STATE OF INDIANA

COUNTY OF MARSHALL

IN THE MARSHALL CIRCUIT COURT

CALENDAR TERM 2021

MARVIN HOUIN, DIANE HOUIN, CHARLIE HOUIN, HOUIN GRAIN FARMS, LLC and MARILYN J. RALSTON by power of attorney MARVIN HOUIN
Plaintiffs

v.

INDIANA DEPARTMENT OF NATURAL RESOURCES
Defendant

CAUSE NO:

FILED
May 18, 2021
IN OPEN COURT
MARSHALL CIRCUIT COURT
RE

50C01-1702-CC-76

JUDGMENT FOR PLAINTIFFS

This matter came before the Court for a bench trial beginning on January 19, 2021, on the Plaintiffs' Complaint.

All Plaintiff representatives, Marvin Houin, Diane Houin and Charlie Houin, appeared in person and by counsel, Brianna Schroeder and Todd Janzen. The Defendant State of Indiana Department of Natural Resources ("DNR") appeared by counsel, Kelly Earls and Courtney Abshire. Following the trial, the Court took all matters under advisement. The Court, having now considered the pleadings, the evidence and written closing arguments, and being duly advised in the premises, enters the following findings, conclusions and orders:

FINDINGS

1. Plaintiffs, Marvin Houin; his wife, Diane Houin; and their son, Charlie Houin, own and operate Houin Grain Farms, LLC in Marshall, St. Joseph and Kosciusko counties. Marvin Houin also has power of attorney over his mother-in-law, Marilyn Ralston, who owns some of the land farmed by Houin Grain Farms, LLC. The Plaintiffs are referred to collectively as "the Houins".

2. The Houins farm approximately 4,890 acres of property, spread out over a 35 mile radius. Some of the fields farmed by the Houins are located in the Lake of the Woods watershed. For purposes of this litigation, these fields are referred to as the "affected fields."

3. The Lake of the Woods is a public, freshwater lake located in Marshall County.

4. The Houins grow corn and soybeans on eight fields surrounding the Lake of the Woods. The Houins allege the DNR's mismanagement of the dam at the lake caused damages in the affected fields and are seeking recovery for damaged crops, damaged field drainage tile, and diminution in property value. The DNR denies any responsibility.

5. Marvin Houin has his bachelor's and master's degrees in agricultural education from Purdue. Marvin taught agriculture and horticulture classes at Purdue University and numerous high schools for 15 years. This included classes about growing crops, evaluating different soil types and

budgeting for a farm. Marvin has lived on and farmed ground in this local area for over 43 years.

6. Charlie Houin is the general manager of Houin Grain Farms, LLC. He grew up on the farm and has a degree from Purdue in agricultural economics.

7. The Houins raise corn, soybeans, and wheat. They rotate their crops and use hybrid seeds selected for their performance characteristics.

8. There are eight farm fields at issue in this case, totaling approximately 407 acres: Ralston-Ruppert (20 acres), Ralston-Reese (120 acres), Bean-East of House (31 acres); Ralston-Redman (110 acres); Ralston-Marks (38 acres); Bean-South Much (45 acres); Ralston-Coffel (17 acres); Ralston-Behind House (26 acres) (collectively, the "affected fields").

9. At the time of trial, Marilyn Ralston owned the "Ralston" fields with a life estate going to her children (including Plaintiff Diane Houin). Ms. Ralston owned all six "Ralston" farms from 2009 through the date of trial. Richard Bean's family owns the "Bean" fields. The Houins cash rent the affected fields from Ralston and Bean.

10. The affected fields are located on the west side and south side of the Lake of the Woods and are within the watershed of the Lake of the Woods meaning they naturally drain into the lake.

11. The Houins also farm other fields on the east side of the Lake of the Woods which are not a part of the Lake of the Woods watershed. These

other fields are within five miles of the affected fields and are used for crop yield comparisons. These are known as the "non-affected fields".

12. The Houins use the latest farming precision technology, including GPS equipment, iPads, and tracking software that records and stores everything from seed spacing to fertilizer application to soil types to yield. The Houins use variable rate seeding, meaning the seeding rate adjusts depending on the soil type. The Houins use satellite imagery and drones to determine the health of a soybean or corn plant. Aerial scouting includes NVDI light technologies that show different chlorophyll levels and moisture problems. The Houins use GPS information (accurate to under an inch) to determine the harvest yield on each field. Their combine equipment measures the location and yield every two seconds as it goes across a field. It records moisture, elevation, yield, and engine performance at all times. This gives the Houins a complete picture of how every part of every field is performing.

13. The affected fields and the Lake of the Woods are located in a relatively flat plain with very little elevation change between the fields and the lake.

14. Any change in the level of the water in the lake affects the ability of the nearby affected fields to drain following any rain event. When the lake level rises, rain and excess moisture have more difficulty draining from the affected fields. For this reason, it is most advantageous for the Houin's farming operation if a lower lake level is maintained.

