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BEFORE THE MONTANA BOARD OF ENVIRONMENTAL REVIEW

BOARD MEETING)
NOVEMBER 3, 2011)

TRANSCRIPT OF PROCEEDINGS

Heard at Room 136/137 of the Metcalf Building
1520 East Sixth Avenue
Helena, Montana
12:00 P.M.

BEFORE CHAIRMAN JOSEPH RUSSELL,
BOARD MEMBERS HEIDI KAISER, ROBIN SHROPSHIRE,
MARVIN MILLER, LARRY ANDERSON, and LARRY MIRES,
(By telephone)

PREPARED BY: JOYCE WITTENBERG
NOTARY PUBLIC

* * * * *

1 WHEREUPON, the following proceedings were had and
2 testimony taken, to-wit:

3 * * * * *

4 (Due to recording issues, the call to order
5 was not recorded. Chairman Russell called the meeting order
6 at 12:06 P.M. He requested a roll call of those present on
7 the phone and in person. Board members Heidi Kaiser, Robin
8 Shropshire, Larry Anderson, Larry Mires, and Marvin Miller and
9 Chairman Russell identified themselves on the phone. Tom
10 Livers and Joyce Wittenberg identified themselves in the
11 room.)

12 MR. MADDEN: Jim Madden, legal counsel, DEQ.

13 MS. ORR: Katherine Orr, Board counsel.

14 MR. DILLIARD: Jon Dilliard, bureau chief, Public
15 Water and Subdivisions.

16 MR. SHEA: Todd Shea, on behalf of the Gardiner-
17 Park Water District.

18 MR. SHORTER: Ron Shorter, manager of the Gardiner-
19 Park Water District.

20 MS. ORR: And Karl and (inaudible)

21 MR. LIVERS: And that's everybody in Helena. If we
22 could now have folks on the phone identify themselves,
23 please, besides the Board members.

24 MR. KNUCHEL: Karl Knuchel for the Fort Yellowstone
25 Subdivision owners.

1 MS. LAHREN: Signe Lahren for Jack McInerney and
2 Fort Yellowstone Subdivision owners.

3 MR. LIVERS: Okay, I think that's everybody. With
4 that, I think I will probably turn this over to Katherine.

5 MS. ORR: Good afternoon everyone. The posture of
6 this case is that I have submitted a proposed order granting
7 summary judgment and that was attached to the agenda for the
8 meeting on the 23rd of September, and hopefully you have that
9 at your fingertips. Also you have a very rough draft of an
10 order for the Board to sign that was in the packet. And the
11 parties were urged to try to reach an agreement because there
12 were exceptions filed to the language of the proposed order
13 granting the summary judgment. And the parties have agreed
14 to language, which I can recommend to the Board. And let me
15 just go right to that. If you look at the order that was in
16 the packet that's entitled "Order of the Board Adopting
17 Recommended Order on Motion for Summary Judgment with Minor
18 Change to the Proposed Order." If you go to the bottom of
19 page one and it starts-- Does everyone have that available
20 to them to review this language?

21 MR. ANDERSON: Larry Anderson. Yes.

22 MS. ORR: Okay. I'll just take it it's a yes if I
23 don't hear anyone say that they don't have it.

24 At the bottom of the proposed order-- and there
25 are, parenthetically, a few more cross outs that have to

1 occur in this order-- but the department established that
2 there was a deviation. And then going to page two, from the
3 terms of the COSA, "because the water main constructed to
4 connect with units at the bottom of the slope on the
5 subdivision was disconnected as to Fort Yellowstone
6 Subdivision subdivision approval without department approval
7 of the deviation through an amended COSA." The parties now
8 want to add after that sentence the following language, and
9 they've agreed on this, "The hearing examiner made no
10 determination about the propriety of the disconnection of the
11 subdivision water main by the district under public water and
12 sewer laws, Title 75, Chapter 6, MCA, or any other laws."
13 And I would recommend that each party be given an opportunity
14 to address their endorsement of this language, because I
15 think the district wants to say something in addition, but
16 that is the recommended language. And the purpose of this is
17 to make it clear that this hearing does not address the
18 propriety of what the district did when it disconnected that
19 water main at the bottom of the slope.

