288 Reddelien Road.
- xxxi. Betty Palmer, Citizen and owner of property at W322  
N7288 Reddelien Road.
- xxxii. Aletta Ruesch, Citizen and owner of property at W322  
N7536 Reddelien Road.
- xxxiii. Thomas Schwartzburg, Citizen and owner of property at  
W322 N7574 Reddelien Road.
- xxxiv. Stephanie Smith, Citizen and owner of property at N73  
W32305 Reddelien Road.
- xxxv. William Timmer, Citizen and owner of property at N72  
W32455 Reddelien Road.
- xxxvi. Suzanne Timmer, Citizen and owner of property at N72  
W32455 Reddelien Road.
- xxxvii. Deborah Wozniak, Citizen and owner of property at  
W322 N7548 Reddelien Road.
- xxxviii. Daniel Yuhas, Citizen and owner of property at W322  
N7392 Reddelien Road.
- xxxix. Jennifer Yuhas, Citizen and owner of property at W322  
N7392 Reddelien Road.

**COUNT I: THE DNR'S BREACH OF ITS  
FIDUCIARY DUTIES TO THE PLAINTIFFS.**

43. The Plaintiffs herein re-allege each and every one of the foregoing paragraphs as though they were set forth in this Count in full.
44. The DNR is the Trustee under the Public Trust Doctrine for all navigable waters within the State of Wisconsin, and for all who use or reside on or along those waters. .
45. The DNR has recognized its obligation to those residing on or along navigable waters in Wisconsin Administrative Code NR §1.90, which provides in pertinent part:

It is the goal of the state of Wisconsin to provide, maintain and improve access to the state's navigable lakes, rivers and streams for the public. ... *The department, alone or in cooperation with local government, shall exercise its management and regulatory responsibilities to achieve this goal and to assure that levels and types of use of navigable waters are consistent with protection of public health, safety and welfare, including protection of natural resources* [Emphasis supplied].

46. Under the provisions of Wisconsin Administrative Code NR §1.95, the DNR is obligated to preserve and protect wetlands, and under NR §1.95(4) the DNR's Natural Resources Board is committed to a policy which "promotes, protects, restores, enhances and preserves the quantity, quality and diversity of Wisconsin's wetlands as a critical component of ecosystems *essential to the health and quality of life of our state's diverse citizenry, plants, animals and landscapes* [Emphasis supplied]."



47. When the DNR fails to honor and fulfill its duties as Trustee under the Public Trust Doctrine, a citizen has standing under that doctrine to assert a claim based on existing Wisconsin law. Two statutes which have been enacted to further the Public Trust Doctrine include Wis. Stats. §30.294 and Wis. Stats. §281.31.
48. Wis. Stats. §30.294 provides in pertinent part: “[e]very violation of [Chapter 30 of the Wisconsin Statutes] is declared to be a public nuisance and may be prohibited by injunction and may be abated by legal action brought by any person.”
49. Wis. Stats. §281.31 provides in pertinent part: “[T]o aid in the fulfillment of the state’s role as Trustee of its navigable waters and to promote public health, safety, convenience and general welfare, it is declared to be in the public interest to establish policies for conservation and protection of Wisconsin’s water resources and also to help insure the maintenance of safe and healthful conditions, and prevent & control water pollution on lands under, abutting or lying close to navigable waters of the State of Wisconsin.”
50. Based on reports from their experts, the Plaintiffs aver that there are wide expanses of saturated soil and water throughout the DNR’s riparian property (referred to as the “Kraus site”), which is often navigable at times of spring freshets or storms. These areas are located in the following sections of the DNR’s riparian Kraus site:

- i. The DNR's proposed access road from Reddelien Road north to the area of the proposed launch, which is marked in red on the map in attached Exhibit E. Also, the area where the proposed parking lot is located, which is marked in yellow on Exhibit E.
- ii. The unnamed stream that flows north and east from the very large area of wetlands directly to the west of Reddelien Road (marked in blue on attached Exhibit E) and empties into North Lake.
- iii. The entire area of the proposed access road from where it turns east to the proposed parking lot becomes navigable during spring freshets or storms, not unlike Lilly Creek in *Village of Menomonee Falls v. DNR*, 140 Wis. 2d 579, 412 N.W.2d 505 (Ct. App. 1987).
- iv. The area where the proposed parking lot is located presently contains a grove of trees, marked in orange on attached Exhibit E. During spring freshets or storms, this orange area turns into a marshland which is navigable.
- v. It is also clear from attached Exhibit E that the DNR's proposed access road will run over and through the Hansons' property, surrounded by a green line in Exhibit E. It is further clear from Exhibit E that the proposed access road will dissect the northwest portion of the

Hansons' property. As noted *infra*, while the DNR may have an easement over the northwest portion of the Hansons' property by virtue of a recent decision of the Court of Appeals, Hansons have never been compensated for their property which will become a highway if the DNR is permitted to proceed with the Kraus adventure.

