

STATE OF MINNESOTA
COUNTY OF RAMSEY

FILED
Court Administrator

JUL 18 2011

By  Deputy

DISTRICT COURT
SECOND JUDICIAL DISTRICT

Case Type: Civil
Court File No. 62-CV-11-5203

In re Government Shutdown Litigation,

In Re Temporary Funding of Core Functions of
the Executive Branch of the State of Minnesota

**ORDER REGARDING THE PETITIONS
OF LAKE MANAGEMENT, INC., LAKE
RESTORATION, INC., MINNESOTA
AQUA CARE, INC., AND CENTRAL
MINNESOTA AQUATICS, INC.**

On June 23, 2011, the undersigned heard oral argument pursuant to the Motion of Petitioner Lori Swanson, Attorney General for the State of Minnesota, for temporary funding of the executive branch. On June 29, 2011, the Court issued its Findings of Fact, Conclusions of Law and Order Granting Motion for Temporary Funding.

In its Findings of Fact, Conclusions of Law, and Order Granting Motion for Temporary Funding dated June 29, 2011, the Court appointed retired Minnesota Supreme Court Chief Justice Kathleen Blatz as Special Master to hear and make recommendations to the Court with respect to issues regarding compliance with the terms of its Order. On July 8, 2011, Special Master Blatz conducted evidentiary hearings regarding Petitioners seeking state funding as providers of critical core functions of government.

The Court accepts and adopts the attached findings of the Special Master subject to modification pursuant to Minn. R. Civ. P. 53.07(b) with respect to the requests of government offices and petitions brought by programs (hereinafter listed).

Based on the file, proceedings, and recommendations, the Court makes the following ORDER:

1. The petitions of Lake Management, Inc., Lake Restoration, Inc., Minnesota Aqua Care, Inc., and Central Minnesota Aquatics, Inc. are granted as the permitted services are necessary for the safety of public waters and must take place without further delay.

Dated: 9-18-11

BY THE COURT:



The Honorable Kathleen Gearin
Chief Judge
Ramsey County District Court

STATE OF MINNESOTA

DISTRICT COURT

COUNTY OF RAMSEY

SECOND JUDICIAL DISTRICT

Court File No. 62-CV-11-5203

In Re: Temporary Funding of Core Functions
of Executive Branch of the State of Minnesota

**SPECIAL MASTER
RECOMMENDATIONS REGARDING
PETITIONS: LAKE MANAGEMENT,
INC., LAKE RESTORATION, INC.,
MINNESOTA AQUA CARE, INC., AND
CENTRAL MINNESOTA AQUATICS,
INC.**

This matter came before the Special Master, the Honorable Kathleen A. Blatz, in Room 230 of the Minnesota Judicial Center on July 8, 2011. Present before the Special Master were Alan Gilbert, Solicitor General and Deputy Attorney General; Jacob Kraus, Assistant Attorney General for the State of Minnesota; David Lillehaug, Special Counsel to the Office of the Governor; and Joseph Cassioppi, Special Counsel to the Office of the Governor. Attorney William E. Flynn, Linquist & Vennum; Mike O'Connor, Owner of Lake Management, Inc.; and Kevin Kretch, Owner of Lake Restoration, Inc., appeared on behalf of Petitioners.

Based upon the arguments of counsel at the hearing, the Special Master makes the following:

Recommendation

1. The Special Master recommends that Petitioners' request that they be allowed to continue to perform DNR permitted services on Minnesota's public waters to manage and control invasive and exotic (non-native) aquatic vegetation, swimmers' itch parasites, and algae through the use of EPA-approved herbicides and algaecides for the purpose of maintaining and preserving public property be **GRANTED**.

Concerns of Petitioner

1. Petitioners Lake Management, Inc., Lake Restoration, Inc., Minnesota Aqua Care, Inc., and Central Minnesota Aquatics, Inc., (collectively, "Petitioners") request that the Court permit Petitioners to proceed with aquatic treatments pursuant to permits previously issued by the Minnesota Department of Natural Resources ("DNR").

