

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS

FOR THE DEPARTMENT OF NATURAL RESOURCES

In the Matter of Amendments to Various **TWELFTH PREHEARING ORDER**
Water Appropriation Permits

These matters came before Administrative Law Judge Eric L. Lipman on September 29, 2023, for an oral argument on several pre-trial motions. Earlier, the Restoration Association and the Homeowners Association jointly filed a motion for partial summary disposition; the City of Lino Lakes filed a motion for a continuance of the proceedings; and the City of Stillwater filed a motion to dismiss. These motions are addressed, in turn, below.

Colin P. O'Donovan, Assistant Attorney General, appeared on behalf of the Minnesota Department of Natural Resources (Department).

H. Alan Kantrud, H.A. Kantrud, P.A., appeared on behalf of the Dellwood Country Club, the Indian Hills Golf Club and the White Bear Yacht Club.

Gary A. Van Cleve, Larkin Hoffman Daly & Lindgren, Ltd., appeared on behalf of the H.B. Fuller Company.

David K. Snyder, Johnson Turner, appeared on behalf of the City of Hugo.

James J. Thomson, Sarah J. Sonsalla, David T. Anderson, and Michelle E. Weinberg, Kennedy & Graven, Chartered, appeared on behalf of the City of Lake Elmo and the City of Oakdale.

Jay T. Squires, Squires, Waldspurger & Mace, P.A., appeared on behalf of the City of Lino Lakes.

David L. Sienko, Bridget McCauley Nason, and Michael Hirak, LeVander, Gillen & Miller, P.A., appeared on behalf of the City of Mahtomedi and the City of Stillwater.

Jared D. Shepherd, Leah C. Koch, and Soren M. Mattick, Campbell Knutson, P.A., appeared on behalf of the City of North St. Paul.

David M. Gorski, Assistant St. Paul City Attorney, appeared on behalf of Saint Paul Regional Water Services.

Caroline Bell Beckman and James C. Erickson, Jr., Erickson, Bell, Beckman, & Quinn, P.A., appeared on behalf of the City of Vadnais Heights.

Monte A. Mills, Faris A. Rashid, and Nicholas Scheiner, Greene Espel, PLLP, appeared on behalf of the City of White Bear Lake.

Chad D. Lemmons, Kelly & Lemmons, P.A., appeared on behalf of White Bear Township.

Michael R. Drysdale, Dorsey & Whitney, LLP, and Karl A. Karg, Latham & Watkins, LLP, appeared on behalf of Saputo Dairy Foods USA, LLC.

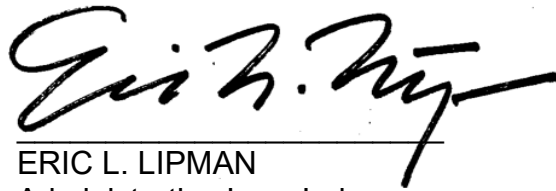
Richard B. Allyn and Shira T. Shapiro, Robins Kaplan LLP, and Byron E. Starns, Stinson LLP, appeared on behalf of the White Bear Lake Restoration Association (Restoration Association) and the White Bear Lake Homeowners Association (Homeowners Association).

Based upon the contents of the hearing record, and the submissions of the parties during the September 29 oral argument,

IT IS HEREBY ORDERED:

1. The joint motion of the Restoration Association and the Homeowners Association for partial summary disposition is **DENIED**.
2. The City of Lino Lakes' motion for a continuance of the proceedings is **DENIED**.
3. The City of Stillwater's motion to dismiss is **GRANTED**, but the effective date of the dismissal is **STAYED** for a period of sixty (60) days from the date of this order.
4. Within seven (7) days of the date of this Order, the City of Stillwater shall report the grant of dismissal to the District Court and report to the undersigned any actions taken or directed by the District Court.
5. Within forty-five (45) days of the date of this Order, the Department shall modify Water Appropriation Permit No. 1975-6207, by removing the four permit conditions labeled "Ramsey County District Court Order: 62-CV-13-2414."

Dated: October 13, 2023


ERIC L. LIPMAN
Administrative Law Judge

MEMORANDUM

Factual Background

In April of 2013, the Restoration Association filed suit against the Department in Ramsey County District Court asserting claims under the Minnesota Environmental Rights Act (MERA).¹ One month later, the Homeowners' Association intervened in the suit as a plaintiff, asserting claims under MERA and the common-law public-trust doctrine.² Still later, the City of White Bear Lake and White Bear Township intervened as defendants.³ In August 2017, the District Court issued findings of fact, conclusions of law and an order granting declaratory and injunctive relief.⁴

Among the injunctions imposed by the District Court were directives to the Department to modify the water appropriation permits of any permit holder within a five-mile radius of White Bear Lake. The court-ordered permit modifications included:

(C) Preparing, enacting and enforcing a residential irrigation ban when the level of White Bear Lake is below 923.5 feet, to continue until the lake has reached an elevation of 924 feet. The preparation and enactment of this process will be completed within 6 months of this order.

