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DNR requests new trial in lake level lawsuit

BY DEBRA NEUTKENS
EDITOR

ST. PAUL — The Department of Natural Resources (DNR) wants a new trial.

The agency filed a memorandum Oct. 5 with District Court asking two things: to amend the judge's order and grant a new trial in the lake level lawsuit.

"It's very common after a court trial and entry of an order with findings of fact and conclusions of law for the losers to come back to the Court and ask the judge to change her mind," said Robins Kaplan attorney Dick Allyn. He was part of the legal team representing the plaintiff in the lawsuit, the White Bear Lake Restoration Association, which prevailed in the Aug. 30 Court order.

Signed by Assistant Attorney General Oliver Larson on behalf of the DNR and Commissioner Tom Landwehr, this latest motion noted that a court may grant a new trial for "errors of law" and may amend its findings of fact and judgement.

Larson's motion listed a lengthy number of arguments, including one that states the court erred in its findings concerning White Bear Lake's elevations:

"The court makes several erroneous findings concerning the 'normal' or 'typical' lake elevations for White Bear Lake. In particular, the court found 1) that White Bear Lake fluctuates with a normal range of 923 to 925 feet; 2) that its long-term average is 923.8 feet; and 3) that it is unusual for the lake to fall below 922 feet. The court provides no citations for these findings, which are both wrong and unsupported by evidence."

Other contested points in the DNR motion to amend:

- The judge erred in finding that increased groundwater withdrawals caused declining lake levels.

The court found that low water levels in White Bear Lake between 2003 and 2010 were caused by a doubling in

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MOTIONS: City of White Bear Lake joins DNR in filing amended order in District Court

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groundwater pumping in the region since 1980. Larson contends evidence at trial does not support the findings.

- Erred in finding that groundwater withdrawals harmed the aquifers.

This finding is contradicted by evidence, according to Larson, and is not grounded in any citation.

The DNR monitors the "available head" of the aquifers through observation wells. The plaintiffs' own expert, Stu Grubb, testified that the observation wells are the "very best evidence" available concerning the pressure of the aquifers, Larson said. The wells show that the pressures are at normal or above normal levels.

In fact, he wrote, the well closest to White Bear Lake shows the aquifer in that area is at its highest-ever recorded level. "The court's order failed to address, let alone explain away, this evidence."

- Erred in relying on a faulty 2013 USGS report.

In finding that the DNR violated MERA and the public trust doctrine, the court extensively relied on a 2013 USGS report that is flawed and unreliable, Larson contends.

The report concluded that groundwater pumping might account for some of the decline in lake level.

The DNR said USGS premised its analysis on groundwater pumping data from a flawed and arbitrary selection of wells. Of particular note, USGS excluded several high capacity wells used by the St. Paul Regional Water Services' system that were about five miles from White Bear Lake while including wells from locations such as Forest Lake that were some 21 miles north of White Bear Lake.

The DNR maintains that the St. Paul wells pumped far more water in the 1980s and 1990s than it did after 2000. The effect of this error was that USGS concluded that groundwater pumping was increasing from 1988 to 2010 when in fact it was flat to declining.

Larson asked that the court's findings be amended to delete references to the 2013 USGS report and any finding that the DNR should have relied on the report in making permitting decisions.

The 35 pages Larson filed in district court to support the motion listed arguments too numerous to include here. A second section also requested amending court conclusions to correct errors of law. One noted that the court lacked jurisdiction to enter relief related to the DNR's implementation of a protective elevation.

The DNR set a protective elevation of 922 feet last December. The court's order directs the DNR to implement the elevation at 923.5 feet.