- vi. It is also clear from Exhibit E that the large wetlands to the west of Reddelien Road now empties into North Lake by means of the Kraus site. Once the football-field-sized-proposed parking lot (in yellow on Exhibit E) is in place that parking lot will block water from the wetlands which Plaintiffs experts state will then flow east over the Reddelien Road property flooding that property and surcharging the septic systems which are located on the Reddelien Road property and this in turn will pollute the residences along Reddelien Road as well as the adjacent waters of North Lake.
- vii. The DNR has devised maps of the Kraus site, one of which is included as attached Exhibit E-1. Plaintiffs submit that because Exhibit E-1 was prepared by the DNR it constitutes in effect an evidentiary admission against interest. In attached Exhibit E-2, the Plaintiffs have overlaid the DNR's map in Exhibit E-1. The yellow,

orange and red boxes on Exhibit E-2 constitute the large wetlands which the DNR acknowledges exist near or by the public boat launch they plan for the Kraus site. In fact, as Plaintiffs' experts are prepared to demonstrate at a hearing on a Preliminary Injunction, the wetlands on the Kraus site are far larger than that conceded by the DNR in Exhibit E-1 and E-2. The following is clear by the attached Exhibits E-1 and E-2:

- a) The access road to and from the Krause property passes very close to a very large area of wetlands (which is denoted on Exhibit E-2 as blue water marks and which the Plaintiffs have surrounded with yellow lines on Exhibit E-2).
- b) It is also clear from the DNR's own map in Exhibit E-2 that the northernmost portion of the proposed access road runs through wetlands for a considerable part of its length (as can be seen from the area contained within the orange box on Exhibit E-2).
- c) By the DNR's own admission in Exhibit E-2, the wetlands in the yellow and orange boxes channel into North Lake via what the DNR itself calls an "unnamed stream," which is contained within a red box in Exhibit E-2).

**COUNT I A: WIS. STATS. §30.294 AND  
THE ABATEMENT OF A PUBLIC NUISANCE.**

51. The Plaintiffs re-allege each and every one of the foregoing paragraphs as though they were set forth in this Sub-Count in full.
52. The Plaintiffs have commenced this action in part pursuant to Wis. Stats. §30.294 as Citizens in the name of the State of Wisconsin for the purposes of seeking abatement of a public nuisance which the DNR threatens to create on its own property.
53. Any violation of Chapter 30 of the Wisconsin Statutes is by the specific terms of Wis. Stats. §30.294 deemed a public nuisance.
54. Under the law as interpreted by the Wisconsin Supreme Court in the case of *Gillen v. City of Neenah*, 219 Wis. 2d 806, 580 N.W.2d 628 (1998), it is unnecessary for a Citizen suing in the name of the State under Wis. Stat. §30.294 to abate a public nuisance to comply with a number of preconditions that might otherwise bar suit. For example, when a Citizen sues under §30.294:
- i. It is unnecessary for such a Citizen to wait until some injury has been done before seeking injunctive relief, because the goal is to prevent injury. *Id.* at 822.
  - ii. It is unnecessary for such a Citizen to comply with Wis. Stats. 893.80 (or in this case §893.82). *Id.* at 822.
  - iii. It is unnecessary for such a Citizen to seek administrative review of any kind within or by the DNR. *Id.* at 831.

- iv. It is unnecessary for such a Citizen to comply with the procedures set out in Wis. Stats. §30.03(4)(a). Id.
- v. It is unnecessary for such a Citizen to wait for or refrain from acting because of actions or enforcement decisions made by the DNR. Id. at 829.

55. As the Trustee under the Public Trust Doctrine and pursuant to Wis. Stats. §30.10(2), the DNR is charged with the responsibility and duty of protecting all streams, sloughs, bayous and marsh outlets which are navigable in fact for any purpose whatsoever.

56. In other reported cases, such as *Village of Menomonee Falls v. DNR*, 140 Wis. 2d 579, 412 N.W.2d 505 (Ct. App. 1987), where parties have sought to fill or alter the flow of a navigable stream, slough, bayou, marsh outlet and even a drainage ditch, the DNR has not hesitated to perform tests to determine whether they are in fact navigable “for any purpose whatsoever.”

57. The DNR has failed and neglected to conduct any tests whatsoever to determine navigability of the unnamed stream and marshland marked and identified on attached Exhibit E. The Plaintiffs’ counsel has searched through the 1250 pages of documents which the DNR produced in response to FOIA requests. The Plaintiffs’ counsel did not find any evidence whatsoever that navigability tests were performed on the unnamed stream or marshland located on the Kraus site. By failing to conduct those tests, the DNR has breached

its fiduciary duty as Trustee under the Public Trust Doctrine to the Plaintiffs and to the public under Wis. Stats. §30.10(2).

58. The Plaintiffs have conducted navigation tests on the unnamed stream and in the marshland on the Kraus site and have verified that large sections of the unnamed stream and marshland are in fact navigable within the meaning of Wis. Stats. §30.10(2) and applicable Wisconsin case law.
59. The DNR threatens to fill or obstruct the said unnamed stream and marshland, which are part of the wetlands on the Kraus site, without conducting navigability tests and without obtaining a permit to do so. If this threat is carried out then pursuant to Wis. Stats. §30.294 it will constitute the creation of a public nuisance because the DNR will thus dam, bridge or obstruct those navigable waters in violation of Wis. Stats. 30.10(2), and under the *Gillen* decision the Plaintiffs have the right to seek injunctive relief to abate that nuisance.
60. Plaintiffs aver that the fact the DNR is also the owner of the Kraus site does not relieve the DNR of its responsibility to conduct all appropriate tests, including navigability tests. By the same token, the fact that the DNR is the issuer of permits does not mean that the DNR need not follow the usual procedures for applying for, and being approved for, any permits.
61. However, in order to remove any question of a conflict of interest and in order to insure that the DNR's testing is not colored by its

clear bias in favor of a determination allowing it to place a public launch on the riparian property it owns, Plaintiffs request that the DNR be required to retain a qualified and neutral third party to conduct the required navigability tests and all other relevant tests to determine whether the said unnamed stream and marshland are navigable under §30.10(2).

