

☞ **05hr_SSC-DNRRRR_Misc_pt06c**



☞ **Exhibits/comments submitted by Tilton. RE: DNR study regarding Lower St. Croix ordinary high water mark.**

(FORM UPDATED: 08/11/2010)

**WISCONSIN STATE LEGISLATURE ...
PUBLIC HEARING - COMMITTEE RECORDS**

2005-06

(session year)

Senate Select

(Assembly, Senate or Joint)

Committee on ... DNR (SSC-DNRRR)

COMMITTEE NOTICES ...

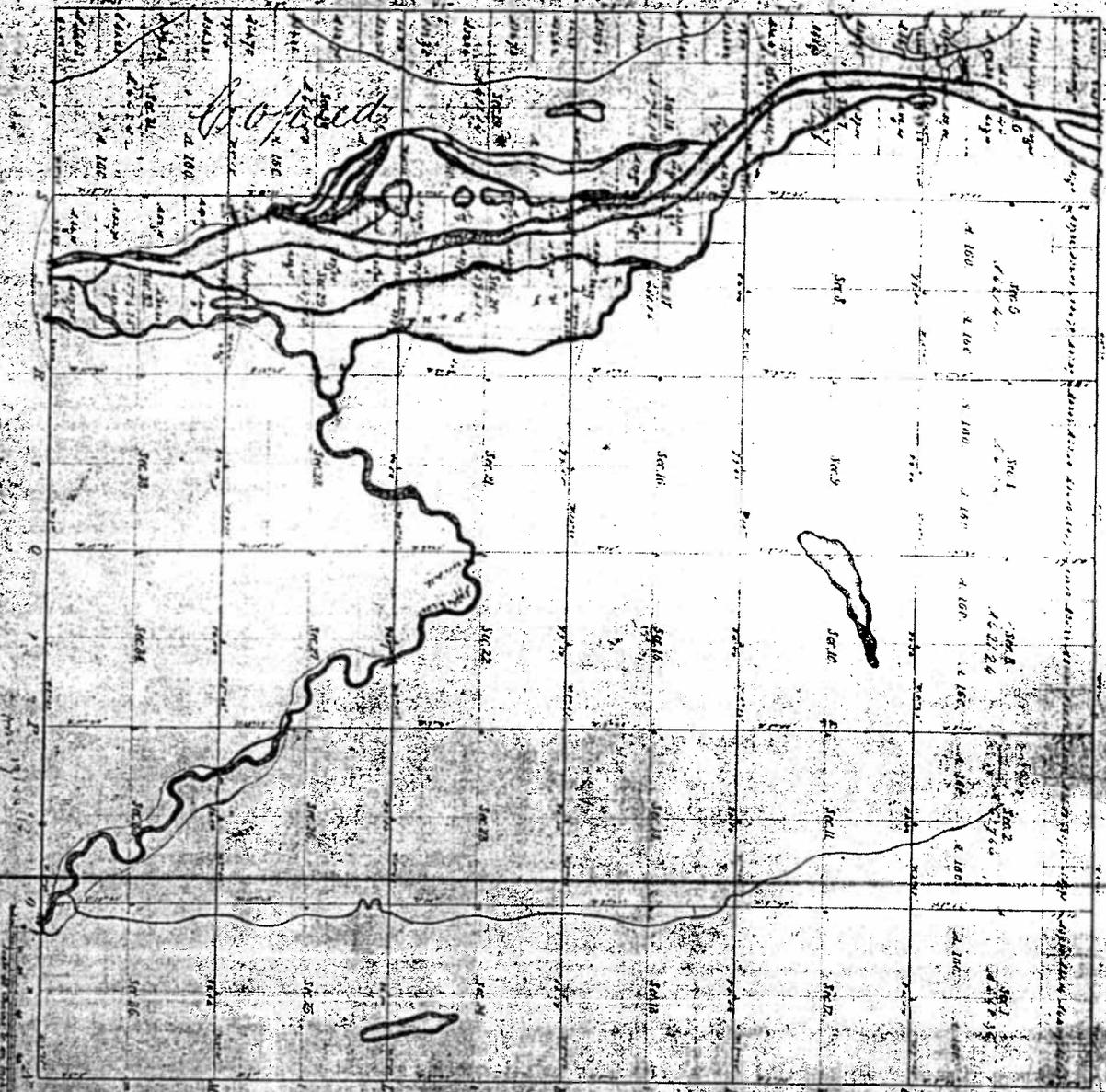
- Committee Reports ... **CR**
- Executive Sessions ... **ES**
- Public Hearings ... **PH**

INFORMATION COLLECTED BY COMMITTEE FOR AND AGAINST PROPOSAL

- Appointments ... **Appt** (w/Record of Comm. Proceedings)
- Clearinghouse Rules ... **CRule** (w/Record of Comm. Proceedings)
- Hearing Records ... bills and resolutions (w/Record of Comm. Proceedings)
(**ab** = Assembly Bill) (**ar** = Assembly Resolution) (**ajr** = Assembly Joint Resolution)
(**sb** = Senate Bill) (**sr** = Senate Resolution) (**sjr** = Senate Joint Resolution)
- Miscellaneous ... **Misc**

* Contents organized for archiving by: Mike Barman (LRB) (July/2012)

Township No. 31 N., Range No. 19 West 4 Mer.

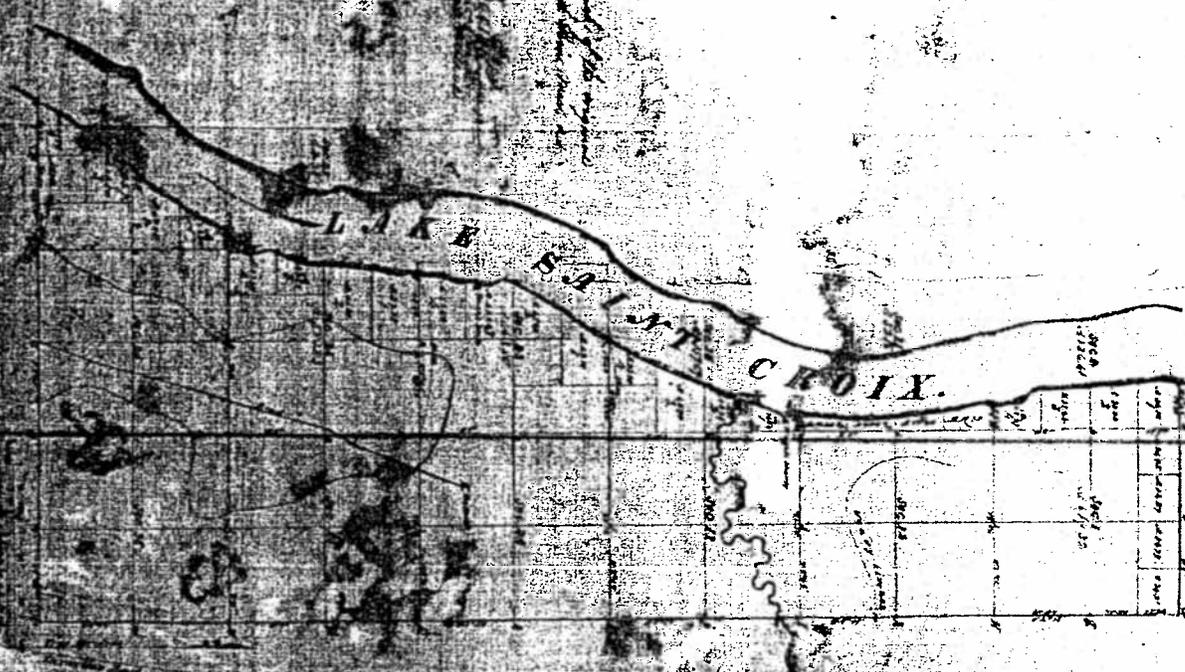


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Section	Area	Section	Area
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34	34.00	34	34.00
33	33.00	33	33.00
32	32.00	32	32.00
31	31.00	31	31.00
30	30.00	30	30.00
29	29.00	29	29.00
28	28.00	28	28.00
27	27.00	27	27.00
26	26.00	26	26.00
25	25.00	25	25.00
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19	19.00	19	19.00
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6	6.00	6	6.00
5	5.00	5	5.00
4	4.00	4	4.00
3	3.00	3	3.00
2	2.00	2	2.00
1	1.00	1	1.00

Township No. 31 N., Range No. 19 West 4 Mer.
 Section 36
 Area 36.00
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 Contour 150
 Contour 200
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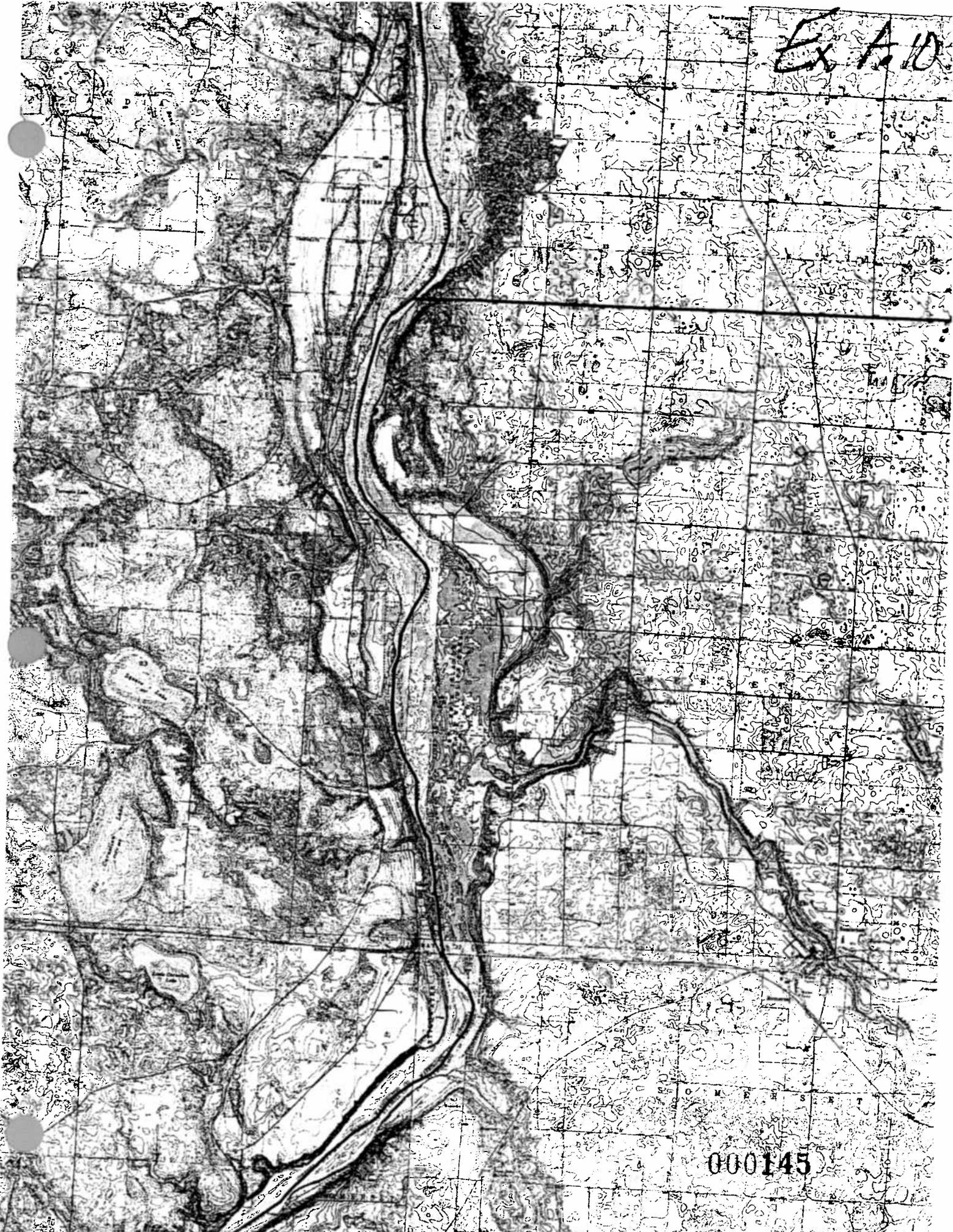
Township No 27 N. Range No 20 West, 7th Mer.

