

Wisconsin Department of Transportation

January 9, 2002

Hoffman Construction Company
123 CTH "A"
Black River Falls, WI 54615
Attention: Ms. Tammy Overlien

TRANSPORTATION DISTRICT 2
141 N.W. Barstow Street
P.O. Box 798
Waukesha, WI 53187-0798
Telephone: (262)521-5361
FAX: (262)548-6465
E-mail: waukesha.dtd@dot.state.wi.us

Dear Ms. Overlien,

**SUBJECT: Project: 2315-01-71/Fed Id No. STP 1998 (214)
Puetz Road, Huntington Park Drive - S. 76th St.
Milwaukee County**

This letter is to request that you direct Habermehl Electric, Inc. to correct its improper classification and payment of electrical workers on this contract. Our enforcement of the contract was delayed due to a court action initiated by Habermehl Electric, Inc. However, those Habermehl Electric workers who performed electrical work on WisDOT projects in the affected classifications continued to be underpaid. The court action has now been dismissed, and Hoffman Construction Company, as Prime Contractor on this project, is responsible for seeing that the payment of the required wage rates are paid to all workers on this project, including those of your subcontractors.

Therefore, please direct Habermehl Electric, Inc., to correct its improper classification and payment of its electrical workers on this contract. Our investigation has determined that Habermehl Electric, Inc. failed to pay the required State minimum wage rates for the State classifications of Equipment Operator, Truck Driver, and Laborer. Habermehl Electric, Inc. apparently relied only on the Federal Line Construction Series that includes the classifications of Groundman, Light and Heavy Groundman Driver, Equipment Operator, and Lineman. This resulted in underpayment to many Habermehl Electric employees. To establish your compliance with the terms of the contract, we hereby require Hoffman Construction Company and Habermehl Electric, Inc. to audit and correct Habermehl Electric's payroll records on this project as follows:

- All work performed on this project in which Habermehl Electric, Inc. used the classification of Groundman must be paid at the State prevailing wage rate for the classification of **General Laborer**.

The General Laborer should be paid **\$25.02 total package per hour for any work completed beginning on 6/1/99 and after**. Habermehl Electric's payrolls illustrate its groundmen were paid at an hourly rate of **\$16.98 plus an unknown amount in fringe benefits for work completed beginning on 6/1/99 and after**.

- All work performed on this project in which Habermehl Electric, Inc. used the classification of Equipment Operator must be paid at the State prevailing wage rate for the appropriate **Equipment Operator** classification.

The Equipment Operator should be paid **\$33.07 total package per hour for any work it completed beginning on 6/1/99 and after.** Habermehl Electric's payrolls illustrate its equipment operators were paid at an hourly rate of **\$19.40 plus an unknown amount in fringe benefits beginning on 6/1/99 and after.**

Documentation must be received in this office no later than **February 6, 2002** that illustrates the fringe benefits paid for all of Habermehl Electric's equipment operators for the entire length of this project. Future certified payrolls submitted by Habermehl Electric, Inc. must specify whether its equipment operators are *light* equipment operators or *heavy* equipment operators.

Finally, contract provisions require that the following steps be taken to establish compliance:

- Please instruct Habermehl Electric, Inc. to perform an audit of their pay practices for all of their classifications utilized on this project and present to our office a **comprehensive spreadsheet** detailing the affected employees, number of affected hours per week and intended corrections to monetarily compensate workers requiring back pay on this project. In addition, a complete list of the fringe benefits paid to the union for each of the classifications used and covering the entire length of this project must be included in the submittal. Verification of these fringe benefit payments to the union by Habermehl Electric, Inc. may be requested at a later date. Please have Habermehl Electric, Inc. submit all of the requested information to you. Once you have reviewed the submittal for completeness, please forward it to my attention. This information must be received in this office no later than **February 6, 2002.**
- Once the submittal is reviewed and approved by this office, Habermehl Electric, Inc. will be responsible for paying back wages to all of the affected employees. Photocopies of the back wage checks must be provided to this office. You will receive notification from this office of the due date for this information. At that time, you will also be given a deadline in which the front and back of the endorsed canceled back wage checks will need to be received in this office. Should Habermehl Electric, Inc. fail to pay the back wages as directed, Hoffman Construction Company, as Prime Contractor on this project, will be held responsible.

Please keep in mind that as prime contractor on this project you are ultimately responsible for ensuring that all aspects of the contract are fulfilled. It is your responsibility to see that Habermehl Electric, Inc. provides all of the information requested in this letter. Should you have any project specific prevailing wage rate questions, please feel free to telephone me at (262) 548-5668. Any questions regarding Habermehl Electric's non-compliance may be directed to Marilyn Kuick of the Wisconsin Department of Transportation's Central Office at (608) 266-3985.

Sincerely,



Lori Nelson
Equal Rights Officer
EEO/Labor Compliance/DBE Unit

cc: Aziz Aleiow, Project Manager N3
Dave Anhalt, G.A.S. & Associates
Jim Forseth, Project Team Supervisor N3
Habermehl Electric, Inc.
Marilyn Kuick, WisDOT Central Office
John Carroll, DBE Programs Office



Wisconsin Department of Transportation

January 9, 2002

James Cape & Sons, Inc.
Attn: Ms. Nancy Turecek
PO Box 044580
Racine WI 53404-7012

TRANSPORTATION DISTRICT 2
141 N.W. Barstow Street
P.O. Box 798
Waukesha, WI 53187-0798

Telephone: (262) 521-5361
FAX: (262) 548-6465
E-mail: waukesha.dtd@dot.state.wi.us

Subject: **Project ID 2390-02-71 (State Funded Only)**
Racine to Caledonia, STH 31
Racine County

Dear Ms. Turecek,

This letter is to request that you direct Habermehl Electric, Inc. to correct its improper classification and payment of electrical workers on this contract. Our enforcement of the contract was delayed due to a court action initiated by Habermehl Electric, Inc. However, those Habermehl Electric workers who performed electrical work on WisDOT projects in the affected classifications continued to be underpaid. The court action has now been dismissed, and James Cape & Sons, Inc., as Prime Contractor on this project, is responsible for seeing that the payment of the required wage rates are paid to all workers on this project, including those of your subcontractors.

