

STATE OF WISCONSIN

CIRCUIT COURT

SAWYER COUNTY

ROUND LAKE PROPERTY OWNERS
ASSOCIATION, INC.
P.O. Box 1070
Hayward, WI 54843,

Case No. 10-CV-_____

Plaintiff,

Case Code: 30704

v.

Other Injunction or Restraining Order

SAWYER COUNTY,
10610 Main Street,
Hayward, WI 54843

Defendant.

COMPLAINT

Plaintiff, Round Lake Property Owners Association, Inc., by and through its attorneys, Michael Best & Friedrich LLP, states and alleges for its Complaint against Sawyer County as follows:

NATURE OF THE CASE

1. The plaintiff, Round Lake Property Owners Association, Inc. (the "Association"), is an association comprised of the owners of lakefront property on Round Lake in Sawyer County, Wisconsin. The Association seeks temporary and permanent injunctive relief against the defendant, Sawyer County, for Sawyer County's failure to properly install and maintain culverts under County Highway NN and for Sawyer County's attempt to transfer jurisdiction of a short segment of county highway above those culverts in order to avoid its obligations to replace the culverts. The Association's claim is based, among other things, on Sawyer County's unauthorized construction of culverts that impede water flow and cause high water conditions on

Round Lake that interfere with the Association members' use of their respective properties and has expanded the footprint of the floodplain surrounding Round Lake.

THE PARTIES

2. The plaintiff is Round Lake Property Owners Association, Inc. (the "Association"), a Wisconsin nonstock corporation with a business address of P.O. Box 1070, Hayward, WI 54843, which was formed to generally promote, encourage and foster the quality of Round Lake. Numerous members of the Association own property on Round Lake in Sawyer County, Wisconsin.

3. The defendant is Sawyer County, a Wisconsin body corporate that can sue and be sued which is located at 10610 Main Street in Hayward, Wisconsin. Sawyer County constructed, owns, maintains, and operates several control structures that regulate the water level on Round Lake, as well as the culverts under County Highway NN that are an outlet for water from Round Lake.

BACKGROUND

4. Association members own property and homes located on Round Lake in Sawyer County, Wisconsin. Association members use their respective properties for vacation, recreation and business purposes.

The Round Lake Chain of Lakes

5. Round Lake is a large, navigable lake in Sawyer County that is about four miles long and three miles wide that covers approximately five square miles. Round Lake is well developed for resorts and summer homes and currently has about 650 homes around the lake.

6. The water from Round Lake flows into Little Round Lake and from there into Osprey Lake which was formerly known as Squaw Lake (herein, "Osprey Lake"). The water

flows from Osprey Lake down Osprey Creek then continues to Lac Court Oreilles Lake, also commonly known as Couderay Lake. This action relates to culverts Sawyer County installed below County Highway NN where the highway crosses Osprey Creek.

The 1937 Orders

7. In 1937 Sawyer County requested authorization to build the Tiger Cat Dam on the north fork of the Chief River thereby creating the Tiger Cat Flowage. The Public Service Commission of Wisconsin (“PSCW”) granted Sawyer County’s request through an order in Docket No. 2-WP-255. In that 1937 order, PSCW set the normal elevation of the Tiger Cat Flowage at 90.0 feet. Since 1937, the elevation of the Tiger Cat Flowage has been raised twice at the request of Sawyer County, viz. in Docket No. 2-WP-766 and Permit No. 3-NW-83-806. In the most recent permit, and at Sawyer County’s request, the maximum level was set at 91.34 feet and the normal level at 91.09 feet.

8. In 1937, Sawyer County also requested authorization for the construction of a diversion canal (known as Diversion Canal No. 4) to allow water from the Tiger Cat Flowage to be diverted into Round Lake, thereby diverting water from one watershed into a separate watershed. Prior to 1937, there were no inflows from this other watershed into Round Lake. PSCW granted Sawyer County’s request in Docket No. 2-WP-298.

9. The purpose of Diversion Canal No. 4 was to permit water from the Tiger Cat Flowage to flow into Round Lake, thereby raising the water level of Round Lake and allowing Sawyer County to maintain the water level on Round Lake. Sawyer County made this request in response to a five-year drought that had lowered the water level on Round Lake to an unacceptable level.

10. In its 1937 Order in Docket No. 2-WP-298, PSCW specified that Sawyer County was to regulate the amount of water diverted from the Tiger Cat Flowage into Round Lake by the construction, maintenance and operation of a head spillway and control dam located on Diversion Canal No. 4 (the “Lake Placid Dam”).

Sawyer County Fails to Comply with the 1937 Order

11. Since 1941, Sawyer County has failed to maintain and operate the Lake Placid Dam and Tiger Cat Dam in compliance with PSCW and WDNR directions.

12. For years, Sawyer County operated the Tiger Cat Dam so that the water elevation of the Tiger Cat Flowage exceeded the maximum level allowed by the State.

13. Since 1941, Sawyer County has repeatedly been informed of tampering with the stop logs at the Lake Placid Dam wherein stop logs were removed allowing excessive water to be diverted to Round Lake even though water was not necessary to restore or maintain Round Lake water levels at its normal elevation. Though Sawyer County installed a locking device to prevent tampering, periodically the lock is either missing or unlocked.

14. Since 1941, because of poor maintenance, Sawyer County has periodically been informed of water coming through the stop logs at the Lake Placid Dam, allowing excessive water to be diverted to Round Lake even though water was not necessary to restore or maintain Round Lake water levels at its normal elevation.

15. Since at least 1947, water from the Tiger Cat Flowage was being diverted to Round Lake not only through the Lake Placid Dam but also through a wetland that circumvented the Lake Placid Dam.

16. As late as 1993, Sawyer County did not have an operational procedure specifying how the Lake Placid Dam should be operated.

17. As late as 2003, Sawyer County was operating the Tiger Cat Dam and the Lake Placid Dam such that water was discharged over the Lake Placid Dam allowing excessive water to be diverted to Round Lake even though water was not necessary to restore or maintain Round Lake water levels at its normal elevation.

The Dispute Over Water Levels on Round Lake

18. Soon after the construction of Diversion Canal No. 4, a dispute arose about the normal water level for Round Lake. Some property owners wanted the Round Lake water level to be lowered because the increased flow into Round Lake from the Tiger Cat Flowage combined with precipitation and groundwater had created high lake levels that caused property damage and erosion. On information and belief, and thereon it is alleged, certain property owners wanted Round Lake to be maintained at a higher lake level to increase the value of development property.

19. On November 30, 1940, Sawyer County petitioned PSCW in Docket No. 2-WP-513 to establish the normal Round Lake water level at elevation 79 feet and to determine how the Round Lake water level was to be maintained. Certain property owners objected to Sawyer County's request to set the normal level at elevation 79 feet because that higher lake level would result in further damage to their Round Lake property.

The Public Hearing on Lake Levels

20. PSCW held a public hearing on February 4, 1941 in Docket No. 2-WP-513 and testimony was taken to determine the normal lake level for Round Lake. PSCW also conducted an investigation into the normal lake level for Round Lake.

21. At the conclusion of that hearing in February 1941 but before issuing a final decision, PSCW requested Sawyer County divert water from the Tiger Cat Flowage through the

Diversion Canal No. 4 and the Lake Placid Dam to maintain the water level of Round Lake at elevation 76.6 feet. PSCW also requested Sawyer County to obtain surveys and engineering data to determine the levels of the adjacent land around Round Lake and to furnish PSCW engineers and examiners with data to make future inspections.

22. Sawyer County failed to timely provide PSCW with the requested information and failed to operate the Diversion Canal No. 4 and the Lake Placid Dam to maintain Round Lake at elevation 76.6 feet. As a result, the Round Lake water level increased above elevation 76.6 feet causing further damage to Round Lake property.

Sawyer County is Ordered to Maintain Proper Water Levels

23. On September 29, 1941 PSCW issued an Order (the “1941 Order”) concluding, *inter alia*, that the normal elevation of Round and Little Round Lake was elevation 77.0 feet and ordered that:

Sawyer County shall maintain Round and Little Round Lakes at the normal elevation of 77.00 feet at all times when a sufficient water supply exists and during freshets and heavy runoffs to prevent the water levels from rising above the elevation of 77.25 feet.

A copy of the 1941 PSCW Order is attached hereto and incorporated herein as Exhibit A.

24. PSCW ordered Sawyer County to take the following actions no later than July 1, 1942:

2. That Sawyer County constructs an outlet channel from Little Round Lake to Squaw Lake [now Osprey Lake] of the capacity to discharge 150 c.f.s., with a dam and control gates whereby the water level in Round and Little Round Lakes may be controlled.
3. That Sawyer County shall maintain Round and Little Round Lakes at the normal elevation of 77.00 feet at all times when a sufficient water supply exists and during freshets and heavy run-off to prevent the water levels from

rising above elevation 77.25 feet. These elevations are referred to the staff gage at Kaiser's resort.

25. PSCW found that in order for the normal elevation of Round and Little Round Lakes to be maintained, a water-control structure (hereafter "the Carlson Road Dam") and a channel from Little Round Lake to Osprey Lake (hereafter "the Northern Channel") must be constructed at least ten feet in width with the high point not higher than elevation 75.25 feet.

26. Sawyer County has a duty to properly maintain the Round Lake water levels.

Sawyer County Fails to Maintain the Water Level

27. After the issuance of the 1941 Order, Sawyer County constructed a series of structures to control the water level of Round Lake without ever receiving the necessary approvals for those structures. Sawyer County also constructed, at least in part, the Northern Channel.

28. In 1942, Sawyer County constructed a temporary timber dam without obtaining prior approval from the PSCW. The timber dam did not comply with all of the construction specifications in the 1941 Order. In 1947, Sawyer County removed the temporary timber dam and replaced it with one 36" culvert. PSCW promptly and repeatedly informed Sawyer County that the single culvert was inadequate, violated the 1941 Order and had to be replaced immediately. In 1949, Sawyer County submitted plans for a twin-box reinforced concrete culvert. Though PSCW told Sawyer County that the proposed structure was inadequate to comply with the 1941 Order, on information and belief, the County built the structure anyway.

29. The current dam and control gates between Little Round Lake and Osprey Lake were built sometime after 1949 and do not comply with the construction specifications listed in the 1941 Order.

30. Sawyer County failed to maintain the water levels on Round Lake by, *inter alia*:

a) failing to properly construct, maintain and operate the Carlson Road Dam by, without limitation, designing and constructing a dam that did not achieve the construction specifications specified in the 1941 Order and could not control the water flows so as to prevent excessive water levels that caused damage to property around Round Lake;

b) failing to properly construct and maintain the Northern Channel, by, without limitation, exceeding a maximum elevation of 75.25 feet and having insufficient capacity to discharge 150 c.f.s.; and

c) failing to properly construct, maintain and/or operate existing structures such as the Tiger Cat Dam, the Lake Placid Dam and the culverts at County Highway NN, which further constrained the water flow from Round Lake, all of which caused high water levels in Round Lake that damaged property around Round Lake.

Sawyer County Refuses to Address the Higher Water Levels

31. From at least 1942 to the present the water levels on Round Lake have periodically exceeded the maximum water level of elevation 77.25 feet. Sawyer County has been continually notified of this condition from 1942 to the present and has failed and refused to control the lake levels despite having the ability to do so and undertaking a duty to do so.

32. In 1984, on information and belief, Sawyer County was informed that the Carlson Road Dam and the Northern Ditch were not constructed in accordance with the 1941 Order. The County was also informed that to discharge 150 c.f.s. through the Carlson Road Dam--which according to PSCW was necessary to control the water levels on Round Lake--Round Lake's water level would have to exceed the maximum-allowed elevation by 3.4 feet. Sawyer County did nothing to redesign the Carlson Road Dam to enable it to control the water levels on Round Lake.

33. On information and belief, in 1999, Sawyer County replaced the culverts at County Highway NN without conducting any hydrologic analysis as to the culverts' impacts on the Round Lake water levels and on the floodplain of the Round Lake chain. Sawyer County did not obtain the required permit from the State of Wisconsin prior to installing the culverts at NN in 1999.