Observe that the course is correct and the bearings are correct. The bearings are correct and the course is correct. The bearings are correct and the course is correct.



Section	Acres	Owner	Remarks
1	36.00	John A. Bell	
2	36.00	John A. Bell	
3	36.00	John A. Bell	
4	36.00	John A. Bell	
5	36.00	John A. Bell	
6	36.00	John A. Bell	
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49	36.00	John A. Bell	
50	36.00	John A. Bell	

Ex A 10



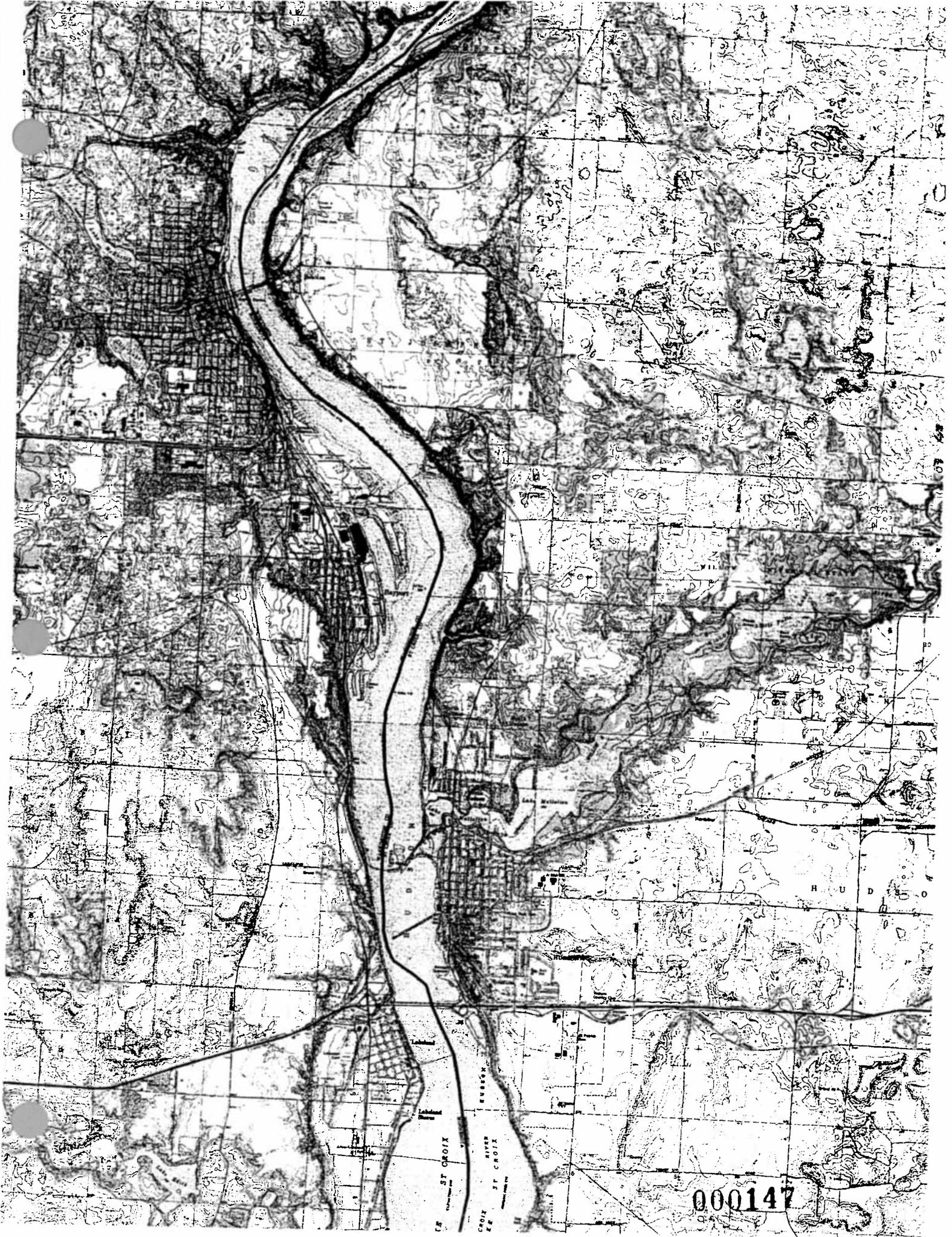
S O M E R S E T

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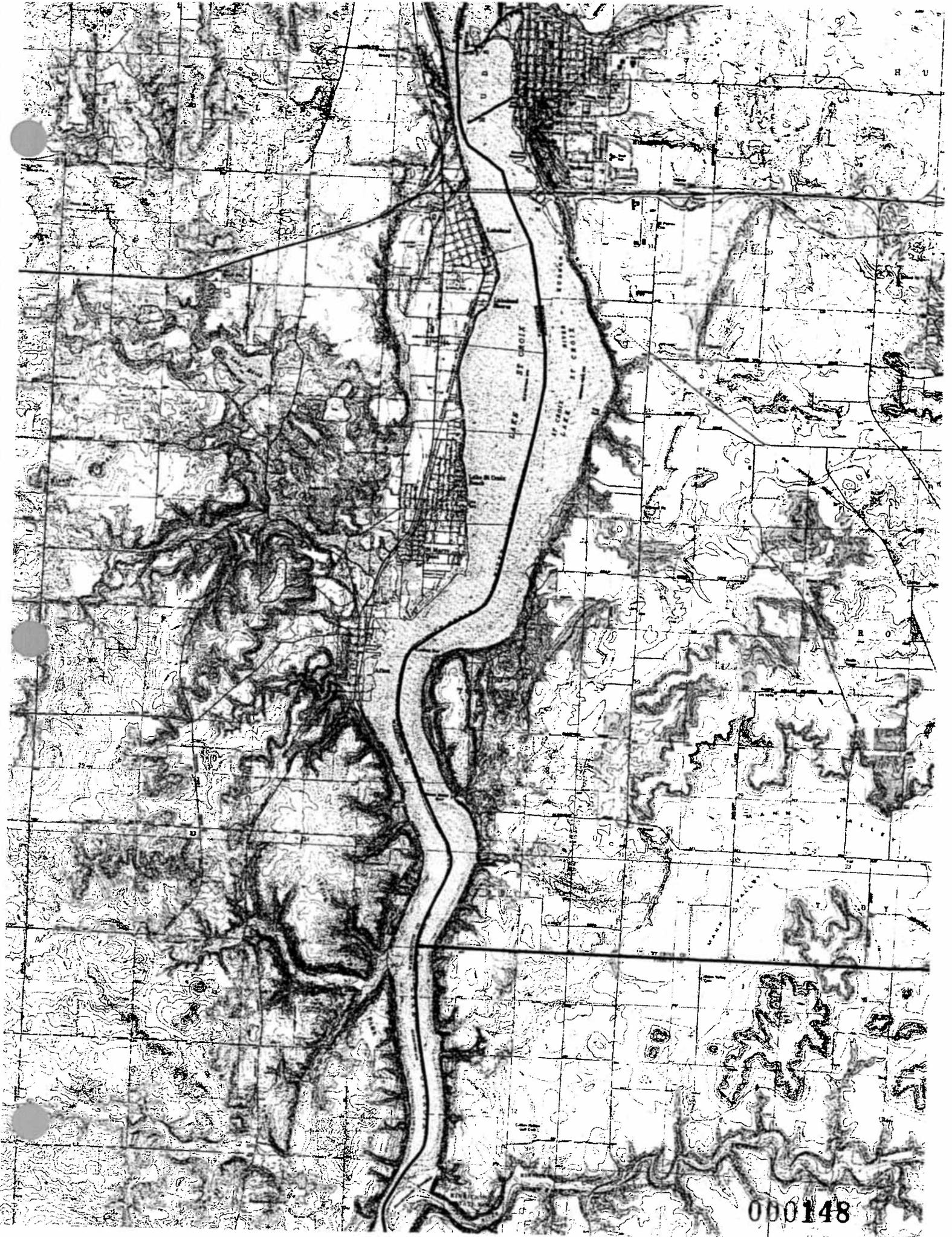
SIR ASHINGTON GARDIN



