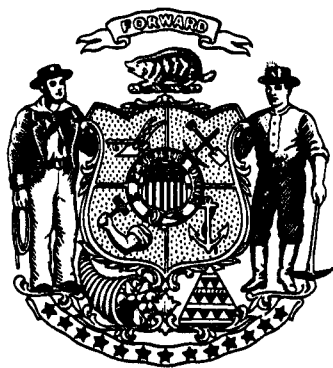


# WISCONSIN LEGISLATIVE COUNCIL



## STAFF REPORT

TO THE  
WATER RESOURCES COMMITTEE  
ON  
PROBLEMS RELATING TO ABANDONMENT OF DAMS

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STAFF REPORT  
to the  
WATER RESOURCES COMMITTEE  
on  
PROBLEMS RELATING TO ABANDONMENT OF DAMS

December, 1959

Legislative Council  
Room 202 South

State Capitol  
Madison, Wisconsin

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1959-61 Biennium

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## PREFACE

This staff report is concerned with only one of the 3 problems assigned to the water resources committee. Other fields of study assigned to the committee are (a) a study of the drainage laws, and (b) a study of the Wolf River basin. While the problem of abandonment of dams is the far-rowest of the 3, it nevertheless may have important implications from the standpoint of the water resource as a whole.

This report seeks to bring out some of those implications and to give the committee some of the background information which it will need for a thorough understanding and successful solution of the problem. The table of contents will indicate the general nature of the materials contained in the report.

The staff is indebted to personnel of the public service commission for providing information and materials which were essential to the development of this report.

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PRELIMINARY STAFF REPORT  
ON PROBLEMS RELATING TO ABANDONMENT OF DAMS

I. THE STUDY ASSIGNMENT

The 1959 legislature, by Jt. Res. No. 94, S., directed the legislative council to study, among other things, the subject matter of Jt. Res. No. 59, S. relating to abandonment of dams. The study has been assigned to the water resources committee created by the legislative council. Jt. Res. No. 59, S. reads as follows:

Whereas, the problem of water, water power and dams has always been of great public interest and the legislature has been charged with the duty of protecting the public trust and the rights of citizens of this state in the lakes and streams; and

Whereas, a legislative committee created by the legislature of 1909 studied the entire problem of water power, mill dams and their relation to the lakes and streams, forests and drainage and as a result of said study chapter 31 of the statutes was created relating to the powers and duties of the public service commission to grant permits to construct, operate and maintain dams in or across navigable waters in said state; and

Whereas, it appears that said study and the legislation adopted in connection therewith considered only the problem attendant to the erection of dams and problems attendant to the continuance of operation and maintenance and provided that "the owner of any dam constructed for the preservation of life, health and property shall maintain the dam in good repair and condition and shall not wilfully or otherwise injure, remove or destroy the same or any part thereof"; and

Whereas, said legislation and the intent of the legislature, as indicated by the report of the interim committee of 1909, did not consider the problems attendant to applications for abandonment; and

Whereas, with the increased generation of electric power by steam, and the advent of the atomic age, hydraulic power dams will be abandoned, and the ponds created by the dams, upon which private riparian owners have gained public rights and have enjoyed the advantages of the artificial level of the water resulting from the dam and improved their property at great expense in reliance upon their continued right to the use of the artificial pond; and

Whereas, if said dams are abandoned the public will be deprived of the enjoyment of said artificial pond for recreational purposes, natural scenic beauty and the full development of agricultural and industrial activity and said abandonment will endanger life and health and constitute a hazard to navigation and thus affect the welfare of the citizens of the state; now, therefore, be it

Resolved by the senate, the assembly concurring, That the legislative council be directed to create a committee of three senators and four assemblymen to study the long-range effect of the destruction and abandonment of dams within the state of Wisconsin and its attendant detriment to the public, the private riparian owners and the right of the citizen to have access to and utilize all of the waters of the state and to report and make recommendations to the 1961 legislature for the future preservation of public waters and problems attendant to the abandonment of dams within the state.



## II. BACKGROUND OF THE PROBLEM

Dams have played an important role in the economic life of the state since territorial days.<sup>1</sup> The territorial legislature of 1840 enacted the first Mill Dam Act to encourage the construction of mill dams to provide power for the grist mills and saw mills which then were so important to the state's economy. It authorized any person to construct a dam on a non-navigable stream and to flow the lands of others without their consent, subject only to their right to sue for damages within a specified period. Until 1911, the test of navigability under this act was quite narrow, so that streams such as the Yahara at Madison were considered non-navigable and therefore could be used for milldams. The Mill Dam Act has been on the statute books continuously with the exception of the period of 1850 to 1857.<sup>2</sup>

In addition to the dams constructed on "non-navigable" streams under the Mill Dam Act, the legislature granted a total of 665 special legislative permits for dams between the years 1836 and 1909. These were granted for the purposes of development of power, improvement of navigation, facilitating log driving or boomage, flowing of cranberry marshes, and others.

By the turn of the century, the mill dam era was well past its peak and generation of electric energy had become the primary objective of dam construction. By 1909 water power was considered to be such an important natural resource of the state that it was felt the state ought to share in its benefits and see that it would be used for the greatest public good. A special legislative interim committee was created in 1909 to study the problem, and the recommendations of that committee culminated in the present system whereby permits for construction of dams were granted by the public service commission. The legislature has not granted any special dam construction permits since the creation of the interim committee in 1909.

There are roughly 1,000 dams in existence in Wisconsin today. This is a substantial number, even though many of them of course are small ones. Now, however, it appears that the harnessing of water power may have reached its peak in this state. At least many of the smaller dams are being abandoned because the owners feel that it no longer is economically feasible to operate them.

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1. For further elaboration of the facts set forth in this and the 2 following paragraphs, see Kanneberg, Law of Waters, 1946 Wis. L. Rev. 345. See also Dykstra, Legislation and Change, 1950 Wis. L. Rev. 523.
  2. The present version of the Mill Dam Act is to be found in Wis. Stat. §§31.31 to 31.33 (1957).

A. Review of some past dam abandonment proceedings

Jt. Res. No. 59, S. refers in a general way to various problems which can arise when a dam is abandoned. Further insight into these problems can be obtained by a review of the dam abandonment proceedings before the public service commission within the past 20 years. Practically all of these proceedings have been conducted pursuant to §31.18 (1) of the statutes which reads as follows:

31.18 (1) The grantee of any permit, the owner of any dam constructed before permits were required by law, and the owner of any bridge of the city of Portage or at any point above that city, over the Wisconsin river, shall maintain and operate all such dams, slides, chutes, piers, booms, guide booms, weirs, tunnels, races, flumes, sluices, pits, fishways, locks, boat hoists, marine railways and all other equipment required by the commission for the protection of public rights in such waters, and for the preservation of life, health and property, in good repair and condition, and shall not wilfully, or otherwise, injure, remove or destroy the same, or any part thereof, unless the commission shall have approved such removal or destruction in writing. In the event of emergency the commission shall have power, pending investigation and hearing, to order the repair of any dam without notice and hearing.

Note that this statute does not expressly mention "abandonment" of dams, but the issue of the commission's authority to permit abandonment was not raised until the recent Somerset Dam case.

The statute also does not prescribe any procedure to be followed in dam abandonment cases but a procedure has been developed by the commission which it follows quite regularly. The application for abandonment usually is informal, generally in the form of a brief letter to the commission asking for permission to abandon a particular dam. A field investigation then is made by engineers on the commission's staff, after which the matter is set for public hearing in some city or village in the vicinity of the dam. Notice is mailed to all parties known to be interested, including the conservation department. Notice also is mailed to the clerk of the county and municipality in which the dam is located and a news story on the scheduled hearing is sent to newspapers in the area. At the hearing all interested persons are permitted to give testimony in support of or in opposition to the granting of the application. Witnesses are sworn and testimony is taken by a reporter and transcribed. Finally, the commission issues a written order granting or denying the application or granting the application in part or subject to conditions.

Besides §31.18, there are 2 other statutes which have some relevance to dam abandonments and which perhaps should be mentioned at this point just to complete the picture, though neither appears to be very significant from the standpoint of this study. One is §29.04 which permits the conservation commission to remove old and abandoned dams from the streams of the state, or to repair and maintain dams on lands belonging to the state if it will promote the conservation of any species of wild animals. Section 89.27 (7) to (14) provides a procedure whereby drainage districts may apply to the public service commission for what in effect amounts to authority to cause a dam to be removed from a navigable stream. The commission, after investigation and hearing, must make a finding as to whether the public health and public welfare will be promoted by the removal of the dam and whether the removal is necessary to the proper operation of the proposed drainage system. If it finds in the affirmative on both counts and also finds that navigation or other public rights in the stream will not be materially impaired by the project, the drainage district may proceed with the removal of the dam.

Since 1940 the public service commission has received 30 applications for abandonment of dams and has completed action on 27 of them. These are discussed in some detail in this report because they are believed to be fairly indicative of the types of cases, and therefore the types of problems, which can be expected to arise in future years. The cases are listed in chronological order. The summaries are based upon the case records in the files of the public service commission, the reference in parentheses at the end of each case name being the commission's file number. By way of review, a summary of all the cases in tabular form will be found at pages 21 to 24 of this report.

#### Oslo Dam, Manitowoc River, Manitowoc County (2-WP-505)

On September 9, 1940 the Wisconsin Public Service Corporation, as owner of the dam, applied for authority to abandon it on the ground that operation of the dam for hydroelectric purposes no longer was economical. A hearing was held October 4, 1940. Testimony at the hearing indicated that it cost over 16 times as much to produce electric energy at this dam as the average cost of producing such energy at the company's other hydro plants. It also appeared, however, that the pond created by the dam was used for fishing to some extent, and the town of Cato in which the dam was located, the county of Manitowoc, and the Manitowoc County Fish and Game Protective Association all expressed interest in taking over the dam and operating it for the benefit of the public. The company was willing to turn over the dam without cost. The stumbling block was that it would cost, on the average, \$1,300 per year to maintain the dam. After corresponding with the various interested groups over a period of several months following the hearing, the commission concluded

that these groups were not willing to assume the cost of maintaining the dam and that "under the facts and circumstances of this case it appears to the Commission that it would be unreasonable to require the Wisconsin Public Service Corporation to assume the expense of operating the dam merely to maintain the pond." It issued its order authorizing the company to leave open the 2 tainter gates of the dam, but specifically provided that the company is not relieved from any liability for damages caused by the dam or other structures which remain in the river.

Lower Amherst Dam, Waupaca River, Portage County (2-WP-572)

On June 26, 1942 the Wisconsin Power and Light Company, owner of the dam, applied for authority to abandon it. A hearing was held on July 30, 1942. From the evidence presented at the hearing, it appeared that the dam had been originally constructed as a mill dam but had been operated by the applicant for the purpose of producing electric energy for sale to the public from 1928 until the water wheel broke down early in 1942. It would have cost from \$15,000 to \$18,000 to put the plant back into operating condition and the small output of the plant would not have warranted the expense from the standpoint of the company. All of the riparians on the pond had given written consent to draining the pond and restoring the river to its natural condition. Conservation department personnel testified that drainage of the pond would be beneficial to trout life in the river below the pond. The only objection was raised by the town of Amherst, (a) on the ground that it would lose some tax revenue if the plant ceased operation, and (b) on the ground that it would lose contributions from the company toward the maintenance of a bridge over the flume. It appeared that the company had at one time in the past made a voluntary contribution toward the maintenance of this bridge, but it also appeared that the company was under no legal obligation to do so then or in the future. The commission on October 2, 1942, issued an order permitting abandonment of the dam.

Boaz Dam, Mill Creek, Richland County (2-WP-634)

On June 19, 1945, A. H. Krouskop and Company applied for authority to abandon the dam on the ground that the dam no longer was of any economic value to the company. It was pointed out that the company's plant, previously run by water power, now had been converted to electric power. The timbers of the dam were in a deteriorated condition and would soon have to be replaced if the dam were to be maintained in the future. The dam originally had been constructed under the Mill Dam Act. No one appeared in opposition to the abandonment of the dam at the hearing held on July 27, 1945, and on August 25, 1945 the commission issued an order authorizing removal of the dam.

Brooks and Ross Dam, Eau Claire River, Village of Schofield (2-WP-644)

On August 23, 1945 the Roddis Lumber and Veneer Co. filed an application requesting authority to abandon the dam because "we are discontinuing the operation of the sawmill in question, and, therefore, have no further need for the dam referred to." A hearing on the application was scheduled for October 1, 1945, but before the hearing could be held or notice thereof given, the company requested permission to withdraw its application to abandon the dam. The permission was granted by commission order dated September 23, 1945 and the proceedings dismissed. Nothing in the record indicates why the application was withdrawn.

Cambridge Milldam, Koshkonong Creek, Dane County (2-WP-646)

On September 13, 1945 Otto L. Febock, owner of the dam, applied for authority to abandon and completely remove it. The dam was partially broken down and apparently was holding back very little water. However, it did hold back enough water to make certain farmlands along the banks of the stream swampy, and the objective in removing the dam was to provide better drainage of the farm lands. In fact, it appeared that Mr. Febock had bought the dam for the purpose of having it removed so that he could better drain certain lands which he owned. At the hearing held on October 22, 1945, there was a moderate amount of opposition from certain homeowners whose property bordered on the stream, but this opposition was withdrawn when a representative of the University of Wisconsin College of Agriculture promised to consult with the property owners in carrying out the drainage project. An order authorizing removal of the dam was issued on December 3, 1945.

Dam No. 2, Bad River, City of Mellen (2-WP-701)

On June 25, 1947, the Lake Superior District Power Company applied for authority to abandon the dam. Until part of the dam failed in a flood in June 1946, it had been used for reservoir purposes for Dam No. 1 located 2-1/2 miles downstream. It appeared that it would have cost \$10,000 to \$12,000 to repair the dam and the company did not believe that this was economically feasible. It appeared that the company had offered to turn the dam over to the city of Mellen if the city wished to repair and maintain the dam. No one registered any official opposition to the abandonment at the hearing. The commission issued an order permitting abandonment of the dam but, as part of this order, the company was directed to remove the concrete outlet structure and so much of the earthen dike as constituted an obstruction to the stream.

