

JOURNAL OF COMMISSION WORK SESSION
March 1, 2011

City Commission Work Session

Mayor Winters presiding

CALL TO ORDER: 5:45 p.m.

ROLL CALL: City Commissioners present: Michael J. Winters, Bill Bronson, Fred Burow, Mary Jolley, and Robert Jones. Also present were the City Manager, City Attorney, Directors of Fiscal Services, Park and Recreation, Planning and Community Development, Public Works, Executive Director of the Housing Authority, Fire Chief, Police Chief, and the Administrative Secretary.

1. INDEPENDENT COUNSEL REVIEW 41QJ WATER RIGHTS

City Manager Greg Doyon explained the Water Masters Report for 41Q was received in October 2010, and there have been ongoing discussions about the City's actions regarding the water reservation in that basin. The Commission sought to have a second look at the recommendation of the Water Masters Report. After a search of experts in the field of water rights, Steve Brown, Garlington, Lohn & Robinson, PLLP, of Missoula, Montana was selected. Mr. Brown's background includes environmental, natural resource, energy and land use law, with specific emphasis on project permitting, regulatory compliance, environmental issues, real estate, natural resource, etc., including experience in the public realm. In addition, Mr. Brown has been working with the City of Missoula on water issues and teaches as an adjunct faculty member of the Montana School of Law. Mr. Doyon hopes Mr. Brown's thorough evaluation will allow the Commission and the community to move forward on the issue.

Mr. Brown explained the process the City is involved in has been going on statewide for more than 20 years. In 1973, Montana decided to determine who had what water rights and whether those rights were good. The adjudication process applies to every water right, as of 1973, in the entire state. He noted there are basins that are further behind the subject basin. Masters Reports are the result of the process, and they are incorporated into a decree that gives entities or individuals who hold water rights the ability to enforce and protect those water rights.

In 1981, the legislature required statements of claim to be filed and claims were filed aggressively to claim as much water as a starting point, knowing that adjustments would be made through the process of reviewing water rights. Mr. Brown noted there is nothing unique about the way Great Falls claimed water rights. Mr. Brown stated the process was designed to take a snapshot in time as to what water rights looked like as of July 1, 1973; the Masters Report documents actual water rights as of 1973 – not 2011 nor 1889.

Mr. Brown stated that the water rights in the Masters Report for 41Q are wrapped up with the 1889 water right, as well as the two junior water rights in 1966 and 1974. Every water right in Montana that applies to a municipality has two components – flow (the amount of water that can be used at a given time) and volume (how much can be used over the course of a year). There

isn't much debate about the flow component, and Great Falls has 154 cubic feet per second for its Missouri River rights; he believes that is a very generous amount of flow.

Mr. Brown reported the volume component has led to some confusion. When the water rights were initially claimed, the maximum flow amount was multiplied by 24 hours a day, seven days a week, 365 days a year. He stated no one in any industry in Montana uses the maximum amount of flow 24 hours a day, seven days a week, 365 days a year.

Mr. Brown reported the Water Court (the entity that reviews water right claims) has guidelines that are applied to municipalities using a standard of 250 gallons per day per person. That standard assumes industrial development, lawn irrigation, and generous household use and is a fairly generous number. The 20,000 acre/feet number in the Masters Report is based on 72,000 population and includes Malmstrom, the airport, and some outlying areas.

To claim a higher volume, a municipality must show that in 1973 there was either actual water use or projected water use that would justify some higher number. Because it appears the most water Great Falls has ever used on an annual basis is about 15,000 acre/feet (3/4 of the maximum), Mr. Brown believes it would be very difficult for Great Falls to justify a higher number. He also believes the volume number in the Masters Report (spread out among the three water rights) is a reasonable figure in the eyes of the Water Court.

Commissioner Burow questioned if the City has enough water rights for the future. Mr. Brown responded that is correct. The 1889 water right is a very good priority date and that is the largest water right. If the river wasn't producing enough water, the City has the ability to call people upstream to release water.

