
International Joint Commission

In the Matter

of

The Reference of February 27, 1925, relating to
the levels of Rainy Lake, Namakan Lake and
other boundary waters.

BRIEF ON BEHALF OF ERNEST C. OBER- HOLTZER, IN OPPOSITION TO ELE- VATION OF LAKE LEVELS.

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Introductory Statement.

This is a reference to the International Joint Commission by the Governments of the United States and Canada of four questions relating to the regulation of the water-levels of Rainy Lake and Namakan Lake and of the adjacent boundary waters. The questions were presented in a letter dated February 27, 1925, addressed to the Commission by Hon. Charles E. Hughes, then Secretary of State, the full text of which is annexed hereto as Appendix A. The questions themselves may be briefly summarized as follows:

1. Is it now practicable and desirable to raise the water-level of Rainy Lake or of Namakan Lake, and to provide storage facilities upon the boundary waters east of Namakan Lake?
2. If it is so found practicable and desirable, what elevation is recommended, and what would be the extent and cost of the acquisition of property and construction necessary to at-

tain the proposed elevation; what interests would be benefitted thereby and how should the cost be apportioned among them?

3. What methods of control and operation would be advisable to regulate the volume, use and flow of waters in each case?

4. What interests are benefitted by the present storage on Rainy Lake and on the waters controlled by the dam of Kettle Falls, and to what extent, and how should the cost thereof be apportioned?

The reference was made by the Secretary of State pursuant to Article IX of the Treaty of January 11, 1909, between the United States and Great Britain, which authorizes either Government to refer to the Commission any "questions or matters of difference arising between them involving the rights, obligations, or interests of either in relation to the other or to inhabitants of the other, along the common frontier. * * *" Upon such a reference, it is provided that the Commission shall "examine into and report upon the facts and circumstances of the particular questions and matters referred, together with such conclusions and recommendations as may be appropriate. * * *" It is expressly stated, however, that reports of the Commission "shall not be regarded as decisions of the questions or matters so submitted either on the facts or the law, and shall in no way have the character of an arbitral award."

The matter having been thus presented to the Commission, after certain preliminary work with engineers appointed by the two Governments, a public hearing was held on September 28-30, 1925,

at International Falls, Minnesota. This hearing gave persons interested an opportunity to appear before the Commission and state their views. It is to the proceedings had at that time that this brief is mainly directed, and the official stenographic report thereof is hereinafter referred to as the Record.

The Region Affected.

The area affected by the proposed alteration in the levels of the boundary lakes, known to the engineers as the Rainy Lake watershed, is part—the headwaters in fact—of the greater system of lakes and rivers rising at North Lake a few miles west of Lake Superior and flowing first westward through Rainy Lake and Rainy River to the Lake of the Woods, thence northwestward through Winnipeg River to Lake Winnipeg, and ultimately northward through Nelson River to Hudson Bay. Of this greater system, the portion extending from North Lake to the Lake of the Woods forms the international boundary between the State of Minnesota and the Province of Ontario; the remainder lies wholly in Canadian territory. The Rainy Lake watershed proper is the portion of the international boundary lying east of the town of International Falls, Minnesota. It consists of 14,500 square miles of forested lakeland. The whole region and its relation to the Great Lakes and to such important centers as Minneapolis, Winnipeg, and Duluth is shown upon the accompanying map.

Naturally, the region lends itself to power development. Literally hundreds of smaller lakes both in Minnesota and Ontario empty their waters over rapids and waterfalls into the main watercourse. Already for many years dams have been erected at the outlets of both Rainy Lake and the

Lake of the Woods and large waterpowers have been developed. Both Rainy Lake and Lake of the Woods are thus held at the present time at artificially high levels for the purpose of providing storage. The dams which it is now proposed to erect, are to be located at points on the international boundary east of International Falls. The erection of the proposed dams would necessarily affect the levels not only of the lakes and streams where the dams are to be situated, but the levels of many of the tributaries as well.

The country is chiefly famous for its natural beauty. It is a rare combination of rock, lake and forest, comparatively flat but very wild and picturesque. Though still heavily wooded, its more valuable commercial timber has already been largely exhausted. Along the shores of the lakes affected are important mining and mineral rights. Partly perhaps because the country is so sparsely settled, of late years it has increasingly become the playground to which the people of the north and middle western states have turned for their outdoor life and development. We shall find occasion later in the course of the discussion of the various questions suggested by the testimony to describe the country in more detail.

The Proponent of the plan to raise the lake-levels is Mr. E. W. Backus and the corporations he represents.

The questions which form the subject of the reference were not presented upon the application of private individuals or corporations, but were referred by the Governments themselves. Nevertheless, the Commission quite properly took notice that the action of the Governments was not the result of a crying public demand nor the out-

growth of an imminent international conflict, but was in fact taken at the instance of private representations made by private individuals or corporations (Record, Pg. 169).

It may fairly be assumed, as the Commission in fact assumed, that the representations to the Department of State which led to the reference were made by or at the instance of Mr. E. W. Backus of International Falls. The great power of Mr. Backus in the lumber interests both of Minnesota and Canada is a matter of common knowledge and is attested by the imposing list of corporations, capitalized at over \$10,000,000, which he controls or is interested in and which he represented at the hearing. That he and his corporate interests had long desired a change in the water-levels of Rainy Lake and other boundary waters is amply evidenced by his own testimony before the Commission, and by the fact that in August, 1920, the *Fort Frances Pulp and Paper Company, Limited*, a Canadian corporation, owned or controlled by Mr. Backus, made an application signed by Mr. Backus as President, to the Government of Ontario, for the right to erect a number of dams and to construct power plants in such a way as to raise the levels of many of the very lakes which form the subject of this reference.

The method by which this reference was brought about, by action of the governments rather than by application of individuals or corporations interested in securing higher water-levels, has certain obvious and definite advantages from the point of view of the proponents of the Backus Plan. In the first place, the very existence of such a reference lends a certain dignity to the proposal to raise the lake levels which as a mere private application it could not attain. In the second place, the cost of

obtaining the data needed for the report of the Commission necessarily falls upon the two governments—a most important practical result; and lastly, by causing the questions to be presented to the Commission by the two governments, Mr. Backus has avoided any necessity for filing formal application papers to become matters of public record, subject to the scrutiny and criticism of all who oppose the proposals. In this connection it should be noted that the Secretary of the Commission wrote to Mr. Backus on May 19, 1926, requesting information relating to the various questions presented by the reference (Record, Pgs. 41-46). In view of Mr. Backus' great interest in the matter and the amount of study which he and his engineers had presumably devoted to the subject, it might reasonably have been anticipated that the information requested would be promptly furnished. Except for a formal and non-committal acknowledgment on June 6, 1926 (Record, Pg. 46), however, no reply was made to the Commission's inquiry until September 27, 1926, the day before the hearing. Hence the opponents of any change in the lake-levels, although informed in a general way as to Mr. Backus' views, were left wholly in the dark as to his specific proposals and were necessarily obliged to base their case largely upon conjecture.

In substance, if not in form, Mr. Backus appeared before the Commission as a party plaintiff, to sustain if he could, the burden of showing the necessity or desirability of a change in the levels of the boundary lakes. No comprehensive proposals were presented to the Commission by any other interests, and a discussion of the plan to alter the levels of the lakes necessarily confines itself mainly to an analysis of the testimony of Mr.

Backus and of his associate, Mr. Thomas, whose testimony we shall later discuss more fully.

It must be understood that in reviewing the testimony and in criticising the proposals presented, no personal imputation of any kind is intended against Mr. Backus. The value of his contribution to the development of the country to which this reference relates must not, in fairness, be underestimated. He has devoted thirty years to developing and exploiting the border-lake country, and by the strength of his personality and his business acumen he has built up a group of companies which in effect dominate industrially the whole region under discussion. It is perhaps not to be wondered at, that he regards with genuine astonishment and chagrin the widespread opposition to his plans, to which he invariably refers with some bitterness as "propaganda." Throughout the hearing Mr. Backus was constantly in evidence as the protagonist of the proposed change. As such, we believe that his statements and attitude are properly the subject of fair comment; and if at times he appears to become the villain of the piece, it must be remembered that our attack is directed against the proposals which we believe are wholly contrary to the public interest, and not against the individual whose personal record of industry and accomplishment commands our sincere respect.

The Proposals of Mr. Backus.

In the lengthy prepared statement which he read to the Commission (Record, Pgs. 228-249), Mr. Backus set forth in a general way his basic recommendations.

The plan, briefly summarized, is to construct a series of dams at the outlets of various lakes so as to raise the water levels of the lakes and afford

additional storage of water. The presence of such dams, Mr. Backus contended, and their regulation would permit an increased and constant flow of water, particularly at Fort Frances, the site of Mr. Backus' paper mill, along the Rainy River, at the outlet of the Lake of the Woods and on the Winnipeg River, in contrast to the present insufficient and variable seasonable flow.

To accomplish the development proposed, the level of Rainy Lake would have to be raised approximately three feet, that of Namakan Lake one foot, that of Lac La Croix sixteen feet and that of Crooked and Saganaga Lakes fifteen feet. From the data presented by Mr. Backus, a similar increase would apparently be effected in the level of Basswood Lake. The levels of many of the tributary lakes which are wholly within Canada or the United States, and so are not in any "boundary waters," would necessarily be raised a varying number of feet depending on geographical conditions. The levels thus fixed would, of course, not be stable, but would be subject to a continual fluctuation, depending partly upon natural conditions and partly upon the momentary needs of the power interests on the Rainy and Winnipeg Rivers.

I.

No adequate reason is offered for any change in the water-levels of the lakes.

An analysis of Mr. Backus' testimony reveals an amazing lack of concrete facts and a mass of unsupported assertion.

"For the past several years," his statement begins, "our engineers have been engaged in making extensive exploration, investigation and survey of the various lakes and rivers on the watershed

tributary to Rainy River on both sides of the International Boundary, in gathering statistics relating to the run-off from these waters, and in reviewing and studying the whole subject of providing additional storage on the upper Lake of the Woods, watershed, including the cost thereof and the effects which it will produce in controlling the levels of Rainy Lake and Lake of the Woods, and the flow therefrom" (Record, Pg. 228).

The foregoing statement would seem to preface the presentation of a careful and technical study of the whole situation, and to indicate that Mr. Backus had available the necessary engineering data upon which to base his conclusions. His subsequent testimony conclusively demonstrated, however, that such was not the case.

In order to obtain the increased storage contemplated by his proposals, Mr. Backus suggested that additions be made to the existing dams on Rainy Lake and Namakan Lake and that seven new storage dams be erected—two on Lac La Croix, one on Crooked Lake, two on Basswood Lake and two on Saganaga Lake—and he ventured to place the estimated cost (excluding Rainy Lake) at an aggregate figure of \$426,125, including damages for flowage easements (Record, Pg. 238).