Monticello Woolen Mills Dam, Little Sugar River, Green County (2-WP-762)

This is the only case reviewed in this report which is not based on an application by the owner of the dam under §31.18 for authority to abandon or remove it. Rather, this case is based on an application by a farm drainage board under §89.27 for authority to remove a dam which it doesn't even own but which it would subsequently purchase, condemn or otherwise acquire if granted the authority to remove it. This proceeding arose out of an application by the Green County Farm Drainage Board for permission to remove a dam and to straighten, clean out, deepen and widen the Little Sugar River for the purpose of drainage of farm lands. The application was made on January 3, 1949 and a hearing held on February 16, 1949. A great deal of testimony was presented as to the soil surveys which had been made and as to the details of the proposed drainage project. The testimony indicated that crops such as corn, which permit soil erosion, could be grown successfully on the low, level land to be reclaimed by the drainage project with less soil erosion than occurs on the higher lands where they were grown in the past. There was further testimony to indicate that damage to highway and railroad facilities would be lessened because of the improved disposition of floodwaters. Some objection was voiced by the owner of the dam who operated the dam to produce power for his woolen mill, but there also was evidence introduced to show that he had not in the past relied entirely on water power but had to purchase some of his power from electric utilities. Mild objections were voiced by a representative of the conservation department who felt that the proposed drainage was inconsistent with the best interests of fish and wild-life propagation in the area, but it was admitted that the affected area was not producing any fish or wildlife to speak of under existing conditions. The commission found by order dated June 28, 1949, that removal of the dam was necessary for proper drainage, that the proposed drainage would promote the public health and welfare, and that it would not materially impair any public rights in the river.

Augusta Mill Dam, Bridge Creek, Eau Claire County (2-WP-793)

On September 13, 1949 the owner, Joseph Tyjeski, filed a request for authority to abandon the dam because it was no longer used for water power purposes. A hearing was set for November 9, 1949 but was postponed at the request of the owner and the city of Augusta. On July 21, 1950 the attorney for the city notified the commission that the city had assumed the maintenance of the dam. Accordingly, the proceedings were dismissed by commission order dated August 29, 1950.

Brickbauer Milldam, Mullet River, Sheboygan County (2-WP-821)

On July 11, 1950 the Plymouth Fur Food Company, owner of the dam, applied for authority to abandon it. It appeared that this application grew out of earlier complaints to the commission by residents in the area that the dam was in a state of disrepair. Subsequently, however, the applicant

changed his mind and caused the dam to be repaired and requested that the abandonment proceedings be dismissed. This request was granted.

McDill Dam, Big Plover River, Portage County (2-WP-830)

On October 13, 1950 the John Strange Paper Company applied for authority to abandon the dam. This application was made after residents of the area had expressed concern about the safety of the dam. The dam was no longer of any economic value to the company. At the hearing on the application, however, there was considerable opposition to abandonment because of the injury to conservation and aesthetic interests which would result therefrom. An investigation by the commission had shown that the dam was in safe condition and that a minimum of repairs would be needed in the future. In view of these facts and of the value of maintaining the dam from a conservation and aesthetic viewpoint, the county of Portage agreed to take over the dam and operate it. As a result, the abandonment proceedings were dismissed. A subsequent letter in the commission's files indicates that the city of Whiting now owns and operates the dam.

Martintown Dam, Pecatonica River, Green County (2-WP-864)

A joint application for removal of the dam was filed by the Wisconsin Power and Light Company and Melvin J. Olson on July 30, 1951, and a hearing thereon was held on August 23, 1951. It appeared that Mr. Olson had secured an option from the company to purchase the dam on behalf of a number of farmers above the dam who desired to have it removed so as to speed the flow of the river and improve the drainage of their lands. The company was willing to sell the dam because it no longer was economical to operate it for the purpose of producing power. At the hearing there was a great deal of testimony as to how the removal of the dam would improve 7,000 to 8,000 acres of farm land. There was very little objection to the plan. The school district in which the power plant was located was concerned about the possible tax loss if the plant were shut down, but it was pointed out that this loss might be recouped through the increased value of the farm lands which would be drained and also from a new power transmission line being built. An order authorizing removal of the dam was issued September 14, 1951.

Viola Dam, Kickapoo River (2-WP-884)

On November 15, 1951 the Viola Electric Utility filed an application for authority to abandon its dam and to remove part of it. A hearing was held December 21, 1951. From the application it appeared that the utility's

generating equipment had been ruined in a recent flash flood and that the flood also had undermined and destroyed a portion of the flume. The village had decided that it would not be economically feasible to replace the equipment or repair the dam. Moreover, it was felt that if the dam were removed, it would lower the water level in the river enough so that it would eliminate the seepage into basements in the village and reduce the likelihood of such basements being flooded. At the hearing several businessmen of Viola testified to the losses they had incurred because of the flooding of the basements of their establishments. There were no objections to the application and an order granting authority to remove the dam was issued February 7, 1952.

Fall River Milldam, Village of Fall River (2-WP-890)

On February 7, 1952, Norman E. Schreiber, doing business as the Schreiber Feed Service, filed an application for authority to abandon and remove the dam. A hearing was held March 31, 1952. At the hearing it appeared that the village was giving consideration to acquiring the dam for recreational or park purposes. The hearing was therefore adjourned to permit further negotiations and the village subsequently did agree to take over the dam. The proceeding was dismissed by order dated May 6, 1952.

Elk Creek Dam, Dunn County (2-WP-891)

On January 28, 1952, Dairyland Power Cooperative applied for authority to abandon the dam. The dam needed extensive repairs and was not being used for the generation of electric power. Prior to and at the hearing, however, there was vigorous opposition on the part of the property owners around the pond created by the dam. It appeared that the land around the pond had been extensively developed for residential purposes. Because of this opposition Dairyland Power Cooperative agreed at the hearing to withdraw its application for abandonment and to repair the dam. The attorney for Dairyland emphasized that this was being done as a goodwill matter and pointed out that Dairyland would have approximately \$20,000 invested in the dam without generating a single kilowatt of electricity. He stated further that "it is our opinion, after examining the law, that we have the legal right to abandon maintenance of the dam, but in deference to the wishes of the property owners, as we have stated, we are undertaking these rather major repairs at this time and will continue ordinary maintenance.... But we want it clearly expressed that we are not by this action committing ourselves or guaranteeing that come what may we will replace any dam." The attorney for the property owners disagreed with this statement of the law. He contended that this dam had been constructed for the primary purpose of improving the property along the stream, with generation of electric power being an incidental purpose, and that this case therefore should be distinguished from the case where the primary purpose in authorizing construction of the dam was the generation of electric power.



Linderman's Dam, Town of Sumner, Trempealeau County (2-WP-894)

On April 18, 1952, Donald H. Sieg and Reino Kolpanen, then owners of the dam, applied for authority to abandon and remove it. A hearing on the application was scheduled, but this was indefinitely postponed upon request of the applicants. It appeared that at about this time conservation groups in Osseo were thinking of taking over the dam, but these plans subsequently were abandoned. When the commission inquired as to the status of the dam in June 1953, it found that the dam was now owned by Ray Boernke and Harold Instefjord and that they were desirous of abandoning the dam and razing the mill connected with it. A hearing was therefore held on July 7, 1953. No one appeared in opposition, though conservation officials requested that the dam be removed in such a manner as not to disturb the mud sill of the dam, the objective being to prevent the silt collected in the pond from being carried downstream. This was taken into account in the order authorizing removal of the dam, dated August 3, 1953.

Monticello Milldam, Village of Monticello (2-WP-912)

The village of Monticello, owner of the dam, filed an application on September 11, 1952 for authority to remove it. A hearing on the application was held on October 24, 1952. At the hearing it appeared that the village owned all the riparian rights around the pond as well as the dam. There was considerable opposition to the application expressed by residents of the village, but it appeared that the arguments for keeping the dam were based on memories of public uses made of the pond many years ago rather than on any present usage. The pond had been drained for the past 2 years and apparently had not been used by the public for many years prior to that time. It did not appear that the dam had any value for flood prevention purposes. An order authorizing removal of the dam was issued February 9, 1953.

East Dam, Wisconsin River, City of Wausau (2-WP-918)

The Wisconsin Public Service Corporation of Milwaukee filed an application on November 17, 1952 for authority to abandon the dam. A hearing was held December 16, 1952. It was determined that the power generating equipment had been removed from the dam site in 1946 because it no longer was economically feasible to operate the dam for power production purposes. The company owned all the flowage rights and it did not appear that the public made any extensive use of the pool. There was no opposition to the application. An order granting authority to abandon the dam and requiring its removal within 5 years was issued March 11, 1953.

U. S. Forest Service Dam, Teal River, Sawyer County (2-WP-970)

The United States Forest Service on January 28, 1954 filed an application for authority to abandon the dam. A hearing was held February 23, 1954. At the hearing it appeared that residents of the Hayward area were interested in having the dam maintained for recreational purposes and the Teal and Lost Land Lakes Improvement Association made a motion that the permit for operating and maintaining the dam be transferred to the Association. The federal government eventually agreed to make this transfer and the proceeding then was dismissed.

D. J. Rohrer Dam, Pigeon River, Clintonville (2-WP-1011)

The D. J. Rohrer Lumber Company filed an application on December 1, 1954 for authority to abandon the dam. A hearing was held on January 13, 1955. On the basis of testimony given at the hearing, it appeared that the dam no longer was used for producing power and therefore was of no economic value to the company. It had been offered for sale to the city for \$5,000. There was much opposition to the proposed abandonment. There was testimony to the effect that the pond was very valuable for fish propagation because of the absence of the usual siltation. The local conservation club had spent considerable money to stock the pond with fish and to remove weeds. The pond was used quite extensively for boating and hunting as well as for fishing. The land around the pond had been developed for residential purposes to a considerable degree. It became unnecessary for the commission to rule on the application, however, because the company managed to sell the dam shortly after the hearing and therefore withdrew its application. The proceedings were dismissed by order dated April 18, 1955.

Nevers Dam, St. Croix River (2-WP-1019)

On December 31, 1954, the St. Croix Falls Improvement Co. filed an application to abandon operation of the dam as a storage reservoir and to remove part of the dam. The gate section of the dam had been damaged by excessive flow in 1950 and since that time the dam had been operated with the gates open and without impounding any water. In the opinion of the company, it would not be economically sound to repair the dam. An inspection report relative to the application was filed by the rivers survey section of the conservation department. This report took into account the fishing, wildlife, boating and aesthetic interests involved, and concluded that those interests would not be harmed if (a) a safe passageway through the dam for pleasure boats is provided, (b) the pond is kept permanently drained, and (c) the pool below the dam is maintained. The public service commission took these factors into account in issuing its order authorizing removal of the gateway structure of the dam.

r County (2-WP-970)

January 28, 1954 filed an application. A hearing was held February 1, 1954. Residents of the Hayward area for recreational purposes at the Association made a motion that the dam be transferred to the city. The city agreed to make this transfer.

e (2-WP-1011)

led an application on December 1, 1954. A hearing was held on January 13, 1955. At the hearing, it appeared that the dam was of no economic value and therefore was of no economic value to the city for \$5,000. The city decided on abandonment. There was testimony that the dam was valuable for fish propagation because the city conservation club had spent money on it and to remove weeds. The city decided on abandonment for residential purposes to a city. The city managed to sell the dam for \$5,000. The city decided on abandonment, 1955.

x Falls Improvement Co. filed an application for the dam as a storage reservoir and for the dam had been damaged. The dam had been operated for many years. In the opinion of the city, it was sound to repair the dam. An application was filed by the rivers survey. The report took into account the interests involved, and concluded that (a) a safe passageway through the pond is kept permanently maintained. The public service commission in issuing its order authorizing abandonment of the dam.

Cross Plains Dam, Black Earth Creek, Dane County (2-WP-1051)

On July 29, 1955 the village of Cross Plains applied for authority to abandon the dam. At the hearing it developed that the village owned the dam and all land flowed, that the village had been working with the conservation department to develop a public fishing area in the pond. For this purpose, a modification of the dam rather than complete abandonment was desired. It appeared that the conservation department would undertake the work necessary to modify the dam so as to lower the pond and that this would add to the scenic beauty of the area, would provide better capacity for flood waters as well as improve fish habitat, and at the same time would keep a sufficient supply of water on hand for fire protection for the village until its waterworks system could be completed. One gate of the dam would be left open to permit passage of fish; the other gates would be lowered. There was no opposition registered against this plan. The commission's order authorizing modification of the dam was issued October 20, 1955.

Major Milldam, Trempealeau River, Jackson County (2-WP-1085)

On March 19, 1956, H. P. Chenoweth, owner of the dam, applied for authority to abandon it. Application was made after the owner was informed by the conservation department that the pond was not a "private lake" and that he could not obtain a license to stock it with fish for his own private use. Shortly after the application, on April 3, 1956, the dam had gone out in a flood. At the hearing held on April 25, 1956, there was some opposition from the Hixton Rod & Gun Club on the ground that fishing in the upper end of the pond might be damaged to some extent. It appeared that the part of the pond had been fished occasionally for trout. A village park also bordered on that end of the pond. A member of the public service commission's engineering staff testified that it would cost \$50,000 to replace the washed out dam with an adequate structure. There was some discussion at the hearing as to whether the owner was at fault in failing to take reasonable steps to prevent the dam from washing out, but it was generally conceded that the flood in question was of such magnitude that the dam most likely would have failed, regardless of precautions which might have been taken. In view of these facts the commission concluded that the cost of a new structure "would not be commensurate with the value for power and the project would have no economic justification although as a civic improvement the pond would be of some benefit to the village and to the park." An order authorizing abandonment of the dam was issued on January 28, 1957.

Glen Loch Dam, Duncan Creek, Chippewa County (2-WP-1095)

On April 26, 1956 the Chippewa Falls Pure Ice Co. applied for authority to abandon the dam. At the hearing held on June 1, 1956 it

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Hixton Milldam, Trempealeau River, Jackson County (2-WP-1085)

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#### Glen Loch Dam, Duncan Creek, Chippewa County (2-WP-1095)

On April 26, 1956 the Chippewa Falls Pure Ice Co. applied for authority to abandon the dam. At the hearing held on June 1, 1956 it

was brought out that the dam was in need of extensive repairs and that it no longer was economical for the company to operate the dam. The hearing also brought out the facts, however, that Glen Loch Pond is one of the most scenic spots in the state, that the pond had been extensively fished, and that the land around the pond had been extensively developed for residential purposes. There was testimony to the effect that property values around the pond had been reduced by 50% because of the lowering of the water levels due to the hole in the dam. The public service commission's files indicate that this case was settled in a rather unique manner. A special nonprofit corporation called the Chippewa Falls Foundation, Inc. was formed to repair, operate and maintain the dam. A total of \$15,000 was raised for this purpose through contributions of merchants and residents of the area. The previous owner of the dam deeded the dam to the Foundation for \$1,500.

