

**STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE COUNTY OF ROSCOMMON**

CITIZENS FOR HIGGINS LAKE LEGAL LEVELS, ERIC OSTERGREN, STEVE RICKETTS, THOMAS THOMSON, CAROL THOMSON, GLENN R. FAUSZ, ROBERT OBRYAN, DRU OBRYAN, THOMAS THOMSON, CAROL THOMSON, and JANICE JAMESON as trustee of the JANICE JAMESON TRUST
Petitioners/Plaintiffs,

Case No.: 19-724711-AW
Honorable Robert W. Bennett

**FIRST AMENDED
COMPLAINT/PETITION**

JURY DEMANDED

v.

BOARD OF COMMISSIONERS OF THE
COUNTY OF ROSCOMMON,
Respondent/Defendant

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**FIRST AMENDED COMPLAINT/PETITION
FOR ISSUANCE OF WRIT OF MANDAMUS**

NOW COMES Petitioners/Plaintiffs, by and through counsel, and complains upon to this Court and seeks the issuance of a Writ of Mandamus as follows:

PARTIES

1. Petitioner/Plaintiff CITIZENS FOR HIGGINS LAKE LEGAL LEVELS is a domestic nonprofit corporation whose purpose and existence are to promote and defend the legal lake levels on Higgins Lake.

2. Each Petitioner/Plaintiff inhabits, owns, uses, and/or accesses land near or abutting Higgins Lake.

a. Petitioner/Plaintiff ERIC OSTERGREN is an inhabitant of and owns property in Roscommon County at 2779 West Higgins Lake Drive,

Roscommon, MI 48653 near Higgins Lake, regularly maintains and uses a recreational watercraft upon Higgins Lake, has access to and enjoys a private dock upon Higgins Lake, and serves as an officer of the Birch Road Dock Association (for a Higgins Lake dock).

b. Petitioner/Plaintiff STEVE RICKETTS is an inhabitant of and owns property in Roscommon County at 107 Jays Drive, Higgins Lake, MI 48653 near Higgins Lake.

c. Petitioner/Plaintiff THOMAS THOMSON is an inhabitant of and co-owns littoral (lake front) property on Higgins Lake in Roscommon County at 214 Lake Shore Drive, Roscommon, MI 48653.

d. Petitioner/Plaintiff CAROL THOMSON is an inhabitant of and co-owns littoral (lake front) property on Higgins Lake in Roscommon County at 214 Lake Shore Drive, Roscommon, MI 48653.

e. Petitioner/Plaintiff JANICE JAMESON, as trustee of the JANICE JAMESON TRUST, owns littoral (lake front) property on Higgins Lake in Roscommon County at 150 Flagpoint, Roscommon, MI 48653.

f. Petitioner/Plaintiff GLENN R. FAUSZ is an inhabitant of and dwells at property, held in trust, in Roscommon County at 359 Chaney Point Drive, Roscommon, MI 48653 littoral (lake front) property on Higgins Lake.

g. Petitioner/Plaintiff ROBERT OBRYAN is an inhabitant of and dwells at property, held in trust, in Roscommon County at 202 Columbine, Higgins Lake, MI 48653 littoral (lake front) property on Higgins Lake.

h. Petitioner/Plaintiff DRU OBRYAN is an inhabitant of and dwells at property, held in trust, in Roscommon County at 202 Columbine, Higgins Lake, MI 48653 littoral (lake front) property on Higgins Lake.

3. Respondent/Defendant BOARD OF COMMISSIONERS OF THE COUNTY OF ROSCOMMON is an entity existing under the laws of the State of Michigan and subject to a Legal Lake Level Order issued under what is today Part 307 of the *Natural Resources and Environmental Protection Act*, MCL 324.30701 et seq.

JURISDICTION

4. This Court has jurisdiction pursuant to MCL 600.601, MCL 600.605, and MCR 3.305(A)(2).

5. Venue is proper in this county.

GENERAL ALLEGATIONS

6. On February 24, 1982, this Court established the legal lake levels for Higgins Lake via what is now codified as Part 307 (Inland Lake Levels) of the *Natural Resources and Environmental Protection Act*, Public Act 451 of 1994.