No data was presented, however, indicating the precise location of the dams in question; and it appears that no plans for their construction have been prepared (Record, Pg. 265).

When pressed by questions of members of the Commission, Mr. Backus confessed that his engineering information as to the contours was insufficient to enable him to state the character of the structures required to give effect to his proposals. In this connection the following dialogue is significant (Record, Pg. 341) :

Mr. Clark: I do not think you understood my question, Mr. Backus. It does not make any difference as to the contours what sort of structure you want to erect at a certain point?

Mr. Backus: Yes, indeed.

Mr. Clark: Have you not already done that?

Mr. Backus: No, we have not run the contours.

Mr. Clark: Then, you are as much at sea as we are?

Mr. Backus: Yes, sir.

Mr. Clark: You do not know what sort of construction you want?

Mr. Backus: No, sir.

It is obvious that under these conditions the estimates of cost of construction submitted can be little more than guess-work.

The regulation of the flow of water through the various lakes and the maintenance of the desired levels would be attained by means of sluices in the various dams. Although admitting that in order to accomplish the proposed regulation it would be necessary to maintain a gang of men at each dam, Mr. Backus briefly disposed of the question of cost of their maintenance with the statement "That expense would be very nominal" (Record, Pg. 308).

Mr. Backus stated that the cost of operating and maintaining the existing dam at Namakan Lake, had been comparatively small and had been entered upon the books of his company under general operating expense, adding:

"If the Commission feels that it is necessary, we can set some of the boys at work and go over all this work and segregate it" (Record, Pg. 273).

The foregoing statements are illustrative of the insufficiency of the data submitted in support of the proposals, and of the almost airy way in which such matters of primary consequence as the possible expense of the operation and maintenance of the proposed developments were disposed of by Mr. Backus. His whole statement is characterized by similar utter lack of substance upon which serious conclusions could be based.

The meagre figures offered by Mr. Backus in connection with his statement are no more than conclusions drawn from sources which he did not see fit to present to the Commission. No means of testing the reliability or accuracy of his estimates was offered. It is obvious that Mr. Backus is not himself an engineer and did not personally make any considerable part of the investigations upon which his statement is based. Neither Mr. Meyers, nor any other technical expert, was called to substantiate or supplement his data, and in reply to Mr. Elmquist's question, Mr. Backus declined to furnish any data except upon request of the Commission (Record, Pg. 277). With all due credit to Mr. Backus' obvious sincerity, it is submitted that such hearsay testimony, plainly inadmissible before any judicial tribunal, is of very doubtful value even under the liberal rules of the Commission.

Nor was Mr. Backus more explicit in stating the benefits to be derived from his proposed alterations.

"The necessity for additional storage on the boundary waters for the benefit of all interests, private and public, is so fully recognized that but little reference thereto is demanded," he states (Record, Pg. 229). Nevertheless for the benefit of skeptics, many of whom appear to have attended the hearing, he concludes his statement with a passage that is almost lyric:

"The benefits to the people of Canada and the United States may be briefly summarized in conclusion. Navigation will be improved and may be revived after having practically passed out of existence for several years. The scenic beauty of the streams and lakes will be enhanced under control and they will become more accessible to tourists and as recreation grounds. The more uniform levels will improve the waters as fish, fowl and game preserves, and for breeding purposes. New wealth in the building up of industries, with all its concurrent and far-reaching possibilities, will be created. The construction of necessary works and power plants is only the first step in bringing into existence that new wealth, which must annually increase as the beneficial results extend to and are enjoyed by an added population of artisans, merchants, manufacturers, and indeed, those in every walk of life. The increased wealth of each and every community within this area will be many times the proposed expenditures. Annually and for all time the people of both countries will enjoy its benefits, which in dollars and cents, it is almost impossible to calculate" (Record, Pgs. 248-249).

The same extravagant claims, without supporting facts, are repeated at somewhat greater length in Mr. Backus' letter to the Commission which was read into the record (Record, Pgs. 261-273).

The alleged benefits to be derived from Mr. Backus' scheme were amply refuted by the voluminous testimony of other witnesses, which we shall consider later, but perhaps even more significant are the important qualifications from his own mouth.

The Alleged Benefit to Navigation Would be Insignificant.

The claim made in the extract from the record quoted above that the adoption of his proposals would result in any substantial benefit to navigation was practically withdrawn by Mr. Backus in his subsequent testimony.

He had no thought, he testified, of establishing a navigable route to the Great Lakes (Record, Pg. 275), and in view of the existence of a railway covering the major portion of his proposed water way, he agreed that so far as navigation was concerned the beneficiaries of his plan would be "more the small craft for pleasure outings and so forth than for traffic in freight."

The following extract from the record (Pgs. 292-293) reveals Mr. Backus' true attitude toward the development of such navigation:

Dr. Dunsmoor: Mr. Backus, in this matter of making dams between these lakes is it contemplated putting in locks so that the damage that might be done to beauty might be in part offset by the facility with which the extent of travel by boat could be made less difficult?

Mr. Backus: That is entirely a matter for the governments and this Commission to pass on in approving the plan. We do not get very far without the recommendation of this Commission.

Dr. Dunsmoor: But a recommendation for locks has not been approved?

Mr. Backus: No. It is quite an expense, in the first place, to put them in, and, in the second place, to operate them.

Mr. Preudhomme: These estimates that

you have been making of the costs of the works ;
do those include locks?

Mr. Backus: No, sir.

The way in which navigation, even of pleasure craft, would be improved by the erection of a series of dams *without locks* is left unexplained.

The general contention of Mr. Backus that scenic beauty would be enhanced by his proposed changes was hardly more fortunate. Under the searching questioning of Mr. McClearn, Mr. Backus was unable to explain how raising the level of the beautiful Lac La Croix seventeen feet, submerging thereby the great majority of its eight hundred islands and leaving merely the tree-tops above the surface of the water, would benefit the region from a scenic point of view (Record, Pgs. 313-314).

It is hardly necessary, however, to consider these and similar matters in further detail in connection with Mr. Backus' testimony, for we have his own frank statement as to the real basis for his interest in his proposals:

Mr. McCumber: The real benefit, the thing you are trying to get is the development of power, is it not?

Mr. Backus: Well, storage and power.

Mr. McCumber: Storage is simply incidental to the power?

Mr. Backus: Yes, in other words that is what we are more interested in than the navigation, although we would like to see some navigation between here and Kenora" (Record, Pgs. 276-277).

The most casual reading of the testimony makes it apparent that power, and the storage of water necessarily incidental to it, is the real crux of the

matter from the point of view of those who seek to obtain higher water-levels. In view of this fact, it seems astonishing that Mr. Backus should have presented his case to the Commission without any concrete evidence whatever that the additional water-power for which he so earnestly seeks is necessary or even desirable. One may search the record in vain for a reference to any specific corporation that needs additional water-power or for any reason for such need.

Who Needs Additional Water-Power and Why?

No answer is made to this inquiry; yet, this, it would seem, is an inquiry of primary importance to the Commission and to the public, and one which must be met definitely and in detail before an undertaking can be recommended that will cost hundreds of thousands of dollars and cause incalculable damage to the whole region and its inhabitants.

The personal prosperity of Mr. Backus and the evident success of his enterprises negative, in the total absence of evidence to the contrary, any contention that the various companies under his control are in any danger from present conditions. No statement by the *Fort Frances Pulp & Paper Company*, or of any other company, is submitted to show that it cannot continue its business legitimately and profitably, as in the past, without requiring the great sacrifice of the public domain which Mr. Backus demands.

It does not appear that a failure to accept Mr. Backus' recommendations would result in any calamity or even serious hardship to him or to any of the companies he represents.

The fact is, that it is not the lumber interests at

the International Falls and Fort Frances controlled by Mr. Backus, that would primarily profit from the proposed elevation of the lake levels. These interests would, as Mr. Backus himself admitted, probably use only a small part of the new water-power which he seeks to have developed (Record, Pg. 320).

**The Nameless Power Interests Represented
by Mr. Thomas.**

It was made to appear that the real beneficiaries, of Mr. Backus' proposals would be certain power interests represented at the hearings by a Mr. Thomas, with which Mr. Backus was stated to have conducted certain negotiations, of a nature not revealed. The relation was somewhat vaguely explained by Mr. Backus:

"I have been trying for several years to get away from eighteen hours work a day and something over a year ago I started in to negotiate with some people whom Mr. Ralph Thomas represents here, to turn over whatever power rights we had on the waters above the Namakan chain of lakes" (Record, Pgs. 249-250).

"We progressed pretty well," he adds, "until this propaganda came up."

Both Mr. Backus and Mr. Thomas positively declined to give any clue as to the identity of these interests (Record, Pgs. 281 and 560-562).

It is a striking—not to say startling—fact that at a public hearing before this Commission, large interests claiming important benefits from the proposed elevation of the water-levels should have seen fit to present their case anonymously.

If these interests have in fact a legitimate plan for the development of power which will produce the great public benefits urged on their behalf, why should they be so hesitant to reveal their identity to the public or even to the Commission itself?

The character and responsibility of promoters is obviously an element of fundamental importance whenever it is proposed to entrust the management and development of public resources to private hands. Not only was it never stated who or what the power interests represented by Mr. Tohomas really are, but all information was positively refused on this point.

It does not appear that these mysterious interests can themselves be confident of the justice of their project or that, if consummated, it will be of great public benefit, for it seems that at the first sign of general opposition rather than reveal their identity and lay their cards on the table, they were disposed to drop the whole matter. Mr. Backus almost plaintively described the situation:

“Since this propaganda started the Commission sent out its invitation to the earlier conference and then the adjourned conference, and Mr. Thomas’ people have indicated the possibility of having cold feet * * *” (Record, Pg. 250).

Such timidity on the part of powerful and presumably reputable power interests can hardly inspire confidence in their good faith or in the sincerity of their claims.

We submit that it is the duty of this Commission, as trustees of the public interest, to scrutinize with the greatest care, and to permit the public to scrutinize, the persons or interests who have introduced themselves in this unpromising fashion.

The testimony of Mr. Thomas, like that of Mr. Backus, was a mere series of conclusions drawn chiefly from reports of Mr. Backus' engineers which were not themselves presented to the Commission or offered for public examination and analysis (Record, Pg. 560). Accepting, however, his statements at their face value the purely speculative character of the proposed water-power development is abundantly apparent.

In all the vast region of lakes and forests through which it is suggested that dams should be erected, there is today not a single industry, not even a single settlement, except at Rainer, International Falls and Fort Frances, which are all clustered at the outlet of Rainy Lake. The practical use of power developed on the upper waters of the border lakes, even if permitted, is necessarily a matter for the remote future, dependent upon the growth of industries, the opening of means of communications and above all the employment of vast capital of which there is no sign whatever at the present time.