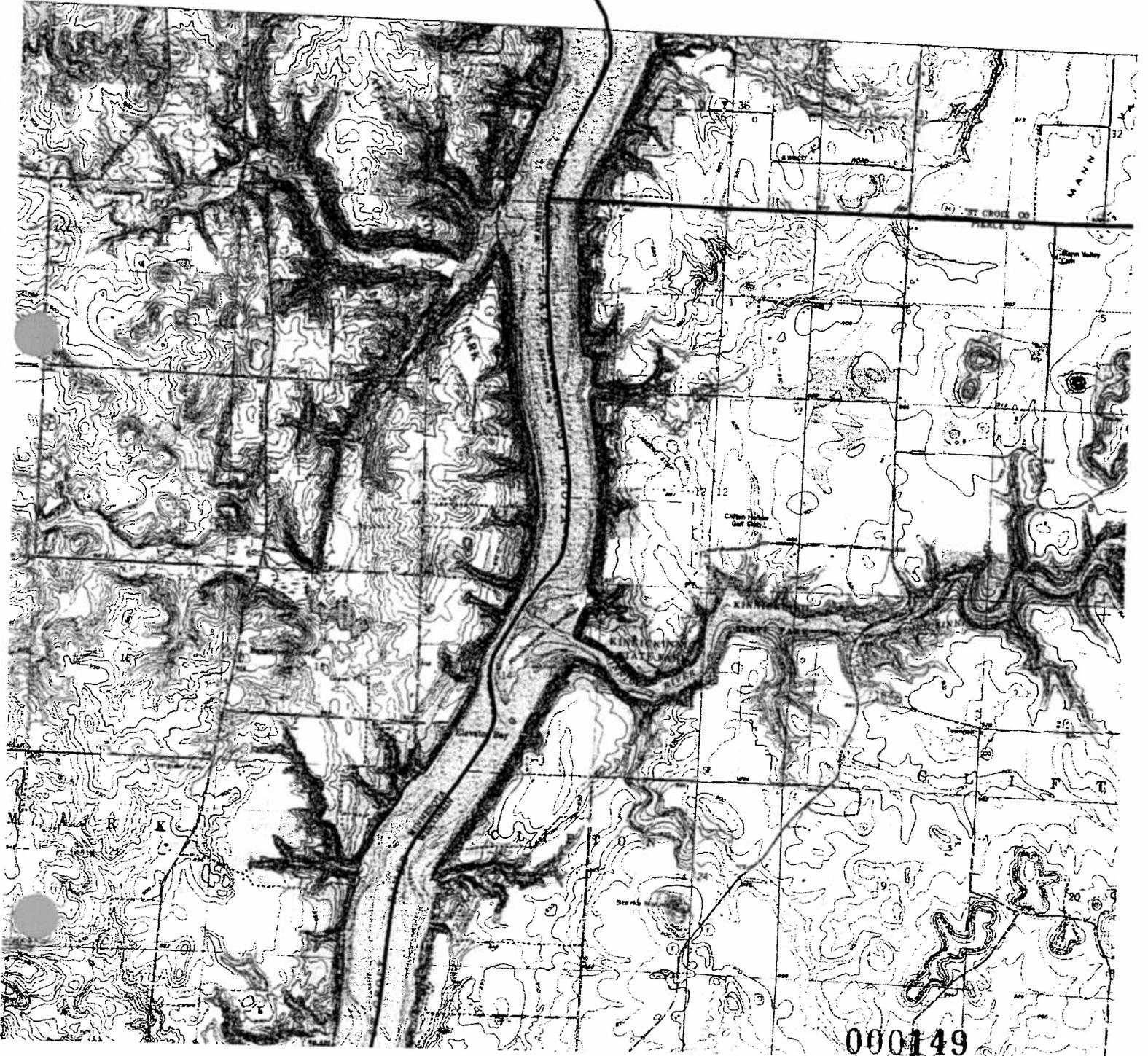
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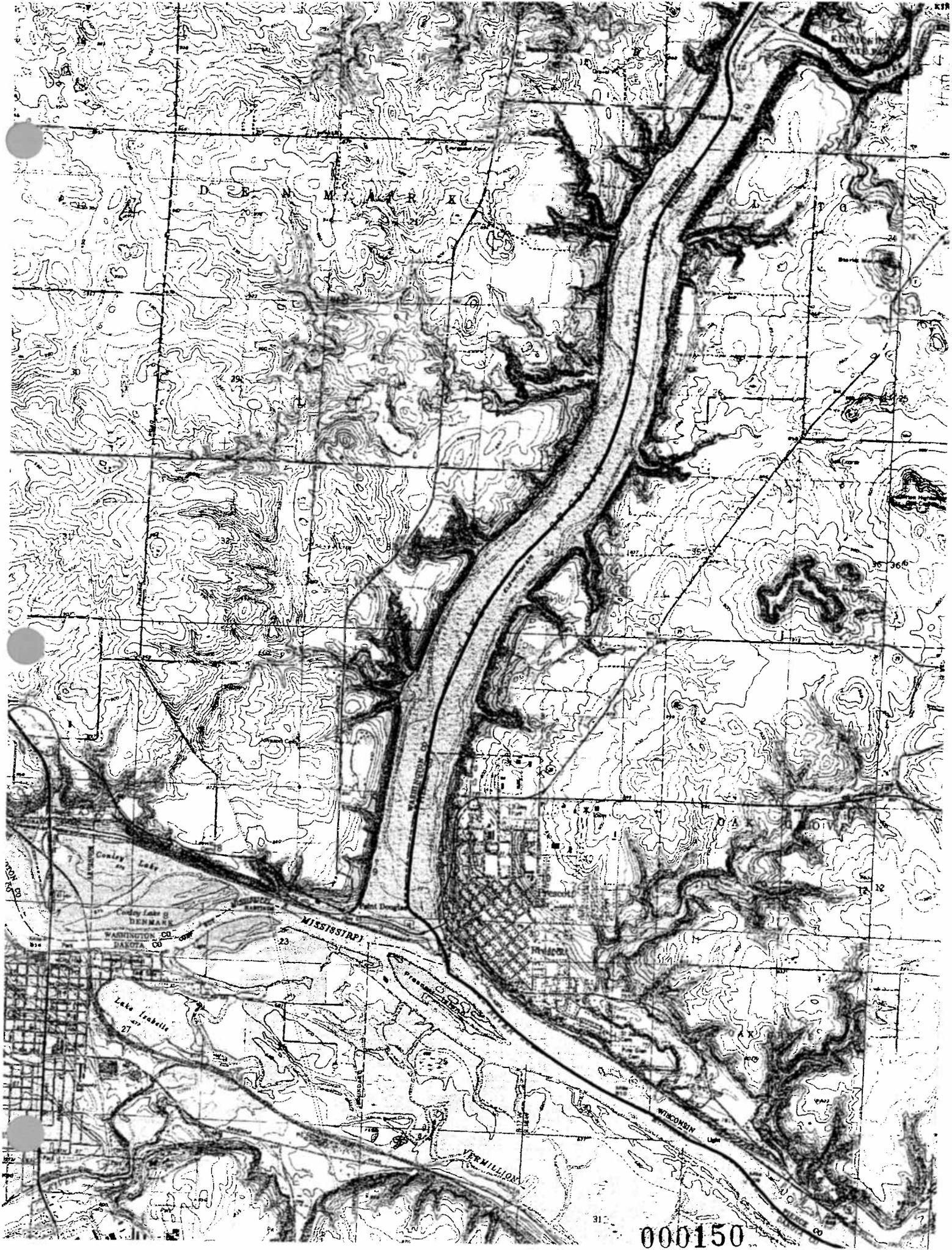
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SOMERSET 'S' PLAT

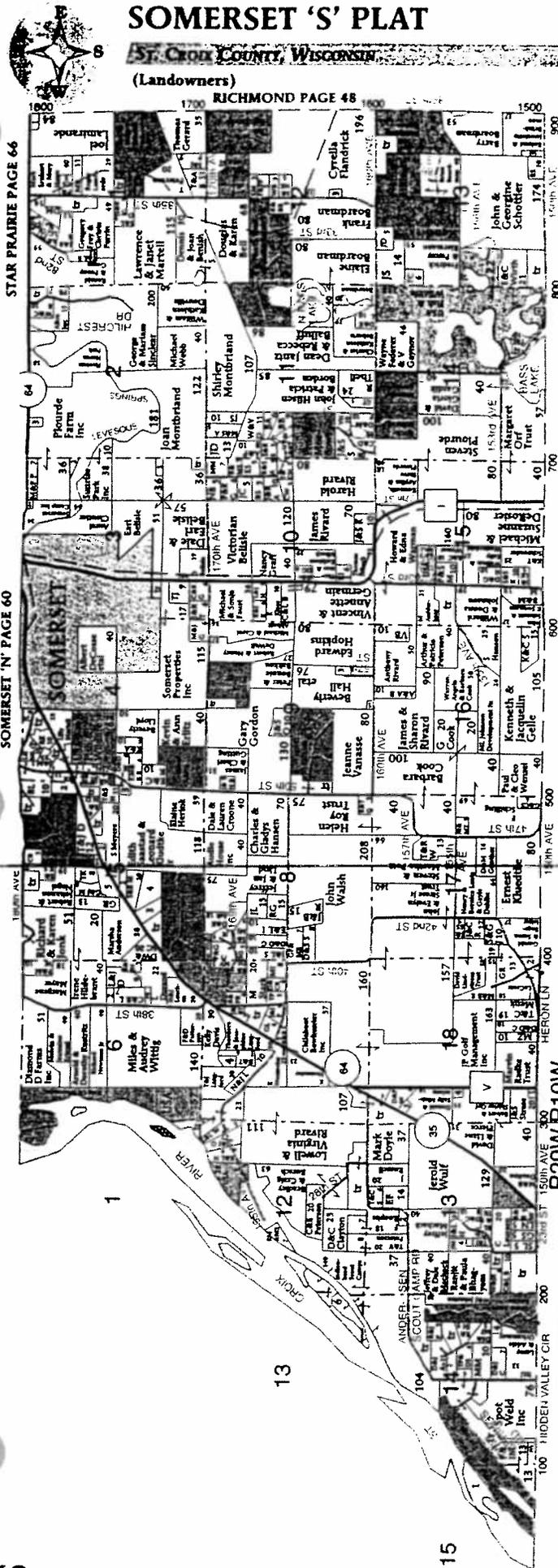
T-30-N ♦ R-20-19-W

ST. CROIX COUNTY, WISCONSIN

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(Landowners)

See Page 112 For Additional Names.



BOX 157
SOMERSET, WISCONSIN 54025
(715) 247-3376

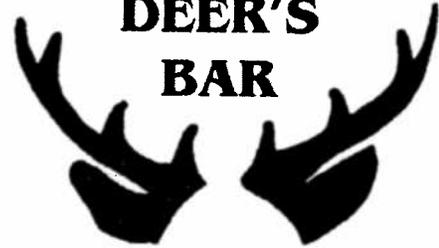
Apple River Dental Care

Dr. Douglas S. Wolff D.D.S.



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P.O. Box 87
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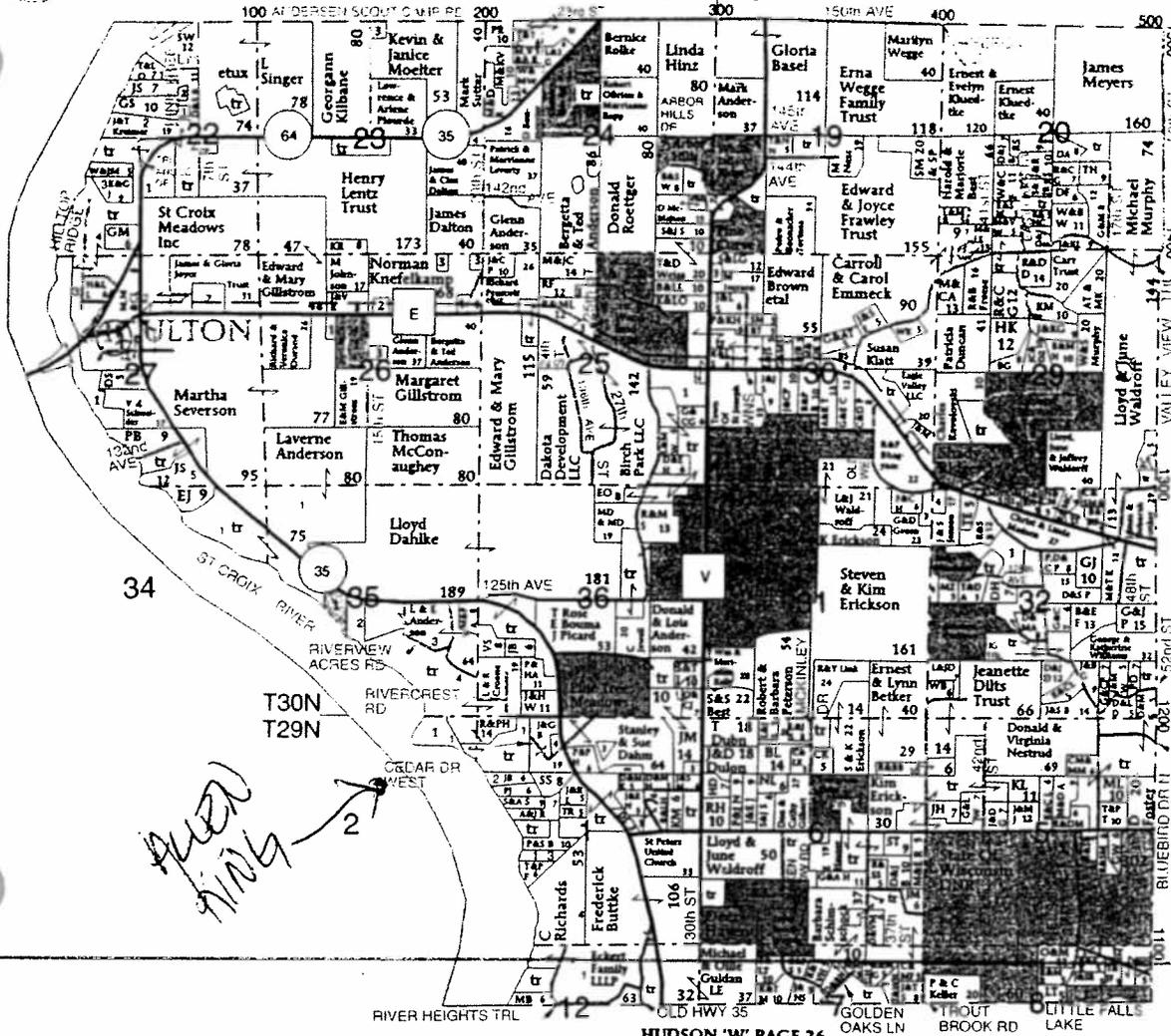
T-29-30-N ♦ R-20-19-W

ST. CROIX COUNTY, WISCONSIN

See Page 112 For Additional Names.