7. This Court, by Circuit Court Judge Carl L. Horn, memorialized that order¹ in written form on February 24, 1982 (hereafter “Legal Lake Level Order”); a copy of said order is attached as **Exhibit A**.²

8. In addition to establishing legal lake levels on Houghton Lake and Lake St Helen, the Court decreed that the legal lake level of Higgins Lake is “established at 1154.11 feet above mean sea level.” *Id.*

9. The Court also provided and set a lower “winter” level be mandated to be no lower than 1153.61 feet, above mean sea level (i.e. a six inch reduction) from on or about November 1st of each year and running until April 14th (or after “ice-out”) for the following year. *Id.*

10. For the last several years, Respondent/Defendant BOARD OF COMMISSIONERS OF THE COUNTY OF ROSCOMMON and/or its delegated authority has regularly and systematically failed to abide by the Legal Lake Level Order for huge percentages of the year, particularly during the summer months when Higgins Lake is used the most for various recreational pursuits.

11. For the last several years, Respondent/Defendant BOARD OF COMMISSIONERS OF THE COUNTY OF ROSCOMMON and/or its delegated authority has regularly and systematically failed to abide by failing to employ known best practices and available technology to properly and/or at least more properly maintain the actual level of Higgins Lake consistent with the actual ordered summer legal level each and every day of the summer time period.

12. The United States Geological Survey monitors the water levels of Higgins Lake and publishes its data on its website at https://waterdata.usgs.gov/mi/nwis/dv?referred_module=sw&format=gif&period=60&site_no=442805084411001.

13. That public authority collected data, consisting of thousands of pages of data, has been organized and correlated for the ease of the parties and the Court, see Rule 1006 of the Michigan Rules of Evidence.

14. A review of this compiled and organized data from the United States Geological Survey (**Exhibits E, F, G, and M**) shows and confirms that Respondent/Defendant BOARD OF COMMISSIONERS OF THE COUNTY OF

¹ Part 307 was formerly the *Inland Lake Level Act*.

² Two additional orders were issued since 1982 which temporarily changed the legal lake level but have expired of their own accord. See **Exhibits B and C**.

ROSCOMMON has been generally non-compliant with the Legal Lake Level Order during the normal (summer) months.³

15. Respondent/Defendant BOARD OF COMMISSIONERS OF THE COUNTY OF ROSCOMMON and its delegated authority has been in considerable daily violations of the Legal Lake Level Order each of the previous three summers in 2016, 2017, 2018 and 2019:

	2016	2017	2018
Number of Normal (Summer) Level Daily Violations	114	82	163
Number of Days In Normal (Summer) Level	194	200	199
% of Normal (Summer) Level Season Daily Violations	58.76%	41.00%	81.91%
Number of "Michigan Summer" Days	99	99	99
"Michigan Summer" Number of Daily Violations	64	26	87
% of "Michigan Summer" Daily Violations	64.65%	26.26%	87.88%

16. As such, during the desirable and important recreation times of Michigan's summertime (i.e. Memorial Day through Labor Day), the County of Roscommon and its delegated authority was in regular violation of (i.e. below) the Legal Lake Level Order two-thirds (2/3) of the time in 2016, over one quarter (1/4) of the time in 2017, and nearly ninety percent (90%) of the time in 2018.

17. A review of the data from the Higgins Lake Property Owners Association and the United States Geological Survey reveals that Respondent/Defendant BOARD OF COMMISSIONERS OF THE COUNTY OF ROSCOMMON and its delegated authority are essentially never in actual or reasonable compliance with the Legal Lake Level Order during the normal/summer months. See **Exhibits M and N**.

18. Each Plaintiff has suffered adverse, negative, and loss-causing effects by the failure of Respondent/Defendant BOARD OF COMMISSIONERS OF THE COUNTY OF ROSCOMMON and its delegated authority to comply within the Legal Lake Level Order.

19. Respondent/Defendant BOARD OF COMMISSIONERS OF THE COUNTY OF ROSCOMMON and its delegated authority are not properly maintaining and supporting sufficient lake levels in the matter utilizing all known reasonable practices and available technology, and thereby is intentionally causing the mid to later summer lake levels to repeatedly drop below the level mandated by the Legal Lake Level Order to the detriment of the users of Higgins Lake, including each Plaintiff.

³ The Higgins Lake Property Owners Association maintains graphical and numerical records of the lake level (see **Exhibit N**, years 2007-2018 taken from <http://hlpoa.org/lake-level-charts-data/>) and the depictions are consistent with the information depicted in **Exhibits E, F, G, and M**.