20 So that's where we are, and I can just sort of
21 review the posture of where we are. Under MAPA there's a
22 provision which allows the parties to file exceptions, 2-4-
23 621, to a proposed order of the hearing examiner and that's
24 where we are. And it looks like we have agreement in with
25 the addition of this language there shouldn't be any other

1 issue regarding adoption of the hearing examiner's order.
2 Now the Board, as you know, may accept, reject, or modify the
3 order on the hearing on exceptions, and I guess this would
4 consist of a small modification. So that's what I have to
5 say about it.

6 CHAIRMAN RUSSELL: Thank you, Katherine.

7 Any questions for Katherine?

8 MR. MILLER: Katherine? This is Miller. Would you
9 reread the additional language, that sentence?

10 MS. ORR: I'd be glad to. "The hearing examiner
11 made no determination about the propriety of the
12 disconnection of the subdivision water main by the district
13 under public water and sewer laws, Title 75, Chapter 6, MCA,
14 or any other laws."

15 MR. MILLER: Thank you very much.

16 MS. SHROPSHIRE: Can you-- Katherine, this is
17 Robin --elaborate on what that means?

18 MS. ORR: Yes. And, you know by all means, I would
19 like the parties to pitch in here after I'm finished.

20 There's concern on the part of the Park-Gardiner
21 Water District, or I should say the Gardiner-Park County
22 Water District, regarding the misconception, the possible
23 misconception that what they did when that water main was
24 disconnected was wrong. And this makes clear that that issue
25 is not part of this proceeding.

1 CHAIRMAN RUSSELL: And all the parties have agreed
2 to that?

3 MS. ORR: Yes. So if you-- Maybe it would be
4 useful-- Is there any party who wishes to address Ms.
5 Shropshire's question about the significance of this
6 language?

7 MR. MADDEN: Well, this is Jim Madden. I could
8 offer one addition of-- The hearing examiner, what she did
9 find was that the relocation of the water main was not
10 something that had been reviewed and approved by the
11 department under the Sanitation in Subdivision Act laws. So,
12 the original Sanitation in Subdivision Act approval for this
13 subdivision showed the design plan with the main located kind
14 of closer down by the river. It was subsequently moved, and
15 that relocation was not re-reviewed under the sanitation act,
16 and I think that the sentence that precedes this new language
17 in the final order indicated that the failure to get an
18 approval of the deviation from the original subdivision
19 approval was a violation of the subdivision act and that
20 warrants the revocation of the original subdivision approval.
21 But then the question comes up whether or not the district
22 was liable for that relocation. And, you know, in our view,
23 the liability is with the subdivision developer to get an
24 approval under the sanitation act to relocate the main.
25 There was no issue in the hearing as to the propriety of the

1 district's relocating the main, and whether or not they
2 received all their approvals, such as approval under the
3 water supply act. They were required to submit plans and
4 specs to the department, but none of that was part of the
5 record and this simply documents that the subdivision
6 approval was not modified to reflect the changed conditions
7 and therefore the original approval is no longer valid.

8 Does that make sense?

9 MS. ORR: And does any other party wish to-- Okay.

10 And the parties on the phone, do they wish to say
11 something about what has just been said?

12 MS. LAHREN: I don't. This is Signe Lahren.

13 MR. KNUCHEL: This is Karl Knuchel. No, I think
14 that explanation is adequate.

15 CHAIRMAN RUSSELL: Well, I think that that clears
16 things up pretty well. How-- Board, are you comfortable
17 with that additional language?

18 MR. MILLER: This is Miller. I am.

19 CHAIRMAN RUSSELL: I am hearing no objections to
20 it. With that, I-- We have an order in front of us and I
21 would authorize, I would ask for authorization for the Board
22 Chair to sign that order with the new language at the end of
23 the first paragraph on page two.