Commissioner Bronson noted that this analysis doesn't deal with the separate reservation that was applied for in 1985. Mr. Brown responded he was only asked to review the Masters Report, and the Masters Report does not involve the reservation. The reservation is an additional block of water that is available to the City. He noted that most water rights in Montana are "use it or lose it", but reservations have share protection.

Mr. Brown explained the reason there was confusion in the Masters Report was because there are three water rights and the Water Court got confused because the entire 20,000 acre/feet was applied to the 1889 water right, and none of the volume was applied to the 1966 or 1974 water rights. The Water Court required some volume be applied to each water right. There was also confusion whether Great Falls was claiming 20,000 acre/feet or 40,000 acre/feet of water. That is the question that is currently before the City.

Mr. Brown noted it would be very difficult if the City stated the claim was meant to be 40,000 acre/feet. That will send up a red flag to the Water Court because that number would be based upon twice the population assumed in the original analysis. That number would also be assuming almost three times the amount of water that has ever been used by the City. He believes the three water rights would be open to an objection process involving hearings and the City would have to present evidence of a concrete plan to use that amount of water. If the City becomes too aggressive, potentially they could become open to scrutiny for people upstream who

get nervous and raise objections. The only entity the City has to satisfy now is the Water Court.

Mr. Brown reported recommendations have been made based on a safe and reasonable approach to get the 20,000 acre/feet volume number locked in, to be used at either a high or low volume rate at certain times of the year, to take care of the City's needs into the foreseeable future. If more water is needed at some point, the reservation is available.

Commissioner Jolley questioned if the reference to complicated monitoring issues in the report refers to the 20,000 acre/feet or the 40,000 acre/feet. Mr. Brown responded that refers to how the 20,000 acre/feet is allocated among the three water rights. He recommends the 20,000 acre/feet with no restrictions on usage, and he believes that would be allowed by the Water Court. During the summer, the City could have the ability to use a higher flow rate than would be allowed under just one water right.

Ms. Jolley questioned if the City used the most water on an annual basis during the Mount St. Helens incident. Mr. Brown believes the City used the highest flow rate at that time. Ms. Jolley also asked the average volume used by the City in a normal year. Water Plant Supervisor Mike Jacobson responded the yearly average is 4.75 billion gallons. Water Right Solutions, Inc. Principal Dave Schmidt commented he did not know the average, but noted he had one clarification to Mr. Brown's report. He stated he had a slightly different number than 15,000 acre/feet. January-December 1973 was the highest water usage at 17,469 acre/feet.

Mr. Bronson commented that he senses the Water Court is not deviating from the same kind of analysis made by Water Master Katherine Lambert in 2005 for Red Lodge and other communities. When a city raises an objection, they are trying to claim more than what they really put to beneficial use. Mr. Brown noted Red Lodge tried to be aggressive in claiming water rights and that was tested in the Water Court. Senior Water Master Kathryn Lambert wrote an opinion that cities don't get special treatment.

Mr. Brown noted that issue was litigated with DNRC when Missoula tried to make the argument that cities should be able to continue to grow and shouldn't be constrained based on the results of 1973. However, that doctrine hasn't been adopted. Montana doesn't differentiate among municipal, irrigation, or any other kind of water rights. The reasonable actual use as of 1973 must be provided, not projections into the future.

Mr. Burow questioned if the 250 gallons per person per day number will increase as the city grows. Mr. Brown responded that number does not go up. However, the city has room to grow because most people don't use that amount of water. If the population grows and the allotment is being bumped against, the city can encourage more conservation, use the water reservation, or find additional water rights.

Mr. Brown added he did not include in his analysis any future planning by the City. Water rights can be acquired with options without committing to buying a large block of water that may or may not be used. Commissioner Burow questioned the use it or lose it risk. Mr. Brown responded that water rights claimed in the 1973 process are relatively safe, even if the total volume isn't used each year. However, if an additional water right is acquired and isn't used

within ten years, there is a presumption in Montana that an unused water right is subject to abandonment.

Mr. Doyon asked Mr. Schmidt to report on the status of 41QJ. Mr. Schmidt earlier provided the Commission with a draft report on 41Q, the basin from the confluence of the Sun River to Belt Creek. He distributed the final report. The only major objectors are the PP&L claims. There seems to be a disparity in the volume claimed on their first report and what was claimed in the Water Court.