(D) Requiring that all existing permits include an enforceable plan to phase down per capita residential water use to 75 gallons per day and total per capita water use to 90 gallons per day. The enactment of this requirement will be completed no later than 1 year from the date of this order.

(E) Immediately amending all permits within the five-mile radius of White Bear Lake to require that within one year of the date of this order, permittees submit a contingency plan in their water supply plans for conversion to total or partial supply from surface water sources. This contingency plan will include a schedule for funding design, construction and conversion to surface water supply.... Whether any conversion would occur shall be determined by the DNR and the affected communities.

(F) Requiring that all groundwater permittees report annually to the DNR on collaborative efforts with other northeast metro communities to develop plans as described in (D), above.⁵

Following the entry of the District Court's order there were a series of appeals through the state courts, the most recent of which resulted in a 2020 decision of the Minnesota Court of Appeals. In that ruling, the appellate panel held that the District Court

¹ *White Bear Lake Restoration Ass'n ex rel. State v. Minn. Dep't of Nat. Res.*, No. A18-0750, 2020 WL 7690268, slip op. at 1 (Minn. Ct. App. Dec. 28, 2020) (unpublished) (*WBL III*).

² *Id.*

³ *Id.*

⁴ *Id.* at 2.

⁵ *White Bear Lake Restoration Ass'n ex rel. State v. Minn. Dep't of Nat. Res.*, No. 62-CV-13-2414, slip op. 137-38 (Dist. Ct. Minn. 2017).

lacked the authority to direct the Department to impose new conditions on existing water appropriation permits, because doing so would deprive the permit holders of their statutory right to a contested-case hearing.

At the outset, we note the error of the district court in its phrasing of paragraph 4(E) of the relief. The paragraph, which dictates that the DNR must “immediately amend” all permits, is in conflict with the statutory right of permit holders to a hearing before their permits can be amended by the DNR. The district court can order the DNR to reopen the impacted permits to seek this amendment, but cannot order the DNR to impose amendments without honoring the right of the permit holders to obtain a contested-case hearing. This is not to say, however, that the permit holders have the right to relitigate whether groundwater appropriations within a five-mile radius of the lake have or will have a negative impact on surface waters within the meaning of Minn. Stat. § 103G.287, subd. 2 The issue of a negative impact has been determined in this case. Nevertheless, paragraph 4(E) must be revised to reflect the right of the permit holders to a hearing prior to any permit amendments.⁶

Indeed, the appellate panel noted that depending upon the result of the hearing process, there was a real risk of inconsistent results between the individual contested cases and the District Court’s broader, region-wide injunction. As the panel detailed:

We also express our concern that the scope of the impact of the paragraph 4(D) and (E) relief on individual municipal permit holders is not known because they were not made parties to this action. As argued by the DNR, the contested-case hearings may produce results that create inconsistent and conflicting obligations.

Turning first to the requirement for enforceable plans to achieve the 75-gallon residential and 90-gallon total per day, per capita level of water usage, we note that the source of these numbers is the Metropolitan Council’s Master Water Supply Plan, where they are set out as a “desired outcome” on a regional level. And evidence in the record establishes that there can be wide variation, municipality to municipality, in the ability to achieve the water-use numbers set out in paragraph 4(D) of the ordered relief. The factors include the size of the municipality, the mix of residential and industrial users and factors such as the ability of the municipality to repair leaking pipes. Depending on these factors, it may not be feasible for a particular municipality—for example, a small municipality with a high percentage of industrial users to residential users—to reduce its water use to these levels. Thus, based on the evidence that may be produced at the contested-case hearings, we foresee a risk of conflicting outcomes between the relief ordered in this case and the decisions reached in the individual hearings.

⁶ *WBL III*, slip op. at 10.