Mr. Thomas was singularly unsuccessful in showing any genuine need for additional power either in Duluth (Record, Pg. 554), or among the mining interests of the Mesabe range. As to the latter, the best he could offer was the statement:

“There has been threatening an actual shortage” (Record, Pg. 565).

It was, perhaps, the weakness of Mr. Thomas' testimony in this vital respect that prompted Mr. Backus to come to the assistance of his colleague with the suggestion:

“Perhaps we will get up some competition here then” (Record, Pg. 564).

The statements of two citizens of the Village of Hibbing, Mr. Power and Mr. Mica, as to the desirability of cheap power along the Mesabe Range in order to lower the cost of mining and to permit the utilization of a lower grade ore than can now be profitably mined, undoubtedly represent legitimate interests which merit and must receive due consideration from the Commission.

Two factors must be considered in this connection, however, which are not satisfactorily met by anything appearing on the Record. The first is, that assuming the nameless interests represented by Mr. Thomas should, in collaboration with Mr. Backus, secure the power rights they seek, would the development in fact inure to the benefit of the towns of the Mesabe range?

Asked by Mr. Power whether the mining people of the Mesabe Range would receive power from his proposed development, Mr. Thomas could only say:

“That is a possible outlook that is being considered at this time” (Record, Pg. 563).

A second inquiry, which Mr. Thomas failed to deal with, was suggested by Mr. Lommen: whether, in any event, the interests which seek control of the additional water-power would be either willing or able to furnish the power to the Mesabe Range at less than the present cost.

As to this point, Mr. Thomas rather doubtfully gave as his opinion, unsupported by reasons or data, that the price of power “would be somewhat less than it is now” (Record, Pg. 565).

The testimony of Mr. Thomas is characterized by a wealth of optimistic generalization coupled with an astonishing barrenness of plain fact and concrete example. *He proposed in substance that this*

Commission advise the Governments of the United States and Canada to write a blank check for the value of a broad area of natural resources in favor of anonymous interests, upon the wholly unwarranted assumption that the enormous power so delivered will somehow be used for the public benefit.

No guarantee whatever is offered that the very large capital obviously necessary to carry out the projects suggested by Mr. Thomas is actually available or will be made available at any definite future time. Even assuming the accuracy of statements made as to the necessity and desirability of additional and cheaper electric power on the American side, we have no certainty that by raising the levels of the border lakes such a result will be attained.

Power on the Winnipeg River.

It is obvious that in order to obtain the approval of this Commission for the project, some showing of general public benefit must necessarily be made; and it was doubtless for that purpose that the indefinite and generally non-committal testimony of Mr. Thomas, on behalf of undisclosed interests, was introduced by the proponents of the scheme.

Less emphasis was laid upon the additional horse-power which the increased storage would generate on the Winnipeg River, especially at Kenora at the outlet of Lake of the Woods, the site of a plant owned by a corporation largely controlled by Mr. Backus. It is, nevertheless, plain from a reading of the whole record that this constitutes one of the principal motives, probably the controlling motive, actuating the advocates of higher water-levels.

The objections to appropriating a large area of public lands belonging to the United States and the State of Minnesota and of private property belonging to American citizens for the benefit and

development of a single corporation at a point situated, not on the international boundary, but wholly within Canadian territory, are so patent, that it is hardly extraordinary that the proposed Winnipeg River development was not stressed at the hearing. Every effort appears to have been made by the proponents of Mr. Backus' plan to divert attention from this feature of their case and to draw the fire of the opposition upon a man of straw in the person of Mr. Thomas.

The Winnipeg River was not wholly ignored, however, and it was alleged that additional flowage on the Winnipeg River, situated wholly in Canada, could be obtained by erecting dams on the border lakes over one hundred and fifty miles away. Testifying as to the effect of his plan upon the production of water-power at certain sites on the Winnipeg River—presumably in particular the site of his own plant—Mr. Backus said:

It will increase the dependable power at these sites by over 71,700 horse-power continuous (80% efficiency) at a capital cost of only \$5.94 per continuous horse-power.

* * * * *

Mr. Magrath: When were those estimates made?

Mr. Backus: Their preparation began about five years ago and has continued up to the present time.

Mr. Magrath: Mr. Meyers' estimate was made some years ago, of course?

Mr. Backus: Yes, sir.

Mr. Magrath: And you are including his estimate in those figures.

Mr. Backus: He made his estimate on the cost of Rainy Lake in 1922, just prior to the hearing called by Premier King at Ottawa, at

the two meetings there in September and November of 1922.

Mr. Scovil: That was the original estimate he made in 1915 and he merely gave a copy of it in 1922 (Record, Pgs. 244-245).

However accurate the foregoing estimate as to cost may have been ten years ago, in 1915, it is obvious that in view of the great increase in costs of all kinds it can be of little use as a guide to the Commission to-day.

We must assume that the additional water-power so derived would in some way be beneficial to the Backus plant at Kenora, but the opposition of the Province of Manitoba and of the City of Winnipeg to the plan is in itself eloquent evidence that no great public advantage would be served.

The interests which would naturally be expected to use any additional flowage in Winnipeg River are the two power companies, the Winnipeg Electric Company and the Manitoba Power Company, Ltd., which were represented by Mr. Guy at the hearing. That these companies can see no immediate use for such additional flowage, is evident from Mr. Guy's statement:

"At the present time we are familiar with the situation that Norman Dam is now being connected to regulate the flow in the Winnipeg River. At Great Falls Power Plant, just recently constructed, only two units are in operation. We have capacity for four more units at that plant. *Until such time as this capacity is utilized there is no necessity for us to obtain any additional storage, and any benefits that might accrue or any increased flowage in the Winnipeg River would simply be a matter of waste.* We are not utilizing what we

have there at the present time and just when we will be in a position to utilize that, is a question which we cannot answer now. *It may be estimated anywhere from ten to fifteen to twenty-five years that we might require or desire additional flowage*, and even if it came to that point and we desired the additional flowage, then the question would always have to be considered, where could we get the additional storage and where could we do it the cheapest?

* * * * *

The present storage on Rainy Lake and on the waters controlled by the dam at Kettle Falls was undertaken solely and entirely as a private undertaking and to provide for the utilization of power for commercial purposes, and was not in any respect intended as a storage basin to regulate the flow of water in the Winnipeg River, and if incidentally such storage for power purposes (which is not admitted but denied) in any way contributed to the more uniform flow of the Winnipeg River, none of the power companies on the Winnipeg River should be asked or expected to contribute anything to such private enterprises" (Record, Pgs. 603, 606; italics ours).

The foregoing statement is made by a representative of the very companies that might be expected to be most favorably inclined to any proposal to make additional water-power available, and by an expert, thoroughly conversant with local conditions.

We submit that Mr. Guy's forceful statement constitutes a complete answer to any contention that additional flowage on the Winnipeg River is a public necessity or even an advantage. No testi-

mony, expert or otherwise, was offered in refutation of any of his conclusions, and in the light of this evidence and its corroboration by Mr. Craig and Mr. Preudhomme, we can only conclude that Mr. Backus' plan in so far as it concerns the Winnipeg River is an enterprise wholly private in character.

Even considering it from that point of view, however, the record is woefully deficient in developing any considerations which should have weight with this Commission.

It does not appear from the testimony presented what, if any, advantage would accrue even to Mr. Backus' companies if the additional flowage were obtained. The natural inquiries which suggest themselves are: does Mr. Backus' plant require additional water-power? What are its present facilities? Are they fully utilized? What are the business conditions that make such an increase necessary? Could not the same benefits be obtained in some other way?

It would seem that this Commission, and particularly the people whose interests it is proposed to sacrifice for Mr. Backus' benefit, are entitled to a full and candid answer to these questions. No hint of such an answer is to be found in the Record.

The Cost.

No attempt was made to present to the Commission any complete statement of the costs of the proposed development, and we shall not attempt to estimate them in detail here.

The aggregate cost of the erection of the seven new dams and of the necessary alterations to the old ones, including flowage easements, was fixed by Mr. Backus at \$750,125. No statement was presented as to the method by which this figure was

arrived at. In his testimony, quoted on page 10 of this brief, Mr. Backus stated that he did not know what sort of construction he wanted for the dams, and Mr. Scovil pointed out (Pg. 22 of this Brief) that the estimates upon which the foregoing figure of costs is based was prepared in 1915. In view of these facts, the unreliable character of Mr. Backus' calculation becomes self-evident.

In contrast to Mr. Backus' figures, affidavits were presented by Mr. Hurlburt showing damage to riparian owners along the southern shore of Rainy Lake alone aggregating \$258,000. In his official capacity as representative from the Rainy Lake region to the Minnesota House of Representatives, Mr. Hurlburt is in a position to judge accurately of the number of property-owners along the shore of Rainy Lake. In presenting the affidavits mentioned above, he stated:

"I would estimate that this statement of \$258,000 is probably not one-half of the damage that would be sustained by the riparian owners on the southern shore of Rainy Lake" (Record, Pg. 839).

It will be observed from the accompanying map that the southern or American shore of Rainy Lake is far shorter than the Canadian shore, which is not included at all in the foregoing estimate. It must also be noted that no definite figures were presented as to the damage to islands, either on the Canadian or American side. A large number of these islands have been elaborately developed and are used for residential purposes, representing a very substantial investment. An example is afforded by Dr. Dunsmoor who testified that he had invested over \$30,000 on the island which he makes his summer home (Record, Pg. 532). In addition

to the private property, Mr. Pratt testified that west of Namakan Lake alone, that is in the Rainy Lake district, there are approximately 100,000 acres of State lands with a minimum value of \$5 an acre which might be affected by the proposed elevation (Record, Pg. 784).

It must be recalled that Rainy Lake, although the largest, is only one of many lakes affected on which property values are at least equally high.

To the amount of property damage must be added the damage that would be caused to the Canadian National Railway by the necessity of raising the level of its right of way. This cost was estimated at \$825,490 (Record, Pg. 726).

As a further item, the Town of Fort Frances estimates its prospective damage at over \$300,000 (Record, Pgs. 802; 816). No figures were presented for the towns of Ranier and International Falls, but it is not too much to assume that their damages would hardly amount to less.

A considerable portion of the Record is devoted to the discussion and analysis of specific items of damage. As might be expected, the whole effort on the part of the proponents of the plan to raise the water-levels was directed to minimizing insofar as possible the value of the property to be destroyed. This position was illustrated in an extreme case, as we have later pointed out (Pg. 45 of this Brief) when Mr. Backus denied the right of the Canadian National Railway to any compensation whatever because at the time their line was established, they might by inquiry have ascertained his plan to raise the water-level and have constructed their track accordingly.

Without going into further detail, it will suffice to note that a wide divergence exists between the \$750,000 suggested by Mr. Backus and the general

estimate of \$5,000,000 given by Mr. Hurlburt (Record, Pg. 840), with the weight of probability strongly against Mr. Backus.

A question of immediate interest, however, is the suggested method of meeting the cost of the proposed development, whatever it may prove to be.