Black Earth Dam, Village of Black Earth, Dane County (2-WP-1155)

On March 8, 1957 Mrs. Ruth Parrell filed an application for authority to abandon the dam. A hearing was held on April 15, 1957. At the hearing it developed that the dam had been sold to the village of Black Earth and the village agreed to be substituted for the original applicant. The dam was badly in need of repair and no longer of any economic value. The owner of the flowed lands agreed to reclaim them for agricultural uses and the stream would revert to its natural course. There was no opposition to the proposed abandonment. An order was issued on May 15, 1957 authorizing abandonment and requiring removal of the dam structure.

Bear Creek Dam, Sauk County (2-WP-1215)

On June 3, 1957 Edward Weitzel, owner of the dam, filed a request for authority to abandon it and a hearing was held October 11, 1957. The application arose out of the inquiry to the commission by an upstream owner who wanted to know if the washed out dam would be rebuilt. His concern was with drainage of his lands. The commission then wrote to the owner and ascertained that he had no interest in rebuilding the dam. Investigation by a commission engineer ascertained that the dam had been used for power for custom grinding until 1943 and for private power until it failed in 1955. A conservation department representative who participated in the field inspection found that no useful conservation purpose would be served by restoring the dam. No one appeared in opposition to the application at the hearing. Order permitting abandonment was issued January 24, 1958.

Somerset Dam, Apple River, St. Croix County (2-WP-1313)

Because of the significance of this case from the standpoint of the current study, it is discussed in detail, beginning at page 15.

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#### Olson Dam, Neenah Creek, Adams County (2-WP-1394).

On May 13, 1959 Florian Laper applied for authority to abandon and remove the dam. On May 14, 1959 representatives of the public service commission and conservation department investigated a washout of the dam which had occurred 3 days earlier. An order authorizing removal of the dam was issued the same day (May 14). The speed of this proceeding therefore is unusual. The reason appeared to be that there was danger of extensive sil-tation unless the dam were removed as soon as possible. Moreover, the com-mission found that "Neenah Creek is a fine trout stream and operation of the dam through the years has caused much complaint of damage to trout habitat. No property has been improved adjacent to the pond held by the dam; and the pond does not have any material public use for fishing, boating, hunting or swimming."

In addition to the 27 cases discussed above, 3 cases presently are pending before the public service commission. One involves the Waldo Dam on the Onion River in Sheboygan county; another is the Mekan Dam in the town of Mekan, Marquette county. Both cases are contested. The third in-volves the Sparta Dam on the La Crosse River in the city of Sparta. This case, for all practical purposes, appears to be settled, for the present owner of the dam (Northern States Power Co.) and the city of Sparta have entered into an agreement whereby Northern States will make repairs to the dam cost-ing in the neighborhood of \$33,000, after which the city of Sparta will assume ownership and maintenance of the dam.

A table summarizing the principal features of the dam abandonment cases discussed above will be found at pages 21 to 24 of this report.

#### B. The Somerset Dam case

The Somerset Dam case is significant not only because it was the case which triggered the current study but because it presents in a single package all the issues, and more, which had been presented directly or implicitly in the previous cases but which had been disposed of amicably or informally for one reason or another.

##### The application

On August 21, 1958 the Northern States Power Co. applied for author-ity to abandon the Somerset Dam and allow it to deteriorate in place. The application stated among other things, that the dam is a timber-crib, rock-filled structure located on the Apple River in the town of Somerset. The pond at normal level is about 100 acres in size and extends 2-1/2 miles above the dam. The dam had leaked badly for many years under the spillway section.



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In 1957 the trash racks collapsed and since that time no electricity has been generated at the dam. The generating capacity of the equipment at the dam is only 430 kw, or only 0.2 of one per cent of the required system load of the company. The company further alleged that it would not be economically feasible to repair the dam and that it would have to be replaced with a new concrete structure at a cost of \$220,000 if power generation at this site is to be continued. Taking into account return on investment, taxes, depreciation and operating and maintenance costs of such a new dam, the company estimated that it would cost \$35,300 per year to operate the plant while the net value of the electrical energy which could be produced at the plant would be \$12,500, thus leaving a deficit of \$22,800 per year. In further support of its application to abandon the dam the company stated that "the small reservoir is not put to significant public or private uses. There is little recreational development in the reservoir area. It is used for occasional boating and fishing. The reservoir is relatively narrow and the change in appearance of the flowage area will not be very noticeable should the stream revert back to its natural condition in the 2-1/2 miles of Somerset pond."

#### The hearing

It had become evident well in advance of the hearing held on December 3, 1958 that the latter statement would be challenged by the residents in and near Somerset and that there was going to be opposition to the abandonment of the dam. At the hearing, Attorney Warren P. Knowles, New Richmond, appeared in opposition on behalf of the village of Somerset and certain property owners adjacent to the Apple River and Attorney William Ward, New Richmond, appeared in opposition on behalf of the American Legion Club of Somerset, the Somerset Fire Department, the town of Somerset, the Somerset Commercial Club, and several owners of property along the river. The conservation department also was represented, as well as the public service commission.

At the beginning of the hearing, Mr. Knowles moved to dismiss the proceedings on the ground that there is no statutory authority which will warrant the commission ruling on the abandonment of the dam. He contended that there is nothing in § 31.18 which authorizes the commission to permit abandonment of a dam by allowing it to deteriorate in place. He further contended that until such time as the legislature authorizes the commission to permit abandonment of dams and sets up standards under which the commission can act, the commission is without authority to proceed in the present matter. Mr. Ward joined in this motion and offered in evidence a first draft of a bill which he planned to introduce in the 1959 legislature and which would spell out the things which the commission must take into consideration in proceedings for abandonment of dams.<sup>3</sup> The hearing examiner denied the motion to dismiss and the hearing proceeded with the understanding that the jurisdictional question would be submitted to the commission for decision.

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3. The draft was subsequently introduced and became Bill No. 97, A. (1959). See Appendix B of this report.

A considerable amount of testimony was presented, and the transcript covers 166 double-spaced typewritten pages. Testimony on behalf of the applicant was taken first. Mr. Stuart V. Willson, president of the Northern States Power Company, testified in regard to the economic feasibility of operating the dam. His testimony was substantially a repetition of the information set forth in the application, the principal point being that it is not economically feasible for the company to rebuild and operate the dam.

In cross-examination by Mr. Knowles, it was brought out that the applicant now owns 6 dams on the Apple River--one near Amery, 2 near New Richmond, and 3 near Somerset. Of the latter 3 dams, the Riverdale Dam is 2 or 3 miles north of Somerset, the Somerset Dam (which is the subject matter of the present case) is at Somerset, and the Apple River Falls Dam is 2 miles below Somerset. It appeared that the applicant's idea in allowing the dam to deteriorate in place was that the debris would float downstream to the Apple River Falls Dam and would be removed at that point.

Mr. Arthur V. Dienhart, hydraulic engineer with Northern States, testified that the rated capacity of the Somerset Dam is 475 kw, making it the second smallest of the 6 dams. He detailed further the condition of the Somerset dam and why a rebuilding cannot be justified from an economic standpoint. He estimated that the leakage through the dam is 180 cfs. (cubic feet per second) and that the average flow of the Apple River at the dam is 300 cfs. but has been as low as 50 cfs.

Mr. Knowles, in his cross-examination, sought to establish that Northern States could control the level of the Somerset pond by release of water from its 3 dams upstream, but Mr. Dienhart denied that this could be done consistent with the efficient operation of Northern States' hydro system. It was also brought out that the collapsed trash racks could be replaced at a fairly nominal cost but the real problem is the leakage in the dam itself. Mr. William Cartwright of the public service commission's engineering department pointed out that if the dam were left to deteriorate in place, the timbers would eventually loosen and float downstream but that most of the rock fill would in all probability remain in place and create a permanent obstruction to navigation. Mr. Dienhart did not deny that this would probably be the result.

In further cross-examination of Mr. Willson, Mr. Ward and Mr. Knowles brought out that the village of Somerset would lose \$1, 100 to \$1, 200 per year in utility taxes if the dam is abandoned. Concern also was expressed as to who would be liable for damages caused by the dam if abandonment were permitted. Northern States now carries adequate insurance to cover any liability on account of the dam.

Several residents of the area testified in opposition to the petition for abandonment. Mr. Maurice Montbriand and Mr. John Hinz testified that they own a half mile of frontage on the pond and that they had made improvements on this land consisting of 2 summer cottages at a cost of \$1,200 each and some landscaping. Mr. Oral Cloutier testified that he owns half a mile of frontage on the pond and that he has plans to develop his land for lake lots. Mr. Lawrence Hope, a retired conservation warden, stated that there is considerable fishing in the pond and that it had been stocked with fish at various times in the past. Mr. Francis Plourde, a farmer with land bordering the pond, complained about the fencing problem he would have if the pond is lowered. Mrs. Marie Strohbeen testified that she has \$35,000 invested in 7 homes along the river in Somerset and is concerned about the effect of the lowering of the pond on the value of these houses.

Mr. Herman Hagestad, a consulting engineer, testified that he had examined the dam at Mr. Knowles' request and that it would cost \$40,000 to \$100,000 to repair it for use as a water retaining structure alone. He did not think it would be economically feasible for the village of Somerset to undertake its repair and maintenance. He also estimated that it would probably cost \$30,000 to \$40,000 to completely remove the dam from the river.

Mr. Milton Meinke, chairman of the town of Somerset, asserted that the pond is the town's only fishing spot. He also expressed concern as to the effect a breakage of the dam might have on town culverts downstream. Mr. William Kress, president of the village of Somerset, corroborated Mr. Hagestad's statement in regard to the economic feasibility of the village's taking over the dam. The village is financially unable to assume the responsibility of repair and maintenance, he said. From previous testimony it appeared that Northern States had offered to turn the dam over to the village for \$1.

Mr. Wilford J. Plourde stated that he owns land on the river and plans to develop it for cottages. Mr. David Bréault, owner of a night club located on the river below the dam, testified that, as a form of entertainment for his patrons, he provides free innertubes for float trips down the river. He seemed concerned that abandonment of the dam would cause a lowering of the water level to the extent that such entertainment would no longer be feasible. Mr. Knowles stated that Mr. John J. Raleigh, also owner of a night club on the river, has plans to build a \$100,000 motel near his club and that lowering of the pond would be detrimental to his interests. Mr. John Cleary, Somerset banker, testified that abandonment of the dam would be bad for Somerset merchants who rely heavily on the Minnesota "Sunday tourist" trade.

Mr. Steve Martell, a well driller, expressed the opinion that abandonment of the dam would cause a lowering of the water table in the area. Mr. Lynn Belisle, assistant fire chief of the village of Somerset, sought to show that the pond has some value as a standby supply of water for fire fighting purposes in case the municipal water system should fail, but it was brought out that the pond has never been used for this purpose.

Mr. Lewis Posekany, representing the conservation department, said that the department appears neither for nor against abandonment, but that it is opposed to the proposal to allow the dam to deteriorate in place and be removed by natural forces.

At the close of the hearing, Mr. Knowles repeated his objection to the jurisdiction of the public service commission and it was agreed that the parties would file briefs with the commission on this question.

#### The briefs

Attorneys Knowles and Ward filed a brief in support of their motion to dismiss the application for abandonment of the dam.<sup>4</sup> In their brief they contended that the commission does not have jurisdiction to authorize abandonment of the dam and to allow it to deteriorate in place. Following is a summary of the principal arguments they made:

1. The statute in question (31.18 (1)) does not contemplate abandonment of dams nor does any other provision of chapter 31. Chapter 31 is concerned with the construction, operation and maintenance of dams.

2. The public service commission being purely a statutory agency, must find its powers within the four corners of the statutes.

3. The whole history of chapter 31 has looked toward the continued preservation and protection of public rights in navigable waters.

4. Riparian owners may have a reciprocal easement to have the artificial water level maintained in a situation where the artificial level has existed for more than 20 years. Also, public rights may attach to navigable waters created by artificial means and the public service commission is charged with a public trust in protecting these rights.

5. The commission has no authority to allow the dam to deteriorate in place, and this would in fact be contrary to the statutes requiring maintenance of the dam in the interest of public safety.

The brief emphasized that this is a case of first impression, that it is likely to set a precedent for future dam abandonment cases, and that the commission therefore should take care not to assume any jurisdiction which is not expressly given to it by statute.

Mr. Bailey Ramsdell filed a brief for Northern States in which he argued that the commission has jurisdiction to hear and determine the

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4. All the briefs filed in the Somerset Dam case are reproduced in full in Appendix A of this report.

application. He made the following principal arguments in his brief:

1. It is not disputed that the commission could require the company to repair the dam and the commission therefore has the negative power to "not require" the repair of the dam. This would in effect be a finding that it is not in the public interest to require the operation and maintenance of the dam.

2. The cases cited in the opposing party's brief in support of the proposition that persons who have improved their property in reliance upon an artificial water level acquire a reciprocal right to have that level maintained, do not apply where the dam owner seeks to completely abandon the dam, as distinguished from the case where he seeks to alter it by positive act and thereby change the water level of the pond. These cases therefore are not a bar to the commission's jurisdiction to authorize abandonment of the dam.

Attorneys Ward and Knowles filed a reply brief in which they made it clear that they were not conceding that continued operation of the Somerset Dam is not economically feasible. They also made clear that they were not relying entirely on rights which private riparians may have acquired in the artificial water level but on public rights which the commission has a duty to protect. They also sought to distinguish this case from the cases cited by counsel for Northern States in that those cases involved action by the owner of the land flowed to compel a manufacturing firm, as a private corporation, to maintain the dam while the instant case involved a public utility and not only private riparian rights but public rights.

#### The commission's order

On March 10, 1959, the commission issued its order dismissing the application to abandon the dam (see Appendix A for copy of order). The commission found, as conclusions of fact, that the gradual deterioration of the dam would cause the water in the pond to decline gradually and would create an indeterminate and unsatisfactory condition in the river, that the gradual erosion and deterioration of the dam would cause deposits of material downstream to the detriment of lower riparians, and that the remains of the dam would constitute a substantial and changing obstruction in a navigable waterway. In regard to the jurisdiction question argued in the briefs, the commission stated without elaboration that it has jurisdiction to dismiss the application.

