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WEDNESDAY, SEPTEMBER 14, 2016
VOL. 120 NO. 48 www.presspubs.com \$1.00

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Judge gets update in lake lawsuit case as attorneys prepare for trial

BY DEBRA NEUTKENS
EDITOR

ST. PAUL — A delayed government report on White Bear Lake concerns the district judge deciding the lake level legal case.

At an update in her courtroom Sept. 8, Judge Margaret Marrinan informed attorneys representing the plaintiffs, the White Bear Lake Restoration Association (WBLRA) and intervening White Bear Lake Homeowners Association, and those representing the defendants, the Department of Natural Resources (DNR) and its intervenors, White Bear Township and city of White Bear Lake, that she was "disappointed" the U.S. Geological Survey (USGS) report is late.

That report, "Characterizing Groundwater and Surface Water Interactions in Selected Northeastern Twin Cities Lakes, 2013-2016," was due this fall and is considered a significant item of evidence in the case. It's a follow-up to an earlier study that found a combination of less precipitation and more groundwater pumping could explain the decline in lake level.

Assistant DNR Commissioner Barb Naramore told the judge the delay was due to peer review, technical comments that had to be addressed and calibration of the ground/surface water flow model. The report will come in two parts, she said, with Chapter 1 expected by Sept. 30 and Chapter 2, with methods and results, coming end of the 2016.

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SEPTEMBER 14, 2016

LAKE LAWSUIT: Judge wants no delays in getting to March trial

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The judge told the parties that she is taking mandatory retirement when she turns 70 in August, 2017. "Many qualified judges could step in," Marrinan indicated. "My preference is to keep the (March 6) trial date."

"If we have to go to trial using a preliminary report, we will do that. It benefits no one to delay," she added.

Twenty-five days have been set aside for the trial; a length the judge feels is excessive. An attorney for the plaintiff, Katie Crosby Lehmann, told the judge she can't imagine going beyond 21 days.

"We are on task and on time to be ready March 6, 2017," said the counsel for the WBLRA, which filed the lawsuit in November 2012.

When the judge prodded Lehmann about the above average rainfall filling the lake, the attorney noted that White Bear Lake is still 2.5 feet below the high water mark and 1 foot below the 100-year average. "The idea it's cyclical is not credible," said Lehmann, who works for Ciresi and Conlin LLP.

A new legal face was representing the DNR in the courtroom. Oliver Larson with the Attorney General's office has replaced attorney Jill Schlick Nguyen, who is now working for the DNR.

Lehmann reminded those present that the suit involves a violation of Minnesota's Environmental Rights Act mainly due to groundwater pumping, and exacerbated by evaporation and precipitation.

"Controlling groundwater controls lake level," she told Marrinan. "The Met Council calls groundwater use unsustainable and the DNR has known this since 1998. We are responsible to protect our natural resources. That has to be the primary concern."

In a status update, the plaintiff counsel noted that the DNR is moving forward with establishing a protected elevation as required by statute; and that the restoration association is OK with the detailed reports regarding conservation efforts.

Since the Legislature failed to meet the Aug. 1 deadline for funding a feasibility study on conversion to surface water (as stated in the settlement agreement), the three-year stay in the lawsuit was lifted; hence the scheduling of the trial.

The judge said the lack of action by the Legislature was a "great disappointment" on this case.

Assistant Commissioner Naramore told her the DNR went well beyond the settlement agreement to pull parties together to talk about the legislation. She maintained the \$1.5 million bonding request for the North and East Metro Project failed due to broad op-

position from the six Phase One communities to convert to surface water and the fact augmentation was being supported by people close to the lake (Friends of White Bear Lake) and members of the plaintiff organization.

"It created a difficult legislative dynamic," Naramore said.

She was referring to the six communities of White Bear Lake, White Bear Township, Mahtomedi, North St. Paul, Shoreview and Vadnais Heights.

Attorney Dick Allyn, co-counsel for the plaintiff with Robins, Kaplan, LLP, did not agree.

"The augmentation alternative did not kill the bill," he said. "In fact, that can't be further from the truth. We ran into a headwind of community opposition, North St. Paul in particular. Augmentation came late as another solution and I don't think we supported augmentation at the detriment of Phase One. It didn't get the support it needed."

The judge responded by saying augmentation would set a "very bad precedent. It would open the floodgates to other lakes in the same position."

Saputo appropriation permit

Lehmann also scolded the DNR for not providing information on a change in the water appropriations permit for Saputo Dairy Foods in White Bear Lake, one of the city's largest water users.

Sharing permit requests with the WBLRA was also part of the settlement agreement.

"It is troublesome to have a commercial industry expand its water use at this time from 180 to 192 million gallons per year," Lehmann said.

DNR General Counsel Sherry Enzler, sitting in the jury box as an observer, said the agency has tried very hard to meet the terms of the settlement.

"The DNR has not viewed notice of application or request for permits by private industry as a requirement," she told the judge. "But we have provided notice (to the plaintiff)."

DNR Water Resources Section Manager Julie Ekman said she was surprised to hear Lehmann say that and explained that the permit itself was in existence for many years. She intended to follow up with staff to see when notice was sent to the WBLRA.

At a Northeast Water Summit meeting in Hugo last month, Ekman told a roundtable group of city leaders that the DNR is setting up meetings with communities closest to the lake to talk to them about potential changes in permitting. There will be discussions about the possibility of suspending non-essential uses, she said.

Evaporation factor

White Bear Lake is approaching a 10-year high, Ekman added, and is 3.4 feet higher than when litigation began.

The DNR is attempting to determine the lake's water budget, she informed the judge, which is determined by inputs and outputs.

"Evaporation is a large part of the water budget. A University of Minnesota study shows 2 feet of evaporation per year. So far, it's a big output. Precipitation is a big input," Ekman said.

Preliminary results from the evaporation study on the lake show an increase from 2014 to 2015 of 230 million gallons. The difference in evaporation rate is due to the fact 2015 was warmer than 2014 with 39 more ice-free days, she explained. By way of reference, 75 million gallons is equivalent to 1 inch of elevation.

The plaintiff provided U of M data that shows the lake area has had nine years of heavy rainfall since 2000, six years of average and one year of low. Five of the last six years have had precipitation levels in the top 30 percent category for annual levels. Yet despite this above average rainfall, they contend, the lake remains more than 2.5 feet below the ordinary high water level, which is 924.89 feet.

"We don't know the degree to which groundwater withdrawals are affecting lake level. We don't know the correlation," Ekman said. "We hope the USGS model sheds light on that. If permits are affecting the aquifer in the model, how will we change permits? Certainly we cannot shut off the water supply. Our focus will be on water conservation, permit compliance, and water volumes."

Judge Marrinan pointed out that aquifers are going dry in Kansas and Oklahoma and wanted the attorneys to remember that.

Both White Bear Lake and White Bear Township attorneys indicated conservation projects are continuing.

The city's counsel in the case, Monte Mills, told the judge White Bear has instituted conservation pricing with higher seasonal water rates. He also wanted to "underscore his concern about the USGS study. It is essential to have that information before proceeding with the trial," he said.

Marrinan said she "liked the idea of raising water rates in summer."

At the conclusion of the status reports, the judge praised both parties for doing a good job.

"It is beyond your control to get the USGS study and to pass legislation. I appreciate you coming in to give us a sense of where we are at this point."