It was proposed that one-half both of the cost of the construction of the various dams and of the damages caused by the raising of the lake levels should be borne by the two Governments and one-half by the persons or corporations directly benefiting from the proposed development (Record, Pg. 272).

It was made quite clear that this method of relieving himself and his companies of one-half of the cost was an integral and essential part of the plan offered by Mr. Backus.

Mr. Wilkie: Then, we have this. That while you have in your mind, at any rate more or less on paper, plans for increasing the capacity of certain dams and plans for the building of certain new dams, you have not the faintest idea of building them at your own expense.

Mr. Backus: Do you mean our companies alone to pay all the bills?

Mr. Wilkie: Yes, your different companies.

Mr. Backus: (No. (Record, Pg. 306.)

No satisfactory reason for imposing any part of the burden of cost upon the governments was advanced however. This is amply illustrated by the following extract from page 274 of the Record:

Mr. McCumber: Will you explain upon what theory you have assessed the two governments with one-half—ability to pay?

Mr. Backus: No, sir.

Mr. McCumber: What is the theory?

Mr. Backus: I figure in this way. In the first place navigation is greatly improved all the way from the head waters to Lake Winnipeg. Of course below Minaki on the Winnipeg River there is no commercial navigation to speak of at the present time, but in the future there will be I am sure. I feel this way, that in turning over the regulation of these works to the government, with the improvement in navigation, the benefits as received by the government generally by taxes from every enterprise that is created and on the boundary waters especially where one government, the Canadian Government, is finding it necessary to stand a certain amount of the expense, I think both governments ought to join in helping to pay for the benefits which they receive. I might refer you to a little work that is going on at the present time right at the Twin Cities. The suggestion is now made to the War Department that a dam should be constructed at the confluence of the St. Croix and the Mississippi River at Preston, an improvement that will cost \$4,000,000. Now, in all probability 10,000 horse-power can be developed when that improvement is put in, but the improvement is suggested in order to benefit navigation. I submit that navigation at the present time on the Mississippi is looked after more diligently and more money is spent on it a hundred times over than this would amount to in the northern part of the State. There is no reason why those waters cannot be made and kept navigable. That is the answer to your query, Senator McCumber.

It is, of course, no answer at all. *The totally inadequate character of the foregoing statement becomes even more apparent when it is considered in connection with Mr. Backus' later testimony regarding the benefits to navigation—or rather lack of such benefits—which we have heretofore quoted and discussed on pages 13 and 14 of this brief.*

In the course of Mr. Thomas' testimony it became quite obvious that it was not the intention of the power interests he represented to pay anything for the use of the water-power which they seek to acquire, beyond one-half of the cost of the erection of the necessary dams:

Mr. Selover: Are you also willing to pay anything for the use of the power other than the mere putting in of the dam?

Mr. Thomas: You mean for the use of the water?

Mr. Selover: Yes.

Mr. Thomas: We would expect to pay for the use of the water in paying those costs. We propose to pay our proportion of the cost.

Mr. Selover: Nothing beyond that for the use of the water for all time to come?

Mr. Thomas: Simply for the costs. That is the rule in Minnesota in all power developments.

* * * * *

Mr. Selover: You do not propose to pay anything per horse-power for the development?

Mr. Thomas: That is the case (Record, Pgs. 544-546).

If the suggestions of Mr. Thomas's principals should be accepted, although the two governments would be expected to make a very substantial capital investment in the erection of dams and in the

payment of damages, there would be no return upon the capital so expended beyond the highly speculative advantage to the users of the additional power. No compensation of any kind would be paid for the use of the water necessary to create the power, and the power interests would in effect receive in perpetuity a magnificent donation out of the public domain. The naive assurance of such a proposal can hardly fail to elicit admiration by its very effrontery.

The proposal that one-half of the cost of the development be borne by the taxpayers will in effect result in depriving those whose property would necessarily be destroyed by the flooding of their lands of at least a substantial part of their just compensation; for it is obvious that the revenue needed to defray the share of the expenses imposed upon the governments would necessarily be raised by local assessments, levied in all probability against the very communities and landowners who would be entitled to damages. *The practical result would necessarily be that the governments would take away with one hand in the form of taxes what they awarded with the other as compensation.* A more unfair proposal or one less consonant with the fundamental Anglo-Saxon principle that private property must not be taken without just compensation could hardly be conceived.

Summary of the Case of the Proponents.

In the foregoing pages we have endeavored to point out that the case in favor of the proposed raising of the lake levels, as presented by its principal proponents, is hopelessly inadequate.

The proposals themselves are so indefinite and nebulous as to preclude any possibility of intelligent examination or scientific criticism. Beyond

the unsupported statement of glittering generalities, no evidence is offered of concrete benefits to be derived by anyone, even by the proponents themselves, from the adoption of their proposals. It is certain that no actual necessity for raising the lake levels has been shown.

Except for Mr. Backus' companies, the only apparent beneficiaries of the proposals are anonymous, and singularly timid power interests, who appear to have been conducting undefined "negotiations" with respect to rights which they do not possess.

The only assurance these interests can give that the concessions they seek would, if granted, be administered in accordance with the public interest is based upon an entirely unwarranted assumption that this Commission is willing and able to exercise constant regulatory and supervisory functions over the proposed development. Such an extension of the powers of this Commission is of course obviously impossible under existing law, and there does not exist today either in Canada or in the United States any governmental body legally competent to control the operation of an international water-power system such as is now proposed. *The corporations represented by Mr. Backus and the unknown interests for whom Mr. Thomas acts as spokesman, guided as they are by astute counsel, are well aware of this fact and once their plan is given effect, would be the first to resist any effort by this Commission to control the operation of their business in any way not covered by the very limited jurisdiction conferred by treaty.*

The cost of the project will be clearly far more than that indicated by the incomplete and admittedly vague estimates of Mr. Backus; and this cost it is proposed to apportion in a way wholly to the

advantage of the proponents and equally to the detriment of the taxpayers on both sides of the border.

The case for the proponents rests in the last analysis upon the statement of Mr. Backus himself, that his proposals will be of general benefit. The value of such a statement is not inconsiderable however, for it represents the opinion of one who has energetically and successfully devoted the better part of thirty-one years to the region now under consideration. It is perhaps not surprising that he should seek to exercise a kind of feudal seigniorial control over the whole border-lake country, and that from his pre-eminent position and long experience he should view with some impatience the temerity of those who have disputed the soundness of his conclusions. This attitude, which serves in some measure to explain the lack of concrete facts which we have repeatedly remarked, is exemplified in his valedictory statement at the close of the hearing:

“It was thirty-one years ago last May that the construction of what is now the Minnesota & International Railway was started from Brainerd north of the boundary.

* * * From the very start the plans were always on the table with the dam built at 497 and provided with three feet of splash board to carry the height up on Rainy Lake to 500.

* * * Every interest, the sawmill interest, the railroad interest, all hands knew what was stated by the engineers to be the practical level at which to hold Rainy Lake. I want you to consider that fact, and when I see protestants coming before this Commission who have purchased property and built houses even up to within a year of the present time, without in-

quiring at what point they would be safe in building, I think it is unfair that they should be seriously considered in adjusting the question of whether we can establish our level at 500 or 499 or 497.

* * * All the private owners of land that are appearing before you to-day could have obtained all of the information that we are giving you by simply coming to our office and asking for it.

* * * * *

Mr. Elmquist: Reduced to the last analysis, Mr. Backus, your statement appears to be this, that having come up into this country thirty-one years ago and opened it up and established certain interests here, all other persons who desire to build homes or lake resorts or make investments of any kind should do it in accordance with some design which you had for the full development of this water?

Mr. Backus: I think he should do it so it would not conflict with that design, if the design were one that seemed to be a practical one" (Record, Pgs. 871-878).

However great the value of Mr. Backus' past services as a pioneer—and it must be remembered that they have proved by no means unprofitable to himself (Record, Pg. 878)—it is evident that the views so expressed cannot be seriously applied to a region which in the last decade has seen the growth of many diverse interests wholly independent of Mr. Backus. It is the attitude of these interests that we must next consider.

II.

The proposal to raise the levels of the border lakes will, if adopted, result in positive detriments which will far outweigh any benefits to be derived.

It is axiomatic that the burden of proving the desirability and practicability of any change in the existing order rests upon its proponents, and the affirmative case presented by Mr. Backus and his associates in favor of altering the lake levels has proved notably insufficient to sustain this burden. Nevertheless the argument against any such alteration does not rest wholly upon the lack of competent testimony to support it, but rather upon the positive and uncontradicted statements of the large number of witnesses who took occasion to record their opposition.

Water-power has come to play a role of ever-increasing importance in the development of our commercial and industrial life. Its value and potentialities have only recently gained a general recognition. The public attitude has today so altered that in place of lethargy and indifference we find projects of any and every kind welcomed with an unthinking enthusiasm, provided only they can take advantage of the magic in the words "water-power." This wide-spread and almost child-like faith, that any plan which involves the development of water-power is a sure road to industrial prosperity, has often caused individuals and whole communities to lose their perspective and to support projects intrinsically without merit in a mistaken belief that by so doing they were making a contribution to industrial progress.

The prevalence of this point of view makes it particularly significant that the plan for increased storage on the border lakes should have been met

from its inception with such extensive opposition and condemnation, and that we should find arrayed against it representatives of every class and occupation, including many of the very interests which might have been expected to view a project of this kind with particular approval.

For convenience the opposition may be divided into four main groups, united in the conclusion that the proposals should not be adopted, but each reaching the same result from a different angle; the municipalities, the industrial interests, the property-owners and the civic and conservation associations. We shall briefly consider each group separately.

The Municipalities.

The immediate beneficiaries of any substantial or proper proposal for an increase of water-power would necessarily be the communities located in the area of the development. It might have been expected, therefore, that the various municipalities would lend their support to the plan, particularly in view of the great and active influence of the Backus companies in all of the towns affected.

Such, however, was not the case. The three communities situated at the western outlet of Rainy Lake; Ranier, International Falls and Fort Frances, the only settlements in the whole region primarily affected, not only did not favor Mr. Backus' proposal, but appeared in active opposition to it.

In spite of the claims of Mr. Thomas, not a single one of the towns of northern Minnesota saw fit to urge the acceptance of the plan by its duly constituted authorities, and no assistance was offered by any governmental body either in Canada or the United States.

On June 11, 1925, a mass meeting of the citizens of International Falls called by the Common Council to consider the proposed changes, voted overwhelmingly against any alteration in the existing water-levels. The resolutions so adopted are set forth at length on the Record at pages 121-122.

Similar resolutions were adopted on September 26, 1925, by the Village Council of the Village of Ranier (Record, Pgs. 150-151).