Therefore, please direct Habermehl Electric, Inc., to correct its improper classification and payment of its electrical workers on this contract. Our investigation has determined that Habermehl Electric, Inc. failed to pay the required State minimum wage rates for the State classifications of Equipment Operator, Truck Driver, and Laborer. Habermehl Electric, Inc. apparently relied only on the Federal Line Construction Series that includes the classifications of Groundman, Light and Heavy Groundman Driver, Equipment Operator, and Lineman. This resulted in underpayment to many Habermehl Electric employees. To establish your compliance with the terms of the contract, we hereby require James Cape & Sons, Inc. and Habermehl Electric, Inc. to audit and correct Habermehl Electric's payroll records on this project as follows:

- All work performed on this project in which Habermehl Electric, Inc. used the classification of Groundman must be paid at the State prevailing wage rate for the classification of **General Laborer**.

The General Laborer should be paid **\$24.08 total package per hour for any work completed beginning on 6/1/99 and after**. Habermehl Electric's payrolls illustrate its groundmen were paid at hourly rates of **\$13.34 and \$16.98 plus an unknown amount in fringe benefits for work completed beginning on 6/1/99 and after**.

- All work performed on this project in which Habermehl Electric, Inc. used the classification of Equipment Operator must be paid at the State prevailing wage rate for the appropriate **Equipment Operator** classification.

The Equipment Operator should be paid **\$33.07 total package per hour for any work it completed beginning on 6/1/99 and after**. Habermehl Electric's payrolls illustrate its equipment operators were paid at an hourly rate of **\$19.40 plus an unknown amount in fringe benefits beginning on 6/1/99 and after**.

Documentation must be received in this office no later than **February 6, 2002** that illustrates the fringe benefits paid for all of Habermehl Electric's equipment operators for the entire length of this project. Future certified payrolls submitted by Habermehl Electric, Inc. must specify whether its equipment operators are *light* equipment operators or *heavy* equipment operators.

Finally, contract provisions require that the following steps be taken to establish compliance:

- Please instruct Habermehl Electric, Inc. to perform an audit of their pay practices for all of their classifications utilized on this project and present to our office a **comprehensive spreadsheet** detailing the affected employees, number of affected hours per week and intended corrections to monetarily compensate workers requiring back pay on this project. In addition, a complete list of the fringe benefits paid to the union for each of the classifications used and covering the entire length of this project must be included in the submittal. Verification of these fringe benefit payments to the union by Habermehl Electric, Inc. may be requested at a later date. Please have Habermehl Electric, Inc. submit all of the requested information to you. Once you have reviewed the submittal for completeness, please forward it to my attention. This information must be received in this office no later than **February 6, 2002**.
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Please keep in mind that as prime contractor on this project you are ultimately responsible for ensuring that all aspects of the contract are fulfilled. It is your responsibility to see that Habermehl Electric, Inc. provides all of the information requested in this letter. Should you have any project specific prevailing wage rate questions, please feel free to telephone me at (262) 548-5668. Any questions regarding Habermehl Electric's non-compliance may be directed to Marilyn Kuick of the Wisconsin Department of Transportation's Central Office at (608) 266-3985.

Project Id No. 2390-02-71

January 9, 2002

Page 3

Sincerely,



Lori Nelson

Equal Rights Officer

EEO/Labor Compliance/DBE Unit

Cc: Kerry Jones, Project Manager S2
Mike Murphy, Project Team Supervisor S2
Habermehl Electric, Inc.
Marilyn Kuick, WisDOT Central Office
John Carroll, DBE Programs Office

FEB 27 2002

PAUL B. HIGGINBOTHAM
CIRCUIT COURT BR 17

STATE OF WISCONSIN

CIRCUIT COURT
BRANCH ____

DANE COUNTY

MADISON TEACHERS, INC.
821 Williamson Street
Madison, WI 53703-4503

GREEN BAY EDUCATION ASSOCIATION
2256 Main Street
Green Bay, WI 54311

KENOSHA EDUCATION ASSOCIATION
5610 55th Street
Kenosha, WI 53144

WISCONSIN PROFESSIONAL POLICE ASSOCIATION, INC.
340 Coyier Lane
Madison, WI 53713

THIS IS AN AUTHENTICATED COPY OF THE
ORIGINAL DOCUMENT FILED WITH THE DANE
COUNTY CLERK OF CIRCUIT COURT

JUDITH A. COLEMAN
CLERK OF CIRCUIT COURT

02CV0601

Plaintiffs,

Case No. _____

vs.

Case Code: 30701

(Declaratory Judgment)

WISCONSIN EMPLOYMENT RELATIONS COMMISSION
18 South Thornton Avenue
Madison, WI 53703

Defendant.

SUMMONS

THE STATE OF WISCONSIN TO SAID DEFENDANT:

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

DANE COUNTY, WI
FEB 21 3 35 PM '02
CIRCUIT COURT

Within forty-five (45) days of receiving this Summons, you must respond with a written answer, as that term is used in Chapter 802 of the Wisconsin Statutes to the Complaint. The court may reject or disregard an answer that does not follow the requirements of the statutes. The answer must be sent or delivered to the court, whose address is 210 Martin Luther King Jr., Blvd., Madison, Wisconsin 53709, and to Plaintiff's attorney, whose address is Cullen Weston Pines & Bach LLP, 122 West Washington, Suite 900, Madison, WI 53703. You may have an attorney help or represent you.

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

If you require the assistance of Auxiliary Aides or Services because of a disability, call (608) 266-4678 (TDD (608) 266-2138)) and ask for the Court ADA Coordinator.

Dated this 21st day of February, 2002.

CULLEN WESTON PINES & BACH LLP

By:  _____

Lester A. Pines, SBN 01016543
Attorneys for the Plaintiffs

Mailing Address:

122 West Washington Avenue

Suite 900

Madison, Wisconsin 53703

Telephone: (608) 251-0101

Facsimile: (608) 251-2883

STATE OF WISCONSIN

CIRCUIT COURT
BRANCH ____

DANE COUNTY

MADISON TEACHERS, INC.
821 Williamson Street
Madison, WI 53703-4503

GREEN BAY EDUCATION ASSOCIATION
2256 Main Street
Green Bay, WI 54311

KENOSHA EDUCATION ASSOCIATION
5610 55th Street
Kenosha, WI 53144

WISCONSIN PROFESSIONAL POLICE ASSOCIATION, INC.
340 Coyier Lane
Madison, WI 53713

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ORIGINAL DOCUMENT FILED WITH THE DANE
COUNTY CLERK OF CIRCUIT COURT.