TABULAR SUMMARY OF DAM ABANDONMENT PROCEEDINGS  
BEFORE THE PUBLIC SERVICE COMMISSION OF WISCONSIN  
(1940-1959)

	Name of Dam	Date of Application	PSC File No.	Hearing Held	Opposition to Abandonment	Manner of Disposition
1.	Oslo Dam, Manitowoc River, Manitowoc County	9-9-40	2-WP-505	yes	yes	Petition granted; owner permitted to leave open dam's gates.
2.	Lower Amherst Dam, Waupaca River, Portage County	6-26-42	2-WP-572	yes	yes	Petition granted.
3.	Boaz Dam, Mill Creek, Richland County	6-19-45	2-WP-634	yes	no	Petition granted.
4.	Brooks & Ross Dam, Eau Claire River, Village of Schofield	8-23-45	2-WP-644			Application withdrawn before PSC could hold scheduled hearing.
5.	Cambridge Milldam, Koshkonong Creek, Dane County	9-13-45	2-WP-646	yes	Yes, but later withdrawn	Petition granted.
6.	Dam No. 2, Bad River, City of Mellen	6-25-47	2-WP-701	yes	no	Petition granted; removal of dam ordered.
7.	Monticello Woolen Mills Dam, Little Sugar River, Green County	1-3-49	2-WP-762	yes	yes	PSC made a finding under §89.27 equivalent to granting of petition under §31.18.

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3.	Boaz Dam, Mill Creek, Richland County	6-19-45	2-WP-634	yes	no	Petition granted.
4.	Brooks & Ross Dam, Eau Claire River, Village of Schofield	8-23-45	2-WP-644			Application withdrawn before PSC could hold scheduled hearing.
5.	Cambridge Milldam, Koshkonong Creek, Dane County	9-13-45	2-WP-646	yes	Yes, but later withdrawn	Petition granted.
6.	Dam No. 2, Bad River, City of Mellen	6-25-47	2-WP-701	yes	no	Petition granted; removal of dam ordered.
7.	Monticello Woolen Mills Dam, Little Sugar River, Green County	1-3-49	2-WP-762	yes	yes	PSC made a finding under §89.27 equivalent to granting of petition under §31.18.

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	Name of Dam	Date of Application	PSC File No.	Hearing Held	Opposition to Abandonment	Manner of Disposition
8.	Augusta Milldam, Bridge Creek, Eau Claire County	9-13-49	2-WP-793	Scheduled but not held		Proceedings dismissed because city agreed to take over dam and maintain it.
9.	Brickbauer Milldam, Mullet River, Sheboygan County	7-11-50	2-WP-821			Proceedings dismissed upon request of applicant who agreed to repair dam.
10.	McDill Dam, Big Plover River, Portage County	10-13-50	2-WP-830	yes	yes	Proceedings dismissed when Portage County agreed to take over and operate the dam.
11.	Martintown Dam, Pecatonica River, Green County	7-30-51	2-WP-864	yes	yes	Petition granted.
12.	Viola Dam, Kickapoo River.	11-15-51	2-WP-884	yes	no	Petition granted.
13.	Fall River Milldam, Village of Fall River	2-7-52	2-WP-890	Yes, but adjourned to permit further negotiations.		Proceedings dismissed when village agreed to take over the dam.
14.	Elk Creek Dam, Dunn County	1-28-52	2-WP-891	yes	yes	Application withdrawn at hearing; owner agreed to repair and maintain dam for the time being.
15.	Linderman's Dam, Town of Sumner, Trempealeau County	4-18-52	2-WP-894	yes	no	Petition granted.

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	Name of Dam	Date of Application	PSC File No.	Hearing Held	Opposition to Abandonment	Manner of Disposition
16.	Monticello Milldam, Village of Monticello	9-11-52	2-WP-912	yes	yes	Petition granted.
17.	East Dam, Wisconsin River, City of Wausau	11-17-52	2-WP-918	yes	no	Petition granted.
18.	U. S. Forest Service Dam, Teal River, Sawyer County	1-28-54	2-WP-970	yes	yes	Proceedings dismissed when dam transferred to Teal and Lost Land Lakes Improvement Association
19.	D. J. Rohrer Dam, Pigeon River, Clintonville	12-1-54	2-WP-1011	yes	yes	Proceedings dismissed because of sale of dam by the applicant.
20.	Nevers Dam, St. Croix River	12-31-54	2-WP-1019	yes	no	Petition granted; removal of gateway structure of dam authorized.
21.	Cross Plains Dam, Black Earth Creek, Dane County	7-29-55	2-WP-1051	yes	no	Petition granted so as to permit the desired modification of the dam.
22.	Hixton Milldam, Trempealeau River, Jackson County	3-19-56	2-WP-1085	yes	yes	Petition granted.
23.	Glen Loch Dam, Duncan Creek, Chippewa County	4-26-56	2-WP-1095	yes	yes	Special nonprofit corporation formed to take over repair and maintenance of dam; proceedings dismissed.



	Name of Dam	Date of Application	PSC File No.	Hearing Held	Opposition to Abandonment	Manner of Disposition
24.	Black Earth Dam, Village of Black Earth, Dane County	3-8-57	2-WP-1155	yes	no	Petition granted.
25.	Bear Creek Dam, Sauk County	6-3-57	2-WP-1215	yes	no	Petition granted.
26.	Somerset Dam, Apple River, St. Croix County	8-21-58	2-WP-1313	yes	yes	Petition denied.
27.	Sparta Dam, La Crosse River	8-22-58	2-WP-1314	Scheduled but not held.	yes	Northern States Power Co., the present owner, and the city of Sparta worked out an agreement whereby NSP Co. will repair the dam and the city then will take it over.
28.	Waldo Dam, Onion River, Sheboygan County	2-23-59	2-WP-1357	yes	yes	Decision pending.
29.	Mecan Dam, Town of Mecan, Marquette County	4-30-59	2-WP-1382	yes	yes	Decision pending.
30.	Olson Dam, Neenah Creek, Adams County	5-13-59	2-WP-1394	no		Petition granted.

### III. A SURVEY OF SOME OF THE LEGAL ISSUES

Before discussing some of the legal issues which may be involved in abandonment of dams, it may be well to define in a nontechnical way a few of the terms and concepts which are involved.

A "riparian" or "riparian owner" is a person who owns land abutting on a lake or stream. A riparian has certain rights which arise from the fact that his land does border on a lake or stream. These are commonly referred to as "riparian rights." Perhaps the most important riparian right from the standpoint of this study is the right to enjoy the natural level of the waters free from unreasonable interference by others; and the artificial level created by a dam may be considered as the natural level if it has existed for a long time. A "prescriptive right" or "right obtained by prescription" is a right to some use of the real property of another which has been obtained because the use has existed for a long time (usually more than 20 years) without objection on the part of the owner of such real property. For example, the owner of a dam may obtain a prescriptive right to flow the lands of another if such flowage exists for a period of 20 years without objection on the part of the person whose lands are flowed. There are "public rights" in waters which are navigable. These include pleasure boating, sailing, fishing, swimming, hunting, skating and enjoyment of scenic beauty.

Following is a survey of some of the legal issues which have been raised or which may be raised in proceedings to abandon dams.

#### 1. Does the public service commission have jurisdiction over abandonment of dams?

This was the principal question argued in the briefs filed in the Somerset Dam case. The arguments against jurisdiction were cogently presented in the briefs filed by Mr. Knowles and Mr. Ward (briefs reproduced in Appendix A). Briefly, they are that the statutes do not expressly mention "abandonment," that the entire law looks toward maintenance rather than abandonment of dams, and that a commission should not get its powers solely by implication where important public rights are at stake. The argument for jurisdiction, as set forth in Mr. Ramsdell's brief (also reproduced in Appendix A) is that the commission has jurisdiction to require the repair of dams and it therefore must necessarily have the power not to require repair, in other words, to permit abandonment. Perhaps another argument in favor of the commission's jurisdiction under present law could be added. That is the statutory rule of construction which holds that long-continued, uniform construction of an ambiguous statute by those charged with its administration is entitled to great weight in determining the true meaning of the statute. As we have seen, the commission has handled dam abandonment cases for many years and there was no challenge of its jurisdiction until the Somerset Dam case.

2. Can the commission be granted jurisdiction to permit abandonment of dams in cases where abandonment would mean substantial impairment of public rights in the waters involved?

The negative argument would run like this: The public may have rights of boating, swimming, fishing, and the like in waters whose levels are artificially raised so as to become navigable; the state holds the navigable waters of the state in trust for the benefit of the public; it would therefore be a violation of this trust for the state through its agent, the public service commission, to permit such waters to be destroyed by allowing the dam which impounds the waters to be abandoned.

The matter of course is not as simple as this and it was not contended in the Somerset Dam case that the public service commission could not be granted jurisdiction to permit abandonment of dams where public rights are involved, rather that "the nature of the public trust is such that the state acting through its authorized agency, the Public Service Commission, must lean over backward in order that those public rights which were intended to be preserved for the enjoyment of the people shall be preserved."

Our supreme court apparently never has been faced squarely with the issue of whether the owner of a dam may be prevented from abandoning it because of the public rights in the waters impounded by the dam. However, the court has commented on this problem in deciding related issues. In Haase v. Kingston Cooperative Creamery,<sup>5</sup> the problem was to determine the ownership of the ice on a body of navigable water created by a mill dam. To solve this problem it was first necessary to decide who owned the land under the water. After deciding that the state did not obtain title to the land underlying navigable water created by artificial means, the court went on to comment as follows on the public rights which had attached to the waters:

"...it does not seem necessary, in order to secure to the public the rights which the public has enjoyed for a period of time equal to that required by the statute of limitations, that the title to the land beneath the waters should be held to have thereby passed from private ownership to the ownership of the state. The public is fully protected in its rights by the remedy applied in Smith v. Youmans, 96 Wis. 103, 70 N. W. 1115, where the owner of the dam was restrained from tearing it down at the suit of riparian owners abutting on the lake.

"While a dam is a fairly permanent institution, it is by no means an agency of perpetual existence. It will decay and wear away in time, and, when it does, the waters will recede to their natural

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5. 212 Wis. 585, 250 N. W. 444 (1933).

level. While the owner of the dam may be restrained from affirmatively interfering with the artificial level which he has created, it is not at all clear how he could be coerced to make the repairs necessary for its perpetual existence, especially when the proprietor of the dam becomes bankrupt, as occasionally happens."

There are cases in which the court has stated that the trust doctrine would prevent the state from changing all or a substantial part of a lake into dry land, but these cases have involved natural lakes rather than man-made ones, and the act involved was the positive one of filling portions of a lake rather than the negative one of abandoning a dam.<sup>6</sup> It is of course a matter of conjecture as to how a case which squarely presents the public rights issue would be decided if it should arise, but it seems probable that it would at the most be only one of the factors to be considered in a dam abandonment proceeding rather than an absolute bar to abandonment.

3. Can riparian owners around a man-made lake acquire such rights in the waters as to entitle them to insist on continued maintenance of the artificial water level or at least to demand compensation for injuries to such rights if the water level is lowered by abandonment of a dam?

This issue was discussed at considerable length in the briefs filed in the Somerset Dam case, particularly in Applicant's brief. Again, our supreme court never has been faced squarely with the question posed above, but the court has commented on this subject in deciding related issues. The principal case is Smith v. Youmans.<sup>7</sup> This was an action by riparians on Lake Beulah to enjoin a dam owner from removing part of his dam. The removal would have had the result of lowering the lake level. The dam and artificial lake level had existed continuously for 40 years and the property around the lake had been extensively developed for summer homes in reliance on the continued maintenance of the artificial lake level. The court decided that an injunction to prevent the dam owner from removing part of the dam had been properly granted on the ground that if a dam has been maintained for a period of time sufficient to give the owner of the dam a prescriptive right to flow the lands of others, the riparian owners who for the same period have enjoyed the advantages of the artificial level of the water and in reliance upon its continued maintenance have improved their property at great expense

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6. State v. Public Service Commission, 275 Wis. 112, 81 N.W. 2d 71 (1957); Madison v. State, 1 Wis. 2d 252, 83 N.W. 2d 674 (1957).

7. 96 Wis. 103, 70 N.W. 1115 (1897).

have a reciprocal right to have the artificial level maintained. The court went on to say, however, that:

"We have no doubt that the defendants may abandon their water rights and easement, so as to escape all liability at law for consequent damages if they are not bound by law or agreement to maintain the higher level of the waters in the lake.... But here, as stated, there has been no abandonment or surrender, and the case must be determined upon the equitable grounds arising out of the special facts found by the trial court."

Would the riparians' chances of preventing abandonment of the dam or of obtaining damages be enhanced if one of the main purposes in constructing the dam was to improve the navigability of the waters above the dam or the property abutting on such waters? It was argued before the public service commission in the Elk Creek Dam abandonment proceeding that this type of case must be distinguished from the case where the primary purpose in constructing the dam was to produce hydroelectric power. The issue was not decided, however, because the owner of the dam voluntarily agreed to repair and maintain the dam for the time being. Probably the most that can be said at this point is that the language of the Youmans case does not close the door to some remedy for riparians in the proper case, particularly if it can be found that there was an agreement on the part of the dam owner to maintain it for a period of time or if he is bound by the law which authorized construction of the dam to maintain it for a certain period of time.

Would the riparians' chances of preventing abandonment of the dam or of obtaining damages be diminished if the flowage rights of the dam owner were obtained in the first instance by purchase rather than by prescription? Probably not, though again no definitive answer can be given. As indicated above, our court has stated on certain occasions that when a dam owner obtains the right of flowage of another's lands by prescription, such other person obtains a reciprocal right to the continued enjoyment of the artificial level of the waters impounded by the dam. It could be argued, therefore, that if the right of flowage was obtained by purchase rather than by prescription, no such reciprocal right would arise. The argument, however, probably would be immaterial in a dam abandonment proceeding (as distinguished from a proceeding wherein the owner seeks to modify the dam) because the court has expressed doubts that riparian owners would have any right to interfere in such a case regardless of the fact that they may have reciprocal rights which would entitle them to prevent modification of the dam in a case where the owner seeks to retain control over the dam. See again the language quoted above from the Youmans case.

4. Can the owner of a dam be forced to maintain it after it no longer is of any economic value to him and in fact imposes an economic burden upon him?