15. However, Lake of the Woods is a public, freshwater lake and is surrounded by residential waterfront homes. A higher water level in the lake is more advantageous to the residential property owners and the boating public for their use in boating, swimming, fishing, etc.

16. Historically, there have been tensions between the agricultural community's desire for lower lake levels and the residential community's desire for higher lake levels.

17. To attempt to address these competing tensions, a water control structure (hereinafter "the dam") was constructed in 1957 at the sole outlet of the lake pursuant to an order from the Marshall Circuit Court.

18. This dam can be lowered (or "closed") thereby holding more water in the lake resulting in a higher lake level; or raised ("opened"), allowing water to pass underneath it resulting in a lower lake level.

19. The Marshall County Circuit Court set the legal average lake level in 1986, issuing what is known as the "1986 Lake Level Order."

20. With the agreement of the residential lake property owners and the agricultural interests near the lake, the 1986 Lake Level Order set two average lake levels for different periods of the year. An average lake level of 803.85 feet (elevation, mean sea level datum), was established for the time period of May 15 to September 15. This was to be accomplished by lowering, or closing, the dam. From September 15 to May 15 the dam should be opened to obtain the lower sill elevation of 802.85 feet

(elevation, mean sea level datum) which served as the low water control level.

21. The higher summer lake level allowed the boaters, swimmers and fishermen better recreational opportunities while the lower lake levels in the spring and fall allowed the farmers better opportunities to get farm equipment into the affected fields for planting and harvesting.

22. The 1986 Lake Level Order also required DNR to facilitate the repair, rebuilding or replacement of the 1957 dam structure to accomplish the ordered dual lake levels.

23. The 1986 Lake Level Order did not require the DNR to operate the dam.

24. The operation, or movement, of the dam is manually controlled. These manual controls are kept locked with two padlocks and both locks must be removed to raise or lower the dam. The key to one lock was traditionally held by a representative of the residential lake interests and the key to the other lock was held by a representative of the agricultural interests. Both representatives would have to meet at the dam at the same time to raise or lower the dam. These locks and keys were provided by the DNR, who also kept a set of the keys.

25. Beginning in 1986, the residential interests and the local agricultural interests worked together to operate the dam. In addition to the twice per year mandated changes (May 15th and September 15th), in the summer months they also operated the dam according to local rain conditions.

They opened the dam in proportion to the rate at which the lake water was rising. When the water went one-tenth of a foot over the legally established level, the dam was opened to the first notch. If the lake level continued to rise, they would open the dam completely. The dam would be left open until the lake level fell one-tenth of a foot below the legally established level. This procedure (opening the dam when the water went 1.2 inches over the legal level and leaving it open until the water fell 1.2 inches below the legal level), coupled with the groups' operation in accordance with local weather conditions, led to an average water level that was close to the mandated summer legal average level of 803.85 feet. The affected fields were not damaged by this mode of operation. The field tile system was able to work as designed to drain the soil, allowing crops to be planted, tended, and harvested.

26. The affected fields have subsurface drainage tiles installed to increase the fields' ability to carry away excess water. Tiles are generally set between 30 and 50 feet apart. The tiles are perforated, so that when water percolates through the soil, the tile will collect the water and carry it away through a system of laterals and main tiles, through the open ditches, and into the Lake of the Woods. The tile is set at a slight slope to give about one tenth of an inch grade per foot to ensure the water flows downhill into the ditches. The tile outlets (where the end of the tile empties into the ditch) in the affected fields are set to outflow at the 803.85 feet elevation.

27. The water level in the ditches which drain the affected fields is always the same level as the lake level. When the lake level exceeds 803.85, the water level in the ditches exceeds 803.85 and water cannot drain from the mouth of the tiles. The tiles fill with standing water and the fields cannot be drained of any rainfall.

28. When the local area receives a large summer rainfall, if the ditches and tiles are already full of water, the flow of water will reverse with lake water flowing backwards into the ditches, into the tiles, and into the fields.

29. Growing corn and bean crops cannot live if submerged in water for more than two days.

30. The affected fields include soil that is classified as poorly drained or very poorly drained. Specifically, they include Houghton, Adrian, Rensselaer, Muck, and Edwards soil types which require drainage to be productive. They are also characterized as soils that are appropriate to "grow corn, soybeans, and small grain." When drained, these soils have the potential to be very productive. The affected fields were successfully row cropped with subsurface drainage from at least the 1970's through 2009.

31. The cooperation between the residential interests and the agricultural interests working in partnership ended in 2005 when the residential group decided to no longer participate.

32. The DNR then voluntarily assumed the responsibilities previously performed by the residential interests.

33. Two plaques or signs at the site proclaim the State of Indiana, through the DNR, as the owner of the dam. A metal plaque affixed to the concrete dam states, "Maintained by Indiana Department of Natural Resources". A metal sign on the dam reads:

LAKE CONTROL STRUCTURE

PROPERTY OF STATE OF INDIANA
PENALTY FOR TAMPERING
WITH STRUCTURE OR EQUIPMENT
INDIANA DEPARTMENT OF NATURAL RESOURCES
DIVISION OF WATER

34. The DNR has periodically posted notices at the dam. In 2009, the following notice was posted:

NOTICE
LAKE OF THE WOODS
GATE OPERATION PROCEDURE

Effective immediately it is the intent of the IDNR to leave the gate closed until the mandated opening date of September 15, 2009 unless the lake level elevation exceeds 804.35'. At 804.35' the gate will be opened to draw down the lake level to 803.85.