Ranier is a small, but thriving community on the American shore of Rainy Lake at its outlet a few miles from International Falls. The town is located on a point of low land so that on two sides the streets and houses run down to the very edge of the water. An increase of three feet in the water level would inevitably inundate the streets of the town and render many of the houses uninhabitable. The town is not an industrial community, and no benefits which it might derive from the additional water-power made available to it under the Backus Plan could compensate it for the virtual destruction of a substantial part of its property.

The interests of the citizens of Ranier and of International Falls were protected at the hearing by the Hon. David Hurlburt, their representative in the Minnesota House of Representatives, who reflected the views of his constituents in his able and vigorous opposition to the proposed encroachment of great corporate interests upon the public domain.

Of the towns immediately affected, however, the most energetic resistance was offered by the Canadian town of Fort Frances. The testimony presented on behalf of the town by its counsel, Mr. Tibbitts, is particularly convincing because of the notable fairness which characterizes it. There is no hostility to Mr. Backus or to the interests he represents, and Mr. Tibbitts expressly recognizes

the commercial advantages derived by the town from the presence and developments of the Backus companies (Record, Pg. 800).

The figures submitted by Mr. Tibbitts show that property of the assessed value of \$85,600 would be inundated and rendered valueless if the water of Rainy Lake were raised to the proposed level (Record, Pgs. 811-816). In addition a park of 64 acres owned by the town would be completely submerged. Mr. Tibbitts further testified that if the water-levels suggested by Mr. Backus are adopted: "we cannot construct sewers in the northern portion of our town and in the southern portion of our town the whole sewer system which I will submit to you has cost us \$261,000, is absolutely useless * * *" (Record, Pg. 802). The figures so given by Mr. Tibbitts, and later corroborated by Mr. Murray, contrast sharply with Mr. Backus' summary estimate of possible damage to Fort Frances at "\$40,000 odd" (Record, Pg. 323).

Coupled with his estimate of damages, Mr. Tibbitts presented a forceful statement of the injury, incalculable in dollars and cents, which would result from the destruction of the ever-increasing tourist trade which the town now enjoys.

It was found by this Commission in the Lake of the Woods Reference, that an increase in the water-level of Rainy Lake to the height suggested by Mr. Backus would make available only 700 additional horse-power at Fort Frances and International Falls, if the additional storage were utilized—as Mr. Backus now apparently proposes—primarily for equalizing the outflow from Lake of the Woods into the Winnipeg River (Final Report, Pg. 36). This estimate was accepted and corroborated by Mr. Backus in his testimony (Record, Pg. 262). It is obvious that the advantages of such an increase

to the people of the three towns affected would be insignificant in comparison to the damage caused.

The Province of Manitoba and the City of Winnipeg proved equally reluctant to accept the alleged benefits of the plan. The project sponsored by Mr. Backus and Mr. Thomas contemplated, among other features, the development of additional power along the Winnipeg River in Ontario and Manitoba. The position of the Manitoba Government was very forcefully explained by Mr. Craig, the Attorney-General of the Province:

“You will see first of all there is the consideration presented as to whether these proposals are practicable and desirable. There is a cumulative effect in that. It is not *either* practicable *or* desirable. It is—are they *both* practicable *and* desirable? It may be regarded that these proposals are entirely undesirable, and we have heard a great deal of testimony urged very forcefully and eloquently upon the Commission to that effect. On the other hand they may be held to be desirable, but not practicable. What the Province of Manitoba is more interested in at the present time is in the two elements involved in the consideration as set out in the notice. There are the elements of time and expense.

The little word ‘now’ precedes the words ‘practicable and desirable.’ Is it *now* practicable and desirable? There is the element of expense or expediency. From the consideration of the element of time, our position is that these proposals would be of no immediate or direct benefit to the Province of Manitoba or the interests within its borders at the present time” (Record, Pgs. 586-587).

A similar position was adopted by Mr. Preudhomme on behalf of the City of Winnipeg, and both agreed in voicing strenuous objection to any project which imposed a burden of expense upon the taxpayers without affording any corresponding advantage.

While the opposition of the Rainy Lake communities is based mainly on the physical destruction which would be wrought by the adoption of the Backus Plan, the opposition of the City of Winnipeg is founded rather on the inequitable proposal for the division of the cost. It is obvious that as the only large city directly affected, Winnipeg's share of any assessment would necessarily be a substantial one. The injustice of requiring the taxpayers of Winnipeg to bear a part of the burden of developing additional water-power, which they neither need nor desire, is self-evident; and any city government which under the circumstances failed to record its opposition would be derelict in its duty to its constituents.

The State of Minnesota and its various departments and bureaus was represented by its Assistant Attorney-General, Mr. Pratt, and by its Commissioner of Forestry and Fire Prevention, Mr. Conzet. A number of reports of other State Commissioners were submitted which we shall mention later (Pages 56 to 58 of this Brief). The testimony of Mr. Conzet was a forceful statement of the disadvantages of the Backus Plan from the point of view of the State, arising both from the flooding of State lands and from the serious effect upon the tourist traffic which his department has so earnestly and effectively fostered (Record, Pgs. 449-466). Mr. Pratt took occasion to point out that the State Constitution requires a minimum value of \$5.00 an acre on State land and that a

considerable area of such lands would be flooded. The value, upon a purely commercial basis, of the State lands which would be flooded in the Rainy Lake district alone he estimated at \$32,102 (Record, Pg. 24). Taking the whole area into account, the result would necessarily be greatly to enhance the cost of the project over the estimates offered by Mr. Backus. The necessity of strict regulation of any proposed water-power development—a feature not provided for except in the most general way by Mr. Backus—was also urged by Mr. Pratt (Record, Pg. 784).

A striking feature of Mr. Pratt's testimony, however, was his statement with regard to unpaid claims for the increase in the water-levels already brought about by the dams at Kettle Falls and at International Falls, constructed and operated entirely by the corporations controlled by Mr. Backus:

Mr. Pratt: The second matter in connection with the present situation as well as the future situation on these two series of lakes, that is Rainy and the lakes controlled by Kettle Falls is the ascertaining of the value of the lands and timber belonging to the State of Minnesota which have been appropriated and taken and for which no compensation has been paid. * * * These waters have been up for ten or twelve years or more. Our lands, our timber, have been taken and appropriated for storage and power purposes and we have received no compensation for them (Record, Pg. 789).

At the risk of digressing, we think this point made on behalf of the State of Minnesota should be emphasized: *no compensation whatever has been*

paid by Mr. Backus or his companies for the property damage that was caused by the erection of the existing dams. This was admitted by Mr. Backus himself in response to questions by Mr. Wilkie:

Mr. Wilkie: So we have this situation: So far as actual structures are concerned, in building dams on streams tributary to Rainy Lake and water courses running out of Rainy Lake, they have all been paid for by Mr. Backus and his associates.

Mr. Backus: We paid all the bills and also at the outlet of Lake of the Woods and gave those boys down the river all the benefits. You know they do not want to give that up.

Mr. Wilkie: Being a stranger, Mr. Backus, perhaps you will pardon me, but the thought passes through my mind, "paid bills so far as they are paid." I understand that no damages have yet been paid to anybody.

Mr. Backus: Well, they have been trying awfully hard to establish some damages. I think you will find that we have all the lawsuits that they dared to bring (Record, Pgs. 305-306).

It may perhaps be objected that the attitude adopted in the past by the interests represented by Mr. Backus, however reprehensible, is not relevant to the issues now before this Commission. We submit, however, that in giving consideration to what is in effect an application by private interests for special concessions involving the destruction of the property of others, this Commission may properly be influenced by the conduct of the applicant upon a previous similar occasion. The ancient maxim that a suitor must come before the court with "clean hands" should fairly be applied to the present case.

The Industrial Interests.

An inference might be drawn from the testimony offered by Mr. Backus that the forces for and against the alteration of the water-levels were divided into two camps, on the one hand, the practical business men with a vision of industrial growth and commercial prosperity, and on the other hand, ill-informed and sentimental theorists.

The fact is, that with the exception of Mr. Backus' own companies and his anonymous allies not a single industrial interest appeared at the hearing before the Commission to advocate his proposal and many came to combat it. The highly colored prospectus of his plan drawn by Mr. Backus in the course of his testimony was designed to appeal chiefly to business men. The benefits of his project which he holds out are distinctly tangible, dollar-and-cent benefits to be found, if at all, under "surplus" on an annual corporate balance sheet. It might have been supposed, therefore, that the plan to provide increased storage, however distasteful to the general public, would have appealed primarily to other companies engaged in business of the same kind as the Backus Companies.

Yet it is apparent that Mr. Backus' competitors in the lumber business do not view with confidence the advantages which Mr. Backus proposes to bestow upon them or share his optimistic belief in the desirability of his plan. The Shevlin-Clarke Company, operating a saw-mill at Fort Frances, the Virginia & Rainy Lake Lumber Co. and other lumber companies represented by Mr. Elmquist regard the proposals with frank concern.

It is not proposed to enter into a detailed discussion of the testimony offered by Mr. Elmquist, Mr. Murray, Mr. Malone, Mr. George and other representatives of the business interests who testi-

fied. It is enough to note that the majority flatly opposed the alteration in the lake levels, and the few, like Mr. George, who assumed a somewhat neutral position, nevertheless made it clear that the proposals could be safely adopted only if accompanied by the introduction of a rigid system or regulation and control which would necessarily extend beyond the jurisdiction of any existing governmental body.

It is important to observe that none of the business interests which were represented before the Commission showed any need for or interest in the additional water-power which appears to be the whole motive of the proposals.

The Canadian National Railway.

By far the most important single interest affected by the proposals is the Canadian National Railway, whose right of way runs for a number of miles in close proximity to the shore of Rainy Lake.

The able examination of Mr. Wilkie brought out from the testimony of Mr. Watson, the Agricultural Agent, of Mr. Wilcox, the General Superintendent of Transportation, and of Mr. Collinson, the Mechanical Engineer, the character of the traffic handled by the Railway, its equipment and its importance as a main artery of development throughout the whole region.

Mr. Pickles, the District Engineer between Duluth and Fort Frances, and Mr. Moodie, the Division Superintendent at Port Arthur, testified at length as to the effect of an increase in the water level of Rainy Lake upon the lines of railway within their respective jurisdictions.

A raise in the water-level would necessitate the practical rebuilding of an important part of the railway, including the raising of the massive steel

bridges which cross the lake at various points, and during such reconstruction traffic would necessarily be interrupted. This is evident from Mr. Moodie's testimony (Record, Pgs. 684-685) :

Mr. Moodie: Dwelling for a moment on the question of raising the bridge, I do not quite see how the bridge could be lifted. It has been said by someone that these bridges can be lifted—I am speaking about under traffic. If we were able to stop traffic, you can do anything; but if you are obliged to keep traffic going on the railway, what you can do is limited and I would not like to undertake to lift the bridge under traffic.

Mr. McCumber: Would not a three foot raise of the water bring part of the mechanical equipment below the water?