(Landowners)

SOMERSET 'S' PAGE 62
R20W R19W



Handwritten note:
Alden Hwy → 2

ST. JOSEPH 'E' PAGE 46

HUDSON 'W' PAGE 26

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T-29-N ♦ R-20-19-W

(Landowners)

See Page 112 For Additional Names.



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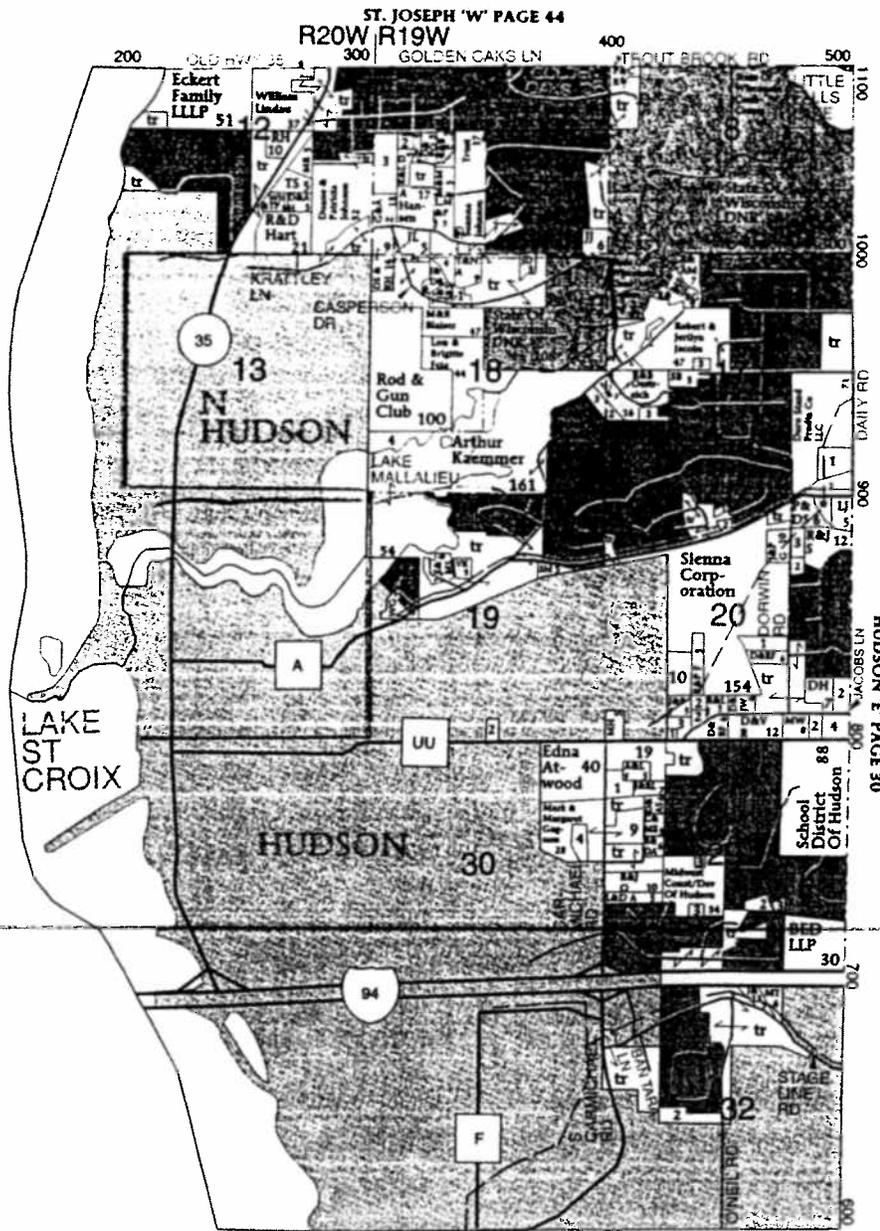
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Hudson, WI 54016





TROY 'W' PLAT

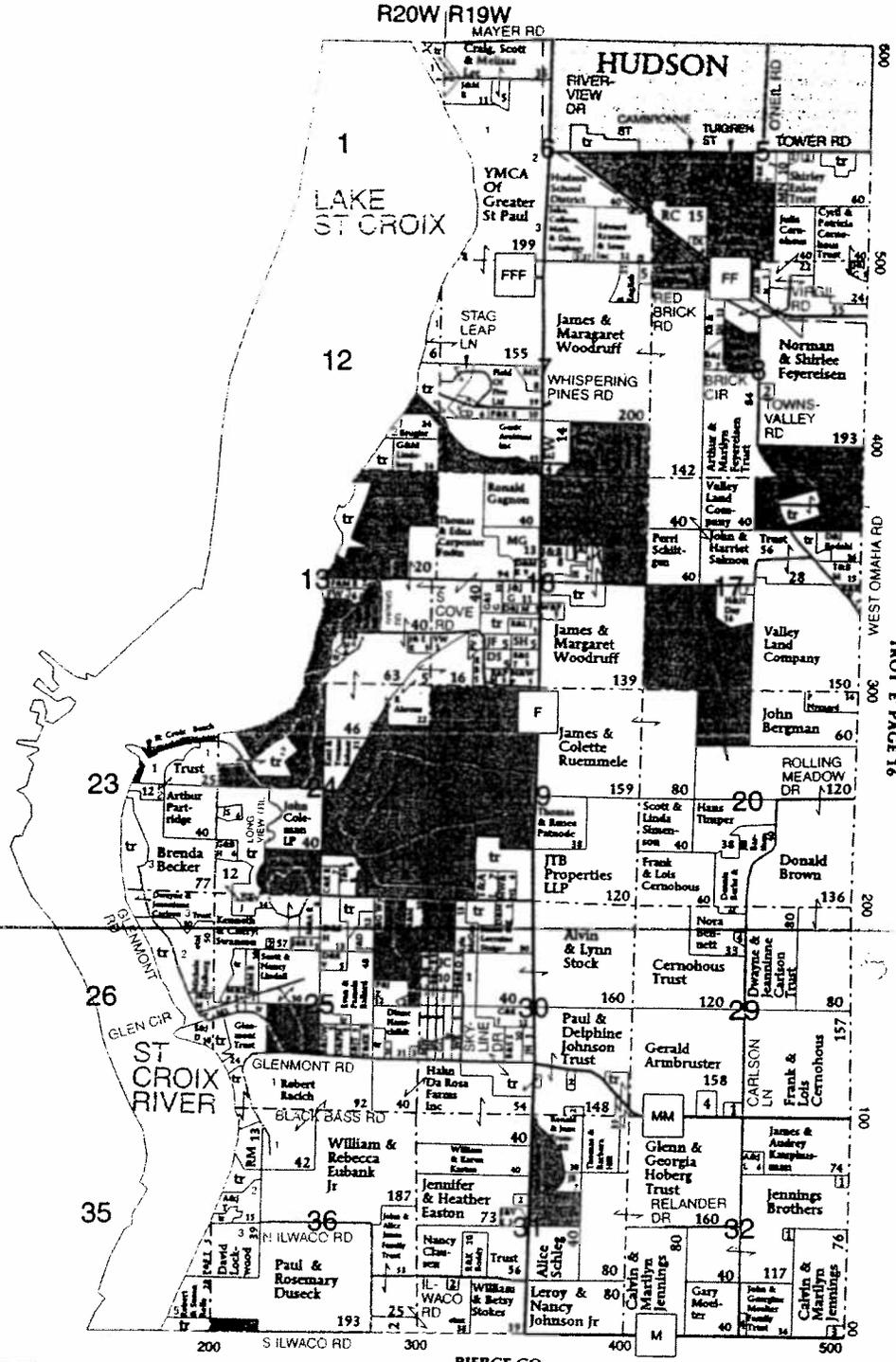
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ST. CROIX COUNTY, WISCONSIN

(Landowners)

HUDSON 'W' PAGE 26

See Page 112 For Additional Names.



Hammond
577 Davis Street
796-2323

Roberts
900 N Division St.
749-3388

Hudson Hill
1207 Coulee Road
386-7404

Hudson South Side Center
1920 Crestview Drive
386-7799

New Richmond
Highways 63,64,46
246-5188

Hudson Downtown
100 Second Street
386-9491

River Falls North
Highway 35 North
425-6371

River Falls South
1025 South Main
425-6844




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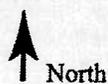
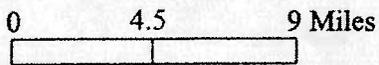
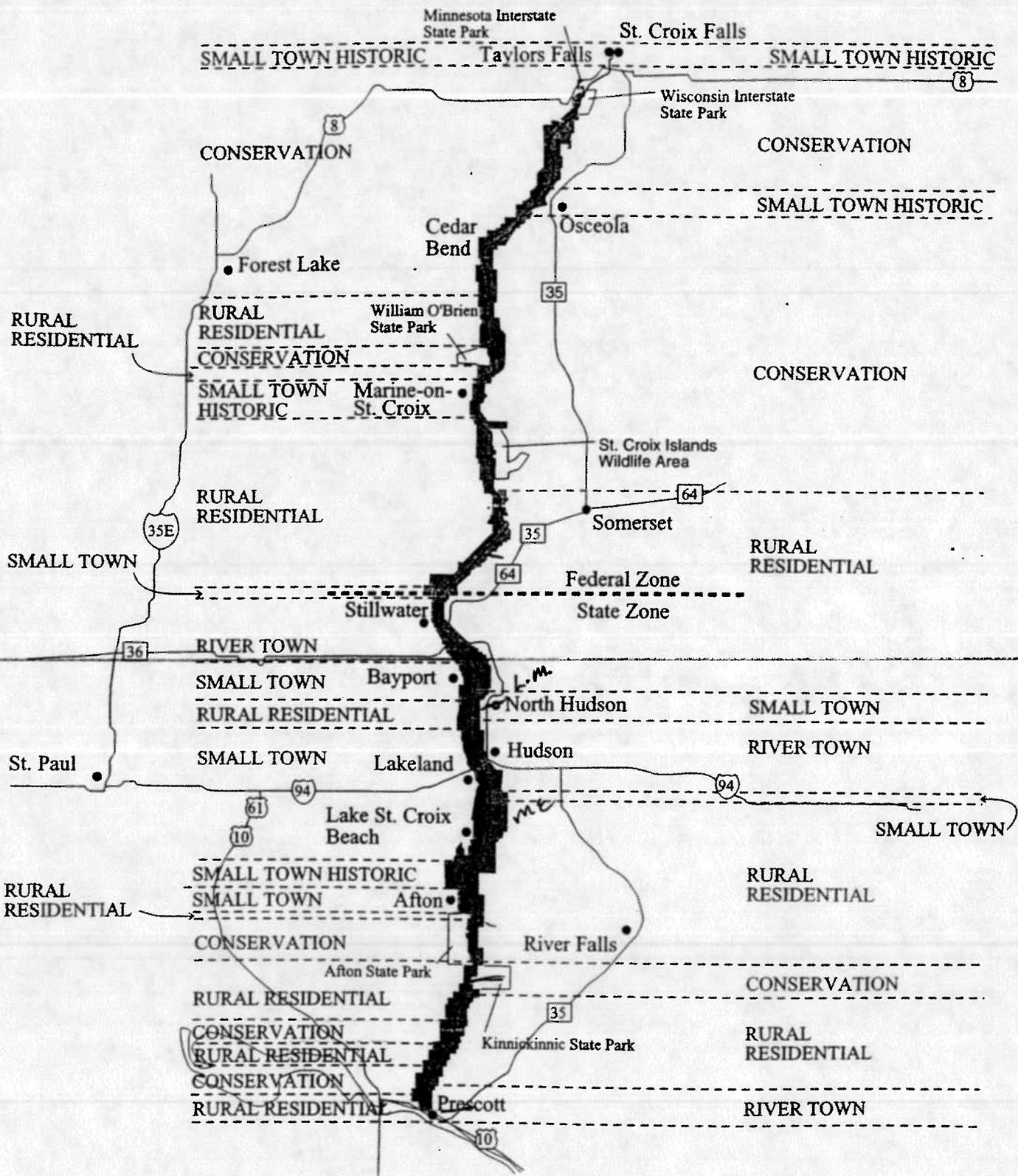
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Land Management Areas Lower St. Croix National Scenic Riverway