JUDITH A. COLEMAN
CLERK OF CIRCUIT COURT

02CV0601

Plaintiffs,

Case No. _____

vs.

Case Code: 30701

(Declaratory Judgment)

WISCONSIN EMPLOYMENT RELATIONS COMMISSION
18 South Thornton Avenue
Madison, WI 53703

Defendant.

DANE COUNTY, WI

FEB 21 3 35 PM '02

CIRCUIT COURT

COMPLAINT

Plaintiffs Madison Teachers, Inc., Green Bay Education Association, Kenosha Education Association and Wisconsin Professional Police Association, Inc., by Cullen Weston Pines & Bach LLP, their attorneys, as a Complaint against Defendant Wisconsin Employment Relations Commission, allege as follows:

INTRODUCTION

1. This is an action for declaratory judgment under Wis. Stat. §227.40(1), challenging certain actions of the defendant as exceeding its statutory authority and failing to comply with statutory rule-making requirements.

PARTIES

2. Madison Teachers, Inc. ("MTI") is a Wisconsin non-stock corporation, organized and operated for the purpose of representing the interests of over 2,800 teachers and other education professionals employed by the Madison Metropolitan School District. Its address is 821 Williamson Street, Madison, WI 53703-4503.

3. The Green Bay Education Association ("GBEA") is a professional organization of approximately 1,600 educators working in the Green Bay Area Public School District. The GBEA represents the public policy, labor and professional interests of its members. Its address is 2256 Main Street, Green Bay, WI 54311.

4. The Kenosha Education Association ("KEA") represents the interests of teachers and other education professionals employed by the Kenosha School District. Its address is 5610 55th Street, Kenosha, WI 53144.

5. The Wisconsin Professional Police Association, Inc. ("WPPA") is a Wisconsin non-stock corporation that is a professional labor and fraternal organization. Most of WPPA's 7,500 members are active and/or retired employees of county and municipal governments. Its address is 340 Coyier Lane, Madison, WI 53713.

6. The Wisconsin Employment Relations Commission ("WERC") is an independent state agency created by Wis. Stat. §15.58 and charged with enforcing the labor laws of the state of Wisconsin.

7. MTI, GBEA, KEA and WPPA regularly have matters considered by the WERC and frequently have contact with the WERC for a variety of purposes. As such, MTI, GBEA, KEA and WPPA are vitally concerned with the operation of the WERC. MTI, GBEA, KEA and WPPA have standing because the actions of the WERC, as described below, have interfered with, impaired and have threatened to continue to interfere with and impair the legal rights and privileges of the plaintiffs, MTI, GBEA, KEA and WPPA.

FACTS

8. On or about April 20, 2001, James Meier ("Meier"), former chairman of the WERC, delegated his powers and responsibilities as chairman of the WERC to General Counsel Peter Davis.

9. WERC General Counsel Peter Davis thereafter has exercised powers and has fulfilled responsibilities formerly exercised and fulfilled by Meier in Meier's former position as chairman of the WERC.

10. On December 21, 2001, Meier issued a written statement in which he purported to confirm his prior delegation of power to Peter Davis, citing section 15.02(4) of the Wisconsin Statutes. A copy of that document is attached hereto as Exhibit A.

11. The December 21, 2001 document and the April 20, 2001 statement are administrative “rules” as that term is defined in Wis. Stat. §227.01(13), a section of the Wisconsin Administrative Procedure Act.

STANDARD OF REVIEW

12. Because this complaint is, in part, a challenge to administrative rule-making based on an agency exceeding its statutory authority, the court should give no deference to the conclusions of the WERC and must apply a *de novo* review standard in considering the scope of the WERC’s statutory authority in that respect.

13. Because this complaint is, in part, a challenge to an action of the WERC as violative of statutory rule-making requirements, this court should give no deference to the conclusions of the WERC and must apply a *de novo* review standard in considering whether the agency failed to comply with those requirements.

DECLARATORY REVIEW PURSUANT TO WIS. STAT. § 227.40(1)

14. In his December 21, 2001 declaration of duties and, upon information and belief, in his April 20, 2001 delegation of duties, Meier cited Wis. Stat. §15.02(4) as authority for such delegation.

15. Wis. Stat. §15.02(4) authorizes the “head” of an independent agency to establish the internal organization of the agency and to allocate and reallocate duties and functions not assigned by law to an officer of the agency.

16. Meier is not and has never been the “head” of the WERC as that term is defined by Wis. Stat. §§ 15.01(2), (8).

17. By delegating duties to WERC General Counsel Peter Davis, Meier exceeded his statutory authority as chairman of the WERC and the statutory authority of the agency itself.

18. Wis. Stat. §§ 227.17 and 227.18 require agencies to give notice of proposed rule-making and to allow a hearing for comments thereon.

19. The WERC has failed to comply with the rule-making requirements outlined in the Wisconsin Administrative Procedure Act.

RELIEF

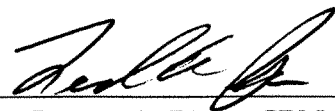
20. Based upon the allegations made in paragraphs 1-19, above, plaintiffs requests that the court:

- A. Pursuant to Wis. Stat. § 227.40(1), enter a judgment declaring that the delegation of duties by the WERC Chairman Meier to WERC General Counsel Peter Davis to be unlawful as exceeding the agency's statutory authority and failing to comply with statutory rule-making requirements.
- B. Issue an injunction prohibiting defendant from maintaining the unlawful delegation of duties to WERC General Counsel Peter Davis.
- C. Any other relief that the court may deem proper.

Dated this 21st day of February, 2002.

CULLEN WESTON PINES & BACH LLP

By: _____



Lester A. Pines, SBN 01016543
Attorneys for the Plaintiffs

Mailing Address:

122 West Washington Avenue

Suite 900

Madison, Wisconsin 53703

Telephone: (608) 251-0101

Facsimile: (608) 251-2883

James R. Meier
Chairperson
A. Henry Hempe
Commissioner
Paul A. Hahn
Commissioner



Mailing Address:
18 South Thornton Avenue
P. O. Box 7870
Madison, WI 53707-7870
Telephone: (608) 266-1381
Fax: (608) 266-6930

State of Wisconsin
Wisconsin Employment Relations Commission

Delegation of Authority
Pursuant to Sec. 15.02(4), Wis. Stats.