Mr. Moodie: Yes, that is one of the factors that would make it necessary to raise the bridge if this contemplated raise is brought about?

Mr. Clark: How would you deal with the situation under traffic if you could not deal with it as suggested by Mr. Powell?

Mr. Moodie: All things are not possible, and I do not know really what I would do. Personally I would not undertake to lift the bridge under traffic. If I were ordered to do the work, I would ask the contractor who built the bridge. We did not build the bridge ourselves. I would call the contractor who built it into consultation and use every possible safeguard to be relieved of any tie-up.

Mr. Clark: You have not any definite knowledge how it would be accomplished?

Mr. Moodie: No. I have given it some consideration, but I cannot suggest any way. I

would have to consult some who are better equipped to handle the bridge than I am.

Mr. Moodie later testified that the same difficulties would apply to two other steel railway bridges at other points (Record, Pgs. 691-692).

The total estimated cost of the work necessary to raise the level of the bridges and tracks of the Railway to meet a raise of three feet in water levels was presented to the Commission as \$825,490 (Record, Pg. 726).

It should be noted that this amount represents actual cash outlay by the Railway Company and does not take into account the inevitable loss both to the Company and to the public which would be occasioned by an interruption of traffic along the line.

No part of this very considerable sum is included in the cost as estimated by Mr. Backus. The omission was deliberate, and Mr. Backus' reason, as stated to the Commission, is illuminating:

Mr. Backus: I do not agree at all that the Canadian National Railways, the Canadian Northern, have a claim of a penny as long as the level does not go above 500 (the level proposed by Mr. Backus) because they had ample notice that was the place where we tried to secure the control of the lake (Record, Pgs. 748-749).

The logic of the foregoing conclusion needs no comment.

The Property-Owners.

The industrial interests and the railway, as we have seen, have recorded their opposition to the proposals upon the unassailable ground that the loss

and cost involved far exceeds any discernible advantages to be gained. The argument applies with equal force to the owners of property along the various lakes.

The inhabitants of the border lake region, and particularly along the southern or American shore of Rainy Lake, are for the most part men of Scandinavian stock, who have gallantly faced the discomforts and rigors of a northern climate to wrest a living for themselves and their families. Their farms are relatively small—a few acres at the most, and, compared with the vast extent of the fertile plain country to the west and south, the area under cultivation is insignificant and agriculturally unimportant. The soil is rocky; the land is often heavily wooded, though the timber is of little commercial value, and to clear the land is no easy task. In many cases the lake affords the only means of transportation. A crop is hard to raise and harder to market profitably. It is certain that the intrinsic value of the property per acre is not high; speaking in terms of money there may even be some justification for Mr. Backus' contemptuous statement:

“Any lands affected by the waters of Rainy Lake are not of value enough to consider”
(Record, Pg. 258).

But there are other factors of an importance not to be measured by any standard of mere cash values—human factors, which this Commission cannot ignore.

No insignificant cash payment can compensate for the loss of a home. With the spirit of the early pioneers, the spirit that is the rock foundation of our American civilization, the farmers of Rainy Lake have established themselves and their

families. They are simple men, unversed in the intricacies of corporate finance and of speculative water-power developments. They do not know their legal rights or how to compel others to respect them. They must rely entirely for their protection on the justice of this Commission and on its sympathetic understanding of human problems, as distinct from the technical data presented to it by the engineers and the ingenious argument of the lawyers.

Six farmers appeared personally to testify before the Commission as representatives of many others. Their stories were brief and simply told and all substantially the same. An extract from the laconic testimony of Mr. Erickson, the owner of forty acres, of which six are under cultivation, affords a fair example (Record, Pgs. 835-836) :

Mr. Hurlburt: What would be the effect upon your farm of an increase in the level of Rainy Lake to the extent of three feet?

Mr. Erickson: It would all be flooded.

Mr. Hurlburt: It would flood the entire cultivated area?

Mr. Erickson: Yes, it would cover the whole forty.

Mr. Hurlburt: Would about the same effect prevail with respect to other land located along there?

Mr. Erickson: The same thing, yes, sir.

Mr. Hurlburt: That is, your neighbors' land would be flooded in the same way, would it?

Mr. Erickson: Yes, sir.

* * * * *

Mr. Clark: How long have you been there?

Mr. Erickson: Eighteen years.

The testimony of Mr. Jespersen was to the same effect (Record, Pgs. 829-830) :

Mr. Hurlburt: What would be the effect upon your farm of an increase in the level of Rainy Lake of three feet?

Mr. Jespersen: It would nearly destroy the whole farm. There would be probably about ten or twelve acres left.

Mr. Hurlburt: Out of a total acreage of two hundred and eighty?

Mr. Jespersen: Yes, sir.

Mr. Hurlburt: Would this unsubmerged portion be cultivated areas?

Mr. Jespersen: Do you mean that which would be left?

Mr. Hurlburt: Yes.

Mr. Jespersen: No, it would be two or three rock ridges.

Mr. Hurlburt: How many acres have you under cultivation?

Mr. Jespersen: About forty.

Mr. Hurlburt: Would this entire forty be submerged?

Mr. Jespersen: Every bit of it.

Mr. Hurlburt: What improvements have you on your farm?

Mr. Jespersen: There are no very good improvements. There are buildings.

Mr. Hurlburt: You have a house and barn?

Mr. Jespersen: Yes, and I have a silo.

Mr. Hurlburt: What would be the effect of this water upon those buildings?

Mr. Jespersen: They would be all under water.

The testimony of the four other witnesses did not materially differ from the two foregoing state-

ments. To supplement this testimony Mr. Hurlburt filed with the Commission affidavits of seventy-two other property owners, similarly situated, and made it clear that this represented but a small part of the total number of property owners who would be injured by a raise in the lake level. (Record, Pg. 839).

However insignificant the financial resources of these property owners may be in contrast to the millions of dollars of corporation money behind their opponents, we submit that they represent an interest to which this Commission is bound to give consideration.

Another class of property-owners was represented at the hearing, whose interest differs somewhat from that of the farmers we have mentioned above, namely the owners of property used for residential purposes.

The point of view of the well-to-do property owners was well expressed by Dr. Dunsmoor who for many years has owned a summer home on the lake and has spent a large sum in developing and improving his property. As he stated to the Commission, the elevation of the water-level of Rainy Lake occasioned by the construction of the existing dam at International Falls, for the benefit of the interests represented by Mr. Backus, has already destroyed the beaches which were formerly an attractive feature of his property (Record, Pg. 532), and in forceful and unqualified language he emphasized the detrimental effect of any further increase. Equally forceful was the testimony of Mr. Lenander, who is also interested in the Rainy Lake region from a residential point of view. Not only did he oppose any further increase in the water-level, but coupled his opposition with a positive suggestion that the present level be reduced. The

latter recommendation was approved and concurred in by Dr. Dunsmoor (Record, Pgs. 172-206 and Pg. 533).

In the face of the definite statements of two men of the high standing of Mr. Lenander and Dr. Dunsmoor, corroborated by the testimony of Mr. Oberholtzer, who has been a resident of Rainy Lake for many years, it is difficult to understand the basis for Mr. Backus' unsupported assertion that no damage would be done to the residential qualities of Rainy Lake.

In addition to the property owners we have already considered, there is a third interest, which was hardly in existence at the time the Commission made its investigation in the Lake of the Woods Reference a decade ago, but which has assumed an importance in recent years that cannot be ignored. There have been erected on the shores of Rainy Lake, and on the other lakes affected by this reference as well, a large number of small houses and camps, designed to accomodate tourists and summer visitors of relatively small means who have come into the region for a vacation.

Miss Speer, is an example of a property owner of this class. She testified that she owned property near Ranier with a frontage of fifty feet on Rainy Lake and that if the proposed increase in the lake-levels were made her entire property, representing an investment of \$8,500, would be destroyed (Record, Pgs. 795-799). We believe that subsequent investigation by the Commission will show that Miss Speer does not represent an isolated instance, but rather a typical case representative of a large and constantly increasing class.

Property owners of every kind are united in their opposition to the proposed plan. *It is especially significant that with the single exception of Mr.*

Backus himself, not a single resident of the whole region appeared to advocate or defend his proposals.

Civic and Conservation Associations.

We have considered heretofore only the opposition of the various interests immediately and personally affected. There is another aspect of the problem which, in a large sense, is the most important of all, and which finds its basis in national rather than local needs.

Within comparatively recent years the Superior National Forest on the American side and the Quetico Forest Reserve on the Canadian side have been created, extending, as is indicated on the accompanying map, over a considerable portion of the territory directly affected by the proposed raise in lake levels. The value and importance of this district of several million acres and of the whole region has been enormously enhanced as a recreational center for the people of all the north and middle western states.

It is perhaps not surprising that Mr. Backus has failed to appreciate the change that has taken place in the character of the country he has done so much to develop, and that he seems wholly unaware of the new importance it has assumed not only to its inhabitants but to the whole nation; for in the many years that he has spent on Rainy Lake, he has not had time, as he himself admits, for pleasure excursions about the country.

The proponents of the plan to elevate the lakes have to a great extent relied upon the conclusions reached by this Commission in its final report submitted on June 12, 1917, upon the reference of June 27, 1912, regarding the levels of the Lake of the Woods. They have assumed that the

conditions found to exist between the years 1912 and 1917 remain substantially unchanged, and that the interests adversely affected by an increased water-level remain substantially the same today as they were at the time of the Commission's previous investigation. In so doing they have seen fit to ignore the development of this region for recreational purposes which has taken place within the last decade, and the great public interest in the preservation of its natural beauties which has thus been created.

It is true that the dedication of the great area under consideration to recreation offers few direct and immediate commercial advantages. Efforts made in late years with increasing intensity to preserve and set aside for the public benefit parts of the continent pre-eminently endowed have always been opposed by those who are willing to sacrifice the ultimate good of present and future generations to their own temporary profit. The efforts to raise the levels of the boundary lakes which form the subject of this reference are another attempt of the same kind, made perhaps with a better prospect of success, because the beauty and the possibilities of the northern lake lands are at present less widely known than those of such regions as the Yellowstone and the Grand Canyon of the Colorado.

The Minnesota Arrowhead Association, with headquarters in Duluth and including in its membership a large number of representative citizens and civic organizations has made a notable contribution to the development of the region east of Rainy Lake, and has become the greatest single force in the state working for a wider appreciation of its undoubted value as a recreational center. As was well stated by Mr. Chaffee, a rapid change has occurred within the last few years by reason

of the development of good automobile roads running to points on the shores of the various lakes, so that a single point, the Town of Ely, the number of people who have taken out canoes during the summer season has increased from 183 in 1921 to 748 in 1925 (Record, Pg. 388). The same ratio has obtained at the Towns of Ray, Ranier and at other points. Without exception the larger lakes affected have literally hundreds of islands where innumerable good camp sites are to be found. The presence of fish, wild fowl and game in abundance affords an added inducement to sportsmen; and the clear portages connecting the tributary lakes and streams give an opportunity for extensive canoe trips.