Our supreme court in the Haase case mentioned the practical problem of forcing a bankrupt owner of a dam to maintain the dam. In addition to

practical problems which may be involved, there may be a constitutional question involved. In other words, how far can the state go in requiring a person to operate his business at a loss before violating the constitutional prohibition against depriving a person of property without due process of law? Probably no definitive answer can be given as there are many variable factors which determine whether a deprivation of property contravenes the due process clause. Public utilities, having dedicated their property to a public use, possibly can be subjected to somewhat greater governmental controls in this respect than other businesses, yet, even here, it has been held, for example, that a street railway utility cannot be required to continue to operate branch lines on which it sustains losses which would result in the whole system's operating at a loss.<sup>8</sup>

5. Can the state lawfully acquire ownership of a dam and assume the obligation of its repair, maintenance and operation?

There may be situations in which a dam which no longer is of any value to the owner is of sufficient importance to the general public so that, as a matter of public policy, it would be desirable for the state to assume all or part of the costs of its repair, maintenance or operation. Perhaps the waters impounded by the dam have become a very important public recreational area or perhaps the structure is important as a flood prevention device.

The principal legal question here is whether such an undertaking by the state would violate the internal improvements clause of the state constitution. This subject is exhaustively treated in a recent article in the Wisconsin Law Review<sup>9</sup> in connection with the examination of legal problems involved in a general state lake management program. The state supreme court never has been presented with the exact question posed above. The author of the law review article concludes that some persuasive arguments can be given for upholding the validity of expenditure of state funds for construction, repair and maintenance of facilities such as dams in the proper circumstances. With one exception the court has consistently held that improvements necessary to carry out clear governmental or sovereign powers are not barred by the internal improvements clause of the state constitution. From this it is reasoned that improvements necessary to effectuate the state's trust in navigable waters must be permissible because management of the trust is itself one of the state's sovereign powers and because such improvements contribute to public health, the preservation of which is a traditional function of government. On the other hand, he points out that the attorney general has taken a conservative attitude in the matter and on several occasions has ruled that the

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8. Crawford v. Duluth Street Railway Co., 60 F. 2d 212 (1932).

9. Waite, The Dilemma of Water Recreation and A Suggested Solution, 1958 Wis. L. Rev. 542, 532-599.

state cannot construct, repair or operate a dam except in connection with the improvement of a public park.

It is evident that the matter is not free of doubt and a test case would likely be necessary to decide the issue.

#### IV. A SURVEY OF PERTINENT LEGISLATION PROPOSED OR ENACTED IN 1959

##### Bill No. 97, A.

This bill was introduced by Assemblyman Ward, apparently as a direct result of the Somerset Dam case. The bill is reproduced in Appendix B of this report.

The following are the principal points of the bill:

1. It would have settled the jurisdictional issue raised in the Somerset Dam case by expressly authorizing the public service commission to take action on petitions for abandonment.

2. It would have required the commission to hold a public hearing on each application for abandonment of a dam and to take evidence offered in support of or in opposition to the application. As is evident from the preceding discussion of past dam abandonment proceedings before the public service commission, it has been the commission's practice to hold hearings in almost every case.

3. It would have required the public service commission to deny a petition for abandonment if it found that removal of the dam (a) would be detrimental to navigation, or (b) would detract from public rights such as the enjoyment of the artificial pond for recreational purposes and natural scenic beauty, or (c) would be detrimental to the full development of agricultural and industrial activity, or (d) would endanger life, health or property. All these are factors which the commission currently takes into account in making its decisions, but it is possible that the above provisions if enacted into law would restrict considerably the commission's latitude in reaching decisions in dam abandonment cases. For example, there are few cases where abandonment of the dam would not to some extent detract from the enjoyment of the pond for recreational purposes, yet the impairment of recreational value in a given case may be very insignificant in comparison with the cost of maintaining and repairing the dam. See, for example, the preceding discussion of the Hixton Milldam case.

4. The commission would be required to take into consideration "the prescriptive rights of the riparian owners who have enjoyed the advantages of the artificial level of the water as a result of the dam and the reliance placed upon its maintenance by those who had improved their property at great expense as a result of the artificial pond created by the dam." If the petition for abandonment were granted, the commission would be required in its order to "reserve to the property owners the right to have determined the question of damages for injuries to rights as riparian owners which may result from the abandonment of



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the dam and to rights acquired to the reciprocal easement to have the waters in the pond left at the same level as they were maintained during the prescriptive period." The bill further provided that such action for damages would have to be commenced within 2 years after the commission's order becomes final. It is not clear what effect the above provision would have on the present law, partly because the present law is not clear and partly because the intent of the above provision is not entirely clear. It is true that our supreme court has spoken in terms of riparian owners on flowed lands acquiring prescriptive rights to have the artificial condition maintained if the condition has existed for the prescriptive period and if the riparians have improved their property at considerable expense in reliance on the continued maintenance of the artificial condition. At the same time, however, the court went on to say that it had no doubts that a dam owner might abandon his water rights and easement "so as to escape all liability at law for consequent damages" if not bound by law or agreement to maintain the artificial water level. This statement in regard to abandonment was not strictly necessary to the decision of the case in which it appeared and therefore is dictum, but it nevertheless lends some support to the proposition that under present law riparians cannot recover damages for injury to their riparian rights because of the abandonment of a dam. How would the proposed bill have changed this? The bill does not expressly create a right of action for damages on the part of riparians, but it certainly would strengthen their position in any attempt to bring such action.

5. The bill would have prohibited the commission from issuing an abandonment order without also ordering removal of the dam so as to restore the waters to their natural state. This would have changed the present practice, as there are some past dam abandonment proceedings in which the commission has permitted abandonment without requiring complete removal of the structure.

Substitute Amendment No. 1, A. to Bill No. 97, A. was introduced by Assemblyman Abraham and also is reproduced in Appendix B. It is a much simplified version of the original bill and would have affected present law and practice primarily as follows:

1. It would have settled the jurisdiction issue by expressly authorizing the public service commission to take action on petitions for abandonment.

2. It would have required the commission to hold a public hearing on every petition for abandonment. As previously noted, this has been the general practice of the commission.

Bill No. 97, A. had a public hearing before the Assembly Judiciary Committee, but the bill was withdrawn by the author before the legislature could take further action on it.

Section 31.38

Section 31.38 of the statutes of 1959 is not a new provision, but it was revised and renumbered in 1959.<sup>10</sup> It is reproduced as Appendix C of this report.

The section is pertinent to this study because it provides the machinery whereby a county, town, city or village may construct, maintain or repair a dam across any lake or stream within or adjoining the municipality and assess benefits to property owners who are specially benefited by the construction, repair or maintenance of the dam. As we have seen, municipal acquisition and maintenance of a dam is sometimes a desirable alternative to complete abandonment.

It may be that the section is in need of minor clarifications. The section does not specifically mention acquisition of an existing dam, though it would seem irrational to conclude that a municipality may only construct its own dams, not acquire ownership of existing dams.

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<sup>10</sup>. See ch. 441, laws 1959.

## V. A SURVEY OF PERTINENT LEGISLATION IN OTHER STATES

It often is helpful when seeking solutions to problems of a statewide nature to see what other states have done in similar situations, but a search of the statutes of other states in this case revealed very little. Only 2 states appear to have statutes dealing directly with abandonment of dams, though several other states have legislation similar to Wisconsin's relative to the maintenance of dams by the owners.

New Jersey is the only state which has a statute dealing very directly with the problems raised by the Somerset Dam case. It is reproduced in full in Appendix D. Briefly, it provides that a dam owner may not abandon a dam without the consent of the state water policy commission if the majority of landowners along the shore of the pond file a petition protesting the abandonment, provided the following conditions also are met: (a) the pond has existed for at least 20 years, and (b) the property owners on the pond have made permanent improvements on their land along the shore of the pond or such land has become a populated community. If such a petition is received, the commission must hold a hearing and may fix a permanent low water mark. If it finds that the maintenance of the dam would be an undue burden on the owner, it may order the landowners around the reservoir or above the dam to pay part of the costs of such maintenance.

Minnesota has a very general provision to the effect that no dam on any public water may be abandoned without first obtaining written permission from the commissioner of conservation (Minn. Stat. §105.42). According to information supplied by Mr. Sidney A. Frellsen, director of the division of waters of the Minnesota department of conservation, experience under this section has been very limited.

Minnesota law also provides a procedure whereby the state, through the commissioner of conservation, may acquire title to abandoned dams and maintain and operate them. (Minn. Stat. §§110.31 to 110.41) Unlike the Wisconsin law which permits the conservation commission to maintain and operate abandoned dams only if located on state-owned lands, the Minnesota law applies to any abandoned dam which meets certain conditions. In the first place, a dam is considered "abandoned" only if it has not been used or maintained by the owner for any lawful purpose for a continuous period of at least 15 years. In the second place, the waters affected by the dam must meet certain conditions: (a) the water level must have been affected by the dam for a period of at least 15 years; (b) the lake must have been used by the public for navigation, fishing, hunting or other beneficial public purposes continuously throughout such 15 year period so far as permitted by natural conditions; (c) the use of the dam for any lawful purpose other than regulating, controlling or maintaining the water level for such public purposes has been discontinued; (d) continuance of such maintenance, regulation or control of the water level

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would be desirable and in furtherance of the public interests in navigation, propagation of fish or waterfowl or other beneficial public uses of the lake, and discontinuance thereof through deterioration or removal of the dam would be detrimental to such public uses. If all these conditions are present, the commissioner is directed to take possession of the dam and to maintain and operate it. The act raises certain statutory presumptions to the effect that all flowage easements have been dedicated to the state and provides for actions to establish the title of the state to the dam and such easements. The commissioner is authorized to convey any such dam to a county or other political subdivision of the state if the county or other political subdivision desires to maintain and operate the dam.

Commenting on experience under this provision of the Minnesota law, Mr. Frellsen stated:<sup>11</sup>

"...public hearings were held by the Commissioner on dams on Vermilion Lake, St. Louis County in 1953, and on Fall Lake, Lake County and Burntside Lake, St. Louis County, in 1958. The Vermilion Lake dam was taken over by the Commissioner and repaired with funds appropriated especially for that purpose. The Fall Lake dam was acquired in the same manner, and reconstructed with emergency work relief funds. Both were logging dams formerly owned by corporations no longer in existence....

"The department has occasionally been requested to take over dams whose economic value has been reduced by changing conditions, often for the purpose of relieving the owners of the burden of responsibility for maintenance and operation. The most recent case was that of the King's Mill dam on the Cannon River at Fairbault, which was used for flour milling until the fall of 1956. While the pool formed by the dam has substantial recreational and other public values, the dam would require some operation. This department is reluctant to accept responsibility for operation of dams because of the difficulties inherent in "remote control." It was therefore suggested that the city or county acquire the dam and flowage rights, and negotiations toward this end are believed to be underway at present.

"It is believed that problems of this nature which arise in the future will generally be solved by transfer to municipal or county governments or by acquisition by the state under the provision of Minnesota Statutes, Chapter 110."

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11. Letter from Sidney A. Frellsen, director of the division of waters of the Minnesota department of conservation, dated November 16, 1959.

Further comments by Mr. Frellsen indicate that many problems relative to old dams in Minnesota are solved without resort to legal action, just as in Wisconsin. During the 1930's, many of the old wooden dams built to facilitate logging and which had created fine recreational areas and enhanced property values were reconstructed, or were replaced by concrete dams, by the GCC work camps or under the WPA program. Many mill dams are maintained by municipalities for the recreational values involved. A few have been taken over by the state and are maintained in connection with state parks or recreational reserves. Others that are no longer used for power are maintained by private owners as scenic attractions for restaurants or other commercial establishments.

## VI. SUMMARY OF THE PROBLEM

The dam abandonment cases discussed in this report represent all dam abandonment cases handled by the public service commission since 1940. The number is not large when compared to the roughly 1,000 dams in existence in the state but gives a good indication of the diversity of conditions and problems which are encountered. However, it may be possible to draw a few general conclusions on the basis of this past experience.

1. It appears to be true as a general proposition that the owner of a dam does not apply for permission to abandon the dam until it becomes an economic burden to him. Usually, the dam must be rebuilt or have immediate and extensive repairs if it is to serve any useful purpose. This means that a decision in a dam abandonment case has important implications. If the owner is required to maintain the dam after it has ceased to be of any value to him, he is saddled with the economic burden; if the owner happens to be a public utility, this burden falls upon the utility's ratepayers who may not be the ones who receive the primary benefits from the dam. On the other hand, if the burden is to be shifted to those who are the primary beneficiaries, there is, firstly, the difficult question of determining who those beneficiaries are and, secondly, the problem of determining how and to what extent each should be made to contribute.

2. In the majority of the cases reviewed there was no real controversy. This may suggest that any statutory procedure which may be worked out to deal with the difficult cases should be set up so as not to make the disposition of the simpler cases too cumbersome.

3. The difficult cases are the ones where the value of the benefits to be derived from maintaining the dam (even though it has become an economic burden to the owner) closely approaches the cost involved in maintaining the dam, particularly if both the costs and the benefits are very substantial. Aside from the legal problems previously discussed, there is then the difficult policy question of where the economic burden is going to fall. There are additional problems when the public has acquired rights in the waters involved.

It is not the purpose of this preliminary report to suggest any specific solutions to the problems posed by Jt. Res. No. 59, S., but it might be helpful, by way of summary, to outline some of the issues on which the committee may desire to focus attention:

- A. Is there a need for legislation in regard to dam abandonment proceedings in this state, or is the matter being handled satisfactorily under present law?

B. If there ~~is~~ a need for legislation, what form should it take?

1. Procedural

- a. Should formal applications be required?
- b. Should public hearing on the application be required?  
In every case? In specified cases only?
- c. Other requirements?

2. Substantive

- a. Should the commission's jurisdiction be clarified?
- b. If abandonment is to be permitted in some cases but not in others, what criteria should the commission use in making its decision? What weight should be given to each?
  - 1. Effect on owner of requiring continued maintenance (e.g., the economic burden)?
  - 2. Effect of abandonment on riparians around the pond (e.g., devaluation of property due to lowered water levels)?
  - 3. Effect of abandonment on lower riparians (e.g., the danger of flood damage)?
  - 4. Effect of abandonment on public rights in the pond (e.g., fishing, swimming, boating, enjoyment of scenery)?
  - 5. Effect of abandonment on public health or safety (e.g., use of pond as reserve water supply for fire fighting)?
  - 6. Effect of abandonment on navigability of the stream (e.g., obstructions and lowered water levels)?
  - 7. Effect of abandonment on business, industry or agriculture in the area (e.g., effect on use for irrigation, industry, commercial recreation)?
  - 8. Effect of abandonment on local governments in the area (e.g., loss of tax revenue)?