20. Lake users, like Plaintiffs, are not able to enjoy the full extent of recreational and water-based activities due to the failure of Respondent/Defendant BOARD OF COMMISSIONERS OF THE COUNTY OF ROSCOMMON and its delegated authority to actually and/or reasonably meet its legal obligation to keep and maintain the water level of Higgins Lake as required by the Legal Lake Level Order.

21. Respondent/Defendant BOARD OF COMMISSIONERS OF THE COUNTY OF ROSCOMMON and its delegated authority have been formerly put on notice of its ongoing violations and still refuses to comply with the Legal Lake Level Order. See **Exhibits I, J, K, and L.**

COUNT I WRIT OF MANDAMUS

22. The prior paragraphs are alleged word for word herein.

23. The benefit and advantage of the Legal Lake Level Order is the clear legal right of these plaintiffs and is entitled to specific duty of keeping the summer lake level of Higgins Lake at 1154.11 feet above mean sea level.

24. Respondent/Defendant BOARD OF COMMISSIONERS OF THE COUNTY OF ROSCOMMON and/or its delegated authority has violated that legal obligation by failing to employ reasonable and best practices and available technology to reasonably maintain the actual level of Higgins Lake consistent with the actual ordered summer legal level each and every day of the summer time period. See **Exhibit H.**

25. When “a court-determined normal level is established pursuant to this part, the delegated authority of the county or counties in which the lake is located shall maintain that normal level.” MCL 324.30702(3).

26. A county, by its Board of Commissioners, may delegate the county’s responsibilities of the Legal Lake Level Order to an agent as provided by Part 307 of the *Natural Resources and Environmental Protection Act*, Public Act 451 of 1994.

27. However, “after the court determines the normal level of an inland lake in a proceeding initiated by the county, the delegated authority of any county or counties in which the inland lake is located shall provide for and maintain that normal level.” MCL 324.30708(1).

28. Respondent/Defendant BOARD OF COMMISSIONERS OF THE COUNTY OF ROSCOMMON has the clear legal duty, pursuant to Part 307, to maintain or have its delegated authority maintain the lake level of Higgins Lake during the summer months at 1154.11 feet above mean sea level.

29. Respondent/Defendant BOARD OF COMMISSIONERS OF THE COUNTY OF ROSCOMMON has breached that clear legal duty.

30. The obligation of compliance is ministerial and, in accordance with prior dicta explanations of this Court, no other remedy exists that might achieve the same result.

JURY DEMAND

31. This matter is requested to be heard and decided by a duly-empaneled Roscommon County jury pursuant to MCR 3.305(F) and all other applicable law for all triable issues.

RELIEF REQUESTED

32. WHEREFORE, Petitioners/Plaintiffs respectfully requests this Court to—

- a. Empanel a Roscommon County jury pursuant to MCR 3.305(F) and hold an evidentiary hearing/trial to adjudicate the breach of the clear legal duty of Respondent/Defendant BOARD OF COMMISSIONERS OF THE COUNTY OF ROSCOMMON by not maintaining the required “normal level” as provided by the Legal Lake Level Order;
- b. Issue upon Respondent/Defendant BOARD OF COMMISSIONERS OF THE COUNTY OF ROSCOMMON a writ of mandamus directing it to meet its legal obligation to keep and maintain the water level of Higgins Lake to the level mandated by the Legal Lake Level Order throughout the entire year;
- c. Order Respondent/Defendant BOARD OF COMMISSIONERS OF THE COUNTY OF ROSCOMMON to implement of the Spice Group’s recommendations and/or establish guidance and operational practices for the devices used to control the lake level of Higgins Lake;
- d. Impose a fine not exceeding \$250 upon every elected member of Respondent/Defendant BOARD OF COMMISSIONERS OF THE COUNTY OF ROSCOMMON pursuant to MCL 600.4411;
- e. Award all damages, if any;
- f. Award costs incurred and applicable interest; and
- g. Award any other relief warranted or justified by the facts and law of this case.

Date: November 30, 2019

PROOF OF SERVICE

The undersigned certifies that a copy of the foregoing document(s) was served on parties or their attorney of record by mailing the same via US mail to their respective business address(es) as disclosed by the pleadings of record herein with postage fully prepaid, on the

30th day of November, 2019.



PHILIP L. ELLISON
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RESPECTFULLY SUBMITTED:



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**Electronic signature(s) now authorized by MCR 1.109(E)(4)