**COUNT I B: WIS. STATS. §281.31 AND THE  
ABATEMENT OF OTHER PUBLIC NUISANCES.**

62. The Plaintiffs re-allege each and every one of the foregoing paragraphs as though they were set forth in this Sub-Count in full.
63. The DNR has also disregarded the Plaintiffs' rights and the rights of the public under Wis. Stats. §281.31(1), which under the facts of this case means that in fulfilling the duties of Trustee under the Public Trust Doctrine the DNR must take into account the effect of their proposed boat launch on the public health, safety, convenience, freedom from noise pollution, wetland destruction, and general welfare of the Plaintiffs. Cf. Wis. Admin. Code NR §1.90 and §1.95
64. The Plaintiffs submit that the DNR has wholly and completely ignored the rights of the Plaintiffs under §281.31(1) and the relevant Wis. Admin Code provisions.
65. The Plaintiffs are thus forced to request a preliminary and permanent injunction so that the DNR may be made to take full account of and demonstrate how they will protect the public health,



safety, convenience and general welfare of the Plaintiffs and avoid polluting the Plaintiffs' neighborhood and North Lake as they proceed to develop the public launch on the Kraus site.

66. Based on reports from their experts, the Plaintiffs further aver that the proposed boat launch and parking lot will effectively destroy or block wetlands which now filter large areas of farm field runoff and storm water runoff, thus creating other public nuisances. For example, the creation of a football-field-sized parking lot, eighteen inches above grade, will act as a "stopper," which will cause large amounts of surface water, often contaminated by farm nutrients, gasoline and oils, to run into the streets of the Plaintiffs' neighborhood and from there into North Lake. Runoff caused by the proposed boat launch and parking lot will increase flooding on Reddelien Road north from Becks Road and will surcharge septic systems, which will cause pollution of the Plaintiffs' neighborhood and of North Lake.

67. Based on reports from their experts, the Plaintiffs further aver that DNR's plan to remove a number of trees and vegetation from the Kraus site, thus creating other public nuisances. For example, the removal of trees and vegetation will expose the Plaintiffs' neighborhood to increased flooding. The removal of trees and vegetation will also inflict other public nuisances on the Plaintiffs in that it will expose those living along northern Reddelien Road to

road traffic noise, 24/7 lighting and the prying eyes of strangers, thus destroying the quiet enjoyment of their property to which the Plaintiffs on northern Reddelien Road are entitled.

68. Based on reports from their experts, the Plaintiffs further aver that the removal will also destroy the natural habitat for wildlife, fish and aquatic life in defiance of Wis. Stats. §281.31(1) and thereby create further public nuisances to the detriment of the Plaintiffs.

69. While the DNR might ordinarily be responsible for the issuance of permits in connection with property over which it has enforcement power, the Plaintiffs aver that it would be a conflict of interest of Constitutional proportions to allow the DNR to act as both enforcer of the water laws of Wisconsin and to pass judgment on whether its conduct as a riparian owner of land adjacent to the Plaintiffs is proper under Wis. Stats. §281.31.

**COUNT I C: THE WISCONSIN ADMINISTRATIVE CODE  
AND THE ENJOINING OF OTHER WRONGFUL CONDUCT.**

70. The Plaintiffs re-allege each and every one of the foregoing paragraphs as though they were set forth in this Sub-Count in full.

71. The DNR has otherwise failed to conduct appropriate and necessary tests to insure the proper delineation of the wetlands located on the Kraus site. In fact, they have often sought to bar experts from the North Lake Management District from entering onto the Kraus site to conduct appropriate tests for wetlands.

72. The DNR has acted in defiance of and contrary to its own standards for the delineation of and protection of wetlands, as set forth in Wis. Admin. Code NR §103.08 and has otherwise ignored and disregarded its duties to take care in the issuance of permits under Wis. Admin Code NR §299.03 and similar rules designed to protect, preserve and enhance the quality of waters in wetlands and other waters of the State influenced by wetlands, such as North Lake. They have done this because of the arbitrary and capricious efforts of local representatives of the DNR, as detailed in Count II *infra*, to force a public boat launch into the Reddelien Road Neighborhood at any cost and despite the destruction it will cause to the environment, the rights of the Plaintiffs in the Reddelien Road Neighborhood and the ecology of North Lake.

73. While the DNR is the owner of the Kraus site, the Plaintiffs aver that this does not relieve it of its responsibility under its enforcement power to follow its own standards for the delineation and protection of wetlands as set forth in Wis. Admin. Code NR §103.08. The Plaintiffs similarly aver that the DNR is obliged by Wis. Admin. Code NR §299.03 to take care in the issuance of permits even when issuing said permits to itself as a riparian owner.