The wide-spread interest in this region is indicated by the long list of organizations which filed resolutions with the Commission opposing any plan that might tend to destroy the border lake region as a center of out-door development. Among those of national scope were the Izaak Walton League, the American Game Protective and Propagation Association with headquarters in New York, and the Conservation Council of Chicago. In addition to these are the Minnesota Arrowhead Association we have already referred to, and the Superior National Forest Recreation Association with headquarters at Rockford, Illinois.

The value of the protests of members of organizations like the Izaak Walton League, for example, has sometimes been questioned because they necessarily come in many cases from persons unfamiliar with the details of the local situation. It is undoubtedly true that on the restricted questions raised by the consideration of a specific plan their opinions would hardly be helpful to the Commission. As to such matters it must rely rather upon

the testimony of communities, industrial interests and property owners immediately concerned, testimony which in this case, as we have already shown, has been overwhelmingly adverse to any change.

But there is another and broader significance in the protests of such organizations, for we submit that there is involved in this reference a question of far more than mere local importance. They are indicative of the sentiment which is constantly growing stronger that regions like this, of unusual scenic beauty and resources, *and particularly those which have already been reserved by law*, must not be destroyed at the instance of private ambition, however powerful. The preservation and protection of Rainy Lake and its surrounding country has become part and parcel of the great national conservation movement initiated by President Roosevelt and now firmly established as a recognized policy of the American Government.

The raising of the lake levels would mean nothing less than the ruin of the whole country for recreational purposes for an indefinite period. The following statement of Mr. Selover, representing the Izaak Walton League, as to the effect of raising the water-levels to the height proposed summarizes much of the testimony presented on this subject:

Mr. Selover: * * * I think as your investigations go on your attention will be called more and more to the fact that particularly on the lower lying American side these elevations will cause a much greater overflow than you have heard anything about. You got a glimpse of it when Mr. Conzet said it might go back one or two miles. I know where it will go back four or five miles on a sixteen or seventeen foot rise. The tributary lakes in the na-

tional forest will be affected, and the streams connecting them and these pathways or trails will be destroyed and obliterated (Record, Pg. 475).

In speaking of a rise of sixteen or seventeen feet Mr. Selover had in mind, of course, particularly the proposed elevation on Lac La Croix and Saganaga Lake.

Lac La Croix is a lake of irregular shape approximately thirty-six miles long and varying from ten or twelve miles to five or six miles in width. Mr. McClearn gave a rough estimate of the number of islands on this lake as eight hundred (Record, Pg. 393). Under the proposals of Mr. Backus the water-level on this lake would be raised between sixteen and seventeen feet. Mr. Chaffee testified as to the effect of the proposal as follows in answer to an inquiry by Senator McCumber:

Mr. Chaffee: I have gone through the lakes, and it would seem to me that if the lake was raised from sixteen to seventeen feet, the best part of all the islands would be submerged; that is, the islands themselves. I have not seen all the islands; I was in there only once this spring, and I made these observations, and from my observations I would say that most of the islands would be submerged. At any rate, they would be spoiled for use for camping purposes. I do not think anyone would want to go there (Record, Pgs. 394-395).

It requires no effort of the imagination to picture the effect upon a shore-line, and particularly upon islands, of increasing the depth of the water over sixteen feet. Except in the comparatively few instances where a rocky incline runs down to the water's edge, the shores of all the

lakes raised to an artificially high level would be lined with trees standing in the water. A shore that can only be approached by passing over and between half-submerged tree trunks can hardly hold out any very alluring prospect for campers. Another and perhaps more serious result would be the increased hazard of forest fires from the dead timber that Mr. Conzet, Commissioner of Forestry and Fire Prevention of the State of Minnesota, testified would thus be created (Record, Pg. 462).

The higher water-levels and particularly the variations in water-levels caused by regulation of the dams will in a short time practically destroy fish and plant life in the lakes affected. This is made abundantly clear by the testimony of Mr. Selover, and is corroborated by the statement filed with the Commission on behalf of the Game and Fish Commissioner of Minnesota. The Commissioner's statement reads in part:

"Generally speaking higher water levels are beneficial to fish life. However, any substantial increase in water levels over and above that ordinarily maintained in a state of nature over a long period of years will naturally destroy the natural spawning beds of fishes of the shallow water spawning species, as well as the aquatic plant life found in such shallow waters, and no one can foretell how many years will be required to re-establish or develop new and proper spawning places. In addition there is involved the problem of the development of plant life, not only that vitally necessary and essential in the life of all species of fish at certain periods of life of each, but that upon which migratory birds are dependent for food supply during breeding season and during flight as well.

Generally speaking, it is not high water levels which are destructive to fish and aquatic plant life, but rather a varying and irregular artificial change of water depths and levels. For example, if the normal or average water level in a lake or stream be taken at benchmark 500 and through the construction and operation of a dam the water level behind or above such dam be raised 15 feet or to benchmark 515 such level maintained for a period of say, weeks or months, and then lowered to benchmark 505 or lowered 10 feet such radical and artificial variation in level would prove, and has by experience been proven, to be absolutely destructive to fish and plant life" (Record, Pgs. 770-771).

As a concrete example, the Commissioner cites the situation in Lake Kabetogama developed by the Kettle Falls dam at the entrance to Rainy Lake, which was constructed and is now operated by the Backus companies. There can be no doubt that the same result will inevitably follow in all the border lakes, if the erection of the proposed new series of dams is permitted.

Mr. E. V. Willard, the Commissioner of Drainage and Waters of the State of Minnesota also filed a memorandum with the Commission, concurring in the view taken by Mr. Chaffee, Mr. McClearn, Mr. Selover and other witnesses that to raise the water levels would necessarily destroy the recreational value of the whole region. The following extract summarizes his view:

"The natural shore lines of these bodies of water have been formed through geological ages and their value may be said to consist in their rugged, wave worn outlines and in the

demarcation which the wave action has formed between the waters' edge and the line of vegetation. The size and kind of forest growth is largely that which has been encouraged by conditions which have existed because of past lake stages. *A material raising of the surface of the lakes will destroy these outlines and will create a new shore line extending over surrounding meadows and into bordering forests. It will take years for a lake under these artificial conditions to restore anything like attractive surroundings, especially when its surface elevations will be fluctuated through long ranges as would be the case in artificially controlled impounding reservoirs*" (Record, Pgs. 776-777; italics ours).

Of the importance to the people of Minnesota and of the neighboring states of preserving the natural beauty of the border lake country there can be no doubt; nor, in spite of Mr. Backus' assurances that its scenic beauty would not be lessened by his plan (Record, Pg. 877), can there be any doubt the effect of his proposals would be to destroy its value as a playground for an indefinite period.

We have not thus far considered the question of the commercial advantage to be derived by the lake region and its inhabitants, if the development so favorably begun by the various conservation and recreational organizations continues. The actual profit to be derived from the tourist trade is, however, a serious and important factor to the northern counties of Minnesota and to the state itself.

The testimony of Mr. W. D. Washburn, who for many years has been a member of the Minnesota legislature, was particularly illuminating on this subject:

Mr. Washburn: Only the woodsmen and settlers that have gone up there are occupying these lakes. We feel this way about the tourists. They have gone up there in good faith. This year we have had 600,000 tourists in the State and they have brought in \$100,000,000, which is three times our wheat crop. It is worth just as much as the wheat crop and the corn crop together, and it will be continually increasing. In these northern counties the timber is very largely cut, and they have made all their improvements on the basis of a very high assessment of timber. They are coming to the point where, if they do not get iron, it will be almost impossible to run the counties at all. In Lake County there are no resources except timber, and that has all been cut. They are relying now largely on the network of lakes. They owe us \$800,000. Thirty per cent. of their taxes are delinquent and twenty per cent., I think, are delinquent in the State.

Mr. Clarke: You need more tourists.

Mr. Washburn: Of course if you hold forth on the tourist proposition, it seems rather spectacular.

Mr. Clark: I know something about it.

Mr. Washburn: The fact is that these lake fronts double and treble every year. When I looked at them first there was no particular sale for them. They are now selling from \$10 to \$15 an acre. When the timber in these northern counties is all cut, if they can get the assessed value of the lake front in the tax law, and the towns can get the business that comes here every summer, it will help the people every summer, because these counties are not in very nice shape (Record, Pgs. 410-411).

The testimony of Mr. Washburn was later strongly corroborated by Mr. Hillman who urged the commercial importance of the tourist trade to Lake County, and presented to the Commission resolutions of the Board of County Commissioners and of the Lake County Development Association protesting against proposals that would destroy it (Record, Pgs. 502-506).

It is evident, therefore, that there is a two-fold interest in the border lake region; first, the interest of those who are not residents of northern Minnesota, but who earnestly desire to preserve the place where they can obtain the manifold benefits of an out-door vacation; second, the interest of the inhabitants to gain such legitimate financial advantage as they can from the annual influx of tourists and campers.

In reviewing the forces in opposition to the Backus plan there will be noted among all classes the same opinion—the game is not worth the candle. There are no advantages to be derived at all commensurate with the sacrifices which must be made. The case for the plan has not been made out; the evidence against it is positive and overwhelming.

III.

The proposed changes in the lake-levels violate fundamental principles of law.

The reference upon which the proposal to raise the levels of the border lakes is presented to this Commission is advisory in character. It is, of course, the first duty of the Commission to collect, sift and collate the evidence, but having done so its task is not ended. The Commission must then determine whether in view of all the facts a certain course of action is "*practicable and desirable.*"

We submit that in reaching any such conclusion there are two principles so fundamental to the law both of the United States and Canada that they cannot be fairly ignored:

(1) Private property can only be taken for a public use, that is, for use either by the public itself through governmental bodies, or by some agency, like a railroad, which is quasi-public in character and offers its facilities to the general public.

(2) Private property cannot be taken unless some method has first been provided to afford just compensation to the property-owners.

No legal discussion or citation of authorities is necessary to establish these basic propositions. In the Lake of the Woods Reference this Commission itself took occasion to consider and discuss them (Final Report, Pg. 99, et seq.). They are beyond dispute and before this Commission can recommend the Backus Plan or any modification thereof as "practicable and desirable," it must find in effect that the destruction of private property obviously and necessarily involved will be for a public purpose and that the proposed method of compensation is a just one. To this extent at least we submit that there have been delegated to the Commission powers and duties of a quasi-judicial nature.

In considering the question of whether any public purpose is to be discerned in the proposal to raise the lake levels it is not necessary to look for an answer in the law books or to rest upon any fine-spun analysis of the decisions of the courts either of the United States or Minnesota or of Canada.

To decide whether or not a given purpose is a public one, it is enough to determine who are to

be its primary beneficiaries. If a proposed plan is designed to meet a public need and to confer definite and genuine advantages upon the general public, then the interest of private individuals must give way.

