

PRESENTATION

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WATER POLICY INTERIM COMMITTEE

State of Montana Legislature

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INTRODUCTION

For your record my name is Richard T. Kerin. I am the president and owner of Kerin & Associates, P.C. Consulting Engineers. My corporate office is located in Bozeman, Montana. I have been a practicing consultant for over 30 years in Montana and as Kerin and Associates, P.C. for the past 27+ years.

I asked to be here today on my own accord. I want to tell you about what I perceive as a serious problem with the process of beneficial public or municipal water appropriation permits through our State DNRC. My goal, here, is to offer constructive criticism, so you, DNRC and the private sector can collectively work together to put laws and implementation guidelines in-place that provide a framework for evaluating beneficial water use and change-of-use application and directives to expedite the review process in an effort to provide a predictable outcome through the DNRC review and approval process.

I will principally focus on the state of affairs in Manhattan, Montana, but this same problem is happening to other corporate cities, communities and existing development areas attempting to grow, as entities do. These same municipalities have for the most part adopted and are implementing their own comprehensive community master plans that specifically deal with the growth in their respective jurisdictions. I am talking about corporate communities that are directly served by municipalities, private water and sewer districts and water user associations in our state that regularly rely on the DNRC permitting process.

In 2006 I was retained by the Town of Manhattan to administer a water system betterment project for the Town. I completed the plans in a timely manner, review them locally with Town officials and sent them off to MDEQ to initiate the Agency's formal technical review. There they sit and have been for almost a year. The water project for the Town is a much needed one involving a new elevated water storage tank, needed water trunk and transmission mains to improve the conveyance and distribution of water around Town and a state-of-the-art SCADA or telemetry system or computer touch screen controlled water operations center. The Town is simply not going to be able to better serve existing customers or grow at all without this water improvement project constructed and placed into service. Business and residential development will simply not occur in Manhattan until this project is in operation.

These water system improvements, coupled with the Town's new state-of-the-art wastewater treatment system, will bring Manhattan into the 21st Century with their major enterprise utilities and allow the Town to better serve their existing customer base and provide for the projected growth, schedule to occur in Town. The Town is poised to meet the challenges growth brings and they have been ramping up to meet this challenge over the past 10 years with the adoption of a comprehensive Town Master Plan, growth policy, municipal design guidelines for street corridor construction, water, sewer and stormwater runoff facilities. To further implement the comprehensive plan the Town has adopted zoning regulations, a zoning ordinance or zone code and an aggressive planning function, administered by an experienced planning director and planning board that oversees the review and plan implementation process. The framework is in-place for Manhattan to administer its own growth.

My business, Manhattan and other corporate communities in the State depend on a good planning process that accommodates such growth. I always contend that we are growing or we are dying and that there is no status quo when it comes to a well functioning and healthy local economy.

So, Manhattan is ready and poised to take its place in-line and absorb some of the growth that is occurring in the Gallatin Valley and Southwest Montana and has planned accordingly to accept this responsibility through sound planning. I'm helping the Town implement the plan.

The Town recently approved through the annexation and preliminary platting process seven (7) major subdivisions. These properties are all in various stages of development and completeness. The initial phases of two (2) of them, Pioneer Crossing and Centennial Village are complete and in-place. When I say in-place I mean streets, curbs, sidewalks, parks, trails, landscaping, and stormwater facilities, etc., are constructed with the final plats of record with the Gallatin County Clerk and Recorder. The owner is ready to sell lots and start building homes.

The statuses on the other developments vary. Several are approved through the MDEQ technical review process awaiting a construction start, where my water plans lie. The remainders are still in the engineering design stage.

In addition to my work to design the Town's water improvement package I was also retained to administer the creation of an SID (Special Improvement District) that will fund the water project. The funding from the SID will come from bonds that are backed by the property owners of the various annexed properties and residential and commercial developments I mentioned above. Contract documents for this project were ready to go to bid in January '08 for an early spring construction start. These are the plans I mentioned at the beginning of talk that have been in review for the past year through no fault of MDEQ, but the delays attributed to water rights permits.

With all that energy, effort and momentum in Manhattan none of these projects, including the two that are constructed, can get water service because of delays with the issuance of beneficial use permitting process. The two constructed projects with plats of record, Pioneer Square and Centennial Village, which actually received their approval prior to the passage of HB-831 and should not be bound by the permitting requirements of HB-831 are now bound by it. The Owner has reluctantly agreed to DNRC's terms in an effort to expedite their permit. The owner is not only delayed due to the length of the review, but is further burdened by a stagnant economy.

With appropriate approvals in-place MDEQ of course allows new applicants or developers to construct their projects. MDEQ will not issue final construction approval, however, until water rights are in-place and signed off by DNRC if water rights are involved. Simply stated, you can complete your project, as Mr. Vidar has, but the Town cannot turn on water at the curb to new homes until DNRC gives the green light to do so.

