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Lake level lawsuit: Plaintiffs amend complaint

BY DEBRA NEUTKENS
EDITOR

ST. PAUL — Parties on both sides of the lake level lawsuit were back in Judge Margaret Marrinan's courtroom Oct. 12.

Attorneys representing the plaintiff, the White Bear Lake Restoration Association (WBLRA), and the intervenor association, White Bear Lake Homeowners, presented arguments that would allow an amendment to the original complaint.

According to Dick Allyn, counsel to the WBLRA for Robins Kaplan LLP, the purpose of the amendment is to add a law that was specifically intended to protect White Bear Lake from "artificial" water removal. That statute: 383A.07, Subd. 19, reads that waters of

White Bear and Goose Lakes are public waters and "shall never be lowered or diminished by any artificial means, nor shall they or any of them ever be connected with, used, or applied to a use or purpose, public or private, by a person, persons, or corporation public or private."

The added environmental statute, say the plaintiff attorneys, provides supplemental support for the existing MERA — The Minnesota Environmental Rights Act — upon which the lawsuit is based.

"Violations of environmental laws is evidence of a violation of MERA," Allyn pointed out.

The WBLRA contends that since 2000, the Department of Natural Resources (DNR) and its commis-

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sioner authorized increased water appropriations "within the area of hydrologic influence" around White Bear Lake. That conduct, says the association, has caused and continues to cause water elevations to unnaturally decline despite precipitation at or near a 30-year average.

"We believe that the growing evidence of the connection between White Bear Lake's level and the municipal wells drawing from the underlying aquifer will demonstrate that the DNR has permitted the lake to be 'artificially' lowered," Allyn said. "That is clearly prohibited by the statute."

An attorney for the defendant, the Minnesota Department of Natural Resources, opposed the motion to amend. New to the case, Assistant Attorney General Oliver Larson argued that with the trial only months away, there isn't sufficient time to gather discovery and depositions that the late amendment would require.

Larson was the sole representative for the DNR at the hearing.

"Their attorney indicated he wants to investigate

all the private wells in the area," Allyn noted. "Presumably he will assert they have a material impact. He apparently wasn't aware that in the past the USGS folks have said that private wells in the area have little impact on White Bear Lake compared to municipal pumping. He also wasn't aware that four of the five cities (Dellwood is the exception) around the lake use municipal systems, not private wells."

Judge Marrinan sided with the plaintiffs and is allowing the motion to amend the complaint to include the law.

"We were pleased the court permitted the amendment," Allyn said. "It's an important statute and it needs to be part of the discussion."

"I think it goes back to a case brought by Judge (John B.) Sanborne who lived on Lake Avenue," explained White Bear Lake's city attorney, Roger Jensen. "He sued an ice company for harvesting ice from the lake and selling it. He claimed that harvesting had some deleterious effect on lake level."

That case was heard by the state Supreme Court in 1900: Sanborn vs. People's Ice Co.

As the law was first passed in 1881, many people aren't aware of the taking-of-water statute.

Homeowners Association attorney Bryon Starns discovered it when he was preparing summary judgment motions almost two years ago. According to the plaintiff's memo, the homeowners association planned to file a motion to amend at that time, but the case was stayed after the summary judgment briefing. When it became apparent the stay would be lifted a few months ago, the motion to amend was filed.

White Bear Township attorney Chad Lemmons argued that the wells at issue are not "connected" to White Bear Lake.

Because the wells draw groundwater, rather than surface water from the lake, the wells do not violate the statute, Lemmons told the judge.

Both White Bear Lake and White Bear Township, intervenors in the lawsuit on the side of the DNR, had representatives at the hearing, which lasted about 90 minutes.

"Our official position," Jensen said, "is we don't think it's appropriate to bring this in at the 11th hour (motion to amend). This should have been done a long time ago. The judge let them do it. I don't think it changes things too much."

The lawsuit goes to trial March 6, 2017.