Pursuant to Sec. 15.02(4), Wis. Stats., now comes James R. Meier, Chairperson of the Wisconsin Employment Relations Commission, who hereby confirms his prior delegation to Wisconsin Employment Relations Commission General Counsel Peter Davis of any function vested by law in the Chairperson of the Wisconsin Employment Relations Commission. The original delegation to General Counsel Davis occurred on April 20, 2001.

Dated at Madison, Wisconsin this 21st day of December, 2001.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

A handwritten signature in black ink, appearing to read "James R. Meier".

James R. Meier, Chairperson

EXHIBIT

A

tabbles

STATE OF WISCONSIN

ROBERT A. DeCHAMBEAU
CIRCUIT COURT BR 1

CIRCUIT COURT
BRANCH _____

DANE COUNTY

RIVER ALLIANCE OF WISCONSIN

306 East Wilson Street, Suite 2W
Madison, Wisconsin 53703

FRIENDS OF THE JUMP RIVER, INC.

P.O. Box 233
Kannan, Wisconsin 54537

DANIEL and CATHERINE HAUPERT

W9511 Ridge Road
Catawba, Wisconsin 54515

DONALD and MARJORIE RETZLAFF

N3395 County Road I
Catawba, Wisconsin 54515

RICHARD U. BAUM

N3438 Woodlawn Road
Kannan, Wisconsin 54537

Petitioners and Plaintiffs,

v.

DEPARTMENT OF NATURAL RESOURCES

101 South Webster Street
Madison, Wisconsin 53703

NATURAL RESOURCES BOARD

101 South Webster Street
Madison, Wisconsin 53703

Respondents and Defendants.

CASE NO.:

02CV1571

Administrative Agency

Review / Declaratory

Judgment: 30607 / 30701

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COUNTY CLERK OF CIRCUIT COURT.

JUDITH A. COLEMAN
CLERK OF CIRCUIT COURT

DANE COUNTY, WI

MAY 17 12 25 PM '02

CIRCUIT COURT

SUMMONS

THE STATE OF WISCONSIN

To each person named above as a defendant:

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

Within 20 days of receiving this summons, you must respond with a written notice of appearance, as provided for in section 227.53 of the Wisconsin Statutes, to the petition and complaint. The Court may reject or disregard an answer that does not follow the requirements of the statutes. The answer must be sent or delivered to the Court, whose address is 210 Martin Luther King, Jr. Boulevard, Madison, WI 53703, and to both Marc N. Melnick and Melissa K. Scanlan, plaintiffs' attorneys, whose addresses are, respectively, Law Offices of Marc N. Melnick, 1801 Keyes Avenue, Madison, WI 53711 and Midwest Environmental Advocates, Inc., 22 East Mifflin Street, Suite 301, Madison, WI 53703. You may have an attorney help or represent you.

If you do not provide a proper answer within 20 days, the Court may grant judgment against you for the award of money or other legal action requested in the petition and complaint, and you may lose your right to object to anything that is or may be incorrect in the petition and complaint. A judgment may be enforced as provided by law. A judgment awarding money may become a lien against any real estate you own now or in the future, and may also be enforced by garnishment or seizure of property.

Dated this 17th day of May, 2002.

Attorneys for Petitioners and Plaintiffs:

**LAW OFFICES OF MARC N.
MELNICK**



Marc N. Melnick
SBN 1037572

Mailing Address:
1801 Keyes Avenue
Madison, WI 53711
Tel: (608) 441-9461

STATE OF WISCONSIN

CIRCUIT COURT
BRANCH _____

DANE COUNTY

RIVER ALLIANCE OF WISCONSIN

306 East Wilson Street, Suite 2W
Madison, Wisconsin 53703

02CV1571

FRIENDS OF THE JUMP RIVER, INC.

P.O. Box 233
Kannan, Wisconsin 54537

CASE NO.:

Administrative Agency
Review / Declaratory
Judgment: 30607 / 30701

DANIEL and CATHERINE HAUPERT

W9511 Ridge Road
Catawba, Wisconsin 54515

DONALD and MARJORIE RETZLAFF

N3395 County Road I
Catawba, Wisconsin 54515

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RICHARD U. BAUM

N3438 Woodlawn Road
Kannan, Wisconsin 54537

JUDITH A. COLEMAN
CLERK OF CIRCUIT COURT

Petitioners and Plaintiffs,

v.

DEPARTMENT OF NATURAL RESOURCES

101 South Webster Street
Madison, Wisconsin 53703

NATURAL RESOURCES BOARD

101 South Webster Street
Madison, Wisconsin 53703

Respondents and Defendants.

**PETITION FOR JUDICIAL REVIEW and
COMPLAINT FOR DECLARATORY JUDGMENT**

Petitioners River Alliance of Wisconsin, Friends of the Jump River, Inc., Daniel and Catherine Hauptert, Donald and Marjorie Retzlaff, and Richard U. Baum (collectively, "Petitioners"), by their attorneys, Marc N. Melnick and Midwest Environmental Advocates, Inc., allege:

1. The Department of Natural Resources (the "DNR") has issued the first ever permit to allow pollution discharge to the pristine North Fork of the Jump River. In doing so, the DNR ignored the existing conditions of the North Fork of the Jump River: that it is of very high quality and that it is trout habitat. By issuing this permit, the DNR violated federal law and state law, which require the DNR to protect the "existing uses" of the navigable waters in its jurisdiction. Moreover, the DNR has even denied Petitioners the right to make these points in an administrative hearing. Because of these errors of law, as set forth below, Petitioners bring this petition and complaint.

2. Petitioners request that this Court, pursuant to Section 227.52, *et seq.*, Stats., and Section 227.40, Stats., review the following matters, as more specifically set forth below: (1) the DNR's letter dated April 18, 2002, denying Petitioners an administrative hearing as to "any issues raised in the Petition regarding whether the Jump River is properly classified"; (2) the issuance by the DNR of Wisconsin Pollution Discharge Elimination Permit No. WI-0061701-01-0 (the "Permit") to the Catawba-Kennan Joint Sewage Commission (the "Sewage Commission"); and (3) the State of Wisconsin's failure to formally classify the North Fork of the Jump River as an exceptional resource water, pursuant to Section NR 102.11, Wis. Adm. Code, or as a cold water or trout fishery.