- c. What are the alternatives to complete abandonment if the owner is not going to be required to maintain the dam?
1. Acquisition and maintenance by a county, city, village or town under § 31.38 (see Appendix C)?
  2. Acquisition and maintenance by the state (see preceding discussion of legal problems)?
  3. Acquisition and maintenance by a private association (whether composed of the property owners around the pond or of broader membership)?
  4. Assessment of part of the costs of maintenance to the owners and part to the property owners or others primarily benefited (see New Jersey statute in Appendix D)?
  5. Others?
- d. If abandonment is to be permitted, should any conditions be placed on the abandonment (e.g., requiring removal of the dam in all or specified cases)?
1. By the legislature?
  2. By the public service commission?

## APPENDIX A

### DOCUMENTS PERTAINING TO THE SOMERSET DAM CASE

1. Brief in support of motion to dismiss proceedings
2. Applicant's brief
3. Reply brief
4. Commission's final order

1. BRIEF IN SUPPORT OF MOTION TO DISMISS PROCEEDINGS

BEFORE THE

PUBLIC SERVICE COMMISSION OF WISCONSIN

Application of Northern States Power : MEMORANDUM BRIEF IN SUPPORT  
Company for Authority to Abandon the : OF MOTION TO DISMISS  
Somerset Dam and Hydro Plant in : PROCEEDINGS  
St. Croix County :

FACTS

Chapter 144 of the Laws of Wisconsin published April 11, 1899, was an Act authorizing Frank W. Epley and Henry Floy and George M. Brill to build and maintain a dam across Apple River on the Southeast Quarter of the Southeast Quarter of Section 35, Township 31, North of Range 19 West, of the fourth principal meridian in the County of St. Croix, "said dam to be maintained for the purpose of the improvement of navigation, the manufacture of flour, feed, and other milling products, and the transmission of electric power; provided that said dam shall not raise the water to exceed twenty-four feet." Pursuant to this authorization, the dam was constructed in the Village of Somerset and has since said time been maintained and operated at the same location.

In 1904-1905, the dam was raised and reinforced and in 1910-1911 it was completely rebuilt in substantially its present form. The complete superstructure was rebuilt in 1933 and the turbine flume was reconstructed in 1938. In 1929, 1939, 1940 and 1945 extensive repairs were made to the dam. The present powerhouse was built in 1910-1911 to house generating units originally installed in or about 1897 and 1903. (Tr. P. 6)

On May 21, 1897, the Apple River Power Company filed Articles of Incorporation with the Secretary of State. They were organized to improve the Apple River and transmit electric power. Presumably, the company operated the dam until about 1916 when it became part of the Interstate Light & Power Company. The Interstate Light & Power Company sold part of its property to another utility, but the Somerset Dam was sold to the Northern States Power Company on April 30, 1956 (See 2-WP\_1113)

The drainage area above the Somerset Dam is about 550 square miles and the area of pond at the normal level is about 100 acres and extends about 2-1/2 miles above the dam at its normal level. (Tr. Page 8-9 See N.S.P. Petition)

The Northern States Power Company in its application states that the dam leaks badly under the spillway section and under the crib at the south end of the dam and leakage has progressed to a point where it is no longer economical to operate the dam. The dam and flume timbers are in a state of

deterioration and in 1957, the trash racks collapsed through failure of the supporting structure and were not replaced. The Northern States Power Company requests approval of the Public Service Commission of Wisconsin to abandon the operation of the dam and to allow it to deteriorate in place for the following reasons:

- (a) The dam is in such deteriorated condition at the present time that the leakage makes operation impossible during a large part of the year.
- (b) The dam is generally beyond repair and any expenditure of funds short of the amount required for complete rebuilding of the dam will of necessity be followed by adding expenditures of considerable sums over future years.
- (c) The cost of the permanent concrete structure would be so great that construction of a new dam would not be economically feasible even though present generation equipment is used.
- (d) Replacement of the present equipment for new equipment of greater capacity and better efficiency is not economically feasible because of the added cost of equipment and limited amount of water available.
- (e) Abandonment of the dam in place will not cause any undue hardship or hazard to the general public.

At the time that the matter came on for hearing, counsel for the Village of Somerset, owners of riparian rights and interested clubs, organizations, and individuals appeared and objected to the jurisdiction of the Commission on the grounds that there is no statutory authority which would permit the Commission to "authorize abandonment of the operation of the dam and to allow it to deteriorate in place." (Tr. page 3-4)

It was mutually agreed by counsel that briefs on the jurisdictional question would be submitted for determination by the Commission prior to the consideration of the other phases of the case. As the moving party, the opponents of the abandonment of the Somerset Hydro Plant has agreed to submit the initial brief.

#### QUESTION

The sole question for consideration by the Commission, therefore, is, "Does the Commission have jurisdiction to abandon the operation of the Somerset Dam and allow it to deteriorate in place?"

## ARGUMENT

### 1. The language of the Statute does not contemplate abandonment.

The Statute in question, Section 31.18 (1) provides:

"The grantee of any permit, the owner of any dam constructed before permits were required by law, and the owner of any bridge at the city of Portage or at any point above that city, over the Wisconsin river, shall maintain and operate all such dams, slides, chutes, piers, booms, guide booms, weirs, tunnels, races, flumes, sluices, pits, fishways, locks, boat hoists, marine railways and all other equipment required by the commission for the protection of public rights in such waters, and for the preservation of life, health and property, in good repair and condition, and shall not wilfully, or otherwise, injure, remove or destroy the same, or any part thereof, unless the commission shall have approved such removal or destruction in writing. In the event of emergency the commission shall have power, pending investigation and hearing, to order the repair of any dam without notice and hearing."

We call attention to the fact that nowhere in the entire Section is the word "abandonment" used. The emphasis of the entire Section is the obligation of owner to maintain and operate such dam. The admonition that they shall not wilfully injure, remove, or destroy the same or any part thereof is in accord with the primary purpose of Chapter 31 which deals with the development of water power and the erection of mills and mill dams.

A careful reading of Section 31.02 outlining the powers of the Commission, indicates that the statement of policy contained in Subsection (1) and (2) deal with the protection of public rights in navigable waters to promote safety and to protect life, health, and property. Again, the Commission is vested with authority to determine all reasonable methods of construction, operation, maintenance and equipment for any dam so as to conserve and protect all public rights in navigable water and so as to protect life, health, and property.

Chapter 31 deals with the basic problems relating to application for permits to construct, the matter of hearing, the acquisition, operation, maintenance, and the obligation relative to maintenance of the dam and the preservation of public rights in navigable waters. From a reading of the entire Chapter, it is impossible to find any specific grant of power or authority authorizing the Commission to permit "Abandonment of the dam or authorization to permit the dam to deteriorate in place." Certainly Section 31.18 relied upon by Northern States Power contains no authority in specific terms. To the contrary, we call attention to Section 31.19 which specifically charges the Public Service Commission with the obligation to examine dams in order to determine whether any reservoir is in unsafe condition and whether the same is sufficiently strong or is unsafe and dangerous to life and property. It might be said that the Commission, in permitting the dam to deteriorate to the extent described by the applicant, has been

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derelict in its duty in not requiring the applicant to maintain the structure in a safe condition sufficiently strong to maintain the water level at a level required by the Commission. The testimony of Northern States Power witnesses is an admission of their failure to comply with the law.

2. Powers of Commission must be found within four corners of Statute.

It is too elementary to require citation of authority that the Public Service Commission being purely a creature of statute has no powers nor jurisdiction except such as is found within the four corners of the Statute creating it. In American Brass Co. vs. State Board of Health, 245 Wis. 440, at page 448, Justice Rosenberry speaking for the Court said:

"No proposition of law is better established than that administrative agencies have only such powers as are expressly granted to them or necessarily implied and any power sought to be exercised must be found within the four corners of the statute under which the agency proceeds."

Monroe v. Railroad Comm. (1919) 170 Wis. 180;

Wisconsin Telephone Company vs. Public Service Commission, 232 Wis. 274; United Parcel Service vs. Public Service Commission, 240 Wis. 603.

The limitations of the administrative agency was considered by the court in Chippewa & F. Implement Company vs. Railroad Commission, 164 Wis. 105, in construing the rights of the Commission to regulate and control navigable waters of the state and fix the maximum and minimum levels that may be maintained by any dam heretofore or hereafter constructed in the interests of public rights or to promote safety and protect life, health, and property, the court said:

"Here the Legislature has performed the legislative function by declaring that water may not be maintained in any dam in navigable waters at a level which is injurious to the public rights in such waters, or which threatens safety, or imperils life, health and property. Having enacted this general law, the legislature has endowed the Railroad Commission with power to investigate and ascertain the facts and to make such regulations and orders as may be necessary to carry into effect the law in concrete cases.

That this may be lawfully done, and that legislative power is not thereby delegated nor judicial power conferred, are propositions too well established to admit of doubt. Minneapolis St. P & S. S. M. R. Co. vs. Railroad Commission, 136 Wis. 146. \*\*\*"

3. The Statute should be strictly construed.

We submit that in the absence of specific authority, language authorizing "abandonment," the Public Service Commission has no right to assume jurisdiction or make orders contrary to the basic intent of the Legislature.



We do not believe that any Administrative Body, particularly one charged with the protection of the public, should construe ambiguous language to broaden the scope of its own authority. The courts have often held that laws shall be liberally construed to effect Legislative intent where such intent is plain. We have, therefore, attempted to review the history of Chapter 31.

The history of the "development of the law of waters" in Wisconsin is fully outlined in an article by Adolph Kennenberg in the 1946 Wisconsin Law Review at page 345. In the interest of brevity we will not attempt to review the entire treatise but direct the Commission's attention to this article for background material.

A review of the history of the law will show that a special Interim Legislative Study Committee was created by the 1909 Legislature. Its report in 1911 considered the entire problem of water power, mills and mill dams, and it was this committee that was largely responsible for the creation of the present law.

It is interesting to note, however, that the Legislative study report contained no reference to abandonment of dams, but rather that the committee was concerned with the delegation of a legislative function relative to the construction of dams. It was evident that the Legislature previously having had full authority to grant franchises for the construction of dams for various purposes found that the development of water power and uses of water for other purposes required that the powers be delegated to an administrative agency.

The Commission further was given the authority to regulate the flow and the level of waters and other specific powers in almost every instant looking to the continued preservation and protection of public rights in navigable waters.

It is also interesting to note that in 1929, the Legislature enacted Chapter 523 which provides:

"The enjoyment of natural scenic beauty is declared to be a public right, and if the Commission shall find that the construction, operation, or maintenance of a proposed dam is contrary to the public interests, when the public right to enjoyment of natural scenic beauty is considered, no permit shall issue."

Historically, therefore, we believe that the extent of Legislative intent up to the present time has dealt with construction of dams and public rights to use navigable waters.

The subject of water and water power has been and still is of continued importance as indicated by the continued legislative study of the problem. In 1957, a Legislative Committee was created for the purpose of studying water uses, diversion for irrigation and other purposes. A further summary of the related problems of access and water use is contained in the 1958 Wisconsin Law Review commencing at page 335. It is not inconceivable that this committee or its successor will study the problems of abandonment. We do not wish to be for the point, however, it is our specific contention that in the absence of

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direct legislative authority, the Public Service Commission is limited in its jurisdiction.

4. The Commission is Required to Protect Public Rights.

It is well established that the term "dam" is not limited to the structure directly across the riverbed, but includes the millrace or canal carrying the impounded water to the powerhouse, and thence the discharge of water. The term "dam" is used to designate not only the structure that impounds the water, but also the pond in which the water is impounded. See Priegel v. Northern States Power Company, 242 Wis. 345.

Among other questions which may arise, therefore, is whether the maintenance of the pool by the company has established any reciprocal rights in the landowners to have the pool maintained on a continuing basis and the effect of the abandonment on public rights and the Commission's public trust.

In the case of Smith vs. Youmans, 96 Wis. 103, the court held that where the owner of a mill dam at the outlet of a lake has for a length of time sufficient to give him a prescriptive right, maintained the waters of the lake at such height that they have covered the low marshy shores and extended to the high banks, thereby rendering the adjacent lands desirable for use as summer resorts, the riparian owners, who have for the same period enjoyed the advantages of such artificial levels of the water, and in reliance upon its maintenance have improved their property at great expense for the use mentioned, have on their part an easement to have the waters kept at said higher level and may prevent the lowering thereof to their injury by the owner of the dam.

It has been further held that riparian property owners having prescriptive rights are proper parties to an action and have an interest in the litigation. Castle vs. Madison, 113 Wis. 346. The Court in Wisconsin Power & Light vs. Public Service Commission decided October 7, 1958, and reported in 92 NW (2d) 241, cites with approval Muench vs. Public Service Commission, 261 Wis. 492, holding that private persons have an interest in navigable streams of the State. We further call attention to Justice Marshall's opinion in Village of Pewaukee vs. Savoy, 103 Wis. 271, in which he said:

"It is settled law that submerged lands of lakes within the boundaries of the state belong to the state in trust for public use, substantially the same as submerged lands under navigable waters at common law. Upon the admission of the state into the union, the title to such lands, by operation of law, vested in it in trust to preserve to the people of the state forever the common rights of fishing and navigation and such other rights as are incident to public waters at common law, with trusteeship inviolable, the state being powerless to change the situation by in any way abdicating its trust."

We quote this provision specifically because we believe that the Public Service Commission having been charged by the Legislature with the control of

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The Court said in State vs. Public Service Commission, 275 Wis. 112, at page 118:

"Certainly the trust doctrine would prevent the state from making any substantial grant of a lake bed for a purely private purpose. Priewe v. Wisconsin State Land & Improvement Co., 93 Wis. 534, 67 NW 918. Even for a public purpose, the state could not change an entire lake into dry land nor alter it so as to destroy its character as a lake. In Re Crawford County L & D. Dist. 182 Wis. 404, 196 NW 874.

The same situation is applicable in the present case as the abandonment of the dam and the attendant destruction of the pond would not only adversely affect the private riparian owners, but would substantially impair the public interests and affect the public use of water, including pleasure boating, fishing, swimming, hunting, skating, and enjoyment of scenic beauty. North State's gain in pecuniary profit would be small when weighed in the great loss to the public interests.