Concerns regarding this approach to gate operation should be forwarded to rmcahron@dnr.in.gov or Ron McAhron, IDNR, 402 West Washington St., Indianapolis, IN 46204. Please specifically identify the nature and location of the concern and provide contact information so the Department can follow up to address the concern.

35. A similar notice was again posted in early 2015 at the dam with the only changes being the date changed from 2009 to 2015 and the contact information changed from Ron McAhron to Michael Neyer of the DNR.

36. The DNR regulates access to the dam. The DNR obtained an easement to place a fence around the dam and then installed a chain link fence around the dam and locked the fence with a padlock. To access the dam, a person needs a key to open the fence lock and then needs two keys to operate the dam. The DNR hands out keys to selected locals but retains copies for the DNR. The DNR makes the keys.

37. While the lake has dual lake levels, the only concern raised by the Houins is the lake level for the summer months, when the dam is closed between May 15 and September 15 in accordance with the 1986 Lake Level Order. The average summer lake level was set by this court at 803.85 feet, and that legal level has never been modified by the Court or any party.

38. The Houins filed a Tort Claim Notice with the State of Indiana on or about April 27, 2016, with regard to their damages stemming from the DNR's operation of the dam.

39. The Houins filed their Complaint in this action on February 17, 2017.

40. Until changed by the DNR in 2009, the previous practice of opening the dam in accordance with local weather conditions allowed any standing water in the fields and tiles to drain in one or two days.

41. In 2009, the DNR changed the way the dam was operated. The DNR set new "trigger levels" for when the dam could be opened to lower the lake water level. The DNR first declared that the dam would remain closed until the water rose to 804.65 feet. When the water level is at 804.65 feet, it is roughly 10 inches above the legal average level. Pursuant to the DNR's instructions, the dam would not be allowed open until the water reached 804.65 and would be left open until the water fell to 803.85 (the legal average level). The DNR confirmed its mandate regarding the trigger level by posting signs at the boat ramp and the dam. The DNR also sent a letter out reiterating the new 804.65 trigger level. The DNR's instructions did not take local weather conditions into account.

42. After 2009, when the dam was operated to maintain the level at only 803.85 or higher, it could take as long as ten days to empty the water from the affected fields after a hard summer rainstorm.

43. The DNR's new operating instructions and trigger levels caused damage to the Houin farming operations in the affected fields. The affected fields took up to ten days to dry out when DNR implemented the 804.65 trigger level.

44. A plant cannot survive for long when underwater, so if the water does not go down, the plant suffocates and dies. Using the legal average level (803.85), the fields could dry out within one to two days. Prior to 2009, the drainage tile in the affected fields were adequate to drain the fields and the Houins were able to effectively farm those fields.

45. The new trigger level procedures caused the fields to flood. Marvin Houin conveyed his concerns to the DNR that the lake level did not just impact the recreation of the folks living around the lake, but actually affected the Houins' entire livelihood.

46. As of June 2015, the DNR was still keeping the dam closed until the water rose to 804.65. On June 30, 2015, the DNR changed its trigger level. The DNR sent out a letter confirming it had been using 804.65 as the upper trigger level for when the structure would be opened to lower the water level. The DNR, however, admitted the 804.65 trigger level did not comply with the 1986 Court Order. The DNR decided to change the upper trigger level to 804.35, but to leave the lower closing level at 803.85, the legal average summer level. The DNR still did not allow the dam to be operated in accordance with local weather conditions and did not allow it to be left open so the water level dipped down below the legal average level. The DNR announced it would allow the keyholders to operate the dam "as directed by the department." The DNR would notify the keyholders when they could and could not open the dam. The DNR told Marvin Houin that the DNR would keep the dam closed until the water rose to 804.35, regardless of weather conditions. The DNR also told Marvin the DNR would instruct the keyholders how and when to operate the dam. When Marvin asked about opening the dam in wet weather before the water level reached the DNR trigger level to prevent flooding, the DNR would simply refer Marvin back to its trigger level signs posted at the lake.

47. Mr. McAhron of the DNR drafted a memorandum explaining the 804.65 trigger level. That DNR memorandum conceded that the 1986 and 1987 dam operation instructions were written to achieve as closely as possible, adherence to the 803.85 summer average set in the 1986 Court Order. The DNR admitted that for years the residential owners and the agricultural interests operated the structure based on local meteorological conditions. But in 2005, the DNR assumed the residential property owner role in the operation of the dam. In 2009, the DNR changed the way the dam was operated. The DNR decided to leave the dam closed until September 15 unless the lake level exceeded 804.65. There was no benefit to this trigger level other than saving DNR staff time. In fact, DNR set the trigger level at 804.65 due to an "innocent keystroke error." The DNR kept the summer lake level between 803.85 and 804.65 from 2009 until June 2015 when it corrected the "innocent keystroke error" and began using 804.35 as the upper trigger level.