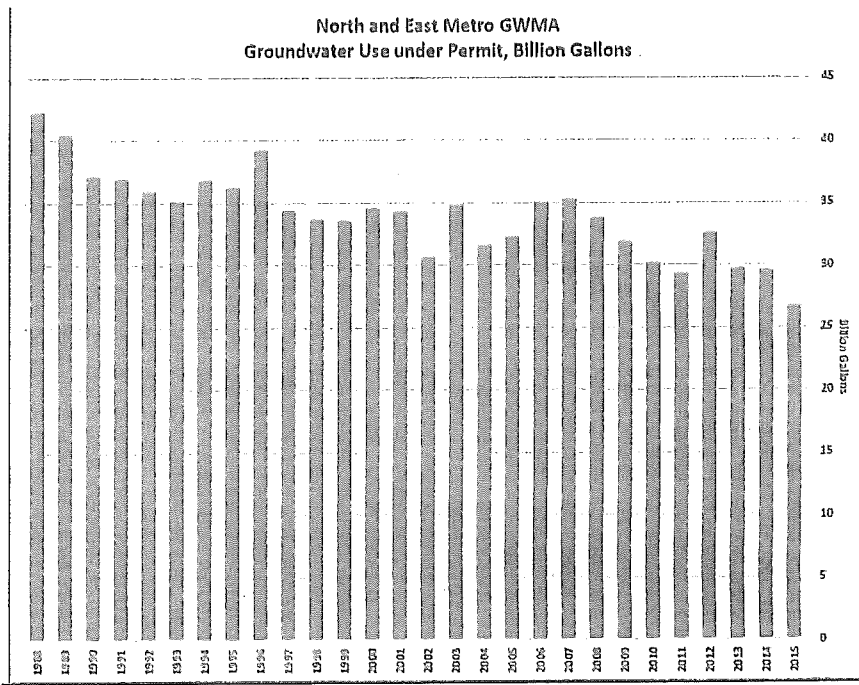
The court also erred in awarding costs to the plaintiffs, according to the attorney general's office. State sovereign immunity precludes taxing costs against a state agency when it acts in its sovereign capacity, he wrote.

Lastly, Larson asked the court to order a new trial. The judge's decision is not justified by the evidence, he concluded.

City files similar motions

The city of White Bear Lake filed similar arguments Oct. 5 as part of its appeal process through outside counsel Monte Mills, an attorney with Greene Espel. While the DNR requested to amend and grant a new trial, the city's motion used the word "alternatively" to move for a new trial.

Both the city and White Bear Township intervened



Groundwater use under permit shows a decreasing trend from 2006 to 2013 in this bar chart included in the city's memorandum in support of motion filed Oct. 5 in District Court.

on the side of the defense in the lawsuit.

Mills wrote that the court incorrectly found that a "dramatic increase" in groundwater use caused White Bear Lake to decline.

Pumping near the lake did not increase during the period when the lake declined, he said. In fact, groundwater pumping has decreased since 2003 when the lake's level was near an all-time high above 925 feet.

"Drought, rising temperatures and evaporation were the proximate cause of White Bear Lake's declining water levels from 2006 to 2013. If groundwater pumping was actually causing the lake to decline, the lake should not have rebounded," Mills said. "But it did."

The court "paid no mind" to the fact the plaintiffs' expert, Stu Grubb, testified that the groundwater withdrawals at 2002 levels were sustainable, Mills pointed out, "and that groundwater use in 2015 was lower than the use in 2002."

The city's water use is consistent with the general declining trend in the north and east metro area. Water production declined from more than one billion gallons in 2013 to 815 million gallons in 2016, according to Mills' memorandum.

The city has not requested an increase to its water appropriation permit in more than 10 years, he said, and has no plans to ask the DNR for an increase.

Errors were "strewn throughout the 140-page order," according to the White Bear Lake attorney.

Mills also said a requirement to provide contingency plans for a conversion to surface water would cost money for municipalities within the five-mile radius. Requiring the expenditure of public funds on plans

for alternative water supply infrastructure belongs to the Legislature, not the courts, Mills wrote.

White Bear Township has not officially declared whether it will appeal.

Town attorneys are requesting an amendment to the order, however, to correct an error regarding the gallons of water pumped by the township.

The judge stated water use at 176 million gallons in 2015 when it should be 402 million, noted Town Clerk/Treasurer Bill Short.

Though a minor correction, the township felt it should be pointed out. "The judge is using this information in her findings of fact and it's not accurate," Short said.

The Town Board is waiting until their attorneys have had a chance to discuss specifics of the appeal with the DNR. "We wouldn't want anything in our appeal to compromise the appeal of the defendants," Short said. The township has spent \$80,300 on the trial so far. Unlike the city of White Bear Lake, they did not hire an outside firm. The city has spent about six times that amount on the lawsuit.

Assistant DNR Commissioner Barb Naramore iterated that the motion to amend is standard procedure with this type of litigation.

"There are certain kinds of issues we can only raise in our appeal if we first raise them with the deciding district court and give them opportunity to address," she said. "It includes evidentiary issues we raised as well as some legal matters."

The decision now goes to District Court Judge David C. Higgs. A hearing is scheduled for Jan. 26 at the Ramsey County District Court in St. Paul.

SUBMITTED