000157

- St. Croix River
- Lower St. Croix NSR
- Major Highways



000158



000159



000160

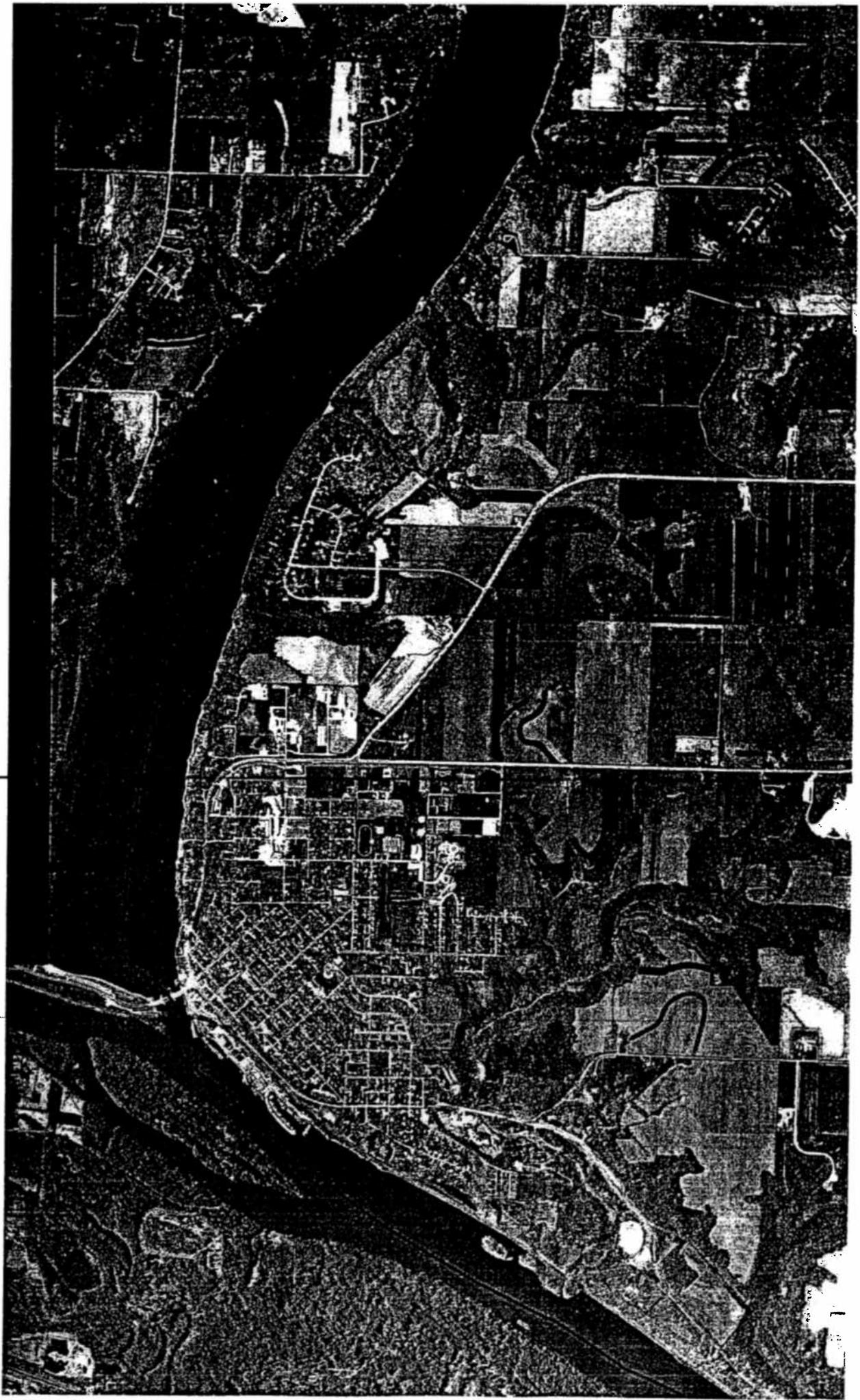


000161





000163



000164

Post, Eunice A.

From: Denny Darnold [ddarnold@ci.hudson.wi.us]
Sent: Monday, August 29, 2005 1:10 PM
To: Post, Eunice A.
Subject: Re: Shoreland/wetland zoning

Eunice,

The city has referred to and regulated the St. Croix River as a river.

Thanks.

Denny Darnold

----- Original Message -----

From: Post, Eunice A.
To: Denny Darnold
Sent: Monday, August 29, 2005 12:20 PM
Subject: Shoreland/wetland zoning

Denny,

For purposes of shoreland/wetland zoning, does Hudson use the St Croix as a river or a lake?

Eunice

000165

08/29/2005

Post, Eunice A.

From: Village of North Hudson [nhvill2@presenter.com]
Sent: Monday, August 29, 2005 12:26 PM
To: Post, Eunice A.
Subject: Re: zoning

Hi Eunice,
All reference as far as I know is to St. Croix River in our Village Municipal Code Book.
Hope that answers your question.

Donna

-----Original Message-----

From: Post, Eunice A.
Date: 08/29/05 12:23:41
To: Village of North Hudson
Subject: zoning

Hey Donna---

Quick question.....

For purposes of shoreland/wetland zoning does N Hudson use the St Croix as a river or a lake?

E

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000166

08/29/2005

Post, Eunice A.

From: Jayne Brand [jbrand@prescottcity.org]
Sent: Monday, August 29, 2005 1:25 PM
To: Post, Eunice A.
Subject: RE: Shoreland/wetland

Eunice,

I have always looked at the St. Croix as a river.

How are things going? It is so great to have a city administrator. He has taken on a lot here when it comes to planning because that is his background. I don't have to attend all of the meetings at night like I use to and I have been able to work on several projects that I have had going for months here.

Hope things are well with you.

Jayne Brand

From: Post, Eunice A. [mailto:Eunice.Post@dnr.state.wi.us]
Sent: Monday, August 29, 2005 11:21 AM
To: Jayne Brand
Subject: Shoreland/wetland

Hey Jayne

For purposes of shoreland/wetland zoning does Prescott use the St Croix as a river or a lake?

E

000167

08/29/2005

Post, Eunice A.

From: Jennifer Shillcox [jennifers@co.saint-croix.wi.us]
Sent: Monday, August 29, 2005 2:59 PM
To: Post, Eunice A.
Subject: RE: Shoreland/wetland

A river!

-----Original Message-----

From: Post, Eunice A. [mailto:Eunice.Post@dnr.state.wi.us]
Sent: Monday, August 29, 2005 12:22 PM
To: Jennifer Shillcox
Subject: Shoreland/wetland

Hi Jenny,

Quick question...

For purposes of shoreland/wetland zoning does the county use the St Croix as a river or a lake?

E

000168

Post, Eunice A.

From: Jim Kleinhans [jkleinha@co.pierce.wi.us]
Sent: Monday, August 29, 2005 3:26 PM
To: Post, Eunice A.
Subject: RE: zoning

I believe we have had this conversation previously but not electronically. The shoreland zoning code lists the St. Croix as a river as does the plat book. The county St. Croix Riverway code refers to it as a river. I don't know that it would make too much difference if we refer to that water body as a lake or a river because the riverway district at least 1,000 feet wide along most of the Pierce County border so the riverway district should cover any filling and grading permits. Have a good week See you on friday.

-----Original Message-----

From: Post, Eunice A. [mailto:Eunice.Post@dnr.state.wi.us]
Sent: Monday, August 29, 2005 12:23 PM
To: Jim Kleinhans
Subject: zoning

Hey Jim

Quick question...

For purposes of shoreland/wetland zoning does Pierce use the St Croix as a river or a lake?

E

000169

08/29/2005

BSS	HT	IS-	Elev	W.L.
11.62	687.79		676.17	W.L.
	4.9		682.89	✓
	2.51		685.39	✓
	2.97		686.39	✓
TP	3.65		685.14	✓
1.04	692.28			
	4.5		687.11	✓
	2.4		687.04	
	16.80		685.14	W.L.

150'	N. 10° E	W. 24° E	-	HIGH	100.00	0.00	152.92
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400'	"	"	"	"	"	"	"
725'	"	"	"	"	"	"	"
810'	"	"	"	"	"	"	"
1000'	N	"	"	"	"	"	"
04-DIR	0.01'	0.01'	1088'				

000171

Waterway and Wetland Handbook

CHAPTER 40

ORDINARY HIGH-WATER MARK (OHWM)

GUIDANCE PURPOSE AND DISCLAIMER

This document is intended solely as guidance, and does not contain any mandatory requirements except where requirements found in statute or administrative rule apply. This guidance does not establish or affect legal rights or obligations, and is not finally determinative of any of the issues addressed. This guidance cannot be relied upon and does not create any rights enforceable by any party in litigation with the State of Wisconsin or the Department of Natural Resources. Any regulatory decision made by the Department of Natural Resources in any matter addressed by this guidance will be made by applying the governing statutes, common law and administrative rules to the relevant facts.

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I. Purpose

The delineation of the ordinary high-water mark (OHWM) is a critical element in the administration of Wisconsin water law and is necessary for an effective water management program. The OHWM is the boundary between riparian owned uplands and the publicly owned beds of natural lakes. It is the boundary of public rights and interest in the waters of navigable streams and lakes except when the water is above the OHWM public rights are "enlarged." When the water is below the OHWM a riparian owner has a qualified right to use the land between the actual water level and the OHWM.

Department field staff determine the OHWM through on-site investigation and analysis of physical and biological indicators on a case-by-case basis.

II. Definition of OHWM in Wisconsin

Although "ordinary high-water mark" was used in a number of Wisconsin Supreme Court cases in the 1800's, the first definition of ordinary high-water mark is found in the Wisconsin Supreme Court case Lawrence v. American Writing Paper Co. (1911), 144 Wis. 556, 562:

...ordinary high-water mark, that is the point up to which the presence and action of the water is so continuous as to leave a distinct mark by erosion, destruction of vegetation, or other easily recognized characteristic.

Three years later the Supreme Court redefined and expanded the definition in Diana Shooting Club v. Husting (1914), 156 Wis. 261, 272:

By ordinary high-water mark is meant the point on the bank or shore up to which the presence and action of the water is so continuous as to leave a distinct mark either by erosion, destruction of terrestrial vegetation, or other easily recognized characteristic.

One of the contentions in the Diana case had been that public rights in navigable waters "consists of nothing more than a right to pass to and from over the open waters" and that a person had "no right to leave the open part of the stream or push into the vegetation" growing through or above the water along the bank or shore. The Supreme Court did not accept this contention, ruling that public rights in navigable waters extend between the boundaries of the ordinary high-water marks and it is immaterial "what the character of the stream or waters is. It may be deep or shallow, clear or covered with aquatic vegetation." The Court then added the wording "on the bank or shore" and the word "terrestrial" to the Lawrence definition to emphasize that the ordinary high-water mark is not at the edge of open water adjacent to aquatic vegetation but on the bank or shore where terrestrial vegetation either begins or is destroyed.

The "distinct mark" must be manifested by "erosion, destruction of terrestrial vegetation or other easily recognizable characteristic"; however only one of the preceding manifestations need be present to qualify as such a mark. The phrase "other easily recognized characteristic" is highly significant since it allows flexibility as to what indicators in the natural environment qualify as the water-established mark.

Diana also stated:

And where the bank or shore at any particular place is of such character that it is impossible or difficult to ascertain where the point of ordinary high-water mark is, recourse may be had to other places on the bank or shore of the same stream or lake to determine whether a given stage of water is above or below the ordinary high-water mark.