PARTIES

3. Petitioner River Alliance of Wisconsin is a non-profit, non-partisan group of

citizens, organizations, and businesses dedicated to advocating for the protection, enhancement and restoration of our rivers and watersheds. Petitioner River Alliance of Wisconsin is a membership organization with approximately 1,600 individual, organizational, and business members. Petitioner River Alliance of Wisconsin's mailing address is 306 East Wilson Street, Suite 2W, Madison, Wisconsin 53703.

4. Petitioner Friends of the Jump River, Inc. is a non-profit organization whose mission is to preserve the wild and natural character of the Jump River corridor. Petitioner Friends of the Jump River, Inc. seeks alliances with land owners, the community, and government agencies to advocate for the health of the watershed through education, monitoring, and the development of resource management techniques aimed at protecting the river for future generations. Petitioner Friends of the Jump River, Inc.'s mailing address is P.O. Box 233, Kennan, Catawba, Wisconsin 54537.

5. Petitioner Daniel Haupt is the President of Friends of the Jump River, Inc. Mr. Haupt and petitioner Catherine Haupt reside at W9511 Ridge Road, Catawba, Wisconsin 54515.

6. Petitioners Donald and Marjorie Retzlaff reside at N3395 County Road I, Catawba, Wisconsin 54515.

7. Petitioner Richard U. Baum resides at N3438 Woodlawn Road, Kennan, Wisconsin 54537.

8. Pursuant to Sections 227.52, 227.53(1)(b), and 227.40(1), Stats., Petitioners are aggrieved by the following final decisions and their legal rights and privileges are interfered with and impaired by those decisions: (1) the DNR's letter dated April 18, 2002, denying Petitioners a hearing as to "any issues raised in the Petition regarding whether the Jump River is properly

classified"; (2) the DNR's issuance of Permit to the Sewage Commission, dated January 30, 2002; and (3) the State of Wisconsin's failure to formally classify the North Fork of the Jump River as an exceptional resource water, pursuant to Section NR 102.11, Wis. Adm. Code, or as a cold water fishery.

9. The individual Petitioners and members of the organizational Petitioners own property near or adjacent to the North Fork of the Jump River, live near or adjacent to the North Fork of the Jump River, and use and enjoy the North Fork of the Jump River for fishing, swimming, recreation, and other uses. Petitioners have a substantial interest in the environmental quality of the North Fork of the Jump River, where they live, work, and recreate. The environmental quality includes the protection and preservation of the very high quality of the North Fork of the Jump River, including its existence as habitat for cold water fish (including trout). The quality of the North Fork of the Jump River will be adversely and significantly affected by the pollution discharge authorized by this Permit. The decisions challenged in this action adversely affect Petitioners.

10. Petitioners have demonstrated their continued interest in this matter during the DNR's evaluation of the Sewage Commission's project.

11. Respondent DNR is the agency of the State of Wisconsin that has been delegated the authority to protect the quality of Wisconsin waters by determining whether to issue pollution discharge permits and the content of those permits, and has been charged with developing and promulgating administrative rules and regulations to protect the quality of Wisconsin waters, including standards for issuance of pollution discharge permits. Respondent DNR's address is 101 South Webster Street, Madison, Wisconsin 53703.

12. Respondent Natural Resources Board is the agency of the State of Wisconsin that

has been charged with setting policy for the DNR, including administrative rules and regulations to protect the quality of Wisconsin waters, including standards for issuance of pollution discharge permits. Respondent Natural Resources Board's address is 101 South Webster Street, Madison, Wisconsin 53703.

13. The Sewage Commission is a local governmental entity of unknown form. Petitioners' counsel will serve the Sewage Commission with a copy of this petition, pursuant to Section 227.52(1)(c), Stats.

14. Petitioners are unaware of any other parties to the proceedings below.

FACTS

15. The North Fork of the Jump River is a navigable waterway that runs through Price County, Wisconsin.

16. Until DNR issued this Permit, there had never been a pollution discharge to the North Fork of the Jump River that was authorized by the DNR.

17. The North Fork of the Jump River is a pristine and beautiful river. It has excellent water quality. It provides outstanding recreational experiences and public fishing grounds. It lies in a largely wild and undeveloped watershed.

18. The North Fork of the Jump River runs from headwaters in central Price County, joining the South Fork of the Jump River near the southern part of the border with Rusk County, and then running as the Jump River southwesterly into Lake Holcombe.

19. The North Fork of the Jump River has historically been home to trout.

20. Trout need colder water to survive and thrive than other fish.

21. The DNR has, in the past, stocked the North Fork of the Jump River and/or its tributaries with trout.

22. There have been trout in the North Fork of the Jump River during at least the past two years.

23. The DNR has conducted a survey of approximately 1,500 rivers in Northern Wisconsin. That survey ranked those rivers in terms of quality. In that survey, the DNR ranked the North Fork of the Jump River as having the 197th highest quality.

24. Pursuant to Section NR 102.11, Wis. Adm. Code, the DNR has classified the Jump River, lower downstream from the discharge allowed by this Permit, as an exceptional resource water. The North Fork of the Jump River is of higher quality than this exceptional part of the Jump River. Even the DNR acknowledges this, as the DNR ranked this exceptional resource segment as the 273rd highest quality segment in its survey of Northern Wisconsin rivers, significantly lower in quality than the North Fork of the Jump River.

25. The Sewage Commission applied to the DNR for this Permit, for a planned new wastewater treatment plant.

26. The Sewage Commission plans to discharge approximately 30,000 gallons per day of partially treated wastewater to the North Fork of the Jump River.

27. The only treatment that the Sewage Commission's plant will do, prior to discharge to the North Fork of the Jump River, is settling in tanks, use of a sand filter, and seasonal ultraviolet disinfection.

28. The discharge authorized by this Permit will include discharge of at least the following pollutants: biochemical oxygen demand (BOD₅), suspended solids (TSS), fecal coliform, nitrogen, ammonia, and phosphorous.

29. The discharge authorized by this Permit will cause a lowering of the water quality of the North Fork of the Jump River.