48. This "innocent keystroke error" moving the upper trigger level from 804.35 to 804.65 caused an additional .30 feet (over three and a half inches) of water to accumulate in the lake, the ditches, the field tiles and the Houins' affected fields from 2009 through June of 2015.

49. In 2015, the DNR admitted: "In speaking with legal staff, it is their opinion that the current operation policy does not meet the spirit of the Marshall County Circuit Court's order for maintaining the lake level." The DNR then changed the trigger level to 804.35 and determined that the lake level

would be lowered until it reached 803.85 (the summer legal average level). It was the goal of the DNR to hire a seasonal DNR employee to operate the dam in the summer to be more reactive to local rainfall events. The DNR made it "crystal clear" that the local keyholders were "operating the dam as directed by the department, as outlined above." The DNR informed everyone that any concerns about the operation of the dam should be directed to Chris Smith with the DNR and provided his contact information. Chris Smith called the keyholders to instruct them when to open the dam and lower the lake level. The DNR's position has been that keyholders were not allowed to open the dam until the lake level met the trigger levels set by the DNR. The DNR changed the upper trigger level on June 30, 2015 to 804.35 but kept all of the other dam operating procedures in place.

50. By their course of conduct beginning in 2005, the DNR assumed a duty in controlling the operation of the dam. This duty was owed both to the Plaintiffs as agricultural interests and to the residential interests around the Lake of the Woods.

51. This assumed duty required the DNR to operate or control the operations of the dam in a reasonable manner.

52. Controlling the dam in a reasonable manner means controlling the flow of water in the Lake of the Woods to conform to the average lake levels as set forth in this Court's 1986 Lake Level Order.

53. The DNR has breached their assumed duty to operate the dam in a reasonable manner (pursuant to the 1986 Lake Level Order) and the Houins have been damaged by such negligence.

54. Jeffrey Carnahan, President of EnviroForensics, an environmental consulting firm, testified for the Houins. Carnahan is a licensed professional geologist in Indiana. He has a Bachelor of Science and a Master's degree in geology. Carnahan has 23 years of geological experience, including analysis of soil types, water basins, subsurface or groundwater, hydrogeology, subsurface investigations, site drainage, and other environmental concerns. Carnahan testified about his experience and knowledge of soil, sediment, porosity, permeability, subsurface water migration patterns, preferential pathways, subsurface pressure, and other geologic questions.

55. Carnahan explained that the water level in the Lake of the Woods and the operation of the dam are connected and have an impact on the affected fields. The DNR's operation of the dam caused an increase in the actual lake water levels that damaged the affected fields. Put simply, the operation of the dam impacts the lake water level, and that water level impacts the drainage ditches, and the level of water in the ditches impacts the ability of the affected fields to drain effectively.

56. The Lake of the Woods area is a delicately balanced basin. The area is quite flat, therefore the tolerances for the connectivity between precipitation, infiltration, drainage, and the lake levels are very small. If the

dam is not operated to maintain a legal summer average of 803.85, as set in the 1986 Court Order, the fields cannot be drained as designed and intended.

57. In other words, if the tile outlets are underwater because of high lake levels, the drainage system cannot function as intended, and this is injurious to the Houins' farming operation.

58. Carnahan explained that the DNR's trigger levels were never going meet the 1986 Court Order's summer average lake level. When 804.65 is the upper or opening trigger level, and 803.85 is the lower or closing trigger level, the result cannot create a procedure likely to be a mathematical or legal average level of 803.85. The lower trigger should be below the average sought to be maintained; not at the average level. This is borne out by the DNR's lake level gage graphs, stipulated into evidence and reviewed by Carnahan. The graphs show the actual level, running average, and legal level of the lake from 2009 to 2015. In each of those years except 2012 (a drought year), the running average and actual water level were significantly higher than the legal average during the summer months—especially the planting season from April to early June.

59. Both corn and beans can be grown in the affected fields so long as appropriate drainage takes place. Corn is typically more profitable than beans on a per acre basis, but good farming practices would result in rotating the type of crop from year to year.

60. Due to inadequate drainage caused by the high lake levels, the Houins usually planted only beans in the fields most at risk due to higher water levels. They also modified their seed hybrids, planting density and fertilizer application methods in an attempt to minimize the damage that might occur due to high water levels in the affected fields.

61. The Court does not find the actions of the Houins in continuing to plant crops in the affected field to be contributorily negligent conduct.