This tells us two things: the area below the ordinary high-water mark need not be covered with water at all times, and where no mark can be found, one can look for marks in other areas and transfer the information through stage or elevation readings. No court cases have specified what a reasonable distance is to find the OHWM at another site nor whether marks must be transferred from similar areas. No court decisions have modified the Diana definition. The Diana definition is flexible and gives the Department the latitude to analyze varying physical conditions.

The courts have not upheld OHWM determinations which were not based on biological or physical indicators. In the case State v. McDonald Lumber Co. (1962) 18 Wis. (2d) 173, the state charged that the defendant illegally placed fill on the bed of Green Bay. The state did not attempt to use the Diana definition to prove the fill was below the OHWM of Green Bay because all the adjacent land was disturbed. Instead, the state offered an elevation for the ordinary high-water mark based on Lake Michigan water level records compiled by the Army Corps of Engineers for the period 1860-1959. The state asserted that the average of the high-water levels recorded was 581.0 feet above sea level and thus the ordinary high-water mark was at that elevation. The trial court found McDonald guilty of filling part of the lakebed but refused to order removal of the fill because the location of the ordinary high-water mark, the boundary of the lakebed, was not proved by the state.

The Supreme Court sustained the trial court's decision ruling that "the term ordinary high-water mark has been defined in Diana Shooting Club v. Husting (1914), 156 Wis. 261, 172," and "that the location of such ordinary high-water mark was not proved by the state" by its use of water level records.

III. Public and Riparian Rights

In Wisconsin riparian rights vary in accordance with the nature of the body of water. With respect to the

IV. Determining the Ordinary High-Water Mark

A. What to look for when making an OHWM Determination

1. Biological Indicators:

- a. Mosses: mosses which are located on exposed rocks, stumps, tree roots, etc., are usually considered terrestrial and the lowermost elevation of these mosses is a good indicator of the OHWM. Some water mosses (e.g. Drepanocladus) form long strings and are aquatic and should not be used as indicators of the OHWM.
- b. Lichen: use these indicators with care for determining the OHWM. Use them mainly for recent, relatively short duration high water stage indicators. Extended high water periods eventually will kill and remove various lichen. Types to look for:
 1. Coarse brown lichen - usually lie above extreme high lake stages.
 2. Black - usually removed readily by water inundation.
 3. Orange Lichen - intermediate in their susceptibility to water destruction.
 4. Green Lichen - the lower most elevation of this lichen can indicate the highest water mark in recent years.
- c. Trees: the roots of living trees and shrubs along the shoreline will turn up and away from the water. ~~Exposed bases and roots of older trees with roots growing primarily toward the shoreland on a~~ horizontal plane are usually just above the OHWM if no slumpage has occurred.
 1. Water roots: Willow trees on the bank will put out red-brown water roots. The start of the water roots will be very near the OHWM. Beware of slumpage.
 2. Pancake roots: Birch, maples, tag alder and tamarack will form pancake shaped root mats usually just above the OHWM. Beware of slumpage.
 3. Pipe elbow roots: Birch and maple will curve their roots away from water forming a pipe elbow bend. The bottom of the root as it bends away will be very near the OHWM. Beware of slumpage.
- d. Pollen: pollen - especially pine pollen - often leaves marks on shore (particularly on large rocks) during spring and early summer. Not an indicator when considered by itself but will indicate recent high-water stages.
- e. Large Cattail Mat: The top of large cattail mats are often slightly above OHWM. Be careful of hummocks, floating bogs and mats, but be aware of where they exist in relation to your determination site.
- f. Algae stain: On rocks, stumps, etc. look for algae stain lines. On some rocks etc. it is possible that

you find a algae/lichen stain line. Algae marks should not be used as the sole basis for a OHWM determination. Because of high water stages and wave splash algae can grow above the OHWM.

2. Physical indicators: [other easily identified characteristics]

- a. Ice Scars: on trees, soil, etc. Ice marks are usually above the OHWM. Caution prevails in using these, because floods, wind and/or ice expansion can cause ice marks well above the OHWM. They are a good indication of the proximity of the OHWM and can help in a final determination.
- b. Erosion (from wave wash): try using small bays where large waves from high winds would not wash above the OHWM.
- c. Mudstains and debris: Mudstains on trees, stumps, rocks, etc. give a good indication of the proximity of the OHWM. The OHWM will usually be located below the mudstains and debris.
- d. Water stains on rocks, culverts, seawalls, etc.: Water stains on fixed objects are excellent indicators of the OHWM. Generally there will be three stain lines on the object (from the bottom) a gray band, a band of lighter color, and then another band of gray or black. The OHWM is located at the line between the lighter color band and the top dark band.
- e. Leachate marks in the soil: Dig into the immediately adjoining shoreland. Long-term water levels will sometimes leave stain marks in light colored soils known as mottling. Iron is the main coloring substance of the subsoil. Air is absent or in short supply when soils become saturated or nearly saturated with water. When air is absent in the soil, iron exists in the reduced state which is gray in color. When an air supply is present as in well drained soils, the iron is in an oxidized state which is yellowish or reddish in color. Imperfectly and poorly drained soils are nearly always mottled with various shades of gray, brown and yellow, especially within the zone of fluctuation of the water table. Some mottled colors occur unassociated with poor drainage past or present, therefore, such stains should be carefully compared with other indicators. Remember the highest past water level is not necessarily the OHWM.
- f. Change in soil types: Dig into the soil or take cores looking for a change from organic (peat-muck) to mineral soils. Although a soil developing under water may have a high mineral content (usually from water or wind born addition) a soil with a high or exclusive content of organic matter cannot form under well-drained conditions. The presence of a peat or muck profile is therefore a good indicator of a water level that is perpetually at or above the soil surface and thus of an OHWM.

B. Additional considerations

1. Cattails: don't use cattails as sole indicators of the OHWM. Cattail is a clone plant that can be found above and below the OHWM. It is extremely tolerant to extremes in water conditions.
2. Water crowfoot: extremely tolerant of dry conditions, similar to cattails.
3. Steep, cliff areas: avoid steep cliff areas because slumpage of terrestrial vegetation will undoubtedly occur.
4. Disturbed areas: avoid disturbed areas because OHWM indicators will probably be destroyed or absent. If necessary, determine the OHWM elsewhere and transfer the elevation of the OHWM to the disturbed area.

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5. Wave windrow areas: avoid wave windrow areas because aquatic and terrestrial vegetation may be smothered by wave carried materials (sand).
 6. Trapped water: areas where water is trapped by ice ridges, etc., can indicate an elevated OHWM.
 7. Pollen, algae marks as the sole basis: such marks are usually located above the OHWM. Pollen, especially pine pollen, often leaves yellowish marks particularly on large rocks during spring and early summer.
 8. Averaging elevations of OHWM determinations. Individual determinations at the same location should be within 0.1 ft. in elevation. Do not average elevations.
 9. Winds can cause increased water elevations at ends of long lakes. You may have to return on a calmer day to make an accurate determination of water level with reference to a benchmark. Water levels on the opposite sides of lakes elongated especially in an east and west direction could be effected by prevailing winds. There is therefore a possibility that the OHWM on the east and west ends of such lakes may be at different elevations. If you suspect this to be the case, level work should be tied into U.S.G.S. benchmarks or other reliable datum.
 10. On lakes or flowages which are controlled by a dam, be wary of drawdowns, erratic level control operations, broken or missing flashboards, etc., that have or could affect water levels and thus the OHWM.
 11. When you have a body of water with an inflow and/or an outflow one of the first things to do in an OHWM determination is to check these locations to see if there are any unusual conditions that could affect your conclusions such as blockages of the inlet or outlet, broken flashboards on the outlet dam, etc. It is also a good idea to tour most of the shoreline and note undisturbed areas before proceeding. If a map of the water body is available, these areas should be marked on the map for further investigation.
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12. Remember the highest past water level is not necessarily the OHWM. Whenever possible existing past data on water level reading should be consulted in the determination of the OHWM.
 13. Court decisions usually involve the question: could a prudent person have reached the same conclusion as you did in you OHWM determination?

V. How to Locate and Document the OHWM

1. Ordinary High-Water Mark determinations are to be made according to the definition in Diana Shooting Club vs. Husting 156 Wis. 261 (1914).
2. Check district and area files for previous OHWM determinations on the same waterbody. Also check all existing past water level readings.
3. Determine the OHWM using the physical and biological features (indicators) previously identified. Measure the distance of the indicators above or below the water level on the day(s) of observation. The water level on the day(s) of observation should be referenced to an easily identifiable benchmark (one method is to measure down from a culvert or wall to the water level). This benchmark (a measurement spot) should be carefully described and its exact location recorded in writing on the checklist, so that it can be found with ease at a future date if needed.
4. Find another spot near your first measurement and repeat the process. Take an adequate number of

measurements and notes before reaching a conclusion. Elevations of OHWM indicators should generally be within 0.1 feet of each other.

5. You should tie the OHWM elevation into a benchmark of known elevation. The checklist has a space for the elevation of the OHWM. This information could be especially useful when it is necessary to transfer the elevation of an OHWM to an area where there is no distinct mark. The checklist could be consulted to see if there are any OHWM determinations near the site where there was no mark. Then pursuant to Diana, the elevation can be transferred to the site where an OHWM determination is needed.
6. If early aerial photographs or maps of the area exist, they will serve as excellent evidence to support the location of a former shoreline which existed prior to disturbance. You can locate these through local Soil Conservation Services (SCS) offices, the Tomahawk DNR office and the Department of Transportation's Highway Testing Lab in Madison.
7. If you need assistance after exhausting district resources contact the Water Regulation Section.

VI. Educational Materials

There are three pamphlets produced by the Department which should be useful in educating the public on the OHWM and Wisconsin water law:

Wisconsin's Water Regulation Programs Work for You provides a general outline of water regulation permit program.

Public or Private I - Navigability discusses the concept of navigability and how it affects private rights.

Public or Private II - The Ordinary High-Water Mark discusses the relationship of the OHWM to private and public rights.

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CORRESPONDENCE/ MEMORANDUM

STATE OF WISCONSIN

DATE: September 19, 1983

FILE REF: 3550
(WMC)

TO: District Directors

FROM: Robert W. Roden

PMMS Response

Put in: Chapter 40, Water Regulation Handbook
Chapter 15, Floodplain Shoreland Management Guidebook

Distribution: All Water Management and Floodplain Staff

SUBJECT: Distinction Between the Terms: "Ordinary high-water mark", "Normal high-water elevation", and "High Water Mark".

1. Are the terms "normal high-water mark" and "ordinary high-water mark" synonymous? If so, why was "normal" changed to "ordinary" in Chapter 330, Laws of 1981?

As used in s. 59.971, 1979, Stats., the phrase "normal high-water elevation" is synonymous with the phrase "ordinary high-water mark." The Department has consistently interpreted the phrase "normal high-water elevation" in s. 59.971 to mean the same as "ordinary high-water mark," and the Wisconsin Supreme Court has never indicated (or even hinted) that "normal high-water elevation" is something different than "ordinary high-water mark" (either before or after the enactment of Chapter 614, Laws of 1965, which created s. 59.971, Stats.)

We have no idea why the drafter of Chapter 614, Laws of 1965 (which created s. 59.971) used the phrase "normal high-water elevation" in s. 59.971 in the first place, since the Wisconsin Supreme Court has used the terminology "ordinary high-water mark" consistently since 1911, when the term was first defined in Lawrence vs. American Writing Paper Company, 144 Wis. 556 (1911). It seems reasonable to assume thereby the reasons for changing "normal" to "ordinary" (and "elevation" to "mark") in Chapter 330, Laws of 1981, were:

- a. To make the statutory language identical to the terminology used by the Wisconsin Supreme Court; and
 - b. To avoid confusion with the concept of mean (or average) water level which is sometimes described as the "normal stage of water" or the "normal water elevation." See, for example Polebitzke vs. John Week Lumber Company, 163 Wis. 322, 325-326 (1916).
2. What is the distinction between "ordinary high-water mark" and "high watermark"? If there is no distinction, is the statute language flawed?