So, Manhattan has little or no control over their own destiny by approving planning projects and providing service in the normal way cities, towns and special districts have historically grown in Montana. The problem, again, is not having predictability with obtaining DNRC's green light with the issuance of water permits.

While I was not retained to administer the Town's water right applications, I have been actively participating on the sidelines and closely observing the arduous and convoluted process that has ensued due to the DNRC's interpretation of the new 831 guidelines. The complaints I hear from those intimately involved with preparing the Town's applications and the technical quantification of the volume of consumptive water involved is not so much the way the law was written, but the way it is being interpreted, administered and implemented by the DNRC.

The permitting process through DNRC is simply not working smoothly or with any consistency that I can see. It seems to me to be a confrontational and adversarial process that pegs DNRC against the applicants. As an experienced design professional, as I believe I am, I don't have these same problems with other processes in which I am involved. It certainly appears to me the Agency is making a scapegoat out of Manhattan.

Mr. Ken Vidar and the Town have been jointly working on a beneficial use permit for the new Pioneer Crossing well for the past several years. He submitted his DNRC beneficial

use application long before the HB-831 was promulgated into law. He, his attorney, and the Town satisfied concerns of all of the protestors. As I understand matters, they were even told by DNRC officials that their permit would be promptly issued. It was not. This is a case in point for what I mean when I call attention to how unpredictable the process is. In my opinion this is unacceptable action from our statewide water regulatory and permitting agency.

Communities, water and sewer districts and existing growth nodes, earmarked for growth with sound planning in-place need to grow normally and as economic conditions allow. I ask first of all that you adopt the "Growing Communities Doctrine" in Montana as law. By doing so you will also be allowing communities to control and administer through local land use planning and zoning and not via water zoning, administered by DNRC, as I have coined it. By implementing such a doctrine you will be encourage the administration of growth at the local level through the local annexation, planning, zoning and the subdivision review process. Your goal should be one that encourages connecting growth to existing corporate entities and communities, like Manhattan, Belgrade, Bozeman, Big Sky, etc. in my area and the other existing municipalities across our state. This will discourage rural sprawl and at the same time minimize the drilling of exempt or non-permitted wells, where water consumption is not controlled as it is through municipal metered delivery and sale of water through individual metering. I believe this is the ultimate goal that will monitor and regulate consumption.

I often hear the argument that residential real estate development uses more water than the historical agricultural farming operation that it replaced. I think the opposite is true. For one a developed piece of property that was historically farmed, say, in alfalfa or grain has half or more of its surface area in impervious ground, such as paved streets, sidewalks, driveways, building envelopes, decks, patios, community centers, play areas, tennis courts. I will hand out to you at the conclusion of my presentation an overlay of the real estate developments that have been approved in Manhattan overlaid over the agricultural ground involved.

I advocate "accountability" for the consumptive losses involved. I realize we are in a closed basin. I strongly feel, though, that once a property is annexed to a city, town, water district, private water company, etc., all the owner/applicant should have to do is relinquish the historical water surface rights and deed them over to the municipality involved. If you have water rights of record, there should not be any more red tape. If no historical water rights are involved, then the applicant/owner needs to acquire the necessary water rights elsewhere to mitigate for the consumptive losses involved. The free market system is already in-place to establish a dollar value for water. As you know, water rights are being bought and sold as any commodity today.

If this simple exchange of historic water rights for the right to develop is too simplistic and you determine are not going to allow it, then I ask that you provide for a menu of options and not just limit mitigation to recharge augmentation or pumping irrigation water into the ground. Here's a couple of suggestions for the list:

1. Leave the ditch water at the headgate. In my opinion this should be the preferred option as it will insure there is water available in the stream during the critically dry, hot month of late July and August for aquatic resources.
2. Leave the water in the ditch. This leaves things in the field as status quo. but it won't provide for depleted flow in the river or stream between the ditch intake and the point of re-entry back to the water course involved.
3. Re-charge augmentation. While I am not ruling this option out, I place it at the bottom of the list. As I understand matters, this is the only option seriously considered by DNRC.

In closing you, as lawmakers, need to simplify and reduce the red tape and review time through the DNRC review process and give applicants the help and predictability they deserve. In doing so you will at the same time encourage growth to connect to existing municipal hubs. In the case of Manhattan to do otherwise will simply break the back of this wonderful emerging Town in the heart of the Gallatin Valley.

Let's work together to write workable legislation that addresses some of the problems I've addressed. You will only be tackling a portion of the problems if you simply make the laws and do not oversee how they are being implemented.

One last point! To better evaluate the historic ag irrigation versus consumption from developed property, I would encourage you to initiate a study that this age old question. It shouldn't be up to the private sector to undertake such a study to quantify them. The State needs to tackle this study. If such a study proves that residential development consumes more water than its agricultural counterpart, then applicants will need to mitigate accordingly.

Let's take some pro active steps now before the judicial system does it for us.

Thank you!

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