62. The court does not find any contributory negligence on the part of the Houins.

63. The Houins are seeking crop yield damages from DNR. As to the claims of damage to the crops, the Plaintiffs and DNR submitted the following stipulations on January 7, 2021, prior to the trial in this case:

    a. The Plaintiffs purchased crop insurance each year from 2009 through 2020 from various crop insurance agencies, including Farm Credit, NAU, Spartan, and JT Crop. This included policies covering the fields at issue in this case.

    b. Crop insurance is regulated by the United States Department of Agriculture (USDA) Risk Management Agency (RMA). RMA approves the insurance forms.

    c. RMA publishes approved crop insurance policy forms on its website each year. The approved policies are modified each year.

d. In years when the Plaintiffs suffered yield loss on the fields at issue, or were prevented from planting the fields at issue, the Plaintiffs tendered claims to their crop insurers. The Plaintiffs made at least one crop insurance claim in each year from 2009 to 2020—some for fields at issue in this lawsuit, some for fields that are not at issue in this lawsuit. For those years for which documentation does not exist, and in which claims were made for damages to crops, Plaintiffs tendered claims for damage from excessive moisture/rain, and did not allege damage from any action or inaction of the Indiana Department of Natural Resources.

e. The USDA "Loss Adjustment Manual Standards Handbook" applies to all levels of federal crop insurance for each respective year.

f. The Defendant sought crop insurance records from the Plaintiffs during discovery in this case. The Plaintiffs requested that their crop insurance agencies provide all records from 2009 through 2020.

g. All records obtained by the Plaintiffs from their crop insurance agencies were provided to the Defendant. Insurance agency Spartan/NAU stated that it had no records prior to 2013 as it converted to a new document storage system in 2012.

h. The Plaintiffs received indemnity payments from their insurers between 2009 and 2020 for losses due to decline in price, cold wet weather, and excess moisture. No record of any claims prior to 2014

exist, but Plaintiffs admit that similar crop insurance claims were submitted and recovered on.

64. The Houin drainage tile silted shut because of the higher summer average lake levels between 2009 and 2016. When water from the lake and ditches backs up into the tile and stays there for a period of time, particles in the water settle in the tile and block water flow. Marvin Houin has personally dug up drainage tiles to investigate why they were not working. He discovered the tiles were two-thirds to three-fourths full of silt from the lake and ditches. The silt is not from the fields because the drainage tiles are equipped with a nylon sock to prevent material from the field from entering the perforations in the tile. If the tile is working correctly, there should be no soil in the tile. Drainage tile have also been damaged by the pressure created when the water from the lake actually runs backwards into the fields from the lake.

65. When the drainage tile is able to work as designed, the affected fields can be very productive. However, when drainage tile is partially or completely silted shut or when a tile is blown out by back pressure, the tile adds no value to the field.

66. The damages to the field tile caused by silt was a cumulative process which resulted from the higher lake levels beginning in 2009 and lasting through at least 2015. Over that period of time, the tiles became less and less effective each year.

67. Marvin testified regarding how much it will cost to replace drainage tile damaged by the high summer lake levels created by DNR. Marvin obtained a quote for tile replacement work in December 2016 for the drainage tile that was silted shut because of the lake levels. Tile is generally cheaper and easier to replace rather than repair. Based on Widner Drainage's prices, in 2016, Marvin estimated the cost to replace all of the damaged tile would be $302,792.00. Mrs. Ralston paid for some of the tile work to be done, which totaled $111,431.00.

68. The DNR focused on the depreciation schedules for Mrs. Ralston, arguing that the tile in the affected fields was worthless because it had been depreciated to zero on her tax returns. Tile installed in the 1970's, 1980's, and 1990's—even if depreciated on a tax return—still has actual value to the farm. If the tiles are not blocked or broken, those 30-year-old tiles are still effective.

69. Mrs. Ralston's fields suffered a reduction in value because of the DNR's mismanagement of the dam and the Lake of the Woods water levels. While the Houins did not lose full enjoyment of the affected fields over these years, the Ralston property was temporarily devalued whether measured by cash rent or fair market value.

70. If the drainage systems on the Ralston properties were in good working order, the land would have a fair market value of $8,000 to $10,000 per acre. However, without adequate drainage, the Ralston fields have a fair market value of $4,000 to $5,000 per acre.

71. Likewise, in normal conditions, the Ralston properties would rent out for $200 to $250 per acre. However, without adequate drainage, the Ralston land is only worth $100 per acre in cash rent.

72. No evidence was produced regarding any specific amount of rent paid or received for the affected fields for any of the pertinent years.

73. If the Houins recover for the costs of replacing the damaged tiles in the Ralston fields (and replace the tiles) and the future average lake levels are kept at the court mandated levels as set in the 1986 Lake Level Order, the Ralston fields' value will be restored to $8,000 to $10,000 per acre.

74. For the Houins to recover both the costs to replace the tiles and the temporary diminution in value for the intervening time would be a double recovery. The Ralston fields were not sold at the lower devalued price so that "loss" was never realized.

75. For the years that less cash rent was paid by the Plaintiff Houin Grain Farms, LLC to the Plaintiff Marvin Houin as POA for Marilyn Ralston due to the impaired condition of the fields, the combined Plaintiffs Houin farming operation suffered an equal benefit and detriment. No recovery should be had for any lesser rental value of the Ralston fields.