There is a distinction between the concept of "ordinary high-water mark" and the concept of "high watermark" (or "high-water mark"). However, there may be no practical distinction when it comes to applying the two concepts to a particular body of water at a particular time. "Ordinary high-water

mark" is defined in State vs. McFarren, 62 Wis. 2d 492, 498 (1974) as "the point on the bank or shore up to which the presence and action of water is so continuous as to leave a distinct mark either by erosion, destruction of terrestrial vegetation, or other easily recognized characteristic."

The phrase "high watermark" (or "high-water mark") refers to the mark left by flood waters or several years of high groundwater causing the water level to increase to a substantially higher level.

Glacial pothole lakes were apparently singled out for special treatment in s. 59.971 because these high water levels in glacial pothole lakes usually remain above the lower "ordinary high-water mark" for several years or more. It was intended that shoreland zoning should apply to areas within 1000 feet of the "high watermarks" of these glacial pothole lakes because often the lower "ordinary high-water marks" would be inundated and could not be located. After the floodwater or groundwater stabilizes to a constant elevation, there should be no difference between this elevation and the ordinary high-water mark.

As a reminder, one should be aware of the fact that a body of water need not be a glacial pothole for this situation to occur on. Many lakes in this state are subject to substantial fluctuations in their water level to the extent that new ordinary high water marks are established. The fact that glacial potholes are specifically mentioned in the statute is because they are typically more prone to these fluctuations than other lakes.

RWR:LW:sm

Reviewed by:

Bill Marlett
Linda Wymore
Scott Hausmann
Larry Larson

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CORRESPONDENCE/ MEMORANDUM

STATE OF WISCONSIN

DATE: June 14, 1984
(WMC)

3500

TO: District Directors

FROM: Robert W. Roden - WRZ/5

PMMS Response
Put in: Chapter 40, Water Regulation Handbook

Distribution: All Program Staff

SUBJECT: Operation of Motor Vehicles in Water Prohibited

We have been asked if operation of a motor vehicle upon the exposed bed of a lake or stream under low water conditions is a prohibited activity under section 30.29 Wis. Stats.

Section 30.29(2) states no person may operate a motor vehicle in any navigable waters of the state with the exceptions identified in 30.29(2). Review of the Legislative history of 30.29 shows that the term in any navigable waters is meant to include the bed of any water of the state below the OHWM. Therefore, operation of a motor vehicle on the exposed bed below the OHWM, subject to the exceptions of 30.29(3), could be regulated under 30.29(2) and the operator subject to enforcement and penalty under 30.29(4).

~~It should also be noted that State v. McFarren (1974) 62 Wis. 2d 492, points out:~~

A riparian owner has a qualified right to the land between the actual water level and the ordinary high water mark; he may exclude the public therefrom but may not interfere with the rights of the public for navigable purposes.

Therefore, any operation of a motor vehicle upon the exposed bed of a lake or stream would be subject to the consent of the affected riparian owner(s). Riparian owners may deny access to the exposed bed and prosecute an operator for trespass if they so desire. They may not, however, deny access by the installation of a fence or similar physical structure constructed or placed below the ordinary high water mark unless a permit has been issued under 30.12.

Reviewed By: John Coke
Scott Hausmann
Mike Cain

CORRESPONDENCE/ MEMORANDUM

STATE OF WISCONSIN

Date: July 30, 1984

File Ref: 3500
(WMC)

To: District Directors

From: Robert W. Roden

PMMS Response

Put in: Chapter 40, Water Regulation Handbook

Distribution: All Program Staff All Conservation Wardens

Subject: Operation of Motor Vehicles in Water Prohibited

Upon further discussion with the Bureaus of Legal Services and Law Enforcement concerning the legislative history of ss. 30.29, it has been determined that the June 14, 1984, memo on this subject was in error. Therefore, the June 14, 1984, memo on this subject is hereby rescinded and is to be replaced by the following:

Section 30.29(2), Statutes, states no person may operate a motor vehicle in any navigable waters of the state with the exceptions identified in ss. 30.29(3). The legislative intent in using the term "in any navigable waters" was to specifically exclude regulation of motor vehicles on the exposed beds. Therefore, as long as the vehicle is not actually operated in the water, such activity would not be regulated under ss. 30.29.

It should also be noted however that State v. McFarren (1974) 62 Wis. 2d 492, points out:

A riparian owner has a qualified right to the land between the actual water level and the ordinary high watermark; he may exclude the public therefrom, but may not interfere with the rights of the public for navigable purposes.

Therefore, any operation of a motor vehicle upon the exposed bed of a lake or stream would be subject to the consent of the affected riparian owner(s). Riparian owners may deny access to the exposed bed and prosecute an operator for trespass if they so desire.

Reviewed by: John Coke
Scott Hausmann
Mike Cain
Dale Morey

CORRESPONDENCE/ MEMORANDUM

STATE OF WISCONSIN

DATE: May 15, 1985

3550
(WMC)

TO: District Directors

FROM: George E. Meyer - AD/5

PMMS Response

Insertion: Chapter 40, Water Regulation Handbook

Distribution: Program Staff
All Conservation Wardens

SUBJECT: Operation of Motor Vehicles in Water Prohibited

We have been provided with additional information that indicates the July 30, 1984 memo on this subject was in error. The original proposal to create section 30.29, Wis. Stats., prohibited operation of a motor vehicle "in the waters of the state or on the bed of any water of the state below the high water mark." Section 30.29(2) now states "in any navigable waters of the state." Our previous memo of July 30, 1984 was based on information that the reason for the change in section 30.29(2) was to exclude regulation of vehicles operated on exposed beds. We have now been informed that the reason for the change to drop "on the bed..." was simply due to the fact that the term "in any navigable waters" includes the exposed bed below the ordinary high water mark and the original wording was simply repetitious.

Therefore, our policy shall be that operation of a motor vehicle on the exposed bed below the OHWM, ~~subject to the exceptions of 30.29(3), is regulated under 30.29(2) and the operator subject to enforcement and penalty under 30.29(4).~~

It should also be noted that State v. McFarren (1974) 62 Wis. 2d 492, points out:

A riparian owner has a qualified right to the land between the actual water level and the ordinary high water mark; he may exclude the public therefrom but may not interfere with the rights of the public for navigable purposes.

Therefore, any legal operation of a motor vehicle upon the exposed bed of a lake or stream under the exceptions identified in 30.29(3) would be subject to the consent of the affected riparian owner(s). Riparian owners may deny access to the exposed bed and prosecute an operator for trespass if they so desire.

Reviewed By: John Coke
Scott Hausmann,
Mike Cain
Dale Morey

JC:slh
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does not address what has turned out to be the major legal issue presented in the case.

WILLIAM G. CALLOW, J. (*concurring*). Although I agree with the result reached by the majority, I write separately to express my concern with this court's prior adoption, in *State v. Dyess*, 124 Wis. 2d 525, 370 N.W.2d 222 (1985), of a single test for harmless error. In *Dyess* this court adopted a rule recognizing there was but a single test for harmless error without that issue having been raised, briefed, or argued by the parties. Because of the circumstances under which the single test for harmless error was adopted, I believe the test for harmless error is ripe for review.

I do not join Justice Day's concurrence because I reserve judgment on the proper harmless error test until this court is presented with a case in which the validity of the *Dyess* harmless error test is properly raised.

STATE of Wisconsin, Plaintiff-Appellant,

v.

Thomas D. TRUDEAU, Trudeau Development, Inc., Trudeau Construction, Inc., Superior Development, Inc., Defendants-Respondents-Petitioners,

The ASHLAND COUNTY BOARD OF ADJUSTMENT, Larry Hildebrandt, Ashland County Zoning Administrator, Defendants-Respondents. †

Supreme Court

No. 85-0818. Argued April 28, 1987.—Decided June 11, 1987.

(Review of a decision of the court of appeals.)

(Also reported in 408 N.W.2d 337.)

1. Nuisances § 68*—abatement of public nuisances—flood-plain zoning violations—cause of action of state. State, by attorney general, is authorized to bring actions to enjoin public nuisance whenever there exists violation of any local floodplain zoning ordinance, since to regard certiorari as exclusive means of review would render language of statute authorizing such abatement as meaningless, which is construction courts should avoid (Stats § 87.30(2)).
2. Navigable Waters and Navigation § 67*—lakebeds—title. Title to lakebeds passed to state upon statehood.
3. Appeal and Error § 869*—findings of trial court—facts fitting legal standard—question of law.

† Motion for reconsideration denied.

* See Callaghan's Wisconsin Digest, same topic and section number.

Question of whether facts in particular case fulfill particular legal standard is question of law which reviewing court will review.

4. Trial § 25*—discussion of court—mistaken view of law—basis of decision.
Where trial court bases its decision on mistaken view of law, its decision constitutes abuse of discretion as matter of law.
5. Navigable Waters and Navigation § 1*; Waters § 2*—lakebed—navigability—necessity.
In order to be considered lakebed, area need not be navigable and may be heavily vegetated by plants rising far above water.
6. Waters § 88*—public trust—rights.
Rights Wisconsin citizens enjoy with respect to bodies of water held in trust by state include enjoyment of natural scenic beauty as well as purposes of navigation, swimming and hunting.
7. Waters § 86*—lakebed title—ordinary high water mark—determination.
In action by state against developers for violation of floodplain zoning ordinance, trial court erred in holding that property upon which development was constructed was not lakebed, where there was positive and uncontradicted testimony as to level of ordinary high water mark of Lake Superior, that project site was and is hydraulically connected to and is in fact part of Lake Superior and where trial court failed to make any findings as to various elevations of project site.

REVIEW of a decision of the Court of Appeals.
Affirmed.

For the defendants-respondents-petitioners there were briefs by *Samuel J. Recht, David L. Peterson, Susan LaCava, Charles & Brady, Milwaukee, Ronald*

* See Callaghan's Wisconsin Digest, same topic and section number.

E. Martell, Gregory M. Bistram, Timothy C. Cook and Moore, Costello & Hart, St. Paul, MN, and oral argument by Samuel J. Recht and Ronald E. Martell.

For the plaintiff-appellant the cause was argued by *Thomas L. Dosch*, assistant attorney general, with whom on the brief was *Bronson C. La Follette*, attorney general.

STEINMETZ, J. The first issue as presented by the parties is whether the land lying below the ordinary high water mark (OHWM) of Lake Superior, which is naturally subject to the flow of water to and from the lake, is part of the bed of Lake Superior even though the water which inundates the site is not navigable. The Ashland county circuit court, the Honorable William E. Chase, held that the disputed property was not lakebed because the plaintiff, state of Wisconsin, failed to prove that the condominium project site was navigable. The court of appeals, in an unpublished decision, reversed holding that the actual navigability of the site is irrelevant if the land lies partly under the OHWM of Lake Superior and found, on the basis of what it termed positive, uncontradicted testimony, that the site is partly the bed of Lake Superior because it is naturally below the ordinary high water mark of the lake and subject to the ebb and flow of the lake.

The second issue is whether the court of appeals committed error in supplementing the findings of the trial court on the issue of the natural connection of the project site to Lake Superior. The trial court failed to make any findings on the relative elevations of the project site and the ordinary high water mark of Lake Superior. Although the trial court found that the project site was subject to inundation by water from

Lake Superior, it dismissed the state's lakebed claim on the basis that the site was not navigable. The court of appeals found that there was evidence that part of the site was under the OHWM of Lake Superior and that there was a water connection between the site and the lake with water flowing between the site and lake, and, therefore, remanded the case to the trial court to determine what part of the site if any is below the OHWM.