We again refer to the Village of Pewaukee v. Savoy, supra, in which the Court at page 277 said:

"The principle is well settled that if the volume or expanse of navigable waters be increased artificially, the public right is correspondingly increased. Whisler v. Wilkinson, 22 Wis. 572; Volk v. Eldred, 23 Wis. 410; Weatherby v. Meiklejohn, 56 Wis. 73; Smith v. Youmans, 96 Wis. 103; Mendota Club v. Anderson, 101 Wis. 479. As the chief justice put it in the Mendota Club Case, the public may use the increased volume of water the same as though it had always been in that condition; that the right existed from the start. So long as the artificial condition existed, the person holding the title to submerged lands could not exclude the public therefrom.

It is not difficult to see how a person who, by artificial means, makes his land a part of the bed of a navigable lake so that the

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It is not difficult to see how a person who, by artificial means, makes his land a part of the bed of a navigable lake so that the

water flowing over the same is rightfully used as a part of the public waters and continues that situation for a long time, loses the right to change the condition. The creation of the condition, knowing that the public will have a right to enjoy it, necessarily carries with it a presumed intention that they shall enjoy it. A person is presumed to intend the natural consequences of his deliberate acts. A situation once created and continued for such length of time that it would be considered a violation of good faith to the public for the person responsible for it to change position and restore the original situation, brings into play the principle of estoppel in pais, which precludes him from revoking what is legally considered a dedication of his land affected by his acts, to the public use."

Again referring to the report of the Special Interim Committee on Water Powers Forestry and Drainage, the majority said:

"The state should declare in unmistakable terms that the use of water in navigable streams and lakes for power developed under a franchise from the state is a public use; and all of the energy developed or undeveloped of the water in the navigable streams is subject to the control of the state for the greatest public good.

The state now regulates and controls under the public utility act, the distribution of power whether generated by water or coal. The state should go farther. When a franchise is given for the development of water power, the state should exercise the right to regulate the creation and use of that power; since it is a matter of public concern to regulate the distribution of power, it must be of the first importance to regulate the creation of that power. By declaring the creation of water power under a franchise, a public purpose coordinate with the improvement of navigation, and by giving the right of eminent domain to the grantee and permitting him to sell the same to the public and compelling him to sell the surplus power to the public, such franchise gives the grantee the status of a public utility and renders such grantee amenable to public control.

The state should declare that the beneficial use and natural energy of the water of the navigable streams and lakes of this state for all public uses belong to the state in trust for all of the people.

The legislature should assert that the state is trustee for the people of the beneficial use in and to the natural energy of the waters of the navigable streams and lakes for public purposes as against the individual, to the end that the state may use it as public necessity or convenience may require, or to the end that the state may delegate it by franchise to individuals to use the same, subject to such trusteeship, upon such terms and under such conditions and circumstances as the public good may require." (See Special Report on Water Power, Pages 19-20)

We called attention to the foregoing because it is so firmly established that the power delegated to the Public Service Commission by the Legislature was a "trust for public purposes." If we are now embarking on a new era where atomic energy will replace power generated by steam or water, it is high time that the Legislature consider the entire problem in the light of the present day conditions. In the event that dams are to be abandoned, reservoirs and artificially created ponds are to be destroyed, there should be a realistic and sane approach to assure protection of both private and public property.

Counsel for the various parties objecting to the removal of the dam, therefore, suggested that the entire matter be postponed or stayed until the Legislature could consider the merits of the entire question. Certainly, in fairness, the Commission should not assume jurisdiction in the phase of a reasonable request for the delay at a time when the Legislature is in session and a specific proposal has been introduced for consideration.

We are well satisfied that the Legislature as now constituted will take prompt action to prevent an abuse of the state's public trust or the destruction of private property rights.

5. Deterioration of the dam in place specifically prevented by law.

As heretofore pointed out, the applicant seeks not only to abandon the dam, but to permit it "to deteriorate in place." This involves a direct violation of the statute requiring maintenance of the dam and reservoir in order to prevent impending danger to persons or property. If the Commission has any authority under the provisions of Section 31.18, it is limited to approving removal or destruction. By allowing it to deteriorate in place, the applicant Northern States Power would in effect be acting completely contrary to the provisions of Section 31.18 wilfully permitting the deterioration thereby removing or destroying the physical structure of the dam and the pond contrary to the statutes.

We searched diligently and without success in an attempt to find a case decided by the Supreme Court of Wisconsin in which the abandonment of a dam has been considered by the Public Service Commission.

We have come to the conclusion that this is a case of first impression, not only in Wisconsin but in the Nation. It is unique in that Northern States Power, a Public Utility has initiated the abandonment proceeding in question. The majority of cases in which the question of public rights have been involved deal with application by utilities to construct dams for purposes of generating power.

We respectfully submit, therefore, that the motion to dismiss should be granted and in the alternative that the entire proceedings be stayed by order of the Commission pending the consideration of the entire subject by the Legislature and the specific authorization to conduct abandonment proceedings, determine damages of the riparian owners and the rights of the public.

Petitioners further respectfully request that an oral argument be granted on the motion to dismiss and to stay the proceeding pending Legislative action.

DOAR & KNOWLES  
Attorneys for Village of Somerset and  
Property Owners Adjacent to Apple River

and

WILLIAM W. WARD

Attorney for American Legion of  
Somerset, Somerset Fire Department,  
Town of Somerset, Somerset Commercial  
Club, and Property Owners

CERTIFICATE OF SERVICE

I certify that copies of the above and foregoing brief have been duly served this 20th day of January, 1959.

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## 2. APPLICANT'S BRIEF

BEFORE THE

PUBLIC SERVICE COMMISSION OF WISCONSIN

Application of Northern States Power	:	2-WP-1313
Company for Authority to Abandon the	:	
Somerset Dam and Hydro Plant in	:	APPLICANT'S BRIEF.
St. Croix County	:	

### JURISDICTION.

Those voicing objections to the application in their Brief state that the sole question for consideration has to do with the jurisdiction of the COMMISSION to grant the application. (Page 3 of Brief, lines 18 to 21.)

It appears to be conceded that the operation of the dam for development of electric power is not economically sound. (Transcript, pages 21 and 22.)

We also desire to call attention to the fact that the applicant is the owner of the lands upon which the dam is located, and is the owner of flowage rights over lands which are flooded by the reservoir. These rights were not acquired by prescription but were acquired by purchase. The flowage rights on certain of the parcels are limited, but as to many of the descriptions are unlimited. (Exhibit 3. Transcript page 18.)

The applicant relies upon the general statutes under the Water Power Act and Public Utility Laws, and specifically upon Section 31.18 (1) of the Statutes.

Section 31.18 (1) of the Statutes is in part as follows:

"31.18 Obligations of Owners of Bridges and Dams. (1) The .... owner of any dam constructed before permits were required by law .... shall not wilfully or otherwise .... remove or destroy the same .... unless the commission shall have approved such removal or destruction in writing."

"31.02 Powers of Commission. (1) The commission in the interest of public rights in navigable waters or to promote safety and protect life, health and property is empowered to regulate and control the flow of water in all navigable waters.... and may by order fix a level for any body of navigable waters below which the same shall not be lowered except as provided in this chapter."

Sub-section (2) provides in part as follows:

"The commission is vested with authority and power to investigate and determine all reasonable methods of construction, operation, maintenance and equipment for any dam so as to conserve and protect all public rights in navigable waters ... and the construction, operation, maintenance and equipment, for any or all thereof, of dams in navigable waters shall be subject to the supervision of the commission and to the orders and regulations of the commission made or promulgated under the provisions of this chapter of the statutes."

"31.33 Jurisdiction of Commission. (1) All Heretofore or Hereafter Constructed; Action for Damages. All mills and milldams lawfully erected or constructed, on streams not navigable at the time, under and pursuant to the provisions of chapter No. 48 of the territorial laws of 1840, chapter 62, laws of 1857, chapter 56 R.S. 1858, chapter 146, R.S. 1878, chapter 146, R.S. 1898, chapter 146, Wisconsin Statutes of 1911, 1913 or 1915 or under and pursuant to any special, private or local act, or under any other act whatsoever, which are not now abandoned but are still in existence and use, and all dams heretofore or hereafter erected or constructed on streams not navigable in fact for any purpose whatsoever, shall be subject to and regulated and controlled by the provisions, so far as applicable, of sections 31.02, 31.03, 31.12, 31.18, 31.19, 31.20, 31.22, 31.25, 31.26 and 31.28 of the statutes,".

Section 196.02 of the statutes provides in part as follows:

"The commission is vested with power and jurisdiction to supervise and regulate every public utility in this state, and to do all things necessary and convenient in the exercise of such power and jurisdiction."

It, of course, will not be disputed that the COMMISSION could order the applicant to repair the Somerset Dam.

If the COMMISSION has the power to compel the applicant to repair the dam, it surely has negative power to refrain from compelling the applicant to repair the dam.

We assume it would not be disputed but that the COMMISSION would have the power to suspend the operation of the dam, and in that connection to require the applicant to remove certain portions of the dam.

It is our position however that the permit to construct the dam does not require the perpetual maintenance and operation of the same, and certainly not without supervision by the PUBLIC SERVICE COMMISSION.

If this proceeding had been instituted for the purpose of compelling the Northern States Power Company to repair or remodel the dam, and if the Power Company had contested the application, no one would have questioned the power of the COMMISSION to hear and determine the controversy.

If the COMMISSION had the power to require the applicant to repair the dam, then certainly the COMMISSION has the power to "not require" the repair of the dam, which in effect is a finding that it is not in the public interest to require the operation and maintenance of the dam.

We quote as follows from 50 American Jurisprudence, page 626, paragraph 159:

"Removal, Alteration, Abandonment or Discontinuance. Ordinarily, the proprietor of a dam has an unqualified right to remove, alter or abandon it where the rights or interests of other persons are not affected by such action. Moreover, the apparent weight of authority is to the effect that the mere fact that one has used or improved his property with reference to the artificial condition created by the maintenance of a dam by another, so that he would suffer loss or inconvenience by the removal or alteration of such dam, confers upon him no right to continued maintenance thereof for his benefit, or, at least, imposes upon the proprietor of the dam no affirmative obligation with reference to such maintenance. The view taken in some cases, however, is that the acquiescence by one person in an artificial condition so created by another may give rise to mutual or reciprocal rights in respect of the continued maintenance thereof, so as to preclude the proprietor of the dam from affirmatively interfering therewith, or to authorize the maintenance thereof by, or at the cost of, the other person."

The case of SMITH v. YOUMANS (1897), 96 Wis. 103, cited by counsel in their brief, and also cited in support of the minority view, discusses the reciprocal rights, and holds that the owner of a mill dam could be enjoined from taking out the dam and allowing the stream to return to its natural state. However the Court, by Justice Pinney, at page 112, states as follows:

"We have no doubt but that the defendants may abandon their water rights and easement, so as to escape all liability at law for consequent damages if they are not bound by law or agreement to maintain the higher level of the waters in the lake."

And also, at page 113

"But here, as stated, there has been no abandonment or surrender, and the case must be determined upon the equitable grounds arising out of the special facts found by the trial court."

In the case of TAFT v. BRIDGETON WORSTED CO., Massachusetts 1921, 130 NE 48, 13 ALR 926, it was held that the owner of a mill dam cannot be compelled to maintain it for the benefit of the owner of the flowed land. (Headnote 4)

The Court at page 931 uses this language:

"Of course the plaintiffs had no right to compel the defendant to maintain its dam for their benefit. The defendant had a right at any time to take down its dam or to cease to impound the water for any reason which seemed to it sufficient. With such conduct the plaintiffs have no legal concern."

Citing:

Lakeside Mfg. Co. v. Worcester, 186 Mass. 552, 72 N.E. 81  
Flagg v. Concord, 222 Mass. 569, 111 N.E. 369  
Mason v. Whitney, 193 Mass. 152, 7 LRA (NS) 289, 78 N.E. 881

There is a note in 88 ALR 130 on the subject:

"Right of Riparian Landowners to continuance of artificial conditions established above or below their land."

We quote at page 131 as follows:

"Where a riparian owner has improved his land by artificial means which incidentally benefit adjoining land, whether upper or lower, the question often arises whether the proprietor of the land so benefited has a right to have such artificial condition continued, or, at least, to have it left undisturbed.

"On this question the courts have widely differed. Many courts, in cases in which the right to have the artificial condition maintained or left undisturbed is claimed on the ground that by the continuance of such condition for the prescriptive period the owner of the land incidentally benefited has acquired a prescriptive right, have denied the existence of such a right, on the ground, expressly or by necessary implication, that adverse user is an essential element of acquisition of prescriptive rights, and that in the enjoyment by such owner of the incidental benefits of artificial improvements on another's land, this element (adverse user) is generally lacking, since the use is not under a claim of right as against the owner of the improvement, but permissive, and during no part of the prescriptive period has the owner of the improvement the legal right to stop the owner of the land benefited from enjoying such benefits, so that the failure to enforce a right which in fact does not exist cannot be the basis of a presumptive grant, which lies at the very foundation of acquisition of rights by prescription."

Cases are cited for this proposition.

And quoting further:

"On the other hand, in a number of cases the courts have taken the view that as in such case the owner of the land artificially improved acquires a prescriptive right to maintain the improvement and cast its burdens upon the adjoining land, so in turn the owner of such adjoining land acquires a reciprocal right to enjoy the benefits of the improvement, and that this obligates the owner of the improvement to continue it thereafter for the benefit of the land so benefited, or at least to refrain from doing any act which would have the effect of destroying the improvement, or in any way lessening the benefits thereof to the other land; particularly where the landowner incidentally benefited has improved his own land with reference to, and in reliance upon, the continuance of such artificial improvement."

Citing cases.

Again the case of SMITH v. YOUMANS, and other Wisconsin cases, are cited to this point. Among the cases cited are CASTLE v. MADISON, 113 Wis. 346. However in that case the court said, at page 355:

"We have already shown that the landowners bordering on the lake have a prescriptive right . . . to have the city keep the water of the lake up to its artificial level so long at least as it has not abandoned or surrendered its easement to flow the lands."

In the case of GOODRICH v. MC MILLAN, 1922, 217 Mich. 630, 187 NW 368, 26 ALR 801, the mill dam which raised the natural level of several small lakes and overflowed on certain lower lands, and had been in existence for nearly 50 years, had become badly out of repair, and the owners of property on the adjacent lake sought to require the owner of the dam to rebuild the same or to permit the plaintiffs to enter upon the premises and to rebuild the dam. They claimed they had acquired a reciprocal right to have the waters maintained at the artificial level. This the court denied.

It would clearly appear from the Statutes and cases cited that the PUBLIC SERVICE COMMISSION does have jurisdiction to grant the relief prayed for.

Dated February 3, 1959.

Respectfully submitted,

RAMSDELL, KING, CARROLL & BARLAND

By Bailey Ramsdell

Attorneys for  
NORTHERN STATES POWER COMPANY.

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Respectfully submitted,

RAMSDELL, KING, CARROLL & BARLAND

By Bailey Ramsdell

Attorneys for  
NORTHERN STATES POWER COMPANY.

131 South Barstow Street  
Eau Claire, Wisconsin

CERTIFICATE OF SERVICE

I hereby certify that copies of the above and foregoing Brief have been duly served by mail this 3rd day of February, 1959, by sending copies to Doar and Knowles, and to William W. Ward, at New Richmond, Wisconsin.

/s/ Bailey Ramsdell

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### 3. REPLY BRIEF

BEFORE THE

PUBLIC SERVICE COMMISSION OF WISCONSIN

Application of Northern States Power )  
Company for Authority to Abandon the )  
Somerset Dam and Hydro Plant in )  
St. Croix County )  
\_\_\_\_\_ )

#### MEMORANDUM REPLY BRIEF

We wish to briefly clarify any misunderstanding which may result from statements contained in Applicant's brief. It was our understanding, as a result of a telephone conference with counsel for applicants, that the first brief in the above matter would relate solely to the question of jurisdiction as raised by the counsel for those objecting to the abandonment proceeding.

We do not concede that the operation for development of electric power is not economically sound. In the event that the Commission should decide that it has the power to exercise jurisdiction, we desire to be heard on the question of economic feasibility and particularly the right of a public utility to abandon one dam or Hydro Electric Plant on a river where it continues to maintain and utilize the river for the purpose of generating power. In this respect, we propose to discuss the economic feasibility in the light of the over-all operation, as well as the duties and obligations of Northern States Power as a public utility. It was for this reason that we asked that the reports of Northern States Power on file with the Commission be incorporated by reference and that the Commission take judicial notice of the facts in considering the ultimate decision to be reached in this case. For the purpose of expediency, however, we omitted this argument as a part of our initial brief. We want it definitely understood that by doing so, we did not intend to waive any rights or make any concessions.

We, likewise, wish to submit further documentation on the question of public rights that have attached in favor, not only of the riparians, but of every member of the public. The cases cited in counsels' brief deal more particularly with private riparian rights. It is particularly interesting to note that in each of the cases referred to in counsels' memorandum, the owner of the land flowed brought the action to compel a manufacturing firm, as a private corporation, to maintain the dam. In the instant case, however, we are dealing with a public utility as a publicly regulated corporation and not only private riparian rights, but public rights. As pointed out in our initial brief, we attempted to find a case in any jurisdiction where a public utility had initiated a proceeding for the abandonment of a dam and we were unable to do so. Needless to say, we feel strongly that in any instance where public rights are involved and where the Public Service Commission is charged with the obligation of protecting the public, the nature of the public trust is such that



the state acting through its authorized agency, the Public Service Commission, must lean over backward in order that those public rights which were intended to be preserved for the enjoyment of the people shall be preserved. See Pewaukee vs. Savoy, 103 Wis. 271; Muench vs. State, 261 Wis. 492; and State vs. Public Service Commission, 275 Wis. 112.

We respectfully direct the Public Service Commission's attention to the fact that the determination of this case will be precedent for other abandonment proceedings to follow. It is, therefore, of utmost importance that the question of the Commission's jurisdiction be considered in the light of the circumstances involved and that the Commission weigh carefully its public duty and obligation. We reiterate that it is our position that in the absence of specific statutory ground rules and specific direction, the Commission should not assume authority beyond the scope of its statutory powers. To assume jurisdiction in this case is forewarning of the deluge of abandonment proceedings to come. Let the Commission once open the floodgates and we predict that consequences will be devastating. The precedent which is set in this case will be of lasting importance and we urge that the Commission weigh carefully its duty to preserve and protect public trust.

As indicated in our main brief, we feel that inasmuch as the authority of the Commission in the matter of regulation of public utilities stems directly from the Legislature, that no action should be taken until the matter of abandonment has been fully considered.

RESPECTFULLY SUBMITTED,

DOAR & KNOWLES

Attorneys for Village of Somerset  
& Property Owners adjacent to  
Apple River

and

WILLIAM W. WARD

Attorney for American Legion of  
Somerset, Somerset Fire Dept.,  
Town of Somerset, Somerset Commercial Club & Property Owners

CERTIFICATE OF SERVICE

I certify that copies of the above and foregoing brief have been duly served by mail this 19th day of February, 1959, by mailing copies to the Public Service Commission of Wisconsin; Conservation Commission of Wisconsin; and Mr. Bailey Ramsdell, Attorney at Law, Union National Bank Building, Eau Claire, Wisconsin

/s/ W. P. Knowles

4. COMMISSION'S FINAL ORDER

BEFORE THE

PUBLIC SERVICE COMMISSION OF WISCONSIN

Application of Northern States Power )  
Company for Authority to Abandon the ) 2-WP-1313  
Somerset Dam and Hydro Plant in St. )  
Croix County )

FINDINGS OF FACT AND ORDER

The Northern States Power Company filed an application with the Commission on August 22, 1958 for authority to abandon the Somerset Dam in the Apple River at Somerset, St. Croix County. Application dismissed.

Pursuant to due notice hearing was set for October 8, 1958 but postponed to December 3, 1958 at Hudson before Examiner Helmar A. Lewis.

Appearances:

Northern States Power Company by  
Stuart V. Willson, president

Bailey E. Ramsdell, attorney  
Eau Claire

In Opposition:

Village of Somerset  
John J. Raleigh  
David Breault and  
other property owners adjacent to  
the Apple River by

Warren P. Knowles, attorney  
New Richmond

American Legion Club of Somerset  
The Somerset Fire Department  
Town of Somerset  
Somerset Commercial Club  
Several owners of property along  
the river by

William Ward, attorney  
New Richmond

4. COMMISSION'S FINAL ORDER

BEFORE THE

PUBLIC SERVICE COMMISSION OF WISCONSIN

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Warren P. Knowles, attorney  
New Richmond

American Legion Club of Somerset  
The Somerset Fire Department  
Town of Somerset  
Somerset Commercial Club  
Several owners of property along  
the river by

William Ward, attorney  
New Richmond

Appearances: (Continued)

As Their Interest May Appear:

Wisconsin Conservation Department by

Lewis Posekany  
Madison

Of the Commission Staff:

W. H. Cartwright, engineering department

Findings of Fact

THE COMMISSION FINDS:

1. The Somerset Dam across the Apple River is in the southeast quarter of section 35, township 31 north, range 9 west, village of Somerset, St. Croix County. It exists under authority of Chapter 144, Laws of 1899. It was rebuilt in 1910-11 in substantially its present form.

2. The dam is about 150 feet long with 70 feet of needle or stoplog gate section and 29 feet of flume. It has a base width of some 50 feet and has its crest about 20 feet above the sandstone bed. The structure is timber crib with rock fill.

3. The dam has not been used for power production since failure of the trash-rack supports at the flume on September 5, 1957. At the present time there is substantial leakage through and under the dam estimated at 180 cubic feet a second with full pond.

4. The company has determined that to continue the dam for power purpose would require general rebuilding which would not be economically feasible.

5. The company applies for authority to abandon the dam and to allow it to deteriorate in place.

6. The application to abandon the dam in place would over a long period of years result in its gradual destruction by the elements. During this long period the dam would continuously deteriorate, and correspondingly the elevation of the water in the pond would decline creating an indeterminate and unsatisfactory condition in the Apple River at this location and in its general vicinity.

7. The gradual erosion of the dam would result in the deposition in the stream below the dam of a large part of the timber in the cribs and of

the finer material now constituting the fill in the dam, all to the detriment of lower riparians.

8. The remains of the dam will constitute a substantial and changing obstruction in a navigable waterway.

9. The abandonment of the dam in question and the allowing of it to deteriorate in place as requested by the application herein would be adverse to the public interest. It will also be adverse to the rights of the public in such stream.

#### Conclusion of Law

#### THE COMMISSION CONCLUDES:

That it has jurisdiction to dismiss the application herein for authority to abandon the dam in question and to allow it to deteriorate in place.

#### Order

#### THE COMMISSION THEREFORE ORDERS

That the application of Northern States Power Company herein to abandon the Somerset dam in the Apple River and to allow it to deteriorate in place be and it hereby is dismissed.

Dated at Madison, Wisconsin, this 10th day of March, 1959.

By the Commission.

Edward T. Kaveny  
Secretary

State of Wisconsin

IN ASSEMBLY

No. 97, A.

February 3, 1959--Introduced by Mr. WARD. Referred to  
Committee on Judiciary

A BILL

To create 31.18 (5), (6) and (7) of the statutes, relating to the procedure  
for the abandonment of a dam.

The people of the state of Wisconsin, represented in senate and assembly,  
do enact as follows:

31.18 (5), (6) and (7) of the statutes are created to read:

31.18 (5) If a petition for abandonment is submitted, the commission shall take into consideration the prescriptive rights of the riparian owners who have enjoyed the advantages of the artificial level of the water as a result of the dam and the reliance placed upon its maintenance by those who had improved their property at great expense as a result of the artificial pond created by the dam. The commission shall, at a hearing thereon duly noticed, take evidence offered by the applicant and other persons in support of the petition or in opposition thereto, and if it appears that the abandonment of the dam and the removal of the structure will be detrimental to navigation or detract from public rights such as the enjoyment of the artificial pond for recreational purposes and natural scenic beauty, and the full development of agricultural and industrial activity or that the abandonment will endanger life, health or property, the commission shall so find and deny the petition.

(6) No abandonment order shall be made without requiring the owner of the dam to remove the structure in the river and adjacent thereto and in connection therewith, in order that the waters be restored to their natural channel or state.

(7) If the petition for abandonment is granted, the order of the commission shall reserve to the property owners the right to have determined the question of damages for injuries to rights as riparian owners which may result from the abandonment of the dam and to rights acquired to the reciprocal easement to have the waters in the pond left at the same level as they were maintained during the prescriptive period. Any action to determine said damages shall be commenced in a court of record within 2 years after the commission's order becomes final.

(End)

State of Wisconsin

IN ASSEMBLY

SUBSTITUTE AMENDMENT NO. 1, A., TO BILL NO. 97, A.

March 19, 1959--Offered by Mr. ABRAHAM.

To create 31.18 (5) of the statutes, relating to the procedure for the abandonment of a dam.

The people of the state of Wisconsin, represented in senate and assembly, do enact as follows:

31.18 (5) of the statutes is created to read:

31.18 (5) If a petition for abandonment of a dam is submitted, the commission shall, at a hearing duly noticed, take evidence offered by the applicant in support of the petition and of all persons either in support of or opposition to the petition, and shall determine and make findings of fact as to the public interest, and based thereon, shall enter its order granting or denying said petition in whole or in part, consistent with the public interest.

(End)

State of Wisconsin

IN ASSEMBLY

SUBSTITUTE AMENDMENT NO. 1, A., TO BILL NO. 97, A.

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(End)



State of Wisconsin

IN ASSEMBLY

SUBSTITUTE AMENDMENT NO. 1, A., TO BILL NO. 97, A.

March 19, 1959--Offered by Mr. ABRAHAM.

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(End)

APPENDIX C

Section 31.38 (Wis. Stats., 1959)

31.38 MUNICIPAL AUTHORITY TO CONSTRUCT AND MAINTAIN DAMS. (1) Every municipality may, subject to this chapter, authorize the construction, maintenance or repair of dams across any lake or stream adjoining or within the limits of such municipality, and may locate such dam within or without such limits..

(2) Whenever it is deemed necessary to construct or repair any such dam, a plan of the work, with specifications and cost estimates, shall be prepared and presented to the governing body of the municipality for adoption. When so adopted, the plan shall, where required, be submitted to the public service commission or proper officer of the United States for approval. No work shall be done in pursuance of such plan until it has been so approved.

(3) For the purpose of this section, a municipality may purchase or condemn lands within and, when necessary, without its limits in order to protect any property situated within such limits.

(4) The municipality shall proceed in accordance with s. 66.60 to make special assessments to property on account of benefits resulting to the property from the improvement mentioned in sub. (2). If the excess of benefits over damages accruing to property within the assessment district is not sufficient to pay the cost of the improvement, the municipality shall pay the balance, either out of its general fund or out of any special fund created for that purpose. The municipality may issue its negotiable bonds, as provided in ch. 67, to pay for such improvement.

(5) Whenever 2 or more municipalities propose to co-operate in erecting, maintaining or repairing a dam, their governing bodies shall first meet and adopt a method of proceeding and a plan of apportioning to each its share of the entire cost. Such method of proceeding and plan of apportionment shall be embodied in a resolution adopted by the governing bodies of the co-operating municipalities acting jointly and later such resolution shall be adopted by each of the governing bodies acting separately.

APPENDIX D

New Jersey statute pertaining to  
abandonment of dams

( N. J. Stat. Anno., 1940)

§58:4-9 Where a reservoir or dam has been in existence twenty years and the owners of land along the shores above such dam or on such reservoir have made or shall have made permanent improvements on said land or where the shores have become a populated community, depending upon the permanency of the condition created, and a petition signed by a majority of the landowners along the shore of any pond formed by the reservoir or dam protesting against the removal of the reservoir, water or dam has been filed with the [state water policy] commission, the owner or owners of the reservoir or dam shall not, without the consent of the commission, tear down, destroy or abandon the reservoir or dam, or withdraw the water below the usual low-water mark, or maintain such a condition, except for the purpose of necessary repairs.

§58:4-10 When a petition has been filed protesting against the removal of any reservoir, water or dam as provided in section 58:4-9 of this title, the commission shall grant a hearing, upon twenty days' notice to all parties interested, and may then establish and fix a permanent low-water mark. Should it appear that the maintenance of such a dam would be an undue burden upon the owner thereof, the landowners interested around the reservoir or above the dam may, in the discretion of the commission, be ordered to pay a part or all of the expenses of maintenance.