74. The Plaintiffs further aver that it would be a conflict of interest of Constitutional proportions to allow the DNR to act as both enforcer of the water laws of Wisconsin and to pass judgment on whether its

conduct as a riparian owner of land adjacent to the Plaintiffs is proper under Wis. Admin. Code NR §103.08 and Wis. Admin. Code NR §299.03.

WHEREFORE, as to Count I, I A, I B and I C, the Plaintiffs pray for the entry of a Preliminary Injunction and a Permanent Injunction against the DNR in the following respects:

A) Pursuant to Wis. Stats. §30.294 barring the DNR from taking any action to fill, alter or modify the unnamed stream and marshland on the Kraus site until and unless they conduct their ordinary and customary navigability tests and other relevant tests, preferably by a qualified and neutral third party, and show to the satisfaction of this Court whether or not the unnamed stream and marshland are navigable waters within the meaning of Wis. Stats. §30.10(2);

B) Pursuant to Wis. Stats. §281.31(1), barring the DNR from proceeding with any development of the Kraus site, including the removal of trees or vegetation, until the DNR has taken full account of and demonstrated, preferably by means of a qualified neutral third party, to the satisfaction of this Court how it will protect the public health, safety, convenience and general welfare of the Plaintiffs and avoid polluting the Plaintiffs' neighborhood and North Lake by the DNR's placement of a public launch on the Kraus site;

C) Pursuant to Wis. Admin. NR Chapters 103 and 299, barring the DNR from proceeding with any development of the Kraus site until a full

and fair review can take place concerning their delineation of the wetlands on and adjacent to the Kraus site and until it can be shown, preferably by means of a qualified and neutral third party, to the satisfaction of this Court that the wetlands on and near the Kraus site will be properly identified and protected despite the placement of a public launch on the Kraus site.

**COUNT II: ARBITRARY AND  
CAPRICIOUS ACTION BY DNR EMPLOYEES.**

75. The Plaintiffs herein re-allege each and every one of the foregoing paragraphs as though they were set forth in this Count in full.

76. Defendants Gloria McCutheon and James Morrissey were and are at all times material employees of the DNR and have been and continue to act under color of state law. Regardless of their amenability to suit under other laws, as public employees acting under color of state law both Defendants McCutheon and Morrissey owe a duty of good faith to the Plaintiffs and are required by law to respect their procedural and substantive Due Process rights under the Wisconsin and United States Constitutions.

77. More specifically, Defendants McCutheon and Morrissey are required to refrain from arbitrary, capricious or unlawful conduct when dealing with the Plaintiffs or their rights, and are further required at all times to act according to and within the statutory limits of their authority as employees of the DNR.

78. The NLMD sought to advance a solution to public access to North Lake whereby two different sites would be established, the Kraus site and the Kuchler site (known as the “two site” plan). The NLMD envisioned a circumstance where the Kuchler site would handle motorized boat traffic pulled on boat trailers, whereas the Kraus site would be converted into a nature conservancy where public access would be restricted to “carry-on boats” (such as canoes) and possibly ice fishing. Under the NLMD plan, the wetlands on the Kraus site would remain largely untouched, although the public would have the opportunity to enjoy the wetlands, woods, vegetation and wildlife through and by means of a series of nature trails on the Kraus site. Under the NLMD plan, the impact on the Reddelien Road Neighborhood would have been minimal.

79. The DNR led the NLMD to believe that it was interested in the two site approach and so the NLMD expended hundreds of thousands of dollars attempting to satisfy concerns which the DNR had about the Kuchler site. The DNR provided substantial input concerning the Kuchler site plans. In fact, because of its technical requirements and plan reviews, etc. the DNR actually participated in the creation of plans for the Kuchler site. The NLMD also obtained tentative approval from the U.S. Army Corps of Engineers for the use of the Kuchler site as a motorized public boat launch.

80. Defendants McCutcheon and Morrissey, and their subordinates, failed and neglected to negotiate in good faith with the NLMD concerning the relative merits of the Kraus site and the Kuchler site as more fully appears from the Petitions, affidavits briefs and record in the Wis. Stats. Chapter 227 Administrative Review of a decision of the DNR to insist on using just the Kraus site for public boat access in the case of *North Lake Management District v. DNR*, Waukesha County Circuit Court Case No. 09CV4828 (still pending before Waukesha County Circuit Court Judge Hassin).

81. Defendants McCutcheon and Morrissey have arbitrarily and capriciously insisted that a public launch must be located on the Kraus site and have failed and refused to consider scientific, technical and environmental evidence that use of the Kraus site will cause serious ecological damage to the riparian owners in Reddelien Road Neighborhood and to North Lake and will otherwise inflict significant public nuisances upon the Plaintiffs.

82. At the same time, Defendants McCutcheon and Morrissey have failed and refused to fairly and properly consider scientific, technical and environmental evidence favoring use of the Kuchler site.