The third issue is whether doctrines of accretion or reliction have any application to a dispute over land not submerged by the waters of Lake Superior when those waters reached the elevation of the lake's ordinary high water mark. The trial court found that the doctrine of reliction operated to give title to the defendants, Thomas D. Trudeau, Trudeau Development, Inc., Trudeau Construction, Inc., and Superior Development, Inc., real estate developers, because the connection of the site to the lake had receded to the point of rendering use of the land as an incident of navigation improbable. The court of appeals held that the doctrine of reliction has no application to the submerged lands.

The fourth issue is whether under the facts of this case certiorari review under sec. 59.99, Stats.,¹ is the

¹Sec. 59.99(1) and (10), Stats., provides:

"59.99 County zoning, adjustment board, (1) APPOINTMENT, POWER. The county board may provide for the appointment of a board of adjustment, and in the regulations and restrictions adopted pursuant to sec. 59.97 may provide that such board of adjustment may, in appropriate cases and subject to appropriate conditions and safeguards, make special exceptions to the terms of the ordinance in harmony with its general purpose and intent and in accordance with general or specific rules therein contained. Nothing in this subsection shall preclude the granting of special exceptions by the county zoning

state's exclusive means of challenging a floodplain zoning variance. The trial court held that certiorari review was the state's exclusive means of challenging a decision to grant a floodplain zoning variance and found that the state had failed to pursue review within the time provided by the statute. The court of appeals held that sec. 87.30(2),² provided the state with

agency designated under sec. 59.97(2)(a) or the county board in accordance with regulations and restrictions adopted pursuant to sec. 59.97 which were in effect on July 7, 1973 or adopted after that date."

"(10) CERTIORARI. Any person or persons, jointly or severally, aggrieved by any decision of the board of adjustment, or any taxpayer, or any officer, department, board or bureau of the municipality, may, within 30 days after the filing of the decision in the office of the board, commence an action seeking the remedy available by certiorari. The court shall not stay proceedings upon the decision appealed from, but may, on application, on notice to the board and on due cause shown, grant a restraining order. The board of adjustment shall not be required to return the original papers acted upon by it, but it shall be sufficient to return certified or sworn copies thereof. If necessary for the proper disposition of the matter, the court may take evidence, or appoint a referee to take evidence and report findings of fact and conclusions of law as it directs, which shall constitute a part of the proceedings upon which the determination of the court shall be made. The court may reverse or affirm, wholly or partly, or may modify, the decision brought up for review."

²Section 87.30(2), Stats., provides as follows:

"(2) ENFORCEMENT AND PENALTIES. Every structure, building, fill, or development placed or maintained within any floodplain in violation of a zoning ordinance adopted under this section, or sec. 59.97, 61.35 or 62.23 is a public nuisance and the creation thereof may be enjoined and maintenance thereof may be abated by action at suit of any municipality, the state or any citizen thereof. Any person who places or maintains any structure, building, fill or development within any floodplain in violation of a zoning ordinance adopted under this section, or sec. 59.97, 61.35 or 62.23 may be fined not more than \$50 for each

an alternative means of challenging a floodplain zoning variance.

This action concerns a parcel of land being developed for a 48-unit, eight-building, residential condominium project. Six of the units in one building were constructed prior to the commencement of this action and substantial sums of money have been invested in the project.

The state of Wisconsin commenced this action on August 16, 1984. The various claims in the amended complaint relate to two sets of parties: a group of real estate developers and several local zoning officials or agencies. The Ashland County Board of Adjustment, Larry Hildebrandt, Ashland County Zoning Administrator and Thomas D. Trudeau, Trudeau Development, Inc., Trudeau Construction, Inc. and Superior Development, Inc. (the developers) were alleged to have violated sec. 30.12, Stats.³ by allowing construc-

tion. Each day during which such violation exists is a separate offense."

³Sec. 30.12(1)(b), (2), (3)(a) 4 and (b), Stats., provides in relevant part:

"30.12 Structures and deposits in navigable waters prohibited; exceptions; penalty. (1) GENERAL PROHIBITION. Except as provided under sub. (4), unless a permit has been granted by the department pursuant to statute or the legislature has otherwise authorized structures or deposits in navigable waters, it is unlawful:

"(b) To deposit any material or to place any structure upon the bed of any navigable water beyond a lawfully established bulkhead line.

"(2) PERMITS TO PLACE STRUCTURES OR DEPOSITS IN NAVIGABLE WATERS; GENERALLY. The department, upon application and after notice as provided under sec. 31.06 and hearing, may grant to any riparian owner a permit to build or maintain for

tion and constructing condominiums and a parking lot on the bed of Lake Superior.

The developers obtained a variance at a hearing before the Ashland County Board of Adjustment on January 13, 1984. The state did not seek review of the decision pursuant to sec. 59.99(1), Stats., within 30 days. The state later commenced an action against the developers alleging that the construction was not, could not have been, authorized and lawful. The trial court dismissed all of the state's claims after a trial.

According to the state, the first meeting regarding the site was on November 1, 1983, at the site. After being discouraged by the Department of Natural Resources (DNR) representative, the developers withdrew their existing plans. The DNR did not receive any other plans. The next the DNR heard of the matter was when it was notified of the variance hearing before the Ashland County Board of Adjust-

ment. The owner's use of a structure otherwise prohibited by statute, if the structure does not materially obstruct navigation or reduce the effective flood flow capacity of a stream and is not detrimental to the public interest. The procedures in this subsection do not apply to permits issued under sub. (3).

"....

"4. Place crushed rock or gravel, reinforced concrete planks, adequately secured treated timbers, cast in place concrete or similar material on the bed of a navigable stream for the purpose of developing a ford if an equal amount of material is removed from the stream bed.

"(b) A person who seeks to place structures or deposits under par. (a) shall apply to the department for a permit. The department shall review the application and inspect the location involved. The department may disapprove the application if it finds the proposed structure or deposit will materially impair navigation or be detrimental to the public interest. The department shall issue the permit or notify the applicant in writing of the disposition of the application."

ment in January, 1984. By that time, the project pilings were in, walls were up and deck floors were in so that the variance was granted after the fact of partial construction.

The state requested injunctive relief requiring the removal of structures found to be in violation of sec. 30.12, Stats., or local zoning ordinances, the prohibition of further construction on the lakebed, and an order vacating the land use permit and floodplain zoning variance given to the developers.

The controversy concerns a real estate development known as the Marina Point Condominiums on Madeline Island in Ashland county, Wisconsin. The developers' plans are to build 48 condominiums in a series of clusters. The first set of six condominiums, known as Cluster A, has already been built and the units placed for sale. The building site is immediately across Old Fort Road from the Madeline Island marina and immediately south of Mondamin Trail. A golf course is adjacent to the site on its inland side. Cluster A has been built on stilt-like pilings and much of the land underlying the structure and the remainder of the site is covered by standing water which was as deep as 1.2 feet in October, 1984. The water on the site is connected by several culverts to Lake Superior, at least one running under Old Fort Road into the marina and another running under Mondamin Trail. (See Exhibit 1 attached to this opinion.)

There is generally some water on the project site and some aquatic-type vegetation. The project site itself is not "navigable" in the sense of paddling a canoe. The source of the water on the property is not entirely clear. There was evidence received that 1.3 million gallons of water per week drained from the golf course onto the project site in the summer. Water

also came through the culverts from Lake Superior when high winds arose. Both parties agree the culverts' purpose was to allow water to drain to Lake Superior rather than accumulate on the project site. The state argues that the culverts were not placed under the Old Fort Road to flood the developers' project but to allow water accumulating there to reach the lake. If the culverts were not there, it is argued the project site would flood and run across the road to Lake Superior or the site would accumulate water and become lakebed itself.

The trial court found that water flows both ways through these culverts, sometimes draining the Marina Point Condominiums site into the main body of Lake Superior and sometimes further flooding the site with water coming in from the marina.

The trial court made no finding as to the elevation of the ordinary high water mark (OHWM) of Lake Superior or of the elevations of the surface of the water or the underlying land at the Marina Point Condominiums site as compared to the OHWM of Lake Superior. The trial court found there was "no distinct mark on the project property" and that the disputed property was separated from Lake Superior as a navigable body of water by Old Fort Road, an artificial barrier. The state introduced the only evidence regarding the OHWM of Lake Superior.

[1]

Contrary to the developers' argument, sec. 59.99(10), Stats., is not the exclusive means of state jurisdiction over floodplain zoning. Section 87.30 and sec. NR 116.22(4), Wis. Adm. Code, provide that the state may seek abatement of violations of floodplain

zoning.⁴ Section 87.30(2) establishes a cause of action to enjoin a public nuisance whenever there exists a violation of any local floodplain zoning ordinances. The state of Wisconsin, by the attorney general, is authorized to bring actions to enjoin such nuisances. To regard certiorari as the exclusive means of review would render the language of sec. 87.30(2), Stats.,

⁴Sec. NR 116.22(4), Wis. Adm. Code provides as follows:

"(4) ENFORCEMENT. The department shall assist municipalities in achieving a consistent statewide approach to floodplain enforcement. This assistance may include, but is not limited to, the measures listed in this subsection.

"(a) The department may request that corrective action be taken by the municipality where construction is occurring in a floodplain area which is either contrary to an existing floodplain zoning ordinance or which would be contrary to an approved floodplain zoning ordinance. Such corrective action may include, where appropriate, the following:

"1. Active prosecution of violations of the floodplain zoning ordinance;

"2. An injunction to stop construction until an adequate floodplain zoning ordinance can be adopted and approved by the department; and

"3. Adoption of an adequate floodplain zoning ordinance and submittal to the appropriate department district office for approval.

"(b) The department may seek an injunction to stop construction in the floodplain area until an adequate floodplain zoning ordinance is adopted and approved.

"(c) The department may seek an injunction to stop construction in the floodplain area when the construction would violate an approved floodplain zoning ordinance or the provisions of this chapter.

"(d) The department may seek adoption of an adequate floodplain zoning ordinance in accordance with the provisions of sec. 87.30(1), Stats., or an upgrading of a floodplain zoning ordinance in accordance with s. NR 116.06.

"(e) The department may seek an injunction for abatement or removal or a fine or both for any violation of a floodplain zoning ordinance in accordance with sec. 87.30(2), Stats."

meaningless which is a construction the courts should avoid. *Associated Hospital Service v. Milwaukee*, 13 Wis. 2d 447, 463, 109 N.W.2d 271 (1961).

Section 30.12 and ch. 30, Stats., generally codify a number of common law doctrines regarding the ownership of the beds of navigable waters. This court stated in *Illinois Steel Co. v. Bilot*, 109 Wis. 418, 425, 84 N.W. 855 (1901):

"The title to the beds of all lakes and ponds, and of rivers navigable in fact as well, up to the line of ordinary high-water mark, within the boundaries of the state, became vested in it at the instant of its admission into the Union, in trust to hold the same so as to preserve to the people forever the enjoyment of the waters of such lakes, ponds, and rivers, to the same extent that the public are entitled to enjoy tidal waters at the common law." (Emphasis added.) See also *State v. McDonald Lumber Co.*, 18 Wis. 2d 173, 176, 118 N.W.2d 152 (1962).

This is as true of the beds of the Great Lakes as it is of lesser inland waters.

In *Muench v. Public Service Comm.*, 261 Wis. 492, 501-02, 53 N.W.2d 514, 55 N.W.2d 40 (1952), the court stated:

"At an early date in its history the Wisconsin court put itself on record as favoring the trust doctrine, that the state holds the beds underlying navigable waters in trust for all of its citizens, subject only to the qualification that a riparian owner on the bank of a navigable stream has a qualified title in the stream bed to the center thereof."

[2]

Title to the lakebeds passed to the state upon statehood. *Pollard's Lessee v. Hagan*, 44 U.S. (3 How.) 212, 230 (1845) stated: