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LCO Tribe seeks to intervene in Round Lake water lawsuit

by **Terrell Boettcher**
News Editor

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The Lac Courte Oreilles Tribe is seeking to intervene in a lawsuit filed recently by the Round Lake Property Owners Association (RLPOA) concerning the county's regulation of water levels.

A hearing is scheduled Nov. 3 before Judge Gerald Wright on the motion by the Lac Courte Oreilles Band of Lake Superior Chippewa Indians to intervene in the case. LCO also asks the judge to stay all proceedings in the case until a hearing is held.

The Round Lake Shore Owners Association (RLPOA) alleges that the county improperly installed culverts carrying Osprey Creek beneath Highway NN 11 years ago. The RLPOA says the culverts act as a dam, and have in the past and will in the future cause damage to shoreowners' lands during high-water events. The RLPOA also alleges that the county has failed to properly construct and maintain the Tiger Cat Flowage Dam, Lake Placid Diversion Dam and Canal and the Carlson Road Dam.

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In an Aug. 25 court filing, LCO tribal attorneys Paul Shagen and Katherine Lindsay state that the Osprey Creek culverts beneath Highway NN "are an outlet for a minimal amount of water flowing from Round Lake, and do not cause the harm

alleged (by RLPOA)."

The tribe "admits that the water level on Round Lake has at times exceeded 77.25 feet (the maximum set by the 1941 Wisconsin Public Service Commission order)" and that the county replaced the NN culverts at an elevation slightly above historical stream bed levels, "but lacks sufficient information or knowledge to form a belief as to the truth of the remaining allegations," the attorneys add.

The tribe asserts that in the event of a 100-year flood event, "the variation in the height of the culverts at issue in the lawsuit could not cause the harm alleged."

Further, LCO states the RLPOA "lacks standing to bring the claims contained in its complaint," and that "necessary and indispensable parties have not been joined, precluding this court from granting complete relief." Those parties include the LCO Band, Tiger Cat Flowage Association and Wisconsin Department of Natural Resources.

Also, the tribe says RLPOA's complaint "concerns only a political controversy and does not raise justiciable issues within the jurisdiction of a Wisconsin circuit court."

The RLPOA complaint "seeks to enforce a (water level) order over 69 years in age, which has been superseded by conflicting and contradictory orders, and as such plaintiff's claims are moot," LCO adds.

In a supportive affidavit, LCO Tribal Governing Board member Brian Bisonette says wild rice grows in the Osprey Creek bed approximately 15 feet east of the NN culverts, and "construction activities to replace the culverts would destroy the wild rice."

Bisonette said that consistent with past practice, the tribe will continue to seek transfer of jurisdiction over the 300-foot section of NN containing the Osprey Creek culverts (which now is blocked by a court temporary restraining order), and of other highways within reservation boundaries.

In recent years, Bisonette added, the tribe has made a concerted effort to

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reacquire lands within the tribe's reservation to re-establish its land base.

"An important aspect of the tribe's sovereignty is gaining back the land that has been lost by, or in some cases taken from, the tribe and tribal members through the years. Also, the tribe receives economic benefits from the Bureau of Indian Affairs to maintain highways under its jurisdiction."

In the event Sawyer County is forced to replace the Osprey Creek culverts on Highway NN, there is "no guarantee that the county will seek to transfer jurisdiction and ownership" of the road, Bisonette adds. Osprey Creek, Highway NN and the culverts "are all located within the exterior boundaries of the tribe's reservation. The tribe seeks to preserve its cultural and natural resources within the tribe's reservation and the territory ceded under the 1837 and 1842 treaties."

The tribe says a court ruling prohibiting the transfer of the 300-foot section of Highway NN from the county to the tribe would jeopardize future transfers of jurisdiction and ownership of highways from the county and other governments.

The RLPOA and Sawyer County "do not adequately represent the tribe's interests," LCO says.

County reply

Through its attorney, Charles Bohl, the Sawyer County Board of Supervisors filed a reply last week to the RLPOA claim.

The county denies the RLPOA's allegations and states that "the county has acted reasonably and in good faith to comply with all orders and directives concerning the Lake Placid Dam and Tiger Cat Dam. Water level variations have been outside the control of Sawyer County."

Further, the county "denies that water is being 'diverted' and affirmatively alleges that there is natural base flow of water from the wetland complex" adjacent to the northeast shore of Round Lake.

The county says RLPOA's allegations are "too vague, uncertain and indefinite as to allow a response." The county "admits that the water level elevation on Round Lake has at times exceeded 77.25 feet." But "Sawyer County has acted reasonably and in good faith to control a lake elevation within the existing (state PSC) orders and directives. Water level variations have been outside the control of Sawyer County."

The county "admits that it replaced the culverts on Highway NN" in 1999 and that they are elevated slightly above historical streambed levels, "but denies that they are elevated approximately 18 inches above the normal stream channel."

Further, the county says it has "communicated with the Wisconsin DNR on multiple occasions in an attempt to obtain guidance and leadership to resolve all issues concerning the NN culverts." The county says it petitioned the DNR in July 2004 to clarify inconsistent orders by state agencies between 1937 and 1985 concerning the water levels of Round, Little Round and Osprey lakes, but the DNR has not acted on the petition.

The county says that in the event of a 100-year flood, "the variation in the height of the NN culverts at issue in the lawsuit would not cause the harm alleged."

The county "denies that a 100-year flood event would result in serious erosion or other physical damage." Further, the county "alleges that properly maintained lake frontage consistent with current DNR regulations would be minimally affected by a 100-year flood."

The county also says the RLPOA failed to comply with statutory procedures by failing to file a notice of claim. It says granting the relief requested would be contrary to public policy, because watershed regulation has been entrusted to the Wisconsin DNR.

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