83. Defendants McCutcheon and Morrissey have in fact actively attempted to suppress evidence concerning the relative merits of the Kraus and Kuchler sites in at least the following respects:

- i. Defendants McCutcheon and Morrissey have barred scientists representing the NLMD from entering upon the Kraus site in order to conduct reasonable tests in and delineations of the wetlands on the Kraus site, despite the fact that the Kraus site is now public property purchased with public money and intended for a public purpose.
- ii. Defendants McCutcheon and Morrissey have failed and refused to conduct navigability tests of the waters located in the unnamed stream and marshland located on the Kraus site, although they customarily have insisted that other citizens must undergo such tests when confronted with requests to do exactly what the DNR seeks to do with the Kraus property.
- iii. Instead of conducting the ordinary and customary tests to determine navigability usually employed by the DNR and otherwise insuring proper delineation of the wetlands on the Kraus site, Defendants McCutcheon and Morrissey have deliberately taken steps to disguise the existence of navigable waters and wetlands on the Kraus site in an effort to gain approval of their plans from the United States Corps of Engineers. Defendants McCutcheon and Morrissey did this by causing the vegetation characteristic of wetlands to be improperly and deliberately mowed just



before an inspection by the Army Corps on or about April 29, 2010, contrary to the specific advice of seasoned and competent DNR professionals. The specifics of their misconduct concerning the mowing of the Kraus site are as follows:

- a) Based on materials obtained by FOIA requests to the DNR, the Plaintiffs aver that Memos from DNR professionals who are knowledgeable about wetland delineations, dated in late 2008 and early 2009, have stated in part: “To determine whether hydrophytic vegetation [characteristic of wetlands] is present, [the Kraus site] needs to be left unmowed for a minimum of one full growing season. Vegetation should be observed under natural, unmowed conditions. A minimum of one full growing season is needed to reestablish species that will help determine zones of hydrophytes and non-hydrophytes.”
- b) One week before the U.S. Army Corps of Engineers was to visit the Kraus site, on or about April 29, 2010 one of the Reddelien neighbors, Donald Reinbold, came upon workers at the Kraus site who were about to mow the site. Mr. Reinbold, who has often worked with the DNR in his capacity as a

Project Engineer for the Wisconsin Department of Transportation, advised the workers not to mow the site. The workers put Mr. Reinbold on the phone with Defendant James Morrissey. Mr. Reinbold specifically told Mr. Morrissey that he should not mow the site before the visit of the Army Corps of Engineers. Mr. Morrissey responded that he had been ordered to mow the site and the mowing proceeded.

- iv. Defendants Morrissey and McCutcheon knew of the internal memoranda advising against mowing the site, but did so anyway. Upon information and belief, the Defendants had the Kraus site mowed before the visit by the Army Corps of Engineers out of an arbitrary and capricious determination to see the Kraus site developed as a public launch at any cost, no matter what the objections might be to the site.

84. By their omissions and commissions detailed in ¶83 *supra*, Defendants Morrissey and McCutcheon exceeded their statutory authority and acted in an arbitrary and capricious manner.

85. Defendant Morrissey's supervisor is Defendant McCutcheon. Upon information and belief, Defendant Morrissey answers to Defendant McCutcheon and receives his primary direction and supervision from Defendant McCutcheon.

86. While the Plaintiffs at this time are not seeking any other relief against Defendants McCutcheon and Morrissey, all of their actions in connection with the Kraus and Kuchler sites have been under color of state law and contrary to the Due Process rights of the Citizens of North Lake in general and the Citizens of the Reddelien Road Neighborhood in particular under both the United States Constitution and the Wisconsin Constitution.

WHEREFORE, as to Count II, the Plaintiffs pray for the entry of a Preliminary Injunction and a Permanent Injunction barring Defendants McCutcheon and Morrissey from having any further contact with or jurisdiction over the Kraus or the Kuchler sites.

### **COUNT III: DECLARATORY RELIEF.**

87. The Plaintiffs herein re-allege each and every one of the foregoing paragraphs as though they were set forth in this Count in full.

88. With the assistance of an advisory jury pursuant to §806.04(9) the Plaintiffs seek a declaration of rights from this Court pursuant to Wis. Stats. §806.04 for the purposes of determining the relative measure of the riparian rights of the DNR versus the riparian rights of the Plaintiffs, and according to what is reasonable under the circumstances under the Common Law of Riparian Ownership.

89. The controversy in the case at bar is justiciable in that: i) the Plaintiffs make a claim as riparian owners under the Common Law against the DNR and further aver that they have an interest in so

contesting the actions of the DNR; ii) the interests of the Plaintiffs and the DNR are clearly adverse; iii) the Plaintiffs have a legally protectible interest as riparian owners; and iv) the issue of determining the relative riparian rights of the Plaintiffs and the DNR is ripe for judicial determination.

90. Plaintiffs need not suffer an injury before seeking declaratory relief under Wis. Stats. §806.04. This case is ripe for declaratory relief because the facts are capable of being sufficiently developed to allow for conclusive adjudication.

91. The DNR does not enjoy sovereign immunity against declaratory relief to the extent it is acting in excess of its statutory authority. In this case, the DNR has purchased what was residential property and is now a riparian owner of property possessing the same rights and obligations as contiguous riparian owners, such as the Plaintiffs. However, the DNR seeks to exceed its authority as an enforcement agency by improperly using the power of its governmental authority to impermissibly augment its rights as a riparian owner and thus unreasonably curtail or eliminate the rights of the Plaintiffs as contiguous riparian owners in violation of the Common Law of Riparian Ownership.