30. The Sewage Commission could have constructed a sewage treatment system that did not discharge to the North Fork of the Jump River.

31. This alternative kind of treatment system would have been cost-effective.

32. The DNR has never taken affirmative action to classify the North Fork of the Jump River.

33. In fact, the DNR has never conducted the triennial review of waters of the State, as required by the Clean Water Act, a review which is designed to facilitate designating uses of water.

34. Rather, because the DNR has failed to conduct a triennial review and designate the use of the North Fork of the Jump River, it has a default classification as a warm water sport fishery. This classification is given to all waters of the State that have not been specifically classified.

35. In reviewing the Sewage Commission's permit application, the DNR only looked at the quality and use of the North Fork of the Jump River as a warm water sport fishery.

36. In reviewing the Sewage Commission's permit application, the DNR failed to look at the actual quality or actual existing use of the North Fork of the Jump River. Thus, the DNR only evaluated the proposed discharge as it would affect a warm water fishery. The DNR did not evaluate the proposed discharge as it would affect an exceptional resource water or a cold water or trout fishery.

37. The DNR made no findings that this discharge was necessary for economic or social development in Price County.

38. The DNR could not have made such findings in good faith, because there are other alternatives available to treat this wastewater.

39. The DNR issued the Permit to the Sewage Commission on January 30, 2002.

40. As allowed pursuant to Section 283.63, Stats., and Section NR 203.16, Wis. Adm. Code, Petitioners filed a petition for an adjudicatory hearing with the DNR to challenge the reasonableness and necessity of the terms of the Permit. A copy of the petition is attached as Exhibit 1. That petition was filed on March 28, 2002, and was timely. Petitioners sought review of "the reasonableness of the WPDES permit's effluent limitations for biochemical oxygen demand (BOD₅) and total suspended solids (TSS) and the necessity for additional effluent limitations for phosphorus." Petitioners alleged that the Permit failed to comply with the federal and state antidegradation policies, and other provisions of DNR regulations.

41. The DNR acknowledged receipt of Petitioners' administrative petition.

42. On April 18, 2002, the DNR granted Petitioners' request for a hearing under Section 283.63, Stats., and Section NR 203.16, Wis. Adm. Code, to challenge "the reasonableness of the effluent limitations for BOD₅ and TSS and the necessity for additional effluent limitations for phosphorous." A copy of the DNR's April 18, 2002 letter is attached as Exhibit 2.

43. However, in that same April 18, 2002 letter, the DNR also denied Petitioners' request for a hearing as to "any issues raised in the Petition regarding whether the Jump River is properly classified." This denial was based on the legal conclusion that "Stream classifications adopted under ch. 281 are not reviewable in a proceeding held under s. 283.63."

44. Petitioners' counsel spoke to the DNR's legal counsel, and confirmed the scope of this denial. The denial would prevent Petitioners' arguments based on the federal Clean Water Act's antidegradation policy and any arguments based on state law which would protect the high quality and existing uses of the North Fork of the Jump River as a cold water fishery. This

denial is based on the DNR's position that it need not comply with the federal antidegradation policy in issuing permits and that it need only look to a water's classification, by regulation, in complying with the state antidegradation policy. Petitioners' counsel confirmed the scope of the DNR's denial in a letter. A copy of this letter is attached as Exhibit 3. The DNR subsequently confirmed, in writing, this understanding of the DNR's denial of a hearing.

45. The DNR's April 18, 2002 letter limiting Petitioners' ability to make arguments about the legal requirements applicable to the Permit curtails Petitioners' ability to challenge the reasonableness of and necessity for terms and conditions of the Permit.

46. Petitioners have no remedy other than this action to challenge the DNR's issuance of this Permit.

ISSUES FOR REVIEW

I. ISSUE ONE: THE DNR'S APRIL 18, 2002 LETTER IS INVALID BECAUSE THE DNR CANNOT DENY PETITIONERS' RIGHT TO CHALLENGE THE REASONABLENESS OR NECESSITY OF PERMIT TERMS SIMPLY BECAUSE PETITIONERS' ARGUMENTS ARE BASED ON FEDERAL AND STATE LEGAL REQUIREMENTS RELATED TO WATER QUALITY STANDARDS.

47. Petitioners reallege and incorporate paragraphs 1 through 46, inclusive., above.

48. Section 283.63, Stats., and Section NR 203.16, Wis. Adm. Code, grant members of the public a right to challenge the reasonableness or necessity of any term or condition of a Wisconsin Pollution Discharge Elimination System permit issued by the DNR.

49. The DNR's denial of Petitioners' request for a hearing as to "any issues raised in the Petition regarding whether the Jump River is properly classified" was based on the legal conclusion that "Stream classifications adopted under ch. 281 are not reviewable in a proceeding held under s. 283.63."

50. Petitioners are not challenging a stream classification adopted under Chapter 281,

Stats., since the DNR has never formally classified the North Fork of the Jump River.

51. Moreover, the fact that stream classifications are not reviewable in an administrative challenge to the Permit does not mean that Petitioners could not make other arguments, based on federal and state law regarding stream classifications, that a term or condition of the Permit is unreasonable.

52. Moreover, as is alleged below, the DNR's issuance of this Permit violated federal and state law.

53. Thus, the DNR's denial of Petitioners' request for a hearing is unlawful. Because the DNR denied Petitioners' proper request for a hearing, this Court should, pursuant to Section 227.57(5), (7), and (8), Stats., set aside that part of the DNR's April 18, 2002, letter that denied Petitioners' right to a hearing on "any issues raised in the Petition regarding whether the Jump River is properly classified."

II. ISSUE TWO: THE DNR'S APRIL 18, 2002 LETTER IS INVALID BECAUSE THE DNR MUST COMPLY WITH THE FEDERAL ANTIDEGRADATION POLICY AND THE DNR MUST CONSIDER WHETHER THE NORTH FORK OF THE JUMP RIVER IS A HIGH QUALITY WATER.

54. Petitioners reallege and incorporate paragraphs 1 through 46, inclusive, above.

55. The federal Clean Water Act requires that:

Where the quality of the waters exceed levels necessary to support propagation of fish, shellfish, and wildlife and recreation in and on the water, that quality shall be maintained and protected unless the State finds, after full satisfaction of the intergovernmental coordination and public participation provisions of the State's continuing planning process, that allowing lower water quality is necessary to accommodate important economic or social development in the area in which the waters are located.