The benefit to be derived by the public must, however, be direct and immediate. It is not enough that the proposed taking will stimulate trade and thus operate indirectly to the general advantage. An example of this is afforded by the case of *Healy Lumber Co. v. Morris*, 33 Wash., 490, where a lumber company sought to take private property by eminent domain. The court said:

“The use under consideration must be by the public or by some agency which is quasi public, and not simply a use which may incidentally or indirectly promote the public interest or general prosperity of the state.”

The foregoing statement, which we believe is an accurate summary of the law, might well have referred to the proposals presented to this Commission by Mr. Backus.

It is unnecessary to recapitulate here the analysis we have already made of the proposed power development. It suffices to say that the direct public benefits to be conferred by the interests represented by Mr. Thomas are at best highly speculative and contingent upon factors impossible to evaluate at the present time. If additional water-power is ever to be developed and made available on a general scale, it can only be accomplished by the employment of large capital, which can hardly be justified by the present state of industrial development of the country. No immediate or substantial advantages will accrue to the communi-

ties on Rainy Lake or at its outlet, and the sole definite and present beneficiary will be Mr. Backus' paper company at Kenora.

We submit that upon the facts so far presented, even by giving the proponents the benefit of the most favorable inferences, it is impossible to discern any advantage to be derived by the general public from the proposed increase in the water-levels. On the contrary the purpose for which it is proposed to create additional water power is essentially for the financial gain of private interests. *The plan presented to this Commission not only does not contemplate the taking of private property for a public use, but, involving as it does the extensive destruction of national parks, it means the appropriation of public property for private advantage.*

Nor does the proposal provide for any "just compensation" to property owners.

The actual assessment of the value of riparian lands and of the appurtenant water rights is, of course, an administrative matter which this Commission cannot undertake.

We submit, however, that no plan can properly be recommended as "practicable and desirable" which is predicated upon the imposition of one-half the cost of the proposed development upon the two governments. The record affords no satisfactory explanation of the theory upon which such a division of the cost is based, and it is difficult to conceive of one, other than Mr. Backus' not unnatural desire for a good bargain.

The proposed method of apportioning the cost was greeted by the vigorous protest of all of the interests affected. We submit that it is both contrary to good sense and to the most elementary principles of justice.

Summary and Conclusion.

The reference presents four distinct problems for the consideration of the Commission: (1) the advisability of any change in the existing levels of the boundary lakes, (2) the extent, cost and effect of such an increase, if any is recommended, (3) the regulation and control of the boundary waters, in the event of an increase in the levels, and (4) the benefits derived and apportionment of cost of the existing storage.

The second and third questions are corollaries of the first, in the sense that the first must be answered affirmatively before any answer is required to the next two. The fourth question presents a separate problem which received little consideration at the hearing and has only been touched upon incidentally in this brief.

It should particularly be observed that in answering the first and fundamental question, the Commission must determine whether any change from the existing lake-levels is "practicable *and* desirable."

Thus, even though the Commission may find, after receiving the reports of its engineers, that an increase in the levels may under given conditions be feasible, it cannot properly recommend such an increase, unless it also finds the increase to be desirable.

The Commission is, of course, bound to examine the facts, regardless of any evidence that may be adduced by interested parties, and as to the *practicability* of an increase such evidence is of secondary importance to that presented by the Commission's own engineers.

As to the *desirability* of any increase, however, the testimony of the various interests affected is of primary importance, for no other means is avail-

able to the Commission of determining the effect of any change upon those directly concerned.

To entitle the proponents of increased lake-levels to a favorable recommendation from the Commission, they must show by a preponderance of affirmative evidence that the advantages of such a change outweigh its disadvantages.

We submit that they have signally failed to do this. A survey of the testimony presented at the hearing shows:

(1) There would be no substantial benefit to navigation by an increase in the water-levels.

(2) The injury to the country scenically and for recreational purposes would be incalculable.

(3) There would be no tangible or immediate economic advantages to be derived, and the growing tourist trade would be destroyed for an indefinite period.

(4) The damage to property owners of all classes would be very extensive, amounting to millions of dollars, and in many cases would be irreparable.

(5) The additional water-power which would be made available at International Falls and Fort Frances would be negligible.

(6) No assurance whatever exists that additional water-power would be available to the inhabitants of Minnesota, for the nebulous power interests which Mr. Thomas purports to represent are so vague and ill-defined, and their plans so speculative as to be unworthy of serious consideration.

(7) Additional flowage is neither needed nor desired on the Winnipeg River.

(8) Although constantly urging in general terms the advantages of his proposed increase in the lake-levels, Mr. Backus entirely failed to present any concrete evidence of a need for such an increase by his own companies, or to cite a single specific instance in which additional water-power is necessary.

(9) The communities and governmental authorities on both sides of the border are unanimous in their opposition. They are joined by the industrial interests and property-owners of every class. Except for Mr. Backus himself not a single resident of the whole region appeared to support the proposal to raise the elevation of the lakes.

Whatever may be the finding of the engineers as to the practicability of erecting the dams sought by Mr. Backus, it is submitted that the overwhelming weight of the testimony not only shows that an increase in the water-levels is not *desirable*, but that on the contrary such an increase would be very positively *undesirable*.

The answer to the second question propounded to the Commission is necessarily dependent upon its conclusion on the first. If, as we believe must be the case, no increase is found to be desirable, there is no necessity of any reply to the second question as to the cost, effect and benefits of an increase. We need only observe that the cost of any increase recommended, although depending upon extent of such increase, would be very great, far exceeding the inaccurate and incomplete estimates furnished by Mr. Backus; that no just and reasonable method of apportioning such cost has been suggested, and that the principal, if not the sole beneficiary, of any increase whatever in the lake-levels would be Mr. Backus and his companies.

As to the third question, relating to the regulation and control of the boundary waters, assuming an increase in the lake-levels is recommended, there is little to be found in the record that is helpful. The general principle of government regulation was accepted by Mr. Backus, but no suggestion was offered as to any means by which such regulation could be practically applied. It was admitted that the State of Minnesota has no agency competent to undertake the necessary control, and the difficulties that would be involved in the assumption by an international commission of administrative duties requiring constant and intimate supervision are self-evident.

The testimony of the witnesses, including the Assistant Attorney-General of Minnesota, make it clear that if any project to increase the level of the boundary lakes is adopted, some effective regulation and control must be established.

It is, therefore, submitted that the creation of a governmental agency, having definite powers of control and equipped with means to enforce its orders should be made an essential prerequisite to any recommendation for an increase in the lake-levels, and that unless, by appropriate legislative action or otherwise, such an agency of undoubted authority can be provided, no change whatever should be recommended in the existing order.

The foregoing discussion of the second and third questions is based upon the assumption, that the Commission finds that the interests represented by Mr. Backus have proved their case. We confidently believe that no such finding is possible.

Without any desire to minimize or neglect the evidence presented by the proponents of the plan to raise the water-levels, we submit that if there is any appreciable benefit to anybody in the pro-

posals made by Mr. Backus, a diligent search of the record has failed to disclose it. A general survey of the testimony of those who appeared in opposition abundantly establishes, on the other hand, the wide extent and variety of the loss that would be caused by the adoption of the plan.

The theory upon which the proposed development rests, the unrestricted power of moneyed capital ruthlessly to sweep aside all obstacles, belongs to an era of the past. It does not accord with modern social tendencies. Corporations, however great, can no longer ride rough-shod over the rights of individuals and for their own profit secure huge concessions from the public treasury to the ruin of those who have the misfortune to stand in their way.

When some public emergency exists, if there is some pressing need which must be satisfied in the public interest, or if there is some general and manifest benefit to be derived, the rights of individuals may be disregarded. But that is not the present case. *The proposal to raise the levels of the border lakes arises, as the record shows, out of nothing more than the desire of private interests to speculate with the public resources for private gain.*

From the evidence presented to the Commission, it is clear that the harm that would result from the adoption of the plan presented by Mr. Backus, or from any similar plan, would greatly outweigh any possible benefits to be derived. We therefore earnestly request this Commission to recommend that no alteration be made in the existing levels of Rainy Lake or of any of the boundary lakes.

Respectfully submitted,

ERNEST C. OBERHOLTZER.

SEWELL T. TYNG,
EWEN C. MAC VEAGIL,
of Counsel.

APPENDIX A.

DEPARTMENT OF STATE
WASHINGTON.

February 27, 1925.

International Joint Commission,
Washington, D. C.

Dear Sirs:

I have the honor to inform you that, in pursuance of Article IX of the Treaty of the 11th January, 1909, between the United States and Great Britain, the Governments of the United States and Canada have agreed to refer to the International Joint Commission the following questions for examination and report, together with such conclusions and recommendations as may be deemed appropriate:

“Question 1. In order to secure the most advantageous use of the waters of Rainy Lake and of the boundary waters flowing into and from Rainy Lake, for domestic and sanitary purposes, for navigation purposes, for fishing purposes, and for power, irrigation and reclamation purposes; and in order to secure the most advantageous use of the shores and harbors of both Rainy Lake and the boundary water flowing into and from the lake, is it, from an economic standpoint, now practicable and desirable, having regard for all or any of the interests affected thereby, or under what conditions will it become thus practicable and desirable—

(a) To regular the level of Rainy Lake in such a manner as to permit the upper limit of the ordinary range of the levels to exceed elevation 1108.61 sea-level datum?

(b) To regulate the level of Namakan Lake and the waters controlled by the dams at Kettle Falls in such a manner as to permit the upper limit of the ordinary range of the levels to exceed elevation 1120.11 sea-level datum?

(c) To provide storage facilities upon all or any of the boundary waters above Namakan Lake?

Question 2. If it be found practicable and desirable thus (1) to regulate the level of Rainy Lake, and/or (2) to regulate the level of Namakan Lake and the waters controlled by the dams at Kettle Falls, and/or (3) to provide storage facilities upon all or any of the boundary waters above Namakan Lake—

(a) What elevations are recommended?

(b) To what extent will it be necessary to acquire lands and to construct works in order to provide for such elevations and/or storage, and what will be their respective costs?

(c) What interests on each side of the boundary would be benefited? What would be the nature and extent of such benefit in each case? How should the cost be apportioned among the various interests so benefited?

Question 3. What methods of control and operation would be feasible and advisable in order to regulate the volume, use and outflow of the waters in each case in accordance with such recommendations as may be made in answer to questions 1 and 2?

Question 4. What interests on each side of the boundary are benefited by the present storage on Rainy Lake and on the waters controlled by the dams at Kettle Falls? What are the nature and extent of such benefits in each case? What is the cost of such storage and how should such cost be apportioned among the various interests so benefited?"

Each Government will appoint from its public service such engineering and other technical assistance as may be necessary to enable the Commission to make the desired examination and to submit their report.

I am, Sirs,

Your obedient servant,

(Signed) CHARLES E. HUGHES