92. Under the law the DNR is the Trustee of the public waterways under the Public Trust Doctrine and the chief enforcer of the State's water laws. In this case, however, the DNR has also elected to

become a riparian owner, just like the Plaintiffs in this action. By improperly using its governmental power the DNR proposes a radical change in the riparian use of the property it has acquired on North Lake to the severe and permanent detriment of the riparian rights of Plaintiffs in the following respects:

- i. The DNR intends to convert the riparian property it has acquired from a single family residential property into a 24/7 boat launch facility, complete with lighting, a 2000 foot long asphalted access road and a football-field-sized parking lot sufficient to accommodate between 16 to 19 automobiles and boat trailers now (with the potential of accommodating 30+ at a later date) directly in between residential homes. See Plaintiffs' attached Exhibit F. This will introduce significant increases in automobile and boat traffic into what is a quiet residential neighborhood.
- ii. Based on reports from their experts, Plaintiffs aver that the DNR's proposed access road and large asphalted parking lot will effectively destroy wetlands which now filter large areas of farm field runoffs and storm water runoffs. See Plaintiffs' attached Exhibit G. The creation of the football-field-sized parking lot will act as a "stopper" preventing the filtering of farm runoff, spring freshets and storm water accumulations. This "stopper" effect will cause

large amounts of surface water, often contaminated by farm nutrients, gasoline and oils, to run into the streets of the Plaintiffs' neighborhood. Plaintiffs aver that the actions of the DNR as a fellow riparian owner will significantly and detrimentally alter the nature and character of the property owned by the DNR's fellow riparian owners, namely the Plaintiffs in this case.

- iii. Based on reports from their experts, Plaintiffs further aver that the runoff caused by the radical change in the DNR's riparian property will increase flooding on Reddelien Road north from Becks road and will surcharge septic systems and crawl spaces where utilities are located, which will cause pollution of the Plaintiffs' neighborhood and of North Lake. See Plaintiffs' attached Exhibit H.
- iv. Based on reports from their experts, Plaintiffs further aver that the DNR's proposed alteration of its riparian property will have a severe and permanent adverse impact on the health, safety and welfare of the Plaintiffs' neighborhood because it will:
  - a) Dramatically increase traffic over a small country road that dead-ends in the Plaintiffs' neighborhood. See Plaintiffs' attached Exhibit J.

- b) This traffic will inevitably invade the Reddelien Road Neighborhood adversely effecting the quiet enjoyment of the Plaintiffs' property and placing in jeopardy children and elderly citizens who often walk on the narrow private asphalt paths of the neighborhood, which paths lack sidewalks or sufficient clearance for large amounts of automobile traffic, especially when pulling boat trailers.
- c) Reddelien Road east from West Shore Drive to the Plaintiffs' neighborhood is narrow and not easily accessible by emergency vehicles. See Plaintiffs Exhibit K. As noted by local law and emergency services, the proposed launch site of the DNR will severely complicate access to the Plaintiffs' neighborhood by health, police and fire units.

93. Under the Common Law of Riparian Ownership, the right of a riparian owner such as the DNR is restricted to a reasonable use of its property. Under the Common Law of Riparian Ownership, reasonable use of the DNR's riparian property is to be measured and determined by the extent and capacity of North Lake, the uses to which it is and has been put, and the rights that other riparian owners on North Lake also have.

94. While there can be no absolute or fixed standard for the measure of such relative rights, the Wisconsin Common Law of Riparian Ownership mandates that the issue of the relative measure of the riparian rights of the DNR versus the riparian rights of the Plaintiffs must be determined by what is reasonable under the circumstances.
95. Plaintiffs further aver that a Trier of Fact could reasonably infer and determine that the radical change the DNR proposes in its riparian property threatens to inflict an unreasonable incursion upon, and drastic alteration of, the rights of the DNR's fellow riparian owners, namely the Plaintiffs in the case at bar.
96. In terms of the reasonableness of the DNR's actions, Plaintiffs submit that all of the threatened damage to the Plaintiffs' riparian rights could be avoided and additional public access to North Lake achieved if the DNR made use of the completely satisfactory alternative site available for a public boat launch directly across the Lake from the Plaintiffs' neighborhood, known as the Kuchler site.
97. The DNR now dismisses the Kuchler site. However, besides the fact that several years ago the DNR sought to purchase the Kuchler site for public access, the Kuchler site has previously been approved for use as a public site by the U.S. Army Corps of Engineers. The Kuchler site has also recently been reworked and developed at the request of the DNR, as noted *supra*. The DNR now ignores the Kuchler site and seeks instead to achieve by developing the Kraus



site what is actually *additional access* at the expense of precious wetlands, navigable waters and the continued vitality and beauty of the Reddelien Road Neighborhood.

98. The Plaintiffs do not seek damages or attorney fees from the DNR, nor do they seek retrospective relief of any kind. They merely seek adjudication of the prospective relative Common Law riparian rights of the DNR versus those of the Plaintiffs. This is essentially a request which sounds in equity and not in law. The Plaintiffs have no adequate remedy at law and will suffer irreparable injury if the DNR is permitted to complete development of the Kraus site before this Court declares the relative riparian rights of the DNR versus the riparian rights of the Plaintiffs according to what is reasonable under the circumstances.

99. Plaintiffs submit that a determination of relative riparian rights is best made by and through an advisory Jury Trial under and pursuant to Wis. Stats. §806.04(9). An advisory Jury is a device of equity. A judgment or decree of the relative riparian rights of the Plaintiffs and the DNR will remove any uncertainty between the parties.

WHEREFORE, as to Count III, the Plaintiffs ask that this Court exercise its equity jurisdiction and order that the following relief be accorded to the Plaintiffs:

A) Pursuant to Wis. Stats. §806.04 for a declaration of the relative measure of the riparian rights of the DNR versus the riparian rights of the Plaintiffs according to what is reasonable under the circumstances.

B) For the empanelling of an advisory Jury Pursuant to Wis. Stats. 806.04(9) to aid this Court in achieving the aforesaid declaration of rights.

C) For the entry of a preliminary and permanent Injunction barring the DNR in its capacity as a riparian owner from taking any action which lessens, modifies or otherwise adversely effects the riparian rights of the Plaintiffs until such time as this Court has declared the riparian rights of the DNR versus the riparian rights of the Plaintiffs according to what is reasonable under the circumstances.

#### **COUNT IV: KRAUS ACTIVITY.**

100. The Plaintiffs herein re-allege each and every one of the foregoing paragraphs as though they were set forth in this Count in full.

101. Defendant Thomas Kraus, who sold his interest in the property to the DNR in 2005, continues to retain ownership of riparian property which is directly contiguous with and lies directly to the north of the DNR property. Defendant Kraus is a private citizen who does not have an employment or formal agency relationship with the DNR.

102. Since his sale to the DNR in 2005, Defendant Kraus filled in wetlands on the property formerly owned by him and on property

owned by the Hansons for the purposes of facilitating the travel by DNR employees and contractors over the proposed access road to the proposed parking lot on the DNR's Kraus site.

103. Since his sale to the DNR in 2005, Defendant Kraus also filled in the navigable waters of the unnamed stream on the DNR's Kraus property adjacent to the proposed access road to the proposed parking lot, again in order to further the interests of the DNR in developing and building a public launch on the Kraus site.

104. The DNR has refused and failed to prevent Defendant Kraus from undertaking such action in defiance of the rules which the DNR is bound to enforce for the protection of the wetlands and navigable waters on the DNR's Kraus property.

105. The DNR has refused and failed to fine or otherwise seek punishment of Defendant Kraus for his filling of the wetlands and navigable as it would other Citizens because of the fact that Defendant Kraus is acting in concert with the DNR.

106. The Plaintiffs aver that they fear that even if injunctive relief is granted against the DNR and its employees, Defendant Kraus may work to undermine those injunctions and seek to fill the wetlands and navigable waters on the Kraus site.

WHEREFORE, as to Count IV, the Plaintiffs pray for the entry of a Preliminary Injunction and a Permanent Injunction against Defendant

Kraus barring him from filling or otherwise altering the wetlands or navigable waters located on the DNR's Kraus property.

**COUNT V: VIOLATION OF ARTICLE I,  
SECTION 13 OF THE WISCONSIN CONSTITUTION.**

107. The Plaintiffs herein re-allege each and every one of the foregoing paragraphs as though they were set forth in this Count in full.

108. By way of demonstrating the unclean hands of the DNR, the Plaintiffs aver and plead as follows on behalf of Plaintiffs Frederick Hanson, Margo Hanson and Thomas Schwartzburg (the "Hansons").

109. The DNR purchased the Kraus property without being aware of the fact that a portion of the access road they needed for ingress and egress to and from the proposed boat launch passed over the property of the Hansons. There was a residential easement over the property of the Hansons in favor of the DNR but Hansons argued that surcharging that easement to accommodate the traffic contemplated by the DNR would severely burden the Hansons' subservient easement.

110. The relative positioning of the easement can be seen from attached Exhibit L. The pink and the green roads denoted on Exhibit L represent two potential paths of the DNR's proposed access road and run through and over the land owned by the Hansons. The only way the DNR can build a sixty foot access road utilizing the pink

and green corridors on Exhibit L is by dramatically expanding and massively surcharging a pre-existing residential subservient easement over the Hansons' property.

111. If the DNR is not allowed to utilize the easement, then the DNR will obtain the corridor marked in blue on attached Exhibit L, which will dramatically increase the cost and technical difficulty of building an access road. If the DNR is permitted to expand and surcharge the easement over the Hansons' property by creating a public thoroughfare, the Hansons will lose all beneficial use of their property.

112. On numerous occasions the DNR offered to purchase the Hansons subservient easement, thus recognizing that the easement was i) private property and ii) a valuable asset of the Hansons. Each time, the Hansons clearly and unequivocally refused to sell their property to the DNR.

113. The DNR repeatedly attempted to defeat the easement, which culminated in a decision of the Court of Appeals on June 16, 2010 in the case of *Hanson v. DNR*, Appeal No. 2009AP1959, wherein the Court of Appeals held as follows:

By its express terms, the easement is a right of way allowing ingress and egress to and from the waterfront property owned by the DNR. The deed set no conditions, restrictions or qualifications on the DNR's use of the right of way. It contained no limitations on the number or type of vehicles the DNR could permit to traverse the right of way to

get to and from the lakefront property. ... [T]he trial court properly determined that the DNR was entitled to summary judgment declaring its right, and the rights of members of the public as permitted by the DNR, to have ingress or egress over the [Hansons'] property without restriction.

Id. at ¶¶8-9.

114. The Plaintiffs do not concede that the Court of Appeals reached the proper conclusion in *Hanson v. DNR*. Be that as it may, it is very clear that the parties never raised, and the Trial Court and the Court of Appeals never considered the rights of the Hansons under Wis. Stats. Chapter 32 or under Article I, Section 13 of the Wisconsin Constitution. More to the point, the Court of Appeals' decision in *Hanson v. DNR* is completely silent concerning both Wis. Stats. Chapter 32 and Article I, Section 13 of the Wisconsin Constitution.
115. Moreover, while the DNR discussed easement rights in its presentations to the Trial Court and Court of Appeals in *Hanson v. DNR*, the DNR never revealed its intent to convert its easement over the Hanson property from a dirt road into a two-way asphalted road with a raised grade that would forever be dedicated as a public thoroughfare, thus depriving the Hansons of any beneficial use of their property now and for all time.
116. In effect and in fact, the DNR took the property of the Hansons for a public use without compensation, in clear violation of

Article I, Section 13 of the Wisconsin Constitution. Further, at no time did the DNR attempt to comply with the strictures of Chapter 32 in acquiring de facto title to the Hanson's subservient easement.

117. The easement which has been illegally seized by the DNR to construct an asphalt highway across the property of the Hansons will forever be dedicated to a public highway and will provide public traffic with a permanent thoroughfare to and from the DNR's Kraus property.

118. There is no use which the Hansons will ever be able to make of that property in the future. The DNR clearly obtained this right without seeking condemnation of the property under Chapter 32 of the Wisconsin Statutes, although from their previous offers to purchase the subservient easement it was clearly their intent to obtain title to the property.

119. A "taking" of property can occur short of actual occupation by the government, if the restriction in fact deprives the owner of all, or substantially all, of the beneficial use of his property. The intent of the government is immaterial; all that matters is whether the property owner is deprived of substantially all beneficial use of his property.

120. Chapter 32 of the Wisconsin Statutes provides the exclusive procedure in condemnation actions. This Chapter is in derogation of the Common Law and therefore is to be strictly construed. The DNR

never at any time attempted to follow the procedures set forth in Chapter 32 with regard to the Hansons' property.

121. It does not matter how small the taking, under the law any taking of private property without compensation is a violation under all circumstances of Article I, Section 13 of the Wisconsin Constitution.

122. The DNR's power to condemn is very limited, and must be done according to the strictures of Wis. Stats. Chapter 32, including §32.02(16).

123. When the Hansons refused to sell the subservient easement, the DNR contrived an easement argument to circumvent the property rights of the Hansons. However, regardless of easement law, there is an absolute Constitutional prohibition against a public agency taking private property without compensation.

124. The actions of the DNR in illegally seizing the property of the Hansons affects the Plaintiffs because it will enable the DNR to immediately proceed with the development of the Kraus site to the serious injury of the Plaintiffs.

WHEREFORE, as to Count V, Plaintiffs request a Preliminary and Permanent Injunction barring the DNR from using the property of the Hansons to build a two lane asphalted road until and unless they comply fully with all the provisions of Wis. Stats. Chapter 32 of the Wisconsin



Statutes and properly condemn the property of Hanson according to Chapter 32 and Article I, Section 13 of the Wisconsin Constitution.

Dated at Hartland, Wisconsin this 2<sup>nd</sup> day of September, 2010.

LAW OFFICES OF WILLIAM C. GLEISNER, III  
Co-Counsel for the Plaintiffs

By: 

William C. Gleisner, III  
State Bar No. 1014276  
300 Cottonwood Avenue, Suite No. 3  
Hartland, Wisconsin 53029  
Telephone: (262) 367-1222  
Fax: (262) 367-1236

ELIZABETH GAMSKY RICH & ASSOCIATES, S.C.  
Co-Counsel for the Plaintiffs  
Elizabeth G. Rich  
State Bar No. 1019123  
W6661 Sumac Road  
Plymouth, Wisconsin 53073  
Telephone (920) 892-2449  
Fax: (920) 892-2449

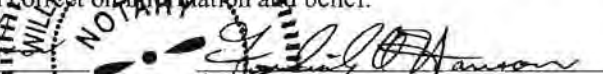
Plaintiffs request a Jury of six as to Count III of the Complaint, pursuant to Wis. Stats. §806.04(9).

STATE OF WISCONSIN) ) SS.  
WAUKESHA COUNTY )

VERIFICATION

F. ROBERT MOEBIUS and FREDERICK A. HANSON, both of whom are named Plaintiffs in this action, came before me on September 2, 2010 and stated to me that they have read the above Complaint and do swear under oath that all factual assertions in the Complaint are true and correct to the best of their knowledge and belief except those stated on information and belief and also those contained in Paragraph 37 above, and as to the factual assertions in that paragraph they believe them to be true and correct on information and belief.

  
F. Robert Moebius

  
Frederick A. Hanson

Subscribed and sworn to this 2<sup>nd</sup> day of September, 2010.

  
Notary Public, State of Wisconsin

My Commission is Permanent (Wisconsin State Bar No. 1014276).