76. The Houins have suffered crop yield damages because of the DNR's mismanagement of the dam at the lake. The Houins measure crop yields with combine monitors and GPS systems.

77. For example, Charlie Houin explained that the Ralston-Reese fields suffered significant yield losses in 2015. Those same fields did not experience any yield problems in 2020, after the damaged tile were replaced in 2019. Charlie explained several drone pictures taken in 2015 show the impacted Ralston-Reese field. The photographs show a very poor stand of corn and an entire region of the field that was not able to be planted due to excessive water from the lake. The tile and riser existing in that area would have drained the field if the dam had been operated correctly to maintain the legal average level at the lake.

78. Using data collected by the Houins' high-tech farm equipment, Charlie calculated crop yield damages across all the affected fields from 2009 to 2019. Charlie compared the affected fields data to the data collected on nearby Houin fields with the same soil types in Marshall County (the "non-affected fields").

79. The data from the affected fields shows a reduced or no yield in many places when compared to the non-affected fields. The soil types in affected and non-affected fields were planted and fertilized the same (i.e., Ackerman soils received the same seed and chemical treatments). The different soil types did not explain the different yields between affected and non-affected fields. Instead, the yield difference is caused by the dam mismanagement. Keeping the dam closed caused the water level at the lake to rise, which pushed water into the tile or prevented the tile from draining into the lake.

80. In 2009, the affected fields had an average yield of 152.0286 bushels per acre of corn. The non-affected fields yielded an average of 187.6241 bushels per acre of corn. This is a difference of 35.59 bushels per acre.

81. The average corn price in 2009 obtained from grain sales by the Houins was $4.57 per bushel. This produced a loss of $162.67 per acre of corn. In 2009, there were 245 corn acres in the affected fields. There were no soybean acres in the affected fields in 2009.

82. Charlie repeated this calculation using data from every year for 2009 to 2019 for corn and soybeans. Those calculations resulted in the following crop loss damages because of the DNR's mismanagement of the dam:

	Corn					
	Affected Field Average Yield	Non-Affected Average Yield	Bushel Difference by Acre	Loss by Acre	Affected Field Acres	Total Corn Loss
2009	152.0286	187.6241	35.5955	$162.67	245.722	$39,972
2010	174.1311	197.8932	23.7621	$169.18	337.674	$57,130
2011	171.2621	193.7319	22.4698	$179.53	275.494	$49,460
2012	165.9035	154.9443	-10.9592	-$95.01	235.2977	-$22,357
2013	172.3993	213.0102	40.6109	$263.97	257.968	$6,8096
2014	157.6990	201.4005	43.7015	$188.79	439.335	$82,942
2015	67.9198	231.3336	163.4138	$817.07	74.654	$60,997
2016	178.1574	192.0915	13.9341	$59.92	421.818	$25,274
2017	0	223.7328	223.7328	$928.49	0	0
2018	154.3795	167.3973	13.0178	$51.68	159.813	$8,259
2019	0	158.6243	158.6243	$642.43	0	0
Total						**$369,773.76**

	Soybean					
	Affected Field Average Yield	Non-Affected Average Yield	Bushel Difference By Acre	Lake Affected Acres	Loss in Dollars by acre	Total Soybean Loss
2009	0.0000	80.5952	80.5952	0.0000	$800.31	$0.00
2010	51.9403	57.8653	5.9250	39.0260	$82.36	$3,214.10

2011	44.3655	51.4272	7.0616	277.2660	$84.74	$23,495.43
2012	66.6192	60.5632	-6.0559	255.5770	-$98.05	-$25,058.23
2013	52.7106	61.2572	8.5467	181.3670	$138.37	$25,095.83
2014	0.0000	42.0755	42.0755	0.0000	$652.17	$0.00
2015	33.9250	72.0720	38.1471	298.5360	$400.54	$119,576.91
2016	64.8975	65.4802	0.5827	17.5170	$6.19	$108.50
2017	42.7674	53.5226	10.7553	439.3440	$110.24	$48,433.88
2018	56.0102	57.1118	1.1015	135.0150	$11.02	$1,487.24
2019	46.6270	44.5961	-2.0309	289.5650	-$19.29	-$5,586.82
Total						**$190,766.84**

83. The second expert at this trial was Matthew House. House grew up on a working farm and now has a Bachelor of Science in Accounting. He is a Certified Public Accountant. House has experience in agricultural accounting, including working for row crop farmers on income tax planning, forecasting, succession planning, financial reporting and analysis, pricing row crops, and CFO or controller equivalent roles. He has published articles on agricultural stress cycles and other agricultural accounting issues. House works with financial statements, payroll, accounts payable, invoices, reconciliation of accounts, financial reports, balance sheets, and planning strategy and execution. House also tracks corn and soybean prices as part of his current role at CliftonLarsonAllen, or CLA. House has experience selling grain on the commodities market.

84. The Houins harvested, stored and transported their own crops and did not realize any consequential savings as a result of the reduced yields. Their combine still had to traverse all parts of each affected field in order to harvest whatever crop was present.

85. House testified the bushel averages and prices Charlie Houin used were reasonable and in line with House's Indiana experience with row crops and agricultural accounting. He found Charlie Houin's method of calculating crop yield losses to be reasonable.

86. Although the Houins received payments from a third party (crop insurance coverage) which reduced their net crop loss damages for certain years, the Court does not find that this potential third party recovery negates any liability of the Defendant for the actual crop loss damages caused by their conduct.

CONCLUSIONS

The Houins assert several legal theories under which they believe they should recover for damages incurred as a result of the DNR's conduct: negligence, nuisance, trespass and the taking of property without just compensation.

Negligence

The Houins argue that by their course of conduct, the DNR has assumed a duty to operate the dam and the DNR's failure to operate the dam in a reasonable manner has caused the Houins damages. There is abundant evidence the DNR caused the dam to be constructed (pursuant to the 1986 Court Order), placed fencing around the dam, placed locks on the fencing, handed out keys to certain persons and placed signage at the dam declaring it was the property of the State

of Indiana and that certain lake levels would be maintained by the DNR. Volunteer local keyholders were instructed to only open or close the dam with DNR approval. Specific trigger levels for operation of the dam were promulgated and enforced by the DNR and those trigger levels caused the summer water levels of Lake of the Woods to exceed the Court mandated summer average lake level of 803.85 feet.

By their actions over the years, the DNR has undertaken to render dam operation services to the farmers and lakefront property owners and public. The DNR was aware of the reason for the regulation of the lake water level and knew or should have known that failure to adhere to the mandated lake levels would be the cause of damage to either the farmers or the lakefront property owners and the public. The Court has found the DNR, by their conduct, assumed a duty to the Houins to regulate the operation of the dam in a reasonable manner, the DNR has breached that duty, and that breach has caused damages to the Houins. Those damages include damages due to lower crop yields and damages to field tile.

The DNR argues the Houins were contributorily negligent for continuing to plant crops in the affected fields after they became aware their crop yields would be reduced because of the DNR's actions in regulating the operation of the dam.

The burden of proof for this affirmative defense of contributory negligence falls upon the DNR. Other than continuing to farm the affected fields, the DNR has not pointed to any evidence the Houins performed any negligent acts. The Houins had a right to believe the DNR would follow the 1986 Lake Level Order and had the DNR done so, the Houins' fields would have drained appropriately and they would not have suffered damages. The Houins took affirmative steps by altering their planting, fertilizing and crop rotations to attempt to minimize the potential harm from extended periods of high water standing in the affected fields.

To adopt the DNR's reasoning, to avoid being contributorily negligent the Houins should have planted zero crops in the affected fields and received a zero crop yield. While this approach may have maximized the Houins' potential damages, it flies in the face of common sense and good farming practices. The Houins were not contributorily negligent, nor did they fail to mitigate their damages.

NUISANCE

The Houins argue the DNR's conduct in failing to appropriately operate the dam caused intermittent flooding of their farm fields resulting in damages:

a) due to their inability to plant, spray or harvest crops at appropriate times;

b) due to their field tiles being flooded with high water causing sediment deposits into the tiles rendering them useless; and

c) decreased marketability of the farm ground.

The Plaintiffs argue this intermittent flooding constitutes a nuisance. Nuisance is defined at IC 32-30-6-6 as "Whatever is: (1) injurious to health; or (4) an obstruction to the free use of property; so as essentially to interfere with the comfortable enjoyment of life or property, is a nuisance, and the subject of an action."

A party that causes a nuisance can be held liable regardless of whether the party owns or possesses property on which the nuisance originates. *Gray v Westinghouse Electric Corp.*, 624 N.E.2d 49 (Ind. Ct. App. 1993). Here, the Court has found the conduct of the DNR in failing to appropriately operate the dam after they assumed a duty to do so has caused damages to the property of the Houins. This meets the definition of nuisance under Indiana law.

Property damages due to nuisance are recoverable under Indiana law, including damages to both real and personal property. Drainage tiles in the fields are fixtures and are considered a part of the real property. Crop yield losses are damages to personal property and are also recoverable under the theory of

nuisance. *See TDM Farms, Inc. of N. Carolina v. Wilhoit Family Farm, LLC,* 969 N.E.2d 97 (Ind. Ct. App. 2012).

The Houins' claims for damages for decreased marketability of the affected fields is denied as no evidence was presented that any sales of the affected fields were contemplated or consummated. No evidence was produced that any cash rental payments were reduced as a result of the DNR's conduct. With repaired field tiles and appropriate future operation of the dam, the affected fields will once again have their full value restored.

TRESPASS

The Houins allege the excess water in the affected fields constituted a trespass onto their real estate by the DNR. However, the primary allegations of the Houins pertain to excess water that was prevented from draining from their real estate into the Lake of the Woods. Trespass requires evidence the defendant entered the Plaintiff's land without the right to do so, or caused some other "thing" to enter the Plaintiff's land. Here there is scant evidence of damages caused by water moving from the Lake of the Woods onto the Houin's affected fields. The primary allegations of damage revolve around the inability to drain the rainfall that naturally fell upon the affected fields.

The Houins have failed to meet their burden of proof with regard to their trespass claims.

TAKING WITHOUT COMPENSATION

The Houins also argue the DNR's failure to appropriately operate the dam caused a governmental taking of property without just compensation. An action for inverse condemnation requires: "(1) a taking or damaging; (2) of private property; (3) for public use; (4) without just compensation being paid; and (5) by a governmental entity that has not commenced formal proceedings." *Murray v. City of Lawrenceburg*, 925 N.E.2d 728 (Ind. 2010).

The affected fields which were damaged are private property, the changes to a higher lake level were for a public purpose (enhancing boating, fishing and swimming by lakefront owners and the public in general as well as reducing DNR time and expenses), the taking was by the DNR, a governmental entity, and no compensation was paid nor eminent domain proceedings commenced. The intermittent flooding of the affected fields caused by the DNR's failure to reasonably operate the dam was a "taking".

Any evidence of distinct damages related to the inverse condemnation by the DNR in this action would need to be proven at a subsequent proceeding pursuant to IC 32-24-1-16.

COMMON ENEMY DOCTRINE

The DNR asserts they have a complete defense to all of the Houin's claims under the common enemy doctrine. That doctrine provides that any landowner has the right to alter or improve his land to accelerate or increase the flow of surface water by eliminating or limiting ground absorption or the grade of his land. So long as the surface water is not collected and then cast in a body upon his neighbor, no liability shall attach.

However, the common enemy doctrine is not available to the DNR as they are not a landowner in this situation (as they have so argued throughout the trial). *Luhnow v. Horn*, 760 N.E.2d 621 (Ind. Ct. App. 2001), discussed a county drainage board would be able to assert this common enemy defense as they have a statutorily imposed right-of-way over property adjoining drainage ditches. This provides no authority for the DNR's position as they do not hold any such statutory authority to operate the dam at the Lake of the Woods.

LIMITATIONS OF DAMAGES

The DNR asserts that any damages claimed by the Plaintiffs are limited by the applicable Statutes of Limitations and the Indiana Tort Claims Act. The Plaintiffs are claiming damages from the 2009 crop season to the date of trial.

A Notice of Tort Claim was sent to the DNR on or about April 27, 2016, with regard to potential claims for damages. IC 34-13-3-6 requires a tort claim notice to be sent within 270 days of the occurrence of a loss. Therefore, any damages for tort claims of the Plaintiffs are limited to the time period from August 1, 2015, to the date of trial.

The general statute of limitations for damages to personal property (crops) is two years pursuant to IC 34-11-2-4. Therefore, any claims for damages to personal property that fall outside of the tort claims notice requirements are limited to time period of February 17, 2015, to the date of trial. This is two years prior to February 17, 2017, the date of filing of the complaint.

The general statute of limitations for damages to real property (field tile, fixtures and farmland) is six years pursuant to IC 34-11-2-7. Therefore, any claims for damages to field tile, other fixtures or farmland that fall outside of the tort

claims notice requirements are limited to the time period of February 17, 2011, to the date of trial (six years prior to filing of the complaint).

The evidence supports the crop losses of the Houins are compensable under theories of negligence, nuisance and inverse condemnation. Under these three theories crop loss damages are limited to the time period from the 2015 crop season to the date of trial. Based upon the spreadsheets of Charlie Houin admitted into evidence, these damages total $258,550.00.

The evidence supports the 2009 to 2016 damage to field tiles of the Houins are compensable under theories of negligence, nuisance and inverse condemnation. Under the negligence theory, the Tort Claims Notice statutes limit tile damages to the time period from August 1, 2015, to the date of trial. Under the theories of nuisance and inverse condemnation, tile damages are limited to the time period from February 17, 2011, to the date of trial.

No evidence exists to specifically date the damage to the tiles as that was a cumulative process. The 2016 replacement cost damages for the field tile was $302,792.00. Based upon the cumulative nature of the damage accruing from 2009 through 2016, only six of those eight years (75%) fall within the six-year statute of limitations for damages to real property and therefore the court reduces

the total damages to field tile ($302,792.00) by 25% leaving a tile damage figure of $227,094.00.

THEREFORE, **IT IS ORDERED BY THE COURT** that:

The Plaintiff Houins are to recover a judgment from the Defendant DNR for damages due to crop loss and damaged field tile in the sum of Four Hundred and Eighty-Five Thousand, Six Hundred and Forty-Four Dollars ($485,644.00) (excluding any distinct damages that might later be assessed for inverse condemnation) plus the costs of this action. Post-judgment interest to accrue per statute.

SO ORDERED, as of the date file-stamped on page 1.

Curtis Palmer, Judge
Marshall Circuit Court