34. The culverts Sawyer County installed at County Highway NN in 1999 are elevated approximately sixteen to eighteen inches above the natural stream channel and act as a dam during high water flow conditions, resulting in elevated water levels in Round Lake.

35. In 2002, the culverts at County Highway NN restricted water flow during a period of peak water flow, resulting in excessively high water levels on Round Lake that caused significant property damage and erosion of property around Round Lake. Association members complained to Sawyer County, *inter alia*, that property had flooded, roadways had been flooded, sand beaches had been washed away and shoreline eroded.

36. On or about June 2, 2004, Sawyer County sent a letter to the Secretary of the Wisconsin Department of Natural Resources ("WDNR"), which Sawyer County styled as a Petition to Review and Clarify Certain Orders Relating to Round Lake, including the 1941 Order and other PSCW orders referenced above relating to water flow upstream and downstream of Round Lake.

37. On information and belief, on or about June 2004, Sawyer County filed an application for an after-the-fact permit from WDNR for the 1999 installation of the culverts at County Highway NN. On or about July 9, 2004, WDNR notified Sawyer County that its application for an after-the-fact permit was incomplete.

38. In response to Sawyer County's petition and after-the-fact permit application, WDNR organized a Round Lake Work Group, comprised of representatives of Sawyer County, the Association, WDNR and others, for the purpose of working together to develop a process and an approach to address Sawyer County's requests. Association members participated in the Round Lake Work Group.

39. The Round Lake Work Group met over a period of approximately two to three years, after which time it issued a recommended action plan. On information and belief, the Sawyer County Board of Supervisors approved the recommended action plan, which provided that the culverts under County Highway NN be lowered.

40. On information and belief, as a result of the work of the Round Lake Work Group, Sawyer County sought authorization to replace the culverts at County Highway NN pursuant to revised plans and specifications prepared by SEH and submitted to WDNR on or about March 18, 2008. The SEH plans and specifications required a lowering of the culverts under County Highway NN.

41. On or about April 23, 2008, WDNR notified Sawyer County that WDNR had reviewed the SEH plans and specifications pursuant to Wis. Admin. Code TRANS 207 and WDNR granted Sawyer County, subject to conditions, Section 401 Water Quality Certification for the culvert replacement project.

42. One of the conditions WDNR imposed on its Section 401 Water Quality Certification stated that the culvert replacement project at County Highway NN shall be constructed in accordance the plan and specifications Sawyer County provided WDNR, including the revised plans and specifications sent by SEH on March 18, 2008.

43. Sawyer County has not replaced the culverts at County Highway NN pursuant to the WDNR conditional approval issued pursuant to TRANS 207, or otherwise implemented the culvert replacement project designed by SEH in 2008.

44. On or about May 7, 2010, WDNR notified Sawyer County that the unauthorized 1999 culvert installation remains an enforcement issue for WDNR and identified two options available to Sawyer County – either i) follow through with modifying the culverts per the TRANS 207 approval or ii) make an application to WDNR to have the existing culverts permitted as a dam.

45. Sawyer County has not taken any action since May 7, 2010 to either modify the existing culverts under County Highway NN or make application to WDNR to have the culverts permitted as a dam.

46. The existing culverts under County Highway NN violate Wis. Stat. ch. 31 and Wis. Admin. Code ch. TRANS 207.

47. On or about July 15, 2010, the Sawyer County Board of Supervisors adopted Resolution #11-2010 authorizing the jurisdictional transfer of 300 feet of County Highway NN, including that section of County Highway NN under which the culverts are installed, to the Lac Courte Oreilles Band of Lake Superior Indians (“LCO”).

48. On information and belief, Sawyer County does not intend to alter the culverts under County Highway NN prior to the jurisdictional transfer to LCO.

49. On information and belief, Sawyer County does not intend to require LCO to alter the culverts under County Highway NN, or otherwise provide for resolution to the issues created by Sawyer County’s unauthorized 1999 culvert installation, as a condition of the jurisdictional transfer LCO.

50. On information and belief, LCO intends to keep the culverts under County Highway NN in the current configuration.

Association Members are Damaged by the Current Culvert Configuration

51. Numerous Association members purchased and developed their properties on Round Lake in reliance on the 1941 Order and Sawyer County's obligation to control the water elevation on Round Lake during high water flow conditions.

52. The culverts at County Highway NN in the current configuration create a dam that, during periods of high water flows, results in water elevations on Round Lake that exceed the allowable tolerances established in the 1941 Order and adversely affects Association members' use and enjoyment of their properties.

53. The culverts at County Highway NN in the current configuration create a dam, which adversely affects Association members by raising the 100-year floodplain. This change in the 100-year floodplain has resulted in restrictions to property owners on Round Lake property, including Association members.

54. On information and belief, if a 100-year flood event occurs under current conditions – that is with the current structures in place – numerous septic tanks and systems around Round Lake will be flooded dumping hundreds or thousands of gallons of raw sewage into Round Lake.

55. On information and belief, if a 100-year flood event occurs under current conditions – that is with the current structures in place – Association members' properties will be subject to severe erosion and other physical damage as a result of higher water levels in Round Lake due to the dam created by the culverts at County Highway NN.

56. Sawyer County's construction, maintenance and operation of the culverts at County Highway NN are in violation of Chapter 31 and, specifically, in violation of Wis. Stats. §§ 31.02(1) and 31.18 because, among other things, Sawyer County has failed to maintain and operate the dam in good repair and condition, and, has failed to construct, maintain and operate the culverts in a fashion that protects property surrounding Round Lake from damage and in compliance with the 1941 Order.

57. The failure of Sawyer County to properly construct, maintain and/or operate the Tiger Cat Dam, the Lake Placid Dam, the Carlson Road Dam, the Northern Channel and the culverts under County Highway NN has substantially or unduly interfered with Association members' use of their Round Lake property and the public's use and enjoyment of Round Lake due to the excessively high water that has caused an increase in the floodplain elevation around Round Lake, has increased sedimentation in Round Lake endangering the fishery, the quality of water and wildlife habitat, and has obstructed navigation on navigable water bodies.

58. Sawyer County has been provided actual knowledge of these conditions and concerns on numerous occasions.

**FIRST CLAIM FOR RELIEF
(Injunctive Relief)**

59. The Association realleges, as though fully set forth herein, the allegations contained in paragraphs 1 through 57.

60. Sawyer County has a duty to control the water levels of Round Lake, and to properly construct, maintain and operate the water control devices that affect the water levels of Round Lake.

61. Sawyer County has failed and refused to fulfill its duty to control the water levels of Round Lake and its duty to properly construct, maintain and operate numerous water control devices in accordance with the 1941 Order.

62. Sawyer County has failed to properly construct and maintain the culverts at County Highway NN. Sawyer County installed the culverts under County Highway NN without the necessary permits, in violation of Wis. Stat. ch. 31 and Wis. Admin. Code ch. TRANS 207, and in a fashion that impedes the general flow of surface water or stream water in Osprey Creek. As a result, there has been an unreasonable accumulation of waters flooding or water soaking upland on Association members' various Round Lake properties.

63. Despite a resolution process initiated by WDNR in response to Sawyer County's June 2004 petition, Sawyer County has failed and refused to correct the inadequate culverts at County Highway NN.

64. The public trust doctrine, embodied in Article IX, Section 1 of the Wisconsin Constitution, requires the state to safeguard the public's use of navigable waters for commercial and recreational purposes, and to protect and preserve the waters as natural resources.

65. The Wisconsin Legislature has delegated to WDNR the State's public trust duty to protect and regulate surface and groundwater resources.

66. WDNR has attempted to fulfill its public trust obligations by issuing a conditional Section 401 Water Quality Certification to Sawyer County that was conditioned upon the replacement of the culverts at County Highway NN in accordance with the plans and specifications prepared by SEH and submitted by Sawyer County.

67. Association members will be deprived of the constitutional protections afforded by Article IX, Section 1 of the Wisconsin Constitution if Sawyer County transfers jurisdiction to LCO of that segment of County Highway NN that crosses Osprey Creek prior to Sawyer County's compliance with Wis. Stat. ch. 31 and Wis. Admin. Code ch. TRANS 207..

68. Sawyer County intends to transfer jurisdiction of 300 feet of County Highway NN to LCO solely for the purpose of avoiding Sawyer County's obligation to correct the inadequate culverts at County Highway NN.

69. If Sawyer County finalizes the jurisdictional transfer to LCO, the Association and its members will be unable to obtain any meaningful relief from Sawyer County's decade-long failure to properly install the culverts at County Highway NN.

**SECOND CLAIM FOR RELIEF
(Statutory Nuisance)**

70. The Association realleges, as though fully set forth herein, the allegations contained in paragraphs 1 through 69.

71. Wis. Stat. § 31.25 provides as follows:

Nuisances, abatement. Every dam, bridge or other obstruction constructed or maintained in or over any navigable waters of this state in violation of this chapter, and every dam not furnished with a slide, chute or other equipment prescribed by the department, is hereby declared to be a public nuisance, and the construction thereof may be enjoined and the maintenance thereof may be abated by action at the suit of the state or an citizen thereof.

72. Sawyer County's construction, maintenance and operation of the culverts at County Highway NN are in violation of Chapter 31 and, specifically, in violation of Wis. Stats. §§ 31.02(1), (2), 31.04 and 31.18 because, among other things, Sawyer County has failed to obtain a permit authorizing the construction of the culverts as currently configured and has failed

to construct, maintain and operate the culverts in a fashion that protects property surrounding Round Lake from damage and in compliance with the 1941 Order

73. Sawyer County's unauthorized construction and maintenance of a dam in the form of the culverts under County Highway NN constitutes a public nuisance under Wis. Stat. § 31.25.

**THIRD CLAIM FOR RELIEF
(Public and Private Nuisance)**

74. The Association realleges, as though fully set forth herein, the allegations contained in paragraphs 1 through 73.

75. The failure of Sawyer County to properly construct, maintain and/or operate the culverts under County Highway NN has substantially or unduly interfered with Association members' use of their Round Lake properties and the public's use and enjoyment of Round Lake due to the excessively high water that has caused damage to Association members' properties, has increased sedimentation in Round Lake endangering the fishery, the quality of water and wildlife habitat, and has obstructed navigation on navigable water bodies.

76. Sawyer County has been provided actual knowledge of this nuisance on numerous occasions.

77. The failure of Sawyer County to properly construct, maintain and/or operate the culverts under County Highway NN is the substantial cause of the damage to Association members' properties and the public's use and enjoyment of Round Lake.

**FOURTH CLAIM FOR RELIEF
(Declaratory Relief)**

78. The Association realleges, as though fully set forth herein, the allegations contained in paragraphs 1 through 77.

79. Wis. Stat. § 86.257 authorizes political subdivisions to transfer jurisdiction and ownership of highways.

80. Sawyer County's proposed jurisdictional transfer to LCO of an isolated segment of County Highway NN that is only 300 feet long violates Wis. Stat. § 86.257.

PRAYER FOR RELIEF

WHEREFORE, plaintiff, Round Lake Property Owner's Ass'n, Inc., prays for judgment in its favor and against Sawyer County as follows:

1. An order requiring Sawyer County to modify, repair and/or replace the culverts under County Highway NN in a manner authorized by WDNR;
2. Temporary and permanent injunctive relief enjoining Sawyer County from finalizing a jurisdictional transfer to LCO of any section of County Highway NN until the culverts under County Highway NN have been modified, repaired and/or replaced in a manner authorized by WDNR.;
3. A declaration that a jurisdictional transfer from Sawyer County to LCO of an isolated section of County Highway NN that is only 300 feet long violates Wis. Stat. § 86.257.
4. Attorneys fees and costs; and
5. Such other and further relief as this Court deems just and reasonable.

Dated this _____ day of July, 2010.

Respectfully submitted,

MICHAEL BEST & FRIEDRICH LLP

By: _____

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