With regard to the requirement that the permit holders develop contingency plans for full or partial conversion to surface-water sources, here again there is a risk of conflicting results. For example, the DNR posed a hypothetical (set out in the City of Stillwater amicus brief) that a municipality, even though within a five-mile radius of the lake, may draw its water not from the aquifer, but from a different source not within the scope of this suit. Consequently, there would be no basis to require that particular municipality to develop a contingency plan for alternate water sources.⁷

During its 2023 regular session, the Minnesota Legislature responded to calls for the resources needed to solve some of the issues in this matter. It appropriated \$2,000,000 to the Metropolitan Council to “to develop a comprehensive plan” that will assure the communities surrounding White Bear Lake access to safe drinking water, water resources for municipal growth and “sustainability of surface water and groundwater resources to supply the needs of future generations.”⁸

The legislation further establishes a work group that includes representatives of each of the municipal permit holders in this matter, alongside other municipalities in the eastern suburbs of St. Paul, and senior officials from several different state and regional agencies.⁹ The work group is tasked with identifying and evaluating methods of conserving, recharging, reusing area water resources and to report on any policy suggestions, “concept level engineering,” and funding recommendations for water supply infrastructure.¹⁰ The statute directs the work group to report back to key legislators by June 30, 2027.¹¹

Legal Standards for Review of Motions to Dismiss or Summary Disposition

Summary disposition is the administrative law equivalent of summary judgment.¹² A motion for summary disposition shall be granted when there is no genuine issue regarding any material fact, and the moving party is entitled to judgment as a matter of law.¹³ The Office of Administrative Hearings follows the summary judgment standards developed in the state district courts when considering motions for summary disposition.

The function of the Administrative Law Judge on a motion for summary disposition, like a trial court’s function on a motion for summary judgment, is not to decide issues of fact, but to determine whether genuine factual issues exist.¹⁴ In other words, the

⁷ *Id.*

⁸ 2023 Laws of Minn. Ch. 60, Art. I, § 5.

⁹ *Id.*

¹⁰ *Id.*

¹¹ *Id.*

¹² *Pietsch v. Minnesota Bd. of Chiropractic Exam’rs*, 683 N.W.2d 303, 306 (Minn. 2004); *see also* Minn. R. 1400.5500(K) (2023).

¹³ *See Sauter v. Sauter*, 70 N.W.2d 351, 353 (Minn. 1955); *Louwagie v. Witco Chemical Corat*, 378 N.W.2d 63, 66 (Minn. Ct. App. 1985).

¹⁴ *See, e.g., DLH, Inc. v. Russ*, 566 N.W.2d 60, 70 (Minn. 1997).

Administrative Law Judge does not weigh the evidence; instead, the Judge views the facts and evidence in a light most favorable to the non-moving party.¹⁵

Summary disposition cannot be used as a substitute for a hearing, when a hearing is otherwise needed to resolve factual disputes.¹⁶ Summary disposition is only proper when there are no fact issues need to be resolved.¹⁷

Lastly, if a movant makes a motion to dismiss, and relies upon evidence outside of the four corners of the Notice and Order for Hearing when making an argument for dismissal, the motion should be treated as one for summary disposition.¹⁸

The Associations' Motion for Partial Summary Disposition

In requesting partial summary disposition as to three of the four permit conditions required by the District Court's 2017 Order, and imposed by the Department, the Associations maintain that the permit holders' challenges to these conditions are foreclosed by collateral estoppel and mootness.

With respect to collateral estoppel (sometimes referred to as "issue preclusion"), the Associations maintain that challenges to requirements for contingency planning, plans to "phase down" to per day limits on water use, and reporting on the efforts to meet these "phase down" limits, are all foreclosed. As the Associations reason, the 2020 decision of the Court of Appeals precludes re-litigation by all municipalities of "whether groundwater appropriations within a five-mile radius of the lake have or will have a negative impact on surface waters...."¹⁹

This last statement is true, so far as it goes, but it does not go nearly so far as to preclude all challenges to the requirements for water use planning, stricter water usage limits and reporting on local plans to meet the new limits.

First, as the Court of Appeals decision makes clear, not every permit holder within a five-mile radius of White Bear Lake was a party to the Associations' original lawsuit.²⁰ Generally, it is not appropriate to give preclusive effect to court rulings for parties that were "strangers" to the original litigation.²¹

¹⁵ See *Ostendorf v. Kenyon*, 347 N.W.2d 834, 836 (Minn. Ct. App. 1984).

¹⁶ See *Sauter*, 70 N.W.2d at 353.

¹⁷ See *id.*

¹⁸ See *N. States Power Co. v. Minn. Metro. Council*, 684 N.W.2d 485, 490-91 (Minn. 2004); Minn. R. Civ. P. 12.02 ("If, on a motion asserting the defense that the pleading fails to state a claim upon which relief can be granted, matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56.").

¹⁹ The Associations' Notice of Motion and Motion for Partial Summary Disposition, at 2 (citing *WBL III*, slip op. at 10).

²⁰ *WBL III*, slip op. at 11 (because "the municipalities [aside from the city and town] were not parties to these proceedings, the evidence is simply not in the record to allow us to evaluate these issues or order modification of the relief beyond correcting paragraph 4(E) as set out above").

²¹ *Hill v. Stokely-Van Camp, Inc.*, 109 N.W.2d 749, 750 (Minn. 1961) ("the general rule is that the doctrine of res judicata, as well as that of estoppel by verdict, does not operate to affect strangers to a judgment");

Second, a determination that large scale appropriations of water from the Prairie du Chien-Jordan aquifer had negative impacts on White Bear Lake, does not necessarily preclude claims by individual permit holders. It is the difference between the region-wide dilemma on water usage and the circumstances of particular permit holders. As the appellate panel points out, permit holders are entitled to claim that their permits should not be revised if their withdrawals of water do not contribute to shortfalls in the aquifer²² or that compliance with the region-wide limit is not feasible.²³ An evidentiary hearing is needed to answer such questions.²⁴

Third, as a matter of fairness, it is a bit sharp for the Restoration Association to have maintained during the District Court proceedings that permit-related issues would be raised and resolved during the later contested case process,²⁵ only now to claim that all challenges to the permit conditions, except those relating to residential irrigation, were fully resolved by the earlier suit.

It is a bit puzzling too. It is not clear from the Associations' submissions why, if the District Court was without the power to "order the DNR to impose amendments without honoring the right of the permit holders to obtain a contested-case hearing,"²⁶ the City of White Bear Lake, White Bear Township, or any of the permit holders were obliged to submit potential permit-related challenges to the District Court in the first instance. Preclusive effect usually presupposes the power to "determine the particular issue."²⁷

Lastly, the Associations assert that the requirements of the 2023 legislation, as well as statutes that oblige water use planning, such as Minn. Stat. §§ 103G.281, .291 (2022), foreclose challenges to adding planning requirements to the permits. The Administrative Law Judge disagrees.

One key difference between the cited statutory requirements, and the permit amendments at issue here, are the potential penalties for not complying with the directives. The 2023 chapter law, for example, includes no penalties whatsoever for not participating in the regional work group.²⁸ It is an oversight issue between the natural resources committees of the Minnesota House of Representatives and Senate, and the

accord *Radmacher v. Cardinal*, 117 N.W.2d 738, 741 (Minn. 1962); *Roberts v. Friedell*, 15 N.W.2d 496, 499 (Minn. 1944).

²² *WBL III*, slip op. at 11 ("[A] municipality, even though within a five-mile radius of the lake, may draw its water not from the aquifer, but from a different source not within the scope of this suit ... there would be no basis to require that particular municipality to develop a contingency plan for alternate water sources").

²³ *Id.* at 10 ("evidence in the record establishes that there can be wide variation, municipality to municipality, in the ability to achieve the water-use numbers set out in paragraph 4(D) of the ordered relief").

²⁴ *Id.* at 11 ("depending on the evidence adduced at the contested-case hearings, modifications [of the District Court's injunction] may be appropriate").

²⁵ *White Bear Lake Restoration Ass'n ex rel. State v. Minn. Dep't of Nat. Res.*, No. 62-CV-13-2414, Transcript of Proceedings, at 29 (Feb. 20, 2014).

²⁶ *WBL III*, slip op. at 10.

²⁷ *Muellerberg v. Joblinski*, 247 N.W. 570, 572 (Minn. 1933) ("where the court has no jurisdiction to determine the particular issue in an action its judgment therein does not operate as a bar on that issue"); accord *Dead Lake Ass'n, Inc. v. Otter Tail Cnty.*, 695 N.W.2d 129, 135, n.10 (Minn. 2005); *Charchenko v. City of Stillwater*, 47 F.3d 981, 984 (8th Cir. 1995) ("In Minnesota, a judgment by a court that lacks subject matter jurisdiction is not considered to be 'on the merits'").

²⁸ See 2023 Laws of Minn. Ch. 60, Art. I, § 5.

communities that are referenced in the legislation, if the municipal permit holders refuse to show up. Likewise, with respect to encouraging more water conservation, Minn. Stat. § 103G.291 provides that the Commissioner of Natural Resources shall use a combination of ratemaking and the “collaborative process to achieve demand reduction measures as a part of a water supply plan review process.”²⁹

Under Minn. R. 6115.0750 (2023), however, violation of the terms of the water appropriation permit comes with potentially severe penalties – termination of the permit itself.³⁰

When read side-by-side, the statutes and the accompanying regulations present as the proverbial “carrots and sticks.” In the statutes, there are warm invitations to collaborate with fellow stakeholders, resources to solve shared problems and innovative pricing models to encourage more water conservation. Under the regulations, however, there is the regulatory “stick.” Termination of an appropriation permit is a bracing sanction. It reduces the affected community’s right to withdraw groundwater to less than 10,000 gallons per day, or a cumulative of 1,000,000 gallons per year.³¹ That would be quite a change for each of the permit holders in this matter. Thus, the permit amendments do much more than reprise the terms of the cited statutes; they include a different and very powerful enforcement mechanism.