2. In spring, the Petitioners apply to the DNR for permits. Subsequent to Petitioners' permit application, the DNR investigates to determine whether the applicant has met the criteria for the permit. If yes, all that is required by the applicant is to notify the DNR by email or by calling an automated message line when the permitted work is going to commence. On the day of the hearing, the automated phone line was still working.

3. Upon receipt of a permit, Petitioners buy the approved herbicides and algaecides. Each Petitioner holds approximately 150 open and outstanding permits. The permit fees have cost Petitioners more than \$100,000, and each Petitioner made substantial expenditures to purchase the herbicide and algaecides needed to do the permitted work.

4. Petitioners typically do several aquatic applications during a very short window of time. To date, Petitioners have done June's aquatic applications and need to do a new round of aquatic applications for the chemical to be effective and to control invasive and noxious plants. The permits do not require active supervision by the DNR or funding on the part of the State and the work under the permit is necessary for the maintenance and preservation of public property and waterways.

Analysis

1. Petitioners have limited their requests to only those permits that require nothing more than an email or phone call to an automated message line to notify the DNR that work has commenced.

2. Credible evidence was received that the notification is more of a formality than a part of an overall regulatory scheme. In their collective 34 years of business, none of the Petitioners has ever been contacted by the DNR requesting any action – a delay, a modification, or suspension – based on these notifications. The Special Master does not view this evidence as a criticism of the DNR but rather as support for the fact that the regulatory focus is on the pre-permit focus when the investigation is conducted.

3. Much of Petitioner's work is contracted for by governmental units or lake associations for the protection and treatment of public waters. The Court's Order provides that "[t]he maintenance and preservation of public property" of the kind advanced by Petitioners constitutes a critical core function. (Order p. 15 ¶ 4.) Exhibit A's Priority 1 Critical Services list expressly includes services relating to the "[p]rotection of lands, buildings, waterways, equipment and other property owned by the government." (Order Ex. A III(A); *see also* pp. 5-6 ¶ 18 for the Court's reference to the federal government's designation of certain activities as core or essential services pursuant to the OMB Memorandum).

4. The fight against the spread of noxious and invasive aquatic plantation is well-known and has been extensively covered by the media. The Petitioners are engaged in the very work that is directed to maintaining and preserving public waters and adjacent beaches.¹ Evidence was presented that without intervention, noxious and non-native species will jeopardize safe use

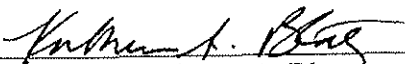
¹ Petitioners regularly treat public beaches to control snails that are causes of swimmers' itch.

of public waters, increase the spread of harmful aquatic species, and put the state back years in its efforts to control invasive species.

5. Based on the evidence before her, the Special Master concludes that the work performed by the Petitioners is essential and critical work to preserve and protect Minnesota's public waters. What is less clear is the role the DNR plays in regulating or supervising Petitioners' activities. It is clear that should the DNR wish to inspect a site, it could. For that reason, the Special Master recommends that the Petitioners' request to continue work under issued and time-sensitive permits requiring only a notification be granted. The Commissioner of the DNR should also be given the discretion to re-hire employees, if necessary, to monitor or inspect if the Commissioner deems such oversight necessary.

6. In making this recommendation, the Special Master distinguishes this petition from the petitions to do telecommunications infrastructure work on highways, access to Buyer's Cards, and credentials for truckers. While all four Petitioners share in the adverse – if not dire – economic consequences of the shutdown, the petition here concerns work necessary to protect public property. Such services should be deemed a critical core function of government. It is this important distinction that is the basis for the recommendation. Minnesota's seasonal climate changes often require – if not dictate – that critical core governmental services be delivered at specific times. When it snows, roads must be plowed. And when it is summer, water must be treated to preserve our lakes, one of Minnesota's most important natural resource.

Dated: July 14, 2011



The Honorable Kathleen A. Blatz
Special Master