Mr. Schmidt noted that many people who filed petitions do not have standing to object, but PP&L's rights provide the aesthetic value and the flow that make Great Falls great. He believes there is a symbiotic relationship with PP&L that must be considered. PP&L has objected again to the change application for SME. After talking with their counsel, he believes they are willing to modify the earlier agreement, possibly with a reduction in flow rates, if approved by the Commission. If the Commission prefers, however, Mr. Schmidt recommended filing a notice of intent to appear rather than filing a formal objection.

Mr. Bronson questioned if PP&L is the only objector on the 41Q. Mr. Schmidt responded PP&L is not objecting to the city's water right. They are objecting to the use of the reservation which has something to do with PP&L's underlying claims to the hydropower right which controls the entire upper Missouri basin. There must be assurance that the reservation is being put to use and once it is put to use, there is the 2025 deadline to do something.

Mr. Doyon stated the report will be made available on the City web site. He asked Mr. Brown to reiterate the next step options for the Commission. Mr. Brown stated that the Masters Report was issued in October, 2010 and a response was requested. If a response isn't given, the Report will be adopted. If an objection is made to the entire report, it will go back into the Water Court process and hearings will be scheduled. Also, requests for adjustments to the report can be made. The current extension expires near the end of March, 2011.

Mr. Brown recommended comments be provided to assure maximum flexibility within the water right for use on a high flow basis or a low flow basis, but not touch the cap because that will raise red flags. Comments must be provided within three weeks, unless another extension is requested. Mr. Doyon requested Mr. Brown draft the recommended comments for Commission review.

Ms. Jolley questioned if the 53,000 acre/feet reduction in 2006 was the only rational choice at that time. Mr. Brown believes it was reasonable at the time. It would have been impossible to protect that amount of water in the Water Court process. She asked if an objection could still be made to the 2006 decision. Mr. Brown responded a request could be made to the Water Court stating the City really didn't mean to make the 2006 reduction and requests returning to the previous allotment. A prolonged process would begin to defend that number.

Ms. Jolley inquired if Red Lodge was successful in their claim efforts. Mr. Brown believes they tried to claim 400 gallons per day per person, but were unsuccessful. Ms. Jolley questioned if Montana League of Cities and Towns was involved in water rights. Mr. Brown responded that a

bill was floated in 2009 to treat municipalities different than irrigation and other water rights to provide longer periods of time to grow into their rights. The bill didn't get much support from municipalities and was also met with a lot of opposition from the agricultural community.

Mr. Schmidt reported the volume issue has been continually revisited for the past three years and has been fully vetted and voted upon three times. The concept of consumptive volume for water pre-1973 for municipal use has been explained in numerous work sessions. The volume issue has been explained to the public by DNRC Lewistown Regional Manager Scott Irvin, DNRC adjudication staff members in Helena, Water Master Doug Ritter, Harley Harris and other competent attorneys in the practice of water law. The historic beneficial use concept has been explained in detail.

Mr. Schmidt stated he cannot allow his firm to be subjected to and suffer further libel and slander by those who either cannot or will not understand the most basic concepts in Montana Water Law. He noted there are those who would rather conduct smear campaigns to promote their own political agendas than to admit to understanding or misunderstanding the issue.

Mr. Schmidt stated he holds some members of the Commission responsible for their inability to vote and move on. He believes there is a lack of leadership and a misunderstanding on the volume issue. He believes certain members of the Commission and the City Manager have created and support a hostile working environment by allowing a private contractor to become a political target. He believes that is bad for business in Great Falls.

Mr. Schmidt stated he cannot stand by and watch the waste of tax dollars to confirm the obvious issues relating to the beneficial use of water. He believes it is best to depart at this time with what is left of his reputation. He stated that effective March 2, 2011, Water Rights Solutions, Inc. is giving formal notice that it is terminating its relationship with the City of Great Falls. Mr. Schmidt provided the letter of resignation to the Commission.

ADJOURN

There being no further discussion, Mayor Winters adjourned the work session of March 1, 2011, at 6:33 p.m.