24 MS. ORR: And Mr. Chairman, I have some other sort
25 of clerical things.

1 CHAIRMAN RUSSELL: Okay, housekeeping. In your
2 order?

3 MS. ORR: Yes.

4 CHAIRMAN RUSSELL: Well, then I'll hold them and
5 not ask for a motion then.

6 MS. ORR: Okay. On page one in the first
7 paragraph, all of the language in the last sentence of the
8 first paragraph should be crossed out. This is from another
9 order, and I apologize for that.

10 CHAIRMAN RUSSELL: Can you state that?

11 MS. ORR: The language in the last sentence in the
12 first paragraph on page one, "On December 21st, 2005," that
13 needs to be crossed out to the end of the sentence, and--

14 CHAIRMAN RUSSELL: I can see that.

15 MS. ORR: Yes. And I also would like the order to
16 read that it's Mr. Bob G. Haney and Mr. Marwin E. Hofer,
17 rather than just without that identifier. And then on the
18 last--

19 MR. LIVERS: You're actually crossing out two
20 sentences. That correct?

21 MS. ORR: Yes, we're crossing out two sentences,
22 everything from "On December 21st, 2005, to January 25th,
23 2010" gets crossed out. And then, on the bottom of page
24 three, the last sentence there says, "The Board hereby adopts
25 the department's motion for summary judgment." That should

1 say "grants the department's motion for summary judgment."
2 So, this order was drawn up very, very hastily the morning of
3 the hearing on the 23rd. So, I apologize for this, but-- So
4 those are the other sort of clerical additions that I would
5 make to this.

6 CHAIRMAN RUSSELL: Okay, that sounds reasonable,
7 especially in light of the (inaudible) explanation.

8 With all that in mind, shall we try it again?

9 MS. ORR: Oh, and we have to-- excuse me again --
10 we have to change the date of the order to November now.

11 CHAIRMAN RUSSELL: Alright. That would be right
12 above my name on the signature line.

13 MS. ORR: Right.

14 CHAIRMAN RUSSELL: Okay. Any other parties? Is
15 everyone on board with this now?

16 MR. SHEA: Yes.

17 MS. LAHREN: Yes.

18 CHAIRMAN RUSSELL: Here we go. I will ask for a
19 motion to authorize the Board Chair to sign the order as
20 amended by Katherine's comments.

21 MR. ANDERSON: Larry Anderson. So moved.

22 CHAIRMAN RUSSELL: Moved by Larry. Is there a
23 second?

24 MR. MILLER: I second.

25 MR. MIRES: Larry Mires.

1 CHAIRMAN RUSSELL: Alright, I think Marv got you
2 there. So I got a motion and a second. Is there any further
3 discussion? (no response)

4 Alright, hearing none, all those in favor signify
5 by saying aye. (all respond)

6 Opposed? (no response)

7 Alright, motion carries unanimously.

8 So, with that, we're done with that business, and,
9 as appropriate, is there anyone that is on the phone or in
10 the audience that would like to speak to the Board on matters
11 pertaining to the Board? (no response)

12 Mr. Livers?

13 MR. LIVERS: Nothing here in Helena, Mr. Chairman.

14 CHAIRMAN RUSSELL: Okay. Anyone on the phone? (no
15 response)

16 Alright, I'll entertain a motion to adjourn.

17 MR. MIRES: Mires. So moved.

18 MS. SHROPSHIRE: Alright, I'll second.

19 CHAIRMAN RUSSELL: Alright, it's been moved and
20 seconded. All those in favor signify by saying aye. (all
21 respond)

22 Opposed? (no response)

23 Motion carries. Meeting adjourned.

24 (The meeting adjourned at 12:22 p.m.)

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CERTIFICATE

STATE OF MONTANA)
COUNTY OF LEWIS AND CLARK)

I, JOYCE L. WITTENBERG, Notary Public in and for the
County of Lewis and Clark, State of Montana, do hereby
certify:

That a telephonic board meeting was held; that the
meeting was then taken before me at the time and place herein
named; that the meeting was recorded and transcribed by me;
and that the foregoing 10 pages contain a true record of the
proceedings to the best of my ability.

IN WITNESS WHEREOF, I have hereunto set my hand and
affixed my notarial seal this 21st day of November, 2011.

Joyce L. Wittenberg
Notary Public