For these reasons, the Associations’ joint motion for partial summary disposition must be denied.

The Motion for Continuance by the City of Lino Lakes

The City of Lino Lakes requests a continuance of the proceedings until the assessments of the regional work group created by the 2023 legislation are complete. As noted above, the new legislation directs the work group to report back to key legislators by June 30, 2027.³² The City argues:

[T]he study authorized by the legislature has the very purpose of generating data that can serve as the basis for city-specific conditions that would provide the greatest most accurate means of water conservation, and consequently preservation of lake levels.³³

It may well be that more hydrological information will be known four years from now, and solutions available in 2027 that are not known today; but those possibilities do not extinguish the right of the Department, within the terms of the law, to adjust the appropriation permits today. To conclude otherwise is to ignore the plain meaning of Minn. Stat. § 103G.315, subd. 11 (2022) and Minn. R. 6115.0750, subp. 5(B) (2023).

Additionally, the request falls far short of the legal standard for progressing forward the City’s contested case. Minn. R. 1400.7500 (2023) instructs that when “determining

²⁹ Minn. Stat. § 103G.291, subds. 3(c), 4(a) (2022).

³⁰ Minn. R. 6115.0750, subp. 8(b) (2023).

³¹ Minn. Stat. § 103G.271, subd. 4(a) (2022).

³² 2023 Laws of Minn. Ch. 60, Art. I, § 5.

³³ City of Lino Lakes’ Memorandum in Support of its Motion for Continuance, at 3.

whether good cause exists, due regard shall be given to the ability of the party requesting a continuance to effectively proceed without a continuance.” In this case, four years is simply too long to wait for additional data, when the hearing record now includes significant detail on the very same points. Accordingly, the report findings are not, as in the words of the applicable rule “mandatory preparation for the case”³⁴ The motion for a continuance of the proceedings must be denied.

The Motion for Dismissal by the City of Stillwater

The City of Stillwater moves for dismissal of its contested case, although, as explained by its pleading and arguments it, in fact, seeks summary disposition. It requests an order striking each of the conditions required by the District Court’s 2017 Order and relies upon matters outside the Notice and Order for Hearing when requesting relief.³⁵

In support of its motion, Stillwater’s expert avers that: (1) the City of Stillwater only has one well within the five-mile radius established by the District Court’s order; (2) this well – Well Number 11 – lies within the five-mile zone by less than five feet; (3) withdrawals from the Well Number 11 “does not have a significant effect on White Bear Lake;” and (4) the impact of its withdrawals on White Bear Lake are both “immeasurably small” and “well beyond the precision of the DNR’s model” to measure.³⁶

Importantly, none of these claims were disputed by any other party.³⁷

Candidly, the tribunal would have preferred more of a record on these claims than the documents submitted in support of the motion for summary disposition, but that is not our process. Administrative Law Judges enter summary disposition “where there is no genuine issue as to any material fact”³⁸ Moreover, as the U.S. Supreme Court instructed in *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986), summary disposition is “properly regarded not as a disfavored procedural shortcut,” but rather as an integral part of the rules of civil procedure, which are designed “to secure the just, speedy and inexpensive determination of every action.”³⁹

On this record, the City of Stillwater is entitled to summary disposition and an order removing each of the four conditions from its water appropriation permit.

In the interest of comity with the state courts, however, the imposition of that order is stayed for a period of sixty (60) days in order to permit the District Court to be apprised of this result and make any order it sees fit in the matters before it.

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³⁴ Minn. R. 1400.7500 (2023).

³⁵ See e.g., Memorandum in Support of City of Stillwater’s Motion to Dismiss, Exhibits A - C.

³⁶ *Id.* at Affidavit of Jacob Bauer.

³⁷ See DNR’s Response to Stillwater’s Motion to Dismiss, at 1 Digital Recording of the Prehearing Conference, OAH 8-2002-37733, at 1:47 – 1:50 (September 29, 2023).

³⁸ Minn. R. 1400.5500(K) (2023).

³⁹ *Celotex Corp. v. Catrett*, 477 U.S. at 327.