40 C.F.R. § 131.12(2).

56. This provision of the federal antidegradation policy provides what is commonly referred to as Tier II protection. This provision prevents pollution discharges to high quality

waters, except in certain limited circumstances.

57. Petitioners would argue and present evidence in the administrative hearing that, in issuing the Permit, the DNR violated this provision because: (1) the North Fork of the Jump River is a high quality water; (2) the Permit will not maintain the high quality of the North Fork of the Jump River; and (3) the DNR made no economic or social findings in issuing this Permit.

58. In fact, the DNR ignored the federal antidegradation policy, and did not even evaluate this Permit under the standards set forth in the federal antidegradation policy.

59. The DNR's April 18, 2002 letter denies Petitioners the right to make these
arguments in their adjudicatory hearing on the reasonableness or necessity of terms or conditions of the Permit.

60. Thus, the DNR's denial of Petitioners' request for a hearing is unlawful. Because the DNR denied Petitioners' proper request for a hearing, this Court should, pursuant to Section 227.57(5), (7), and (8), Stats., set aside that part of the DNR's April 18, 2002, letter that denied Petitioners' right to a hearing on "any issues raised in the Petition regarding whether the Jump River is properly classified." Alternatively, because the DNR failed to comply with the federal antidegradation policy, this Court should, pursuant to Section 227.57(5), (7), and (8), Stats., set aside the DNR's issuance of the Permit.

III. ISSUE THREE: THE DNR'S APRIL 18, 2002 LETTER IS INVALID BECAUSE THE DNR MUST COMPLY WITH THE FEDERAL ANTIDEGRADATION POLICY AND THE DNR MUST PROTECT THE EXISTING USES OF THE NORTH FORK OF THE JUMP RIVER.

61. Petitioners reallege and incorporate paragraphs 1 through 46, inclusive, above.

62. The federal Clean Water Act requires that:

Existing instream water uses and the level of water quality necessary to protect the existing uses shall be maintained and protected.

40 C.F.R. § 131.12(1).

63. The federal Clean Water Act defines the term "existing uses" to mean "those uses actually attained in the water body on or after November 28, 1975, *whether or not they are included in the water quality standards.*" 40 C.F.R. § 131.3(e) (emphasis added).

64. This provision of the federal antidegradation policy provides what is commonly referred to as Tier I protection. This provision prevents pollution discharges that will interfere with any uses in the waterbody which have occurred since November 28, 1975.

65. Petitioners would argue and present evidence in the administrative hearing that, in issuing the Permit, the DNR violated this provision because: (1) one of the existing uses of the North Fork of the Jump River is as habitat and the home of cold water fish, including trout; and (2) the Permit will not protect that existing use.

66. In fact, the DNR ignored the federal antidegradation policy, and did not even evaluate this Permit under the standards set forth in the federal antidegradation policy.

67. The DNR's April 18, 2002 letter denies Petitioners the right to make these arguments in their adjudicatory hearing on the reasonableness or necessity of terms or conditions of the Permit.

68. Thus, the DNR's denial of Petitioners' request for a hearing is unlawful. Because the DNR denied Petitioners' proper request for a hearing, this Court should, pursuant to Section 227.57(5), (7), and (8), Stats., set aside that part of the DNR's April 18, 2002, letter that denied Petitioners' right to a hearing on "any issues raised in the Petition regarding whether the Jump River is properly classified." Alternatively, because the DNR failed to comply with the federal antidegradation policy, this Court should, pursuant to Section 227.57(5), (7), and (8), Stats., set aside the DNR's issuance of the Permit.

IV. ISSUE FOUR: THE DNR'S APRIL 18, 2002 LETTER IS INVALID BECAUSE THE DNR MUST COMPLY WITH THE STATE ANTIDegradation POLICY.

69. Petitioners reallege and incorporate paragraphs 1 through 46, inclusive, above.

70. Section NR 102.05(1)(a), Wis. Adm. Code, requires that:

No waters of the state shall be lowered in quality unless it has been affirmatively demonstrated to the department that such a change is justified as a result of necessary economic or social development, provided that no new or increased effluent interferes with or becomes injurious to any assigned uses made of or presently possible in such waters.

71. Petitioners would argue and present evidence in the administrative hearing that, in issuing the Permit, the DNR violated this provision because: (1) the Permit will lower the quality of the North Fork of the Jump River and this change is not justified as a result of necessary economic or social development; or (2) the Permit interferes with existing uses of the North Fork of the Jump River.

72. In addition, Section NR 207.03(4)(b), Wis. Adm. Code, provides:

[A] proposed new discharge [to an exceptional resource water] is not needed to prevent or correct either an existing surface or groundwater contamination situation, or a public health situation, water quality based effluent limitations shall be set equal to the existing levels of these substances upstream of, or adjacent to, the discharge site.

Other regulatory provisions require discharges to meet this standard in other circumstances. *See, e.g.,* sec. NR 207.04(2)(b), Wis. Adm. Code.

73. Petitioners would argue and present evidence in the administrative hearing that, in issuing the Permit, the DNR violated these provisions because: (1) the North Fork of the Jump River is and should be classified as an exceptional resource water; (2) the discharge authorized by the Permit is not needed to prevent or correct any contamination or public health situation; and (3) the Permit's effluent limitations are not set equal to the existing levels of the substances

discharged.

74. The DNR's April 18, 2002 letter denies Petitioners the right to make these arguments in their adjudicatory hearing on the reasonableness or necessity of terms or conditions of the Permit.

75. Thus, the DNR's denial of Petitioners' request for a hearing is unlawful. Because the DNR denied Petitioners' proper request for a hearing, this Court should, pursuant to Section 227.57(5), (7), and (8), Stats., set aside that part of the DNR's April 18, 2002, letter that denied Petitioners' right to a hearing on "any issues raised in the Petition regarding whether the Jump River is properly classified." Alternatively, because the DNR failed to comply with the state antidegradation policy, this Court should, pursuant to Section 227.57(5), (7), and (8), Stats., set aside the DNR's issuance of the Permit.

V. ISSUE FIVE: THE DNR'S APRIL 18, 2002 LETTER IS INVALID BECAUSE THE DNR MUST COMPLY WITH THE STATE STANDARDS FOR COLD WATER FISH AND AQUATIC LIFE.

76. Petitioners reallege and incorporate paragraphs 1 through 46, inclusive, above.

77. Section NR 102.04(4)(e), Wis. Adm. Code, provides, in part, that:

[C]old water communities may not be altered from natural background temperature and dissolved oxygen levels to such an extent that trout populations are adversely affected.

That provision further provides that "Dissolved oxygen in classified trout streams shall not be artificially lowered to less than 6.0 mg/L at any time."

78. Petitioners would argue and present evidence in the administrative hearing that, in issuing the Permit, the DNR violated these provisions because: (1) the North Fork of the Jump River has a trout population; and (2) the Permit fails to meet these dissolved oxygen standards..

79. The DNR's April 18, 2002 letter denies Petitioners the right to make these

arguments in their adjudicatory hearing on the reasonableness or necessity of terms or conditions of the Permit.

80. Thus, the DNR's denial of Petitioners' request for a hearing is unlawful. Because the DNR denied Petitioners' proper request for a hearing, this Court should, pursuant to Section 227.57(5), (7), and (8), Stats., set aside that part of the DNR's April 18, 2002, letter that denied Petitioners' right to a hearing on "any issues raised in the Petition regarding whether the Jump River is properly classified." Alternatively, because the DNR failed to comply with the standards for cold water fish and aquatic life, this Court should, pursuant to Section 227.57(5), (7), and (8), Stats., set aside the DNR's issuance of the Permit.

VI. ISSUE SIX: THE DNR'S REGULATIONS, AS TO THE NORTH FORK OF THE JUMP RIVER, ARE INCONSISTENT WITH FEDERAL LAW, AND THEREFORE ARE VOID.

81. Petitioners reallege and incorporate paragraphs 1 through 46, inclusive, above.

82. The Clean Water Act requires that Wisconsin's antidegradation policy be consistent with the federal antidegradation policy.

83. The federal antidegradation policy requires that:

Where the quality of the waters exceed levels necessary to support propagation of fish, shellfish, and wildlife and recreation in and on the water, that quality shall be maintained and protected unless the State finds, after full satisfaction of the intergovernmental coordination and public participation provisions of the State's continuing planning process, that allowing lower water quality is necessary to accommodate important economic or social development in the area in which the waters are located.

40 C.F.R. § 131.12(2). This provision of the federal antidegradation policy provides what is commonly referred to as Tier II protection. This provision prevents pollution discharges to high quality waters, except in certain limited circumstances.

84. The federal antidegradation policy also requires that:

Existing instream water uses and the level of water quality necessary to protect the existing uses shall be maintained and protected.

40 C.F.R. § 131.12(1). The federal Clean Water Act defines the term "existing uses" to mean "those uses actually attained in the water body on or after November 28, 1975, *whether or not they are included in the water quality standards.*" 40 C.F.R. § 131.3(e) (emphasis added). This provision of the federal antidegradation policy provides what is commonly referred to as Tier I protection. This provision prevents pollution discharges that will interfere with any uses in the waterbody which have occurred since November 28, 1975.

85. The North Fork of the Jump River is a high quality water.

86. The North Fork of the Jump River should be classified under DNR regulations as an exceptional resource water.

87. The North Fork of the Jump River has been home to trout since November 28, 1975. The North Fork of the Jump River is currently home to trout, and has habitat for trout.

88. The North Fork of the Jump River should be classified under DNR regulations as a cold water and trout fishery.

89. If the federal antidegradation policy does not directly apply to the DNR's issuance of pollution discharge permits or state law does not incorporate those federal antidegradation standards, then Wisconsin law does not meet the requirements of the Clean Water Act.

90. Therefore, the DNR's regulations are invalid as to the North Fork of the Jump River because, pursuant to Section 227.40(4)(a), those regulations violate constitutional provisions (the U.S. Constitution's supremacy clause) and exceed the statutory authority of the DNR and/or the Natural Resources Board.

91. Because the DNR's regulations are invalid as to the North Fork of the Jump River, the Court should, pursuant to Section 227.40, Stats., declare as invalid the DNR and/or the

Natural Resource Board's failure to classify the North Fork of the Jump River as an exceptional resource water and as a cold water and trout fishery and command the DNR and/or the Natural Resources Board to classify the North Fork of the Jump River as an exceptional resource water and as a cold water and trout fishery.

92. The Court should also, pursuant to Section 227.57(5), (7), and (8), Stats., set aside the DNR's issuance of the Permit or remand the case to the DNR until the DNR and/or the Natural Resources Board adopts regulations that comply with the federal antidegradation policy.

WHEREFORE, Petitioners request the Court grant the following relief pursuant to Sections 227.57, 227.40, and 806.04, Stats.:

1. That the Court set aside that part of the DNR's April 18, 2002, letter that denied Petitioners' right to a hearing on "any issues raised in the Petition regarding whether the Jump River is properly classified;"

2. That the Court declare that the DNR must comply with the federal antidegradation policy in evaluating WPDES permits;

3. That the Court declare that the DNR must protect the existing quality and uses of waters in implementing the state antidegradation policy in evaluating WPDES permits;

4. That the Court set aside or remand the DNR's issuance of Wisconsin Pollution Discharge Elimination System Permit No. WI-0061701-01-0 to the Catawba-Kennan Joint Sewage Commission;

5. That the Court remand this case to the DNR until the DNR and/or the Natural Resources Board adopts regulations that comply with the federal antidegradation policy;

6. That the Court declare as invalid the DNR and the Natural Resource Board's failure to classify the North Fork of the Jump River as an exceptional resource water and as a

cold water and trout fishery and command the DNR and the Natural Resources Board to classify the North Fork of the Jump River as an exceptional resource water and as a cold water and trout fishery;

7. That, pursuant to Section 227.54, Stats., the Court issue a stay of the administrative proceedings before the DNR on this matter;

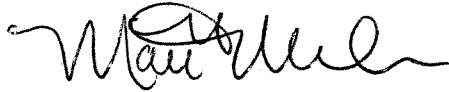
8. That the Court award Petitioners their costs and attorneys' fees; and

9. That the Court provide whatever additional relief is appropriate, irrespective of the form of this petition, pursuant to Section 227.57(9), Stats.

Dated this 17th day of May, 2002.

Attorneys for Petitioners:

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